Most hostile takeover attempts in the U.S. involve litigation. The target corporation may be able to stop, or at least slow, the takeover contest, allowing it to pursue alternative strategies to address stock price vulnerabilities or alternative transactions with friendlier counter-parties. The potential acquirer may need to enjoin the use of anti-takeover statutes and defensive measures adopted by the target corporation or to clear the way to take the offer to the shareholders. Both sides may seek venue advantages, prompting a “race to the courthouse” when a hostile acquisition attempt becomes clear.

The purpose of this paper is to discuss the basic principles that a litigator will likely encounter in the context of a hostile takeover attempt. This survey is not intended to be exhaustive; we have attached a bibliography of treatises and other references that treat the subject more thoroughly.

The Rules Governing Takeover Attempts and Responses

There are two general regulatory schemes governing hostile takeover attempts in the U.S.: Federal law (which applies in all fifty states) is most concerned with disclosure and timing issues, although specific areas of federal law (notably antitrust) are also important. The law of the state of incorporation for the target company imposes specific statutory and common law duties that govern the conduct of the contests and the conduct of target management.

1. Federal Regulation.

Federal Disclosure Standards. The Williams Act, 15 U.S.C. §§ 78m(d)-(e) and §§ 78n(d)-(f) (1968), sets forth the federal regulatory framework for tender offers and proxy contests. The Act is primarily concerned with providing adequate information in a timely fashion, and ensuring a level playing field for the participants.

- Section 13(d) requires disclosure of substantial share acquisitions by individuals or groups, who generally must disclose the percentage of
shares held in concert and the purpose of the acquisition when the threshold of 5% is passed.

- Section 14(a) governs the disclosures in connection with proxy contests, and prevents material misrepresentations and omissions in proxy statements.

- Section 14(d) sets forth the procedural and disclosure requirements for a tender offer.

- Section 14(e) is the general tender offer anti-fraud provision and prohibits material misrepresentations and omissions in connection with the offer, including in the offering materials. This section is limited to disclosure claims.

The U.S. Securities and Exchange Commission (“SEC”) plays an active role in reviewing hostile takeover attempts. In a tender offer context, the offeror must file certain specific information (set forth in Rule 14d-1) with the SEC for its review before sending the offer to the shareholders. SEC review is more rigorous in a proxy contest, and all communications with shareholders must be filed with the SEC. The SEC staff can play an active role in approving what can and cannot be said to the shareholders.

**Hostile Tender offers.** A hostile tender offer involves a direct offer to the target’s shareholders for all or a controlling number of shares. It is sent directly to shareholders, and carries a deadline (often extended) by which shareholders must tender their shares. Schedule 14D-1 requires specific disclosure about the offer, including its terms and its purpose, the bidder’s identity and background, the sources of funds for the offer, any negotiations with the target, and (except in all-cash offers if other criteria are met) financial statements of the bidder. The bidder must file its offer and other required disclosures with the SEC and deliver the filing to the target company. The target must respond to the offer by filing the information required by Schedule 14d-9, within ten business days. The offer must be kept open for at least twenty business days from commencement (Rule 14e-1) and remain open at least five business days from the date any material change to the offer is published. Exchange Act Release No. 24,296 (April 3, 1987), 52 Fed. Reg. 11,548 (1987).
If an acquirer engages in an unorthodox share acquisition program involving open-market purchases or direct solicitation of shareholders, there may be uncertainty whether these purchases amount to a tender offer under US federal law. The SEC uses an eight-factor test to determine whether a tender offer has been commenced, examining whether there is (i) an active and widespread solicitation of public shareholders for the shares of an issuer; (ii) solicitation for a substantial percentage of the issuer’s stock; (iii) a premium over the prevailing market price; (iv) firm rather than negotiable terms; (v) any contingency on the tender of a fixed number of shares, or the offer is subject to a fixed maximum number to be purchased; (vi) a limited period of time for the offer; (vii) pressure upon the offerees to sell their stock; and (viii) public announcement of a purchasing program preceding or accompanying rapid accumulation of large amounts of target company’s securities. \textit{Wellman v. Dickinson}, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979); \textit{Brascan Ltd. v. Edper Equities Ltd.}, 477 F. Supp. 773, 791 n.13 (S.D.N.Y. 1979). See also \textit{SEC v. Carter Hawley Hale Stores, Inc.}, 587 F. Supp. 1248, 1253 (C.D. Cal. 1984), aff’d, 760 F.2d 945 (9th Cir. 1985).

Proxy contests. Another course for a hostile acquisition is through a proxy contest to replace the directors of the target company, either at an annual meeting or at a special meeting called for this purpose. If elected, the acquirer’s nominees will usually facilitate the acquisition by eliminating the defenses against the acquirer’s tender offer or by approving a merger in which the company’s shares are, in effect, sold to the acquirer. Due to the proliferation of poison pills, proxy contests have become a necessary part of a hostile bidder’s strategy. Proxy contests without a tender offer also are possible, and are far less expensive to conduct. These contests can be commenced by any shareholder of record who otherwise complies with charter, bylaw, and state law requirements. Proxy contests do not entail making an offer for the stock of the company, but instead a campaign (often public) to win the votes of the shareholders. Section 14(e) of the Williams Act (discussed above) governs the disclosures in connection with the contest, and the SEC usually plays an active role in reviewing communications with shareholders. Proxy contests for control frequently involve litigation.

Under the Oct. 22, 1999 SEC Amendments (effective Jan. 24, 2000), solicitations of shareholders may now occur prior to the filing or delivery of a proxy statement, if no proxy card is given to or requested from shareholders. See 17 C.F.R. § 240.14a-12. The SEC Amendments have foreclosed litigation, commonplace when the old rules were in effect, over...
whether solicitation occurred prior to the filing or delivery of a proxy statement. Preliminary copies of proxy statements must be filed with the SEC ten days before they are sent to shareholders, although there are exceptions for meetings involving only mundane matters. See 17 C.F.R. § 240.14a-6. Copies of the definitive statements must also be filed with the SEC on the date they are sent to shareholders, as must any revisions.

A party soliciting proxies must disclose all material information. “An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . What the standard . . . contemplate[s] is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.” TSC Indus., Inc. v. Northway, Inc., 426 U.S. 439, 449 (1976).

