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Table of Contents

I. Thesis Summary……………………………………………………………………........3

II. Introduction………………...…………………………………………………….........4

III. Brief History of Merger Activity…………………………………………….............5

IV. Buy-Side Strategy and Implications………………………………………………….8

  i. Takeover Motives and Tactic Selection……………………………………….....8

  ii. Aggressive Acquirer Tactics……………………………………………..............9

V. Target Defenses……………………………………………………………………...11

  i. Sources of Target Vulnerability…………………………………………………11

  ii. Preventive Target Defenses……….……………………………………………13

    a. Classified Boards……………………………………………...…14

    b. Super Majority……………………………………………………...15

    c. Fair Price…………………………………………………………………15

    d. Dual Class Recapitalization………………………………………...16

    e. Leveraged Recapitalization……………………………………………17

    f. Poison Pills…………………………………………………………………18

    g. Poison Puts………………………………………………………………….20

    h. Parachutes………………………………………………………………..20

    i. Employee Stock Option Plans……………………………………...21

  iii. Active Target Defenses…………………………………….……………………22

    a. Divestments………………………………………………………………22

    b. Share Repurchases………………………………………………….…23

    c. Greenmail Payments…………………………………………...…24

    d. Standstill Agreements……………………………………………………25

    e. Litigation…………………………………………………………………25

    f. Pac-Man Defense………………………………………………………...25

    g. White Knights……………………………………………………………26

    h. White Squires…………………………………………………………….26

VI. Necessity and Effectiveness……………………………...……..…………............................27

i. Theories of Business Obligation…………………………………………………...27
ii. Judicial Endorsements and Restrictions…………………………………..........29
a. Cheff v. Mathes and the Primary Purpose Test…………………………29
b. Moran v. Household and Poison Pill Legitimacy...……………….........30
c. Unocal v. Mesa and the Unocal Test……………......………………...31
d. Revlon v. MacAndrews & Forbes and the Revlon Doctrine…….………33
e. Paramount v. Time and the “Just Say No” Defense.................................34
f. Paramount v. QVC and the Duty to Investigate Alternatives……………35
g. Unitrin v. American General and the Range of Reasonableness……......36
iii. Current Framework for Judicial Review……………………………………...37
VII. Conclusion …………………..........………………………………………………..38
VIII. Reflection………………………………………………………………………….39
IX. Appendix…………………………………………………………………………..42
i. Legal Process for M&A……………………………………………………42
ii. Poison Pill Diagram………………………………………………………..43
X. Bibliography………………………………………………………………………44

SOUTH CAROLINA HONORS COLLEGE
SENIOR THESIS

VULNERABILITY AND RESISTANCE: AN EVALUATION OF HOSTILE TAKEOVER DEFENSES

PROPOSED BY: CARISSA WILSON, INTERNATIONAL BUSINESS & BUSINESS ECONOMICS

I. THESIS SUMMARY

Within the context of mergers and acquisitions ("M&A"), hostile takeovers comprise a complex and pivotal area of study. It is hostile takeovers, rather than friendly ones, that give rise to the need for most buy- and sell-side tactics related to strategic M&A. This paper focuses primarily on sell-side tactics, or "target defenses," used to deflect undesired takeover attempts and prevent changes in corporate control. It will attempt to present a high level, comprehensible, and comprehensive listing of defensive tactics in the target arsenal, with references to related case law.

Target defenses developed preemptively, or before an official takeover offer has been made, are often called "preventive defenses," while those created to combat a current, specified takeover attempt are dubbed "active defenses." Both types of defenses have been debated as regards both their effectiveness and, perhaps more interestingly, their acceptability according to the various constructs of managerial and general business ethics.

These constructs include, firstly, Milton Friedman's views on the business director's exclusive obligation to maximize shareholder welfare in all situations; it can be argued that directors who choose to fight a lucrative buyout offer using target defenses may be unethically depriving shareholders of possible gains to which they are unexceptionally entitled. Next, the business judgment rule describes circumstances in which directors are due certain decision-making license;

in those cases where directors do not qualify for protection under the business judgment rule, they may be held liable in court for injury or perceived injury to the business and its shareholders.

This debate over the acceptability of target defenses has been voiced primarily through courtroom testimony and resulting judicial decisions. Through these decisions, a three-tiered framework has been built to assess the appropriateness of target defenses. Using this framework, the relevant court officials will evaluate (Wong 173):

1. Whether the target board acted in good faith when adopting the defense.
2. Whether the defense is preclusive or subject to heightened levels of judicial scrutiny.
3. Whether the target defense is proportional to the threat posed.

This paper will evaluate the context in which this framework was created. It will provide a timeline of landmark and similarly notable cases through which the framework was developed over time. Finally, it will comment on the development of the concept of judicial review in the field of target defenses in M&A.

II. INTRODUCTION

Mergers and acquisitions are elements of corporate financial and strategic management which involve organizational restructuring through the purchase, sale, combination, or division of companies or institutions. This is done, most typically, to increase market share and competitiveness, to unlock synergies through economies of scale, and to create value for shareholders.

These takeovers come in many forms – public and private, horizontal and vertical, conglomerate and otherwise. From a strategic perspective, the most interesting merger dichotomy is “friendly”

versus "hostile." Friendly takeovers occur when an acquisition is approved by the management of the company being acquired, i.e. the "target" company. Hostile takeovers, in contrast, occur when an acquirer or "bidder" utilizes strong-arm tactics to overrule opposition from target management.

The proposed thesis will evaluate forms of target opposition, known as takeover defenses, from a legal and business perspective. It will do so, most principally, to address the following questions:

1. What factors or qualities of a company, whether intrinsic or extrinsic, contribute to its vulnerability to hostile takeover?
2. What are the takeover defenses that make up the arsenal available to target management and how effective are these defenses at warding off unwanted takeover attempts?
3. How ethically permissible are various target defenses as means to maintain or enhance shareholder value and managerial control?

These questions will be assessed through a survey of the relevant scholarly literature, including an examination of important case law.

III. BRIEF HISTORY OF MERGER ACTIVITY

Since the popularization of M&A in the late 19th century, both the quantity and quality of takeover activity has risen and fallen along peaks and troughs (Lipton 4). Substantial rises in takeover activity are regularly referred to as "merger waves" (Lipton 4)

According to The Oxford Handbook of Mergers and Acquisitions, each major wave is "characterized by a predominance of one type of takeover strategy" or acquisition motive (Faulkner 13). The six generally accepted waves and their predominant strategies are as follows:

First Wave (1893-1904):

The first merger wave was motivated by westward-expanding business and the industrial revolution (Lipton 4). This wave saw the rise of horizontal mergers, those which occur between firms in the same general line of business. Through horizontal mergers, business owners of steel, telephone, oil, mining, and railroad assets began to form highly profitable and expansive empires (Lipton 4). Horizontal mergers were checked to some degree with the enactment of various early antitrust laws in 1904 (Lipton 4).

