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TIMING IS PARAMOUNT: THE IMPACT OF
PARAMOUNT V. TIME ON THE LAW OF HOSTILE
TAKEOVERS

PAUL E. BURNS*

I. INTRODUCTION

On March 9, 1990, the Supreme Court of Delaware affirmed Chancellor William T. Allen's decision to decline to enjoin the well-publicized union of Time Inc. (Time) and Warner Communication, Inc. (Warner), a union which the Board of Directors of Time had pursued despite the formidable assault mounted by Paramount Communications, Inc. (Paramount).¹ This Article will examine how the Paramount case has impacted the law of hostile takeovers by: (i) affirming a target board's right to reject a hostile bid in order to facilitate the completion of a transaction planned before the announcement of the bid; (ii) establishing that directors have the power to choose a time frame for achievement of corporate goals, provided they have developed a deliberately conceived plan; (iii) recognizing that all-cash, all-shares offers can pose threats other than inadequacy of price; (iv) reaffirming the need for a majority of outside, independent directors; and (v) permitting target boards to incur "heavy debt" in order to effectuate the alternative, preplanned transaction.

The Article will begin by examining the Paramount case in detail. It will then survey the pre-existing case law, with primary emphasis on the development of the enhanced business judgment rule developed in Unocal Corp. v. Mesa Petroleum Co.² During the course of this examination, the Article will discuss how post-Unocal decisions seemingly foreshadowed the Paramount decision by emphasizing the importance of the timing of the target board's proposed alternative action relative to the hostile bid, i.e., that board actions planned or implemented before the hostile offer are more worthy of protection than post-tender actions. Finally, the Article will analyze how the Paramount decision

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2. 493 A.2d 946 (Del. 1985).
has impacted the enhanced business judgment rule and the law of hostile takeovers.

II. Paramount v. Time

A. The Facts

Time has long been one of the world's leading publishers of books and magazines. Time also plays a major role in the cable television industry through its ownership of Home Box Office, Inc., Cinemax, and numerous cable TV franchises. In 1987 Time established a special committee to propose long-term corporate strategies for the 1990s. The committee decided that Time should acquire a foothold in the video production business to complement its cable TV enterprises and to position it favorably for the global economy of the 1990s. Several of Time's outside directors expressed concern that a foray into video production might threaten "Time Culture" and its policies of editorial integrity and journalistic focus. Notwithstanding this apprehension, the board decided to explore various means to implement the special committee's recommendation.

Throughout 1987 and the first half of 1988, Time's Board considered various alternatives. Finally, in July 1988, the Board concluded that a merger with Warner was the best course of action to pursue. Negotiations between the two companies continued in the months following, but they broke down in late fall due to seemingly irreconcilable differences.

3. Paramount, 571 A.2d at 1143.
4. Id.
5. Id.
6. Id.
7. Id. These directors believed that Time was "an institution built upon a foundation of journalistic integrity." Id. at 1143 n.4. It was feared that entry into the entertainment business would shift Time's focus away from news journalism and editorial independence and thus jeopardize the "Time Culture." Id.
8. Id. at 1144.
9. Id. The alternatives under consideration included merging with such entertainment giants as Warner Brothers, Paramount, Columbia, M.C.A., Fox, MGM, Disney, and Orion. Id.
10. Id. A consolidation with Warner carried with it a number of advantages. Warner had just acquired Lorimar Productions and its film studios, thus enabling the Time-Warner combination to produce its own movies and television shows for broadcast on HBO. Warner also had an international film and video distribution system that could be used to sell films, videos, books, and magazines. In addition, Warner was a major player in the music and recording business, an area into which Time wanted to expand. Moreover, Warner's cable system and publishing company could be easily integrated with Time's. Id. at 1144-45.
ble differences between the parties.\footnote{Id. at 1145. Motivated by its desire to preserve the Time Culture, Time insisted on dominating the corporate governance of the merged enterprise. Warner, on the other hand, feared that this would create the unwanted perception that Warner was "selling out to Time." \textit{Id.} When talks ceased, Time held informal discussions with other companies, including Paramount. Throughout these discussions, Time maintained that it was not putting itself up for sale. Accordingly, Time terminated discussions with companies that proposed to purchase Time or to control management of the proposed combination. \textit{Id.}} Discussions resumed in January 1989 after Warner indicated its willingness to allow Time to control CEO succession.\footnote{Id. Time had proposed that Steve Ross, Warner's CEO, would act as co-CEO of the new enterprise along with Time's CEO, N.J. Nicholas, but that Ross would retire after five years leaving Nicholas as the sole CEO. Ross initially rejected this proposal as indicating a lack of confidence in his leadership. Interestingly, Ross reconsidered after a private dinner with Michael Dingman, one of Time's outside directors, at which Dingman convinced Ross that the proposal did not reflect a lack of trust in Ross. \textit{Id.}} Although Time had favored an all-cash or cash-plus securities acquisition of Warner, Time ultimately acceded to Warner's request for a stock-for-stock deal.\footnote{Id. at 1145-46. In deciding upon a stock exchange ratio, Time's Board recognized the need to pay Warner a premium in exchange for controlling corporate governance. Accordingly, although the market exchange ratio of Time stock for Warner stock was .38 in favor of Warner, Time agreed to an exchange rate of .465. This ratio would result in Warner stockholders owning 62% of the stock of the merged company. \textit{Id.} at 1146.} Finally, in March 1989, the Boards of Time and Warner approved the merger.\footnote{Id. at 1146.}

New York Stock Exchange rules required approval by Time's stockholders before its shares could be issued to effectuate the merger.\footnote{Id.; see \textit{Del. Code Ann. tit. 8, § 251(c)} (1988).} In addition, Delaware law provided that a majority of Warner stockholders must assent to the merger.\footnote{\textit{Paramount, 571 A.2d} at 1147. One month before the vote, Time sent out extensive proxy statements urging stockholders to vote in favor of the merger. \textit{Id.}} The Time Board scheduled its stockholder vote for June 23, 1989.\footnote{Id. On June 7, 1989, the date of the tender offer, Time's stock was trading at $126. On the following day, the market price rose to $170. \textit{Id.}}

Just two weeks before the scheduled vote, Paramount announced an all-cash offer to purchase all outstanding shares of Time for $175 per share.\footnote{Id.} Although Paramount claimed that the offer was "fully negotiable," it was in fact subject to three conditions.\footnote{Id.} First, Time
had to terminate the merger agreement with Warner. Second, Time was required to transfer ownership of certain cable franchises to Paramount. Finally, a judicial determination that the Delaware antitakeover statute was inapplicable to a Paramount-Time merger would have to be obtained.20

Time's Board unequivocally rejected Paramount's offer as inadequate and steadfastly maintained that the Warner combination offered Time the greatest benefits.21 Notwithstanding previous widespread stockholder support for the Warner merger, the Board was concerned that it might be unable to dissuade its stockholders from accepting Paramount's tempting offer.22 Consequently, the Board decided to restructure the transaction as an outright acquisition of Warner that would not require shareholder approval.23 In order to obtain Warner's assent, Time had to agree to abide by the original corporate governance provisions and to be legally bound to complete the transaction unless enjoined.24

On June 23, 1989, Paramount raised its offer to $200 per share.25 Three days later Time's Board rejected the bid, insisting that the Warner deal offered stockholders greater long-term value and the preservation of "Time Culture."26 Paramount then commenced an action in the Delaware Court of Chancery seeking to enjoin Time's acquisition of Warner.27 Chancellor Allen refused to enjoin the Time-Warner transaction.28 Ten days later, on July 24, 1989, the Supreme Court of Delaware orally affirmed the Chancellor's decision,29 but it did not issue its final written opinion until March 9, 1990.30

Although the supreme court's written opinion reaffirmed Chancellor Allen's decision, its reasoning and analysis differ from the Chan-

21. Paramount, 571 A.2d at 1148. Time's Board was convinced that the Paramount offer directly threatened "Time's control of its own destiny and retention of the 'Time Culture.'" Id.
22. Id.
23. Id. The restructured deal was a two-tiered transaction in which Time would purchase 51% of Warner stock for $70 per share in cash and the remaining 49% for cash and securities valued at $70 per share. At the time of the decision it was estimated that Time would have to incur $7 to $10 billion dollars in debt. Id. The actual amount of debt that Time incurred turned out to be approximately $10.8 billion. See Susan Duffy, Time Warner: Debt Burden? No Problem, BUSINESS WEEK, Oct. 22, 1990, at 82.
24. Paramount, 571 A.2d at 1148.
25. Id. at 1149.
26. Id.
29. Paramount, 571 A.2d at 1140.
30. Id.
cellor's in several material respects. This Article focuses exclusively on
the supreme court's decision, with appropriate references to the chan-
cery court decision where necessary to facilitate greater understanding
of the supreme court's decision.

B. The Inapplicability of Revlon

The first issue considered by the supreme court was whether the
Time-Warner agreement was tantamount to putting Time up for sale, thus
invoking auctioneer duties under Revlon, Inc. v. MacAndrews &
Forbes Holdings.\(^{31}\) In Revlon, the court ruled that once it appears that
the break-up of a company is inevitable, "'[t]he directors' role change[s] from
defenders of the corporate bastion to auctioneers charged with getting the
best price for the stockholders at a sale of the company.'"\(^{32}\) The Paramount plaintiffs argued that Revlon was trig-
gerated because: (i) the original Time-Warner stock-swap deal resulted
in Warner shareholders' owning sixty-two percent of the new com-
pany, and (ii) the Time directors adopted various defensive measures
to assuage their concern that Time might be viewed as being up for
sale.\(^{33}\) The plaintiffs further claimed that in cloaking the Time-Warner
transaction with antitakeover armor, Time triggered Revlon duties by
effectively precluding its shareholders from obtaining a control pre-
mium.\(^{34}\)

The supreme court identified two circumstances that activate Rev-
lon duties. The first is when a corporation initiates a sale of itself ei-
ther as a going concern or with the understanding that a breakup will
result.\(^{35}\) The second is when a company reacts to a takeover threat by
abandoning its long-term strategy and soliciting an alternative bid that
anticipates the breakup of the company.\(^{36}\) Under these circumstances,
"'[t]he duty of the board [has] changed from the preservation of . . .
[the] corporate entity to the maximization of the company's value at a

\(^{31}\) Id. at 1149; Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986).
\(^{32}\) Revlon, 506 A.2d at 182.
\(^{33}\) Paramount, 571 A.2d at 1149. The record indicates that some Board members were
concerned that the Time-Warner negotiations might be perceived as putting Time "in play." This
concern prompted discussions regarding whether the Board should adopt further anti-
takeover measures in addition to the substantial provisions already in place. Id. at 1144 & n.5.
Ultimately, when the board approved the stock swap, it implemented additional defensive mea-
sures, including an automatic share-exchange agreement with Warner, acquisition of assurances
that certain lenders would not finance any attempt to acquire Time, and a "no-shop" provision
that precluded Time from considering any other consolidation proposal. Id. at 1146.
\(^{34}\) Id. at 1149.
\(^{35}\) Id. at 1150; see, e.g., Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del.
1989).
\(^{36}\) Paramount, 571 A.2d at 1150; see, e.g., Citron v. Fairchild Camera & Instrument
sale for the stockholders' benefit . . . .”37 If, on the other hand, the board defends a hostile takeover bid in order to protect the corporation’s continued existence, Revlon duties do not attach.38

The court of chancery based its denial of the plaintiffs’ Revlon claim on the fact that the original Time-Warner stock swap transaction would not have resulted in any change of control.39 The supreme court, however, premised its rejection of the Revlon argument on the lack of any evidence showing that Time’s board made the dissolution or breakup of Time inevitable by negotiating with Warner.40 The supreme court further ruled that the alleged subjective intent of Time’s board as manifested by expressions of concern that the Warner deal might be perceived by the market as putting Time up for sale “is entirely insufficient to invoke Revlon duties . . . .”41 Moreover, the supreme court adopted the Chancellor’s holding that the validity of defensive measures and the forbearance of a substantial control premium are properly subject to a Unocal analysis and do not, in and of themselves, trigger Revlon duties.42

