Takeover Responses and Directors' Responsibilities—An Update

*By Martin Lipton and Andrew R. Brownstein**

Reprinted from THE BUSINESS LAWYER, Vol. 40, No. 4, August 1985, a publication of the Section of Corporation, Banking and Business Law, American Bar Association,

Takeover Responses and Directors' Responsibilities—An Update

*By Martin Lipton and Andrew R. Brownstein**

During the past several years, takeover battles have increased not only in number, but also in scope and intensity. Acquirors have devised new forms of attack that make virtually any corporation a potential target. Targets have employed novel and, to some, radical defensive strategies in response to actual and threatened attacks. Prior to 1981, the billion-dollar hostile tender offer was hard to imagine. Now multibillion-dollar bids can readily be financed. In 1984 there were eighteen transactions with announced price tags in excess of $1 billion, including Texaco's $10 billion acquisition of Getty Oil Company and SOCAL's $13.4 billion takeover of Gulf.[1] Prior to 1981, most bids were any-and-all cash offers by well-financed corporations. Now takeover "entrepreneurs" can launch bust-up takeovers financed by so-called junk bonds[2] or two-tier, front-end loaded offers.[3] In addition, other new forms of takeover activity, such as bust-up proxy fights[4] and greenmail,[5] have become prominent.

Responses to the array of takeover tactics include new defensive maneuvers such as the "Pac-Man" or counter tender offer,[6] charter amendments adopting classified boards, "fair price" and supermajority vote provisions,[7] "white squire" arrangements,[8] the convertible preferred stock dividend plan,[9] the share

*Mr. Lipton and Mr. Brownstein are members of the New York bar and practice law with Wachtell, Lipton, Rosen & Katz in New York City. The authors gratefully acknowledge the assistance of their partners and associates and of Benjamin Rosenberg, Harvard Law School Class of 1985, in preparing this article. Wachtell, Lipton, Rosen & Katz acted as counsel in many of the cases cited in this article.

1. Other transactions included Beatrice's $2.5 billion takeover of Esmark, Kiewit-Murdock's $2.5 billion acquisition of Continental Group, and IBM's $1.3 billion purchase of Rolm. *See Corporate Scorecard*, Am. Law. (Apr. 1985).
2. *See infra* text accompanying note 44.
3. *See infra* text accompanying note 45.
4. *See infra* text accompanying note 51.
5. *See infra* text accompanying note 52.
6. *See infra* text accompanying note 61.
7. *See infra* text accompanying note 53.
8. *See infra* text accompanying note 64.
9. *See infra* text accompanying note 69.

purchase rights plan,[10] and the use of debenture exchange offers[11] and springing warrants.[12]

Amidst this changing environment, regulators, courts, corporate participants, and shareholders are reexamining the takeover process and the rules governing it. This article attempts to give an update on this continuously evolving area of law. Beginning with an overview of basic legal principles in the area, it will proceed to review current takeover methods and new defenses. Finally, new federal and state regulatory responses will also be considered.

BASIC PRINCIPLES

THE BUSINESS JUDGMENT RULE

It has been well established by the case law that, in the takeover context, directors, as fiduciaries of the corporation, are obligated only to exercise their business judgment and to act in what they reasonably believe to be the best interests of the corporation and its shareholders.[13] Takeovers have been in this respect like any other corporate event. Thus, the directors are not obligated to explore each acquisition proposal or to accept every bid that offers shareholders a substantial premium over market price; similarly, defensive tactics have been sanctioned.[14]

Directors are entitled to the protection of the business judgment rule when responding to hostile takeover bids so long as the directors acted in good faith and a rational business purpose can be attributed to their response.[15] Plaintiffs bear the burden of rebutting the presumption of the business judgment rule. To meet the burden, plaintiffs must show that impermissible, selfish motives *predominated* in the directors' decision; merely proving that impermissible desires were among the directors' motivations is insufficient.[16] Application of the business judgment rule has thwarted challenges to several of the recent defensive innovations.[17]

10. *See infra* text accompanying note 77.

11. *See infra* text accompanying note 80.

12. *See infra* text accompanying note 80.

13. This position has been unqualifiedly asserted in three leading federal appellate decisions interpreting Delaware, New York, and general corporate law. *See* Panter v. Marshall Field & Co., 646 F.2d 271, 293–95 (7th Cir.), *cert. denied,* 454 U.S. 1092 (1981); Treadway Cos. v. Care Corp., 638 F.2d 357 (2d Cir. 1981); Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980), *cert. denied,* 450 U.S. 999 (1981). These cases are discussed in detail in Lipton, *Takeover Bids in the Target's Boardroom: An Update After One Year,* 36 Bus. Law. 1017 (1981). *See also* Crouse-Hinds v. InterNorth, Inc., 634 F.2d 690 (2d Cir. 1980).

14. *See* cases cited *supra* note 13.

15. *Id.*

16. *See* Johnson v. Trueblood, 629 F.2d at 292–93; Pogo Producing Co. v. Northwest Indus., Inc., No. 83-2667 (S.D. Tex. May 24, 1983).

17. *See, e.g.,* Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707 (5th Cir. 1984) (use of "springing warrants"); Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir.), *cert. denied,* 104 S. Ct. 550 (1983) (applying the business judgment rule to target's sale of treasury stock and lock-up option on treasury stock); Pogo Producing Co. v. Northwest Indus., Inc., No. 83-2667 (S.D. Tex.

In two significant federal appellate cases decided in 1984, the Fifth and Ninth Circuits, applying Texas and California law, respectively, affirmed the application of the business judgment rule in determining the legality of defensive actions taken by a target's board of directors. In *Gearhart Industries, Inc. v. Smith International, Inc.*,[18] the Fifth Circuit affirmed the lower court's ruling that the business judgment rule protected the Gearhart board's determination, in the face of market accumulation of Gearhart stock by Smith, to sell $100 million principal amount of discount-coupon subordinated debentures with attached "springing warrants" to a small group of institutional investors. The warrants to purchase Gearhart shares were designed to be exercisable by the debentureholders at a lower price in the event of a change of control than if no change of control occurred. In holding that the Gearhart board had acted fairly and had not breached any fiduciary duty, the Fifth Circuit ruled that the district court had properly considered, among other things, Smith's failure to present any evidence that any of the directors had authorized the debenture/warrant

May 24, 1983) (applying business judgment rule to target's self-tender); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623 (D. Md. 1982) (business judgment rule applied to counter tender offer); Whittaker Corp. v. Edgar, 535 F. Supp. 933 (N.D. Ill. 1982) (business asset).

To enjoy the benefits of the business judgment rule, the target management must follow procedures that will demonstrate that its deliberations on the tender offer were conducted in good faith and without bias or self-interest. The importance of procedures allowing for an informed decision is underscored by the Delaware Supreme Court's recent decision in Smith v. Van Gorkom, No. 255 (Del. Jan. 29, 1985). *See* text accompanying note 35. These procedures have been summarized previously in these pages. Lipton, *Takeover Bids in the Target's Boardroom*, 35 Bus. Law. 101, 121-23 (1979). *See also* Lipton, *supra* note 13, at 1026–28.

The business judgment rule will not protect directors who breach fiduciary obligations imposed by other statutes. In Donovan v. Bierwirth, 538 F. Supp. 463 (E.D.N.Y. 1981), *aff'd*, 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982), a case that arose out of Grumman Corporation's successful defense against a hostile tender offer by LTV Corporation, the court found that the trustees of Grumman's pension plan, who included members of Grumman's management, breached their fiduciary duties under ERISA in causing the plan to reject the LTV tender offer and to purchase Grumman stock in the face of the tender offer. The court held that, while ERISA recognizes that fiduciaries may have dual loyalties when acting on behalf of the plan, a "trustee having dual loyalties has 'an *especial obligation* to act fairly on behalf of those concerned with the results of the action taken.' " *Id.* at 469 (emphasis in original; citation omitted). ERISA requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* at 470 (citation omitted). The court held that this "subsumes the duty 'to make an independent inquiry into the merits of a particular investment' decision." *Id.* (citation omitted). The court found that the Grumman trustees' actions were motivated solely by their desire to defeat the LTV bid, that they did not consider their actions from the point of view of the plan beneficiaries, and that, therefore, they "failed to discharge their duty of prudence either diligently or in good faith." *Id.* at 475. The court's opinion highlights the obligations of trustees who are members of target management to proceed carefully in the context of a hostile takeover bid and stresses the lack of attention paid by the Grumman trustees to the investment decision being made. Thus, the opinion should not be read as absolutely prohibiting purchases of target stock by target benefit plans of which target management are the fiduciaries. Plan trustees should, however, be certain that appropriate professional advice is sought and that all their decisions are properly documented.

18. 741 F.2d 707 (5th Cir. 1984).

transactions in order to entrench himself; the fact that six of the seven directors were outside directors and that the directors owned seven percent of Gearhart's stock; and the board's retention of well-respected financial advisors and counsel. The Fifth Circuit noted with approval the district court's observation that "merely because one of Gearhart's reasons for the transaction was to discourage Smith's impending tender offer does not make the transaction inherently illegal."

In *Jewel Companies, Inc. v. Pay Less Drug Stores Northwest, Inc.*,[19] the Ninth Circuit held that a target corporation can be bound by a board-approved merger agreement in the face of a higher competing bid and that a board may thus agree to forego competing offers pending shareholder consideration of the initial proposal. In upholding the validity of a "no-shop" provision, the Ninth Circuit reaffirmed the role of a target board in determining whether, and on what terms, the target should be acquired, and confirmed the application of the business judgment rule to that determination by the board.

