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A Retrospective Analysis of the Williams Case and Possible Best Practices for the Future

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Abstract

This paper analyzes the reasons that allowed the poison pills practice to resurrect and boom in early 2020 as a response to the unprecedented crisis caused by the pandemic – stock prices plummeted and market volatility dramatically increased –. Between March 3 and June 30, 2020, a total of 73 S&P companies adopted the poison pills. At the end of 2019, only 25 companies among S&P 500 had an active poison pill plan. Williams Cos. Inc., an energy company, suffered a precipitous drop in the value of its shares, from US$ 24 at the end of 2019 to US$ 9.25 on March 18, 2020, two days before the poison pill plan was announced. The board viewed the decline in Williams' stock price as a weakness that could potentially attract a hostile takeover.

Furthermore, this paper will tackle the position taken by Delaware Court of Chancery, and confirmed by Delaware Supreme Court, vs the extremely aggressive poison pills terms enacted by Williams Co.

The poison pills strategy triggered by the Pandemic has forced the markets during that period of time– in particular the proxy advisors and asset managers– to rethink their view of such tactics in light of the extraordinary crisis. While that anxiety has passed and the markets have absorbed that shock, the Williams CO case provided the Delaware Court with the opportunity to leave "the door open" to future poison pills strategies. It did not intend to obliterate this practice. The same court has, in fact, shine additional light on the parameters under which this defensive tactic will be appreciated in the future. The activism by shareholders and funds makes the poison pill instrument less resolute as compared to the 1980s because, today, the accountability of management and the board of directors is more frequent and transparent. Furthermore, the amount of information and news readily available to shareholders in 80's, when poison pills became the norm, was far poorer than it is today. The court criticized the Williams board for acting on hypothetical rather than cognizable threats and the condition of the poison pills were too harsh.

This paper concludes by illustrating the lesson learned following the Williams Co case and the potential future prospects of this defensive instrument also in relation to shareholders' and funds' activism as observed in the Twitter-Elon Musk case.

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INTRODUCTION

Poison pills emerged in the 1980s in response to a wave of hostile takeovers. A takeover occurs when one company makes a bid to take control of/or to acquire another, often by buying a majority stake in the target company[1]. "*Takeovers are usually friendly affairs. Corporate executives engage in top-secret talks, with one company or group of investors making a bid for another business. After some negotiating, the companies engaged in the merger or acquisition announce a deal has been struck. But other takeovers are more hostile in nature. Not every company wants to be taken over*[2]."

Historically, the dynamics of judicial adjudication in the United States have favored managers by making it relatively difficult for shareholders to influence the rule. Indeed, in several important takeover decisions, Delaware courts have rejected the perspective of shareholders' choice, emphasizing instead that the company is managed by or under the control of its directors.

The poison pill – or shareholder rights plan – is used to massively dilute a hostile bidder's stake if the bidder acquires more than a certain percentage of the target shares, usually between 10 and 15 percent. In addition, there is a variant of the pure poison pill that focuses on the financial aspect: The Net Operating Loss Pill (NOL). An NOL poison pill is adopted to protect a corporation's long-term shareholder value by preserving the corporation's ability to use its NOLs. NOL practice is relevant, as Williams adopted a 5 percent threshold for its "regular" Poison Pills Plan.

Poison pills, after a prolonged lethargy, resurfaced in early 2020 due to the extraordinary crisis brought about by the pandemic. While the pandemic was not technically a "black swan," the devastating effects of Covid-19 were like one on the sudden depression of stock values often not justified, notwithstanding the severity of the crisis, by the fundamentals. The financial markets have since absorbed the shock

[1] *See* Anna Poorna, *Takeover,* Clear Tax (May 18, 2022), available at https://cleartax.in/g/terms/takeover.

[2] *See* Tuugi Chuluun, *Do poison pills work? A finance expert explains the anti-takeover tool that Twitter hopes will keep Elon Musk at bay*, The Conversation (Apr. 18, 2022), available at https://theconversation.com/do-poison-pills-work-a-finance-expert-explains-the-anti-takeover-tool-that-twitter-hopes-will-keep-elon-musk-at-bay-181447.

also due to the positive effects of the vaccine that has led companies in all industries to resume an almost "normal" sate of the affairs.

To fully understand the relevance and impact of "poison pills," it is important to understand the extent of assets – i.e., liquidity – that flow into the market and are readily available when conditions become attractive. Such circumstances shape the behavior of management and the board, as will be seen in the Williams case, whose defensive action was rejected by Delaware Supreme Court.

The key players who took advantage of the "windows of opportunity" opening in the United States are asset managers, which were significant "gatherers" of the available wealth that was circulating, as they held most shares of US public companies. Among these, there are Private Equity and Hedge Funds. PE is an alternative asset class and consists of capital that is not listed on a public exchange[3]. Despite the crisis, the PE fundraising market remained robust at the onset of the pandemic. Hedge funds, on the other hand, are alternative investments with pooled funds and are aggressively managed using derivatives and leverage, to generate high returns. In 2020, hedge funds generated an average return of 18.9% for their investors[4], the highest average annual return since 2009[5].

Notoriously, takeovers can be "hostile", meaning that the board of directors and the management are not in agreement with such an undertaking. Typically, the board of directors and the management are ousted when the takeover is successful. From a shareholders' perspective, this practice allows them to tender their shares at a premium vs the pre-takeover evaluation. Many well-known companies such as Papa John's, Netflix, JCPenney and Avis Budget Group have used poison pills to successfully fend off hostile takeovers.

The poison pill saga has three key players: asset managers, proxy advisors, and lastly, the trio of management, the board of directors and the shareholders. The following paragraphs will address each of these in turn.

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[3] *See Private Equity (PE),* Assignment Point (May 2021), available at https://assignmentpoint.com/private-equity-pe/.

[4] In 2021 average hedge fund returns was 13.7%.

[5] *See* Hannah Zang, *Hedge Funds May Be Falling Out of Favor – Again*, Institutional Investor (Mar. 16, 2022), available at https://www.institutionalinvestor.com/article/b1x679cwhwg7rp/Hedge-Funds-May-Be-Falling-Out-of-Favor-Again.

Poison pills, following a prolonged lethargy, re-emerged in early 2020 due to the extraordinary market circumstances brough about by Pandemic. Despite a proliferation, at a corporate level, of resilience plans elaborated through computer-simulated war games, a pandemic, though anticipated in many scenario analyses, was not given robust credibility and a high probability of happening. It, in fact, caught the world by surprise and vastly unprepared. "As a result of the ongoing crisis [caused by the Covid-19], many corporations have found themselves dealing with unprecedented challenges and disruptions. Companies whose operations have stalled, such as airlines and brick-and-mortar retailers, are likely to suffer from cash flow problems, potential defaults, and suppressed revenues. Moreover, intense market volatility means that stock prices may be depressed due to bad news which does not reflect underlying firm fundamentals or the true continuation value of the firm[6]."

While, technically, the pandemic was not a "black swan" – i.e., an unforeseen/ not imagined event that comes as a surprise, has a major effect, and is often inappropriately rationalized after the fact – Covid-19's devasting aftermath was of that caliber. The financial markets have, however, absorbed this shock also leveraging the positive effects of the vaccine that allowed almost all industries to resume to a pre-pandemic status.

As will be seen later, the rights plan adopted by Williams Companies is an outlier, with a 5% threshold, causing the pill to be classified as "highly restrictive". As a result, one of the main proxy advisory firms, ISS (Institutional Shareholder Services) recommended against the election of the company's Chairman at the company's stockholder meeting[7]. The Delaware Court of Chancery noted, "the Williams pill is unprecedented in that it contains a more extreme combination of features than any pill previously evaluated by this court." The court proceeded in evaluating the Williams pill under the two-part test established in *Unocal Corp. v.*

[6] *See* Micheal Wittry & Ofer Eldar, *The Return of Poison Pills: A First Look at "Crisis Pills",* Harvard Law School Forum on Corporate Governance (May 6, 2020), available at https://corpgov.law.harvard.edu/2020/05/06/the-return-of-poison-pills-a-first-look-at-crisis-pills/#:~:text=Although%20historically%20popular%2C%20particularly%20in,had%20an%20active%20positive%20pill.

[7] *See* Andrew L. Bab, Gregory V. Gooding & William D. Regner, *Rethinking Poison Pills, Again*, Debevoise & Plimpton (Apr. 9, 2020), https://www.debevoise.com/insights/publications/2020/04/rethinking-poison-pills-again.

Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). It then invalidated the Williams pill, holding that the defendants failed to show that a reasonable threat existed[8].

