Tender Offers and the Sale of Control: An Analogue to Determine the Validity of Target Management Defensive Measures

Stuart R. Cohn*

The corporate world has been satirized on the stage and pilloried in the theatre, but for sheer drama little compares to the true-life scenes played almost daily by an ever-changing cast of directors, officers, shareholders, attorneys, investment bankers, and others engaged in pursuing or defeating hostile tender offers. The conflicts created by such offers provide a direct and highly visible confrontation between an acquiror seeking support from target shareholders and an embattled target management fearing the consequences of the takeover effort,*

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1. References to the term "tender offer" denote a publicly announced and broadly disseminated offer addressed to all shareholders of a particular corporation, referred to as the "target corporation," to purchase shares of the target corporation at a stated price, generally a premium over market, subject to stated time limitations and, often, minimum percentage tendering of shares. Payments are in the form of cash, securities, or a combination thereof. The tender offer, made directly to shareholders, does not require approval or any other formal action by the board of directors of the target corporation, although approval may be sought as a means of inducing the tendering shares. Tender offers may be for any percentage of a target corporation's shares, generally the offer being for at least a sufficient number of shares to acquire working control of the target. The term "hostile tender offers" refers to those offers opposed by management of the target corporation. Reference to "tender offer" in this Article is consistent with but not necessarily limited to statutory interpretation of that term under the Williams Act, §§ 13(d), (e), (f), 14(d), (e), (f), 15 U.S.C. §§ 78m(d), (e), (f), 78n(d), (e), (f) (1976); see note 8 infra. See, e.g., Wellman v. Dickinson, 475 F. Supp. 785, 817, 826-27, 829-37 (S.D.N.Y. 1979) ("class of shareholders protected," "tender offer," and "effort to gain control" defined).

2. Although negotiated mergers and tender offers are the normative means of effecting a reorganization, contested tender offers comprised approximately 30% of all tender offers in 1978 and approximately 20% of tender offers in 1979, there being, respectively, an annualized total of 166 and 112 interfirm tender offers during such years. Austin, Tender Offer Update: 1978-1979, 15 MERGERS & ACQUISITIONS, Summer 1980, at 13-14. Austin's figures also indicate that 76% of contested tender offers in 1978 were at least partially successful, and 75% were in 1979. Id. at 18. The success rates appear misleading, however, for they do not take into account inchoate efforts frustrated by pre-tender offer defensive tactics and thus never brought to public attention. See text accompanying notes.
Notorious contests in recent years include Occidental Petroleum-Mead Corporation, Anderson Clayton-Gerber Products, Carter Hawley Hale-Marshall Field, and American Express-McGraw-Hill. Each of these confrontations resulted in target management causing the eventual withdrawal of the tender offer by employing a variety of defensive measures known colloquially as “scorched earth” tactics. Although potential acquirors may be wary of entering upon so tumultuous a stage, the “urge to merge” among major corporations will continue to produce unsolicited, nonnegotiated tender offers at varying scales of size.

The hostile tender offer phenomenon has spawned wholesale defensive measures adopted by target company management. Strategies and

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techniques have been created at the expense of the opportunity to gain control of a corporation, causing a discernible liability on management and counsel to defunct courts. The result is often mired in amorphous conceptions of different defense plans and the effect of standards set thereunder. An analysis of corporate and sharehold perspectives such as fiduciary duty inadequate as a means to develop specific measures. Such espousal of the broad concept of defending antitakeover tactics against the lost opportunity of a premium.

The predictable result of perhaps indefinable concepts in defensive measures undertaken by the management view is that such concepts as the “business judgment doctrine” may range from genuine to grudgingly defer any justification of bent management. The relative costs be borne either by the insurance carrier or the target corporation. Questions may arise about whether if tender offers are frustrated but also against target management.

8. Williams Act, §§ 13(d), (e), (f) and 14(d), (e), (f) (1976). The Williams Act amended §§ 13(d), (e), (f) (1976). The Williams Act amendment requires the filing of the Securities and Exchange Commission, including the background of the acquiror, source of funds, and any plans for future merger, reorganization, or change in the target corporation’s board of directors or other matters considered in § 14(e).
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Techniques have been created at a pace faster than the process of litigation, causing a discernible lag between the ingenuity of corporate management and counsel to devise defensive measures and the ability of courts to develop legal standards effectively addressed to this expanding and novel area. The result is that analysis of the validity of such measures is often mired in amorphous concepts derived from contexts substantially different from the competing claims of management, investors, and others affected by tender offer disputes. Arguments as to validity are frequently voiced under the rubric of "fiduciary duty," the old warhorse whose unbridled breadth gives sustenance to innumerable claims. No less ambiguous are arguments framed upon statutory provisions, including such concepts as the "business judgment rule," "corporate democracy," and the effect of standards set by the Williams Act and regulations thereunder. An alternative basis for evaluation relies upon economic analysis of corporate and shareholder interests. Here too, however, an aura of reason fades in the tangle of conflicting positions utilizing independent economic theories and goals.

The predictable result of reliance upon expansive, ill-defined, and perhaps indefinable concepts is a lack of cohesive standards by which defensive measures undertaken by target management are judged. Broad perspectives such as fiduciary or statutory concepts have been wholly inadequate as a means to develop meaningful standards by which to evaluate specific measures. Such inadequacy is strikingly revealed by the espousal of the broad concepts noted by both target management defending antitakeover tactics and disgruntled shareholders reacting to the lost opportunity of a premium sale.

The pattern of case law to date is consistent with the lack of definitive standards. In the profusion of nebulous and conflicting standards, courts have been reluctant to find target management liability or to enjoin tort measures except in egregious circumstances where defensive actions blatantly defy any justification other than the self-perpetuation of incumbent management. The relative ease by which management may create a new form of insurance, underwritten by an insurance carrier or the acquiring company, may be borne either by the insurance carrier or the acquiring company, depending upon the outcome. Questions may arise about what constitutes "successful resistance," particularly if tender offers are frustrated but subsequent derivative actions result in damage awards against target management.

8. Williams Act, §§ 13(d), (e), 14(d), (e), (f), 15 U.S.C., §§ 78m(d), (e), 78n(d), (e), (f) (1976). The Williams Act amended the Securities Exchange Act of 1934 by adding §§ 13(d), (e) and 14(d), (e), (f). The statutory provisions and regulations thereunder require the filing with the Securities and Exchange Commission (SEC) of documents by an entity, person, or group acquiring more than 5% beneficial interest in a corporation or intending to make a tender offer that may result in obtaining more than 5% of a class of equity securities, the filing to include information as to the identity and background of the acquiror, source of funds, relationships with the target corporation, and any plans for future merger, reorganization, or other material use of the target's assets or change in the target's board of directors. Id. § 78m(d)(1), (e). General antifraud considerations covering activities of both the tender offeror and target corporation are contained in § 14(e).
patina of legitimacy for defensive measures results in even further constriction of judicial relief. The recent district court decision in Panter v. Marshall Field & Co. is representative of judicial myopia in this area. As more fully discussed below, the court's dismissal of the shareholder complaint against management's successful blocking of the Carter Hawley Hale tender offer was laced with imposing references to fiduciary obligations and business judgment concepts. Yet the opinion of the court is one of homage without substance, for there is a marked lack of evaluation of the fundamental question whether a business—as opposed to a survival—judgment was in fact made, or whether the judgment made was based upon adequate consideration of relevant facts.11

Panter, unfortunately, is not aberrational. The Second Circuit's recent decision in Treadway Cos. v. Care Corp., reflects a similar eagerness to embrace a business judgment standard despite a lower court's explicit findings that target management's actions created unusual and deleterious effects upon the corporation and minority stockholders. Until standards for control battles are more sharply delineated, one cannot expect courts, with occasional exception, to be other than inadequate arbiters of competing interests, routinely endorsing and thus perpetuating the confusing maze of contradictory rationales. Identifying appropriate and feasible standards for evaluating defensive measures goes beyond creating a framework for judicial response. Inherent in such an exercise is determining a formula for according priorities and limitations among the competing rights, obligations, and interests of management, shareholders, and the corporate entity.14

The ambiguities inherent in current perspectives might be substantially reduced if attention is focused on the nature and effect of the tender offer, analogizing a successful tender offer to the sale of control by a single or otherwise controlling shareholder. The owner of a fractional percentage of shares who joins with others in the collective sale of control in the tender offer context should be subject to no greater limitations upon transferability decisions than is the fifty-one percent owner who

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9. 486 F. Supp. 1168 (N.D. Ill. 1980), appeal docketed, No. 80-1389 (7th Cir. Mar. 24, 1980). Notwithstanding eventual disposition of the factual context is illustrative and the district court's treatment of such issues as fiduciary duty and business judgment is indicative of the lack of clarity and direction within those standards.
10. See text accompanying notes 87, 121-24 infra.
11. See note 124 infra.
12. FED. SEC. L. REP. (CCH) ¶ 97,605 (2d Cir. 1980).
13. See notes 107, 112 infra.
14. The standards and perspectives proposed in this Article may appropriately be adopted at the judicial level without imposition of statutory or administrative controls. The proposals have accordingly been directed towards a judicial response, although no inference is intended that legislative or regulatory intervention consistent with such standards should necessarily be avoided. As a matter of preference, it appears that the tender offer context contains complexities and variables more appropriately suited for judicial evaluation than the mandatory application of potentially inflexible rules.

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must be cognizant of corporate concerns but over whom management generally has no control. Standards developed to protect the corporation and minority shareholders from the potential dangers of an ill-advised sale of control by a dominant shareholder may be equally appropriate and sufficient to judge the wisdom of the potential sale of control by the collective judgment of individual shareholders. Application of those standards supports certain defensive measures and denies or suggests modifications of others, and in each instance the evaluation focuses much more directly and accurately on the essential characteristics of tender offers than do the analyses of currently employed concepts.

After briefly outlining principal defensive measures, Part I of this Article will examine each of the fiduciary, statutory, and economic perspectives generally advanced in tender offer struggles, focusing upon the difficulties of employing such perspectives as a basis for evaluating defensive measures. Part II will posit an alternative approach, analogizing the collective action of tendering shareholders to a sale of control by a single, dominant shareholder. Specific defensive measures by target management to impede the tender offer will be analyzed in the context of the sale of control analogue.

PART I

A. Defensive Measures by Target Management

1. Preparatory Actions

The notoriety of hostile tender offers and the resulting unease of the management of potential targets have created a welter of anticipatory defensive measures. Indeed, corporate counsel uniformly advise that when directors and officers conclude that a reasonable possibility of an unwanted tender offer exists, defensive measures not wait until the wolf is at the door.

15. See text accompanying notes 171-80 infra.

16. Factors relevant to such evaluation include size and extent of block holdings of shares, percentage of shares owned or controlled by management or those likely to side with management, corporate liquidity, antitrust and regulatory matters, and similar economic and strategic factors. For a description of such factors, see Hayes & Tausig, Tactics of Cash Takeover Bids, 45 HARV. BUS. REV., Mar.-Apr. 1967, at 138; Troubh, Characteristics of Target Companies, 32 BUS. LAW. 1901, 1901-04 (1977).

17. Forming a 'team' to assist management in advance planning is discussed in Small, Defending Target Companies—General Perspectives, 92 BUS. LAW. 1984, 1951-52 (1977). Advance planning is illustrated in Panter v. Marshall Field, 486 F. Supp. 1168 (N.D. III. 1980), appeal docketed, No. 80-1389 (7th Cir. Mar. 24, 1980), in which Marshall Field hired special counsel in 1969, 10 years prior to any tender offer effort, to advise in the event of any takeover effort, with counsel thereafter attending each board of directors meeting. Id. at 1176-77.
meet with substantially increased shareholder resistance and judicial scrutiny.\footnote{18}

Questions of validity are most sharply raised with regard to aggressive antitakeover measures that attempt to create a porcupine-type defense not dependent upon the hope that shareholders will reject the tender offer either because of loyalty to, or the persuasive logic of, target management.\footnote{19} Nonaggressive measures such as frequent communications to shareholders, particular attention to holders of large blocks of targeted shares, and respectable dividend policies generate a goodwill between shareholders and management that may be of considerable help in combating takeover efforts. Such measures, however, create far less impediment to both target shareholders and acquiring companies than do the aggressive measures described below, and are often only an incidental part of an expanded package of defensive tools.

Aggressive defensive measures are designed to impose substantial tactical and administrative barriers to the pursuance of a hostile tender offer. The following discussion briefly notes the more commonly adopted measures, adopted individually or in various combinations.

Amendments to the articles of incorporation. A pervasive and potentially highly effective antitakeover device is the adoption of charter amendments enlarging the defensive powers of target management and making the corporation an unattractive takeover candidate.\footnote{20} Although wide variations exist, the principal types of charter provisions sought by target management specify broad increases in the minimum vote required for the sale of assets with a broad range of factors in determining the breadth of management actions. Shareholders of MacDuff amend the corporation's articles of incorporation as "the social, legal and economic interests of suppliers, customers and business offers.\footnote{21} Management of Foremost Industries, Inc., issued during an ongoing tender offer for the shares of OSI, with the brief discussion contained in the December 15, 1978, proxy statement of Alberto-Culver Company issued at a time of no pending or anticipated tender offer. Extracts of each of the proxy statements are set forth in A. Fleischer, Tender Offers: Defenses, Responses, and Planning 408-75 to 400-111 (1979).

18. Proxy statements for charter amendments to be adopted during the pendency of a control fight will not only alert shareholders to their potential loss of premium in a specific context (should the amendment pass), but will also involve much greater risks of nondisclosure or misleading statements regarding the control issues. Compare, for example, the extensive disclosures in the April 18, 1979, proxy statement of Outdoor Sports Industries, Inc., issued during an ongoing tender offer for the shares of OSI, with the brief discussion contained in the December 15, 1978, proxy statement of Alberto-Culver Company issued at a time of no pending or anticipated tender offer. Extracts of each of the proxy statements are set forth in A. Fleischer, Tender Offers: Defenses, Responses, and Planning 408-75 to 400-111 (1979).

19. Description of defensive measures in this Article is intended principally as a background for discussion of the legal models used to determine justification. Comprehensive descriptions of the variety of available defensive measures are set forth in E. Aranow & H. Einhorn, Tender Offers for Corporate Control 219-76 (1973); E. Aranow, H. Einhorn & G. Berlestein, Developments in Tender Offers for Corporate Control 193-206 (1977); A. Fleischer, supra note 18, at 113-56; and L. Lipson & E. Steinberger, Takeovers & Freezesouts 263-325 (1979). The defensive measures discussed are applicable to cash tender offers. Where the offer is premised upon an exchange of securities, additional measures based upon the quality of the security offered, disclosure, and other securities law concerns may be taken. This Article will focus principally, however, upon measures common to both cash and exchange offers.

Shareholder resistance and judicially raised issues with regard to aggressive create a porcupine-type defense not holders will reject the tender offer persuasive logic of, target manager will, as frequent communications to bidders of large blocks of targeted securities generate a goodwill between provide considerable help in combination, however, create far less impeding acquiring companies than do the and are often only an incidental live tools.

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**Corporation.** A pervasive and potential is the adoption of charter owners of target management and the takeover candidate. Although a majority of charter provisions sought by are to be adopted during the pendency of a potential loss of premium in a merger will also involve much greater risks of the control issues. Compare, for example, 1979, proxy statement of Outdoor Sports tender offer for the shares of OSI, with the 1978, proxy statement of Alberto-Culver incipient tender offer, Extracts of each of the, TENDER OFFER: DEFENSES, RESPONSES.

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charter provisions is found in Buford, LAW 1553, 1553-56 (1971); Hochman & Money-Law Techniques, 34 BUS. LAW. 537, 537, But Takeovers—Defensive Charter Provisions

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target management specify broad areas for board of directors' concerns, increase the minimum vote required for mergers, and protect against wholesale changes in board composition.

Charter provisions authorizing the board to consider a broad range of factors in determining whether to resist a hostile tender offer are designed to legitimate and thus remove any questions regarding the breadth of management concerns that may justify defense reactions. Shareholders of MacDonald's Corporation were thus asked to amend the corporation's articles to permit directors to consider such factors as "the social, legal and economic effect on franchises, employees, suppliers, customers and business" in considering whether to resist tender offers. Management of Foremost-Mckesson, concerned about the intentions of a substantial minority shareholders, obtained approval from shareholders of an amendment authorizing the board to interfere with stock purchases by "a person or persons determined to be unsuitable by government authorities," and empowering the board to express views to regulatory agencies on that subject. Although such provisions may technically be unnecessary in light of expanding notions of board responsibilities, they remove questions of validity regarding indirect concerns and offer support to board members who might be otherwise cautious of blocking shareholder acceptance of favorable premium offers.

A second and potentially more impediment amendment requires a supermajority vote of shareholders to approve a merger with any party that has previously obtained a specified minimum percentage of shares. Supermajority provisions typically range from two-thirds to as much as ninety percent, a higher figure often reflecting a relatively low percentage of shares controlled by management and insiders. As tender offers are frequently the first of a two-step process involving eventual merger of the acquiring and target corporations, a substantial impediment to merger may considerably reduce the risk of a hostile tender offer. To avoid the supermajority impediment from later being amended down to a more workable percentage, such provisions are frequently accompanied by the further requirement that they cannot be amended or repealed except by 21. Wall St. J., Apr. 30, 1979, at 10, col. 2.
23. See note 71 infra.
24. A two-thirds provision was proposed for MacDonalds. Wall St. J., Apr. 30, 1979, at 10, col. 2. A typical provision was adopted by Bell Industries, providing for an affirmative vote of at least 75% of Bell's shares to authorize a merger, consolidation, or sale of assets with a "related entity," defined as a person or entity owning directly or indirectly 20% of Bell's voting securities. Id., Oct. 19, 1979, at 6, col. 2. An 80-10 combination is also common, requiring 80% shareholder approval for merger with owners of 10% or more of the market's shares. See Three More Companies Lay Plans to Impede Hostile Tender Offers, Wall St. J., Apr. 9, 1979, at 14, col. 2. An example of a 90% provision is described in Buford, Amending the Corporate Charter, 32 BUS. LAW. 1553, 1554 (1977). Fleischer notes a variation that increases the vote requirement on a scale relative to an increase in stock owned by the acquiring company. A. FLEISCHER, supra note 18, at 19.
an equally high supermajority vote. An additional related provision, to assure that friendly or negotiated mergers do not face the difficult hurdle of supermajority approval, permits approval of mergers by a simple majority vote if the board of directors has approved the merger prior to the acquiring company's attainment of control of the board of directors. The consequent ability of the board to affect voting requirements has survived challenge in at least two states. However, the more fundamental question of adoption of a supermajority amendment through a simple majority vote has not yet been directly addressed.

A third and frequent form of charter amendment provides for a classified board of directors, thus delaying the ability of the acquiring company to obtain majority control of the board. The limitation could be an extremely effective impediment where acquisition of control on a near-term basis is important to the potential offeror, including situations where the offeror intends to utilize assets of the target company to fund the costs of acquisition.

Reincorporation. A majority of states have adopted statutes imposing advance notice, filing, and other requirements upon potential acquirors of target corporations incorporated, located in, or otherwise having substantial connections with the state. Often referred to as antitakeover statutes, the legislation generally provides to state administrative authorities provisions for administrative hear by target management. The provisions offer important breathing them to consider, prepare, and deliberate prior to the prise offer. Moreover, there is a trend will find the tender offer to possibly time-consuming disclosing quently, such statutes become defensive measures, and it is no shareholder approval of reincorporation.

25. Such restrictions may be superfluous, however, in some states that establish such limitation by statute. Delaware's statute, for example, requires "such greater vote" to alter, amend, or repeal a supermajority provision. Del. Code Ann. tit. 8, § 242(c)(4) (Supp. 1978).

