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Just Do It: An Antidote to the Poison Pill

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The poison pill is the most powerful defense against hostile takeovers. It can help to make a company takeover-proof, or nearly so. Efforts at developing an antidote have focused largely on shareholder-adopted bylaws, but the legality of such proposals has been questioned by many. In any event, shareholder-adopted bylaws have not been very successful in eliminating poison pills thus far. In order to effect takeovers, hostile bidders cannot rely on the courts or the target company's shareholders; they can rely only on themselves. In this Article, I propose a strategy for hostile bidders to counteract the poison pill and to consummate hostile takeovers without redemption of the poison pill rights. The proposed strategy involves a series of coordinated tender offers: an initial offer to trigger the poison pill rights, offering little or no consideration, and a subsequent offer in which the fully diluted value is paid to all shareholders after the rights have been exercised. This antidote strategy allows the hostile bidder to respond to management's "just say no" defense with a "just do it" offense of triggering the poison pill without ingesting its economic poison. Moreover, the antidote strategy does not allow the hostile bidder to evade the legitimate, salutary effects of the poison pill. It merely seeks to restore to shareholders a right that should have been deemed inalienable: the right to sell their shares without management's consent.

INTRODUCTION

The single most significant development in the ever-changing world of hostile takeovers was the invention, approximately two decades ago, of the poison pill defense by New York attorney, Martin Lipton.[1] The "Holy Grail"

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[1] *See* 1 MARTIN LIPTON & ERICA H. STEINBERGER, TAKEOVERS & FREEZEOUTS § 6.03[4], at 6-58 (2002) ("Rights plans are the most effective device yet developed in response to abusive takeover tactics and inadequate bids, and have become a central feature of most major corporations' takeover preparedness."). For

of defense mechanisms, the poison pill deters hostile takeovers for as long as it remains in place; moreover, it can be adopted at any time by director resolution and has no negative consequences from management's perspective.[2] While the use of the poison pill theoretically is subject to judicial review for breach of fiduciary duty, case law has accorded boards of directors broad discretion in reacting to hostile takeovers, enhancing its potency significantly.[3] Many now believe that a board of directors is entitled to "just say no"[4] to a hostile tender offer regardless of the preferences of the company's shareholders.[5]

Since its inception, hostile bidders have been searching for a way around the poison pill—an antidote, if you will. Early versions of the poison pill proved somewhat vulnerable, but modifications were quickly made to enhance its potency.[6] Eventually, it came to be understood that there were only three ways around the poison pill, each involving the removal of the poison pill before the takeover could proceed: a friendly deal, which is difficult once a hostile takeover is initiated; a judicial decree, which is unlikely in light of judicial deference to directors; and a proxy contest, which though expensive, presents the only viable alternative.[7] However, even the proxy contest might be ineffective when other defense mechanisms, such as a staggered board of

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an early version of the poison pill, see Martin Lipton, Discussion Memorandum: Warrant Dividend Plan (Sept. 15, 1982) (on file with Author).

2 *See* Julian Velasco, *The Enduring Illegitimacy of the Poison Pill*, 27 J. CORP. L. 381, 381-82 (2002).

3 *See* Velasco, *supra* note 2, at 416-22.

4 "'Just say no' is a label used to describe a context in which a board of directors attempts to stonewall a hostile takeover bid indefinitely." Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 TEX. L. REV. 261, 315 (2001).

5 *See, e.g.*, 1 LIPTON & STEINBERGER, *supra* note 1, § 5A.01[7], at 5A-26 ("[U]nless the target has otherwise subjected itself to *Revlon* duties . . . it seems clear that the target may, if it meets the relevant standard, just say no to an acquisition proposal."); Jonathan R. Macey, *The Legality and Utility of the Shareholder Rights Bylaw*, 26 HOFSTRA L. REV. 835, 837 (1998) ("Target firms can now keep their poison pills in place and 'just say no' to would-be acquirers, regardless of the market premiums these acquirers were willing to pay to shareholders."); Velasco, *supra* note 2, at 384 ("[T]he poison pill eventually became the means to employ a 'just say no' defense of resisting hostile takeovers, regardless of the interests of shareholders."); *see also* Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffet*, 19 CARDOZO L. REV. 511, 523 (1997) ("[M]any argue that a board can now use the poison pill to implement a 'just say no' defense against a hostile takeover."); Thompson & Smith, *supra* note 4, at 315 ("The acceptability of the 'just-say-no' defense under Delaware law is uncertain. . . . The fact that some courts and commentators consider the 'just-say-no' defense a plausible approach to corporate governance reflects how far we have strayed from the notion that shareholders should have a meaningful voice in corporate affairs.").

6 *See infra* notes 53-54, 60-67 and accompanying text.

7 *See* Velasco, *supra* note 2, at 383-84.

directors or "dead-hand" or "no-hand" provisions in the poison pill, are employed.[8]

Efforts to find other ways around the poison pill have continued. Recent efforts have focused on one particular strategy: the adoption of antidote bylaws by the shareholders of the target company.[9] Such proposals have taken various forms, from a command that the poison pill be removed or submitted to shareholder vote,[10] to subtler changes intended to facilitate takeovers.[11] An important debate has arisen as to whether shareholders are entitled to adopt bylaws limiting the use of poison pills.[12]

The issue is based on two arguably conflicting statutory provisions. Delaware General Corporation Law section 141(a) provides that "[t]he business and affairs of every corporation . . . shall be managed by or under the

8 A staggered board of directors is one in which only a fraction of the directors are elected each year, for multi-year terms. *See* DEL. CODE ANN. tit. 8, § 141(d) (2001). Such a structure would require a hostile bidder to prevail in proxy contests at two successive annual meetings of shareholders before it would have sufficient control to redeem the poison pill Rights. *See* Lucian Arye Bebchuck, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence & Policy*, 54 STAN. L. REV. 887, 890 (2002).

> "*[D]ead-hand*" provisions . . . require redemptions of poison pills to be approved by "continuing directors" (*i.e.*, directors in office when the poison pill was adopted or directors who were elected with the support of such directors); and "*no-hand*" provisions . . . suspend, limit or eliminate the board's power to redeem the poison pill after a majority of the board has been replaced.

Peter V. Letsou, *Are Dead Hand (and No Hand) Poison Pills Really Dead?*, 68 U. CIN. L. REV. 1101, 1101 (2000). Dead-hand and no-hand provisions have been struck down in Delaware, *see* Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998); Carmody v. Toll Bros., Inc., 723 A.2d 1180 (Del. Ch. 1998), but have been upheld by some other courts, *see, e.g.*, AMP, Inc. v. Allied Signal, Inc., 1998 U.S. Dist. LEXIS 15617 (E.D. Pa. Oct. 8, 1998) (upholding no-hand poison pill under Pennsylvania law); Invacare Corp. v. Healthdyne Technologies, Inc., 968 F. Supp. 1578 (N.D. Ga. 1997) (upholding dead-hand poison pill under Georgia law). Such provisions, where legal, could delay or even defeat the hostile bidder's attempts to redeem the poison pill.

9 For very different strategies to combat the poison pill, *see* Addison D. Braendel, *Defeating Poison Pills Through Enactment of a State Shareholder Protection Statute*, 25 DEL. J. CORP. L. 651 (2000) (proposing legislative antidote strategy); Mark D. Majkowski, *Structured Tender Offer with Acquiring Firm Rights Plan—Antidote for the "Poison Pill,"* 67 U. DET. L. REV. 357 (1990) (proposing antidote Shareholder Rights Plan).

10 *See, e.g.*, John C. Coffee, Jr., *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests?*, 51 U. MIAMI L. REV. 605 (1997); Gordon, *supra* note 5, at 544-51; Macey, *supra* note 5, *passim*; Thompson & Smith, *supra* note 4, at 319-23.

11 *See, e.g.*, John C. Coates IV & Bradley C. Faris, *Second-Generation Shareholder Bylaws: Post-*Quickturn *Alternatives*, 56 BUS. LAW. 1323 (2001).

12 *See, e.g.*, Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*, 73 TUL. L. REV. 409 (1998); Charles F. Richards, Jr. & Robert J. Stearn, Jr., *Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law*, 54 BUS. LAW. 607 (1999).

direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."[13] Section 109(b), on the other hand, provides that a corporation's "bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[14] Proponents of antidote bylaws argue that section 141(a)'s grant of power to directors is expressly limited by other provisions of the Delaware General Corporation Law, including section 109(b), which allows bylaws to limit directors' powers. Opponents argue that section 141(a) provides that directors' powers can only be limited by law or by the certificate of incorporation, and therefore not by the bylaws, and that section 109(b) does not allow for bylaws inconsistent with other laws, including section 141(a).

As a purely textual matter, the proponents have the stronger argument. Notwithstanding the claims to the contrary,[15] the two sections do not create a truly recursive loop. Section 141(a) allows directors' powers to be limited pursuant to other provisions of the Delaware General Corporation Law, including section 109(b).[16] Section 109(b), on the other hand, only says that bylaws cannot be inconsistent with other laws. Because section 141(a) is subject to modification pursuant to section 109(b), however, most bylaws would be consistent with section 141(a).[17] On the other hand, the argument

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[13] DEL. CODE ANN. tit. 8, § 141(a) (2001).

[14] *Id.* § 109(b).

[15] *See* Gordon, *supra* note 5, at 546-47; *see also* Thompson & Smith, *supra* note 4, at 320 ("Most commentators who have considered these questions have concluded that the two sections of the Delaware statute cannot be reconciled without appeal to policy arguments.").

[16] The issue raised by Professor Hamermesh is admittedly awkward:

> If the by-laws could contain limitations on director managerial authority, due to the "except as may be otherwise provided in this chapter" phrase in section 141(a), why would section 141(a) bother to make explicit that such limitations can be placed in the certificate of incorporation, yet fail to make explicit that such limitations can be placed in the by-laws?

Hamermesh, *supra* note 12, at 431. However, while the reference to the charter may be untidy, it neither renders the proponents' argument logically inconsistent, nor renders any language in § 141(a) meaningless. As a logical matter, the plain meaning of the passage is unaffected. As a practical matter, the slight awkwardness of the proponents' interpretation is far superior to the outright disregard for statutory text of the opponents' interpretation. *See infra* note 18 and accompanying text.

[17] As a purely textual matter, this interpretation very well might mean that § 141(a) could not be inconsistent with any bylaws:

> If section 109(b) provide[s] such authority, it would be unbounded, at least on its face. The statute would ostensibly allow a by-law to regulate any aspect of managing the business and affairs of the corporation, right down to the most minute operational detail. This is not an inherently

that the bylaws cannot interfere with directors' powers under section 141(a) is plainly inconsistent with the language of section 109(b), which expressly provides that bylaws can regulate "the business of the corporation, the conduct of its affairs, and . . . the rights or powers of [the corporation's] . . . directors."[18] These words are rendered meaningless by the opponents' interpretation of section 141(a). Ultimately, their arguments simply prove too much; virtually every bylaw interferes with directors' powers in some sense.[19]

Statutory interpretation, however, is not always a purely textual matter. History and precedent are also involved. For example, bylaws have been characterized as "self-imposed rules and regulations deemed expedient for [the] convenient functioning [of the corporation]."[20] If bylaws are so limited, a substantive provision commanding the removal of the poison pill might be unauthorized. On the other hand, a procedural provision requiring shareholder

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> preposterous mode of governance, at least for closely held corporations, but it is sharply at odds with the centralized management approach that characterizes, even animates, public company law. Thus, even those who advocate by-laws that limit director managerial power inevitably recognize that the scope of such by-laws must be limited and cannot extend to all aspects of the corporation's business and affairs. They therefore go to great lengths to find dividing lines between permissible and impermissible by-law limits on director power, even though neither section 109(b) nor section 141(a) itself identifies any such limits.

Hamermesh, *supra* note 12, at 432 (footnotes omitted). Professor Hamermesh's concerns are exaggerated. Inferring reasonable limits, as some have done, *see, e.g.*, Coffee, *supra* note 10, at 613-15; Gordon, *supra* note 5, at 547-49, is far more reasonable than rejecting clear statutory language.

The cross-references in §§ 109(b) and 141(a) reasonably could be interpreted to allow for exceptions to, but not evisceration of, the rule that the corporation is to be managed by the board of directors. If so, there would be no reason to suppose that the scope of shareholder bylaws must be limited and could not extend to all aspects of the corporation's business and affairs. The ability to make any particular decision is a far cry from the ability to make every single decision, especially in a large, public corporation.

18 DEL. CODE ANN. tit. 8, § 109(b). It is worth emphasizing that § 109(b) permits the bylaws to regulate the "business . . . [and] affairs" of the corporation, the very language used to describe the scope of authority of directors in § 141(a). *Compare id.* § 141(a), *with id.* § 109(b).

19 Another interesting textual argument might be based on § 157, which provides that "[s]ubject to any provisions in the certificate of incorporation, every corporation may create and issue . . . rights or options entitling the holders thereof to purchase from the corporation any shares of its capital stock." *Id.* § 157(a). This grant of authority is expressly subject to restriction only by the certificate of incorporation; it does not allow for restrictions in the bylaws, not even indirectly by reference to other provisions of law. It could be argued reasonably that this more precise provision should trump the more general § 109(b). Section 157 falls short, however, in that it is a grant of power to the corporation, not to the directors. Directors have the ability to exercise that power only by reference to § 141(a), which in turn is subject to § 109(b). Thus, while § 157 allows the corporation to issue rights and options, it does not necessarily allow the directors to do so without limits.

20 Gow v. Consol. Coppermines Corp., 165 A. 136, 140 (Del. Ch. 1933).

approval might not.[21] Moreover, the Delaware Supreme Court has stated that "[o]ne of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation."[22] Thus, interference with a board's powers in the context of a takeover, "an area of fundamental importance,"[23] might be deemed unauthorized.[24] If so, however, then all bylaws become problematic, at least to the extent that they interfere with takeover defense.[25]

The Delaware Supreme Court has not yet ruled on the matter of antidote bylaws. However, there are many who believe that the courts will rule antidote bylaws to be impermissible,[26] and they have persuaded the U.S. Securities and Exchange Commission to consider such bylaws "inappropriate for shareholder action under state law."[27]

Regardless of the ultimate disposition of such matters, antidote bylaws share a common shortcoming: they depend upon preemptive action by shareholders of the particular company that is to be the target of a takeover

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21 *See* Coffee, *supra* note 10, at 613-16 (discussing limits of shareholder bylaws, including distinction between procedure and substance).

22 Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998).

23 *Id.* at 1291-92.

24 The Delaware Supreme Court also stated that "[s]ection 141(a) requires that any limitation on the board's authority be set out in the certificate of incorporation." *Id.* at 1291. However, this statement was only dictum, not holding. As a factual matter, it was clearly imprecise. Section 141(a) also allows for limitations pursuant to other provisions of law, and it seems unlikely that the court intended to deny that fact. The statement merely was intended to forbid one board of directors from entering into contracts, such as dead-hand poison pills, which limit the powers of a future board of directors. The Delaware Supreme Court was not addressing the issue of shareholder bylaws, and cannot be interpreted fairly as having decided the matter.

25 In fact, however, shareholder bylaws specifically intended to interfere with takeover defense have been upheld. *See, e.g.*, Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985) (upholding bylaw, adopted by majority shareholder in context of hostile takeover, setting quorum for board meetings at full attendance and requiring unanimous vote for director action). In *Frantz*, the acquiror already had obtained majority ownership of the target company and was trying to protect its interests as such. *Id.* at 402-06. However, the case illustrates that the shareholders have the power to amend bylaws in ways that interfere with the board's management, even in the context of a hostile takeover.

26 *See, e.g.*, Hamermesh, *supra* note 12, *passim*; Richards & Stearn, *supra* note 12, *passim*.

27 *See* Novell Inc., SEC No-Action Letter, 2000 SEC No-Act LEXIS 212 (Feb. 14, 2000). While this decision has little or no bearing on the question of Delaware state law, it has a significant impact on the ability of shareholders to adopt antidote bylaws. As a result, Delaware corporations are not required under Rule 14a-8(i)(1) to include in their proxy solicitation materials any shareholder proposals to adopt such bylaws. Thus, a shareholder would have to be willing to pay for the expense of a proxy solicitation just to have the proposal considered by shareholders.

attempt.[28] As such, they are more of a vaccine than an antidote. While they very well could change the landscape of corporate takeovers in the long run, they do not necessarily provide any assistance to a company that would like to conduct a hostile takeover today. A self-help strategy, by which one company could acquire another in the face of a poison pill, would be ideal. Most have assumed that no such solution is possible, or at least economically feasible.[29]

This Article will propose exactly that: a self-help strategy by which one corporation could acquire another without the prior removal of the poison pill. The proposal would allow an acquiror to act unilaterally, without the necessity of prior shareholder action or a sympathetic court decision. Although it could not guarantee the acquisition of the target company by the acquiror, it would allow the acquiror to respond to a target company's "just say no" defense with a "just do it" offense of triggering the poison pill—without ingestion of the economic poison. Part I describes the mechanics of the poison pill, and how it operates to prevent a hostile takeover. Part II sets forth the mechanics of the proposed antidote strategy, and how it is possible to trigger the poison pill without suffering its intended effects. Part III addresses the strengths and weaknesses of this antidote strategy. Despite its shortcomings, the antidote strategy should be able to get the acquiror past the strongest defense that target companies have in their arsenal.

In the course of discussion of the poison pill and the antidote strategy, it will be necessary to make use of illustrative examples.[30] For the sake of simplicity, this Article will employ one hypothetical situation, with minor

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[28] While such bylaws could be enacted by the acquiror in a proxy contest, it would be significantly easier in most cases simply to replace the directors in the proxy contest. Antidote bylaws generally are intended as preemptive action taken by shareholders.

[29] *But see* William J. Carney & Leonard A. Silverstein, *The Illusory Protections of the Poison Pill*, 79 NOTRE DAME L. REV. (forthcoming 2004) (arguing poison pill dilution is not necessarily prohibitive).

[30] Unfortunately, it also will be necessary to make use of a significant amount of math. Every effort has been made to simplify the discussion in the text and to supplement the text with calculations in the footnotes. Where possible, the footnote calculations have been streamlined as well.

