WHAT'S LEFT OF *UNOCAL*?

BY PAUL L. REGAN*

ABSTRACT

The upsurge of hostile takeovers in corporate America in the 1980s brought about a rise in shareholder challenges to the defensive measures adopted by their board of directors. The Delaware Supreme Court responded to these challenges in Unocal Corp. v. Mesa Petroleum Co., *announcing that directors when adopting defensive measures were to satisfy a two-part test of reasonableness that would be known later as "enhanced scrutiny." Several months after* Unocal *was decided, the court went further in* Moran v. Household International Inc, *upholding the board's use of the poison pill, but imposing two important limitations to the power. The court emphasized that shareholders must retain the ability to remove their board through the proxy machinery, and secondly, that the board was subject to* Unocal *review in their use of the pill in the face of an actual tender offer.*

Over the years the balance of the director-shareholder power established in these cases has been altered dramatically by the Delaware Supreme Court. Cases such as Paramount Communications, Inc. v. Time Inc. *and* Unitrin, Inc. v. American General Corp., *have introduced the concept of "substantive coercion" as a threat that justifies a powerful defensive response under the "enhanced scrutiny" test in* Unocal. *The author argues that by endorsing this concept, the court has essentially reduced Unocal review to ensuring the shareholders retain power to remove the board in a proxy contest at the next election.*

This article discusses the Unocal *decision and how it has developed in the case law through the years. The article goes on to discuss how these later decisions have virtually eliminated the added fiduciary protections* Unocal *and* Moran *once promised. The article concludes with some proposals on how the Delaware Supreme Court can reinvigorate* Unocal*'s promise of meaningful fiduciary accountability for board adopted defensive measures.*

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"There is little change in the governance structure as a result of the adoption of the Rights Plan."[1]

"All changed, changed utterly: A terrible beauty is born."[2]

I. INTRODUCTION

In the "watershed year of 1985,"[3] the Delaware Supreme Court announced a trilogy of decisions, beginning with *Unocal Corp. v. Mesa Petroleum Co.*,[4] that profoundly affected the then emerging firestorm of corporate takeover activity in America, much of it hostile.[5] *Unocal* introduced a new "intermediate form of judicial review"[6] for board approved defensive measures that are designed to thwart a threatened change of control.[7] This form of judicial review, also known as "enhanced scrutiny,"[8] calls on the court to assess, among other things, the substantive reasonableness of the board's decisions without any showing by a shareholder plaintiff that the board was disloyal or grossly negligent.[9] This relatively "rare"[10] form of intrusion by the judiciary departs from the more conventional approach to shareholder lawsuits challenging director action. Under the rubric of the traditional business judgment rule, the wisdom of directors' choices ordinarily are given great deference by the courts unless

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[1]Moran v. Household Int'l, Inc., 500 A.2d 1346, 1354 (Del. 1985).

[2]William Butler Yeats, *Easter* 1916, *in* THE COLLECTED POEMS OF W.B. YEATS 177, 178 (definitive ed. with the author's final revisions, 1956).

[3]E. Norman Veasey, Book Review, 15 DEL. J. CORP. L. 573, 576 (1990) (reviewing D. BLOCK ET AL., THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS (3d ed. 1989)).

[4]493 A.2d 946 (Del. 1985).

[5]Dennis J. Block et al., *The Duty of Loyalty and the Evolution of the Scope of Judicial Review*, 59 BROOK. L. REV. 65, 79 (1993) ("The 1980s represented 'a decade in which unprecedented merger and acquisition activity raised issues of corporate law that had lain dormant for fifty years.'") (quoting William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW. 2055, 2055 (1990)).

[6]AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986).

[7]In *Unocal* the court upheld as reasonable the board's decision to launch a discriminatory exchange offer that was extended to all shareholders of target Unocal Corporation except hostile bidder Mesa Petroleum Co., an affiliate of T. Boone Pickens, Jr. *Unocal*, 493 A.2d at 949 n.1, 958.

[8]Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986). *Revlon* was the first case in which the Delaware Supreme Court used the phrase "enhanced scrutiny" to describe the intermediate level of review under *Unocal*. *See Unocal*, 493 A.2d at 954 (referring to an "enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred").

[9]*See infra* Part II.

[10]Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994).

the plaintiff can show that the board was not independent, or acted with less than minimally adequate information.[11]

Within months of *Unocal*, the Delaware Supreme Court completed the famous trilogy by announcing decisions in *Moran v. Household International Inc.*[12] and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[13] In *Moran* the court upheld as lawful and (in that particular case) equitable, a board's decision "on a clear day"[14] to adopt the remarkably innovative defensive measure known as the poison pill.[15] Importantly, the court in *Moran* emphasized that the board's future use of the pill, when confronted with an actual hostile takeover bid and a request to dismantle the pill, would be subject to the fiduciary analysis required by *Unocal*.[16] *Revlon*

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[11]*Id.* ("Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decisions of the directors. The business judgment rule embodies the deference to which such decisions are entitled.") (citing Aronson v. Lewis, 473 A.2d 805, 811-12 (Del. 1984)); Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) ("The [business judgment] rule operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation.") (citations omitted); *see generally* Block et al., *supra* note 5, at 67 ("[C]ourts will not interfere with a business decision if it is made in good faith by disinterested directors after reasonable investigation and does not constitute an abuse of discretion."); Paul L. Regan, *Great Expectations? A Contract Law Analysis for Preclusive Corporate Lock-Ups*, 21 CARDOZO L. REV. 1, 91 (1999) (judicial deference accorded to boards under the business judgment rule promotes the value of centralized decisionmaking) (quoting Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation*, 44 BUS. LAW. 503, 522 (1989)).

[12]500 A.2d 1346 (Del. 1985).

[13]506 A.2d 173 (Del. 1986). Although the decision in *Revlon* was announced in open court in early November 1985, just weeks before the opinion in *Moran* was issued, the opinion in *Revlon* was not released until March of 1986. *Id.* One might go back earlier in the "watershed" year of 1985 to *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), decided just three months before *Unocal*, and revisit the opinion, as some have done, as an example of an early but "not yet fully rationalized,' *Revlon*' . . . case." Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049, 1051 n.4 (Del. Ch. 1996) ("I count *Smith v. Van Gorkom* . . . not as a 'negligence' or due care case involving no loyalty issues, but as an early and, as of its date, not yet fully rationalized, '*Revlon*' or 'change in control' case."); *see also* Jonathan R. Macey & Geoffrey P. Miller, Trans Union *Reconsidered*, 98 YALE L.J. 127, 128 (1988) (construing *Van Gorkom* as a takeover case).

[14]*Moran*, 500 A.2d at 1350.

[15]*See* Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 27 (Del. Ch.), *aff'd*, 721 A.2d 1281 (Del. 1998) ("Since making its legal debut in 1985, the story of the poison pill has been a work-in-progress, with each variation and innovation generating new litigation and occasions for judicial opinion writing.") A pill is dismantled, and thus its deterrent effects are extinguished, when the target board redeems the rights issued under the shareholder rights plan in favor of a bid the board deems acceptable. Unless the rights are redeemed, the hostile bidder faces disastrous dilution of its holdings in the target once the rights are triggered (i.e., become exercisable) because the rest of the target's shareholders then typically become entitled to purchase newly issued shares of the target at half the market price. Moran v. Household Int'l, Inc., 490 A.2d 1059, 1066 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985) ("The resultant dilution of the acquiror's capital is immediate and devastating."); Jeffrey N. Gordon, *Corporations, Markets and Courts*, 91 COLUM. L. REV. 1931, 1937-38 (1991).

[16]*Moran*, 500 A.2d at 1354, 1357.

soon reinforced this fiduciary principle by declaring as satisfactory under *Unocal*'s reasonableness review the Revlon board's use of a pill to fend off Pantry Pride's initially lower offers. The court noted with approval that the Revlon board's use of the pill "spurred the bidding to new heights, a proper result of its implementation."[17]

To ask what's left of *Unocal*, as this article does, is really to ask what's left of *Moran*. The answer is that only half of the promise that once was *Unocal* remains. First, as explained in *Moran*, the pill does not prevent stockholders from receiving tender offers (and therefore is legally valid), because stockholders have the proxy mechanism at their disposal to remove the board and replace them with directors who will redeem the pill.[18] But *Moran* also emphasized something "addition[al]"[19]—something separate from the proxy machinery—as a check on director power with regard to the pill. Directors also would be subjected to the "same fiduciary standards" under *Unocal* in deciding whether to redeem the pill in the face of an actual tender offer as they would be in adopting the pill in the first instance.[20]

This article argues that this latter principle, the idea that *Unocal* separately constrains the board's decision whether to dismantle a pill, has all but vanished from the corporate governance landscape. *Unocal*, as reinterpreted in later Delaware Supreme Court decisions such as *Paramount Communications, Inc. v. Time Inc.* (*Time-Warner*)[21] and *Unitrin, Inc. v. American General Corp.*,[22] has been virtually reduced to the first principle announced in *Moran*—that shareholders can always "turn the board out"[23] through the proxy machinery.[24] In practical effect, *Unocal* inquiry, to the extent it holds any jeopardy today for boards adopting defensive measures, is now modestly limited to ensuring that the shareholders are not mathematically eliminated from winning a contested election to replace the board.