C. The Unocal Analysis

In Unocal Corp. v. Mesa Petroleum Co.,43 the supreme court held that in evaluating whether the business judgment rule should be in-

37. Paramount, 571 A.2d at 1150 n.13 (alteration in original) (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986)).
38. Id. at 1150-51.
39. Id. at 1150. This is an example of how the Chancellor made the right decision, but for reasons different than those of the supreme court. The supreme court’s test for determining whether Revlon duties attach is whether the breakup of the company is inevitable. Id. The Chancellor’s test was whether a change of control is contemplated. Paramount Communications, Inc. v. Time Inc., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,264, 93,277 (Del. Ch. July 14, 1989), aff’d, 571 A.2d 1140 (Del. 1990). However, the Chancellor concluded that no change of control would result even though Warner stockholders would own 62% of Time-Warner stock. Id. at 93,279. Given that before the original merger agreement “control of the corporation existed in a fluid aggregation of unaffiliated shareholders representing a voting majority—in other words, in the market,” control over Time “can be expected to remain unaffected by a stock for stock merger.” Id.
40. Paramount, 571 A.2d at 1150.
41. Id. at 1151; see Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1285 n.35 (Del. 1989); see generally Lyman Johnson & David Millon, The Case Beyond Time, 45 Bus. Law. 2105, 2110-12 (1990).
42. Paramount, 571 A.2d at 1151. The court also noted that a future acquisition of the Time-Warner combination might be possible, thus leaving open the possibility of receiving a future control premium. Id.
43. 493 A.2d 946 (Del. 1985).
voked to protect a board's defensive response to a hostile takeover, the board has the burden of proving: (i) that it had reasonable grounds for believing that the takeover bid posed a threat to corporate policy and effectiveness and (ii) that the defensive measure adopted was reasonable in relation to the threat posed.44

1. Reasonableness of Believing That a Threat to Corporate Policy and Effectiveness Existed

The court in Paramount rejected the plaintiffs' contention that inadequate value was the only possible "threat" posed by an all-cash, all-shares offer.45 This contention "represents a fundamental misconception of our standard of review under Unocal principally because it would involve the court in substituting its judgment as to what is a 'better' deal for that of a corporation's board of directors."46 The court reaffirmed its holding in Unocal that, in addition to inadequate value, appropriate considerations in evaluating takeover threats include the "'nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders, . . . the risk of nonconsummation, and the quality of securities being offered in the exchange.'"47

44. Id. at 955; Paramount, 571 A.2d at 1152. In Unocal, the court explained:
[The] business judgment rule, including the standards by which director conduct is judged, is applicable in the context of a takeover. The business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be "attributed to any rational business purpose."

When a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders. In that respect a board's duty is no different from any other responsibility it shoulders, and its decisions should be no less entitled to the respect they otherwise would be accorded in the realm of business judgment. There are, however, certain caveats to a proper exercise of this function. Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.

Unocal, 493 A.2d at 954 (citations omitted) (footnote omitted); see infra pt. III.B.

45. Paramount, 571 A.2d at 1153.

46. Id.

47. Id. (omission in original) (quoting Unocal, 493 A.2d at 955). The court observed that the open-ended analysis mandated by Unocal is not intended to lead to a simple mathematical comparison of the discounted value of Time-Warner's expected trading price at some future date with Paramount's present offer. Id. "[T]he precepts underlying the business judgment rule militate against a court's engaging in the process of attempting to appraise and evaluate the relative merits of a long-term versus a short-term investment goal for shareholders." Id.
Applying this standard to the Paramount bid, the court found that the Time Board reasonably believed that, in addition to inadequate value, the tender offer posed other threats, such as: (1) the likelihood that shareholders might tender their shares in ignorance of the strategic benefits afforded by the Time-Warner merger, (2) the degree of uncertainty resulting from the conditions placed on the offer, and (3) the fact that the timing of the offer was designed to upset the originally scheduled shareholder vote on the Time-Warner merger for the purpose of confusing the shareholders. In addition, the court ruled that the Time Board’s previous investigation of possible merger candidates, including Paramount, provided the Board with sufficient information to enable it to make an informed decision concerning the threats posed by the Paramount offer—the Board was under no obligation to reconsider Paramount after having previously rejected it. 

“Given this record evidence, we cannot conclude that the Time Board’s decision . . . that Paramount’s offer posed a threat to corporate policy and effectiveness was lacking in good faith or dominated by motives of either entrenchment or self-interest.”

The court’s conclusion was influenced in part by the fact that twelve of the sixteen board members were outside independent directors.

2. Reasonableness of the Defensive Action

In determining whether the defensive measures were reasonably related to the threats posed, the court evaluated “‘the importance of the corporate objective threatened; alternative methods of protecting that objective; impacts of the ‘defensive’ action, and other relevant factors.’” In rejecting Paramount’s claim that Time’s response was unreasonable, the court held that the directors’ duty to manage the corporation “includes the selection of a time frame for achievement of corporate goals.” “That duty,” the court ruled, “may not be delegated to the stockholders.” Consequently, the court concluded, “[d]irectors are not obliged to abandon a deliberately conceived cor-

48. Id.
49. Id. at 1153-54.
50. Id. at 1153.
51. Id. at 1154; see Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985); Moran v. Household Int’l, 500 A.2d 1346, 1356 (Del. 1985).
53. Id.; see infra pt. III.B.
54. Paramount, 571 A.2d at 1154.
porate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy. 55

Even in the face of a valid threat, if the board’s actions are coercive or “force upon shareholders a management-sponsored alternative to a hostile offer,” they may be struck down as unreasonable responses. 56 The supreme court found that the Time Board’s action was not aimed at forcing shareholders to accept management’s alternative, but it was designed to consummate a transaction that had been adopted before the Paramount bid. 57 Moreover, the court found that the revised Time-Warner transaction did not preclude Paramount from making a future offer for the combined company. 58 Thus, the court concluded that the Time Board’s action was reasonably related and proportionate to the threat posed. Consequently, having determined that Revlon was inapplicable and that the Unocal test was met, the court affirmed the Chancellor’s refusal to enjoin the Time-Warner transaction. 59

III. THE LAW BEFORE PARAMOUNT v. TIME

In order to understand fully the impact of Paramount v. Time on the law of hostile takeovers, an examination of prior case law is warranted. After a brief review of Revlon, this Article will analyze Unocal and the cases decided during the subsequent half-decade before Paramount v. Time. The analysis will endeavor to chart the development of Unocal’s enhanced business judgment rule and to show how the Delaware courts had become increasingly influenced by the timing of board action in their determination of whether the action passed muster under Unocal. The analysis will also demonstrate the chancery

55. Id. Paramount argued that the Time Board failed the “reasonable relationship” prong of the Unocal test because its action precluded shareholders from receiving a control premium. The court rejected this argument, declaring that the board has the power to decide if and when shareholders should receive a control premium. Shareholders do not have an absolute right to a control premium. Id.; see Johnson & Millon, supra note 41, at 2109.


58. Paramount, 571 A.2d at 1155.

59. Id. The court was unmoved by the fact that Time was required to incur a “heavy debt” to finance its acquisition of Warner. Id. That fact alone, said the court, “does not render the Board’s decision unreasonable so long as the directors could reasonably perceive the debt load not to be so injurious to the corporation as to jeopardize its well being.” Id. But see Duffy, supra note 23, at 82, where Business Week reports that 15 months after the Time-Warner transaction, stockholders were concerned that the $10.8 billion of debt incurred by Time was adversely affecting the value of the company’s stock which, at the time of the article, was trading at approximately $70 per share, $130 less than Paramount’s highest offer.
court’s propensity to scrutinize board actions more closely than the supreme court’s policy of judicial restraint would ultimately allow.60

A. Revlon, Inc. v. MacAndrews & Forbes Holdings and the Duty to Auction

In Revlon, Inc. v. MacAndrews & Forbes Holdings,61 the Delaware Supreme Court fashioned a rule that has become a doctrinal pillar of Delaware corporation law. The “Revlon principle” provides that when the breakup of the company becomes inevitable in the context of a takeover bid, the duty of the board changes from the preservation of the corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit.62

As the Revlon Board painfully learned, the duty of auctioneer carries with it certain obligations. Once the corporation has been placed in the “Revlon mode,” the board may not favor one bidder over another.63 In addition, the board must place shareholders’ interests before all other “constituencies” when an auction among active bidders is in progress.64 The Revlon Board’s failure to adhere to these princi-


63. Revlon, 506 A.2d at 184. As the court explained:
 Favoritism for a white knight to the total exclusion of a hostile bidder might be justifiable when the latter’s offer adversely affects shareholder interests, but when bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced Unocal duties by playing favorites with the contending factions. Market forces must be allowed to operate freely to bring the target’s shareholders the best price available for their equity.

Id.; see also Macmillan, 559 A.2d 1261.

In Macmillan, the supreme court enjoined a lockup agreement between Macmillan and “white knight” Kolberg Kravis Roberts (KKR) after Macmillan’s Board gave KKR an unfair advantage over plaintiffs in an auction for control of Macmillan. Id. at 1264. The court ruled that the transaction failed to pass the “intrinsic fairness” test set forth in Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983). Id. at 1265. The court applied the intrinsic fairness test because the court found that some of the directors had a personal interest in seeing KKR prevail in the auction. Id. at 1265, 1279-80.

Although Macmillan is cited here as an example of a case in which the board improperly favored one bidder over another, it is instructive to examine the Macmillan court’s attempt to bring Revlon within the conceptual penumbra of Unocal by declaring that a board will continue to be judged by Unocal standards even when it enters the Revlon mode. Id. at 1287-88; see Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984); Revlon, 506 A.2d at 182; Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

64. Revlon, 506 A.2d at 182; see also Unocal, 493 A.2d at 955.
ple led to the court's refusal to sustain the board's attempt to thwart a hostile bid by Pantry Pride. 65

Although Paramount v. Time is more aptly classified as Unocal progeny, an examination of Revlon is helpful to illustrate the limitations on board action in the context of a hostile takeover. Once the target corporation enters the Revlon mode, it becomes a certain casualty in a bidding war with the spoils going to the highest bidder regardless of whether that bidder is friendly to the target board. Accordingly, the oft-used defensive tactic of searching for a "white knight" can backfire when the "shark" is determined to outbid friendly suitors. 66 As the Paramount court explained, Revlon is invoked when the sale or breakup of the company becomes inevitable either at the behest of the board or as a reaction to a hostile threat. 67 Consequently, target boards desiring to "defend the corporate bastion" should avoid actions that will invoke the Revlon duty to auction. 68

B. Unocal Corp. v. Mesa Petroleum Co. and the Enhanced Business Judgment Rule

Unocal Corp. v. Mesa Petroleum Co. 69 is the seminal case that created the legal standard applicable to target boards' defensive actions. In Unocal, Mesa Petroleum Company and other entities controlled by reputed corporate raider T. Boone Pickens, Jr. initiated a two-tiered, front-loaded hostile bid for Unocal Corporation. The "front end" consisted of an offer to pay $54 per share in cash for 37% of Unocal's

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65. Revlon, 506 A.2d at 185. As a defensive tactic to Pantry Pride's hostile bid, the Revlon Board issued its own offer to exchange Revlon stock for certain subordinated notes. Id. at 177. After the board announced plans to permit Forstman Little & Co. to acquire Revlon via a leveraged buyout (with Revlon management's participation) and to waive certain note covenants, the market value of the notes declined irrevocably. Id. at 178. Irate noteholders threatened to sue the board. Id. Motivated by their fear of personal liability, the Revlon directors prematurely ended the auction between Pantry Pride and Forstman by approving a Forstman bid that purported to protect the noteholders by supporting the par value of the notes. Id. at 179. The court held that, by preferring the noteholders at the expense of the shareholders, the directors breached their duty of loyalty. Id. at 182. Moreover, by placing their own interests in avoiding personal liability over the interests of shareholders, the directors could not withstand the enhanced scrutiny required by Unocal. Id. at 184.

66. See, e.g., Macmillan, 559 A.2d 1261.

67. Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990); see, e.g., Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53 (Del. 1989); Macmillan, 559 A.2d 1261. The Paramount court rejected the applicability of Revlon on the grounds that Time's negotiations with Warner did not make the breakup of Time inevitable. See supra text accompanying notes 39-42.

