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THE POISON PILL WARRANT—APOTHECARY
AND ANTIDOTE:
MORAN v. HOUSEHOLD INTERNATIONAL, INC.

INTRODUCTION

In Moran v. Household International, Inc.,1 the Delaware Supreme Court sounded the bugle to end yet another battle in the world of corporate acquisition wars. The issue in this case was the validity of a “poison pill”2 anti-takeover device implemented by the board of directors of Household International to stave off hostile takeover plans that may have been secretly brewing in the uneasy and volatile environment surrounding the financial services industry.3 The Household court, in a case of first impression, upheld the board’s implementation of the poison pill4 as a legitimate exercise of business judgment,5 even though no corporate “raider”6 had yet attempted a takeover.7

1. 500 A.2d 1346 (Del. 1985).
2. The Delaware Supreme Court, unlike the Delaware Chancery Court, did not call the anti-takeover device implemented by Household the “poison pill” but rather the “Plan” or “Rights Plan.” 500 A.2d at 1348.
3. The Household record showed that “bust up” takeovers in the financial services industry were pervasive at the time. 500 A.2d at 1349. A “bust up” takeover refers to a situation in which a corporate raider, after acquiring a target, sells off assets of the target in order to finance the takeover. Id. at 1349 n.4.
5. 500 A.2d at 1357.
6. “Raider” is a term used to refer to a person or corporation seeking to force a merger or consolidation against the wishes of the target corporation. See 111 Cong. Rec. 28,257 (1965) (remarks of Sen. Williams).
7. 500 A.2d at 1349.
The most significant aspect of the *Household* decision is that the Delaware Supreme Court authorized the implementation of a corporate defensive device to preempt the possibility of a takeover. Another significant aspect of the *Household* decision is the court's affirmation that poison pills are to join rank with a myriad of other anti-takeover devices judged according to the business judgment rule. Moreover, the decision is not without a practical side. *Household* and the cases cited therein may be used to set up guidelines for exercising prudent business judgment when adopting a poison pill defense. Thus, *Household* is an apothecary of sorts, prescribing the "medicine" of prudent business judgment.

8. A partial list of anti-takeover devices includes:

The "Pac-Man" Defense: The target corporation defends against a hostile takeover by tendering for the raider's stock. The target's counter offer changes the terms of the combination upon merger, ideally making the target corporation dominant. By making a counter offer, the target implicitly acknowledges the desirability of a merger. Thus, the device is not a true anti-takeover device. See, e.g., Bendix Corp. v. Martin Marietta Corp., 549 F. Supp. 623, 633 (D. Md. 1982) (Pac-Man defense upheld).

The "Crown Jewel" Defense: This defense gives a friendly party the option to purchase a target corporation's most valuable asset. Thus, raiders are discouraged from acquiring the target because its value will severely diminish when the option is exercised. See, e.g., Whittaker Corp. v. Edgar, 535 F. Supp. 933, 951 (N.D. Ill. 1982) (crown jewel defense upheld), aff'd mem., Nos. 82-1305 and 82-1307 (7th Cir. 1982). But see Mobile Corp. v. Marathon Oil Corp., 669 F.2d 366 (6th Cir. 1981) (lock-up device similar to crown jewel invalidated as manipulative).

The "Golden Parachute" Defense: Special employment contracts are given to key executives providing large severance bonuses and acceleration of benefits should they be forced to bailout of a hostile takeover. Thus, a raider is discouraged from acquiring a target because the target's assets will pay for the severance bonuses. See, e.g., Morrison, *Those Executive Bailout Deals*, *Fortune*, Dec. 3, 1982, at 82, 84 (Bendix Corp. granted its CEO a $4 million golden parachute).


The "Shark Repellent" Defense: Corporate charter or by-laws provide that an extremely high percentage of shareholders must agree to a takeover before it may be consummated. However, a board may independently approve the takeover before the raider has acquired a certain percentage of shares. See generally Hockman & Folger, *Deflecting Takeovers: Charter and By-Laws Techniques*, 34 *Bus. Law.* 537 (1979) (discussing shark repellent defense).

The purpose of this Note is to use the Household decision to suggest practical guidelines for attorneys and corporate directors who adopt the poison pill defense. Use of these guidelines may help win court approval, at least Delaware court approval, of a board’s decision to implement the poison pill. But once a poison pill has been implemented, what can a corporate raider do to counteract the pill? Antidotes to the poison pill will also be discussed. Secondly, this Note examines the many policy considerations for and against the use of preemptive defenses by corporations targeted for takeover. As this Note suggests, one’s views on the desirability of preemptive defenses are largely determined by one’s outlook on how preemptive defenses affect shareholder, corporate, and economic interests.

I. BACKGROUND

A. The Poison Pill

The most recent and highly publicized defense mechanism in the arsenal of corporate anti-takeover devices is the poison pill.10 Poison pills are warrants11 to purchase stock which are distributed to shareholders as a dividend on the occurrence of some predetermined event, such as a tender offer or an acquisition of shares by a raider.12 Each warrant, which is a certificate entitling the owner to buy a specified amount of stock at a specified time for a specified price,13 initially entitles the warrant holder to purchase shares, or fractional shares, of preferred stock at a premium price. When the warrants are first issued, they are not likely to be exercised because the warrant holder can purchase identical shares in the market at a price far below the price authorized by the warrant.14 The warrants,

10. See supra note 2.
11. Two types of poison pills have gained popularity as defensive tactics: the warrant dividend plan, used by Household, and the convertible preferred stock plan. The warrant dividend plan gives a dividend to shareholders in the form of a warrant to buy target common stock. The warrants are issued when a tender offer is made or when a certain percentage of stock is acquired by a raider. The convertible preferred plan gives a stock dividend in the form of convertible preferred stock which is convertible into common stock when a raider acquires a certain percentage of shares. See Note, Protecting Shareholders Against Partial and Two-Tiered Takeovers: The “Poison Pill” Preferred, 97 HARV. L. REV. 1964, 1964-65 (1984) [hereinafter Note, Protecting Shareholders]. The convertible preferred poison pill is not the focus of this Note so its discussion will be limited.
12. The occurrence of the event and the subsequent issuance of warrants is known as the “trigger.” 500 A.2d at 1348.
14. For example, the Household warrant could be exercised to purchase 1/100 share of preferred stock at $100, making the price of one share $10,000. 500 A.2d at 1349. At the time, Household’s common stock was selling between $30 and $33. Moran v. Household Int’l, Inc., 490 A.2d 1059, 1066 (Del. Ch. 1985).
however, will be exercised by the warrant holder when a merger or consolidation with a target corporation is forced by the raider because the warrant holder can purchase shares of the continuing corporation at a fraction of their market value. The intended effect of the poison pill is to render the cost of a takeover prohibitive by inflating the value of the target corporation's stock and, upon merger, cause a dilution in value and control of the continuing corporation's stock. In other words, the poison pill forces the raider, upon a merger, to foot the enormous bill created when the warrants are exercised to purchase the continuing raider corporation's stock at a greatly reduced price. Thus, raiders facing the poison pill must think twice about whether they can afford their hostile tactics.