This paper will conclude that the terms and conditions of issuing a poison pill were further clarified by the Delaware Supreme Court who confimed the earlier ruling of the Chancery. This sentence provides the opportunity for this defensive instrument to still be considered with a lesser chance of rebuttal if a reasonable threat exists and conditions of exercise are carefully considered. Furthermore, while the short-lived poison pills in the Twitter – Elon Musk case brought worldwide media attention and hence shareholders and funds were particularly engaged, the phenomenon of activism – a way that shareholders can influence a corporation's behavior by exercising their rights as partial owners – has made the poison pill institute less automatic compared to 1980s. The frequency and transparency of today's data available to shareholders is not comparable to the 1980s, making the board of directors and management less insular. It must also be said that not all companies in hostile takeover cases will enjoy the off-the chart level of media attention that Twitter did. This makes, once again, the institution of poison pill still viable in the future and, coherently with Delaware Chancery latest ruling, appealing.

[8] *See* Renee Zaytsev, Anna K. Starl, Thomas M. Ritzert et al, *Pandemic Poison Pill Wave Crashes*, Thompson Hine (March 16, 2021), available at https://www.thompsonhine.com/publications/pandemic-poison-pill-wave-crashes.

I. TAKEOVER STRATEGIES: POISON PILLS

In a Merger and Acquisition transaction, the ownership of companies or other organizations are consolidated with other entities. A merger is a combination of two companies to form a new company, while an acquisition (or takeover) is the purchase of one company by another in which no new company is formed[9]. Takeovers can be friendly or hostile. In hostile takeover attempts, the board of directors almost always has conflicts of interest, as it could be argued that they want to protect their tenure on the board by fending off the outsider's attempt to take a majority shareholding, in which they are likely to be voted off the board. In contrast, shareholders favor hostile takeovers, as they are looking at an immediate profit gain. Therefore, if the board succeeds in fending off the takeover attempt, they are depriving the shareholders of profit. As a result, in response to a wave of hostile takeovers, the infamous defensive tactics of Poison Pills emerged in the 1980s.

A. *Poison Pills*

Poison pills are one of the more powerful instruments a board may use to prevent unwanted stock accumulations. They are technically known as "shareholder right's plans" and take the form of a dividend or stock purchase rights to buy the shares of the company at a significant discount. Overall, the objective of the pill is to enable the management in agreement with the board of directors to veto and to make more costly, borderline with unacceptably expensive, a tender offer. These options are triggered if someone acquires a prespecified percentage of the public traded shares of the target company. If a board has adopted a pill, the only way for a bidder to acquire control of the company is through a proxy fight to replace the board. The justification for pills was that shareholders might be tempted to sell their shares to a bidder for a lower price than the true value of the firm. However, because takeovers usually involve a premium over the market value of the target company, the poison pill gave rise to the concern that boards may adopt it to protect themselves. Even though the first poison pill was

[9] See Ayush Yadav, *Hostile Takeovers and its Defensive Tactics*, SSRN, (Nov. 21, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962538.

invented in 1982, there is still a debate about its effects on shareholders[10]. As explained by Simon Hitzelberger, poison pills in the United States can be passed by the board of directors without consulting the shareholders in several states[11]. This demonstrates the ongoing hypothesis (or mere curiosity) on whether the board of directors is acting in the best interest of the shareholders or if they are simply protecting, they're tenure on the board.

B. *Net Operating Loss poison pills*

Furthermore, there is a variant of the straight poison pill which is focused on the financial aspect: Net Operating Loss Pill, or NOL kind. An NOL poison pill, in the form of a tax benefits preservation plan, is adopted for the purpose of protecting the long-term shareholder value of a corporation by preserving the corporation's ability to use its NOLs. According to the Internal Revenue Code (IRC), a corporation that is subject to an "ownership change" in a three-year period is generally limited in its use of certain tax attributes, including certain NOLs and built-in losses, arising before that ownership change, to offset post-change income[12]. To guard against the inadvertent loss of valuable NOLs caused by an ownership change, the ownership threshold in an NOL poison pill is normally set slightly below 5 percent, such as 4.99 percent[13].

This low percentage threshold is widely accepted as standard practice. NOLs practices are pertinent to this paper and specifically to the section where the Williams case will be illustrated and analyzed. As we shall see, Williams adopted a 5 percent threshold for its "regular' Poison Pills Plan. A questionable extension, per analogy, of NOLs.

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[10] *See* Katherine G. Fowlkes, Poison Pills and Their Effect on Shareholder Return, Tennessee Research and Creative Exchange (May 2019), available at https://trace.tennessee.edu/cgi/viewcontent.cgi?article=3267&context=utk_chanhonoproj.

[11] *See* Simon Hitzelberger, *What effect do poison pills have on shareholder value?*, NOVA School of Business (May 1, 2017), available at https://run.unl.pt/bitstream/10362/26192/1/Hitzelberger_2017.pdf.

[12] *See* I.R.C. § 382.

[13] *See* Eric M. Kogan, Leslie J. Levinson & Anna Jinhua Wang, *An Update on Poison Pills, NOL Poison Pills and the COVID-19 Pandemic*, The National Law Review (Aug. 17, 2020), available at https://www.natlawreview.com/article/update-poison-pills-nol-poison-pills-and-covid-19-pandemic.

C. *Decline in the shareholder's rights plan*

The shareholder's rights plan has been declining over the prior decade due to several factors, some of which are as follows: firstly, because of the relative paucity of hostile deals. Secondly, due to the strong view of many institutional stockholders, supported by proxy voting advisors, that poison pills are generally not in the stockholders' best interests. Moreover, the recognition by boards of directors that companies can achieve much of the benefit of a rights plan by having one "on the shelf," ready for immediate adoption when needed, rather than continuously in place irrespective of any specific threat[14]. The board should take into consideration better practices in their consideration on whether to adopt a stockholder rights plan in the current environment. For example, considering what signal will be perceived by the stockholders by adopting the pill could safeguard them from posing an unintentional threat of an opportunistic action. As a matter of fact, most states, including Delaware, have statutes that limit an acquirer's ability to obtain a larger share of the market without target company board approval[15]. Even though the shareholder rights plan was considered popular, especially during the merger waves of the later 1980s and 1990s, poison pills have fallen out of favor in the last two decades, largely due to the influence of proxy advisors as well as the wave of shareholders' activism whose main goal is bringing change within or for the company[16]. "The reasons for the shareholders' activism may be financial or non-financial. Financial goals include cost-cutting, changes in the corporate or financial structure, or a spin-off or merger. Non-financial goals may be the abandonment of operations in certain markets or the adoption of socially or environmentally friendly policies[17]." ESG (Environmental Social and Governance) practice and its latest evolution of stakeholder capitalism, adopted by both the Geneva based World Economic Forum and the Business Roundtable[18], make the strategy, the governance and social/environment behavior

[14] *See* Andrew L. Bab, Gregory V. Gooding & William D. Regner, *supra* note 7.
[15] *See* Florentina Moisescu, Ana-Maria Golomoz, *Effects of Business Combinations on the Competitive Environment,* Multidisciplinary Journal for Education, Social and Technical Sciences (May 28, 2018), available at https://riunet.upv.es/bitstream/handle/10251/109504/10164-40649-1-PB.pdf?sequence=4&isAllowed=y.
[16] *See* Micheal Wittry & Ofer Eldar, *supra* note 6.
[17] *See* Scott Powel, *Activist Shareholder,* CFI (Jan. 11, 2021), available at https://corporatefinanceinstitute.com/resources/knowledge/finance/activist-shareholder/.
[18] Founded in 1978 in New York, its members are the CEOs of American corporations.

much more transparent and data accessible to shareholders. These in fact have become more active and vigilant in the daily life of a given corporation.

II. THREE KEY PLAYERS OF THE POISON PILL SAGA

To fully appreciate the relevance and implications of poison pills, it is critical to understand the magnitude of the wealth, henceforth, the liquidity that spills into the market and is readily available when the conditions become attractive. Such circumstances shape the behavior of the management and the board of directors as we shall see in the Williams case which was borderline illegitimate. Like all things in a competitive market, there are "windows of opportunity" meaning that they open up as quickly as they close. This is particularly true in the US, the world hub of financial markets and a notoriously risk-prone environment[19].

By the end of 2020, gross personal savings in the United States amounted to approximately US$ 5.83 trillion[20]. In the wake of the massive and prolonged quantitative easing[21] (QE) provided primarily by the two most important world's central banks – the Federal Reserve in the US and the European Central Bank in Europe – this hunger for deals has increased as the world economy crawls through a phase of zero cost of money, meaning that traditional safe harbors, such as governments' bonds, ended up having negative returns. This has unchained the "animal spirits" of capitalism embodied, among others, by Private Equity (PE) and Hedge Funds. Furthermore, in 2020, of the US$ 51.4 trillion of professionally managed assets in the United States, US$ 17.1 trillion, 33% or one in three dollars, were invested in sustainable, ESG, assets[22].

