DELAWARE CORPORATE LAW BULLETIN

Defusing the "[N]uclear [W]eapon of [C]orporate [G]overnance": Chancery Court Enjoins "Extreme, Unprecedented" Poison Pill Adopted to Defend Against Hypothetical Stockholder Activism

Chancery Court confirms that boards must justify adoption of an "extreme" form of stockholder rights plan based on actual threats perceived at the time of adoption, not on the possibility of "hypothetical future threats"

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INTRODUCTION

As hostile takeovers flourished in the 1980s, boards of directors of target companies sought potent defenses to force a negotiation or cause delay to find a "white knight" willing to make a topping bid. The stockholder rights plan (a/k/a "*poison pill*"), which can be implemented by a target board without stockholder approval, emerged as one of the most popular takeover defenses. Stockholder rights plans come in different flavors but, in broad strokes, generally prevent potential acquirers from purchasing a significant block of target company stock without first negotiating with the target board. A hostile bidder who purchases shares in an amount that crosses the designated rights plan threshold without first obtaining target board approval would, by operation of the plan, suffer massive dilution of its equity position. The threat of this dilution is the stick that forces a hostile bidder to negotiate with the target board rather than continuing to amass shares in the open market or via a tender offer.

After the Delaware Supreme Court first upheld the validity of the stockholder rights plan in *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985) ("*Moran*"), the rights plan became a standard feature in boards' takeover defenses. Post-*Moran*, "[p]oison pills metamorphosed": boards steadily lowered trigger thresholds from 20% in *Moran* to 10% and lower, and began deploying rights plans for other purposes, such as protecting net operating loss assets ("*NOLs*") for tax purposes. The Delaware Supreme Court tacitly approved the expanded boundaries for the stockholder rights plan when, in *Versata Enters., Inc. v. Selectica, Inc.*, 5. A.3d 586 (Del. 2010) ("*Selectica*"), the high court upheld a stockholder rights plan with a 4.99% trigger designed to preserve NOLs by warding off changes in control.

Post-*Moran*, the Delaware Court of Chancery ("*Chancery Court*") evaluates stockholder challenges to rights plans under the enhanced standard of review first articulated by the Delaware Supreme Court in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) ("*Unocal*"). *Unocal* established a two-part inquiry for analyzing takeover defense measures. *First*, the Chancery Court asks "whether the board had reasonable grounds for identifying a threat to the corporate enterprise." If the answer to this query is yes, then, *second*, the Chancery Court looks to "whether the defensive measure is draconian, in the sense of being preclusive or coercive" and, if not, "whether the response was reasonable in relation to the threat posed." To the chagrin of many corporate governance activists, this seemingly narrow framework has resulted in relatively few invalidations of stockholder rights plans (or other takeover defenses) over the years. Perhaps most famously, in *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 16 A.3d 48 (Del. Ch. 2013), Chancellor William B. Chandler was highly critical of a target board's use of a standard rights plan to defeat an all-cash, noncoercive premium tender offer by a competitor, but ultimately declined to intervene.

On the other hand, when target boards on occasion have tweaked their rights plans to establish an even more aggressive takeover defense than the norm, the Chancery Court has interceded to strike down those features. For example, the Chancery Court has struck down rights plans employing so-called "dead hand" (see *Carmody v. Toll Bros.*, 723 A. 2d 1180 (Del. Ch. 1998)); and "slow hand" (see *Mentor Graphics Corp. v. Quickturn Design Syss., Inc.*, 728 A.2d 25 (Del. Ch. 1998)) provisions designed to impede the ability of investors to wage a proxy contest and seat new directors committed to terminating the rights plan.

Recently, the Chancery Court encountered a stockholder rights plan with novel features in *Williams Cos. S'holder Litig.*, No. 2020-0707-KSJM, 2021 WL 75493 (Del. Ch. Feb. 26, 2021) ("*Williams Litigation*"). Then-Vice Chancellor Kathaleen St. Jude McCormick (although Vice Chancellor McCormick has been elevated to Chancellor, this *Delaware Corporate Law Bulletin* will, for convenience, refer to her as the "*Vice Chancellor*") described the subject rights plan as "unprecedented in that it contains a more extreme combination of features than any pill previously evaluated by this court: a 5% trigger threshold, an expansive definition of 'acting in concert,' and a narrow definition of 'passive investor.' " Although the target board adopted its rights plan "at the outset of the COVID-19 pandemic and amid a global oil price war" in response to a dramatic dive in the company's market price, the Vice Chancellor, applying *Unocal*'s enhanced scrutiny standard of review, reiterated that adoption of a rights plan must be justified based on actual threats the board perceived at the time of adoption rather than to preempt the possibility of "hypothetical future threats." Absent any such threats, the Vice Chancellor declared that the target board "failed to show that this extreme, unprecedented collection of features bears a reasonable relationship to the [ ] stated corporate objective" and, as a result, permanently enjoined operation of the rights plan.

