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Importing Hazardous Substances from the United States?: The Poison Pill in Japan and Korea*

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Abstract

The authors were motivated to write this article by South Korea's steps to amend its corporate law to permit the use of the shareholder rights plan (poison pill). Poison pills are permitted in some of the world's most sophisticated economies, and they have engendered strong opinions and changed the face of corporate law in the most well-established of jurisdictions. This article first looks back at the poison pill's history in the United States and Japan, highlighting the advances and setbacks that might have predictive value for Korea. To accomplish this, we borrow a framework from Ronald Gilson and then look at case law precedent, existing and proposed legislation, strategies for the regulation and deployment of poison pills, and parties available to police its use. This article goes on to consider how a transplant of the poison pill doctrine into Korean M&A law could play out; focusing less on predicting the outcome and more on identifying the key success factors and potential pitfalls, and highlighting the importance of ongoing corporate governance reform.

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I. Introduction

On March 2, 2010, the Korean Cabinet approved amendments to the Korean Commercial Code ("KCC") to permit the use of the poison pill takeover defense by Korean companies. The bill is slated to take effect in 2011, but first must be approved by the National Assembly, where it is expected to cause intense debate.[1] Controlling shareholder-managers, like the powerful heads of the *Chaebol* in Korea, certain governmental bodies, and business lobby groups have praised the poison pill for its ability to protect management from short-term market fluctuations and allow them to focus on long-term profitability rather than on propping up the stock price.[2] Shareholder rights organizations, civic groups, and opposition party lawmakers counter that these benefits come at too great a cost;[3] poison pills also provide management and controlling shareholder-managers the ultimate tool to entrench themselves by unilaterally blocking value-increasing acquisition attempts, often at the expense of minority shareholders.

The debate surrounding the poison pill, also known as a shareholder rights plan,[4] has been ongoing since the device was first put to use in the United States in 1982. This is not surprising as it is a very powerful tool. On its own, it is a formidable obstacle to an acquirer because it greatly dilutes a hostile bidder's equity stake when triggered, by allowing all other

1) Hyo-sik Lee, *Seoul to Adopt 'Poison Pill' Against Hostile M&A*, Korea Times, Mar. 2, 2010.

2) Eun-jung Kim, *S. Korea to Adopt Poison Pill System Against Hostile Takeovers*, Korea Herald, Mar. 2, 2010.

3) *Id*.

4) According to a widely-accepted definition, "the essence of the poison pill is that the crossing by an acquirer of a relatively low threshold of ownership triggers rights for target shareholders in relation to the shares of either the target or the acquirer, from which the acquirer itself is excluded and which render the acquisition of further shares in the target fruitless or impossibly expensive." Paul Davies & Klaus Hopt, *Control Transactions*, in The Anatomy of Corporate Law: A Comparative and Functional Approach 225, 238-239 (Reinier Kraakman et al. eds., 2009). *See* Lucian Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 Colum. L. Rev. 1168 (1999); Lucian Bebchuk & Allen Ferrell, *On Takeover Law and Regulatory Competition*, 57 Bus. Law. 1047 (2002).

shareholders to purchase additional shares at a substantially reduced price. When paired with other takeover defenses such as the staggered board, it can become terminally effective.[5] The United States and Japan both allow poison pills and can bring valuable insight to the debate, including scholarship on the mechanics and implementation of poison pills and rich judicial precedent regarding takeover defenses generally. These experiences with the pill reveal its amorphous nature—it cannot be easily classified as good or bad, and the implementation and maintenance it requires are far more complex than its initial adoption. This means that any attempt to judge the poison pill's suitability for the Korean corporate realm must consider how use of the poison pill will be restricted and how its evolution will be controlled. This paper explores these questions. Part II lays the groundwork for analysis with a discussion of the economics behind the market for corporate control and introduces Ronald Gilson's efficiency test. Part III summarizes the legal history of the poison pill in the United States. Part IV analyzes the Japanese experience since its introduction of the poison pill in 2005, offering a look at how the poison pill works when transplanted into a new environment.[6] Part V presents a comparative analysis to the Korean experience and reviews changes in the KCC. Part VI presents some concluding thoughts.

II. Market Efficiency and the Gilson Framework

In 2004, on the eve of Japan's adoption of the poison pill, Ronald Gilson predicted the introduction of the shareholder rights plan and evaluated its potential.[7] Gilson explained the forces at work in the market for corporate control and laid out a simple two-question framework for analyzing the economic and political infrastructure regulating the poison pill's use in a

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5) Lucian Bebchuk, John Coats IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002).

6) *See generally* Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PENN. L. REV. 527 (2001).

7) Ronald J. Gilson, *The Poison Pill in Japan: The Missing Infrastructure*, 2004 COLUM. BUS. L. REV. 21.

given country.[8] He suggested that the market for corporate control serves as an equilibrating mechanism, which moves assets into the hands of the firms that value them the most.[9] These distributions are constantly re-evaluated due to changes in technology, business strategy, and the regulatory environment. Such recurrent evaluations result in a continuous stream of M&A activity. However, because the market is driven by Kaldor-Hicks efficiency rather than just Pareto efficiency,[10] some parties are often put in a worse position as a result of changes in corporate control.[11] Complications arise because the target company's management team often bears the brunt of the Kaldor-Hicks' downside. However, they possess the power to reject transactions that would be disadvantageous to their positions.

Once self-dealing activity reaches a certain level, hostile takeovers will begin occurring so that acquirers can bypass the management and take their offer directly to the stockholders. However, hostile takeovers alone are not a solution to the efficiency problem because they shift the power to interfere with market allocation from the target to the acquirer by interfering with the target's ability to reject *all* transactions, not just unattractive ones. This means that any time a company sacrifices short-term profitability to achieve long-term growth, an exploitable arbitrage opportunity may arise from a temporarily depressed stock price. Corporate raiders can swoop in, execute a hostile acquisition, and sell the company's assets for a profit; but in some cases, the target firm was making the best long-term use of those assets. Thus hostile takeovers can theoretically cause a massive *over*correction in the market. In this manner, the hostile takeover is a weapon that can be wielded for both corrective and disruptive purposes.

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8) *Id*. at 28-29.

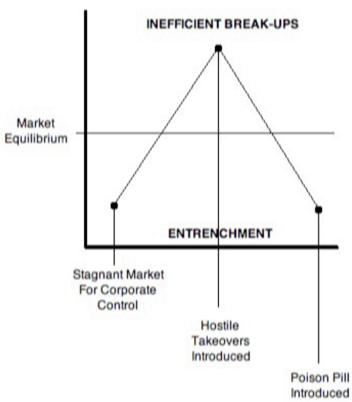
9) *Id.* at 28.

10) Pareto improvements are allocational changes that can be made which make at least one party better off without making any party worse off. Pareto efficiency is achieved once no further Pareto improvements are possible. Kaldor-Hicks improvements are allocational changes that result in a net improvement, even if one party bears all the costs and none of the benefits. *See* William Allen et al., Commentaries and Cases on the Law of Business Organization 4-5 (2nd ed. 2007).

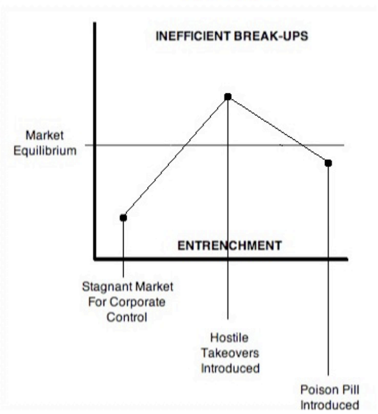
11) Gilson, *supra* note 7, at 29.

The poison pill is a powerful tool against hostile takeovers, giving the target company's management the ability to block inefficient hostile acquisitions that would be detrimental to the target's shareholders.[12] In an unfortunate twist, the poison pill ironically carries with it the overlapping drawbacks of the hostile takeover—it is too powerful and can be used to block value-increasing transactions when in the hands of self-interested management. Intuitively, this raises the concern that the situation is no different than the starting point since it shifts the power to self-deal back to the target management (Theory #1, below). However, if introduced at the right time and with proper mitigating forces, then presumably each additional shift brings the market closer to equilibrium (Theory #2, below) rather than simply causing a binary power shift.

Theory #1



Theory #2



In light of this, any country that is considering adopting a poison pill should ask itself the following question: For a country that has allowed hostile acquisitions, will adopting a poison pill increase market efficiency by blocking inefficient hostile transactions, or will the realized gain be overshadowed by self-interested agents who will use the pill to block

12) Harm to the shareholders occurs during hostile takeovers when the premium offered by the acquirer is worth less than the present value of the stock at a future date. Although it is impossible to determine the outcome had the transaction been consummated, the target company's management is in the best position to estimate future value.

efficient hostile transactions? Gilson poses two key questions to judge whether a poison pill should be adopted:

> a. How will the poison pill be policed to prevent defensive tactics motivated by management self-interest, and
> b. Who will be the policeman?[13]

In the following sections, we consider these two questions along with the aforementioned timing and efficiency concerns to review and evaluate in turn the poison pill's use in the United States, Japan, and Korea.

III. The Poison Pill in the United States

In the 25 years since the Delaware court endorsed the use of the poison pill in *Moran v. Household International*, a complex body of case law has developed to govern the takeover defense, and corporate governance institutions have pressured boards to increase shareholder input on takeover defenses. The following is a brief historical look at case law and shareholder activism surrounding the poison pill in the United States.[14]

1. Case Law

Three years after the first poison pill was put in place, the Delaware Supreme Court decided *Moran v. Household International Inc*.[15] The case applied *Unocal v. Mesa Petroleum*[16] to the flip-over rights plan. The court

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13) Gilson, *supra* note 7, at 29.

14) For a current outline describing the legal environment relating to takeovers, *see* WACHTELL, LIPTON, ROSEN & KATZ, TAKEOVER LAW AND PRACTICE (2010). *See also* RONALD GILSON & BERNARD BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 801–895 (2nd ed. 1995).