The recent case of *Norlin Corp. v. Rooney, Pace Inc.*[20] suggests that courts may in certain circumstances narrow the broad scope of the business judgment rule when a defensive action is too extreme or is clearly designed to entrench management. The board of directors of Norlin responded to purchases of large blocks of Norlin's stock by an unwanted group of investors by issuing new common and voting preferred stock to its wholly owned Panamanian subsidiary and a recently created employee stock ownership plan. As a result of these corporate actions, the Norlin board effectively assured itself voting control over the company. The Second Circuit upheld a preliminary injunction barring voting of the newly issued shares. *Norlin* may be interpreted to stand for the proposition that, at least in the Second Circuit, the actions of a takeover target's board of directors in issuing new shares, which issuance results in the board's effectively assuring its own voting control, will not normally be entitled to the broad protection of the business judgment rule. The court reasoned that "the duty of loyalty requires the board to demonstrate that any actions it does take are fair and reasonable. We conclude that Norlin has failed to make that showing."[21] By superimposing the duty of loyalty onto the business judgment rule, the court may have intended to narrow the latter.[22]

19. 741 F.2d 1555 (9th Cir. 1984).

20. 744 F.2d 255 (2d Cir. 1984).

21. *Id.* at 266.

22. The court also rejected the argument that a temporary lockup of control was needed for the board to gain sufficient time to explore alternatives to the unwanted takeover, which alternatives, the company contended, would ultimately further the interests of the shareholders. The court responded to this contention by stating that "it strains credulity to suggest that the retention of control over corporate affairs played no part in their plans." *Id.* at 265 (footnote omitted). If the court really intended to hold that a temporary lockup of control in order to obtain a better deal could not be justified, the decision in *Norlin* would be contrary to the mainstream of judicial thinking on the issue. *See* cases cited *supra* notes 13, 16, and 17.

Norlin's effect is difficult to predict.[23] Read most broadly, it may mark the beginning of judicial intolerance of the deference given the decisions of target management, particularly when extreme defensive tactics are involved. On the other hand, *Norlin* was an extreme case, and may be narrowly read and limited to its facts. The management's actions were severe, scarcely disguised efforts to retain control. Moreover, they had the effect of undermining the voting rights of

23. Two cases decided in the Delaware Court of Chancery at roughly the same time that *Norlin* was decided by the Second Circuit indicate that the chancery court may also be focusing more carefully on the uses and applications of the business judgment rule. In Thompson v. ENSTAR Corp., No. 7641 (Del. Ch. June 20, 1984, *revised* July 5, 1984, *revised* Aug. 16, 1984), the Delaware Court of Chancery reviewed a voting trust agreement entered into by ENSTAR for the benefit of prospective joint acquirors Allied Corporation and Ultramar PLC. Under the terms of the voting trust agreement, Allied and Ultramar obtained the right for a period of 10 years to vote ENSTAR's interest in a valuable Indonesian oil and gas joint venture that was ENSTAR's principal income-producing asset. The Allied/Ultramar acquisition proposal, by its terms, would have lapsed if not accepted by a specified time and was conditioned upon ENSTAR's first entering into the voting trust agreement with respect to the joint venture. The voting trust agreement was designed to be operative without regard to whether Allied and Ultramar succeeded in acquiring any shares of ENSTAR's common stock. The court held that the acts of ENSTAR's directors in approving the merger and entering into the voting trust agreement were protected by the business judgment rule. The court noted, however, that lockups "often prevent open bidding for assets which, of course, is usually in the best interests of the shareholders." The court stated that "[lockups] also often infringe on the voting rights of shareholders. They therefore must be given careful scrutiny by a court to see if under all the facts and circumstances existing in a particular case they are fair to the shareholders." In upholding the voting trust, the court seems to have been persuaded by ENSTAR's reason for entering into the voting trust agreement—that it was necessary in order to secure the best deal possible for ENSTAR's shareholders—and by the fact that 10 out of the 12 ENSTAR directors were not members of management, which meant that the board vote could not be characterized as an effort by management to entrench itself. By stating that lockups require careful scrutiny, the court did, however, indicate a narrowing of the traditional broad deference afforded to corporate boards under the business judgment rule. The suggestion in *Thompson v. ENSTAR* that shareholders may be entitled to an auction unless the lockup survives "careful scrutiny" is contrary to the holding in the *Payless* case, discussed *supra* at text accompanying note 19, that a board of directors may bind itself with a no-shop clause.

In DMG, Inc. v. Aegis Corp., No. 7619 (Del. Ch. June 29, 1984), Aegis entered into a merger agreement with DMG, a white knight, in response to Minstar's hostile tender offer. In connection with the merger agreement, Aegis granted an option to DMG to acquire a 51% interest in Wellcraft, an Aegis subsidiary, in the event a third party acquired 40% or more of Aegis. The court observed that "[o]ne of Minstar's primary considerations in seeking to gain control of Aegis was a desire to thereby acquire control of the operations of Wellcraft . . . ." Despite the DMG option, Minstar proceeded with the acquisition of control of Aegis in its tender offer. Shortly thereafter, Minstar installed a new Aegis board of directors. The new board instituted a variety of measures, the effect of which was to prevent DMG from exercising control of Wellcraft by means of the option with respect to 51% of the Wellcraft stock granted to DMG by Aegis.

DMG moved for a preliminary injunction to prevent further acts that would thwart DMG's rights under the option. The motion was denied. In support of its motion for a preliminary injunction, DMG attempted to invoke the business judgment rule, contending that the former Aegis directors had used reasonable business judgment in granting the Wellcraft option. The court, without disputing the availability of the business judgment rule as a defense to a potential claim against the former Aegis directors, held that DMG, as a plaintiff, could not use the business judgment rule "for the purpose of establishing a right to a preliminary injunction against internal corporate action."

the public shareholders of the corporation.[24] Regardless of its precise implications, *Norlin* is indicative of a period in which the entire takeover process, both offense and defense, is being reexamined.[25]

Several important Delaware cases decided in the first two months of 1985 have reaffirmed the applicability of the business judgment rule to defensive strategies and have clearly established the right of the directors to reject a premium bid in order to protect shareholders from abusive takeover techniques. In *Moran v. Household International, Inc.*,[26] the Delaware Court of Chancery upheld the decision by Household's board of directors to adopt a Share Purchase Rights Plan. This plan, described in detail later in this article,[27] gave shareholders certain rights to acquire stock that might make a tender offer for Household more costly. The court applied the business judgment rule to evaluate the innovative defense and concluded "that while the Plan indirectly limits alienation of shares and the conduct of proxy contests, those features are sustainable . . . as necessary to protect the corporation and all its constituencies from the coercive nature of certain partial tender offers."[28]

The opinion is especially significant in that it recognized the value and legitimacy of the board of directors taking a central role in determining the company's response to a takeover bid. The court stated:

> Although the Plan may indeed have the effect of limiting a shareholder's ability to consider takeover proposals, shareholders do not possess a contractual right to receive takeover bids. The shareholders' ability to gain premiums through takeover activity is subject to the good faith business judgment of the board of directors in structuring defensive tactics.[29]
> . . . Indeed, the directors who have the responsibility for the governance of the corporation are entitled to formulate a takeover policy, whether it be to meet a specific threat or a general prospective one, even though the policy may not please all its shareholders.[30]

The court also held that the board of directors can take steps to increase its ability to negotiate with a raider or to assure that shareholders do not become subject to abusive takeover practices. The court stated:

24. The Delaware courts, at least, have jealously guarded shareholder voting rights. *See, e.g.*, Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971); Telvest, Inc. v. Olson, No. 5798 (Del. Ch. Mar. 8, 1979).

25. In addition to the legislative proposals discussed in the section entitled "New Regulatory Initiatives" *infra*, the takeover process has recently been the subject of substantial debate. *See, e.g.*, Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 Colum. L. Rev. 1145 (1984); Easterbrook & Jarrell, *Do Targets Gain From Defeating Tender Offers?*, 59 N.Y.U. L. Rev. 277 (1984); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 Colum. L. Rev. 249 (1983).

26. No. 7730 (Del. Ch. Jan. 29, 1985).

27. *See* text accompanying note 77.

28. Moran v. Household Int'l, Inc., slip op. at 54.

29. *Id.* at 20–21.

30. *Id.* at 30.

