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Greenmail: From Backrooms to Boardrooms to Courtrooms

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COMMENTS

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INTRODUCTION

Defensive tactics employed by target corporations in recent corporate takeover battles have generated mounting concern in both boardrooms and courtrooms.[1] To fend off a takeover,[2] target companies have employed devices such as a "white knight,"[3] "poison pill,"[4] "pac man"[5] and, the subject of this Comment, "green-

1. In 1960, there were eight tender offers to acquire control of corporations with securitites listed on national exchanges. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2 (1968), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2812. In 1982, there were 94 tender offers. As the number of tender offers has increased, the defensive tactics have also. Defensive tactics are actions by a board of directors taken at the expense of the corporation in order to ward off a takeover. *See* Greene & Junewicz, *A Reappraisal of Current Regulation of Mergers and Acquisistions*, 132 U. PA. L. REV. 647, 650 n.3 (1984).

2. The person or company seeking to gain ownership control of another company is called a raider. A raider can achieve a takeover by a proxy fight or by a tender offer. Although tender offers are more popular, there is an apparent resurgence in the use of proxy fights to gain control. There are two types of tender offers, a cash tender offer and a public exchange offer. A cash tender offer is an invitation to the shareholders of a company to tender their shares to the raider in exchange for cash. The raider states in its tender offer how many shares it seeks to purchase. The amount stated will be enough to at least give the raider working control of the target company. The proportional size of the desired holding depends on the characterisitics of the target company. If shareholders tender for sale fewer shares than the amount stated by the raider in its tender offer, then the raider is not required to buy any shares. If more than the stated amount of shares is tendered, then the raider has the option to purchase the excess.

A public exchange offer is essentially the same as a tender offer except that instead of offering cash in exchange for the shares, the raider offers a package comprised of debt and/or equity. Effectively, the raider gives the tendering shareholders an interest in it in exchange for their interest in the target company. The well developed, sophisticated securities exchange market provides an easy way for the tendering shareholders in a public exchange offer to sell their interests in the raider. As a result, the distinction between a cash tender offer and a public exchange offer is blurred. R. HAMILTON, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS 602-03 (2d ed. 1981).

3. A "white knight" is a friendly third party investor. When a target company is faced with a takeover threat, a defensive measure may be to attract a white knight to buy a sufficient number of shares in the target corporation, thereby precluding the raider making the hostile takeover from ever obtaining control of the target company. *See* Mobil Corp. v. Marathon Oil Co., 669 F.2d 336 (6th Cir. 1981); and Block & Miller, *The Responsibilites and Obligations of Corporate Directors in Takeover Contests*, 11 SEC. REG. L.J. 44, 52-53 (1983).

4. A "poison pill" can take many forms, but in every case it acts as a negative attribute of the target corporation which a raider would have to "swallow" should it complete

mail."[6] The impact of these defensive devices on corporations, combined with the failure of natural market control, has prompted the business community to turn to the law for a remedy. However, the nature and complexity of the problem has made the formulation of a legal solution very difficult.

Greenmail is the practice of using the threat of a takeover to force a target corporation[7] to pay to remove the threat. Stated simply, greenmail is the premium[8] above market price[9] that a target corporation pays to repurchase its own shares from the raider in order to fend off a takeover.[10] Although greenmail is not a completely new idea, greenmail payments have grown larger and more frequent[11] and the business world and the law have become more

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the takeover. A common type of poison pill is found in the company charter of the target corporation providing that its shareholders can exchange their shares for those of the raider at a rate costly to the raider. Such a provision is usually triggered by a raider obtaining a certain percentage of control, such as 30% or 40%. The intention of including such a provision in the company charter is to make a takeover so costly to a raider that it is unable to consumate it. *See, e.g.,* Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255 (2d Cir. 1984); Moran v. Household Int'l, Inc., 490 A.2d 1059 (Del. Ch. 1985), *aff'd* 500 A.2d 1346 (1985).

5. "Pac man" is a scheme whereby a target company defends against the takeover by trying to take over the raider. Thus, each urgently purchases the other's shares. The party which first acquires control of the other is the winner. *See* Martin Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982); Block & Miller, *supra* note 3, at 64-66.