15) Moran v. Household International Inc., 500 A.2d 1346 (Del. 1985).

16) Unocal v. Mesa Petroleum, 493 A.2d 946 (Del. 1985); Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769 (2006); Ronald Gilson, *Unocal Fifteen Years Later (and What We Can Do About It)*, 26 DEL. J. CORP. L. 491 (2001); Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 TEX. L. REV. 261 (2001).

held that the decision to adopt a defensive mechanism to protect against future unwanted takeover bids is protected by the business judgment rule, and noted that pre-planning may reduce the risk of the board failing to exercise reasonable judgment when forced to act quickly in the face of a hostile bid.

Unocal is not a poison pill case, but it is highly relevant to all takeover defenses a target board enacts. In April 1985, Mesa Petroleum, which owned approximately 13% of Unocal's stock, commenced a two-tier cash tender offer. At the front end, Mesa offered a cash tender for approximately 37% of Unocal's outstanding stock at a price of $54 per share. At the back end, Mesa offered $54 of highly subordinated junk bonds.[17] After receiving a fairness opinion that found Mesa's bid to be wholly inadequate, Unocal's board unanimously approved a discriminatory self-tender offer resolution, providing that if Mesa acquired 37% of Unocal stock through its offer, Unocal would buy the remaining 49% of outstanding shares for an exchange of debt securities having an aggregate par value of $72 per share. The self-tender resolution excluded Mesa.

The case was reviewed by the Delaware Supreme Court, which found that such discriminatory treatment against Mesa is not invalid *per se* because the board's duty of care extends to protecting the corporation from perceived harm whether from third parties or shareholders.[18] The Delaware Supreme Court established a two-prong test to determine whether the board's implementation of defense mechanisms in reaction to a pending takeover bid is appropriate. First, the board must prove the existence of an actual threat to the corporate policy and effectiveness posed by a hostile bidder.[19] In order to satisfy this burden, the board must show good faith and reasonable investigation. Further, the court added that the proof is materially enhanced if the board is comprised of a majority of independent directors who have acted in accordance with the foregoing

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17) *Unocal*, 493 A.2d at 949-50.

18) *Id.* at 952.

19) *Id.* at 955 ("In the face of this inherent conflict, directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person's stock ownership").

standards.[20] In establishing that the board is reacting to a threat to the corporate value, it must show that it is acting without a primary purpose of management entrenchment.[21] The second prong of the *Unocal* test states that the defensive mechanism must be proportionate to the threat and not "draconian."[22] To determine whether the defensive mechanisms are reasonable in relation to the threat posed, the court may consider the following factors: inadequacy of the price offered, nature and timing of the offer, questions of illegality, impact on constituencies other than shareholders, risk of non-consummation, and quality of securities being offered in the exchange.[23] Timing of the bid is an important factor in considering whether the response is proportional. As illustrated in *Paramount Communications, Inc. v. Time Incorporated*,[24] the Delaware Supreme Court found that the defensive mechanisms put in place were reasonable due to Paramount's "eleventh hour offer." Such timeframes by the bidder shift the board's responsibilities to a higher standard by requiring an immediate response to address the threat to the corporate value and shareholders' interests.

This proportionality prong was further fleshed out in *Unitrin, Inc. v. American General Corp*.[25] Under the *Unocal-Unitrin* standard, takeover defenses will, as a rule, only be found disproportionate (*i.e.*, "draconian") if they are "coercive" (if they "cram down" a management-sponsored alternative on the shareholders)[26] or "preclusive" (they make a successful takeover "mathematically impossible or realistically unattainable").[27] *Unitrin* suggests that a takeover defense cannot be deemed preclusive as

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20) *Id.* at 955.

21) *Id.* at 954, citing Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964) (the board must show that "the directors have not acted out of sole or primary purpose to entrench themselves in office").

22) *Id.* at 955 (The mechanism must be "designed to ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders, which in all circumstances must be free of any fraud or other misconduct").

23) *Id.* at 955.

24) Paramount Communications, Inc. v. Time Incorporated, 571 A.2d 1140 (Del. 1990).

25) Unitrin, Inc. v. American General Corp., 651 A.2d 1361 (Del. 1995).

26) *Id.* at 1387.

27) *Id.* at 1388.

long as a proxy contest remains a viable alternative for attaining the acquirer's goals. If the defensive mechanism is neither coercive nor preclusive, the court needs to assess whether the mechanism is within the "range of reasonableness."[28)]

In applying this two-prong standard in *Unocal*, the Delaware Supreme Court found that the threat posed by Mesa was reasonable because Mesa's bid was a grossly inadequate two-tier coercive tender offer coupled with the threat of greenmail.[29)] The court expressed the flexibility of the decision and the lack of a definitive blueprint to follow in fashioning the satisfaction of the *Unocal* prongs.[30)] As a final note, the *Unocal* court provided an alternative means of ensuring shareholder rights by stating that "[i]f the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out."[31)]

Revlon v. MacAndrews[32)] validated the poison pill as a response to a specific threat in addition to a valid pre-planning strategy. The outcome of *Revlon* allowed boards to adopt poison pills to protect against offers the board believed to be inadequate. The ongoing use of the poison pill would still be required to meet the *Unocal* proportionality test—both when used as a pre-planning tool and a responsive one. The first Delaware case to approve flip-in poison pills was *Stahl v. Apple Bancorp*[33)] in 1990. Flip-in pills have faced tougher scrutiny, as they are capable of diluting the bidder's holdings of the target, thereby deterring takeovers altogether. The court ruled that when a rights plan excludes proxies obtained through public solicitation from the definition of beneficial ownership, shareholders' voting rights are not infringed upon since they are free to solicit proxies to

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28) *Id*. at 1387-88.

29) *Unocal*, 493 A.2d at 956 (The court explicitly references Mesa's "national reputation as a greenmailer").

30) *Id.* at 957 ("[Corporate law] must grow and develop in response to, indeed in anticipation of, evolving concepts and needs . . . More recently, as the sophistication of both raiders and targets has developed, a host of other defensive measures to counter such ever mounting threats has evolved and received judicial sanction").

31) *Id*. at 959, citing Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).

32) Revlon v. MacAndrews, 506 A.2d 173 (Del. 1986).

33) Stahl v. Apple Bancorp, 579 A.2d 1115 (Del. Ch. 1990).

remove the board. Several courts have used *Unocal*'s heightened scrutiny test to examine whether a flip-in pill is an overreaction to a takeover threat.[34)]

Grand Metropolitan v. Pillsbury[35)] and *City Capital Associates v. Interco*[36)] cast doubt on the usefulness of the poison pill as a takeover defense, offering fact-specific applications of *Unocal* proportionality. In both cases, the court issued a preliminary injunction against the ongoing use of the poison pill to prevent the completion of a hostile tender offer. More recent cases, such as *In re Holly Farms Corp. Shareholder's Litigation,*[37)] have demonstrated that when the factual circumstances do not lead the court to find that the poison pill fails the *Unocal* proportionality test, the poison pill may be allowed to remain in place to enable the board to conduct an auction or seek a white knight.

When Oracle launched a hostile bid for PeopleSoft, Inc. in 2003, the Delaware court was faced with another poison pill that was adopted in the midst of a hostile takeover battle. The pill was only a part of the elaborate set of defenses the PeopleSoft board put in place, and many scholars expected the court to force PeopleSoft to redeem the poison pill for failing the cognizable threat element of *Unocal*. Delaware courts have found that structural coercion (two-tiered offers with less appealing consideration offered in the second tier) and substantive coercion (shareholders tendering without being fully informed) are the two primary threats. However, in

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34) Delaware courts have looked disfavorably on certain iterations of the poison pill—notably, the "dead hand" and "no hand" varieties—which would allow directors to limit or control when a pill could be redeemed even after they have left the board. In *Carmody v. Toll Brothers*, 723 A.2d 1180 (Del. Ch. 1998), the court cast serious doubt on the legality of dead hand pills, on the grounds that they would violate Delaware statutes vesting voting power in the entire board and requiring that the current board have the power and authority to manage the business and affairs of the corporation. The court also found the dead hand poison pill to be a breach of fiduciary duty under the *Unocal-Unitrin* standard. In *Quickturn Design Systems v. Shapiro*, 721 A.2d 1281 (Del. 1998), the court condemned the use of no hand pills (those which cannot be removed by any newly elected director for a specified period) altogether. The court based its decision on the same factors that led to the *Toll Brothers* holding that such a device deprives newly elected directors of the authority vested in them by statute, and constitutes a breach of fiduciary duty.

35) Grand Metropolitan v. Pillsbury, 588 A.2d 1049 (Del. 1988).

36) City Capital Associates v. Interco, 551 A.2d 787 (Del. Ch. 1988).

37) *In re* Holly Farms Corp. Shareholder's Litigation, 564 A.2d 342 (Del. Ch. 1989).

PeopleSoft's case, the offer was all cash and the shareholders had been given almost 16 months to consider the offer. The case ended in a settlement, but it nevertheless raised interesting corporate law questions. V.C. Strine refused to rule on the case until PeopleSoft made a final unconditional counteroffer, validating that in cases such as this, the target board cannot simply say no.

Paramount Communications v. Time[38] is another case that, despite not directly addressing rights plans, has had a significant impact on their use. The court characterized the risk that shareholders would erroneously perceive the underpriced offer as an attractive one as a reasonable threat to the corporation, thus allowing directors to use this possibility as grounds for putting a poison pill in place. The opinion also criticized the Delaware Chancery Court's *Interco* decision as being colored by the court's own valuation of a tender offer. The Delaware Supreme Court emphasized that the *Unocal* analysis must be based on the *board's* valuation of the tender offer, not the court's.

In addition to the case law that continues to build the framework for poison pill use, United States courts have also had to reconcile poison pills with tax and securities law.[39]

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38) Paramount Communications v. Time , 501 A.2d 1140 (Del. 1990).