SEC Schedule 14A, found at 17 C.F.R. § 240.14a-101, lists the items that must be included in a proxy statement. Although courts have found that this list is not exclusive, it is “persuasive authority as to the required scope of disclosure in proxy materials.” General Electric Co. v. Cathcart, 980 F.2d 927, 937 (3d Cir. 1992).

The duty to disclose pending litigation is subject to the materiality test. Therefore, the SEC mandates disclosure of some kinds of litigation against a director nominee in the related proxy statement, see 17 C.F.R. § 240.14a, and courts have found that some pending lawsuits against a company are material in the context of a proxy solicitation concerning a merger or a similar transaction, see, e.g., Zell v. Intercapital Income Sec., Inc., 675 F.2d 1041, 1043 (9th Cir. 1982). But unrelated or potential (as opposed to pending) litigation is generally exempt from the disclosure requirements. See General Electric Co. v. Cathcart, 980 F. 2d 927, 935-37 (3d Cir. 1992).

Antitrust review. The Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) share responsibility for antitrust enforcement. The jointly-issued Horizontal Merger Guidelines are used to evaluate any proposed combination using the Herfindahl-Hirschman Index (HHI) of market concentration. Once the relevant market is defined (which is often a hotly-contested issue), the HHI is calculated by squaring the market shares of each of the two companies involved in the merger and adding them together. For instance, if a company with a pre-merger market share of 20 sought a merger with a company
with a market share of 3, the resulting HHI would be 409. Usually, an HHI of 1000 or below is not challenged, and an HHI of 1800 or above is presumed illegal. An HHI in the middle range generally raises concerns among regulators. See Stephen J. Squeri, Government Investigation and Enforcement: Antitrust Division and the Federal Trade Commission, 1252 PLI/Corp 689, 721-22 (2001).

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 sets forth the notification and waiting periods for mergers and acquisitions. In 2000, Congress made major amendments to the Act that, among other things, changed the notification thresholds. The Act, as amended, generally requires notification whenever, after the transaction, an acquirer would hold assets and voting securities valued at greater than $200 million in a target company. However, if the acquirer has total assets or annual net sales of $100 million or more and the target has total assets or annual net sales of $10 million or more, then the Act requires notification whenever an acquirer would hold assets and voting securities valued at more than $50 million in the target company after the transaction. See 15 U.S.C. § 18a(a). There are further reporting thresholds as the acquirer acquires more assets and voting securities in the same target company. All cash offers require waiting periods of 15 days before the offer can be consummated; for other transactions, the waiting period is 30 days. These waiting periods can be shortened if the filings have been made and antitrust concerns appear minimal. A “second request” from the antitrust agencies usually entails the filing of extensive information and further delay.

National security review. Target companies may be able to resist a hostile acquisition attempt by raising national security concerns to block the acquisition. The Exon-Florio Amendment, 50 U.S.C. app. § 2170, passed in 1988 and amended in 1992, enables the President to block takeovers that threaten national security. The Committee on Foreign Investment in the United States (CFIUS), the group empowered to investigate and recommend action, must be given notice of a proposed or completed transaction, and has thirty days to determine whether to conduct a full-scale investigation. If such an investigation is warranted, it must be completed within forty-five days and the President has fifteen days to determine whether to exercise his powers. Very few proposed foreign acquisitions have been blocked under this law. However, the law has been invoked in more than a thousand cases, and is important to the timing of hostile takeover attempts.
Foreign companies are not the only potential acquirers that face national security issues; domestic companies may face potential problems in attempts to acquire targets whose business involves classified information or other national security concerns. For example, in Computer Associates’ hostile bid for Computer Sciences in 1998, the target raised the classified nature of some of its business for the Department of Defense as a defense to the acquisition attempt. These defenses can generally be overcome through attention to the structure of the post-acquisition entity, but can nonetheless serve as potent weapons to slow an acquisition attempt or as part of the campaign to influence the target’s stockholders.

2. The Law of the Target’s State of Incorporation

Companies can select any state as their state of incorporation – the selection of the state has nothing to do with where business is conducted or where the company’s shareholders live. Many companies conduct little or no business in their state of incorporation, although generally they must retain an agent for service of process within the state of incorporation.

With its charter and bylaws, the law of the state of incorporation provides the basic framework for the governance of the company, including the election of directors, shareholders’ meetings, and the composition of the board of directors. The charter and bylaws, as well as all actions that may be taken by target management in response to a takeover attempt, are governed by the law of the state of incorporation.

Delaware serves as the state of incorporation for more companies – and more public companies – than any other state and Delaware corporate law serves as the model for most corporate law in the U.S. Delaware’s Court of Chancery is the forum where many, if not most, of the significant cases concerning corporate law have been litigated. The court has a special expertise in corporate law and corporate governance issues, and, as a court of equity, has no jury trials. Because the caselaw concerning corporate control issues is not as well developed in other states, many states specifically look to Delaware caselaw as precedent for decisions in their own courts. See, e.g., Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342, 1346 (D. Nev. 1997) (looking to Delaware law where no relevant Nevada precedents existed). However, even though they may follow Delaware law generally, some states have adopted significantly greater protections against a hostile acquirer. These are described in “State Anti-Takeover Statutes”, below.
Shareholders’ meetings for the election of directors are usually an essential component of any takeover battle, since control of the board of directors is often essential to dismantle “poison pills” (see below) and other takeover defenses. Annual shareholder meetings for the election of directors and other business are required under Delaware law at least every year. Any shareholder of record may force a shareholders’ meeting if no annual meeting has been held for thirteen months by petitioning the Delaware Chancery Court. See Del. Code Ann. tit. 8, § 211(c). Some states and some corporate charters and bylaws permit shareholders with a specified percentage of shares to call a special meeting. Delaware permits only the board and those authorized in the charter or by-laws to call special meetings. See Del. Code Ann. tit. 8, § 211(d).