Second Wave (1919-1929):

The second merger wave was motivated by the emergence of major automobile manufacturers and marked by industry consolidation (Lipton 4). This wave saw the rise of vertical mergers, mergers between firms at different levels of the supply chain in which the buyer extends back toward the source of raw material or forward toward the end consumer (Lipton 4). “For example,” says Lipton, Ford “was integrated from the finished car back through steel mills, railroads and ore boats to the iron and coal mines” (Lipton 4). This wave concluded with the 1929 Crash and the Great Depression (Lipton 4).

Third Wave (1955 to 1969-1973):

With the third merger wave, hostile takeovers and conglomerate mergers, mergers between firms in unrelated lines of business for the purpose of diversification, gained popularity (Lipton 5). Conglomerate stocks later crashed, putting an end to the wave and eliminating most of the anticipated benefits of the diversification sought by companies throughout the era (Lipton 5).

Fourth Wave (1974-1980 to 1989):

This period of M&A, though sometimes thought to have begun in 1980, has its roots as far back as the first major hostile bid (Lipton 5). This bid was made by Morgan Stanley and Inco for ESB in 1974 (Lipton 5). The majority of this period is littered with appearances by rising corporate raiders and coercive buy-side tactics, not checked until the creation of the poison pill in the mid-1980s (Lipton 5). Overall, the fourth wave of M&A activity is noted for the rise of leveraged buyouts, along with numerous insider trading scandals, and ended with the collapse of the junk market (Lipton 5).

Fifth Wave (1993-2000):

The fifth merger wave has been characterized as the era of the mega-deal (Lipton 6). High valuation global strategic mergers substantially increased in prominence due to a new "global view of competition" (Lipton 6). Antitrust restrictions were relatively lax in this period, allowing for major combinations of companies such as Exxon and Mobil, the record-setting $165 billion deal between AOL and Time Warner, and others (Lipton 6). According to Lipton, this wave ended in 2000 with the millennium bubble burst and Enron scandal which "gave rise to the revolution in corporate governance" (Lipton 6).

Sixth Wave (2003-present):

The existence of a sixth wave of merger activity is somewhat debated by M&A practitioners and scholars, many of whom believe the wave of 1993 is still ongoing. Regardless, the last decade of merger activity has been significantly affected by globalization and government influence (Lipton 7).

Today, the “M” in M&A has lost much of its relevance to the term. According to the authors of the Oxford Handbook, “very few of the new relationships are mergers in the sense of a future of equals” (Faulkner 12). Cooperation between corporate leaders to maximize shared resources is rare. Rather, as argued by Michael Jensen, takeovers are “the arena in which alternative management teams compete for the right to manage corporate resources” (Jensen 23).

These so-called management teams represent both acquirers seeking to purchase other companies as well as purchase targets seeking to resist purchase attempts and retain company ownership. This resistance is manifested through strategic target defenses, the primary focus of this paper.

IV. BUY-SIDE STRATEGY AND IMPLICATIONS

i. Takeover Motives and Tactic Selection

Takeover activity is motivated by a wide variety of financial, economic, reputational, and other concerns. To some extent, knowledge of the motives and strategy underlying a takeover launch may be helpful to targets in the selection of effective defenses against the takeover.

In general, acquiring companies are motivated to undergo M&A in pursuit of economies of scale, complementary resources, consolidation and reduction of industry overcapacity, expansion into new or foreign markets, R&D acquisitions, or empire building (Faulkner 2). Economies of scale, the natural goal of frequent horizontal mergers, represent cost savings and efficiency improvements resultant from the sharing of central services and elimination of redundancies.

In the case of specific tactic selection by acquirers and their rationale for choosing to launch a certain kind of bid (hostile or friendly, horizontal or vertical, and so on), two main contexts are influential: strategy and corporate governance (Faulkner 1). As will be discussed in a later section,

the legal jurisdiction in which the intended target company operates also influences what tactics are available to the acquirer to ensure acceptance of a bid in the face of both national and state regulations.

The ultimate goal of M&A, regardless of the various strategic forces at play, is to create value for shareholders. This point is particularly relevant to the debate on the acceptability of takeover defenses. As will also be discussed in a later section, many professionals argue the use of takeover defenses by an acquisition target seeking to prevent a change of power may reduce or even eliminate shareholder value. When officers of a company act in ways which reduce shareholder value, they are typically deemed to be in breach of their fiduciary and other ethical duties.

ii. Aggressive Acquirer Tactics

As previously stated, the main contexts which shape takeover tactic selection by acquirers include underlying strategy, corporate governance, and the legal and practical availability of various tactics. Some acquirer tactics are regarded as coercive in certain states or countries and are therefore illegal. These restrictions serve as the most basic form of defense against unwanted advances by acquirers.

Prominent forms of coercive buy-side tactics include Saturday night specials and two-tier tender offers. Saturday night specials are considered coercive due to the excessive time pressure placed on shareholders to tender during a highly restricted offer period (Faulkner 19). Saturday night specials are prohibited in most jurisdictions (Faulkner 19). In contrast, two-tier tender offers, which pose similar time pressure, are permitted throughout most of the US (Faulkner 20). When a bidder launches a two-tier tender offer, he first offers to purchase a limited number of shares at a certain price during a set period of time (Faulkner 20). He then poses a secondary offer with a

lower price per share and a later expiration date (Faulkner 20). Shareholders are more likely to tender and to tender early due to the fear of missing out on the higher first-tier price (Faulkner 20).

Other semi-controversial buy-side tactics include bear hugs, toeholds, dawn raids, and a variety of other diverse and intricate techniques. In the case of the bear hug tactic, an eager bidder will make a high priced bid, essentially obligating target management to accept based on the magnitude of their “fiduciary responsibility” to shareholders (Gupta 136).

Toeholds represent the bidder’s initial ownership share in the target before a bid is ever officially initiated (Faulkner 16). Despite the many benefits of toeholds, namely the diminished need for acquisition of new shares in order to establish control, only 13% of bidders in the US in the period from 1973-2002 possessed toeholds (Faulkner 16). Toeholds, and the gradual stake building which often accompanies them, are more often seen in strictly hostile takeovers (Faulkner 16).

Though toeholds are ultimately subject to few restrictions, dawn raids, a related tactic, are somewhat more controversial. Dawn raids allow would-be acquirers to create substantial toeholds over a short period of early morning time, as soon as the market opens (Faulkner 17). The primary benefit for acquirers of the dawn raid tactic is that stock is acquired at market price, a price “which does not incorporate the anticipation of a takeover bid” (Faulkner 17).

The most common and straight-forward acquirer tactics include proxy fights and tender offers. These tactics are particularly relevant to our discussion of target defenses since they are most often used in hostile takeovers to circumvent acquisition-averse target management. Proxy fights, or proxy contests, are waged by a “dissenting group” of shareholders who seeks to enhance their own representation on the board through the replacement of non-compliant members (Gupta 136). This tactic is often utilized when target management has opposed a merger despite shareholders’

disapproval (Gupta 136). If would-be acquirers possess a toehold or can otherwise influence shareholder opinion, this tactic can be used to move targets toward a deal.

Tender offers, a simpler form of the more coercive two-tier offer, take place when the acquirer goes over the heads of target management to negotiate directly with shareholders of the target for the tender of their shares (Gupta 136). This is often an acquirer's first step toward hostile dealings after a friendly transaction attempt has failed (Gupta 137).

