LUISS

Department of Economics and Finance

Chair of Law and Economics (Business and Corporate Law; Antitrust and Regulation)

CRISIS PILLS: THE ADOPTION OF POISON PILLS IN RESPONSE TO THE COVID-19 ECONOMIC CRISIS

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Academic Year 2020/2021

To my beloved grandparents

To my cherished parents, brothers, and sisters

To my precious Francesca

To all my other family members

To my loved Giovanni, Caterina, Beatrice and Edoardo

To Edoardo, Paolo, Filippo, Matteo, Damiano, and all dearest friends of mine

To my guardian angels Zeno, Rosanna, and Caterina

Abstract

The sudden outbreak of the pandemic Covid-19 has turn upside-down the world economy during the last year, causing massive disruption not only under the healthcare perspective but also under the economic one. The stock market was massively impacted by the pandemic crisis. Most notably, most public companies suffered one of the worst stock market crash of recent history, which caused a drop in the valuation of many listed companies – not justified by preceding trends of negative performances.

The unprecedented scenario created a fertile ground for the proliferation of hostile takeovers – thereby making boards considering a range of various defensive tactics offered by corporate governance practice. The volatility in the market fostered the recurrence of boards to the implementation of defensive tactics to fight potential opportunistic behaviours from institutional investors. Among those mechanisms, the poison pill may be dramatically important in fighting the negative consequences of the pandemic.

The poison pill – as a governance tool – was created during the 1980s by Martin Lipton and went through several waves of massive adoption and significant modifications.

The deployment of the poison pill increased dramatically in the first period straight after the outbreak of the pandemic. For instance, since March 2020 nearly 50 S&P 500 companies had active poison pills, while at the end of 2019 only 25 of them adopted shareholder rights plans.

The position of the major proxy advisors shifted – from the general aversion towards shareholders rights plan – to a more open view with respect to crisis pills that have specific features (duration, triggers, threats).

Recently, the first court decision on the matter was issued by the Delaware Court of Chancery (McCormick, V.C.). The Court released a memorandum opinion – in The Williams Companies Stockholder Litigation – enjoining a "poison pill" stockholder rights plan adopted by The Williams Companies, Inc. in the wake of extreme stock price volatility driven by the double whammy of COVID-19 and the Russia-Saudi Arabia oil price war.

However, his decision should not be construed as jeopardizing the ability of boards to implement, in general, poison pills in response to legally cognizable threats. Indeed, The Court maintained that the boards when implementing a poison pill in response to the current scenario must take in to account the two standards of conduct reflected in the two-part Unocal standard.

Therefore, boards that are considering adopting crisis pills must consider more standard features (unlike the extreme characteristics drafted in Williams).

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INTRODUCTION

Coronavirus (Covid-19) made its first appearance in December of 2019 in Wuhan, one of the greatest cities in China and a major transport hub and rail interchange. Within a month, the number of cases has grown steadily in Hubei. Eventually, Covid-19 has been declared a Public Health Emergency of international concern on 30th of January 2020 and has been recognized as a pandemic by WHO (the World Health Organization) on 11th of March.

The virus has rapidly become truly globalized, also because of the structure of modern society, which has favoured the spread of the pandemic across the most developed countries.

Since the subject of Coronavirus is topical, research on the economic effects of the virus is still at an early stage. What is clear so far is that the spread of the virus has produced a sort of 'de-globalization' process, by forcing countries to lock-down borders, preventing normal flows of individuals, goods, and capital[1].

The Covid-19 outbreak caused an unprecedented havoc in the global supply chain, a field in which China is one of the most important players of the Globe. There are two channels through which the virus has affected the global supply chain: the production shock and the shock to trade flows due to transports and logistics disruptions. Chinese factories were affected not only by lockdowns and quarantines but also by the partial production strikes in other countries due to deficiency of inputs from China itself. Thus, given the massive global connection of the supply chain, the shock has started rapidly spilling over the other economies, causing a 'Bullwhip effect'[2] in the global supply chain by forcing firms to reduce or shut down production and sales.

The other channel of global supply chain shock is disruptions in transports and logistics – which causes a halt in the movement of humans and goods. The unexpected supply chain breakdown has massively affected industrial productions not only in China but also in other production areas across the globe – particularly in countries that were strongly interconnected with Chinese firms and suppliers; this impact was huge in many industries like automotive, pharmaceuticals, medical supplies, and high-tech manufacturing.[3]

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[1] *See* Barua Suborna, *Understanding Coronanomics: The Economic Implications of the Coronavirus (COVID-19) Pandemic* 12 (April 1, 2020), Available at SSRN: https://ssrn.com/abstract=3566477.

[2] "The bullwhip effect is the amplification of demand variability along a supply chain: a company bullwhips if it purchases from suppliers more variably than it sells to customers. Such bullwhips (amplifications of demand variability) can lead to mismatches between demand and production and hence to lower supply chain efficiency.", *see* Robert L. Bray & Haim Mendelson, *Information transmission and the bullwhip effect: An empirical investigation*, Mgmt. Sci. No. 58.5, 10 (2012). "The bullwhip effect (BWE) is considered to be a key phenomenon in supply chain management. The principal notion of BWE is that demand variability increases as one moves upstream in a supply chain." *as defined* in Zhao Rong *et al*., *Supply Chain Relational Capital and the Bullwhip Effect: An Empirical Analysis Using Financial Disclosures*, Int. J. of Op. & Prod. Mgmt., Vol. 39 (5) DOI 10.1108/IJOPM-03-2018-0186, (October 28, 2018). Available at SSRN: https://ssrn.com/abstract=3274287.

[3] *See supra* note 1.

On top of that, coronavirus had a strong impact on other branches of the world economy – a remarkable example being the stocks market. Indeed, several companies faced a sharp decline in stock prices, and the valuation of many businesses – made by public or private investors – collapsed, not reflecting their actual long-term value.

Global financial markets have experienced unprecedented volatility – thereby creating a prolific ground for hostile takeovers[4]. Indeed, hostile activity and stockholder activism often correspond with – or follow – periods of extreme market volatility and investor uncertainty, as the one generated by the coronavirus crisis.[5]

As a matter of fact, the crisis originated by the virus has created a new risk: activist investors with no liquidity problem (well-capitalized "players") may undertake the acquisition of significant stakes in companies at depressed prices (a sort of "coronavirus discount"). This means that – in the high volatility context caused by Covid-19 – the Board of Directors of a target firm could have faced sudden changes in the ownership and find out that they have a new active shareholder with a large portion of shares – probably acquired at a depressed price which does not reflect the intrinsic long-term value of the company.

A key point in my analysis is the trend of the dismantlement of shareholder rights plan – also known as "Poison pills" – as a takeover defensive tactics during the last decade – a phenomenon that makes it hard for the target firms to respond strongly to hostile attacks.

Thus, many public companies reconsidered their defensive plans from any type of hostile takeover. Some of them chose to reconsider the adoption of shareholder rights plans as a response to the economic consequences of the pandemic. As a consequence, the number of public companies that deployed poison pills in this context increased exponentially. Since March 2020 – when the impact of Covid-19 on financial markets became clear – almost 50 *S&P 500* corporations adopted poison pills (versus 25 companies at the end of 2019).[6]

The aim of this research is to look deep into the shareholder rights plans (considering its history and modifications over time), to understand whether this defensive mechanism could help firms to respond to the Covid-19 crisis, and to analyse the Delaware Chancery Court's verdict in the Williams Companies litigation involving one of the first 'Crisis Pills'.

The dissertation is organized as follows. In Part I, I will provide a brief overview of takeovers subject and defensive mechanisms developed within the Corporate Governance subject – with a special focus

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[4] An unwelcome or hostile takeover occurs when a large company goes after the target company although the board of directors of the target company is unwilling to agree to the takeover.

[5] *See* Mark D. Gerstein, Tiffany F. Campion, & Joshua C. Reisman, *Proactively Adopting a Poison Pill in Response to the Covid-19 Crisis*, Harv. L. Sch. F. on Corp. Gov. 1 (April 11, 2020).

[6] *See* O. Eldar & M. Wittry, *The return of poison pills: a first look at "crisis pills"*, Duke Law School Public Law & Legal Theory Series 2020-18, at 2-4 (March 2021). Available at SSRN: https://ssrn.com/abstract=3583428.

on the 'Poison Pill'. In Part II, I will analyse the effect of Covid-19 on the global economy – in particular on the financial markets – and the adoption of the shareholder rights plan as a response to the pandemic crisis. In Part III, I will discuss the Delaware Court of Chancery's decision on The Williams Companies Stockholder Litigation – case that involved the application of an extreme 'Crisis Pill' – and the takeaways derivable from the litigation. Finally, in the last section (Part IV), I will attempt to understand the significance of Williams and the possible future developments of the poison pill doctrine.

I. TAKEOVERS & DEFENSIVE TACTICS: A FOCUS ON SHAREHOLDERS RIGHTS PLAN

A. *Takeovers and Most Common Defensive Strategies*

1. Takeovers: Background & Historical Bits

"Takeovers, like bankruptcy, represent one of Nature's methods of eliminating deadwood in the struggle for survival. A more open and more efficiently responsive corporate society can result."[7]

Takeovers are remarkably important within M&A subject and cover a relevant position in the business world. As defined by Nobel Laureate Paul Samuelson (above quoted), this important business phenomenon may be seen as a sort of "Darwinian industrial selection promoting social welfare".[8] Broadly speaking, a takeover happens when a company (the bidder) presents an offer to acquire or assume the control of another company (the target company) – often by purchasing a majority stake in the target firm. Formally, takeovers are acquisitions of companies' stakes of equity large enough to allow the acquiring firm to exercise control over the acquired company. Therefore, a takeover consists of a transaction that can bring benefits both to the shareholders and to the performances of the firm itself.

In general, the M&A movements are organized in waves. Takeover activity is usually distinguished by some slightly heterogeneous indicators. First, they are concentrated in periods of economic recovery – *i.e.*, after an economic crisis. For example, distinct takeover waves have been registered during economic recoveries after the market crash provoked by the oil crisis (wave commenced in 1981) and the dot-com bubble (begun in mid-2003). Second, the waves coincide with periods of accelerated credit expansion. Finally, the surge in M&A activity is frequently pushed by technological and industrial shocks or by strong regulatory modifications. On top of that, managers' personal

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[7] *See* P. Samuelson & W. Nordhaus, *Economics* 505 (1970).

[8] *See* Eckbo, B. Espen, *Corporate Takeovers and Economic Efficiency*, Annual Review of Financial Economics, Vol. 6, at 2 (25 Nov 2014).

objectives had a significant influence on takeover activity. In some circumstances, this influence – used in an opportunistic way – led to poor acquisitions.[9]

2. Hostile Takeovers & Defensive Mechanisms

Dealing with takeovers, a crucial distinction is the one between friendly and hostile takeovers. Friendly or voluntary takeovers are corporate governance mechanism in which the target company is acquired by the bidder via mutual agreement between the two companies. Consequently, these transactions usually go smoothly since both the management of the acquiring company and of the target company consider it a positive opportunity for both firms. Before the bidder makes an offer to acquire the target company, he first informs the board of directors of the target company. If the board feels that accepting the offer pursues the shareholders' interests better than rejecting the offer, it advises the shareholders to accept the offer. In fact, friendly takeovers must be approved by shareholders, who will only agree to the takeover if they think the price offered per share is fair.[10]

On the other hand, a hostile takeover consists of the acquisition of the target company by the acquiring firm completed by going straight to the shareholders or attempting to remove the incumbent management to get the takeover approved.[11]

Corporate law deal with the matter within the subject of 'Corporate Governance'[12] – through which it has developed a set of defensive mechanisms and strategies that the management of a firm may employ in the case the company is facing a hostile attack. One of the most famous classifications of defensive strategies, according to the US doctrine, is the distinction between "pre-bid" and "post-offer" tactics. Intuitively the former are defensive measures considered in advance of the bid, while the latter concern the period after the bid is presented by the potential acquirer.

It may be useful for the aim of the research to quote some of the most common strategies that the companies have used in the past decades to protect their interest from opportunistic and unwelcome attack (Specifically in the U.S.). Among the pre-bid strategies, I found several sub-categories, as the "shark repellent provisions"[13] (Golden parachutes, Supermajority provisions, Staggered board of

[9] *See* Martynova, Marina & Renneboog, Luc, *A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?*, Journal of Banking and Finance, ECGI - Finance Working Paper No. 97/2005, at 7 (Jan 2009).

[10] *See* Martynova, Marina & Renneboog, Luc, *Mergers and Acquisitions in Europe*, ECGI - Finance Working Paper No. 114/2006, CentER Discussion Paper Series No. 2006-06, at 6 (January 2006).

[11] *Id*. at 6.

[12] *See* Dumitrescu Ariadna & Zakriya Mohammed, *The Corporate Governance – Performance Puzzle: New Insights*, ESADE Bus. Sch. Res. Paper No. 268, at 2 (June 2017).

[13] "Representative of anticipatory defenses that can be adopted by way of amending a corporations charter or by-laws, shark repellents serve to reinforce the ability of a firm's board of directors to retain control, mainly by making it more difficult for control to be gained over the board either by proxy fight or at an annual or special meeting." as defined in

directors[14], Strategic incorporation), and maybe the most important category, which includes tactics such as the Poison Pill, Flip-in, Flip-over, Black-End Rights and Dead-Hand. On the other hand, there are post-offer defensive strategies, that are mechanism executed when there is a real threat of a hostile takeover. The most relevant are: Just say no defense, Litigation, Greenmail (Greenmailing), Crown jewel defense, Pac-Man defense, White knight defense and White squire defense.

I will now examine the fiduciary implication of poison pill strategies adoption by boards and then shift the focus of our discussion into the shareholder rights plan, which recently came as a central argument of many discussions between scholars.

B. *Board of Directors Involvement*

1. Fiduciary Duties & Standard of Judicial Review

The adoption of defensive tactics by the target boards is subjected to the observance of fiduciary duties, namely specific legal requirements aimed to protect the stakeholders from potential opportunistic behaviours by the management of the firm. In the context of a corporation, fiduciary obligations characterize the nexus of duties that every director must respect during the execution of his/her managing activities.

One of the most discussed issues is whether an ultimate decision, regarding a takeover bid, should be made by the directors or by the shareholders. It may be useful to make a distinction in two different scenarios. If the company is facing a "friendly" takeover, there should be no interest for the board to act opportunistically. The management has, in that case, the opportunity to negotiate with the potential acquirer, to bring to the stockholders the best offer achievable. However, there's the case in which the company faces a hostile takeover attempt, in which the bid is usually made directly to the shareholders – and in which the management adopts a defensive strategy to prevent opportunistic behaviours from the bidder. In this case, the employment of defensive strategies may be made in the best interest of stockholders, but sometimes may not. In the light of the controversial effects of takeover defences adopted by the board of a target company, the principle of fiduciary duties acquires greater importance to understand whether the board acted in good faith and in the best interest of the company or not.

In the UK, and then in the US, common law has been a crucial tool in the development of fiduciary duties – starting from the concept of the director as a trustee. According to Delaware Supreme Court,

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Aga Saira, *A Review and Comparison of Takeover Defenses in the U.S. and U.K.* 3 (June 27, 2010). Available at SSRN: https://ssrn.com/abstract=1631432.

[14] *See* Ferruccio Maria Sbarbaro, *I fiduciary duties nel quadro delle scalate ostili* 61 (1st Ed. Nov. 2017).

directors' legal obligations may be classified into two broad categories: '*Duty of Loyalty*' and '*Duty of Care*'. Both categories of duties are derived from the same idea according to which directors are required to act in the best interest of the corporation, rather than in their own interests.[15]

Directors' responsibilities in Delaware and most jurisdictions are measured primarily by the business judgment rule, especially in corporate takeover contexts. To overcome the shield provided to directors by the business judgment rule, a shareholder plaintiff must prove that the "*board of directors, in reaching its challenged decision, breached any one of its 'triad of fiduciary duties, loyalty, good faith, due care*.'"[16]

Moreover, Delaware Courts recognizes other judicial standards for reviewing target boards' actions in takeovers' situations, as the Unocal[17] and Entire Fairness[18] standards of judicial review, or the well-known Revlon Rule[19]. These standards represent more rigorous judicial scrutiny of boards decisions upon the adoption of defensive measures to block hostile takeover attempts, developed by Delaware Court in some of the most relevant cases concerning M&A litigations.