> A board armed with a Rights Plan of the type now under review will possess a bargaining tool which can be used to extract concessions from an acquiror which it otherwise would not secure, or to deter the acquisition effort entirely. Through its power to redeem the rights before a triggering event occurs the Household Board has assumed a plenary negotiating role. It has also taken upon itself the responsibility for assuring that the rights are not triggered in such a fashion as to inflict harm upon the corporation by rendering it acquisition-proof.[31]

The *Household* decision also reaffirms that directors' actions carry with them a "presumption" that places upon the one attacking the action of the board the burden of demonstrating bad faith. This presumption is particularly strong when a majority of the directors are independent or outside directors receiving no income other than usual directors' fees. Thus, the court stated:

> Despite the nuances which have developed in the decisions applying the business judgment rule in takeover situations, I conclude that the presumption continues to afford protection to directors in pre-planned strategies as well as reactive devices adopted on an *ad hoc* basis and a showing of a "motive to retain control" is not the equivalent of bad faith sufficient to remove the presumption.[32]

Despite the existence of this presumption, when actions taken by the board result in shifting power from the shareholders to the board, the board must present evidence that its actions were motivated not "primarily" by a desire to retain control, but by a reasonable belief that the action was necessary to protect the corporation. Thus, the court stated that the board bore "the burden of going forward on a showing of reasonableness rather than a burden of persuasion."[33]

Along with the focus on the board's power to formulate corporate strategy, there is a concurrent and equally important emphasis on the need for the directors' decision to be fully informed and carefully considered. Thus, the court in *Household* stated that the judgment of the directors must be an "informed" one and indicated that it would examine "the material or advice the board had available to it and whether it had sufficient opportunity to acquire knowledge concerning the problem before acting."[34]

The importance of this requirement of an informed decision has been vividly demonstrated by the recent Delaware Supreme Court case of *Smith v. Van Gorkom*,[35] in which the court found directors personally liable for the difference

31. *Id.* at 56. Two cases decided after *Household* have refused to grant preliminary injunctive relief to plaintiffs challenging the rights plan or variations thereof. In each case the court found that the plaintiff failed to show a probability of success on the merits. *See* Horwitz v. Southwest Forest Indus., Inc., CV-R-84-467-ECR (D. Nev. Mar. 19, 1985); APL Corp. v. Johnson Controls, Inc., No. 85-C-990 (E.D.N.Y. Mar. 25, 1985).

32. *Household*, slip op. at 36.

33. *Id.* at 37.

34. *Id.* at 32.

35. No. 255, slip op. (Del. Jan. 29, 1985).

between the fair market value of their company's shares and the cash price received in the merger. The merger had been approved by shareholders (who received a forty-eight percent premium over the market price), but the court stated that the shareholders were not fully informed of all facts material to their vote. The court, although it held that the "proper standard for determining whether a business judgment . . . was an informed" one was gross negligence,[36] nonetheless found the directors liable. It made no difference that there were no allegations of fraud, bad faith, or self-dealing on the part of the directors, who included heads of major companies.

The court stated that the determination whether the business judgment was an informed one turned on "whether the directors informed themselves 'prior to making a business decision of all material information reasonably available to them.' "[37] In reaching its conclusion, the court referred to the lack of an outside valuation study and the absence of a fairness opinion by independent investment bankers, to the fact that certain members of senior management were not present at the board meeting that initially considered the merger proposal, to the lack of documentation at that board meeting, to the fact that the meeting was called without prior notice of its subject matter, and to the lack of any previous consideration of the sale of the company. The decision thus underscores the critical need for the retention of independent experts and for careful preparation and documentation in connection with handling takeover proposals.

Smith complements the broad discretion granted to the board of directors in *Household*. Clearly, if a board of directors has the power to formulate strategies that will determine the fundamental structure of the corporation's existence, it must act only after the most thorough and reasoned analysis. Indeed, as *Smith* indicates, this responsibility cannot be transferred to the shareholders. The court states that "a director may not abdicate [his] duty by leaving to the shareholders alone the decision to approve or disapprove" proposed corporate action.[38] Also, as in *Household*, the court in *Smith* stated that a board acting within the ambit of the business judgment rule faces no ultimate liability for rejecting a premium takeover bid. Thus, *Smith* reinforces the *Household* principle that a well-informed board of directors, after careful consideration, may legitimately reject and take steps to prevent a takeover proposal that is not in the best interests of all shareholders.[39]

36. *Id.* at 25–26.

37. *Id.* at 23–24.

38. *Id.* at 27.

39. In Edelman v. Phillips Petroleum Co., No. 7899 (Del. Ch. Feb. 12, 1985), the court denied a motion to enjoin a special shareholders' meeting of the Phillips Petroleum Company at which a recapitalization would be voted upon. In reaffirming the basic principles set forth in *Household*, the court held that if a planned takeover defense strategy, whether it was general and prospective or specific and reactive, was not primarily designed for entrenchment, it continued to enjoy the presumption that it was the result of good faith managerial judgment. Also, as in *Household*, although the board would be required to demonstrate a rational purpose for its conduct in the event that actions shifted power from shareholders to management, the plaintiff would nonetheless

SECURITIES REGULATION

In 1981, in *Mobil Corp. v. Marathon Oil Co.*,[40] the Sixth Circuit held that the target's defensive maneuvers—a stock option arranged with a friendly bidder, and an option to sell to the same bidder one of the target's key assets—were instances of manipulation under section 14(e).[41] The decision sparked controversy and debate,[42] but it has been squarely rejected in several more recent federal circuit cases.[43] The prevailing view appears to be that "Congress' concern [in enacting the Williams Act] was more with the procedural provisions of the Act than with the substantive terms of takeover bids,"[44] and therefore that the Williams Act only requires full disclosure and does not limit defensive tactics of a target company.

NEW TAKEOVER TECHNIQUES

JUNK BOND—BUST-UP TAKEOVERS

Aside from the sheer size of the transactions, one of the most significant aspects of takeover activity during 1984 was the proliferation of greenmail and bust-up takeover attempts. Based on experience garnered from leveraged buyouts, bootstrap acquirors can now form a shell acquisition vehicle, which sells so-called junk bonds and other securities specifically designed to finance a takeover. These securities are typically high-yielding, low-credit bonds or

continue to bear the burden of proof. Applying these principles, the court indicated that a target can take any reasonable action to protect shareholders from a two-tier or other abusive takeover raid.

The court in *Edelman* also applied the *Smith* analysis to test the board's evaluation of defensive tactics. In finding that the board's actions satisfied the requirements of *Smith*, the court stated that the presumption of the business judgment rule extended to the element of whether the judgment was an informed one and that, in measuring directors' conduct to determine whether the directors were adequately informed, the applicable standard was one of gross negligence. The opinion emphasizes the importance of full deliberation by the target's board and the advice and opinions of investment bankers and legal counsel.

40. 669 F.2d 366 (6th Cir. 1981).

41. *Id.* at 373–77.

42. *See, e.g.*, Burnelle, *Using the "Lock-up" to Defend Against a Hostile Tender Offer—When Is It Manipulative?*, 11 Sec. Reg. L.J. 76 (Spring 1983); Weiss, *Defensive Responses to Tender Offers and the Williams Act's Prohibition Against Manipulation*, 35 Vand. L. Rev. 1087 (1982); Note, *Target Defensive Tactics as Manipulative Under Section 14(e)*, 84 Colum. L. Rev. 228 (1984); Note, *Tender Offer Defensive Tactics and the Business Judgment Rule*, 58 N.Y.U. L. Rev. 621 (1983).

43. *See* Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2d Cir.), *cert. denied*, 104 S. Ct. 550 (1983) (squarely rejecting *Marathon*); Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1326 (1984) (same); Schreiber v. Burlington N., Inc., 731 F.2d 163 (3d Cir.), *cert. granted*, 105 S. Ct. 81 (1984) (same).

In fact, the Sixth Circuit recently distinguished *Marathon* in refusing to hold that a standstill agreement and an agreement providing a seller of a block of stock with "most favored nation" price protection were "manipulative" within the meaning of § 14(e). Biechele v. Cedar Point, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,829 (6th Cir. Nov. 8, 1984). The *Biechele* court cited language in *Marathon* as to the unusual nature of that case and noting that it involved a situation in which there were in fact two bidders.

44. *Buffalo Forge*, 717 F.2d at 760.

preferred stocks, frequently with variable rate or exchangeability options and with detachable warrants or other equity "kickers." With the cash proceeds of the sale of junk bonds, the acquisition vehicle can then obtain sufficient bank financing to make a cash offer for 100% of the target's stock. Following the takeover, the target is subject to a bust-up sale of assets to retire part of the acquisition financing. Junk bond bust-up takeovers are particularly effective against targets for which there are a limited number of white knights interested in purchasing all of the target's business, but a large number of prospective buyers of individual pieces of the target in the postacquisition bust-up. The ability to finance large takeovers with junk bonds has resulted in a significant change in the nature of takeovers. Many more unsolicited takeover attempts are launched by entrepreneurs seeking to profit through a bust-up of the target. If the takeover effort is unsuccessful, the entrepreneur can often recoup his costs by engaging in greenmail—selling his stock back to the target at a premium.

TWO-TIER, FRONT-END LOADED BIDS

In a two-tier, front-end loaded bid, the bidder makes a first-step cash tender offer for approximately fifty percent of the target's shares and then "squeezes out" the remaining shareholders in a lower-priced "back-end" merger. Because shareholders fear being caught in the second, less lucrative, tier of the squeezeout merger, they are driven into tendering in the first tier. The two-tiered system thus coerces target shareholders into tendering at a high rate.[45] Moreover, notwithstanding rule 14d-8, which requires full proration in partial tender offers,[46] two-tier bids advantage market professionals, who are able to achieve a better proration factor.[47] Like junk bond financing, two-tier bids enable small companies and takeover entrepreneurs to bootstrap finance the acquisition of large companies. Mesa Petroleum, for example, borrowed $500 million to bid $40 per share for half the shares of General American Oil Company, stating that upon getting control it would merge with General American, issuing Mesa equity or subordinated debt (with a value less than $40 per share) for the remaining half of the shares. The banks financing Mesa were assured of two dollars of asset coverage for each dollar loaned to Mesa. Without the two-step technique or junk bond financing, such bids could not be financed.