Regardless of which tactic is selected by the acquirer, its effects will be subject to influence by larger dynamics. Takeover tactics have circumstantial, rather than inherent power and thus, in theory, may be thwarted through manipulation of their broader influencers.

V. TARGET DEFENSES

In many cases, target management is resistant to the prospect of acquisition. This resistance is usually attributed to the historical trend of post-acquisition capacity reduction and the dismissal of target employees to make way for the acquirer's management, operations, and procedures (Faulkner 3). Thus, after an acquisition, especially one of non-equals, target management will likely be out of a job as managers of the acquiring company dismember the target's old business structure to complement their own.

i. Sources of Target Vulnerability

Despite detailed looks at the M&A paper trail of the last several decades, researchers have detected few true patterns to explain why one company is targeted by unsolicited bidders and another is not. Some firms target small businesses for takeover while others target large competitors. Some

firms specialize in acquiring and revamping struggling businesses while others select only thriving enterprises to help bolster their own performance.

That being said, there are a number of factors which are deemed to make a target more attractive to potential acquirers. These include a low q-ratio, a liquid balance sheet, good cash-flow, low profit and EPS ratios, detachable subsidiaries or properties, and small stock holdings under incumbent management (Gupta 135).

For the most part, these qualities are signs of a healthy business. They contribute to target vulnerability because they provide for ease of financing for the acquirer and suggest high value-creating potential of the acquisition (Gupta 135). It is then a paradox of the acquisitions game that healthy business is both a source of vulnerability and the greatest defense against takeover. According to Manju Gupta in his book, *Contemporary Issues in Mergers and Acquisitions*:

> "It is often proposed that the best defense against a takeover is for the firm to be highly efficient, its sales growth favorable, and its profitability margins high. However, the firm could become a takeover target of another firm seeking to benefit from an association with such an efficient firm. In addition, if it has long-range investment plans with pay-offs that are not reflected in its current stock price, the firm might be viewed as undervalued" (Gupta 135).

Because of this paradox, reducing vulnerability is difficult and often profit-reducing. For companies seeking to avoid acquisition, there is often nowhere to hide. Many managers thus feel that takeover potential must be addressed head-on, resulting in the popularization of strategic target defense tactics.

ii. Preventive Target Defenses

Preventive defense tactics are those used to reduce the threat or likelihood of a takeover before one has been launched by either decreasing the attractiveness of acquisition or increasing its difficulty.

As previously discussed, many qualities such as a low q-ratio, a liquid balance sheet, low profit and EPS ratios, and small stock holdings under incumbent management all increase attractiveness to acquirers leading to heightened vulnerability (Gupta 135). However, reversal of these qualities can lead to declines in profit and the overall health of the target business.

More positive preventive defenses include enhancing share prices and safeguarding positive investor relations (Faulkner 22). High share prices ensure high valuations of the target company, often substantially increasing the purchase price and reducing affordability for potential bidders.

Share prices also affect shareholder satisfaction. As will be discussed in a later section, shareholders hold the key to most hostile takeover success stories. Happy and well-compensated shareholder are less likely to be receptive to tender offers and similar hostile buy-side tactics.

Procedural restrictions mark a yet more substantive approach to preempting an acquisitions campaign before it is launched. Since the 1960s, some companies have introduced various clauses to their formative documents to complicate the acquisitions process with red tape, hidden costs, and other deterrents for participants on either side of the feared deal. The most common anti-takeover amendments include: classified boards, super majority, fair price, dual class recapitalization and leveraged recapitalization.

a. Classified Boards

One common approach by would-be acquirers to assure the success of a bid is to acquire representation and thus voting power on the target company's board. Such representation gives a bidder enhanced bargaining power and influence over the target's board and shareholders. To preempt such action on the part of future potential bidders, around 60% of US corporations have implemented a defense tactic called the "classified" or "staggered" board (Zarin 15).

The creation of a classified board requires shareholder approval and is valued for its addition of significant time and financial costs to gaining board membership (Gordon 4). Rather than reelecting all board members annually, companies with classified boards submit a small grouping of board members for reelection each year. "For example," Gupta says, "a nine-member board might divide into three classes, with only three members standing for election to a three-year term each year" (Gupta 138).

Board seats are generally acquired through the purchase of shares; however, in the face of a staggered board structure, even with sufficient funds, a targeting company may only purchase a limited number of seats in a given year. It cannot possibly buy out the entire board at one time. This time delay often results in added expenditures and financing difficulties for the acquiring company, further deterring bidding attempts (Gupta 138).

The classified board defense has been deemed "moderate" in effectiveness by various studies including those performed by Bebchuk, Coates & Subramanian (Zarin 15). In addition to its preemptive merits, the defense is further said to substantially increase a company's likelihood of "remaining independent" in the case that a hostile bid is launched (Gordon 822-823).

However, despite its popularity, this strategy is sometimes questioned due to the negative effect on shareholder profits (usually an 8%-10% reduction in acquisition premium) in the case the defense fails and a sale is achieved (Zarin 15). Overall, no significant decline in stock prices has been seen with the passage of such amendments.

b. Super Majority

Super majority provisions are considered a "mild" takeover defense and require a heightened level of internal approval, usually 80%, for a merger to take place (Ruback 57). According to Richard S. Ruback of the Harvard Business School, "some super majority provisions apply to all mergers" while others "are only applied at the board's discretion to takeovers that they oppose or that involve a large stockholder" (Ruback 57).

In most cases, super majority provisions are seen to have little negative impact on stock price. However, in cases where an escape clause has been adopted to allow for special exceptions to the super majority rule, a "statistically significant" return of 5% is often seen with the passage of the amendment (Ruback 57). Escape clauses, also called "board-outs," usually hold that the super majority provision will not apply if the merger is approved by the board of directors (Gupta 137).

c. Fair Price

According to Ruback, fair price amendments are, themselves, a type of escape clause which allow for the waving of a super majority provision if the bidder proposes to pay all stockholders the same price in the acquisition (Ruback 58). The price may be given in terms of a price minimum or earnings multiple (Gupta 138).

As a defense mechanism, fair price amendments are enacted to discourage two-tier tender offers (Ruback 58). Two-tier tender offers are those in which a bidder offers to purchase a fraction of the target's common stock at a high price followed by a secondary offer for additional shares at a reduced price and later expiration date (Ruback 58). This acquirer tactic creates an early bird advantage, motivating shareholders to tender early.

In the case of fair price amendments, the bidder must offer the same price to all shareholders, usually the "blended price" – essentially the average of the first and second tier offers (Ruback 58). According to Ruback, "this restructures the offer, but does not raise the cost of acquiring the target" (Ruback 58). That being said, fair price amendments reduce the time pressure on shareholders to accept the offer and may result in lower acceptance overall.

d. Dual Class Recapitalization

Dual class equity structures are a relatively rare pre-bid defense, in part due to the one share, one vote rule put in place by the SEC, applicable, in particular, to the New York Stock Exchange (NYSE) (Ruback 60). However, this defense may increase in relevance if the NYSE is successful in lobbying for a removal of the dual class restriction (Ruback 60).