Part II of this article briefly examines the history of *Unocal* and its progeny before the *Time-Warner* decision. During this short but exciting era, the Delaware Court of Chancery usually, but not always, accorded

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[17]*Revlon*, 506 A.2d at 181. *Revlon* undoubtedly is better remembered for its ground breaking holding that once a board decides to negotiate a sale of the company to a third party, the role of the directors is "changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." *Id.* at 182.

[18]*Moran*, 500 A.2d at 1354.

[19]*Id. See also infra* note 45 and accompanying text.

[20]*Moran*, 500 A.2d at 1354.

[21]571 A.2d 1140 (Del. 1990).

[22]651 A.2d 1361 (Del. 1995).

[23]*Unocal*, 493 A.2d at 959.

[24]*Moran*, 500 A.2d at 1354.

deference to a board's decision to adopt defensive measures under *Unocal*. Nevertheless, a model was emerging suggesting pills were useful, even beneficial, but in an appropriate case, might have a limited time of legitimacy in the face of a noncoercive tender offer that is arguably fairly priced and which shareholders might reasonably prefer. Part III examines how all of this changed dramatically with the Delaware Supreme Court's decision in *Time-Warner* and the court's endorsement of "substantive coercion," the idea that an all cash, all shares offer at a substantial premium could be a cognizable threat justifying defensive measures under *Unocal*. The court's later reaffirmation of this principle in *Unitrin*[25] is similarly explored as an erosion of the fiduciary protections *Unocal* once promised. Part IV concludes with some proposals to reinvigorate *Unocal* review of defensive measures and to restore the promise of *Moran* that meaningful equitable constraints—beyond simply ensuring the efficacy of the proxy machinery—also protect shareholders from overreaching by their directors.

II. *UNOCAL* AND ITS PROGENY BEFORE *TIME-WARNER*

In the early 1980s, as hostile takeovers became more prevalent,[26] there were a number of cases decided in the federal courts involving the scope of judicial review for shareholder challenges to board adopted defensive measures. These federal courts tended to apply a conventional deferential model, holding that a target board's decision to adopt defensive measures in response to a hostile takeover bid was entitled to the protection of the business judgment rule.[27] In its 1984 decision in *Pogostin v. Rice*,[28] the Delaware Supreme Court ruled that the business judgment rule was "equally applicable . . . [under Delaware law] in the context of a takeover."[29] The *Pogostin* court did not, however, specifically apply the rule to a board's use

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[25]Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).

[26]*See, e.g.*, Minstar Acquiring Corp. v. AMF Inc., 621 F. Supp. 1252, 1253 (S.D.N.Y. 1985) ("The recent years have seen a massive proliferation of corporate takeover battles."); Dennis J. Block & Yvette Miller, *The Responsibilities and Obligations of Corporate Directors in Takeover Contests*, 11 SEC. REG. L.J. 44, 44 n.1 (1983) (noting that the then large number of hostile takeovers was "virtually without precedent").

[27]*See, e.g.*, Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 759 (2d Cir.), *cert. denied*, 464 U.S. 1018 (1983); Panter v. Marshall Field & Co., 646 F.2d 271, 293-96 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); Treadway Cos. v. Care Corp., 638 F.2d 357, 380-82 (2d Cir. 1980); Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690, 702-04 (2d Cir. 1980); *see also* Johnson v. Trueblood, 629 F.2d 287, 292-93 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981) (holding that unless the plaintiff can show that the defendant acted in bad faith, a court will uphold the presumption that the directors did not breach their duty).

[28]480 A.2d 619 (Del. 1984).

[29]*Id.* at 627.

of defenses to thwart a takeover.[30] That insight would come one year later with the seminal *Unocal* decision, when the Delaware Supreme Court announced that directors are required to satisfy an "enhanced duty" when adopting defensive measures because of the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders."[31]

A. Unocal

The facts in *Unocal* involved the easily identified threat of a "two-tier[ed] 'front loaded' cash tender offer"[32] by hostile bidder Mesa Petroleum Company for a bare majority of the shares of Unocal Corporation. Shares not tendered to Mesa would be exchanged for junk bonds of dubious value in a second step merger transaction.[33] Armed with advice from their investment banker that the Mesa offer was both financially inadequate and structurally coercive, the Unocal directors stymied the Mesa bid with a defensive exchange offer that was extended to all Unocal shareholders except Mesa. The Delaware Supreme Court upheld the defensive measure after announcing, and then applying, a new two-part analysis that would later be called "enhanced scrutiny."[34]

Under the terms of this now familiar test, the deference normally accorded directors' decisions is provisionally suspended upon a mere showing that the board unilaterally (i.e., without shareholder approval) adopted a defensive measure. If the directors satisfy the evidentiary showing required of them under this test, then the protective shield of the business judgment rule is restored to their decision.[35] Under this test, the "directors [first] must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another

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[30]The directors in *Pogostin* rejected an unsolicited tender offer but apparently took no steps to block the offer. *Id.* at 622, 627. *Pogostin* was used later in the decade to support the "just say no" defense, a name borrowed from the slogan for former First Lady Nancy Reagan's anti-drug campaign. Robert A. Prentice & John H. Langmore, *Hostile Tender Offers and the "Nancy Reagan Defense": May Target Boards "Just Say No"? Should They Be Allowed To?*, 15 DEL. J. CORP. L. 377, 382 (1990); *see also* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1285 n.35 (Del. 1988) ("A refusal to entertain offers may comport with a valid exercise of business judgment.") (citing *Pogostin*, 480 A.2d at 627). Of course, the "just say no" defense involves substantially more than "just" formally rejecting an unsolicited bid. The target board is empowered to rebuff the bid in such circumstances—absent judicial intervention—because the directors also have in place a pill to give force to their "no" by refusing to redeem the rights.

[31]*Unocal*, 493 A.2d at 954.

[32]*Id.* at 949.

[33]*Id.* at 951.

[34]*Revlon*, 506 A.2d at 184.

[35]*Unocal*, 493 A.2d at 954.

person's stock ownership."[36] The real significance of *Unocal*, however, lay in "the element of balance" required by the second prong of the enhanced scrutiny test.[37] Under this step, the court, without any showing of disloyalty or negligence by the board, weighs the substantive reasonableness of the board's defensive response to ensure that it is proportionate to the threat posed by the hostile takeover bid.[38]

B. Moran *and* Revlon

Just months after *Unocal* was announced, the Delaware Supreme Court's much anticipated decision in *Moran* gave legal sanction to shareholder rights plans, or poison pills. At issue in the case was simply the decision by the board of Household International, Inc. to adopt a pill on a clear day, not the actual use of the pill to fend off a particular takeover threat. The plaintiffs in the case, Household director John Moran and an intervening shareholder plaintiff, pressed various legal and equitable arguments against the validity of the pill. Following a trial on the merits, the

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[36] *Id.* at 955. The directors satisfy this first prong of the *Unocal* analysis "by showing good faith and reasonable investigation." *Id.* (quoting Cheff v. Mathes, 199 A.2d 548, 555 (Del. 1964)). This first prong of the *Unocal* analysis is essentially a reformulation of what previously constituted the entire test under *Cheff* for assessing the validity of a defensive stock repurchase. *See Cheff*, 199 A.2d at 554-55. Under *Cheff*, the entire case would turn on a judicial determination of whether the board's primary motivation or purpose in buying out a dissident stockholder with proceeds from the corporate treasury was pure (the dissident shareholder's corporate policies were in conflict with those of the target board's and thus could be injurious to the enterprise) or venal (the target board was principally motivated by the desire to retain control). *See generally* Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 249 (1989) (discussing *Cheff* test).

[37] *Unocal*, 493 A.2d at 955.

[38] *Id.* (explaining that before a defensive measure may "come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed"). *See* Gilson & Kraakman, *supra* note 36, at 251 ("The proportionality test brings a novel, objective standard to the review of defensive tactics—a reasonableness test that impliedly allows courts to identify and reject unreasonable tactics, whatever the motives of their authors.") Then practitioner Veasey offered the following insights on the *Unocal* inquiry:

> The application of an "enhanced" business judgment rule in contests for corporate control, as developed in *Unocal* and its progeny, implicates primarily two concepts which depart from the traditional formulation of the rule and its rationale. The first is a threshold shifting in the burden of proof (at least the burden of going forward with the evidence) requiring directors to show by their good faith and reasonable investigation that they reasonably perceived a threat to corporate policy and effectiveness. The second involves judicial review of the reasonableness or proportionality of the corporate action taken in response to a threatened takeover.

Veasey, *supra* note 3, at 576; *see also In re* Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 474 (Del. Ch. 2000) ("That [*Unocal*] standard of review enables the court to do something that it ordinarily cannot do under Delaware corporate law: examine the substantive reasonableness of the decisions of a board of directors.").

Delaware Court of Chancery ruled in favor of the Household board and determined that the pill was legitimately adopted.[39] In affirming, and thus validating the pill as a defensive measure, the Delaware Supreme Court took up both the legal and equitable arguments of the plaintiffs.