I. FACTUAL BACKGROUND

The Williams Companies, Inc. ("*Williams*" or the "*Company*") "owns and operates natural gas infrastructure assets . . . and handles approximately 30% of the nation's natural gas volumes." Between March and late-August 2020, "Williams' market capitalization ranged from approximately $11.22 to $27.54 billion." About half of Williams' outstanding shares were "owned by approximately twenty institutional investors," with the "largest three stockholders—Blackrock, Vanguard and State Street—collectively hold[ing] almost a quarter of the Company's common stock." Further, at this time, the Williams board of directors (the "*Board*") "comprised twelve members"—including CEO Alan Armstrong—"and eleven outside directors." Directors stood for re-election annually.

As corporate governance activists and others launched an offensive against corporate takeover defenses, including stockholders rights plans, in the wake of the Enron scandal of the early 2000s, many public corporations approved "on-the-shelf" rights plans that could be activated rapidly by the target board, without stockholder action, when a takeover threat arose. The Board followed suit, approving its own "on-the-shelf" rights plan (the "*Shelf Pill*") and refreshing the Shelf Pill from time to time thereafter. At the time of its last refreshment in October 2019, the Shelf Pill "was geared towards a traditional change of control situation." While memories were faulty by the time of the *Williams Litigation*, the Shelf Pill "likely had a trigger of 15% and certainly greater than 5%."

A. Williams Faces a Failed Merger and Stockholder Activism

In 2011, two activist stockholders (the "*Activists*") each acquired "slightly less than 5% of Williams stock." In 2014, representatives of each of the Activists were added to the Board and began pushing for a merger with Energy Transfer Equity LP ("*ETE*"). The two companies signed a merger agreement in 2015 (the "*ETE Merger*"). However, when adverse developments in the energy industry effectively destroyed the tax efficiencies anticipated for the ETE Merger and ETE's tax counsel could not deliver the required tax opinion, the parties terminated the transaction.

The failed ETE Merger, "bruising to both sides," embroiled Williams in a series of court battles as the parties "sought to dress their wounds with the balm of contractual damages" (quoting *Williams III* below):

- *First*, in 2016, Williams asked the Chancery Court to specifically enforce the ETE Merger. Vice Chancellor Sam Glasscock III denied this motion, ending all hope that the transaction would be reinstated. *Williams Cos. v. EnergyTransfer Equity, L.P.*, No. 12168-VCG, No. 12337-VCG, 2016 WL 3576682 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017) ("*Williams I*"). For a discussion of *Williams I*, see Robert S. Reder & Nicole A. Dressler, *Delaware Court Refuses to Enjoin Buyer from Terminating Merger Agreement Due to Failure of Closing Condition*, 71 Vand. L. Rev. En Banc 49 (2018).
- *Second*, ETE sought payment from Williams of a $1.48 billion termination fee. This time Vice Chancellor Glasscock sided with Williams, ruling it was not required to make this payment. *Williams Cos. v. Energy Transfer Equity, L.P.*, No. 12168-VCG, No. 12337-VCG, 2017 WL 5953513 (Del. Ch. Dec. 1, 2017) ("*Williams II*").
- *Third*, Vice Chancellor Glasscock denied ETE's motion for summary judgment seeking to dismiss Williams' claim it was entitled to a $410 million reimbursement fee. *Williams Cos. v. Energy Transfer Equity, L.P.*, No. 12168-VCG, No. 12337-VCG, 2020 WL 3581095 (Del. Ch. July 2, 2020) ("*Williams III*"). For a discussion of *Williams II* and *III*, see Robert S. Reder & Maryam Saad, *Chancery Court Considers Whether Either Party to Failed Multibillion Dollar Merger Was Entitled to Payment of a Fixed Termination Fee*, 74 Vand. L. Rev. En Banc 263 (2021).

These events created significant fallout for Williams: the Activists attempted to replace Armstrong as CEO; six of Williams' then thirteen-member Board resigned when Armstrong was retained; one of the Activists threatened a proxy fight to replace the entire Board, but "agreed to stand down when Williams named three new independent directors," one of whom became Board Chair; and management "underwent significant change."