It is worth noting that, in the discussion of the effects of the antidote strategy on participating shareholders, shareholders will be assumed to hold that number of shares which makes the calculations simplest. Thus, for example, when working with a 20% triggering event threshold and an 80% minimum tender requirement, it is most convenient to assume that each shareholder holds 4 shares; on the other hand, when working with a 10% triggering event threshold and a 70% minimum tender requirement, it is most convenient to assume that each shareholder holds 7 shares. The calculations are merely illustrative, and the substance is not affected by such assumptions: all relevant shareholders fare equally (except, perhaps, to the extent that fractional shares are not dealt with adequately).

variations throughout.[31] In each case, the target company will have adopted a standard flip-in/flip-over poison pill, with a standard exchange option.[32] The key terms of the poison pill will include an exercise price of $120 and a triggering event of 20% ownership. The target company will have 50 outstanding shares of common stock, each selling at $30. The aggregate value of $1,500 will be assumed to be the fair market value, or the intrinsic value, of the corporation. The acquiror, sometimes referred to as the hostile bidder, will be willing to pay a $1,000 premium for the target company, or $2,500 in the aggregate ($50 per share). No one else will be willing to pay more than the fair market value, except perhaps for one third party in certain examples. Thus, if the acquiror were to revoke its offer, the stock price would revert to its fair market value. An efficient market for the target company's common stock, in the sense of the semi-strong form of the efficient market hypothesis, is also assumed.[33]

I. MECHANICS OF THE POISON PILL

The term "poison pill" does not refer to a single, uniform device. Rather, it refers to a family of devices that operate in a similar fashion. The poison pill defense is generally implemented through the adoption, by a company's board of directors, of a "Shareholder Rights Plan." Simplified, a Shareholder Rights Plan would, in the event of a hostile takeover, provide every shareholder—other than the acquiror—the right to acquire additional securities (or other assets) at a significant discount (or even free). This discriminatory discount would dilute the interest of the acquiror, making acquisition of the company prohibitively expensive.

The poison pill defense can be fashioned in a variety of ways to suit the needs or preferences of the company employing the device. While potential variations are limited only by the imagination, there are standard provisions and common variations that comprise the essence of the poison pill. This Part will discuss the key elements of the poison pill.[34]

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[31] The figures in the examples are based on examples used by Martin Lipton. *See, e.g.*, 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][b], at 6-61 to -65. Some changes were made for the sake of simplicity.

[32] Unless otherwise specified in the text, the exchange option would allow the company to exchange each valid Right for 1 share of the target company's stock.

[33] *See generally* BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET (7th ed. 1999) (containing a defense of efficient market hypothesis).

[34] For prototype Shareholder Rights Plans, see 2 ARTHUR FLEISCHER, JR. & ALEXANDER R. SUSSMAN, TAKEOVER DEFENSE, exhibit 15 (6th ed. 2002); 5 LIPTON & STEINBERGER, *supra* note 1, app. H.

A. Shareholder Rights Plans Generally

Under a typical Shareholder Rights Plan, the company issues a dividend of one "Right" for each share of its common stock. Each Right represents only a conditional right: it is not immediately exercisable; moreover, it is attached to, and cannot be traded independently of, the corresponding share of common stock.

The Rights would become meaningful upon the occurrence of specified triggering events. The key triggering event is the acquisition, by anyone, of a specified percentage of the company's shares of common stock.[35] The threshold ownership level can vary, but it is usually in the ten- to twenty-percent range.[36] Upon the occurrence of a triggering event, the Rights would give their holders the right to acquire additional securities (or other assets) at a discount. The key to the poison pill, and that which makes it so venomous, is that any Rights in the hands of the hostile bidder would become void and nontransferable.[37] Because all other shareholders would acquire additional securities at a discount, the interest of the hostile bidder would be diluted severely.[38] This dilution would make the acquisition of the company

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35 Actually, there are two triggering events in the typical Shareholder Rights Plan. The first is usually the announcement or commencement by any person of a tender offer pursuant to which such person would cross the specified threshold. Upon the occurrence of such a triggering event, the Rights would detach from the shares of stock and become freely tradable and exercisable. However, the Rights would remain "out of the money," and not worth exercising. Moreover, the board of directors usually has a limited amount of time in which to postpone the effect of this triggering event. Making use of this first triggering event would be extremely helpful to the antidote strategy proposed in this Article. It would entirely eliminate the hold-out problem, *see infra* Part II.B, because tendering shareholders would not have to forfeit any of their Rights in tendering their shares. However, because the target company usually has the right to waive this triggering event, it is best to assume that it does not, in fact, exist.

The actual acquisition of stock, as specified in the text, is usually the second triggering event, but is the one with real significance. Because the first triggering event would be helpful for the antidote strategy, this Article will assume the existence of the second triggering event only.

36 *See* 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][b], at 6-61; *see also* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.05[C][1], at 5-70 to -73.

> The selection of an appropriate flip-in percentage level is an important issue in the adoption of a [poison] pill. If the threshold level is set too high, the pill will lose much of its effect as a deterrent against the risks created by a significant stock accumulation. However, below a certain level a court might conclude that the pill is disproportionately Draconian to the threat under *Unocal/Unitrin* principles.

Id. at 5-70. The risk of judicial disapproval of a 10% triggering event threshold is not very high. *See id.* at 5-73 & n.185. However, low thresholds make the antidote strategy proposed in this article significantly easier to implement. *See infra* note 316 and accompanying text.

37 This discrimination among shareholders arguably is illegal. *See* Velasco, *supra* note 2, at 403-07.

38 As will be made clear in the text, the statement that "the interest of the hostile bidder would be diluted

prohibitively expensive. The intention is to deter any unwelcome acquisition,[39] and the poison pill has been very successful in that respect.[40]

The exact nature of the dilution varies depending on the specific terms of the Shareholder Rights Plan. The "active ingredient" in the poison pill can take many different forms, but the main variations fall into three categories. The original form of the poison pill featured "flip-over" provisions. These would entitle the shareholders to acquire shares of stock of the hostile bidder at a significant discount, but only under certain circumstances. Shortcomings in the flip-over pill led to the creation of newer versions of the poison pill.[41] For example, "back-end" provisions would entitle the shareholders, other than the acquiror, to receive assets, generally in the form of debt securities or cash, from the company. However, back-end pills also suffer significant infirmities.[42] "Flip-in" provisions, on the other hand, suffer from no such shortcomings and account for the prevalence of the poison pill.[43] They would entitle shareholders, other than the hostile bidder, to acquire shares of stock of the target company at a significant discount. Each version of the poison pill is discussed in turn below.

If the Shareholder Rights Plans were to stop there, however, they would not be very practical. Such provisions would prevent any acquisition of the company, however beneficial it might be. Directors generally realize that the limitations inherent in a complete ban would be unwise. Thus, Shareholder Rights Plans also include provisions that allow the board of directors to "pull the pill" by redeeming the Rights at a nominal price. These provisions are intended to encourage potential acquirors to negotiate the acquisition with the

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severely" is technically most accurate with respect to the flip-in pill and least accurate with respect to the flip-over pill. In each case, however, the hostile bidder and its shareholders are forced to suffer some dilution of their interests.

39 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.02[A], at 5-18 to -19 ("[O]ne of the [poison] pill's fundamental attributes is its deterrent effect. As the SEC has noted: 'In fact such plans are adopted with the intent that they will never be implemented.'"); 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][b], at 6-61 ("The basic objectives of the rights plan are to deter abusive takeover tactics by making them unacceptably expensive to the raider and to encourage prospective acquirors to negotiate with the board of directors of the target rather than to attempt a hostile takeover.").

40 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.01[B][1], at 5-8 ("[T]he level of dilution [the flip-in pill] would inflict on both the voting power and the economic value of the stock of a raider who unilaterally crossed the ownership trigger level has proven universally unacceptable—indeed, the trigger has never been pulled . . . .").

41 *See infra* notes 53-54 and accompanying text.

42 *See infra* notes 60-67 and accompanying text.

43 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.01[B][1], at 5-8 ("[T]oday, it is the flip-in which accounts for the [poison] pill's effectiveness.").

company's board of directors.[44] If the acquiror were to persuade the board of directors concerning its offer, then the board could vote to pull the pill by redeeming the Rights. However, if the acquiror were unable to persuade the board, then the poison pill would remain intact. Thus, directors would retain maximum flexibility.

However, an unlimited ability to redeem the Rights would also be problematic because it would permit the acquiror to redeem the Rights after gaining control of the company. Shareholder Rights Plans therefore typically provide that the Rights may be redeemed by the board of directors of the company at any time prior to the triggering of a poison pill, but not afterwards. Upon the occurrence of a triggering event, the Rights would become non-redeemable. Thus, the flexibility enjoyed by the original board of directors is not freely available to the hostile bidder.[45]

Nevertheless, two avenues remain for the hostile bidder to have the Rights redeemed against the will of the target company's board of directors. First, it can try to persuade a court that the board of directors has breached its fiduciary duty to the shareholders by failing to redeem the Rights. In such circumstances, the courts could require the board of directors to do so.[46] Second, the hostile bidder can, prior to the consummation of a tender offer, wage a proxy contest in order to elect a new board of directors that would be inclined towards redeeming the Rights.[47] This new board would have the ability to redeem the Rights because a triggering event would not have occurred. However, if the poison pill were to remain in effect because the

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[44] The ability of the company's board of directors to redeem the Rights when faced with an offer that is, in its judgment, in the interests of shareholders was a key factor in the courts' decision to uphold the adoption of the poison pill. *See* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1354 (Del. 1985):

> [T]he Rights Plan is not absolute. When the [company's] Board of Directors is faced with a tender offer and a request to redeem the Rights, they will not be able to arbitrarily reject the offer. They will be held to the same fiduciary standards any other board of directors would be held to in deciding to adopt a defensive mechanism . . . .

See also Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291-92 (Del. 1998) (invalidating delayed redemption provision in poison pill because it restricted board's ability to fulfill fiduciary duties by redeeming Rights).

[45] In light of the importance of redeemability to the validity of the poison pill, *see supra* note 44, one can argue that poison pills cannot provide legally that the Rights *ever* become non-redeemable, even upon the occurrence of a triggering event. *See* Velasco, *supra* note 2, at 409-11.

[46] *See Moran*, 500 A.2d at 1354.

[47] This strategy can be limited severely by dead-hand and no-hand provisions in poison pills, where such provisions are legal, or by the existence of a staggered board of directors. *See supra* note 8 and accompanying text.

acquiror could not or did not persuade the board of directors, the courts, or the shareholders, it generally is accepted that a hostile acquisition could not proceed because of the dilutive effect of the poison pill.[48]

B. *Flip-Over Provisions*

As originally conceived, the poison pill featured a flip-over provision. Under a flip-over pill, each Right represents the conditional right to acquire shares of common stock of the hostile bidder at a discount. Upon the occurrence of a triggering event, the Rights would detach from the shares and become freely transferable. However, at that point the Rights would remain insignificant. It is only if the acquiror were to attempt a squeeze-out merger or similar transaction[49] that the Rights would become meaningful. At that point, the holders of the Rights would have the right to purchase shares of the acquiror at half price. More precisely, the holders of the Rights would be entitled to pay the exercise price and receive in return shares of the acquiror's common stock with a market value equal to twice the exercise price.

The flip-over pill is designed to provide additional compensation to the target company's shareholders at the expense of the acquiror.[50] It also has the effect of impeding the ability of a hostile bidder to acquire the target company by way of a leveraged buy-out.[51] Perhaps the most venomous effect of the flip-

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[48] *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.02[A], at 5-18 to -19 ("There is no known instance of a raider buying through the trigger level of a flip-in [poison] pill that is operative and has neither been judicially invalidated nor been redeemed or waived by the target's board."). *But see* Carney & Silverstein, *supra* note 29.

[49] These provisions are usually quite broad, preventing the acquiror from engaging in any type of business combination with the target company.

[50] The economic consequences depend upon the acquiror's capital structure. Thus, in addition to the standard assumptions, *see supra* notes 30-33, assume that the acquiror were to have 100 shares, worth $30 each, for an aggregate market value of $3,000. Once the acquiror were to cause a triggering event, there would be 40 valid Rights, *see infra* note 72. Given an exercise price of $120, each Right would entitle the holder to acquire 8 shares of the acquiror's stock. *See infra* note 73 (identical calculation with respect to flip-in provision). In the aggregate, the Rights would entitle their holders to pay $4,800 (40 Rights x $120 per Right) in order to acquire 320 shares (40 Rights x 8 shares per Right) of the acquiror's stock. Upon exercise of the Rights, the acquiror would have a total of 420 shares outstanding (100 original shares + 320 newly-issued shares) and a market value of $7,800 ($3,000 original market value + $4,800 exercise price). The acquiror's stock then would be worth $18.57 per share ($7,800 market value ÷ 420 outstanding shares). Thus, each Right would convey to its holder an aggregate value of $148.56 (8 shares x $18.57 per share). After subtracting the amount paid to exercise such Right, the holder is left with a net gain of $28.56 ($148.56 - $120 exercise price). This amount represents the additional compensation per share that the flip-over Right would provide to the target company's shareholders in this example.

[51] "[A] highly leveraged acquiror would need to own the entire target in order to have unrestricted access to its earnings, cash flow and assets in order to service the acquisition debt." 1 FLEISCHER & SUSSMAN, *supra*

over pill, however, is that it threatens the status of a controlling shareholder of the acquiror. This is because the flip-over pill would not dilute the acquiror's interest in the target company, but rather in itself—or, more accurately, the interest of the acquiror's shareholders in the acquiror. The acquiror would be required to issue a large number of additional shares to the shareholders of the target company, and even a 100% owner could easily find itself becoming a minority shareholder.[52] A controlling shareholder might be unwilling to lose or threaten her status as such, and this might cause the acquiror to forego the acquisition.

However, the flip-over pill is effective only if the acquiror were to insist upon following the acquisition with a merger or similar transaction. If the acquiror were willing to maintain control of the target company as a partially-owned subsidiary, then the flip-over pill would provide no protection whatsoever.[53] This shortcoming became apparent early in the life of the poison pill. In 1985, Sir James Goldsmith sought to acquire Crown Zellerbach Corporation, but he faced a flip-over pill. Goldsmith went ahead and acquired 51% of Crown Zellerbach's stock, thereby triggering the pill. While Goldsmith could not proceed with a merger transaction, he did obtain a controlling interest in Crown Zellerbach.[54] Because the goal of the poison pill is to deter unwelcome acquisitions, the flip-over pill was proven a failure.

Nevertheless, most Shareholder Rights Plans featuring other provisions also include a flip-over provision, perhaps as a vestige of the evolutionary development of the poison pill.[55] Originally, the flip-over provision may have been retained in Shareholder Rights Plans because the validity of the flip-in pill was not beyond question.[56] Once the courts, and in certain cases the

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note 34, § 5.04[D][2], at 5-58. The only way to obtain 100% ownership of the target company is through a squeeze-out merger, but that would subject the acquiror to the effect of the flip-over pill.

52 *See, e.g.*, *supra* note 50. Even if one person were to own all the shares of the acquiror prior to the transaction (*i.e.*, 100 shares), she would own less than one-quarter of the shares after the impact of the flip-over pill (*i.e.*, 420 shares).

53 "Because the dilutive effect of the flip-over rights [is] only triggered by a second-step merger or business combination, a bidder who [is] willing to forego such a transaction [can] avoid the negative consequences associated with the rights." Letsou, *supra* note 8, at 1109.

54 For descriptions of the Goldsmith / Crown Zellerbach affair, see 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.04[D][2], at 5-58 to -59; 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][b][ii], at 6-66 to -67; Letsou, *supra* note 8, at 1109-10.

55 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.01[B][1], at 5-8 ("The flip-over feature of the current pill is largely an anachronistic carryover from the earlier form of the pill . . . .").

56 *See* Velasco, *supra* note 2, at 398-400.

legislatures, proved amenable to the flip-in pill,[57] there remained little need for the flip-over provision. However, there was no reason to remove the flip-over provisions, and so they remained intact as an extra level of protection—just in case. If the poison pill were triggered, the flip-in rights would inure to the benefit of the shareholders. However, Right holders also would retain the right to wait for a squeeze-out merger and to exercise their Rights in exchange for shares of the acquiror's common stock.

C. Back-End Provisions

A second type of poison pill generally is known as the "back-end" pill.[58] Under a back-end pill, each Right represents the conditional right to receive debt securities or cash from the company. One variation of the back-end pill is known as a "put" pill. With a put pill, upon the occurrence of the triggering event, each Right would represent the right to require the company to exchange the holder's stock for debt securities or cash in an amount representing the "fair value" of the company's common stock. Another variation of the back-end pill is known as the "value assurance" pill. With a value assurance pill, upon the occurrence of the triggering event, each Right would represent the right to receive debt securities or cash in an amount equal to the excess of the "fair value" of the company's stock, as determined by the board of directors, over the tender offer price paid by the acquiror. In each case, the back-end pill is crafted so as to ensure that shareholders would receive the designated fair value of their shares.

The exact nature of the right to receive assets from the company can vary in the back-end pill, but the effect would be essentially the same for all such plans: assets would be drained from the company and distributed to shareholders other than the acquiror. While the back-end pill would not dilute the voting interest of the hostile bidder, the economic effect potentially would be more severe than under the flip-in or flip-over pills. Theoretically, at least, a back-end pill could drain all value from the target company, diluting the acquiror's economic interest to zero.[59] Knowing that this would be the

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57 *See id.* at 400-03.

58 For a general discussion of back-end provisions, see 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.04[C], at 5-45 to -54; 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][c], at 6-70 to -70.1.

59 In theory, the exercise of back-end Rights easily could cause a distribution of the entire market value of the company. For example, *see supra* notes 30-33 and accompanying text, this would be the case if a back-end pill were triggered by the acquisition of 20% of the company's stock, and the remaining shareholders were to exercise all of their Rights to receive fair value representing a mere 25% premium to market value. (80% of

inevitable result, the hostile bidder likely would not be interested in acquiring the company.

A major problem with the back-end pill is that it requires the determination of the "fair value" of the company's common stock.[60] Fair value is a dynamic concept and must be determined based on the circumstances at a given time. Other versions of the poison pill operate independently of fair value: they simply allow the Right holders to purchase securities at a discount. Thus, they easily can be adopted far in advance of any tender offer. The back-end pill, on the other hand, is best suited to adoption in reaction to a specific threat, when the appropriate fair value can be determined. However, even when facing a hostile tender offer, a target company might prefer not to determine any "fair price." Doing so could be interpreted as setting a price at which the company would be for sale.[61] Accordingly, the back-end pill has not enjoyed the same popularity as the flip-in/flip-over pill.

The back-end pill also faces significant legal issues.[62] First, the Securities and Exchange Commission has taken the position that the back-end pill may operate as an issuer tender offer.[63] If so, the "all holders" requirement of Rule 13e-4(f)(8) would prohibit discrimination against the hostile bidder.[64] In addition, there very well might be significant restrictions on the target company's ability to honor the Rights. These restrictions may come from covenants in the company's own contracts[65] or from laws such as fraudulent

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shares x 125% of market value per share = 100% of market value.) However, this is only a theoretical possibility. *See infra* notes 65-67 and accompanying text.

