CORPORATE GOVERNANCE

The Continuing Viability of Contractual "Continuing Director" Change of Control Provisions

A couple of recent Delaware decisions suggest that "continuing director" change of control provisions in existing loan agreements and indentures are unlikely to provide the sweeping protections that many capital providers assume existed. In other types of agreements, the enforceability of such provisions is likely dependent on the magnitude of the risk to the company of a breach and the degree of interference with the primacy of the shareholder franchise.

by David E. Ross and Bradley R. Aronstam

"Continuing director" provisions, which have become commonplace in commercial loan agreements, indentures, and other contracts, can create significant disincentives for shareholders to replace existing board members by threatening accelerated obligations or other penalties on a company (such as the immediate repayment of a loan or the hastened callability of the outstanding debt instruments) should a majority of the company's directors cease to satisfy the contractual definition of "continuing directors." This particularly is true in light of the substantial financial challenges presented by the current economic environment. Indeed, depending on a company's financial situation and the nature of its debt obligations, the effect of default under one of these provisions can be so significant that shareholders may, as a practical matter, be precluded from replacing incumbent directors.

The historical attractiveness of these provisions for providers of capital was clear: They enabled these providers to hedge their risk by insisting on repayment—or the repurchase of their notes—in the event of a contractually defined change in control of the borrower. But the leverage that makes these provisions so attractive to those providers also makes them suspect as a matter of corporate law. The right of shareholders to elect directors is fundamental.[1] By potentially limiting or defeating altogether a shareholder's right to elect new directors, these provisions raise serious corporate governance concerns. It therefore is not surprising that in two recent opinions, *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*[2] and *Law Debenture Trust Co. of New York v. Petrohawk Energy Corp.*,[3] the Delaware Court of Chancery carefully scrutinized and narrowly interpreted these provisions, consistent with the Court's invalidation of "dead-hand" poison pill provisions in the takeover context more than a decade ago.

Read together, *Amylin* and *Petrohawk* offer valuable guidance concerning the factors most likely to bear on the enforceability of "continuing director" provisions going forward. These decisions also provide important guidance for parties to, or considering entering into, agreements containing such provisions, as well as the lawyers and other advisors counseling them.

San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.

The Governing Instruments

In June 2007, Amylin Pharmaceuticals, Inc. issued convertible senior notes governed by a trust indenture dated June 8, 2007 (Indenture). The Indenture permitted noteholders to redeem their notes at face value under certain circumstances, including a contractually defined "Fundamental Change." Among other events, a "Fundamental Change" occurred "'any time the Continuing Directors d[id]

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not constitute a majority of the Company's Board of Directors.'"[4] In addition to those directors serving when Amylin issued the notes, "Continuing Directors" included:

> any new directors whose election . . . or nomination for election by the stockholders . . . was approved by at least a majority of the directors then still in office . . . either who were directors on the Issue Date or whose election or nomination for election was previously so approved.[5]

Amylin also had a senior secured credit facility. As did the Indenture, the Credit Agreement governing that facility contained a "continuing director" change of control provision. Unlike the Indenture, however, the Credit Agreement excluded

> 'any individual whose initial nomination for, or assumption of office as, a member of th[e board of directors] . . . occurs as a result of an actual or threatened solicitation of proxies or consents . . . by any person or group other than a solicitation . . . by or on behalf of the board of directors'

from its definition of "continuing directors."[6]

The Proxy Contest

In January 2009, Amylin found itself in the midst of a heated proxy consent concerning the election of directors to the Amylin board. Two Amylin shareholders, who together held more than 21 percent of Amylin's outstanding common stock, advised the company that each of them intended to nominate five directors for election to the company's 12-member board.[7] Concerned that the existence of two five-member dissident slates created a risk of triggering the Indenture's "Continuing Directors" provision, one of the two shareholders asked Amylin to assemble a slate of nominees from each proposed slate. Amylin declined to do so. Instead, in its Form 10-K Amylin disclosed the risk that the change of control provisions of the Indenture and the Credit Agreement could be triggered and result in serious financial consequences to the company.

