

March 1, 2021

Court of Chancery Enjoins Anti-Activist Rights Plan

The Delaware Court of Chancery last week enjoined an “unprecedented” rights plan, adopted at the outset of the pandemic, broadly designed to deter stockholder activism. [\*The Williams Companies Stockholder Litigation, C.A. No. 2020-0707-KSJM \(Del. Ch. Feb. 26, 2021\)\*](#). The decision does not undermine the utility of rights plans, but rather reaffirms that boards of directors must exercise measured discretion in deploying corporate defenses.

In March 2020, the Williams Companies’ board adopted a rights plan, explaining that it feared activist investors could exploit its plummeting share price to take sizeable positions in the company. The plan included what the Court of Chancery called “a more extreme combination of features than any pill previously evaluated”: a 5% ownership trigger (including both beneficial and derivative ownership interests), an expansive definition of “acting in concert” that would capture parallel conduct, and a limited “passive investor” exception. The board did not identify any specific activist threat but was instead “acting pre-emptively to interdict hypothetical future threats.”

Although it found that the directors “conducted a good faith, reasonable investigation,” and although it recognized that “Delaware law does not categorically foreclose the possibility that certain conduct by activist stockholders might give rise to a cognizable threat,” the Court concluded that generic hypothetical activism could not justify the rights plan at issue. Even while acknowledging that the rapid accumulation of stock by an activist wolf pack might justify the use of a rights plan, the Court held that the “extreme, unprecedented collection of features” in this plan did not bear “a reasonable relationship” and were “disproportionate” to that threat here.

Drawing on our experience in conceiving and establishing the legality of the pill under Delaware law, and our success in defending its use in the Delaware courts, we [wrote](#) at the outset of the pandemic that companies should not “rush or race” to adopt rights plans. Poison pills are “situationally specific defenses” that ought to be tailored to “company-specific circumstances” and adopted with “an appropriate culture of caution in the board room.” Overbroad plans, not adequately tethered to cognizable challenges to corporate policy, are legally vulnerable, as last week’s decision shows. But tailored plans, adopted on a deliberate record, remain a key tool for boards looking to defend long-term corporate policy and value.

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