60 The exercise price for other variants of the poison pill does not operate as a "fair value" determination; it merely establishes the extent of dilution of the acquiror's interests. With the flip-in and flip-over poison pills, the acquiror would suffer the intended dilution even if it were to offer an amount equal to the exercise price. With a back-end pill, by contrast, an offer equal to the designated fair value would eliminate the dilutive effect as well as the incentive for shareholders to exercise such Rights.

61 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.04[C][1], at 5-45 ("The original 'put' pill . . . exposed the target to the risk that it would be seen as having put a minimum price tag on itself, making it difficult to justify rejecting bids in excess of that price."); 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][c], at 6-70.1 ("If adopted before [a takeover] attempt has begun . . . [back-end pills] may place the board of directors of the target in the position of seeming to pick a price for the company . . . .").

62 *See generally* 1 FLEISCHER & SUSSMAN, *supra* note 34, §§ 5.04[C][1]-[2], at 5-45 to -48.

63 *See* Registration of Rights Issuable Pursuant to Stockholder Rights Plans, SEC No-Action Letter, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,411, at 77,331 (Jan. 7, 1987).

64 17 C.F.R. § 240.13e-4(f)(8) (2002) ("No issuer or affiliate shall make a tender offer unless . . . [t]he tender offer is open to all security holders of the class of securities subject to the tender offer . . . .").

65 Financing documents often contain covenants restricting the ability of the company to make distributions to shareholders. *See* 19 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 3:80, at 185 (perm. ed., rev. vol. 1988).

transfer laws[66] or those limiting the payment of distributions to shareholders.[67] Thus, the effectiveness of the back-end pill is in doubt.

D. Flip-In Provisions

The flip-in provision is the most significant feature of the modern poison pill. Under a flip-in pill, each Right represents the conditional right to acquire additional shares of common stock of the target company at a discount.[68] Upon the occurrence of a triggering event, the Rights would detach from the shares and become freely transferable and immediately exercisable.[69] At that point, the Rights would represent the right to purchase shares of the target company's common stock at half price. More precisely, the holder would be entitled to pay the exercise price and receive in return shares of the company's common stock with a market value equal to twice the exercise price.

An example of the dilutive effect of the flip-in pill is in order.[70] If the acquiror were to purchase 20%, or 10 shares, of the target company's common stock, the value of its holding ordinarily would be $300.[71] However, if the target company were to have a flip-in pill in effect, the situation would change dramatically. As soon as the acquiror were to purchase the tenth share, the 40 Rights held by the other shareholders would detach and become exercisable.[72] Each such Right would represent the right to purchase 8 shares of the target

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66 State laws generally prohibit a company from making any transfers of assets, including distributions to shareholders, that would render the company insolvent. *See, e.g.*, DEL. CODE ANN. tit. 6, §§ 1304-1305 (2001).

67 State corporate laws generally limit a company's ability to make distributions to shareholders. *See, e.g.*, DEL. CODE ANN. tit. 8, § 170(a).

68 Actually, Shareholder Rights Plans typically deal with preferred stock rather than common stock. This makes the poison pill easier for the board of directors to implement because corporate charters often allow boards of directors to issue "blank check preferred." *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(a)(4) (permitting charter to allow board of directors to establish by resolution terms of any classes of stock not set forth in charter). Generally, one share of such preferred stock is made the equivalent of 100 shares of common stock and the Shareholder Rights Plan speaks in terms of hundredths of a share of preferred stock rather than in terms of common stock. This is a matter of convenience for the board of directors and has no impact on the effect of the poison pill. Thus, for the sake of convenience, this Article generally will speak in terms of common stock rather than hundredths of a share of preferred stock.

69 Actually, all of this already may have occurred pursuant to the first triggering event. *See supra* note 35. However, upon the occurrence of the second triggering event, the Rights generally become "in the money," as described in the text.

70 For the assumptions underlying the example, *see supra* notes 30-33 and accompanying text.

71 10 shares x $30 per share = $300.

72 The 10 Rights held by the acquiror would be void and nontransferable.

company's common stock for $120.[73] In the aggregate, the 40 valid Rights would represent the right to purchase 320 shares for $4,800.[74] Assuming the Rights were fully exercised, the target company would be worth $6,300.[75] Thus, the target company would have 370 shares outstanding,[76] each worth $17.03.[77] The acquiror's 10 shares, previously worth $300 in the aggregate, would be reduced in value to a mere $170.30[78]—a 43% decline. In addition, its 20% ownership interest would be reduced to a mere 2.7% interest.[79]

The flip-in pill would effect a significant dilution of the acquiror's interest in the target company. The potential effects of the flip-in pill have proven sufficiently detrimental that no one has been willing to ingest its economic poison.[80] This deterrence is the desired effect.[81]

E. Exchange Option

One major drawback of the flip-in and flip-over provisions of the poison pill is that the Right holders would be required to pay the exercise price. Because the exercise price generally is set at the long-term value of the stock and far in excess of the current market value,[82] the poison pill would require the Right holders to put up significantly more money than their initial investments in order to take advantage of the poison pill. While this might not

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73 The exercise price represents four times the market value of a share of common stock. Assuming a market value of $30 per share, each Right would entitle the holder to buy 8 shares of common stock ($120 exercise price ÷ $30 market price ÷ ½ price). In reality, the market value of the stock surely would increase upon the announcement of the tender offer, which would mean that each Right would entitle the holder to buy fewer new shares of stock, thereby reducing the extent of dilution. For the sake of simplicity, the maximum possible dilution is assumed.

74 40 Rights x 8 shares per Right = 320 shares. 40 Rights x $120 per Right = $4,800.

75 $1,500 original market value + $4,800 exercise price = $6,300 market value after exercise.

76 50 original shares + 320 newly-issued shares = 370 outstanding shares.

77 $6,300 market value ÷ 370 outstanding shares = $17.03 market value per share.

78 10 shares x $17.03 per share = $170.30.

79 10 shares ÷ 370 outstanding shares = 2.7%.

80 *See supra* note 40. Although an early variant of the flip-in pill has been triggered once, *see* Amalgamated Sugar Co. v. NL Indus., Inc., 644 F. Supp. 1229 (S.D.N.Y. 1986), the poison pill in that case did not provide that crossing the ownership threshold would result in the dilution, *see id.* at 1232. Thus, it remains true that the dilutive effects of the flip-in pill have never been triggered.

81 *See supra* note 39.

82 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.05[E][1], at 5-89 ("[I]n a flip-in/flip-over pill the exercise price of the rights is intended to represent the board's informed prediction as to the likely market price of the company's common stock at the end of the term of the rights plan."); 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][b][i], at 6-62 ("The exercise price would be set at an amount . . . which approximates the board's view of the long-term value of the company's common stock.").

be unmanageable for the institutional investor,[83] it might be problematic for the individual investor.[84]

In order to obviate the potential problems, many Shareholder Rights Plans provide the company with the option of exchanging the Rights for securities or cash at a lower level. For example, a typical provision gives the company the option of exchanging each Right for one share of the company's common stock. In order to prevent an acquiror from taking advantage of this ability, such Shareholder Rights Plans generally provide that the target company would lose this option after any person were to acquire a majority of the company's common stock.[85]

The exchange option would cause a dilutive effect similar to an exercise of the flip-in provision but without requiring payment of the exercise price. For example,[86] the act of triggering the poison pill ordinarily would reduce the acquiror's interest in the target company from a 20% stake worth $300 to a 2.7% stake worth $170.30.[87] However, if the target company were to exercise its exchange option, it would distribute 1 share per Right to all shareholders other than the acquiror. As a result, 40 new shares would be issued, for a total of 90 outstanding shares.[88] Because no payment would be made for the newly-issued shares, the aggregate value of the company would remain at $1,500. Thus, each of the 90 shares would be worth $16.67.[89] The acquiror's 10 shares then would represent an 11% stake in the target company,[90] worth only $166.70.[91] The effect is fairly comparable to that of an exercise of the Rights.

That, however, is only one form of exchange option. A Shareholder Rights Plan could instead provide the company with the option of exchanging each Right for more than one share of the company's common stock.[92] Such a

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83 Even the institutional investor would be likely to find the need to pay the exercise price inconvenient at best. A large holding in the target company's common stock would result in a correspondingly larger aggregate exercise price. Institutional investors could have to raise very great sums to pay the exercise price on the Rights.

84 Of course, the individual investor should be able to sell the Rights to an arbitrageur who could afford to exercise them. Presumably, however, the individual investor would have to sell the Rights at a discount.

85 For the impact of this provision on the antidote strategy, *see infra* text accompanying note 301.

86 For the assumptions underlying the example, *see supra* notes 30-33 and accompanying text.

87 *See supra* notes 70-79 and accompanying text.

88 50 original shares + 40 newly-issued shares = 90 outstanding shares.

89 $1,500 market value ÷ 90 outstanding shares = $16.67 market value per share.

90 10 shares ÷ 90 outstanding shares = 11%.

91 10 shares x $16.67 per share = $166.70.

92 One possibility would be to provide that each Right could be exchanged for as many shares of the company's common stock as would be equal in value to the exercise price. In the running example, *see supra*

provision would have the same general effect as the previously-discussed exchange provision, albeit with a more dramatic effect. For example, if each valid Right were exchanged for 4 shares,[93] there would be a total of 210 shares outstanding,[94] each worth $7.14.[95] The acquiror would then have a 4.8% stake in the target company,[96] worth only $71.40.[97]

Perhaps the most aggressive form of exchange option is one that would provide the company with the option of exchanging some or all of the Rights for the exercise price in cash.[98] This type of exchange provision would have essentially the same effect as the back-end pill.[99] An exchange for cash would not merely reduce the acquiror's percentage ownership interest but would actually distribute assets to the Right holders in the same manner as the back-end pill. The acquiror's interest thus could be reduced to zero.[100] In reality, the distribution probably could not approach 100% of the target company's value.[101] Nevertheless, the damage that could be done to the acquiror's interest would be quite severe.

Ultimately, it would seem almost certain that the target company would exercise its option to exchange Rights for shares in the unlikely event that a triggering event ever were to occur. The real effect of the poison pill would be felt only after the Rights were converted into shares. But the exercise price would be high enough, relative to the shareholders' investments, that some shareholders might be unable or unwilling to exercise their Rights fully and/or immediately. By exercising its exchange option, the target company could ensure the maximum effect of the poison pill. Because the dilutive effect on

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notes 30-33 and accompanying text, this would equal 4 shares ($120 ÷ $30 per share). This could be defended on the ground that paying the exercise price to receive shares worth twice the exercise price is the equivalent of receiving shares worth the exercise price without paying anything.

93 *See supra* note 92.

94 If each of the 40 valid Rights were exchanged for 4 shares, 160 new shares would have to be issued. 50 original shares + 160 newly-issued shares = 210 outstanding shares.

95 The market value of the company would not change. $1,500 market value ÷ 210 outstanding shares = $7.14 market value per share.

96 10 shares ÷ 210 outstanding shares = 4.8%.

97 10 shares x $7.14 per share = $71.40.

98 This could be defended on the ground that paying the exercise price to receive shares worth twice the exercise price is the equivalent of receiving cash in an amount equal to the exercise price.

99 *See supra* Part I.C. It also raises some of the same concerns as the back-end pill. *See supra* notes 62-67.

100 *See supra* note 59 and accompanying text.

101 *See supra* notes 65-67 and accompanying text. In fact, the exchange option, much like the back-end pill, very well might be considered a form of selective issuer tender offer which would be illegal under federal securities laws. *See supra* notes 63-64 and accompanying text.

the acquiror would be comparable to that of the exercise of the Rights by shareholders, there would be very little reason for the target company not to exercise its exchange option.[102]

II. THE ANTIDOTE

The poison pill works by threatening the dilution of the acquiror's interest to such an extent that it would be economically impractical to proceed with a hostile takeover. Ultimately, it is nothing more than a sophisticated mathematical problem. As with most mathematical problems, a solution is theoretically possible. The antidote proposed in this Article would allow the acquiror to anticipate the dilution of the poison pill and account for it in the initial bid. By doing so, it would allow the acquiror to trigger the poison pill without ingesting its economic poison.

The basic outline of the antidote strategy is as follows: The acquiror must make two tender offers in succession. The first tender offer would offer little or no consideration. Although the acquiror would accept only the minimum number of shares that would be considered a triggering event under the target company's Shareholder Rights Plan, the tender offer nevertheless would be conditioned upon the tender of a large majority of the outstanding shares. In addition, the acquiror would undertake to consummate a second tender offer or to pay a specified amount if a second tender offer were never consummated. The second tender offer would follow after the full dilution could be ascertained. It would be for a specified aggregate amount, subject to certain specified adjustments depending upon subsequent events. Once the second tender offer were consummated, the acquiror would pay the shareholders who had tendered in the initial offer the same consideration paid in the second tender offer. In the end, each shareholder would receive roughly the same consideration she would have received had there been no poison pill, and the acquiror would not suffer the consequences intended by the target company's board of directors.

This Part fleshes out the antidote strategy. It begins with a discussion of how the two tender offers are to be priced. The basic idea is that the acquiror must pay the fully diluted price for each share. However, there are disincentives to tendering in the initial offer at a fully diluted price. The hold-

102 The considerations change somewhat when the target company is confronted with the antidote strategy proposed in this Article. *See infra* notes 115-18, 260-62 and accompanying text.

out problem is therefore addressed next. The requirement of a high minimum tender in the initial offer is the solution to the hold-out problem, because each shareholder would know that any hold-outs would threaten the entire takeover. Finally, a number of optional variations that could strengthen the antidote strategy are suggested. The strengths and weaknesses of the antidote strategy are discussed in Part III.

A. *Determining the Price*

The effect of the flip-in poison pill would be to dilute the interests of the acquiror in the target company.[103] This dilution would occur on both an economic level and a voting level.[104] After the poison pill were to run its course, there would be many more shares of target company stock outstanding, each with a market value significantly lower than that of the pre-triggering event shares.

Dilution is not necessarily an insurmountable problem if it can be anticipated from the start. In order to avoid the economic dilution, the acquiror would have to acquire all shares at a fully diluted price per share. Voting dilution, on the other hand, cannot be avoided entirely. However, it can be minimized by ensuring that as few Rights as possible are deemed void. Thus, a partial tender offer—*i.e.*, just enough shares to cause a triggering event—at a fully diluted price per share could detoxify the poison pill, avoiding the economic dilution and minimizing the voting dilution. While it would not transfer control, it would enable the acquiror to proceed with a hostile takeover in the face of the poison pill.[105]

What is the fully diluted price per share? The price is simple to calculate if it can be assumed that the target company would exercise the exchange option. For example,[106] once the acquiror were to purchase 10 shares, the remaining 40 shares effectively would be doubled. The value of the target company would remain unchanged at $1,500, but there then would be 90 shares outstanding,[107]

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[103] This Article begins with the flip-in pill because of its significance and prevalence. *See supra* note 43 and accompanying text. The effects of the flip-over pill can be avoided simply by avoiding subsequent interested transactions, *see supra* notes 53-54 and accompanying text, and the effects of the back-end pill are dealt with in terms of the exchange option, *see infra* notes 120-27 and accompanying text.

[104] *See supra* note 87 and accompanying text.

[105] After the poison pill were triggered, it would no longer prevent anyone from proceeding with a hostile takeover. *See infra* note 312 and accompanying text.

[106] For the assumptions underlying the example, *see supra* notes 30-33 and accompanying text.

[107] *See supra* note 88.

and each share would be worth $16.67.[108] The acquiror, who was willing to pay a $1,000 premium for the target company, could be expected to offer $27.78 per share.[109]

It is likewise simple to calculate the fully diluted price per share if it can be assumed that the Rights would be exercised. Once the acquiror were to purchase 10 shares, the remaining shareholders would have the right to purchase an aggregate of 320 newly-issued shares for a total of $4,800.[110] The target company then would be worth $6,300.[111] Because there would be a total of 370 shares outstanding,[112] each share would be worth $17.03.[113] The acquiror could be expected to offer $19.73 per share.[114]

Unfortunately, one cannot be certain in advance whether the target company will exercise its exchange option. Under normal circumstances, it would be quite safe to assume that the exchange option would be exercised.[115] However, it is unlikely that a target company's management would want to be so cooperative in the face of a hostile takeover employing an antidote strategy. The mere existence of the exchange option would prevent the acquiror from determining the appropriate price for the tender offer, delaying consummation of the takeover. This would give the target company the incentive to delay any decision on whether to exercise its exchange option.[116]

Fortunately, the acquiror could make a safe assumption without knowing the actual outcome. The safe assumption would be to pay the lower price—*i.e.*, assume that the Rights would be exercised. If the higher price were to be paid, it might prove to have been too much; the acquiror thereby would suffer at least some economic dilution. On the other hand, if the lower price were to be paid, it might prove to have been too little. However, there would be

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108 *See supra* note 89.

109 Given that the company is worth $1,500 and that the acquiror is willing to pay a $1,000 premium, the aggregate offering price should be $2,500. $2,500 ÷ 90 outstanding shares = $27.78 per share.

110 *See supra* note 74.

111 *See supra* note 75.

112 *See supra* note 76.

113 *See supra* note 77.

114 The acquiror should be willing to increase its aggregate offering price by the $4,800 that the target company would receive upon the exercise of the Rights. *See infra* note 122. Given that the acquiror was willing to pay $2,500 for the target company originally, it should be willing to pay $7,300 ($2,500 + $4,800) after the Rights were exercised. $7,300 ÷ 370 outstanding shares = $19.73 per share.

115 *See supra* text accompanying note 102.

116 This is a problem for the antidote strategy, *see infra* notes 260-62 and accompanying text, although not an insurmountable one, *see infra* notes 263-94, 299-301 and accompanying text.

nothing to prevent the acquiror from agreeing at the outset to pay the difference to the shareholders who tender in the initial offer if appropriate.[117] In fact, the acquiror would be required, both by law and by contractual obligation, to do so.[118] In making the additional payment, the acquiror would not be raising the aggregate cost of the hostile takeover.[119] Thus, the acquiror could assume in the initial tender offer that the exchange option would not be exercised.

However, even this is not an entirely safe assumption. If the exchange option, or some other back-end provision, were to allow the target company to exchange Rights for cash or debt securities, the target company still would be able to sabotage the acquiror's efforts. In theory, such an option could enable the target company to distribute all of its value to the other shareholders—in effect, to pay a discriminatory liquidating dividend. In such case, any amount paid in the initial tender offer would prove to be too much, because the shares would become worthless. As discussed, the target company would face significant limitations in making such distributions to shareholders.[120] However, there is no doubt that a great deal of value could be drained from the company in this manner. Thus, the acquiror could not safely pay even the lower of the two amounts. It would be very difficult for the acquiror to determine in advance any appropriate price for the initial tender offer.