A dual class plan structures the equity of the firm into two different classes, one with inferior and one with superior voting rights (Ruback 60). According to Ruback, the inferior class voting rights usually constitute one vote per share while superior rights usually constitute ten votes per share (Ruback 60).

Though, in many cases, these plans "may not have substantially changed the probability of being taken over" for target firms, dual class recapitalizations can sometimes be highly impactful

takeover defenses (Ruback 61). Because the superior voting stock of the two-tier structure usually has lower dividends and marketability, holders of this so-called superior stock are motivated to exchange for ordinary common stock (Ruback 60). This occurrence leads to the concentration of voting power "in the hands of incumbent managers," making it more difficult for potential bidders to gain control or to replace managers (Ruback 61).

e. Leveraged Recapitalization

A considerably newer tactic, leveraged recapitalization was popularized in 1985 by Multimedia and Goldman Sachs (Gupta 147). Leveraged recapitalization plans involve the issuance of a "super dividend," funded through debt assumption (Gupta 146). The conversion of equity to debt increases the firm's leverage, making takeover less appealing to potential acquirers (Gupta 146-147).

Leveraged recapitalization is considered a promising substitute to both white knights and leveraged buy-outs (Gupta 147). The plan is thought to increase the controlling power of target management and to raise the share price received by shareholders (Gupta 147).

Though recapitalization plans do not always require charter amendments, they usually require stockholder approval and may be prohibited based on legislative restrictions or previous debt agreements in the company's own documents (Gupta 147). Furthermore, according to Gupta, "all companies that used an LCO have also made charter amendments such as super majority voting or adopting poison pill voting plans" (Gupta 147).

In addition to anti-takeover amendments, companies may choose to implement *repellant* measures. Repellent tactics usually do not require changes to the company's formative documents but are

adopted for the same purpose, in attempt to prevent takeovers which have not yet been formally identified or officially launched.

f. Poison Pills

According to Guhan Subramanian of the Yale Law Journal, the poison pill is “by far the most important defense today” (Subramanian 625), despite its fairly recent introduction in the 1980s by New York attorney, Martin Lipton (Zarin 16). Poison pills are special offers of particular rights or share purchasing options tentatively granted to shareholders, which can be later “redeemed,” or in other words eliminated, by the board of directors (Zarin 16). The offers are “inactive” until “triggered” by board action in order to discourage a likely hostile bid launch (Zarin 16).

These outstanding options make the company less appealing and more expensive to potential purchasers because of the necessity to “swallow” the pill and all resultant costs when acquiring the business. However, in many cases, if the bidder can manage to acquire control of the target’s board, it can usually eliminate the pill itself and proceed with the tender offer as usual (Subramanian 627). Targets can safeguard against this threat by supplementing a pill with a measure such as a staggered board, making it more difficult for bidders to gain board control (Zarin 18).

The two primary variations on poison pills include the “flip-in” and the “flip-over” provision (Subramanian 625). These pills are activated in the event that a shareholder or group of shareholders surpasses a certain specified level of share ownership, usually between ten and twenty percent (Subramanian 625). In such cases, the flip-in provision gives target shareholders the rights to buy shares of the target while the flip-over provision gives shareholders the right to buy shares of the acquirer (Subramanian 625).

Additional pills of varying potency exist, such as the dead hand and slow hand pill, as well as the "just say no" defense. The dead hand pill specifies that the pill can only be redeemed by those directors who were in office at the time the pill was first developed, or their "approved successors" (Subramanian 628). The slow hand pill dictates that no pill may be redeemed for a given period of time after a change in composition of the target's board, making acquisition additionally time-consuming (Subramanian 628).

As will be discussed in detail in a later section, the "just say no" defense was first endorsed by the Delaware Supreme Court in the 1990s and has been used controversially in the years since (Subramanian 626). The tactic has since allowed target companies to preserve friendly mergers in the face of superior hostile offers by simply refusing to redeem their poison pills (Subramanian 626).

As a highly debated defense, the legality of each variation of the poison pill varies greatly by state. The relative potency of pill variations can be seen in the diagram referenced below along with the states that endorse them. It is also important to note that, for the most part, companies which do not have a poison pill in place have the opportunity to create one very rapidly, meaning that most negotiation is done, at minimum, in the "shadow" of a poison pill (Subramanian 625).

(See Poison Pill Diagram in Appendix)

In the US, the board of directors of a company can develop a poison pill without seeking shareholder approval (Zarin 16). Additionally, because a pill is essentially "a dividend of rights to purchase stock, and the board has the exclusive authority to issue dividends," a pill can be adopted in as little time as a "matter of hours" (Subramanian 625). For these reasons, poison pills are

considered highly effective both as preventive measures and active defenses after a hostile bid is launched.

g. Poison Puts

A variation on the poison pill, poison puts are part of a defensive strategy which seeks to impose substantial repayment obligations on acquirers as well as to protect bondholders from value deterioration risks which accompany a change in control (Gupta 141).

The poison put gives bondholders the right to demand redemption before maturity in the case of events such as a restructuring of company ownership, or, more pointedly, an acquisition. Like with most other repellants, the stated rights and attached acquirer expenses are "triggered" typically by a hostile change in control (Gupta 141). Overall, this tactic has been viewed as a more effective protection device than a genuine defense (Gupta 141).

h. Parachutes

Parachutes are another protective measure, somewhat similar in nature to poison pills and puts, implemented to reduce the attractiveness of a target to potential bidders and triggered by the change in control. In general, parachutes are severance agreements which provide employees with large compensation packages, often two to three times annual salary if the employee is terminated as the result of an unwelcomed change in control of the company (Reed 495).

Though golden parachutes are the most popular and noted form of the tactic, silver and tin parachutes are also employed. Golden parachutes shield top executives from the negative effects of a hostile takeover; they require the payment of large lump sums, often multiples of the manager's salary and bonus, in the case the manager is terminated as the result of an acquisition

(Gupta 141). Given the preference toward post-acquisition capacity reduction and the retention of the acquirer's management over residual target employees (Faulkner 3), these expenses must be considered likely to be incurred by the acquirer.

Silver parachutes are used to protect a more extensive employee group, usually composed of middle managers, and often involve severance packages equaling six to twelve months' salary (Gupta 142). Lastly, tin parachutes are severance payments for the lowest level employees usually constituting one to two weeks' pay for every prior year of employment (Gupta 142). Whereas golden parachutes may have some effect in dissuading takeover attempts, less costly silver and tin parachutes must be considered primarily protective measures.

Parachutes are frequently used in combination with other more potent defense measures, but are often still unsuccessful in diverting impending bids. However, a survey by Lambert and Larcker indicates the implementation of parachutes – specifically golden parachutes – increases the wealth of shareholders by an average of three percent (Zarin 19). All this being said, golden parachutes often have the undesired effect of incentivizing executives and "potential beneficiaries" to support a takeover that might otherwise have been rejected (Faulkner 24).

i. Employee Stock Option Plans

Employee stock option plans are sometimes used to improve performance and to align employee interests with those of the company (Gupta 148). The plans involve the offering of stock options or equity to a wide base of employees. These plans are thought to make hostile takeovers more difficult for potential acquirers through the distribution of ownership rights over a group of highly contented employees who are "likely to be sympathetic to management" (Gupta 148).

iii. Active Target Defenses

As has been discussed, a variety of pre-bid acquisition defenses exist which serve a repellant function, making the target less attractive to potential bidders (Faulkner 20-21). Once a hostile bid is actually made or "is imminent," a variety of other defenses become available and relevant to the dissuasion of an unwelcome offer (Faulkner 26).