[19] *See* Statista Research Department, *Share of Households Owning Mutual Funds in The US From 1980 To 2019,* Statista LUISS (Nov. 9, 2020), available at https://www.statista.com/statistics/246224/mutualfundsowned-by-americanhouseholds/.
[20] *See* Statista Research Department, *Gross private savings in the U.S. 1960-2020*, Statista (Feb. 21, 2022), available at https://www.statista.com/statistics/246241/gross-private-savings-in-the-united states/.
[21] Quantitative Easing is a monetary policy strategy used by central banks (like the Federal Reserve) whereby a central bank purchases security to reduce interest rates, increase the supply of money and drive more lending to consumers and businesses.
[22] US SIF Foundation, 2020 Trends Reports.

A. *Asset managers: Private Equity and Hedge Fund*

PE and Hedge Funds are sizable "collectors" of this available wealth. PE is an alternative investment class and consists of capital that is not listed on a public exchange. It is composed of funds and investors that directly invest in private companies, eventually leading to IPO (Initial Public Offering) or that engage in buyouts of public companies, resulting, at times, in the delisting of public equity. Despite the crisis, the private equity fundraising market remained robust at the start of 2020 with a total of 3,524 PE funds in the market; 1,679 PE investment vehicles with a North American focus raised over US$ 460 billion in capital commitments in 2019. In 2019, the 50 largest funds raised US$ 320 billion, or 55% of all capital raised, match the amounts raised by the top funds in 2018[23].

Hedge funds, on the other hand, are alternative investments using pooled funds and are aggressively managed to make use of derivatives and leverage, in both domestic and international markets to generate high returns. In a world of "zero" interest rates, hedge funds had an average return for their investors of 12.3% in 2020,

marking the largest average annual return since 2009. The hedge-fund industry's assets under management ballooned 7.7% to a record $3.5 trillion[24]. To put this amount into perspective, it is almost the equivalent of Germany's 2019 Gross Domestic Product (GDP), US$ 3.8 trillion at the official exchange rate[25]. Against this backdrop of unprecedented liquidity, aggressive players, and hunger for high returns, the pandemic staged a perfect storm for active investors: solid, profitable, high-yield companies available at a discount.

[23] *See 2021 Preqin Global Private Equity & Venture Capital Report*, Preqin (Feb. 4, 2021), available at https://www.preqin.com/insights/global-reports/2021-preqin-global-private-equity-and-venture capital report.
[24] *See* Ben Winck, *The Hedge Fund Industry Raked in 12.3% Last Year, Its Largest Annual Return Since 2009, As Markets Bounced Back from Coronavirus Lows*, Markets Insider (Jan. 19, 2021, 3:54 PM), available at https://markets.businessinsider.com/news/funds/hedge-fund-returns-2020-stock bond-marketrebound-largest-decade 2021-1-1029983231.
[25] *See* Central Intelligence Agency, *Economic Overview: Germany* (Apr. 15, 2021), available at https://www.cia.gov/theworld-factbook/countries/germany/#economy.

B. *Proxy Advisors*

Proxy advisory firms play a central role in the dynamics in between management/board of directors and shareholders. They provide investors with research, data, and recommendations on management and shareholder proxy proposals that are voted on at a company's annual meeting [26]. Proxies are agents legally authorized to act on behalf of another party. The proxy may also allow an investor to vote without being physically present at the annual shareholder's meeting. This is done through a proxy card, on which shareholders mark their vote, specifying "how the shares are to be voted or […] simply give the proxy agent discretion to decide how the shares are to be voted[27]." A Proxy Statement is a packet of documents containing information necessary to make informed votes on issues facing the company[28]. Section 303.A.07 of the NYSE's Listed Company Manual, sets out that the audit committee must prepare an annual report on the audit process to be included in the company's annual proxy statement[29]. The two largest proxy advisory firms are Institutional Shareholder Services, Inc. (ISS) and Glass, Lewis & Co., LLC (Glass Lewis)[30]. Proxy advisory firms have emerged to compensate for market failures as far as voting is concerned and the broader system of corporate governance.

Asset managers hold most shares of US public companies—among these we have highlighted hedge funds and PE but there are also mutual funds, exchange-traded funds (ETFs), and independent investment advisers— whose clients give them authority to vote proxies on their behalf. Asset managers have henceforth enormous voting power. Due to the resource costs involved in due diligence and the presence of considerable economies of scale, asset managers tend to hire firms specializing in proxy-voting advice. ISS and Glass Lewis heavily influence a substantial portion of the voting power of millions of individual shareholders, which is managed by thousands of asset managers[31].

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[26] *See* Jayshree P. Upadhyay, *Sebi Issues Disclosure Standards for Proxy Advisory Firms*, Mint (August 3, 2020), available at https://assignmentpoint.com/private-equity-pe/.
[27] *See* Stephen M. Bainbridge, *Corporate Law*, 307 (West Academic, 4th ed. Oct. 30, 2020).
[28] *See* Chester Spatt, *Proxy Advisory Firms, Governance, Failure, and Regulation*, The Harvard Law School Forum on Corporate Governance (Jun. 25, 2019), available at https://corpgov.law.harvard.edu/2019/06/25/proxy-advisory-firms governance-failure-and regulation/.
[29] *See* Stephen M. Bainbridge, *supra* note 27, at 60.
[30] *See* Chester Spatt, *supra* note 28.
[31] *Id.*

C. *The Trio: Management, the Board of Directors, and the Shareholders (And Shareholders' Activism)*

Lastly, the management, the board of directors, and the shareholders are the "on stage' protagonists of the corporate life and, for the scope of this paper, of the poison pills. The role of public company shareholders in voting defines and sculptures the system of corporate governance. Shareholders vote on several important issues that can affect the value of their shares (and hence their money). One must recall one of the six characteristics of a corporation: the separation between ownership and control; meaning that the shareholders "own" the corporation on the one hand, however, on the other hand, "the corporation is managed by or under the direction of a board of directors[32]." "Shareholders have virtually no right to initiate corporate action and […] are entitled to approve or disapprove only a very few board actions[33]." Annual shareholder meetings typically include votes for or against candidates for director positions, questions related to executive compensation plans, and proposals put forth by other shareholders. Special shareholder meetings involve votes on important corporate structure matters, such as a takeover offer, that is especially time sensitive[34]. Few shareholders show up physically to the annual meeting to vote, while the vast majority cast their votes "by proxy" (online, by mail, or by phone). As a result, many aspects of shareholder voting are governed by federal law instead of state law, as federal law "governs the procedures by which shareholders vote and the disclosures to which the shareholders are entitled[35]."

Finally, there is activism of shareholders that can avail themselves of different methods to push the desired changes within or for the company. The most common forms of shareholder activism include: shareholder resolution (a proposal that can be submitted by the shareholders for a vote at the company's annual meeting), proxy fights (a group of shareholders is not happy with the company's management it may persuade other shareholders to use their proxy votes to effect changes in the management), Publicity campaigns (an activist shareholder may use mass media to draw the public's attention to a problem or issue in a corporation), negotiations with

[32] *See*, DGCL § 141 (a).
[33] *See* Stephen M. Bainbridge, *supra* note 27, at 289.
[34] *See* Chester Spatt, *supra* note 28.
[35] *See* Stephen M. Bainbridge, *supra* note 27, at 290.

management (activist shareholders can reach their goals through a simple negotiation with corporate management), litigation (activist shareholders can also initiate legal action against the company's management to reach their goals).

This preamble is necessary to appreciate what has happened in the Williams Inc. case at the onset of the pandemic. It all happened in an 8-10-week period when financial markets precipitously contracted to open the gate to financial behemoths to exploit "windows" of lucrative opportunities.

III. POISON PILLS RESURRECTED BY THE PANDEMIC?

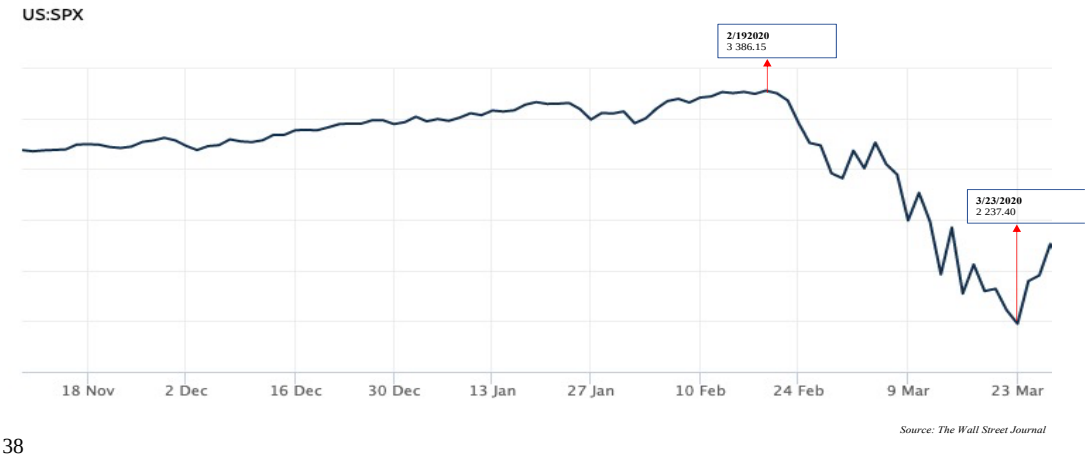
A. *Pandemic and Poison Pills: Implications*

Against this background of unprecedented liquidity, aggressive players, and hunger for hefty returns, the pandemic staged for active investors a perfect storm: solid, profitable, and earnings of generous companies available at a discount.