26. Again, variations abound. Some corporations may vest the waiver power in the acquiring company's attainment of control of the board of directors. Such statutes may be only one aspect additional factors that may influence the outcome, e.g., a finding that the purpose of the action to this state, its citizens and its resources 1980). Presumably such a standard would have a less direct impact upon employers and employment may be closed or relocated. In United Technologies Corporation, the New York Attorney General required a detailed description of what the takeover bid by United Technologies from Louis Lifkowitz under A. Fleischer, supra note 18, at 561-562.


31. See note 109 infra.

32. Price may be only one aspect additional factors that may influence the outcome, e.g., a finding that the purpose of the action to this state, its citizens and its resources 1980). Presumably such a standard would have a less direct impact upon employers and employment may be closed or relocated. In United Technologies Corporation, the New York Attorney General required a detailed description of what the takeover bid by United Technologies from Louis Lifkowitz under A. Fleischer, supra note 18, at 561-562.

33. Bell industries, for example, some states have also enacted such measures.
the legislation generally provides minimum time frames for advance notice to state administrative authorities and to the target corporation, as well as provisions for administrative hearings on the merits of the offer if opposed by target management. The notice and delay occasioned by such provisions offer important breathing space for target management, permitting them to consider, prepare, and launch countermeasures to subvert the surprise offer. Moreover, there is always the chance that a state administrator will find the tender offer to be unfair, or will require additional and possibly time-consuming disclosure. Delay alone can be decisive. Consequently, such statutes become an important weapon in the arsenal of defensive measures, and it is not uncommon to find corporations seeking shareholder approval of reincorporation in states that have adopted such statutes. A major cloud on the validity of the various state statutes will, however, remain until the Supreme Court resolves the preemption and interstate commerce issues avoided by its jurisdictional decision in *Leroy v. Great Western United Corp.*

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32. Price may be only one aspect of fairness, as statutory provisions often include additional factors that may influence an administrator’s determination. Louisiana, for example, requires a finding that the potential acquisition “will provide a positive benefit to this state, its citizens and its resources.” La. Rev. Stat. Ann. § 51:1501G (West Supp. 1980). Presumably such a standard could lead to an injunction where the acquisition may have adverse impact upon employment, competition, or communities in which plants or offices may be closed or relocated. In United Technologies’ tender offer for shares of Carrier Corporation, the New York Attorney General, acting under the New York statute, required a detailed description of what arrangements would be made to protect Carrier’s existing employee benefit plans, and the criteria United would use to determine whether changes would be made in Carrier’s current management and plant locations. In *Re: Takeover Bid by United Technologies for Carrier Corp.* (letter dated Oct. 2, 1978, to United Technologies from Louis Lefkowtiz, Attorney General, State of New York), *cited in A. Fleischer, supra note 18, at 56-2, n.139.


**Issuance of shares.** Where insiders own or control an insufficient number of shares to discourage tender offers, effort might be made to place a sizeable block of shares in the hands of one or more parties who may be expected to side with management in the event of a hostile takeover effort. One avenue is the establishment of an Employee Stock Ownership Trust (ESOT). Although formation of an ESOT concurrent with opposition to a pending tender offer raises substantial questions of whether the formation is serving a valid corporate purpose,15 an ESOT established well in advance of any potential offer may be free from mergers, thereby increasing the acquiror’s cost of acquisition or creating significant shifts in the percep

*Repurchase of shares.* If management owns or controls a substantial percentage of shares, a repurchase program by the target corporation may increase that percentage perhaps to the point that it acts as an effect-


35. In Klaus v. H-C Shear Corp., 528 F.2d 225 (3d Cir. 1975), the court suggested that an ESOT might be enjoined permanently from voting or otherwise dealing with any of the shares acquired by it if its establishment during a control fight would cause irreparable harm or would be a breach of management’s fiduciary duties to minority shareholders. Id. at 234. Accord, Pentose v. Callinet Indus., Inc., [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,435, at 95,557 (N.D. Ill. 1978); ("defendants adopted the ESOT for the improper purpose of retaining control by diluting the plaintiff’s voting strength").


37. The dividend reinvestment plan as a preparatory defensive measure is discussed in Robinson, Strategy to Prevent a Takeover, 52 BUS. LAW. 1361, 1362 (1977).

38. Here, too, timing and appearance are critical. Acquisitions not concurrent or reasonably close to a struggle for control may have a substantial chance of success given the absence of facts inferring questionable motivation and the disinterest of courts to interfere with business decisions.

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Acquisition of regulatory once an unexpected offer is agencies as possible in a concerns. Thus, potential targets thus be less attractive, to the regulatory controls. Ensuing by McGraw-Hill’s efforts to Among other defensive anti- Communications Commission FCC consideration regarding the continued validity of McC.

39. Repurchases may be used cause—through a reduction in output or to buy out the holdings of a diss industralizes substantial l per gram reduces the total number of & the overall tender offer cost unless market price per share. In most particular in light of anticompetitive (proposed) Rule 13e-2, SEC Exim 94-17222 (Oct. 1979). Purchase of substantial issues of corporate purpose the possibility of precipitating a bid purposes are therefore most effective in increases in the percentage holdings Sobel, Corporate Stock Repurchases & Law 1345, 1556 (1980).

40. Wall St. J., Mar. 14, 1980, a tender offer for 10,600,000 of its own. The combined effect of the tender would increase insider holdings from 1d.

41. Informal pressure for share exchanges or other institutional forc e 1977), the New York Stock Exchange though noncontrolling, block of sh for shareholder approval. Id. at 561; legally this was necessary." Id.

42. See notes 59, 97 infra.

43. Wall St. J., Jan. 17, 1979, a formed a basis of General Host’s ef American, despite the relatively im
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41. Informal pressure for shareholder referendum may be brought to bear by exchanges or other institutional forces. In Kaplan v. Goldsamt, 680 A.2d 536 (Del. Ch. 1977), the New York Stock Exchange advised that the proposed repurchase of a sizeable block against a hostile tender offer.39 A recent decision by the Board of Marriott Corporation to authorize the repurchase of up to 3,100,000 Marriott shares will result in increasing the Marriott family's control from 24.7 to 36 percent of the common stock, thus effectively precluding hostile takeover efforts because of Marriott's requirement for two-thirds approval of mergers.40 Absent special charter provisions, repurchases do not require shareholder approval and therefore may not be subject to proxy disclosures regarding the effect of such programs upon slight but significant shifts in the percentage ownership of insiders.41

Acquisition of regulated businesses. A common defensive measure once an unexpected offer is announced is to engage as many regulatory agencies as possible in a consideration of antitrust and licensing concerns. Thus, potential targets may create administrative burdens, and thus be less attractive, to the extent that their operations fall within regulatory controls. Enlisting the aid of regulatory agencies is illustrated by McGraw-Hill's efforts to avoid an American Express tender offer. Among other defensive reactions,42 McGraw strenuously sought Federal Communications Commission (FCC) support to delay the offer pending FCC consideration regarding the effect of a transference of control upon the continued validity of McGraw's four television licenses.43

39. Repurchases may be undertaken for other defensive reasons, such as to cause—through a reduction in outstanding shares—an increase in market price per share or to buy out the holdings of a dissident group likely to side with a potential acquiror. These purposes carry substantial legal and practical risks. However, a repurchase program reduces the total number of shares necessary to acquire control, thereby reducing the overall tender offer cost unless the target repurchases have materially increased market price per share. In most cases a material rise in market price is unlikely, particularly in light of antimonopolistic provisions of the federal securities laws. See, e.g., (proposed) Rule 13e-2, SEC Exchange Act Release Nos. 34-10559 (Dec. 5, 1975) and 34-17222 (Oct. 17, 1980). Purchase of shares from a select group of shareholders raises substantial issues of corporate purpose and unequal treatment of shareholders, as well as the possibility of precipitating a bidding war for such shares. Repurchases for defensive purposes are therefore most effectively undertaken when they may effect significant increases in the percentage holdings of management and other insiders. See Nathan & Sobel, Corporate Stock Repurchases in the Context of Unsolicited Takeover Bids, 35 Bus. Law. 1545, 1556 (1980).

40. Wall St. J., Mar. 14, 1980, at 16, col. 3. Marriott had previously engaged in a tender offer for 10,600,000 of its own shares, for which 7,500,000 shares were tendered. The combined effect of the tender offer and repurchase program, when completed, would increase insider holdings from 24.7% to 36% of the outstanding common stock. Id.

41. See notes 59, 91 infra.

42. Wall St. J., Jan. 17, 1979, at 8, col. 2. Shipping and communication regulations formed a basis of General Host's efforts in 1975 to enjoin the tender offer of Triumph American, despite the relatively insignificant aspects of those portions of General Host's
Reduction in liquidity. Corporations may be attractive takeover candidates because of substantial liquid assets that may be used by acquirors to fund the acquisitions or expansion of their own operations. It is not uncommon for such candidates to deliberately reduce their cash through the payment of cash dividends, cash acquisitions of companies or major assets, and the premature retirement or redemption of debt and preferred securities.

Restrictive provisions in loan agreements. Banks and other lending institutions may be utilized as allies through provisions in loan agreements requiring acceleration of loans in the event of any change in control of the borrowing corporation. Acceleration may cause a substantial drain upon working capital of the target corporation, thus giving pause to potential acquirors. Although new loans may be obtained following acceleration, interest rates and other lending provisions may not be as favorable as at the date of the original loan. The limited usefulness and questionable validity of such loan provisions, however, have probably caused banks as well as borrowers generally to avoid their adoption.

2. Defensive Measures Concurrent with Announced or Pending Tender Offers

The preparatory measures described above may also be initiated during the pendency or imminence of a tender offer. Adoption of such measures at a later date, however, may raise considerable legal questions under "perpetuation of control" theories. Nevertheless, the ambiguity in

operational General Host Corp. v. Triumph Amercans, Inc., 359 F. Supp. 749, 752 (S.D.N.Y. 1973); see note 285 infra. Some regulated industries may offer greater defensive protection than others. One commentator has noted that "acquiring a small insurance company can be very helpful because of the regulatory roadblock which can be thrown up, no matter how insignificant a part of the business it may represent." R. Jennings & H. Marsh, Securities Regulation 742-43 n.28 (4th ed. 1977).

44. Within five days of an announced tender offer by Schiavone & Sons, Inc. for the shares of Corenco Corp., Corenco directors declared an extra cash dividend payable to holders of record the day after the offer's stated expiration date. See Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 297, 212 (2d Cir. 1973). See also City Investing Co. v. Schmults & Kelly, 475 F. Supp. 1210, 1214 (S.D.N.Y. 1979).


46. Such loan provisions have been criticized as "a particularly shocking technique" that "would also raise the possibility that the management be held liable for tying up the company on a long-term basis." Cary, Corporate Devices Used to Insulate Management from Attack, 25 Bus. Law. 859, 841 (1970). Consee, Kamen, Special Problems of Institutional Lenders, 32 Bus. Law. 1423 (1977), in which it is suggested that cases upholding the acceleration of mortgage loans upon sale of the property may have analogous application to creditor interests in changes of management. Id. at 1425.

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standards for determining the below, encourages the adoption of a control struggle employed during a tender offer.

Litigation. Immediate initial injunction against the tender offer reaction in hostile takeover situations including failure to make of such filings, antitrust violations borrowing restrictions, rule 101 ingenious counsel for target may raise the attractive possibilities of in may open new avenues of at preliminary injunction. Delay a or the entering of a preliminary acquor is dependent upon a p of funding sources.

The two most fruitful goals and antitrust concerns. The W violations, ranging from technical standards. However, even if W may be short-lived if the injunctive disclosure correction. Much in theory preliminary injunction has scope and complexity of antitrust time-consuming discovery that to wasteful from the standpoint
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standards for determining the validity of defensive measures, as discussed below, encourages the adoption of aggressive measures even in the midst of a control struggle. Additional defensive techniques often employed during a tender offer battle include the following:

**Litigation.** Immediate initiation of litigation seeking a preliminary injunction against the tender offer proceeding has been almost a knee-jerk reaction in hostile takeover situations. The suit often alleges a host of violations including failure to make filings under the Williams Act, inadequacy of such filings, antitrust violations, obtaining funds in excess of statutory borrowing restrictions, rule 10b-5 violations, and whatever other claims ingenious counsel for target management might devise. Litigation offers the attractive possibilities of time-consuming and broad discovery that may open new avenues of attack, as well as the potentiality of a preliminary injunction. Delay alone, whether created by litigation itself or the entering of a preliminary injunction, may be decisive where the acquirer is dependent upon a pending line of credit or other availability of funding sources.

The two most fruitful grounds for litigation involve Williams Act and antitrust concerns. The Williams Act provides a variety of potential violations, ranging from technical filing requirements to broad disclosure standards. However, even if Williams Act violations are proven, victory may be short-lived if the injunction is conditional on a particular filing or disclosure correction. Much more promising is the possibility of a long-term preliminary injunction based on a potential antitrust violation. The scope and complexity of antitrust litigation also invites a broad range of time-consuming discovery that may become enervating and eventually too wasteful from the standpoint of the potential acquirer. Moreover,

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47. See notes 65-160 infra and accompanying text.
49. The commonality of litigation has caused one commentator to note that "almost without exception, any announcement of a take-over bid is now instantly followed by an injunction action filed by the corporate management charging the 'raider' with most of the crimes in the Decalogue, but usually stopping short of statutory rape." R. JENNINGS & H. MARSH, SECURITIES REGULATION 742 (4th ed. 1977).
50. Additional advantages noted by a leading practitioner include the chilling of the enthusiasm of arbitrageurs before substantial positions are acquired, creating breathing space for target management's efforts to find a more suitable merger partner, and raising the morale of an embattled target management. Wachtell, *Special Tender Offer Litigation Tactics*, 52 BUS. LAW. 1435, 1437 (1977).
52. E.g., Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 59 (1975) (corrective filing of schedule 13D is sufficient relief in the absence of plaintiff establishing irreparable harm caused by initial failure); Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 207, 215 (2d Cir. 1973) (permanent injunction denied when defects in schedule 14D disclosures were corrected).
53. In issuing a preliminary injunction halting the tender offer of Paccar, Inc. for the common shares of Harnischfeger Corporation, the trial judge acknowledged that the
matters learned through discovery might become a basis for heightened governmental concern or intervention.\(^4\)

**State tender offer statutes.** Target management may receive welcome assistance from local officials charged with enforcement of state antitakeover statutes. For example, in the aborted effort by Occidental Petroleum to go forward with a tender offer for Mead Corporation, Mead gained valuable time and impetus when the Ohio Division of Securities made an initial finding that Occidental had made inadequate and misleading disclosures. As a result of the finding, Occidental could not proceed with its offer until those disclosures had been corrected.\(^5\)

Securities made an initial finding that Occidental had made inadequate antitakeover statutes. For example, in the aborted effort by Occidental and Mead, gain valuable time and impetus when the Ohio Division of Securities made an initial finding that Occidental had made inadequate and misleading disclosures. As a result of the finding, Occidental could not proceed with its offer until those disclosures had been corrected.\(^5\)

Defensive acquisitions. Timely acquisitions by target corporations may bootstrap the target into an offensive litigating posture based upon antitrust concerns. The haste by which such acquisitions are made, however, as well as the substantial suspicion necessarily raised as to bona fides, create considerable risk of adverse judicial reaction.\(^7\) The Panter court, however, appeared untroubled by Marshall Field's eleventh hour acquisition of stores in the Carter Hawley Hale marketing areas.\(^8\)

**Publicity campaigns.** Full page ads in national and regional newspapers, press releases, analysts, and others within the target's earshot: one, to create a pause, shareholders' eagerness to buy shares, and second, to serve as a9

Defensive mergers. If all to be inadequate against a defense may seek a more suitable acquirers as to management tenure shifting control. Rescuing the fray either by competing to shareholder approval, 'outbid or frustrate the unwary knights' have their limits and bidding war.\(^6\)

The foregoing discussion is the most aggressive and effective

\(^{54}\) See Axinn, Tactics and Strategies, 32 Bus. LAW. 1527, 1531 (1977).

\(^{55}\) The delays obtained by Mead permitted it to undertake a wide range of defensive activities that eventually resulted in Occidental's withdrawal. The Occidental-Mead struggle is described in Hostile Merger Mergers Meet Fierce Opposition from Target Concerns, Wall St. J., Apr. 3, 1979, at 1, col. 6. See note 59 infra.

\(^{56}\) Subsequent to the announced exchange offer by Crane to acquire 22.6% of the common stock of Anaconda, Anaconda acquired a major competitor of Crane and sought a preliminary injunction against the offer, inter alia, upon antitrust grounds. Crane Co. v. Anaconda Co., 411 F. Supp. 1210, 1220 (S.D.N.Y. 1975). The court denied the request for injunction, relying upon the investment exception provision of § 7 of the Clayton Act, 15 U.S.C. § 18 (1970), as well as a perceived ability to "unravel the situation" should that be necessary after a full trial on the merits. 411 F. Supp. at 1219-20.

\(^{57}\) Royal Indus., Inc. v. Monogram Indus., Inc. [1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,868 (C.D. Cal. 1976). Five days following the announced intention of Monogram to make a tender offer for the shares of Royal, Royal negotiated and executed an agreement for the acquisition of Sar Industries, a small but competing business of Monogram's that was plaintiff in a pending antitrust action against Monogram. Id. at 91,154. The acquisition was totally a defensive maneuver designed solely to create an antitrust block. At Monogram's instance the court enjoined the acquisition. Id. at 91.155.

\(^{58}\) Royal Indus., Inc. v. Monogram Indus., Inc. [1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,868 (C.D. Cal. 1976).

\(^{59}\) When Occidental Petroleum's offer was challenged by McGraw-Hill's voicer in American Express who sought the same period that American Express lost its tender offer. In 16, 1979, at 5, col. 1. A disclosure that Clayton was whether Anderson-Clayton to its employees in connection with the Clayton withdrew its tender offer. In 1516-14 (W.D. Mich. 1971).

\(^{60}\) Kern County Land Co. v. Old Kern, known for the Court's "pragmatic" approach to the Old Kern's accomplishing a defensive acquisition of a substantial block of shares.\(^6\)

\(^{61}\) Defensive efforts by Liggett Grand Metropolitan Ltd. included use of the same period that American Express lost its tender offer. In 16, 1979, at 5, col. 1. A disclosure that Clayton was whether Anderson-Clayton to its employees in connection with the Clayton withdrew its tender offer. In 1516-14 (W.D. Mich. 1971).
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newspapers, press releases, and mailings to shareholders, brokers, analysts, and others within the investment industry serve a two-fold purpose: one, to create a pause, hopefully of permanent duration, in the shareholders’ eagerness to embrace the premium being offered for their shares, and second, to serve the potential acquirer with notice that it is in for an arduous struggle. Although more relevant to exchange rather than cash offers, a hard-hitting publicity campaign sets up upon every actual or contrived weakness of the acquirer, occasionally causing even the most determined acquirer to consider whether the allegations and costs of rebuffing such campaigns are worth enduring.59

Defensive mergers. If all other defensive measures appear or prove to be inadequate against a determined adversary, target management may seek a more suitable acquirer, presumably one that raises fewer concerns as to management tenure, use of target assets, and other effects of shifting control. Rescuing acquirors, dubbed “white knights,” may enter the fray either by competing tender offers or by negotiated mergers subject to shareholder approval.60 In either case, the effort is designed to outbid or frustrate the unwanted tender offeror, although even “white knights” have their limits and may not tolerate too many dark days of a bidding war.61

The foregoing discussion presents those defensive measures generally the most aggressive and effective in forestalling, impeding, and perhaps

59. When Occidental Petroleum initiated its takeover efforts of Mead Corporation, Mead gathered enormous volumes of documents regarding Occidental’s global activities from the files of federal regulatory agencies as well as directly from Occidental. Wall St. J., Apr. 3, 1979, at 39, col. 2. Mead’s photocopying bill alone was approximately $300,000. Id. The information obtained was then organized and disseminated to numerous regulatory commissions in an effort to prompt or facilitate investigations of Occidental’s activities in the decade preceding the takeover bid. Id. at 1, col. 6. During the American Express battle for McGraw-Hill, the integrity of American Express was challenged by McGraw-Hill’s vociferous denunciation of the “conspiratorial” role of the president of American Express who served on the board of directors of McGraw-Hill during the same period that American Express was planning its takeover attempt. Id., Jan. 16, 1979, at 5, col. 1. A disclosure issue raised by Gerber Products against Anderson-Clayton was whether Anderson-Clayton had failed to sufficiently disclose illegal payments to its employees in connection with foreign sales. Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1314-16 (W.D. Mich. 1979). In particular, Gerber sought disclosure of the identification and location of the employees involved in the illegal payments. Id. at 1315. During the pendency of the action seeking an order for fuller disclosure, Anderson-Clayton withdrew its tender offer. Id. at 1318.

60. Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973), best known for the Court’s “pragmatic” approach to the interpretation of § 16(b), arose out of Old Kern’s accomplishing a defensive merger with Tenneco after Occidental had already acquired a substantial block of shares through a tender offer. Id. at 587.

61. Defensive efforts by Liggett Group to ward off a proposed cash tender offer by Grand Metropolitan Ltd. included enticing a competing offer from Standard Brands, Inc. Wall St. J., May 7, 1980, at 3, col. 2. The effort failed when Grand Metropolitan increased its bid, and Standard Brand’s “rescue” attempt was promptly withdrawn. Id., May 15, 1980, at 6, col. 1.
precluding hostile tender offers. Each of the measures, whether taken prior to or concurrent with pending hostile offers, is couched in terms of safeguarding corporate and shareholder interests. Management's role in the initiation and pursuance of defensive measures is defined at times by fiduciary concepts, at other times by reference to the statutory management powers of directors, and on occasion by resort to economic theory. These diverse standards reflect not a harmony of goals, but a confusing panoply of inherently ambiguous, self-contradictory perspectives. Each of the standards is sufficiently broad to generate and embrace arguments by both advocates and adversaries of defensive maneuverings. Fiduciary concepts, for example, both fuel the ardor of shareholder complaints and offer refuge to beleaguered management. Similarly, statutory and economic arguments are raised with equal vigor by both sides on the issue of validity of defensive measures. What is surprising is not the phenomenon of contrasting use, which is predictable whenever broad principles are sought to be applied to issues of substantial complexity and competing claims, but rather the tenacity of such perspectives in light of their inability to provide meaningful guidance. Examination of each of the three perspectives may place their limitations in sharper relief.

B. Current Perspectives for Evaluation of Target Management Response

1. Fiduciary Concepts

The most alluring theoretical underpinning for examining management's defensive techniques is the "fiduciary" concept. As if the statement has inherent and authoritative meaning, we are told that directors of target companies "have a high fiduciary duty of honesty and fair dealing with shareholders . . . and their dealings with the corporation and its shareholders are rigorously scrutinized." This standard creates the appearance of an acceptable evaluative norm for management actions, but upon application it fades into illusion. Justice Frankfurter's oft-quoted statement in SEC v. Chenery Corp. testifies to the inherent lack of substance in the fiduciary concept. In the tender offer context, the lack of substance becomes glaring. To whom, for example, do the so-called fiduciaries owe shareholder interests? The target corporation, although noting the iniquity with respect to investment influencing factors.

The issue of allegiance within a specific tender offer company. Where a cash tender offer of all target shareholders would harm the corporate enterprise, the question whether equal offers per share possible? So effects of the acquisition by the acquiring company desires be weighted by tax, employees, customers, and what are the priorities of the


Id. See also Note, Corporate Directors, Substantive and Procedural Modernization, 575, 598 (1979). 65. In Bromberg, Tender Offers and Management Responsibility, 449, 466-47 (1978). Weiss stated: [I]t must be questioned whether management's fiduciary responsibility to management's fiduciary requirement of . . . that management's price per share possible? And what are the priorities of the
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Spinning for examining managerial concept. As if the statement g, we are told that directors of duty of honesty and fair dealing concessions, for example, both fuel the offer refuge to beleaguered economic arguments are raised the issue of validity of defensive the phenomenon of contrasting use, principles are sought to be applied competing claims, but rather the their inability to provide mean- the three perspectives may place

so-called fiduciaries owe primary allegiance when corporate and shareholder interests diverge? Some courts and commentators have stressed the target corporation. Others have pointed to shareholder interests, although noting the inevitable lack of uniformity among shareholders with respect to investment goals, loyalty to management, and other influencing factors.

The issue of allegiance may be further complicated by variables within a specific tender offer and by ultimate intentions of the acquiring company. Where a cash tender offer is the first step in an eventual elimination of all target shareholders through a cash-for-stock merger, does the fiduciary requirement of "utmost good faith and fair dealing" demand that management's efforts be limited exclusively to obtaining the highest price per share possible? Such an argument is plausible since any adverse effects of the acquisition upon the target corporation will be borne solely by the acquiring company and its shareholders. Or may shareholder desires be weighed by target management against the concerns of employees, customers, and creditors of the target corporation, and if so what are the priorities of these competing concerns? The complexities of

67. Examples of the belief that fiduciary duty is owed primarily to the target corporation include the following: "Management has not only the right but the duty to resist by all lawful means persons whose attempt to win control of the corporation, if successful, would harm the corporate enterprise." Heit v. Baird, 567 F.2d 1157, 1161 (1st Cir. 1977).

"Management should be recognized as possessing the responsibility and power to shape the corporation's business, its development, its return to investors, and its satisfaction of social requirements." Seinbrink, Management's Response to the Takeover Attempt, 58 CASE W. RES. L. REV. 889, 884 (1978).


[I]t must be questioned whether . . . a request [to enjoin a tender offer] is consistent with management's fiduciary obligation owed to all of the corporation's stockholders. In seeking to enjoin an offeror from commencing or continuing with the tender, management may be giving insufficient consideration to the adverse impact an injunction will have on the rights of those stockholders to tender.

Id. See also Note, Corporate Directors' Liability for Resisting a Tender Offer: Proposed Substantive and Procedural Modifications of Existing State Fiduciary Standards, 52 VAND. L. REV. 575, 598 (1979).

69. In Bromberg, Tender Offers: Safeguards and Restraints—An Interest Analysis, 21 CASE W. RES. L. REV. 613 (1970), the author noted that there is no ready answer to the question whether equal standards are to apply to the interests of both long-term and short-term holders of target company securities. Id. at 624. See also Weiss, Tender Offers and Management Responsibility, 23 N. Y. L. SCH. L. REV. 445, 452 (1978).


71. See, e.g., Herald v. Seawell, 472 F.2d 1081 (10th Cir. 1972). The Seawell court noted that the economic interests of the shareholders of the Denver Post were not the sole concerns of management, citing such noninvestor interests as the preservation of the high quality of accurate news coverage and the maintenance of favorable employee working conditions. Id. at 1095. The court was undoubtedly influenced by the particular enterprise involved, noting at one point that "a corporation publishing a great newspaper such as the Denver Post is, in effect, a quasi-public institution." Id. See generally Note, Herald Co. v. Seawell: A New Corporate Social Responsibility, 121 U. PA. L. REV. 1157 (1975).
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Both the Berman and Panter reference to fiduciary duty. Lofty scrutiny, however, soon gave way to business judgment, an independent favor of management action. Nurturing the underlying questions that are raised by including such questions as to whether parameters of fair dealing when diverge, and whether the consequences properly favor one interest over another, narrowed its discussion to the legal closure deficiencies. Inasmuch as any and all Gerber shares tendered consider who the intended beneficent litigation were. They were certainly well in excess of a majority, whose litigation protected the interests of assumption that the integrity of A material fact to the remaining Gerber the acquiror's management was so had stated in the tender offer matter. The Gerber shares were aware of illegal foreign whether the speculative value of a shareholders outweighed the interest. Target management chose the issue initiating litigation. Was one or both fiduciary standards? The Berman fairness and conflicting interests, alluding to "[t]he so-called 'business judgment in management to act in the best interest of the corporation."

Only lip service to reference to "high fiduciary duty."

The Panter court followed a set of duties of "honesty, loyalty, good faith, shifting to the presumption favoring an absence of fraud, bad faith, gross

78. 454 F. Supp. at 1319; 486 F. Supp. at 1319.
79. See note 66 supra and accompanying note.
80. The Berman court stated that "[t]he principal dispute between Gerber and... of the disclosure required in connection with operation." 454 F. Supp. at 1319.
81. Id. at 1315.
82. Id. at 1319.
83. See id.
85. Id. at 1194.

See also Steinbrink, Management's Response to the Takeover Attempt, 28 CASE W. RES. L. REV. 882, 909 (1978).


73. In Panter, defendant management countered the plaintiff shareholders' claim of breach of fiduciary obligation by arguing that their actions were required by their fiduciary obligation to the corporation to avoid an antitrust violation. 486 F. Supp. at 1195-94.


76. 486 F. Supp. at 1168 (N.D. Ill. 1980).

77. 454 F. Supp. at 1317. See also Abella v. Universal Leaf Tobacco Co., 495 F. Supp. 713, 714-15 (E.D. Va. 1980), in which a shareholder of Universal Leaf brought a derivative action alleging that directors of Universal breached their fiduciary duties by opposing a hostile takeover attempt by Congoleum. The derivative action was upheld against the claim that disinterested directors could void the suit, but no decision has as yet been reached on the merits. Id. at 717.

tender offer battles give rise to a plethora of similar questions, none of which is readily answered by reference to a fiduciary concept whose breadth makes it inherently incapable of creating priorities among the recipients of its beneficent standards.

Yet the concept survives, even flourishes. Reference to the "fiduciary duties" of management is prominent in recent tender offer litigation. Its popularity is the direct outgrowth of its inherent ambiguity, serving as the simultaneous rallying cry of both plaintiff shareholders and defendant management. Frequency of recitation creates an illusion of substance. The utility of a legal standard must be seriously questioned when the standard is avidly and equally embraced by adversaries. Examination of recent cases illustrates the inadequacy of the fiduciary standard.

Fiduciary arguments are raised under state law, although frequently joined with federal causes of action based on alleged Williams Act violations. In both Berman v. Gerber Products Co. and Panter v. Marshall Field & Co., the most direct cases to date involving shareholder challenges under state law to the validity of management's defensive measures taken against hostile tender offers, plaintiff shareholders' allegations regarding breach of fiduciary duties focused upon litigation undertaken against the acquiring companies. The Berman plaintiffs, for example, alleged that such litigation "was not motivated by legitimate business interests but rather by the self-serving interests of the individual board members."
plethora of similar questions, none of reference to a fiduciary concept whose able of creating priorities among the flourishing. Reference to the "fiduciary in recent tender offer litigation. Its inherent ambiguity, serving as the plaintiff shareholders and defendant creation raises an illusion of substance. be seriously questioned when the stan- by adversaries. Examination of recent the fiduciary standard.

under state law, although frequently based on alleged Williams Act violations. and Panter v. Marshall cases to date involving shareholder validity of management's defensive under offers, plaintiff shareholders' Eary duties focused upon litigation Panes. The Berman plaintiffs, for no "was not motivated by legitimate self-serving interests of the individual

to the Takeover Attempt, 28 CASE W. RES.


entered the plaintiff shareholders' claim of that their actions were required by their fiduciary duties as corporate officers. 486 F. Supp. at 1192.


v. Universal Leaf Tobacco Co., 495 F. shareholder of Universal Leaf brought a action which raised the issue of breach of fiduciary duties by the corporation. The derivative action was upheld by the court, but no decision has as yet

Both the Berman and Panter courts began their analysis with reference to fiduciary duty. Lofty statements of fair dealing and rigorous scrutiny, however, soon gave way in each case to the statutory model of business judgment, an independent standard carrying a presumption in favor of management action. Neither court addressed any of the underlying questions that are raised by reference to the fiduciary standard, including such questions as to whom the fiduciary obligation is owed, the parameters of fair dealing when shareholder and corporate interests diverge, and whether the consequences of management's actions appropriately favor one interest over another. Instead, the Berman court narrowed its discussion to the legitimacy of Gerber's allegations of disclosure deficiencies. Inasmuch as Anderson Clayton was offering cash for any and all Gerber shares tendered, it would have been appropriate to consider who the intended beneficiaries of the corporation's defensive action were. They were certainly not the shareholders, presumably well in excess of a majority, who would have tendered. Arguably, the litigations protected the interests of the nontendering shareholders, on the assumption that the integrity of Anderson Clayton's management was a material fact to the remaining Gerber shareholders. Yet the integrity of the acquiror's management was substantially known—Anderson Clayton had stated in the tender offer materials that some of its directors and officers were aware of illegal foreign payments. The issue, therefore, was whether the speculative value of additional information to nontendering shareholders outweighed the interests of shareholders desiring to tender. Target management chose the interests of the nontendering shareholders in initiating litigation. Was management's choice consistent with fiduciary standards? The Berman court failed to address the questions of fairness and conflicting interests, avoiding such questions entirely by turning to "[t]he so-called 'business judgment rule' [that] leaves relatively wide discretion in management to act in what it considers to be the best interests of the corporation." Only self service was paid to the court's opening reference to "high fiduciary duty."

The Panter court followed a similar pattern, citing first the fiduciary duties of "honesty, loyalty, good faith, diligence and fairness," then shifting to the presumption favoring management's actions "in the absence of fraud, bad faith, gross overreaching or abuse of discretion."

78. 454 F. Supp. at 1319; 486 F. Supp. at 1192.
79. See note 66 supra and accompanying text.
80. The Berman court stated that "[t]he factual history of this case ... indicates that the principal dispute between Gerber and Anderson-Clayton centered around the extent of the disclosure required in connection with Anderson-Clayton's foreign payments operation." 454 F. Supp. at 1319.
81. Id. at 1319.
82. Id. at 1319.
83. See id.
85. Id. at 1194.
As in *Berman*, there was a complete lack of perception of the differing and competing shareholder and corporate interests, or of the fact that management unilaterally made choices among such interests. Instead, the *Panter* court looked at the narrow question of the antitrust fears of Marshall Field management, an examination that was inadequate even on its own terms. One may wonder what reflex reaction caused the *Berman* and *Panter* courts to assert fiduciary standards. One would also find it difficult to give a meaningful content to the fiduciary concept from these or other court opinions.

Even in cases where target management's action has been successfully challenged, the fiduciary concept has served as no more than a gloss on the court's reasoning. In *Condec Corp. v. Lunkenheimer Co.*, target management sought to dilute the effect of a tender offer by issuance of 75,000 shares to a proposed merger partner. The court premised its conclusion against the target board upon a fiduciary standard, citing a "breach of this [fiduciary] duty . . . for directors to make use of issuance of shares to accomplish an improper purpose." The reference to "improper purpose" concerned an issuance of shares in circumstances suggesting a motive of self-perpetuation rather than a valid business objective. In these circumstances, reference by the court to the fiduciary standard was unnecessary because the directors failed to adhere to elementary statutory obligations of management, the issuance of shares having been made "with precipitous haste with insufficient consideration or opportunity for consideration of the interest of the corporation or its stockholders." Reference to fiduciary duty in *Condec* was not only superfluous but created unnecessary ambiguity. It has been argued by one commentator, for example, that even a precipitous sale of shares to thwart an impending takeover, as was done in *Condec*, is in the best interests of the corporation, and thus consistent with a fiduciary duty owed to the corporation.


94. See note, *Herald Co. v. Seawell*, 570 A.2d 358, 363, 230 A.2d 775, 230 A.2d 776 (N.D. Ill. 1969). The court combined references to "that strict impartiality which is required by their [director's] fiduciary duties," *id.* at 712-13, with business judgment concepts upholding management's defensive issuance of shares because "plaintiff has not shown any likelihood that it can prove that the transaction amounts to fraud." *Id.* Whatever the content of the fiduciary model, it scarcely could be regarded as resting narrowly upon the absence of fraud.

98. 43 Del. Ch. 355, 230 A.2d 769 (1967).
102. *id.* at 359, 230 A.2d 775.
103. Lipton states: "Once the directors have properly determined that a takeover should be rejected they may take any reasonable action to accomplish this purpose, including the issuance of shares to a big brother . . . ." Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 123-24 (1979).
lack of perception of the differing corporate interests, or of the fact that they are among such interests. Instead, the question of the antitrust fears of domination that was inadequate even that reflex reaction caused the Berry standards. One would also find fault to the fiduciary concept from the moment's action has been successfully served as no more than a gloss on the v. Lankenheimer Co. target of a tender offer by issuance of shares. The court premised its decision on a fiduciary standard, citing a directors' duty to make use of issuance power. The reference to "improper purposes in circumstances suggesting a valid business objective." In part to the fiduciary standard was to adhere to elementary statutory use of shares having been made consideration or opportunity for corporation or its stockholders. was not only superfluous but been argued by one commentator, of shares to thwart an impending vote of the corporation, owed to the corporation. 

by the use of uncertain terminology is 11 F. Supp. 706 (N.D. Ill. 1969). The definiteness which is required by their business judgment concepts upholding cause "plaintiff has not shown any intent to fraud." Id. Whatever the concern was regarded as restocking narrowly upon the

v. Wachtel, 25 Del. Ch. 247, 256, 17 TENDER OFFERS

management-oriented argument asserts its own answer to the original enigma—to whom is the fiduciary duty, however defined, owed?

Perhaps the most frequent attempt to give content to the fiduciary concept is the "primary purpose" test—were the defensive measures taken primarily for a legitimate corporate purpose or for the improper, narrow purpose of perpetuation of management control? It takes little imagination, however, for target management of large, multidimensional corporations to elevate arguably plausible corporate concerns as the "primary" motivation for opposing an unsolicited tender offer. Egregious circumstances may offer relatively easy cases. But what was the primary purpose of Marshall Field management in pursuing defensive litigation based principally on an antitrust opinion from their own counsel? Or what was the purpose of McGraw-Hill management who professed substantial concern over the editorial independence of their publications? Even if perpetuation of control is found to be one purpose of management, defensive measures may be justified, we are told, if other corporate purposes are also served. When does a purpose become a valid business objective. In circumstances suggesting a . . . tender offer." Royal Indus., Inc. v. Monogram Indus., Inc. [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,863, at 91,136 (C.D. Cal. 1976). See note 57 supra; text accompanying note 77 supra; text accompanying note 58 supra. For the purpose of a tender offer by issuance of shares to thwart an impending vote of the corporation, owed to the corporation. 


95. See note 57 supra; text accompanying note 77 supra. See also Petty v. Pennrench Papers, Inc., 347 A.2d 140, 145 (Del. Ch. 1975) (redemption of shares in sufficient percentage to remove an existing threat to management's control).


97. McGraw-Hill management strenuously argued that its publication, Business Week, would suffer a loss of editorial objectivity in the event of an American Express takeover. Wall St. J., Jan. 16, 1979, at 5, col. 1. In this context, to whom is the "fiduciary" duty owed, and with what consequences? Management clearly sensed a primary duty to the integrity of one of its principal corporate divisions. Shareholders who would be chased out by acceptance of the offer, and therefore would have no continuing interest in the editorial objectivity of Business Week, regarded their interests at the appropriate focus. See id., Feb. 20, 1979, at 14, col. 2, describing an eleven hour effort by certain McGraw-Hill shareholders to seek shareholder input, led principally by arbitrageurs who had acquired substantial blocks after American Express' initial announcement. The efforts did not reach fruition, although at least five shareholder class action suits were eventually filed against McGraw-Hill based on management's impeding the American Express offer. Id. Mar. 2, 1979, at 4, col. 5. Yet even within the shareholder group there may have existed a sizeable block that agreed with management, as well as those still undecided. How is the fiduciary concept to be applied to these widely varying interests? With regard to the Business Week question, does the fiduciary concern of management include reasonable efforts to overcome the problem so that the offer to shareholders may go forward? These and numerous other issues surfaced from this struggle, and it is readily apparent that notions of primary motivation, fidelity, fair dealing, and equally amorphous concepts are totally inadequate as dispositive bases for siting through competing interests.

primary? In this metaphysical realm, concepts are not easily defined. Thus one commentator has suggested that “the primary purpose test is perhaps somewhere between the 'business judgment' and 'fairness' tests of state law.”