The idea of rendering a hostile takeover cost prohibitive is not a new one. A predecessor to the poison pill, now a part of many corporate charters, is the fair price provision. This provision requires a raider, seeking to force a merger or consolidation following a tender offer, to pay the same amount, or in many instances a premium, for shares acquired after the merger.

The fair price provision and the poison pill are both extremely effective in discouraging popular two-tier tender offers. In the two-tier scenario, a raider forces a merger, following a partial tender offer, and then buys out nontendering shareholders at a price below that paid to tendering shareholders. Two-tier tender offers are designed to stampede shareholders into tendering at the first tier, even if the offering price is unfair, out of fear that they will receive very little at the second tier.

15. A raider frequently acquires a target through a cash tender offer. See Austin, Tender Offer Update: 1983, 18 MERGERS & ACQUISITIONS 57 (1983). Cash tender offers composed 89% of the total number of tender offers made in 1982. Id.


17. Although a poison pill may deter a raider, it also imposes costs upon the target. The warrants may create a large overhang of stock that may affect the market price of the target's common stock as well as inhibit common stock financing. Moreover, the pill deters friendly takeovers as well as hostile ones unless the pill has a provision, as in Household, to render the pill harmless by recalling the warrants. See Comment, Tender Offer Defensive Tactics: A Proposal for Reform, 36 HASTINGS L.J. 377, 388 n.52 (1985) [hereinafter Comment, Proposal for Reform].

18. The crown jewel, golden parachute, and fair price provision defenses all render a takeover cost prohibitive. For a discussion of these devices, see supra note 8.

19. For an in depth discussion of fair price provisions, see generally Finkelstein, supra note 16 (purpose of fair price provisions is to provide equivalent consideration to all shareholders).

20. See Note, Protecting Shareholders, supra note 11 at 1966-68.

21. For a discussion of the coercive nature of a two-tier tender offer, see Brudney & Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 HARV. L. REV. 297, 337
provisions and poison pills discourage two-tier tender offers because they ensure that shareholders will receive an extremely favorable price for their shares even if they decide to sell them to the raider at the second tier. Thus, a prospective raider seeking an inexpensive acquisition will have to look elsewhere.

But here the similarity between fair price provisions and poison pills ends. Poison pills, unlike fair price provisions, do not require shareholder approval to be implemented by a board of directors. Further, once a poison pill is implemented, a board can neutralize the pill at its discretion by repurchasing the warrants underlying the pill. Consequently, a board of directors has great control over the success or failure of a tender offer and the raider is forced to negotiate exclusively with the target corporation's board. Clearly, the pill's strength and major advantage over fair price provisions lies in its flexibility and speed of implementation, which is an important asset in a volatile business environment.

But even if the poison pill is flexible and quickly implemented, it may not be used haphazardly. Delaware law imposes certain duties on directors when they decide to implement a defense. These duties are imposed by the business judgment rule. But exactly what duties are imposed by this rule and how do these duties apply in the context of implementing a poison pill or other defense? The following discussion of the business judgment rule is directed towards answering these questions and providing a basis for understanding the guidelines of prudent business judgment discussed later.

B. Fiduciary Duties and The Business Judgment Rule

A great deal has been written about the business judgment rule. The rule governs much of the area of corporate law and specifically corporate takeovers. It is well settled that the day-to-day affairs of a corporation are governed by its board of directors rather than by its shareholders.

(1974); Lipton, Takeover Bids in the Targets Boardroom, 35 Bus. Law. 101, 113-14 (1979). See also Note, Protecting Shareholders, supra note 11, at 1966 (by offering inflated price for shares until offeror obtains holding of 51% of stock, the two-step merger process holds out a carrot and then wields a stick).

22. See infra note 77. In Delaware, unless the corporate charter provides otherwise, if a shareholder or director has votes sufficient to effectuate an action at a meeting of stockholders, he may do so without a meeting, notice, or vote. Del. Code Ann. tit. 8, § 228 (1974 & Supp. 1982). In lieu of a meeting, obtaining proxies necessary to effectuate an action will suffice. Id.


24. See, e.g., Norlin Corp. v. Rooney Pace, Inc., 744 F.2d 255, 258 (2d Cir. 1984) (day-to-day affairs of a company are to be managed by its officers under the supervision of the directors, however, shareholders must vote on most extraordinary issues). See also Del. Code Ann. tit. 8, § 242 (1974) (amending articles of incorporation); id. § 271 (sale of assets); id. § 275 (dissolution); id. § 251 (some mergers).
Thus, an imbalance of power is created between the directors and the shareholders they serve. To counteract this imbalance, courts have deemed it necessary to impose a fiduciary duty on directors to exercise good faith and prudent business judgment in the management of corporate affairs. The business judgment rule creates a presumption in favor of directors that they have satisfied their fiduciary obligations of acting prudently, honestly, and in good faith when carrying on the corporation’s affairs. Absent a showing that directors have not lived up to these obligations, a court may not second guess directors by deciding whether they have made a correct or incorrect business decision.

The business judgment rule has been promulgated not only to restore the balance of power between directors and shareholders, but also to promote judicial economy, for without it, the courts would become embroiled in corporate affairs. The rule also was promulgated to afford directors the opportunity to run corporate affairs without fear of constant shareholder harassment or personal liability for honest mistakes in judgment.

25. Shareholders, however, have power even though they do not play a role in the corporation’s day-to-day affairs. Shareholders who disagree with decisions of the board have two means of recourse: they may set the corporate democratic process in motion and begin a proxy contest to oust the incumbent board or reject the proposed transaction, or they may bring suit invoking the business judgment rule in order to prevent the transaction or to recover damages. Generally, the second alternative is chosen because of insufficient time, procedural obstacles and extraordinary legal costs. See Graham and Pinto, The Business Judgment Rule and Takeovers, BARRISTER, SPR. 1985, at 36.

26. See, e.g., Conoco, Inc. v. Seagram Co., 517 F. Supp. 1299, 1303 (S.D.N.Y. 1981) (best judgment must be exercised by directors with respect to any proposal pertaining to corporate affairs); Bodell v. General Gas & Elec. Corp., 15 Del. Ch. 119, 121, 132 A. 442, 446 (1926) (directors stand in position of fiduciaries), aff'd, 15 Del. Ch. 420, 140 A. 264 (1927); Litwin v. Allen, 25 N.Y.S.2d 667 (Sup. Ct. 1940) (directors must exercise duties in honesty and in good faith). See also Corporate Director’s Guidebook, 33 Bus. L. 321 (1977) (discussion of director’s fiduciary duties to shareholders); Lipton, supra note 21, at 105 (directors owe shareholders fiduciary duty to act prudently and in good faith on reasonable basis of assurances that operations are for the benefit of the corporation).