At the end of 2009, 346 companies in the S&P Composite 1500 index had stockholder rights plans in place[36], at the end of 2019, only 25 companies among S&P 500 had an active poison pill plan[37]. Toward the end of the first 2020 quarter, the pandemic started to hit value-chains across industries as consumers started to be confined at home. Consumptions of all sorts plummeted. Some industries, especially those dealing with final consumers, were more impacted than others. Management and the board of directors felt the pressure.

Figure 1 illustrates the precipitous drop of the S&P 500 index. In a 4-week window it moved from 3,386 (Feb.19, 2020) to 2,237 (Mar. 23, 2020) burning 34% of its value.

Figure 1: S&P 500 Index
SPX
Nov 8 2019 – Jun 26 2020



[38]

[36] *See* Andrew L. Bab, Gregory V. Gooding & William D. Regner, *supra* note 7.
[37] *See* Pierluigi Matera & Ferruccio Maria Sbarbaro, *Le Poison Pill ai tempi del Covid: le scalate Ostili Alle Società quotate statunitensi tra nuove prospettive ed "eterno ritorno dell'uguale"* (Poison Pills in the Time of COVID: A Novel Defense or An Eternal Return in Hostile Takeovers of US Listed Companies), SSRN (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635817.
[38] *See S&P 500 Index (SPX),* The Wall Street Journal, available at https://www.wsj.com/market-data/quotes/index/SPX/advanced-chart.

Between March 3 and June 30, 2020, a total of 73 S&P companies adopted the poison pills. Table 1 hereinafter, lists the ones that adopted the pills during the month of March, the date of the press release, whether each experienced a significant stake increase, and the industry of belonging[39]. By the end of April, 51 companies had a plan. More specifically: 26 companies in March 2020, 25 companies in April 2020, 16 companies in May 2020, and 6 companies in June 2020.

Chesapeake Energy Corp. is an example of how consequential the pandemic has been. Management put a shareholder rights plan in place on April 23, 2020, before filing for Chapter 11 bankruptcy protection later that year. Refiner Delek US Holdings Inc. also took a poison pill, on March 20, 2020, in response to a perceived threat from activist investor Carl Icahn. Among these, Williams Cos. Released to the press its poison pill plan on March 20.

"This fact comes as no surprise. A general relationship between poison pills and times of crisis has already been proven … raiders could exploit a stock price which is not reflecting the actual value of the company. What's more, shareholders might be induced to accept an unfair price. Because of the crisis, they might be experiencing a liquidity shortage and might be keen to accept an unfair bid, selling the shares at a low price[40]."

[39] *See* Ofer Eldar & Michael D. Wittry, *supra* note 6.
[40] *See* Pierluigi Matera & Ferruccio Maria Sbarbaro, *supra* note 37.

Table 1: Companies adopting Poison Pills

#	Company	Date Press Release	Meaningful Stake Increase	Industry
1	LSC Communications Inc.	March 2	No	Commercial printing
2	Aviat Networks Inc	March 3	No	Microwave networking
3	Drive Shack Inc.	March 6	Yes	Golf & leisure
4	Cohen & Company Inc.	March 10	No	Asset management
5	Heat Biologics Inc	March 13	Yes	Biotechnology
6	MMA Capital Holdings	March 13	No	Asset management
7	Occidental Petroleum Corp	March 13	Yes	Oil & gas
8	GCP Applied Technologies	March 13	No	Construction products
9	Ashford Inc	March 16	No	Asset Management
10	Tengasco Inc	March 17	No	Oil & Gas
11	Dave & Buster's Entertainment Inc	March 19	Yes	Restaurant & entertainment
12	Global Eagle Entertainment Inc	March 19	No	Inflight entertainment
13	**The Williams Cos Inc**	**March 20**	**No**	**Oil & gas**
14	Delek U.S. Holdings Inc.	March 20	Yes	Oil & gas
15	The Chefs Warehouse Inc.	March 23	Yes	Specialty foods
16	Aikido Pharma Inc.	March 23	No	Pharmaceutical
17	Evofem Biosciences Inc.	March 25	Yes	Biopharmaceutical
18	Fluor Corp.	March 25	Yes	Engineering & construction
19	Barnes & Noble Education Inc	March 25	No	Book retailer
20	Tempur Sealy International Inc.	March 27	No	Furniture retailer
21	Whiting Petroleum Corp.	March 27	No	Oil & gas
22	Aar Corp.	March 30	No	Aviation & aerospace
23	Spirit Airlines Inc	March 30	No	Commercial airline
24	Viad Corp.	March 30	No	Events & travel
25	Tailored Brands Inc	March 31	Yes	Apparel retailer
26	Six Flags Entertainment Corp.	March 31	Yes	Amusement parks

It must be noted that the majority of the pills adopted in March and April 2020 would expire in less than one year (typically 364 days after adoption) and were triggered by acquisitions in the range of 10-15 percent of the company's equity[41]." The pandemic challenged the traditional and consolidated view –one of skepticism and/or outright disfavor—of poison pills plans by established proxy advisory firms.

"Our current policy is designed to apply a nuanced, contextual assessment of these provisions [poison pills][42]*"* wrote on April 11, 2020, for the *Harvard Law School Forum on Corporate Governance* a top representative of Glass, Lewis & Co. A sophisticated idiomatic English statement to signal an opening to poison pills during an extraordinary time.

[41] *See* Andrew L. Bab, Gregory V. Gooding & William D. Regner, *supra* note 7.
[42] *See* Aaron Bertinetti, *Poison Pills and Coronavirus: Understanding Glass Lewis' Contextual Policy Approach,* The Harvard Law School Forum on Corporate Governance (Apr. 11, 2020), available at https://corpgov.law.harvard.edu/2020/04/11/poison-pills-and-coronavirus-understanding-glass-lewiscontextual-policy approach.

"The financial outlook changes daily, with an unprecedented number of companies impacted by supply chain disruption, suppressed revenues, limited cash flows and sharply depressed stock prices. These dire conditions have prompted many companies to consider the added risk of opportunistic activism[43]*."*

In early 2020 businesses were more fearful of Covid-19 than any past recession due to the uncertainties that the pandemic brought about: duration, spread, depth, and viable solutions (or lack thereof). These market conditions are anathema for businesses and decision-makers. So Covid-19 rehabilitated the poison pills practice.

The extra-ordinary circumstances brough about by the pandemic, pushed, as noted earlier, proxy advisors to review their traditional stance vs poison pills. It was, however, not a sudden conversion but the position evolved as the market conditions created more anxiety.

Glass Lewis went to the extent of siding with the company's directors of the Williams Companies., Inc. In their report published to clients on April 6, 2020, it remarked how its *"approach is demonstrably different to the approach of other proxy advisors*[44]." It, square and center, pointed the finger against its key competitor, ISS, directing the reader via an embedded URL to a Wall Street Journal article whose headline stated: *"Proxy Advisers ISS urges shareholders to withhold votes for Chairman [of Williams] over 'restrictive' poison pills*[45]*."*

For the record and to underline the adrenaline in the aftermath of Williams poison pill plan, ISS, still on *Harvard Law School Forum on Corporate Governance,* stroke back on April 11, 2020: *"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; however, boards should provide detailed disclosure regarding their choice of duration, or on any decisions to delay or avoid putting plans to a shareholder vote beyond that period. The triggers for such plans*

[43] *Id.*
[44] *Id.*
[45] *See* Corrie Driebusch & Rebecca Elliott, *Pipeline Operator Williams Comes Under Fire*, The Wall Street Journal (Apr. 7, 2020, 6:16 PM ET)), available at https://www.wsj.com/articles/pipeline operatorwilliamscomes-under-fire11586286169.

will continue to be closely assessed within the context of the rationale provided and the length of the plan adopted, among other factors[46]*."*

All in all, the pandemic forced the markets – Proxies in particular along with assets managers– to revisit their view and acceptance of the poison pills plans. It fostered them to align, not without contradictions, to changed market conditions cognizant of the controversies of such a defensive instrument. Covid-19 revitalized an intellectual and juridical debate that, it was thought, was buried in the past. The Williams case is quintessential as the Delaware Court, as we shall see, has enhanced, and made more tangible the parameters under which poison pills will be appreciated and analyzed in the future.