Nevertheless, there is one way that an acquiror could protect itself even from the effects of the exchange option or a back-end pill: offer nothing in the initial tender offer.[121] Of course, it would not be the intention of the acquiror to obtain the initial shares for free. However, because no price would have been set in the initial tender offer, the acquiror would have the freedom to adjust the price in the second offer as necessary in response to any distributions made by the target company. The same payment could then be made to the shareholders who had participated in the initial tender offer without suffering the effects of the economic dilution.

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117 The difference in the examples used thus far would be \$8.05 per share. \$27.78 appropriate amount - \$19.73 amount paid = \$8.05 amount due.

118 The contractual obligation would arise from the terms of the initial offer, while the legal obligation would arise from the Williams Act. *See infra* notes 228-31 and accompanying text.

119 The acquiror simply would be paying the fully diluted price per share. The difference paid later represents the amount by which the acquiror erred in calculating the fully diluted price per share by assuming an exercise of Rights instead of an exchange.

120 *See supra* notes 65-67 and accompanying text.

121 Rather than offer no consideration, it might be preferable to offer nominal consideration, such as 1¢ per share.

In order to succeed in the initial tender offer, the acquiror would have to do significantly more than offer no consideration. At the very least, certain promises would have to be made. The basic promise would have to be that the acquiror would make a second tender offer, with equal consideration being paid to shareholders who tender in the initial tender offer. The price at which the second tender offer would be made corresponds to the aggregate amount that the acquiror is willing to pay for the target company, subject to adjustments: the addition of any proceeds from the exercise of the Rights, and the subtraction of any distributions made by the target company.[122] For example, the acquiror should be expected to pay an extra $4,800 if the Rights were exercised; on the other hand, it should be expected to pay less if any distributions were made by the target company.[123] Thus, if the exchange option were exercised, the price would be $27.78;[124] if the exchange option were not exercised, the price would be $19.73.[125] If, however, the target company were to effect a liquidating distribution pursuant to the exchange option, the acquiror might not have any obligation to effect a second tender offer at all.[126] The

[122] Given that the acquiror originally was willing to pay a certain amount for the target company, it should be willing to increase that amount if the target company were to receive an infusion of cash (or other assets), because the target company would be worth that much more. Similarly, the acquiror should be insistent upon decreasing the amount if the target company were to distribute (or waste) its cash (or other assets), because the target company would be worth that much less.

[123] It is clear that any discriminatory distribution would have to be deducted from the promised price. However, it is equally important to exclude any waste of assets and even non-discriminatory distributions because they also reduce the value of the company. For marketing purposes, it may be wise to ignore ordinary dividend payments. However, other distributions, including non-discriminatory distributions, should be factored into the promised price. In general, they should serve to reduce the promised price, although the portion of any distribution received by the acquiror should be added back in.

[124] *See supra* note 109.

[125] *See supra* note 114.

[126] The acquiror would be permitted to reduce the amount it must pay in the acquisition in response to distributions to shareholders made by the target company. If the target company were able to distribute $2,500 to the remaining shareholders, then the acquiror's obligation clearly would be to tender $0 for the remaining shares.

A tricky issue would arise if the target company were to distribute a mere $1,500 (the company's fair market value) to the remaining shareholders. The acquiror very well might consider its obligation to pay $1,000 (the original premium) for a company with a fair market value of $0 to be burdensome; on the other hand, the acquiror might not, because the target company should be able to be restored to its former glory with a cash infusion. The acquiror should consider carefully whether reductions for distributions should be dollar-for-dollar, or whether they should be made at an accelerated pace. For example, the acquiror might prefer to reduce the promised amount by $1.67 for each $1.00 of distributions made by the target company. This would mean that the company would have no obligation to conduct a second tender offer if the company were to effect a liquidating distribution in the amount of $1,500. However, while this would protect the acquiror, it would make the takeover less attractive to the target company's shareholders. In some cases, the shareholders would fare poorly under an accelerated reduction formula. *See infra* note 127.

continuing shareholders should not be worse off because they received the benefit of the liquidating distribution.[127]

In short, by paying nothing in a tender offer that barely triggers the poison pill, the acquiror would become free to acquire control of the company through a second tender offer at an appropriate price. It would not be harmed by the economic dilution intended by the poison pill. The acquiror therefore would be able to consummate the takeover at the aggregate offering price desired.

B. The Hold-Out Problem

Although the proposed antidote works well from the acquiror's perspective, it may seem somewhat less than ideal from the perspective of the target company's shareholders. At the simplest level, shareholders will wonder why they should be expected to tender their shares for significantly less than their fair market value—indeed, for nothing! While it may seem strange, it is demonstrably in their interests to do so.

If all outstanding shares were tendered in the initial offer, the shareholders would receive the same aggregate amount as if the poison pill had been redeemed. For example,[128] in the absence of the poison pill, the acquiror would be willing to pay $50 for each of the 50 outstanding shares. Because of the poison pill, however, the acquiror would be forced to employ an antidote strategy. If all shares were tendered in the initial offer, a shareholder with 5 shares would transfer only 1 share[129] and retain 4 shares and 4 valid Rights.

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[127] If the offering price were to include a healthy premium over the market price, then a distribution that would eliminate the need to conduct a second tender offer would leave the target company's shareholders no worse off than they were prior to the takeover attempt. For example, if the target company were able to distribute $2,500 to the shareholders other than the acquiror, each valid Right would entitle its holder to $62.50 ($2,500 ÷ 40 Rights). A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. Her aggregate distribution would amount to $187.50 ($62.50 per Right x 3 Rights)—more than the $120 worth of target company stock she began with.

On the other hand, a distribution of only the aggregate market value of the target company would leave shareholders who tender in the initial offer somewhat worse off. The $1,500 distribution would entitle the holder of each valid Right to $37.50 ($1,500 ÷ 40 Rights). A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. However, her aggregate distribution would be $112.50 ($37.50 per Right x 3 Rights)—less than the $120 worth of target company stock she began with. To be made whole, she would need compensation equal to $7.50 for the original share. *See infra* Part II.C. Any accelerated adjustments to the promised price, *see supra* note 126, would have to take this into consideration.

[128] For the assumptions underlying the example, *see supra* notes 30-33 and accompanying text.

[129] The acquiror would accept only 20% of the shares. It must accept shares pro rata. 17 C.F.R. § 240.14d-8 (2002). Thus, each shareholder would have 20% of her shares—or 1 of 5—accepted in the initial tender offer.

Assuming that the exchange option were exercised, she would have a total of 8 shares.[130] In the second tender offer, she would receive $27.78 for each of her shares,[131] including the share tendered in the initial offer. The aggregate amount of $250.02 is equal to the amount she would have received for her original 5 shares had there been no poison pill or antidote.[132] Assuming, on the other hand, that the Rights were exercised, she would have to pay $480 in order to receive 32 newly-issued shares.[133] She would have a total of 36 shares.[134] In the second tender offer, she would receive $19.73 for each of her shares,[135] including the share tendered in the initial offer. After subtracting the amount paid to exercise the Rights, she would receive a net aggregate amount of $250.01.[136] Again, this amount is the equivalent of $50 for each of her original 5 shares.

A major wrinkle is the hold-out problem. It is true that all shareholders would benefit equally if they all were to tender fully into both tender offers. However, an individual shareholder would fare better if she were to tender only in the second offer. For example, a shareholder with 4 shares who were not to tender in the initial offer would retain 4 shares and 4 valid Rights. Assuming that the exchange option were exercised, the shareholder would have a total of 8 shares.[137] In the second tender offer, she would receive $27.78 for each of her shares.[138] The aggregate amount of $222.24[139] is equal to $55.56 for each of her original 4 shares.[140] Assuming, on the other hand, that the Rights were exercised, she would have to pay $480 in order to receive 32 newly-issued shares.[141] She would have a total of 36 shares.[142] In the second tender offer, she would receive $19.73 for each of her shares.[143] After subtracting the amount paid to exercise the Rights, she would receive a net

130 4 original shares + 4 newly-issued shares = 8 shares.

131 *See supra* note 109.

132 $27.78 per share x 9 shares = $250.02. $50 per share x 5 shares = $250.

133 4 Rights x $120 per Right = $480. 4 Rights x 8 shares per Right = 32 shares.

134 4 remaining shares + 32 newly-issued shares = 36 shares.

135 *See supra* note 114.

136 $19.73 per share x 37 shares = $730.01 - $480 exercise price = $250.01.

137 4 original shares + 4 newly-issued shares = 8 shares.

138 *See supra* note 109. Whether any particular shareholder were to tender in the initial offer would not affect the final fully diluted price per share offered in the second tender offer.

139 8 shares x $27.78 per share = $222.24.

140 $222.24 ÷ 4 original shares = $55.56 per original share.

141 *See supra* note 133.

142 4 original shares + 32 newly-issued shares = 36 shares.

143 *See supra* note 114. Whether any particular shareholder were to tender in the initial offer would not affect the final fully diluted price per share offered in the second tender offer.

aggregate amount of $230.28.[144] This amount is equal to $57.57 for each of her original 4 shares.[145] In each case, the hold-out shareholder would receive more than the intended $50 per original share.

Moreover, the greater the number of hold-outs, the worse the problem would be for those who were to tender in the initial tender offer. At the extreme, if only 20% of the outstanding shares were tendered in the initial offer, the shareholders so tendering would bear the entire burden and receive less than the fair market value of their shares.[146] No shareholder could be expected to tender under such circumstances.

The hold-out problem arises from the fact that shareholders would lose the Rights corresponding to shares accepted in the initial offer, but not those Rights corresponding to shares held for the second offer. Because each valid Right ultimately would be converted into additional shares, shareholders would receive greater consideration per original share in the second offer than the first. Thus, each shareholder would fare better as fewer of her shares were accepted in the initial offer; as demonstrated, shareholders who were to tender only in the second offer would fare significantly better than shareholders who were to have all their shares accepted in the initial offer.

Fortunately, there is a solution. The hold-out problem can be mitigated by minimizing the percentage of tendering shareholders' shares that must be accepted in the initial offer. That percentage could be lowered in two ways. The first way would be to decrease the number of shares that must be accepted in order to cause a triggering event. However, this might not be in the direct control of the acquiror.[147] The second way, however, would be to increase the

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144 $19.73 per share x 36 shares = $710.28 - $480 exercise price = $230.28.

145 $230.28 ÷ 4 original shares = $57.57 per original share.

146 If only 20% of the shares were tendered, all tendered shares would be accepted. Thus, a shareholder who were to tender 4 shares in the initial offer would transfer all 4 shares and retain no shares or Rights. She would receive no benefit from her Rights, because all of them would have been transferred in the initial tender offer. She would not receive any premium for her shares; in fact, she would not even receive their original fair market value. Rather, she would receive only the fully diluted price per share. Assuming that the exchange option were exercised, this amount would be $27.78 per share. *See supra* note 109. The shareholder would receive an aggregate of $111.12 for her shares ($27.78 per share x 4 shares)—$8.88 short of the $120 worth of stock she began with. Assuming, on the other hand, that the Rights were exercised, the amount would be $19.73 per share. *See supra* note 114. The shareholder would receive an aggregate of $78.92 for her shares ($19.73 per share x 4 shares)—$41.08 short of the $120 worth of stock she began with.

147 This is largely in the control of the target company, which establishes the ownership threshold that constitutes a triggering event. (Ironically, recent adoptions of poison pills have tended to include lower triggering event thresholds. *See infra* notes 313-15 and accompanying text.) An acquiror could, however,

number of shares that must be tendered in the initial offer. Although the acquiror should purchase only enough shares to constitute a triggering event in the initial tender offer, the transaction nevertheless should be conditioned on a large minimum tender by shareholders.[148]

For illustrative purposes, it shall be assumed hereafter that the minimum tender requirement should be set at 80% of the outstanding shares. However, it is important to find the appropriate minimum tender requirement in order for the antidote strategy to work. The minimum tender requirement must be set high enough so that there would be no margin for shareholders to game the system; otherwise, they might be willing to gamble on a hold-out strategy. Of course, the minimum tender requirement could not be set at 100% of the outstanding shares because there are always shareholders who cannot be expected to tender at all. Among them are insiders—the officers of the target company and possibly its directors, employees, and significant minority shareholders[149]—and inattentive shareholders who cannot be made aware of the tender offer by any reasonable means. Shares held by such shareholders must be excluded from the minimum tender requirement, but no others could be excluded. Each willing shareholder must know that she simply cannot hold out or she will block the takeover.

Unfortunately, the fact remains that those shareholders who were not to tender in the initial offer would fare better than those who were to tender. However, any incentive to hold out would be counteracted by the risk of losing the entire deal. Moreover, the disincentive to tender would be minimized by a high minimum tender requirement because the shareholders who were to tender in the initial offer would be assured a significant premium.[150] For example, a shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. Assuming that the exchange option were exercised, she would have a total of 6 shares.[151] She

make open-market purchases prior to commencing the initial tender offer. *See infra* notes 196-227 and accompanying text.

148 The maximum exposure of tendering shareholders would be reduced as the minimum tender requirement were increased because the burden would be divided among a greater number of shareholders.

149 By definition, a hostile takeover is opposed by at least some insiders. Insiders can comprise a fairly significant block of shares; the larger the block, the worse the hold-out problem.

150 The extreme situation referred to above, *supra* note 146 and accompanying text, would not be possible. The high minimum tender requirement would ensure that the burden were shared among a significant majority of the shareholders.

151 3 remaining shares + 3 newly-issued shares = 6 shares.

would receive $27.78 for each of her shares,[152] including the share tendered in the initial offer. The aggregate amount of $194.46[153] is equal to $48.62 for each of her original 4 shares.[154] Assuming, on the other hand, that the Rights were exercised, she would have to pay $360 to acquire 24 newly-issued shares.[155] She would then have a total of 27 shares.[156] In the second tender offer, she would receive $19.73 for each of her shares,[157] including the share tendered in the initial offer. After subtracting the amount paid to exercise the Rights, she would receive a net aggregate amount of $192.44.[158] This amount is equal to $48.11 for each of her original 4 shares.[159] In each case, the shareholder would receive an amount close to the $50 she would receive in the ideal situation. Although this is less than a hold-out shareholder would receive, it is far in excess of the $30 fair market value of her shares. Thus, there would be little risk associated with tendering in the initial tender offer.

Assuming that the second tender offer were not to take place, things would become slightly more complicated. If a shareholder were to give away a significant portion of her shares without any real consideration, she would be left with a loss. This could easily discourage shareholders from tendering in the initial offer. For example, a shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. Assuming that the exchange option were exercised, she would have a total of 6 shares,[160] worth $16.67 each.[161] The aggregate value of $100.02[162] is equal to $25 for each of her original 4 shares.[163] That is less than the original fair market value of $30 per share. Assuming, on the other hand, that the Rights were exercised, she would have to pay $360 in order to receive 24 newly-issued shares.[164] She would have a total of 27 shares,[165] worth $17.03 each.[166] After subtracting the amount paid to exercise the Rights, she would have a net

152 *See supra* note 109.
153 $27.78 per share x 7 shares = $194.46.
154 $194.46 ÷ 4 original shares = $48.62 per original share.
155 3 Rights x $120 per Right = $360. 3 Rights x 8 shares per Right = 24 shares.
156 3 remaining shares + 24 newly-issued shares = 27 shares.
157 *See supra* note 114.
158 $19.73 per share x 28 shares = $552.44 - $360 exercise price = $192.44.
159 $192.44 ÷ 4 original shares = $48.11 per original share.
160 3 remaining shares + 3 newly-issued shares = 6 shares.
161 *See supra* note 89.
162 $16.67 per share x 6 shares = $100.02.
163 $100.02 ÷ 4 original shares = $25 per original share.
164 *See supra* note 155.
165 3 remaining shares + 24 newly-issued shares = 27 shares.
166 *See supra* note 77.

aggregate value of $99.81.[167] This amount is equal to $24.95 for each of her original 4 shares.[168] Again, that is less than the original fair market value of $30 per share. Thus, it would be necessary for the acquiror to promise to compensate shareholders who were to tender in the initial offer in the event that the second tender offer were not consummated within a specified time frame for any reason.

In determining the amount necessary to compensate such shareholders, two options spring to mind. The compensation could be based on the amount promised for the second tender offer. That would be $27.78 per share[169] if the exchange option were exercised and $19.73 per share[170] if the Rights were exercised. In many cases, that would be sufficient to ensure that each shareholder would be no worse off for having tendered in the initial offer.[171] However, under certain circumstances, those amounts could leave the shareholders slightly worse off than if they had not tendered. For example, if there were no second tender offer and the Rights were exercised, a shareholder who were to tender 4 shares in the initial offer would transfer 1 share, retaining 3 shares and 3 valid Rights. She would have to pay $360 in order to receive 24 newly-issued shares.[172] She would have a total of 27 shares,[173] worth $17.03 each.[174] She would also receive $19.73[175] in compensation from the initial tender offer. After subtracting the amount paid to exercise the Rights, she would have a net aggregate value of $119.54.[176] This amount is equal to $29.89 for each of her original 4 shares[177]—slightly less than the original market value of $30 per share. Thus, the promised amount might not be adequate compensation.

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[167] $17.03 per share x 27 shares = $459.81 - $360 exercise price = $99.81.

[168] $99.81 ÷ 4 original shares = $24.95 per original share.

[169] *See supra* note 109.

[170] *See supra* note 114.

[171] For example, if there were no second tender offer and the target company were to exercise its exchange offer, a shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. After the exchange, she would have 6 shares, *see supra* note 160, each worth $16.67, *see supra* note 89. When added to the $27.78 compensation for the initial tender offer, *see supra* note 169 and accompanying text, the aggregate value is $127.80 ($16.67 per share x 6 shares + $27.78 compensation). This amount is equal to $31.95 for each of her original 4 shares ($127.80 ÷ 4 original shares).

[172] *See supra* note 155.

[173] *See supra* note 165.

[174] *See supra* note 77.

[175] *See supra* note 170 and accompanying text.

[176] $17.03 per share x 27 shares + $19.73 compensation = $479.54 - $360 exercise price = $119.54.

[177] $119.54 ÷ 4 original shares = $29.89 per original share.