Although one federal district court has explicitly rejected the argument that a two-tier pricing structure was a manipulative device violative of the antifraud provisions of the federal securities laws,[48] another court has more recently recognized the legitimacy of a target's board of directors' concern in opposing a

45. For a discussion of this coercive effect, see Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 Harv. L. Rev. 297 (1974); Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 Yale L.J. 1354 (1978).

46. Rule 14d-8 under the Securities Exchange Act of 1934 provides that if the bidder tenders for fewer than all the target's shares, and if a greater number of shares than he is willing to buy are tendered, they must be purchased pro rata as nearly as possible, disregarding fractions.

47. *See* Lederman, *Tender Offer Bidding Strategy*, 17 Rev. Sec. Reg. 917 (1983).

48. Radol v. Thomas, 534 F. Supp. 1302 (S.D. Ohio 1982).

partial offer, that the offer would "subject the remaining stockholders to a captive status."[49] Two-tier pricing also raises difficult state law questions of appraisal rights and entire fairness.[50]

PROXY FIGHTS

In the past, proxy fights have generally stretched over several months and have been fraught with litigation and public allegations of mismanagement and fraud. However, recent experience has shown that a proxy fight can on occasion be a rather expeditious method of acquiring control or forcing an extraordinary transaction on a target. Acquirors can "creep up" on targets by buying stakes in the target and then launching a proxy fight to force a deal on the target. This method can be quick and economical: in the spring of 1982, Alan E. Clore, a British investor, engineered a proxy fight that won control of Gulf Resources & Chemical Corporation in only eighteen days at a cost of $1.5 million (in addition to the cost of a fifteen percent block purchased in the market).[51]

The Clore/Gulf Resources contest renewed interest in using proxy contests not only as a means of acquiring control, but also as a means of forcing an extraordinary corporate transaction such as a merger or liquidation. Thus, the 1983 and 1984 proxy seasons witnessed a number of bust-up proxy fights by acquirors who sought to force a deal on the target. Examples include GAF, Canal-Randolph, and Flexivan (election contests); Louisiana Land & Exploration (election contest and royalty trust); Trans World (resolution to liquidate company); Southeast Bank (attempt to defeat increase in authorized stock); Superior Oil (shareholder proposal seeking committee to review acquisition proposals); New Jersey Resources (election contest with insurgents committed to effecting a merger on specified terms); and ENSTAR (election contest with insurgents seeking to control a sale of the company).

GREENMAIL

Technically speaking, greenmail—stock accumulation coupled with threats of takeover attempts or proxy fights in order to force a buyback at a premium—is not a takeover method. The greenmailer's goal is not to acquire but to be bought out at a good price. To this end, the greenmailer uses the threat of a takeover—a threat that is made credible, however, by the availability of junk bond financing and the two-step takeover technique.

Greenmail is particularly effective because even if the greenmailer does not desire to take over the target company for itself, the greenmailer, by holding ten

49. Beebe v. Pacific Realty Trust, No. 83-228-PA (D. Or. Jan. 12, 1984).

50. *See generally* Mirvis, *Two-Tier Pricing: Some Appraisal and "Entire Fairness" Valuation Issues*, 38 Bus. Law. 485 (1983).

51. Lewin, *Waging Corporate War by Proxy*, N.Y. Times, July 4, 1982, § 3, at 1. Mr. Clore had accumulated 15% of Gulf Resources' stock before the vote and succeeded in electing 12 of the 14 directors by rallying other shareholders behind a promise to consider "redeployment of some or all" of the company's assets. *Id.* at 6.

percent or more of the outstanding shares of the target, can sell its shares at a premium to a bidder who does want to take over the target and preempt the ability of the target's board of directors to determine the desirable price, form, and timing of an acquisition transaction. The only practical solution for a company seeking to maximize long-term values for its shareholders is to purchase the accumulated shares. Otherwise the company loses control over its own destiny and runs the risk of being forced into a takeover situation at a time that is disadvantageous to its shareholders. Perhaps recognizing this, courts have generally applied the business judgment rule when scrutinizing corporate repurchases. The repurchases have generally been sustained when the acquisition has been effected for a legitimate business purpose and not for the sole or primary purpose of entrenching management.[52] Although greenmail repurchases have been the subject of much recent controversy, it must be recognized that the credibility of the greenmail threat, and hence the prevalence of greenmail, are directly related to the increasing availability of junk bond takeover financing and the ability to launch two-tier offers. Thus, greenmail is but a symptom of an overall problem.

RECENT DEVELOPMENTS IN TAKEOVER DEFENSE

DEFENSIVE CHARTER AMENDMENTS

Defensive charter amendments are a limited defense because they are not designed to prevent takeovers entirely and they have no impact on an offer to acquire all of the target's shares at the same price. Charter amendments can, however, protect shareholders and enhance the target's stability. Fair price provisions mandate that shareholders receive equivalent consideration at both ends of a two-tier bid. The coercive aspects of two-tier, front-end loaded tender offers are thus avoided. Furthermore, by mandating that the back-end merger be for cash or the same form of consideration as the front-end acquisition, fair price provisions prevent a bidder from bootstrap financing the bid. "Staggered board" provisions establish continuity on the target's board of directors by staggering the directors' terms so that an acquiror who seizes control must wait for some years before being able to effectuate its plans.[53]

52. *See, e.g.*, Heine v. Signal Cos., [1976–1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,898 (S.D.N.Y. Mar. 4, 1977); Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (Del. 1964); Kaplan v. Goldsamt, 380 A.2d 556 (Del. Ch. 1977); Kors v. Carey, 39 Del. Ch. 47, 158 A.2d 136 (1960). In Lewis v. Kurshan, N.Y.L.J., Dec. 1, 1983, at 6, col. 4 (N.Y. Sup. Ct.), the court granted summary judgment in favor of defendants in a case challenging a stock repurchase, stating that "[u]nless the directors have made a profit (other than retention of control) or have committed fraud, there is no basis for an action."

53. A survey of approximately 291 companies that proposed fair price or staggered board charter provisions at annual meetings from December 1982 through June 1984 showed that more than 94% were successful in securing shareholder approval for the proposals. Despite this high approval rate, a recent study by Investor Responsibility Research Center, Inc. indicates that out of 31 institutional stockholders surveyed, most vote against supermajority, fair price, staggered board, blank check preferred stock, and reincorporation proposals. Investor Responsibility Research

International Minerals & Chemical Corporation recently sought shareholder approval for a charter amendment prohibiting the repurchase by the company of stock at a premium from a three percent or greater holder unless the repurchase is approved by a majority vote of the shareholders. An antigreenmail amendment can be combined with charter provisions designed to protect shareholders against two-tier or bust-up bids other than the traditional fair price amendments. For example, an antigreenmail amendment can be proposed in conjunction with charter provisions (a) requiring that a substantial purchase or sale of assets or securities, or any business combination transaction with a holder of five percent or more of the target's stock, be approved by a vote of a majority of the shares owned by disinterested shareholders or by a majority of the disinterested directors and (b) requiring cumulative voting in the event that any single person or group acquires a substantial percentage (35%–40%) of the stock.

"SUPER-VOTING" COMMON STOCK

Dow Jones & Company and Coastal Corporation each received shareholder approval in 1984 for a new class of "super-voting" common stock that would be distributed to current holders of common stock. The new stock has disproportionately high voting rights and lower dividends than the common stock and is nontransferable except that it can be converted into common stock at any time. The anti-takeover effect of the new class of stock stems from the fact that shareholders other than insiders will have less desire to retain the nontransferable super-voting stock and, therefore, over time will convert their shares of super-voting stock into common stock. As conversions by shareholders other than insiders occur, the percentage of the total voting power held by the insiders will increase.

Super-voting common stock is ineffective unless one or more blocks of stock are held by a family or insiders willing to forego dividends or retain nontransferable shares or both in order to ensure voting control. A large (30%–40%) insider holding may be necessary for this technique to be successful unless, as in the case of Coastal, the company already has charter provisions requiring supermajority votes for major corporate actions. The Dow Jones and Coastal proxy statements indicated that the New York Stock Exchange (NYSE) would most likely delist their common stock because of the NYSE policy against listing one class of common stock if there is another class with greater voting rights. However, under pressure from the proposed issuance by General Motors of a second class of common stock in connection with its acquisition of EDS, the NYSE subsequently announced a review of its policy and advised Dow Jones and Coastal that their common stock would continue to be listed pending the completion of that review. Recently, a subcommittee of the NYSE recommended that a company's securities not be delisted if the company creates classes of

Center, Inc., Corporate Governance Service—Voting Policies of Institutional Investors on Corporate Governance Issues.

common stock with unequal voting rights, provided that (a) the proposal is approved by two-thirds of all holders entitled to vote; (b)(i) if the issuer has a majority of independent directors at the time the proposal is voted upon, a majority of these directors approve the proposal, or (ii) if the independent directors constitute less than half the board, all independent directors approve the proposal; (c) the voting rights of one class outweigh the other by no more than ten-to-one; and (d) the rights of the holders are substantially the same except for voting power.[54] The recommendation must be approved by NYSE directors and the SEC before it becomes final.