[46] *See* Beth Berg, Derek Zaba & Kai Liekefett, *ISS Signals: More Understanding for Poison Pills and Skepticism for Activist Campaigns During the COVID-19 Crisis*, The Harvard Law School Forum on Corporate Governance (Apr. 11,2020), available at https://corpgov.law.harvard.edu/2020/04/11/iss signals-moreunderstanding-for-poison-pills-and skepticism-for-activist-campaigns-during-the-covid 19crisis/.

IV. THE WILLIAMS COS. INC. CASE

A. Challenges and Misinterpretations.

Williams Cos. Inc. is an energy company headquartered in Tulsa, Oklahoma. It is listed on the New York stock exchange (WMB). The Williams Cos., Inc. operates as an energy infrastructure company, which explores, produces, transports, sells, and processes natural gas and petroleum products[47]. The gas pipeline business includes interstate natural gas pipelines and pipeline joint venture investments, and the midstream business provides natural gas gathering, treating, and processing services; NGL production, fractionation, storage, marketing and transportation, and deep-water production handling and crude oil transportation services.

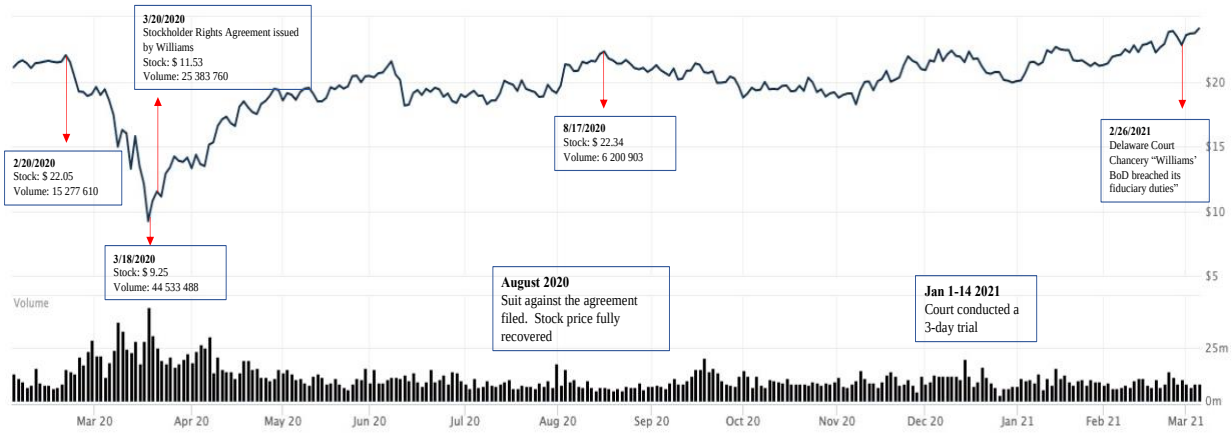
Relevant to the Delaware Court decision, there were approximately 1.2 billion shares of Williams common stock outstanding. Based on the stock's trading price from March 2020 through the time of trial, Williams' market capitalization ranged from approximately US$ 11.22 to US$ 27.54 billion.

Figure 2 illustrates the precipitous loss in value of Williams stock. At the end of 2019 it was trading in the US$ 24 range, on February 20, 2021, it was trading at US$ 22.05. On March 18, two days before Williams announced its poison pills plan, it hit a value of US$ 9.25. About 50% of Williams' outstanding shares are owned by approximately twenty institutional investors. Williams' largest three stockholders

Blackrock, Vanguard, and State Street—collectively hold almost a quarter of the Company's common stock[48].

[47] *See Williams Companies Inc.*, CNN Business, available at https://money.cnn.com/quote/profile/profile.html?symb=WMB.
[48] *In re* the Williams Companies Stockholder Litig., C.A. No. 2020-0707-KSJM, at 5 (Del. Ch. February 26, 2021).

Figure 2: Williams Cos.
WMB (U.S.: NYSE)
Mar 3 2020 – Mar 4 2021 Stock Performance



Source: The Wall Street Journal

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The board perceived this drop in Williams' stock price as a vulnerability, potentially attracting a hostile takeover. The board of directors, at first, considered a stock repurchase program. This approach was shelved when Charles Cogut, an outside independent director, and former M&A New York lawyer, proposed a shareholder rights plan. A poison pill plan, the board concluded, was in the best interest of the company[50]. On March 20, it announced its poison pill plan to the press. The plan would last one year.

Beginning in August 2020, class actions were filed seeking to enjoin the pill. Plaintiffs alleged that the Williams directors breached their fiduciary duties in adopting the pill and sought a permanent injunction requiring the board to withdraw it. The Court conducted a three-day trial in January (12-14), 2021, summoning, among others, the board of directors. Post-trial briefing concluded on February 5, 2021[51].

The Delaware Court of Chancery ruling on February 26, 2021, on Williams' poison pill plan represents a landmark case as far as the interpretation and implementation of poison pills are concerned. The Supreme Court of Delaware confirmed this ruling on November 3, 2021.

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[49] *See Williams Cos*. WMB (U.S.: NYSE), The Wall Street Journal, available at https://www.wsj.com/market-data/quotes/WMB.
[50] *In re* the Williams Companies Stockholder Litig., *supra* note 48, at 8.
[51] *See* Roger Cooper et al., *Delaware Court Enjoins Poison Pill Adopted in Response to COVID-19-Related Market Disruption*, CLEARLY GOTTLIEB (Mar. 2, 2021), *available at* https://www.clearygottlieb.com/news-and-insights/publication-listing/delaware-court-enjoins-poison-pill-adopted-in-response-to-covid (last visited Apr 28, 2021).

While Williams in the past had faced activist investors like Soroban Capital Partners LP and Corvex Management LP, which advocated for a merger with Energy Transfer LP that eventually failed in 2016, the Delaware Court of Chancery saw "no evidence that it was a motivating factor of the board as a whole" for the 2020 proposal[52].

The Delaware Court of Chancery enjoined the plan – the rationales are analyzed later in this paper– and provides an enhanced view of the challenge of balancing the right of the management of a firm to field a strategy to fence-off a threat to be overtaken at a discount price by an active investor with the duty of preserving the level playing field of competition which, is esteemed, to be a solid bastion in the protection of the shareholders' value. The opportunity to contend with a public listed firm is sacrosanct in the US system. This to avoid providing the management (and the board of directors) with an alibi for not performing and, eventually, damaging the shareholders because of arbitrary or speculative-only behavior. The Delaware Court of Chancery, as we shall see, does live the door open to the possibility of poison pills plans in the future. This ruling provides the players with further and clearer conditions under which such a defensive mechanism might be enacted.

The Williams plan had four major components[53]:

1. **A 5 % ownership trigger.** It would be triggered whenever a potential acquirer owned 5 percent or more of the company's stock or commenced a tender offer that would result in the potential acquirer owning 5 percent (or more) of the common stock. According to the ruling, Morgan Stanley advised Williams' board that "only 2% of all plans identified by Morgan Stanley had a trigger lower than 10%. Even among pills with 5% triggers, the Plan ranked as one of only nine pills to ever utilize a 5% trigger outside the NOL context".[54]
2. **"Beneficial ownership" definition.** An extensive and too wide a definition. It included ownership of securities such as warrants and options, in assessing if an acquiring person was over the 5 percent threshold.
3. **Broad "acting in concert" provision**. The poison pill also included a broad acting-in-concert provision, also known as a *"wolfpack provision"* – an allusion

[52] *In re* the Williams Companies Stockholder Litig., *supra* note 48, at 56.
[53] *See* Roger Cooper et al., *supra* note 51.
[54] *In re* the Williams Companies Stockholder Litig., *supra* note 48, at 21.

to hedge funds trading in parallel strategies to avoid group status under Section 13(d) of the Securities Exchange Act of 1934 – allowing the board to aggregate the holdings of multiple stockholders in determining whether the 5 percent trigger had been met. The plan also included a *"daisy chain"* concept that allowed the board to consider a group of stockholders to be acting in concert with each other even if some of the members of that group were not directly acting in concert with other members of that group. The concept of the "daisy chain" meant that if Party A and Party B separately and independently "act in concert" with Party C, Party A and Party B are considered to be "acting in concert" with another.[55] Another feature was that the AIC clause was asymmetrical; it excluded actions by officers or directors, allowing them to act together without suffering the consequences of the pill[56].