An alternative standard for giving content to the fiduciary concept is reflected in Klaus v. Hi-Shear Corp., the court requiring a “compelling business purpose” to justify the issuance of shares— in Klaus, the establishment of an ESOP—as a defense measure during a control battle. Even the “compelling business purpose” standard, while perhaps appearing more definitive than other tests, creates broad areas of subjectivity and lack of guidance. As described by the Klaus court, the test “suggests a balancing of the good to the corporation against the disproportionate advantage to the majority shareholders and incumbent management.” Notions of “balancing,” “good to the corporation,” and “advantage... to incumbent management” offer scant evidence of clarity.

The lack of substance in the fiduciary perspective is further illustrated by the efforts of both the Berman and Panter courts to infuse the concept with content through the so-called “business judgment rule.” The fiduciary ideology is grounded on notions of loyalty, fair dealing, and avoidance of conflict. This is far removed from the judicially-created presumption favoring the business judgment rule as the courts' standard was taken from the language of the California Supreme Court in Jones v. H.F. Ahmanson & Co., 80 Cal. Rptr. 592, 599 (1969), dealing with the obligations of controlling shareholders.

In Fischel, Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers, 57 Tex. L. Rev. 1 (1978), the author argued for universal adoption of the “compelling business purpose” test as “more consistent with the inevitable conflict of interest faced by management in a contested control situation. Adoption of this test would subject many defensive tactics to claims of breach of fiduciary duty, a radical departure from much of existing law.” Id. at 44. It is difficult to accept the author's implication that clarity is obtained by the confluence of “compelling business purpose,” burden of proof, and the fiduciary duty context, for defensive measures are frequently defended on plausible business and fiduciary grounds. The content of these ambiguous standards is what creates the problems of application, and perceptions may vary among courts just as they vary among management and shareholders. It would therefore be preferable to consider standards that avoid such inherently ambiguous terminology.

99. A. FLEISCHER, supra note 18, at 86-87.
100. The “primary purpose” test has been further criticized with regard to the ambiguity of the term “primary” (is the primary motive that which is stronger than all other motives combined, or simply the strongest of any individual motive?) and the uncertainty of determining motives when board members act collectively, each member perhaps responding to a different influencing factor. See Gellon & Sebastian, Reevaluating the Duties of Target Management in a Hostile Tender Offer, 60 B.U. L. Rev. 457-45 (1980).
101. 528 F.2d 225 (9th Cir. 1975).
102. Id. at 253-54. It is not coincidental that Klaus is a Ninth Circuit decision, for the court's standard was taken from the language of the California Supreme Court in Jones v. H.F. Ahmanson & Co., 80 Cal. Rptr. 592, 599 (1969), dealing with the obligations of controlling shareholders.
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104. 528 F.2d at 234.
105. See text accompanying notes 78-87 supra.
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presumption favoring the business decisions of management so long as
such decisions are made “in the absence of fraud, bad faith, gross over
reaching or abuse of discretion.”110 The distinctions between the two
create differing burdens of proof and, depending upon which standard is
selected, the burden created may be dispositive of particular actions.107
Yet, precisely because the fiduciary concept lacks inherent guidelines,
courts are prone to a confusion of terms and an implicit, perhaps even
unknowing, rejection of fiduciary ideology.108

Definitional content to fiduciary concepts is impeded in part because
a tender offer is directed to target shareholders in their individual
capacities. There is no clearly defined role for target management
analogous to merger or sale of asset transactions.109 Thus courts and
commentators are left groping for substance. Notions of good faith,
honesty, loyalty, and other virtues inherent in the fiduciary model are
not readily translatable into decisional standards in the complexities of
hostile tender offer struggles. The result predictably has been polariza
tion of opinion, ranging from the argument that directors breach their
fiduciary duty whenever they aggressively impede an offer from reaching
shareholders110 to the position that “the ever-present fiduciary obligation
of management . . . [justifies] taking such reasonable action as they deem
appropriate to frustrate or delay an unsolicited takeover attempt.”111

107. The distinction and effect upon results are illustrated by the recent Second Cir
decisions in Treadway Cos. v. Care Corp., Ltd., FED. SEC. L. REP. (CCH) ¶ 97,803 (2d
Cir. 1980), reversing the district court's injunction against the voting of shares issued by
Treadway during the midst of a control battle with Care. Id. at 98,213. The district court
focused upon Treadway management's fiduciary duty to shareholders and enjoined the
issued shares from voting in light of its conclusion that “Treadway's incumbent manage
ment was primarily motivated by its desire to stave off a Care takeover bid.” 490 F. Supp.
668, 687 (S.D.N.Y. 1980). The Second Circuit found that the lower court "did not apply
the standard business judgment analysis" and reversed, based upon a failure of plaintiff
to overcome the presumption that directors "have acted properly and in good faith." FED.
SEC. L. REP. (CCH) ¶ 97,803, at 98,218-11; see note 112 infra. Similarly, in Crouse-Hinds
Co. v. Internorth, Inc., No. 80-7865 (2d Cir. 1980), an injunction against certain defen
sive measures was reversed based upon the appellate court's reallocation of the burden of
proof to plaintiffs rather than target company directors.
108. In Brundney, Fiduciary Ideology in Transactions Affecting Corporate Control, 65
Mich. L. Rev. 259 (1966), the author points out that Delaware courts, in considering the
repurchase of shares by corporations during control fights have, in the author's opinion,
eronously slipped into business judgment standards rather than viewing the issues
within the fiduciary context of a duty of loyalty. Id. at 275-77.
109. The Williams Act permits but does not require target management to issue a
statement recommending or opposing the tender offer. § 14(d)(4), 15 U.S.C. § 78n(d)
(1976). Limited authority is given to target managers by some state anti-takeovers
statures permitting management to invoke state administrative review. See, e.g., Ohio
110. A Brief Against Managements that Fight Off Tender Offers, FORTUNE, Mar.
12, 1979, at 159.
111. Steinbrink, Management's Response to the Takeover Attempt, 28 CASE W. RES.
Competing arguments often are based on wholly discrete perceptions of the proper object of management’s “fiduciary” concerns. Perceptions vary as well among courts, resulting in decisions that lend neither guidance nor substance to already ambiguous standards.\(^\text{112}\)


A distinct perspective for evaluation of defensive measures centers upon statutory provisions that hopefully avoid the ambiguities of common-law and equity doctrines by defining the specific roles of management and shareholders. This perspective, however, embraces several independent statutory bases. Thus, in common with the problems raised by fiduciary concepts, varying statutory provisions support arguments of both challengers and defenders of defensive measures. Moreover, resort to a statutory perspective is further clouded by the imprecision of broad statutory language, as well as by a lack of clear delineation to determine which of several potentially conflicting statutory provisions have priority in application.

A starting point for some courts and commentators is the provision found universally in statutory codes granting to directors broad discretionary authority to manage the conduct and affairs of the corporation.\(^\text{113}\)

\(^{112}\) The problems in application of ambiguous standards are reflected in Treadway Cos. v. Care Corp., FED. SEC. L. REP. (CCH) \($\$\) 97,603 (2d Cir. 1980), in which the perceptions of management motivation differed sharply between the district court and court of appeals. The district court, noting the haste by which a substantial block of shares was issued to a third party, the unusual terms of the transaction mandating the eventual redemption of such shares, and management’s obvious efforts to avoid a shareholder vote on the issuance, concluded that “Treadway’s incumbency management was primarily motivated by its desire to stave off a Care takeover bid.” 490 F. Supp. at 687. The Second Circuit, however, reversing the lower court’s issuance of an injunction, found “the critical fact, in our view, is that the Treadway board . . . in approving the stock sale . . . were moving Treadway toward a business combination with Fair Lanes.” FED. SEC. L. REP. (CCH) \($\$\) 97,603, at 98,212. The Second Circuit’s opinion suffers from several weaknesses compared to the extensive discussion of issues in the lower court. The appellate court failed to address the unusual terms of the issuance, such as mandatory redemption, and dismissed in a cursory and inadequate footnote the problem of dilution of minority shares that abrogated a statutorily created veto right. Id. at 98,211-12 n.48. Moreover, if the court of appeals was prepared to accept the issuance as a first step toward a business combination, a matter of substantial shareholder concern and statutory rights, the court was unaccountably silent regarding the district court’s finding that “Treadway has consistently structured its proposed transactions so as to avoid shareholder scrutiny.” 490 F. Supp. at 686. If business combination was a major purpose, then why is not shareholder scrutiny appropriate? The court would have been better served had it kept in mind its earlier admonishments in Butler Aviation Inc. v. Comprehensive Designers, Inc., 425 F.2d 942 (2d Cir. 1970), that “[w]hile courts should rigorously enforce the policy of honesty and fair dealing prescribed by federal securities legislation, they must guard against the risk that, at the instance of incumbent management, they may be frustrating informed shareholders from doing what the latter want.” Id. at 945.

\(^{113}\) The role of corporate counsel in raising questions of potential conflict that are not apparent to the management of the corporation is not uniformly regarded as a duty. See, e.g., MAYER, deciding to accept the issuance as a first step toward a business combination, a matter of substantial shareholder concern and statutory rights, the court was unaccountably silent regarding the district court’s finding that “Treadway has consistently structured its proposed transactions so as to avoid shareholder scrutiny.” 490 F. Supp. at 686. If business combination was a major purpose, then why is not shareholder scrutiny appropriate? The court would have been better served had it kept in mind its earlier admonishments in Butler Aviation Inc. v. Comprehensive Designers, Inc., 425 F.2d 942 (2d Cir. 1970), that “[w]hile courts should rigorously enforce the policy of honesty and fair dealing prescribed by federal securities legislation, they must guard against the risk that, at the instance of incumbent management, they may be frustrating informed shareholders from doing what the latter want.” Id. at 945.

\(^{113}\) Del., Code Ann. tit. 8, § 141 (1978); MODEL BUSINESS CORPORATION ACT § 55 (1975). In Treadway, challenging Treadway’s defensive issuance of shares in an effort to dilute Care’s holdings and prevent an eventual Care takeover, the court noted that “the
Within that grant of authority, it is argued, there can be no more important judgment for directors than to consider the future viability and long-term interests of the corporation. Thus, it is argued, it makes little sense to permit directors to make decisions regarding day-to-day business operations but preclude them from taking appropriate action in instances where they perceive that corporate welfare is threatened by a potential takeover. The natural extension of such reasoning is to apply the "business judgment rule" to takeover defenses in the same manner the rule applies to other operational decisions of management. As noted earlier, the result of applying the rule may be a substantial deference to the presumed business expertise of management, a deference overcome only by gross overreaching or fraud. In *Northwest Industries, Inc. v. B.F. Goodrich Co.*, a derivative action based upon target management's hastily arranged issuance of shares to a friendly third party was dismissed because "management has the responsibility to oppose offers which, in its best judgment, are detrimental to the company or its stockholders." Similarly the directed verdict in *Panter* was based on "a presumption of sound business judgment . . . . which courts will not disturb if any rational business purpose can be attributed to their [directors'] decisions." The business judgment rule may offer greater certainty than the fiduciary model, but it suffers from equally severe limitations for evaluative purposes. Rarely will a target corporation, particularly one advised by knowledgeable counsel, be unable to devise a plausible business purpose starting point in our analysis is the business judgment rule," citing New Jersey's statutory delegation of managerial authority to the board of directors. *Fed. Sec. L. Rep. (CCH) 97,605, at 98,210.*

Lipton comments:

A takeover bid is no different than any other fundamental business decision . . . . As long as matters such as capital expenditures, discontinuances of businesses and bankruptcy are for the reasonable business judgment of the directors, there is no reason to put acceptance or rejection of a takeover bid on any different basis.


See text accompanying notes 78-79 supra.

*See 486 F. Supp. at 1194.*


pose for its conduct. The Panter court accepted the legitimacy of defensive acquisitions even though none of the acquisitions was pursued prior to the initiation of takeover efforts. The court also readily accepted management’s decision to undertake defensive litigation. Judicial deference to a presumed business judgment is starkly exhibited by the court’s acceptance of the argument that a “business judgment” was made by Marshall Field directors when they concluded that the proposed Carter Hawley Hale offer justified antitrust litigation. The directors’ conduct in this regard exhibited a determined unwillingness to consider financial and other corporate benefits of the proposed merger and a marked eagerness to embrace antitrust concerns to support their opposition. If the facts in Panter support a “business judgment” as to

be unreasonable to expect counsel to undertake an independent investigation of management motivations. Nor would it be reasonable to demand that counsel independently evaluate whether the tender offer is advantageous for its corporate client. Reliance will necessarily be placed upon management expertise. Is reliance reasonable in a hostile tender offer context? The issue is deserving of careful study and evaluation. See Gary, Professional Responsibility in the Practice of Corporation Law: The Marky Divide Between Right and Wrong, PROFESSIONAL RESPONSIBILITY OF THE LAWYER 27, 29-30 (N. Galston ed. 1972). It is appropriate to note that adoption of standards proposed by the court of control analogue would ameliorate a substantial aspect of the problem by reducing the area of unilateral management activity.

120. See Lynch & Steinberg, supra note 74, at 926 (“Besieged with business reasons justifying the use of a maneuver, a court applying the business purpose test frequently finds itself compelled to legitimize the corporate conduct.”). See also U.S. Smelting v. Clevice Corp., Fed. Sec. L. Rep. (CCH) ¶ 92,691 (N.D. Ohio 1968), in which the court noted the serious time pressures on target management and approved the hasty decision as consistent with valid business judgment in light of the exigencies of the situation.” Id. at 95-04.
121. 486 F. Supp. at 1194; see note 230 infra.
122. 486 F. Supp. at 1194.
123. Id.
124. Although both Carter Hawley and Marshall Field operated stores throughout the country, antitrust concerns involved only the Chicago area, focusing upon one store operated by Carter Hawley in Northbrook Court, potential competition with regard to two future sites, and existing competition in the retail sales of books. Id. at 1188. Management’s judgment was based upon an opinion of counsel from the company’s law firm in response to a request from Angelo Arena, Marshall Field’s president. Id. Although over three months passed between the date of the opinion and Carter Hawley’s eventual withdrawal, no further consideration was made of the antitrust issues despite the facts that: (a) the issues were fairly narrow in scope and therefore potentially resolvable; (b) Carter Hawley advised Marshall Field of its willingness to sell the Northbrook store, the primary source of concern, id. at 1180; (c) Marshall Field management should have been aware, and at least one director was so advised by Carter Hawley, that the FTC had approved prior department store mergers, including one involving the leading company in the industry, Deposition of Edward McCormick Blair, Sept. 29, 1978; and (d) Marshall Field management was aware that Carter Hawley’s attorneys had opined “that there is no antitrust deterrent” to the potential merger. 486 F. Supp. at 1188. The potential merger, apart from antitrust concerns, held substantial promise for Marshall Field and its shareholders. It appears that at least Arena believed that advantages were present. Deposition of Angelo Arena, Oct. 2, 1978 (“There is some benefit to be accrued by pooling of management and pooling of special professional people in a bigger organization . . . .

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the antitrust concerns, it is by directors to any problem “business judgment.” The Panter court creates for def the much-criticized Chefs v. repurchase of shares.

Apart from validating a judgment rule” creates a pr proper governance situation shareholder control. Thus, impede, and are therefore right to determine the man. The division of ownership an constricted the sphere of share stakes of shareh aut statutory authority in manage create an ongoing authority management. A tender offer shareholder to acquire suffic available for a midstream perspective, constraints upon tioned, for there is no comp authority to directors over a shares.

And I don’t doubt that those points said as being reasonable . . . .”). In additional efforts to determine the existing problems could be readily in any direction was made. Deposition that the gave no consideration to Carto be sold, being satisfied to rest totally, it is difficult to perceive or accept a lack of any effort to apply bus justified by, the long-standing co commitment “expressed in many tim as policy.” 486 F. Supp. at 1177.
125. 41 Del. 494, 198 A.2d 548 Shares—Are There New Overtonal?
128. See id. § 141(c) (Supp. 1978)
129. See Fla. STAT. § 607.064(1875). Limiting or denying the adi tional defensive measure that may be were recently adopted by the Amer shareholders. Wall St. J., July 28, 1978.
130. In Maldonado v. Flynn, 41 aplicity of the business judgment
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...the antitrust concerns, it is difficult to imagine what minimum attention by directors to any problem will not constitute a judicially protected "business judgment." The deference accorded management by the Panter court creates for defensive litigation an aura of legitimacy that the much-criticized Cheffs v. Mathes decision creates for the defensive repurchase of shares.

Apart from validating unwarranted judicial deference, the "business judgment rule" creates a presumption for management action in corporate governance situations traditionally and statutorily entrusted to shareholder control. Thus, it has been argued that defensive measures impede, and are therefore contrary to, the shareholders' fundamental right to determine the management structure of their corporation. The division of ownership and management in modern corporations has constricted the sphere of shareholder action, with the rights to elect and alter management being perhaps the last and most fundamental vestiges of shareholder authority. These rights, coupled with the statutory authority in many states to call special shareholder meetings, create an ongoing authority in shareholders to determine corporate management. A tender offer represents an opportunity for a single shareholder to acquire sufficient shares to invoke the statutory provisions available for a midstream change in management. Viewed in this perspective, constraints upon shareholder action must be seriously questioned, for there is no compelling basis for preferring a grant of statutory authority to directors over a distinct grant of statutory authority to shareholders. And I don't doubt that those points were valid, so I accepted the bulk of what Phil Hawley said as being reasonable ... 

"Besieged with business reasons for the purpose test frequently conduct.") See also U.S. Smelting, 11 (N.D. Ohio 1968), in which the court approved the hasty decision of counsel from the company's law firm that advantages were there is no promise for Marshall Field to sell the Northbrook store, potential competition with regard to the retail sales of books. Id. at 1180. And I don't doubt that those points were valid, so I accepted the bulk of what Phil Hawley said as being reasonable ... field operated stores throughout the Chicago area, focusing upon one store, potential competition with regard to the retail sales of books. Id. at 1180. And I don't doubt that those points were valid, so I accepted the bulk of what Phil Hawley said as being reasonable ...
The foregoing conflict of statutory authority is clouded by yet another statutory provision cited for target management intervention, namely those provisions requiring director consent to statutory merger. Application of the provision is premised on the fact that a successful tender offer for a controlling interest is essentially equivalent to a merger, particularly when the offer is the first step in an eventual two-step merger process. The merger analogy is not for the purpose of requiring a formal director vote, but rather to justify director consideration of the merits of the proposed tender offer and to thereafter take actions consistent with their conclusions. This argument has shades of the de facto merger concept, seeking application of statutory provisions when the effect, but not the procedure, of the transaction is arguably governed by statutory policy. The merger analogy for tender offers seeks to justify director response, while the de facto merger doctrine is designed to permit shareholder involvement.

Yet each of the arguments is derived by which to evaluate defenses guides or criteria to determine whether a board is dissatisfied with the de facto merger doctrine is designed to permit shareholder involvement.

of a derivative action. The business judgment rule was regarded as a "limitation of liability" and "not an independent grant of authority to the directors to dismiss derivative suits." Id. at 1262. Accord, Maher v. Zappas Corp., 490 F. Supp. 348, 551-54 (S.D. Tex. 1980); Abella v. Universal Leaf Tobacco Co., 495 F. Supp. 715, 717 (E.D. Va. 1980). Contra, Genuzer v. Cunningham, 498 F. Supp. 682, 688 (E.D. Mich. 1980). The Maldonado court was influenced by the ability of "an impartial tribunal, and not a committee appointed by the alleged wrongdoers," to decide the merits of the particular claims. 413 A.2d at 1265. Relevance of these decisions to the tender offer context is not immediately apparent, but the opinions represent a possible crack in the business judgment rule in instances where conflicting claims of shareholders and management may be readily resolved through the judicial process. Unilateral defensive measures by target management may thwart a tender offer without shareholder input, despite the fact that a tender offer, like a derivative action, is a matter directed to the decisionmaking by individual shareholders. Regardless of the tender offer as analogous to a collective sale of control, the judgment of tendering shareholders should not be subordinated to a presumption that management's "business judgment" should prevail. To do so without the weighing process of adjudication would create a burdensome restraint on the alienability of minority shares not present in transfers by dominant shareholders. It will be interesting to observe whether the reasoning in the Maldonado and Maher opinions is expanded to contexts other than derivative actions.