27. See, e.g., Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (presumption that directors act in good and in best interest of the company in making business decisions); Auerbach v. Bennett, 47 N.Y.2d 619, 630, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 926 (1979) (directors presumed to have acted in good faith). Some commentators are against the strict application of the business judgment rule in the takeover setting. For an excellent analysis of the rule from this standpoint, see Comment, Proposal for Reform, supra note 17, at 390-92.


29. See supra note 28.

30. See, e.g., Mathes v. Cheff, 190 A.2d 524 (Del. Ch. 1963), rev’d, 199 A.2d 543, 555
The presumption of prudent business judgment in favor of directors remains until it can be satisfactorily shown by a challenger\(^{31}\) that the directors have breached their fiduciary duty. The challenger meets this burden by showing either abuses of discretion that are in violation of the directors' duty of care,\(^{32}\) or actions of self-dealing that are in violation of the directors' duty of loyalty.\(^{33}\) Duty of loyalty and duty of care are two components of the directors' fiduciary duty to shareholders. Once a challenger meets his burden of proof, directors are no longer entitled to the presumption of propriety. The burden of proof then shifts to the directors to demonstrate that their actions were taken in the best interest of shareholders.\(^{34}\) Only if the directors' demonstration is satisfactory will they and the corporation win their case.

Delaware law, as it pertains to corporate defensive strategies,\(^{35}\) however, does not automatically afford directors the presumption of prudent business judgment. Rather, the initial burden of proof is placed on the directors who must make some preliminary showings in order to win protection of the rule.\(^{36}\) The burden requires proof of reasonable

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\(^{31}\) See, e.g., Treadway Cos. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980) (plaintiff must show directors' bad faith, self-interest, or some other impermissible motive); Barnes v. Andrews, 298 F. 614, 616 (S.D.N.Y. 1924) (burden on plaintiff to prove breach of fiduciary duty resulted in loss); Auerbach v. Bennett, 47 N.Y.2d at 630, 393 N.E.2d at 1000, 419 N.Y.S.2d at 926 (burden on plaintiff to show fraud or bad faith).

\(^{32}\) For a discussion of a director's duty of care, see infra notes 37-55.

\(^{33}\) Self-interest is a desire of the target's directors to benefit by the takeover through continued employment, salaries, benefits, power, and control. Courts, however, are generally unwilling to conclude that this type of self-dealing, by itself, is a per se breach of loyalty. See, e.g., Johnson v. Trueblood, 629 F.2d 287, 292 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981) (noting that a director has a certain amount of self-interest in all business decisions). Different courts apply varying standards, however, to determine when a plaintiff has proven breach of loyalty. See, e.g., Panter v. Marshall Field & Co., 486 F. Supp. 1168, 1194 (N.D. Ill. 1980) (plaintiff must show fraud, bad faith, gross overreaching, or abuse of discretion), aff'd, 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Johnson v. Trueblood, 629 F.2d at 293 (plaintiff must prove that motive to retain control was primary or sole purpose); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (plaintiff must show director's gross negligence).

\(^{34}\) A shift in the burden of proof offers little resistance to the target board who usually offers proof that the offering price was too low, the timing of the takeover was injurious, or that a change in control would constitute a clear threat to the future business or existing, successful business policy of the corporation. See Crane Co. v. Harasco Corp., 511 F. Supp. 294, 298 (D. Del. 1981). See infra note 132.

\(^{35}\) However, the business judgment rule as applied to other corporate dealings remains unchanged. See supra notes 27-34 and accompanying text and infra notes 36-40 and accompanying text.

\(^{36}\) See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (initial burden on directors). The rationale behind placing the initial burden on the directors is that conflicts of interest necessarily arise when a threat to their control arises. Bennett v. Propp,
grounds for believing that a danger to corporate policy and effectiveness existed. Inclusive in this burden is a showing of good faith and reasonable investigation. Additionally, directors must show that the defensive mechanism was reasonable in relation to the threat posed. Finally, they must show that their decision to implement a defensive strategy was an informed one. The Delaware Supreme Court clarified the meaning of an informed decision in Smith v. Van Gorkom. This case is integral to understanding the Household decision and provides a basis for recommendations made later in this Note.

In Van Gorkom, three former shareholders of Trans Union Corporation (TU) sought damages as a result of TU's merger with a subsidiary of the Marmon Group Corporation. The court's decision focused primarily on the activities of TU's directors during the six days in between the TU chairman's initial approach to the Marmon Group's chairman and the approval of the merger by TU's board. The Delaware Supreme Court held that TU's board was not entitled to the presumption of prudent business judgment because TU's chairman was grossly negligent in his actions preceding the board's approval of the merger, and TU's board failed to adequately inform itself prior to its approval of the merger. According to the record, Marmon's chairman made an offer to TU's chairman to purchase TU at a price previously discussed at a social outing. At this time, no other TU director had any knowledge of the offer. Two days later TU's chairman, without notice, called a special meeting of the board in order to consider the proposal. The bulk of the meeting consisted of a twenty minute oral presentation made by TU's chairman outlining the terms of the offer and a brief presentation made by legal counsel indicating that failure to accept the offer might be a breach of the directors' fiduciary duty because shareholders would be denied a fifty percent premium over the per share market price of TU's stock. During the meeting, TU's financial officer briefly explained that according to his valuation


37. Proof of reasonableness is materially enhanced where the majority of the board favoring the defensive mechanism are outside directors who have complied with the good faith and reasonable investigation standards. Aronson v. Lewis, 473 A.2d at 812-15.
41. Id. at 873.
42. Id. at 858.
43. Id. at 864-70.
44. Id. at 864.
45. Id. at 865-67.
46. Id. at 867.
47. Id. at 868.
study, which the court found to be cursory and inaccurate, the price offered for TU’s shares was within the range indicated by his study.\(^4\) The meeting closed with approval of the offer by TU’s board. No director asked to review the draft agreement of the offer and no director consulted with an investment banker or other personnel qualified to assess the offer’s fairness to shareholders.\(^4\)