These additional defenses are sometimes called "counter-bids" and represent more active and focused tactics (Faulkner 3). Post-bid defenses have significant intrinsic value and possible advantage over preventive defenses in that targets possess greater knowledge of the nature and motivations of the bid they are trying to thwart. Unfortunately, it is also possible that defenses erected after a bid has been launched may be too late to be effective.

a. Divestments

Divestments are yet another mechanism through which companies under high threat of takeover seek to reduce attractiveness. Divestments are of two primary forms: crown jewel sales and pre-emptive sales (Faulkner 24). In the first scenario, targets sell off parts of the business which are particularly sought-after by the acquirer (Faulkner 24). This defense can be highly effective, particularly in the case of targeted acquisitions; however, it may also reduce the value of the company in such a way as to produce negative effects for the existing company.

Alternatively, targets may sell off parts of the business which are deemed to be "under-performing" in order to boost performance and reduce shareholders' incentives to sell (Faulkner 24). This strategy can be particularly dangerous as it may actually increase the attractiveness of the target to potential bidders.

b. Share Repurchases

Share repurchases are a straightforward defense with “two-fold” impact (Gupta 142). In implementing this strategy, the target firm under attack repurchases its own floating shares from the public (Gupta 142). By doing this, targets (Gupta 142):

1. Reduce the number of shares which can be easily purchased by hostile acquirers.
2. Increase the stake held by target management without the necessity of new investment.

The four major types of share repurchases are fixed price tender offers, Dutch auctions, transferable put rights, and open market repurchases (Gupta 142-143). Each of these mechanisms will be defined and discussed below.

In a fixed price tender offer, either a set percentage or alternatively the entire body of shares is sought at a set price over a limited time (Gupta 143). The offer price is usually above going market value, resulting in most fixed price offers being at least fully subscribed (Gupta 143).

In the case of Dutch auctions, targets determine the number of shares they wish to repurchase as well as the acceptable price range in which shareholders may offer to tender shares (Gupta 143). The number of shares desired by the firm is used to determine the price at which the shares will be repurchased (Gupta 143). If the minimum price which will result in the desired number of shares being offered is $17, all shareholders will receive that price, even if they might have been willing to tender for less (Gupta 143).

Next, in the case of transferable put rights, a set number of shares is sought for repurchase by the target (Gupta 143). Transferable put rights (TPR) are then issued at a given rate, such as one TPR

for every 20 shares (Gupta 143). Afterwards, “a secondary market” develops for the sale and purchase of TPRs (Gupta 143).

Lastly, in open market repurchases, firms agree to buy back a set dollar amount of shares (Gupta 144). This method represents the most common form of share repurchase but is generally only effective for the repurchase of small percentages of total shares (Gupta 144).

c. Greenmail Payments

The term “greenmail” combines the ideas of blackmail and greenbacks or dollar bills (Faulkner 25). Greenmail payments represent a defense in which target management seeks to preserve control by buying out a potential acquirer at a high premium (Faulkner 25).

This defense is used in cases where a tender offer by an identified acquirer is feared and in which said potential acquirer has formed a substantial stake in the target company through the purchase of shares (Faulkner 25). The premium paid is sometimes called a “goodbye kiss” or “bon voyage bonus” (Faulkner 25).

Though this tactic is often effective in the short-run, long-run consequences can be substantial. Firstly, the so-called defense may signal the target’s vulnerability to other potential acquirers or even merely those seeking to benefit from the same cash payout (Faulkner 25). Additionally, share prices of the target firm often drop after a greenmail payment which can contribute yet further to future vulnerability (Faulkner 25). Due to these risks, greenmail is viewed as a highly controversial defense and has been prohibited in several jurisdictions (Faulkner 25).

d. Standstill Agreements

Standstill agreements are contractual arrangements purposed to prevent continuous stake building by an intended acquirer (Gupta 144). The standstill specifies that the would-be acquirer must not increase its holdings in the target while the agreement is active (Gupta 144). Alternatively, the agreement may specify that the acquirer will not increase its holdings beyond a certain percentage (Gupta 144). In many cases, this is done while escapes from the hostile bid are sought or while the possibility of a greenmail payment is being discussed (Gupta 144).

The potential acquirer is motivated to participate in the agreement by the payment of a substantial fee by the target. Though standstill agreements are put into place before a bid has been officially launched, they are considered active defenses in that they are 1. Unrelated to the target's formative documents and 2. Used only when a bid is deemed imminent based on substantial stake building on the part of the potential acquirer.

e. Litigation

After the launch of an official hostile bid, targets can seek to eliminate the bid through litigation. Most commonly, targets sue for temporary injunctions to serve the same function as a standstill agreement: to temporarily prevent the undesired bidder from increasing its current stake (Gupta 148). In such cases, targets will typically also bring into question the antitrust effects of the acquisition, inadequate disclosure, and other legal violations on the part of the bidder (Gupta 148).

f. Pac-Man Defense

Pac-Man is one of the most aggressive and risky tactics in the target's arsenal; employment of this measure is likely to mitigate the effects of many other defenses, especially those related to antitrust

arguments (Gupta 148-149). In the Pac-Man defense, the original target initiates a bid to purchase the initial would-be acquirer (Gupta 148-149). According to Gupta, this defense suggests, essentially, that "the target company's board and management are in favor of the acquisition," but, "they disagree about which company should be in control" (Gupta 148-149).

Additional risks of the Pac-Man defense include the possibility that both firms could be ruled to be subsidiaries of each other under state law, complicating the M&A process for all participants and likely resulting in substantial cost implications (Gupta 148-149).

g. White Knights

The white knight is a highly involved defense in that it requires the active, long-term participation of a third party (Zarin 20). Faced with a hostile bid, targets often seek "white knights," a pseudo savior company who will take the target over under more favorable conditions (Zarin 20). White knights may be deemed preferable to existing acquirers for numerous reasons, including beliefs of better fit, better synergies, and better post-acquisition retention outlooks for employees (Zarin 20). Though this tactic may be effective in thwarting a specific hostile bid, its ultimate outcome is likely takeover (Zarin 20).

h. White Squires

In many cases, the white squire defense may be much more favorable that the white knight approach. In application of the white squire defense, a third party (usually a portfolio investor) is sought out to whom a large block of shares is issued, rather than a controlling percentage as in the white knight defense (Gupta 146). This method dilutes the current stake of the would-be hostile acquirer by raising the total number of shares (Gupta 146). Additionally, the agreement between

target and squire can be drafted so as to prevent the squire from transferring shares to another hostile acquirer in the future (Gupta 146).