6. Greenmail is a payment made by a target corporation to repurchase its own shares from a raider threatening a takeover. For example, Raider wants to greenmail Target. First, Raider purchases at least five percent of the outstanding shares of Target. At that point, the law requires that Raider notify Target of its purchase by filing a statement with the SEC. This statement must contain, *inter alia,* any intentions of Raider to acquire control of Target. In order for Raider to greenmail Target, Raider announces its intent to take over Target. Soon thereafter, Raider makes a tender offer to the other shareholders of Target to effectuate that intention. Once the tender offer is made, Target becomes defensive and tries to stop the takeover. Raider, anticipating this reaction, then offers to sell its Target shares back to Target, eliminating the threat of Raider's takeover. Target will be so enthusiastic to remove that threat that it pays a premium for the shares Raider holds. This payment is the greenmail payment.

7. A "target corporation" is a company subject to a tender offer. More specifically, a target corporation is the company whose shares an investor is offering to purchase from its shareholders. BLACK'S LAW DICTIONARY 1306 (5th ed. 1979).

8. "Premium" is the value above the listed market price that one is offering. For example, if a stock is listed at $10 per share on the securities exchange and an investor offers $15 per share, then $5 is the premium. Comment, *Golden Parachutes: A Perk That Boards Should Scrutinize Carefully,* 67 MARQ. L. REV. 293 n.4 (1984).

9. "Market price" is the value of the share that is listed on the securities stock exchange. Market value is much more difficult to ascertain if the company's stock is not listed on a securities exchange. Various valuation methods exist to approximate the value of shares not traded on a securities exchange. The details of such methods are beyond the scope of this Comment. *See* Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker,* 72 YALE L.J. 223, 231-35 (1962).

10. *See supra* note 6.

11. Between November, 1983, and December, 1984, at least eight greenmail attempts were successfully consumated resulting in about $750 million in profits. Block & Miller, *supra* note 3; Note, *Greenmail: Targeted Stock Repurchases and the Management-Entrenchment Hypothesis,* 98 HARV. L. REV. 1045 (1985).

concerned about controlling it. In 1984, attempts at greenmail resulted in over $600 million in profits[12]—and the practice continues. Since both natural market forces and legislation[13] have been unsuccessful in controlling greenmail, the corporate world has turned to the courts for a solution.

There are three primary reasons why greenmail has become a particular source of concern to both the business world and the legal world. First, greenmail has had a negative impact on corporations and shareholders.[14] Commentators have noted that "[e]mpirical evidence shows that the stock market considers such greenmail payments detrimental to shareholders."[15] Second, the attempts at controlling greenmail through legislation is evidence that there is congressional concern reflecting the public's interests.[16]

Finally, the 1934 Securities Exchange Act[17] includes in its statement of purpose that it is an act to provide for the regulation of security exchanges and over-the-counter markets operating in interstate and foreign commerce and through the mails to prevent inequitable and unfair practices.[18] Greenmail payments made to one shareholder at the expense of all other shareholders, without a clear showing that they are in the best interests of the company as a whole, conceivably come under the realm of this purpose. Specifically, the inequitable distribution of company funds among the shareholders is a practice which appears to be covered by the Se-

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12. Note, *supra* note 11, at 1045 n.1 (citing Office of the Chief Economist, Securities and Exchange Commission, *The Impact of Targeted Share Repurchases (Greenmail) on Stock Prices* 15 (Sept. 11, 1984)).

13. Four bills were introduced into Congress in 1984 proposing to restrict greenmail payments. Regarding the greenmail issue, all four bills were essentially the same. They proposed to eliminate greenmail by prohibiting a company from purchasing its securities at a premium from any person or persons who hold more than five percent of the company's stock and who have held such stock for less than two years *unless* the company has shareholder approval. S. 2782, 98th Cong., 2d Sess. (1984); S. 2777, 98th Cong., 2d Sess. (1984); S. 2754, 98th Cong., 2d Sess. (1984); H.R. 5693, 98th Cong., 2d Sess. (1984). *See also* S. 286, 99th Cong., 1st Sess. (1985).