In holding that TU’s board was not entitled to the presumption of prudent business judgment, the Delaware Supreme Court emphasized that the board’s burden of proof would only be met if it had informed itself “prior to making a business decision, of all material information reasonably available to [it].”\(^5\) The court concluded that an informed decision had not been made. The court further stated that TU’s directors were grossly negligent,\(^5\) because they made an “unintelligent or unadvised judgment” when they blindly accepted their chairman’s recommendations to accept Marmon’s tender offer.\(^2\) The court specifically noted the directors’ failure to read the draft agreement, their overall cursory review of the offer, and their acceptance of the offer without adequate consideration of the true value of TU or the effects of the offer on shareholders.\(^3\) In making these findings, the court pointed out that TU’s board did not consult with an investment banker and that no reliable valuation study had been conducted.\(^4\) The court also found the board negligent because it failed to recess to consider the offer in depth, even though there was no crisis requiring action in a short period of time.\(^5\) Thus, the Van Gorkom decision stands for the proposition that, in Delaware, no presumption of propriety exists for directors who make uninformed takeover decisions in a grossly negligent manner.\(^6\)

II. THE HOUSEHOLD DECISION

A. Facts and Prior Procedure

*Moran v. Household International, Inc.* came to the Delaware Supreme Court from the Delaware Chancery Court which upheld the Household

\(^{48}\) *Id.* at 866, 875. The valuation study was not a true valuation study, but rather, a study concerning a leveraged buy-out of TU by the Marmon Group. *Id.* at 866. The study calculated the book value of TU based on a fictional value of $55 per share decided on by TU’s chairman according to the company’s historic stock market price. *Id.*

\(^{49}\) *Id.* at 877.

\(^{50}\) *Id.* at 872 (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

\(^{51}\) 488 A.2d at 872.

\(^{52}\) *Id.* (citing Mitchell v. Highland-Western Glass, 167 A. 831, 833 (Del. Ch. 1933)).

\(^{53}\) 488 A.2d at 874.

\(^{54}\) *Id.* at 877-78.

\(^{55}\) *Id.* at 877.

\(^{56}\) *Id.* at 881.
board's adoption of a poison pill plan as a legitimate exercise of business judgment. Household was a holding company with its principle subsidiaries in the financial services, transportation, and merchandising industries. Its board was composed of sixteen directors, ten outside directors and six members of management. Appellant Moran, one of Household's outside directors and chairman of the Dyson-Kissner-Moran Corporation, the largest single stockholder of Household stock, began discussions with Household's board about a possible leveraged buy-out after observing that Household's stock was significantly undervalued in the market in relation to its book value. The record showed that Moran never intended a hostile takeover and further, that Moran's suggestion of a buy-out never progressed beyond mere discussion.

Prior to its discussions with Moran, the Household board retained legal counsel to develop an anti-takeover strategy. Several plans, including a fair price provision, were considered by the board but were rejected in favor of the poison pill which was adopted without shareholder approval on August 14, 1984. The record showed that the poison pill was not implemented in response to Moran's overtures or any other impending battle with a corporate raider, but rather, as a precautionary measure to ward off future advances in the uneasy and volatile takeover environment surrounding the financial services industry at the time.

Household's poison pill plan provided that common shareholders would be issued one warrant per common share on the occurrence of one of two

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58. 500 A.2d at 1349.
59. Id. at 1348 n.2.
60. Id. at 1349.
61. Id.
62. Id.
63. Id. In addition, the chancery court's record shows that Household employed an investment banker who worked side-by-side with legal counsel in developing the "Raid Preparedness" plan. The plan assessed the overall takeover climate as well as various other anti-takeover devices. 490 A.2d at 1065.
64. 490 A.2d at 1065. See supra notes 19-24 and accompanying text.
65. 490 A.2d at 1065. See supra note 22 and accompanying text.
66. 490 A.2d at 1065. The poison pill plan was approved after nearly two hours of discussion by a vote of fourteen to two with only Moran and one other director dissenting. Id. at 1067. In opposition to the board, Moran argued that the poison pill plan would deny shareholders the opportunity to sell their shares at a premium on occurrence of a tender offer. Id. See infra notes 83-95 and accompanying text.
67. 490 A.2d at 1065. Household was concerned about the frequency of "bust-up" and "bootstrap" takeovers in the form of two-tier tender offers in the financial services industry as early as February 1984, well before Moran's discussions with Household concerning a leveraged buy-out. Id. See supra notes 3, 20-21 and accompanying text for a discussion of "bust-up" takeovers and two-tier tender offers. The board was specifically concerned with the possible adverse affects that an attempted takeover would have on employee performance and morale. 490 A.2d at 1065.
specified events. The first was an announcement of a tender offer for at least thirty percent of Household's shares. The second was the acquisition of at least twenty percent of Household's shares by any single entity or group. In the case of a tender offer for thirty percent of Household's shares, the issued warrants would immediately entitle the warrant holders to purchase one-hundredth of a share of Household's new and specially issued preferred stock for $100. The board, without shareholder approval, could redeem these warrants at fifty cents per warrant. If any party acquired twenty percent or more of Household's shares, the issued warrants would again be exercisable to purchase one-hundredth of a share of new preferred stock for $100, but the warrants would automatically become nonredeemable by the board. Most importantly, if a warrant had not previously been exercised and a raider forced a merger or consolidation, each warrant would be exercisable to purchase $200 of the common stock of the continuing corporation for $100.

B. Moran's Arguments and the Court's Response

The Delaware Supreme Court wholeheartedly affirmed the Delaware Chancery Court's decision. It held that Household's directors were authorized to adopt the poison pill, that the poison pill did not usurp rights of shareholders to receive hostile tender offers by changing Household's fundamental structure, the pill did not seriously restrict shareholders' rights to conduct a proxy contest, and that implementation of the poison pill was a legitimate exercise of business judgment. In so holding, the Delaware Supreme Court struck down numerous theories presented by Moran attacking the validity of the poison pill.

Moran first contended that the board was unauthorized to adopt the poison pill because no provision of the Delaware Corporation

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68. 500 A.2d at 1348.
69. The new preferred stock would be nonredeemable and subordinate to other series of Household's preferred stock. Its dividend right would be 100 times that of Household's common stock, and its liquidation preference would be the same as the common stock's. 490 A.2d at 1066.
70. 500 A.2d at 1349. No prudent investor would exercise his warrants at this price. See supra note 14 and accompanying text.
71. 500 A.2d at 1349. Because the warrants were still redeemable at this stage, Household's board could nullify the effects of the pill if a favorable takeover opportunity had arisen. See supra note 23 and accompanying text.
72. 500 A.2d at 1349.
73. Id. If both triggering events occurred consecutively, as in a tender offer for thirty percent of Household's shares and then an actual acquisition of twenty percent of Household's shares, the warrants issued on occurrence of the thirty percent trigger would become nonredeemable as soon as twenty percent of Household's stock was acquired.
74. Id. This is the so-called "flip over" provision. See supra note 16 and accompanying text.
75. 500 A.2d at 1357.
Code authorized such a plan. 76 The court dispelled this theory, explaining that section 157 77 of the Code authorized the poison pill warrant 78 and that section 151 79 authorized the issuance of the new preferred

76. Id. at 1351.
77. Del. Code Ann. tit. 8, § 157 (1974). The power to issue warrants to purchase shares is conferred by section 157 which provides in pertinent part:

Subject to any provisions in the certificate of incorporation, every corporation may create and issue, whether or not in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to purchase from the corporation any share of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors.