B. Effects of COVID-19 Pandemic and Global Oil Price War

In the months preceding the onset of the COVID-19 pandemic, Williams' stock price enjoyed a relatively stable period around a high of $24.04. This stability was short-lived as Williams, like many companies, experienced a sharp decline in its market price in 2020:

- By the end of February 2020, Williams' stock traded at $18.90.
- When a global oil price war broke out in early March 2020, the market price "fell to [its] lowest level[ ] in 15 years, dropping 20% in a single day" and closing at $14.99 on March 9.
- The stock price kept falling throughout March, so that "[b]y March 19, Williams stock price had fallen to approximately $11, which was close to a 55% decline since January 2020."

Alarmed by the market price drop and dramatic fluctuations in daily trading volume, the Board met with management and representatives from Morgan Stanley to discuss possible responses. Morgan Stanley informed the Board that "the stock was approaching lows similar to those in 2010 and 2016, despite the fact that earnings were 25% higher and the Company was carrying significantly less debt." Although the Board considered a share repurchase program to address the low valuation, one Board member, Charles I. Cogut, a retired mergers and acquisitions lawyer well experienced with implementing stockholder rights plans, proposed an alternative solution: an enhanced rights plan.

C. Board Adopts New Rights Plan

Drawing on his experience, Cogut proposed the Board adopt a rights plan with the goal of preventing "[a]ny activism that would influence control over the company at an aggregate level above 5 percent." In particular, Cogut opined that the " 'uncertainty' in the market required a solution that could 'insulat[e]' management from activists 'who were trying to influence the control of the company.' " Cogut's proposed rights plan would have a "5% triggering threshold, a one-year duration, and an exclusion for passive investors." Cogut felt the Board needed to adopt an extreme solution—one he termed "the nuclear weapon of corporate governance"—to address the unprecedented situation of a combined pandemic and global oil price war.

The Board moved quickly to implement Cogut's proposal. After management reviewed a draft rights plan prepared by outside counsel, the Board met first at an "emergency" meeting on March 18, 2020, and then reconvened the next day. During the second meeting, Morgan

Stanley advised that "campaigns from well-known activists are expected to continue at a reasonable pace in the current market." After focusing almost exclusively on the 5% trigger, the Board unanimously adopted the rights plan "in substantially the form presented at the meeting." The next day, Williams publicly disclosed adoption of the rights plan and, although the Board supplemented its 2020 proxy statement to disclose the rights plan adoption, it was not submitted for a stockholder vote at the annual meeting.

D. Key Features of Rights Plan

In addition to a one-year expiration date intended to deflect "potential negative investor reaction," the newly-adopted rights plan (the "*Rights Plan*") included "four key features":

- an aggressive 5% trigger;
- an expansive definition of "acquiring person" capturing indirect stock ownership through derivative interests, such as warrants and options;
- an "acting in concert" provision (the "*AIC Provision*") giving the Board a "great amount of latitude" to determine when an investor was "Acting in Concert" with another, by including within its coverage (i) "parallel conduct" to address concerns of "so-called wolfpack activism achieved through 'conscious parallelism' that deliberately stop[s] short of an explicit agreement" among investors, and (ii) a "daisy chain" concept whereby "[a] Person who is Acting in Concert with another Person shall be deemed to be Acting in Concert with any third party who is also Acting in Concert with such other Person"; and
- a limited "passive investor" exemption that potentially excluded investors seeking to "direct or cause the direction of the management and policies of the Company," which "would include at most" the Company's three largest institutional investors.

Moreover, the Rights Plan operated in an "asymmetrical" manner by excluding from its coverage " 'actions by an officer or director of the Company acting in such capacities,' such that incumbents can act in concert without suffering the consequences of the Plan."

E. Williams Faces Significant Backlash

As the Board anticipated, both the market and stockholders reacted negatively to the Rights Plan. For example, Institutional

Shareholder Services Inc. ("*ISS*") recommended that stockholders vote against the Board Chair's reelection at the upcoming annual meeting, citing the Rights Plan as "problematic" and "highly restrictive." ISS also complained that the Rights Plan "was not a reaction to an actual threat—real or perceived—of an activist investor or hostile bidder." In response, Williams "launched a stockholder outreach campaign to preserve [the Board Chair']s seat," and Williams management held an investors conference to discuss the Rights Plan. At the annual meeting, Williams stockholders narrowly reelected the Board Chair, with only 67% of the votes cast favoring his reelection.