68. Revlon, 506 A.2d at 182; see generally Barry Reder, The Obligation of a Director of a Delaware Corporation to Act as an Auctioneer, 44 BUS. LAW. 275 (1989).

69. 493 A.2d 946 (Del. 1985).
outstanding stock, while the "back end" provided for an exchange of highly subordinated junk bonds purportedly worth $54 per share for the remaining publicly held shares. The Unocal Board unanimously rejected the offer and proposed to initiate its own self-tender if Mesa was successful in completing the front end of its offer. The Board also resolved to preclude Mesa from participating in the self-tender. In response to this defensive action, Mesa convinced the court of chancery to enjoin the board from excluding Mesa from the self-tender, but the supreme court vacated the injunction.

The supreme court took advantage of the opportunity presented by the Unocal case to enunciate the principles governing directors' duties when the directors are confronted with a hostile takeover bid. The court began with the premises that directors have an obligation to determine whether an offer is in the best interests of the corporation and its shareholders, and that the board's decision on this issue "should be no less entitled to the respect they otherwise would be accorded in the realm of business judgment." However, before the court will confer the protections of the business judgment rule upon the board, a threshold inquiry must be conducted. The court explained:

Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.

70. Id. at 949.

71. Id. at 950-51. The Board decided that upon Mesa's acquisition of 37% of Unocal stock, Unocal would purchase the remaining 49% of outstanding shares for debt securities valued at $72 per share. Id. at 951.

72. Id. To permit Mesa to participate in the self-tender would have defeated the Board's objective to protect shareholders from the "back end" of the Mesa proposal because Unocal would, in effect, be financing the Mesa offer and Mesa would receive majority control. Id.

73. Id.

74. Id. at 959.

75. Arguably, the supreme court could have left for another day the proclamation of these principles. The court could have simply decided the case on the narrow issue before it: whether it was proper for the Board to deal selectively with its stockholders under the circumstances presented in the instant action. The court did set forth the "well established" rule that a corporation may deal selectively with its stockholders provided that the directors have not acted out of a sole or primary purpose to entrench themselves in office. Id. at 954; see also Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964); Bennett v. Propp, 187 A.2d 405, 408 (Del. 1962); Martin v. American Potash & Chem. Corp., 92 A.2d 295, 302 (Del. 1952). However, rather than simply analyzing the facts to determine whether Unocal's Board met this test, the court went far beyond that inquiry to set forth the "enhanced business judgment rule" for determining whether defensive actions of target companies will be upheld. Unocal, 493 A.2d at 954.

76. Unocal, 493 A.2d at 954.
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. [This burden is satisfied] by showing good faith and reasonable investigation. Furthermore, such proof is materially enhanced, as here, by the approval of a board comprised of a majority of outside independent directors who have acted in accordance with the foregoing standards.  

In addition to showing a reasonable belief that a danger to corporate policy and effectiveness existed, the board must show that the defensive action taken by it was "reasonable in relation to the threat posed." As the court further explained:

This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders (i.e. creditors, customers, employees and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange . . . . [In addition], a board may reasonably consider the basic stockholder interests at stake, including those of short term speculators, whose actions may have fueled the coercive aspect of the offer at the expense of the long term investor.

After the board meets its burden of showing a reasonable belief that a danger to corporate policy and effectiveness existed and that its response was reasonable in relation to the threat posed, the business judgment rule applies to the board's action. Once the business judgment rule attaches, a court will not substitute its judgment for that of the board in the absence of evidence of a breach of fiduciary duty. Applying these principles to the case before it, the Unocal court found

77. Id. at 954-55 (citations omitted).
78. Id. at 955.
79. Id. at 955-56.
80. Id. at 958.
81. Id. The court lends support to its application of the business judgment rule (as modified by Unocal) to target boards' defensive actions by citing an empirical study that showed that stockholders benefited from successful defenses of hostile takeovers in a majority of the cases from 1973 to 1982, as evidenced by higher subsequent offers or by stock price increases. Id. at 956 n.11 (citing Martin Lipton and Andrew R. Brownstein, Takeover Responses and Directors' Responsibilities: An Update, 40 Bus. Law 1403 (1985)). This raises the question of whether the court would invoke a higher degree of scrutiny over defensive actions if a future study showed contrary results.
that the Unocal Board’s selective self-tender offer, which discriminated against Mesa, was entitled to the protection of the business judgment rule.22 "If the stockholders are displeased with the action of their elected representatives," said the court, "the powers of corporate democracy are at their disposal to turn the board out."23

Unocal illustrates the Supreme Court of Delaware’s attempt to balance its reluctance to become a “supreme board of directors” that would second guess every defensive action with the need to quell the “omnipresent specter” of director self-interest.24 Some commentators have criticized the Delaware judiciary’s policy of judicial restraint in the hostile takeover arena as sanctioning self-interested defensive actions designed to entrench management at the expense of shareholders.25 Notwithstanding this criticism, the supreme court has wisely

82. Unocal, 493 A.2d at 957-58. The court noted that the Board’s decision effectively protected 49% of the shareholders who would otherwise have been forced to accept the inferior junk bonds as part of the “back end” of the Mesa offer. Id. at 957.

83. Id. at 959; see also Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).

84. See Johnson & Millon, supra note 41, at 2114 (noting the Delaware judiciary’s “venerable policy of judicial restraint”).


resisted the temptation to interfere with corporate governance to the extent suggested by its critics. The rationale for the court's policy of restraint may be found in the underpinnings of the business judgment rule itself.\textsuperscript{66}

When formulating a response to a hostile bid, target boards must draw on their members' business acumen and knowledge of both the corporation and the environment in which it operates. Target boards must often rely on uncertain economic forecasts, financial projections, and estimates of value compiled and analyzed under the intense pressure of a takeover battle. These data must be evaluated together with corporate information not publicly available and with uncorroborated assumptions about the hostile suitor's intentions. While courts routinely render judgments on highly complex and technical issues with the assistance of expert testimony, neither judges nor experts have the requisite business experience and insider knowledge necessary to evaluate the propriety of the board's judgment where no breach of fiduciary duty has occurred.\textsuperscript{67} Moreover, the substitution of the judg-

\textsuperscript{66} As one commentator has explained:

There are several rationales underlying the business judgment rule. First, the rule reflects judicial acknowledgement that courts are ill-equipped to analyze business decisions and substitute their own business judgment for that of directors. Second, the rule recognizes that directors must be given room to take risks in order for the corporation to make a profit and should not be exposed to liability simply because the risks taken later prove to be unfruitful. Third, the rule embodies the simple recognition that nobody is perfect, including directors. . . . Therefore, directors who have acted in good faith and in accordance with their fiduciary duties of care and loyalty should not be held liable for decisions which turn out poorly or to the displeasure of stockholders. Finally, the rule considers the economic rationale that courts should not interfere with directors' decisions, nor impose liability on directors, because market forces already provide a sufficient monitor of director efficiency.


\textsuperscript{67} See AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986) ("[T]he business judgment rule . . . is, of course, simply a recognition of the allocation of responsibility made by section 141(a) of the General Corporation Law and of the limited institutional competence of courts to assess business decisions."); In re Curfew Valley Assocs., 14 B.R.
ment of various judges for that of various boards would produce an incongruous mosaic of case law that, over time, would assume anarchic proportions.

In sum, the court appropriately declined to implement an overly intrusive rule to regulate target boards' defensive actions, while at the same time recognizing that the "omnipresent specter" requires something more than an ordinary business judgment rule analysis. Consequently, Unocal's "enhanced judicial scrutiny" was a logical compromise between the court's reluctance to become a "superboard" and the need to protect shareholders from board entrenchment.

506, 511 (Utah 1981) ("The courtroom is not a boardroom. The judge is not a business consultant."); see also Linsley, supra note 86, at 534-35. (citing Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986) ("Not only do businessmen know more about business than judges do, but competition in the product and labor markets and in the market for corporate control provides sufficient punishment for businessmen who commit more than their share of business mistakes."); Towers, supra note 86, at 492 n.41 ("Directors who are familiar with the business of their corporation, who have experience in the business world, and who must often make decisions in the heat of the moment, are in a better position to make corporate business decisions than is a judge, who at best can attempt to exercise 20-20 hindsight.").

In his Paramount decision, Chancellor Allen observed that because directors have access to information about the corporation's present and future condition that is not publicly available, the efficient capital market hypothesis is rendered inoperative. Paramount Communications, Inc. v. Time Inc., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,264 (Del. Ch. July 14, 1989), aff'd, 571 A.2d 1140 (Del. 1990). Accordingly, it is reasonable for directors to believe that the market price of stock at any given time does not accurately reflect the true value of the corporation. Id.; see Johnson & Millon, supra note 41, at 2106-08. But see Ronald J. Gilson & Reinier Kraakman, Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?, 44 BUS. LAW. 247, 259-64 (1989), where the authors discuss the problem of reconciling shareholder mistrust of directors with directors' expertise and insider knowledge.

For an explanation of the efficient capital markets hypothesis, which has as its central tenet that the market correctly values the worth of a company at any given time, see Robert Hamilton, CORPORATE FINANCE: CASES AND MATERIALS, 252-95 (West 2d ed. 1989). See also Proper Role, supra note 85; Daniel R. Fischel, Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers, 57 TEX. L. REV. 1 (1978) (efficient capital markets hypothesis applicable to hostile takeovers); see generally Prentice & Langmore, supra note 85, at 414-20; Cindi S. Ingram, Comment, An Overview and Economic Analysis of Tender Offers and Management's Response to Takeover Threats, 54 Mo. L. Rev. 953, 992-99 (1989).

88. See Gilbert v. El Paso Co., 575 A.2d 1131, 1144 (Del. 1990); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. 1985); see also Gilson & Kraakman, supra note 87, at 266 ("The premise of an intermediate standard of review is that the courts must exercise independent judgment in balancing the reasonable skepticism of shareholders (which considered alone would suggest prohibiting preclusive tactics) against the presumptive expertise of managers (which considered alone would suggest blanket business judgment protection of preclusive tactics.").

89. See Gilbert, 575 A.2d at 1145 & n.29; Unocal, 493 A.2d at 954-55.

While the enhanced business judgment rule represents a commendable attempt to adopt a flexible compromise between board autonomy and shareholder protection, an analysis of its structural components reveals that it contains "duplicate prongs." By way of illustration, the
C. The Development of the Enhanced Business Judgment Rule and the Emergence of Timing As a Determinative Factor in the Decision of Whether Board Action Will Be Upheld

With the Unocal decision firmly in place, the Delaware courts were prepared to meet the challenges presented by the merger-manic years between 1985 and 1989. The unprecedented volume of takeover battles during this period would prove to be a formidable testing ground for Unocal's enhanced business judgment rule. An examination of the most significant hostile takeover decisions during the five years following Unocal shows how the timing of the target board's action relative to the hostile bid had become a determinative factor in the decision to uphold or strike down the action. As the Delaware judiciary moved closer to the Paramount v. Time decision, the importance

structural components of the enhanced business judgment rule may be represented as follows:

A. The threshold examination:
1. The board must show that it had a reasonable belief that the tender offer posed a danger to corporate policy and effectiveness, which may be satisfied by a showing of:
   (a) good faith; and
   (b) reasonable investigation; [the proof of which is "materially enhanced" by the fact that the board consists of a majority of outside directors].
2. The board must show that its defensive action was reasonable in relation to the threat posed.

B. The business judgment rule:
1. If the threshold examination is satisfied, the business judgment rule applies.
2. Once the business judgment rule attaches, directors' actions are protected so long as the actions are not primarily based upon perpetuating the directors in office and as long as they have acted:
   (a) in good faith;
   (b) based on reasonable investigation;
   (c) without overreaching; and
   (d) in the absence of fraud.

Unocal, 493 A.2d at 954-55, 958. Consequently, if a board satisfies the first prong of "the threshold examination" by showing good faith and reasonable investigation, it invariably satisfies the good faith and reasonable investigation elements of the traditional business judgment rule.