The law of the state of the target’s incorporation also controls the mechanics of a proxy contest, including the setting of the record date (the date on which the corporation determines the stockholders entitled to vote at the shareholder meeting) and meeting postponements and advancements. Courts have generally allowed directors to postpone meetings if such postponements do not conflict with state law or the corporation’s charter or bylaws and if they give shareholders time to become better informed. See Arthur Fleischer, Jr. & Alexander R. Sussman, Takeover Defense § 10.03(B) (6th ed. 2000). The timing of the postponement, however, is often an important factor. In Stahl v. Apple Bancorp, Inc., 579 A.2d 1115 (Del. Ch. 1990), the Court held that a board’s decision to defer an annual meeting after a record date had been set but before either a meeting date was set or any proxies were solicited did not impede shareholders’ exercise of franchise under Blasius Industries, Inc. v. Atlas Corp., see infra, and satisfied the Unocal test. In Stahl, the board had postponed the meeting in response to a tender offer and proxy contest after its financial advisors had suggested that a higher value could be obtained if the board spent more time searching for alternatives. Similarly, in Hilton Hotels Corp. v. ITT Corp., 962 F. Supp. 1309, 1311 (D. Nev. 1997), the court held that, before it sets an actual meeting date, “[the] Board of Directors retains reasonable discretion in setting an annual meeting to resist hostile takeover offers.” However, in Aprahamian v. HBO & Co., 531 A.2d 1204 (Del. Ch. 1987), the court rejected the board’s attempt to postpone the meeting. In that case, the postponement occurred on the day before the meeting was to occur and after the board had received preliminary information from its proxy solicitor that the election was too close to call.
Courts have been more skeptical of meeting advancements. In Schnell v. Chris-Craft Industries, Inc., 285 A.2d 437 (Del. 1971), the Delaware Supreme Court enjoined a board from advancing the date of an annual meeting by approximately one month in order to disadvantage opponents in a proxy contest. “It is not to be expected that management will attempt to advance the date in order to obtain an inequitable advantage in the contest.” Id. at 439.

Common State Law Anti-Takeover Protections

There are several common protections against hostile takeover attempts found in corporate charters and bylaws, and new ones are conceived and implemented every day to address perceived vulnerabilities in the defenses. Some of the basic types of protections are discussed below.

“Poison Pills.” These refer to stockholder rights plans that deter hostile acquirers from purchasing any stock beyond a trigger lever (usually 10 to 20 percent). These plans are commonplace and usually provide the first and most important line of defense against hostile takeovers. Poison pills generally work by conferring substantial economic benefits upon a company’s shareholders when the trigger level is reached, rendering a hostile acquisition above the trigger level prohibitively expensive. Poison pills generally can be adopted by the board of directors without shareholder approval. See Arthur Fleischer, Jr. & Alexander R. Sussman, Takeover Defense § 5.01(B)(2) (6th ed. 2000).

Under the leading Delaware case, Moran v. Household Int’l, Inc., 500 A.2d 1346 (Del. 1985), a poison pill is lawful, and is not required to be redeemed in the face of a hostile takeover bid, as long as the board’s actions otherwise meet the Unocal/Unitrin test (discussed below). In Moran, the target company adopted the pill at issue prior to the making of any hostile offer. Some states, such as Pennsylvania, have adopted statutes that explicitly permit corporations to adopt poison pills. See, e.g., 15 PA. CONS. STAT. ANN. § 2513(a); see also AMP Inc. v. Allied Signal Inc., 1998 U.S. Dist. LEXIS 15617, at *16-17 (E.D. Pa. Oct. 8, 1998).

The most common form of poison pills can usually be overcome through a proxy contest to replace the target board’s board of directors. The new directors merely vote to de-
activate the pill. Some recent forms of pill have attempted to remove this vulnerability. These are discussed below.

- **“Dead Hand” pills.** These provisions allow only “continuing directors” to redeem the pill. Generally, “continuing directors” are the incumbent directors when the plan was adopted or their designated successors. These pills were developed to counteract a hostile bidder’s strategy of combining a tender offer with a proxy contest, because they foreclose or seriously reduce the possibility of a proxy contest, which is why their legality is questionable.

  States differ in permitting these pills. They are generally not permitted under New York law, see *Bank of New York Co. v. Irving Bank Corp.*, 528 N.Y.S.2d 482 (N.Y. Sup. Ct. 1988), but are permitted under Georgia law, see *Invacare Corp. v. Healthdyne Technologies, Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997). The Delaware Court of Chancery has strongly suggested that such pills will not be permitted under Delaware law for a variety of reasons, including that they are preclusive measures under *Unocal/Unitrin* and that they interfere with the shareholder right to vote. See *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180 (Del. Ch. 1998) (denying target corporation’s motion to dismiss).

- **“No Hand” pills.** These pills generally prevent any newly-elected board from redeeming the pill for a specified time, such as six months or a year, after taking office or after an unsolicited acquisition proposal. Delaware has rejected the use of this sort of pill. In *Quickturn Design Systems, Inc. v. Mentor Graphics Corp.*, 721 A.2d 1281 (Del. 1998), the board of Quickturn Design Systems had amended its dead-hand provision in response to a hostile takeover bid by replacing it with a “no hand” provision under which no new board could redeem the pill for six months after taking office. The “no hand” provision took effect if the purpose of the redemption was to facilitate a transaction with an “Interested Person,” of which the hostile bidder was one. Affirming the Court of Chancery’s
invalidation of the “no hand” provision, the Delaware Supreme Court held that the provision violated the board’s statutory authority and fiduciary duty to manage the corporation in the shareholders’ best interests.

Faced with a similar challenge, however, a federal court interpreting Pennsylvania law upheld the use of such a pill. See AMP Inc. v. Allied Signal Inc., 1998 U.S. Dist. LEXIS 15617 (E.D. Pa. Oct. 8, 1998). In this case, AMP originally had a dead-hand poison pill provision. In response to a hostile tender offer from Allied Signal, AMP’s board amended the provision to make the pill non-redeemable and non-amendable in the event of an unsolicited acquisition of control. However, the provision lasted only until the poison pill itself expired approximately one year later, and the board’s resolution included a provision stating that the pill would not be renewed for six months after its expiration. Faced with Allied Signal’s challenge to the poison pill amendment, the court upheld the pill provision at issue and emphasized that one reason for its decision was that the provision was finite in duration.

**Classified boards.** The law of Delaware (as well as that of every state except Arkansas, see Fleischer & Sussman, supra, at § 4.07(A) n.207) allows companies to adopt “staggered” boards, with classes of directors. See Del. Code Ann. tit. 8, § 141(d). For these companies, the term of the directors is longer than a single year, and only those directors in a particular class must face election in a given year. A common plan is to divide the board into three classes, each with three-year terms. Thus, only one-third of a company’s directors are subject to re-election each year. Adoption of a classified board requires shareholder approval. See, e.g., Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342, 1348 (D. Nev. 1997).