Frequently the tender offer seeks only to acquire working control to achieve an eventual merger between the acquiring company and target. Thus, it is argued that tender offers should not subvert a major role of management in merger transactions, i.e., bargaining for consideration, a role that results in a more favorable return to shareholders than would ensue if acquirors were able to deal with the shareholders on an individual basis. See Harrel, Schmidt & Davis, Why Corporate Directors Have a Right to Resist Tender Offers, 61 CHI. B. REC. 152, 153 (1979). This argument gives economic justification to the involvement of directors under a merger equivalency theory. Lipton, supra note 93, at 116.

Thus, again there are effects of mergers are effected as a result of a veto power, therefore, what defensive measures would be appropriate under a merger analogy? Since mergers are effected through shareholder action following proxy solicitation, is management's role limited to a proxy-type disclosure? The latter role would be consistent with the Williams Act, and indeed it has been argued that the Act has limited management to communications alone. Thus, again there are competing, independent statutory arguments raised in support of, or in opposition to, management involvement. Moreover, the merger analogy offers little guidance where the tender offer is for less than a majority of the shares, or when the acquiring company has no announced intention of ultimate merger.

Business judgment, corporate governance, and merger analogies are arguments based upon state corporate codes. At the federal level, and rounding out the diverse statutory elements, is the Williams Act. The lack of reference in the Williams Act to specific defensive measures has fueled arguments on both sides of tender offer struggles regarding the effect of the Act upon evaluation of such measures. For example, it is argued that the principal purpose of the Act, citing legislative history, is to create a balancing between the target company and the acquirer so that shareholders of the target company are not met with the pre-Williams Act situation of having to make immediate decisions based upon relatively

134. A board veto may not be overridden by shareholder vote. The remote possibility exists, of course, that a shareholder revolt will remove and replace the board.

135. Lynch & Steinberg, supra note 74, at 55-58; see text accompanying note 139 infra.

136. See notes 1, 8 supra.

137 Support for the argument that the Williams Act limits target management discretion is drawn from the remarks of Senator Harrison Williams, sponsor of the legislation:

'This measure is not aimed at obstructing legitimate takeover bids. In some instances, a change in management will prove a welcome boon for shareholders... and... it may be necessary if the company is to survive. I have taken extreme care with this legislation to balance the scales equally to protect... corporation, management, and shareholders... Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.

113 CONG. REC. 854-55 (1967).
little information. Thus the balancing is achieved through disclosure mechanisms and minimum time frames, one purpose of the minimum time frames being to permit target management, should they so desire, to provide shareholders with additional information, recommendatory, and arguments respecting the merits of the offer. From this perspective, the permissible activity of target management is fairly limited, and is designed primarily to provide information to shareholders so that they may make an intelligent decision about whether to tender their shares. Any other management action that interferes with the shareholder decision-making process creates a disturbance in the balance of the Williams Act and, it is argued, is impermissible conduct under that Act.

Equally plausible, however, is the argument that the disclosure mechanisms and various time frames provided for in the Act are not consistent with, but rather support, aggressive defensive measures by target management designed to impede the takeover effort. From this perspective, the Williams Act provides restraints upon the acquiring company to a much greater degree than might be imposed upon target management. Seen primarily as a protective measure against acquiring companies, the Williams Act is thus viewed as neutral to the taking of defensive measures. The neutrality of the Act is silent support for defensive tactics, as Congress arguably chose to regulate only disclosure aspects and not other defensive activities of target management.

These alternative arguments mask a more serious weakness within the Williams Act context: the Act’s provisions are not triggered unless and until there is a tender offer or a public announcement of an intended offer. Where scorched earth tactics prevent a proposed offer from reaching fruition—as is generally their intent—there may be substantial doubt whether the threshold jurisdictional elements of the Williams Act have been met with narrow judicial approaches that denied Williams Act claims. The jurisdictional problem—possibility that a private cause of action under the Williams Act is thus viewed as neutral to the taking of defensive measures. The neutrality of the Act is silent support for defensive tactics, as Congress arguably chose to regulate only disclosure aspects and not other defensive activities of target management.

The jurisdictional problem—possibility that a private cause of action under the Williams Act is thus viewed as neutral to the taking of defensive measures. The neutrality of the Act is silent support for defensive tactics, as Congress arguably chose to regulate only disclosure aspects and not other defensive activities of target management.

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139. Lynch & Steinberg, supra note 74, at 973.
141. Lewis v. McGaw, 619 F.2d 192, 195 (2d Cir. 1980), cert. denied, 49 U.S.L.W. 3332 (Nov. 3, 1980) (No. 79-2054); Panter v. Marshall Field & Co., 486 F. Supp. 1188, 1190 (N.D. Ill. 1980); Berman v. Gerber Products Co., 454 F. Supp. 1310, 1318 (W.D. Mich. 1978). It may be questioned whether these decisions, which effectively deny Williams Act application where defensive measures have successfully impeded a tender offer, do not take too narrow a view of the remedial purposes of the Act. In Panter, for example, where the court held that the Act did not apply because Carter Hawley’s proposed tender offer had not commenced or been announced in a sufficiently unconditional manner, 486 F. Supp. at 1190-91, the effect upon the market of Carter Hawley’s announced intentions was substantially similar to what the market reaction would have been if the offer had been unconditionally commenced. A flurry of trading activity increased the price of Marshall Field stock over 50%, and investor decisions were being made by numerous shareholders and arbitrageurs in light of the pending tender offer. Where scorched earth tactics prevent a proposed offer from reaching fruition—"as is generally their intent"—there may be substantial doubt whether the threshold jurisdictional elements of the Williams Act have been satisfied. Shareholders of McGraw-Hill, Gerber Products, and Marshall Field were all met with narrow judicial approaches that denied Williams Act claims.

142. See Royal Indus., Inc. v. Monopolies Commission, 479 F.2d 66 (5th Cir. 1973).
The jurisdictional problem, however, pales in comparison to the possibility that a private cause of action has not been created by the Williams Act. Shareholders conceivably will be without any Williams Act basis to challenge defensive measures, either on grounds of disclosure or on broader aspects of fraud or denial of "fair opportunity." The Supreme Court in *Pipe v. Chris-Craft Industries* carefully limited its opinion to denying standing to tender offerors suing for damages from target corporations, but recent denials by the Court of implied private causes of action in other securities law contexts raise doubt about whether an implied right for private actions under the Williams Act by aggrieved shareholders will in fact be upheld.

As the foregoing discussion indicates, the statutory perspective contains elements that both justify and challenge unilateral defensive actions by target management. While not suffering from the inherent ambiguities of fiduciary concepts, the statutory approach fails because of conflicting emphases placed upon alternative statutory provisions. Here too, the and arbitrageurs in light of the pending tender offer struggle. *Id.* at 1182-84. It seems to strain logic under these circumstances to suggest that the disclosure and antidilution provisions of the Williams Act should not be applicable. The narrow readings of the Williams Act in this regard are in marked contrast to the more expansive interpretations found in other cases seeking to define the notion of tender offer. *See, e.g.*, Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979).


144. *Id.* at 47.


147. A suggestion that combines statutory and fiduciary perspectives would apply the business judgment presumption to decisions made by "outside" directors, and a presumably higher, "fairness" standard to decisions made by an insider-dominated board. Gelfond & Sebastian, *Reevaluating the Duties of Target Management in a Hostile Tender Offer*, 60 B.U. L. REV. 403, 447 (1980). The dual approach is based on the premise that "outside" directors are more likely to reach an objective decision than insiders, a premise that may well be questionable even in a control context. *See Solomon, Restructuring the Corporate Board of Directors: Fond Hope—Faint Promise*, 76 Mich. L. REV. 581, 590 (1978). Moreover, use of the business judgment standard in tender offer battles is problematic. The authors noted as much when they concluded in an earlier portion of their article that "this standard of culpability [business judgment rule] ignores both the realities of corporate control contests and the balances adopted in related areas..."
difficulty of developing a standard for evaluating defensive measures lies not in the illegitimacy of any particular argument, but rather in the diversity that exists within the framework of the evaluative effort.

3. Economic Interests

If fiduciary concepts and statutory constructs are unable to provide firm guidance to evaluate defensive measures, perhaps economic theory can fill the void. The economic approach views the several actors in a tender offer battle from the perspective of economic interests that each of those actors is seeking or is charged with protecting.

Arguments favoring active target management intervention stress that corporate directors are much more qualified than shareholders to make judgments affecting the corporation’s long-term economic viability. Directors are regarded as possessing greater ability and objectivity to consider the long-range concerns raised by a tender offer, including the interests of employees, suppliers, and other groups that may be materially affected. Shareholders, on the other hand, are seen as having a narrower interest, namely, their particular investment in the target’s stock. This limited perspective inevitably compels shareholders, it is argued, to favor immediate, favorable, short-term returns, and to disregard long-term consequences to the corporation, nontendering shareholders, and other interests. This argument is buttressed by the frequent presence of arbitrageurs and other speculators, who often compose a significant percentage of shareholders during a tender offer fight and whose interests are undeniably short-term. Some commentators, so taken by the perceived dichotomy between management’s high road and shareholders’ low road, regard it as a matter of “national policy” that directors be allowed to inter-

of corporate law.” Gelfond & Sebastian, supra, at 434. Finally, the suggested approach assumes ready application to specific defensive measures. Inherent ambiguities within business judgment and fairness standards, however, provide little guidance to judge the validity of actual measures.

148. Steinbrink, Management’s Response to the Takeover Attempt, 28 CASE W. RES. L. REV. 882, 891 (1978). Regarding the shareholder’s interest in a corporation as a monetary one limited solely to the value of his stock leads to the argument that the social and broad economic repercussions of a shift in control is too important a decision to leave to shareholders motivated solely by personal concerns. Lipton, supra note 39, at 115-18. Although shareholders interested primarily in long-term, low-risk growth may constitute a bloc favoring defensive measures, it may reasonably be presumed that in most hostile tender offer situations the pro-management block represents an insubstantial minority. Indeed a major factor in considering the prospects of a tender offer is the dispersal of shares of the target company and management’s lack of control of sizeable blocks.

149. The role of arbitrageurs in tender offers is discussed in O’Boyle, Changing Tactics in Tender Offers, 25 BUS. LAW. 865, 865 (1970), and Rubin, Arbitrage, 32 BUS. LAW. 1315, 1315 (1977). Because arbitrageurs may constitute a pressure group upon management to accept or at least not impede the tender offer from going forward, it is important from a tactical standpoint that target management act with sufficient speed and force to discourage substantial arbitrage activity.

150. One commentator stated: Rather than forcing directors to choose between shareholders, national policy requires a role for the shareholders and its constituencies in addition to Lipson, supra note 95, at 115.


152. A more fundamental position is to recognize the broad disparity between “own vs. other-owned” analyses as early as 1982 by A. B. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 61 (1973).

153. The role of arbitrageurs in tender offers is discussed in O’Boyle, Changing Tactics in Tender Offers, 25 BUS. LAW. 865, 865 (1970), and Rubin, Arbitrage, 32 BUS. LAW. 1315, 1315 (1977). Because arbitrageurs may constitute a pressure group upon management to accept or at least not impede the tender offer from going forward, it is important from a tactical standpoint that target management act with sufficient speed and force to discourage substantial arbitrage activity.

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vene in the tender offer process. Indeed, it has been suggested that the social and economic consequences of a relatively unbridled tender offer movement are matters of such moment that neither shareholders nor management should be entrusted with major economic decisions, but that Congress should establish a more pointed public policy limiting tender offer efforts. Such perspectives are of course completely antithetical to any notion of a substantial shareholder role in the decisionmaking process.

A related economic argument favoring management is that management is most capable of determining whether the acquiring company is offering sufficient value for the target shares. Although tender offers may be at substantial premiums over market price, it is argued that the "inherent values" of the shares—presumably not reflected on the market—may be higher yet. Defensive measures are thus justified as a means of improving the offering price, assuming a willingness to compromise on share value by acquiring and target management.

150. One commentator stated:

Rather than forcing directors to consider only the short-term interests of certain shareholders, national policy requires that directors also consider the long-term interests of the shareholders and the company as a business enterprise with all of its constituencies in addition to the short-term institutional shareholders.

Lipton, supra note 93, at 115.


152. A more fundamental position endorsing management priority may be based on the broad disparity between "ownership" and "control" of a corporation, thoroughly analyzed as early as 1932 by A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 220-32 (1932). If in fact corporations may be best viewed "as an intricate, centralized, economic-administrative structure run by professional managers who hire capital from the investor," Manning, Book Review, THE AMERICAN STOCKHOLDER, 67 YALE L.J. 1477, 1489 (1958), any shareholder-investor role in control or other long-term economic decisions would be anomalous. The investor role would be no different than that of lenders or long-term creditors, neither of which groups are regarded as entitled to cause a change in corporate control. The argument would be stronger, however, had the disparity of ownership and control resulted during the past 50 years in any statutory movement to restrict shareholder suffrage or the ability to remove directors. In fact the recent trend has been opposite, witness the increased SEC emphasis upon notions of "corporate democracy" and state statutory provisions permitting shareholder removal of directors without cause. The attitude inherent within the continuing role for shareholders is that shareholder ability to remove management, however limited or infrequently exercised, remains a positive check upon management excesses and abuse of power. Manning, for example, having recognized the investor role of shareholders, also noted that "powerful arguments can be advanced to justify the corporate 'raid' as a mechanism for reallocating frozen assets." Id. at 1488-89. No "raid" could be effectively accomplished without shareholder cooperation.


154. Harzel, Schmidt & Davis, Why Corporate Directors Have a Right to Resist Tender Offers, 61 CHI. B. REC. 152, 154 (1979); see text accompanying notes 242-45 infra (regarding defensive measures assertedly undertaken by reason of price inadequacy).
Accordingly it has been argued that the proper test for judging defensive actions is "whether the defensive action is reasonably calculated to benefit shareholders in a market sense, that is, higher values for their securities." This argument suffers from an inability to distinguish good faith efforts to determine "inherent value" from the employment of a price inadequacy concern as a smokescreen for management's feared loss of control. Determining the bona fides of management's position is made considerably more difficult by the subjective nature of "inherent value." Opinions of investment counsel often vary widely, particularly in the soft areas of long-term forecasting, effects of synergism, and long-range economic conditions.

A contrasting argument would suggest that it is ironic for management to be posing as the protector of shareholder returns, for the presumably undervalued market price may be a reflection of the market's collective judgment of the inefficiency of current management. Acquiring companies are prepared to pay substantial premiums for target shares presumably because they foresee an ability to create a more productive use of assets than exists under target management. Hostile tender offers thus serve a useful economic purpose in upgrading, or at least serving as a prod to improve, management performance. For this reason it has been suggested that management's veto role—even in statutory mergers—is inimical to assuring that "corporations are controlled by those who can use that control most productively." Defensive measures are thus regarded as contrary to economic efficiency because they hinder the ability of shareholders and preclude obtaining the greater economic value of the tender offer phenomenon was noted by the court in "A tender offer plays an important role in the health of the national economy in that it serves as a device which helps to maintain accountability of corporate management to its shareholders." Similarly the Senate Report on the Williams Act noted that "takeover bids should not be discouraged because they provide a useful purpose of providing a check on entrenched but inefficient management." 504 Supp. 1, 9 (S.D. Ind. 1978) ("A tender offer plays an important role in the health of the national economy in that it serves as a device which helps to maintain accountability of corporate management to its shareholders."). Similarly the Senate Report on the Williams Act noted that "takeover bids should not be discouraged because they provide a useful purpose of providing a check on entrenched but inefficient management." 504 Supp. 1, 9 (S.D. Ind. 1978) ("A tender offer plays an important role in the health of the national economy in that it serves as a device which helps to maintain accountability of corporate management to its shareholders."). Similarly the Senate Report on the Williams Act noted that "takeover bids should not be discouraged because they provide a useful purpose of providing a check on entrenched but inefficient management." 504 Supp. 1, 9 (S.D. Ind. 1978) ("A tender offer plays an important role in the health of the national economy in that it serves as a device which helps to maintain accountability of corporate management to its shareholders."). Similarly the Senate Report on the Williams Act noted that "takeover bids should not be discouraged because they provide a useful purpose of providing a check on entrenched but inefficient management.


156. During the course of the American Express tender offer effort, McGraw-Hill chairman Harold McGraw was reported to state: "Who says we have an obligation to sell this company: I never saw times better for (McGraw-Hill)." Wall St. J., Apr. 25, 1979, at 31, col. 5. If such better times were so evident, it may be questioned why the market price of McGraw-Hill was not higher and why the market price following the withdrawal by American Express dropped back to close to its preoffer position. Unless we are to give little if any credence to the efficient capital market hypothesis, it may be questioned whether Chairman McGraw was basing his comment on information not adequately disclosed to the public investors.


158. The inability of courts to determine whether a tender offer is reasonably calculated to benefit shareholders is a substantial lapse of time—weeks, if not months—between the tender offer and the post-tender offer market price. See supra note 95, at 107. Lipson suggests that management should be able to defeat tender offers involving mult disparate shareholders, and a costly array of counsel, investor information are a relatively recent phenomenon of the market, including "sleeping beauties," "hugs," "knights," but from an evaluative perspective of defensive measures, there is little if any indication that the efficient capital market hypothesis, it may be questioned whether Chairman McGraw was basing his comment on information not adequately disclosed to the public investors.


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A. Sale of the Business

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they hinder the ability of shareholders to remove inefficient management and preclude obtaining the greatest return on shareholder investment.

Although each of the economically oriented arguments contains elements of legitimacy, there is no apparent basis for embracing one economic perspective over another for evaluating defensive measures. Despite the economists' delight in empirical evidence, there is a paucity of evidence in the tender offer context to support any particular economic theory. Dispositive data as to the desirability of any one economic perspective could scarcely be expected given the unavoidably speculative nature of judgments regarding the desirability of a particular takeover, and the vicissitudes of economic and market conditions following a successful defense to a tender offer.

PART II

A. Sale of Control Analogue

The inability of courts and commentators to concur on a standard to evaluate defensive measures is due in part to the inherent ambiguities of fiduciary concepts, the diversity of statutory provisions arguably applicable, and the conflicting perspectives within economic arguments. It is also due to the use of defensive measures in an aggressive, explosive environment alien to traditional modes of corporate conduct out of which such concepts as fiduciary duty and business judgment have evolved. Hostile tender offers involving multinational corporations, thousands of disparate shareholders, and scorched earth defensive tactics employing a costly array of counsel, investment bankers, accountants, and publicists are a relatively recent phenomenon. The phenomenon has created a distinct lexicon, including delightfully descriptive phrases such as "bear hugs," "sleeping beauties," "Saturday night specials," and "white knights," but from an evaluative standpoint the ingenuity, speed, and complexity of defensive measures have outrun the slower-paced judicial process.