A further crucial investigation upon fiduciary duties in a takeover context is the recognition of who are the beneficiaries of these duties. In principle, directors owe fiduciary obligations to the company, not individually to each stockholder. However, there's the chance that individual shareholders may directly suit directors for the breach of fiduciary duties with respect to the single stockholder, rather than a derivative action on the behalf of the company. Going straight to the point, it may be interesting to notice that – in some specific circumstances – takeover contexts place fertile ground for the assumption according to which fiduciary duties are owed to shareholders rather than to the company. Of course, these considerations do not deny the principle of directors' duties regulation, but they integrate it.[20]

2. The Target Board

As mentioned earlier, the Board of Directors of a target company – *i.e.*, targeted by another firm for an acquisition – must act in such a way to protect and maximize the interests of stakeholders. The risk of opportunistic behaviours is significantly high – especially in the case of hostile takeovers. This

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[15] *See* Despotovic & Damjan, *Fiduciary Duties and the Business Judgment Rule* 7 (June 9, 2010). Available at SSRN: https://ssrn.com/abstract=1639338.

[16] *See Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. Supr. 1971).

[17] *See* Cox James D. & Thomas Randall S., *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, Del. J. of Corp. L., Vol. 42, No. 2, 2018, at 349 (2017). Available at SSRN: https://ssrn.com/abstract=3127687.

[18] *See* Licht Amir N., *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, Eur. Corp. Gov. Inst. No. 439/2019, at 5 (2019). Available at SSRN: https://ssrn.com/abstract=3331097.

[19] *See* Arthur Fleischer Jr. & Alexander R. Sussman, *Directors' Fiduciary Duties in Takeovers and Mergers*, 31 Ann. Sec. Reg. Inst. 10 (2004). Available at: https://www.friedfrank.com/.

[20] *See supra* note 14 at 31-45.

issue has been addressed by US corporate law via the application of some standards of judicial review – thus applying remarkable decisions taken by Courts in the past decades (in most cases Delaware Courts).

Firstly, the traditional standard of review that was applied by Courts during the rise of the takeover wave of the '80s is the well-known Business Judgement Rule[21].

However, in Delaware, the "traditional" went through some revisions to be properly applied in contexts of takeovers – particularly when hostile takeovers are avoided by Boards via the employment of defensive mechanisms. Because of the nature of unwelcomed takeovers and mergers and the very substantial financial stakes involved, the actions undertaken by target Boards of Directors in those contexts are frequently challenged in courts. Therefore, numerous cases have adjudicated the nature of a board's fiduciary responsibilities in evaluating and reacting to an unsolicited bid and in entering a merger or sale of control, thereby providing fertile ground for the development of a significant body of law.[22] The modifications of the business judgement rule by Delaware courts have produced a series of standards of judicial review that have been applied by courts across the US for decades. The most relevant – as mentioned above – are the Unocal & Entire Fairness standards and the Revlon Rule. One of the most important evolutions of the business judgement rule – in a takeover litigation context – has been the gradual adoption of more meticulous scrutiny by courts of board decisions concerning the employment of defensive mechanisms to avoid hostile takeovers. According to the Unocal standard of judicial review – formalized in Delaware in the 1985 decision in Unocal Corp. v. Mesa Petroleum Co – the use of defensive tactics to stop hostile takeover attempts imposes a special burden on directors before they can reap the benefits of the business judgment rule. First, each member of the Board of Directors must be fully informed, and any decision to take defensive actions must emerge from a mindful evaluation of the hostile bid and of the various alternative courses of action available. Second, the defense employed by the Board of Directors must be reasonable in relation the actual threat to shareholders and corporate interests – threat caused by the hostile takeover attempt.

[21] As mentioned by D. Despotovic in *Fiduciary Duties and the Business Judgement Rule,* 'The rule can be understood both as a safe harbor and as a legal presumption. It is a safe harbor because it shields directors and officers from personal liability for some actions. The role of the rule as a safe harbor can also be understood as a sort of substantive, as opposed to simply procedural presumption. This presumption is also irrebuttable, and it can be formulated in the following way: "director who is reasonably informed and acts in good faith is irrefutably presumed to have satisfied the duty of care." (Black, Cheffins, Clausner, *Outsider Director Liability*, at *12).
In effect, the rule's role is to protect directors from personal liability even when they fail to live up to the standard of care required by law. […] In addition to its function as a safe harbor, the business judgment rule, in the procedural sense, creates a legal presumption that – when making a business decision – directors acted with due care, and with good faith, and no ulterior motives. Or as the Delaware Supreme Court put it: the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." (Aronson v. Lewis, 812, Del. 1984)'.

[22] *See supra* note 19 at 10.

Generally, courts have considered a defensive measure as improper or "disproportionate" if it was either "draconian" (coercive or preclusive) or falls outside the scope of reasonable responses.[23]

If the actions – undertaken by the Board – pass the Unocal reasonableness test, these actions are subject to review under the business judgment standard. However, if the Board's actions fail to pass the reasonableness test, the defensive measures will be invalidated unless the board can demonstrate that its actions were entirely fair.[24]

If the litigation brought before the court involves a sale of control the Revlon principles will apply. The Revlon rule "requires the board – when it undertakes a sale of the company – to set its singular focus on seeking and attaining the highest value reasonably available to the stockholder."[25]

Under Revlon enhanced standard of judicial scrutiny, directors must demonstrate that they had this singular focus. After this step, the court will rigorously examine the process of settled price negotiation. By imposing the burden of proof upon directors and modifying the standard judiciary scrutiny – from the traditional business judgment rule to reasonableness – Revlon created a presumption that the decision to sell a company was tainted.[26]

In the application of the Revlon rule, the crucial work for the court is generally determining what constitutes a "sale of control". For instance, in *Paramount Communications Inc. v. QVC Network*, Inc.[27], the Delaware Supreme Court held that

> Because the merger transaction approved by the Paramount board resulted in a transfer of voting control from the Paramount public shareholders to the individual controlling shareholder of Viacom, the transaction was a sale of control and triggered the duty under Revlon to obtain the best value reasonably available.[28]

The court pointed out that the Paramount board of directors had breached its duty in favouring Viacom over the competing bidder – *i.e.,* QVC. Specifically, in the Paramount's decision the court specified the obligation that the directors had under a sale of control circumstance as follows:

> Under the facts of this case, the Paramount directors had the obligation: (a) to be diligent and vigilant in examining critically the Paramount-Viacom transaction and the QVC

[23] *See supra* note 19 at 11.
[24] *Id.*
[25] *See Ryan v. Lyondell Chem. Co.,* No. 3176–VCN, 2008 WL 2923427, at *2 (Del. Ch. July 29, 2008) *citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), *rev'd on other grounds*, 970 A.2d 235 (Del. 2009).
[26] *See* Sharfman, Bernard S., *Shareholder Wealth Maximization and Its Implementation under Corporate Law* 412 (April 18, 2014). Available at SSRN: https://ssrn.com/abstract=2198459.
[27] *See Paramount Communs., Inc. v. QVC Network, Inc.*, 1993 Del. LEXIS 548, 637 A.2d 828 (Del. Dec 9, 1993).
[28] *Id* at *43-48.

> tender offers; (b) to act in good faith; (c) to obtain, and act with due care on, all material information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide the best value reasonably available to the stockholders; and (d) to negotiate actively and in good faith with both Viacom and QVC to that end.[29]

The Delaware Supreme Court added:

> a court applying enhanced judicial scrutiny should be deciding whether the directors made a reasonable decision, not a perfect decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise, or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness.[30]

Generally, the Delaware cases subject defensive decisions to preliminary judicial scrutiny to determine if the standards discussed above have been met. If defensive mechanisms put in motion by directors satisfy these basic standards and if the directors' decisions are based upon their evaluation of business considerations, the business judgment rule will be enforced, and their decisions will not be second-guessed by the courts. However, if the board's actions breach one of the fiduciary duties (good faith, loyalty, or due care) or fail to meet the Unocal or Revlon standards, then the business judgment rule will not be applicable. At this stage, the board's actions are not – *ipso facto* – invalid. Rather the Entire Fairness standard will be taken into consideration by the court.[31]

Therefore, it may be said that fairness "becomes an issue only if the presumption of the business judgment rule is defeated."[32]

If the plaintiff can prove that those involved in the decision-making process either lack independence or breached any of their fiduciary duties, then – as mentioned earlier – the business judgment rule's application is denied, and the court will apply the "entire fairness doctrine." As a result, the burden

[29] *Id* at *48.
[30] *Id* at *45.
[31] *See supra* note 19 at 10,11.
[32] *See* Sinclair Oil Corp. v. Levien, 280 A.2d at 720; *see also* Grobow v. Perot, Del.Ch., 526 A.2d 914, 921 (1987).

shifts to the defendants to prove that both the process that was followed and the price that was achieved are fair to the stockholders of the corporation.[33]

In *Krasner v. Moffet*, the Delaware Court implicitly defined a two-step process that leads to the inapplicability of the business judgement rule. First, "when a majority of the board of directors is the ultimate decision-maker and a majority of the board is interested in the transaction, the presumption of the business judgment rule is rebutted." Second, "when the presumption of the business judgment rule has been rebutted, the entire fairness rule is implicated, and defendants bear the burden of proof."[34]

At the same time, in *Texlon Corp. v. Meyerson*, the Court defined the entire fairness standard as an instrument designed to be used in conflicted transactions in which the majority of the board is interested or stands to receive a material benefit, a director has financial incentives adverse to the company, or a conflicted director or stockholder "controls or dominates the board as a whole."[35]

C. *The Poison Pill or Shareholder Rights Plan*

1. Definition and Modifications

It's now time to shift the focus of the discussion on the Poison Pill, which is considered by many scholars to be one of the strongest defensive tactics. This mechanism was invented at the end of the 19th century by Martin Lipton, and it consists of a technique that a target firm may use to prevent or discourage a hostile takeover by an acquiring company. The idea that underlies the standard poison pill is quite straightforward: the company sets a fixed limit of stocks ownership, and once a potential acquirer crosses that limit the shareholders that are not affiliated with the acquirer – also called the 'target shareholders' – get the opportunity to buy additional shares at a price that is significantly lower than their actual value. This is the most common type of poison pill – also known as flip-in poison pill. Another relevant modification of the shareholder right's plan is the flip over pill. This strategy – when triggered – allows the target company's shareholders to purchase shares of the acquiring company at a significant discount (in the case the takeover succeed). This will dissuade potential acquirers if they believe that their own company value will be affected post-takeover.[36]

Through the purchase of the new shares at a discount, the existing target shareholders significantly dilute the value of the potential acquirer's ownership stake in the target company. The actual objective

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[33] *See* Shant H., Chalian & Kristen M, Bandura, *The Business Judgment Rule and the Entire Fairness Doctrine*, Robinson & Cole LLP Publications, (2020). Available at: http://www.rc.com/documents.

[34] *See Krasner v. Moffet*, 826 A.2d 277, 287 (Del. 2003).

[35] *See Texlon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2002).

[36] *See* Fowlkes, Katherine G., *Poison Pills and Their Effect on Shareholder Return*, Chancellor's Honors Program Projects, (2019). Available at: https://trace.tennessee.edu/utk_chanhonoproj/2238.

of this technique is to push the price of the takeover so high as to make it unprofitable, thereby discouraging a potential acquirer.

Shareholder rights plans have usually been determined by the fixed limit after which the mentioned procedure of dilution of shares at a value between 10 and 20 per cent of target stock. Nonetheless, in recent years we have seen a spread of poison pill mechanisms that are triggered by ownership thresholds exceeding 5 per cent – primarily as a way of protection for tax assets (net operating losses, or NOL). In many instances these types of poison pills have shown controversial outcomes, though; in fact, the 5 per cent threshold may reveal itself overprotective for tax purposes, and the low ownership threshold may serve to entrench management.

Poison pills also include one additional key feature: the management of the target company has the power to eliminate a poison pill in specific circumstances. This feature enables the target's board to clear the way for a desirable deal which the pill would otherwise prevent. Courts generally accord significant authority to the board of directors to decide whether to redeem or maintain a poison pill. Thus, boards have a significant amount of discretion and freedom of action within this specific area. The poison pill, therefore, makes the board of directors the central focal point in a fight for control of the target[37].

There are also significantly different applications of poison pill strategies adopted by companies to fight against hostile takeovers and corporate riders. For instance, the management may decide to take on a debt that would leave the company overleveraged and potentially unprofitable. Another different way to apply the mechanism is to set a series of golden parachutes for corporate executives, making the takeover of the company prohibitively expensive for a potential acquirer who had planned to replace the top management. Then there is a non-financial application of the poison pill, which consists of staggering the election of the board of a firm so to push the unwelcome acquirer in the position of facing a hostile board for an extended period. In some cases, this delay in gaining control of the board is a sufficient deterrent for a takeover attempt. Last, but not least, I have noticed an extreme application of the poison pill, known as the "suicide pill"[38].

[37] *See* Barry Jordan, *Takeover Defenses: The Lay of the Land and Disputed SignPosts*, Res. Hb. on M&A 181 (2016). Available at SSRN: https://ssrn.com/abstract=3091422.

[38] A suicide pill – also known as Jonestown defense – is an extreme defensive strategy from hostile takeovers by which the target company undertakes actions that may drive the firm itself into bankruptcy rather than allowing the conclusion of the merger or transaction. The name 'Jonestown' comes from the mid-1970s Jonestown massacre.

2. Historical Bits and Applications Over Time

It may be useful – for our research – to investigate some historical bits about the poison pill, giving some insights on the background in which the mentioned defensive strategy was theorized.

In this sense, the poison pills have existed in several forms for many decades, but they were viewed merely as anomalies in corporate finance. The general thought according to which diversification would enable companies to maintain consistent profitability caused a staggering diffusion of takeovers. This logic fostered the creation of conglomerates, such as *LTV*, *TRW*, *General Electric* and *Tenneco*, enormous corporate empires that had interests in several major industries, specifically for diversification purposes. Both these aggregations of business power into conglomerate activity and the rhythm of mergers and acquisitions caused concern that takeovers were causing excessive concentration in certain industries and in general were not going in the direction of the shareholders' best interests. This led to congressional lobbying by business federations, labour unions, and institutional investors that culminated in the emission of the Williams Act[39] in 1968.

The act became the basis for other federal laws regarding corporate mergers and acquisitions and established a basis for legal challenges using arguments such as bad faith, misrepresentation, and antitrust concerns. During the period that followed, many state legislatures passed more specific and restrictive legislation on takeovers, based on the Williams Act. [40]

In such an environment, the poison pill was theorized by mergers and acquisitions lawyer Martin Lipton of *Wachtell, Lipton, Rosen & Katz*. It was seen as a response to hostile takeovers and became popular during the early 1980s. Its name derives its original meaning from the poison pills which were taken by the spies if they were discovered, so as to eliminate the possibility of being captured and interrogated by the enemies.

To deeply understand how poison pills work – I will provide an overview of some of the most relevant cases involving the application of these defensive strategies across history.

The tactic was first employed by the firm Wachtell, Lipton, Rosen, and Katz with one of its clients, a company called *General American Oil*, that at the time was under the attention of *T. Boone Pickens*, who was an American business magnate and financier. Martin Lipton advised the board of directors

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[39] "Enacted in 1968, the Williams Act was a response to a wave of hostile coercive takeover attempts, primarily cash tender offers. At the time the Williams Act was passed, most shares were owned by individual shareholders, a fragmented and ill-informed group unprepared to exert their rights as shareholders. Cash tender offers posed the real risk of destroying value by forcing shareholders to tender their shares on a compressed timetable. The Williams Act was designed to protect these investors, who faced serious dilemmas when "corporate raiders" launched attempts to take over companies in which they owned stock. It was intended to fill gaps in federal and state corporate law, as Federal securities laws already included disclosure requirements for proxy fights and share-for-share exchanges, while no laws applied to cash tender offers.", *See* Andrew Nagel *et al.*, *The Williams Act: a truly "modern" assessment,* Harv. L. Sch. F. on Corp. Gov. 1 (2011).

[40] *See* Grieco Joseph M., *The Ever-Evolving Poison Pill: The Pill in Asset Protection and Closely Held Corporation Cases*, Del. J. of Corp. L., Vol. 36, No. 2 (2011). Available at SSRN: https://ssrn.com/abstract=1950353.

of *General American Oil* to employ a new specific strategy to avoid the takeover. The plan consisted of flooding the market with new shares of the company's stock, thereby diluting the equity. The dilution of the firm's equity had as core objective making the acquisition much more expensive to pursue, given that *Pickens* would have to acquire many more shares to get the same expected gain. At first glance, this strategy was seen as controversial and possibly a breach of fiduciary duty, because a takeover may be a great opportunity for shareholders in terms of financial profits, but then was ruled legal by the Delaware Supreme Court in 1985[41]. In the following decades the poison pill has been employed in several ways and by many companies in different jurisdictions, constantly evolving till more recent times.