DISAGGREGATION DEFENSES—SELF-TENDERS, LARGE-SCALE OPEN MARKET REPURCHASES, AND SALES OF ATTRACTIVE ASSETS

Of the variety of disaggregation defenses, the most important, and the most illustrative of the application of the business judgment rule, are self-tenders and sales of attractive assets. A variant of the self-tender offer defense—large-scale open market repurchases by a target—may present problems not inherent in the self-tender offer method.

Self-Tenders

When faced with a hostile tender offer, a target may self-tender for cash at a price substantially above the bidder's price. This technique has the advantage of affording shareholders the choice of obtaining cash pursuant to the self-tender or remaining shareholders in a company that target management believes will provide higher returns over time. Courts have scrutinized self-tenders under the business judgment rule and have upheld them.[55]

Self-tenders pose two problems, however. First, using a self-tender as a response to an any-and-all cash tender offer runs the risk that target shareholders may be unwilling to risk proration of their shares even at the higher price offered by target; moreover, if target shareholders are unimpressed by management's expectation of the target's future earnings potential, they will be unwilling to stay with the target when faced with the prospect of receiving cash immediately for all their shares from the bidder. Second, large-scale self-tenders are only possible while a target has sufficient unrestricted assets to support large borrowings or the capacity to sell equity securities to friendly purchasers quickly.

Self-tenders have been used several times recently, and the following three case histories are illustrative of the possibilities made available by self-tenders.

In the first case, General American Oil employed a self-tender in response to a tender offer by Mesa Petroleum. Mesa offered $40 per share for 50% of

54. Subcomm. on Shareholder Participation and Qualificative Listing Standards, NYSE, Dual Class Capitalization (Initial Report Jan. 3, 1985).

55. *E.g.*, Pogo Producing Co. v. Northwest Indus., Inc., No. H-83-2667 (S.D. Tex. May 24, 1983) (relying on business judgment rule, the court refused to enjoin the Pogo self-tender).

General American Oil and stated its intention to acquire the other 50% for Mesa securities worth less than $40 per share. General American, being debt-free, arranged a $600,000 loan to finance a self-tender at $50 per share and, after making the self-tender, dropped all but the "white knight" condition to its self-tender—so that if Mesa obtained 50% of General American at $40 per share, General American would purchase a major portion of the balance at $50 per share and thereby provide a cash "second step," giving General American shareholders an average price of $45. Ultimately, Phillips Petroleum Company came in as a white knight at an average price of $45 per share, and the General American self-tender provided convenient financing for Phillips as well as the assurance of success it sought as a condition to making its bid. Thus, the self-tender proved to be a means both of protecting target shareholders against a second step for paper of uncertain (but lower) value than the front-end tender offer and a means of facilitating a white knight transaction. However, it should be noted that a self-tender of this magnitude is possible only in the rare case in which the target has sufficient unrestricted assets to support borrowing to repurchase almost 50% of its stock.

In the second case, Pogo Producing Company launched a self-tender for approximately 26% of its shares for $25 per share in response to a hostile tender offer for the same number of shares at the same price by Northwest Industries, Inc. and SEDCO, Inc. Pogo reserved the right to terminate its offer if the Northwest Industries/SEDCO offer were terminated or expired without the purchase of any shares. When Northwest Industries and SEDCO extended their offer for one week after its scheduled expiration, however, Pogo chose to purchase rather than to play "chicken" until the expiration of the sixty-day statutory lock-up period. Pogo's actions were facilitated by the fact that it had placed a block of convertible preferred stock in friendly hands, thereby substituting most of the equity lost by the self-tender and, because of certain class voting provisions contained in Pogo's charter, establishing a blocking vote against certain change-of-control transactions.

In the third case, Houston Natural Gas Corporation combined a self-tender for approximately 19% of its shares (with the right to increase to approximately 26%) at $69 per share with a counter tender offer in order to defend against the front-end loaded two-tier offer for Houston Natural made by Coastal Corporation pursuant to which Coastal sought to acquire approximately 45% of Houston Natural's shares at $68 per share and then squeeze out the remaining shareholders for unspecified securities having a value of less than $68 per share. Houston Natural's strategy was designed to make it economically unattractive for Coastal to gain control of Houston Natural or, alternatively, in the event that Coastal did obtain control pursuant to its front-end tender offer, to provide Houston Natural's shareholders with at least a partial cash alternative to the lower-valued back-end. The strategy was premised upon the availability of unencumbered assets to secure the financing for the offers. The Houston Natural/Coastal situation was ultimately resolved when Houston Natural repurchased Coastal's 5% block for $60 per share and the parties entered into certain agreements relating to the purchase and transportation of natural gas.

Large-Scale Open Market Repurchases

In April 1984, Carter Hawley Hale Stores used a combination of defensive tactics in response to an unsolicited partial cash tender offer by The Limited for 20.3 million shares of Carter Hawley common stock at $30 per share. Carter Hawley sold one million shares of convertible preferred stock to General Cinema Corporation for $300 million (the shares had 11.11 votes each—equivalent to twenty-two percent of the outstanding vote—and were to be voted in accordance with the Carter Hawley board's recommendation except in certain special circumstances), granted General Cinema a six-month option to buy Carter Hawley's Waldenbooks operation for approximately $285 million, and allocated up to $500 million for the repurchase of up to 15 million (out of approximately 35.7 million then outstanding) shares of Carter Hawley common stock in the open market or in privately negotiated transactions. In a one-hour period on the afternoon of April 16, 1984, Carter Hawley purchased approximately 244,000 shares at an average price of $25.25. On April 17, Carter Hawley purchased 6.5 million shares (approximately eighteen percent of the outstanding stock) within a two-hour period at an average price of $25.88. Carter Hawley continued to purchase its own stock over the next four days. On April 22, 1984, Carter Hawley's board increased the authorization for repurchase to 18.5 million shares. By the close of business on April 24, Carter Hawley had acquired approximately fifty percent (17.9 million shares) of the shares outstanding prior to the commencement of the repurchases.

Immediately following Carter Hawley's announcement of the open market purchase program, The Limited sought to enjoin the purchases. Its motion was denied.[56] The SEC filed suit alleging that Carter Hawley's open market repurchases constituted an illegal tender offer in violation of section 13(e)(1) of the Securities Exchange Act of 1934 (1934 Act) and rule 13e-4. The U.S. District Court for the Central District of California denied the SEC's motion for a preliminary injunction.[57] On May 9, 1984, the Ninth Circuit denied the SEC's motion for an injunction pending appeal, finding that the SEC had not shown a strong likelihood of success on the merits.[58] The SEC is presently pursuing its appeal of the district court's decision.

Sales of Attractive Assets

A target may try to make the bidder go away by selling off those assets that are most attractive to the bidder. For example, in Grand Metropolitan's bid for Liggett Group, it was thought that Grand Met's bid was motivated in large part

56. Carter Hawley Hale Stores, Inc. v. The Limited, Inc., No. CV 84-2200-AWT (C.D. Cal. Apr. 17, 1984).

57. SEC v. Carter Hawley Hale Stores, Inc., 587 F. Supp. 1248 (C.D. Cal. 1984).

58. SEC v. Carter Hawley Hale Stores, Inc., No. 84-5897 (9th Cir. May 9, 1984).

by its desire to acquire Liggett's Austin Nichols subsidiary because of the distribution network Austin Nichols could provide in the United States for Grand Met's products. While the Grand Met offer was pending, Liggett sold Austin Nichols to Pernod Ricard S.A. in an effort to make Liggett less attractive to Grand Met. As it turned out, this tactic was unsuccessful in warding off the Grand Met bid, although Grand Met did raise its price to stop Standard Brand's white knight bid for Liggett. This tactic may be effective if the bidder values some aspect of the target's assets more highly than does the target itself. Courts presented with challenges to this tactic have applied the business judgment rule.[59]

One problem with sales of attractive assets as a defense, and with disaggregation defenses generally, is that they will be possible in many cases only if there has been careful preparation by the company and by its investment bankers and counsel. Arranging for a friendly buyer of a particular asset, for example, and restructuring one's business to accommodate the loss of the asset, are time-consuming, complicated, and costly.[60] In the case of the self-tender defense, the money must be raised quickly, and the assets that are to be mortgaged or sold should be carefully chosen.

PAC-MAN

Pac-Man counter tender offers became an accepted offensive and defensive strategy during 1982. NLT–American General showed the efficacy of the counter tender offer to obtain a higher price. The Cities Service bid for Mesa Petroleum illustrated the benefits of a preemptive strike. The Olympia Brewing counteroffer for Pabst, made at a time when Olympia was forty-nine percent owned by Pabst, was designed both to defeat a competing offer and to effect a planned recapitalization. Heublein's counterpurchase of General Cinema stock caused General Cinema to repurchase its stock in order to concentrate General

59. In G.M. Sub Corp. v. Liggett Group, Inc., No. 6155 (Del. Ch. Apr. 25, 1980), the court rejected Grand Met's motion for a preliminary injunction against the sale and made clear that the business judgment rule applied to takeover responses: "The test, loosely stated, is whether the board is fairly and reasonably exercising its business judgment to protect the corporation and its shareholders against injury likely to befall the corporation should the tender offer prove successful." Slip op. at 3. *See also* Whittaker Corp. v. Edgar, 535 F. Supp. 933, 949 (N.D. Ill. 1982) (upholding target Brunswick Corporation's sale of one of its divisions to defend against an offer by Whittaker, applying the business judgment rule, and finding that "a sale of a substantial asset by a [target] corporation in the face of a hostile tender standing alone is not a violation of section 14(e) [of the Williams Act]"; *see also* Carter Hawley Hale v. The Limited, Inc., CV 84-2200-AWT (C.D. Cal. Apr. 17, 1984) (upholding Carter Hawley Hale's sale of its subsidiary Waldenbooks to General Cinema to deter a hostile bid by The Limited).