The Ensuing Litigation

Less than one month later, one of the dissident shareholders filed a complaint against the company and its directors in the Delaware Court of Chancery alleging that the defendants breached their fiduciary duties by:

- Agreeing to the "Continuing Directors" provisions in both the Indenture and the Credit Agreement;[8]
- Failing to "approve" the dissident candidates (thereby eliminating the risk presented by the provisions); and
- Failing to disclose properly in the company's annual report the risk presented by the "Continuing Directors" provisions.[9]

The complaint sought various forms of relief, including both a declaration that the "Continuing Directors" provisions were unenforceable and a mandatory injunction requiring the company's board of directors to approve the 10 dissident nominees. The company and its directors responded by filing a cross-claim against the Indenture Trustee seeking a declaration that the board could approve any of the shareholder nominees at any time before their election.

Shortly thereafter, the plaintiff, the company, and its directors entered into a partial settlement agreement, under which the company and its directors—while continuing to oppose the election of the 10 dissident nominees—agreed to "approve" each shareholder's slate of nominees on a judicial determination that they were entitled to do so.

Following a one-day trial, Amylin notified the Court that each dissenting shareholder had reduced the size of its proposed slate. One of the dissident shareholders was nominating only two directors; the other was nominating three directors. Because there could therefore be no breach of the change of control provisions as a result of the upcoming shareholder meeting, the Indenture Trustee argued that the case was not ripe for determination. The Court nevertheless issued an opinion construing the "Continuing Directors" provision, without deciding whether any of the dissident nominees qualified under the particular facts at issue.[10]

The Court's Decision

The Court framed the "the central issue in the case [a]s whether or not the Amylin board has both the power and the right under the Indenture to approve the stockholder nominees" while simultaneously running and supporting its own slate.[11] The Indenture Trustee argued that the decision of the board of directors "'not to recommend the election of any of the Dissident Nominees'" and to instead nominate its own slate "'clearly indicate[d] *disapproval*'" of the dissident candidates.[12] Amylin countered that "approve" means "'to give formal sanction to; to confirm authoritatively,'" not to "endorse" or "recommend."[13] Accordingly, Amylin's board of directors could "approve a slate of nominees for the purposes of the Indenture . . . without endorsing them, and . . . simultaneously recommend and endorse its own slate instead."[14]

Under the Indenture Trustee's interpretation, a board "could never approve a stockholder-nominated slate . . . and yet, simultaneously, run its own slate in opposition."[15] This interpretation, which "would prohibit *any* change in the majority of the board as a result of any number of contested elections[ ] for the entire life of the notes," clearly troubled the Court.[16] The Court explained the serious entrenchment and shareholder franchise implications:

> A provision in an indenture with [the] eviscerating effect on the stockholder franchise [advocated by the Indenture Trustee's interpretation] would raise grave concerns. In the first instance, those concerns would relate to the exercise of the board's fiduciary duties in agreeing to such a provision. The court would want, at a minimum, to see evidence that the board believed in good faith that, in accepting such a provision, it was obtaining in return extraordinarily valuable economic benefits for the corporation that would not otherwise be available to it. Additionally, the court would have to closely consider the degree to which such a provision might be unenforceable as against public policy.[17]

Unwilling to adopt such an interpretation, the Court held that the "board may approve a slate of nominees for purposes of the Indenture (thus sanctioning their nomination for election) without endorsing them, and may simultaneously recommend and endorse its own slate instead."[18] The Court was clear, however, that the authority to do so was not unrestricted: The board could only "approve the stockholder nominees if the board determines in good faith that the election of one or more of the dissident nominees would not be materially adverse to the interests of the corporation or its shareholders."[19] In making this determination, the board was required to "take such action in conformity with the implied covenant of good faith and fair dealing and in accordance with their normal fiduciary duties."[20]

Because the Court had no evidence regarding the process and deliberation leading to the board's decision to "approve" the dissident nominees, it was unable to assess the propriety of that decision.[21] The Court nevertheless provided some insight into the factors that it would consider in making such a determination. First, the Court held that unfavorable statements by Amylin during the proxy fight regarding the dissident nominees (*i.e.*, "election puffery") did not preclude the board from "approving" the dissident nominees.[22] Second, the Court recognized that the company's agreement to approve the nominees as part of a negotiated settlement "at least raise[d] a question whether the board's decision to approve was made in a good faith exercise of its considered business judgment, or instead [was] taken simply to avoid facing a suit for money damages against themselves personally."[23]