Despite the blowback, the Board left the Rights Plan in place. And, as the initial shock of the pandemic wore off, Williams' stock price recovered so that, by August 24, the stock closed at $21.68.

Nevertheless, on August 27, two Williams stockholders ("*Plaintiffs*") filed suit in Chancery Court challenging the Rights Plan. Plaintiffs' operative complaint, which asserted a direct claim for breach of fiduciary duty against all but one of the Board members ("*Director Defendants*"), sought declaratory and injunctive relief regarding the validity and enforceability of the Rights Plan. After a three-day trial in early January 2021, Vice Chancellor McCormick issued a mandatory injunction requiring Board redemption of the Rights Plan.

II. VICE CHANCELLOR MCCORMICK'S ANALYSIS

At the outset, Vice Chancellor McCormick considered the applicable standard of review for analyzing the validity of the Board's adoption of the Rights Plan. Although, following *Moran*, "this court and the Supreme Court have used *Unocal* exclusively as the lens through which the validity of a contested rights plan is analyzed," Director Defendants sought application of the "deferential business judgment standard," arguing that the "omnipresent specter" of director entrenchment that triggers enhanced scrutiny in the takeover defense context "is not present where a poison pill is designed to address stockholder activism. . . ." According to the Vice Chancellor, this "contention runs contrary" to *Selectica*, where the Delaware Supreme Court held that "all poison pills, 'by . . . nature,' have a potentially entrenching 'effect.' " Therefore, the Vice Chancellor invoked *Unocal*'s two-prong enhanced scrutiny standard of review.

A. Unocal Prong One

Under the first prong of *Unocal*, directors must demonstrate that "after conducting a reasonable investigation and acting in good faith, the board . . . sought to serve a legitimate corporate objective by responding to a legitimate threat." Vice Chancellor McCormick explained that "a reasonable investigation into [an] illegitimate threat[ ] or a good faith belief that the threat warranted a response[ ] will not be enough to save the board." Rather, directors must establish they (i) conducted a "good faith and reasonable investigation" *and* (ii) identified a *legitimate* corporate threat. As such, directors "cannot justify their conduct based on threats that they never identified or beliefs they did not hold."

1. "[G]ood [F]aith and [R]easonable [I]nvestigation"

Vice Chancellor McCormick acknowledged that "[t]he reasonableness of the investigation is 'materially enhanced' where the corporate decision is approved by a board comprising a majority of outside, nonemployee directors 'coupled with a showing of reliance on advice by legal and financial advisors.' " This was not an impediment for the Board, as the "Director Defendants are nearly all independent, outside directors" who "considered the Plan over the course of two meetings." In particular, the Vice Chancellor found the Board engaged in "genuine deliberation concerning the Plan" and "were advised by outside legal and financial advisors who were available to answer questions" during the Board meetings. While "aspects of the process were less than perfect," the Vice Chancellor observed, "nothing about the process jumps out as unreasonable."

2. "Actual Threats That the Board Identified"

Despite Williams' recent bruising experiences with stockholder activism, Vice Chancellor McCormick concluded this experience was not a factor in the Board's deliberations. Instead, the Vice Chancellor observed that "[t]he record [was] clear that [Williams'] declining stock price was the initial catalyst for the Board's decision." Further, although several Defendant Directors testified that the Rights Plan was implemented to deter stockholder activism, this contention flew in the face of contemporaneous documentation—"e.g., board resolutions, board minutes, company disclosures"—prepared by Company counsel stating that the Rights Plan "was intended in part to serve as a takeover deterrent."

Regardless, the Vice Chancellor found that the Board identified three possible threats during its decisionmaking process:

- *First*, the Board "desire[d] to prevent stockholder activism during a time of market uncertainty and a low stock price."
- *Second*, the Board was "concern[ed] that activists might pursue 'short-term' agendas or distract management."
- *Third*, the Board was "concern[ed] that activists might rapidly accumulate over 5% of the stock" and believed that "the Plan could serve as an early detection device to plug the gaps in the federal disclosure regime."

The Vice Chancellor emphasized that "[e]ach of the three threats were *purely hypothetical*" because the "Board was not aware of any *specific activist* plays afoot" (emphasis added). Thus, the Vice Chancellor was left to consider whether curbing hypothetical opportunistic stockholder activism presented a legitimate corporate objective under Delaware law.