39) Recently, poison pills have been put to a new use: protecting Net Operating Losses ("NOLs"). Bolstered by the recent financial crisis, firms sustain losses that can be used as tax credits in following years. The advantages of NOLs can be reduced or eliminated if there is a change in beneficial ownership, meaning that companies with NOLs have an interest in preventing such a change in ownership before the tax advantages are realized. Additionally, depressed share prices make acquiring a company with a large NOL attractive and affordable. Poison pills with very low thresholds (4.99%) can protect these NOLs and also prevent a hostile bidder from acquiring a large stake. In *Selectica v. Versata*, No. 193, 2010 Del. LEXIS 506 (Del. Oct. 4, 2010), the potential acquirer intentionally triggered the NOL pill and then challenged the validity of the *Selectica* pill in the Delaware Chancery Court. The court held that the risk of losing an NOL was a sufficient threat under *Unocal*, and dismissed the challenge. The triggering of the pill provided new insight into the back-office mechanics of a poison pill, and may change the way companies adopt and redeem poison pills in the future. Another recent development is that many companies are including synthetic and derivative positions as triggers for their poison pills. In *CSX Corp v. The Children's Investment Fund Management*, No. 08-2899-cv, 2008 U.S. App. LEXIS 19788 (N.Y.S. 2d Sept. 15, 2008), the court ruled that such synthetic and derivative positions constituted beneficial ownership under Section 31(d) of the Exchange Act. This ruling helps companies prevent hedge funds and other institutional investors from amassing large

2. Recent Shareholder Input

There is ongoing debate over whether a board's ability to block a hostile bid with a poison pill benefits shareholders by empowering the board to negotiate for the best deal, or harms them by allowing the board to entrench itself. Most shareholder activists subscribe to the latter view; as a result, there have been continued attempts to restrain the board's ability to unilaterally adopt a poison pill.

To influence corporate policy, shareholder activists attempt to garner support for and vote in new by-laws. Without a by-law governing poison pills, they are governed either by board discretion or corporate policy. Corporate policies are not incorporated into the charter or by-laws, so the board may alter or remove policies at any time without seeking shareholder input. As of 2005, 78 companies had adopted poison pill policies.[40) Although companies have historically abided by their poison pill policies, when it becomes advantageous for the board not to do so, there is nothing keeping the directors from abandoning the policy. As one quintessential example, News Corporation adopted a poison pill while negotiating its move from Australia to Delaware, but adopted a corporate policy stating that it and any future poison pill would expire within one year unless approved by shareholders. Despite this policy, the board adopted a two-year poison pill shortly after completing the move. Shareholders in Australia, Britain, and the Netherlands brought suit against News Corporation for breach of contract, fraud, and misrepresentation. News Corporation settled the lawsuit out of court, agreeing to put the poison pill to a vote and to allow shareholder input on poison pills for the next twenty years. The poison pill was approved shortly thereafter, receiving 57% of the shareholder vote.[41)]

Proposing a by-law is generally accomplished by submitting a proposal to the board, and if it meets certain requirements the board must include the proposal in the annual proxy. However, the SEC altered its position on

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positions before launching a proxy contest.

40) John Laide, *Poison Pill Policy*, SharkRepellent.net, Oct. 11, 2005.

41) *News Corp. Vote Okays Poison Pill*, St. Petersburg Times, Oct. 21, 2006, at 2D.

poison pill by-law propositions in 2004, and began allowing corporations to exclude such propositions on the grounds that they had already been substantially implemented if the board has a poison pill policy.[42] As a result, proposing such a by-law now requires one to mount their own proxy contest—a task that can be prohibitively expensive for even the largest shareholders of most public corporations.

Shareholder activists often propose one of two types of poison pill by-laws. The first, similar to a chewable poison pill, would require the board to redeem the rights plan under certain circumstances where the price and terms of the proposed deal meet specified thresholds. The second common pill by-law requires shareholder approval for the adoption or renewal of any poison pill. However, questions remain about the legality of by-laws that limit the board's power to conduct the business and affairs of the corporation—authority granted to the board by statute. The court came close to addressing this issue in *General DataComm Industries v. State of Wisconsin Investment Board*.[43] At issue was a proposed by-law that would have prevented the board from re-pricing options without shareholder approval—addressing the issue of whether a by-law may be used to limit board authority head on. However, since it had merely been proposed, not passed, the court declined to decide the issue as it was not yet ripe.[44]

One commentator suggests that two recent cases emphasize that Delaware courts will make an effort to construe charter and by-law provisions to support shareholders' rights to nominate and vote for directors.[45] In *Jana Master Fund v. CNET Networks*,[46] the court held that the advance notice by-law for shareholder proposals is inapplicable to independently financed proxy solicitations. In the same year, *Levitt Corp. v.*

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42) Laide, *supra* note 40.

43) General DataComm Industries v. State of Wisconsin Investment Board, 731 A.2d 818 (Del. Ch. 1999).

44) Brett McDonnell, *Shareholder By-laws, Shareholder Nominations, and Poison Pills*, 3 Berkeley Bus. L.J. 205, 232 (2005).

45) Milbank, Tweed, Hadley & McCloy LLP, *Renewed Focus on Takeover Defenses: Re-Tooling Advance Notice By-laws and the Return of the Stockholder Rights Plan*, 2 Client Alert (Jan. 9, 2009).

46) Jana Master Fund v. CNET Networks , 947 A.2d 1120 (Del. 2008).

Office Depot[47] held that the advance notice requirement for director nomination would not apply to shareholder candidate proposals after the directors had filed the company's proxy materials. Rather, the shareholders could effectively piggyback on the notice given by the board. This was due to an Office Depot by-law (albeit an ambiguous by-law) regulating the business at annual meetings by requiring the advance notice of shareholder proposals.

International Brotherhood of Teamsters v. Flemming Companies,[48] decided by the Oklahoma Supreme Court, directly addresses the legality of poison pill by-laws. The issue arose when shareholders passed a resolution to remove the existing poison pill. When this resolution was ignored by the board, the shareholders prepared a proxy statement for inclusion in the proxy materials for the next annual meeting. The board initially refused to include it, but was forced to once the issue made its way through the court. The by-law proposal passed with 60% of the vote, upon which the directors claimed that this was an improper limitation of their authority. The relevant Oklahoma statutes[49] are very similar in language to the comparable Delaware statutes, and the court ruled the by-law to be valid.

A 2010 case making its way through the Delaware Chancery Court, *Yucaipa v. Barnes & Noble*,[50] demonstrates that a board's ability to unilaterally adopt a poison pill will likely remain safe. Applying *Unocal*, the court found that adoption of a pill in response to billionaire investor Ron Burkle's accumulation of a significant stake in Barnes & Noble was a reasonable reaction to the threat posed. The court noted two factors that made the pill neither coercive nor preclusive: (1) Yucaipa could still launch a proxy contest to gain control of the company and (2) the poison pill was scheduled to be put to a shareholder vote in the near future.

RiskMetrics Group ("RMG"), a leading provider of shareholder voting recommendations, has played a significant role in forcing the evolution of

47) Levitt Corp. v. Office Depot, No. 3622-VCN, 2008 Del. Ch. LEXIS 47 (Del. Ch. Apr. 14, 2008).

48) International Brotherhood of Teamsters v. Flemming Companies, 975 P.2d 907 (Okla. 1999).

49) McDonnell, *supra* note 44, at 228.

50) Yucaipa v. Barnes & Noble, 1 A.3d 310 (Del. Ch. 2010).

the poison pill into a more shareholder-friendly device. Since 2005, RMG has recommended the removal (by withholding votes) of directors at companies that adopt or renew pills without shareholder approval or a commitment to put the pill to a shareholder vote within twelve months, except where the board acted unilaterally to meet its fiduciary duty.[51)] RMG also advocated sunset provisions that took effect in 36 months or less (believing the ten-year pills to be harmful to shareholders), as well as shareholder redemption provisions, a trigger of no less than 20%, chewable features, and the absence of any dead hand or no hand features. Initially, the response was unimpressive. In 2005, less than 5% of the companies that adopted poison pills committed to putting the pill to a vote.[52)] Over time, however, the policies have begun to have a stronger effect. In 2009, 27% of the companies that adopted pills committed to putting them to shareholder votes. Notably, RMG's policies have helped to shorten the average duration of poison pills. In 2009, 43% of them had a duration of five years or less. In 2003, only 3% had a duration of five years or less.[53)] The increased effect of the policies has a number of possible explanations, one of which is that companies are increasingly switching from a plurality to a majority voting standard for director elections, meaning shareholders can actively vote out directors, rather than relying on mandatory resignation policies.

The important takeaway is that poison pills and activist shareholders can coexist. Since the first year of RMG's policy (2005), 40 pill ratification proposals have been put to the shareholders (32 of which have been decided); of those, 23 passed and 9 failed. Twelve proposals met all of RMG's shareholder friendly criteria; of those, 11 passed.[54)] Additionally, 4 NOL poison pills have been proposed, all of which were approved by the shareholders, and on average received almost 90% of the vote.[55)] Widespread compliance with RMG's policies is unlikely. Just as some activist shareholders believe that no pill should ever be adopted without

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51) John Laide, *A New Era in Poison Pills - Specific Purpose Poison Pills*, SharkRepellent.net, Apr. 1, 2010.

52) *Id.*

53) *Id.*

54) John Laide, *Shareholder Input on Poison Pills*, SharkRepellent.net, Jun. 15, 2009.