The court's tolerance of this modicum of conceptual redundancy was probably motivated by the customary judicial desire to avoid deviating from traditional legal principles. The court must have believed that it was more beneficial to invoke the traditional business judgment rule with appropriate modifications than to fashion a completely new rule that might have unwanted ramifications beyond the realm of hostile takeovers.

of timing began to foreshadow the essential holdings expounded in *Paramount v. Time*: (i) that board actions planned before the announcement of the offer appear to be more worthy of protection than post-tender actions; and (ii) that boards have the power, and indeed the duty, to choose a time frame for achievement of corporate goals, provided they have formulated a "deliberately conceived plan" before the announcement of the offer.

1. **The Pre-Planned, Prophylactic Defensive Mechanism: Moran v. Household International**

In *Moran v. Household International, Inc.*, Householder's Board adopted a prophylactic poison pill designed to discourage potential hostile suitors. A prospective tender offeror brought suit to enjoin the implementation of the pill. In affirming the court of chancery's refusal to enjoin the pill, the Delaware Supreme Court foreshadowed the emerging importance of timing in determining whether board action will be upheld. As the court stated:

> [P]re-planning for the contingency of a hostile takeover might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise reasonable judgment. Therefore, in reviewing a pre-

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91. 500 A.2d 1346 (Del. 1985).
92. *Id.* at 1348-49. A recent definition of the term "poison pill" provides:
A "poison pill" is a plan providing for the below market value distribution to common stockholders of a corporation of either preferred stock or stock rights consisting of redemption or conversion privileges. Its purpose is to deter hostile takeover offers for the stock of a target corporation and its effect is to make the target's stock prohibitively expensive to the suitor.


The poison pill adopted by Household's Board provided that Household common stockholders would get one "right" per share upon either of two triggering events: (i) the announcement of a tender offer for 30% or more of Household's shares, or (ii) the acquisition of 20% of Household's shares by any single entity or group. *Moran*, 500 A.2d at 1348. If the 30% trigger occurred, the rights were issued and were immediately exercisable to purchase 1/100 of a share of new preferred stock for $100. In addition, the rights were redeemable by the board for $.50 per right. If the 20% trigger occurred, the rights were exercisable to purchase 1/100 of a share of preferred stock, but the rights were not redeemable. The right also contained a "flip-over" provision which provided that if the right holder did not choose to acquire the preferred stock, the right could be exercised to purchase $200 worth of common stock of the tender offeror for $100 if a subsequent merger or consolidation between Household and the tender offeror occurred. *Moran*, 500 A.2d at 1349.

planned defensive mechanism it seems even more appropriate to apply the business judgment rule.\textsuperscript{94}

From this passage, it may reasonably be inferred that the fact that Household’s defensive action came well before any prospective tender offer was a substantial factor in the court’s decision to uphold it.\textsuperscript{95} The court admonished, however, that “[t]he ultimate response to an actual takeover bid must be judged by the Directors’ actions at that time,” and that nothing in the Moran opinion relieves the board of its “basic fundamental duties to the corporation and its stockholders.”\textsuperscript{96}

In addition to providing the first post-Unocal illustration of the importance of timing, Moran left its imprint on Unocal by establishing a “gross negligence” standard for determining whether target boards’ defensive actions are adequately “informed” for the purpose of satisfying the “reasonable belief” prong of the Unocal test.\textsuperscript{97} The Moran court held that the Household Board’s investigative efforts were sufficient to warrant a finding that it was not grossly negligent.\textsuperscript{98} These efforts consisted of: (i) examining a summary of the pill, (ii) reading articles about the current takeover environment, (iii) engaging in an “extended discussion” of the pill with Household’s counsel and investment bankers, and (iv) listening to contrary views.\textsuperscript{99} While target

\textsuperscript{94.} Moran, 500 A.2d at 1350. The court actually applied Unocal’s enhanced business judgment rule. Accordingly, Unocal is applicable to defensive actions regardless of whether such action is taken in response to an actual takeover bid.

\textsuperscript{95.} It is also interesting to note that the Moran court premised both its finding of “reasonable belief” and its finding of “rational relationship” on the fact that Household’s directors adopted the pill in reaction to a perceived threat of “bust-up” takeovers in general, and coercive, two-tiered tender offers in particular. \textit{Id.} at 1356-57.

\textsuperscript{96.} \textit{Id.} at 1357. The court applied the enhanced business judgment rule after concluding that the adoption of the pill was within the authority of the Household Board under Delaware law. \textit{Id.} at 1355-56. In reaching that conclusion, the court rejected the appellants’ contentions that: (i) no provision of the Delaware General Corporation Law authorized the issuance of the pill, (ii) the pill improperly usurped stockholders’ rights to receive hostile tender offers, and (iii) the pill restricted stockholders’ rights to conduct a proxy contest. \textit{Id.} at 1351-55; see also TW Servs., Inc. v. Shareholders Litig., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) \#94,334, at 92,182 (Del. Ch. 1989) (“This court has understood [Moran] to mean that a decision not to redeem a pill in the face of a hostile tender offer is a defensive step that has to be ‘reasonable in relation to the threat posed’ by such offer.”).

\textsuperscript{97.} Moran v. Household Int'l, 500 A.2d 1346, 1356 (Del. 1985); see also Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985). The court concluded that the Household Board was not grossly negligent in failing to obtain adequate information relative to the decision to implement the pill. Moran, 500 A.2d at 1356. The court also found that the “good faith” portion of the first prong of the Unocal test was satisfied because the plaintiffs had failed to allege bad faith. \textit{Id.}

\textsuperscript{98.} \textit{Id.}

\textsuperscript{99.} \textit{Id.} Plaintiff Moran was a Household director and Chairman of appellant Dyson-Kissner-Moran Corp. (D-K-M). Before implementation of the pill, Moran had commenced discus-
boards may be tempted to view Moran’s approval of Household’s rather perfunctory investigation as a “safe harbor,” they should be cautioned that different circumstances will undoubtedly require different levels of investigation.\textsuperscript{100}

2. The Board’s Timeless Right to Defend Against Infamous Raiders and Coercive, Two-tiered Tender Offers: Ivanhoe Partners v. Newmont Mining Corp.

In \textit{Ivanhoe Partners v. Newmont Mining Corp.},\textsuperscript{101} the court preserved the right of directors to defend the corporation against coercive, two-tiered tender offers made by corporate raiders such as T. Boone Pickens, regardless of the timing of the offer or the nature of the defensive action. There, Pickens’ Ivanhoe mounted a hostile, two-tiered bid for Newmont Mining, one of the largest gold producers in North America.\textsuperscript{102} In response, the Newmont Board commenced an aggressive capital program and encouraged its largest shareholder, Consolidated Gold Fields PLC, to refrain from terminating a pre-existing standstill agreement.\textsuperscript{103} Ivanhoe responded by raising its offer from $95 to $105 per share.\textsuperscript{104} Newmont’s Board rejected the increased offer as inadequate and implemented a restructuring plan designed to prevent Ivanhoe from consummating its bid.\textsuperscript{105} The plan

\begin{footnotesize}
\begin{enumerate}
\item The Moran court’s willingness to accept such a cursory investigation may be explained by the fact that the Board was not faced with a pending hostile bid when it was deciding whether to implement the pill.
\item 535 A.2d 1334 (Del. 1987).
\item \textit{Id.} at 1336-39. The first tier of Ivanhoe’s bid was a cash offer for 42\% of Newmont stock at $95 per share, subject to obtaining financing. The second tier was a mere nonbinding intention to acquire the remaining shares in a second step transaction for $95 per share cash. \textit{Id.} at 1339. Ivanhoe’s refusal to commit itself to execute the second step rendered the offer coercive because shareholders would be induced to tender their shares to Ivanhoe in the first phase for fear of losing the opportunity to tender at $95 if Ivanhoe did not consummate the second step. \textit{Id.}
\item \textit{Id.} In 1981, Gold Fields entered into a 10-year standstill agreement with Newmont in which it agreed not to acquire more than one-third of Newmont’s outstanding stock and agreed to make certain other concessions to Newmont’s Board. The agreement was terminable at the option of Gold Fields upon acquisition by a third party of 9.9\% of Newmont stock. When Ivanhoe purchased more than 9.9\% of Newmont stock, Gold Fields’ option to terminate the standstill agreement was triggered. \textit{Id.} at 1338.

The capital program, referred to as “the Gold Plan,” called for the acceleration of gold exploration and production. It was designed to boost the value of Newmont’s stock. \textit{Id.} at 1339 n.11.
\item \textit{Id.} at 1339.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
HOSTILE TAKEOVERS

consisted of the declaration of a $33 per share dividend\textsuperscript{106} and the execution of a new standstill agreement with Gold Fields that allowed Gold Fields to acquire up to 49.9% of Newmont's stock via a "street sweep."\textsuperscript{107}

Ivanhoe brought suit in the Delaware Chancery Court to enjoin the dividend and Gold Field's acquisition of additional Newmont stock.\textsuperscript{108} The chancery court issued a temporary restraining order based upon its preliminary finding that the standstill agreement had entrenching effects because: (i) Gold Fields was not permitted to transfer its shares unless the transferee agreed to be bound by the standstill, and (ii) Gold Fields was required to vote for the Newmont Board's nominees.\textsuperscript{109} To satisfy the court, Gold Fields and Newmont amended the standstill to permit Gold Fields to tender its shares into an "any-or-all" tender offer if the offeror had firm financing and to provide for the establishment of cumulative voting.\textsuperscript{110} The court ruled that these amendments cured the entrenchment problem and denied Ivanhoe's motion for preliminary injunction.\textsuperscript{111} Ivanhoe then appealed to the Delaware Supreme Court.\textsuperscript{112}

The supreme court appeared to use Ivanhoe as an opportunity to rearrange the components of the Unocal enhanced business judgment rule.\textsuperscript{113} In Unocal, the court had structured the rule by setting forth a two-pronged "threshold examination" requiring the directors' to show: (i) a reasonable belief that the offer posed a danger to corporate policy and effectiveness, and (ii) that the board's response was reasonable in relation to the threat posed.\textsuperscript{114} After the threshold examination was satisfied, the court applied the business judgment rule, which protects the board unless "the directors' decisions were primarily based on perpetuating themselves in office, or some other breach

\textsuperscript{106} Id. at 1340. The dividend was financed by the sale of Newmont's non-gold assets.

\textsuperscript{107} Id. at 1339-40. Although the new standstill agreement permitted Gold Fields to acquire up to 49.9% of Newmont stock, it limited Gold Fields' representation on Newmont's Board to 40% and required Gold Fields to vote for the Board's nominees. In addition, Gold Fields could not transfer its interest to any third party unless the transferee agreed to be bound by the standstill. The $33 per share dividend received by Gold Fields facilitated its purchase of additional Newmont stock, which was effectuated via a "street sweep." Id. A "street sweep" is the rapid purchase of securities on the open market during and immediately after a tender offer. Id. at 1337 n.3.

\textsuperscript{108} Id. at 1340.


\textsuperscript{110} Ivanhoe Partners, 535 A.2d at 1340.

\textsuperscript{111} Id.; Ivanhoe Partners v. Newmont Mining Corp., 533 A.2d 585, 610 (Del. Ch. 1987).

\textsuperscript{112} Ivanhoe Partners, 535 A.2d at 1336.

\textsuperscript{113} See supra note 89.