Most of the *Moran* opinion is devoted to examining the purely legal arguments concerning the pill's validity. Of significance to this article was the court's responses to the plaintiffs' arguments that the Household pill was illegal as a matter of law because it "usurp[s] stockholders' rights to receive tender offers by changing Household's fundamental structure."[40] The supreme court rejected this argument for an invalid premise, fairly implying that a defensive measure that effectively precluded shareholders from receiving tender offers would be illegitimate. As the court declared: "We conclude that the Rights Plan does not prevent stockholders from receiving tender offers . . . ."[41]

In support of this conclusion, the *Moran* court recited the now familiar list of methods by which a hostile tender offer for Household, or any other company with a pill, could still succeed. These various methods conceptually align into two different categories: voice and choice.[42] As for voice, a bidder can couple the tender offer with a proxy contest or consent solicitation, and thereby seek to replace the board through the electoral process with a slate of directors more inclined to redeem the rights.[43] In the matter of stockholder choice, the *Moran* court emphasized that the pill also did not prevent tender offers because the target board would always be subject to *"addition[al]"*[44] equitable constraints, reviewable under *Unocal*, in deciding whether to redeem the rights for a particular offer.

> *In addition*, the Rights Plan is not absolute. When the Household Board of Directors is faced with a tender offer and

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[39]Moran v. Household Int'l, Inc., 490 A.2d 1059 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985).

[40]*Moran*, 500 A.2d at 1353-54.

[41]*Id.* at 1354.

[42]Technically, a third category might include a decision by the bidder to "swallow the pill" by (1) conditioning the tender offer on receipt of a high minimum number of shares, such as 90%, and (2) absorbing only negligible dilution when the pill is triggered for a relatively small universe of remaining rights holders. *See id.* (citing successful use of this strategy by Sir James Goldsmith in acquiring Crown Zellerbach).

[43]*Id.* These suggested "voice" methods presume of course that the target company's charter has no provision (1) preventing stockholder action by written consent or (2) classifying or staggering the terms of the board such that only a minority of the board is vulnerable to the electoral process in any one instance. *Cf.* Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1343 (Del. 1987) (noting under *Unocal's* reasonableness/proportionality that a reviewing court "scrutinized collectively as a unitary response to the perceived threats" the various defensive measures deployed).

[44]*See supra* note 19 and accompanying text.

> a request to redeem the Rights, they will not be able to arbitrarily reject the offer. They will be held to the same fiduciary standards any other board of directors would be held to in deciding to adopt a defensive mechanism, the same standard they were held to in originally approving the Rights Plan.[45]

Surely this language conveyed fiduciary limits on the board's use of the pill in the context of an actual tender offer and that such limits existed independently of the check on power afforded by the sporadically available electoral process.[46]

Completing the trilogy of key Delaware Supreme Court cases from this era was the landmark *Revlon* case.[47] *Revlon* is most familiar as a change of control case and the first of many important decisions establishing the narrowly focused obligation of the board to obtain the highest price reasonably available for its shareholders in such circumstances.[48] Yet before

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[45]*See Moran*, 500 A.2d at 1354 (emphasis added) (citing *Unocal*, 493 A.2d at 954-55, 958) ("The Board does not now have unfettered discretion in refusing to redeem the Rights. The Board has no more discretion in refusing to redeem the Rights than it does in enacting any defensive mechanism."). This language in *Moran* emphasizing fiduciary limitations on the use of the pill, was an echo of the trial court's expression of concern that pills could be abused and that the Household board would remain accountable for the use of the pill in the face of an actual takeover bid:

> It must be emphasized, however, that the Rights Plan also creates the potential for the misuse of directorial authority. . . . As Professor Jensen noted, the economic benefits of takeover activity are divided between the target and the bidder based upon the relative bargaining power of the parties. A board armed with a Rights Plan of the type now under review will possess a bargaining tool which can be used to extract concessions from an acquiror which it otherwise would not secure, or to deter the acquisition effort entirely. *Through its power to redeem the rights before a triggering event occurs the Household Board has assumed a plenary negotiating role. It has also taken upon itself the responsibility for assuring that the rights are not triggered in such a fashion as to inflict harm upon the corporation by rendering it acquisition-proof.*

Moran, 490 A.2d at 1083, *aff'd*, 500 A.2d 1346 (Del. 1985) (emphasis added).

[46]*See* Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919 (2001).

> [W]hen the astounding innovation of the poison pill was sanctioned by the Delaware courts in *Moran*, it was on the express understanding that the directors of a corporation would have to justify not only their adoption of the pill in the first instance but their use of the pill in the heat of battle. Not only that, they would have to do so under the heightened *Unocal* standard.

Id. at 925 (footnotes omitted).

[47]506 A.2d 173 (Del. 1986).

[48]*Id.* at 182 ("The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company") *See also* Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 49 (Del. 1994) (holding that the Paramount directors violated their fiduciary duties as their defensive measures were not

addressing the dispositive claims relating to the breakup and sale of Revlon, the supreme court examined the Revlon board's early defensive measures within the *Unocal* crucible.[49] These defensive measures, adopted when the Revlon board still sought to maintain the company's independence, included the adoption of a pill and implementation of an exchange offer in which Revlon exchanged newly issued Revlon Notes for several million shares of its common stock. The court gave its blessing to the use of the pill to thwart Pantry Pride's early offers, which—though all cash and for all shares—were considered financially inadequate by the Revlon board. In upholding the board's use of the pill in this manner, the court appeared to reinforce the existence of fiduciary limits on the continued use of the pill as the offers reached levels at which the Revlon board was ready to deal (at least with a white knight). Thus in citing the page from the *Moran* opinion in which the court there declared the existence of equitable constraints on a board's decision whether to redeem a pill, the *Revlon* court observed: "Far from being a 'show-stopper,' as the plaintiffs had contended in *Moran*, the measure spurred the bidding to new heights, a proper result of its implementation."[50]

C. *The Court of Chancery Animates* Unocal

The early decisions from the Delaware Court of Chancery reflected a cautious willingness to animate *Unocal*'s concern for the omnipresent specter of potential board disloyalty in adopting defensive measures. With regard to the pill in particular, the chancery court, understandably informed by the language in *Moran* and *Revlon* emphasizing fiduciary limits on the redemption question, sought to develop a model of board accountability within *Unocal*'s reasonableness review. These decisions faced nuances not presented by such clumsy threats as the structurally coercive partial or two-tiered offers presented in *Unocal* and *Ivanhoe*, and feared as possibilities in *Moran*.[51] Made possible by the phenomenal liquidity of the then soaring junk bond market, hostile bidders could now make all-cash, all-shares tender

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reasonable); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1264 (Del. 1988) (holding that in the context of a corporate auction, *Revlon* "requires the most scrupulous adherence to ordinary standards of fairness in the interest of promoting the highest values reasonably attainable for the stockholders' benefit").

[49]Although it was not entirely clear at the time *Revlon* was decided, and arguably remained open to debate after *Macmillan*, the court's decision in *QVC* made plain that *Unocal*'s enhanced scrutiny, or some variation thereof, would apply to every change of control or breakup transaction, irrespective of whether the target board played favorites among competing bidders or not. *QVC*, 637 A.2d at 42, 45, & 48.

[50]*Revlon*, 506 A.2d at 181 (citing *Moran*, 500 A.2d at 1354, 1356-67).

[51]*Unocal*, 493 A.2d at 956; *Ivanhoe*, 535 A.2d at 1342; *Moran*, 500 A.2d at 1356.

offers with commitments to acquire any shares not tendered for the same cash price in a second step merger. A board's ability to "just say no" in such cases seemed very open to question.

1. *Anderson, Clayton*

The most significant of the early Delaware Court of Chancery decisions applying *Unocal* came in *AC Acquisitions Corp. v. Anderson, Clayton & Co.*,[52] a case in which Chancellor William Allen preliminarily enjoined as unreasonable under *Unocal* a defensive partial self-tender offer that was structurally coercive. The hostile bidder in that case, AC Acquisitions Co., Inc. (an acquisition vehicle for Bear, Stearns & Co., Inc. and other investment groups) launched a tender offer for any and all shares of Anderson, Clayton for $56 per share in cash and announced its intention to proceed with a follow-up merger at the same price it acquired fifty-one percent of the company's shares in the tender offer. Perhaps remarkably, management's investment banker "was unable to tell the Board that the [Bear Stearns Group] proposal did not represent fair value."[53] Management found itself responding defensively in terms of affording shareholders an alternative that would allow them to realize a premium, but also to maintain an ongoing equity interest in the company.[54]

The court's analysis in *Anderson, Clayton* was significant with regard to both prongs of *Unocal*'s two-part test for enhanced scrutiny. Regarding the first prong, identifying a "threat" that justifies a defensive response, the court found that the "concededly fair" offer by the Bear Stearns Group was "non-coercive."[55] Nevertheless, the court, apparently harkening back to the first prong's roots in *Cheff*'s motivational/primary purpose test,[56] concluded that a proper corporate purpose was served in affording shareholders an

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[52]519 A.2d 103 (Del. 1986).

[53]*Id.* at 110.