The trend since the early 2000s has been for shareholders to vote against poison pill authorization, since these strategies are designed to prevent takeovers, when in fact from a shareholder point of view takeovers can be financially rewarding. Some have asserted that poison pill mechanisms may be destructive to shareholder interests since they perpetuate the existing management. An important example of this is the case of *Yahoo! v. Microsoft Corp*.[42] – which became one of the most famous cases of poison pill employment due to the behaviour of Yahoo! top management. Yahoo CEO Jerry Yang 'de facto' threatened to make the takeover as difficult as possible unless Microsoft would have raised the price to $37 per share. In response, one of the Microsoft executive directors ironically commented: "They are going to burn the furniture if we go hostile. They are going to destroy the place.". Furthermore, Microsoft raised the offer to $33 per share, but still, Mr Yang refused the offer and chose to keep running a poison pill strategy to prevent the takeover. Some believed that Yahoo! CEO was not acting in good faith, the reason for which several shareholders launched lawsuits against him and other executive directors of the company. Yahoo's stock price fell after that Microsoft has withdrawn the offer, and the former CEO Yang faced a negative reaction from stockholders that eventually led to his resignation.[43]

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[41] *See Moran v. Household International Inc*., 500 A.2d 1346 (Del. 1985) – a decision by the Delaware Supreme Court that upheld the shareholder rights plan as a legitimate exercise of the Business Judgment Rule by Household International's board of directors. *See* Regan Paul L., *What's Left of Unocal?*. Del. J. of Corp. L., Vol. 26, No. 3, at 947-975. Available at SSRN: https://ssrn.com/abstract=333101; *See also* Andrew G.T. Moore II, *The Birth of* Unocal – *A Brief History*, 31 Del. J. Corp. L. 865 (2006).; *See also* Kahan Marcel & Rock Edward B., *Anti-Activist Poison Pills*, NYU L. & Econ. Research Paper No. 17-08. Available at SSRN: https://ssrn.com/abstract=2928883, *in which* the authors discuss the reasons why *Moran v. Household International Inc*. is considered an important case concerning this subject. Here we report the two main reasons: "Moran remains noteworthy for two reasons. First, it establishes a doctrinal framework for analyzing pills. When faced with an actual bid the decision of whether to redeem the rights issued under the pill is subject to enhanced scrutiny under Unocal: the bid must constitute a threat and retention of the pill must be reasonable to the threat. Second, it ties the validity of pills to a bidder's ability to succeed with a hostile tender offer even in the presence of a pill. Most importantly, Moran noted that a bidder could conduct a proxy contest to replace the board – and have the new board redeem the pill – while a bid was pending. From the start, the possibility of a proxy contest was thus critical to the legitimacy of the pill."

[42] *See Yahoo! Inc. v. Microsoft Corporation*, US Dis. Court S. Dis. of N.Y. No. 1.2013cv07237.

[43] *Id.*

The last case of the shareholder rights plan I present involves one of the most famous companies of the moment, namely *Netflix*. In 2012 the American company adopted a Poison Pill defense to prevent Carl Icahn[44] from effecting a hostile takeover. Upon learning that Icahn had acquired a 10% stake in the company, Netflix immediately employed a defense strategy. Any attempt to buy a large equity position in Netflix without board approval would result in flooding the market with new shares, making any hostile takeover attempt excessively expensive.

3. Effects of Poison Pills Application

The consequences of deploying poison pill are controversial. There is no common conclusion of how the market reacts to its adoption. The debate on whether poison pills have positive or negative effects on the economic and financial position of companies has been extensively dynamic over time.

The literature presents two conflicting hypotheses concerning the reaction of markets to poison pill adoption. On the one hand, the managerial entrenchment hypothesis states that poison pills isolate the management from the positive forces of the market for corporate control. In fact, a constant threat of potential takeovers would function as a natural mechanism to reduce agency costs.[45] Shareholder rights plans shield the board from this external influence – thereby deteriorating the principal-agent relationship. The management – while acting – could be driven by personal benefits and interests. Therefore, they could choose inappropriate strategies that do not maximize shareholders' wealth.[46]

On the other hand, the shareholder wealth maximization hypothesis defines antitakeover provisions as rational tools that effectively protect shareholders. According to the hypothesis, the power of rejecting opportunistic takeover attempts is in the long-term interest of shareholders.[47] Generally, the long-term prosperity of a company should be favoured over short-term profits. The shareholder wealth maximization hypothesis is backed by two unrelated arguments. Firstly, poison pills put the boards of the target companies in a superior bargaining spot. Secondly, these devices enable management to extract the maximum bid premium.[48]

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[44] *See* Schloetzer Jason D. & Lee Richard, *The Activism of Carl Icahn and Bill Ackman*, Geo. McDonough Sch. of Bus. Res. Paper No. 2442317 (2014). Available at SSRN: https://ssrn.com/abstract=2442317

[45] *See* Sang Yop Kang, *Transplanting a Poison Pill to Controlling Shareholder Regimes — Why It Is So Difficult*, 33 Nw. J. Int'l L. & Bus., 33(3), 619–676 (2013). Available at: http://scholarlycommons.law.northwestern.edu/njilb/vol33/iss3/3

[46] *See* Sundaramurthy, C. *et al*., *Board structure, antitakeover provisions, and stockholder wealth*, Strategic Management Journal, 18(3), 231–245 (1997). Available at: http://doi.org/10.1002/(SICI)1097-0266(199703)18

[47] *See* Yeh, T. Ming, *The effects of anti-takeover measures on Japanese corporations*, Review of Quantitative Finance and Accounting, 42(4), 757–780 (2014). Available at: http://doi.org/10.1007/s11156- 013-0361

[48] *See* Datta, S., & Iskandar-Datta, M., *Takeover Defenses and Wealth Effects on Securityholders: The Case of Poison Pill Adoptions*, Journal of Banking and Finance, 20(7), 1231–1250 (1996). Available at: http://doi.org/10.1016/0378-4266(95)00051-8

Practically speaking, evidence shows that few companies have been able to hold a strong and independent financial position for a long period after the employment of a poison pill defensive tactic. At the same time, the effective prevention of hostile offers caused by the poison pill has shown to the financial community some structural weakness of the companies using these strategies.

One of the most important effects of deploying such a defensive mechanism is keeping away potential opportunistic investors, who may purchase large stakes of a company only looking at short-term financial gains. Thus, the shareholder right's plan is clearly a strong tool that may be employed as protection for long-term shareholders' interest and long-term investments operated by the companies. Although these protection effects that a firm can experiment employing poison pill strategies, in the last decades this defensive tactic has been scaled down because of the negative consequences it may yield.

For instance, many shareholder activists[49], concerned with the potential abuses that might result, have sponsored proposals that would require mandatory shareholder approval for the introduction of a poison pill in the charter (or bylaw) or the activation of an existing shareholder rights plan. In fact, by preserving the independent position of firms, poison pills have the negative implication of 'keeping alive' inefficiencies and bad management – which may result in declining productivity and competitiveness that is reflected in lower share value. [50]

Despite the resistance from shareholder activists, poison pill popularity has grown during the 1990s, so that – in 1998 – about 530 companies extended or adopted new shareholder rights plans, and in 1999 at least 20 per cent of all poison pill plans were expected to come up for reconfirmation. In many cases, shareholders' consultation was not even mandatory for boards of directors for the renewal or suspension of existing poison pill plans.

Another possible concern caused by poison pills is the potential shield for managers from accountability to investors, the reason why America's largest investors have typically been sceptical of the use of these strategies.[51]

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[49] *See* Mary Ann Cloyd, *Shareholder Activism: Who, What, When, and How?,* in which the authors define shareholder activism in the following way: "'Activism' represents a range of activities by one or more of a publicly traded corporation's shareholders that are intended to result in some change in the corporation. The activities fall along a spectrum based on the significance of the desired change and the assertiveness of the investors' activities. On the more aggressive end of the spectrum is hedge fund activism that seeks a significant change to the company's strategy, financial structure, management, or board. On the other end of the spectrum are one-on-one engagements between shareholders and companies triggered by Dodd-Frank's "say on pay" advisory vote*."*; *See also* Cheffins, Brian R. & Armour, John, *The Past, Present and Future of Shareholder Activism by Hedge Funds*, (2011). J. of Corp. L., (2012). Available at SSRN: https://ssrn.com/abstract=1932805

[50] *See* John Simley, David P Bianco, *Poison Pills*, Ref. for Bus. 1 (2019)

[51] *Id.*

In conclusion, I may say that – since their introduction (in 1982) – poison pill plans have been viewed as controversial defensive mechanisms.[52] Early literature – Malatesta and Walkling (1988) or Ryngaert (1988) – mostly define shareholder right plans as management entrenching provisions. Therefore, they had a significantly negative vision of the effects of poison pills.[53]

However, recent research – Schepker et al. (2016) & Heron and Lie (2015) – have a more positive vision of the effects of shareholder right plans use.[54] In particular, they tend to depict a positive market reaction to the adoption of the poison pill. This conclusion is in line with the empirical findings gathered by Simon Hitzelberger. In this analysis, Hitzelberger shows "highly significant abnormal returns centred on the date of the pill adoption".[55] Thus, the most recent evidence seems to confirm that shareholders react positively to poison pill adoption, particularly if they expect a hostile takeover attempt. Stockholders seem to value the enhancement of management bargaining power provided by shareholder right plans. This higher bargaining power may eventually result in higher possibilities to extract the maximum possible bid premium.[56]

II. Poison Pill: A Possible Response to the Pandemic Crisis

A. *The economic Impact of Covid-19*

1. General Analysis of the Current Scenario

The Covid-19 pandemic has caused a severe economic crisis, affecting most of the industries of the world economy. Its impact has disrupted different aspects of society, devastated the global economy, and slowed down development. The magnitude of the consequences was quite inconsistent among countries depending on their economy, health infrastructure, and socio-political factors. These considerations have also influenced the various paths followed by countries to respond to the pandemic – where a few have coped well, and some have catastrophically failed.[57]

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[52] *See* Sunder, D. L., *The Controversial "Poison Pill" Takeover Defense: How valid are the Arguments in Support of it?* 47–66 (2014). Available at: https://www.semanticscholar.org/paper/

[53] *See* Malatesta, P. H., & Walkling, R. A., *Poison Pill Securities*, Journal of Financial Economics, 20, at 347–376, (1988). Available at: http://doi.org/10.1016/0304-405X(88)90050-5; *see also* Ryngaert, M., *The Effect of Poison Pill Securities on Shareholder Wealth*, Journal of Financial Economics, 20(C), at 377–417, (1988). http://doi.org/10.1016/0304-405X(88)90051-7.

[54] *See* Schepker, D. J., Oh, W.-Y., & Patel, P. C., *Interpreting Equivocal Signals: Market Reaction to Specific-Purpose Poison Pill Adoption*, Journal of Management, (July 2016). Available at: http://doi.org/10.1177/0149206316635250

[55] *See* Simon Hitzelberger, *What effect do poison pills have on shareholder value?*, An empirical research on the adoption of poison pills 36, (January, 2017). Available at: https://run.unl.pt/bitstream/

[56] *See supra* note 48.

[57] *See* FX, Lovelina Little Flower *et al., Society, Economy and Development During the COVID-19 Pandemic: Lesson for Emerging Economies*, (October 30, 2020). Available at SSRN: *https://ssrn.com/abstract=3796820*

The unprecedented economic disruption provoked by the pandemic is not only disastrous but also has spillover implications since it created demand and supply shocks in almost every area of human life.[58] In facts, the spread of the coronavirus affected both developed and developing economies in various ways – the most relevant ones being drastic declines in domestic demand, tourism, trade and production, supply chain disruptions and negative health effects.[59]

The spread of coronavirus has managed to suffocate economic activities in two ways. First, the need for social distancing led to the shutdown of many business activities. Second, the flaming diffusion of the virus – and the uncertainty surrounding it – led to a hysteric shift to safety in consumption and investment among consumers, investors, and businesses. This outbreak has triggered a global recession in 2020 – still ongoing in 2021 – which reflected the difficult choice that many countries had to make to save their people.[60]

Broadly speaking, Governments around the globe have responded with different approaches and several policies principally aimed to contrast the spread of the pandemic and to save the largest number of individual possible. The early measures orchestrated by governments consisted in lockdowns, social distancing measures and travel restrictions – with different magnitudes among nations – all aimed to slow down the diffusion of the coronavirus pandemic. While being very effective in containing the surge of infections in many countries, these measures may have caused further arms to firms operating in different sectors. As recent research – conducted by N. Bloom, R. Fletcher, and E. Yeh – on the impact of Covid-19 on US firms demonstrated, the outbreak of coronavirus negatively impacted the sales of most US firms. The severity of the consequences of the pandemic was intensified by the fact that many businesses closed in response to governments' mandates.[61]

2. The 2020 Stock Markets Crash

Looking from a general perspective, the financial markets reacted to the diffusion of the pandemic with a terrible decline of the stock prices – due to the uncertainty of the unprecedented scenario – and a shift of investors towards safer financial instruments and assets.

[58] *See* Ozili, Peterson K and Arun, Thankom, *Spillover of COVID-19: Impact on the Global Economy* 5 (March 27, 2020). Available at SSRN: https://ssrn.com/abstract=3562570

[59] *See* Lahiri, Shouvik and Sinha, Manish, *A Study of the Socio-Economic Implications of the COVID-19 Pandemic,* Australasian Accounting, Business and Finance Journal*,* 15(1), 2021, at 51-69. Available at: http://dx.doi.org/10.14453/aabfj.v15i1.5

[60] *Id* at 51-69.

[61] *See* N. Bloom et al., *The Impact of Covid-19 on US Firms*, National Bureau of Economic Research (January 2021). Available at: http://www.nber.org/papers/w28314

Firstly, the Covid-19 disease was thought to be a problem limited to China. Therefore, the financial markets did not respond significantly till mid-February. Once it became clear that the outbreak was spreading across Europe – and eventually the rest of the world – around February 20 stock markets crashed.

Beginning on February 20, 2020, the global stock markets have suddenly shifted from a bull market to a bear market. In the following five weeks, the three major U.S. stock market indexes – the S&P 500, the NASDAQ, and the Dow Jones Industrial Average index – have decreased dramatically, falling respectively by 33.9%, 30.1% and 37.1%. It is considered the worst downturn since the Great Recession in 2008 – get in the way of the 11-year bull market trend (from March 2009 to February 2020). During this long prosperous period in the stock market, the S&P 500 index has soared massively from 676.53 on March 9, 2009, to 3,386.15 on February 19, 2020 – a four-fold increase.[62]

In the 2020 stock market crash – also named "Coronavirus Crash" – the level-1 trading curbs or circuit breakers have been triggered repeatedly (four times) – due to massive panic selloffs – as soon as the S&P 500 Index dropped in the range of 7% to 13%. Since the trading curb rule was prompted after Black Monday in 1987, the first and only other trading curb occurred on 27 October 1997, more than 22 years ago. Therefore, the fact that the trading curb was triggered four times within 10 days is an extremely rare situation.[63]

The crash in stock markets around the globe was principally triggered – or at least worsened – by the governments' decisions to severely restrict travel to impose lockdowns to various degrees. By March 18, stock markets have dropped more than 30% from their peak.[64]

The shock in the stock markets has significantly impacted the lives and livelihoods of many people across the globe. During the crisis, the yield on the US 10-year Treasury notes – the most popular debt instrument and lowest-risk investment in the world backed by the full faith and credit of the United States, serving as a broader barometer for economic growth, inflation expectations and financial conditions – dropped by 65.4% within three weeks, falling from 1.56% on 2/19/2020 to 0.54% on 3/9/2020, the lowest close in history.[65]

Over the same period, the yield on 30-year US Treasuries decreases by almost a percentage point, driving prices of 30-year bonds up by approximately 30%. I noticed a similar occurrence with German

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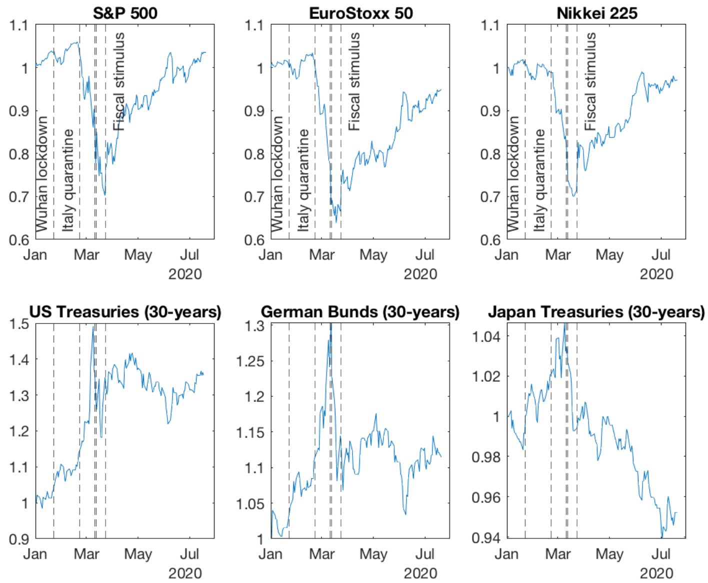
[62] *See* Ruiqiang Song, Min Shu, Wei Zhu, The 2020 Global Stock Market Crash: Endogenous or Exogenous?, (2021).
[63] *Id*.
[64] *See* Gormsen, Niels Joachim and Koijen, Ralph S. J., *Coronavirus: Impact on Stock Prices and Growth Expectations*, University of Chicago, Becker Friedman Institute for Economics Working Paper No. 2020-22, (August 3, 2020). Available at SSRN: https://ssrn.com/abstract=3555917.
[65] *See* 10-Year Treasury Constant Maturity Rate. Retrieved from https://fred.stlouisfed.org/series/DGS10.

bunds, which are the safe assets in the Euro area. As a result, investors' demand for long-term government bonds issued by the US, Germany, and to some extend Japan, increased.[66]

This phenomenon is considered by many economists one of the worst crashes in the stock markets in recent history. Figure 1 shows the response – to the 2020 stock market crash – of the stock and nominal bond markets in US and EU.