VI. NECESSITY AND EFFECTIVENESS

i. Theories of Business Obligation

The debate on the necessity and effectiveness of target defenses is a complex and extensive one, based on various perspectives on the nature and purpose of business. The debate itself seems to stem from two sometimes contrasting ideologies: 1. Milton Friedman's position on the purely financial obligations of business managers and 2. The business judgment rule which is most commonly used to assess managerial conduct in a legal context.

Friedman insists that the supreme obligation of business managers is to optimize shareholder returns; furthermore, essentially any conduct which reduces shareholder returns can be ultimately viewed as the levying of a tax on shareholders and a misappropriation of authority. According to Friedman, managers serve as agents of the business and thus have limited discretion in matters likely to have a negative impact on financial returns of the firm.

In many instances, M&A is much like a game of monkey in the middle; hostile buyers go over the heads of managers to shareholders; managers go over the heads of shareholders to white knights or other sources of salvation from takeover. Many target defenses are mechanisms employed by managers to thwart, manipulate, or at least change the minds of shareholders who are open to takeover.

Furthermore, the motives which underlie target defenses often have more to do with fear of administrative and staffing repercussions resulting from a change in control than actual issues of

shareholder finances. Thus, critics may question whether managers who choose to fight lucrative acquisition offers act in the best financial interests of their shareholders.

Alternatively, the business judgment rule offers a greater level of discretion and subsequent protection to business directors. In essence, the business judgement rule seeks to give directors the benefit of the doubt in decision making, including decisions regarding M&A, if several criteria are met.

According to general business principles, business directors have a certain duty and standard of care; they are obligated to discharge their duties in good faith, with ordinary prudence of a person in like circumstance, and in a manner reasonably believed to be in the best interest of the corporation (Emanuel 173). The business judgment rule states generally that managers should not be said to have breached this duty of care if (Emanuel 171):

1. The director had no "conflicting self-interest."
2. The director made himself "adequately informed" about relevant facts.
3. His decision was "rational" as of the moment it was made.

Though the business judgment rule seems to impose somewhat looser restrictions on executive decision making, it still poses a variety of potential objections to the execution of target defenses. In particular, the "management entrenchment" hypothesis suggests that bidder elimination tactics are employed primarily to perpetuate the reign of self-serving managers (Faulkner 25).

However, it seems unreasonable that managers should necessarily resign themselves to the sale of a company they have built simply due to the certainty of returns upon sale. Defragmentation M&A

offers a great alternative for start-up companies to expensive IPO launches, and yet, many directors choose not to sell.

ii. Judicial Endorsements and Restrictions

Opposing theories of business obligation have led to the myriad of opinions regarding the appropriateness of target defenses. In response to this diversity of thought, companies have sometimes sought judicial review to answer the question of a specific defense's acceptability. The resulting judicial endorsements and accusations directed at target defenses have been addressed through the case law of the last several decades, resulting in layer upon layer of sometimes contradictory judgment.

Much of this litigation and legislation has been directed at specific forms of takeover defenses, such as the poison pill, while some has been directed at the idea of target defenses more generally. In the following section, a series of landmark and otherwise notable cases will be summarized which form the basis of case law on the acceptability of target resistance to takeover attempts.

a. Cheff v. Mathes and the Primary Purpose Test

Cheff v. Mathes was a decision of the Delaware Supreme Court, decided in 1964 (Corporations Outline 25). In the proceeding events, Arnold Maremont, a businessman and stockholder of Holland Furnace Company, sought out Holland CEO, P.T. Cheff, to discuss the possibility of a merger. Cheff refused, at which point Maremont began building stake in Holland Furnace through stock purchase on the open market. Ultimately, Holland's board negotiated the repurchase of Maremont's holding at an above-market price, constituting a greenmail payment to Maremont.

This case included a number of complicating factors including questionable businesses practices on the part of Holland Furnace, Maremont's reputation as a raider, and the perceived conflict of interest of Cheff and the Holland board in their desire to maintain control of the company. Ultimately, the Court found that the Holland board was protected by the business judgment rule, having acted in good faith against a credible threat to the continued existence of the company.

The Court's judgment established a precedent of judicial sanctioning of sometimes controversial greenmail practices. Furthermore, it established the primary purpose test (Corporations Outline 25). The primary purpose test consisted of criteria used to assess the perceived conflict of interest of the Holland board and concerns regarding the practice of business managers to use corporate funds to perpetuate their own control (Corporations Outline 25-26).

The primary purpose test says that boards motivated by a sincere belief in the danger posed to the business' existing practice should not be held liable, whereas those who seek only to perpetuate their own control are liable (Corporations Outline 25). The test also addresses cases in which directors are necessarily conflicted, placing the burden of proof of primarily corporate interest on the directors themselves (Corporations Outline 26).

b. Moran v. Household and Poison Pill Legitimacy

The poison pill, as previously defined, was invented in 1983 (Subramanian 625). According to Subramanian, it "has never been deliberately triggered" by a would-be acquirer and is "generally understood to be a complete barrier to a direct attack in the form of a conventional tender offer" (Subramanian 625). This is due to the excessive increase in acquisitions cost created by the pill for a potential acquirer.

Immediately, the nature of the poison pill, in particular the fact that it can be adopted without a shareholder vote, triggers the concern of critics. These concerns may be more or less intense based on relative pill potency derived from "important differences in the background state corporate law" (Subramanian 625). Perhaps most important are the state corporate laws of Delaware, home to roughly half of US public companies, including Household International, Inc. (Subramanian 625).

Household International was a diversified holding company which decided in 1984 to adopt a preemptive shareholder rights plan. At the time, the Household board had not been approached with any particular takeover threat but was concerned with the high frequency of "bust up" takeovers amongst industry conglomerates at the time (Spamann). At the time, board member John Moran, the voice of opposition against the plan, was also chairman of Household's largest shareholder, Dyson-Kissner-Moran (D-K-M). D-K-M was said to have been contemplating a leveraged buyout of Household (Spamann).

In 1985, Moran and D-K-M brought suit against Household for its adoption of the shareholder rights plan, deemed to constitute a poison pill. Ultimately, the Delaware Supreme Court upheld the move as a legitimate exercise of directors' power under the business judgement rule and Del. Code Ann. Tit. 8, § 157 (Moran v. Household).

c. Unocal v. Mesa and the Unocal Test

Following the Moran v. Household judgment, Mesa Petroleum, headed at the time by a known corporate raider, made a two-tiered hostile bid for Unocal (Unocal Corp. v. Mesa Petroleum). The bid offered a $54 share price in cash to early tenderers and $54 in high-risk junk bonds to late-comers (Unocal Corp. v. Mesa Petroleum). Because of this structure, most shareholders were expected to tender regardless of opinions on price fairness.

The Unocal board responded with a self-tender offer at a higher price for all but Mesa's existing shares because "it would be counterintuitive to include the shareholder who initiated the conflict" (Unocal Corp. v. Mesa Petroleum). However, the Delaware Chancery Court determined this exclusion was not permissible, resulting in Unocal's appeal to the Delaware Supreme Court. The Delaware Supreme Court found that Unocal's defensive tactics were acceptable based on their reasonableness in comparison to the threat of takeover.