[54]*Id.*

[55]*Id.* at 112. The court regarded the absence of coercion with such an offer as presenting a "special case," impliedly requiring a more restrained defensive response within the "element of balance" framework of *Unocal*:

> A board need not be passive, even in the face of an any-and-all cash offer at a fair price with an announced follow up merger offering the same consideration. But in that special case, a defensive step that includes a coercive self-tender [offer] timed to effectively preclude a rational shareholder from accepting the any-and-all offer cannot, in my opinion, be deemed to be reasonable in relation to any minimal threat posed to stockholders by such offer.

Id. at 114 (citing *Unocal*, 493 A.2d at 954). The court's views with regard to the absence of coercion in an all-cash, all-shares offer would not survive the supreme court's analysis in *Time-Warner* endorsing the concept of "substantive coercion." *See infra* Part III.

[56]*See supra* note 36.

alternative transaction and thus "satisfie[d] the first leg of the *Unocal* test."[57] Second, the court found the company's structurally coercive defensive alternative unreasonable under *Unocal*'s second prong, because the company's front-loaded partial tender offer would force shareholders to tender into the company's offer to avoid the unacceptable risk of holding all devalued "stub" shares upon completion of the offer. This coercively structured offer could not pass muster under *Unocal* in light of the target board's avowed position that it developed this alternative to "preserve the ability of the stockholders to choose."[58]

2. 1988—The Court of Chancery's "Watershed" Year

A flurry of pill cases were decided by the Delaware Court of Chancery in 1988. Most, but not all, of these decisions denied the motion of the hostile bidder for an injunction requiring the target board to redeem the rights under the pill so as to permit the bidder's all-cash, all-shares offer to proceed. In each instance where an active auction of the company was underway, or recently announced, the court refused to order the target board to dismantle the pill, quite reasonably concluding that the interests of shareholders would be advanced by allowing the board to continue to negotiate on behalf of all shareholders for the highest possible price.[59] Of more interest to the present discussion were those decisions involving a challenge under *Moran* to a target board's continued refusal to redeem a pill

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[57]*Anderson, Clayton*, 519 A.2d at 112.

[58]*Id.* at 113. Interestingly the brief writer's rhetoric, quoted more fully below, framed the argument in terms that presumed the shareholders' right of choice under the circumstances of the case: "[T]he Board contends that 'the decision in this fundamentally economic contest lies properly with the shareholders' and that the Board 'has preserved the ability of the stockholders to choose between these two options.'"). *Id.* at 112 (citing Defendants' Answering Brief at 42).

[59]*See, e.g.*, *In re* Holly Farms Corp. S'holders Litig., No. 10,350, 1988 Del. Ch. LEXIS 164, at *189 (Del. Ch. Dec. 30, 1988), *reprinted in* 14 DEL. J. CORP. L. 1062, 1074 (1989) (enjoining effectuation of an auction ending asset lock-up agreement, but upholding continued use of pill upon finding that "it may still have a role in maximizing values"); Doskocil Cos. v. Griggy, No. 10,095, 1988 Del. Ch. LEXIS 132, at *13 (Del. Ch. Oct. 7, 1988), *reprinted in* 14 DEL. J. CORP. L. 682, 689 (1989) (refusing to order rights redeemed under pill where evidence showed that an auction involving competing bidders had not concluded); Tate & Lyle PLC v. Staley Cont'l, Inc., No. 9813, 1988 Del. Ch. LEXIS 61, at *26 (Del. Ch. May 9, 1988), *reprinted in* 14 DEL. J. CORP. L. 418, 435 (1989) (refusing to enjoin use of pill where target's shares were trading higher than tender offer in market place and pill was "serving a useful purpose in allowing the Board to seek a more realistic offer" from possible white knight); Facet Enters. Inc. v. Prospect Group, Inc., No. 9746, 1988 Del. Ch. LEXIS 51, at *16 (Del. Ch. Apr. 15, 1988), *reprinted in* 14 DEL. J. CORP. L. 310, 319-21 (1989) (citing *Moran* court's *Unocal* analysis, court refused to order pill redeemed where target's board decided to conduct an auction and the pill would provide "a reasonable opportunity to conduct and complete the auction"). *See also* CRTF Corp. v. Federated Dep't Stores, Inc., 683 F. Supp. 422, 437-39 (S.D.N.Y. 1988) (upholding continued use of the pill as providing target board "a shield to fend off coercive offers and . . . a gavel to run an auction").

where no *Revlon*-type auction was underway or planned. In other words, these cases presented the *Moran* accountability principle in its purest form: at what point outside of the *Revlon* context is a board required to redeem the rights under a pill? The results were mixed but intriguing.[60]

For example, in *City Capital Associates Limited Partnership v. Interco, Inc.*,[61] Chancellor Allen built on the shareholder choice model from *Anderson, Clayton* and ordered the rights under the *Interco* pill to be redeemed so as to permit the company's shareholders to choose between management's reactive leveraged recapitalization and the hostile bidder's all cash, all shares "noncoercive" offer. In that case hostile bidder Cardinal Acquisition Corporation (Cardinal), an acquisition vehicle for brothers Stephen and Michael Rales and certain other investors, initially offered $64 per share cash for all shares of Interco in a negotiated deal, at a time when the market price of the company's shares had recently been in the low 40s.[62] Cardinal later announced a tender offer for all Interco shares at $70 per share, and eventually increased its offer to $74, a process that spanned some three months.[63] Meanwhile, the board of Interco, advised by its banker that the offer was "inadequa[te]," held Cardinal at bay with the pill and eventually announced a plan to pursue a highly leveraged recapitalization of the company that ostensibly was worth "at least $76 per share."[64]

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[60]*Compare* Grand Metro. Pub. Ltd. v. Pillsbury Co., 558 A.2d 1049, 1057 (Del. Ch. 1988) (ordering pill dismantled for all cash offer at $63 per share where target board's defensive spin-off transaction might be worth $68 per share in the future, reasoning that "a Pillsbury shareholder . . . could conclude that $63 in present cash is preferable to the possibility of $68 if all of the 'ifs' in Pillsbury's plan disappear and its hopes for the future become realities"); City Capital Assocs. v. Interco, Inc., 551 A.2d 787, 790 (Del. Ch.1988) (ordering pill dismantled for all cash, all shares "noncoercive" tender offer at $74 per share, where target's proposed defensive leveraged recapitalization might have a future net value of at least $76 per share) *with* MAI Basic Four, Inc. v. Prime Computer, Inc., No. 10,428, 1988 Del. Ch. LEXIS 161, at *7, *12 (Del. Ch. Dec. 20, 1988), *reprinted in* 14 DEL. J. CORP. L. 1086, 1094 (1989) (refusing to order rights redeemed for all cash non-coercive tender offer where (1) target's banker opined that offer was financially inadequate and (2), "[o]f particular significance," the tender offer was then only pending some three weeks); Nomad Acquisition Corp. v. Damon Corp., No. 10,173, 1988 Del. Ch. LEXIS 133, at *12, *15 (Del. Ch. Sept. 20, 1988), *reprinted in* 14 DEL. J. CORP. L. 814, 824 (1989) (refusing to order rights redeemed for all cash, non-coercive offer for $24 per share where target board's financial advisor's opined that tender offer was inadequate and that company was worth in excess of $30 per share).

[61]551 A.2d 787 (Del. Ch. 1988).

[62]*Id.* at 791-92.

[63]*Id.* at 792-93.

[64]*Id.* at 793. The recapitalization entailed (1) a special dividend of cash and securities with a stated value of $66 per share (much of the proceeds of which would be generated through some $2 billion in newly borrowed funds) and (2) the shareholders' retention of a "stub" share, the residual equity interest in a highly leveraged Interco. *Id.* The board's investment banker opined that the stub would trade at a price of at least $10 per share in the future, but simultaneously disclaimed any assurance that this in fact would occur. *Id.* at 793, 799.

Applying *Unocal*, Chancellor Allen concluded that Cardinal's offer posed no threat in terms of shareholder coercion and only a "mild" threat in terms of price inadequacy.[65] The court did not overrule the Interco board's judgment on the adequacy question, but recognized that "the relative closeness of the values" presented by the competing proposals could not justify under *Unocal*'s reasonableness review a use of the pill to foreclose shareholder choice on the question.[66]

Similarly, the Delaware Court of Chancery's decision in *Grand Metropolitan PLC v. Pillsbury Co.* (*Grand Met*)[67] again picked up the theme of shareholder choice in the face of an all-cash, all-shares tender offer at a substantial premium to the company's recent trading price in the stock market.[68] Starkly placing the contest in terms of shareholder choice, the court asked: "[S]hould the Pillsbury Directors, who alone put the Pill in place, be ordered to remove it so that their stockholders may have a free choice to accept or refuse the Tender Offer?"[69] Although the company's banker opined that the Grand Met offer at $63 was inadequate, the court, applying *Unocal*, ordered the pill redeemed because the company's alternative spin-off plan offered the possibility of $68 per share in value in the future and a Pillsbury shareholder could find the immediate $63 offer "preferable."[70]

In summary, a model was emerging at this time suggesting that pills were useful, even beneficial, but in an appropriate case, might have a limited time of legitimacy in the face of a non-coercive tender offer that was at least arguably fairly priced and which shareholders might reasonably prefer.[71] In

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[65]*Interco*, 551 A.2d at 798; *see also id.* at 796 ("The [Cardinal] tender offer is in no respect coercive.").