Combined with a poison pill, a classified board provides powerful protection against a hostile acquisition attempt. Since the most effective way to disable a pill is to gain control of the board through a proxy contest, a classified board forces a potential acquirer to win two board elections to acquire control.

**Supermajority provisions.** These provisions, which normally require shareholder approval to be adopted, typically require approval of a supermajority of the shareholders – for
example, 80% – for certain kinds of transactions, including an acquisition of the company by an “interested shareholder,” which is usually a shareholder with 5% or 10% of the shares. These provisions limit an acquirer’s ability to gain control. In order to ensure the intended effect, supermajority provisions usually require approval by a supermajority for amendment or repeal of the provisions. Note that state law may limit a corporation’s ability to adopt supermajority provisions for certain kinds of shareholder elections. For instance, under Delaware law, a simple majority of shareholders have the right to remove a director on a non-staggered board with or without cause. See DEL. CODE ANN. tit. 8, § 141(k).

State anti-takeover statutes. In addition to the protections afforded by the target’s charter and bylaws, the states themselves have adopted various statutes intended to deter hostile takeovers of the companies incorporated within their jurisdiction. These laws vary substantially; the most common forms are discussed below. Some can have a substantial deterrent effect against a hostile tender offer, although the use of poison pills has reduced their importance in the landscape of hostile takeovers.

- Business Combination Statutes. These statutes typically place a three- or five-year moratorium on business combinations between an “interested shareholder” (usually, a shareholder with 5% to 25% of the stock, depending on the state) and the target corporation. Business combination is broadly defined to include other forms of business dealing. In effect, they delay combinations to the detriment of the interested shareholder. The most common exception to a moratorium is for shareholders who gain board approval either for crossing the relevant ownership percentage threshold or for the business combination itself. The Delaware Business Combination Statute does not apply if the interested shareholder acquires more than 85% in the transaction that takes him above ownership threshold (e.g., tender offer or exchange offer). See DEL. CODE ANN. tit. 8, § 203(b). Some statutes impose restrictions on the combination – such as fair-price restrictions – even after the moratorium period has ended.

Business combination statutes have generally been upheld as constitutional, at least insofar as they apply to a state’s domestic
corporations. For example, in *Amanda Acquisition Corp. v. Universal Foods*, 877 F.2d 496 (7th Cir. 1989), the Seventh Circuit upheld Wisconsin’s business combination statute as constitutional. While questioning the wisdom of state anti-takeover legislation, the court found that Wisconsin’s statute, which required a three-year moratorium for shareholders with 10% or more of the stock, was not preempted by the Williams Act and was consistent with the Commerce Clause.

- **Fair-Price Statutes.** The fair-price statutes, first adopted by Maryland in 1983, typically prohibit a large shareholder from effecting a business combination with the target company unless a fair-price test is met. The Maryland statute serves in particular to prevent shareholders from receiving inadequate prices in the second step of a two-step offer.

- **Cash-Out Statutes.** Pennsylvania and Maine have cash-out statutes (sometimes called “right of redemption” statutes). Pennsylvania’s statute requires a raider who acquires more than 20% of the stock of a corporation to notify the other shareholders that a “control transaction” has occurred. The shareholders have the right to demand cash payments for the fair value of their shares from the raider; the raider’s notice to shareholders must include the minimum value shareholders can receive, which is the highest price paid per share by the raider in the last 90 days. If shareholders believe the fair value of the shares is higher, they may request a court-appointed appraiser to make a final determination of the fair value. Pending that determination, the raider must make a partial payment the stated minimum value for the shares being cashed-out, but the raider doesn’t receive those shares until a final determination of the fair value has been made. Maine’s statute is similar.

- **Control-Share Statutes.** Control-share statutes generally require shareholder approval before the acquirer of a control share of the stock is permitted to vote its control shares. Indiana’s control-share statute is perhaps the best known of these. Whenever a person or entity acquires
20%, 33 1/3%, or 50% of an Indiana corporation, he or it does not immediately acquire voting rights. Only a vote by the majority of disinterested shareholders can grant voting rights. However, the acquirer can force the management to hold a special shareholder meeting within 50 days of the acquisition in order to hold such a vote. Targets are often advised to opt out of these statutes because they allow the bidder to have a referendum on the offer. Control share statutes only help targets that lack other defenses.

- **Constituency Statutes.** These statutes generally allow boards to consider other constituencies (e.g., employees), along with shareholders, in making management decisions. Despite their popularity, it is far from clear what impact they have on takeover defense. For instance, in *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342 (D. Nev. 1997), aff’d, 116 F.3d 1485 (9th Cir. 1997), the court found that nothing in Nevada’s constituency statute suggested that the interests of third parties were to be placed above the interests of shareholders. In addition to the usual avenues for constitutional challenges to state anti-takeover statutes, see infra, these statutes might be challenged as violations of the Contract Clause and Takings Clause.

- **Anti-Greenmail Statutes:** Several states have statutes designed to protect corporations from buying back shares from raiders at a premium (“greenmail”) in order to thwart takeovers. Many anti-greenmail statutes adopted by states in the 1980s simply prevent corporations from buying back more than a certain percentage of their own stock without disinterested shareholders’ approval. Pennsylvania and Ohio have since adopted more aggressive “disgorgement” statutes that allow a corporation to recover profits received by the raider from the sale of equity securities in the 18-month period after the raider acquires control. Because anti-takeover statutes can have a devastating effect in delaying and/or preventing the consummation of a hostile tender offer, they have been the subject of litigation in
connection with such attempts. The principal means of challenge are that they are pre-empted by federal law (namely, the Williams Act) or impose unconstitutional impediments to interstate commerce.

- **Pre-emption:** Under a Supremacy Clause preemption analysis, if the state statute does not directly conflict with the Williams Act, then the question is whether the statute “frustrates the purposes” of the Act. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 79 (1987). The Williams Act focuses on the disclosure of tender offers and the procedures governing such offers. Therefore, preemption arguments should focus on the conflicts or discrepancies between these federally-regulated areas and the requirements imposed by the state anti-takeover statute at issue.