14. A takeover entails purchasing a controlling interest in the target corporation at a premium. This is an expensive endeavor, especially in the case of cash tender offers. If the raider does not possess such resources, any greenmail attempt will fail because the underlying threat of takeover necessary to succeed will be absent.

15. Note, *supra* note 11, at 1065.

16. The public's concern stems from the "unfairness" of the greenmail payment. One shareholder receives a premium for his shares at the expense of the other shareholders in a greenmail situation. *See* Macey & McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13, 48 (1985). *See also* Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CALIF. L. REV. 1072 (1983). The negative impact on shareholders also contributes to this concern. *See generally infra* notes 48-74 and accompanying text.

17. 15 U.S.C. §§ 78a-78kk (1982 & Supp. III 1985).

18. *See* McIntyre, *Shareholders' Recourse Under Federal Securities Law Against Management for Opposing Advantageous Tender Offers*, 34 BUS. LAW. 1283 (1979).

curities Exchange Act.

This Comment will address how effectively the courts have dealt and could deal with greenmail. Part I of this Comment will discuss the important role the business judgment rule plays in permitting greenmail.[19] Part II will address the effect of greenmail on corporate capital structure.[20] Part III will then discuss how the law has dealt with the greenmail problem up to the present by addressing first the legislative actions [21] and then judicial holdings in this area,[22] analyzing these attempts and determining whether they present a viable solution. Finally, Part IV will propose creating a tribunal to solve not only the problems created by greenmail, but also the problems created by other defensive tactics.[23]

I. THE BUSINESS JUDGMENT RULE

The business judgment rule is a judicial tool to protect the members of a board of directors from personal liability which might arise from their business decisions. The rule effectively creates a presumption that the directors satisfied the fiduciary duty they owed their shareholders. As a result, the decision of the directors of the target corporation to pay greenmail will not subject them to liability despite the cost to the shareholders.[24] Given the nature and complexity of business decisions, courts have found that the best interests of that corporation are best served by not trying to second-guess the directors.[25] Courts have stated that im-

19. See *infra* notes 24-47 and accompanying text.
20. See *infra* notes 48-74 and accompanying text.
21. See *infra* notes 79-105 and accompanying text.
22. See *infra* notes 106-42 and accompanying text.
23. See *infra* notes 43-78 and accompanying text.
24. United Copper Sec. Co. v. Amalgamated Copper Co., 244 U.S. 261, 263-64 (1917); Abramowitz v. Posner, 672 F.2d 1025 (2d Cir. 1982); Shivers v. Amerco, 670 F.2d 826 (9th Cir. 1982); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981) (Cudahy, J., concurring in part and dissenting in part), *cert. denied*, 454 U.S. 1092 (1981); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623 (D. Md. 1982); Whittaker Corp. v. Edgar, 535 F. Supp. 933 (N.D. Ill. 1982); Unocal Corp. v. Mesa Petroluem Co., 493 A.2d 946 (Del. 1985); Pogostin v. Rice, 480 A.2d 619 (Del. 1984); Morgan v. Household Int'l, Inc., 490 A.2d 1059 (Del. Ch. 1985); Kaufman v. Belmont, 479 A.2d 282 (Del. Ch. 1984). *See also* Johnson, *Anti-Takeover Actions and Defenses: Business Judgment or Breach of Duty?*, 28 VILL. L. REV. 51, 52-53 (1982).
25. If directors were held personally liable for incorrect business decisions, then not only would it be very difficult to find someone to be a director, but those who would take the position would be very constrained in their actions. Business decisions involve a great deal of uncertainty and require risk-taking. If liability were imposed, the directors would become risk averse and therefore could be inhibited from acting in the best interests of the shareholders. Finding the proper balance between giving the board members enough autonomy to make appropriate decisions and not giving them absolute immunity so that they may act in their own self interests is difficult. *See generally* Block & Miller, *supra* note 3, at 46-52; Johnson, *supra* note 24, at 55-56; Walsh, *Defensive Tactics and the Fiduciary Obligations of the Target Board of Directors*, 7 J. CORP. L.

