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Raiders and Activists

We have long been [advising](#) and defending companies attacked or threatened by raiders and activists seeking to profit by bust-up takeover, greenmail extortion or increase in stock price by financial engineering and excess leverage. Those attacks and pressures have often involved reducing wages and/or firing employees, cutting CAPEX and compromising the long-term outlook, competitiveness and sustainability of the enterprise—all to the detriment of the value of the company and the shareholders who are left holding the bag after the raider/activist has emptied it. We have also long supported and innovated a number of defenses, like the “poison pill,” protective bylaws and charter provisions, amendments to state corporation statutes and federal regulations that address raider/activist proxy fights and give boards of directors the necessary tools to fulfill their duties. In 2016 we worked with the World Economic Forum to advance [The New Paradigm](#) for modernizing shareholder engagement, fostering a collaborative framework of partnership between companies, their major investors and stakeholders and creating long-term, sustainable value while advancing corporate purpose and ESG imperatives.

Our fundamental positions and methods have continuously been attacked by economics and law professors who support the extreme short-termism imposed by raiders and activists. A new paper by Professor Zohar Goshen and Reilly S. Steel entitled [“Raiders, Activists and the Risk of Mistargeting”](#) builds the case for greater regulation of activists and for allowing boards greater leeway to defend against activist tactics. The central thesis is that activists are breakers, not fixers; and that activists—even worse than raiders—have limited information and have structural conflicts of interest that impair their ability to objectively evaluate what is best for the companies they target. As the authors summarize their findings:

Because shareholder activists have a higher risk of *mistargeting*—mistakenly shaking things up at firms that only *appear to be* underperforming—they are much more likely than corporate raiders to destroy value and, ultimately, social wealth. This insight has important implications for the law and policy of control contests: Delaware and federal law alike have focused on building walls to keep raiders outside the gates, but they ignore the real threat—shareholder activists—that are already inside . . . .

[T]he law’s efforts to lock the gates against corporate raiders while letting shareholder activism go relatively unchecked should be adjusted. If shareholder activists are no better than corporate raiders—and potentially even more harmful—it would seem the barbarians are already *inside* the gates.

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