55) *Id.*

shareholder approval, many boards and board advisors believe that RMG's policies water down the poison pill enough that it may not be able to accomplish the task for which it was designed.[56)]

Many corporate law scholars regard the battle against poison pills as largely over.[57)] Shareholder activists have set their sights on other corporate governance issues, such as classified boards and executive compensation. In 2003, there were almost 100 proposals mounted against poison pills; in 2005, that number had fallen to 44, and by 2008 it was down to 8.[58)] However, the past two years have seen a spike in poison pill use, which can be attributed to at least three factors. First, 1999 was a landmark year for poison pills—most of which had a ten-year sunset provision, meaning that in 2009, boards had to decide whether to renew, revise, or abandon their rights plans. Second, the recent financial crisis has caused a sharp drop in the market capitalization of many companies, leaving their directors and officers concerned about the prospect of a hostile bidder in search of a deal. Third, poison pills have found a new role in corporate law—protecting NOLs, as discussed above. The reemergence of poison pills may also be explained by the absence of aggressive shareholder activism, and the fact that the poison pills being enacted now contain more shareholder-friendly features than they once did.

3. Observations

The Delaware court's work as policeman of the takeover defense has provided an extensive set of rules and standards, but it also serves as a constant reminder of the ongoing challenges that arise from the poison pill's amorphous nature. As Gilson points out, decades after the question was first asked, it is still unclear whether a target board may block an offer over contrarian shareholder voices on the grounds that the offer does not measure up to the target's fundamental value.[59)] The progression of case

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56) *Id.*

57) John Laide, *Rethinking the Role of the Poison Pill*, SharkRepellent.net, Sept. 17, 2008.

58) *Id*; John Laide, *Trend Towards Removing Takeover Defenses Continues*, SharkRepellent.net, Jan. 17, 2006.

59) Gilson, *supra* note 7, at 39.

law has also caused the pill to evolve into a negotiating tool for obtaining the best share price, rather than simply for blocking hostile bids.[60)]

Institutional investors, such as CalPERS, have taken advantage of their strong influence over boards and management teams to promote better and more transparent corporate governance. Independent directors serve as an additional guard against entrenchment. Essentially a creation of the court system, independent director safe harbors now operate as a substantial hurdle to the self-interested use of the poison pill. The New York Stock Exchange ("NYSE") raised the independent director standards and instituted various other transparency and governance-focused requirements. Since the NYSE and its sister exchanges are the doorkeepers of the largest pool of capital available to corporations, they are able to command companies' attention and compliance in a way that even the court system cannot.

IV. The Poison Pill in Japan

1. Overview[61)]

Japan introduced its poison pill in 2005, and within two years almost 10% of the 4,000 companies listed on the national stock exchanges had incorporated poison pills into their defense strategies.[62)] The most important development is the Japanese High Court's seminal decision in the *Bulldog* case in 2007. Steel Partners Japan Strategic Fund ("Steel Partners"), a foreign hostile acquirer, filed a motion for a preliminary injunction to invalidate Bulldog Sauce Company's ("Bulldog's") poison pill, but the motion was denied on the grounds that 1) the principle of equal treatment

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60) *Id.* at 33.

61) *See* Satoshi Kawai, *Poison Pill in Japan*, 2004 COLUM. BUS. L. REV. 11; Ronald J. Gilson, *The Poison Pill in Japan: The Missing Infrastructure*, 2004 COLUM. BUS. L. REV. 21; William B. Chandler III, *Hostile M&A and the Poison Pill in Japan: A Judicial Perspective*, 2004 COLUM. BUS. L. REV. 45; Hideki Kanda, *Does Corporate Law Really Matter in Hostile Takeovers?: Commenting on Professor Gilson and Chancellor Chandler*, 2004 COLUM. BUS. L. REV. 67.

62) Osugi, Kenichi, *What is Converging?: Rules on Hostile Takeovers in Japan and the Convergence Debate*, 9 ASIAN-PACIFIC L. & POLICY J. 143, 158 (2007).

of shareholders had not been violated, and 2) Steel Partners had failed to show its management plan or its proposed exit strategy.[63] The court interpreted majority shareholder support as being indicative of a legitimate purpose, and since Bulldog made Steel Partners a reasonable offer for its stake and warrants, the action was not considered draconian.[64] The High Court affirmed the appeal, using the altered reasoning that since Steel Partners had no intention of managing Bulldog post-acquisition, it was an "abusive acquirer." The High Court added that shareholder approval caused the action to fall within the range of reasonableness.[65]

As alluded to by the *Bulldog* decision, the Japanese courts appear as if they will be the leading entity policing the Japanese poison pill. The Japanese Ministry of Justice and the Ministry of Economy, Trade, and Industry ("METI") taskforce on takeover defenses in Japan explicitly deemed Delaware takeover jurisprudence as a fitting set of guiding principles,[66] and the language from the *Bulldog* case illustrates that the court borrowed *Unocal* and *Unitrin* reasoning in formulating the decision.[67] Scholarly opinion praises the work of the courts thus far; in the face of such a daunting challenge, they appear to be performing quite well.[68]

There were a number of complementary forces that served to limit the use of the poison pill in the United States, and it is critical that equivalent forces come to bear in Japan. Unlike in the United States, directors in Japanese corporations face a much lower bar to be deemed independent ("outside directors"),[69] so the independent committee is of limited usefulness in stopping self-dealing transactions. The Tokyo Stock Exchange ("TSE") is likely the best entity to address this problem. By adopting stricter listing standards, the independence requirement could be brought in line with the

63) *Id*. at 159.

64) *Id*.

65) *Id*.

66) *But see* Bernard Black, *The Core Fiduciary Duties of Outside Directors*, ASIA BUS. L. REV. 3, 27 (July 2001) ("[I] would not wish for another country to copy our confused case law").

67) Curtis Milhaupt, *Is the Poison Pill Good for Japan?: A Preliminary Analysis of the New Takeover Guidelines*, RIETI, July 28, 2005, http://www.rieti.go.jp/en/events/bbl/05072801.html.

68) *Id*.

69) Gilson, *supra* note 7, at 41.

Delaware court's definition,[70] which would ease the pressure on Japanese courts by preempting litigation. Institutional investors should also play a role, but they are more suited to follow than lead; the establishment of strong corporate governance standards empowers institutional investors to pressure management to comply with those standards.

One positive development unique to Japan is the 2006 Company Law Amendments requiring corporations to annually disclose their contemplated defensive measures and to include a statement from the board that the measures are in the common interest of all shareholders and do not serve an entrenchment purpose.[71] The TSE followed suit, and now requires listed companies to comply with similar disclosure regulations when issuing the rights underlying a poison pill. The TSE also reserves the power to delist companies that abuse the takeover defense.[72] However, Japan is also facing a unique problem in that complaints (although mostly from foreign investors) have been voiced about the current proxy system. Many feel that it offers too short a timeframe for proxy voting and that the process is subject to abuse because of limited auditing requirements.[73]

Building the regulatory infrastructure and correctly incentivizing these private parties to participate is a long-term process. In the mean time, shareholders must be willing to take proactive steps to protect their rights. The courts are proving themselves capable of handling the growing pains these changes are causing, but this requires shareholders to be willing to sue when they feel that management is going too far in adopting defensive techniques.[74]

2. *The Bulldog Sauce Case*

Just three years ago when someone mentioned Bulldog sauce, all that came to mind was the famous and beloved *tonkatsu* sauce found in every

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70) Milhaupt, *supra* note 67.

71) Bliss B. Pak, *National Markets and New Defenses, The Case for an East-Asian Opt-in Takeover Law*, 20 COLUM. J. ASIAN L. 385, 405 (2007).

72) *Id.*

73) Milhaupt, *supra* note 67.

74) *Id.*

Japanese kitchen. Today, lawyers and businesspeople associate Bulldog sauce with an infamous hostile takeover attempt that had a major impact on Japanese corporate law. By ruling that the poison pill implemented by Bulldog against hostile bidder Steel Partners was valid, the Supreme Court of Japan raised questions about the legality of defense mechanisms and the standards that would be used to evaluate their validity. Despite the strong public sentiment and media attention surrounding the case, we suggest that there is no use crying over spilled Bulldog sauce.

Some critics believe that the *Bulldog* case was decided incorrectly. Most importantly, as mentioned above, the holding has complicated practitioners' ability to determine the legal standard to apply to defensive mechanisms. The decision has also caused concern among foreign investors who view the *Bulldog* holding as confirmation of Japan's protectionist attitude regarding foreign investors. Despite these critiques, many believe the *Bulldog* case lays the foundation for solidifying Japan's corporate law with respect to hostile takeovers and defensive mechanisms. Arguably, the *Bulldog* decision[75] is Japan's *Unocal*.

1) Factual Background

In May 2007, Steel Partners launched a takeover bid for Bulldog, offering 1,584 yen for each outstanding share (later raised to 1,700 yen per share, reflecting a premium of 18.56%). The move was executed through a special purpose vehicle of Steel Partners, which already held 10.25% of the issued shares.

In response to questions posed by Bulldog regarding Steel Partners'

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75) There are three translations available for the Supreme Court decision of the *Bulldog* case:

a. Saiko Saibansho [Sup. Ct.] 2007 (Kyo) No. 30, Minshu Vol. 61 No. 5, *Bulldog Sauce*, Aug. 7, 2007, *available at* http://www.courts.go.jp/english/judgments/text/2007.08.07-2007.-Kyo-.No.30.html (From the Supreme Court of Japan website).

b. Saiko Saibansho [Sup. Ct.] 2007 (Kyo) No. 30, Minshu Vol. 61 No. 5, *Bulldog Sauce*, Aug. 7, 2007, *available at* http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr26/case.pdf.

c. Nels Hansen, *Japan's First Poison Pill Case, Bulldog Sauce v. Steel Partners: A Comparative and Institutional Analysis*, 26 Zeitschrift für Japanisches Recht [J. Japan L.] 139, 145-54 (2008).

post-aquisition plan for the company, Steel Partners made the following acknowledgements regarding its past history and its intentions for Bulldog:

a. Steel Partners has never managed a company in Japan nor does it have any plan to do so at present, including Bulldog;
b. Steel Partners has no intention of managing Bulldog;
c. Steel Partners has not thought about the way to present proposals regarding the means to improve corporate value to the management;
d. Steel Partners has no business plan or management plan for the time when it takes over control of Bulldog; and
e. As there is no intention on the part of Steel Partners to manage the daily business of Bulldog, Steel Partners does not feel that it is necessary to respond to questions regarding the production and sales business of Bulldog.[76)]

Further, Steel Partners gave no indication of how the investment would be recovered.[77)] These responses by Steel Partners led Bulldog's board of directors to determine that the takeover bid would "harm the corporate value of [Bulldog] and the common interests of shareholders."[78)]

In response to the hostile bid, Bulldog's board proposed a plan for the allotment of rights to purchase new shares without consideration ("Gratuitous Allocation of Share Options").[79)] Steel Partners representatives

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76) Saiko Saibansho [Sup. Ct.] 2007 (Kyo) No. 30, Minshu Vol. 61 No. 5, *Bulldog Sauce*, Aug. 7, 2007, at §2(5).