posing liabilty in these circumstances would inhibit the directors to such a degree that they could not make appropriate decisions.[26] The majority of courts will review the decisions of directors only where there is a showing that the directors either acted in bad faith or acted soley in their self-interests.[27] This latter position is very difficult to prove. Therefore, "the business judgment rule does not express the measure by which a court determines whether management has discharged its duty of care; rather, its application reflects a conclusion that the management action in question will not be reviewed at all."[28]

A minority of courts are not willing to afford a board of directors such blanket protection in the context of a hostile takeover.[29] However, the minority view is divided on what form a more lenient application of the business judgment rule should take.[30] One minority approach shifts the burden of proof to the defendant board requiring it to show that its actions were made in good faith and were in the best interests of the corporation.[31] This stems from the general practice of the courts to shift the burden of proof from the plaintiff to the defendant where there is evidence of fraud, self-dealing, overreaching or abuse of discretion.[32] Proponents of this minority view assert that because of the natural conflict of interest between the directors and the corporation when a takover threat occurs, any actions by the directors perpetuating their control resembles self-dealing.[33] However, shifting the burden of proof has not significantly altered the effect of the business judgment rule because the burden is easily satisfied. For example,

579, 581 (1982).

26. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

27. In the case of a parent/subsidiary relationship, the potential for self-dealing is so great that the courts will put the burden on the directors to show that their decision was made in good faith. *See* Brudney, *supra* note 16, at 115-18, for a discussion concerning the increased potential for self-dealing in the parent/subsidiary merger context.

28. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 822 (1981).

29. Committee on Corporate Laws, *Guidelines for Directors: Planning for and Responding to Unsolicited Tender Offers*, 41 BUS. LAW. 209, 211 (1985) [hereinafter *Guidelines for Directors*]. *See also* Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964), and Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

30. See *Guidelines for Directors, supra* note 29, at 211, and *Cheff*, 41 Del. Ch. at 506, 199 A.2d at 555.

31. See *Guidelines for Directors, supra* note 29, at 211.

32. In most cases, showing fraud, self-dealing, overreaching or abuse of discretion is very difficult. *Id.* For a discussion on the difficulty of proving fraud under section 14(e) of the Securities Exchange Act of 1934, *see* McIntyre, *supra* note 18.

33. "If courts view greenmail payments as simply vehicles for entrenching incumbent management, and if incumbent management cannot articulate coherent alternative justifications, such payments may be prohibited." Macey & McChesney, *supra* note 16, at 54; Walsh, *supra* note 25; Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); McIntyre, *supra* note 18.

in *Cheff v. Mathes*,[34] the defendant directors satisfied the court by simply asserting that they had a better strategy planned for the corporation than did the raider.[35] The other minority approach takes the inquiry one step further by actually reviewing the board's decisions or by requiring the board to show that its decisions were not soley intended to retain control of the corporation.[36]

The minority views of the business judgment rule stand in opposition to federal appellate courts which generally side with the majority.[37] Consequently, under both federal and state law, directors are afforded a wide latitude of discretion. This discretion results in director entrenchment[38] because directors who actively manage the company secure themselves in their positions to the extent that they become almost impossible to remove.

In this sense, management entrenchment is a negative by-product of the business judgment rule. Apparently, up until this time, management entrenchment is considered preferable to the alternative of not having the business judgment rule.[39] This point is emphasized by the fact that even where a director is primarilly motivated by self-interests, a majority of courts will not hold the director liable for business decisions.[40] Consequently, management entrenchment has become a common problem in corporate law today.

The most apparent problem with management entrenchment is that the directors can more readily act in their own self-interests and not in the best interests of the shareholders.[41] Therefore,

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34. 41 Del. Ch. 494, 199 A.2d 548 (1964).

35. *Id.* at 506, 199 A. 2d at 555.

36. In Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985), the court looked beyond the business judgment rule, claiming that the board's decision was not made "upon reasonable investigation." This case is, however, highly critized. *See Guidelines for Directors*, *supra* note 29.