This verdict established an "enhanced scrutiny test," also known as the Unocal Test, to determine if the business judgment rule may be applied to a target board's decision making in the process of takeover defense (Enhanced Scrutiny Test). The Unocal Test has two requirements (Enhanced Scrutiny Test):

1. Demonstrated reasonableness of the target board's perception of threat and resulting defense.
2. Demonstrated proportionality of the defense employed in comparison to the threat posed.

Unocal Corporation v. Mesa Petroleum is considered a landmark decision of the Delaware Supreme Court due to the establishment of substantial precedent and the Unocal Test of reasonableness and proportionality. However, the Court has also specified the following constraint:

> "The ultimate response to an actual takeover bid must be judged by the Directors' actions at that time, and nothing we say here relieves them of their basic fundamental duties to the corporation and its shareholders. Their use of the [poison pill] will be evaluated when and if the issue arises" (Subramanian 626).

Even with this disclaimer, the Unocal Test represents a substantial change in judicial opinions and precedents in M&A.

d. Revlon v. MacAndrews & Forbes and the Revlon Doctrine

Revlon v. MacAndrews & Forbes represents yet another landmark decision on the part of the Delaware Supreme Court. In the events preceding the case, a number of offers were made by Pantry Pride to acquire Revlon (Furlow 524). Revlon responded by adopting a notes purchase rights plan, another poison pill, to repurchase many of its own shares (Furlow 524).

After a substantial bidding war, Revlon sought a white knight in Forstmann to purchase shares at an even higher price (Furlow 524). At this point, MacAndrews & Forbes Holdings, Inc. sought an enjoinment on behalf of Pantry Pride on the grounds that the agreement was not in the best interest of the shareholders and was thought not to uphold the fiduciary duties of directors (Furlow 524).

The result of Revlon v. MacAndrews & Forbes was the creation of the Revlon doctrine which governs so-called "sales of control" (Furlow 520-521). The doctrine states, in cases where sale of the business is inevitable, 1. That directors should focus on maximizing immediate value for shareholders rather than long-term corporate well-being and 2. That if directors are perceived to have failed in acting on this new focus, they shall not receive protection under the business judgment rule (Furlow 521). Instead, the court will:

> "…review the decision with "enhanced scrutiny," a procedure that requires independent, disinterested directors to prove: 1. that their decision-making process was performed with adequate care; and 2. that their decision was reasonable under the circumstances" (Furlow 521).

These narrowed fiduciary duties are often referred to as "Revlon duties" (Furlow 521).

The Delaware Supreme Court, upon appeal from the chancery court, found that Revlon had acted acceptably in adopting its poison pill. However, after the sale of the company became inevitable, Revlon violated its duty to achieve the highest possible sale price for stockholders by structuring the Forstmann deal in such a way as to put an end to the ongoing price war (Furlow 524-525). When dissolution of the company becomes inevitable, directors have an obligation to negotiate the surrender to maximize the gains of shareholders (Ventoruzzo 26-27).

e. Paramount v. Time and the "Just Say No" Defense

Paramount v. Time was decided in 1989 by the Delaware Supreme Court. In 1987, Steve Ross of Warner Brothers and Nicholas J. Nicholas, Jr. of Time met to discuss the possibility of a joint venture to create a superior cable network (Paramount v. Time [4]). Time strategists ultimately set their sights on a strategic consolidation with Warner based on a long-term expansion plan (Paramount v. Time [4]).

Third parties viewed this combination as a signal that Time was up for sale. Time sought to establish preventive defenses but was ultimately ineffective and Paramount made a competing offer to purchase Time shares (Paramount v. Time [4]). Time rejected the Paramount offer, which Paramount viewed as a breach of the company's Revlon duties to maximize shareholder profit (Paramount v. Time [2]). Stockholders of both Time and Paramount then sued to stop the lower price tender offer which had been erected between Time and Warner (Paramount v. Time [3]).

However, when the Delaware Supreme Court weighed in, it "relaxed the reigns" of the Unocal and Revlon decisions (Ventoruzzo 27). From this case was born the now popular "just say no" defense,

which provides directors with additional autonomy to reject an offer based on strategic factors other than price alone (Ventoruzzo 27). The Court also found that Revlon duties apply only in cases where a corporation has actively initiated bidding to sell itself or when sale is inevitable; in this case, Time intended to continue business as usual (Paramount v. Time [3]).

f. Paramount v. QVC and the Duty to Investigate Alternatives

Another important decision involving Paramount Communications, Paramount v. QVC was decided by the Delaware Supreme Court in 1994. In this instance, the Paramount board was considering a strategic merger with Viacom to increase competitiveness when QVC expressed its intent to acquire Paramount (Paramount v. QVC [1]).

Paramount and Viacom negotiated a tentative arrangement which included a number of measures attempting to ensure deal closure; these measures included a no-shop clause stating that Paramount would not seek competing offers as well as a $100 million termination fee and certain discounted stock options to be paid to Viacom in the event the deal did not close (Paramount v. QVC [1]).

QVC initiated a competing offer to buy Paramount at a higher price than the proposed Viacom deal but was rejected, at which point QVC filed suit. QVC insisted that Paramount was subject to heightened Revlon duties to seek the highest possible value for shareholders since the company had essentially placed itself up for sale (Paramount v. QVC [1]). Paramount argued they were not seeking to sell the entire company to Viacom, but rather to sell a controlling interest (Paramount v. QVC [1]).

Upon appeal, the Delaware Supreme Court determined the sale constituted a sale of control and that such sales should be subject to enhanced scrutiny under the Revlon doctrine (Paramount v.

QVC [1]). After consideration under this framework, the Court ultimately found that Paramount had failed to adequately exercise its Revlon duties because the board had failed to adequately investigate the two competing offers and to protect shareholders through a sale-of-control premium (Paramount v. QVC [1]).

According to earlier case law, specifically Chistophides v. Porco in 1968:

> "[A] purchaser is free to offer a premium for a block of control stock. This is so, even though control stock is purchased pursuant to a plan to acquire the remainder of the shared at a lower price…" (Bayne 616).

In Manacher v. Reynolds in 1960, it was more specifically stated that:

> "No other factor being present, they (the shareholders) may demand a reasonable premium for the use of their key… with which to unlock the 'discount' treasure chest" (Bayne 616-617).

Overall, Paramount v. QVC helped establish the importance of conducting an investigation of alternative bidders in order to maximize shareholders gains, to protect minority shareholders, and to compensate them for reduced future opportunities resulting from a sale of control.

g. Unitrin v. American General and the Range of Reasonableness

Unitrin v. American General in 1995 built on the foundations set out in Unocal v. Mesa years earlier (Wong 169). In this case, American General sought to purchase a controlling block of Unitrin shares through a tender offer that was rejected by the Unitrin board based on its perception

of the deal price as inadequate (Wong 182). Unitrin then adopted a share repurchase program as a defense against the takeover attempt (Gallardo).