77) *Id.*

78) *Id.*

79) As noted on the website of the Supreme Court of Japan, the poison pill was structured as follows:

a. Steel Partners would issue three rights to all shareholders to purchase new shares per existing share;

b. The consideration to be paid by a shareholder for the issue of an ordinary share by Steel Partners on the exercise of a right would be 1 yen per share;

c. Bulldog and its affiliates, including Steel Partners Japan Strategic Fund—a wholly owned special purpose vehicle of Steel Partners used to purchase shares for Bulldog—would not be entitled to exercise their right to purchase new shares; and were present at the general shareholders' meeting in June 2007, and voted Steel Partners' Bulldog shares.[80] The plan was approved, receiving 88.7% of present shareholders' votes and 83.4% of the total votes.[81] After the proposal's approval, the board decided that Bulldog would acquire all the rights of Steel Partners and its affiliates for 396 yen per right—without causing any tax liability. Upon the implementation of the defense mechanism, Steel Partners' holdings fell from 10.25% to about 3% of Bulldog.[82] As compensation under the Gratuitous Allocation of Share Options plan, Steel Partners would receive just over 2.3 billion yen in consideration of issued stock acquisition rights, calculated based on the tender offer price.

2) Legal Application

The *Bulldog* case focuses on the equal treatment of shareholders principle, which is codified in Article 109-1 of the Japanese Company Act.[83] It stipulates that "[a] stock company shall treat its shareholders equally in accordance with the features and number of the shares they hold." However, a caveat exists: if there is a risk that the acquisition of management control by a particular shareholder would harm the company's interest or the common interests of the shareholders, discriminatory treatment against this threatening shareholder aimed at preventing such acquisition is not a violation of the equal treatment of shareholders principle

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d. Bulldog may acquire Steel Partners' rights to purchase new shares by paying Steel Partners and its affiliates for 396 yen per right (one quarter of Steel Partners' original tender offer price).

Id. at §2(6).

80) *Id.* (At the general shareholders' meeting, Steel Partners "merely asked questions about the content of the defensive measure vis a vis the TOB, the total cost involving its implementation, whether or not tax liability emerges if the measure is to be implemented, the projected response of the counter party if the TOB is withdrawn and another attempt of takeover via a takeover bid is made").

81) *Id.*

82) Saiko Saibansho [Sup. Ct.] 2007 (Kyo) No. 30, Minshu Vol. 61 No. 5, *Bulldog Sauce*, Aug. 7, 2007, Ritsumeikan L. Rev., at 254.

83) The Company Act, English Translation provided by Nagoya University, *available at* http://www.kl.i.is.nagoya-u.ac.jp/told/h17a08601en.2.1.txt (last visited Mar. 31, 2010).

unless the treatment is unreasonable or unfair.[84] This caveat mimics the *Unocal* standard by looking first to the existence of a threat to the corporate value, then to the reasonableness of the defense mechanism. This standard is also parallel to the guidelines proposed by the METI, which establishes that the three principles governing countermeasures to hostile takeovers are: "1) the protection of corporate value and thus shareholders' common interests; 2) prior disclosure and reflection of shareholders' will; and 3) reasonability and necessity in response to the threat posed."[85]

Similar to the *Unocal* court, the Supreme Court of Japan found that Bulldog's defensive measures were valid and would not be enjoined. The Supreme Court found that the first *Unocal* prong was satisfied because the Bulldog board reasonably determined that Steel Partners' hostile bid presented an urgent situation that required that the board act defensively "in order to prevent damage to the corporate value of [Bulldog]."[86] In order to assess the threat posed by the bidder, the directors must demonstrate that they acted in good faith, conducted a reasonable investigation, and acted without motive to entrench the management. The court noted that the board asked Steel Partners to inform them of its history of managing Japanese companies, its future business plan for Bulldog, and for its investment recovery strategy. The board claimed that the non-responsive answers to the aforementioned questions reasonably led to the conclusion that the takeover bid would harm Bulldog's corporate value as well as the common interests of the shareholders.[87] Additionally, similar to the *Unocal* court's classification of Mesa's reputation as a greenmailer as a threat, the Supreme Court in *Bulldog* noted that Steel Partners' statements (and its

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84) Saiko Saibansho [Sup. Ct.] 2007 (Kyo) No. 30, Minshu Vol. 61 No. 5, *Bulldog Sauce*, Aug. 7, 2007, at §4(1)(b) ("[I]n cases where, by the taking of control of the company by a specific shareholder, the corporate value and the interest of the company, and ultimately the common interest of shareholders would be harmed, treating the above shareholder in a discriminatory manner in order to prevent this from happening is not immediately against the underlying idea of the principle of the equality of shareholders, unless it is against the idea of fairness and lacks reasonableness").

85) Hansen, *supra* note 75, at 144.

86) Saiko Saibansho [Sup. Ct.] 2007 (Kyo) No. 30, Minshu Vol. 61 No. 5, *Bulldog Sauce*, Aug. 7, 2007, at §4(2).

87) *Id.* at §2(5).

acquisition history) raised a cognizable threat of greenmail.[88)]

The *Bulldog* court explicitly noted that the underlying motive of Bulldog's board was not entrenchment, but enhancement of corporate value and advancement of shareholder interests. The rights plan, although it discriminated against Steel Partners, was not deployed to protect the company's management or controlling shareholders:

> If the Gratuitous Allocation of Share Options to shareholders with discriminatory contents is primarily intended for the maintenance of control by directors who are in charge of the management or shareholders who are supporting them, and not for the maintenance of the corporate value, and ultimately the common interest of shareholders, such gratuitous allocation of share options is, as a rule, regarded as extremely unfair means. It is evident from [the facts of this case] that the Gratuitous Allocation of Share Options does not fall in such cases.[89)]

After finding that a legitimate threat existed, the Supreme Court next looked to whether the response was proportional and reasonable in relation to the threat posed by Steel Partners. One of the factors that is reviewed in determining the proportionality of the response to a hostile bidder's threat is timing of the offer. In the *Bulldog* case, the court looked at the timing of Steel Partners' hostile bid and noted that:

> [A]s a measure in response to an urgent situation in order to prevent damage to the corporate value of the counter party . . . when the [takeover bid] was suddenly initiated and the possibility of

88) Konari Uchida & Peng Xu, *U.S. Barbarians at the Japan Gate: Cross Border Hedge Fund Activism*, Bank of Japan Working Paper series, 1 (Feb. 2008) (discussing Steel Partners' history investing in over 30 companies in Japan since its entrance into Tokyo in 2002. After launching takeover bids against Sotoh Corporation, Yushiro Chemical, Sapporo Holdings, Myojo Foods and Tenryu Saw Manufacturing, most bids resulted in greenmail where the takeover bids failed, but Steel Partners sold the shares in exchange for large profits). It is also interesting to note here the uncanny parallel roles that are played by T. Boone Pickens in the *Unocal* case and Warren Lichtenstein in the *Bulldog* case.

89) Saiko Saibansho [Sup. Ct.] 2007 (Kyo) No. 30, Minshu Vol. 61 No. 5, *Bulldog Sauce*, Aug. 7, 2007, at §4(2).

> taking over control of the counter party by the Appellant and the Affiliates became real, . . . the Gratuitous Allocation of Share Options cannot be found to be by extremely unfair means.[90)]

Under the *Unocal-Unitrin* standard, the Gratuitous Allocation of Share Options was not "coercive" because it was approved by a shareholder vote. Further, Steel Partners participated in the general shareholders' meeting, took part in the process by asking clarifying questions regarding the proposal, and voted on the proposal itself. With the high approval ratio of the shareholders (83.4%), this proposal cannot be deemed as a means of "cramming down a management-sponsored alternative on the shareholders."[91)] Further, the defensive mechanism cannot be considered "preclusive" because the takeover process was not made "mathematically impossible or realistically unattainable,"[92)] strictly due to the Gratuitous Allocation of Share Options in it of itself; rather, it became impossible only after the shareholders' vote.

After finding the defensive mechanism to be neither coercive nor preclusive, the court assessed whether the mechanism fell within the range of reasonableness.[93)]

The court found two main reasons that the Gratuitous Allocation of Share Options was not an unreasonable response to the threat and thus not a violation of Article 109-1 of the Company Act. First, the court noted that Steel Partners had the opportunity to express its opinion at the general shareholders' meeting and vote on the process. Second, Steel Partners was able to receive compensation that approximated the value of stock warrants.

The final issue considered by the Supreme Court was the timing of the implementation of the Gratuitous Allocation of Share Options. Article 247 of the Company Act[94)] questions whether the discriminatory plan was put

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90) *Id.*

91) *Unitrin,* 651 A.2d at 1387.

92) *Id.* at 1388.

93) *Id.* at 1387-88.