60. *Whittaker Corp.*, 535 F. Supp. 933, emphasizes the importance of advance preparation in dealing with a hostile tender offer. In the *Whittaker* case, the sale of the division was pursuant to an agreement by the buyer to tender for Brunswick shares at a price higher than the hostile tender offer and then to exchange those shares for the division. This type of transaction is facilitated if a company in advance identifies a division that would sell for a higher multiple than the company itself, there are separate financials for such a division, and loan agreements are structured so that the sale and stock repurchase can be accomplished without delay or undue penalty.

Cinema's percentage of control, and thereby diverted General Cinema from acquiring more Heublein stock. Martin Marietta's counter tender was the key element in its maintaining independence. Perhaps as a result of the notoriety of the Bendix/Martin Marietta situation, counter tender offers were not prominent in 1983; however, Houston Natural's counter tender for Coastal in February 1984 was critical to its successful defense.

In the only two instances in which courts have ruled on the legitimacy of the counter tender offer defense, they have sustained the defense under the business judgment rule and have also ruled that the Pac-Man defense is not manipulative under section 14(e) of the Williams Act.[61]

The Pac-Man defense has certain liabilities. First, as in the case of the self-tender, it may require a great many unsecured assets or a large amount of free cash. Second, by making a counter tender offer, the target necessarily waives certain defenses, such as antitrust and regulatory claims, and implicitly acquiesces in the desirability of a business combination (although only on its terms). Third, the counter tender offer can give rise to a confusing tangle of fiduciary obligations. The Maryland federal court in *Martin Marietta Corp. v. Bendix Corp.*,[62] in declining to enjoin the Martin Marietta offer even though Bendix had purchased seventy percent of the Martin Marietta stock, cited Martin Marietta's fiduciary duty to its shareholders and the *shareholders* of Bendix—not the management or directors of Bendix. The court also concluded that as the majority shareholder of Martin Marietta, Bendix had a duty to the other Martin Marietta shareholders not to force abandonment of the Martin Marietta offer:

> By refusing to halt its offer, Marietta's board is permitting Bendix' shareholders to freely exercise their own judgment as to whether the Marietta offer is in their own best interests. Indeed, Bendix, as the majority shareholder of Marietta, owes fiduciary duties to Marietta's other shareholders not to force Marietta to abandon a desirable business opportunity. . . . Maryland law prohibits a controlling shareholder from using his control for some ulterior purpose adverse to the interests of the corporation and its stockholders.[63]

61. American Gen. Corp. v. NLT Corp., [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,808 (S.D. Tex. July 1, 1982); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623 (D. Md. 1982).

62. 549 F. Supp. 623 (D. Md. 1982).

63. *Id.* at 634. The situation was further tangled and complicated by proceedings in the state court. The Delaware Court of Chancery held that the bidder, in defending against the counter offer, may take steps designed to insure the success of its offer and the defeat of the target's counter offer. The Delaware Court of Chancery upheld the call by Bendix of a special meeting of shareholders on the statutory minimum 10-day notice for the purpose of adopting shark repellants designed to prevent the removal of the Bendix directors by the written consent of the holder of a majority of the Bendix shares (that is, Martin Marietta, assuming the success of its offer) and to require a supermajority shareholder vote to approve a merger with Martin Marietta. Martin Marietta Corp. v. Bendix Corp., No. 6942 (Del. Ch. Sept. 19, 1982). On appeal, the Delaware Supreme Court expressly reserved on the legality of the proposed amendments and the procedure used by the

"WHITE SQUIRE" ARRANGEMENTS

The issuance by a target company of stock to a "friendly" holder, subject to standstill restrictions, has often been used, either alone or in combination with other actions, as a defense. Such transactions should be upheld if a target properly determines that the takeover is not in the best interests of shareholders or if the issuance is not for the sole or primary purpose of entrenching management.[64] In certain cases, however, courts have not allowed these transactions. In *Consolidated Amusement Co. v. Rugoff*,[65] the court held that management was not entitled to place a block of stock in friendly hands when there was no independent legitimate business purpose for the transaction. The *Rugoff* case presented particularly aggravated circumstances, including agreements structured so that the holder of the block had no financial interest and incurred no downside risk, and the acceptance of inadequate consideration. In the *Norlin* case,[66] the Second Circuit affirmed an injunction on the issuance of shares to a wholly owned subsidiary and to a newly created employee stock ownership plan when the shares issued, together with those already controlled by the board, gave the board control of forty-nine percent of the outstanding shares.

Recent examples of the defensive placement of a block in friendly hands include the Warner Communications/Chris-Craft and the Carter Hawley Hale/General Cinema transactions. In response to a threatened hostile takeover by Rupert Murdoch's News Corporation, Warner Communications issued a 19% equity interest to Chris-Craft Industries in exchange for a 42.3% interest in a Chris-Craft subsidiary. News Corporation sought to enjoin the transaction, but the Delaware Court of Chancery denied the motion.[67] Carter Hawley issued one million shares of convertible preferred stock to General Cinema for $300 million. Each share had 11.11 votes and voted with the common stock so that the convertible preferred stock represented 22% of the total voting power.[68]

CASH OR STOCK ACQUISITIONS

An often effective response to an unsolicited offer is a stock or cash acquisition by the target. Any such acquisition will change the nature of the business and financial picture of the target and may possibly make it less desirable to the

Bendix board of directors in recommending the amendments to shareholders; the court found that the Court of Chancery had not abused its discretion in refusing to enjoin the Bendix shareholder meeting. Martin Marietta Corp. v. Bendix Corp., No. 298 (Del. Sept. 21, 1982).

64. *See, e.g.*, Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 365 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

65. [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,584 (S.D.N.Y. Oct. 6, 1978).

66. *See supra* text accompanying note 20.

67. News Int'l v. Warner Communications Inc., No. 7920 (Del. Ch. Jan. 11, 1984).

68. The New York Stock Exchange restricts the ability of a corporation to issue securities without shareholder approval when the issuance involves a change of control or the acquisition of a business. NYSE Listed Company Manual § 312.00. In addition, the NYSE objects to certain typical provisions of standstill agreements, including rights of first refusal with respect to the newly issued shares, *id.* § 308, and requirements that the holder vote the block in accordance with management's direction, *id.* §§ 308, 313.00(B).

initial bidder. The acquisition might result in the creation of antitrust or other regulatory barriers to the acquisition of the target. Such an acquisition may also have the effect of increasing the size of the target and thereby forcing the acquiror to alter its financing arrangements. Further, in the case of a cash acquisition, the use of the cash or the incurrence of debt by the target may make the target less desirable, especially if the bidder had intended to rely upon the assets of the target to repay its own financing. Further, if the acquisition has resulted in increasing the target's price/earnings ratio, the bidder's balance sheet may no longer be able to withstand the dilution.

A recent example of the successful use of such a defense was the tender offer in December 1984 by Textron for Avco Corporation, following Textron's receipt of a "bear hug" from Chicago Pacific Corporation.

CONVERTIBLE PREFERRED STOCK DIVIDEND PLAN

The convertible preferred stock dividend plan has been used by target companies in the face of stock accumulation by a third party or a tender offer. Issued as a dividend to the target's common shareholders, the convertible preferred stock contains redemption and conversion features designed to assure that shareholders receive a fair price for their shares and to allow those who so desire to continue their equity interest in the target company following the takeover. The Share Purchase Rights Plan[69] affords protections similar to the convertible preferred stock dividend plan and, although it is currently the subject of a litigation,[70] it raises fewer legal issues than the convertible preferred stock dividend plan.[71]

The fair price provisions are built into the redemption formula. If a person or group acquires beneficial ownership of thirty percent of the target's voting power, whether by means of a tender offer or other accumulation, and does not consummate a second-step merger within 120 days, the preferred is thereafter redeemable at the election of the holders, at any time, at a redemption price equal to the highest price paid by the acquiror during the last twelve months in acquiring shares of common or preferred stock.

The adjustment formula for the conversion feature of the preferred contains a flip-over provision designed to protect the holders from being frozen out in a second-step merger following the acquisition of thirty percent of the target's voting power. In the event of a thirty percent stock acquisition followed by a freezeout merger, the preferred becomes exchangeable for substitute preferred of the acquiror. The conversion rights thereby "flip over," with the substitute preferred being convertible into the common stock of the acquiror, having a

69. *See infra* text accompanying note 77.

70. *See infra* text accompanying note 79.

71. See Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred*, 97 Harv. L. Rev. 1964 (1984), for a discussion of the plan which concludes that it is not violative of Delaware law.

market value at the time of conversion equal to not less than the price paid by the acquiror during the last twelve months in acquiring shares of the target.