\textsuperscript{114} Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. 1985).
of fiduciary duty such as fraud, overreaching, lack of good faith, or being uninformed."115

In *Ivanhoe*, Justice Moore appeared to change the original "two-tiered threshold examination plus traditional business judgment rule" structure into a straightforward, tripartite test:

[T]he directors [have] the burden of proving that they have not acted solely or primarily out of a desire to perpetuate themselves in office, that the threatened takeover posed a danger to corporate policy and effectiveness, and that the defensive measures adopted are reasonable in relation to the threat posed.116

The board "must satisfy these prerequisites by showing good faith and reasonable investigation before enjoying the presumptions afforded by the business judgement rule."117 Interestingly though, after having appeared to restructure the rule, the court's analysis seems to have lapsed back into the "threshold examination plus business judgment rule" approach expounded in *Unocal*.118

The court in *Ivanhoe* added the bidder's *modus operandi* to the long list of considerations that directors may contemplate in determining whether the hostile bid presents a threat to the corporation.119 The court found that the Newmont Board properly took into account the fact that corporate raider T. Boone Pickens controlled *Ivanhoe* and that Mr. Pickens had previously engaged in numerous attempts to acquire and break up other companies.120 Moreover, the court recognized the coercive nature of two-tier partial tender offers and found that such coercive devices were part of "Mr. Pickens' typical *modus*
Given Mr. Pickens' history, the coercive nature of the offer, and the finding of inadequate value, the court concluded that the Newmont Board reasonably believed that Ivanhoe posed a threat to corporate policy and effectiveness.\footnote{122}

The court held that the Newmont Board’s defensive actions were reasonable in relation to the threats posed and that the board acted not to entrench itself, but rather to maintain the company’s independence.\footnote{123} Indeed, given the circumstances presented in \textit{Ivanhoe}, the Newmont Board “had both the duty and responsibility to oppose the threats presented by Ivanhoe and Gold Fields.”\footnote{124}

The \textit{Ivanhoe} court gave the Newmont Board virtual \textit{carte blanche} to defend against an inadequate, coercive, two-tiered tender offer initiated by a reputed corporate break-up specialist. Accordingly, \textit{Ivanhoe} demonstrates the inverse relationship between the level of threat posed by the hostile offer and the relevance of the timing of the challenged board action. When a hostile bid poses a threat of the magnitude presented by corporate greenmailers bearing two-tiered offers, the board will have a virtually unbridled right to defend the corporation against it. This right is “timeless”; i.e., the timing of the defensive action is essentially irrelevant.

3. \textit{An Example of Bad Timing by the Board: AC Acquisitions Corp. v. Anderson, Clayton & Co.}

In \textit{AC Acquisitions Corp. v. Anderson, Clayton & Co.},\footnote{125} the Delaware Chancery Court demonstrated the importance of timing as a determinative factor in its decision to strike down a target board’s defensive action. There, AC Acquisitions Corp. (AC) initiated a tender offer for “any and all shares” of Anderson, Clayton at $56 per share.\footnote{126} The day after the offer was announced, Anderson, Clayton commenced a self-tender for 65\% of its outstanding shares at $60 per

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\footnote{121. \textit{Ivanhoe Partners}, 535 A.2d at 1342; see also Moran v. Household Int’l, 500 A.2d 1346, 1357 n.14 (Del. 1985); \textit{Unocal}, 493 A.2d at 956.}
\footnote{122. \textit{Ivanhoe Partners}, 535 A.2d at 1342. The court also ruled that the Board reasonably believed that Gold Fields posed a threat to the corporation because it had the right to terminate the original standstill agreement and acquire control of Newmont. \textit{Id.} The court’s analysis acknowledged that Gold Fields might have acquired control of the company after consummation of the first step of the Ivanhoe bid, “thus leaving the remaining shareholders without protection on the ‘back end.’” \textit{Id.}}
\footnote{123. \textit{Id.} at 1344.}
\footnote{124. \textit{Id.} at 1345. For an interesting discussion of \textit{Ivanhoe}, see \textit{Towers}, supra note 86.}
\footnote{125. 519 A.2d 103 (Del. Ch. 1986).}
\footnote{126. \textit{Id.} at 104. AC intended to do a follow-up merger at $56 per share after it had acquired 51\% of Anderson, Clayton stock. \textit{Id.}}
\end{flushleft}
Anderson, Clayton also intended to sell 25% of its issued and outstanding stock to a newly formed Employee Stock Ownership Plan (ESOP). AC immediately brought suit to enjoin the self-tender and the sale of the stock to the ESOP.

Although Chancellor Allen found that the board satisfied the first prong of the Unocal test, he was unable to conclude that the board's action was "reasonable in relation to the threat posed." The "threat" posed by AC's offer, the Chancellor observed, was:

only in a special sense and on the assumption that a majority of the Company's shareholders might prefer an alternative to the [AC] offer. On this assumption, it is reasonable to create an option that would permit shareholders to keep an equity interest in the firm, but, in my opinion, it is not reasonable in relation to such a "threat" to structure such an option so as to preclude as a practical matter shareholders from accepting the [AC] offer. . . . [The self-tender] will have that effect.

Given that the board's action (i) failed the Unocal test, (ii) had an entrenchment effect, and (iii) could not be justified as reasonable, the Chancellor concluded that the self-tender could not stand in its current form.

127. Id.
128. Id.
129. Id. at 105.
130. Id. at 112. The Chancellor observed that the self-tender "may seem not to satisfy" the reasonable belief requirement because there was no evidence that AC's tender offer threatened injury to the corporation or its shareholders. Id. Accordingly, Chancellor Allen completely recharacterized the "reasonable belief" prong of the enhanced business judgment rule by interpreting it "to be simply a particularization of the more general requirement that a corporate purpose, not one personal to the directors, must be served by the stock repurchase." Id. The Chancellor's conclusion that the first leg of the Unocal test was satisfied was based upon a finding of a valid corporate purpose, not based upon a finding that the board had a reasonable belief that a danger to corporate policy and effectiveness existed. Id.
131. Id. at 113.
132. Id. The Chancellor found that the self-tender was coercive in that it effectively precluded shareholders from choosing the AC offer—no shareholder could risk being frozen out of the front end of the self-tender in the event that the AC offer failed to close because of the nonoccurrence of certain conditions precedent, such as the Board's abandonment of the self-tender. Id. at 109, 114; see also Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1015 (E.D. Wis. 1989) (target board may not preclude shareholder choice solely on the basis of its own perception of inadequacy of the offer).
133. Anderson, Clayton, 519 A.2d at 114-15. The Chancellor ruled that because the Unocal test was not met, the Board could not avail itself of the protections of the business judgment rule. Id. at 114. The Chancellor then explained that where board action does not have the protection of the business judgment rule, it can only be upheld if the transaction is objectively or intrinsically fair. Id. at 115; see also Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1265 (Del. 1988); Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983); Shamrock Holdings
"The problem and its solution," the Chancellor observed, "is one of timing." The court suggested that the Anderson, Clayton Board could meet the "reasonable relationship" prong of Unocal by giving shareholders the option to tender their shares to the corporation if a majority did not tender into the AC offer. In other words, the self-tender could be commenced after the shareholders have had an opportunity to decide whether or not to tender into the AC offer, rather than commencing it at the same time and effectively forcing shareholders to choose the self-tender. The court explained that if the timing of the board action were modified in this way, it would be a reasonable defensive step in that: (i) it would make the change in control threatened by the AC offer less likely; (ii) it would give shareholders an alternative that, due to the noncoercive nature of the AC offer, would be readily available to shareholders if a majority of shareholders in fact were to prefer it; and (iii) it would not impair shareholders' ability to effectively elect the AC option if a majority of shareholders in fact preferred that option.

Anderson, Clayton illustrates the Delaware judiciary's distaste for coercive tender offers regardless of whether the offer is generated by a hostile suitor or by the target itself. Anderson, Clayton also shows how the timing of board action relative to the timing of the hostile bid can be the determinative factor in the decision to sustain or enjoin the challenged action. Chancellor Allen's prescient observation that "[t]he problem and its solution is one of timing" highlights the

v. Polaroid Corp., 559 A.2d 257, 271 (Del. Ch. 1989). "Similarly here, where the entrenchment effect of the [self-tender] creates a species of director interest even on the part of outside directors, the failure to qualify for the protections of the business judgment rule means that all aspects of the transaction must be deemed fair to shareholders . . . to be sustained." Anderson, Clayton, 519 A.2d at 115.

134. Id. at 114.

135. Id.

136. Id. The Chancellor left the door open for Anderson, Clayton to offer an alternative to the AC transaction by permitting it to participate in the framing of an injunction order that would eliminate the coercive aspects of the self-tender but would preserve it as an option by modifying the timing as suggested by the court. Id. at 116.

137. Id. at 114. See also Robert M. Bass Group v. Evans, 552 A.2d 1227 (Del. Ch. 1988), where the chancery court struck down a similar coercive self-tender by a target company's board. The court found the self-tender in Evans to be even more egregious than that in Anderson, Clayton because it was economically inferior to the hostile bid. Id. at 1244. The Evans court was also influenced by the Board's failure to conduct a reasonable investigation of the offer and its proponent. Id. at 1240.

Evans was the first reported decision involving the battle over control of publishing giant Macmillan, Inc. and is referred to as Macmillan I. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988), cited throughout this Article and discussed supra note 63 is referred to as Macmillan I. See, e.g., Mills Acquisition, 559 A.2d at 1265; Prentice & Langmore, supra note 85, at 404-05 & nn.137-38.

emerging importance of timing as a consideration in the development and application of the enhanced business judgment rule.


In City Capital Associates v. Interco, Inc., Interco’s Board adopted a prophylactic poison pill similar to that which was employed in Moran. Less than three weeks later, the Rales brothers announced an offer to acquire Interco by a merger for $64 per share cash; the offer was ultimately increased to $74 per share. The Board rejected the offer and adopted a restructuring plan allegedly worth up to $76 per share to be financed by the sale of the company’s Ethan Allen furniture division and by $2.025 billion in new debt. The Rales brothers requested the court to order the board to redeem the pill and to enjoin the restructuring transaction.

Chancellor Allen took advantage of the opportunity to hail Unocal as “the most innovative and promising case in our recent corporation law” and to provide an instructive explanation of its principles. Referring to the Unocal test as “a new intermediate form of judicial review” that had been dubbed “the proportionality test,” the Chancellor admonished that the test must be applied cautiously in order to reduce the danger that courts “will too readily seek to assert the primacy of their own view on a question upon which reasonable, completely disinterested minds might differ.” The Chancellor explained that the threat posed by a tender offer for all shares would not be to corporate policy or effectiveness, but rather to shareholder interests.

139. 551 A.2d 787 (Del. Ch. 1988).
140. Id. at 791. The stock rights plan contained “flip-in” and “flip-over” provisions providing that: (i) if a shareholder acquired 30% or more of Interco stock, rights holders would have the right to purchase Interco stock having a market value of twice the exercise price of each right, and (ii) in the event of a merger or acquisition of 50% or more of the company’s assets, the rights could be exercised to acquire common stock of the acquiring company having twice the exercise price of the right. Id. at 791-92. The rights plan was adopted because of the Board’s perception that Interco was vulnerable to a “bust-up” takeover.
141. Id. at 792-94.
142. Id. at 793. The restructuring was designed and valued by Interco’s investment banker, Wasserstein Perella, which, the court noted, “has a rather straightforward and conventional conflict of interest” because it would have received substantial contingency pay if the restructuring was successfully completed. Id. The Ethan Allen furniture division was said to be Interco’s “crown jewel.” Id. at 794.
143. Id. at 795.
144. Id at 796.
146. Interco, 551 A.2d at 796.
147. Id. at 797.
These threats are of two types: (i) "threats to voluntariness," in that a shareholder may be forced to accept an offer because of its coerciveness;\textsuperscript{148} and (ii) "threats from inadequate but noncoercive offers," in which the offering price may be inadequate or unfair.\textsuperscript{149}

In the latter case, courts have held that a board is not required to redeem a poison pill rights plan simply because of the existence of a noncoercive offer.\textsuperscript{150} The board is justified in leaving the poison pill in place while it decides what action to take "to protect and advance shareholder interests," whether the action consists of negotiating an increase in the offer, instituting a \textit{Revlon}-style auction, or developing an alternative "value-maximizing" transaction.\textsuperscript{151} However, "there may come a time when a board’s fiduciary duty will require it to redeem the [pill] and to permit the shareholders to choose" between the hostile offer and the board’s alternative action.\textsuperscript{152} That time comes

\textsuperscript{148} Id.; see also Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Moran v. Household Int'l, 500 A.2d 1346 (Del. 1985). The Chancellor also noted that "a different form of threat relating to the voluntariness of the shareholder’s choice would arise in a structurally noncoercive offer that contained false or misleading material information." \textit{Interco}, 551 A.2d at 797 n.10; see also Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1015 (E.D. Wis. 1989).