4. **Narrow "passive investor" definition**. It carved out passive investors from the definition of "Acquiring Person" so the holdings of passive investors would not trigger the 5 percent threshold in the Williams plan. Under federal securities laws, a holder of 5 percent or more of a public company's stock is required to report such holder's ownership position (Schedule 13-D) unless the stockholder is considered a passive investor and did not acquire its equity position in the target company for or with the effect of changing or influencing the control of the company in question. Henceforth, many investors that would typically be considered passive investors under federal securities laws would not be considered passive investors for purposes of the Williams plan.

Under Delaware law, board actions are subject to scrutiny under the *business judgment rule*. In the case of a dispute over a Delaware company's adoption of a poison pill, however, the decision of the board to adopt such a plan will be subject to the heightened standard of review set forth in the Delaware Supreme Court's 1985 decision *Unocal Corp*. v. *Mesa Petroleum*[57].

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[55] *See* Lori Marks-Esterman, Steve Wolosky & Andrew Freedman, *Delaware Chancery Court Invalidates "Anti-Activist" Poison Pill* (Mar. 16, 2021), available at https://corpgov.law.harvard.edu/2021/03/16/delaware-chancery-court-invalidates-anti-activist-poison-pill/.

[56] *Id.*

[57] *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, (Del. 1985) (discussing takeover defenses).

***Unocal Corp*. v. *Mesa Petroleum Co*. (Del. 1985)**

> *Landmark decision by Delaware Supreme Court on corporate defensive tactics against take-over bids. Until the Unocal decision, the Delaware courts had applied the business judgment rule, when appropriate, to takeover defenses, mergers, and sales.*
> *In this case, the Court held that a board of directors may only try to prevent a take-over where it can be shown that there was a threat to corporate policy and the defensive measure adopted was proportional and reasonable given the nature of the threat.*
> *This requirement has become known as the Unocal test for a board of directors.*

Under the *Unocal* standard, the board of directors has the burden to establish the following, to substantiate the use of a stockholder rights plan:

1. In adopting a stockholder rights plan, the board had reasonable grounds for concluding that a threat to the corporate enterprise existed.
2. Any defensive measures taken were reasonable in relation to the threat posed[58].

The Delaware courts also seemingly recognized that their power of review easily could become the power to decide[59]. To avoid that result, they are exercising appropriate caution in applying the *Unocal* standard[60].

In addition, the second condition of the *Unocal* rule calls for proportionality of the action vs the potential threat. But most importantly the board had to have "evidence" of activities, intentions, declarations, plans in scope hostile to the company.

More specifically, on the first *Unocal* derived test, the Delaware Court considered and analyzed three possible threats by the defendant directors during their testimony[61]:

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[58] *See* Lori Marks-Esterman, Steve Wolosky & Andrew Freedman, *supra* note 55.
[59] See Stephen M. Bainbridge, *Were Easterbrook and Fischel Right That Target Company Boards Should Remain Passive in The Face of a Hostile Takeover Bid?*, ProfessorBainbridge (September 9, 2020), available at https://www.professorbainbridge.com/professorbainbridgecom/executive-compensation/.
[60] *See* Stephen M. Bainbridge, *supra* note 27, at 478.
[61] *See* Ethan Klingsberg, Paul Tiger, and Elizabeth Bieber, *Poison Pills After Williams: Not Only for When Lightning Strikes*, Harvard Law School Forum on Corporate Governance (Mar. 21, 2021), available at https://corpgov.law.harvard.edu/2021/03/21/poison-pills-after-williams-not-only-for-when-lightning-strikes/.

1. The general threat of stockholder activism.
2. The threat of an activist pursuing a short-term agenda and causing a disruption in the company.
3. The ability of a stockholder to quickly accumulate large amounts of Williams stock undetected (a so-called "lightning-strike attack").

The first two threats, according to the Court, were non-existent because the board was not aware of any ongoing activist activity at the company. The Court found that what drove the directors to block these "threats" was a desire to insulate the board from risks of stockholder pressure and proxy contests. This positioning and mindset emerged abundantly clear during Delaware Court's January 2021 hearings of Williams' board of directors[62].

In terms of threat by shareholder activism, it is worthwhile to observe Figure 2's bottom stacked bars, highlighting the volumes traded at and around March 2020. With the exception of a physiological spike in trade on March 18, 2002 – over 44 million stocks traded when the stock hit its lowest, incidentally during that day the stock's value went even lower– there was, in fact, no anomaly in the volumes' trend that might have induced the board of directors to suggest that unwelcomed activities were in the making to overtake the company.

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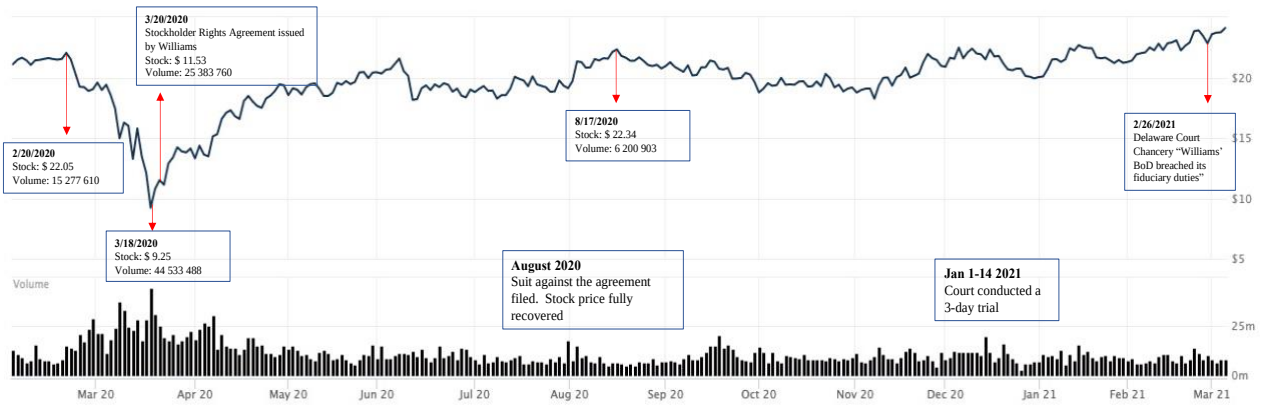
Figure 2: Williams Cos.
WMB (U.S.: NYSE)
Mar 3 2020 – Mar 4 2021 Stock Performance



Source: The Wall Street Journal

[62] *In re* the Williams Companies Stockholder Litig., *supra* note 48, at 74.
[63] *See* Williams Cos. WMB (U.S.: NYSE), *supra* note 49.

As for the third justification, the Court assumed, without deciding, that using the plan to detect threats before they would be noticed via the federal disclosure system was legitimate. The Court acknowledged that various commentators had recommended that boards consider adopting pills to avoid "lightning strike attacks" where, for example, stockholders acquire large stakes in the 10-day period between the triggering of a Schedule 13D filing obligation and the date such report is due. Essentially exploiting a loophole/delay gap in time between the facts and the reporting. The Court, however, expressed concern that recognizing such an interest would provide "a readymade basis for adopting a pill" to all, or at least many, Delaware corporations subject to the federal disclosure regime[64].

The court also found that the Williams plan failed to meet the second part of the *Unocal* test. The plan was not proportionate in response to the threat posed. In reaching this conclusion, the court noted that the Williams plan's 5 percent trigger was substantially lower than triggers for most other poison pills, that its definition of beneficial ownership was overly broad, and that its definition of passive investor was atypically narrow.

To sum up, what follows were the showstoppers of Williams poison pills plan: the "off-market" 5 percent trigger, the expansive definition of "beneficial ownership" that captured synthetic interests, the broad definition of "acting in concert" that included parallel conduct in the absence of an agreement or understanding, as well as a daisy-chain concept, the narrow definition of "passive investor" that potentially excluded categories of holders not commonly considered to be activists.

"The thirty-thousand-foot view looks bad for defendant [65]*,"* Delaware's ruling noted.

Furthermore, as the Williams board itself predicted, market and shareholders' reaction to the plan was negative. Management was forced to engage in a stockholder outreach campaign to preserve the seat of the company's chairman who had voted in favor of the plan, but even with that campaign, approximately one-third of the shares were voted against his reelection at the company's annual meeting.

This landmark ruling by the Delaware Court of Chancery gave birth to some misinterpretations about outright hostility vs the adoption of a poison pill. This

[64] *In re* the Williams Companies Stockholder Litig., *supra* note 48, at 77.
[65] *Id.* at 78.

appears, as also remarked earlier, not to be the case. Although the Court struck down the pill in this specific Williams' case for the reasons illustrated previously, that should not prevent the board of directors from considering the adoption of a pill in a situation where they are facing an identifiable threat, whether from a potential takeover or activist shareholder, and tailoring the terms of such a pill to the threat posed. The Court criticized Williams' board for acting on hypothetical threats, rather than cognizable threats.