78. In one of his arguments, Moran contended that section 157 could not authorize the poison pill because the section would become contradictory to section 203(a), a notice statute. 500 A.2d at 1352-53. See Del. Code Ann. tit. 8, § 203(a). Section 203 provides lax standards generally requiring that notice be given to a target corporation before a tender offer is made for its shares. The fact that section 203 creates little burden to the offeror, Moran argued, evidences legislative intent to reject any interpretation of the Delaware Corporation Code that would impede the tender offer process. 500 A.2d at 1353.

The court rejected this contention as a non sequitur, holding that the legislature's desire to impose minimal state regulations on tender offers does not indicate its desire to preclude private regulation of this activity through the use of anti-takeover devices. Id. See supra note 77. Compare Del. Code Ann. tit. 8, § 203(a) (1974) which provides:

No offeror shall make a tender offer unless:

(1) Not less than 20 nor more than 60 days before the date the tender offer is to be made, the offeror shall deliver personally or by registered or certified mail to the corporation whose equity securities are to be subject to the tender offer, at its registered office in this State or at its principal place of business, a written statement of the offeror's intention to make the tender offer . . . .

(2) The tender offer shall remain open for a period of at least 20 days after it is first made to the holders of the equity securities, during which period any stockholder may withdraw any of the equity securities tendered to the offeror, and any revised or amended tender offer which changes the amount or type of consideration offered or the number of equity securities for which the offer is made shall remain open at least 10 days following the amendment; and

(3) The offeror and any associate of the offeror will not purchase or pay for any tendered equity security for a period of at least 20 days after the tender offer is first made to the holders of the equity securities, and no such purchase or payment shall be made within 10 days after an amended or revised tender offer if the amendment or revision changes the amount or type of consideration offered or the number of equity securities for which the offer is made. If during the period the tender offer must remain open pursuant to this section a greater number of equity securities is tendered than the offeror is bound or willing to purchase, the equity securities shall be purchased pro rata, as nearly as may be, according to the number of shares tendered during such period by each equity security holder.

79. Del. Code Ann. tit. 8, § 151(g) (1974 Supp. 1982). Section 151(g) provides:

When any corporation desires to issue any shares of stock of any class or of any series of any class of which the voting powers, designations, preferences and relative, participating optional or other rights, if any, or the qualifications, limitations or restrictions thereof, if any, shall not have been set forth in the certificate of incorporation or in any amendment thereto but shall be provided for in a
stock underlyng the warrants. The fact that these sections previously had not been applied in the context of a takeover defense was of no consequence to the court which held that the sections’ application would not be limited to its prior common use, corporate financing, without a clear showing of legislative intent to that effect.

resolution or resolutions adopted by the board of directors pursuant to authority expressly vested in it by the provisions of the certificate of incorporation or any amendment thereto, a certificate setting forth a copy of such resolution or resolutions and the number of shares of stock of such class or series shall be executed, acknowledged, filed, recorded, and shall become effective, in accordance with § 103 of this title.

80. See supra note 69.
81. 500 A.2d at 1351.
82. Id. The court noted that Delaware corporate law is not static but rather responds to evolving concepts and needs. The fact that the Delaware Corporation Code is silent as to a specific matter does not mean it is prohibited. Id. (citing Unocal v. Mesa Petroleum Co., 493 A.2d 946, 957 (Del. 1985)).

The court rejected another argument made by Moran on this basis. Moran contended that section 157 authorizes the issuance of warrants “entitling holders to purchase from the corporation any shares of its capital stock ....” 500 A.2d at 1352. See supra note 79. Thus, Moran contended that the statute’s plain language indicated that a corporation could not issue warrants to purchase another corporation’s stock. 500 A.2d at 1352. The court rejected this argument with an analogy to anti-dilution provisions found in many corporation securities. These provisions protect shareholders in the event of a merger by giving them the right to convert their securities into whatever securities are to replace the stock of their company. Id. Corporations use these provisions for financing purposes because of shareholders’ fears that their securities would become worthless in the event of a merger. These provisions give potential shareholders confidence, and in return, they purchase the corporation’s securities.

The similarity between anti-dilution provisions and the poison pill is that they both allow the shareholder to acquire the new corporation’s stock upon merger. Thus, the Household court held that without a clear showing of legislative intent to the contrary, there was no basis for declaring the poison pill invalid when anti-dilution provisions have been upheld. 500 A.2d at 1352. The court also held, contrary to Moran’s argument, that the warrants underlying the poison pill were not a “sham” and that the new preferred stock issued to cover the warrants was not illusory. Id. The court noted that the warrants could be exercised upon their issuance and that they most assuredly would be exercised following a hostile merger or consolidation. Id. See supra notes 16-17 and accompanying text. Thus, the warrants were not a “sham.” 500 A.2d at 1352. As to the preferred stock, the Delaware Supreme Court agreed with the Chancery Court’s finding that its superior dividend and liquidation rights prevented it from being considered illusory. Id. See supra note 69.

Alternatively, Moran questioned the authorization of the poison pill pursuant to section 157 on constitutional grounds, asserting that the poison pill was violative of the commerce and the supremacy clauses since it is an obstacle to the policies underlying the Williams Act. 500 A.2d at 1353. The court rejected the assertion, holding that Household’s actions as a private party in implementing the pill pursuant to state statute did not provide sufficient nexus to the state for there to be a state action which may violate the commerce or the supremacy clauses. Id. Accordingly, the Williams Act, Pub. L. No. 90-439, Stat. 454 (1968) (amending Securities Exchange Act of 1934, ch. 404, 48 Stat. 894 (1934)), which prohibits manipulative acts or practices in connection with tender offers, works only to prohibit state actions that are manipulative and not those of private parties. 500 A.2d. at 1353. Drawing the above conclusions, the Delaware Supreme Court held that Household’s board had the authority to implement the poison pill. Id.
Moran's second major contention was that the board's approval of the poison pill usurped shareholders' rights to receive hostile tender offers by altering Household's fundamental structure. The structural change, Moran argued, resulted from the board's unfettered discretion to refuse to redeem the warrants even when a takeover would be economically favorable to Household's shareholders. This fundamental transfer of power from the shareholders to the board would give the board exclusive control over the success or failure of a tender offer, thereby depriving shareholders of their right to decide the ultimate fate of the corporation.