Figure 1: The response of the stock and nominal bond markets in the US and EU [67]



However – as highlighted previously – the decline in stock prices is not the only issue firms are dealing with now. The global spread of the coronavirus – in fact – had not as a unique consequence a strong uncertainty in the financial markets, thereby reducing the market value of listed firms. A further – and significant important – repercussion is the significant disruption of the global supply chain that clearly affects not only companies but also all the individuals that are related to them – as employees, suppliers, and final customers.[68]

In the current circumstances, many firm's boards of directors and executives are despairingly working to find effective strategies to protect their employees, shareholders and all the parts involved in economic relations with the company. However, as the pandemic crisis is getting worse, it seems clear that companies cannot make it through without real support by Governments, public and private financial institutions, and legislators.

[66] *See supra* note 62.
[67] *Figure 1 see supra* note 65. The figure shows the cumulative return on the S&P 500, the Euro Stoxx 50 index, the Nikkei 225 Index, the 30-year US Treasuries, the 30-year German bunds, and the 30-year Japanese Treasuries.
[68] *See* Mark D. Gerstein et al., *Proactively Adopting a Poison Pill in Response to the COVID-19 Crisis*, Harv. L. Sch. F. on Corp. Gov. 2 (2020).

In the last decade, the shareholders' rights plan has been progressively set aside, primarily because of the negative effects that I have mentioned earlier. This decrease in the employment of poison pill strategies has been strongly endorsed by some proxy advisory firms[69] – for instance Glass, Lewis & Co. and the Institutional Shareholder Service (ISS). These firms advise shareholders – in most of the cases institutional investors – how to vote in shareholders' meetings, often having a strong influence on their decisions.

Nonetheless, the burst of the Covid-19 may have caused a change in the direction of the application of defensive strategies to avoid hostile takeovers and opportunistic investors. In fact, the significant volatility experienced by most of the listed companies during this pandemic time may push boards to create new poison pill plans – or at least to update old plans put 'on the shelf' in the past years.

B. The Crisis Pills

1. A New Application of Shareholder Rights plan

As pointed out before, in the last decade a very small number of companies deployed poison pills – or at least activated pre-existing plans. Proxy advisory firms sponsored a process of the dismantlement of poison pills. For instance – in 2004 – ISS ratified voting guidelines recommending that institutional investors withhold their votes from the directors of companies that approved or renewed clear-day pills[70], and evidence – gathered by Johnson, Karpoff, and Wittry – suggests that directors involved in pill adoptions experienced a decrease in the likelihood of board appointments[71].

The economic crisis caused by the global spread of the coronavirus brought to light a chink within the defensive strategies that companies may employ to protect the interests of long-term shareholders from hostile attacks by opportunistic investors – usually in search of short-term financial gains. In fact, the crash of financial markets caused a drop in the prices of several firm's stocks. This gave rise to the concern that activist shareholders or private equity firms would take advantage of the situation by acquiring a significant stake in firms (at a sort of "covid discount") – seeking for objectives that might not be in the long-term best interests of the company[72].

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[69] *See* Eckstein Asaf & Hannes Sharon, *A Long/Short Incentive Scheme for Proxy Advisory Firms*, W. For. L. Rev. 2 (2018). Available at SSRN: https://ssrn.com/abstract=3098008.

[70] *See* Catan, Emiliano, *The Insignificance of Clear-Day Poison Pills*, NYU Law and Economics Research Paper No. 16-33, Journal of Legal Studies, (September 7, 2016). Available at SSRN: https://ssrn.com/abstract=2836223.

[71] *See* Johnson, William C. et al., *The Consequences to Directors for Deploying Poison Pills*, Fisher College of Business Working Paper No. 2019-03-023, Charles A. Dice Center Working Paper No. 2019-23, at *20,21 (February 15, 2021). Available at SSRN: https://ssrn.com/abstract=3460201.

[72] *See* Eldar, Ofer & Wittry, Michael D., *Crisis Poison Pills*, Duke Law School Public Law & Legal Theory Series 2020-18, Fisher College of Business Working Paper No. 2020-03-006, Charles A. Dice Working Paper No. 2020-06, Review

Furthermore, another threat for shareholders may be the mis-valuation of some businesses due to low performances caused by the pandemic crisis – a thing that would probably also affect the future value of the firm. This unprecedented scenario generated fertile ground for the proliferation of hostile takeover attempts.

As a response, many boards of directors are meditating on whether (or not) their actual governance structures enable them to protect the interests of their long-term shareholders from those who may seek to exploit the current situation.[73]

The debates on which should be the best response strategy to the risk of hostile attacks during and immediately after the pandemic crisis seem to bring to light again the shareholder rights plan – a mechanism that has been rarely used in recent years.

Perhaps, the idea of turning back to poison pill comes from the application that this defensive strategy had during the '08-'09 recession, caused by the preceding financial crisis. At the time rights plans were not principally employed as a protection against hostile takeovers, but to protect companies' ability to use net operating loss carryforward.[74]

Therefore, many public companies, especially those which experienced a huge drop in their market capitalization, are considering either implementing brand new poison pill strategies or employing old shareholder rights plans previously inserted in the Article of association (bylaw for US corporation).

Specifically – during the first two months after the outbreak of Covid-19 – almost 50 S&P 500's companies adopted poison pills (against the 25 firms listed in the S&P 500 that deployed shareholder rights plan at the end of 2019).[75]

Of course, not all the listed companies activated such a strong defensive mechanism, but it seems reasonable for boards of publicly traded companies to have up-to-date shareholder rights plans – ready to be implemented whenever the circumstances require them.

In terms of regulation – at least in Delaware – the standard concerning the board's decision to adopt poison pills depends on the circumstances the company is operating in. The unprecedented times we are living in may justify the application of poison pill strategies – even if the company is not actually facing a hostile attack (*i.e.*, on a "clear day"); the management may exercise the Business Judgement Rule[76], asserting that they are adopting poison pill strategies in the best interest of the shareholders.[77]

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of Corporate Finance Studies, 10(1), 204-251, March 2021., (December 30, 2020). Available at SSRN: https://ssrn.com/abstract=3583428.

[73] *See* Gail Weinstein *et al*., *Inside Shareholder Rights Plans Adopted Amid COVID-19*, L. 360, at 1 (2020).

[74] *See* Hurt Christine, *The Hostile Poison Pill*, UC Dav. L. Rev., Vol. 50, No. 1, at 14 (2016). Available at SSRN: https://ssrn.com/abstract=2739843.

[75] *See* Pierluigi Matera & Ferruccio M. Sbarbaro, *Le poison pill ai tempi del Covid: le scalate ostili alle società quotate statunitensi tra nuove prospettive ed «eterno ritorno dell'uguale»*, Comparazione e diritto civile, 2020, n. 3, forthcoming, at *25.

[76] *See supra* note 21.

[77] *See* Beth Berg *et al.*, *Sidley's Shareholder Activism Review - Tales From the Trenches*, at *2 (2020).

Although the current environment seems to push the boards to implement shareholder rights plans in response to the volatility of financial markets and to the economic disruptions provoked by the spread of Covid-19, this may not be the best strategy for all listed firms. Each company should carefully consider the specific circumstances it is going through and adopt a poison pill mechanism if and only if it is ready to deal with the corporate governance consequences. This because there is no guarantee that institutional investors or proxy advisory firms would totally go against their general course of action – that is averse to poison pill strategies even in these unprecedented circumstances. Some of the factors that boards should consider in deciding whether to employ poison pill strategies are[78]:

- **Industry**: Many companies around the Globe have gone through stock price sharp declines. Some industries have been hit even harder and are therefore more exposed to the mentioned risks (e.g., energy, retail, restaurant, entertainment, and travel). Moreover, smaller businesses in several industries are more vulnerable.[79]

- **Market Capitalization**: Mega- and large-capitalized companies are less exposed at risk than small- and mid-capitalized companies because of the lower liquidity and the greater risk-aversion of potential investors in search of short-term financial rewards.[80]

- **Trading Volume**: The trading volume of stocks makes the respective company vulnerable to unexpected attack from opportunistic investors. High trading volume companies are clearly more exposed to that risk, while low volume companies are less vulnerable.[81]

- **Relative Value**: In the current scenario firms' valuation may be non-reflective of the actual long-term value of the businesses. Therefore, companies having underestimated indexes due to lower performances in the context of the pandemic crisis may be more at risk than similar companies that had a less severe decline in stock prices.

- **Shareholder Base**: The allocation of stakes among shareholders is a primal factor that may significantly influence the exposure of companies with respect to hostile attacks and activist

[78] *See supra* note 50.
[79] *See* Fernandes Nuno, *Economic Effects of Coronavirus Outbreak (COVID-19) on the World Economy* 10 (2020). Available at SSRN: https://ssrn.com/abstract=3557504.
[80] *See* Baker Todd H. & Judge Kathryn, *How to Help Small Businesses Survive COVID-19.* Colum. L. Rev, (2020). Available at SSRN: https://ssrn.com/abstract=3571460.
[81] *See* Li Xiafei *et al.*, *Transaction Costs, Trading Volume and Momentum Strategies*, (2009). Available at: https://doi.org/10.3905/JOT.2010.5.1.066.

campaigns. Namely, companies with controlling shareholders (also called block-holders) are less vulnerable to hostile approach. By contrast, having strongly dispersed shareholding makes a company more vulnerable to a sudden attack.

- **Existence of a Potential Hostile Bidder or Known Activist**: Another important factor could be the presence of hostile investors that have approached the company yet or a known activist who already owns stock. These could massively increase the risk of hostile takeovers, even more, if the insurgent's liquidity has not been undermined by the crisis.

- **Debt Change of Control Triggers**: Most listed companies have credit facilities and bonds with specific provisions that trigger either default or establish right if a change of control occurs. Usually, the trigger level lies between 25 and 50 per cent and has a direct impact on the risk the company is supporting. In fact, the lower the threshold, the higher the risk for a company to have to refinance its debt because of a rapid stock accumulation.

- **NOLs**: Companies that have significant NOLs (net operating losses) may consider the adoption of a poison pill strategies because the related tax benefits will be impaired in the event of an ownership change according to Section 382 of the Internal Revenue Code[82]. That contains an extremely broad definition and includes an ownership increase by 5 per cent of shareholders by more than 50 percentage points within a rolling three-year period. A poison pill with a 4.9 per cent trigger threshold can protect a company against such an ownership change and has been upheld by the Delaware courts. [83]

2. Practical Implementation of Poison Pills in Pandemic Times

I have gathered in this section some examples of the adoption of poison pill strategies as a response to the pandemic crisis (considering companies operating in different contexts that have adopted shareholders' rights plans in the last few weeks).

Williams Companies. The *Williams Companies Inc*., an S&P 500 firm, announced on March 20, 2020, the adoption of a shareholders' rights plan. Williams is a natural gas infrastructure company,

[82] "Section 382 of the Internal Revenue Code generally requires a corporation to limit the amount of its income in future years that can be offset by historic losses, i.e., net operating loss (NOL) carryforwards and certain built-in losses, after a corporation has undergone an ownership change."
[83] *See* Everett *et al*., *How Effective Tax Planning Can Increase the Tax Benefits of Corporate NOLs*, J. of Tax., Vol. 120, No. 2, (2014). Available at SSRN: https://ssrn.com/abstract=2481152; *See supra* note 21.

with a pre-pandemic strong financial position and a current $21 billion market capitalization (dropped to 14 billion in the last weeks). The firm has gone through a sharp decline in stock price (more than 50%) right after the issue of the last earnings report about a month ago. The peculiarity of the rights plan is that they set a 5% ownership trigger even if it's a plan to prevent hostile takeovers (usually marked by 10% or 20% ownership trigger). The reasons that may have pushed Williams Companies to set a lower trigger could be various. Certainly, the dramatic decline in stock price, notwithstanding the firm's announcement that it had just completed its best financial and operational year ever, and the massive drop in the market capitalization, which makes the company more an appetible target for many investors, are factors that have strongly influenced this decision. In the past, a 5% trigger was sanctioned by Delaware Supreme Court in its 2010 *Selectica* decision[84], when the firm has employed the plan as a NOL rights plan, but with also a hostile takeover-defense objective, as they were facing an unwanted takeover bid. It is interesting to notice that Williams Companies' stock price rose 6.6% straight after the announcement of the poison pill adoption (at the same time the S&P 500 Index declined 4.3% and the S&P 500 Oil, Gas and Consumable Fuels Index rose 0.9%).[85]

Occidental Petroleum – (subject to shareholder approval)**.** *Occidental Petroleum Corp*. ("Oxy"), another S&P 500 company, announced on March 13, 2020, the potential adoption of a shareholders' rights plan in April (trigger: 15%, duration: 1 year). The company exhibited the intention of putting the plan to a shareholder vote at the firm's upcoming annual shareholder meeting and also assured to drop it in case of non-approval by the owners. Oxy has gone through a massive fall in market capitalization (down from $42.2 billion at the beginning of this year to 9.16 billion), since the stock price dropped by 60% after the announcement (also due to the collapse in oil prices). This is an important case since it is one of few times that continuation of a new shareholder rights plan is being put to a shareholder vote. Occidental Petroleum stock price rose 19.9% the day of the rights plan announcement, while the S&P 500 Index rose 9.3% and the S&P 500 Oil, Gas and Consumable Fuels Index rose 8.5%.[86]

Dave & Buster's. *Dave & Buster's Entertainment Inc*., an S&P 600 company, announced on March 19th, 2020, the adoption of a poison pill mechanism (trigger: 15% or 20%, duration: 1 year), probably as a response to the forthcoming coronavirus crisis. Dave & Buster's is an American business that

[84] *See Selectica, Inc. v. Versata Enters., Inc*., 2010 Del. Ch. LEXIS 39 (Del. Ch. March 1, 2010); *See also* Copland James et al., *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, Stan. Univ. Grad. Sch. of Bus. Res. Paper No. 18-27, at 3 (2018). Available at SSRN: https://ssrn.com/abstract=3188174
[85] *See* Gail Weinstein *et al*., *A Turn Back to "Poison Pills" in Response to the Coronavirus Pandemic*, Harv. L. Sch. F. on Corp. Gov. 3 (2020).
[86] *Id*.

combines games, entertainment, and dining. The company experienced a $1.4 billion drop in market capitalization in January, with a 90% fall of the stock price over a month before the announcement of the shareholders' rights plan. In the two months prior to that, the firm has suffered due to takeovers speculation, based on disclosure by two private equity firm that had acquired respectively 7% and 8.3% company's stakes planning to propose variations in the company's capital structure, board and governance. After the rights plan announcement, Dave & Buster's stock price rose 76.6% (as compared to a rise of 0.5% for the S&P 500 Index and 9.1% for the S&P 500 Restaurant Index). [87]

Delek. *Delek US Holdings Inc*. announced on March 20, 2020, that it had adopted a rights plan (trigger: 15%, duration: 1 year). Delek is a downstream energy company that holds assets in many related industries, primarily in petroleum refining. It has suffered a huge drop in market capitalization, currently $1.2 billion (down from $2.5 billion in January and $4.7 billion in June 2018). The shareholders' rights plan was implemented right after that Carl Icahn[88], a famous US activist investor, has disclosed the acquisition of a 14.8% stake in the company with the intention of sponsoring a potential takeover of the firm by CVR Energy. The stock price was up almost 31% the day of announcement of the plan (while the S&P 500 Index declined 4.3% and the S&P 500 Oil, Gas and Consumable Fuels Index rose 0.9%). [89]

Other rights plan adoptions. I now mention some other example of poison pills application in smaller companies. In response to the spread of the coronavirus, *Ashford Inc*. announced on March 13 the application of shareholders' rights plan. The firm is a provider of services to the hospitality industries, thereby being in the first line in the fight against the pandemic. Thereafter, on March 19, *Global Eagle Entertainment Inc*., a provider of inflight entertainment services to the airline industry, also confirmed the employment of a poison pill strategy. These two firms have considered the adoption of such a strong defensive tactic to prevent hostile takeovers. Also, I have gathered three examples of small-cap companies which adopted NOL rights plans: *Aviat Networks, Inc*. (on March 3), *Drive Shack, Inc*. (on March 5) and *Cohen & Company, Inc*. (on March 10). Certainly, these are only a few companies that have adopted or renewed a shareholders' rights plan in response to the global economic crisis generated by the spread of Covid-19.