- **Commerce Clause:** Dormant Commerce Clause attacks on state anti-takeover statutes typically focus on the potential impact of inconsistent state regulations on interstate commerce. See *CTS Corp.*, supra, at 88. The question of whether a balancing test still applies to this inquiry is a murky one. To the extent a balancing test applies, any Commerce Clause attack on such a statute would have to show that a state’s interest in defining its corporations and protecting shareholders does not, under the circumstances, justify the statute’s negative effect on interstate commerce. See Arthur Fleischer, Jr. & Alexander R. Sussman, *Takeover Defense* § 4.04(B) (6th ed. 2000). Of course, state statutes that apply to out-of-state corporations would be especially vulnerable to Commerce Clause attacks. See *CTS Corp.*, supra, at 93.

*Bonding agreements.* Bonding agreements are contracts not to purchase more than a certain percentage of shares in the target corporation for a certain period of time. They have generally been upheld, as long as they otherwise meet the requirements of the *Unocal/Unitrin* test and do not contain provisions requiring the shareholder to vote its shares with the target’s management. See, e.g., *Enterra Corp. v. SGS Assocs.*, 600 F. Supp. 678, 687-89 (E.D. Pa. 1985); *Ivanhoe Partners v. Newmont Mining Corp.*, 533 A.2d 585, 608-09 (Del. Ch. 1987) (approving some aspects of a standstill agreement, including the limit on the percentage of
shares acquirable by the purchaser, and disapproving of others, including the requirement that
the purchaser vote its shares for the target board’s director nominees).

Standstill agreements can take several forms, and can be found in any sort of contract between the contestants. For example, non-competition covenants with the principal of the acquirer can also be used to stop a takeover attempt. Such a covenant was a basis for Computer Associates’ defense against Sam Wyly’s hostile proxy contest to acquire control of Computer Associates’ board of directors.

**Takeover Contests and Defensive Measures**

It is important to note that there is no *per se* obligation to permit stockholders to consider a hostile offer. As the Delaware Supreme Court ruled in *Pogostin v. Rice*, 480 A.2d 619 (Del. 1984), overruled on other grounds by *Brehm v. Eisner*, 746 A.2d 244, 253-54 (Del. 2000):

Establishing such a principle would rob corporate boards of all discretion, forcing them to choose between accepting any tender offer or merger proposal above market or facing the likelihood of personal liability if they reject it . . . the complaint does not overcome the presumption that the [target’s] board properly and prudently exercised its managerial discretion. *Id.* at 627.

For this reason, oftentimes the strategy – and correspondingly, the litigation – in a hostile takeover context involves attempts to delay or to prevent altogether the hostile offer or slate of directors from being decided by the public shareholders.

**Standards for evaluating defensive actions by target management.**

Generally, the actions of a board of directors are judged under the “business judgment rule”, under which courts are loathe to second-guess disinterested actions taken by a board in good faith and approved by a majority of independent directors. Defensive measures taken in response to a hostile takeover threat – whether bylaw amendments, recapitalizations, transactions with third parties, or any other “defensive” action – must stand scrutiny under the *Unocal/Unitrin* test, which examines whether the response is reasonable in light of the threat posed and the interests to be protected. In addition, defensive measures that affect the shareholder franchise must meet a higher level of scrutiny. Finally, the decision to sell a
controlling interest in a company must meet the Revlon standard requiring directors to seek the highest value for a company that is reasonably attainable. All are discussed below.

**Unocal/Unitrin standard for takeover defenses.** A decision of directors to approve a defensive measure in response to a threat to corporate control is subject to the so-called “Unocal/Unitrin” standard. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Unitrin, Inc. v. American General Corp., 651 A.2d 1361 (Del. 1995) Under Unocal/Unitrin, a court will first assess whether the directors reasonably determined that the takeover posed a threat to legitimate corporate interests and will then assess whether the defensive measure authorized is coercive or preclusive and, if not, whether it is a reasonable response in proportion to the threat.

In Unocal, the Delaware Supreme Court was called upon to consider the propriety of Unocal’s unprecedented defense in the attempted takeover by T. Bonne Pickens and Mesa Petroleum. 493 A.2d 946, 955 (Del. 1985). In response to the “hostile” tender offer for its shares by a 13% stockholder, Unocal responded with a self-tender at a price $20 per share higher. The Unocal offer, however, was made to all stockholders except the Mesa group.

The Delaware Supreme Court upheld Unocal’s exclusionary self-tender but made plain that it was not prepared to defer blindly to any and all takeover defenses. In the case of such transactions, it said, the business judgment rule would only be applied if two pre-requisites were established. First, the directors must show that they reasonably determined that the threatened takeover posed a risk to legitimate corporate interests. They satisfy that burden, the Court said, “by showing good faith and reasonable investigation.” Second, the defensive transaction must bear a reasonable relationship to the perceived threat. The court would not, it said, tolerate resistance to takeovers by “any Draconian means available.”

In the later case Unitrin, Inc. v. American General Corp., 651 A.2d 1361, 1387 (Del. 1995), the Delaware Supreme Court refined this second prerequisite, often termed the “proportionality test.” It held that a defensive transaction would not bear a reasonable relationship to the perceived threat if it were draconian—that is, “either coercive or preclusive in character,” or if it were not within a “range of reasonableness” in proportion to the perceived threat.
Failure to meet the Unocal/Unitrin standard requires the board to prove that the transaction as a whole resulted in “entire fairness” and therefore should be upheld. In practice, it is highly unlikely that a defensive transaction that is found to be draconian or unreasonable would nevertheless be found to be “fair.” See, e.g., William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law, 56 Bus. Law. 1287, 1311 (2001).

The business judgment rule. If a company meets the standards under Unocal/Unitrin, the normal “business judgment rule” applies the standard for evaluating the legality of their actions. Under this rule, courts generally defer to the reasonably-informed decisions of directors made in good faith and not motivated by self-interest. This protection prevents courts from second-guessing the actions of directors if the action is rationally related to a legitimate business purpose. Whether the decision is the best decision is not at issue.