The impression that the adoption of a pill on a "clear day" – when no hostile actor is on the scene – is to be avoided is, in fact, mistaken. The documents analyzed and the opinion of competent actors suggest this be an erroneous takeaway. Indeed, experts believe it is preferable to adopt a pill on a clear day because such a cut and clear circumstance may minimize the risk that the directors' motives will be characterized as entrenchment[66]. In other words, a plan designed and approved by the board of directors in "a clear day" represents a good management practice of acting in response to a "what if scenarios" analysis.

The Williams' board's weak spot was, among others, the 5% threshold which is too low to justify the logical link to the prevention of a third party from acquiring control without paying a premium. Furthermore the 5% was not an industry benchmark/standard (10% to 15% would be the norm) nor a practice widely adopted as highlighted by Morgan Stanley. It appears from the outside that the board of directors was ill-prepared (or not at all) in the poison pills understanding, best practices, and potential implications.

During the January 12-14, 2021 hearing it is worth noticing the testimony of Charles Cogut, the independent director at Williams who suggested the poison pill plan in alternative to the stock repurchase program. His *"testimony was the most unadorned and refreshingly candid. He testified that he proposed the Plan to insulate the Board and management from all forms of stockholder activism during the uncertainty of the pandemic*[67]*."*

Cogut's own words describe best the mood and the scope of Williams board: *"The Rights Plan was a "novel concept" that used "the technology of shareholder*

[66] *See* Ethan Klingsberg, Paul Tiger, and Elizabeth Bieber, *supra* note 61.
[67] *In re* the Williams Companies Stockholder Litig., *supra* note 48, at 57.

rights plans to provide insulation [for] management during the uncertainty created by the pandemic[68]*."*

Relevant to the "do's and don'ts" manual in cases like this one, Cogut went as far as using the nuclear bomb parallel: "*The Plan's power was immense, ... shareholder rights plan is the nuclear weapon of corporate governance, and 'nuclear weapons are deterrents' that would force activists to deal with the Board instead of talking to each other*[69]*."* Poison pills, however, remain a legitimate and, upon a careful analysis and considerations of the circumstances at hand, advisable defense strategy provided that the plan characteristics adhere to what has been illustrated so far in this paper.

B. Not "To chill the shareholder franchise": Delaware Supreme Court November 3, 2021, ruling on Williams Cos poison pill

On November 3, 2021, the Delaware Supreme Court ended the Williams Cos. poison pill case. The state court, in fact, upheld a ruling that The Williams Cos Inc's board didn't act in the oil pipeline company's best interest, and that of its shareholders, when it adopted an "extreme" poison pill. This was an "en banc" session in which the case was heard before all the judges of Delaware Supreme court, before the entire bench. During session the judges ruled based on the reasons assigned by the Court of Chancery in its Memorandum Opinion dated February 26, 2021, its Implementing Order dated March 4, 2021, and its Final Order and Judgment dated April 23, 2021[70]. Gregory Varallo of Bernstein Litowitz Berger & Grossmann, who has co-advised the Williams shareholders who sued over the plan, said the case reaffirms that boards can't use poison pills "to chill the shareholder franchise[71]." Justice was indeed provided to the shareholder who sued the company and board in September 2020, alleging that the plan's "insidious" features "denuded the corporate franchise" and shut down investors' ability to influence the company[72].

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[68] *Id.*
[69] *Id.*
[70] *In re* the Williams Companies Stockholder Litig., C.A. No. 2020-0707-KSJM, (Del. Ch. February 26, 2021).
[71] *See* Sierra Jackson, *Del. Supreme Court affirms ruling on Williams Cos Poison Pill,* Reuters (Nov. 4, 2021), available at https://www.reuters.com/legal/transactional/del-supreme-court-affirms-ruling-williams-cos-poison-pill-2021-11-04/.
[72] *Id.*

It must be noted that on appeal, Williams affirmed that the lower court failed to show that the plan had chilled stockholder activity. Furthermore, the company said the court did not "adequately consider the once-in-a-lifetime storm facing Williams at the time of the Plan's adoption[73]." The bottom line of this case is that the board of The Williams Companies failed to demonstrate that its adoption of a so-called "poison pill" was a reasonable response to a specific stockholder activist threat.

This paper has hence demonstrated that while Williams' specific poison pills plan was not coherent and comparable to other benchmark poison pills issued during the extraordinary same period, i.e., the crisis unleashed by the pandemic, the poison pills remain a defensive instrument for companies and the Williams ruling has provided a further honing of the terms and conditions under which a board of directors can issue such a plan. This paper has also demonstrated, more details are illustrated in Twitter-Elon Musk chapter that follows, that while shareholder's activism has eroded some of the gravitas and primacy of the poison pills instrument thanks, among other factors, to today's transparency, the amount of quality data and news swiftly available to shareholders and funds, the ruling of the Delaware Court of Chancery has left the door open to poison pills whereby the ruling was specifically focused to reject Williams Co. and not the poison pills instrument.

[73] *Id.*

V. SHAREHOLDERS'ACTIVISM AND POISON PILLS: ELON MUSK AND TWITTER CASE

In mid-April 2022, the Tesla electric automobile founder and Chief Executive Officer, Elon Musk, offered US$54.20 a share in cash to buy Twitter, a social media platform. This step came days after he took a 9 per cent stake in the company, becoming its largest shareholder but rejecting an invitation to join its board. Musk filed its offer to the US Security and Exchange Commission on April 14, 2022, and announced it via a Twitter "I made an offer[74]," attaching the Schedule 13D/A to the tweet. The Twitter board of directors perceived this offer as hostile. It launched a poison pill takeover defense to fend off this $43bn hostile bid from the billionaire. Following this action in an official communication the company stated that its board of directors adopted this resolution unanimously.

Given the notoriety of the proponent, Elon Musk, and the global pool of Twitter users, 290 million, this transaction conquered headline news.

This poison pill would have lasted, in the board plan, one year to allow all shareholders to appreciate the full value of their investments in Twitter. Musk's offer was in competition with the one by the private equity group Thomas Bravo. Both rivals had the same strategy of bringing Twitter private in the belief that Twitter needed to be delisted, henceforth owned by a private, to turn it around and realize its full potential revenue and media wise. Musk stated that he would "unlock" the company's potential to be "the platform for free speech around the globe[75]."

Under the plan enacted by Twitter, existing shareholders would have been able to buy shares at a discount if anyone acquires more that 15 per cent without board approval. This would dilute an unwelcome bidder. In other words, "under the poison pill adopted by Twitters' board last week […] [Twitter management] can flood the market with new stocks by allowing investors to buy share at 50 per cent discount if Musk – or any other new investor – builds a stake in the company exceeding 15 per

[74] *See* Elon Musk (@ElonMusk), Twitter (Apr. 14, 2022, 1:23 PM), available at https://twitter.com/elonmusk/status/1514564966564651008.
[75] *See* Elon Musk (@elonmusk), Twitter (Apr. 26, 2022, 9:33 PM), available at https://twitter.com/elonmusk/status/ 1519036983137509376.

cent[76]." To a certain extent this poison pill worked. Morgan Stanley, in fact, had lined up US$ 25.5 billion in debt for the Twitter deal under the condition that the shareholder rights plan (i.e., the poison pill) would be withdrawn. The bank by applying this conditionality was calling for a truce and, hence, the board approval. To achieve this status Musk had to negotiate or to find other means to pressure Twitter's board. "He can't actually buy the shares until all the conditions are satisfied. But if enough shareholders tender, that can create enough shareholders pressure on the board to do a deal with Musk" said an M&A lawyer[77].

On April 25, 2022, in fact due to shareholders' and funds' activism, Twitter's board accepted billionaire Elon Musk's offer to buy the social media company and take it private. The announcement ended a weekslong saga Musk kicked off when he offered to buy the company at $54.20 per share, his "best and final."

We believe that the Twitter case – whether the deal will go through or not – provides an interesting perspective in assessing the positioning and the future appeal and applicability of the poison pill instrument vs shareholders and funds' activism.

As illustrated earlier, the Delaware Court of Chancery ruling cannot be interpreted and as defunction of the poison. The Court has further clarified the conditions and the perimeter when such an action is legitimate and defendable. It has its virtue when it does not hamper shareholders' right and/or the management does not appear in conflict of interest to preserve its job and that of the board of directors.

It is also true, however, that the 1980s' did not have the plethora of digital platforms enabled by internet. This abundance and readiness of quality data and news, including the possibility of leaking information, has provided shareholders and funds with a lot more power to intervene directly making their instances heard and not waiting for management and the board of directors to be the only dominus. The Twitter case provides evidence.