The court refuted these assertions and held that the poison pill affected no more structural change than other previously upheld anti-takeover devices and that, even if some change did result, shareholders did not seriously lose their ability to receive hostile tender offers. Specifically, the court noted that the pill alters a corporation's structure less than the "crown jewel" defense which destroys the assets of a corporation, or the "greenmail" defense which causes an outflow of corporate funds and thus impedes a corporation's financial flexibility. Further, hostile tender offers could be accomplished in many ways, in spite of the pill. Possibilities include: tendering with a condition that the board redeem the warrants; tendering and soliciting proxies to remove the board and then redeeming the warrants; acquiring 50% of the shares and causing Household to self-tender for the warrants; tendering with a high minimum condition of shares and warrants; and finally, acquiring up to 19.9% of Household's shares and soliciting proxies to remove the board and then redeeming the warrants.

The court also held, contrary to Moran's argument, that the board does not have unfettered discretion in denying all tender offers. Rather, the directors' fiduciary duty to shareholders mandates that they consider each bid carefully on its own merits and specifically consider whether the

83. 500 A.2d at 1353-54.
84. Id.
85. Id. at 1354.
86. Id.
87. Id.
88. Id.
89. See supra notes 4 & 9.
90. 500 A.2d at 1354.
91. See supra note 8.
92. 500 A.2d at 1354. See supra note 8. Also, as the court noted, the poison pill did not dilute earnings per share and did not adversely affect the market price of Household's stock.
93. 500 A.2d at 1354.
94. Id.
95. Id.
96. Id.
97. Id.
98. See supra note 26 and accompanying text.
offer would be in the best economic interest of the shareholders. If shareholders' interests would be better served by accepting a hostile takeover bid, the board must deactivate the pill by repurchasing the warrants and allow the takeover to run its course. The above considerations, the court concluded, would not warrant a finding that the poison pill was invalid on the theory that it precluded shareholders from accepting hostile tender offers.

Moran's third contention, that the poison pill would restrict shareholders' rights to conduct a proxy contest, was also struck down by the court. The court noted that while the pill does restrict individual shareholders or groups of shareholders from first acquiring beneficial ownership of twenty percent of Household's shares before waging a proxy contest, this restriction would have minimal effect on the success of a proxy contest. Evidence presented at trial showed that many proxy contests were won with insurgent ownership of less than twenty percent of a corporation's outstanding shares and that very large holdings did not guarantee the success of a takeover. Thus, in the court's view, the key variable in a successful proxy contest was the merit of the insurgent shareholders' issues and not how much stock the raider had acquired. Accordingly, the Household court held that the poison pill defense is legal in Delaware. The court, however, still needed to pronounce a standard to determine when and under what circumstances a board could legally use the poison pill. The court concluded that the business judgment rule was the appropriate doctrine for determining whether a board of directors had lawfully implemented a poison pill. Moreover, the Household court held that the business judgment rule was applicable in determining the lawfulness of preemptive defenses generally. In so holding, the court noted that preemptive defenses required pre-planning which would reduce the risk that, under the pressure of a takeover bid, directors would fail...
to exercise prudent business judgment. Thus, in the court's view, application of the business judgment rule to pre-planned defensive strategy was especially appropriate.

After upholding the applicability of the business judgment rule to the poison pill defense, the Household court held that Household's directors were entitled to the presumption of prudent business judgment. The court found that the board had met its burden of proof by showing that it had reasonable grounds for believing that a danger to corporate policy or effectiveness existed. The court further found that the board exercised good faith and reasonable investigation, that use of the poison pill was reasonable in relation to the threat posed, and that the board was not grossly negligent in reaching an informed opinion with respect to the pill's effect on shareholders' interests.

The court noted that the board's implementation of the poison pill was in response to a perceived threat of "bust-up" takeovers in the form of coercive two-tier tender offers and the negative effect a two-tier tender offer would have on employee morale and productivity. Furthermore, the court found that the decision to implement the poison pill was a reasonable response to the threat of coercive two-tier tender offers because the decision was made by a majority of the board who were outside directors and not seriously prone to conflicts of interest. Finally, the board's decision was presumed to have been made in good faith because Moran never alleged self-dealing on the part of Household's directors.

The Household court then found that an informed decision had been made by the board because board members had conducted extended discussions amongst themselves and with legal counsel before implementing the poison pill defense. The court noted that each director received a notebook which contained an outline of the poison pill plan and copies of articles concerning the current takeover environment. Moreover, the court decided that the board was well informed and reasonable in its conclusion that the poison pill did not restrict proxy contests and did not preclude shareholders from receiving hostile tender offers. In sum, the court held that the Household directors' implementation of the poison pill defense was appropriate.

110. Id.
111. Id.
112. Id. at 1357.
113. See supra notes 37-38 and accompanying text.
114. See supra note 38 and accompanying text.
115. 500 A.2d at 1356-57.
116. Id. at 1357.
117. See supra note 37.
118. 500 A.2d at 1356.
119. Id.
120. Id.
121. Id.
was not a grossly negligent, uninformed decision and that they were entitled to protection afforded by the business judgment rule.\textsuperscript{122}

\section*{III. Analysis}

Delaware courts have long upheld defensive strategies under the business judgment rule.\textsuperscript{123} However, \textit{Household} was the first Delaware Supreme Court decision to uphold a preemptive defense under such a doctrine. The court noted the major distinction between \textit{Household} and prior decisions stating: "[H]ere we have a defensive mechanism adopted to ward-off possible future advances and not [as in prior cases] in reaction to a specific threat."\textsuperscript{124} The decision, therefore, encourages preemptive defenses by sanctioning their use under the business judgment rule. It is debatable, however, whether takeovers are desirable in terms of public policy.

Some commentators view takeovers, hostile or otherwise, as favorable because they benefit target shareholders and the economy by maximizing share prices and increasing economic efficiency.\textsuperscript{125} Under this view, preemptive defenses are undesirable because they hinder the movement of assets to more efficient management and deny shareholders the opportunity to secure the maximum price for their shares as dictated by the economic forces of supply and demand.\textsuperscript{126} Some proponents of this position go so far as to say that target management should never be allowed to defend itself from hostile tender offers.\textsuperscript{127} According to this view, preemptive defenses are disruptive because of their potential to severely curtail takeover activity.

Opponents of this view question whether takeover activity has a positive impact on the economy\textsuperscript{128} because many target corporations are already profitable and productive and their demise, therefore, would not benefit the economy. Furthermore, opponents are not ready to concede that takeovers have significantly affected the economy on the whole. At the most, takeovers cause only regional economic instability because the tar-

\begin{itemize}
\item \textsuperscript{122} Id. at 1356-57.
\item \textsuperscript{123} Id. at 1350.
\item \textsuperscript{124} Id.
\item \textsuperscript{126} Id. at 1739; Easterbrook & Fischel, \textit{The Proper Role of a Target’s Management in Responding to a Tender Offer}, 94 HARV. L. REV. 1161, 1194 (1981).
\end{itemize}
get's employees may be fired or the corporation's assets may be sold by the raider subsequent to the takeover. According to this view, preemptive defenses are welcomed as a viable means to control regional economic stability and protect productive and profitable corporations. How each individual stands on these economic issues largely determines his view of the desirability of preemptive defenses. However, another important determinant is one's view on the role of directors and shareholders in the takeover process.