Rather than attempt to squeeze tender offers and defensive

160. Lipton suggests that management actions often do not impair shareholder return even when the tender offer is defeated, and offers a table of several illustrations where the post-tender offer market price was near or higher than the defeated offering price. Lipton, supra note 93, at 107. Lipton concluded that of the 36 unsolicited tender offers rejected and defeated by target management between 1976 and June 1979, "the shareholders of more than 50 percent of the targets are better off today than if the defeated tender offer had succeeded." Id. The difficulty with such evaluations arises both from the substantial lapse of time—several years in most cases—between the tender offer and current illustrative prices, as well as an imputed assumption, impossible to confirm or refute, that shareholders who reinvested their proceeds received from the tender offers (had the offers been successful) would not have an accumulated return greater than the current market price of target company shares.
measures into traditional modes created in differing contexts, it may be more appropriate to examine the validity of defensive measures within the framework of the underlying transaction. Such analysis takes as its starting point the nature and purpose of the tender offer. Fundamentally, a tender offer is equivalent to a private transaction in which a potential purchaser offers terms and conditions governing the purchase for acceptance or rejection by the potential seller. What transforms the private, relatively unregulated one-on-one transaction\textsuperscript{145} into a tender offer subject to Williams Act provisions and to a host of adverse target management reactions is the extension of the offer to all shareholders with the consequent potentiality of a shift in control in the target company.\textsuperscript{146}

Shifts in control occur, of course, in private transactions. Such private transactions between a single or small group of control shareholders and a third party usually meet with no management opposition, management generally being synonymous with control shareholders. It is appropriate, indeed it may even be logically mandated, to question why a single, controlling shareholder may sell his shares in a relatively unburdened transaction, while fractionalized, minority shareholders cannot do so collectively without overcoming substantial and costly impediments created by an unhappy target management.

Corporate control may be transferred in several manners. A statutory merger involves director approval because the merger may substantially alter the capital structure and identity of the merged corporation. A sale of a controlling block of shares, however, creates no change in corporate structure, identity, or legal relationships. Thus, no state corporate code provides for director approval as a condition precedent to a shareholder’s sale of controlling interest. If the transfer of shares by a single, dominant shareholder is an individual judgment to pass corporate control to the purchaser, the transfer of shares through a tender offer is a collective judgment

\begin{itemize}
  \item \textsuperscript{145} Certain judicial and statutory standards apply to all sales of securities by insiders or others possessing material information and under a duty to disclose or abstain from trading, \textit{e.g.}, Perlman v. Feldman, 219 F.2d 175, 178 (2d Cir.), \textit{cert. denied}, 349 U.S. 952 (1955), and Brown v. Halbert, 271 Cal. App. 2d 252, 272, 76 Cal. Rptr. 781, 793-94 (1969), and other judicially created standards have developed with respect to potentially fraudulent conduct, \textit{e.g.}, Diamond v. Oreamuno, 24 N.Y.2d 494, 498-501, 248 N.E.2d 910, 912-14 (1969). Despite the imposing list of potential pitfalls, the overwhelming bulk of daily transactions occur between traders for whom such restrictions have no applicability.

  \item \textsuperscript{146} It was the specter of unregulated shifts in control, rather than broad based offers to shareholders at large, that appears to have been the primary purpose of the Williams Act. See Smallwood v. Pears Brewing Co., 489 F.2d 579, 599 (5th Cir.), \textit{cert. denied}, 419 U.S. 875 (1974). The court stated that a corporation does not become a tender offeror simply by proposing a paper exchange of securities. There must be contemplated some change in control. If actual control does not shift, it is difficult to see why the shareholder needs the protection of Section 14(e).

\end{itemize}
by tendering shareholders to the same effect. The motivation behind each of such transfers may be identical. It therefore makes little sense to attack the motivation of minority shareholders as being based upon selfish, monetary considerations alone, when the motivation of a controlling shareholder may be equally susceptible to such challenge but is beyond reproach except in limited circumstances. Moreover, to the extent that tender offers permit removal of inefficient management, the collective action of tendering shareholders is in effect a vote of no confidence and provides a far more efficient means of changing management than the proxy system.

Regarding the tender offer as effecting a collective sale of control suggests that defensive measures be judged by standards relevant to sale of control transactions. The dual identity of purpose and effect between individual and collective transfers causes inquiry into what limitations applicable to the dominant shareholder are appropriately applicable in the tender offer context. Alternatively, to what extent do specific defensive tactics by management place minority shareholders at an unreasonable disadvantage compared to the transferability rights of controlling shareholders? It is submitted that the collective sale of control should be restricted only to the extent of validly imposed restraints upon its individual counterpart, a conclusion stemming from the transactional nature of the tender offer. The application of consistent standards to both individual and collective transfers of control is referred to in this Article as the sale of control analogue. The premise of analogous treatment is that defensive measures by target management are appropriate to the extent that they are consistent with limitations imposed upon private transfers of control and to the degree they do not reasonably impair the opportunity of minority shareholders to make a collective sale of control as effectively as an individual sale may be transacted.

163. See text accompanying notes 171-80 infra. Kaplan states:

[I]n very few instances is an obligation to act primarily for the benefit of the corporation at the expense of the majority shareholder’s own interest imposed. For example, it is seldom if ever held that . . . he shall be restricted in selling his control shares (other than to a looter or at a premium which constitutes a diversification of corporate advantage).


164. Brudney and Chirelstein comment:

Realistically, the tender-plus-merger procedure is merely a way of bypassing the target company’s proxy machinery, which is controlled by the incumbent board, and submitting the acquisition proposal to direct referendum of the stockholders. Those who accept the tender offer are properly to be regarded as aye-voters, those who do not, as nay- or non-voters.


165. A significant difference between the sale of control by a single dominant shareholder and sale by individual stockholders in the tender offer context is that, in the latter situation, management acts as a surrogate for negotiating or affecting some matters
The sale of control analogue is, it is submitted, the most appropriate standard for judging defensive measures. It does not seek to impose standards developed from such historically differing contexts as the fiduciary and statutory perspectives. More importantly, it treats the tender offer in its essential characteristic—an offer to purchase directed to each shareholder in his individual capacity. The analogue focuses on alienability, a fundamental characteristic of the ownership of shares, and eliminates the incongruity of restraints that management's defensive measures have created between the alienability of majority and minority shares. A unified approach applies, individual shareholders possessing no greater right to transmit control by acting in a collective manner adverse to corporate interests than does the single, dominant shareholder. Nor is there less right, or conversely, greater justification for management interference with decisionmaking for the minority rather than the majority shareholder.

Distinctions unquestionably exist between factors influencing the transference-of-control-judgment of the dominant shareholder and factors affecting fractionalized shareholders acting in a de facto collective manner. In the former instance, a controlling shareholder may have fostered relationships with corporate employees, suppliers, customers, minority shareholders, and other community interests—relationships the shareholder that scattered shareholders are incapable of handling collectively. While this difference is significant, it only goes to who raises the questions and not the judgments to be made. Target management, for example, might negotiate with the acquiror regarding changes in the price or other terms of the offer. Management might also institute litigation based upon concerns of corporate waste. Management's role in these circumstances may be appropriately regarded as facilitating resolution of the more fundamental issue, determined by shareholders alone, of accepting or rejecting the offer.

166. For Williams Act purposes the definition of tender offer goes well beyond the essential characteristic noted in the text. See Wellman v. Dickinson, 475 F. Supp. 783, 817 (S.D.N.Y. 1979). This is to be expected, for distinct issues are being considered. The text seeks to consider the essential characteristic of a tender offer for the purpose of evaluating management's defensive response. Statutory definition has sought to determine what combination of characteristics will trigger Williams Act procedures and requirements. Characteristics such as premiums, contingencies, and limited time frames, examined for Williams Act purposes, do not necessarily distinguish an individual sale of control from the collective sale, as such factors may well be present in both circumstances. Characteristics determining whether stockholders should come under the Williams Act umbrella, designed to protect them from undue pressure, nondisclosure, and inequitable treatment by the tender offeror, do not necessarily apply in determining whether the transaction may permissibly trigger a host of defensive reactions by target management. It is, for example, a matter of relative indifference for defensive purposes whether the potential acquiror is offering a premium for the purchase of shares. Indeed a common reply by target management is that the premium is not adequate. The existence of a premium, however, is a primary element in determining whether a tender offer exists for Williams Act purposes.

167. See Bromberg, *Tender Offers: Safeguard and Restraints—An Interest Analysis*, 21 CASE W. RES. L. REV. 615, 678-79 (1970) (discussing the tender offer as a device for providing equal opportunity for the sale of shares by both minority and majority shareholders).
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differing contexts as the fiduciary tantly, it treats the tender offer in to purchase directed to each 44 The analogue focuses on alien- of the ownership of shares, and is that management’s defensive nability of majority and minority individual shareholders possessing by acting in a collective manner sees, the single, dominant share-the, greater justification for making for the minority rather between factors influencing the dominant shareholder and factoring a de facto collective manner. reholder may have fostered rel-appliers, customers, minority share-relationships the shareholder- ding collectively. While this difference is not the judgment to be made, at the same time the alternative might be to institute litigation based on the role in these circumstances may be of the more fundamental issue, determining the offer. s of tender offer goes well beyond the willman v. Dickinson, 475 F. Supp. 785, distinct issues are being considered. The of a tender offer for the purpose of ficiency of issuing a tender offer has sought to deter- trigger Williams Act procedures and contingencies, and limited time frames, narrowly distinguish an individual sale of s will be present in both circumstances, should come under the Williams Act pressure, nondisclosure, and unequal ness reactions by target management. nce for defensive purposes whether the purchase of shares. Indeed a common n is not adequate. The existence of a so tending whether a tender offer exists for

TENDER OFFERS

may desire to assure are protected as part of the transference of control. The dominant shareholder also presumably has the economic expertise to determine whether the transfer will have deleterious effects upon corporate constituents. In the tender offer context, offerors may be able to exert greater leverage over minority shareholders in determining issues of price, number of shares to be purchased, conditional acceptances, and other aspects of the offer. The differences, however, in knowledge and perspective between control and noncontrol shareholders do not lead to the conclusion that the latter should not enjoy similar decisionmaking roles. Differences in knowledge may well be ameliorated by disclosure, and the Williams Act has encouraged a greater flow of information to shareholders. Concerns expressed for employee, customer, and community interests are protected by two independent sources: target management’s injunctive efforts and the acquiring company’s economic concerns. The former, however selfishly pursued, may raise issues of waste, looting, and illegality analogous to concerns relevant to a majority shareholder’s transference of control. Even more protective of such interests, and frequently overlooked in discussions regarding the feared consequences of takeovers, are the economic interests of the acquiring company that may and probably will be quite inimical to substantial disruptions in employee morale, supplier and trade relationships, and the nonproductive use of acquired assets. Concerns for corporate and shareholder welfare based on the disparity in knowledge and position between control and noncontrol shareholders are thus substantially resolved by the impact of disclosure, the availability of judicial scrutiny, and the commonality of target-acquirer economic interests.

168. See note 71 supra.
169. See text accompanying notes 176-80 infra.
170. The sale of control analogue may be viewed as a neutral perspective with regard to the appropriate scope of limitations upon the actions of controlling shareholders, relying principally on a premise that whatever such limitations are they should be analogously applied to the collective action of individual shareholders in a tender offer context. A judgmental response may be that current limitations on controlling shareholders are insufficient to protect the broad range of corporate and community interests, therefore an argument based solely on analogy to current standards fails to address underlying issues of values and goals. To some extent the argument would be valid, for this Article does not purport to examine current limitations on controlling shareholders from social and economic perspectives. That is not to say, however, that reliance upon current standards is without unarticulated major premises that adopt policies supporting the scope of such limitations. One premise is the acceptance of standards that deny free alienability of shares where the result may be economically damaging to nonparticipatory shareholders and corporate creditors. An independent premise adopts in a broad sense the values of encouraging competitive enterprise, thus limiting the alienability of shares in circumstances where antitrust concerns have appropriate dominance. A third, perhaps more fundamental, premise regards current limitations as consistent with a presumptive right of alienability of shares, imposing upon third parties the burden of advancing arguments based upon competing values and claims. The analogue is thus not without judgmental aspects, although such premises are generally tangential to the theses of this Article.
B. Limitations upon the Sale of Controlling Interests

Limitations upon the sale of control shares are narrowly drawn, consistent with judicial concerns regarding restraints upon alienability. Twenty-five years have passed since Perlman v. Feldmann,” yet that apparently ground-breaking decision has failed to produce substantial litigation challenging sales of control. Contrary to the efforts of some commentators to give expansive interpretations to Perlman,” the Circuit has regarded Perlman in the narrow context of its somewhat unusual factual situation. That court's characterization of Perlman seven years after the decision “was basically that the controlling shareholders in selling control to a potential customer had appropriated to their personal benefit a corporate asset: the premium which the company's product could command should seek to obtain for the minority shareholders the opportunity to sell their shares in a time of market shortage.” Perlman has thus not created a substantial restraint upon the sale of control shares, and may be viable only in the relatively infrequent instances of clearly identifiable corporate opportunities inuring to the principal benefit of selling shareholders. Such a limitation would have rare application in the tender offer context where the offered premium extends to all shareholders, each shareholder thus given the right to share proportionately in the premium representing transference of control.”


174. In a fairly narrow reading of Perlman, it has been suggested that the case is simply an illustration of the “looting” standard arising from such cases as Gerdes v. Reynolds, 28 N.Y.S.3d 628, 652-53 (Sup. Ct. 1941). See Hill, The Sale of Controlling Shares, 70 HARV. L. REV. 986, 988-90 (1957).

175. The Perlman decision has been used to suggest that the controlling shareholder should seek to obtain for the minority shareholders the opportunity to sell their shares upon the same terms offered to the controlling shareholder. This obligation has been implied by some commentators based upon a broad reading of Perlman. Andrews, The Stockholder's Right to Equal Opportunity in the Sale of Shares, 78 HARV. L. REV. 505, 515 (1965); Berle, “Control” in Corporate Law, 58 COLUM. L. REV. 1212, 1222 (1958); Jennings, Trading in Corporate Control, 44 CALIF. L. REV. 1, 31 (1956). But Perlman has not evolved in this direction and the position has generally been rejected. Cagett v. Hutchison, 585 F.2d 1555, 1564 (4th Cir. 1978); Honigman v. Green Glam Co., 309 F.2d 667, 707 (9th Cir. 1963), cert. denied, 372 U.S. 941 (1968); Yerke v. Bateman, 876 N.E.2d 1211, 1215 (Ind. Ct. App. 1978). California courts, however, appear more prone to accept an “equal opportunity” doctrine, particularly where arguably undue advantage has accrued to the controlling shareholder. In Brown v. Halbert, 271 Cal. App. 2d 252, 76 Cal. Rptr. 781 (1969), the court referred to the articles cited in note 172 supra and suggested that the growth in shareholder population and need for continual investment "may in the future require legislative action or the adoption by the courts of one or the other law writer's recommendations for the investor's protection." Id. at 271, 76 Cal. Rptr. at 791.

176. More relevant to tender offer context where offers are open to everyone is In re 14(d)(7), 15 U.S.C. § 78n(d)(7)(1970), in which Williams Act § 14(d)(6), 15 U.S.C. § 78n(d)(7)(1970) is held not to authorize a fiduciary duties standard in the tender offer context where offers are open to everyone.

177. Insurashares Corp. v. Noe, 211 N.Y.S.2d 418 (1960); Gerdes v. Reynolds, 28 N.Y.S.2d 360 (1940), rev'd, 98 HARV. L. REV. 1212 (1941). See generally Has­traching Shareholders - Common Law Proposal for Reform, 125 U.PA. L.Rptr. at 177. In DeBau v. First W. Bank, 233 A.D. 2d 364 (1975), the court upheld a decision of the Second Circuit to enjoin a director from selling shares of the corporation without a tender offer. See Perlman v. Feldmann, 169 F.2d 147 (2d Cir.), aff'd, 349 U.S. 952 (1955). The court found that the seller became a dis­senting person that the purchaser was enti­

178. In Levy v. American Beer Co., 260 A.D. 208, 215, 58 N.Y.S.2d 375, 379 (4th Dep't 1946), the court found that the seller became a dis­senting person that the purchaser was not a biding person. The law does not require one to

179. The law does not require one to
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More relevant to tender offers is the common-law limitation prohibiting or imposing liability upon the sale of controlling interests in circumstances where a "looting" or other usurpation of corporate assets by the acquiror is reasonably foreseeable. Decisions in this area have generally dealt with companies owning highly liquid assets and have turned upon whether the sellers could reasonably have perceived the risk that corporate assets would be wasted or otherwise exploited by the acquiring party.76 Perception of this risk must arise from facts known to the seller,77 for there does not appear to be an affirmative duty upon sellers to investigate the character or intentions of the purchaser.78 Although case law has generally developed through derivative actions against former controlling shareholders, management may seek injunctive relief "if the circumstances surrounding the proposed transfer would alert suspicion in a prudent man that the purchasers are an irresponsible group who will mismanage and loot the corporate assets."79 Looting and waste ordinarily have narrow connotations, but it would be entirely consistent to apply such standards to instances of alleged statutory illegality, thus including antitrust and regulatory violations. Management is aided in its ability to perceive potential misuse of target assets through the disclosure obligations of the Williams Act, including disclosure of the source of funds, plans regarding potential merger, liquidation, sale of assets, and board changes, as well as any other material effects upon the target company's corporate structure and business.80

The foregoing restraints on alienation of controlling interests are minimal. Corporate and minority shareholder interests are regarded as sufficiently protected as long as the selling shareholder does not appropriate through the sales price the value of a corporate asset, and has no reasonable offer context where offers are open to all shareholders on identical terms, Williams Act § 14(d)(7), 15 U.S.C. § 78n(d)(7) (1976), and shares may be rejected only on a pro rata basis. Williams Act § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1976).


177. In DeBaun v. First W. Bank & Trust Co., 46 Cal. App. 3d 692, 120 Cal. Rptr. at 534 (1975), the court upheld a derivative action against the seller of control where the court found that the seller became directly aware of facts that would have alerted a prudent person that the purchaser was "likely to loot the corporation." Id. at 697, 120 Cal. Rptr. at 536.

178. In Levy v. American Beverage Corp., the court stated: The law does not require one to act on the assumption that a person with whom a business transaction, even of a large amount, is had, will commit a fraudulent or criminal act if given the opportunity to do so. Quite the contrary may be assumed, in the absence of actual notice.


grounds to suspect that the acquirer will engage in corporate looting or other waste. In the absence of legitimate concerns by target management about either of these potentialities, considering as well questions of magnitude and subsequent availability of judicial relief, fractionized shareholders acting as a collective majority should have no additional impediments placed upon their judgments regarding transference of shares. Corporate interests and remaining minority shareholders require no greater protection in the context of collective, rather than unitary, decisionmaking. Employing such a conclusion as the premise of the sale of control analogue, it is appropriate to examine specific defensive measures in light of the analogue standard.

C. Application of the Sale of Control Analogue to Defensive Measures

Evaluating specific defensive measures in the perspective of relatively circumscribed common-law restraints on the sale of control indicates that some defensive tactics are consistent with alienability rights accorded control shares, while other measures unreasonably impinge upon transferability and exceed protections developed at common law. In particular, the sale of control analogue may be examined with regard to the following defensive techniques.

1. Amendments to Articles of Incorporation

A controlling shareholder is not likely to be faced with charter or by-law restraints that may impede the sale of control. It would be quite extraordinary to expect the controlling shareholder to tie his own hands or limit his own transferability by charter provisions requiring supermajority votes in excess of his own voting strength. What the controlling shareholder is unlikely to impose upon himself is nevertheless imposed upon a fractionalized minority through supermajority provisions that effectively preclude the possibility of merger and therefore create in management or recalcitrant shareholders a virtual veto over unwanted tender offers.181

The justification for supermajority voting restraints imposed by charter amendment is their adoption by the shareholders, who presumably have knowledge of the effect that such provisions will have in discouraging potential tender offers.182 This justification, however, does not address a more fundamental issue: what protections are appropriate to assure that supermajority provisions do not unreasonably restrict future conduct desired by a majority of the shareholders?

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181. See notes 24-25 supra and accompanying text.