On the other hand, the compensation could be based on a "make-whole" concept. In this case, shareholders would receive enough compensation to ensure that they would have, in the aggregate, no less than they had prior to the takeover bid. For example, a shareholder with 4 shares would have an aggregate fair market value of $120 before tendering in the initial offer. If the exchange option were exercised, she would have 6 shares,[178] worth $16.67 each.[179] She would have an aggregate value of only $100.02.[180] Thus, she would be due $19.98.[181] If the Rights were exercised, she would have to pay $360 in order to receive 24 newly-issued shares.[182] She would then have 27 shares,[183] worth $17.03 each.[184] After subtracting the amount paid to exercise the Rights, she would have a net aggregate value of only $99.81.[185] Thus, she would be due $20.19.[186]

As between the two alternatives, the make-whole amount seems more appropriate, even though in some cases it actually would be less than the tender offer amount. This is because the make-whole amount minimizes both the shareholders' disincentive to tender and the acquiror's economic risk, whereas the tender offer amount deals with the former at the expense of the latter. However, if the exchange option were not exercised by the time the takeover attempt were abandoned, the higher make-whole amount—*i.e.*, $20.19, which assumes that the exchange option would not be exercised—seems appropriate. This is because it would be unfair to have the shareholders wait for a final resolution given that the acquiror would not be fulfilling its promise to proceed with the second tender offer. Fortunately, there is not necessarily a great difference between the two make-whole amounts.[187]

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178 *See supra* note 160.

179 *See supra* note 89.

180 $16.67 per share x 6 shares = $100.02.

181 $120 appropriate amount - $100.02 amount paid = $19.98 amount due.

182 *See supra* note 155.

183 *See supra* note 165.

184 *See supra* note 77.

185 $17.03 per share x 27 shares = $459.81 - $360 exercise price = $99.81.

186 $120 appropriate amount - $99.81 amount paid = $20.19 amount due.

187 It may seem unfair that the acquiror could walk away from the second tender offer with the shares from the first tender offer after paying less than the original fair market value for such shares. However, the result is neither a loss to the tendering shareholders, who are made whole, nor a benefit to the acquiror, who is forced to pay more than the ultimate fair market value for such shares.

In certain unlikely circumstances, a greater amount might be necessary to make a shareholder whole in the absence of a second tender offer. *See, e.g., infra* note 275, *Example A*. It is not clear that the mere possibility necessitates much of a response by the acquiror. A contingent increase in compensation should be adequate.

The compensation amounts discussed above assume that the target company would not make any cash distributions, especially one pursuant to a back-end-like exchange option in the Shareholder Rights Plan. The actual compensation amount promised in the initial tender offer would have to be adjustable under the same circumstances as the promised second tender offer price, even if based on a make-whole amount.[188] Thus, it is theoretically possible that if a liquidating distribution were made, no compensation would be due.[189] However, in that case, the shareholders would have been made whole by the liquidating distribution itself.[190]

Thus, while at first it may seem illogical for shareholders to be willing to tender their shares for nothing, it is actually in their interests to do so. Assuming that the hostile takeover bid offering a premium over market value were in the interests of shareholders, a high minimum tender requirement for the initial offer should dissuade shareholders from attempting to hold out for greater consideration in the second tender offer. In addition, the promise of compensation should a second tender offer not be consummated within a specified time frame would ensure that shareholders who tender in the initial offer would not be worse off under any circumstances. Finally, if the hold-outs were to doom the antidote strategy, then the acquiror could walk away from the transaction having failed in the takeover attempt and having lost the expenses incurred, but largely having avoided the effects of the poison pill.

C. Two Variations

The antidote strategy discussed above is not carved in stone. As is the case with the poison pill itself, the antidote strategy is quite flexible. Many variations can be devised to address specific concerns. Two such variations, each of which addresses fairly universal concerns, are discussed below. An additional variation is discussed later in this Article.[191]

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188 *See supra* notes 122-27 and accompanying text. The purpose of the compensation payment for the initial tender offer in the event no second tender offer were consummated is to make the tendering shareholder whole. The make-whole amount assures that, in the end, the tendering shareholders would have at least $30 per original share. Distributions should be taken into consideration because they are benefits that shareholders receive as a result of the takeover attempt.

189 *See supra* note 126 and accompanying text.

190 *See supra* note 127 and accompanying text.

191 *See infra* Part III.A.3.

A fourth variation is worth mentioning, as well. Many of the problems created by the poison pill and imperfectly addressed by the antidote strategy could be overcome if the acquiror were permitted to initiate simultaneous tender offers for the common stock and the corresponding Rights. Although the Rights are attached to the common stock (such that they must be tendered jointly)—and would become void in the

One reasonable concern that the shareholders of the target company likely would have is trust. Shareholders might not feel confident that the acquiror would be willing, or even able, to follow through on its undertaking of a second tender offer or compensation. Shareholders would be in a precarious position after having tendered their shares for nothing more than a promise of future payment.[192] Even if the acquiror's integrity were not in question, the acquiror nevertheless could become unable to make the promised payments because of insolvency.

One possible solution to increase the confidence of tendering shareholders is the creation by the acquiror of a trust for the benefit of such shareholders. The acquiror could deposit with the trustee cash in an amount equal to the make-whole amount.[193] The trustee would have detailed instructions on the conditions under which the trustee would distribute the funds. With a trust in place, shareholders could be confident that they would be compensated in all circumstances.

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acquiror's hands—this does not prevent the acquiror from paying for those Rights separately. In the initial tender offer, the acquiror would still offer little or no consideration for both the shares and the Rights. However, the acquiror would undertake to pay, upon the successful completion of the final tender offer, a separate amount for the Rights tendered in the initial offer. The aggregate consideration to be paid would remain the same. However, that amount could be divided among the shares and the Rights in such a way that shareholders who were to tender in the initial offer would be compensated for the shares that they would forego by surrendering the Rights. By providing for equal treatment between tendering and non-tendering shareholders in the event of a successful takeover, this strategy would greatly reduce the hold-out problem.

The hold-out problem would not be eliminated entirely because shareholders who were to tender in the initial offer would only be entitled to the make-whole amount in the event that the takeover were not successful. In that case, tendering shareholders would not fare as well as non-tendering shareholders. Nevertheless, capping the acquiror's liability to the make-whole amount in the event of an unsuccessful takeover is a necessary risk-management measure for the acquiror.

The benefits of this variation on the antidote strategy could be tremendous, and are not fully detailed in this footnote. Nevertheless, it is relegated to a footnote for two reasons.

First, there is a risk that courts would not interpret the transaction in the intended manner. For example, the larger payment to shareholders who tender in the initial offer would be problematic if it were seen as a larger payment for the shares rather than an equal payment for the shares and an additional payment for the Rights. This could lead to potentially serious problems under Exchange Act Rule 14d-10. 17 C.F.R. § 240.14d-10 (2002). Thus, the acquiror should consider seeking exemptive relief from the Securities and Exchange Commission before pursuing this course of action.

Second, the lower payment for shares in the final offer would allow a third party to step in and make a better offer at a lower aggregate cost. The effect would be similar to that described with the second alternative in the text, with the payment for Rights replacing the cost of open-market purchases. *See infra* notes 213-18 and accompanying text.

The option of paying for the Rights would require additional protections for the acquiror in order to be feasible.

192 *See supra* notes 161-68 and accompanying text.

193 As discussed above, this might be $20.19 per share. *See supra* notes 179-90 and accompanying text.

In brief, the trust agreement might provide as follows: If a second tender offer were not consummated within a specified time frame, the entire trust corpus would be distributed to the beneficiaries;[194] if a second tender offer were consummated, the beneficiaries would be entitled to the promised amount. If the promised amount were to exceed the trust corpus (because of a successful takeover), the acquiror would be liable for the difference; if the trust corpus were to exceed the promised amount (because of a distribution by the target company), the remainder would be returned to the acquiror. Thus, the shareholders would receive the promised amount if a second tender offer were to take place and the make-whole amount otherwise.[195]

The second variation to be considered is the purchase of shares of the target company on the open market prior to the employment of the antidote strategy. In a typical tender offer situation, this is the standard practice because the prevailing market price is lower than the tender offer price, which must include a premium.[196] However, under the antidote strategy, the original market value

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[194] Actually, the beneficiaries would be entitled only to the make-whole amount, which very well might be less than the trust corpus. For example, if the exchange option were exercised, it would be the slightly lower make-whole amount of $19.98. *See supra* notes 179-81 and accompanying text. If there were distributions made by the target company, the make-whole amount might be lower still. *See supra* notes 188-90 and accompanying text.

[195] The consummation of a tender offer by a third party, rather than by the acquiror, should be deemed to satisfy the trust conditions. In other words, if a third party were to consummate a tender offer at a price exceeding the acquiror's promised price, the shareholders should be entitled to nothing more than the promised price. This result best replicates a world without the poison pill, where the acquiror would have made open-market purchases prior to initiating a tender offer and would be able to sell such shares at a profit after losing a bidding contest. Similarly, if the acquiror were to lose in a bidding contest, it should be able to profit from the difference between its promised price and the final selling price.

In fact, the acquiror's profit under the antidote strategy would be quite limited, because it would keep only the excess over the promised price, which includes a significant premium, rather than the excess over the initial market price. For example, *see supra* notes 30-33 and accompanying text, assume that the acquiror were to consummate the initial tender offer, then the target company were to exercise its exchange option, and finally a third party were to outbid the acquiror by offering an aggregate amount of $3,000 for the target company's stock, or $33.33 per share ($3,000 ÷ 90 shares). The acquiror would have purchased 10 shares at $27.78 each, *see supra* note 109. He could then sell them to the third party at a profit of $5.55 per share ($33.33 - $27.78), or $55.50 in the aggregate. By comparison, assume a standard, non-poison pill takeover in which the acquiror were to buy 10 shares in the open market at $30 per share before announcing a tender offer at $50 per share, but were ultimately outbid by the third party offering $60 per share. The acquiror would then sell its shares to the third party at a profit of $30 per share ($60 - $30), or $300 in the aggregate. Even after returning half the amount as a short-swing profit under § 16(b) of the Exchange Act, *see* 15 U.S.C. § 78p(b) (2000), the acquiror would profit significantly more from a standard, non-poison pill takeover than it would under the antidote strategy.

[196] Without the dilution of the poison pill, the number of shares remains constant. Thus, it is preferable to pay the lower market value for as many shares as possible.

generally would be higher than the fully diluted tender offer price.[197] Thus, purchasing any shares prior to the employment of the antidote strategy would be a costly and risky endeavor. Nevertheless, it could greatly reduce the incentive for shareholders to attempt a hold-out strategy.

For example,[198] assume that the acquiror were to purchase 10% of the target company's shares on the open market. It would pay $150 for the shares,[199] leaving an aggregate of $2,350 for the tender offers.[200] The next step would be to make a tender offer for 10% of the target company's shares, but requiring a minimum tender of 70%.[201] Thereafter, the second tender offer would be made. The final price would be $26.11 per share[202] if the exchange option were exercised and $19.32 per share[203] otherwise. Although the open market purchases would have reduced the tender offer price from $27.78[204] and $19.73,[205] respectively, there would remain a significant premium to the fair market values of $16.67[206] and $17.03,[207] respectively. Moreover, the difference between the consideration received by shareholders who were to tender in both tender offers and that received by shareholders who were to tender only in the second tender offer would be cut nearly in half: only $3.73 per original share if the exchange option were exercised,[208] and only $4.94 per

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197 For example, *see supra* notes 30-33 and accompanying text, the original market value is $30 per share, while the fully diluted offering price is at most $27.78 per share, and possibly significantly less, *see supra* notes 106-14 and accompanying text.

198 For the assumptions underlying the example, *see supra* notes 30-33 and accompanying text. Here, a few assumptions have been modified, as discussed in the text.

199 10 shares x $30 per share = $150.

200 $2,500 offering price - $150 open-market purchases = $2,350 remaining for tender offers.

201 The 10% tender offer, when added to the 10% already purchased on the open market, equals a 20% holding, which results in the desired triggering event. The 70% minimum tender, when added to the 10% already purchased on the open market, equals the 80% threshold desired for the minimum tender requirement.

202 If the exchange option were exercised, there would be 90 shares. *See supra* note 88 and accompanying text. $2,350 ÷ 90 shares = $26.11 per share.

203 If the exchange option were not exercised, there ultimately would be 370 shares. *See supra* note 76 and accompanying text. The acquiror should be willing to pay an aggregate amount of $7,150 ($2,350 + $4,800). $7,150 ÷ 370 shares = $19.32 per share.

204 *See supra* note 109.

205 *See supra* note 114.

206 *See supra* note 89.

207 *See supra* note 77.

208 A shareholder with 7 shares who were not to tender in the initial offer would retain 7 shares and 7 valid Rights. After the exchange, she would have a total of 14 shares (7 original shares + 7 newly-issued shares). In the second tender offer, she would receive $26.11 for each of her shares. *See supra* note 202. The aggregate amount of $365.54 ($26.11 per share x 14 shares) is equal to $52.22 for each of her original 7 shares ($365.54 ÷ 7 shares).

On the other hand, such a shareholder who were to tender in the initial offer would transfer 1 share and retain 6 shares and 6 valid Rights. After the exchange, she would have a total of 12 shares (6 remaining shares original share if the Rights were exercised,[209] as compared to $6.94[210] and $9.46,[211] respectively, without the open market purchases. If the triggering event threshold were lower, or if the pre-tender offer purchases were greater, the effect would be even more dramatic.[212]

Open market purchases, however, would cause the acquiror to suffer the dilutive effects of the poison pill to some extent. If the acquiror were to go on to acquire the target company at the promised price, the open-market purchases would have been irrelevant. However, by engaging in open-market purchases, the acquiror would create an opportunity, after the poison pill were triggered, for a third party to start a bidding war with an advantage. This opportunity is best explained by an example.[213] Assume that the third party and the acquiror were to value the target company equally: $2,500 in the aggregate. Because the third party would not spend any money on costly open-market purchases, it would be able to offer the promised price discussed originally: *i.e.*, $27.78 per share[214] if the exchange option were exercised and $19.73 per share[215] if the Rights were exercised. This would defeat the acquiror's offers of $26.11[216] and

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+ 6 newly-issued shares). In the second tender offer, she would receive $26.11 for each of her shares, *see supra* note 202, including the share tendered in the initial offer. The aggregate amount of $339.43 ($26.11 per share x 13 shares) is equal to $48.49 for each of her original 7 shares ($339.43 ÷ 7 shares). $52.22 - 48.49 = $3.73.

209 A shareholder with 7 shares who were not to tender in the initial offer would retain 7 shares and 7 valid Rights. After the initial tender offer, she would have to pay $840 (7 Rights x $120 per Right) in order to receive 56 newly-issued shares (7 Rights x 8 shares per Right). She would have a total of 63 shares (7 original shares + 56 newly-issued shares). In the second tender offer, she would receive $19.32 for each of her shares. *See supra* note 203. After subtracting the amount paid to exercise the Rights, she would receive a net aggregate amount of $377.16 ($19.32 per share x 63 shares - $840 exercise price). This amount is equal to $53.88 for each of her original 7 shares ($377.16 ÷ 7 shares).

On the other hand, such a shareholder who were to tender in the initial offer would transfer 1 share and retain 6 shares and 6 valid Rights. She would have to pay $720 (6 Rights x $120 per Right) in order to receive 48 newly-issued shares (6 Rights x 8 shares per Right). She would have a total of 54 shares (6 remaining shares + 48 newly-issued shares). In the second tender offer, she would receive $19.32 for each of her shares, *see supra* note 203, including the share tendered in the initial offer. After subtracting the amount paid to exercise the Rights, she would receive a net aggregate amount of $342.60 ($19.32 per share x 55 shares - $720 exercise price). This amount is equal to $48.94 for each of her original 7 shares ($342.60 ÷ 7 shares). $53.88 - $48.94 = $4.94.

210 $55.56 (*see supra* note 140) - $48.62 (*see supra* note 154) = $6.94.

211 $57.57 (*see supra* note 145) - $48.11 (*see supra* note 159) = $9.46.

212 *See supra* note 147 and accompanying text.

213 The assumptions are the same as those underlying the previous example, *supra* notes 198-211 and accompanying text, except as specified in the text.

214 *See supra* note 109.

215 *See supra* note 114.

216 *See supra* note 202.

$19.32,[217] respectively. In fact, the third party could offer less and still prevail, as long as its offer were to exceed the acquiror's offer. Thus, the third party could acquire the target company at a lower price than could the acquiror.[218]

In addition, the acquiror would risk a loss if it were not successful in consummating a second tender offer. If a third party were to prevail, the acquiror would be able to sell its shares only at the fully diluted tender offer price. This might be as little as $19.33 per share,[219] which is significantly less than the $30 paid on the open market.[220] If no second tender offer were consummated by anyone, the losses would be even greater. The acquiror would be able to sell its shares only at the fully diluted market price of $16.67[221] or $17.03,[222] depending on whether the exchange option were exercised. These amounts represent a loss of approximately $13 per share[223] on 10 shares. In addition, the acquiror would lose an additional—albeit significantly smaller—amount on the shares acquired in the initial tender offer. Assuming a make-whole amount of $20.19,[224] the loss would be over $3 per share[225] on 10 shares. This is essentially the effect that the poison pill was intended to have, albeit to a reduced degree.

Perhaps most significant is the possibility that the target company could drain all, or at least a substantial portion, of its value by means of an exchange

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217 *See supra* note 203.

218 If the third party were to offer only 1¢ more per share than the acquiror, theoretically it could prevail in the takeover. If so, it would have paid significantly less than the acquiror's $2,500. Assuming that the exchange option were exercised, the third party would offer $26.12 for each of the 90 shares, *see supra* note 202, or $2,350.80 in the aggregate ($26.12 per share x 90 shares). Assuming, on the other hand, that the Rights were exercised, the third party would offer $19.33 for each of the 370 shares, *see supra* note 203, or $2,352.10 in the aggregate, after subtracting the aggregate exercise price of the Rights ($19.33 per share x 370 shares - $4,800 exercise price).

219 If the exchange option were not exercised, the acquiror would be willing to offer $19.32. *See supra* note 203. The third party would have to top that offer by at least 1¢ per share.

220 The third party could be forced to offer significantly more if a bidding war were to ensue. However, the acquiror would have to risk prevailing at a price that is higher than it originally had been willing to pay for the company. Nevertheless, because some loss would have become inevitable, it might be worthwhile for the acquiror to drive up the price somewhat.

221 *See supra* note 89.

222 *See supra* note 77.

223 Assuming an exchange: $30 original market value - $16.67 fully diluted market value = $13.33. Assuming exercise of the Rights: $30 original market value - $17.03 fully diluted market value = $12.97.

224 *See supra* note 186 and accompanying text.

225 Assuming an exchange: $20.19 compensation - $16.67 fully diluted value = $3.52. Assuming exercise of the Rights: $20.19 compensation - $17.03 fully diluted value = $3.16.

for cash.[226] Shares purchased by the acquiror on the open market theoretically could become worthless, or nearly so, and this loss could not be avoided by the antidote strategy.[227] This is reason enough not to employ open-market purchases in most cases.

Fortunately, open-market purchases are merely an option available to alleviate the hold-out risk. Such purchases are not at all necessary to the antidote strategy. In fact, the recommended course of action would not include them. The high minimum tender requirement should be sufficient to overcome the hold-out problem without incurring the risk inherent in making open-market purchases prior to employing the antidote strategy. In some cases, however, an acquiror may consider the additional risk it would face due to open-market purchases to be worthwhile in light of the reduction in risk to shareholders.