\textsuperscript{149} \textit{Interco}, 551 A.2d at 797. As the Chancellor further explained:

> Even where an offer is noncoercive, it may represent a "threat" to shareholder interests in the special sense that an active negotiator with power, in effect, to refuse the proposal may be able to extract a higher or otherwise more valuable proposal, or may be able to arrange an alternative transaction or a modified business plan that will present a more valuable option to shareholders.

\textit{Id.} at 797-98; see, e.g., \textit{In re J.P. Stevens & Co. Shareholders Litig.}, 542 A.2d 770 (Del. Ch. 1988); CFRT v. Federated Dep’t Stores, 633 F. Supp. 422 (S.D.N.Y. 1988).


\textsuperscript{151} \textit{Interco}, 551 A.2d at 798. Cf. \textit{TW Servs. v. Shareholders Litig.}, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,334, at 92,181 (Del. Ch. Mar. 2, 1989). In \textit{TW Services}, the chancery court held that in the few circumstances where it had ordered a board to redeem a pill (referring to \textit{Interco} and Grand Metro. PLC v. Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988)), "it was thought that the central purpose of a pill—to give a board time to negotiate on shareholders’ behalf or to consider alternatives to a tender offer . . . that threatened to coerce or otherwise injure shareholders—had been fully served." \textit{Id.} The court distinguished \textit{Interco} and \textit{Pillsbury} on the grounds that they "did not involve circumstances in which a board had in good faith . . . elected to continue managing the enterprise in a long term mode and not to actively consider an extraordinary transaction of any type." \textit{Id.}

\textsuperscript{152} \textit{Interco}, 551 A.2d at 798; see also Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp 984, 1015 (E.D. Wis. 1989) (If no threat other than inadequacy of the offer exists, "a board must at some point allow shareholders to choose between the offer and some alternative."); \textit{TW Servs., Inc. v. Shareholders Litig.}, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,334, at 92,182 (Del. Ch. Mar. 2, 1989) ("A decision not to redeem a pill in the face of a hostile tender offer is a defensive step that has to be ‘reasonable in relation . . . to the threat posed’ by such offer.").
when it is apparent that the board does not intend to negotiate an increase in the offer or institute an auction and when it has had sufficient time to arrange an alternative transaction. 153 "The only function then left for the pill at this end-stage is to preclude the shareholders from exercising a judgment about their own interests that differs from the judgment of the directors . . . ." 154 Applying these principles to the facts, the Chancellor concluded that the time had come for the board to redeem the pill and to permit the shareholders to choose between the plaintiff's bid and the board's restructuring transaction. 155

It is ironic that even though Chancellor Allen expressly warned against applying Unocal to permit courts "to assert the primacy of their own view," that is exactly what the Paramount court accused Chancellor Allen of doing with respect to his decision in Interco. 156 In rejecting Paramount's attempt to use Interco as support for its claim that an all-cash, all-shares offer could not pose a threat, the supreme court declared:

We disapprove of such a narrow and rigid construction of Unocal. . . . Plaintiffs' position represents a fundamental misconception of our standard of review under Unocal principally because it would involve the court in substituting its judgment as to what is a "better" deal for that of a corporation's board of directors. To the extent that the Court of Chancery has recently done so in certain of its opinions, we hereby reject such approach as not in keeping with a proper Unocal analysis. See, e.g., Interco, 551 A.2d 787, and its progeny . . . . 157

153. Interco, 551 A.2d at 798.
154. Id.
155. Id. at 800. The Chancellor refused, however, to enjoin the Board from implementing the restructuring transaction. Id. at 801. The court declared that a hostile bidder "has no right to demand that its chosen target remain in status quo while its offer is formulated, gradually increased and, perhaps, accepted." Id.
157. Id. at 1153; see also Johnson & Milon, supra note 41, at 2113-14. It is interesting to note that in his own Paramount opinion, Chancellor Allen had attempted to preserve Interco by distinguishing it from the Paramount facts. As Chancellor Allen observed:

[In Interco], the board sought to assure continued control by compelling a transaction that itself would have involved the sale of substantial assets, an enormous increase in debt and a large cash distribution to shareholders. In other words, . . . management was presenting and seeking to "cram down" a transaction that was the functional equivalent of the very leveraged "bust up" transaction that management was claiming presented a threat to the corporation.

Here, in sharp contrast, the revised transaction, even though "reactive" in important respects, has its origin and central purpose in bona fide strategic business planning, and not in questions of corporate control.

It is unclear exactly why the supreme court felt that Chancellor Allen had "substituted his judgment for that of the board" and to what extent the court's criticism invalidates the *Interco* decision. Nevertheless, the Chancellor's ruling that the Interco pill had exceeded its time provides another example of how the timing of a board's action, or in this case, its refusal to act, was becoming a substantial factor in pre-Paramount hostile takeover decisions.

In *Grand Metropolitan PLC v. Pillsbury Co.*,\(^{158}\) the court of chancery ordered Pillsbury's Board to redeem a poison pill in circumstances similar to those presented in *Interco*.\(^{159}\) In 1986 Pillsbury's Board had adopted a stockholder's rights plan and other defensive mechanisms to protect Pillsbury from potential hostile suitors.\(^{160}\) In late 1988, Grand Metropolitan launched an all-cash tender offer for all Pillsbury stock at $63 per share (approximately 60% more than the NYSE closing price), conditioned upon, inter alia, the Board's redemption of Pillsbury's poison pill.\(^{161}\) Not surprisingly, the Pillsbury Board rejected the offer as inadequate and declined to redeem the pill.\(^{162}\) Grand Metropolitan then sought an injunction ordering the Pillsbury Board to redeem the pill on the grounds that it precluded Pillsbury shareholders from choosing whether to accept Grand Met's offer.\(^{163}\)

The *Pillsbury* court began its analysis by restructuring the enhanced business judgment rule into a five-part test. Under this restructured test, the board must first establish that it had reasonable grounds for believing that a danger to corporate policy and effectiveness existed. Second, the board must show that it acted in good faith in considering the tender offer. Third, the board must show that it made a reasonable investigation of the tender offer. Fourth, the board must have consisted of a majority of outside, independent directors in order for the proof of the above requirements to be "materially enhanced." Fi-

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158. 558 A.2d 1049 (Del. Ch. 1988).
159. *Id.* at 1060.
160. *Id.* at 1051. The rights plan provided for each common share to receive a preferred stock purchase right that was exercisable 10 days after a person or group acquired ownership of at least 20% of Pillsbury's common stock or commenced a tender offer. Each right entitled the holder to purchase $200 worth of Pillsbury stock for $100. The Board retained the power to redeem the rights for one cent each. *Id.* at 1051 n.2. The Board also implemented other defensive devices such as staggered directorships, a prohibition against shareholder action by written consent, a limitation on who may call shareholders' meetings, and a "supermajority/fair price" amendment to the corporate charter requiring 80% of the outstanding voting stock to authorize any "business combination transaction" not approved by the Board. *Id.* at 1051.
161. *Id.* at 1052.
162. *Id.* During the fiscal year ending May 31, 1988, Pillsbury stock ranged in price from $28 to approximately $48. *Id.*
163. *Id.* at 1053-54.
nally, the defensive measure implemented must be reasonable in relation to the threat posed.\textsuperscript{164}

Although the court found good faith, reasonable investigation and a majority of independent, outside directors, it concluded that Grand Metropolitan's offer posed no threat to Pillsbury; the only possible danger posed was to the shareholders and concerned the adequacy of the price.\textsuperscript{165} Citing \textit{Interco}, the \textit{Pillsbury} court granted the requested relief on the grounds that the Board's decision to keep the pill in place was not reasonable in relation to any threat posed by the tender offer and that its sole purpose was to preclude shareholders from choosing to accept the offer.\textsuperscript{166} Noting that the Pillsbury Board's alternative restructuring plan would yield shareholders $68 per share in five years, the court reasoned that a shareholder may decide that $63 in cash presently was preferable to the possibility of $68 in the future.\textsuperscript{167} "[A] stockholder cannot make that choice unless the Rights are redeemed."\textsuperscript{168}

To the extent that \textit{Pillsbury} is deemed to be among \textit{Interco}'s "prog- eny," it may be argued that it is no longer good law after \textit{Paramount v. Time}.\textsuperscript{169} However, like \textit{Interco}, \textit{Pillsbury} provides us with another

\begin{footnotes}
\item[164] Id. at 1056; see also supra note 89; cf. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. 1985).
\item[165] \textit{Pillsbury}, 558 A.2d at 1056.
\item[167] \textit{Pillsbury}, 558 A.2d at 1057.
\item[168] Id. The court concluded that the Pillsbury Board's refusal to redeem the pill was, under the circumstances, "Draconian." Id. at 1058; \textit{Unocal}, 493 A.2d at 955. The court's decision was influenced by the fact that 87\% of shares had tendered into the offer and that shareholders could collectively lose more than $1.5 billion if the Grand Metropolitan offer were withdrawn, assuming that the stock price fell to its pre-offer level. \textit{Pillsbury}, 558 A.2d at 1058.
\end{footnotes}
example of the emerging importance of timing in the pre-Paramount case law.

5. **Timing Becomes Paramount: Shamrock Holdings v. Polaroid Corp.**

   *Shamrock Holdings v. Polaroid Corp.* confirmed that the timing of the development of the board’s alternative action relative to the hostile bid was becoming of paramount importance in the determination of whether the action would be upheld. In that case, Shamrock Holdings sought to acquire all of Polaroid’s stock. In March 1988, more than three months before Shamrock announced its interest in Polaroid, Polaroid’s Board approved the development of an ESOP, a plan that Polaroid’s management had been contemplating for more than two years. The board believed that the ESOP would improve employee productivity and would also provide Polaroid with some level of antitakeover protection at a time when it was particularly vulnerable to a hostile bid.

   The Board had originally planned to create an ESOP that would own approximately 5% of Polaroid’s issued and outstanding stock. During the ensuing four months, Polaroid management negotiated with employee groups concerning the manner in which the ESOP would be funded. On June 14, 1988, Polaroid’s Board approved and adopted the actual ESOP plan document. On June 17, 1988, Shamrock informed Polaroid in writing of its interest in the company and its desire to meet with Polaroid’s management. The meeting was set for July 13 after Shamrock agreed not to acquire any more Polaroid stock for a reasonable period of time after the meeting. On July 12, Polaroid informed Shamrock that it was cancelling the meet-

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170. 559 A.2d 257 (Del. Ch. 1989).
171. Id. at 259.
172. Id. at 261-63.
173. Id. Polaroid was vulnerable to a takeover bid for several reasons. First, the company’s profits were down. Second, the company had only a modest amount of debt. Finally, Polaroid had the potential of recovering more than $6 billion from Kodak in a patent infringement suit. Id. at 261.
174. Id. at 263.
175. Id. At issue were the nature and quantity of benefits that the employees would be willing to give up in order to fund the ESOP. Alternatives considered included a pay cut, pay scale increase delays, and the use of profit sharing retirement funds. Not surprisingly, the employees vehemently opposed any pay cut. Id. at 263-64.
176. Id. at 264.
177. Id.
178. Id. at 265.
ing. Also on that date, the Polaroid Board implemented a modified ESOP that would own 14% of Polaroid stock.\(^{179}\)

On July 19, Shamrock proposed to acquire Polaroid for $40 per share cash.\(^{180}\) The next day, Shamrock filed suit seeking to invalidate the ESOP on the grounds that it was a defensive measure adopted by a misinformed Board that did not properly apply the analysis required by *Unocal*.\(^{181}\) During the pendency of the suit on September 9, 1988, Shamrock commenced a tender offer for all of Polaroid's outstanding stock at $42 per share cash, conditioned on a final judicial determination invalidating the ESOP.\(^{182}\)

Undoubtedly determined to rule in favor of Polaroid, Vice-Chancellor Berger chose to apply the more stringent standard suggested by Shamrock and then to conclude that the ESOP met the standard. As the court stated:

[N]either a board's failure to become adequately informed nor its failure to apply a *Unocal* analysis, where such an approach is required, will automatically invalidate the corporate transaction. Under either circumstance, the business judgment rule will not be applied and the transaction at issue will be scrutinized to determine whether it is entirely fair.\(^{183}\)

The court held the ESOP was fundamentally fair even though the increased stock allocation to the ESOP was motivated in part by a desire to obtain its possible antitakeover benefits in the wake of Shamrock's overture.\(^{184}\)

\(^{179}\) Id. at 267-68. The Board decided that the 14% ESOP would be funded by a 5% pay cut, a delay of pay scale increases, 401(k) (retirement plan) matching funds, and a contribution from the profit sharing plan. Id. at 268.