The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. . . . A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter’s decision can be attributed to any rational business purpose.” Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

Whether the business judgment rule applies to a particular action generally turns on the board of directors have met their duties of care, loyalty, and independence.

i. The Duty of Care. What constitutes due care turns upon the particular facts and circumstances of the action. Most litigation challenging the application of the business judgment rule because the board of directors failed to meet the duty of care involves charges of (i) inadequate information, study, or preparation; or (ii) self-interested motivation. See Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (“Under the business judgment rule there is no protection for directors who have made an unintelligent or unadvised judgment. . .”); Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 370-71 (Del. 1994) (Sale agreement was not preceded by a “prudent search for alternatives” to enable the directors to know whether a higher value might be achieved; most directors had “little or no
knowledge of the transaction to be acted upon in advance of the board meeting”; and the board did not take reasonable steps to be adequately informed.)

ii. **The Duty of Loyalty.** Directors owe a duty of loyalty to the corporation and its stockholders. If directors act to benefit their personal interest (e.g., to entrench themselves) at the expense of stockholder interests, the action is improper.

iii. **Independence.** The presence of a majority of independent directors is important to establish the basis for application of the business judgment rule. Absent an independent majority of the board, a committee of independent directors may be utilized to obtain protection, although a committee of independent directors sometimes only serves to switch the burden of proof to the party attacking the transaction. To be considered independent, directors must not have a personal financial interest in the matter before them. A director who has a position as an officer or employee of the corporation, or who is a member of a firm receiving substantial revenue from the corporation, is usually not considered independent. Similarly, a director who has negotiated some benefit for himself in connection with the transaction, such as a finder’s fee or a position with the surviving entity, also may not be considered independent.

If the business judgment rule applies, the courts generally will not second-guess the directors’ rationale. For example, in Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990), the board of directors of Time had approved a merger agreement with Warner intended to implement a long-term corporate strategy. While the merger was pending, Paramount launched a hostile cash offer for Time stock at a very substantial premium. The board’s decision to reject the Paramount offer and continue with the Warner transactions was upheld by the Delaware Supreme Court: In doing so, the court made clear that, under Delaware law, a board is not required to simply “let the shareholders decide” whether to accept a premium offer if the board has determined, on a fully informed basis, that the offer is not in the best strategic interests of the corporation and the board has not approved sale of control to any other party.
Interference with the Shareholder Franchise. Because of the paramount importance of the shareholder franchise to corporate governance, any defensive action that interferes with the right to vote is given much higher scrutiny. The Delaware Chancery Court recognized the importance of this area in the seminal case Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988), which notes that “[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.” The analysis set forth in Blasius applies to any board action whose “primary purpose” is to interfere with the effectiveness of a shareholder vote.

In Blasius, a seven-member board added two new members in an effort to avert a shareholder proposal to elect eight new members to the board through a consent solicitation. The Delaware Court of Chancery invalidated the board’s action. In doing so, however, the court rejected the Unocal/Unitrin test and instead concluded that a board “bears the heavy burden of demonstrating a compelling justification” for any action that limits shareholder franchise. The court reasoned that, because of the importance of shareholder democracy in governing companies, any board action that interferes with that franchise, even if done in good faith and with an unselfish motive, requires a compelling justification.

Since Blasius, courts have struggled to resolve two major questions: 1) which situations require imposition of the often outcome-determinative Blasius test, or, in other words, when the “primary purpose” of a board’s action is to disenfranchise shareholders; and 2) when courts should apply the Blasius test rather than the more lenient Unocal/Unitrin test, since many contested board actions are both defensive measures in response to a potential takeover and involve some limitation on shareholder franchise. See William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law, 56 Bus. Law. 1287, 1313 (2001).

In Kidsco Inc. v. Dinsmore, 674 A.2d 483 (Del. Ch. 1995), the court shed some light on which situations implicate Blasius. In Kidsco, the board had adopted a by-law amendment enabling its shareholders to vote on a merger twenty-five days before a hostile bidder could call a board meeting in connection with its tender offer. Without the by-law amendment, a simultaneous election process would have occurred. The Court of Chancery rejected the application of the Blasius standard to a challenge of this amendment. Instead, it
found that Blasius would generally apply only where “the board action found to constitute
inequitable conduct relating to a shareholder vote had the effect (and, in some cases, also the
intent) of either (i) precluding effective shareholder action . . . or of (ii) snatching victory from an
insurgent slate on the eve of the noticed meeting.” Id. at 495-96 (internal quotations and
citations omitted).

With respect to the second question raised by Blasius, concerning the overlap
between its standard and that of Unocal/Unitrin, recent Delaware decisions have effectively
combined the two standards in situations in which both tests are implicated. In Stroud v. Grace,
606 A.2d 75, 91-92 & n.3 (Del. 1992), the Delaware Supreme Court suggested that “[a] board’s
unilateral decision to adopt a defensive measure touching ‘upon issues of control’ that
purposefully disenfranchises its shareholders is strongly suspect under Unocal, and cannot be
sustained without a ‘compelling justification.’” A more recent Delaware Court of Chancery
case, acknowledging that “it is often impossible to distinguish the inquiry of whether a measure
fails to pass muster under Unocal from the inquiry necessary to determine whether the Blasius
standard even applies,” suggested that a defensive measure affecting the shareholder voting
process would not trigger Blasius if it were not preclusive under Unocal/Unitrin. See
Chesapeake Corp. v. Shore, 771 A.2d 293, 322-23 (Del. Ch. 2000).

“Revlon duty” and “enhanced scrutiny” standards. A different standard is used to
evaluate a transaction involving a change of control: The directors must seek to attain the
highest value reasonably available for stockholders. This obligation is often referred to as the
“Revlon” duty, after the case in which it was first enunciated. See Revlon, Inc. v. MacAndrews
& Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). The board’s decision to approve a sale of
control is subject to a “enhanced scrutiny” standard, in which the burden of proof is on the
directors to demonstrate (a) that they received sufficient information to determine whether the
transaction is the best value reasonably available for the stockholders and (b) that the action
approved was reasonable. See also Paramount Communications Inc. v. QVC Network Inc., 637
A.2d 34 (Del. 1994) (stock-for-stock exchange in a merger viewed as a “sale of control” if a
single stockholder or group of stockholders would acquire control of the other merging
corporation; duty of the directors is to “secure the transaction offering the best value reasonably
available for the stockholders.”) Paramount established that “enhanced scrutiny” review
involves two determinations: (i) whether the directors obtained and acted with due care on all
material information reasonably available to determine the course which would provide the best value reasonably available to the stockholders and (ii) whether the decision of the directors, based on such information, was a reasonable one. “The directors,” the Court said, “have the burden of proving that they were adequately informed and acted reasonably.”