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Although such provisions are generally of shareholders pursuant to statute, amendment or repeal requires a supermajority requirement.184 The effect locked into the supermajority provision be the "dead hand" of prior shareholders but sold their shares long before they did.185 The result of supermajority provisions is perhaps no longer identifiable, but in different circumstances has effectively without management approval.186 Although corporate codes utilize corporate machinery to impose restrictions, it may be questioned whether provisions to be adopted by any vote percentage.187 The eighty percent

183. E.g., Del. Code Ann., tit. 8, § 183 followed by approval by "a majority of the stockholders present at a meeting of the stockholders." The articles of incorporation may require that any supermajority provisions be imposed upon a shareholder to tie his own hands or limit his own transferability by charter provisions requiring supermajority votes in excess of his own voting strength.
184. See note 25 supra and accompanying text.
185. The "dead hand" argument is that pre-existing restraints unreasonably impinge upon transferability and thereby create in management or recalcitrant shareholders a virtual veto over unwanted tender offers.
186. See, e.g., E. Aranow, H. Einhorn, TENDER OFFERS FOR CORPORATE CONTROL (1979) (footnote omitted). Indeed, the proxy statement is often an abatement by Home Corporation recommended to its shareholders supported by a majority of the shareholders. Id. at 195. In what is surely an aberration of the majority into what may be a protection of minority by permitting that minority to block the sale of control or to prevent director elections. Id. at 390-41, 42.
187. Whether supermajority provisions of management or shareholders is not directly linked to the propriety of these charters and by-law provisions. 18, at 13.
will engage in corporate looting or the concerns by target management considering as well questions of availability of judicial relief, fractionalized minority should have no additional amendments regarding transference of voting minority shareholders require collective, rather than unitary, conclusion as the premise of the sale to examine specific defensive stand.

An Analogue to Defensive Measures

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likely to be faced with charter or sale of control. It would be quite shareholder to tie his own hands or provisions requiring supermajority strength. What the controlling himself is nevertheless imposed on such supermajority provisions that merger and therefore create in escers a virtual veto over unwanted majority voting restraints imposed by provision by the shareholders, who act that such provisions will have in . This justification, however, issue: what protections are appropria provisions do not unreasonably a majority of the shareholders?

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Although such provisions are generally adopted by only a majority vote of shareholders pursuant to statutory provision, any attempted amendment or repeal requires a supermajority vote equivalent to the underlying merger requirement. The effective result is that future majorities are locked into the supermajority provision, unable to overcome what may be the "dead hand" of prior shareholders who approved the amendments but sold their shares long before the emergence of a viable acquiring candidate. The result of supermajority provisions is that a shifting, perhaps no longer identifiable, majority of shareholders acting in far different circumstances has effectively precluded current tender offers without management approval. Inefficient management is thus able to utilize corporate machinery to insulate itself from challenge.

Although corporate codes universally permit supermajority provisions, it may be questioned whether statutory interpretation permits such provisions to be adopted by any vote less than the proposed supermajority percentage. The eighty percent provision of Gulton Industries, Inc.

183. E.g., Del. Code Ann. tit. 8, § 242(c)(1) (Supp. 1978) (requires board approval followed by approval by "a majority of the outstanding stock entitled to vote thereon."). The articles of incorporation may require a greater vote than the statutory standard. Imposing a supermajority voting requirement upon a supermajority charter proposal would impose a substantial solicitation burden for numerous corporations, particularly those with diverse, highly fragmented shareholder groups.

184. See note 25 supra and accompanying text.

185. The "dead hand" argument is not applicable where shareholder approval of restrictive charter provisions occurs during the pendency of a tender offer. See, e.g., Labaton v. Universal Leaf Tobacco, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,945 (S.D.N.Y. 1979). Although shareholder approval of amendments in such circumstances is equivalent to a rejection of the tender offer, adoption should nevertheless require supermajority approval as the provisions create future prophylactic effects.

186. See, e.g., E. Aranow, E. Eshkenazi & G. Berle, Developments in Tender Offers for Corporate Control (1977), in which it is argued that supermajority provisions are contrary to the basic principles of corporate democracy, for they permit incumbent management to control a corporation long after it has lost the support of its shareholders. In addition... [such] provisions... transform the will of the majority into what may be described as the tyranny of the minority, by permitting that minority to block significant changes in the corporation that are supported by a majority of the shareholders.

Id. at 185. In what is surely an aberrational reversal of roles, the management of U.S. Home Corporation recommended to its shareholders in 1979 the repeal of a 75% supermajority provision adopted as a defensive measure in 1975. Management's proxy statement noted that the supermajority provisions "reflect a defensive posture which is neither consistent with the Company's current philosophy nor in tune with current concepts of corporate governance. In addition, such provisions place excessive power in the hands of management." The proxy statement is extracted in A. Fleischer, supra note 18, at 990, 41-42.

187. Whether supermajority provisions may be validly adopted by less than a supermajority vote has not been directly litigated. Fleischer refers to "sparse case law on the propriety of these charter and by-law amendments, either as a matter of fiduciary concern or with respect to compliance with 'technical provisions.'" A. Fleischer, supra note 18, at 13 (footnote omitted). Indeed, "sparse" is an overstatement as to any direct
was adopted by a fifty-four percent shareholder vote.\textsuperscript{188} Plaintiff shareholders in \textit{Seibert v. Gulton Industries} did not challenge the sufficiency of the vote.\textsuperscript{189} Rather, they focused on the Board of Directors’ discretionary authority to reduce the required percentage vote from eighty percent to a simple majority by Board approval of a proposed takeover prior to the offeror’s acquisition of a five percent stock interest.\textsuperscript{190} Although the court’s decision upholding the alternative percentage provision may impliedly be read to support the validity of the underlying shareholder vote, the validity of that vote was not at issue. Delaware precedent may not be lacking should such validity be challenged. Cases involving the reduction of prior rights of shareholders indicate the inability of one group of shareholders or management to unilaterally acquire an improved position relative to nonconsenting shareholders. In \textit{Telvest, Inc. v. Olson},\textsuperscript{191} a defensive effort by target management to issue to all common stockholders preferred shares containing supermajority terms for the approval of certain merger, sales of assets, or similar transactions was held to violate plaintiff’s voting rights despite plaintiff’s equal treatment with all other shareholders.\textsuperscript{192} The acts of the Board of Directors were purportedly consistent with its statutory and charter authority to issue preferred shares and set the terms thereof.\textsuperscript{193} Nevertheless, this action resulted in “an alteration of the voting powers of the common stock”\textsuperscript{194} such that plaintiff’s twenty percent interest no longer carried the same strength to influence merger votes as existed prior to the issuance of the preferred shares.\textsuperscript{195}

The \textit{Telvest} decision suggests that a similar “alteration of voting powers” argument may apply to the adoption of supermajority provisions by less than a supermajority vote. The adoption in \textit{Seibert} effectively aggrandized a fifty-four percent decision into an eighty percent decision that could not be altered without an eighty percent approval. Thus, the forty-six percent of the Gulton Industries shareholders who opposed or abstained from voting in favor of the supermajority provision must now convince not five percent, but an additional thirty-four percent of the shareholders to repeal the provision should this be the case. The legislative history of the antitakeover provision indicates the power of the shareholder vote. \textit{Seibert v. Gulton Industries} was adopted by a fifty-four percent shareholder vote.\textsuperscript{196} Delaware precedent may not be lacking should such validity be challenged. Cases involving the reduction of prior rights of shareholders indicate the inability of one group of shareholders or management to unilaterally acquire an improved position relative to nonconsenting shareholders. In \textit{Telvest, Inc. v. Olson},\textsuperscript{197} a defensive effort by target management to issue to all common stockholders preferred shares containing supermajority terms for the approval of certain merger, sales of assets, or similar transactions was held to violate plaintiff’s voting rights despite plaintiff’s equal treatment with all other shareholders.\textsuperscript{198} The acts of the Board of Directors were purportedly consistent with its statutory and charter authority to issue preferred shares and set the terms thereof.\textsuperscript{199} Nevertheless, this action resulted in “an alteration of the voting powers of the common stock”\textsuperscript{200} such that plaintiff’s twenty percent interest no longer carried the same strength to influence merger votes as existed prior to the issuance of the preferred shares.\textsuperscript{201}

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shares to repeal the provision should an attractive merger partner appear. This is a far heavier burden than management's task of achieving adoption of the antitakeover provision through only a fifty-four percent vote.

Additional statutory support for requiring a supermajority vote of adoption may be garnered from the provision in some corporate codes requiring the same supermajority vote to alter, amend, or repeal the particular provision. The legislative policy thus reflected is that a matter considered by an earlier group of shareholders to be sufficiently important to require supermajority approval should not be subject to the shifting, subsequent tides of any lesser number. It would not be unreasonable to regard this legislative policy as containing an implicit presumption that the original adoption of the provision likewise was not the result of a temporary, shifting, simple majority, but was instead the overwhelming choice of shareholders knowingly imposing restrictions upon their statutorily granted voting powers.

Insistence upon a vote in excess of the minimum statutory standard is not without precedent. In Seagrave Corp. v. Mount, shareholder approval of a charter amendment having substantial control and conflict-of-interest ramifications was rejected by the court disregarding the votes of interested shareholders. The votes of the noninterested shareholders controlled, notwithstanding the fact that only approximately six percent of the total vote was in opposition to the amendment. The court's action was based entirely on equitable grounds, as no statutory authority existed for the nonrecognition of the votes of interested shareholders.

196. See note 25 supra.

197. If a supermajority vote for adoption were the norm, evasion may be sought through reincorporation, requiring only a majority vote with supermajority provisions already written into the articles of the survivor corporation. Such efforts might be subject to challenge, however, as lacking a legitimate business purpose other than the avoidance of the higher shareholder approval that would otherwise be required.

198. 212 F.2d 389 (6th Cir. 1954). Disregarding the 45,000 shares voted by the interested shareholders, the amendment received 53,979 affirmative votes, falling short of the 61,351 votes required to achieve a statutory majority. Id. at 397. The court may have been unobly harsh in not reducing the required majority to a figure based upon the shares of noninterested shareholders. Avoidance of the statutory standard on equitable grounds was made even clearer in the district court opinion, which stated that "the approval by the majority of the stockholders of the proposed plan which is in violation of the principles of equity, is not binding upon the stockholders of the corporation." Mount v. Seagrave Corp., 112 F. Supp. 530, 534 (S.D. Ohio 1953).

199. See 212 F.2d at 397.


I raise the question... whether a majority of shareholders... may create a super-majority requirement. Certainly I have no actual case in mind that would lead me to say that it is invalid. I do have in mind some statutes in this field particularly relating to the New York Business Corporation Act, which permits [sic] more than so-called majority requirements in other areas. They in effect require that such a provision can only be created by a super-majority as well.

Id. at 840. Professor Cary presumably had in mind § 616 of the New York Business Cor-
Corporate democracy as a means of reflecting changing consensus, as well as the need to facilitate corporate response to altered conditions, are objectives frustrated by supermajority charter provisions that prevent a majority shareholder interest from acting. Turnover rates among shareholders within particular corporations may not be readily available, but it is reasonable to surmise that for many corporations an active market will have the cumulative, relatively frequent effect of a change in identity and a significant shift in percentage of ownership of shares. The transient nature of stock ownership, coupled with the evanescent quality of a majority block of shares, suggest the need for substantial safeguards before past judgments are permitted to preclude current decisions favored by a majority of shareholders. Supermajority provisions may render shareholders—and even management—powerless to react to changed economic conditions, however material their impact. The amending process is intended to facilitate timely corporate reaction to fluctuating conditions; it is not a process designed for strangulating market will have the cumulative, relatively frequent effect of a change in identity and a significant shift in percentage of ownership of shares.

In the absence of an announced or threatened takeover effort, decisions by target management to issue shares to ESOT's, employees, suppliers, or other third parties are appropriately evaluated by such standards as capital structure, and similar traditional concerns. Where the issuance has obstinacy or enshrining irrevocable veto rights. 202

In order to permit individual rights of transferability analog issuance of shares during a ten wise materially affecting control shareholders. Such approval

201. The shift in evaluative con illustrated by Northwest Indus., Inc 1969. In 1965, Goodrich and Gulf sidered having one party buy out the agreement on price. Id. at 708. Su January 1969 when Northwest indus for Goodrich shares. Id. Negotiation mentioned, and after only one day of ne by the exchange of $5,000,000 of court noted that "although the offer of mutual agreement to defeat the directors between the companies." Id. at 712. The applied traditional business judgement shares, totally ignoring the dynamic ance upon the entrenchment of Good judgment presumptions may have been concluded and challenged, but in the tions were unduly charitable to target respective in Creuse-Hinds v. Interstate, which Creuse-Hinds found itself the announced proposed merger with. It determined that the business judged their efforts to go forward with the ing the tender offer. The decision occurrence of a tender offer should measures generally consistent with pr management's decision to merge the Hinds shareholders. As long as no knowledge of an imminent tender or be avoided simply because the shar opportunity.
not effected a material shift in control, management's action may be accorded appropriate presumptions. However, any presumption favoring management is subject to the availability of judicial relief, if appropriate, as well as to the statutory right of shareholders to change management if dissatisfied with its use of corporate power.

A different set of concerns arises when the issuance of shares affects control or is concurrent with an announced or threatened takeover effort. The sale of control analogue may provide appropriate guidance. A controlling shareholder faced with a premium offer for the purchase of his shares would be unlikely to cause the corporation to issue shares that might create a veto block over any eventual merger or other reorganization. Even if the particular offer is not favored, creation of an independent, negative block diminishes the prospects for future, potentially more favorable offers.

In order to permit individual, noncontrolling shareholders to enjoy rights of transferability analogous to a dominant shareholder, a corporate issuance of shares during a tender offer time frame, or any issuance otherwise materially affecting control, should be subject to prior approval of shareholders. Such approval would necessarily involve full disclosure of

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203. The shift in evaluative context between control and noncontrol situations is illustrated by Northwest Indus., Inc. v. B.F. Goodrich Co., 501 F. Supp. 706 (N.D. Ill. 1980). In 1965, Goodrich and Gulf Chemicals, Inc., engaged in a joint venture, considered having one party buy out the other's interest but negotiations failed for lack of agreement on price. Id. at 708. Such prospect apparently was not raised again until January 1969 when Northwest Industries announced its intention to make a tender offer for Goodrich shares. Id. Negotiations between Goodrich and Gulf immediately recommenced, and after only one day of negotiations Goodrich agreed to buy Gulf's interest by the exchange of $35,000,000 of Goodrich common stock for Gulf's share. Id. The court noted that “although the officers of both Goodrich and Gulf claim there was no mutual agreement to defeat plaintiffs' takeover bid, there was a remarkable empathy between the companies.” Id. at 712. Despite these “remarkable” circumstances, the court applied traditional business judgment standards in evaluating the defensive issuance of shares, totally ignoring the dynamics of the battle for control and the effects of such issuance upon the entrenched management. Id.; see note 87 supra. Business judgment presumptions may have been validly invoked had the 1965 negotiations been concluded and challenged, but in the context of a 1969 tender offer battle such presumptions were unduly charitable to target management. Fairly unusual circumstances were present in Crouse-Hinds Co. v. Intermoth Inc., No. 80-7865 (2d Cir. Nov. 14, 1980), in which Crouse-Hinds found itself the target of an unwanted tender offer subsequent to its announced proposed merger with Belden Corp. See note 153 supra. The Second Circuit determined that the business judgment presumption protected target management in their efforts to go forward with the merger, despite the merger's negative effects upon the proposed tender offer. The decision is reasonable in its narrow context, for the mere occurrence of a tender offer should not affect the burden of proof as to the validity of measures generally consistent with prior approved plans. Using a sale of control analogue, management's decision to merge was pursuant to authority acknowledged by Crouse-Hinds shareholders. As long as management was acting in good faith and without knowledge of an imminent tender offer, a presumption of business regularity should not be avoided simply because the shareholders are now confronted with a tender offer opportunity.
the reasons and consequences of the issuance of shares, including the potential inhibiting of pending or imminent tender offers. While shareholder votes may be strongly influenced by management's control of the proxy machinery, shareholder consciousness will be considerably elevated by full disclosure in a tender offer context. A decision in such circumstances to issue additional shares to third parties who may be antagonistic to the tender offer is equivalent to a collective rejection of, or at least a judgment to impede, the offer. The sale of control analogue thus premises shareholder approval of the issuance of shares upon two factors: the recognition that an issuance of shares may effectively undercut or preclude a tender offer from proceeding, and a model that regards individual shareholders as possessing the right to make a collective judgment equivalent to the right enjoyed by a single control shareholder or group of dominant shareholders.

Focusing upon shareholder approval and disclosure aspects would relieve courts from the mysteries of determining "primary" purposes or the bona fides of stated management concerns. The advantage of an alternative approach is illustrated by Chicago Stadium Corp. v. Scallen. Although the plaintiff shareholder owned fifty-two percent of the outstanding shares, it did not control the Board of Directors at the time the Board chose to issue a substantial block of shares that would have reduced plaintiff's holding to thirty-four percent and shifted control to the corporate president. Relying upon a "primary purpose" approach, the court concluded that the purported basis for issuance of the shares, an extinguishment of a debt undermined by serious quest debt. These deficiencies rather than the bona fides of the shift in control were the unfortunate implications established, the shift in control shareholder objection. If fundamental considerations whether the extinguishment of a debt upon control or the available Mandating shareholder approval, tender offer context, any "primary," "sole," "bona fide" shareholders would be harmed by a decision appropriate within the fiduciary concern with corporate wealth limitation upon measures taken to concepts is not resolved except by shareholders of the offeror decide on its merits.

Shareholder approval of tender offers is the accepted on Take-Over and Mergers Code, regarded as "good faith" that, during the pending may be taken by the Board "could effectively result in a shareholders of the offeror decide on its merits."
issuance of shares, including the imminent tender offers. While
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extinguishment of a debt owed to the president by the corporation, was undermined by serious questions regarding the validity and amount of such debt.\(^3\) These deficiencies led to the conclusion that the issue of control, rather than the bona fide of the debt, motivated the issuance of shares.\(^4\) The unfortunate implication is that, had the debt been sufficiently established, the shift in control might have been accomplished despite shareholder objection. If directors' actions are upheld under business judgment considerations whenever there is "any rational business purpose,"\(^5\) the extinguishment of a legitimate debt may well suffice, despite effects upon control or the availability of alternative, noncontroversial measures. Mandating shareholder approval in control situations, including imminent tender offer contexts, avoids the hair-splitting problems created by "primary," "sole," "bona fides," and similar ambiguous standards.\(^6\)

Shareholder approval of corporate actions during the pendency of tender offers is the accepted norm in England, pursuant to the City Code on Take-Overs and Mergers.\(^7\) Among the General Principles of the Code, regarded as "good standards of commercial behavior,"\(^8\) is the provision that, during the pendency of an actual or imminent offer, no action may be taken by the Board without the approval of shareholders that "could effectively result in any bona fide offer being frustrated or in the shareholders of the offeree company being denied an opportunity to decide on its merits."\(^9\) The limitation on Board activity is further

\(^{209}\) Id. at 207.8.

\(^{210}\) Id. at 207-08.


\(^{212}\) Chicago Stadium Corp. v. Scallen, 1976).

\(^{213}\) At no time after a bona fide offer has been communicated to the board of an offeree company or after the board of an offeree company has reason to believe that a bona fide offer might be imminent shall any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval in general meeting of the shareholders of the offeree company, which could effectively result in any bona fide offer being frustrated or in the
specified in rule 38 of the Code, in which shareholder approval is expressly required for the issuance of any shares, the issuance or grant of options or convertible rights, the sale of a material amount of assets, and any other contract not in the ordinary course of business.\textsuperscript{214}

Although the scope of the English model may not appeal in all of its aspects to authorities on this side of the Atlantic, its basic philosophy is consistent with the sale of control analogue and the avoidance of discriminatory treatment between control and noncontrolling shareholders. To those who argue that shareholders will uniformly reject defensive measures simply for shareholder consideration of the merits of the issuance of shares, not a shareholder vote on acceptance or rejection of the tender offer. The English and proposed models both regard the tender offer as a matter of disclosure. Primary emphasis in such votes will be upon the merits of the proposed transaction, a somewhat different context, although admittedly one that would undoubtedly be influenced by the effect that the transaction would have on the impending offer.