94) Article 247 of the Company Act states:

> In the following cases, if shareholders are likely to suffer any disadvantage, shareholders may demand that the Stock Company discontinue an issue of the Share Options relating to solicitation under Article 238(1):

in place in response to the hostile bid, not prior to it.[95] The decision states:

> [I]f the problem of whether defensive measures against an attempt to take over control of the company would be adopted or not, and if they are to be adopted, their content, are determined in advance of such an attempt, it would increase the foreseeability of shareholders, investors, acquirers etc. In fact, there are increasing numbers of cases providing for such measures in advance. However, *the absence of such advance rules does not in itself mean that adoption of defensive measures is impermissible at the time the attempt of taking over control has started.*[96]

Thus, the fact that the takeover defense plan was not laid out by management prior to the takeover attempt does not make the defensive measure a *per se* violation of Japanese corporate law, which follows closely with Delaware law.[97]

3. Questions That Remain After the Bulldog Sauce Case

There is a clear parallel between the *Unocal* and the *Bulldog* decisions. However, it remains unclear what conditions must be met to receive the court's approval of defense mechanisms after the *Bulldog* decision. This section analizes three potential requirements addressed in the *Bulldog*

(i) In cases where such Share Option issue violates the applicable laws and regulations or articles of incorporation; or

(ii) In cases where such Share Option issue is effected by using a method that is extremely unfair.

The Company Act, English Translation provided by Nagoya University, §247.

95) *Id.* at §247(ii).

96) Saiko Saibansho [Sup. Ct.] 2007 (Kyo) No. 30, Minshu Vol. 61 No. 5, *Bulldog Sauce*, Aug. 7, 2007, at §4(2) (emphasis added).

97) It is interesting to note that the overwhelming majority of poison pills are of the pre-warning variety. Curtis J. Milhaupt, *Bulldog Sauce for the Japanese Soul? Courts, Corporations, and Communities - A Comment on Haley's View of Japanese Law*, 8 WASH. U. GLOBAL STUD. L. REV. 345, 352 (2009) (Table 1 shows that as of July 2006, of the companies with defensive measures, 93.5% had pre-warning type defenses, and as of July 2007, 97.4% had pre-warning type defenses).

opinion and the problems that these requirements raise.

1) Shareholder Approval

Despite the similarities between *Unocal* and *Bulldog*, the Japanese system is exceptional because the shareholders are the players that ultimately decide whether an acquisition harms their common interests. The *Bulldog* opinion states that the decision rests with the "shareholders themselves, to whom the company's interests ultimately inure, and that decision should be respected unless the general shareholders' meeting was procedurally unfair, the facts upon which the decision was predicated prove to be nonexistent or false, or there is some other important fault that renders the decision unjustified."[98] A June 30, 2008 report issued by METI (the "2008 Report") prescribing the code of conduct for directors further established the weight placed on shareholder input.[99] The emphasis put on shareholder approval in *Bulldog* also perpetuated the mistaken belief that procuring a certain percentage of management-friendly shareholder votes will provide a bullet-proof takeover defense for future corporations planning on implementing defense measures against hostile takeovers. Following the Supreme Court's decision, companies came to believe that maintaining at least 50% of voting shares in friendly hands is the best way to avoid hostile takeovers, either through cross-holdings or employee ownership. This belief has led to a revival of cross-shareholding among Japanese companies. Crossholdings jumped from 11.1% of all listed shares in March 2005 to 12.3% by the end of March 2008.[100]

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98) "Unless there is a material flaw which deprives the legitimacy of the decision of shareholders such as the flaw in the procedure of the general shareholders' meeting or the facts which served as the basis of shareholders' decision did not actually exist, or was false, the shareholders' decision should be respected." Saiko Saibansho [Sup. Ct.] 2007 (Kyo) No. 30, Minshu Vol. 61 No. 5, *Bulldog Sauce*, Aug. 7, 2007, at §4(1)(b).

99) Corporate Value Study Group, *Takeover Defense Measures in Light of Recent Environmental Changes*, Ministry of Trade, Economy and Industry of Japan, 7-8 (Jun. 30, 2008). Section (3)(1) emphasizes the board's responsibility by consistently referring to the need to consider, enhance, and contribute to shareholder interests in 6 of the 8 codes of conduct for the directors in the face of a takeover bid.

100) Ken Kiyohara, Jotaro Yokoyama & Scott Jones, *Recent Developments in Takeover Defense Discussions in Japan*, Jones Day Publications (Sept. 2008); Milhaupt, *supra* note 97, at 359.

The importance of shareholder approval of takeover defenses is illustrated by comparing *Bulldog* with *Livedoor v. NBS*,[101] a case in which the Tokyo District Court and High Court enjoined NBS from diluting Livedoor's stake in NBS by issuing warrants to management-friendly parties in order to maintain control.[102] The difference between the *NBS* case and the *Bulldog* case is that in *NBS*, defense mechanisms were unilaterally instated by a resolution of the board without a shareholder vote. The *NBS* court held that new warrants may only be issued under special circumstances to protect the common interests of the shareholders. The Tokyo High Court said that a board of directors would still be acting appropriately if the bidder were an "abusive acquirer."[103]

Bulldog was not meant to create a "just say no" standard based strictly on a shareholder vote.[104] The Supreme Court will not deem a corporation fully invulnerable from hostile bidders simply because it has a majority of friendly shareholders and an *ex ante* rights plan affirmed by the shareholders. However, reliance strictly on shareholder approval does have the negative effect of skewing the incentives of shareholders, leading them to dispose of their shares before the record date because they have no vested interest in the outcome of the meeting. Such a lack of accountability and disregard for minority shareholders could not have been the intention of the Supreme Court.

Another question that the *Bulldog* case leaves open is how to weigh the importance of shareholder input in cases where the board plays a paternalistic role by protecting corporate value that is not evident to shareholders. This is where the similarities between the Delaware and Japanese court decisions end. There are numerous Delaware cases that permit the board of target corporations to create defense mechanisms

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101) Nippon K.K. v. Raibudoa K.K., 1173 Hanrei Taimuzu 125 (Tokyo Koto Saibansho [Tokyo High Ct.], Mar. 23, 2005); *See* CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 87-107 (2008).

102) Cristina Alger, *The Livedoor Looking Glass: Examining the Limits of Hostile Takeover Bids in Japan*, 3 NYU J. L. & BUS. 309, 319-21 (2007).

103) *Id.*

104) See *supra* Section IV(2)(2) for a discussion of the considerations that went into the *Bulldog* opinion.

against hostile bidders without consulting the shareholders. One example of this protectionist approach is seen in *Moore Corp. v. Wallace Computer Services*.[105] In *Moore*, the District Court of Delaware found that the defensive mechanisms put in place against the hostile bidder were not redeemed because the board reasonably believed that the shareholders' lack of information about the long-term benefits of their investment would cloud their judgment and lead to an inadequate price offering only a small short-term gain.[106] How will the Japanese courts balance the deference to boards' business judgment and the protection of shareholders' interests?

2) Compensation for Potential Acquirers

The *Bulldog* case has also been criticized for its potential to encourage greenmailing. One of the reasons the Supreme Court found the Gratuitous Allocation of Share Options to be a reasonable and proportional response to Steel Partners was the compensation that Steel Partners received. Although it is rational to consider whether the hostile bidder suffered financial harm, the holding simultaneously seems to approve of greenmailing. Advance-warning type defensive measures such as the poison pill signal to corporations that they should provide the target company's management with the time and information necessary to adequately inform its shareholders about the potential purchase, and to do so before making a large purchase of shares. If the potential purchaser fails to comply (as Steel Partners did here), the management may use defensive countermeasures that could cause extensive monetary damage to the acquirer. The threat of such damage acts as a deterrent and compels the acquirer to work with the management. However, if the acquirer is determined to take control of the company, these barriers will sometimes be insufficient to force the acquirer to negotiate with the board.

The ruling also may send the wrong message to business executives by

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105) Moore Corp. v. Wallace Computer Services, 907 F. Supp. 1545 (Dist. Ct. Del. 1995).

106) *Id.* at 1560-61 ("Therefore, Moore's tender offer poses a threat that shareholders might tender their shares without appreciating the fact that after substantial capital investment, Wallace is actually witnessing the beginning of the pay-off of its business strategy. The Court therefore finds that Moore's tender offer poses a threat to Wallace that shareholders, because they are uninformed, will cash out before realizing the fruits of the substantial technological innovations achieved by Wallace").

leading them to believe that they can pay off unsolicited acquirers. As evidence that this perception is taking hold in the boardroom, the statistics after the *Bulldog* decision show an increase in defensive measures that stipulate monetary payoff to unsolicited acquirers. It was estimated that, as of July 2008, around 21.4% of all takeover-defensive measures (39.5% of defensive measures newly adopted in that year) stipulated to the option of making a payment of money to unsolicited acquirers.[107]

3) Proxy Battles

When considering the standards set by the *Unitrin-Unocal* decisions, American legal practitioners and judges must always think about the availability of proxy fights. The second prong of the *Unitrin-Unocal* proportionality test requires that the defense mechanism not be preclusive. *Unitrin* has clearly established that takeover defenses cannot be deemed preclusive as long as a proxy contest remains a viable alternative for attaining the acquirer's goals, regardless of the difficulty and expense associated with this process. This section looks at the prevalence and effectiveness of proxy fights in Japan.

Thus far, proxy fights have been rare in Japan, and uncertainty remains regarding regulations and practice.[108] However, recently, there has been a small number of cases in which shareholders were able to mount successful objections to company business plans using proxy fights. Notable cases include Tokyo Kohtetsu Co., Ltd., the first Japanese case which saw shareholders successfully veto a merger approved by both company boards. In February 2007, a proposal for Tokyo Kohtetsu to become a wholly-owned subsidiary of Osaka Steel Co. Ltd. through a share exchange was rejected by the shareholders because Ichigo Asset Management International Pte. Ltd. initiated a proxy fight to object to the share exchange on the grounds that it failed to fully reflect the value of Tokyo Kohtetsu.[109] Similarly, a CFS Corporation merger proposal was rejected through a proxy fight. In October 2007, CFS's proposal to establish a new holding company

107) Shintaro Takai & Keiji Tonomura, *Hostile Takeover Defense Measures*, INTL. FIN. L.R.: GUIDE TO JAPAN 2009 (2008).