III. STRENGTHS AND WEAKNESSES

The antidote strategy described above can be a strong offensive weapon in the takeover wars. However, it is not a perfect strategy; it has its strengths and its weaknesses. This Part will consider each in turn. It will begin with an assessment of the weaknesses inherent in the antidote strategy. There are a number of legal and strategic issues that the acquiror must confront, but they are not insurmountable. Perhaps the greatest weakness is the unorthodox nature of the antidote strategy, which may make persuading shareholders to tender a difficult matter. This Part will then turn to the strengths of the antidote strategy, all of which are strategic advantages in a hostile takeover. Chief among them is the low risk nature of the endeavor, both for shareholders and for would-be acquirors. It is the minimal exposure to risk, more than any other feature, that should make the antidote strategy an attractive option.

A. Weaknesses

An acquiror who wishes to employ the antidote strategy will have to confront both legal and strategic issues. The legal issues arise under both federal law and state law; the strategic issues are inherent to the antidote

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[226] *See supra* notes 120-21 and accompanying text. *But see supra* notes 62-67 and accompanying text (discussing legal issues confronting back-end pills that may be applicable to exchanges for cash).

[227] The antidote strategy would permit the acquiror to pay as little as nothing for shares acquired in the initial tender offer. *See supra* note 226 and accompanying text. Open-market purchases, however, would be sunk costs.

strategy. These issues are weaknesses of the antidote strategy, but they are not insurmountable and need not prevent the acquiror from succeeding in its goal of a hostile takeover.

1. Legal Issues

Federal law issues arise under both the securities laws and the tax laws. The antidote strategy should not be problematic under the Williams Act,[228] which regulates tender offers. Neither the Williams Act nor Securities and Exchange Commission regulations prohibit successive tender offers. Rather, the law is likely simply to integrate the two tender offers into one.[229] Thus, for example, Rule 14d-10 would require that the best price paid to any shareholder in either offer would have to be the price paid to every shareholder in each offer.[230] This is not a problem, however, because it is the intent of the acquiror pursuing the antidote strategy to do exactly that.[231] The fact that equal payment is actually required by law should only serve to enhance the acquiror's credibility.

However, issues do arise under the Securities Act of 1933.[232] At the most basic level, the antidote strategy might qualify as a security that would have to be registered with the Securities and Exchange Commission. It may not appear

[228] 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (2000).

[229] At least one court has adopted the following criteria to determine whether technically separate transactions would be considered one integrated tender offer:

> (1) are the offers part of a single plan of acquisition; (2) do the offers involve the purchase of the same class of security; and (3) are the offers made at or about the same time? These factors are useful in determining the ultimate fact of whether an offeror has abandoned the goal of an initial tender offer . . . .

Field v. Trump, 850 F.2d 938, 945 (2d Cir. 1988). A continuing attempt to acquire control of the target company would satisfy each of these criteria, as well as the "ultimate fact."

[230] 17 C.F.R. § 240.14d-10 (2002). It could be argued that the integration principal should also apply to withdrawal rights. *See* 17 C.F.R. § 240.14d-7. Thus, shareholders who were to tender in the initial offer might have the right to withdraw such shares during the subsequent offer. It is not clear that the Securities and Exchange Commission is as concerned with withdrawal rights as it is with the best price rule. However, this would not present a serious problem in any event. Once the initial tender offer were to cause a triggering event, it could not be undone by a subsequent reduction in the acquiror's ownership level. There would be little reason for shareholders to withdraw because either way they would get the same amount for the shares as a result of the second tender offer. Moreover, withdrawal of the shares would not result in a return of the Rights, which are then void and non-transferable. At most, such a withdrawal would permit shareholders who tender in the initial offer to capitalize on a successful bid by a third party, thereby reducing the acquiror's profit from such a bid. *See supra* note 195 and accompanying text.

[231] *See supra* note 118 and accompanying text.

[232] 15 U.S.C. § 77a to 77z-3 (2002).

to involve a security, at least not in the standard sense of a stock, a bond, or even an investment contract. However, an argument can be made that the antidote strategy is essentially a "note" or an "evidence of indebtedness," because the acquiror is obligated to make a future payment to the tendering shareholders.[233] Strong arguments could be made that the antidote does not involve the issuance of a security as well, if only because "the context otherwise requires."[234] However, without an indication to the contrary from the Securities and Exchange Commission, it would be prudent to assume that the antidote strategy would involve the issuance of a security.

If the antidote strategy were deemed to involve a security, then it would be necessary to file a registration statement and to distribute the prospectus to shareholders.[235] This would increase the cost of the acquisition. However, the

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[233] The antidote strategy likely would involve a promissory note, or at least be deemed to involve one, and thus would be presumed to involve a security. *See* Reves v. Ernst & Young, 494 U.S. 56, 67 (1990). Although the term "any note" cannot be taken literally, *see id.* at 63, the instrument employed in the antidote strategy does not bear a "strong family resemblance" to any of the instruments on the list of instruments that are not deemed securities, *see id.* at 65. While this is not determinative, *see infra* note 234, it does create a real possibility that the antidote strategy would be deemed to involve a security. It could also be characterized as an "evidence of indebtedness," because it "on [its] face establish[es] a primary obligation to pay the holders thereof a sum of money." United States v. Jones, 450 F.2d 523, 525 (5th Cir. 1971).

[234] One must look to the economic reality to determine whether an instrument is a security. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). The fact that any instrument involved in the antidote strategy is simply a payment mechanism and not an investment vehicle strongly suggests that it should not be deemed a security.

In determining whether an instrument is a security, courts look to four factors:

> First, . . . the motivations that would prompt a reasonable seller and buyer to enter into [the transaction]. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security." If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a 'security.'"

Reves, 494 U.S. at 66. With the antidote strategy, the "note" is not about investment at all. The seller's purpose would not be to raise money and the buyer would not be interested primarily in the profit the note is expected to generate—if there were any. "Second, . . . the 'plan of distribution' of the instrument . . . [and] whether it is an instrument in which there is 'common trading for speculation and investment.'" *Id.* The distribution surely would be broad enough to be considered public. However, even if subsequent trading were allowed, it is unlikely that there would be "common trading for speculation and investment." Certainly that would not be the intent of the acquiror. "Third, . . . the reasonable expectations of the investing public." *Id.* It is unlikely that the public would consider this an investment requiring the protections of the Securities Act of 1933. "Finally, . . . whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Act unnecessary." *Id.* at 67. The existence of a trust would certainly count as such a factor: there would be little to no risk because the obligation would be fully funded and beyond the control of the acquiror. Thus, the antidote strategy should not be deemed to involve a security.

[235] 15 U.S.C. § 77e (2000).

cost of a registered offering is not likely to be prohibitive in a hostile takeover setting. More importantly, it should not delay the tender offer very much. The Securities and Exchange Commission has recently promulgated regulations intended to make exchange offers competitive with cash tender offers.[236] The offer could begin with the filing of the registration statement,[237] and the registration statement would receive expedited review from the staff.[238] It should be declared effective by the time an exchange offer would lapse.[239]

The Internal Revenue Code[240] is another source of difficulty for the antidote strategy. The poison pill is designed so as to have no tax consequences.[241] However, that assumes that the poison pill would never be triggered and the Rights would never become exercisable. What would happen if the antidote strategy were attempted? Fortunately, the mere triggering of the poison pill should not be considered a taxable event.[242] However, the sale of the shares in the initial tender offer would be a taxable event to the selling shareholders. This becomes a concern when one remembers that shareholders might not be receiving any consideration with which to pay their tax liabilities.[243] It becomes a problem when one realizes that the target company might be able to delay the consummation of the antidote strategy beyond the end of the tax year.[244] Shareholders might be required, for tax purposes, to recognize a sale of their shares at fair market value—even though they receive no cash immediately and ultimately would receive significantly less than the fair market value of such shares.[245] This unfunded tax liability could dissuade many shareholders from tendering in the initial offer.

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236 *See* Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 7760, Exchange Act Release No. 42055 [1999-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,215, at 82,593-95 (Oct. 22, 1999) [hereinafter Regulation of Takeovers].

237 *See* 17 C.F.R. § 240.14d-4(b) (2002); *id.* § 230.162.

238 *See* Regulation of Takeovers, *supra* note 236, at 82,594 ("We are . . . committed to expediting staff review of exchange offers so that they may compete more effectively with cash tender offers.").

239 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 1.04[A][1], at 1-21.

240 26 U.S.C. §§ 1-9833 (2000).

241 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.01[C][1], at 5-12 ("Adoption of a poison pill rights plan involves . . . no adverse tax consequences to the company or its stockholders."); 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][b][i], at 6-64 ("[T]he adoption of a rights plan is not a taxable event for the company or its shareholders under the federal income tax laws.").

242 *See* 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][b][i], at 6-64 ("The physical distribution of rights certificates upon the rights becoming exercisable should not result in any tax. . . . Upon the rights becoming rights to purchase additional common stock of the company, holders of rights probably would not have a taxable event.").

243 *See supra* note 121 and accompanying text.

244 *See infra* notes 261-89 and accompanying text.

245 *See* 26 U.S.C. § 453(k) (2000); 26 C.F.R. § 15a.453-1(d)(2)(iii) (2002).

Fortunately, the impact is not as serious as it first may appear. In the first place, the shareholders ultimately would not be worse off for the antidote strategy. They merely would face a timing issue with respect to taxes.[246] In addition, many shareholders who would tender in the initial offer presumably would be institutional investors or arbitrageurs who would be able to bear the timing burden without too much difficulty. Many shareholders would not be subject to tax on the transaction at all.[247] Even individual shareholders, who would be hit hardest, would only have to pay tax on capital appreciation, and likely at the lower capital gains tax rate. For example,[248] an individual shareholder who bought the shares of the target company at $15 might be deemed to have sold the shares for their fair market value of $30 in the initial tender offer, even though she received no consideration.[249] The capital gain of $15, when taxed at the 15% rate,[250] would yield a tax of $2.25 per share.

The probable tax burden on shareholders should not be prohibitive. Even if individual shareholders could not afford to tender their shares, they could easily sell their shares to others, such as arbitrageurs, who could. Nevertheless, if an acquiror were to feel that the tax issue would be too great a problem, it might be able to improve the situation by paying minimal consideration, rather than nominal or no consideration, in the initial tender offer. For example, the acquiror could pay the $2.25 expected tax burden of a typical individual shareholder. For an acquiror to avoid risk entirely, its best strategy would be to pay nothing in the initial tender offer.[251] However, if this would not work for any reason, the next best strategy might be to pay the lowest amount of consideration that would be expected to result in success. By paying some consideration, the acquiror could ensure that shareholders would have the cash necessary to pay all or most of their tax burden. To be sure, paying any such amount would expose the acquiror to some risk. The target

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246 Clearly timing is an important issue with respect to taxes. However, the antidote strategy would not create any additional tax obligation. If the shareholders were to tender all of their shares and receive cash in exchange, they would be required to pay the full tax burden; at the end of the day, they will be required to pay the same amount under the antidote strategy. The antidote strategy merely exposes them to a portion of that liability before they receive any cash from the acquiror.

247 For example, many types of retirement accounts and pension plans enjoy deferred taxation; accordingly, securities held in such accounts would not be subject to immediate taxation. *See* 26 U.S.C. § 501(a). Similarly, securities held by tax-exempt organizations would not be subject to taxation. *See id.*

248 For the assumptions underlying the example, *see supra* notes 30-33 and accompanying text.

249 *See supra* note 245.

250 *See* 26 U.S.C. § 1(h)(1)(C).

251 *See supra* Part II.A; *see also supra* notes 226-27.

company might be able to drain its assets entirely,[252] leaving the acquiror with worthless shares. However, it is unlikely that the management would be able to drain all value from the target company.[253] Thus, the risk assumed by the acquiror in paying minimal consideration would be only moderate.

The antidote strategy also has some state law vulnerabilities. It is only designed to counter the poison pill, and not other possible takeover defenses. Other defensive measures might be able to hamper, perhaps even cripple, the antidote strategy's ability to result in a hostile takeover under certain circumstances. In particular, state antitakeover laws could be very problematic. States can always pass laws that make any action more difficult, possibly even impossible, and the antidote strategy is not necessarily immune. Fortunately, however, the most common species of antitakeover laws—business combination statutes and control share acquisition statutes—are manageable.

Business combination statutes, such as the one in effect in Delaware, limit an acquiror's ability to effect a squeeze-out merger after acquiring a significant interest in a target company.[254] Thus, any transaction that requires a merger rather than a subsidiary structure might be impossible, even with the antidote strategy. However, a squeeze-out merger is not always essential to a hostile takeover. This was a lesson learned early in the development of the poison pill.[255] In addition, the minimum tender requirement might, in some cases, satisfy an exception to the applicability of such provisions, at least under Delaware law.[256] Thus, business combination statutes are not barriers to many transactions.[257]

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252 *See supra* notes 98-100 and accompanying text.

253 *See supra* notes 65-67 and accompanying text.

254 *See, e.g.*, DEL. CODE ANN. tit. 8, § 203 (2001); *see generally* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 4.05, at 4-24 to -37; 1 LIPTON & STEINBERGER, *supra* note 1, § 5.03[1][a], at 5-25 to -28.

255 *See supra* notes 53-54 and accompanying text.

256 *See* DEL. CODE ANN. tit. 8, § 203(a)(2). The shares acquired in the initial tender offer very well might exceed 85% of the non-management shares. However, this exception would be available only if the triggering event threshold were less than 15%. *Id.*

257 Many business combination statutes include exceptions that could benefit the antidote strategy. For example, Delaware law provides that a shareholder who were to acquire a 15% position thereafter would be barred from engaging in interested transactions with the company for three years; however, a shareholder would not be subject to the moratorium if it were to acquire an 85% interest in the transaction in which it exceeds 15%. *See* DEL. CODE ANN. tit. 8, § 203. If a triggering event threshold were less than 15%, it would be possible for the acquiror to avoid the moratorium by triggering the poison pill and obtaining at least 85% ownership in the second tender offer.

Another significant type of antitakeover law is the control share acquisition statute. Such laws generally provide that, whenever a shareholder crosses certain specified ownership thresholds (often set at 20%, 33%, and 50%), the shareholder loses the voting rights associated with such shares unless the non-interested shareholders vote otherwise.[258] This could prevent the acquiror from gaining voting control of the corporation after a successful takeover. The prospect of being a majority shareholder without any voting control likely would be considered unacceptable to most would-be acquirors. However, such statutes allow for shareholder approval prior to the acquisition.[259] Thus, the matter could be submitted to shareholders at the time of the initial tender offer.

There can be no doubt that antitakeover laws could pose a serious problem to the antidote strategy. Fortunately, the most common laws are manageable. However, other laws that would be more problematic for an antidote strategy could be imagined.

2. *Strategic Issues*

Another set of shortcomings of the antidote strategy can be described as strategic issues. One such issue already has been mentioned: Although the antidote strategy could work regardless of whether the company were to exercise its exchange option, it could not be consummated with safety until the decision were made and the Rights were converted into shares. This is true because the price to be paid under the antidote strategy would depend upon the fully diluted value of the shares, making the amount of dilution a necessary given.[260]

Under normal circumstances, one could be confident that the target company would, in fact, exercise its exchange option.[261] It would be in the interests of both the shareholders and management to do so. However, if a hostile bidder were employing an antidote strategy, refusal to exercise the exchange option could have strategic value as a delaying mechanism.[262] One

258 *See, e.g.*, IND. CODE ANN. § 23-1-42-1 to -11 (Michie 1999); *see generally* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 4.06[A], at 4-37 to -43; 1 LIPTON & STEINBERGER, *supra* note 1, § 5.03[1][b], at 5-28 to -31.

259 *See, e.g.*, IND. CODE ANN. § 23-1-42-7 (discussing a special meeting of shareholders "for the purpose of considering the voting rights to be accorded the shares acquired or to be acquired.").

260 Moreover, any Rights would become void in the hands of the acquiror, preventing the acquiror itself from acquiring the Rights and exercising them.

261 *See supra* note 102 and accompanying text.

262 *See supra* notes 115-16 and accompanying text.

could hardly expect the target company's directors to go ahead with the exchange option under those circumstances.

Of course, the Rights themselves would remain exercisable. Thus, it would be possible for shareholders to forego the possibility of the exchange option and exercise the Rights themselves. However, shareholders might not be willing to do so. In the first place, it would require a huge cash outlay relative to the value of the investment because the exercise price per Right is usually a number of times greater than the market value of the corresponding shares.[263] Shareholders might be unwilling or even unable to make that kind of commitment.[264]

In addition, exercise of the Rights would be financially imprudent under some circumstances. Under a standard Shareholder Rights Plan, in which the exchange option allows the target company to exchange each Right for one share of common stock, it generally would be in the shareholders' interests to exercise their Rights rather than to wait for an exchange. For example,[265] assume that half of all shareholders, including half of all non-tendering shareholders, were to exercise their Rights before the target company could exercise the exchange option. Of the 40 valid Rights, 20 would be exchanged for 20 newly-issued shares, and 20 would have been exercised for 160 newly-issued shares at an aggregate price of $2,400.[266] Thus, the target company would be worth $3,900.[267] There would be a total of 230 outstanding shares,[268] each worth $16.96,[269] and the acquiror would be willing to pay $21.30 per share.[270] Shareholders who were to tender in the initial offer and then exercise their Rights would receive the equivalent of $59.10 per original share,[271] while

263 *See supra* note 82 and accompanying text.

264 However, it is likely that arbitrageurs would step in and solve the problem. *See supra* note 84.

265 For the assumptions underlying the example, see *supra* notes 30-33 and accompanying text.

266 20 Rights x 8 shares per Right = 160 newly-issued shares. 20 Rights x $120 per Right = $2,400.

267 $1,500 + $2,400 exercise price = $3,900.

268 50 original shares + 160 newly-issued shares upon exercise + 20 newly-issued shares upon exchange = 230 shares.

269 $3,900 ÷ 230 outstanding shares = $16.96 per share.