[76] *See* Nikou Asgari, *Persuasion and Pressure: how Elon Musk could detoxify Twitter's Poison Pill*, Financial Times (April 23, 2022), available at https://www.ft.com/content/dcbadc5b-b4cc-4720-bb19-431a95ce7625.
[77] *Id.*

CONCLUSION

A. Possible best practices in designing a Poison Pill in the future

The Delaware Supreme Court final ruling should not be construed as jeopardizing the ability of boards of directors to deploy poison pills in response to legally cognizable threats. The Williams pill, as illustrated in this paper was too "abundant", stretching far and wide to the level that it, *de facto* and *de jure*, suspended, one might argue, market competition. Cogut used the phrase *"one-year moratorium on activism*[78]*."* The poison pill plan rationale was against a decade of Delaware jurisprudence in this sector.

The Twitter hostile takeover case highlights how the poison pill option lost its magic and, to a certain extent, its resolve. The same Twitter case, however, cannot be a one size fits all and taken as a benchmark. While shareholders' and funds' activism are here to stay, the world media attention and glamor of Twitter cannot be considered the norm and hence "the door open" left by the Delaware Court of Chancery remains a viable option for a poison pill. It must be underlined that the extraordinary market conditions caused by the pandemic, made the poison pills, once again, a sought-after defensive instrument that had its hey-days during the 80s. Today as the market has absorbed the shock, this instrument might be less appealing due to stakeholders' activism which consists, as illustrated in this paper, in different and more immediate actions vs management and the board of directors.

Against the background illustrated so far and leveraging the latest ruling by the Delaware Court of Chancery, several lessons could be learned from the Williams' case that might constitute recommendable if not, best practices in dealing with a poison pill plan in the future: Culture matters.

The cognition and the understanding of the responsibilities that a board member bears in managing and protecting shareholders' value are of paramount importance and should not be discounted. These values should be spelled out, practiced and the record should be kept and made visible to shareholders and, depending on the nature of the business, to stakeholders as well. This might be particularly applicable and more relevant to the Twitter case where, one might argue, a lot more fundamental than

[78] *In re* the Williams Companies Stockholder Litig., *supra* note 48, at 57.

shareholders' value is at stake. In fact, one of the key questions around the Twitter case is if Elon Musk is "too big to regulate[79]."

The Delaware Chancery was called upon, both in the Williams case as well as in the possible Twitter deal, to strike a balance in protecting shareholders' value and the right of management to defend itself. It is indeed difficult when greed, as remarked in the paper, is one of the driving forces. Musk's case is pertinent to the supremacy of the law in intervening among contrasting forces and possibly the hubris that comes with wealth and power. Musk is not new in challenging the system and testing financial market regulations when he candidly tweets market-moving news; as in 2018 when he was considering taking Tesla private and "funded secured". This Tweet pushed the SEC (Security and Exchange Commission) to prosecute Musk leading to settlement in which he paid a fine and stood down as Tesla chairman for three years. Therefore, culture does matter, and it is critical how the different players – the companies, the proxy, the investors, and the judicial system—work and behave to shape it.

The board of directors' induction sessions – typically provided to board members to understand and to appreciate the business and its evolutions – should rehearse periodically, at least once a year, corporate governance. In case of extraordinary circumstances, such as the Pandemic, induction sessions with external and independent professionals become a must.

The Williams case underscores the importance of regular sessions with the board to educate directors about acceptable and unacceptable rationales for the adoption of pills. These sessions are best held when the board is not currently contemplating the actual adoption of a pill.

Directors should not only appear "independent" but truly be, in order to be a guarantee for all shareholders and be a constructive challenge to management. Additionally, it might be advisable to rotate board members more frequently. There is an unquestionable value of having long term board members. The tenure brings along a better understanding of the business, its prospects and hence it contributes to protect and eventually increase shareholder value. The flip side, however, is that over

[79] *See* Richard Waters and Stefania Palma, *Is Elon Musk too big to regulate?*, Financial Times (May 16, 2022), available at https://www.ft.com/content/48549850-891a-4079-b7c0-29b537cb5a9.

time a board members might lose his/her independence and "freshness" in judgment and hence diminishing or harming the role of the board as check mechanism on management. Hence, it represents a governance issue if the board becomes too much aligned and complacent with management. Furthermore, a practice of rotating more frequently board members might contribute to have members reaction less sanguine or "to preserve the specie" attitude as they would know that there is term coming up. Concerning these governance practices, the Delaware Court of Chancery stated in its final 90-page document: *"The Director Defendants are nearly all independent, outside directors. They considered the Plan over the course of two meetings. Although aspects of the record create the impression that the second Board meeting was window dressing, it is clear that there was genuine deliberation concerning the Plan. Defendants were advised by outside legal and financial advisors who were available to answer questions. Certainly, aspects of the process were less than perfect*[80]*."*

More specific to the poison pills, there are several considerations that would make this practice sounder and "bullet proof." A solid and educated legal ground should underpin pills with a trigger greater than 10% and other litigation-tested terms that are adopted in response to a specific threat and supported by a robust record. As the Delaware Court of Chancery's decision recalls, the record is extremely important. In Williams, the court found the record was unclear as to what the board viewed as the actual or emerging threat at the time the rights plan was adopted[81]. This consideration recalls and strengthen the need to rehearse the value and the objective of governance and to have external advisors for induction sessions on this very topic. A board deliberation must be clear, well documented, and easily understandable. It should not, in any shape or form, invite anyone, even less so a judiciary institution, to second guess the true motivations. In the Williams' case, it has fostered skepticism as to whether the Williams board adopted the rights plan in response to a cognizable threat or as a mere pretext to isolate the company for legitimate market dynamics. For these reasons, a board considering adopting a pill must ensure that there is an adequate record reflecting its deliberations, the threats it is trying to address, and the specific features of the pill.

[80] *In re* the Williams Companies Stockholder Litig., *supra* note 48, at 63.
[81] *See* Roger Cooper et al., *supra* note 51.

The courts of Delaware have made clear that the decision of the board to adopt a stockholder rights plan on a "clear day" – i.e., in the absence of any specific threat– is protected so long as the board reasonably perceives a threat from the possibility of hostile actions[82]. The board must also be equipped with ongoing scenarios' analysis to appreciate possible consequences of hostile macro-economic conditions. As the world crawls out of the Pandemic it is entering a war-time scenario: slow economic growth, inflation and, possibly, the end of a seamless globalization as experienced in the past 30 years. This phase will be less holistic. The impact on supply value chains will be significant as these will need to be redesigned. These are challenges and represent an ideal setting for speculative deals. The understating of potential threats over time, furthermore, will provide the board with more balance and serenity when, in fact, a threat might materialize. This practice will allow the board to react rationally even if management might be a state of panic.

Decisions to adopt a pill in response to a specific threat, or whether to redeem a pill, will be reviewed based on the specific threat posed according to the parameters – today even clearer vs the pre-Williams case – illustrated in this paper. Indeed, to design a poison pills plan during "a clear day' is advisable and appropriate.

Anticipating Proxy Adviser Response is also important. In considering poison pills, boards should take note of the historical skepticism – though somehow diminished as we have seen – of Institutional Shareholder Services, Glass Lewis, and other proxy advisory firms toward defensive measures generally, and rights plans, that have not been approved by a company's shareholders. ISS noted in the April release that the pandemic "is likely to be considered valid justification in most cases" for short-term pills[83].

While the pandemic will be eventually tamed, the resurrection of poison pills is here to stay. Extraordinary circumstances and a pre and post Russia-Ukraine war scenarios will dispense crises, artificial intelligence will kick in with force and global threats such as cybersecurity will continue to disrupt, once more, the business world. Henceforth the utilization of Poison Pills must be scrutinized, and corporate governance cherished as a defining moment for the protection of shareholders.

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[82] *See* Andrew L. Bab, Gregory V. Gooding & William D. Regner, *supra* note 7.
[83] *See* Beth Berg, Kai Haakon E. Liekefett and Derek Zaba, *supra* note 46.

As with all defensive measures, careful board consideration within the fiduciary framework of Delaware law and thoughtful, clear, proactive communication with shareholders and the investment community will be critical for a company to achieve its objectives and receive positive market and court reaction to its decisions[84].

"*Poison pills are not perfect defenses – they don't provide protection against proxy campaigns – but they have proven effective over time in deterring potential activists and acquirers from acquiring substantial equity stakes without board assent."*[85]

Greed, possibly the flip side of ambition, will endure being deeply intertwined with capitalism itself.

[84] *See* Douglas N. Cogen, David K. Micheals, and Ethan A. Skerry, *Consideration in Adopting Poison Pills in the Covid-19 Environment*, Fenwick (April 13, 2020), available at https://www.fenwick.com/insights/publications/considerations-in-adopting-poison-pills-in-the-covid-19-environment.
[85] *Id.*

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