108) *Id.*

109) Reuters, *A First in Japan: Shareholders Block a Takeover*, N.Y. TIMES, Feb. 22, 2007.

with Ain Pharmaciez Inc. through various share transfers to merge their business operations failed because the largest shareholder of CFS, Aeon Co., Ltd. initiated a proxy fight on the grounds that the exchange ratio for the merger was disadvantageous for CFS.[110)] Tokyo Electron is the third case in which shareholders successfully refused to support the board's proposal. Similar to the two cases preceding it, this case reflects the growing ability of shareholders to reject management's business plan.[111)]

The shareholder power derived from proxy fights extends beyond the ability to trump management business plans, and reaches to thwart management appointments. At a May 2008 meeting of Aderans Holdings Co., dissatisfied shareholders successfully led other shareholders to reject 7 of the 9 company sponsored reappointments to the board.[112)] The importance of this case lies in the fact that the shareholders were able to replace the management of a corporation through a proxy contest. This is of particular significance because of the Delaware standard that protective measures are not considered preclusive or coercive when shareholders are capable of removing the current management and redeeming defensive measures they have put in place. The success of these proxy fights illustrates Japanese shareholders' growing scrutiny of management's proposals, ensuring that corporate value and the promotion of shareholder interests continue to improve.

The effectiveness of proxy fights in Japan will likely continue to improve shareholder activism and defense mechanism evaluation. This is especially true because proxy fights in Japan are more potent weapons against the poison pill than in the United States because Japanese corporate law does not permit staggered boards and allows removal of directors

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110) Taiga Uranaka, *Japan's Aeon to Double Stake in Drug Store Chain*, Reuters, Mar. 17, 2008.

111) Douglas G. Gruener, *Chilled to the Pill: The Japanese Judiciary's Cool Reception of the Poison Pill and Potential Repercussions*, 67 U. Pitt. L. Rev. 871, 874 (2006); Hansen, *supra* note 75, at 169-70.

112) Tomoko Yamazaki & Shigeru Sato, *TCI Loses More Than Face as Japan Says No to Foreigners Playing*, Bloomberg, July 28, 2009. ("On May 28 [2008], Steel Partners won a rare victory, using its 27 percent ownership of Aderans Holdings Co., a Tokyo-based wigmaker, to install a new board to maintain control and block a rival bid. The move effectively prevented a 17.6 billion yen offer from a Japanese buyout fund, Unison Capital Inc., which the Aderans management had backed").

without cause.[113)]

These questions are not clearly answered by the *Bulldog* case. Only further court decisions in future hostile takeover cases will resolve the ambiguities found in the current legal standards.

4) Observations

Although many scholars believe that the Japanese system is converging with the United States system, the reality is that this belief is somewhat overstated. As we have tried to demonstrate in this paper, the *Bulldog* case has raised more questions about the proper balance of shareholder empowerment, the proper compensation for potential acquirers, and the future role of proxy fights. However, as we look at the future of Japan and the convergence with Delaware's framework,[114)] there should be little real concern about these questions. These are changing tides, and Japanese corporate law is being constantly refined and reevaluated by the courts. Similar to Delaware, the relevant case law at times offers mixed conclusions and the precedential case law is largely fact-dependent.[115)] Japan will face many more cases, which will raise questions that current precedent cannot answer, and the judges that face these cases must carefully craft answers with the aim of shaping the long-term direction of Japanese corporate law.[116)] As was the case in Germany, crafting a legal response to hostile takeovers touches deep chords of nationalism, protectionism, and fear of

113) Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2202 (2005).

114) *Id.* at 2196 (demonstrating the incorporation of Delaware case law into the 2005 METI Takeover Guidelines).

115) The case law and the decisions have been all over the map and no consistent bright line rule exists for defensive mechanisms in response to hostile takeover actions. This statement is no truer than in the context of defensive mechanisms and hostile takeovers. The case law that post-dated *Unocal* added numerous conditions and additional rules to be addressed, as evidenced by *Unitrin*. The addition of the *Revlon* and *Omnicare* duties further muddled the legal waters with respect to board duties in reaction to hostile takeover bids. As stated in *Barkan v. Amsted Industries, Inc.*, 567 A.2d 1279, 1286 (Del. 1989), "there is no single blueprint that a board must follow to fulfill its duties." This statement stands true for *Unocal* and *Revlon* duties.

116) The indeterminacy that plagues the Delaware courts will likely be more prevalent in Japan because Japanese judges lack formal training in business and finance. Milhaupt, *supra* note 97, at 358.

the unknown.[117] Currently such fear is premature; hostile bids remain a largely immobilized strategy in Japan. Friendly takeovers are still the norm and Japan has yet to see a successful hostile takeover.[118] Although there has been an increase in hostile takeover bids, this is different from the *ex ante* threat of hostile takeovers.[119] As a further deterrent to aspiring corporate raiders, the recent imprisonment of Takafumi Horie and Yoshiaki Murakami—two of the most prominent shareholder activists in Japan—has had a chilling effect on Japan's takeover market, especially the domestic market.

The Commercial Code amendments and the METI Guidelines do not establish the total legal realm of the defensive mechanisms. The Takeover Guidelines in particular are only soft legal guidelines, and offer no certainty for determining the legally enforceable standards for defensive mechanisms. The job of establishing the standards and limitations of defensive mechanisms falls to the Japanese courts.[120] Milhaupt is hopeful that "Japan will find its own equilibrium point in this process of shifting expectations as it fits Delaware takeover jurisprudence to the dictates of its own political economy."[121] Until hostile takeovers become more prevalent in Japan, additional case law will be sparse. In the meantime, it is important to understand the advantages hostile takeovers bring to markets and not fear such a development. Despite the questions raised and the disruptive side effects of the *Bulldog* case, the future is bright for Japanese corporate law and there is no use crying over spilled *Bulldog* sauce.

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117) Milhaupt, *supra* note 113 at 2183; Jeffrey N. Gordon, *An American Perspective on Anti-Takeover Laws in the EU: The German Example*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 541, 556 (Guido Ferrarini et al. eds., 2004).

118) Dan W. Puchniak, *Delusions of Hostility: The Marginal Role of Hostile Takeovers in Japanese Corporate Governance Remains Unchanged*, 28 ZEITSCHRIFT FÜR JAPANISCHES RECHT [J. JAPAN L.] 89, 111 (2009).

119) *Id*. at 112.

120) Gilson, *supra* note 7, at 41; Milhaupt, *supra* note 97, at 357.

121) Milhaupt, *supra* note 113, at 2215.

V. The Poison Pill in Korea

1. Corporate Governance Concerns

Korea is still debating the merits of adopting the poison pill. Strong voices have emerged on both sides of the issue, as touched on in the introduction. In the wake of a presidential promise to enact takeover defense legislation,[122] supporters of the bill believe it will allow Korean firms to stop spending cash reserves fighting off hedge funds and greenmailers with expensive share buybacks,[123] which would in turn free up finances to hire more workers, build new facilities and focus on long-term growth and development. Controversially, the bill's supporters also claim that secured managerial control will increase corporate investment.[124] Opponents fear the poison pill could be viewed as discriminatory against foreign capital for its protectionist qualities.[125] They also have concerns about how the pill will interact with the *Chaebol* system of control;[126] many claim that it will further consolidate power, while paralyzing ongoing corporate governance reform and reducing transparency.[127] Some people believe that the pill is a moral hazard because those currently in power will determine how and when the device will be implemented.[128] These critics express concern regarding the stifling of foreign investments, and express that Korea's unique corporate governance structure will not be able to integrate the anti-takeover provisions. The overwhelming sentiment of

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122) Lee, *supra* note 1.

123) Yu-ho Kim, *Poison Pill*, Korea Times, Mar. 18, 2010.

124) *Id.*

125) *Id.*

126) *See* Jeong Seo, *Who Will Control Frankenstein?: The Korean Chaebol's Corporate Governance*, 14 Cardozo J. Int'l & Comp. L. 21 (2006); James Jinho Chang & Hyun-Han Shin, *Family Ownership and Performance in Korean Conglomerates*, 15 Pacific-Basin Fin. J. 329 (2007); E. Han Kim & Woochan Kim, *Changes in Korean Corporate Governance: A Response to Crisis*, J. App. Corp. Fin. 47 (2008); Hwa-Jin Kim, *Toward the "Best Practice" Model in a Globalizing Market: Recent Developments in Korean Corporate Governance*, 2 J. Corp. L. Stud. 345 (2002).

127) Eun-jung Kim, *supra* note 2; Woochan Kim, *The Poison Pill Bill is Not in Perspective*, Kyunghyang.com, Nov. 11, 2009 (Korean).

128) Yu-ho Kim, *supra* note 123.

these individuals is that the costs will outweigh the benefits.[129] If the pill were to be adopted in Korea, the key to efficiently utilizing the tool would be to implement other mechanisms to minimize the detrimental effects of the pill.[130]

Although heated debate can be interpreted as a sign of disorder, in this case, the contrasting views are beneficial. As long as the dissenting voices continue to monitor the effect of the poison pill after its adoption, these critics can act as the policemen to ensure the success of the pill in Korea by acting as a safeguard against abusive and inappropriate uses of the pill.

In addition to proactive oversight, timing is an important consideration in determining how effective the poison pill will be. Korea can benefit from the introduction of the poison pill because Korea has been experiencing a sharp spike in hostile takeover bids, beginning with the Dongbu Group's acquisition of Hannong Corporation in 1994. In the last decade, approximately three major hostile attempts have arisen each year, many for companies belonging to the most prominent corporate groups.[131] There is no consensus on whether Korea's hostile takeover activity is efficient. As discussed above, the desirability of free markets and secure managerial control for foreign investors is still uncertain. How the anti-takeover measures will impact ongoing Korean corporate governance reforms is also unclear.