Some commentators believe directors should play little or no role in the takeover process for two reasons. First, hostile tender offers are made to shareholders, not directors, and shareholders can certainly determine whether or not it is in their own best interest to accept or reject the price offered for their shares. Second, directors face an inherent conflict of interest in a takeover situation and may implement a defense contrary to the best interests of the shareholders in order to protect the incumbent regime. Those who agree with these views probably also believe preemptive defenses unfavorably increase the director's role in takeover situations.

However, others believe that directors should assume an active role in the takeover process because they are in a superior position to render takeover decisions given their knowledge and expertise. Indeed, the business judgment rule is premised on the notion that directors are best suited to run corporate affairs and should be allowed to do so without fear of shareholder harassment. Proponents of this view also argue that shareholders cannot make takeover decisions in their own best interest when confronted with a coercive takeover bid, such as a two-tier tender offer, because they may accept the offer out of fear that they will receive little or nothing for their shares subsequent to a forced merger. Thus, shareholders individually may accept an offer they would reject collectively. Advocates of this position welcome preemptive defenses as a tool to be used by directors in order to protect shareholders' interests.

As a practical matter, it is too early to determine whether preemptive defenses will have a significant effect in protecting individual corporations or reducing takeover activity over all. Two factors will lessen the effectiveness of preemptive defenses. First, raiders still have options available to force a merger in spite of a preemptive defense. The Household court even outlined a raider's options in respect to the poison pill. Second, at the time of attack, the raider may bring suit to force a target's board to stop its defense if the raider can prove that the tender offer is in the best interest of shareholders and that the directors are breaching their fiduciary duty to the shareholders by preventing the takeover. As evidenced in the

129. Easterbrook & Fischel, Takeover Bids, supra note 125, at 1745.
131. See supra note 21.
Household decision, this recourse may not always be fruitful, because directors can plan their defenses to meet the requirements of the business judgment rule.

IV. IMPACT

The business judgment rule requires that directors meet the traditional requirements of good faith and prudent judgment. However, the court’s posture in applying these standards appears lenient. Directors, with proper planning, can meet these burdens with relative ease. Indeed, the Household court summarized the current requirements of the business judgment rule, presenting practical guidelines for directors to use when implementing defensive strategies that will win the rule’s protection. Thus, the Household decision is analogous to an apothecary because it dispenses the medicine needed by directors to meet their burden of proof under the business judgment rule. Moreover, the Household decision contains antidotes to the poison pill that allow prospective raiders to work around the poison pill’s prohibitive effect on a takeover bid.

A. The Apothecary

Directors who desire to implement the poison pill, as well as other preemptive defenses, must insure that they can meet the burden of proof imposed by the business judgment rule. If this burden is met, it secures for directors the presumption of prudent business judgment in their decision to implement their chosen defense. Once the presumption is established, it is hard to overcome because a challenger must then prove that the directors have breached their fiduciary duty. Chances are excellent, therefore, that the poison pill plan will be upheld once directors meet their initial burden of proof. Meeting the burden, however, requires careful planning on the directors’ part so that sufficient evidence indicating prudent behavior can be presented at trial.

First, directors should start planning their anti takeover strategy as early as possible. In Household, for example, the court specifically noted that Household’s directors considered implementing the poison pill far in ad-

132. Contrary to the challenger’s burden, the directors’ burden is easily met. A number of business reasons can be proffered by directors to explain why a takeover is undesirable. For example, directors may consider the offering price inadequate or the selling time inappropriate. Unocal Corp. v. Mesa Petroleum Corp., 493 A.2d 946, 955 (Del. 1985). See Lipton, Takeover Bids in the Target’s Boardroom: An Update After One Year, 36 Bus. Law. 1017, 1022-23 (1981). See also Comment, Proposal for Reform, supra note 17, at 386; E. Folk, The Delaware General Corporation Law 75-81 (1972).

133. Cf. Household, 500 A.2d at 1350 (“pre-planning for the contingency of a hostile takeover might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise reasonable judgment”); Delaware Rulings Complicate Poison Pill Picture, Legal Times, Feb. 4, 1985, at 9, col. 1.
vance of any specific threat or actual takeover bid. When directors begin their planning process early, they allow themselves adequate time to make a reasonable investigation and an informed decision. Moreover, early planning evidences good faith on the directors' part and precludes a finding of self-interest because directors will not be forced to make rushed decisions under pressure of an imminent takeover bid.

Second, directors should schedule multiple board meetings to discuss the poison pill defense and its effects on shareholders. Multiple discussions evidence reasonable investigation into the matter and reflect an absence of self-dealing. In the event that directors have not sufficiently planned ahead and a takeover threat becomes imminent, the directors should, at a minimum, adjourn their emergency meeting for several hours to review relevant documents and economic materials and to consult with legal counsel and qualified financial personnel. The adjournment will evidence some semblance of an informed decision.

Third, detailed minutes of all board meetings pertaining to anti-takeover strategy should be kept. The minutes serve an important evidentiary function because they show that the directors adequately discussed anti-takeover plans and sought opinions from outside individuals such as attorneys and investment bankers. Thus, directors will avoid allegations of self-dealing or making uninformed decisions. Additionally, the minutes should reflect that the directors had reasonable grounds for believing that a hostile takeover attempt would endanger existing corporate policy and effectiveness. This may be accomplished by a board discussion concerning the effect of a hostile bid on employee morale and productivity.

The gathering and distribution of data, concerning the current takeover climate, to the directors is further proof of reasonable grounds. This proof will be enhanced if the data reflects a relatively high frequency of coercive takeover bids such as two-tier tender offers. In Household, for example, the court concluded that the directors had reasonable grounds for believing that a hostile takeover attempt would endanger the corporation, largely because the corporation was supplied with such data.

134. 500 A.2d at 1350.
135. Id.
137. Cf. 500 A.2d at 1350 (pre-planning reduces the risks).
138. See, e.g., Kamin v. American Express Co., 86 Misc. 2d 809, 813-14, 383 N.Y.S.2d 807, 811 (1976) (board decision upheld where minutes showed directors considered various proposed plans); Chef v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964) (minutes served important function in determining self-dealing); Bennett v. Propp, 187 A.2d 405 (Del. 1962) (minutes may be supplemented with oral testimony).
139. 500 A.2d at 1357.
140. Id.
141. Id.
Under Delaware law, proof of reasonableness is enhanced if a majority of directors favoring the poison pill are outside directors. The minutes should show, therefore, that the decision process was structured in such a way that outside directors made the final determination on the merit of all proposals relating to a poison pill’s implementation.