The Court upheld the repurchase program because it was deemed to be non-preclusive; in other words, “the repurchase program did not mathematically preclude shareholders from dismissing the current board and redeeming the rights plan through a proxy contest” (Gallardo). Furthermore, the Court’s determination in Unitrin v. American General “broadened the range of possible defensive actions that directors can adopt,” expanding the proportionality test set forth in Unocal to a “less clearly defined ‘range of reasonableness’” standard (Ventoruzzo 27).

iii. Current Framework for Judicial Review

Today, in “general terms,” Delaware courts utilize a three step framework to assess the acceptability of target defense tactics (Wong 173). According to the Virginia Law Review, courts will (Wong 173):

1. Evaluate whether the target board acted in good faith when adopting the defense.
2. Assess whether the defense is subject to heightened scrutiny under doctrines such as Revlon and whether the defense is preclusive.
3. Determine whether a defense is proportional to the threat posed.

The contribution of case law to this modern standard is self-evident. However, formal judicial review of takeover cases is still a relatively new concept and relevant standards and procedures are still developing.

VII. CONCLUSION

Over the past several decades, the arsenal and supporting case law of target defenses in the field of M&A has developed substantially. The study of target defenses has similarly increased in prominence and is helpful in answering the following questions which have been posed in this document:

1. What factors or qualities of a company, whether intrinsic or extrinsic, contribute to its vulnerability to hostile takeover?
2. What are the takeover defenses that make up the arsenal of target management?
3. How effective and ethically permissible are various target defenses as means to maintain or enhance shareholder value and managerial control?

Scholars have examined the factors and qualities of companies which contribute to their vulnerability. It is widely agreed that no single factor or concise set of factors can be precisely identified as the source of vulnerability. Vulnerability to takeover is affected by external factors such as the presence of raiders and strategies of competitors, as well as internal factors of target performance. In regards to target performance, it is a significant paradox of the acquisitions game that healthy business is both a source of vulnerability and the greatest defense against takeover.

A myriad of specific defenses have been popularized, many of which are purposed specifically to counteract vulnerability; these preventive defenses are put in place before a specific takeover attack has been launched and often before any specific threat has been identified. Preventive defenses may or may not involve changes to the implementer's formative documents.

Active defenses make up a second category of target tactics and are employed after a specific threat has been identified. Active defenses have been often contested by would-be acquirers. These contests usually revolve around the various perspectives on managerial ethics and the extent of decision-making autonomy vested in managers by shareholders. They are often argued in court – a fact which has resulted in an assortment of case law and a variety of standards by which defenses are judged.

Ultimately, the target defense arsenal and related process of judicial review are relatively new ideas to the legal field – ideas which will likely be subject to additional development, research, and application in the future.

VIII. REFLECTION

In selecting this subject for my senior thesis through the University of South Carolina Honors College, my intent was as follows:

1. To expand on the education I received during the course of the International Business degree as well as my semester abroad at Wirtschaftsuniversität Wien in Vienna, Austria.
2. To compile a high level, comprehensible, and comprehensive listing of defensive tactics in the target arsenal as well as the related case law.
3. To select an interdisciplinary topic relevant to my personal interests and intended future studies.

Throughout my undergraduate program, I have worked to explore the intersection of business and legal studies. In this spirit, my degree has included courses such as Business Law, as well as The

Trial of Othello, an experimental literary mock trial course through the University of South Carolina Honors College. During my semester abroad, my courses included Economics and Law in the European Union, as well as, most significantly, International Mergers and Acquisitions.

My course in International Mergers and Acquisitions was conducted off-campus at Schönherr, a law firm in the beautiful and historic first district of Vienna. The course was led by partners and Harvard Alumni, Christian Herbst and Sascha Hödl. This class represented my first exposure to the field of M&A and comprised several hundred pages of reading which served as the primary basis for the formulation of this thesis.

In examining the extensive materials provided by this class, it occurred to me that the focus on target vulnerability and defenses was highly limited. The company line on these issues seemed only to be that no one truly knows why companies are targeted for takeover since few consistent patterns have been detected to link targets according to size, performance, or other metrics. Furthermore, most lists of target defenses are decidedly non-exhaustive. Most focus on only a few defenses at a level of baffling detail.

The scenario is much the same with regards to the relevant case law. Full judicial decisions are available as are highly detailed, so-called case summaries. However, outside of Wikipedia, information on the background events leading to the decisions or really any information at all that has been expressed in a concise and functional manner is surprisingly scarce. Additionally, though one relevant M&A case summary may reference another, leading the reader to discover it, few comprehensive, chronological summaries exist to demonstrate the complex development of this form of judicial review.

It was thus one of the goals of this paper to create a practical, comprehensive reference source for newcomers to the study of M&A law. The listing of target defenses has been compiled from a variety of different sources, as has the history of relevant case law. These lists have also been contextualized in an overview of basic M&A principles and a limited history of the field.

From the time I began the International Business Program at USC, it was my intent to leverage my degree toward a career in law. In this highly interdisciplinary field, I feel I will be able to creatively utilize my various skills and interests in areas such as English, political science, and, of course, business. In the next several months, I will be applying to a number of law schools in order to pursue my professional goals. With that in mind, I am tremendously grateful for the opportunity created for me by the Honors College thesis requirement to conduct such relevant and intriguing academic research.

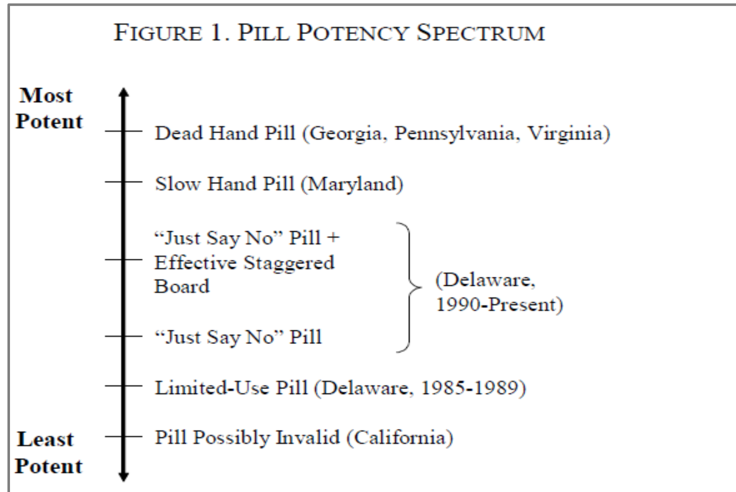
IX. APPENDIX

i. Legal Process for M&A

The general deal shaping process for an acquisition is as follows (Bruner 685-687):

1. Strategic planning, search, and identification of an appropriate target by the acquirer.
2. Initial contact between the acquirer and target, comprising the proposal or "pitch."
3. Signing of the confidentiality agreement and related documents to preserve competitive advantage, R&D information, and trade secrets of the target during the bidder's due diligence.
4. Filing of the term sheet and letter of intent to confirm the growing level of commitment.
5. Buyer's due diligence and negotiation of a definitive agreement.
6. Affirmative vote by target board of directors.
7. Legally mandated disclosure of the deal to the public and regulators.
8. Antitrust filings and permission of relevant competition authorities.
9. Informing of target shareholders and gaining of an affirmative vote.
10. Closing, at which parties affirm all representations, warranties, and covenants have been met.
11. Initiation of a post-merger integration process to align practices of the acquisition and acquirer.

ii. Poison Pill Diagram



(Subramanian 629)

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