[66]*Id.* at 799 ("[T]he [Cardinal] $74 cash offer did not represent a threat to shareholder interests sufficient in the circumstances to justify, in effect, foreclosing shareholders from electing to accept that offer."); *see also id.* at 796 ("A reasonable shareholder could prefer the restructuring to the sale of his stock for $74 in cash now, but a reasonable shareholder could prefer the reverse.").

[67]558 A.2d 1049 (Del. Ch. 1988).

[68]Grand Met's $63 per share tender offer, increased from its original $60 offer, represented a premium of about 60% over the $39 closing price of Pillsbury shares on the New York Stock Exchange immediately before the tender offer was announced. *Id.* at 1052.

[69]*Id.* at 1053.

[70]*Id.* at 1057. As the court in *Grand Met* explained:

> Certain it is that a Pillsbury shareholder, seeking to make a determination as to what is in his/her best interest, could conclude that $63 in present cash is preferable to the possibility of $68 if all of the 'ifs' in Pillsbury's plan disappear and its hopes for the future become realities. But a stockholder in Pillsbury cannot make that choice unless the Rights are redeemed.

Id.

[71]Paramount Communications, Inc. v. Time Inc., No. 10,866, 1989 Del. Ch. LEXIS 77, at *61 (Del. Ch. July 17, 1989), *reprinted in* 15 DEL. J. CORP. L. 700, 735 (1990), *aff'd*, 571 A.2d 1140 (Del. 1990) ("The . . . more difficult doctrinal setting for the question of whose choice is it,

those days "non-coercive" meant an all-cash, all-shares tender offer that was not structurally coercive because the bidder had announced a commitment to proceed with a second step merger on identical terms. With the introduction of the concept of "substantive coercion" in *Time-Warner*, a sea change was at hand for *Unocal* review.

III. *UNOCAL*, WE HARDLY KNEW YE—*TIME-WARNER* AND *UNITRIN* ALTER THE LANDSCAPE

The court of chancery's incremental development of substantive fiduciary constraints on a target board's use of a pill amidst an actual takeover threat, per *Moran*, was stopped cold with the Delaware Supreme Court's decision in *Time-Warner*.[72] It seems a board could in fact use a pill to rebuff a premium offer that was not structurally coercive so long as management could make the case that the premium offer was sufficiently tempting to constitute something called "substantive coercion."[73] *Unitrin* later reinforced this point with a narrowing refinement to the *Unocal* inquiry[74] that seemed, as a practical matter, to limit the scope of *Unocal* review ensuring that shareholders are not mathematically eliminated from winning a contested election to replace the board. *Moran*'s "addition[al]" promise—that equitable constraints beyond ensuring the availability of the proxy machinery would limit the board's decision whether to dismantle a pill in the face of an actual offer—seems to have been abandoned.

A. Time-Warner

In *Time-Warner* the court examined the interplay of *Unocal* with a board's defensive decision to restructure and thereby preserve a pending merger transaction that was proposed after a long, multi-year process of strategic deliberation and exploration. In the spring of 1989, the board of Time Incorporated resolved to transform the company into a large media enterprise (expanding beyond journalism into entertainment) by merging with Warner Communications, Inc. Paramount Communications, Inc.

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is presented by *Unocal*... and a string of Chancery opinions construing its test to require, in certain circumstances, the taking of action—typically the redemption of a so-called poison pill—to permit shareholders to choose between two functionally equivalent alternative transactions.") (citations omitted).

[72]Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990).

[73]*Id.* at 1153 n.17 (citation omitted).

[74]*See, e.g.*, Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder Adopted Bylaws: An Essay for Warren Buffet*, 19 CARDOZO L. REV. 511, 525 (1977) (arguing that *Unitrin* "relaxed judicial scrutiny in proportionality review").

sought to displace this choice of strategic partners by announcing a hostile tender offer for all shares of Time at a price of $175 per share—a substantial premium over the recent $126 per share price for Time shares following the announcement of the proposed merger with Warner. Time, upon receipt of advice from its financial advisors, rejected the Paramount offer as financially inadequate for a change of control transaction. But fearing that Time shareholders would not vote for the merger with Warner because of the "tempting prospect" presented by Paramount's cash premium, the Time board and Warner agreed to recast the transaction to eliminate any vote by Time shareholders.[75] Time instead would acquire fifty-one percent of Warner through an all cash tender offer, following which Time and Warner would be merged into one enterprise.[76] Paramount raised its tender offer to $200 per share, but the Time board again rejected the bid as inadequate.

1. Chancery Court Finds *Unocal* Test Satisfied —*Interco* and *Grand Met* Distinguished

In the Delaware Court of Chancery, then Chancellor Allen refused to enjoin the pending tender offer by Time for Warner pursuant to the recast merger transaction. Applying *Unocal*, the court reasoned that this defensive reaction was a reasonable and proportionate response to the threat that the Time shareholder vote on the original stock-for-stock merger might fail in light of the intervening all cash premium bid by Paramount.[77] Notably, the Chancellor explicitly declined to decide the case on the grounds that the Paramount bid was a threat because Time shareholders might be deceived or confused by the tempting offer of immediate cash from Paramount.[78] Instead, the court reasoned that the Paramount offer, by jeopardizing the shareholder vote on the original merger transaction, posed a cognizable

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[75]*Time-Warner*, 571 A.2d at 1148.

[76]Recasting the transaction in this manner would require Time to incur $7-10 billion in new debt whereas the original transaction would have been a stock for stock deal with no increase in borrowings by Time. *Id.*

[77]Paramount Communications Inc. v. Time Inc., No. 10,866, 1989 Del. Ch. LEXIS 77, at *42-*43, *87-*88 (Del. Ch. July 17, 1989), *reprinted in* 15 DEL. J. CORP. L. 700, 726, 749 (1990), *aff'd*, 571 A.2d 1140 (Del. 1990).

[78]The Chancellor thus remarked:

> [I]t is reasonable to suppose that most . . . money managers would be tempted by the cash now. While the record here contains testimony about a possible concern about confusion or deception of shareholders as part of the reason that the board elected to abandon the merger form of transaction and pursue a cash offer, I will decide this motion not on the understanding that the board was reacting to a threat of confusion . . . but on the understanding that it sought to avoid the risk that the merger would not get an affirmative vote even if there were no confusion.

Id. at *42-*43, *reprinted in* 15 DEL. J. CORP. L. at 726.

threat to Time as a corporate entity given Time's important and long-planned corporate policy of expansion by merging with Warner.[79] In this regard, the court distinguished cases like *Interco* and *Grand Met* where the bidders' all cash, all shares bids posed no appreciable threat to the target corporations' status quo policies but posed a possible threat to shareholders with regard to price inadequacy.[80] The court further distinguished these recent pill cases as instances in which (1) the target boards had attempted to use the pill to "cram down" wholly reactive, management-sponsored alternative transactions and (2) the question of relative values was sufficiently close that a reasonable shareholder could prefer either transaction.[81] Finally, the court upheld as reasonable Time's defensive tender offer for Warner because it furthered Time's legitimate interest in achieving its preexisting business plan of expansion and did not preclude Paramount from bidding for the combined Time-Warner enterprise.[82]

2. "Stop Me Before I Sell Again!"—The Supreme Court Endorses Substantive Coercion

The Delaware Supreme Court properly affirmed the chancery court's decision refusing to enjoin Time's defensive tender offer for Warner. Its *Time-Warner* opinion, however, dramatically altered the balance of director-shareholder power established under *Unocal/Moran* and which the chancery court had been developing in the few short years since these decisions were announced. In particular, with regard to the "threat" analysis under the first prong of the *Unocal* test, the supreme court regrettably used the *Time-Warner* opinion as an occasion to scale back the accountability of boards by substantially expanding the universe of *Unocal* qualifying threats.

First, the court in *Time-Warner* went out of its way to criticize the chancery court's *Unocal* threat analysis for the all-cash all-shares offers in *Interco* and *Grand Met*. The court described these decisions as suggesting that such structurally non-coercive offers "cannot constitute a legally recognized 'threat' to shareholder interests sufficient to withstand a *Unocal*

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[79] *Id.* at *83-*84, *reprinted in* 15 DEL. J. CORP. L. at 747 ("[T]he revised transaction, even though 'reactive' in important respects, has its origin and central purpose in *bona fide* strategic business planning, and not in questions of corporate control.").

[80] *Id.* at *81-*82, *reprinted in* 15 DEL. J. CORP. L. at 746 (citing *Grand Met*, 558 A.2d at 1056; *Interco*, 551 A.2d at 796).

[81] *Paramount*, 1989 Del. Ch. LEXIS 77, at *81-*83, *reprinted in* 15 DEL. J. CORP. L. at 746-47. Elsewhere the court cautioned that the use of a poison pill, "which by definition is a control mechanism and not a device with independent business purposes, may present distinctive considerations than those presented in this case." *Id.* at *88 n.22, *reprinted in* 15 DEL. J. CORP. L. at 749 n.22.