Prevention of Stockholder Activism. As a threshold matter, the Vice Chancellor noted that "stockholder activism" encompasses a wide variety of "stockholder activities intended to change or influence a corporation's direction," many manifestations of which "can be beneficial to a corporation . . . ." Because Delaware law mandates that boards of directors manage the business and affairs of the corporation, stockholders must direct their concerns to the board, including by threatening to replace directors via a proxy contest in connection with an annual stockholders meeting. Without the lever of a proxy fight, stockholder activists might lose their ability to counter failing boards.

With respect to the *first* possible threat, the Vice Chancellor explained that "directors cannot justify their actions by arguing that 'without their intervention, the stockholders would vote erroneously out of ignorance or mistaken belief' in an uncoerced, fully informed election." Delaware law does not countenance a "we-know-better" justification by directors to interfere with the stockholder franchise, and "[v]iewing all stockholder activism as a threat" is an "extreme manifestation" of the "we-know-better" mentality. Accordingly, a *generalized* concern about stockholder activism cannot justify adoption of a stockholder rights plan. At the same time, the Vice Chancellor did not foreclose the possibility that *specific* instances of stockholder activism could constitute a cognizable *Unocal* threat.

Distraction or Disruption. As for the *second* possible threat, the Vice Chancellor framed the "short-termism" justification as a "concern that 'a particular activist seeks short-term profit without regard to the impact on the company's long-term prospects,' " while the "disruption" justification is a "concern that the actions of the activists might cause operational disruption . . . ." The Director Defendants, by contrast, claimed they sought "to insulate the management team from distraction" during a time of great uncertainty. Regardless of the probity of this concern generally, the Vice Chancellor noted that, under the facts before her, any concerns about short-termism, distraction, or disruption were purely hypothetical as no actual activists had emerged. And, she observed, the Board's *hypothetical* concerns could not rise to the level of a cognizable threat.

Gap Filling. Vice Chancellor McCormick noted that the *third* possible threat was the only Board-identified threat framed with sufficient particularity to possibly move forward in the *Unocal* analysis. This threat centered around a concern that activists could rapidly accumulate more than 5% of Williams' stock because, under the current Securities and Exchange Commission ("*SEC*") regime for reporting 5% ownership, the report does not have to be filed until *ten days after* the 5% threshold is crossed. During this ten-day period, a newly-minted 5% stockholder, or a so-called "wolfpack" none of whose "members" owns a 5% stake, could engage in a "lightning strike attack" to accumulate additional shares before disclosing their ownership stake and intentions. In this scenario, the Rights Plan "could serve as an early detection device" to guard against lightning strikes. The Vice Chancellor observed that some academics have advocated for a modified rights plan to provide advance notice to fill this reporting gap in the federal disclosure regime.

In this connection, Vice Chancellor McCormick raised two questions: *first*, does a board's "desire to fill gaps in federal disclosure laws through private ordering constitute[ ] a legitimate corporate objective under *Unocal*" and, *second*, if gap filling is a legitimate corporate objective, does this objective become "more viable in the face of market uncertainty or a precipitous stock drop resulting in a stock price that undervalues the corporation"? The Vice Chancellor expressed a degree of skepticism as to both questions. *First*, she noted, "if gap filling were a legitimate corporate objective that justified the adoption of a poison pill, then all Delaware corporations subject to the federal disclosure regime would have a ready-made basis for adopting a pill." *Second*, as precipitous stock drops are "not an uncommon occurrence," they do not mitigate the policy concern that gap filling would provide boards with "an omnipresent justification for poison pills . . . ." This "would constitute a dramatic turn in Delaware law," which "routinely views poison pills as *situationally specific defenses*" (emphasis added). As Vice Chancellor McCormick observed, "Delaware law has handled these 'nuclear weapon[s] of corporate governance' with the delicacy they deserve."

Despite her skepticism, the Vice Chancellor opted not to decide whether gap filing presented a legitimate *Unocal* consideration. Instead, the Vice Chancellor "assume[d] for the purposes of analysis that gap filling to detect lightning strikes at a time when stock price undervalues the corporation is a legitimate corporate purpose." On this basis, she turned to *Unocal*'s second prong.

B. Unocal Prong Two

Under *Unocal*, even if the Chancery Court finds that directors met their burden under the first prong of identifying a cognizable threat to a legitimate corporate objective, the second prong recognizes that a board "does not have unbridled discretion to defeat any perceived threat by any draconian means available." Because Plaintiffs did not claim the Rights Plan was either "preclusive or coercive," Vice Chancellor McCormick pivoted to the question of whether the measure falls "within a range of reasonable responses to the lightning-strike threat posed," requiring an examination of "the importance of the corporate objective threatened; alternative methods for protecting that objective; impacts of the defensive action and other relevant factors." For this purpose, the Director Defendants bore "the burden to show their actions were reasonable."