270 The acquiror is willing to pay a $1,000 premium, or $4,900 in the aggregate. $4,900 ÷ 230 shares = $21.30 per share.

271 A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. She would have to pay $360 in order to receive 24 newly-issued shares. *See supra* note 155. She would have a total of 27 shares. *See supra* note 156. In the second tender offer, she would receive $21.30 for each of her shares, *see supra* note 270, including the share tendered in the initial offer. After subtracting the amount paid to exercise the Rights, she would receive a net aggregate amount of $236.40 ($21.30 per share x 28 shares - $360 exercise price). This amount is equal to $59.10 for each of her original 4 shares ($236.40 ÷ 4 shares).

those whose Rights were exchanged would receive the equivalent of $37.28 per original share.[272] Shareholders who were not to tender in the initial offer and were to exercise their Rights would receive the equivalent of $71.70 per original share,[273] while those whose Rights were exchanged would receive the equivalent of $42.60 per original share.[274] The shareholders who were to exercise their Rights, whether tendering in the initial offer or not, would receive significantly more than those whose Rights were exchanged for shares. This would make the exercise of the Rights extremely likely.[275]

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272 A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. After the exchange offer, she would have a total of 6 shares. *See supra* note 151. In the second tender offer, she would receive $21.30 for each of her shares, *see supra* note 270, including the share tendered in the initial offer. The aggregate amount of $149.10 ($21.30 per share x 7 shares) is equal to $37.28 for each of her original 4 shares ($149.10 ÷ 4 shares).

273 A shareholder with 4 shares who were not to tender in the initial offer would retain 4 shares and 4 valid Rights. She would have to pay $480 in order to receive 32 newly-issued shares. *See supra* note 133. She would have a total of 36 shares. *See supra* note 134. In the second tender offer, she would receive $21.30 for each of her shares. *See supra* note 270. After subtracting the amount paid to exercise the Rights, she would receive a net aggregate amount of $286.80 ($21.30 per share x 36 shares - $480 exercise price). This amount is equal to $71.70 for each of her original 4 shares ($286.80 ÷ 4 shares).

274 A shareholder with 4 shares who were not to tender in the initial offer would retain 4 shares and 4 valid Rights. After the exchange offer, she would have a total of 8 shares. *See supra* note 130. In the second tender offer, she would receive $21.30 for each of her shares. *See supra* note 270. The aggregate amount of $170.40 ($21.30 per share x 8 shares) is equal to $42.60 for each of her original 4 shares ($170.40 ÷ 4 shares).

275 Assuming there were no second tender offer, the situation would be reversed: shareholders whose Rights were exchanged would receive slightly more than those who exercised their Rights. For example, shareholders who were to tender in the initial offer and then exercise their Rights would receive the equivalent of $29.53 per original share (*Example A*, below), while those whose Rights were exchanged would receive the equivalent of $30.44 per original share (*Example B*, below); shareholders who were not to tender in the initial offer and were to exercise their Rights would receive the equivalent of $32.64 per original share (*Example C*, below), while those whose Rights were exchanged would receive the equivalent of $33.92 per original share (*Example D*, below). Thus, the exercise of Rights would involve some risk for shareholders. However, the upside potential would be significantly greater than the downside potential and would be significantly more likely to result, as well.

Example A. A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. She would have to pay $360 in order to receive 24 newly-issued shares. *See supra* note 155. She would have a total of 27 shares, *see supra* note 156, worth $16.96 each, *see supra* note 269. She would also receive $20.19 in compensation from the initial tender offer. *See supra* note 186. After subtracting the amount paid to exercise the Rights, she would have a net aggregate value of $118.11 ($16.96 per share x 27 shares + $20.19 compensation - $360 exercise price). This amount is equal to $29.53 for each of her original 4 shares ($118.11 ÷ 4 shares). (It might be deemed necessary to provide for an increase in compensation to tendering shareholders under circumstances such as these, so that they truly are made whole. *See supra* note 187.)

Example B. A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. After the exchange offer, she would have a total of 6 shares, *see supra* note 151, worth $16.96 each, *see supra* note 269. She would also receive $19.98 in compensation from the initial tender offer. *See supra* note 181. The aggregate value of $121.74 ($16.96 per share x 6 shares + $19.98 compensation) is equal to $30.44 for each of her original 4 shares ($121.74 ÷ 4 shares).

Example C. A shareholder with 4 shares who were not to tender in the initial offer would retain 4 shares

Under these circumstances, however, it is likely that the target company's management would exercise the exchange option immediately. Each exercise of Rights decreases the share of the takeover premium that otherwise would go to the exchange participants. If management were to exercise its own Rights and subsequently exercise the exchange option for others, it would be allocating a greater portion of the takeover premium to itself. Such a course of action would be difficult for management to defend.[276] Thus, management would be required, as a practical matter, to participate in any exchange option. Any hesitation to exercise the exchange option, however, would result in a greater portion of the takeover premium being allocated to shareholders who were to exercise their Rights—an outcome presumably unacceptable to management. Thus, management would be left with no alternative but to exercise the exchange option immediately. This would facilitate the consummation of the antidote strategy.

On the other hand, if the exchange option were to enable the target company to exchange each Right for multiple shares of stock,[277] it very well might be foolish for shareholders to exercise their Rights unilaterally, at least until they are certain that the target company would not exercise its exchange option. For example, assume again that half of all shareholders, including half of all non-tendering shareholders, were to exercise their Rights before the target company could exercise the exchange option. Of the 40 valid Rights, 20 would be exchanged for 40 newly-issued shares, and 20 would have been exercised for 160 newly-issued shares at an aggregate price of $2,400.[278] Thus, the target company would be worth $3,900.[279] There would be a total of 250 outstanding shares,[280] each worth $15.60,[281] and the acquiror would be willing

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and 4 valid Rights. She would have to pay $480 in order to receive 32 newly-issued shares. *See supra* note 133. She would have a total of 36 shares, *see supra* note 134, worth $16.96 each, *see supra* note 269. After subtracting the amount paid to exercise the Rights, she would have a net aggregate value of $130.56 ($16.96 per share x 36 shares - $480 exercise price). This amount is equal to $32.64 for each of her original 4 shares ($130.56 ÷ 4 shares).

Example D. A shareholder with 4 shares who were not to tender in the initial offer would retain 4 shares and 4 valid Rights. After the exchange offer, she would have a total of 8 shares, *see supra* note 130, worth $16.96 each, *see supra* note 269. The aggregate value of $135.68 ($16.96 per share x 8 shares) is equal to $33.92 for each of her original 4 shares ($135.68 ÷ 4 shares).

276 *See infra* notes 321-24 and accompanying text.

277 *See supra* note 92 and accompanying text.

278 *See supra* note 266.

279 *See supra* note 267.

280 50 original shares + 160 newly-issued shares upon exercise + 40 newly-issued shares upon exchange = 250 shares outstanding.

281 $3,900 ÷ 250 outstanding shares = $15.60 per share.

to pay \$19.60 per share.[282] Shareholders who were to tender in the initial offer and then exercise their Rights would receive the equivalent of \$47.20 per original share,[283] while those whose Rights were exchanged would receive the equivalent of \$49 per original share.[284] Shareholders who were not to tender in the initial offer and were to exercise their Rights would receive the equivalent of \$56.40 per original share,[285] while those whose Rights were exchanged would receive the equivalent of \$58.80 per original share.[286] The shareholders who were to exercise their Rights, whether tendering in the initial offer or not, would receive less than those whose Rights were exchanged for shares. This would make the exercise of the Rights extremely unlikely.[287]

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282 The acquiror should be willing to pay \$4,900 (\$2,500 initial offering price + \$2,400 exercise price). \$4,900 ÷ 250 outstanding shares = \$19.60.

283 A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. She would have to pay \$360 in order to receive 24 newly-issued shares. *See supra* note 155. She would have a total of 27 shares. *See supra* note 156. In the second tender offer, she would receive \$19.60 for each of her shares, *see supra* note 282, including the share tendered in the initial offer. After subtracting the amount paid to exercise the Rights, she would receive a net aggregate amount of \$188.80 (\$19.60 per share x 28 shares - \$360 exercise price). This amount is equal to \$47.20 for each of her original 4 shares (\$188.80 ÷ 4 shares).

284 A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. After the exchange offer, she would have a total of 9 shares (3 remaining shares + 6 newly-issued shares). In the second tender offer, she would receive \$19.60 for each of her shares, *see supra* note 282, including the share tendered in the initial offer. The aggregate amount of \$196 (\$19.60 per share x 10 shares) is equal to \$49 for each of her original 4 shares (\$196 ÷ 4 shares).

285 A shareholder with 4 shares who were not to tender in the initial offer would retain 4 shares and 4 valid Rights. She would have to pay \$480 in order to receive 32 newly-issued shares. *See supra* note 133. She would have a total of 36 shares. *See supra* note 134. In the second tender offer, she would receive \$19.60 for each of her shares. *See supra* note 282. After subtracting the amount paid to exercise the Rights, she would receive a net aggregate amount of \$225.60 (\$19.60 per share x 36 shares - \$480 exercise price). This amount is equal to \$56.40 for each of her original 4 shares (\$225.60 ÷ 4 shares).

286 A shareholder with 4 shares who were not to tender in the initial offer would retain 4 shares and 4 valid Rights. After the exchange offer, she would have a total of 12 shares (4 original shares + 8 newly-issued shares). In the second tender offer, she would receive \$19.60 for each of her shares. *See supra* note 282. The aggregate amount of \$235.20 (\$19.60 per share x 12 shares) is equal to \$58.80 for each of her original 4 shares (\$235.20 ÷ 4 shares).

287 Assuming there were no second tender offer, the situation would be exacerbated. For example, shareholders who were to tender in the initial offer and then exercise their Rights would receive the equivalent of \$20.35 per original share (*Example A*, below), while those whose Rights were exchanged would receive the equivalent of \$40.10 per original share (*Example B*, below); shareholders who were not to tender in the initial offer and were to exercise their Rights would receive the equivalent of \$24.40 per original share (*Example C*, below), while those whose Rights were exchanged would receive the equivalent of \$46.80 per original share (*Example D*, below).

Example A. A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. She would have to pay \$360 in order to receive 24 newly-issued shares. *See supra* note 155. She would have a total of 27 shares, *see supra* note 156, worth \$15.60 each, *see supra* note 281. She would also receive \$20.19 in compensation from the initial tender offer. *See supra* note 186. After subtracting the amount paid to exercise the Rights, she would have a net aggregate value of \$81.39

In cases where an exchange would be a better option than the exercise of the Rights, the target company would have the ability to delay the takeover by refusing to make any decision with respect to an exchange. This is because shareholders would be unwilling to exercise their Rights for as long as an exchange option were to exist. Without a resolution on the ultimate dilution, it would be impossible for the acquiror to set the price for the second tender offer. In other words, the target company could hold off the acquiror indefinitely.

Actually, there is a maximum amount of time that the acquiror could have to wait: until the next annual meeting of shareholders.[288] If, by that time, the target company were not to exercise the exchange option, the acquiror could mount a proxy contest to remove the directors and elect a new board that would exercise the exchange option and allow the acquisition to proceed.[289] Given that a super-majority tender would have been required in the first tender offer, shareholders should favor the acquiror in a proxy contest. Thus, obtaining the requisite proxies should not be very difficult, especially because the acquiror itself already would have a significant voting position from the initial tender offer.

At this point, one may question the advantages of the antidote strategy given that, even without it, an acquiror could always have the poison pill pulled through a proxy solicitation. Nevertheless, there is a significant advantage to the antidote strategy in forcing the target company into a sale.

($15.60 per share x 27 shares + $20.19 compensation - $360 exercise price). This amount is equal to $20.35 for each of her original 4 shares ($81.39 ÷ 4 shares).

Example B. A shareholder who were to tender 4 shares in the initial offer would transfer 1 share and retain 3 shares and 3 valid Rights. After the exchange offer, she would have a total of 9 shares (3 remaining shares + 6 newly-issued shares), worth $15.60 each, *see supra* note 281. She would also receive $19.98 in compensation from the initial tender offer. *See supra* note 181. The aggregate value of $160.38 ($15.60 per share x 9 shares + $19.98 compensation) is equal to $40.10 for each of her original 4 shares ($160.38 ÷ 4 shares).

Example C. A shareholder with 4 shares who were not to tender in the initial offer would retain 4 shares and 4 valid Rights. She would have to pay $480 in order to receive 32 newly-issued shares. *See supra* note 133. She would have a total of 36 shares, *see supra* note 134, worth $15.60 each, *see supra* note 281. After subtracting the amount paid to exercise the Rights, she would have a net aggregate value of $81.60 ($15.60 per share x 36 shares - $480 exercise price). This amount is equal to $20.40 for each of her original 4 shares ($81.60 ÷ 4 shares).

Example D. A shareholder with 4 shares who were not to tender in the initial offer would retain 4 shares and 4 valid Rights. After the exchange offer, she would have a total of 12 shares (4 original shares + 8 newly-issued shares), worth $15.60 each, *see supra* note 281. The aggregate value of $187.20 ($15.60 per share x 12 shares) is equal to $46.80 for each of her original 4 shares ($187.20 ÷ 4 shares).

288 *But see infra* notes 292-94 and accompanying text.

289 Moran v. Household Int'l, Inc., 500 A.2d 1346, 1354 (Del. 1985).

Once the poison pill were triggered, the defense tactic would be gone.[290] Even if the acquiror were not to succeed, a change of control would be extremely likely. Management's ability to resist a hostile takeover would be seriously weakened by the antidote strategy.[291]

If the target company were to have a staggered board of directors, this could increase the maximum delay for an additional year, until a second annual meeting of shareholders were to take place and a majority of the board of directors could be replaced. Clearly, this would complicate matters significantly.[292] However, it would not make the takeover impossible for the determined acquiror. In fact, the acquiror employing the antidote strategy would be affected less severely than the typical acquiror because of the inherent flexibility of the antidote strategy[293] and because it puts so few resources at risk.[294]

Another potential problem is the possibility that, after the poison pill were triggered but before the acquiror could obtain control, the target company could simply adopt another poison pill. If so, the target company might be able to block the second tender offer—at least until the new poison pill could be removed by proxy contest. However, even if this were the case, the acquiror would not have suffered the dilutive effects of the poison pill. The acquiror's maximum exposure would be no greater than previously described. Moreover, the dynamics of the takeover battle would have changed dramatically, greatly increasing the likelihood of a change of control of the

290 *But see infra* notes 295-98 and accompanying text.

291 *See infra* notes 311-12 and accompanying text.

292 *See* Bebchuck et al., *supra* note 8, *passim*. The authors of that article argue that "[c]ourts should not allow managers to continue blocking a takeover bid after they lose one election conducted over an acquisition offer." *Id.* at 944. This Author agrees. Thus, the board of directors should not be permitted to cause further delay or otherwise block the takeover after a single proxy contest. Moreover, this Author believes that courts should require the redemption of the poison pill Rights even though Shareholder Rights Plans provide that they would no longer be redeemable. *See supra* note 45. In fact, this Author believes that the antidote strategy itself is superior to any proxy contest and therefore should not be able to be resisted by management. *See infra* notes 325-28. However, it is possible that the courts will not share this view. Therefore, it cannot be denied that staggered boards are likely to present a significant problem.

293 The antidote strategy, for example, provides for an adjustable price for the final tender offer, depending on subsequent events. *See supra* notes 121-27 and accompanying text.

294 A staggered board would mean that the takeover drama could last considerably longer than it would with a normal board of directors. However, the acquiror employing the antidote strategy would stand to lose only the make-whole amount (plus expenses incurred in the takeover attempt), because that is the contractual price of failure. Even so, the acquiror would retain ownership of shares in the target company, which shares might be worth nearly as much as the make-whole amount. *See supra* notes 160-90.

target company.[295] Thus, the possibility of a second poison pill provides little reason to avoid the antidote strategy.

In fact, it seems unlikely that the target company could adopt a second poison pill. Even the most deferential courts would have a difficult time justifying such a move because the antidote strategy would pose no threat to shareholders—and certainly not one that a second poison pill could remedy meaningfully.[296] Moreover, a second poison pill would create an unmanageable capital structure, given the numbers—of shares and dollars—that would be involved.[297] At the simplest level, it seems highly unlikely that the target company would have the authorized blank check preferred stock remaining to support additional Rights.[298] Thus, while the possibility does exist, it seems rather remote.

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295 *See supra* notes 290-91 and accompanying text.

296 Even assuming the threat of "substantive coercion," *see* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1383-84 (Del. 1995), the antidote strategy provides greater protection for shareholders than does a proxy contest, *see infra* notes 325-28 and accompanying text. Courts already allow acquirors to circumvent the poison pill by proxy contest, so there is no reason not to allow them to do so with the antidote strategy.

297 The effect of multiple poison pills would be exponential, particularly if the Rights were given to newly-issued shares.

For example, *see supra* notes 30-33 and accompanying text, assume that the first poison pill Rights were exercised. The target company originally had 50 shares, worth $1,500 in the aggregate. Right holders would have to pay $4,800 in order to receive 320 new shares, and the target company would be transformed into a company with 370 shares, worth $6,300 in the aggregate. *See supra* notes 75-76 and accompanying text. Assume that the target company then were to adopt a second poison pill plan that would treat original and newly-issued shares equally. Assume also a 30% triggering event threshold for the second poison pill plan. (A higher triggering event threshold would be necessary because, if the Rights were not yet exercised, the acquiror would still hold 20%.) Once the second poison pill were triggered, there would be 259 valid Rights (370 outstanding shares - 30% held by the acquiror). Because the fully diluted value per share would be $17.03, *see supra* note 77, each Right would presumably represent the right to buy 8 shares for $68.12 (4 x $17.03). Thus, Right holders as a group would have to pay $17,643.08 ($68.12 per Right x 259 valid Rights) in order to receive 2,072 new shares (8 new shares per Right x 259 valid Rights)! This is a tall order for a company that was originally worth $1,500.

Admittedly, not every possible implementation of a second poison pill would have such a drastic effect on the target company's capital structure. However, additional iterations could easily move beyond the comical into the absurd.

298 The initial poison pill would require a large number of shares of blank check preferred in order to satisfy the Rights. The actual number in the running example would be approximately 6% of the total number of shares of common stock outstanding. This is because each share (other than those held by the acquiror) would have a corresponding Right entitling the holder to buy the equivalent of 8 shares of common stock. This would require a 640% increase in the number of shares of common stock (40 valid Rights x 8 shares per Right = 320 new shares ÷ 50 original shares = 640%). Because generally there would not be a sufficient number of shares of authorized stock to satisfy this requirement, Shareholder Rights Plans use blank check preferred, instead. *See supra* note 68. In fact, they tend to create a class of preferred stock that is the functional equivalent of 100 shares of common stock. *See id.* Thus, the 640% increase can be divided by 100. Even so, this is likely to consume most of the authorized shares of preferred stock for many companies.

But perhaps the greatest weakness of the antidote strategy is its oddness. It may be quite difficult to persuade shareholders to tender their shares to an acquiror paying as little as nothing for those shares. Even though it may be demonstrably in the shareholders' interests to do so, they might be unwilling to tender in the initial offer for many reasons: they might not be willing to trust the acquiror, even with a trustee overseeing their rights; they might not be willing to wait to receive consideration for their shares, especially if they would have a tax burden for doing so; they might be uncomfortable with, or hoping to capitalize on, the hold-out potential. However, this Author believes that, if the antidote strategy were structured properly and described well enough, shareholders could be persuaded.