Addressing the plaintiff's duty of care claim, the Court found that Amylin's directors were not grossly negligent in failing to learn that the Indenture contained the "Continuing Directors" change of control provision. While gross negligence requires "a substantial deviation from the standard of care," the Amylin board was advised by sophisticated legal counsel and "sought advice from Amylin's management and investment bankers as to the terms of the agreement."[24] The directors had asked whether there was anything "'unusual or not customary'" in the agreement and were not told of the "Continuing Directors" provision.[25] And while the directors had not read the agreement itself, "no one suggest[ed] that the directors' duty of care required them to review, discuss and comprehend every word of the 98-page Indenture."[26] The Court *was* clearly concerned, however, about the "troubling reality that corporations and their counsel routinely negotiate contract terms that may . . . impinge upon the free exercise of stockholder franchise."[27]

Law Debenture Trust Co. of New York v. Petrohawk Energy Corp.

Amylin is not the first time that the Court of Chancery narrowly construed a "continuing director" provision in a corporate debt instrument. While *Petrohawk* involved a different aspect of these provisions, it further illustrates how their effectiveness might be limited.

As in *Amylin*, the indenture in *Petrohawk* contained a change of control provision obligating the issuer (KCS) to repurchase immediately its notes (at 101 percent of face value) upon a breach of the agreement. And as in *Amylin*, a change of control occurred if "'a majority of the Board of Directors of the Company [we]re not Continuing Directors.'"[28] In addition to those directors on the board at the time that KCS issued the notes, "Continuing Directors" included any director who "was nominated for election or elected to such Board of Directors with the approval of majority of the Continuing Directors who were members of such Board at the time of such nomination or election."[29]

Following a merger between KCS and Petrohawk Energy Corp., the Indenture Trustee filed suit, claiming a breach of the change of control provision. The Merger Agreement provided for Petrohawk to be governed by a nine member board of directors following the merger, with Petrohawk designating five directors and KCS designating four directors. To avoid breaching the change of control provision, five of the post-merger directors therefore needed to be "Continuing Directors." Taking "care to avoid a Change of Control" the KCS board adopted a resolution days before the merger "confirm[ing] and approv[ing] the nomination and election of" all nine post-merger directors.[30] Other than identifying the nine-post merger directors in the certificate of merger, however, Petrohawk took "no . . . formal corporate action . . . to vest the Post-Merger Directors with their board positions."[31]

The Indenture Trustee argued that the failure to seat properly the KCS nominees meant that they were not "nominated for election or elected . . . with the approval of" the board as required by the Indenture.[32] Following limited discovery, the Court granted summary judgment in favor of Petrohawk, rejecting the Indenture Trustee's "wholly-technical, 'gotcha' argument" designed "to use a technicality to trigger a right of redemption."[33] It reached this result despite finding the corporate law challenges to be "colorable," concluding that the noteholders were not the proper parties to bring these challenges.[34]

For purposes of the Indenture, the "key issue" was "whether the post-Merger board was comprised of a majority of directors whose service was approved by the incumbent KCS board."[35] This is because "the key function of the Continuing Director Provision . . . was to provide the Noteholders with a limited contractual protection against hostile acquisitions."[36] The provision "turned the Notes into a form of 'poison debt,' which made a hostile acquisition more difficult by requiring Notes to be paid in full with a 1% premium if the incumbent board did not sign off on the transition."[37] As long as KCS complied with the terms of the Indenture, however, it "could freely authorize a friendly transaction" without breaching the change of control provision.[38] And because the incumbent directors had full authority to "sign off on [a] transition," the KCS board was free to "'approv[e]' any director before she takes office, by whatever means of selection."[39]

"Continuing Directors" in Poison Pills

The *Amylin* and *Petrohawk* decisions are not the Court of Chancery's first forays into "continuing director" provisions. More than a decade ago, the Court addressed the validity of a similar provision in a shareholder rights plan (*i.e.*, "poison pill"). In *Carmody v. Toll Brothers, Inc.*,[40] the Court made clear that "dead hand" provisions barring newly elected directors from redeeming (or repealing) poison pills, even if only for a limited time after taking office, impermissibly infringed on the shareholder franchise. While the context was different, *Carmody* provides further insight into the concerns about, and therefore the potential obstacles to enforcing, these types of provisions.