[82] *Id.* at *87-*88, *reprinted in* 15 DEL. J. CORP. L. at 749.

analysis."[83] Moreover, the emphasis in these chancery court opinions on the question of arguably close values which a shareholder might reasonably prefer was improper, the court reasoned, because it (1) ostensibly reduced the "flexibility" of *Unocal* review into a mathematical exercise of appraisal and (2) "would involve the court in substituting its judgment as to what is a 'better' deal for that of a corporation's board of directors."[84]

Second, and of even greater concern to the values of good corporate governance was the *Time-Warner* court's endorsement of the concept of "substantive coercion" as a threat justifying a powerful defensive response under *Unocal*. Whereas the Chancellor had expressly declined to consider the case on these terms,[85] the Delaware Supreme Court, citing an article on *Unocal* by Professors Gilson and Kraakman,[86] emphasized the existence of substantive coercion as an additional threat posed by the premium priced Paramount offer.[87] As the court put it, "One concern was that Time shareholders might elect to tender into Paramount's offer in ignorance or a mistaken belief of the strategic benefit which a business combination with Warner might produce."[88]

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[83]*Time-Warner*, 571 A.2d at 1152. Technically, this is an inaccurate description of the chancery court's approach in these cases. The court in *Interco* described the all cash bid as a "mild" threat under the circumstances, which under *Unocal*'s "element of balance"/proportionality test, called for a more restrained defensive response than using a pill to force shareholders to accept management's hastily and reactively developed leveraged recapitalization. *Interco*, 551 A.2d at 798-99. Likewise in *Grand Met*, the court noted that Grand Met's premium all-cash bid posed a threat of arguable price inadequacy justifying a defensive response under *Unocal*, but determined that the use of the pill to preclude shareholders from choosing to accept that offer was not reasonable in relation to any threat posed by such an offer. *Grand Met*, 558 A.2d at 1057.

[84]*Time-Warner*, 571 A.2d at 1153. Again, the chancery court in these decisions was *not* second-guessing the target board's judgment on the adequacy/value question, although *Grand Met* admittedly comes a bit closer than *Interco* to doing so. *Grand Met*, 558 A.2d at 1057 ("The record contains substantial evidence that the per share price offered by Grand Met for Pillsbury is fair and adequate."). The point in these cases, for *Unocal* purposes, was that the question of values—between management's wholly reactive defensive restructurings and the all cash bids that prompted them—was sufficiently close, and debatable, that the board's use of the pill to foreclose shareholder choice in such cases represented the kind of abuse of discretion that *Moran* had warned against. As the Chancellor made plain in *Interco*: "The point here is not that, in exercising some restrained substantive review of the board's decision to leave the pill in place, the court finds Drexel's opinion more persuasive than Wasserstein Perella's. I make no such judgment. What is apparent—indeed inarguable—is that one could do so." *Interco*, 551 A.2d at 799; *see also Grand Met*, 558 A.2d at 1057 (stating that "a Pillsbury shareholder . . . could conclude that $63 in present cash is preferable to the possibility of $68 if all of the 'ifs' in Pillsbury's plan disappear and its hopes for the future become realities").

[85]*See supra* note 79.

[86]Gilson & Kraakman, *supra* note 36, at 267.

[87]*Time-Warner*, 571 A.2d at 1153 n.17.

[88]*Id.* at 1153. This parentalistic notion of protecting shareholders from themselves—because they might not understand or believe in the prospect for greater value under management's plan if there's a premium cash bid on the table—becomes even more strained when one considers

3. *Interco* and *Grand Met* Criticized but Not Overruled

Although *Time-Warner* plainly discredited the chancery court's approach in *Interco* and *Grand Met* to the first step threat inquiry under *Unocal*, the court did not speak one way or the other to the *Moran* issue of whether the pill was properly ordered redeemed in those cases. As noted earlier, the Chancellor determined in *Time-Warner* that the Time board properly and reasonably recast the merger with Warner so as to preserve a long-sought and important strategic business policy.[89] This fact, reasoned the Chancellor, significantly distinguished *Time-Warner* from *Interco* and *Grand Met* where the target boards, in response to all-cash, premium hostile tender offers, threw together reactive, management-sponsored alternatives and sought to use the pill to "cram down" these alternatives on their shareholders.[90] Breathing possible new life into *Interco* and *Grand Met*, the supreme court in *Time-Warner* specifically adopted the Chancellor's reasoning in this regard in affirming the court's determination that the Time board's decision to recast the merger to protect a long sought-after business plan, was a reasonable response under *Unocal*.[91] This aspect of the *Time-*

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the increasing presence and sophistication of institutional investors, a phenomenon even the *Time-Warner* court noted. Thus in one of the more mystifying juxtaposition of sentences one might find in corporate decisional law, we find the following in *Time-Warner*: "At these June meetings, certain Time directors expressed their concern that Time stockholders would not comprehend the long-term benefits of the Warner merger. Large quantities of Time shares were held by institutional investors." *Id.* at 1148. This writer has commented on this tension previously. *See* Paul L. Regan, *Supreme Court Missed Chance to Revitalize* Unocal *in* Quickturn *Decision*, DEL. L. WKLY., June 8, 1999, at 7:

> What was very curious about the defendants' successful substantive coercion argument in *Time-Warner*—i.e., that it was okay for the Time board to take away the shareholders' vote because the shareholders might not "comprehend" the long-term benefits of the Warner deal—is that large quantities of Time stock were held by institutional investors."

Id. See also Chesapeake Corp. v. Shore, No. 17,626, 2000 Del. Ch. LEXIS 20, at *90 n.73 (Del. Ch. Feb. 7, 2000) (noting analytical tension in substantive coercion analysis of *Time-Warner* and *Unitrin*).

[89]*See supra* Part III.A.1.

[90]*See supra* note 80 and accompanying text.

[91]The court in *Time-Warner* thus arguably implied that the boards' attempted use of the pill in *Interco* and *Grand Met* to "cram down" the reactive restructurings in those cases may well have been properly enjoined:

> We have found that even in light of a valid threat, management actions that are coercive in nature *or force upon shareholders a management-sponsored alternative to a hostile offer may be struck down as unreasonable and nonproportionate responses.* ***
>
> *Here, on the record facts, the Chancellor found that Time's responsive action to Paramount's tender offer was not aimed at "cramming down" on its shareholders a management-sponsored alternative, but rather had as its goal the carrying forward of a pre-existing transaction in an altered form.*

Warner court's decision has gone largely unnoticed by courts and commentators and, if revisited, could offer the possibility of more meaningful *Unocal* review in future cases.

B. Unitrin *Shuts the Door*

The Delaware Supreme Court's decision in *Unitrin*, decided some five years after the opinion in *Time-Warner* was announced, presented two negative developments for corporate governance. First, the opinion resurrected the specter of "substantive coercion" as a *Unocal* qualifying threat, holding fast to the idea that boards must protect shareholders from tempting premium cash offers because investors might mistakenly accept the cash without understanding (or disbelieving the board's assertions about) the intrinsic value of the firm.[92] Second, the court in *Unitrin* all but abandoned the additional promise of *Moran* that a board's use of the pill in the face of an actual offer would be checked by meaningful substantive review under *Unocal* outside of the proxy contest. As a practical matter, the opinion in *Unitrin* appears to have reduced *Unocal* review to the important but incomplete function of ensuring that shareholders are not mathematically eliminated from removing the board in a contested election.

In *Unitrin*, American General Corporation publicly announced its offer to the board of Unitrin, Inc. to acquire the company for cash in a merger transaction at a price representing about a 30% premium over the company's recent market price. The Unitrin board concluded that the offer was inadequate and adopted various defensive measures. The board initially adopted a poison pill and an advance notice bylaw, and then later initiated a self-tender repurchase program for about 20% of Unitrin's outstanding shares. The Delaware Court of Chancery upheld the pill and bylaw measures, but concluded that the additional step of implementing the share repurchase program was "unnecessary" and therefore unreasonable under *Unocal* in view of the other measures already in place.[93] The Delaware Supreme Court reversed and remanded the case, stating that the Chancellor applied an incorrect legal test in ruling that the repurchase defense was

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Time-Warner, 571 A.2d at 1154-55 (citations omitted) (emphasis added).

[92]Not since *Time-Warner*, decided five years earlier, had the term "substantive coercion" appeared in a Delaware case. *See supra* note 73 and accompanying text. Its resurrection in *Unitrin*—after the number of institutional investors soared even further and the information age exploded onto the scene—caught this writer by surprise. *See Unitrin*, 651 A.2d at 1382 ("The record reflects that institutional investors own 42% of Unitrin's shares. Twenty institutions own 33% of Unitrin's shares.").

[93]*Unitrin*, 651 A.2d at 1385-86.