216. Id. at 30-31.

217. The arguments in Lipton, supra note 38, at 123-24, against a shareholder referendum on tender offer: it should be noted that both the English and proposed models provide for shareholder consideration of the merits of the issuance of shares, not a shareholder vote on acceptance or rejection of the tender offer.\textsuperscript{217}

218. See notes 171-80 and accompanying text.

219. Required shareholder approval of an increase in authorized shares indirectly places the question of issuance before the shareholders. Often, however, corporations are organized with or develop a surplus of authorized but unissued shares for indeterminate, future purposes, and shareholder approval in calmer times is given without attention to the ultimate use of such shares. In such cases, the question of whether the transaction will be approved by management or insiders is evident.


221. See, e.g., note 40 supra (disparity).

222. For example, suppose there is a block, along with a statutory proxy merger. A repurchase program of 33% of the outstanding shares, however, may raise the same disparity from the effect of a repurchase program.

223. The recommended shareholder reaction to such a proposal may create an effective veto on the transaction. The requisite reaction of the management may not be possible, however, in a favorable market or tender offer context.

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Decisionmaking authority vested in the board of directors may be based upon reduction in excess capital balance, or investment in corporate stock as undervalued or overvalued. Shares may have the effect of management or insiders power.\textsuperscript{211} A control shareholder likely to permit the board to seriously impede his ability to manage the corporation may be of management, may in turn create an effective veto on the possibility of a shareholder approval. It may be anticipated that such a shareholder approval power will be of management, may in turn create an effective veto on shareholder approval of such a tender offer.
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3. Repurchase of Shares

Decisionmaking authority for corporate repurchase of shares is ordinarily vested in the board of directors, as statutory provisions confer no express powers to shareholders relative to such decisions. Repurchase programs may be based upon a variety of legitimate purposes, such as reduction in excess capitalization, obtaining shares for stock option or other use, and investment motivations when directors regard the corporate stock as undervalued. Regardless of purpose, however, repurchases may have the effect of aggrandizing the percentage of shares held by management or insiders to a dominant position or an effective veto power. A control shareholder, recognizing such possibilities, is not likely to permit the board to undertake a repurchase program that would seriously impede his ability to transfer his shares by creating an antagonistic minority block capable of vetoing merger or other reorganization plans. Noncontrol shareholders should be no less protected. Thus, under a sale of control analogue, any repurchase program that carries the possibility of a substantial increase in management's percentage holding, or creates a veto power within management, should be subject to shareholder approval following full disclosure of control consequences. It may be anticipated that shareholders will uniformly approve repurchase programs in nontender offer contexts. Approval, however, will be much more difficult to obtain where the program may seriously impair announced or imminent tender offers.

The likelihood or probability of shareholder rejection of defensive measures taken during a tender offer contest are not grounds for denying a decisionmaking role to noncontrolling holders, for it may be no less probable that a dominant shareholder would preclude the adoption of restraints in similar circumstances. Where reasonable concern over the

[Further text not visible]
future corporate welfare exists, management’s concerns should be tested in an independent forum, analogous to derivative actions that may be brought against controlling shareholders. For example, the repurchase of shares by management from the potential acquiror in Kors v. Carey may have been necessary to protect the goodwill and customer relations of the target corporation. It is possible that, if given the opportunity, shareholders would have disapproved the repurchase on the premise that the repurchase denied an opportunity for a premium sale of their shares. Inferences and assumptions about shareholder judgment, however, are inadequate bases to preclude shareholder involvement in favor of unilateral management action. If potential misuse, waste, or other serious concern reasonably exists—as it may have in Kors v. Carey—with regard to potential control of corporate assets by the acquiror, the proper response is not to deny shareholder involvement in decisionmaking, but rather to emphasize the right of management to seek an injunction against the acquisition of control. Litigation would focus attention upon the alleged potentialities of misuse in a context directly analogous to common-law limitations on the sale of control. Management, acting on behalf of the corporation, would seek to enjoin a collective sale of control on the grounds that the sale of shares cannot be made in circumstances indicating a significant danger of misuse or waste of corporate assets by the acquiring company.

The proposed approach substantially equates the transferability rights of controlling and noncontrolling shareholders, permitting the latter the same opportunity to influence decisions affecting their abilities to sell as enjoyed by dominant shareholders. Concerns for corporate well-being would be met not by unilateral management actions to issue or repurchase shares, but rather through litigation to enjoin the acquisition based upon standards discussed in the following section.225

225. In Mite Corp. v. Dixon, 533 F.2d 486 (7th Cir. 1980), the court denied the tender offeror’s motion for preliminary injunction against a competing repurchase offer instituted defensively by target corporation. Id. at 490. There was no explicit finding about corporate purpose other than a concern that the tender offer price was too low. A repurchase program unilaterally adopted by target management in opposition to an announced offer may create for shareholders two offers rather than one. However, it does not follow that shareholders are therefore not adversely affected by target’s competing offer. Where the target corporation, by acquiring a fairly limited number of shares, increases the percentage holding of shares of management to the point of an effective veto power, see text accompanying notes 39-41 supra, a target offer limited in scope may have the effect of eliminating, not enlarging, the transferability opportunities of shareholders. Although blocking of shareholder opportunity was apparently not involved in Mite Corp. v. Dixon, where the repurchase offer was for 350,000 shares, approximately 40% of the outstanding shares, competing tender offers by target corporation should not be regarded as favorable to shareholders in all circumstances. The text’s recommendation of shareholder approval is an appropriate safeguard against repurchases that may create the adverse consequences noted.

The sale of control analogous on behalf of the corporate ceedings against the pending c brought to safeguard the interest the corporate entity, are anal minority shareholders on behalf shareholder’s sale of control. Mi beyond raising issues similar restraint upon the transference role for rendering shareholder right to litigate in a collective material, to the statutory safeg takeover statutes, and other su Act, the Interstate Commerce use of loans to finance tender e Antitrust litigation require prevalence, potentiality for but target to manufacture claims (Field, for example, sought to oppos Carter Hawley Hale ten additional stores. Moreover, adequate attention to whether resolvable by the acquiring com substantial expenditures of co suggestion that relatively high issuance of a preliminary inj
The sale of control analogue does not deny target management, acting on behalf of the corporation, the ability to initiate injunction proceedings against the pending or proposed tender offer. Such actions, brought to safeguard the interests of nontendering shareholders as well as the corporate entity, are analogous to derivative actions brought by minority shareholders on behalf of the corporation to enjoin a dominant shareholder's sale of control. Management's authority, however, extends beyond raising issues similar to such common-law and equitable restraints upon the transference of control. It also encompasses a protective role for tendering shareholders, unable because of their fragmentation to litigate in a collective manner, to assure adherence, where material, to the statutory safeguards of the Williams Act, state antitakeover statutes, and other statutes such as the Investment Company Act, the Interstate Commerce Act, and regulations regarding the use of loans to finance tender offers.

Antitrust litigation requires particular consideration, owing to its prevalence, potentiality for burdensome delays, and the ability of the target to manufacture claims through defensive acquisitions. Marshall Field, for example, sought to bootstrap its antitrust claims against a proposed Carter Hawley Hale tender offer by a hurried acquisition of additional stores. Moreover, Marshall Field directors failed to direct adequate attention to whether potential antitrust problems were resolvable by the acquiring company. These factors, coupled with the substantial expenditures of corporate funds created by antitrust litigation, suggest that relatively high standards should apply prior to the issuance of a preliminary injunction. In particular:

226. Williams Act, see note 1 supra, requirements of timely filing of schedules 13d and 14d, together with statutory requirements in § 14(e) of full disclosure of all material aspects of the offer, were designed principally for the protection of the target shareholders. Piper v. Chris-Craft Indus., Inc., 450 U.S. 1, 35 (1977). Shareholders anxious to accept a premium offer are not likely to initiate litigation. Management therefore is necessarily thrust into the role of enforcing Williams Act requirements. Similar concerns involve potential violations under rule 10b-5, although the disclosure obligations under § 14e appear to have rendered superfluous rule 10b-5 considerations. R. Jennings & H. Marsh, Securities Regulation 757 (4th ed. 1977).


231. See note 124 supra.
(a) Antitrust problems created by defensive acquisitions, that is, acquisitions initiated and made with knowledge of pending tender offers, should not be regarded as being raised in good faith unless such acquisitions are pursuant to shareholder approval following full disclosure of the potential tender offer and antitrust implications. Otherwise, target management may achieve an effective block on the transferability of shares to the potential acquiror, utilizing antitrust laws in a manner that controlling shareholders, if given the opportunity, may consider objectionable.

(b) Judicial attention should be directed not simply to alleged antitrust problems, but also to whether any reasonable efforts were made to seek resolution of such problems. If antitrust concerns represent the most serious challenge to what may be an otherwise favorable merger, the directors’ good faith in litigating such issues may be questioned where remedial possibilities are ignored or deliberately avoided.232

(c) A preliminary injunction against the tender offer may not be the most appropriate response even where potential antitrust problems are evident. Judge Friendly’s oft-quoted statement in support of preliminary relief233 is not a signal for reflex injunctions against tender offers, but rather was designed to encourage district court judges to frame orders at an early stage that permit flexibility and accommodation of competing interests. The “variety of tools” available to courts include permitting the tender offer to proceed with sufficient safeguards so that potential divestiture or other remedy may be readily imposed if appropriate. Thus, temporary limitations upon the absorption or disposal of major assets, changes in employee and customer practices, and other protective measures maintain a relative status quo and facilitate a nondisruptive transition if remedial action is eventually required.234

[Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long ‘lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown. Such cases require a balancing of public and private interests of various sorts. 
Id. at 854. Accord, Raybestos-Manhattan, Inc. v. Hi-Shear Indus., Inc., FED. SEC. L. REP. (CCH) ¶ 97,806, at 90,048-49 (E.D.N.Y. 1980).

233. Judge Friendly observed:
[D]istrict judges would do well to ponder whether, if a violation has been sufficiently proved on an application for a temporary injunction, the opportunity for doing equity is not considerably better than it will be later on. The court will have a variety of tools useable at that stage. 

234. See United States v. United Technologies Corp., 466 F. Supp. 106 (N.D.N.Y. 1979), where, after a preliminary injunction by the court, the United States in General Host Corp. v. United Technologies Corp., 72 F.R. 4845 (2d Cir. 1978); Order requiring United to maintain a stockeld at 203, Accord, Anaconda Co. v. Co., 466 F. Supp. 197 (E.D. N.Y. 1978-2 Trade Cas. (B. C.H.) ¶ 162,405 (2d Cir. 1979), involving relatively minor other grounds in the complaint led to preliminary injunction, it would be apparent resolvable shipping and tender offer.

256. Target management may measures, as a tactic to force a high defeated. Antitrust litigation, bowing this result, for the antitrust bullet though target management’s off Wachrell, supra note 50, at 1457. 
257. See note 46 supra. 
TENDER OFFERS

(d) In cash tender offer situations involving the acquisition of a substantial percentage of shares, the costs of divestiture and damages occasioned by antitrust problems will be borne heaviest by the acquiring company. Although divestiture may create adverse consequences to target corporate interests such as goodwill, relations with suppliers, and employee relationships, and preacquisition status quo may be difficult to completely achieve, the consequences may be remote and of uncertain extent. Moreover, suppliers and employees of the acquired company may have adequate insulation against the effects of divestiture by normal contractual processes or leverage.

The foregoing analysis suggests a cautious judicial response to target management’s claims of antitrust violations, and perhaps may have analogous application to other claimed violations where adequate judicial relief may be fashioned short of enjoining the tender offer. Restricting the impact of this string in the defensive bow would not create substantial, adverse consequences to shareholders or corporate interests. Legitimate, nonantitrust concerns of misuse of corporate assets or of other adverse consequences of control transference may be answerable through other forms of litigation and defensive measures.

5. Other Defensive Measures

The preceding discussion has focused upon the defensive techniques employed by target management that raise, under a sale of control analogue, substantial questions of legitimacy. Although certain defensive measures not discussed may also be of doubtful validity, such as acceleration provisions in loan agreements and the withholding of shareholder lists, other measures generally do not create serious concern under a 1979) where, after a preliminary injunction barring a tender offer had been denied, Carrier Corp. v. United Technologies Corp., 1978-2 Trade Cas. ¶ 62,595, at 76,578, aff’d, 1978-2 Trade Cas., ¶ 62,405 (2d Cir. 1978), the district court issued a Hold Separate Order requiring United to maintain Carrier “as a separate corporation such that Carrier will be capable of being divested pursuant to any subsequent decree.” 466 F. Supp. at 203. Accord, Anaconda Co. v. Crane Co., 411 F. Supp. 1210, 1213 (S.D.N.Y. 1975).

252. See the alleged violations of federal shipping and communication laws in General Host Corp. v. Triumph American, Inc., 559 F. Supp. 749 (S.D.N.Y. 1973), involving relatively minor aspects of the target company. Id. at 750. Although other grounds in the complaint led to a cumulative effect that caused the court to issue a preliminary injunction, it would have been unfortunate had the relatively minor and apparently resolveable shipping and FCC issues been a determinative factor in precluding the tender offer.

257. See note 46 supra.

258. See Mesa Petroleum Co. v. Aztec Oil & Gas Co., 406 F. Supp. 910, 914 (N.D. WA LAW REVIEW 475 [1981]

- defensive acquisitions, that is, knowledge of pending tender offers, in good faith unless such acquisition following full disclosure of implications. Otherwise, target block on the transferability of antitrust laws in a manner that opportunity, may consider objec-
sale of control analogue. For example, a defensive merger with a "white knight" may be accomplished only pursuant to shareholder approval. Assuming full disclosure of the adverse effect of such a merger upon a pending tender offer, approval of the merger is equivalent to majority shareholder rejection of the tender offer. Broad-scale publicity campaigns do not inhibit target shareholder options, are consistent with full disclosure goals, and may be adequately policed by the disclosure standards of the Williams Act. Reduction in liquidity through increased cash dividends, premature debt repayments, and other uses of liquid assets may have relatively little impact as a brake upon a tender offer. Such measures may actually improve the capitalization structure of the target company, and in any event, they are governed by standards of waste and mismanagement that would give directors considerable pause prior to authorizing extraordinary cash outlays.

6. Defensive Measures as a Means of Improving the Offering Price to Shareholders

A more benign attitude is often taken towards management if their pursuit of aggressive defensive measures is viewed as a method of forcing a higher bid from the potential acquiror. Indeed, shareholders may often wind up with higher or competing offers as a result of management's belligerance. When management believes the offering price to be too low, a strenuous publicity campaign may be justified as a means of forcing a higher bid. The present a way that in fact inadequate may be raised to meet offerings from unexpected sources aroused to action during the period of delay created by defensive measures. Even in the absence of competing offers the bids may be raised to meet objections of inadequacy or to place increased pressure on management. See Kummer & Hoffmeister. Valuation Consequences of Cash Tender Offers, 53 J. Finance 505, 514 (1978) ("Comparatively speaking, premiums for the resisted tenders are significantly greater than the passive tenders."). For discussion of competing tender offers initiated by targets, see supra note 184. If price inadequacy is based upon assertions that defensive measures undertaken unilaterally may be inappropriate response to the issue viewed by management as unrealized, perceived judgments as to management's inadequacy may be anticipable, however, that analysis of new techniques as developed will be aided by the sale of control analogue, thus avoiding the obfuscation of inherently ambiguous or conflicting standards generally in vogue.

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Determining the validity of a defensive measure through fiduciary, statutory, and case law ambiguity, and conflicts in the Williams Act. Efforts to resolve competing claim of management's assertedly inadequate tender offer provisions may actually improve the capitalization structure of the target corporation into its defensive partner.

3. Defensive Measures as a Means of Improving the Offering Price to Shareholders

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low, a strenuous publicity campaign is appropriate and perhaps obligatory. More difficult questions relate to judging when the issue of price is a bona fide concern and determining which defensive measures may be justified as a means of augmenting the offering price. Aggressive defensive measures undertaken unilaterally by target management are an inappropriate response to the issue of price inadequacy. A market price viewed by management as unrealistically low may well be the result of perceived judgments as to management's capabilities. Moreover, a bid that is in fact inadequate may generate competing bids of higher values, and the advance notice provisions in numerous state statutes provide a time frame for competing bids to be formulated. In an era of substantial merger activity, the absence of competing bids may belie management's assertions that defensive measures are necessary to avoid inadequate offers. Moreover, litigation, and the invoking of regulatory provisions are high risk methods of adding a higher offering price, for legal arguments once raised may not be conveniently ignored when a higher bid has been obtained.

CONCLUSION

Determining the validity of defensive measures by target management through fiduciary, statutory, or economic perspectives is impeded by ambiguities and conflicts inherent in those traditional standards. Efforts to resolve competing claims by reference to macrocosmic theories have inevitably created conflicting arguments. Judicial response has not created clarity because opinions tend to confuse distinctions among standards and often fail to address adequately the full implications of particular concepts cited in support of their decisions.

An effort to avoid ideological ambiguities that defy consensus or greater than the passive tenders.

Means of Improving the Shareholders

Taken towards management if their view is viewed as a method of forcing a merger. Indeed, shareholders may offer a result of management's efforts to augment the offering price to be too high, a strenuous publicity campaign is appropriate and perhaps obligatory. More difficult questions relate to judging when the issue of price is a bona fide concern and determining which defensive measures may be justified as a means of augmenting the offering price. Aggressive defensive measures undertaken unilaterally by target management are an inappropriate response to the issue of price inadequacy. A market price viewed by management as unrealistically low may well be the result of perceived judgments as to management's capabilities. Moreover, a bid that is in fact inadequate may generate competing bids of higher values, and the advance notice provisions in numerous state statutes provide a time frame for competing bids to be formulated. In an era of substantial merger activity, the absence of competing bids may belie management's assertions that defensive measures are necessary to avoid inadequate offers. Moreover, litigation, and the invoking of regulatory provisions are high risk methods of adding a higher offering price, for legal arguments once raised may not be conveniently ignored when a higher bid has been obtained.

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An effort to avoid ideological ambiguities that defy consensus or
reasonable accommodation, and to view defensive measures in more direct and realistic terms, is reflected by the sale of control analogue. The analogue views the tender offer as an effort to achieve a collective sale of control through the common response of tendering shareholders. There is no persuasive justification for imposing greater impediments upon the collective sale of control than are imposed upon a dominant shareholder’s private transference of control shares. Judicial limitations that have developed to restrain the actions of dominant shareholders are appropriate guidelines to evaluate restraints upon transferability imposed by defensive measures. In this context certain measures lack reasonable justification while others may be appropriate only if consistent with express or implied shareholder consent. Whatever the result of evaluation, the sale of control analogue is better suited than currently prevalent rationales to reflect the dynamics of the tender offer context.

Contribution and Multiparty Actions

M. Patri

Most private civil actions under the Securities Exchange Act of 1934 and rule 10b-5 are resolved by settlement rather than by trial.3 The reluctance to try cases is a function of catastrophic damages in the securities market. When all defendants participate in settlement, any defendant in settlement is arrived at by agreement of all defendants and the plaintiff, and the difficult questions involved in applying the law with violating rule 10b-5.4 It is relevant to compare the different economic and tactical interests of the defendant in settlement and the plaintiff in the class action. It is also important to compare the efforts of the defendant to settle the case and the efforts of the plaintiff to bring an action under rule 10b-5 and, finally, the reasonableness of the individual defendant in evaluating the fairness of settlement. The compensation is being paid to the class, a distribution of each defendant.5

1. Securities Exchange Act of 1934 gives the Securities and Exchange Commission authority to issue regulations prohibiting "any manipulative or deceptive device or contrivance in connection with the purchase or sale of any security or with the delivery or acceptance of money or other property in connection with any such purchase or sale or with the induction or participation in any such purchase or sale." 17 C.F.R. § 240.10b-5 (1976).


3. Mullaney, Theories of Measur

4. See, e.g., S.E.C. v. Texas Gulf Sulphur—The Second Round: Privity and

5. See Duban v. Diversified Mort.

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