"Dead Hand" Poison Pill Plans

Poison pills are defensive measures used by corporate targets to deter unfair and coercive hostile bids for control. While there are a number of different variations on the poison pill, "rights" generally become operational to all target shares except those held by the would-be acquiror upon the occurrence of a given triggering event (*e.g.*, an acquiror's purchase of a given percentage of the target's shares). These rights most commonly allow the shareholders of the target corporation to purchase shares of the target at a severely discounted price or to sell their shares back to the target at a substantial premium. Triggering the poison pill renders the cost of proceeding with the acquisition so prohibitively expensive that, as a practical matter, the acquiror is forced either to: (1) negotiate with the target's board, thus increasing the likelihood of target shareholders receiving a higher premium, or (2) initiate a proxy contest with the hope of gaining control of the target corporation and electing new directors more amenable to removing the pill.

Under "dead hand" (or "continuing director") provisions, only directors who were on the board that adopted the pill, or who subsequently were elected with the recommendation of the other continuing directors, could redeem the pill. These provisions deter suitors from waging proxy contests to elect directors committed to redeeming the pill, because even if elected, the directors lack the power to do so.

Carmody v. Toll Brothers, Inc.

The Court of Chancery in *Carmody* addressed for the first time whether "dead hand" poison pill plans were subject to challenge as either *ultra vires* or a breach of fiduciary duty. In its decision denying the defendants' motion to dismiss, the Court found that the plaintiffs stated colorable claims that the directors breached their fiduciary duties in adopting the "dead hand" plan in two separate respects.[41] First, the plaintiffs stated a claim under *Blasius Indus., Inc. v. Atlas Corp.*,[42] which requires directors to offer a "compelling justification" for any defensive measure that was purposely adopted to disenfranchise shareholders.[43] The "continuing director" provision at issue in *Carmody* threatened to disenfranchise shareholders by making any shareholder vote in connection with a hostile takeover meaningless. Shareholders who wanted to accept the bid would be forced to vote for the incumbent directors (the only directors capable of redeeming the poison pill). Additionally, the "continuing director" provision threatened to "preclude a hostile bidder from waging a proxy contest altogether."[44] For these same reasons, the Court found the "dead hand" provision to be a potentially "disproportionate" (*i.e.*, coercive and preclusive) response in violation of "enhanced scrutiny" under the *Unocal Corp. v. Mesa Petroleum Co.*[45] line of authority.[46]

"Dead hand" poison pills differ from permissible poison pill plans in a critical respect. The poison pill at issue in *Moran v. Household International, Inc.*,[47] for example, survived judicial scrutiny, in part, because "if the board refused to redeem the plan, the shareholders could exercise their prerogative to remove and replace the board."[48] Stated differently, the ability of shareholders to replace directors is a "safety valve which justifies a board being allowed to resist a hostile offer a majority of shareholders might prefer."[49] This ultimate veto right "reflect[s] the fundamental value that the shareholder vote has primacy in our system of corporate governance because it is the 'ideological underpinning upon which the legitimacy of directorial power rests.'"[50] While valid defensive measures permitted shareholders "to elect a board that is both willing and able to" defuse them, "dead hand" provisions rendered shareholders "powerless" to do so and were accordingly impermissible.[51]

The Continuing Enforceability of "Continuing Director" Provisions

While *Amylin* and *Petrohawk* unquestionably raise serious issues regarding the future of "continuing director" provisions, these decisions should not be read to preclude their use altogether. Rather, the enforceability of "continuing director" provisions will continue to be evaluated on a case-by-case basis, with the Court likely to focus on two considerations: (1) the magnitude of risk to the company resulting from a breach of the provision,[52] and (2) the extent to which the provision infringes on the shareholder franchise.