The first attempt at employing this antidote strategy certainly would be a difficult one. It likely would have the greatest chance of success in the case of a large corporation attempting a takeover of a smaller corporation with relatively few shareholders. This would facilitate communication with shareholders and make their persuasion significantly more achievable. However, one instance of success surely would make the antidote strategy significantly more acceptable to the investing public in subsequent transactions.

3. *A Third Variation*

One additional variation on the antidote strategy is worth addressing at this point because it addresses some of the weaknesses discussed above, although not all. The acquiror might be able to improve the antidote strategy by means

The second poison pill, however, is far worse. *See supra* note 297. After the first poison pill, there might be outstanding shares (including equivalents) equal to 740% of the original number of shares. With the same assumptions as before, *see id.*, 518% (370 total shares - 30% held by the acquiror = 259 shares ÷ 50 original shares = 518%) would have valid Rights representing the right to buy 4,144% new shares (259 valid Rights x 8 shares per Right = 2,072 shares ÷ 50 original shares = 4,144%). Even though each share of preferred stock would be the equivalent of 100 shares of common stock, the target company nevertheless would have to have authorized but unissued blank check preferred equal to approximately 41% of the original number of outstanding shares. Successive poison pills would be exponentially worse.

Of course, the target company could use the blank check preferred to create a new class of preferred stock which would be the functional equivalent of a much higher number of shares of common stock. Thus, if the target company were to make each share of "Series B Poison Pill Preferred" the equivalent of one trillion shares of common stock, then one share of authorized blank check preferred could last for a number of iterations of poison pills. It would be interesting to see whether the courts would allow such abuse. On the one hand, corporate law often does allow companies to issue fractional shares of stock. No court has questioned its use in the poison pill. On the other hand, the potential for unlimited use of fractional shares would render meaningless the charter's provision for a specified number of authorized shares. While there seems to be little reason for the court to permit this type of abuse, it would not be terribly surprising for them to do so. Nevertheless, the viability of the antidote strategy does not hinge upon this issue.

of an additional tender offer. After the initial tender offer and before the exercise or exchange of Rights, the acquiror could seek to purchase a majority of the outstanding shares—without the unattached Rights—by means of such an additional tender offer, again for no consideration. Only after the acquiror had obtained a majority interest would the final tender offer, for any and all shares, take place at the appropriate price.

The additional tender offer would solve a number of problems. First, it would eliminate the target company's ability to delay the transaction with the exchange option.[299] Under certain circumstances discussed above,[300] shareholders would be unwilling to exercise their Rights as long as the possibility of an exchange were to exist; they would not be expected to do so prior to the additional tender offer. However, once the acquiror were to purchase a majority of the outstanding stock, the exchange option would be lost forever.[301] Thus, the target company would have to either exchange before the consummation of the additional tender offer or forego the exchange altogether. Once the deadline for the exchange option were to pass, the acquiror could proceed with a final tender offer for the remaining shares at the appropriate price. With the exchange option out of the way, shareholders could exercise their Rights with confidence that they would not be burned by a subsequent exchange.

An additional tender offer might also resolve the tax issues discussed above.[302] The acquiror could consummate all three tender offers in rapid succession, causing them all to occur within the same tax year for most shareholders. Thus, there would be no timing issues for such shareholders.

An additional tender offer might also help to overcome the problems presented by a staggered board of directors. A staggered board, standing alone, is not a particularly effective takeover defense. This is because it does not block the acquisition of a controlling interest; it merely delays the ability of the acquiror to obtain control of the board of directors. If an acquiror were willing to acquire a controlling interest, the board of directors would be unlikely to resist the inevitable and likely would prefer to cooperate or to

299 *See supra* notes 261-89 and accompanying text.
300 *See supra* notes 263-64, 277-87 and accompanying text.
301 *See supra* text accompanying note 85.
302 *See supra* notes 240-45 and accompanying text.

resign.[303] The poison pill, however, prevents the acquisition of such a controlling interest. Together, the poison pill and a staggered board delay the ability of an acquiror to obtain *either* a controlling interest *or* control, providing a strong antitakeover effect.[304] However, the first tender offer in the antidote strategy could eliminate the poison pill, leaving only a staggered board. The additional tender offer then could transfer a controlling interest to the acquiror. If so, the board of directors likely would not maintain its resistance against the acquiror. Thus, the additional tender offer should be able to overcome the combined effect of a poison pill together with a staggered board.

An additional tender offer might be helpful in combating the adoption of a second poison pill, as well. Because the acquiror would not have paid anything in the initial tender offer, the acquiror and the target company would be returned more-or-less to their original relative positions upon the adoption of the second poison pill. The acquiror could therefore respond with an additional round of antidote tender offers. There would be no additional risk to it in doing so.[305] The most significant effect of the second poison pill on the antidote strategy would be to increase further the benefits of a successful acquisition accruing to non-tendering shareholders at the expense of tendering shareholders.[306] Shareholders who already would have tendered in the initial offer could not share those benefits if the acquiror were to keep the minimum tender requirement at the same level.[307] They might nevertheless be willing to tender in a second tender offer and to accept a smaller premium because a small premium would be better than no premium at all. On the other hand, shareholders who were to resist from the start—including management—

303 *See* ROBERT CHARLES CLARK, CORPORATE LAW 576 (1986); Ronald J. Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775, 780-83, 793-96 (1982). *See also* Bebchuk et al., *supra* note 8, at 903-04, 916 (agreeing with Clark and Gilson).

304 *See* Bebchuk et al., *supra* note 8.

305 In making the additional tender offer, the acquiror would have to decide what to do about the hold-out problem—*i.e.*, how much to increase the make-whole amount. *See supra* Part II.B. Ultimately, this is a risk management issue: adding more to the make-whole amount would increase the likelihood that shareholders would participate in the second offer, but it also would increase the risk to the acquiror.

306 *See supra* Part II.B (discussing hold-out problem).

307 The acquiror would need to maintain the minimum tender requirement at the same level in order to minimize the hold-out problem. Under such circumstances, shareholders who were to tender in the initial offer could not benefit from the second poison pill. They would suffer some additional dilution relative to non-tendering shareholders if they were to tender in the additional tender offer; however, if they were to refuse to tender, they would cause the additional tender offer to fail. It would still be possible for the acquiror ultimately to succeed in its takeover attempt, but an unsuccessful tender offer very well could cause the takeover attempt to fail altogether.

would be rewarded with an increasing share of the takeover consideration. This is sure to be a problem for the courts.[308]

It is not inconceivable that, if a second poison pill were upheld, the target company could respond to the antidote strategy with a third poison pill, and then subsequent poison pills. In each case, the acquiror could attempt another round of antidote tender offers. However, the dance could not continue indefinitely. Even if the courts would not intervene, the numbers quickly would make further iterations impossible for one side or the other. In any event, the acquiror would not need to be timid because the antidote strategy limits its exposure to risk: the target company really would only be harming its own shareholders.[309] Moreover, the takeover could succeed even if the shareholders were to refuse to tender in additional tender offers. Because they already would have tendered in the initial offer, they should be willing to vote in a proxy contest to replace the incumbent management and redeem the additional poison pill Rights. This would allow the final tender offer to proceed.

Finally, the additional tender offer might actually improve the attractiveness of the antidote strategy. It may seem at first that if two tender offers are bad, three only could be worse. However, by reducing the amount of time that would be required to consummate the takeover, the additional tender offer might actually make the antidote strategy significantly more palatable to shareholders. If so, this might be reason enough to pursue the alternative.

B. Strengths

The antidote strategy may suffer from a few shortcomings, but it can be a strong offensive weapon in the takeover wars, capable of disabling the poison pill defense and permitting a hostile takeover to proceed without redemption of the Rights. It offers would-be acquirors many advantages, not least of which is independence: the antidote strategy is a self-help mechanism, and does not rely on legislatures, courts, or even shareholder action prior to the takeover attempt. The acquiror can pursue the antidote strategy unilaterally, with a strong chance of success. It can even be successful in states where dead-hand and no-hand provisions are legal because it does not depend upon any redemption of

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308 *See infra* notes 321-24 and accompanying text.

309 *See supra* note 307 and accompanying text.

Rights.[310] Standing alone, this could be reason enough for many acquirors to pursue the antidote strategy.

Moreover, by disabling the poison pill, the antidote strategy could change the dynamics of the situation. Once the poison pill were disabled, a hostile takeover could proceed. In fact, third parties would be able to make competing bids as well, because their acquisitions would no longer be subject to dilution. While the acquiror might prefer not to have competition, the possibility of a takeover contest would make a change in control all but inevitable. Arbitrageurs would likely step in and acquire significant amounts of the target company's stock, providing a large base of cooperative shareholders.[311] Such momentum could be an important asset in a hostile takeover, and might cause the target company's directors to see the futility of resistance.[312]

The antidote strategy also forces defense-minded directors into a difficult decision with respect to the structuring of the poison pill defense. Originally, the triggering event threshold was set at fairly high levels: 20% and over.[313] However, companies quickly realized that lowering the threshold would provide additional protection: it would prevent an acquiror from obtaining much of a toehold in a hostile takeover attempt and the requisite proxy contest. In fact, there seemed to be no disadvantage to lowering the threshold—other than perhaps the possible disapproval of the courts, which was not terribly likely.[314] It should therefore come as no surprise that companies did, in fact, lower the triggering event threshold to the 15% or even 10% level.[315] However, such a strategy becomes dangerous in the face of the antidote strategy. The lower the triggering event threshold, the smaller the potential hold-out problem for the antidote strategy and the easier it is to remedy.[316]

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310 *See supra* note 8 and accompanying text.

311 *See* 1 LIPTON & STEINBERGER, *supra* note 1, § 1.09[2], at 1-96.

312 *See* 1 *id.* § 1.06[4][a], at 1-40 to -42.

313 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.05[C][1], at 5-72.

314 *See* 1 *id.* § 5.05[C][1], at 5-73 & n.185 ("In several cases involving 10% flip-in pills, courts have upheld the pill without specifically discussing, or specifically criticizing, the flip-in level."). *But see* Avon Prods., Inc. v. Chartwell Assocs., L.P., 738 F. Supp. 686 (S.D.N.Y. 1990), *aff'd per curium*, 907 F.2d 322 (2d Cir. 1990) (rejecting 12.5% ownership threshold under New York law).

315 *See* 1 FLEISCHER & SUSSMAN, *supra* note 34, § 5.05[C][1], at 5-72 to -74.

316 With a low triggering event threshold, the magnitude of the hold-out problem would be relatively low. *See supra* note 147 and accompanying text. This would give the acquiror more flexibility to deal with the minimum tender requirement. It also would reduce the amount of open-market purchases that would be necessary to improve the situation. *See supra* notes 147, 212 and accompanying text. Moreover, a triggering event threshold below 15% would enable the acquiror to avoid the effect of Delaware's business combination statute. *See supra* note 257.

Thus, an antidote strategy would be easier to implement with respect to a target company with a 10% triggering event threshold than one with a 20% or 30% threshold. On the other hand, defense-minded directors could not raise the triggering event threshold too much either, for this would allow an acquiror to gain a large minority position that would make proxy contests much easier.[317] In other words, the target company has to choose its own poison.

Another advantage of the antidote strategy that should not be ignored is the benefit it provides to the acquiror's legal arguments. While a successful antidote strategy would be good, redemption of the poison pill Rights would be better. Faced with the antidote strategy, the target company's directors retain their fiduciary duty under *Unocal Corp. v. Mesa Petroleum Co.*,[318] to decide whether to pull the pill by redeeming the Rights.[319] Assuming that the target company's directors were unwilling to redeem the Rights, the acquiror might nevertheless be able to persuade the courts that they should be required to do so pursuant to their fiduciary duties. Normally, directors can argue that they are resisting the hostile takeover in the interests of their shareholders. Although, as a general matter, shareholders dislike defensive measures and would prefer to sell their shares to the hostile bidder at a premium, courts nevertheless are deferential to directors' decisions on business matters.[320] However, if blocking the takeover were no longer possible because of the antidote strategy, there would be no benefit to shareholders from resistance—only the aggravation of going through multiple tender offers. On the other hand, resistance would provide a direct financial benefit to the insiders, because they would not be tendering in the initial offer.[321] In other words, the target company's management would not be able to block the takeover by resisting, but it would be able to obtain for itself a greater portion of the premium that the acquiror is willing to pay. This behavior can no longer be characterized as takeover defense; it is simply self-dealing.[322] As such, it should be reviewed by the courts under the demanding "intrinsic fairness"

317 A high triggering event threshold would allow a hostile bidder to acquire a larger position in the open market without triggering the poison pill. With a larger voting block, the hostile bidder would have to persuade fewer shareholders in order to prevail in a proxy contest.

318 493 A.2d 946 (Del. 1985).

319 *See supra* notes 44-46 and accompanying text.

320 *See* Velasco, *supra* note 2, at 411-22.

321 Insiders are hold-outs and receive the benefits of the hold-out strategy. *See supra* Part II.B.

322 "Classic examples of director self-interest in a business transaction involve either a director appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by the shareholders generally." Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 362 (Del. 1993). Any action to block the antidote strategy would qualify under the latter criterion.

test[323]—a burden that directors would have a difficult time satisfying. Under those circumstances, a court very well might order that the Rights be redeemed, in which case the acquiror would have won a solid victory without the necessity of actually carrying out the antidote strategy.[324]

It is important to note that there is little reason for the courts to fear this antidote strategy. Although the structure of the transactions is odd, it is not intended to evade any tax, securities or even general corporate law; nor does it have the effect of doing so. It is narrowly tailored to overcoming the poison pill, and it does so in a way that honors the original intent of the poison pill.[325] It does not allow the acquiror to force through any coercive offer;[326] nor does it allow the acquiror to rush through a marginal offer.[327] All it does is remove the ultimate power of deciding whether to accept a hostile takeover offer from the hands of the target company's board of directors and put it back in the hands of its shareholders where the power belongs. Moreover, the antidote strategy requires even greater collective action than would a proxy contest,[328] making it superior to the anti-pill strategy approved by the courts.

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323 Because of their self-interest, the directors would not be entitled to the protection of the business judgment rule; rather, they would have to prove that their actions were entirely fair to both the corporation and its shareholders. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983).

324 Once the poison pill were triggered, new arguments would become available. The provisions of the Shareholder Rights Plan that render the Rights nonredeemable are of questionable validity under Delaware law. *See supra* notes 44-45. *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281, 1291-92 (Del. 1998), held that a poison pill could not "restrict[] the board's power in an area of fundamental importance to the shareholders—negotiating a possible sale of the corporation." *Id.* With only 20% of its shares in the hands of the acquiror, the target corporation would still be in a position to negotiate the sale of the corporation but for the fact that the Rights are no longer redeemable. This should raise doubts about the validity of the poison pill. *See* Velasco, *supra* note 2, at 409-11.

325 The poison pill was intended to protect shareholders against abusive takeover tactics. *See* 1 LIPTON & STEINBERGER, *supra* note 1, § 6.03[4][b], at 6-61 ("[A] basic objective[] of the rights plan [is] to deter abusive takeover tactics by making them unacceptably expensive to the raider . . . .").

326 Because the antidote strategy requires that all shareholders receive the same price for their shares, *see supra* note 118 and accompanying text, it is impossible to use it in conjunction with such coercive tactics as the two-tier, front-loaded tender offer, *see* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985) (describing two-tier, front-loaded tender offer).

327 The antidote strategy requires that there be two successive tender offers. The minimum time each offer must be open is 20 business days. *See* 17 C.F.R. § 240.14e-1(a) (2002). In addition, there would be additional time consumed by the issuance of the Rights certificates, and the determination of whether they will be exercised or exchanged.

328 Barring cumulative voting, a proxy contest merely requires the acquiror to obtain the consent of a majority of the outstanding shares—and less, if fewer than all shares are represented at the meeting of shareholders. The antidote strategy, by contrast, would require the consent of significantly more than a majority of the outstanding shares. The high minimum tender requirement ensures that the only hostile bidders who could succeed would be those that could obtain the cooperation of nearly all non-insiders.

Perhaps the greatest strength of the antidote strategy, however, is that it is a low-risk strategy from the perspectives of both the acquiror and the target company's shareholders. If the hostile takeover were to succeed, the shareholders would receive a premium and the acquiror would spend only as much as it were willing to spend. If the acquiror's efforts fail because of a bidding war, both the shareholders and the acquiror could profit from the third party's increased offer.[329] And if no change of control were to occur at all, the shareholders would still be made whole by the acquiror. While the acquiror would have incurred some expenses and would have paid slightly more than the fully diluted market value of the shares in the initial tender offer,[330] the amount at risk would be fairly low, given the circumstances.

This lack of risk is the greatest asset of the antidote strategy. To be able to defeat the poison pill at all is, of course, its raison d'être. However, a strategy that could offer a mere possibility of success at a high cost would not be particularly attractive. On the other hand, a strategy that could disable the poison pill without much risk would be highly desirable. There are always costs and risks associated with a hostile takeover attempt, but the antidote strategy keeps both at manageable levels while giving the acquiror the opportunity to persuade the shareholders to sell their shares. That is as much as reasonably can be hoped for in any takeover strategy.

CONCLUSION

The poison pill defense has been at the very center of the law of mergers and acquisitions for nearly two decades. It has proven to be a formidable defense against hostile takeovers. There have been many efforts to defeat it, but only the proxy contest has enjoyed any real success. This Article has set forth a new strategy that should be able to do the job. This antidote strategy may appear odd, involving as it does multiple tender offers. However, it should prove to be effective in increasing a hostile bidder's chances for a successful takeover.

It is important to emphasize that the antidote strategy proposed in this Article is merely an outline. It is expected that variations on the theme would

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329 The shareholders profit from any offer that includes a premium. The acquiror might profit from the third party's offer to the extent of the increase over the initial offering price. *See supra* note 195 and accompanying text. *But see supra* note 230 and accompanying text.

330 *See supra* note 187 and accompanying text.

be necessary to deal with the circumstances of any particular hostile takeover. A properly planned antidote strategy, however, should provide the acquiror with maximum flexibility to deal with whatever the target company might throw its way.

The goal of the antidote strategy is innocuous: to restore the balance of power between shareholders and directors. By facilitating takeovers, it should make directors more accountable and return to shareholders a right that should have been deemed inalienable—the right to sell their shares. Best of all, it should do so without any negative side-effects. The antidote strategy does not enable hostile bidders to push through coercive offers. It simply allows them to take an offer directly to the shareholders without being subject to a management veto. When the target company's management attempts to respond to a hostile takeover with a "just say no" defense, the acquiror should reply with a "just do it" offense. By triggering the poison pill, the antidote strategy allows the shareholders to decide the target company's fate.