37. *See, e.g.*, Abramowitz v. Posner, 672 F.2d 1025 (2d. Cir. 1982); Shivers v. Amerco, 670 F.2d 826 (9th Cir. 1982); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981) (Cudahy, J., concurring in part and dissenting in part), *cert. denied*, 454 U.S. 1092 (1981); Miller v. American Tel. & Tel. Co., 507 F.2d 759 (3d Cir. 1974); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623 (D. Md. 1982); Whittaker Corp. v. Edgar, 535 F. Supp. 933 (N.D. Ill. 1982); Note, *supra* note 11, at 1057.

38. *See* Johnson, *supra* note 24, at 53; Walsh *supra* note 25, at 580; Note, *supra* note 11, at 1048-49. The business judgment rule is an "almost irrebutable presumption of sound business judgment, prevailing over everything but the elusive hobgoblins of fraud, bad faith or abuse of discretion." *Panter*, 646 F.2d at 299 (Cudahy, J., concurring in part and dissenting in part).

39. This conclusion is simply an inference from the fact that the courts have adhered so vehemently to the business judgment rule. *See supra* note 25 regarding the consequences of not affording directors the protection of the business judgment rule.

40. *See supra* notes 25-36 and accompanying text; *see also* LIpton, *supra* note note 70, at 101. Lipton notes that despite all the lawsuits against directors, no director has been found liable for rejecting a takeover.

41. Competition would theoretically converge the interests of the shareholders with

when a takeover threat is posed, corporate management has the freedom it needs to make the greenmail payment to the greenmailer without concern for potential repercussions from its shareholders, its creditors or the law.[42] Whether the takeover would have been in the best interests of the shareholders will never be addressed by the courts: The business judgment rule protects the directors from this inquiry.[43]

The business community has made only one significant attempt to try to prevent management entrenchment in the context of corporate takeovers. A scheme called a "golden parachute" was devised to eliminate directors' incentive to resist a takeover simply to perpetuate their control.[44] However, this has not proven to be an effective deterrent to management entrenchment. The size of the payments to the directors in some cases are so enticing that the directors incite a takeover.[45] Consequently, the business community once again turns to the courts for assistance.

In addition to a successful golden parachute, directors will retain a passive role in allowing a takeover to occur unresisted when they are assured by the raider that their positions will not be usurped.[46] However, in the case of greenmail, the greenmailer

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the interests of the managers. However, if the market could solve the problem, one must question why the market has not done so already. See Easterbrook & Fischel, *supra* note 33, at 1164 for a discussion on how management's interests diverge from shareholders. *See also* Macey & McChesney, *supra* note 16, at 15; Bebchuck, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1030-33 (1982); McIntyre, *supra* note 18, at 1284.

42. "If the directors engage in resistance motivated by their own interest, and if they are successful, there is no way . . . to protect the shareholders' interest." Herzel, Schmidt & Davis, *Why Corporate Directors Have a Right to Resist Tender Offers*, 61 CHI. B. REC. 152, 158 (1978).

43. *See supra* note 25 and accompanying text.

44. The term "golden parachute" describes a device included in a company's by-laws to provide for a monetary payment to be made to the directors in the event of a takeover if the raider threatens to remove the board. This ensures that the directors will only defend a takeover in the event that the takeover is truly not in the best interests of the company. Although theoretically this device appears appealing, the size of the payments to directors has given the appearance of self-dealing and, as a result, legislation has been proposed to prohibit golden parachutes. *See* H.R. 5693, 98th Cong., 2d Sess. (1984). *See also* Gruenbaum, *Acquisitions and Mergers*, 8 CORP. L. REV. 84 (1985); Comment, *supra* note 8.

45. This is the conflict of interest problem revisited, except that in this instance, the directors' interest is not to perpetuate their control, but to be rid of it so they are paid the "golden parachute." Therefore, if a takeover is instigated by the directors for this reason, there is no indication that they will be acting in the best interests of the shareholders. "Clearly, the 'golden parachute' agreement is prejudicial to corporate shareholders, includes self-dealing on the part of corporate directors and officers, and results in a 'raid' of the corporate treasury." Johnson, *supra* note 24, at 70-71.