With respect to the magnitude of risk to the company, *Amylin*—which involved the potential immediate repayment of $915 million of debt—recognized that "there are few events which have the potential to be more catastrophic for a corporation than the triggering of an event of default under one of its debt agreements."[53] But the consequences of breach may not be as significant if, for example, default merely results in an increase in the interest rate. The effect on the company also may not be significant when the provision is included in an executive employment agreement. Indeed, the Court in *Petrohawk* noted that the merger resulted in a contractual change of control (albeit due to share ownership levels, as opposed to the number of "continuing directors") that entitled certain executives to approximately $15 million in change of control payments.[54] This was a fraction of the more than $275 million that would have been due if KCS breached the change of control provision in its Indenture and therefore presented far less risk to the company.

The Court also will evaluate the effect of "continuing director" provisions on the shareholders' right to elect directors. This analysis considers the extent to which directors elected by the shareholders in a proxy contest would constitute "continuing directors." The harder it is for directors elected in contested elections to qualify as "continuing directors," the greater the infringement on the shareholder franchise (and the more suspect the provision). The provision in the Credit Agreement in *Amylin* (and the Indenture in *Amylin* under the interpretation advocated by the Indenture Trustee in that case) significantly would restrict the shareholders' right to replace directors. In contrast, the provision in the Indenture in *Amylin*, as interpreted by the Court, encroaches far less on the shareholder vote.

Provisions that present a substantial risk to the company materially cannot encroach on the shareholder franchise. Because the risk to the company of breaching the change of control provision in *Amylin* was catastrophic, the Court was unwilling to accept any significant restriction on the shareholder franchise. But it easily can be imagined that the interpretation championed by the Indenture Trustee would have been more acceptable if the "continuing director" provision was in an executive employment agreement and the dispute concerned a few million dollars in change of control payments.

Counseling Companies and Boards

Amylin and *Petrohawk* provide important substantive and procedural guidance for lawyers counseling companies and boards concerning "continuing director" provisions in both existing and prospective agreements.

With respect to existing agreements (particularly existing debt and loan agreements), providers of capital may have far less protection under "change of control" provisions than they previously believed. Given the *Amylin* Court's interpretation of the provision at issue (and rejection of the Indenture Trustee's interpretation), one is hard-pressed to imagine circumstances under which directors would not be able to "approve" the nomination of a dissident's slate to avoid the potentially "catastrophic" effects caused by a breach. Lenders and noteholders should therefore reevaluate existing agreements to determine whether they enjoy sufficient protection in the likely event that the Delaware courts continue to interpret "continuing director" provisions in this manner.

If their agreements lack sufficient alternate protection, lenders may seek to negotiate substitute protections for their capital. Alternatively, agreements may be amended to limit the remedy for breaches of "continuing director" change of control provisions. Instead of making the entire debt callable, for example, a breach of the "change of control" provision could increase the interest rate or require the payment of certain fees. Doing so would limit the risk to the company (and, as a result, the encroachment on the shareholder franchise) and may enable the provision to survive judicial scrutiny.

Additionally, companies that face the prospect of tripping change of a control provision in an existing agreement may structure transactions to avoid breaching the provision. That was the case in *Petrohawk*, where the Court made clear that "[i]ssuers of corporate debt do not breach their contractual obligations by structuring transactions to avoid triggering a mandatory redemption provision in favor of Noteholders."[55]

Prospectively, because *Amylin* at its core involved an issue of contract interpretation, one could attempt to limit its direct application by making clear in an underlying agreement that directors nominated in proxy fights (*i.e.*, the approach set forth in Amylin's Credit Agreement) are not "continuing directors."

But this approach presents two significant problems. First, borrowers will rarely, if ever, be able to agree to these types of provisions. Following *Amylin*, a board can only agree to such a provision upon a showing that it had a good faith belief that it was "obtaining in return extraordinarily valuable economic benefits for the corporation that would not otherwise be available to it."[56] While this possibility cannot be foreclosed altogether, any board that agrees to this type of "continuing director" provision must clearly document its reasoning and deliberative process, including both the "extraordinarily valuable" benefits and the directors' evaluation or, perhaps even more important, the *absence* of alternative, less restrictive options.