"unnecessary" and suggesting that the chancery court improperly substituted its judgment for the Unitrin board in so concluding.[94]

On the question of *Unocal*'s threat analysis, the court in *Unitrin*, citing *Time-Warner*, once again endorsed the concept of "substantive coercion" as a threat justifying a defensive response. The court thus noted with approval the Unitrin board's concern that the company's stock was undervalued in the market "and that the [b]oard considered Unitrin stock to be a good long-term investment."[95] This analysis of course extended the concept of substantive coercion even further than in *Time-Warner* where the risk of shareholder mistake related to the future benefits of a recently announced strategic merger. Unitrin was simply in status quo mode, with nothing new or difficult to value in the pipeline.[96] The uncritical acceptance of "substantive coercion" in this context now meant that "[a] board was permitted to address the concern that shareholders would mistake the value of business as usual."[97]

Unitrin also spelled trouble for the director-shareholder power balance by collapsing the once promising two part analysis of *Moran*—proxy protection *and* fiduciary protection—into simply ensuring the availability of the proxy machinery for replacing the board. The *Unitrin* court thus refined the reasonableness/proportionality analysis of *Unocal* by introducing a new layer of inquiry which asks whether the defensive measure is coercive or preclusive. If so, the defensive measure is disproportionate and thus invalid under *Unocal*, but if not, the measure is then examined under a range of reasonableness analysis that reads more like the business judgment rule than substantive reasonableness review.[98] *Unitrin* thus telescoped the inquiry under *Unocal* into whether a successful proxy contest "would either be

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[94] *Id.* at 1384-86.

[95] *Id.* at 1384.

[96] *See, e.g.*, Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 290 (Del. Ch. 1989) (describing how an offer was problematic because the offer failed to account for hard-to-quantify, but valuable, patent litigation against Kodak).

[97] Gordon, *supra* note 74, at 525.

[98] As the court observed:

> The *ratio decidendi* for the "range of reasonableness" standard is a need of the board of directors for latitude in discharging its fiduciary duties to the corporation and its shareholders when defending against perceived threats. The concomitant requirement is for judicial restraint. Consequently, if the board of directors' defensive response is not draconian (preclusive or coercive) and is within a "range of reasonableness," a court must not substitute its judgment for the board's.

Unitrin, 651 A.2d at 1388 (citing *QVC*, 637 A.2d at 45-46). *See* Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Power* (Apr. 21, 2001) *available at* http://www.law.umich.edu/centersandprograms/onlin/confpapers/thompson.pdf at 38 (arguing that the *Unitrin* court's range of reasonableness test seems to "echo descriptions of the business judgment rule").

mathematically impossible or realistically unattainable."[99] After *Unitrin*, management can put its thumb on the proxy scale and will always find refuge in a relaxed range-of-reasonableness test, so long as the defensive response does not mathematically or realistically foreclose a contested election.

In summary, *Time-Warner* and *Unitrin* dramatically expanded the scope of "threats" justifying defensive responses under *Unocal*, in particular with the endorsement of substantive coercion as a *Unocal* qualifying threat. At the same time, especially in *Unitrin*, the court appeared to narrow the field of invalid, disproportionate responses and expand the range of responses qualifying as reasonable. So long as the shareholders remain free to turn the board out in a proxy contest in the next election (or two, assuming a staggered board), the use of the pill to block a premium-priced all cash bid that is arguably fairly priced may well survive *Unocal* review.

C. *Just Say No?* Moore v. Wallace Computer

Because the Chancellor's decision to uphold the board's adoption of the pill in *Unitrin* was not appealed, the case left in its wake a vital question. Fairly read, *Unitrin* suggests that (1) only coercive or preclusive responses are in trouble under a *Unocal* inquiry and (2) defensive responses that can eventually be avoided by replacing the board through the proxy machinery are not preclusive. As Professor Gordon has thoughtfully explained, the crucial question left after *Unitrin* was whether a board's refusal to redeem a pill in the face of an actual bid is preclusive (because only the board can redeem the pill) and therefore draconian, or is non-preclusive (because the shareholders can always "turn the board out"[100] at the next election) and therefore reasonable.[101] Applying Delaware law, the federal district court in *Moore Corp. Ltd. v. Wallace Computer Services, Inc.*[102] chose the latter response, reasoning that a refusal to redeem the pill for Moore's all cash premium offer was not coercive or preclusive because "retention of the pill will have no effect on the success of the proxy contest."[103] The court in *Wallace Computer* dutifully acknowledged that "Delaware courts have recognized that at some point, the failure to redeem a poison pill can constitute a fiduciary breach."[104] Nevertheless, in the wake of *Unitrin*, the

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[99] *Unitrin*, 651 A.2d at 1388-89.
[100] *Unocal*, 493 A.2d at 959.
[101] Gordon, *supra* note 74, at 531.
[102] 907 F. Supp. 1545 (D. Del. 1995).
[103] *Id.* at 1563.
[104] *Id.* at 1562.

court gave virtually exclusive emphasis to the proxy machinery as the only real check on the pill redemption question. *Moran*'s *Unocal* promise—of fiduciary accountability for the board's use of a pill in the face of an actual offer— has vanished.[105]

D. Quickturn *and the Death of Deadhand Pills*

The Delaware Supreme Court in *Quickturn Design System, Inc. v. Shapiro*[106] case properly dealt a fatal blow to the short lived innovation of dead hand, or slow hand pills. Perhaps emboldened by *Unitrin*, planners sought to limit even the efficacy of turning the board out in a proxy contest by creating pills that purported to prevent an incoming board from redeeming the rights. As this article has argued, *Moran*'s only remaining promise after *Unitrin* was that the shareholders could get around the pill by electing a new board through the proxy machinery. Dead hand and slow hand pills now sought to limit even this vestige of shareholder protection by disabling the newly elected board from dismantling the pill. In the case of a dead hand pill, only the directors in office when the pill was adopted could redeem the rights.[107] With a "slow hand" pill, the newly elected board has the power to redeem the rights, but that power is arbitrarily deferred under the terms of the pill for some set period of time such as six months.[108]

The Delaware Court of Chancery ruled that the slow hand pill in *Quickturn* was outside a "range of reasonableness" and therefore invalid under *Unocal* because of a disconnect between the threat identified by the defendants and the actual operation of the pill. The directors of target Quickturn Design Systems argued that any newly installed board would need time to get familiar with the company's intrinsic value and that the slow hand pill properly responded to the threat that a new board might act precipitously in deciding to sell the company. In fact, the pill did not operate that way. Quickturn's slow hand pill would only prevent the new board from selling

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[105]*But see In re* Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 481 (Del. Ch. 2000). In *Gaylord*, Vice Chancellor Strine suggested that a board's use of a pill to block an actual offer might be preclusive and therefore vulnerable under *Unocal*:

> While it is true that a poison pill absolutely precludes a hostile acquisition so long as the pill remains in place, the mere adoption of a garden-variety pill is not in itself preclusive under Delaware law. That is because in the event of a concrete battle for corporate control, the board's decision to keep the pill in place in the face of an actual acquisition offer will be scrutinized again under *Unocal*.

Id.

[106]721 A.2d 1281 (Del. 1998).

[107]*See, e.g.*, Carmody v. Toll Bros., Inc., 723 A.2d 1180, 1184 (Del. Ch. 1998).

[108]Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 27 n.2 (Del. Ch.), *aff'd*, 721 A.2d 1281 (Del. 1998).

the company to hostile bidder Mentor Graphics, but otherwise would allow a precipitous sale by a new board to any other possible buyer.[109]

The Delaware Supreme Court affirmed the judgment invalidating the Quickturn pill but did so on purely legal grounds. The court ruled that Quickturn's slow hand pill was statutorily invalid because it restricts the ability of a newly elected board to act with "*full* power," as provided under the Delaware General Corporation Law.[110] To its credit, the court in *Quickturn* kept faith with *Moran*'s assurance that a pill did not prevent shareholders from receiving tender offers because the proxy machinery would always be available to install a new board more disposed to redeem the pill. Nevertheless, the court missed an opportunity to breathe new life into *Unocal* and *Moran*'s additional, but abandoned promise, that boards would be held accountable in fiduciary terms for defensive measures independent of simply ensuring an insurgent the mathematical possibility of success in a proxy contest. The few chancery court decisions invalidating defensive measures that found their way to the supreme court were reversed.[111] Here was a chance to instill some new substance to *Unocal*'s proportionality review, but the *Quickturn* court declined the opportunity.

IV. A MODEST PROPOSAL

This article has argued that judicial review of defensive measures under *Unocal* has, as a practical matter, been reduced to the vitally important—but incomplete—task of ensuring that the shareholders retain the ability to remove their board of directors through the proxy machinery. Even there, management can take measures to tilt the vote their way so long as an insurgent's prospects for success in a contested election do not thereby become "mathematically impossible or realistically unattainable."[112] Meanwhile, *Moran*'s early promise, that a board's use of the pill to fend off an actual bid would be *Unocal* reviewable separately from ensuring the efficacy of the proxy machinery, has gone unfulfilled.

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[109] *Id.* at 50-51.

[110] *Quickturn*, 721 A.2d at 1291-92; DEL. CODE ANN. tit. 8, § 141(a) (1991) (stating that "the business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors).

[111] Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). Conversely, those occasions in which the chancery court has applied enhanced scrutiny and invalidated director action in the change of control context have routinely resulted in affirming decisions by the Delaware Supreme Court. *See, e.g.*, Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[112] *Unitrin*, 651 A.2d at 1389.