46. When an investor/raider acquires a five percent holding in another company, the investor is required by § 13(d) of the Securities Exchange Act of 1934 to file a Schedule 13D with the SEC. In the Schedule 13D, the investor must divulge any intention to take over the target company, liquidate or merge it, or any other planned major change in the

simply compounds the threat of takeover by stating that it intends to change the management of the target company.[47]

As a result of the above characteristics of corporate direction, the greenmailer can rely on the directors' response of perpetuating their control on the board. The greenmailer, therefore, has the foundation for success. Unfortunately, the greenmailer's success negatively impacts target companies.

II. The Effect of Greenmail on Corporate Capital Structure

Inevitably, greenmail has a detrimental effect on the capital structure of a target company since the company is forced to incur unnecessary debt in order to fight the alleged takeover. On one hand, if the greenmail attempt is successful, then the company must finance the greenmail payment. The popular way to finance greenmail payments is to increase the company's debt.[48] Increasing debt can be accomplished by using any of the available corporate forms of debt.[49] In 1984, greenmail cost corporations $3.5 billion,[50] all of which was probably financed by the companies assuming additional debt.

Even if the greenmail attempt is unsuccessful, the company must nonetheless finance the measures employed to ward off the threat.[51] This too is an expensive endeavor. In *Unocal Corp. v. Mesa Petroleum Co.*,[52] Unocal was faced with a takeover threat from Mesa Petroleum. Instead of making the greenmail payment to Mesa, Unocal issued a self-tender offer,[53] intending to give the board the majority voting rights. Consequently, the board could prevent Mesa from either greenmailing or taking over Unocal.

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business or corporate structure. This disclosure will also reveal the raider's intentions with respect to changing management of the target corporation. 15 U.S.C. § 78 m(d) (1982).

47. By stating its intention to change management in the Schedule 13D, a raider can ensure that the target's board of directors feels threatened.

48. Essentially, the only other way the target company could finance such a costly procedure would be to have a stock issue. This is, however, more costly and cumbersome than increasing debt and often entails an amendment to the charter. Even if a share issue were permissable, its effect would be to dilute the value and earnings per share of outstanding stock which would elicit a negative response from existing shareholders.

49. Many characteristics can be integrated into a bond or debenture to make it more appealing. Those characteristics are commonly termed "sweetners."

50. Note, *supra* note 11, at 1045.

51. A poison pill, self-tender offer and any other measure chosen to resist the takeover inevitably costs large sums of money. *See, e.g.*, Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255 (2d Cir. 1984); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

52. 493 A.2d 946 (Del. 1985).

53. A self-tender offer is an offer by an issuer to purchase its own shares at a stated price from those willing to sell them. *See id.*

The self-tender offer would have caused Unocal to incur at least $6.1 billion of debt. Predictably, the court did not address the validity of the decision to incur such debt, relying on the business judgment rule.

In another case, *Norlin Corp. v. Rooney, Pace Inc.*,[54] Norlin issued new stock to dilute the interest of a tender offer made by Rooney, Pace. Norlin issued the stock to a wholly-owned subsidiary and to a newly created employee stock option plan.[55] This effectively increased the board's voting control and consequently enabled the board to ward off any attempted takeovers. These actions by Norlin cost it approximately $6.8 million.[56] Incurring debt in such large sums, as evidenced by the above cases, would certainly adversly affect the performance of the firm.[57]

In order to make a successful greenmail attempt, the greenmailer must have the resources to pose a valid takeover threat.[58] This usually entails millions, if not billions, of dollar in assets. Arguably, one having such resources should be permitted to greenmail since he should be able to profit from the use of such wealth as he sees fit.[59]Other proponents of greenmail assert that greenmail helps decrease the monitoring costs incurred in attempting to reduce agency costs.[60] Agency costs are the costs of management performing in a way that does not fully maximize a corporation's profit.[61] The cost of poor management is lost profits, a cost which is reflected in a share price that will be less than the company's potential value. The corporation is thus considered undervalued.[62]

54. 744 F.2d 255 (2d Cir. 1984).