Second, it is not clear that a lender would (or should) take any comfort in the protection afforded by such provisions in the event that a borrower agrees to them. The *Amylin* Court warned that even if the board made the required showing, the Court would "have to closely consider" whether the potential effect on shareholder voting was permissible as a matter of public policy.[57] When the provision significantly limits a shareholder's ability to replace incumbent directors in a contested election, the parties are "on constructive notice of the possibility of its ultimate unenforceability."[58] The risk that the Court would not enforce these provisions counsels heavily in favor of providers of capital incorporating alternative protections into their agreements.

To the extent that a party nevertheless elects to seek the protection of a "continuing director" provision in a prospective agreement, *Petrohawk* underscores the importance of avoiding ambiguity. The Court is likely to interpret any ambiguous "continuing director" provision in favor of the company and its shareholders, and may even reject an interpretation that would be appropriate in a different context, such as a corporate law dispute. Therefore, it is critical that companies seeking the protection of these provisions minimize this potential risk by eliminating any potential ambiguity during the drafting process.

For lawyers and other advisors counseling boards of directors, the *Amylin* decision underscores the need to "highlight[ ]" any terms that may affect a shareholder's right to elect or replace directors. It is irrelevant that a provision is commonplace; the issue is how the provision affects a shareholder's ability to elect directors. In light of the fundamental tension between the interests advanced by "continuing director" provisions and the interests of shareholders, lawyers must ensure that directors who agree to these provisions evaluate both their implications and other potential options. This is especially true for debt agreements, under which an event of default can have "catastrophic" effects on the company. Particularly in those circumstances, counsel must be sure that the board is "especially solicitous to its duties both to the corporation and to its stockholders" when making its decision.[59]

Conclusion

The *Amylin* and *Petrohawk* decisions suggest that "continuing director" change of control provisions in existing loan agreements and indentures are unlikely to provide the sweeping protections that many providers of capital assumed existed. For other types of agreements, as well as modified loan agreements and indentures, the enforceability of particular provisions is likely to depend on the magnitude of risk to the company of breaching the agreement and the degree of interference with the primacy of the shareholder franchise. Before agreeing to any such provisions, companies and their directors must carefully consider their necessity and the potential effect on the shareholders' ability to replace directors.

NOTES

1. *See Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests. Generally, shareholders have only two protections against perceived inadequate business performance. They may sell their stock (which, if done in sufficient numbers, may so affect security prices as to create an incentive for altered managerial performance), or they may vote to replace incumbent board members. . . . [W]hether the vote is seen functionally as an unimportant formalism, or as an important tool of discipline, it is clear that it is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own. Thus, when viewed from a broad, institutional perspective, it can be seen that matters involving the integrity of the shareholder voting process involve consideration not present in any other context in which directors exercise delegated power.").
2. *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc*., 2009 Del. Ch. LEXIS 83 (Del. Ch. May 12, 2009).
3. *Law Debenture Trust Co. of New York v. Petrohawk Energy Corp*., 2007 Del. Ch. LEXIS 113 (Del. Ch. Aug. 1, 2007), *aff'd* 947 A.2d 1121 (Del. 2008).

4. *Amylin*, 2009 Del. Ch. LEXIS 83, at *5 (*quoting* § 1.01 of the Indenture).

5. *Id.* at *5–6 (*quoting* § 1.01 of the Indenture).

6. *Id.* at *9–10 (*quoting* §1.01 of the Credit Agreement).

7. *See http://online.barrons.com/article/SB123358932683539591.html?mod=googlenews_ barrons* (accessed on June 15, 2009). Both shareholders were concerned about the performance of the company's management, and one was interested in putting the company up for sale. *See http://finance.yahoo.com/news/Eastbourne-Icahn-gain-seats-apf-15363405.html?.v=1* (accessed on June 8, 2009).

8. Before the trial Amylin entered into a settlement agreement with Bank of America, N.A., which served several roles related to the Credit Agreement, including Administrative Agent. Pursuant to the settlement, Bank of America waived any default resulting from the director election in exchange for the payment of certain fees.