[87] *Id*.
[88] *See* Schloetzer Jason D. & Lee Richard, *The Activism of Carl Icahn and Bill Ackman*, Geo. MD. Sch. of Bus. Res. Paper No. 2442317, at 5 (2014). Available at SSRN: https://ssrn.com/abstract=2442317
[89] *See supra* note 84.

3. The Response of the Major Proxy Advisors

It may be interesting to analyse the role that institutional investors cover in the United States so as to give us an overview of the influence that they had on firms' decision on whether apply poison pill strategies in the pre-pandemic scenario.

In the US, institutional investors hold packages of shares for their clients, having the opportunity to vote, with a defined time-frequency, in the shareholders' meetings in place of their clients. The typical voting strategy they apply is the vote by proxy, that consist of the nomination of a third party that pick their votes. Institutional investors often designate proxy advisor, namely legal consultancy firms that provide guidance, suggestions and all the information needed to support investors vote their shares on the various proposal before them. As a matter of fact, to some extent proxy advisors have influence over institutional investors' voting decisions concerning directors' elections and other matters. Proxy advisors may also have a strong – yet indirect – influence on boards of directors of specific companies. In fact, knowing that investors will rely on guidelines and other information provided by proxy advisors, managers and executives directors may decide to adopt strategies or make other decisions that they otherwise would not – to avoid potential oppositions by proxy investors that operate in place of their clients. [90]

In ordinary times, Glass Lewis & Co. & Institutional Shareholder Service (ISS), two of the most important proxy advisory firms, and many institutional investors generally disapprove the adoption of shareholder rights plans by company boards of directors. Therefore, normally is not recommended the application of poison pill strategies in absence of actual hostile bidders or activist investors who are already owners of important stakes of the company.[91]

Institutional Shareholders Service seems to understand the *ratio* underlying the potential implementation of poison pill strategies in this unprecedented scenario. In fact, ISS issued a new guideline – on April 8th, 2020 – asserting that it would consider the specific situation on a case-by-case basis. In fact, ISS pointed out that:

> A severe stock price decline as a result of the COVID-19 pandemic is likely to be considered valid justification in most cases for adopting a pill of less than one year in duration. […] Boards should provide detailed disclosure regarding their choice of

[90] *See* Tuch Andrew F., *Proxy Advisor Influence in a Comparative Light*, 1464, 99 B. U. L. Rev. 1459, (2019). Available at SSRN: https://ssrn.com/abstract=3384264; *See* Brian Tayan, *Proxy Advisory Firms: Empirical Evidence and the Case for Reform* 13 (2018).

[91] *See* Copland James *et al.*, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, Stan. Univ. Grad. Sch. of Bus. Res. Paper No. 18-27, at 2 (2018). Available at SSRN: https://ssrn.com/abstract=3188174

duration, or on any decisions to delay or avoid putting plans to a shareholder vote beyond that period. The triggers for such plans will continue to be closely assessed within the context of the rationale provided and the length of the plan adopted, among other factors.[92]

Certainly, the ISS position is quite changed in response to the severe spread of the pandemic, but they still suggest boards to put poison pills to a shareholder vote. Moreover, they suggest guidelines for the adoption of these strategies, stating that:

for poison pills/rights plans with a duration of less than a year, our policy is to consider the situation on a case-by-case basis considering the disclosed rationale for adopting the plan and other relevant factors (such as a commitment to put any future renewal of the pill to a shareholder vote). We will, therefore, continue to take this case-by-case approach, which includes examining whether directors appear to have sought to appropriately protect shareholders from abusive bidders without inappropriately entrenching the existing board and management team. Under such reviews, we will generally consider both the board's explanation for its adoption of a poison pill, including any imminent threats and the specific provisions (triggers, terms, "qualified offer" provisions and waivers for "passive" investors) of the pill.[93]

Glass Lewis generally opposes the adoption of poison pills, as they argue that these strategies are not in shareholders' best interest and may reduce management liability by substantially limiting opportunities for corporate takeovers (managerial entrenchment hypothesis). In standard times, they recommend that shareholders vote against the poison pill strategies *"to protect their financial interests and ensure that they have an opportunity to consider any offer for their shares, especially those at a premium*". However, Glass Lewis seems to be supportive of shareholders' rights plans that meet certain conditions – as sustained also by the ISS. They support poison pill strategies that are:

limited in scope to accomplish a particular objective, such as the closing of an important merger, or a pill that contains what we believe to be a reasonable qualifying offer clause.[94]

[92] *See* ISS Global Policy Board, *Impacts of the Coivd-19 pandemic, ISS policy guidance* 6 (April 8, 2020).
[93] *See supra* note 91.
[94] *See* Glass Lewis & Co., *Proxy Paper Guidelines, an overview of the Glass Lewis approach to proxy advice* 44 (2020). Available at: https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.

> In its new guideline, Glass Lewis also gives a consideration upon the implementation of NOL poison pill strategies. They may support the adoption of a limited poison pill in the event that a company seeks shareholders' approval of a rights plan for the express purpose of preserving Net Operating Losses (NOLs).[95]

The proxy advisor firm in question evaluates NOL poison pills on a case-by-case basis, considering a set of factors. They may support a proposal that is limited in duration (typically three years or less) and requires shareholder ratification in case of renewal. Furthermore – for its adoption – the company must provide a reliable rationale that includes citing a legitimate need to preserve existing NOLs and disclosing why the company's current circumstances warrant such a provision. [96]

III. THE WILLIAMS COMPANIES STOCKHOLDER LITIGATION

A. Background & Explanation of the Events

1. The Williams Companies, Inc

The Williams Companies, Inc. ("Williams" or the "Company") is a publicly traded Delaware corporation headquartered in Tulsa, Oklahoma. The Company core business consists of the processing and transportation of natural gas and petroleum. It operates also in different industries such as wholesale distance services (The Williams Communications Group), audio & videoconferencing services (Global Access), and transmission service for broadcast and cable networks (Vyvx).

It owns and operates over 30,000 miles of pipelines and 28 processing facilities and handles approximately 30% of the US natural gas volumes.

At all times relevant to the Delaware Court of Chancery's sentence, the number of outstanding shares of Williams common stock was approximately 1.2 billion. Based on the stock's trading price from March 2020 through the time of trial – Williams' market capitalization ranged from approximately \$11.22 to \$27.54 billion. About 50% of Williams' outstanding shares are owned by approximately twenty institutional investors. Blackrock, Vanguard, and State Street – which collectively possess

[95] *See supra* note 85. *See supra* note 91.

[96] *See* Aaron Bertinetti & Glass, Lewis & Co, *Poison Pills and Coronavirus: Understanding Glass Lewis' Contextual Policy Approach*, Harv. L. Sch. F. on Corp. Gov. 3 (2020).

almost a quarter of the Williams Companies' common stock – are the Williams' largest three stockholders.[97]

In the past, Williams experimented some controversies with activist investors. Specifically, in late 2011 Soroban Capital Partners LLC (led by Eric Mandelblatt) ("Soroban") and Corvex Management LP (led by Keith Meister) ("Corvex") each acquired slightly less than 5% of Williams stock. Then – in 2014 – Mandelblatt and Meister became part of Williams' board of directors via an agreement with the Company. Their presence on the board was instrumental to promote a merger with Energy Transfer Equity LP ("ETE") – a Delaware limited partnership operating in the gas pipeline business. The Agreement and Plan of Merger (the "Merger Agreement" or "the Agreement") signed by Williams and ETE consisted of two distinct steps. In the first step, Williams would merge into a new legal entity, Energy Transfer Corp LP ("ETC"). Then, ETE would transfer $6.05 billion to ETC in exchange for 19% of ETC's stock.[98] The Williams stockholders would receive the $6.05 billion and 81% of ETC's equity in exchange for their Williams shares.

The second step established that ETC would swap the Williams assets for newly issued ETE Class E partnership units. The result would be that the Williams shareholders would receive $6.05 billion plus 81% of ETC's stock, ETE would receive the Williams assets and 19% of ETC's stock, and ETC would own ETE Class E partnership units equal in number to the shares issued by ETC.[99]

A further condition for the completion of the merger was closely linked to the second step. According to this condition, Latham & Watkins LLP ("Latham") – ETE's tax counsel – would issue an opinion on the transfer of Williams' assets to ETE in exchange for the Class E partnership units. The merger could be completed only if the transfer would be a tax-free exchange of a partnership interest for assets under Section 721(a) of the Internal Revenue Code (the "721 opinion").[100]

After the Agreement was reached, the energy market went through a severe crisis – a phenomenon that caused a significant devaluation of the assets held by Williams and ETE. Therefore, the transaction became financially undesirable to ETE. This energy market decline also led to ETE doubting whether the IRS might no longer consider the whole $6.05 billion as payment only for the ETC stock, but as payment in part for the Williams assets – thereby transforming the second step of

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[97] *See The Williams Companies Stockholder Litigation*, Consolidated C.A. No. 2020-0707-KSJM, at *4 (Del. Ch. Feb. 26, 2021).

[98] ETE and ETC are the primary defendants, and the relationship of the remaining defendants is as follows: ETE Corp GP, LLC is a Delaware limited liability company and the general partner of ETC; LE GP, LLC is a Delaware limited liability company and the general partner of ETE; Energy Transfer Equity GP, LLC is a Delaware limited liability company that, pursuant to the Merger Agreement, would merge with LE GP, LLC and be the surviving entity and general partner of ETE. Following the merger, ETC was to become the managing member of Energy Transfer Equity GP, LLC.

[99] *See The Williams Companies, Inc.*, v. *Energy Transfer Equity, L.P.*, *et al.,* C.A. Nos. 12168 & 12337, at *2 (Del. Mar. 23, 2017).

[100] According to Section 721(a) – or "General Rule" – of Title 26 of the U.S. Internal Revenue Code, "No gain or loss shall be recognized to a partnership or to any of its partners in the case of a contribution of property to the partnership in exchange for an interest in the partnership.".

the merger taxable. Accordingly, Latham responded to the situation with the unwillingness to issue the 721 opinion. Since the 721 opinion was a condition of the transaction, ETE indicated that it would not proceed with the merger. Williams attempted to enjoin ETE from terminating the Merger Agreement, arguing that ETE breached the Agreement by failing to "use commercially reasonable efforts" to obtain the 721 opinion and "reasonable best efforts" to consummate the transaction. However, The Delaware Court of Chancery rejected all Williams' arguments.[101]
After the termination of the Merger, six of the Board's thirteen members – including Meister and Mandelblatt – sought to displace and substitute Armstrong as CEO. Eventually, the attempt failed, and those six directors resigned. At that stage, Meister threatened a proxy fight to replace the entire Board, but he agreed to cease as Williams appointed three independent directors—Bergstrom, Sheffield, and Spence.
The negative experience with shareholder activism forced the Company to significantly modify the management structure. Armstrong carried on as CEO, yet Williams hired many new executives – including John D. Chandler as CFO and T. Lane Wilson as General Counsel.
The only two Director Defendants who hold a position in the Board during the "Soroban and Corvex era" are Armstrong and Smith; the others were appointed in either 2016 or 2018. According to Smith, the Soroban and Corvex's activism was highly detrimental to the Company. In his opinion, Soroban and Corvex pushed for short-term-value-enhancing agendas that were not aligned with the Board's long-term goals.[102]
As of March 2020, the Board was composed of twelve members – the CEO Armstrong and eleven outside directors. The complaint named as defendants Armstrong and ten of the outside directors—Stephen W. Bergstrom, Nancy K. Buese, Stephen I. Chazen, Charles I. Cogut, Michael A. Creel, Vicki L. Fuller, Peter A. Ragauss, Scott D. Sheffield, Murray D. Smith, and William H. Spence (collectively, the "Director Defendants").[103]

2. The Stock Crash & Williams response

In the pre-Covid scenario – Williams' stock price had been relatively stable over several months and traded at a high of $24.04. The early months of 2020 were detrimental for the Company financial position. In fact – as mentioned earlier – a black swan (Covid-19 pandemic) hit the world with terrible consequences on global health and economy. The impact of the pandemic was severe also for the stock market, which (as seen in chapter II) experienced one of the worst crashes in recent history.

[101] *See supra* note 99.
[102] *See supra* note 97.
[103] *See supra* note 97.

The decline in stock prices – which interested of course also the Williams Companies, Inc. – was magnified by the oil price war between Russia and Saudi Arabia – a phenomenon that caused a shock in the oil market and affected companies related to the industry.

The spread of Covid-19 was the first (of the two *phenomena*) to influence Williams' stock price fall. By the end of February 2020, the Company's share price fell to $18.90 (-21%). The data showed a significant (and unusual) prevalence of short-term-type trading, together with unusually high volatility.

At this stage, the Company experienced the consequences of the oil price war. On March 8, 2020 – Saudi Arabia adopted a price-cutting strategy in response to Russia's conduct at a March 2020 meeting of the Organization of the Petroleum Exporting Countries. As a result, the following day energy stocks plummeted to their lowest levels in 15 years – a 20% drop in only one trading day. Williams' stock price closed at $14.99 on March 9, 2020, to reach the lowest value by March 19 – when Williams traded approximately at $11. This represented a nearly 55% decline in stock price for Williams (since January 2020).

Figure 2: The Williams Companies, Inc.' stock price crash [104]

The stock price shock surprised the management that met with financial advisors to discuss solutions.

[104] Figure 2. *See* Laura Starks, Seeking Alpha, *The Williams Companies Successfully Flexes into 2021*, (April 18, 2021). Available at: https://seekingalpha.com/.

The company experienced similar lows (for instance, in 2010 and 2016), but the scenario was quite unusual this time. In fact, they were carrying significantly less debt and presented 25% higher earnings – with respect to 2010 & 2016 stock price drops.

The first hypothesis was the potential adoption of a stock repurchase plan – later abandoned in favour of a strong alternative proposed by the outside director Cogut[105]. The alternative proposed by Cogut consisted of a peculiar shareholder rights plan[106].

As stated during the trial, Cogut worked with poison pills throughout his career – witnessing all shareholder rights plan' evolutions. He described this defensive mechanism as "the nuclear weapon of corporate governance."[107]

Like most of Delaware corporations, Williams had an "on-the-shelf" pill – a poison pill that the Company has already "prepared" and can quickly deploy in the case a threat arises. The board of directors considered a "refreshment" of the shelf pill every so often; in Williams' case, the last update took place in October 2019. The shelf pill was generated to be adopted in traditional change of control situations – with a trigger that was probably set at 15% ("None of the Company representatives could testify as to details of the Shelf Pill other than its existence").[108]

After Cogut's proposal – Wilson consulted with Davis Polk & Wardwell LLP ("Davis Polk") – the Williams Companies outside counsel. On March 11 – Davis Polk redrafted the shelf pill and sent a new proposal to Wilson. The poison pill draft proposed by the outside counsel was generally considered positively by Williams' senior managers.