In assessing reasonableness of the Rights Plan, the Vice Chancellor focused on its aggressive characteristics:

- *First*, while a 5% trigger is not unheard of, the Board's advisors explained before adoption that (i) "only 2% of all plans . . . had a trigger lower than 10%," and (ii) this would be one of the few rights plans with "a 5% trigger outside the NOL context."
- *Second*, the "beneficial ownership" definition went "beyond the default federal definition to capture synthetic equity . . . ."
- *Third*, the "acting in concert" definition went beyond the SEC's focus on stockholders who enter into express agreements "to capture 'parallel conduct' and add the daisy-chain concept."
- *Fourth*, the "passive investor" definition excluded not only investors who seek to influence control, as in the SEC regime, but also any "persons who seek to direct corporate policies."

For Vice Chancellor McCormick, the Rights Plan "increases the range of Williams' nuclear missile range by a considerable distance beyond the ordinary poison pill." While the 5% threshold was technically necessary to achieve the gap-filling purpose, and was not problematic in and of itself given the Company's large market cap, "the Board might have considered one of the less extreme options aimed at detection and designed to compel stockholder disclosure." In fact, the

Rights Plan's innovative features exceeded gap-filling proposals offered by various academics. For instance, (i) the AIC Provision could "sweep[ ] up potentially benign stockholder communications," such as "attending investor conferences and advocating for the same corporate action"; (ii) the daisy-chain concept further muddied the waters by allowing the Board to "aggregate stockholders even if members of the group [had] no idea that the other stockholders exist[ed]"; and (iii) the wolfpack provisions designed "to make illicit parallel actions that are not the product of an agreement" could block the operation of "sound corporate governance" by impeding stockholder communications in support of proxy contests, potentially entrenching underperforming boards. All in all, these features could "have a chilling effect on an activist's ability to communicate with other shareholders."

Given the hypothetical nature of the Board's identified reasons for adopting the Rights Plan, the Vice Chancellor concluded, the Director Defendants "failed to show that this extreme, unprecedented collection of features bears a reasonable relationship to their stated corporate objective." As such, the Rights Plan was "disproportionate to its stated hypothetical threat," thereby failing to satisfy *Unocal*'s second prong. Accordingly, the Vice Chancellor declared the Rights Plan unenforceable and permanently enjoined its use by the Company.

CONCLUSION

In the *Williams Litigation*, Vice Chancellor McCormick reiterated that *Unocal* is the appropriate standard for reviewing the validity of a stockholders rights plan, regardless of the circumstances under which it was adopted. Further, the Vice Chancellor reaffirmed the notion that to be cognizable under *Unocal*, a threat must be specific and particularized—hypothetical and generalized concerns about stockholder activism, short-termism, disruption, or distraction will not do. Even during times of great market uncertainty, a Delaware board of directors may not adopt a "we-know-better" mentality to justify measures that would block legitimate stockholder activism. Finally, the Vice Chancellor indicated that the purpose behind a rights plan's adoption will guide the proportionality analysis under the second *Unocal* prong. Even assuming that the gap-filling rationale behind the Board's action was sufficient to satisfy the first prong, the Director Defendants failed to establish that the Rights Plan's "extreme, unprecedented collection of features bears a reasonable relationship to their stated corporate objective."

Because the outcome of any *Unocal*-based challenge to adoption of a stockholder rights plan, or any other takeover defense, is highly fact sensitive, it is difficult to predict the impact of the *Williams Litigation* on future challenges to rights plans. The Chancery Court rarely has interceded in this area. But Vice Chancellor McCormick's opinion does make clear that the addition of unusual and extreme features to the standard rights plan will be examined under the crucible of enhanced scrutiny, particularly in the absence of a particularized threat to the corporation, and, therefore, will not be rubber-stamped.

POST-SCRIPT

The Rights Plan was scheduled to expire by its own terms in March 2021, shortly after Vice Chancellor McCormick issued her opinion in the *Williams Litigation*. Nonetheless, Director Defendants filed an appeal with the Delaware Supreme Court, which heard oral arguments on October 20. On November 3, the Delaware Supreme Court, sitting en banc, affirmed the lower court ruling without further comment.