The Delaware courts could take a substantial step toward reinvigorating the promise of meaningful fiduciary accountability under *Unocal* and *Moran* by rejecting the concept of substantive coercion as a cognizable threat. It was difficult to accept this idea more than ten years ago in *Time-Warner*, when the presence of sophisticated institutional investors was already a phenomenon. With the virtually explosive rise of the institutional investor in the decade that followed, the concept of substantive coercion has become simply untenable. The idea that such sophisticated investors could be confused or mistaken about the value of management's business plans, when confronted by the tempting prospect of an unsolicited premium cash offer, becomes even less supportable when the historic availability of information in this technological age is added to the mix.[113] To the extent any bona fide risk of confusion exists in such circumstances, one would think a more proportionate defensive response would be the delivery of information, not insurmountable obstacles.

Revisiting *Time-Warner*'s acceptance of substantive coercion, and the court's seemingly illogical juxtaposition of the Time board's concern for shareholder confusion with the reference to a large presence of institutional investors,[114] one wonders if another unspoken concern was lurking. Was the court perhaps suggesting that institutional investors are exactly the problem in the context of seemingly attractive premium all cash bids? Was the problem less a concern with confusion or comprehension and more a concern with a perceived inclination of large institutional investors to prefer short-term certain gains to long-term hopes?[115] It is noteworthy in this regard that the *Time-Warner* court seemed to accept uncritically the Time board's concern that these institutional investors would be particularly vulnerable to the temptation of short-term certain gains.[116]

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[113]As Vice Chancellor Leo Strine thoughtfully observed in *Chesapeake Corp. v. Shore*, No. 17,626, 2000 Del. Ch. LEXIS 20, at *94 (Del. Ch. Feb. 7, 2000):

> This confusion rationale should also be tested against the information currently available to investors. The proliferation of computer technology and changes in the broadcast media industry have given investors access to abundant information about the companies in which they invest. The capability of corporations to communicate with their stockholders has never been greater. And the future promises even easier and more substantial information flows.

Id.

[114]*See Time-Warner*, 571 A.2d at 1148.

[115]*See* Regan, *supra* note 88, at 7 ("[I]t seems the [*Time-Warner*] court was implying that institutional investors are notoriously short-term minded and will, if given the choice, invariably lock in a substantial and certain short-term gain instead of betting on a more distant but potentially higher payoff.").

[116]This surprising juxtaposition of themes in *Time-Warner* concludes with an emphasis on the fact that these institutional investors would be particularly tempted by Paramount's premium cash bid:

Steering the analysis in this direction avoids the logical incompatibility between investor sophistication and the risk of shareholder confusion. It also moves the debate closer to the fundamental tension presented by the *Time-Warner* case: who decides the takeover contest, management or the shareholders? Even more to the point, this tension in Time-Warner related to externalities. Time's duly elected board had spent years putting together a strategic plan of expansion after an exhaustive investigation of possible merger partners. Paramount was a deal jumper that sought by hostile tender offer for all of Time's shares to thwart the Time board's plan. Should the Time board be required in such circumstances to dismantle its defenses and just let the shareholders decide? Should an outsider to the firm, Paramount, be empowered to dictate the timing for a sale of Time and supplant the Time board's strategic vision on the eve of its culmination? These questions reveal that the initial inquiry of whether management or shareholders decide a takeover contest is simply too broad to permit an answer for all cases in all instances.

Harkening back to the Chancellor's trial court decision in *Time-Warner*, the court there declined to decide the case on the basis of shareholder confusion. Instead the Chancellor suggested, without apology, that the Time board properly recast the deal with Warner because, following the emergence of Paramount's offer, Time's directors had lost confidence in winning a shareholder vote on the Warner merger.[117] The threat of losing the long-planned strategy of expansion with Warner justified as proportionate the response of restructuring the combination with Warner so that no vote of Time's shareholders would be required.[118] This effort to preserve the preexisting plan to combine with Warner distinguished the case in a dispositive way from the suspect efforts of the boards in *Interco* and *Grand Met* to use the pill to "cram down" wholly reactive and functionally equivalent management alternatives.[119]

As an alternative to simply rejecting the concept of substantive coercion outright, the Delaware courts could reinvigorate *Unocal* by significantly confining its scope. To the extent a "confusion" rationale

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> [C]ertain Time directors expressed their concern that Time stockholders would not comprehend the long-term benefits of the Warner merger. Large quantities of Time shares were held by institutional investors. *The board feared that even though there appeared to be wide support for the Warner transaction, Paramount's cash premium would be a tempting prospect to* <u>*these investors*</u>.

Time-Warner, 571 A.2d at 1148 (emphasis added).

[117] *See supra* note 78 and accompanying text.

[118] *Time-Warner*, 1989 Del. Ch. LEXIS 77, at *87, *reprinted in* 15 DEL. J. CORP. L. at 749, *aff'd*, 571 A.2d 1140 (Del. 1990) ("[T]he reactive step taken was effective but not overly broad. The board did only what was necessary to carry forward a preexisting transaction in an altered form.").

[119] *Id.* at *88-*84 , *reprinted in* 15 DEL. J. CORP. L. at 746-47.

actually undergirds the concept, then *Unitrin*'s step of extending the doctrine to protect management's status quo "business as usual"[120] plans must be reconsidered. It is one thing to suggest that shareholders might mistakenly fail to appreciate the value of a proposed, but not yet consummated, massive plan of expansion as in *Time-Warner*;[121] it is quite another to suggest that shareholders might be mistaken or confused about the value of management's existing business plan.

To the extent that substantive coercion must remain a part of the takeover landscape, then its invocation to protect shareholders from mistakenly failing to understand the value of management's existing business plan should invite the highest degree of judicial skepticism. A similar degree of skepticism should apply to a target board's attempts to protect, under the guise of substantive coercion, a wholly reactive management-sponsored alternative. As Vice Chancellor Strine in his *Chesapeake* decision thoughtfully recognized, "[s]ubstantive coercion is a slippery concept" that must require a board to show something substantially more than abstract expressions of concern for shareholder confusion.[122] It cannot be enough, consistent with a principled balancing of power between the board and the shareholders in the takeover context, for management to get a free pass by making sure the concept shows up in the board minutes so the litigators have the ammunition needed for claiming deference. In this alternative scenario, only upon a particularized showing of possible confusion not easily ameliorated by the flow of additional information (e.g., a pending merger transaction, a massive but unquantified litigation judgment, etc.), should a board be permitted to invoke the doctrine of substantive coercion as a basis for denying shareholders a choice on a structurally non-coercive offer that is arguably fairly priced.

Finally, there is still hope after *Time-Warner* for meaningful fiduciary accountability under *Unocal* as *Moran* once promised. The *Time-Warner* court expressly approved the Chancellor's *Unocal* proportionality analysis which emphasized that the Time board's recast merger transaction was "not aimed at 'cramming down' on it shareholders a management-sponsored alternative" but rather had as its goal the realization of an important strategic transaction that preceded any takeover threat by Paramount.[123] The Delaware Supreme Court's approval of this analytical distinction arguably implied, and still implies, that the question of shareholder choice in the

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[120]Gordon, *supra* note 74, at 525.

[121]*See also* Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 290 (Del. Ch. 1989) (profitable but not yet quantified patent litigation against Kodak presented difficult question of valuation).

[122]*Chesapeake*, 2001 Del. Ch. LEXIS 20, at *99.

[123]*Time-Warner*, 571 A.2d at 1154-55.

former scenario—where the board *is* using the pill to cram down a wholly reactive alternative—is still very much open to debate. Leaving aside one trial court opinion in the federal courts,[124] the validity of "just say no" may still be open to question after all these years.

V. CONCLUSION

Unocal offered the promise of meaningful fiduciary accountability for boards that unilaterally adopt takeover defenses. In particular, the prospect of judicial review of the substantive reasonableness of directors' takeover decisions offered the hope that a workable and principled balance of power between directors and shareholders in this important context would be carefully developed. *Moran* upheld the extraordinary board power of the poison pill but emphasized two crucial limitations on the exercise of that power. First, shareholders would have the proxy machinery at their disposal to replace the board with a slate of directors more disposed to dismantle the pill. Second, the board's use of the pill in the face of an actual tender offer would in any event be subject to *Unocal* review for reasonableness. This article argues that this second promise of *Moran* has gone unfulfilled. Although some early decisions in the Delaware Court of Chancery sought to animate *Unocal*'s meaning in this important context, judicial review of defensive measures today appears limited, after *Unitrin*, ensuring that a shareholder is not mathematically or perhaps realistically eliminated from waging a successful proxy contest.

The Delaware courts can reinvigorate *Unocal* review, and restore a better balance of power between directors and shareholders in the takeover context by rejecting the concept of substantive coercion. Alternatively, the courts should (1) substantially limit the scope of substantive coercion and (2) require a board invoking this concept to make a particularized showing of the risks it presents in a specific case. Finally, *Unocal* should be reinvigorated further by restoring *Moran*'s promise that a board's refusal to redeem a pill in the face of an actual offer would be subject to meaningful *Unocal* review beyond simply ensuring the mathematical possibility of a successful proxy contest to remove the board.

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[124]Moore Corp. Ltd. v. Wallace Computer Servs., Inc., 907 F. Supp. 1545, 1583 (D. Del. 1995) (holding that the board met their fiduciary duty and acted properly in refusing to redeem the poison pill).