The Company's management scheduled a first urgent meeting to formally discuss the potential adoption of the revisited shareholder rights plan. In the management view – the plan was intended to:

> (a) "Discourage unsolicited takeover attempts that do not offer an adequate price to all stockholders or are otherwise not in the best interests of the company and its stockholders;" (b) "Discourage or prevent coercive or unfair takeover tactics" such as "acquisitions of control through open market purchases [,] 'street sweeps,'" or "coercive tender offers, including partial and two-tiered tender offers;" (c) "Encourage bidders to negotiate with the Board;" and (d) "Provide the Board with [the] opportunity to preserve

[105] Charles Cogut has been named a "Senior Statesman" in the practice areas of corporate M&A and private equity buyouts in Chambers Global and Chambers USA Guides and was named "Deal Maker of the Year" by The American Lawyer. He is a member of the board of overseers of the University of Pennsylvania Law School. Cogut had led the M&A and private equity practices of a prominent New York law firm. He joined Williams' board in 2016.

[106] *See §* II,C,1.

[107] *See The Williams Companies*, *at* *8.

[108] *See The Williams Companies*, *at* *9.

> existing, more advantageous strategies or to develop and implement superior alternatives."[109]

The following day, the board scheduled a second meeting – as advised by Wilson to show "appropriate consideration by the Board". On March 19 – The members of the board unanimously agreed to adopt a poison pill "in substantially the form presented at the meeting." Then – On March 20 – the Company issued a press release that publicly disclosed the Board's adoption of the Plan.[110]

3. Williams' Crisis Pill Features

The 'Crisis Pill' adopted by Williams had a one-year duration and was characterised by has four key features:

> (i) a 5% trigger; (ii) a definition of "acquiring person" that captures beneficial ownership as well as ownership of certain derivative interests, such as warrants and options; (iii) an "acting in concert" provision that extends to parallel conduct and includes a "daisy chain" concept (the "AIC Provision"); and (iv) a limited "passive investor" exemption.[111]

For what concerns the first feature – Williams' management deliberated for a 5% trigger threshold. This means that an investor who fell in the scope of the definitions established by the other features of the plan could not buy more than 5% of the stocks without dealing with the board in advance. More precisely, the pill provided that if an "acquiring person" were to either "beneficially own" a stake in the Company greater than 5% or initiate a tender offer to increase its beneficial ownership beyond the 5%, then the acquiring person would suffer the massive dilution that results from the triggering of a poison pill.[112]

Taking into consideration Williams' market capitalization in March 2020 – triggering the 5% threshold at the time the Williams Pill was deployed would have required an economic investment of roughly $650 million.[113]

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[109] *See The Williams Companies*, *at* *13.

[110] *See The Williams Companies*, at *20.

[111] *See The Williams Companies*, at *22.

[112] *See* Ethan Klingsberg, et al., *Poison Pills After Williams: Not Only for When Lightning Strikes*, The Harward Law School Forum on Corporate Governance 1, (Mar. 21, 2021). Available at: https://corpgov.law.harvard.edu/.

[113] *See The Williams Companies*, at *22.

The second major characteristic of the plan involved the concept of "beneficial ownership". The Company's management shaped the definition of this concept around Rule 13d–3 of the Exchange Act[114] – then extending the definition more broadly to include "[c]ertain synthetic interests in securities created by derivative positions," like options and warrants.[115]
In stating the third feature, the management of Williams Companies cited an 'Acting in Concert' provision. The AIC Provision deems a person to be "Acting in Concert" with another person if:

> such Person knowingly acts (whether or not under an express agreement, arrangement or understanding) at any time after the first public announcement of the adoption of this Right Agreement, in concert or in parallel with such other Person, or towards a common goal with such other Person, relating to changing or influencing the control of the Company or in connection with or as a participant in any transaction having that purpose or effect, where (i)each Person is conscious of the other Person's conduct and this awareness is an element in their respective decision-making processes and (ii) at least one additional factor supports a determination by the Board that such Persons intended to act in concert or in parallel, which additional factors may include exchanging information, attending meetings, conducting discussions, or making or soliciting invitations to act in concert or in parallel.[116]

The management crafted the AIC Provision through a sort of "daisy chain" concept, mentioning that "[a] Person who is Acting in Concert with another Person shall be deemed to be Acting in Concert with any third party who is also Acting in Concert with such other Person."[117] In other words,

[114] As defined by the *SEC* in *§ 240.13d–3* of the Exchange Act. "(3) A person who in the ordinary course of his business is a pledge of securities under a written pledge agreement shall not be deemed to be the beneficial owner of such pledged securities until the pledgee has taken all for- mal steps necessary which are required to declare a default and determines that the power to vote or to direct the vote or to dispose or to direct the dis- position of such pledged securities will be exercised, provided, that:
(i) The pledgee agreement is bona fide and was not entered into with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with any transaction having such purpose or effect, including any transaction subject to Rule 13d–3(b).
(ii) The pledgee is a person specified in Rule 13d–1(b)(ii), including persons meeting the conditions set forth in paragraph (G) thereof; and
(iii) The pledgee agreement, prior to default, does not grant to the pledgee; (A) The power to vote or to direct the vote of the pledged securities; or
(B) The power to dispose or direct the disposition of the pledged securities, other than the grant of such power(s) pursuant to a pledge agreement under which credit is extended subject to regulation T (12 CFR 220.1 to 220.8) and in which the pledgee is a broker or dealer registered under section 15 of the act."
[115] *See The Williams Companies*, at *23.
[116] PTO ¶ 70; JX-69 at *18.
[117] *Id* at *18.

shareholders "Act in Concert" with one another by separately and independently "Acting in Concert" with the same third party.[118]

However, the AIC Provision has been considered asymmetrical. In fact, it excludes "actions by an officer or director of the Company acting in such capacities," so that incumbents can "Act in Concert" without being subjected to the consequences of the poison pill.

The last (fourth) characteristic of the 'Crisis Pill' that I have considered is the provision of "Passive Investors" – that is derived from the definition of "Acquiring Persons".

Williams' shareholder rights plan delineates "Passive Investors" to mean:

> [A] Person who (i) is the Beneficial Owner of Common Shares of the Company and either (a) has a Schedule 13G on file with the Securities and Exchange Commission pursuant to the requirements of Rule 13d-1(b) or (c) under the Exchange Act with respect to such holdings (and does not subsequently convert such filing to a Schedule 13D) or (b) has a Schedule 13D on file with the Securities and Exchange Commission and either has stated in its filing that it has no plan or proposal that relates to or would result in any of the actions or events set forth in Item 4 of Schedule 13D or otherwise has no intent to seek control of the Company or has certified to the Company that it has no such plan, proposal or intent (other than by voting the shares of the Common Shares of the Company over which such Person has voting power), (ii) acquires Beneficial Ownership of Common Shares of the Company pursuant to trading activities undertaken in the ordinary course of such Person's business and not with the purpose nor the effect, either alone or in concert with any Person, of exercising the power to direct or cause the direction of the management and policies of the Company or of otherwise changing or influencing the control of the Company, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to Rule 13d-3(b) of the Exchange Act, and (iii) in the case of clause (i)(b) only, does not amend either its Schedule 13D on file or its certification to the Company in a manner inconsistent with its representation that it has no plan or proposal that relates to or would result in any of the actions or events set forth in Item 4 of Schedule 13D or otherwise has no intent to seek control of the Company (other than by voting the Common Shares of the Company over which such Person has voting power).[119]

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[118] *See The Williams Companies*, at *25.

[119] PTO ¶ 69; JX-69 at *22.

The aim of this provision was to ensure that actual passive investors (those who do not buy shares in a company to participate in the day-by-day business activities) would not fall into the scope of "Acquiring Persons" under the 'Crisis Pill'. However, the drafted plan has been considered far more exclusive. The wording of the provision in question requires a stockholder to meet all three conditions to be exempted from the "Acquiring Person" definition.[120]

I now shift the focus of the analysis to the litigation brought before the Delaware Court of Chancery by Plaintiffs Steven Wolosky – who filed this litigation on August 27, 2020 – and City of St. Clair Shores Police and Fire Retirement System – who filed a similar action on September 3, 2020. Most notably, the court granted expedition on September 8 and consolidated the two actions on September 15. Specifically, the "complaint asserts a direct claim for breach of fiduciary duty against the Director Defendants seeking declaratory and injunctive relief regarding the validity and enforceability of the Plan."[121]

B. Inside the Delaware Court of Chancery's Decision

1. Direct Versus Derivative

The first issue the parties disputed on whether the claim was direct or derivative. On the one hand, Plaintiffs argued that their claim was direct. However, Defendants argued that Plaintiffs' claim was derivative and thus subject to Court of Chancery Rule 23.1[122] – which mandates the plaintiff to either make a pre-suit demand on the board of directors or to demonstrate that demand would have been

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[120] *See The Williams Companies*, at *28.
[121] *See The Williams Companies*, at *35.
[122] *See* Rule 23.1 - Derivative Actions by Shareholders, Del. R. Ch. Ct. 23.1, in which the Delaware Court of Chancery states that "**(a)** In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort. **(b)** Each person seeking to serve as a representative plaintiff on behalf of a corporation or unincorporated association pursuant to this Rule shall file with the Register in Chancery an affidavit stating that the person has not received, been promised or offered and will not accept any form of compensation, directly or indirectly, for prosecuting or serving as a representative party in the derivative action in which the person or entity is a named party except (i) such fees, costs or other payments as the Court expressly approves to be paid to or on behalf of such person, or (ii) reimbursement, paid by such person's attorneys, of actual and reasonable out-of-pocket expenditures incurred directly in connection with the prosecution of the action. The affidavit required by this subpart shall be filed within 10 days after the earliest of the affiant filing the complaint, filing a motion to intervene in the action or filing a motion seeking appointment as a representative party in the action. An affidavit provided pursuant to this subpart shall not be construed to be a waiver of the attorney-client privilege. **(c)** The action shall not be dismissed or compromised without the approval of the Court, and notice by mail, publication or otherwise of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the Court directs; except that if the dismissal is to be without prejudice or with prejudice to the plaintiff only, then such dismissal shall be ordered without notice thereof if there is a showing that no compensation in any form has passed directly or indirectly from any of the defendants to the plaintiff or plaintiff's attorney and that no promise to give any such compensation has been made. At the time that any party moves or otherwise applies to the Court for approval of a compromise of all or any part of a derivative action, each representative plaintiff in such action shall file with the Register in Chancery a further affidavit in the form required by subpart (b) of this rule. **(d)** For the purposes of this Rule, an "unincorporated association" includes a statutory trust, business trust, limited liability company and a partnership (whether general or limited), and a "member" includes a person permitted by applicable law to bring a derivative action to enforce a right or such an unincorporated association."

futile. Since Plaintiffs did not present a pre-suit demand, Defendants maintained that Plaintiffs have failed to meet the step required by Rule 23.1 to bring a derivative claim before the court – thus requiring the Court to rule in Defendants' favour.

In Tooley v. Donaldson, Lufkin & Jenrette, Inc. ("Tooley"), the Delaware Supreme Court established a two-step test to decide whether claims are direct or derivative.

Tooley involved a third-party, two-step acquisition in which the acquiring company let the target company's management postponing the closing of the first-step tender offer by twenty-two days. Shareholder plaintiffs sued, claiming that the stockholders of the target corporation were financially harmed by the delay in the closing. The Delaware Court of Chancery ruled that the claims were derivative and dismissed them under Rule 23.1. In reaching this verdict, the court relied on Delaware decisions based on the concept of "special injury" to determine when a plaintiff could sue directly.[123]

The "Special Injury" test required that the harm suffered by the stockholder should be configured as a wrong "separate and distinct from that suffered by other shareholders […] or a wrong involving a contractual right of a shareholder."[124]

Through the adoption of the special-injury test, the Court of Chancery held that there was "no meaningful distinction between the contract rights of the tendering and non-tendering stockholders", such that they all held parallel contract rights."[125]

Nevertheless, this verdict was reversed by the Delaware Supreme Court, which stated that the concept of special injury had become "amorphous and confusing". Moreover, the High Court expressly overruled the "special injury" test, describing it as "not helpful to a proper analytical distinction between direct and derivative actions."[126]

In place of the special injury test, the Court established a new – two-part – standard to determine whether a specific claim is derivative or direct. Specifically, the Court stated that:

> The analysis must be based solely on the following questions: Who suffered the alleged harm – the corporation or the suing stockholder individually – and who would receive the benefit of the recovery or other remedy?[127]

[123] *See* Tooley v. Donaldson, Lufkin, & Jenrette, Inc., No. 845 A.2d 1031 (Del. 2004).
[124] *See* Moran v. Household Int'l, Inc., 490 A.2d 1059, at *1070 (Del. Ch. 1985).
[125] *See* Tooley, 845 A.2d at *1035.
[126] *Id*.
[127] *See* Tooley, 845 A.2d at *1033.

Before the adoption of this new standard (or test), the controversial Delaware Court of Chancery's decision "Moran I" designed the proposition that challenges to shareholder rights plans must be brought via derivatively.[128]

The derivative presumption drafted in Moran I drew criticism even before Tooley. For instance, Principles of Corporate Governance – published in 1994 by the American Law Institute – pointed out the issue, observing that

> [c]ases have divided as to whether the issuance of a 'poison pill' security can be challenged by a direct action on the grounds that it chills voting rights or restricts the alienability of the shareholder's stock.[129]

The passage criticized *Moran I* because its

> focus on the similarly of treatment misses the central point that fundamental shareholder rights (e.g., voting and alienability) can be infringed by a variety of board actions that treat existing shareholders alike.[130]

In addition, I have found some other examples of criticism concerning *Moran I* over the last decades. In 1999, this court in *Gaylord* criticized the same derivative presumption.[131]

In that circumstance, Vice Chancellor Strine was asked to establish whether the complaint pled direct or derivative claims. Although the case was eventually dismissed under Unocal standard, he got the chance to express a critic regarding the reasoning of the rule of Moran I. He centered on Moran I's failure to identify who suffered the wrong and clearly asked: "why a board's action to interpose itself between stockholders who are ordinarily free to sell their shares, and purchasers who are ordinarily free to buy those shares – if improper – works an injury *on the corporation as an entity*."[132]

At the same time, he defined it as "obvious" that the shareholder rights plan violated stockholders' fundamental rights to sell and vote.[133]

Evidently, *Tooley* addressed the flawed logic behind the derivative presumption drafted in *Moran I*. In fact – also thanks to *Gaylord* – it is now possible to acknowledge that shareholder rights plans – if

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[128] In Moran, the Court of Chancery stated that "[W]here, as here, no shareholder is presently engaged in a proxy battle, and the alleged manipulation of corporate machinery does not directly prohibit proxy contests, such an action must be brought derivatively on behalf of the corporation." *See Moran*, 490 A.2d 1059, 1070 (Del. Ch. 1985).

[129] *See Principles of Corporate Governance: Analysis and Recommendations* § 7.01 n.3, at 29 (Am. L. Inst. 1994).

[130] *Id*.

[131] *See Gaylord*, 747 A.2d at *76–79.

[132] *Id*. at *78.

[133] *Id*.

adopted improperly – produce an injury on stockholders directly by harming at least two fundamental stockholder rights (rights to sell and vote). Besides these two shareholders' rights, some of the stockholders' fundamental rights are the rights to communicate with the other stockholders on matters relevant to the stocks owned[134], to nominate directors[135], and communicate with management and the board of directors[136].

All shareholder rights plans interfere to a certain extent with the rights to sell and vote, yet a traditional poison pill does not attempt to restrict stockholder communications. Williams 'Crisis Pill' went beyond traditional rights plans – particularly due to the extreme trigger threshold of 5%, the 'AIC Provision', and the exception for 'Passive Investors'. As drafted, *William*'s pill interfered with the right to communicate (among stockholders and between stockholder and management). It also restricted the stockholder's faculty to nominate (or replace) directors.

Thus, it can be concluded that *Williams*' crisis pill – as articulated – infringed directly rights of the stockholders – and not the Company itself. In this case, enjoining rights the rights plan is a remedy that purely affects the owners of the company, not the company.