Fourth, whenever an anti-takeover strategy is contemplated, it is essential to consult with investment bankers or other qualified financial personnel as to the economic effects of an acquisition on shareholders. A detailed valuation study should be conducted and should contain all of the important economic attributes of the corporation, including the corporation’s book value. Delaware courts consider the existence and use of valuation studies extremely important in determining whether directors have acted in good faith and have reached an informed decision. The valuation study should be conducted by an outside investment banking firm because its work will be beyond reproach in terms of self-dealing or self-interest. Qualified in-house financial staff may also conduct the study but should be aware that their work will be carefully scrutinized by the courts as to its accuracy and validity. The study should indicate whether a takeover would be favorable to shareholders, and if so, at what price per share. If a takeover would not presently benefit shareholders, the study should indicate whether another time would be more suitable.

Fifth, legal counsel specializing in mergers and acquisitions should work side-by-side with an investment banker to develop a poison pill plan that fits the economic needs of the defending corporation. Additionally, both legal counsel and the investment banker, or other qualified personnel, should be present during board discussions of the poison pill plan to make suggestions and answer questions about the pill’s economic effect on shareholders and the pill’s legality. Legal counsel should inform the board that while an opinion conducted by an investment banker is not required in Delaware as a matter of law, the opinion would serve a useful purpose in litigation. These suggestions help to insure that an

142. 493 A.2d at 955. For a discussion of whether courts place too much weight on the role of independent directors, see Werner, Corporation Law in Search of its Future, 81 COLUM. L. REV. 1611, 1656-58 (1981) (courts’ deference to outside directors’ judgment impairs shareholders’ protection against management abuses). But see Lipton, supra note 127, at 1235 (majority of directors not affiliated with management take responsibilities seriously).

143. Smith v. Van Gorkom, 488 A.2d at 877-78. See also Panter, 646 F.2d at 275 (reliance on investment banking reports); Treadway Cos., 638 F.2d at 356 (reliance on investment bankers); Buffalo Forge Co., 555 F. Supp. at 904 (reliance on investment bankers).

144. See, e.g., Panter, 646 F.2d at 271 (reliance on attorneys); Buffalo Forge Co., 555 F. Supp at 904 (reliance on attorneys).


146. Id. at 876-85.

147. Id. at 868.

148. Id.
informed decision has been made and that directors have acted without self-interest.

Sixth, although a showing of self-interest alone is not generally enough to show bad faith, a prudent board should nonetheless seek to reduce the appearance of self-dealing by relying on the opinions of outside experts, such as investment bankers and legal counsel, as much as possible. Reliance on experts demonstrates good faith and objectivity and will help shield directors from charges that they breached their fiduciary duty when a challenger attempts to rebut the presumption of prudent business judgment.

B. Antidotes

The *Household* court offered prospective raiders several ways in which to complete a successful tender offer in spite of the poison pill. The court first suggested that a raider could profit, through peaceful means, by negotiating a friendly takeover with the target. If a target agreed to be acquired, its board would simply redeem the warrants, thereby enabling the now friendly raider to make a viable tender offer. The obvious drawback, however, to this suggestion is that many corporations do not want to be acquired and will refuse to negotiate.

In this case, the court suggested that a raider could make a tender offer hoping to acquire fifty percent of the target's shares. The raider could then replace the target's board with directors who would redeem the warrants. This strategy, however, could be costly because a raider may never acquire enough shares to gain control. A more conservative strategy, noted by the *Household* court, is that a raider could make a tender offer conditional on a controlling number of shares actually being tendered. Thus, if shareholders refuse to tender, the offer will fail and the raider will have lost nothing. Shareholders would have incentive to accept a conditional tender offer because if they decide to hold onto their shares so as to exercise their warrant upon merger, the tender offer may fail and they would lose a sure profit.

The court also suggested that a raider could wage a proxy contest in order to replace the target's board with directors who would redeem the warrants underlying the poison pill. The court noted that acquisition of proxies by a raider, without beneficial ownership of the underlying stock,

149. Directors are generally allowed to rely reasonably and in good faith on experts chosen with due care. See, e.g., Panter, 486 F. Supp. at 1194 (directors entitled to rely on outside experts); Cheff, 199 A.2d at 556 (directors properly relied on investment bankers' reports showing raider had a bad reputation in the business community); Kaplan v. Goldsant, 380 A.2d 556, 568 (Del. Ch. 1977) (board properly relied on investment bankers' reports in setting price for stock repurchase). Further, the Delaware Corporation Code specifically allows reliance on experts. See Del. Code Ann. tit. 8, § 141(e) (1974).

150. 500 A.2d at 1354.
may not trigger the warrant thereby enabling warrant holders to purchase stock at a reduced price. However, beneficial ownership of the target's stock is required before a warrant may be exercised in this fashion. Thus, a raider could acquire as many proxies as is needed to replace the target's board, without triggering the warrants.

One antidote not mentioned by the court is that a raider could gain control of a corporation through either a tender offer or a proxy contest via a shell corporation, and gradually transfer the target's assets to this corporation. Because a merger is never effectuated, the warrants will never become effective and therefore could not be exercised for stock of the continuing corporation. Thus, by avoiding the formation of a new corporation, the raider will avoid the costly effect of the warrants.

A second antidote, not mentioned by the *Household* court, is that a raider can exert pressure on a target's board to redeem the warrants by making a tender offer conditional on the board's redemption of the warrants. If a target's directors believe that a raider will eventually be able to force a merger, they may be willing to accept a favorable price while they still can. New versions of the poison pill are likely to appear in the near future because of the pill's effectiveness against popular two-tier tender offers. These new versions will probably try to draft around the antidotes presented above, making them obsolete. It is likely, however, that opportunistic raiders will find new antidotes as fast as protective corporations find new poison pills. In the interim, the above antidotes will remain effective against poison pills of the *Household* variety.

**Conclusion**

The *Household* court provided guidelines for attorneys and directors to use when implementing a poison pill takeover defense. The court also provided antidotes to the poison pill to be used by prospective corporate raiders. A prudent board of directors will follow the Delaware Supreme Court's suggestions for exercising good business judgment and, in return, its implementation of the poison pill defense will be upheld. New versions of the poison pill are likely to appear in the near future because of the pill's effectiveness against popular two-tier tender offers. These new versions are likely to render the antidotes to the poison pill provided by the Delaware Supreme Court obsolete. Opportunistic raiders, however, are likely to find new antidotes as fast as protective corporations find new poison pills.

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