It also bears emphasizing that the Revlon standard is limited and does not apply where there is no change of control. For example, an acquisition of a public company without a controlling shareholder or group by a company that does not itself have a controlling shareholder or group does not involve a change in control. Similarly, in Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990), discussed above, the Delaware Supreme Court concluded that the Time-Warner merger did not make the sale of the corporation inevitable. The court “decline[d] to extend Revlon’s application to corporate transactions simply because they might be construed as putting a corporation either ‘in play’ or ‘up for sale.’” Id. at 1151. Instead, the court applied the Unocal test to Time’s defensive actions taken in response to Paramount’s hostile offer.

Selected Issues in Hostile Merger and Acquisition Litigation

Common claims. Common claims that are asserted in hostile takeover litigation include Williams Act claims concerning the adequacy of the disclosures mandated under federal laws; claims regarding share accumulation disclosure under Section 13(d) of the Williams Act; breach of fiduciary duty claims against target management to invalidate defensive measures under state law; trade secret claims; antitrust claims; and insider trading.

Litigation regarding disclosure issues can often be mooted merely by disclosing the allegations of wrongdoing. For example, in Avnet, Inc. v. Scope Industries, 499 F. Supp. 1121 (S.D.N.Y. 1980), the court held that a Section 13(d) claim was mooted by informing the shareholders of the nature of the claims made. Avnet may not apply, however, where the relief sought is not limited to curative disclosures.

Venue. Venue is one of the most important considerations in commencing litigation, and one of the reasons that litigation commences quickly in connection with hostile acquisition attempts, as both sides want to obtain a “home court” advantage. Once a plaintiff determines that it wants to (or must) bring suit in federal court, various federal venue provisions determine the district(s) in which a plaintiff can file the action.
The Williams Act, because it was enacted as a set of amendments to the Securities Exchange Act, is governed by that Act’s venue provision, which is much broader than the federal venue provision that usually governs actions brought under federal law. Civil suits alleging Williams Act violations may be brought in the United States District Court for the district “wherein any act or transaction constituting the violation occurred” or “wherein the defendant is found or is an inhabitant or transacts business.” 15 U.S.C. § 78aa. See also Leroy v. Great Western United Corp., 443 U.S. 173, 187-88 (1979). The practical result is that plaintiffs in Williams Act suits have a “liberal choice in their selection of a forum.” Id. (quoting Ritter v. Zuspan, 451 F. Supp. 926, 928 (E.D. Mich. 1978)).

Plaintiffs alleging only state law claims but bringing suit in federal court on the basis of diversity of citizenship must rely on the narrower general venue provision. In such cases, suit may be brought only in: “(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.” 28 U.S.C. § 1391(a). For purposes of this statute, a corporation “reside[s] in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.” Id. at § 1391(c).

*State v. federal court.* Another important choice, related to venue, is whether to file litigation in state or federal court. Federal judges are appointed by the President and have life tenure, and therefore are perceived to be less subject to local pressure. In many states, the judges in the state courts are elected and therefore perceived to be more influenced by local concerns. Cases often move faster in federal court because of their limited jurisdiction and because of the applicability of the Federal Rules of Civil Procedure. In addition, the process for obtaining discovery in states outside the chosen venue is usually far easier in federal court than in state. However, many companies involved in hostile takeover litigation prefer to be heard in Delaware’s Chancery Court, a state court where the judges have unique expertise in dealing with corporate governance matters.

In some cases, a plaintiff may not have a choice whether to file suit in federal or state court. For example, when alleging Williams Act violations, a plaintiff must bring suit in
federal court, because federal courts have exclusive jurisdiction over the securities laws, including the Williams Act. See 15 U.S.C. § 78aa. Similarly, if a corporate plaintiff alleges only state law claims against any defendant that resides in the same state as the plaintiff, the plaintiff will have to file suit in state court. However, when a plaintiff files only state law claims against defendants who do not reside in the same state as the plaintiff, the plaintiff will usually have a choice of federal or state court.

Confidentiality of Information. A paramount concern in the hostile takeover context is the protection of the confidentiality of advice and strategies. The attorney-client and work product privileges protect communications between client and counsel as well as the attorney’s work product. The “business strategy” or “white knight” privilege is available, at least on a temporary basis, to protect against disclosure of takeover strategies. Both are discussed below.

- The attorney-client privilege, in theory, protects from disclosure confidences that a client has shared with his lawyer in order to obtain legal advice. “Its purpose is to encourage full and frank communication between attorneys and their clients.” Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). In practice, the privilege may be narrower or broader depending on which jurisdiction’s privilege law applies. The privilege applies only to statements or documents for which there was an expectation of confidentiality and for which the privilege was not waived and was affirmatively raised during litigation. “[T]he protection of the privilege extends only to communications and not to facts. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.” Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981) (quoting Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

The Garner doctrine is a notable exception to the privilege. Under this doctrine, the attorney-client privilege may not apply fully to communications between a corporation’s management and its attorneys
when the corporation is sued by shareholders, particularly in a derivative suit. “[M]anagement does not manage for itself and . . . the beneficiaries of its action are the stockholders. . . . [I]t is difficult to rationally defend the assertion of the [attorney-client] privilege if all, or substantially all, stockholders desire to inquire into the attorney’s communications with corporate representatives who have only nominal ownership interests, or even none at all.” Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970). The test set out in Garner required that “the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.” Id. Some courts have extended this privilege exception to non-derivative suits by minority shareholders against the corporation’s management. In Fausek v. White, 965 F.2d 126 (6th Cir. 1992), one-time owners of 40% of a corporation’s stock sued the company’s majority shareholder, who also served as the director and CEO of the corporation, in a non-derivative suit. The court found that the attorney-client privilege was not absolute in the context of a shareholder suit brought by individual (and, in this case, minority) shareholders in their own right and that the privilege could be defeated by a showing of good cause.