In *National Education Corp. v. Bell & Howell Co.*,[72] the Delaware Chancellor ruled that a five percent holder of Bell & Howell's common stock had failed to show a likelihood of success on arguments that issuance by Bell & Howell of a convertible preferred stock dividend would violate the Delaware General Corporation Law and Delaware's policy against altering shareholders' voting rights without a shareholder vote, and therefore was not entitled to a preliminary injunction, even though the Chancellor also noted that Bell & Howell had not succeeded in persuading him of the correctness of contrary arguments. This decision was written by the same Chancellor who several years earlier had enjoined issuance of a "piggyback" preferred stock dividend in *Telvest, Inc. v. Olson*.[73] In *Telvest* the court found that the challenged stock was not truly "preferred" since the only preference it had was a supermajority voting right with respect to certain business combinations, and concluded that Telvest's board was impermissibly trying to alter the voting rights of the common stock. The Chancellor noted various factors distinguishing the Bell & Howell situation from *Telvest*. Since the Chancellor's decision was based on preliminary injunction law, it does not represent a resolution of questions about the legality of the convertible preferred stock dividend plan. Although the matter proceeded to trial, it was settled before the court reached a decision when Bell & Howell agreed to repurchase the shares held by National Education.

Lenox Inc. declared a convertible preferred stock dividend in the course of the bid by Brown-Forman Distillers Corporation. After the declaration of the dividend, but prior to its issuance, Brown-Forman sought a temporary restraining order barring Lenox from taking any defensive actions, including issuing the preferred, without giving two days' prior notice to Brown-Forman. The federal district court in New Jersey denied Brown-Forman's motion, concluding that Brown-Forman had not demonstrated a likelihood of success on the merits.[74] The legality of the dividend was ultimately not determined, however, because the parties negotiated a merger and, as a part of the merger negotiation, the dividend was rescinded.

In *Roy M. Huffington v. ENSTAR Corp.*,[75] the Delaware Court of Chancery was presented with a question whether or not the action of ENSTAR's board of directors in postponing its annual meeting for a month was proper. The court held that it was. In an attempt to convince the court of the ENSTAR board's improper motives, the plaintiffs had attacked the earlier convertible preferred stock dividend effected by ENSTAR. The court, in dicta, responded:

> [The ENSTAR] Board could be viewed as having acted contrary to the wishes of its stockholders on at least one occasion. Viewed fairly, however,

72. No. 7278 (Del. Ch. Aug. 25, 1983).
73. No. 5798 (Del. Ch. Mar. 8, 1979).
74. Brown-Forman Distillers Corp. v. Lenox, Inc., No. 83 Civ. 2116 (D.N.J. June 20, 1983).
75. No. 7543, slip op. (Del. Ch. Apr. 19, 1984).

> the "poison pill" amendments, a measure enacted by the Board when "takeover" fever gripped the industry, could be considered legitimate exercises of Board discretion designed to protect the stockholder against a less than arms-length sale.[76]

SHARE PURCHASE RIGHTS PLAN

For companies whose shares are undervalued, the protection against a freeze-out merger provided by the convertible preferred stock dividend plan can be achieved by the declaration of a dividend consisting of rights to purchase common stock.

The rights may be issued with a five- or ten-year term. The exercise price would be set at a price that conservatively approximates management's view of the value of the stock in ten years (approximately 200%-300% of current market).[77] Initially, the rights are not exercisable, separate certificates are not issued, and the rights automatically trade with the target company's common stock. Ten days after someone acquires beneficial ownership of twenty percent or more of the target company's common stock, or makes a tender offer to acquire thirty percent or more of the common stock (even if no purchases actually occur), the rights become exercisable, separate certificates representing the rights are issued, and the rights then trade independently from the common stock. At no time do the rights have any voting power. The rights have a flip-over provision similar in concept to that of the poison pill convertible preferred stock. In the event that the target company is acquired in a merger or other business combination transaction, each right entitles its holder to purchase, at the then-current exercise price of the rights, that number of shares of common stock of the acquiring company that at the time of the transaction would have a market value of two times the exercise price of the rights.[78]

The rights do not compel a substantial holder to effect a second-step transaction and do not provide fair price protection in the event of a second step. The potential dilution to an acquiror may, however, deter a raider from attempting a bootstrap or bust-up bid. However, it is possible to provide that, after there has been a twenty-five percent acquisition, rights not owned by the twenty-five percent shareholder will become exercisable for *company* common stock having a market value of two times the exercise price in the event of certain self-dealing

76. *Id.* at 7.

77. Since the rights are "out of the money," they will not dilute the company's earnings per share and should not have any depressing effect on the market price of the common stock.

78. An example may make this clearer. If the exercise price of the rights were $200 and the market value of the acquiring company's common stock at the time of such transaction were $50 per share, each right would thereafter entitle the holder thereof to receive upon exercise eight shares of the acquiring company's common stock.

Two companies recently announced dividends of warrants or rights similar in concept to the share purchase rights described above. Jerrico distributed common stock purchase warrants with a "fair price"-type provision. Southwest Forest Industries declared a stock purchase rights dividend with an alternative to the flip-over provision that would permit an acquiring corporation to cash out the rights in a merger at a premium price.

transactions involving, or attributable to, the control shareholder. Thus, although an acquiror may acquire a controlling block without effecting a second step, he will be penalized if he uses his control position to treat the target's shareholders unfairly.

If a target has insufficient authorized but unissued common stock, similar rights to purchase preferred stock may be distributed. Crown Zellerbach Corporation, Colgate-Palmolive Company, and Johnson Controls, Inc. recently declared dividends of common stock purchase rights. Household International, Inc. and Owens-Illinois, Inc. declared dividends of preferred stock purchase rights.

As discussed above, the rights to purchase preferred stock distributed by Household International were upheld by the Delaware Court of Chancery in a fifty-six-page opinion issued after a ten-day trial, and two other courts recently denied preliminary injunctive relief in cases challenging share purchase rights plans after finding that plaintiffs had failed to establish a probability of success on the merits.[79]

The *Household* decision has been appealed to the Delaware Supreme Court, and a decision is expected in late 1985.

VARIATIONS ON THE THEME—SPRINGING WARRANTS, FAIR VALUE RIGHTS, AND DEBENTURE EXCHANGE OFFERS

The warrants used by Gearhart in its effort to repel a takeover by Smith International had no flip-over provision but would have a similar dilutive effect in the event of a change of control, due to an adjustment in the exercise price triggered by a change of control. Although the sale of warrants was upheld by the Fifth Circuit,[80] it should be noted that the warrants did not have the benefit of treating all shareholders equally since the warrants were not distributed as a dividend to all shareholders but rather were sold, along with debentures, to a small group of institutions.

A recent variation of the rights plan is the Fair Value Rights Plan adopted in February 1985 by Phillips Petroleum Company. Phillips distributed to its stockholders rights to acquire one-year senior notes of the company in the principal amount of $62 in exchange for one share of common stock. The rights would be exercisable upon the acquisition by a person or group of thirty percent of its stock unless the acquiror promptly commenced an offer at the price of $62 per share in cash. This plan enables the board of directors to assure that the shareholders are not deprived of the right to receive the value of their investment in the company in the face of an inadequate, coercive two-tier bid.

The Phillips rights differ from the Household rights in that they entitle the holder to "put" common stock to the company in exchange for a fixed amount of

79. *See supra* text accompanying notes 26 and 31.

80. Gearhart Indus., Inc. v. Smith Int'l Inc., 741 F.2d 707 (5th Cir. 1984), discussed at text accompanying note 18.

debt rather than to "call" common stock upon payment of a fixed exercise price. The Delaware court in *Edelman v. Phillips Petroleum Co.*[81] was aware of the existence of the rights, although it did not expressly consider their validity.

When a self-tender for about fifty percent of target common is indicated as an appropriate defensive response to a bootstrap two-tier takeover attempt but bank financing of a cash offer is difficult to obtain, a target can accomplish the same purpose through a self-exchange offer of short-term subordinated debentures. The exchange offer can be accomplished quickly and without registration under the Securities Act of 1933. In addition, the debentures can be combined with the flip-over share purchase rights described above or made convertible on the same flip-over basis as the share purchase rights. A recent example of a successful use of this defense is the Phillips Petroleum Company's exchange offer in response to a two-tier bid by Carl Icahn.

NEW REGULATORY INITIATIVES

SEC AND CONGRESSIONAL INITIATIVES

Background

In February 1983 the SEC initiated the tender offer reform process by establishing a Tender Offer Advisory Committee—consisting of representatives of a variety of constituencies, including corporations, shareholders, market professionals, lawyers, and investment bankers—to study changes in takeover practices and to make proposals for changes in the federal regulatory framework. The committee divided on several major issues, including issues relating to the application of state law to defensive measures, such as whether to require advisory votes on certain defensive measures and whether to limit the availability of supermajority charter provisions, but delivered its report to the SEC in July 1983.[82] Some of the committee's recommendations were incorporated into the SEC's proposals, which were delivered to Congress in March 1984.[83] Members of the House and the Senate subsequently initiated efforts to pass stopgap legislation aimed at some of the more notorious "abuses" of the tender offer process, with a view to passing more comprehensive legislation in 1985. These stopgap efforts focused on curbing certain defensive tactics employed by management which have been publicly perceived as damaging for the companies involved in takeover contests and their shareholders, including the payment of greenmail, self-tender offers during the pendency of a third-party tender offer,

81. *See supra* note 39.