9. *Amylin*, 2009 Del. Ch. LEXIS 83, at *13-14.

10. Because the Court could have dismissed the case in its entirety on ripeness grounds, its decision to address the effect of "continuing director" provisions presumably reflects the Court's view of the importance of the paramount shareholder rights at issue in this context. The Court also may have been influenced by the need for guidance on this issue in light of the popular nature of these provisions and the increasing prominence and influence of activist shareholders, which significantly increases the prospect of triggering such provisions.

11. *Amylin*, 2009 Del. Ch. LEXIS 83, at *21.

12. *Id.* at *25 (citation omitted).

13. *Id.* at *25–26 (citation omitted).

14. *Id.*

15. *Id.* at *25.

16. *Id.* at *26–27.

17. *Id.* at *27–28.

18. *Id.* at *26.

19. *Id.* at *30–31. The Court's invocation of the standard articulated in *Hills Stores Company v. Bozic*, 769 A.2d 88 (Del. Ch. 2000), which involved a change of control provision in an officer's employment contract, evidences the varied contexts under which this issue can arise.

20. *Id.* at *3.

21. The plaintiff below sought an expedited appeal regarding whether the company properly approved the dissident nominees. The Supreme Court of Delaware denied that request, and briefing on that and other issues on appeal is ongoing. A decision is expected this fall.

22. As explained by the Court, "[e]lection 'puffery' in the context of a fight letter is hardly the same as a determination by the board, in the exercise of its power to approve Continuing Directors, that the election of one or more of the stockholder nominees would be harmful to the corporation or the interests of its stockholders." *Id.* at *32.

23. *Id.* at *34.

24. *Id.* at *38.

25. *Id.*

26. *Id.* at *39.

27. *Id.*

28. *Petrohawk*, 2007 Del. Ch. LEXIS 113, at *7 (*quoting* § 1.1 of the Indenture).

29. *Id.*

30. *Id.* at *11–12.

31. *Id.* at *13.

32. The Indenture Trustee also argued unsuccessfully that notwithstanding a provision in the Indenture authorizing company to merger, directors of successor corporations were not continuing directors because the Indenture did not include successor corporations within the definition of the "Company." *Id.* at *26–32. The Court also rejected the Indenture Trustee's "technical argument" that because Petrohawk did not properly redeem certain preferred shares, KCS stockholders held less than half of the shares in the surviving entity, causing a change of control. *Id.* at *36–40.

33. *Id.* at *46–47.

34. *Id.* at *37–38.

35. *Id.* at *37.

36. *Id.* at *38 (emphasis added).

37. *Id*.

38. *Id*.

39. *Id.* at *44.

40. *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998).

41. *Id. at* 1190, 1193.

42. *Blasius Indus., Inc. v. Atlas Corp*., 564 A.3d 651 (Del. Ch. 1988).

43. *Carmody*, 723 A.2d at 1192-93 (*discussingBlasius'* standard of review).

44. *Id.* at 1194.

45. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

46. *Carmody*, 723 A.2d at 1194 (discussing Unocal and Unitrin, Inc. v. American General Corp 651 A.2d 1361 (Del. 1995)).

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

48. *Carmody*, 723 A.2d at 1193 (*citingMoran*, 500 A.2d at 1355).

49. *Id*. (*citingUnocal*, 651 A.2d at 959).

50. *Id.* (*quotingBlasius*, 564 A.2d at 659).

51. *Id.* at 1193–1195.

52. This factor is analogous to the consideration, in the takeover context, of whether the restrictions attendant to defensive measure are so significant as to be preclusive of other offers, rendering the defensive measure invalid. *See, e.g.*, *Unitrin*, 651 A.2d at 1387; *Omnicare v. NCS Healthcare*, 818 A.2d 914 (Del. 2003).

53. *Amylin*, 2009 Del. Ch. LEXIS 83, at *4 n.7, *39.

54. *Petrohawk*, 2007 Del. Ch. LEXIS 113, at *10.

55. *Id.* at *24.

56. *Amylin*, 2009 Del. Ch. LEXIS 83, at *27–28.

57. *Id.* at *28.

58. *Id.* at *28 n.32.

59. *Id.* at *39–40.