\(^{180}\) Id. at 269.

\(^{181}\) Id. at 259, 269. Shamrock also sought monetary damages for breach of certain promises that Polaroid allegedly made to Shamrock in connection with the July 13 meeting. Id. at 259.

\(^{182}\) Id. Shamrock indicated its intention to decrease the offer to $40 if the ESOP was not invalidated. Id.

\(^{183}\) Id. at 271; see, e.g., Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1265 (Del. 1989); Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983); AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 115 (Del. Ch. 1986).

\(^{184}\) Polaroid, 559 A.2d at 275-76. The court noted that the ESOP permitted employees to choose whether or not to accept a tender offer. The court further observed, however, that employees were not likely to tender their shares to a hostile bidder for fear of losing their jobs in the personnel reorganizations that often follow such acquisitions. Accordingly, even though the existence of the ESOP would make it more difficult for a hostile bidder to acquire all of Polaroid's stock, "it cannot be said that management controls the employees' tendering decisions . . . . The ESOP may mean that a potential acquiror will have to gain the employees' confidence and support in order to be successful in its takeover effort." Id. at 273-74. The court also found that the ESOP was likely to increase productivity and earnings and that these benefits outweighed the minimal decrease in earnings per share and the risk of shareholder dilution. Id. at 272 n.16, 274.
Although the *Polaroid* decision is devoid of any reference to the timing of the original decision to develop an ESOP as a basis for its decision to uphold the board’s action, both the court of chancery and the supreme court concluded in their *Paramount v. Time* decisions that the *Polaroid* court upheld the ESOP primarily because it had been planned before the acquisition attempt.\(^{185}\) Accordingly, *Polaroid* is significant because of how the supreme court and the chancery court subsequently used it to illustrate the importance of the timing of the development of board action relative to the hostile bid.

The cases discussed above show how the Delaware judiciary has become increasingly influenced by the timing of board action relative to the hostile bid in the determination of whether the board’s action passes muster under *Unocal*. These decisions reveal an increasing trend toward favoring board actions that were planned before the announcement of the hostile bid. Consequently, after *Polaroid*, if a target board responded to a hostile bid by attempting to facilitate the completion of an alternative action planned before the announcement of the bid, the Delaware courts appeared to be inclined to permit the board to reject the offer and to complete the pre-planned action.\(^{186}\) In *Paramount v. Time*, this trend ripened into a definitive rule of law.

**IV. THE IMPACT OF PARAMOUNT V. TIME**

*Paramount v. Time* represents the culmination of the Delaware judiciary’s five year struggle with the development of the *Unocal* enhanced business judgment rule and its desire to avoid becoming a “super board of directors.”\(^{187}\) The *Paramount* court could have easily set aside the Time Board’s pre-planned action in order to permit Time

\(^{185}\) See *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1155 (Del. 1990), aff'd *Paramount Communications, Inc. v. Time Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,283 (Del. Ch. July 14, 1989). Neither the chancery court nor the supreme court gave a specific page citation to the *Polaroid* opinion to support their conclusion, nor did they mention that the 14% ESOP ultimately adopted was not voted on until after the Board learned of Shamrock’s overture.

\(^{186}\) This pre-*Paramount* rule should be modified to reflect *Interco* and *Pillsbury*’s holdings that where a pre-planned action (such as a poison pill) exceeds its purpose, the chancery court will require the target board to abandon it. See *City Capital Assocs. v. Interco, Inc.*, 551 A.2d 787 (Del. Ch. 1988); *Grand Metro. PLC v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988). However, after *Paramount*, the viability of *Interco* and *Pillsbury* is suspect. See *Paramount*, 571 A.2d at 1152-53. The rule should also reflect that the Delaware courts’ interest in timing will decrease as the threat posed by the hostile bid increases. See *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987) (affirming the board’s timeless right—and duty—to defend against coercive, two-tiered offers).

\(^{187}\) *Paramount*, 571 A.2d at 1153; see also supra text accompanying notes 84-89.
shareholders to make a $74 per share profit. Instead, the court chose to remain true to its policy of judicial restraint and its recognition of the importance of timing. The court’s refusal to intervene in such compelling circumstances is a testament to its commitment to the rules of law expounded in Paramount v. Time. These holdings are summarized below.

A. A Target Board’s Responsive Action Will Be Upheld Where It Is Intended to Facilitate the Completion of a Transaction Planned Before the Hostile Bid

The Paramount court’s principal reason for upholding the Time Board’s decision to restructure the Time-Warner transaction was that it “was not aimed at ‘cramming down’ on its shareholders a management-sponsored alternative [to the Paramount bid], but rather had as its goal the carrying forward of a pre-existing transaction in an altered form.” The court felt that the restructuring of the transaction was a reasonable response to the threats posed by the Paramount bid, even though Time was required to incur “a heavy debt” to finance it. Consequently, the court upheld the Time Board’s responsive action because it facilitated the completion of a transaction that was planned before the announcement of the hostile bid. If the Time Board had not planned or implemented the Time-Warner combination before the announcement of the Paramount bid, the court may have reached a different result.

Thus, Paramount v. Time conclusively establishes that “timing is paramount” in determining whether a board’s action will be upheld when challenged by a hostile suitor. A target board’s responsive action will be upheld where it is intended to facilitate the completion of a transaction planned before the announcement of the hostile bid.

B. Directors Have the Power to Determine the Time Frame for Achievement of Corporate Goals If They Have Developed a Deliberately Conceived Plan

The Paramount court expounded another important rule of law concerning the issue of timing. Directors’ fiduciary duty to manage

188. On June 7, 1989, the day before Paramount announced its original tender offer of $175 per share, Time stock was trading at $126 per share. Two weeks later, Paramount increased its offer to $200 per share, thus affording shareholders an opportunity for a $74 per share profit. Paramount, 571 A.2d at 1147-49.
189. Id. at 1154-55; see also Shamrock Holdings v. Polaroid Corp., 559 A.2d 257 (Del. Ch. 1989).
190. Paramount, 571 A.2d at 1155. In order to acquire Warner, Time had to incur a staggering $10.8 billion of debt. Id. at 1146, 1155; see also Duffy, supra note 23, at 82.
the corporation, the court ruled, "includes the selection of a time frame for achievement of corporate goals. That duty may not be delegated to the stockholders." Therefore, the court concluded, "[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy." This holding raises the issue of whether directors have an unconditional right to choose a long-term corporate strategy over a short-term one, or whether the court intends to restrict that right to cases in which the board has adopted and seeks to preserve a "deliberately conceived plan." If the court intended the right to be unconditional, then the rule would likely be applied in all hostile takeover cases to permit target boards to "just say no" to hostile bids without offering an alternative transaction or without having previously developed a "deliberately conceived plan." If, however, the court desired to

191. Paramount, 571 A.2d at 1154 (citing Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985)). As the supreme court explained earlier in its opinion:

[W]e think it unwise to place undue emphasis upon long-term versus short-term corporate strategy. Two key predicates underpin our analysis. First, Delaware law imposes on a board of directors the duty to manage the business and affairs of the corporation. This broad mandate includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability. Thus, the question of "long-term" versus "short-term" values is largely irrelevant because directors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon. Second, absent a limited set of circumstances as defined under Revlon, a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover.

192. Paramount, 571 A.2d at 1154. The court rejected Paramount's argument that Time failed the "reasonable relationship" prong of Unocal because shareholders were precluded from receiving a control premium. The court declared that shareholders do not have an absolute right to receive a control premium. Whether or not shareholders receive a control premium is within the discretion of the board. Id.; see also Johnson & Millon, supra note 41, at 2108-11 (arguing that the Paramount court emphasizes directors' duties to the corporate enterprise as opposed to shareholder interests).

193. Before the supreme court's issuance of its Paramount decision, several commentators speculated on whether the chancery court's Paramount opinion supported what has been termed the "just say no" defense, i.e., where a target board seeks to rebuff a hostile bid without proposing an alternative transaction. See, e.g., Gregg A. Jarrell, The Paramount Import of Becoming Time-Warner: A Present Value Lesson For Lawyers, WALL ST. J., July 13, 1989, at A14 (Paramount decision supports "just say no" defense); Judith H. Dobrzynski, From One Decision Flow a Lot of Hard Lessons, BUSINESS WEEK, July 31, 1989, at 28-29 (quoting investment banker Roger Altman as opining that Paramount did not affirm the "just say no" defense). After the supreme court issued its written opinion, Prentice and Langmore concluded that Paramount "seems to clearly establish a right to 'just say no.'" See Prentice & Langmore, supra note 85, at 479-80. Cf. Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp 984, 1013-15 (E.D. Wis. 1989).
limit the right to cases where the board has previously developed a "deliberately conceived plan," then the rule arguably does not stand as an independent principle of law, but rather as a rationale for the court's holding that a target board's responsive action will be upheld where it is intended to facilitate the completion of an action planned before the announcement of the hostile bid.194

If the directors' right to select a time frame for achievement of corporate goals was unconditional, target boards would undoubtedly argue that this right would always permit them to reject the short-term opportunity presented by the hostile bid in favor of any legitimate long-term goal "unless there is clearly no basis to sustain the corporate strategy."195 This interpretation could seriously erode or even eliminate the enhanced business judgment rule on the theory that every hostile bid would pose a "threat" to the target board's right to choose a time frame and that any responsive action designed to defeat the bid would be "reasonably related" to the "threat" posed. Thus, the enhanced business judgment rule would arguably be rendered meaningless. If the supreme court intended to adversely impact Unocal in this fashion, it undoubtedly would have made its intention crystal clear. Consequently, it is far more likely that the court intended to limit a target board's right to reject hostile bids on "time frame" grounds to situations in which the board has developed a "deliberately conceived plan."

Assuming that Paramount stands for the proposition that directors may choose a time frame for achievement of corporate goals provided they have developed a "deliberately conceived plan," and that such a plan may be defended when threatened by a hostile bid, the question then becomes, what qualifies as a "deliberately conceived plan"? Will any plan suffice "unless there is clearly no basis to sustain" it?196 Or will the court articulate a more rigorous standard?

If a plan needed only to pass the "no basis" test, any loosely articulated plan could arguably qualify. On the other hand, a plan must still be a plan regardless of whether it needs only to pass muster under the "no basis" standard. Webster's New World Dictionary provides that "plan refers to any detailed method, formulated beforehand, for doing . . . something."197 Accordingly, the requirement that there be a "deliberately conceived plan" presumably envisions the formulation of a detailed method for achieving a specific corporate goal.

194. See supra text accompanying notes 189-91.
195. See Paramount, 571 A.2d at 1154.
196. See id.; supra text accompanying notes 191-92.
Time's deliberately conceived plan was the Time-Warner combination that allowed it to gain a foothold in the video production business while, at the same time, preserving the "Time Culture" and its ability to control its own destiny.\textsuperscript{198} While an ill-defined "plan" to preserve the "Time Culture" alone would probably not have sufficed, Time's intention to enter the video production business via a well thought-out combination with Warner obviously qualified.\textsuperscript{199} Accordingly, in order to assert the "time frame" defense to support its decision to "just say no" to a hostile bid, a target board must have formulated an actual plan to achieve a legitimate corporate goal \textit{before} the announcement of the hostile bid.\textsuperscript{200}

It is important to remember that the \textit{Paramount} court held that directors not only have a \textit{right} to select a time frame for achievement of corporate goals, but they also have a \textit{duty} to do so—a duty that may not be delegated to the stockholders.\textsuperscript{201} In light of this holding, it was not only appropriate for the Time Board to cancel the shareholder vote and restructure the Time-Warner transaction as an outright acquisition in order to effectuate the planned combination, but it would have arguably been \textit{improper} for the board to permit a shareholder vote on the issue.