2. The Code

Under current Korean law, the United States incarnation of the poison pill is not legal. The KCC restricts dividend payouts to cash or stock, which prevents the issuance of the necessary rights, and shareholders play a controlling role in the form and timing of dividends, meaning a board of directors cannot unilaterally create the framework for a poison pill.[132] The

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129) *Id.*

130) *Id.*

131) Hwa-Jin Kim, *The Case for Market for Corporate Control in Korea*, 10 OXFORD U. COMP. L. FORUM 2, 229 (2009).

132) *Id.* at 268. This is also the case in many European countries. Davies & Hopt, *supra* note 4, at 239.

Korean Ministry of Justice formed a working group in April 2008 and after two years of work, produced an 862 page report in March 2010.[133] The following is a summary of some key proposed revisions to the KCC:

Article 432-2 would allow companies, by amendment to their articles of incorporation, to give shareholders the right to request the issuance of new shares which could be used in a shareholder rights plan. The proposed text of the article would limit the time period and exercise price, while also mandating that the new shares be issued in proportion to current ownership. The article also limits the use of these provisions to actions that would benefit all shareholders and maintain or increase the value of the company. Further, it provides for discriminatory issuance and redemption by granting the subscription options to only certain shareholders, limiting the ability to exercise the option, or offering different redemption terms to certain shareholders. This provision gives the pill its teeth, by allowing the company to use the subscription to dilute the holdings of certain shareholders. It would also preempt the disputes regarding the equal treatment of shareholders principle that took place in the *Bulldog* case.

Articles 432-3 and 432-4 would include transparency requirements that must be met if the subscription option is granted (which triggers the poison pill). Through resolution or public notice, the board must specify which shareholders will not receive the full benefits of the option, explain the reasons for the discriminatory action, and disclose information about the securities to be issued. Article 432-5 would prohibit the transfer of the pill separately from the shares. It also allows the free redemption of the pill through the resolution of board of directors or of the shareholders' meeting.

While the final bill may look quite different than the current proposal, ministry officials stated that "the revision will . . . impose strict guidelines that prevent large shareholders seeking to protect their management control from abusing the system."[134] They even considered requiring two thirds of directors to vote in favor of the rights plan, although this idea has not been extensively pursued.[135] The statutory inclusion of shareholder

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133) Korean Ministry of Justice, Proposal for an Amendment of the Commercial Code (Subscription Options): Annotations and Minute of Meetings (Mar. 2010) (Korean).

134) Eun-jung Kim, *supra* note 127.

135) Lee, *supra* note 1.

approval in the bill is a strong indicator that Korea appreciates the potential destructive power of the pill and brings it to the forefront of the poison pill evolution as we see it in the United States and Japan.

However, according to a recent empirical study using the Korea Exchange data, the stock market did not react negatively in March 2008 to the news that the Korean government (Ministry of Justice and Financial Supervisory Service) decided to introduce the poison pill.[136] The study also found that the stock price of *Chaebol* firms did not show unusual movement upon the government's announcement.[137] It did not find that firms with higher foreign ownership showed stronger negative reaction to the news. The study concludes that the new takeover defense tool would not make the agency problems in Korean firms worse.[138]

3. *Monitoring*

The potential police for the Korean poison pill are similar to those doing the monitoring in the United States and Japan. The court system, government agencies, shareholder rights groups, institutional investors, and the national stock exchange are all possible overseers.

Considering Japan's experience, the court seems to be the likely candidate for leading the movement. Although corporate jurisprudence in Korea is currently somewhat undeveloped,[139] the decisions the court has issued demonstrate a commitment to fair and balanced positions regarding takeovers and takeover defenses. Although Korea does not currently have a specialized commercial court, international scholars including Stephen Choi and Bernard Black have proposed creating an analog to the Delaware Chancery Court.[140] Regardless of whether such a court is created or current

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136) Hyun Han Shin et al., *Stock Market Reactions to the Announcement of Adopting Poison-pills in Korea*, 52 ADVANCED COMMERCIAL L. REV. 53 (2010) (Korean).

137) *Id*.

138) *Id*.

139) Hwa-Jin Kim, *supra* note 131, at 245.

140) *See, e.g.,* Stephen Choi, *The Future Direction of Takeover Law in Korea*, 7 J. KOREAN L. 25, 32 (2007). For the examples of the business courts in the United States, *see* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 711 (2002).

courts handle the litigation that will arise from takeover disputes, concerns about developing judicial expertise and maintaining a sufficient corporate law caseload remain.[141] These concerns may be outweighed by the judicial system's flexibility; a rigid set of rules can be much more easily maneuvered around, while in a court each dispute further builds on the law—a valuable asset to countries with limited corporate jurisprudence.[142] We believe that the court system is the core of the answer to Gilson's policing question, but other forces must supplement these efforts in order for them to be effective.[143]

Governmental agencies offer unmatched qualifications for handling takeover defense regulation,[144] but considering the *Chaebol* system, these agencies may suffer from a lack of proper incentives unless stronger political and economic forces develop to push them to carefully protect minority shareholders and acquirers. The task is a delicate and constantly changing balancing act, one that will be very difficult to achieve with the static legislation such agencies tend to promulgate. A well intentioned but imbalanced regulatory scheme or legislative overcorrection could cause disorder in the delicate system.

Shareholder rights groups have played an important role in the debate over adoption of the pill,[145] and ideally will remain involved if the bill passes. As the market for corporate control becomes more liquid and proxy reform occurs, these groups will likely gain influence and could become powerful enough to have a strong impact on the outcome of control battles through voting recommendations and proxy solicitation. Institutional investors will likely follow a similar trajectory, and international hedge funds and acquirers may play a more immediate role in improving corporate governance in Korea if they are able to obtain large stakes in major companies. Such an impact could be especially noticeable if investors are able to acquire stakes in *Chaebol* member firms.

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141) Choi, *supra* note 140, at 32.

142) Hwa-Jin Kim, *supra* note 131, at 275.

143) *See* Hwa-Jin Kim & Ok-Rial Song, Mergers and Acquisitions 409-410 (2009) (Korean).

144) Choi, *supra* note 140, at 32.

145) Lee, *supra* note 1.

Lastly, the Korea Exchange ("KRX") ought to play a regulatory role similar to that of the NYSE and TSE. Choi points out that the national exchange is in a position to be incentivized by companies wanting to list their stock as well as investors who provide the capital.[146] The exchange has more freedom to experiment with rules and guidelines than government agencies and Korea's Ministry of Finance and Economy, which could further ensure that the rules and guidelines it promulgates protect the interests of investors.[147]

VI. Concluding Remarks

The United States offers a wealth of substantive experience with the poison pill that other countries should take into account and incorporate into their own efforts to regulate the takeover defenses. The substance of Delaware's relevant jurisprudence alone is enough to substantially limit takeover defenses to mostly desirable circumstances. But neither Delaware law nor the United States' strategy as a whole is perfect, and they continue to change. In 2009, under strong pressure from shareholder rights groups, the percentage of companies voluntarily requiring shareholder input on the implementation of poison pills increased dramatically,[148] bringing the United States more in line with the Japanese and Korean proposed pill structure. This groundbreaking shift lends itself to the conclusion that the precedential value of the United States' strategy lies in its age, not its fundamental design—and countries building their own strategies for poison pill regulation would be remiss to attempt a simple transplant without critical evaluation and customization.

Japan appears to have laid the groundwork for a successful long-term implementation of the poison pill. Even though the isolated nature of the *Bulldog* case does not allow us to draw definitive conclusions about what

146) Choi, *supra* note 140, at 34.

147) *Id.* at 39. For the self-regulation of the Korea Exchange, *see generally* Bernard Black, *The Role of Self-Regulation in Supporting Korea's Securities Markets*, *in* SELF-REGULATION IN THE KOREAN SECURITIES MARKET (Hwa-Jin Kim, ed., 2002).

148) John Laide, *Shareholder Input on Poison Pills*, SharkRepellent.net, June 15, 2009.

direction the courts will take the poison pill, it does provide sufficient analysis for academic critique. The questions raised by the decision in Japan will be answered in due time, and at this point there is no immediate threat of a sudden spike in hostile takeovers as feared by some academic scholars. The questions raised by the *Bulldog* case will shape the future of the legal structure as the courts opt to answer them over time. As was true in Delaware, the road to establishing these legal standards will be long and complex.

Korea also appears to be laying the groundwork for successful adoption of the poison pill. There has been vigorous debate, and the human infrastructure necessary to oversee the pill's use seems to be in place. Korea's experience thus far is fairly analogous to the paths of the United States and Japan. One potential complication not thoroughly addressed in this article is how a poison pill would mesh with the *Chaebol* holding structure. One argument is that hostile takeovers are finally allowing the market to determine the optimal organizational structure and the pill will empower *Chaebol* families to further protect against this change.[149)] The truth is the *Chaebol* holding structure itself is a more powerful takeover defense than the poison pill,[150)] and perhaps adding liquidity to the market for corporate control is best done through other types of corporate governance reform. Choi specifically notes that increased fiduciary duties, a better framework for shareholder litigation, and a corporate opportunity doctrine would all be positive and productive steps for Korea.[151)] Similarly, wider corporate governance reforms could have a strong preventative impact on poison pill misuse. The important question is not simply whether the poison pill should be adopted or not. The poison pill is little more than a tool—one that can be used for different purposes and with different motives. Prohibiting its use accomplishes little; there are many tools available and as time goes on, new ones will be invented to fill the gaps. The underlying goal should be to disincentivize all self-dealing acts by incumbent management and arbitrage-driven corporate raids by acquirers, by focusing on discouraging these activities and intervening

149) Choi, *supra* note 140, at 26.

150) *Id*. at 35.

151) *Id*. at 38.

when they do occur, rather than attempting to regulate the multitude of tools and devices the market invents.

KEY WORDS: corporate governance, takeover, poison pill, Commercial Code, Bulldog case, Livedoor, *Chaebol*

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