Consequently, the Delaware Court of Chancery affirmed – under *Tooley* – that Plaintiffs' claim was direct.[137]

2. The Standard of Review

A further motive of contrast between the parties was the pertinent standard of judicial review. On the one side, the Defendants argued that the more deferential *business judgement rule* should have applied. On the other side, Plaintiffs asserted that *Unocal* should have guided the court's scrutiny.

As mentioned earlier – one of the more important standards of judicial review applied by the Delaware Court of Chancery and Supreme Court is *Unocal*. After the Delaware Supreme Court's verdict in *Moran*, the Court of Chancery "and the Supreme Court have used Unocal exclusively as the lens through which the validity of a contested rights plan is analyzed."[138]

Therefore, also in this case, the court maintained that *Unocal* was the right standard to apply – moving around the principle established by the Delaware Supreme Court decision in *Selectica II.*[139] In that

[134] *See B.F. Goodrich Co. v. Nw. Indus*., Inc., 1969 WL 2932, at *2 (Del. Ch. Mar. 26, 1969).
[135] *See Harrah's Ent., Inc. v. JCC Hldg. Co.*, 802 A.2d 294, at *310–11 (Del. Ch. 2002).
[136] *See Abajian v. Kennedy*, 1992 WL 8794, at *6 (Del. Ch. Jan. 17, 1992).
[137] *See The Williams Companies*, at *45.
[138] *See Third Point LLC v. Ruprecht*, 2014 WL 1922029, at *15 (Del. Ch. May 2, 2014); *see also eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 28 (Del. Ch. 2010).
[139] *See Versata Enterprises v. Selectica, Inc.*, 5 A.3d 586, at *599 (Del. 2010).

instance – the High Court held that *Unocal* standard must be adopted when analysing each contested rights plan since all poison pills, "by...nature," have a potentially entrenching "effect."[140]

Thus, it was settled law that the board of directors' obedience to their fiduciary duties in deploying (and then failing to redeem) the Williams' crisis pill must have been assessed under Unocal.

As seen before – the *Unocal* standard calls for a two-part scrutiny. To satisfy the first step, Defendants must demonstrate that the BoD performed a "good faith and reasonable investigation."[141] The reasonableness of the investigation is deemed "materially enhanced"[142] when the decision is ratified by a board composed of a majority of outside, nonemployee directors "coupled with a showing of reliance on advice by legal and financial advisors."[143]

Actually – to meet the first step of the *Unocal* standard – Defendants must go beyond the demonstration of good faith and reasonable investigation. In fact, "[T]he first part of Unocal review requires more than that; it requires the board to show that its good faith and reasonable investigation ultimately gave the board 'grounds for concluding that a threat to the corporate enterprise existed.'[144]

Then, to meet their burden under the second part of *Unocal*, directors must show that the defensive measures were "reasonable in relation to the threat posed."[145]

This aspect of the *Unocal* test highlights the fact that the board have not absolute discretion while acting, and that it "does not have unbridled discretion to defeat any perceived threat by any Draconian means available."[146]

When the court carries out the proportionality analysis, it also scrutinises the relation between the defensive measure that the directors undertook and the issue they wanted to address.[147]

Thus, the court examines "the reasonableness of the end that the directors chose to pursue, the path that they took to get there, and the fit between the means and the end."[148]

The nature of the threat "sets the parameters for the range of permissible defensive tactics"; therefore, the "reasonableness analysis requires an evaluation of the importance of the corporate objective threatened; alternative methods for protecting that objective; impacts of the defensive action and other relevant factors."[149]

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140 *Id.*
141 *See Unocal*, 493 A.2d at *955.
142 *Id.*
143 *See Selectica, Inc. v. Versata Enterprises, Inc.*, C.A. No. 4241-VCN, at *12 (Del. Ch. Feb. 26, 2010).
144 *See Air Products v. Airgas*, 16 A.3d 48, at *104 (Del. Ch. 2011); (quoting *Selectica II* at *599).
145 *See Unocal*, 493 A.2d at *949.
146 *Id.*
147 *See Mercier v. Inter-Tel,* 929 A.2d 786, at *808 (Del. Ch. 2007).
148 *See Obeid v. Hogan*, C.A. No. 11900-VCL, at *13 (Del. Ch. Jun. 10, 2016).
149 *See Selectica I*, 2010 WL 703062, at *19.

C. Principles of Law, Takeaways

1. The Decision

According to *Unocal*, the directors must have identified and responded to a legitimate corporate threat. Their conduct cannot be justified based solely on unidentified threats or beliefs they did not possess.[150]

The first step that brought the Delaware Court of Chancery to the verdict consisted in determining the motives that pushed Director Defendants to adopt the 'Crisis Pill'.

This was clearly a challenging task for the court, as there is no easy way to identify a unified purpose behind a decision made by a group of people. Most significantly, in litigation contexts, courts face the risk that witnesses may look back on events – occurred prior to the litigation – from a different perspective influenced by newly crafted litigation positions. On top of that, in this case Williams' lawyer-drafted documents – relevant to find board resolutions, board minutes, company disclosures – did not reflect the management actual objective. As a matter of fact, all the official documents relevant to the 'Crisis Pill' mentioned that the rights plan's purpose was avoiding hostile takeover attempts. Yet the plan was not deployed to avoid takeovers; actually, the 'Crisis Pill' was not adopted to shield the Company against any specific threat at all.[151]

The trial memorandum of opinion – in fact – exhibited no concern of the board about any activist threat. Nor the management adopted such a rights plan to protect specific corporate assets (*e.g.,* NOL poison pills). Rather, Williams' directors acted pre-emptively to stop whatever hypothetical future threats.[152]

While it is true that the board – communicating with stockholders in advance of the annual meeting – cited prior issues with activist investors as a reason for adopting the rights plan, the Court found no proofs that it was a motivating factor for the board (as a whole). In fact, Williams' prior controversies with activism were not discussed during the official 18th and 19th March board meetings. The Court considered this justification as artificially produced by the board post-adoption of the plan.

Most notably, the Court stated that the actual motive that initially persuaded Williams' management to employ the poison pill was the significant decline of the stock price. This decision was quite straightforward due to all the proofs that emerged from intra-board communications, trial testimonies and board behaviours during the days considered relevant to the matter.

[150] *See, e.g.*, *Chesapeake Corporation v. Shore*, 771 A.2d 293, at *332 (Del. Ch. 2000).
[151] *See The Williams Companies* at *52.
[152] *Id*. at *54.

As stated in The Williams Companies, some themes directly arose from the Director Defendants' testimony. Commenting the testimony, the Court specified that

> first, they all expressed the sentiment that the Plan was intended to deter stockholder activism. Second, they desired to insulate the board from activists pursuing "short-term" agendas and from distraction and disruption generally. Third, they were concerned that a stockholder might stealthily and rapidly accumulate large amounts of stock.[153]

Once the Court completed this first analysis, the *Unocal* first step was adopted. Indeed, the Court had to decide whether Williams' management conducted a "good faith reasonable investigation and had grounds for concluding that a threat to the corporate enterprise existed."[154]

According to the Court, Director Defendants have proved that the board of directors carried on a "good faith reasonable investigation" when adopting the crisis rights plan. In fact, the board comprised nearly all independent outside directors who discussed the adoption of the plan through two meetings. In addition, the Company was also advised by legal and financial advisors who explained the plan and were available to solve any doubts.

The Court established that the actual issue was not the process, yet the threat identified by the Defendants. They identified three threats[155]; the first two – that "1) the plan "was intended to deter shareholder activism;" 2) the plan was intended to "insulate the board" from the "short-term" agendas of shareholder activists specifically – were considered by the court as purely hypothetical and not cognizable threats."[156] The third threat – that "the board was concerned that a shareholder might take advantage of the market disruption to quietly accumulate large amounts of stock, given "gaps" in the federal disclosure regime" – was assumed as a legitimate threat by the court – thus moving the scrutiny to the successive step.

The second step of *Unocal* standard requires the court to evaluate whether the defensive mechanism adopted by the defendants "fell within a range of reasonable responses to the lightning-strike threat posed." [157]

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[153] *Id*. at *62.

[154] *See Air Prods*. at *104.

[155] The directors identified the three threats in the prevention of stockholder activism during a time of market uncertainty and a low stock price, the concern that activists might pursue "short-term" agendas or distract management, and the concern that activists might rapidly accumulate over 5% of the stock at an unjustified discount. To expand *see The Williams Companies* at *64-76.

[156] *See* Cleary Gottlieb, *Delaware Court Enjoins Poison Pill Adopted in Response to COVID-19- Related Market Disruption* 3 (Mar. 2, 2021).

[157] *See Unitrin, Inc. v. American General Corp*., 651 A.2d 1361, at *1387,88 (Del. 1995); quoting *Paramount*, 637 A.2d at *45,46.

To properly apply the second prong of Unocal, the court analysed the main features of the Williams pill. The court considered the trigger threshold; the extreme nature of the trigger was testified by the fact that – of the twenty-one pills adopted between March 13 and April 6, 2020 – only the Williams pill presented a 5% threshold. Most notably, among these twenty-one corporations, thirteen were facing ongoing activist campaigns at the time of adoption of the pills.

Also, the other key features of the rights plan were regarded as extreme. For instance, the "beneficial ownership" denotation went far beyond the default definitions drafted to capture synthetic equity.[158] In addition, the Plan's AIC Provision exceeded the concept of "parallel conduct" (common to federal law) and added the mentioned daisy-chain concept. Last, but not least, Williams' managers defined "passive investor" in a way that overstepped "the influence-control default of federal law to exclude persons who seek to direct corporate policies."[159]

To sum up, the court asserted that Williams' pill went far beyond the ordinary poison pill. Moreover, the court judged that such extreme features exceeded even those of the ordinary gap-filling poison pills – endorsed by Professor Subramanian in *Corporate Governance 2.0* and Professors Coffee and Palia in *Wolf at the Door*[160].

For the motives analysed earlier, the court concluded that defendants "failed to show that th[e] extreme, unprecedented collection of features" of the rights plan at issue in this case "bears a reasonable relationship to [the board's] stated corporate objective."[161]

Furthermore, the Court stated that the effect of the 'Crisis Pill' was likely to "chill a wide variety of anodyne stockholder communications."[162]

Given the extreme nature of the pill, and that board's decision to adopt the pill did not withstand scrutiny under Unocal – the Delaware Court of Chancery imparted a "mandatory" injunction requiring that the 'Crisis Pill' be withdrawn.

2. Takeaways

Although the Court enjoined the 'Crisis Pill' in Williams' case – this verdict is not necessarily a threat to the capacity of directors to adopt more standard rights plans to defend the corporation from "legally

[158] *See Anti-Activist Poison Pills* 949,50.
[159] *See The Williams Companies at *78.*
[160] *See* Guhan Subramanian, Corporate Governance 2.0, 92 Harv. Bus. Rev. 96, at 15 (2015). *See also* Coffee, John C. & Palia, Darius, The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance, Columbia Law and Economics Working Paper No. 521, at 601,602 (September 4, 2015). Available at SSRN: https://ssrn.com/abstract=2656325
[161] *See The Williams Companies* at *88-89.
[162] *Id.* at *82.

cognizable threats". As shown above – the poison pill adopted by Williams in response to the Covid-19 stock market crash comprised too extreme features (an almost unique 5% trigger – outside of the NOL context – and expansive anti "wolf-pack protections with daisy-chain implications"). Traditional shareholder rights plans with litigation-tested features (e.g., >10% trigger and other litigation- tested terms) that are deployed in response to a legally cognizable threat and backed by a strong record should still stand on solid legal ground.163

Speaking of record – this verdict strengthens the thesis according to which the record is massively important. In Williams, the court second-guessed the board's true motivations as the record did not clarify what the board identified as the actual or emerging threat when adopted the rights plan. Indeed, it is crucial that a board – contemplating the deployment of a poison pill – guarantees that there is an adequate record of its deliberations, of the threats, and of the specific features of the pill.

In Williams case, the Court did not regard the board's "hypothetical" concerns about shareholder activism as a credible threat justifying the adoption of a pill. The Court's position seems to suggest that, in order for activism to be a cognizable threat under Unocal, the board would need to identify a specific activist threat.164

The Court verdict also left open the possibility that a shareholder rights plan may be adopted to warn the Legislator to fill the gaps in the federal disclosure regime. However, the Court expressed concern that justifying gap-filling poison pills for all public companies would produce a significant shift from the case-by-case scrutiny of contested poison pill – traditionally conducted by Delaware courts. This could bring back to the poison pill early times – when most of the listed companies had rights plan in place, and not just on the shelf. In Clearly Gottlieb & Hamilton LLP view – tough – the return to that era is not very likely to happen in the close future – since "corporate governance norms have dramatically shifted, and institutional investors and proxy advisory firms' views have hardened in the years since."165

Even in the case the board is responding to a legitimate threat, directors must consider whether the features of a rights plan are proportioned to the cognizable threat. As highlighted earlier, the Court considered the Williams 'Crisis Pill' characteristic too extreme. In particular, the Court maintained that the broad AIC provision combined with the narrow "passive investor" definition would have limited even some of the most basic shareholders' rights. Therefore, boards adopting poison pills should carefully consider any chilling effect the rights plan would have on fundamental stockholder activity.166

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[163] *See Delaware Court Enjoins Poison Pill Adopted in Response to COVID-19- Related Market Disruption* 4.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 5.

IV. *WILLIAMS*: NOT REALLY A RESPONSE?

A. What About Williams?

1. More "Standard" Crisis Pills

The Delaware Court of Chancery's verdict on Williams 'Crisis Pill' to enjoin the plan was principally motivated by the extreme features drafted by Williams' board of directors. As shown, the low trigger threshold, the beneficial ownership description, the AIC provision, and the passive investor definition together were considered by the court non-reasonable in the specific context.

The last objective of this dissertation is to understand whether the Williams verdict was intended to limit (or even deter) the adoption of shareholder rights plans in general, or the court left room for BoDs to deploy poison pills to respond to opportunistic behaviours by activist investors in the uncertain scenario created by the pandemic.

In this regard, I deem important to analyse other application of poison pills in the Covid-19 context – mainly to highlight differences with respect to the plan adopted by Williams.

As mentioned earlier, nearly 50 of the companies included in the *S&P500* index[167] recurred to the shareholder rights plan as a mechanism to protect the long-term shareholders – deterring hostile takeovers attempts favoured by the 2020 stock crash. Besides Williams, I cited *Occidental Petroleum Corp.* (*Oxy*), *Delek US Holdings, Inc.* (*Delek*), and *Dave & Buster's Entertainment Inc.* as the largest companies that deployed 'Crisis Pills'.

Among these, *Occidental Petroleum Corp.* and *Delek US Holdings, Inc.* share some common features with Williams. First, they operate in similar industries (core business in the oil industry); second, also these two firms experienced a dramatic drop in stock prices due to the stock market crash of March 2020. The two firms differ from Williams since their BoDs managed differently the crisis pills implementation process.

Oxy – one of the S&P500 companies – announced the implementation of a shareholder rights plan (on March 13th) to avoid hostile takeover attempts. Oxy and Williams have some features in common – such as the fact that they are included in the S&P500 index and operate in similar industries. What's more, they are similar in the fact that both companies suffered a 60% drop in valuation – because of

[167] The Standard & Poor's 500 Index (S&P500) is a market-capitalization-weighted index of the 500 U.S. largest publicly traded corporations. It is not an exact list of the top 500 U.S. companies by market capitalization because there are other criteria to be included in the index. The index is widely regarded as the best gauge of large-cap U.S. equities.

the 2020 stock market crash – and recovered steadily after the deployment of the relative crisis pills (both outperforming the S&P 500 Oil, Gas and Consumable Fuels Index, i.e., their reference index). On the contrary, Oxy's board of directors engaged in a more adequate campaign of adoption of the plan – with respect to Williams. Eventually, Oxy's 'Crisis Pill' has not been challenged in court by shareholders. The main reason rests on the fact that the board deployed a more "standard" – or traditional – version of the shareholder rights plan. In addition, the board acted in response to an actual hostile takeover threat. As a matter of fact, Oxy implemented the crisis plan to defend against unsolicited takeover approaches by activist investor Carl Icahn – within the scope of his campaign to fire the beleaguered U.S. oil producer's board. Icahn tried to gain control over Oxy's board taking advantage of the drop in valuation of the company straight after the hit of the pandemic.[168]

As mentioned, Oxy's crisis pill presented more "traditional" core attributes. The plan had a duration of 1 year, with a reasonable 15% trigger threshold, and the remarkable shareholders' approval required for the adoption of the plan. The requirement of shareholders' ratification was a very high-level standard even for a traditional poison pill (in fact the shareholder approval is rarely required).