• “Business Strategy” or “White Knight” Privilege is far less protective than the attorney-client privilege. Generally, “a communication concerning business strategy or advice, as opposed to legal advice, does not fall within the scope of the attorney-client privilege.” Weeks v. Samsung Heavy Industries Co., 1996 WL 341537, at *3 (N.D. Ill. June 20, 1996). However, the business strategy doctrine, created by Delaware courts, affords some business strategy materials temporary, qualified immunity from discovery in takeover litigation (but not the absolute privilege enjoyed by attorney-client communications). The doctrine protects sensitive material concerning a target’s potential defensive responses to a hostile takeover (hence the term “white knight,” meaning a friendly bidder), as well as sensitive information concerning the bidder’s

To determine whether to apply the doctrine, Delaware courts use a fact-specific balancing test that weighs the need for the discovery against the possible risks of disclosure. “[W]here interests deserving of consideration are threatened – such as the disclosure of trade secrets or of important ongoing business plans – it is inescapably the duty of the court . . . to evaluate the competing needs and interests of the parties and to shape the remedy that best promotes the interest of justice in the particular circumstances presented.” Gioia v. Texas Air Corp., 1988 WL 18224, at *4 (Del. Ch. Mar. 3, 1988).
Appendix A

STATE ANTI-TAKEOVER STATUTES

1. Business Combination Statutes

- Three-year moratorium; 15% shareholder threshold
- Applies to all Delaware corporations

New York: N.Y. BUS. CORP. LAW § 912
- Five-year moratorium; 20% threshold
- Applies only to domestic resident corporations that are both incorporated in New York and: 1) have their principal offices in the state; 2) have 250 employees or 25% of the total employees employed in N.Y; or 3) have at least 10% of their voting stock owned by New York residents
- Even after the moratorium period, the business combination is permitted only if a majority of the disinterested shareholders approve or if the bidder pays a minimum fair price


- Five-year moratorium; 10% threshold
- Allows domestic corporations to opt into the statute at any time by adopting a bylaw, but an action to repeal such a bylaw is not effective for 18 months and requires a two-thirds vote of the directors and a majority of voting shares of the noninterested shares

Idaho: IDAHO CODE § 30-1701, §§ 30-1703 to 30-1710 (1999)


Iowa: IOWA CODE § 490.1110 (1999)

Kansas: KANS. STAT. ANN. §§ 17-12,100 to 17-12,104 (1996)

  • 25% threshold


Massachusetts: MASS. GEN. LAWS ch. 110F §§ 1 to 4 (1995)
  • 5% threshold


  • Imposes a fair-price test on the business combination even after the moratorium has ended


Nevada: NEV. REV. STAT. §§ 78.411 to 78.444 (1999)


Ohio: OHIO REV. CODE ANN. §§ 1704.01 to 1704.07 (1994)


Oregon: OR. REV. STAT. §§ 60.825 to 60.845 (1999)


Rhode Island: R.I. GEN. LAWS §§ 7-5.2-1 to 7-5.2-8 (1999)


Texas: TEX. BUS. CORP. ACT ANN. arts. 13.01 to 13.08 (Supp. 2000)

  • Three-year moratorium; 10% threshold


  • Three-year moratorium; 10% threshold
  • Held constitutional by Amanda Acquisition Corp. v. Universal Foods, 877 F.2d 496 (7th Cir. 1989)


2. Fair Price Statutes

Maryland: MD. CODE ANN., CORPS & ASS’NS § 3-302

Other states with similar provisions are:
  Arizona
  Connecticut
  Florida
  Georgia
  Idaho
  Illinois
  Indiana
  Kentucky
  Louisiana
  Michigan
  Mississippi
  Missouri
  New Jersey
  New York
  North Carolina
  Pennsylvania
  South Carolina
  South Dakota
  Tennessee
  Virginia
  Washington
  Wisconsin

3. Cash-Out Statutes
Pennsylvania: PA. STAT. ANN. tit. 15, § 1910
Maine: ME. REV. STAT. ANN. tit. 13-A, § 910

4. Control-Share Statutes

Florida: FLA. STAT. ch. 607.0901 to 607.0903 (1999)
Idaho: IDAHO CODE § 30-1601, §§ 30-1603 to 30-1614 (1999)
Maryland: MD. CODE ANN., CORPS & ASS’NS §§ 3-701 to 3-709 (1999)
Massachusetts: MASS. GEN. LAWS ch. 110D §§ 1 to 8, ch. 110E §§ 1 to 7 (1995)
Nevada: NEV. REV. STAT. §§ 78.378 to 78.3793 (1999)
Oregon: OR. REV. STAT. §§ 60.801 to 60.816 (1999)


Utah: UTAH CODE ANN. §§ 61-6-1 to 61-6-12 (1997)


Appendix B

BIBLIOGRAPHY

Treatises and Other Secondary Materials:


R. Franklin Balotti & Michael J. Feinstein, Practising Law Institute, State Takeover Statutes (1990), available on Westlaw at 680 PLI/Corp 119

Wells M. Engledow, Structuring Corporate Board Action to Meet the Ever-Decreasing Scope of Revlon Duties, 63 Alb. L. Rev. 505 (1999)


Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery (2000)

Cases:

Amanda Acquisition Corp. v. Universal Foods, 877 F.2d 496 (7th Cir. 1989)


Aprahamian v. HBO & Co., 531 A.2d 1204 (Del. Ch. 1987)


Carmody v. Toll Bros., Inc., 723 A.2d 1180 (Del. Ch. 1998)

Chesapeake Corp. v. Shore, 771 A.2d 293 (Del. Ch. 2000)

Enterra Corp. v. SGS Assocs., 600 F. Supp. 678 (E.D. Pa. 1985)

Fausek v. White, 965 F.2d 126 (6th Cir. 1992)
Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970)

General Electric Co. v. Cathcart, 980 F.2d 927 (3d Cir. 1992)


Ivanhoe Partners v. Newmont Mining Corp., 533 A.2d 585 (Del. Ch. 1987)

Kidsco Inc. v. Dinsmore, 674 A.2d 483 (Del. Ch. 1995)

Koppel v. 4987 Corp., 167 F.3d 125, (2d Cir. 1999)


Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994)

Pogostin v. Rice, 480 A.2d 619 (Del. 1984)


Stroud v. Grace, 606 A.2d 75 (Del. 1992)


Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)


Zell v. Intercapital Income Sec., Inc., 675 F.2d 1041 (9th Cir. 1982)