82. SEC, Advisory Committee on Tender Offers—Report of Recommendations (July 8, 1983).

83. While agreeing with the advisory committee's proposal that supermajority provisions in corporate charters should require comparable votes for adoption, the SEC was not prepared to concur in recommendations that state anti-takeover statutes be preempted and that certain change-of-control-related policies of corporations require advisory votes. On the other hand, the SEC endorsed legislation limiting the use of defensive self-tenders and issuances of securities, matters that the advisory committee would have left to state law.

the issuance of new shares by a target company during a tender offer, and golden parachutes.

1984 Legislative Proposals

The House Energy and Commerce Committee approved a bill[84] authored by Representative Wirth (D.-Colo.), which, among other things, would limit the payment of greenmail by requiring shareholder approval for purchases above the market price from any person who has held more than three percent of the outstanding stock less than two years, unless the same offer is made to all shareholders; forbid a self-tender offer once a third-party tender offer has been initiated unless the shareholders give their approval; prohibit targets from increasing the number of outstanding voting securities through new issuances of five percent or more during a tender offer, unless the shareholders give their approval; close the "ten-day window" under section 13(d) of the 1934 Act;[85] and increase the minimum tender offer period under the Williams Act from twenty business days to forty calendar days.

The House committee failed to include two controversial measures proposed by Representative Wirth. One measure would have altered the business judgment rule in the tender offer context by requiring management to show that a defensive tactic was prudent for the company and fair to its shareholders. The other measure proposed by Representative Wirth would have prohibited two-tier front-end loaded tender offers by requiring any bidder who tenders for ten percent or more of the target's shares to tender for all of them.

Various proposals containing provisions similar to those in the Wirth bill were introduced in the Senate. Senators D'Amato, Heinz, and Riegle each introduced greenmail bills identical to Representative Wirth's. The Senate Banking Committee approved legislation incorporating Riegle's greenmail provision along with a provision outlawing golden parachutes.[86] Senator Heinz introduced a measure altering the business judgment rule that is very similar to Representative Wirth's,[87] while Senator D'Amato introduced Representative Wirth's bill prohibiting two-tier tender offers.[88]

In addition, Senator D'Amato proposed giving the SEC authority to close the "ten-day window" and to forbid further acquisitions for two days after the section 13(d) filing.[89] D'Amato's legislation would also require stockholder approval for new issuances of stock during a tender offer and forbid self-tender offers during a tender offer.[90] Unlike the Wirth bill, the D'Amato legislation contains a definition of "tender offer": a tender offer that is unconditional with respect to at least ten percent of the target's securities and that is made at a price

84. H.R. 5693, 98th Cong., 2d Sess. (1984).
85. 15 U.S.C. § 78m(d)(1) (1982).
86. S. 2851, 98th Cong., 2d Sess. (1984).
87. S. 2777, 98th Cong., 2d Sess. (1984).
88. S. 2783, 98th Cong., 2d Sess. (1984).
89. S. 2784, 98th Cong., 2d Sess. (1984).
90. *Id.*

at least twenty-five percent greater than the average market price for the securities during the ten days preceding the commencement of the offer.

SEC and Administration Responses to the Wirth Bill

The Wirth bill, which was proposed in large part at the urging of the SEC, was subjected to surprising last-minute SEC opposition. In a letter dated September 7, 1984, the SEC stated its opposition to the Wirth bill. The SEC objected to certain technical aspects of the Wirth bill and to the extension of the tender offer period. Similarly, the initial silence of the Administration with respect to the proposed tender offer reforms was broken in late September by letters from the Office of Management and Budget and the Department of the Treasury, voicing fundamental objections to the House bill. The letters reiterated the Administration's philosophical deference to state law and reluctance to create additional federal regulation in the area of corporate governance. This opposition was a major reason for the inaction on the proposed legislation. The Administration's attitude was reiterated in the 1985 Economic Report of the President, which concluded its discussion relating to corporate control battles by stating that "further Federal regulation of the market for corporate control would be premature, unnecessary and unwise."[91] Although members of both the House and the Senate have indicated that they will continue to press for remedial legislation in the next Congress, the success of that effort may depend upon overcoming the SEC and Administration opposition.

Effect of Proposed Legislation

The legislative changes proposed by the SEC and incorporated into various bills in the House and Senate would on the whole seriously hinder target companies' efforts to resist hostile takeovers. While the legislation pending before Congress includes a noncontroversial provision that would close the ten-day window under section 13(d), it also strikes at several of the target companies' most important defensive weapons. Furthermore, although one proposal, not included in the SEC's original recommendations but subsequently added by the House Committee, would lengthen the minimum period during which a tender offer must remain open to forty days, the lengthened time period would still not be sufficient for management to secure shareholder approval of various defensive moves, as would be required by other provisions of the proposed legislation. Hence, the House bill would appear to give more to bidders than to target companies, despite statements by members of Congress that it is not the intent of Congress to alter the present balance of federal regulation between bidders and management.

91. Council of Economic Advisors, 1985 Economic Report of the President 216 (1985).

Nondeductibility of Interest on Hostile Acquisition Indebtedness

H.R. 1100,[92] introduced in February 1985 by Representative J. Jones (D.-Okla.), would amend the Internal Revenue Code of 1954 to provide that no deduction would be allowed for any interest paid or accrued with respect to any junior obligation issued after February 19, 1985, in connection with a hostile acquisition. A "hostile acquisition" is defined as certain business combinations, reorganizations, distributions, and similar transactions that are not approved by a majority of the independent directors and that involve any person or group that acquired twenty percent of the total combined voting power of all classes of stock of the company entitled to vote or twenty percent of the total fair market value of the shares of all classes of stock of the company (other than nonvoting stock that is limited and preferred as to dividends) during the twelve-month period preceding such transaction. If this bill were enacted, it would curtail junk bond financing used in connection with bust-up takeovers. This bill would also impose an excise tax on "greenmail profits."

NEW STATE TAKEOVER STATUTES

In 1982 the Supreme Court declared Illinois' takeover statute unconstitutional.[93] Since then a number of states have enacted statutes designed to avoid the flaws of the Illinois statute.

Ohio Type

The Ohio statute[94] requires shareholder authorization prior to the consummation of tender offers for, and open market and privately negotiated purchases of, shares above the 20%, 33⅓%, and 50% levels. A quorum of a majority of the shares held by disinterested shareholders and approval of a majority of the shares voted by the disinterested shareholders are required for shareholder authorization. The statute is inapplicable if the articles or bylaws of a corporation so provide. Minnesota[95] and Wisconsin[96] have recently enacted statutes with provisions similar to those of the Ohio statute.

Maryland Type

The Maryland statute[97] imposes supermajority voting requirements for mergers, sales of assets, liquidations, and recapitalizations (but not tender offers) between a Maryland corporation and an interested shareholder unless the transaction meets statutory fair price requirements. If the fair price standards

92. H.R. 1100, 99th Cong., 1st Sess. (1985).
93. Edgar v. MITE Corp., 457 U.S. 624 (1982).
94. Ohio Rev. Code Ann. § 1701.831 (Page Supp. 1984).
95. Minn. Stat. Ann. § 302A.671 (West Supp. 1985).
96. Wis. Stat. Ann. § 180.69 (West Supp. 1984–1985).
97. Md. Corps. & Ass'ns Code Ann. §§ 3-601 to 3-603 (Supp. 1984).

are not met, an 80% vote of the outstanding shares and a 66⅔% vote of the shares held by disinterested shareholders are required. A corporation may elect not to be governed by the statute if it secures approval for a charter amendment to that effect by the same supermajority vote. Statutes with similar provisions have recently been enacted in Connecticut,[98] Kentucky,[99] Michigan,[100] and Wisconsin.[101]

Pennsylvania

The Pennsylvania statute[102] requires persons acquiring thirty percent or more of the voting power of a Pennsylvania corporation to pay the remaining shareholders the "fair value" of their shares. The statute does not apply to corporations that amended their bylaws within ninety days of its enactment or that subsequently amended their articles, in each case to provide explicitly that the statute does not apply. Shareholders owning thirty percent of the voting power when the statute was enacted are grandfathered unless they increase their voting power after the date of the statute. The statute also provides that officers and directors, in discharging their duties, may consider "the effects of any action upon employes, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors"[103] and that certain transactions between a corporation and one or more of its shareholders must be approved by a majority of the votes of the disinterested shareholders. The latter provision does not apply to transactions approved by a majority of the disinterested directors or meeting certain fair price criteria.

PROGNOSIS

Based upon current trends, a year-end update of developments in the takeover area will almost certainly be in order. As is evident from these pages, takeover activity in this country has been the subject of a unique dynamism as bidders and targets each add to their arsenal of weapons by way of tactic and counter-tactic. There is no reason this process of development will not continue; accordingly, the latter half of 1985 will undoubtedly witness new, and perhaps controversial, offensive and defensive takeover techniques. On the legal front, a decision by the Delaware Supreme Court in the *Household* case promises to be a major development. Finally, it can be expected that the economic, legal, and political debate over takeover activity, which became so prominent in 1984, will continue through 1985.

98. 1984 Conn. Acts § 84-431 (Reg. Sess.).
99. Ky. Rev. Stat. Ann. § 271A.397–.399 (Baldwin 1984).
100. Mich. Comp. Laws Ann. § 450.1775–.1784 (1984).
101. Wis. Stat. Ann. § 180.725 (West Supp. 1984–1985).
102. Pa. Stat. Ann. tit. 15, § 1910 (Purdon Supp. 1984–1985).
103. *Id.* § 1408B.