Besides the more technical peculiarities (duration, trigger, particular provisions), I consider the shareholders' approval provision the critical difference between the two crisis pills. Of course, once most stockholders ratified the plan, the burden of responsibility on the directors become milder.

The course of action taken by Oxy's board was significantly different with respect to that of Williams. As shown above, Williams directors drafted an extreme crisis pill, which was not adopted to respond to an actual emerging threat of hostile takeover.

The other important example mentioned earlier is Delek's shareholder rights plan. Delek operations are well diversified, but its core business is petroleum refinement. Delek – similarly to Oxy – was targeted by Carl Icahn, who had a significant portion of the company shares and attempted an unsolicited takeover aimed to control the board and sponsor a merger with the refiner CVR Energy CVI (in which he held 71% ownership).

Delek's board adopted a limited duration stockholder rights plan (1 year) with traditional characteristics. The trigger threshold was set at 15% (versus Williams Pill 5% trigger). Stock price responded to the plan with a significant 31% increase in the day the plan was announced.

In this instance, the board of directors recognized that the adoption of the plan was clearly linked to the uncertainty caused by the spread of Covid-19. In fact, the stock market crash generated a massive gap between the market valuation of the company and the actual value of the enterprise. Most notably,

[168] *See* Joe Carroll & Kevin Crowley, Bloomberg, *Occidental Deploys Poison Pill Amid Icahn Push to Oust Board* (2020), available at https://www.bloomberg.com/news/articles/2020-03-13/occidental-deploys-poison-pill-amid-icahn-effort-to-oust-board

the threat of a hostile takeover was real – unlike in Williams – since Icahn had bought up to 14.8% of the company's shares.

2. What Williams Really Represents?

The Delaware Court of Chancery's verdict in Williams should not constitute a generic ban that would deter boards of directors from adopting shareholder rights plans a priori. Indeed, the more "traditional" crisis pills – like those deployed by Delek and Oxy – have not been challenged by involved stockholders. Oxy and Delek drafted plans with characteristics that were reasonable and proportionate in response to an actual (or cognizable) threat.

Instead, Williams' verdict should be deemed as a landmark for those boards that are considering the employment of a poison pill. The Williams' board actions – considered not reasonable and not in line with the standard of judicial review – can be used in the future as a (negative) model not to follow. Most notably, directors evaluating a shareholder rights plan must act carefully and even seek professional advice from independent counsels.[169]

In particular, *Williams'* case highlighted some critical issues the board should cautiously consider. First, a board that is considering the adoption of a rights plan should ensure appropriate deliberation and discuss all the material features of the pill (preferably, over multiple meetings and with the benefit of review of all pertinent documents). Second, the management must identify a specific ("non-hypothetical" or "cognizable") threat(s) to which the board is responding via the adoption of the defensive measure. In addition, the board should examine judicial precedents that more closely relate to the specific situation in order to draft a plan with characteristics in line with the market practice. Last – but not least – the directors should the relation between the plan's features and the identified threat (in terms of reasonableness) – with the aim to build an adequate documental record for any possible subsequent judicial review.[170]

On top of that – according to Charlotte K. Newell et al. – the Williams decision had also some more general takeaways for directors willing to implement shareholder rights plans to fight hostile takeovers in the post-pandemic environment. Among these, the most relevant ones include:

> (i) another reminder not to include in board agendas allotted periods of time for specific items — the Court specifically called out how much time the agenda provided for specific

[169] *See* Charlotte K. Newell et al., The CLS Blue Lion logo Sky Blog, *Sidley Austin Discusses Delaware Chancery's Latest Guidance on Poison Pills*, available at https://clsbluesky.law.columbia.edu/2021/04/06/sidley-austin-discusses-delaware-chancerys-latest-guidance-on-poison-pills/

[170] *Id.*

> items and even compared the fact that one agenda assigned 40 minutes to the rights plan and 20 minutes to the discussion of whether to hold the annual meeting virtually. (ii) that it is better to err on the side of sending the board too many materials than too few materials — it is important that directors receive copies of the agreements they are being asked to approve and, where appropriate, summaries of the key terms of those agreements; the *Williams* opinion notes that the Williams board did not receive a copy of the rights plan before the board approved it and that most of the directors admitted that they had not read the plan's key features until after the litigation began; (iii) that it may not be ideal for management to take the lead presenting to the board on highly specialized topics like rights plans — while the Court did not specifically criticize this, it did note that "aspects of the process were less than perfect" and that the CEO and GC delivered the rights plan presentation (although outside counsel and financial advisors were in attendance); notably, while the decision quotes the financial advisor, it does not mention that representatives of outside counsel *even spoke* during the meeting; and (iv) another reminder to exercise caution in emails and notes — the Court cites emails between the company and its counsel regarding the activism threat in advance of the pill adoption, and the opinion quotes the CFO's notes.[171]

While being a perfect example of a too extreme shareholder rights plan, I do not deem Williams to be a landmark in the poison pill case law development. As a matter of fact, Delek and Oxy's crisis pills – which presented more "standard" traits and were implemented more cautiously – were not brought before a court by involved shareholders.
The Delaware Court of Chancery's verdict – as mentioned earlier – was built upon the absence of an actual (or cognizable) hostile takeover threat. The sole hypothetical threat (or the simple presence of a conjuncture more friendly for the proliferation of unsolicited takeovers) was clearly rejected by the court as an actual threat to the corporation – thereby not meeting the first prong of the Unocal standard of review.

[171] *Id.*

B. Post Williams

1. The 'Crisis Pill' After *Williams*

It may be worthwhile to remind the general positive aspects related to the adoption of a poison pill to better understand whether shareholder rights plan future developments after Williams.

According to professors Ofer Eldar (Duke University) and Michael D. Wittry (The Ohio State University) – who conducted a technical analysis of the implementation of poison pill in response to the 2020 stock market crash and the pandemic – stockholders' view of poison pill adoption was generally positive. Eldar and Wittry found that announcements of these crisis pills were highly correlated with "immediate positive stock price reactions in various event windows in the 10 days following the pills' adoptions."[172]

Specifically, data showed that – following the adoption of the 53 poison pills in response to the Covid-19 stock market crash – markets featured a strong positive reaction, with an announcement-day cumulative abnormal return ("CAR") of 2.9% and 10-day post-announcement CARs of over 4%. In contrast, a matched sample of firms that had not adopted a shareholder rights plan did not experience a similar price reaction (in the same period). The announcement-day CAR for the matched sample is statistically equal to zero, while the 10-day post-announcement CAR reached -2.8%. These results confirmed that the initial shareholders' view of the adoption of the pill was on average positive.[173]

Another positive aspect that derives from the adoption of shareholder rights plans is the deterrence of opportunistic investors' unsolicited takeover attempts. This occurs via the dilution of shareholding that is triggered when the activist overcome the predetermined threshold.

As mentioned in part I of the dissertation, the dilution renders any unwelcomed takeover attempt way more expensive for the bidder – thereby protecting the interest of the long-term stockholders.

In addition, an important function carried out by the shareholder rights plan is the so called "gap-filling" function. Broadly speaking, a poison pill may be helpful for a corporation in detecting threats that would not be noticed (or would be noticed with a large delay) via the federal disclosure regime.

Specifically, the current federal disclosure system provides investors – who acquire or have beneficial ownership of more than 5% of a class of shares in a corporation – with a 10-day disclosure threshold. In some circumstances, the 10-day period may allow activists and hedge funds to accumulate shares for a sensible amount of time without anyone knowing.[174]

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[172] *See supra* note 72 at 4.
[173] *See supra* note 72 at 21.
[174] *See* Roger A. Cooper et al., Cleary Gottlieb, *Delaware Court Enjoins Poison Pill Adopted in Response to COVID-19-Related Market Disruption* 3.

In this regard, a shareholder right plan would mandate disclosure of any acquisition above a certain level – thereby incentivizing potential bidders to deal with the board to proceed with the acquisition. In Williams, the Court expressed concern that granting Williams with a gap-filling justification – which would always apply to nearly all public corporations – would represent a relevant departure from the situationally specific scrutiny of shareholder rights plans traditionally conducted by Delaware courts. However, the Court left some room for the adoption of the poison pill as an early warning mechanism to fill the gaps in the federal disclosure regime.[175]

2. Is Poison Pill Still Worthwhile?

All is left to understand is whether the poison pill – with the positive and negative consequences deriving from it – is still a valuable tool for protecting long-term stockholders and all relevant stakeholders when the corporation is targeted by unwelcome opportunistic investors.

The arguments in favour of the poison pill deployment – mentioned in the previous section – are numerous and solid (in a defensive from hostile threats perspective). At the same time, boards that are considering the adoption of a shareholder rights plan must carefully ponder over the negative impact that the plan could have on the firm – as shown in Part I.

Most notably, the effects of deploying a poison pill vary significantly and are influenced by different factors in every specific case. In fact, there is no univocal (or general) outcome of all the shareholder rights plans adopted by the companies in response to an unsolicited takeover attempt. This high specificity of the poison pill – *i.e.*, the fact that the court scrutinizes every challenged rights plan – and the unfavourable position of the proxy advisors (in general) render it rather arduous to draw a conclusion on the future developments of the related case law.

Surely – as highlighted before – the Delaware Court of Chancery's verdict in Williams does not construct a significant departure from the relative history of litigation. As a matter of fact, the shareholder rights plan has always been used by boards in periods of crisis occurred since 1980s (when attorney Martin Lipton invented this strong corporate governance defensive tool). What's more, I deem that there are no reasons why "standard" versions of the poison pill (i.e., plans that feature 10/15% trigger thresholds, do not depart significantly from AIC provisions and standard beneficial ownership definition, and exclude truly passive investors) should be challenged by shareholders whenever the company faces a real threat of unwelcome takeover – or at least no reasons for these plans to be enjoined by courts.

[175] *Id.* at 4.

In addition, nowadays, the courts have reached sufficiently high standards in terms of predictability of judicial scrutiny of challenged poison pills. Indeed, *Williams* proved that – even in unprecedented times – Delaware courts review challenged rights plans applying the usual judicial standard of review. Thus, boards of public companies that are facing threats of hostile takeovers may still consider adopting such a strong instrument to deter the hostile attempt – or at least to force the potential acquirer to deal with the firm's board of directors, thereby allowing the management to be in a better spot to extract the best possible price for long-term stockholders.

Moreover, I believe that firms should consider what is known as the poison pill 'On-the-shelf strategy'. The poison pill 'On-the-shelf strategy' consists of arranging the documentation and taking all the other preparational steps to launch the poison pill, but not launching it until a cognizable threat of hostile takeover arises. Naturally, the pill put on the shelf must be close (in terms of features) to the traditional pills discussed above. This since triggering thresholds in poison pills commonly used and already upheld by courts are more likely to be sustained and not challenged by stockholders.[176]

CONCLUSION

The spread of coronavirus, the consequential economic implications, the concern of boards across all global economies on whether the companies they are managing are going to survive in a post-coronavirus world, and the discussions among scholars on which defensive strategies may be adequate to prevent damages – deriving from eventual speculations on companies that are now underperforming due to externalities – are all topical circumstances. It is therefore difficult to come up with a conclusive view over them. I may only make assumptions on what are going to be the future developments of human relationships – and consequently also juridical and economic interactions.

Certainly, it would be hard to come back to the 'normality' we all have known and experienced before. More likely we would meet a new 'normality', a paradigm in which all the basic interactions between individuals would work differently, with significant modifications of our day-by-day interactions deriving from the pandemic. The different paradigms would probably also affect the interactions between companies, as they are considered legal persons ("fictio iuris"[177]); as shown by the evidence gathered, the adoption of the poison pill I have discussed in part II increased dramatically in the first period straight after the outbreak of the pandemic. For instance, since March 2020 nearly

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[176] *See* Michelle Early et al., Locke Lord LLP - JDSupra, *Delaware Court of Chancery Reminds That Rights Plans Have Limits* 3 (12 March 2021), available at: https://www.jdsupra.com/legalnews/delaware-court-of-chancery-reminds-that-8379237/

[177] *See* Rogge Malcolm, *Vesting Transnational Corporate Responsibility in Natural Persons v. Legal Persons – What Matters Today?*, CIGI-McGill-Queen's Univ. Press, at *4 (2020). Available at SSRN: https://ssrn.com/abstract=3570105

50 S&P 500 companies had active poison pills, while at the end of 2019 only 25 of them adopted shareholder rights plans.
For what concerns companies – the coronavirus had a major impact on global exchanges and trades. Therefore, some firms would struggle to come back to pre-pandemic volumes and financial position. Companies that had a stop in production will hardly come back (in the short term) to their precedent position in the global supply chain. As a result, the value of many firms will extensively decrease – reducing the chance to survive the crisis for some of them; at the same time, other companies will be targeted by institutional investors and competitors with a stronger and more stable market position. Considering these perspectives, the adoption of the poison pill as a defensive strategy in response to the potential threat of hostile bids – made by firms that are in excellent financial position regardless of the pandemic crisis – seems reasonable – if under some specific circumstances.
Furthermore, directors of several firms find themselves in an even more delicate position, considering all the individuals that are involved in relationships with the companies – such as employees, suppliers, and creditors. Taking into account these factors involved in the companies' life – in the current circumstances – the priority may be translated on the analysis of the best strategies to protect them. As examined in the research – a sort of 'Crisis Pill' could be a proper strategy to respond to the incumbent crisis – principally because it could prevent hostile takeovers aimed to accumulate short-term gains not aligned with long-term interests of the companies' stakeholders.
Certainly, the adoption of shareholders' rights plans is not an accurate solution for all the publicly traded companies that are suffering declines in stock prices. As highlighted earlier, the poison pill could have relevant consequences on governance structures and could negatively affect stockholders – for instance, deterring a potentially profitable takeover. In general, the employment of these defensive measures has important negative implications also upon the members of boards.
Thus, the adoption of a crisis rights plan must be subject to precise circumstances, follow specific characteristics (duration, trigger) and be supported by an adequate rationale – i.e., it is adopted in response to an actual threat.
This position is reflected by the Delaware Court of Chancery's decision in *Williams*, where the court enjoined the rights plan due to the extreme nature of the features drafted by Williams' management.
A proper solution may be the insertion (in the bylaw) of a sort of "inactive" shareholder rights plan – ready to be adopted if the company suddenly faces specific conditions discussed in advance with shareholders – which presents features more in line with those of a traditional poison pill.
An important endorsement of these previsions has been given by Prof. David J. Berger, who expects that the adoption of poison pills in the next few months will be of limited duration (one year, as opposed to significantly longer periods of application during the '80s). Professor Berger affirmed

that, given the limited deployment duration, they will not have a significant effect on the market for corporate control. The *rationale* behind this lies in the fact that the actual US market for corporate control is basically in the hands of shareholders. For instance, if stockholders consider a bid to be a potentially good deal – and the board try to obstruct them – then a specific bidder can start a proxy contest, thereby bringing the offer directly to the target company's shareholders.

In the present governance environment, in which the stockholders are fundamentally in control, a poison pill may allow a board of directors to 'buy' some time to consider alternatives, which can be helpful if the board is trying to defend the company from an opportunistic offer (made at a time in which the company is suffering from a temporary decline in market capitalization caused by outside forces like the coronavirus).

Moreover, the position of Delaware Court of Chancery in *Williams* leaves room for directors to deploy crisis pills in response to the volatility in the market generated by Covid–19. In fact, the Court expressly enjoined the Williams pill because the provisions drafted by the board were too extreme with respect to those of a traditional plan. The verdict clearly does not represent a ban for every single shareholder rights plan – in particular in the current scenario. Even the 'leaner' position taken by proxy advisors in the months that followed the spread of the pandemic is emblematic in this view. Therefore, the boards of companies that suffered the consequences of the Covid-19 crisis should bear in mind the position of the Delaware Court and proxy advisors, proposing short-term crisis pill only in case of actual threats.

To conclude, I deem that the adoption of these 'covid pills' is only a temporary measure that the boards can deploy, while, as also highlighted by David J. Berger, in the long-term it will not prevent the acquisition of a company, especially if the stockholders themselves want it to be sold.

Besides this, will the corporate governance practitioners find an alternative defensive strategy to protect the long-term life of these companies (hence the long-term interests of stockholders) in the post-pandemic context? "*Sentence waits posterity*"[178].

[178] *See* Alessandro Manzoni, *Fifth of May* (1821).

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