While some may criticize the court for embracing director supremacy over shareholder democracy,\textsuperscript{202} the supreme court's view of corporate

\begin{itemize}
  \item \textsuperscript{198} \textit{Paramount}, 571 A.2d at 1143 \& n.4; \textit{see also supra} text accompanying notes 3-8.
  \item \textsuperscript{199} \textit{See Paramount}, 571 A.2d at 1148-49. Time spent two years formulating the plan to combine with Warner. \textit{See id.} at 1144-45; \textit{see also supra} text accompanying notes 3-13.\textit{ Cf. In re Desoto, Inc. Shareholder Litig., [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) \textsuperscript{¶ 94,964,} at 95,392 (Del. Ch. Feb. 5, 1990).}
  \item \textsuperscript{200} The most common form of a plan to achieve a corporate goal would be a transaction planned \textit{before} the announcement of the hostile bid. \textit{See supra} text accompanying notes 189-91. The Delaware courts have yet to address the issue of whether the formulation of a "deliberately conceived plan" that does not involve some form of a transactional alternative to the hostile bid would be sufficient.
  \item \textsuperscript{201} \textit{See Paramount}, 571 A.2d at 1154.
  \item \textsuperscript{202} \textit{See, e.g.,} Johnson \& Millon, \textit{supra} note 41, at 2108-09 (criticizing the court for failing to articulate a standard by which to measure whether the board is acting in the best interests of the corporation in rejecting short-term profit maximization); \textit{see also} Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1014-15 (E.D. Wis. 1989), where the district court ruled as follows:

\begin{quote}
Applying the \textit{Unocal} standards, I am unable to conclude that a board may in all instances preclude shareholder choice solely on the basis of its own perception of the inadequacy of the offer. If no other threat is posed to the corporation and shareholders, a board must at some point allow shareholders to choose between the offer and some alternative. . . . To do otherwise is to disenfranchise the shareholders. \textit{Id.}
\end{quote}
\end{itemize}
governance is the more pragmatic and logical approach.\textsuperscript{203} Given that most publicly-held corporations have many thousands of shareholders and are affected by a multitude of highly complex economic, financial, political, and technological factors, the better approach is to empower a centralized and informed board of directors to manage the corporate enterprise rather than permit that power to be exercised by "a fluid aggregation of unaffiliated shareholders."\textsuperscript{204} As the \textit{Paramount} court ruled, the directors' power to manage the corporation includes the power to select a time frame for the achievement of corporate goals if the board has developed a deliberately conceived plan before the announcement of the hostile bid. If the shareholders are unhappy with their directors' decisions, they are not without a remedy—they always possess the ultimate power to vote the directors out of office.\textsuperscript{205}

\section*{C. All-Cash, All-Shares Offers May Pose Threats Other Than Inadequate Value}

The \textit{Paramount} court examined three chancery court cases dis-
cussed above—Anderson, Clayton,206 Interco,207 and Pillsbury208—and found that they suggested that an all-cash, all-shares offer does not pose a threat to corporate policy and effectiveness, but rather it poses a threat to shareholders only to the extent that the price may be inadequate.209 The Paramount plaintiffs used these cases to support their argument that an all-cash, all-shares offer within the range of acceptable values cannot pose any threat to the corporation and its shareholders.210 In response to this argument, the supreme court ruled:

Implicit in the plaintiffs' argument is the view that a hostile tender offer can pose only two types of threats: the threat of coercion that results from a two-tier offer promising unequal treatment for nontendering shareholders; and the threat of inadequate value from an all-shares, all-cash offer at a price below what a target board in good faith deems to be the present value of its shares. Since Paramount's offer was all-cash, the only conceivable "threat," plaintiffs argue, was inadequate value.

... Plaintiffs' position represents a fundamental misconception of our standard of review under Unocal principally because it would involve the court in substituting its judgment as to what is a "better" deal for that of a corporation's board of directors. To the extent that the Court of Chancery has recently done so in certain of its opinions, we hereby reject such approach as not in keeping with a proper Unocal analysis. See, e.g., Interco, 551 A.2d 787, and its progeny. ...211

The court explained that the Unocal enhanced business judgment rule is useful because of "its flexibility in the face of a variety of fact scenarios" and that it is not intended to lead to a simple mathematical comparison of the value of the hostile bid with the present value of the management sponsored alternative.212 "Indeed, in our view," the court declared, "precepts underlying the business judgment rule militate against a court's engaging in the process of attempting to appraise and evaluate the relative merits of a long-term versus a short-term investment goal for shareholders."213

206. 519 A.2d 103 (Del. Ch. 1986).
207. 551 A.2d 787 (Del. Ch. 1988).
208. 558 A.2d 1049 (Del. Ch. 1988).
209. Paramount, 571 A.2d at 1152; Pillsbury, 558 A.2d at 1056; Interco, 551 A.2d at 797; see also Anderson, Clayton, 519 A.2d at 113 (the only threat posed is that shareholders might prefer an alternative to the hostile bid).
210. Paramount, 571 A.2d at 1152.
211. Id. at 1152-53.
212. Id. at 1153.
213. Id.
The court ruled that the Time Board reasonably believed that the Paramount bid posed three threats in addition to inadequate value. First, inasmuch as the Paramount offer was made just sixteen days before the Time shareholders’ vote on the Time-Warner merger, a threat existed that Time shareholders might elect to accept the Paramount offer in ignorance or in a mistaken belief of the strategic benefit that the combination with Warner might produce. Second, a threat existed that the Paramount bid was not a certain offer because it was conditioned upon termination of the merger agreement, redemption of the rights plan, receipt of cable TV franchises, and the inapplicability of the Delaware antitakeover statute. Third, a threat existed that the Paramount bid, by virtue of its timing, was designed to upset or confuse the Time shareholders’ vote on the Time-Warner merger.214

“Given this record evidence,” said the court, “we cannot conclude that the Time Board’s decision . . . that Paramount’s offer posed a threat to corporate policy and effectiveness was lacking in good faith or dominated by motives of either entrenchment or self-interest.”215

It is evident that the target board’s perceptions of threats from hostile offers will be given a much greater degree of deference in the post-Paramount world than they had been given in Anderson, Clayton; Interco; and Pillsbury. What is less clear, however, is the extent to which the Delaware courts will be willing to pass judgment on a board’s finding of “inadequate value” where no other threats are posed by a particular hostile bid. The Paramount court’s declaration that it would not “appraise and evaluate the relative merits of a long-term versus a short-term investment goal for shareholders” appears to suggest that future target boards will also enjoy greater deference with respect to their findings of inadequate value if such findings are made in good faith and are based upon reasonable investigation.

Thus, Paramount v. Time has favorably impacted a target board’s ability to defend against all-cash, all-shares offers by recognizing that

214. Id.
215. Id.; see generally Ronald J. Gilson & Reinier Kraakman, Delaware’s Intermediate Standard For Defensive Tactics: Is There Substance to Proportionality Review?, 44 Bus. LAW. 247 (1989). Professors Gilson and Kraakman identify three types of threats posed by hostile offers: (i) opportunity loss . . . [where] a hostile offer might deprive target shareholders of the opportunity to select a superior alternative offered by target management; (ii) structural coercion, or the risk that disparate treatment of non-tendering shareholders might distort shareholders’ tender decisions; and (iii) substantive coercion . . . the risk that shareholders will mistakenly accept an underpriced offer because they disbelieve management’s representations of intrinsic value.

Id. at 267. Substantive coercion was one of the threats found to be posed by the Paramount offer.
such offers can pose threats other than inadequate value. It has also
discouraged hostile suitors by reaffirming the court’s commitment to
avoid becoming a “supreme board of directors” that would substitute
its judgment as to what is a better deal for that of the target corpora-
tion’s board.

D. Target Boards Should Have a Majority of Outside Independent
Directors

Although it had been well settled before Paramount v. Time that a
corporation should have a majority of outside, independent directors
in order to establish “good faith” and “reasonable investigation,”216
the Paramount court reaffirmed this rule.217 The fact that twelve of
sixteen Time directors were outside and independent helped convince
the court that the Time Board’s decisions were based upon reasonable
investigation.218 Accordingly, Paramount v. Time manifests the con-
tinued importance of maintaining a majority of outside, independent
directors on the board if a target company desires to succeed in de-
fending against prospective hostile takeovers.

E. A Target’s Incurrence of “Heavy Debt” to Finance a Pre-
planned, Alternative Transaction is Not Per Se Unreasonable

The supreme court was unmoved by the plaintiffs’ allegation that
the Time Board acted improperly because it caused the corporation to
incur too much debt in order to effectuate the acquisition of
Warner.219 In response to this claim, the court summarily stated:

[W]e note that although Time was required, as a result of
Paramount’s hostile offer, to incur a heavy debt to finance its
acquisition of Warner, that fact alone does not render the board’s
decision unreasonable so long as the directors could reasonably
perceive the debt load not to be so injurious to the corporation as to
jeopardize its well being.220

1987); Moran v. Household Int’l, 500 A.2d 1346, 1356 (Del. 1985); Unocal Corp. v. Mesa Petro-
1049, 1056 (Del. Ch. 1988).
217. Paramount, 571 A.2d at 1154.
218. Id. The court’s conclusion was also supported by the fact that the Board had considered
and rejected Paramount as a potential merger candidate when it was exploring the possibility of
merging with one of a number of entertainment companies. Id.
219. Id. at 1155. Time incurred $10.8 billion in debt to acquire Warner. See Duffy, supra
note 23, at 82; see also Paramount, 571 A.2d at 1148.
220. Paramount, 571 A.2d at 1155.
The court’s unwillingness to pass on the merits of the Time Board’s decision to incur close to $11 billion in debt is entirely consistent with its overall policy of judicial restraint and its reluctance to second guess board judgment. The economic ills of the nineties may, however, change the court’s view of the incurrence of excessive debt from business as usual to a threat of the magnitude presented by coercive, two-tiered tender offers.\(^\text{221}\) If courts come to suspect that unfettered incurrence of debt was responsible in whole or in part for the painful economic downturn that the country is suffering at present, board decisions authorizing excessive corporate borrowing will undoubtedly be subject to greater scrutiny in the future.\(^\text{222}\)

V. CONCLUSION

*Paramount v. Time* has impacted the law of hostile takeovers in five significant ways. First, it confirmed that the “timing of board action is paramount” by affirming the right of directors to reject a hostile bid in order to facilitate the completion of a transaction planned *before* the announcement of the offer. Second, it established that directors have the power to choose a time frame for achievement of corporate goals—and that this power will permit directors to “just say no” to a hostile bid—provided they have previously developed a “deliberately conceived plan” to achieve a legitimate corporate goal. Third, it recognized that all-cash, all-shares offers can pose threats in addition to inadequate value. Fourth, it reaffirmed that boards should have a majority of outside, independent directors in order to show that their decisions are made in good faith and based upon reasonable investigation. Fifth, it found that the incurrence of a “heavy debt” to finance a pre-planned, alternative transaction is not *per se* unreasonable.

These holdings confirm the Supreme Court of Delaware’s policy of judicial restraint and its reluctance to become a “supreme board of directors” in hostile takeover cases. The fact that these holdings were rendered in a case in which shareholders could have realized a $74 per share profit is a testament to the court’s determination to resist the temptation to substitute its judgment as to what is a “better” deal for


\(^{222}\) See *Duffy*, supra note 23, at 82-83. As of the date of the Business Week article, Time Warner stock was trading at approximately $70 per share. The article argues that Time Warner stock has not performed better primarily because of the enormous debt burden undertaken to effectuate the Warner acquisition and investors’ uncertainty about Time’s ability to reduce it. See also *Prentice & Langmore*, supra note 86, at 480-81.
that of the corporation's board. The *Paramount* case shows that *Unocal*’s enhanced business judgment rule has developed into an effective compromise between the corporation’s need for power to be exercised by a knowledgeable and informed board of directors and the shareholders’ need to be protected from the “omnipresent specter” of board entrenchment in the context of hostile takeovers.

The Delaware Supreme Court’s hostile takeover jurisprudence should not be judged by the results of economic studies on the relative merits of hostile takeovers. Rather, it should be evaluated on the basis of its success in preserving the traditional concept of the corporation as manifested in the legislation that creates and defines corporations. *Paramount v. Time* demonstrates that the court has achieved that goal.