55. The employee stock option plan (ESOP) was created by the board so that it could dedicate the shares to the plan in return for a promissory note. Meanwhile, the board maintained voting control of the ESOP stock so that its overall voting power would increase.

56. *Norlin Corp.*, 744 F.2d at 259.

57. Increasing debt increases the debt-to-captial ratio. A low ratio historically has been an indication of financial stability. Comment, *supra* note 8, at 294 n.8.

58. *See supra* notes 2 & 14.

59. This extreme laissez-faire argument is untenable in that a logical extension of it would justify ignoring all laws for the sake of pure capitalism.

60. This has been described as a "free-rider" problem because the investor seeking to reduce agency costs bears a downside risk. That is, if the investor loses, he bears the costs alone, and if he succeeds, the shareholders of the target company share in the benefits. Easterbook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. LAW. 1733, 1739 (1981); Note, *supra* note 11, at 1055-56.

61. The rationale underlying this concept is that if management worked at optimal efficiency, the company would be making maximum profits. Therefore, if management is operating at suboptimal efficiency, a percentage of the profits are forgone. *See* Bebchuck, *supra* note 41, at 1030-31 & nn.18-19; Easterbrook & Fischel, *supra* note 33, at 1162-74.

62. The agency cost is reflected in the share price in that the market value of the share will be less than the share price if managment were operating at optimal efficiency. Prospective bidders monitor the performance of managerial teams by comparing a corporation's potential value with its value (as reflected by share prices) under

An investor will seek out an undervalued company, buy it, change management and then realize the increase in share price that reflects the increased efficiency of the company.[63]

Takeover investments of this nature are beneficial both to the business and to the shareholders. Such takeover investments benefit the shareholders by offering a premium for their shares; the business is benefitted by the increase in management efficiency that the takeover threat could prompt. In other words, the awareness that the high agency cost of poor management will attract a takeover gives management the incentive to increase its efficiency. A natural result of increased management efficiency is increased profits.

Such a positive market force will exist only so long as shareholders profit. Raiders argue the benefits of greenmail in the following way: If the raider is successful, then all the shareholders share the benefit; however, if the raider mistakenly invests in a company that is not undervalued, then he alone bears the costs. But if greenmail is permitted, then the raider can reduce his loss (which comes from the greenmail payment being less than the amount expended to purchase the shares) by the amount of the greenmail payment and continue in pursuit of profiting from takeovers which ultimately reduce agency costs. However, the cost of the payment to the shareholders of the target company is greater than the benefit that may accrue to the business world as a whole. Thus, one author has asserted that "[i]t is impossible to assert with any confidence that the benefits of increased policing of agency costs outweigh the clear costs to shareholders of companies that pay greenmail."[64] As a result, the negative impact that greenmail has on shareholders has prompted efforts to control greenmail despite contradicting arguments from certain investors.

Regardless of the success of the greenmail attempt, the final outcome is that the target company incurs vasts amounts of debt.

> current management. When the difference between the market price of a firm's shares and the price those shares might have under different circumstances becomes too great, an outsider can profit by buying the firm and improving its management.

Easterbrook & Fischel, *supra* note 33, at 1173. *See also* Johnson, *supra* note 24, at 52-53.

63. A raider will offer a premium price for the shares of a target corporation in order to entice the shareholders to sell their shares to the raider. However, the premium must be lower than the amount that the raider can realize after obtaining control of the target corporation. "The source of the premium is the reduction in agency costs, which makes the firm's assets worth more in the hands of the acquirer than they were worth in the hands of the firm's managers." Easterbrook & Fischel, *supra* note 33, at 1173. Premiums realized by the target company's shareholders range from 14% to 50%. *Id.* at 1187. *See also* Dennis, *Two-Tiered Tender Offers and Greenmail: Is New Legislation Needed?*, 19 GA. L. REV. 281, 317 n.175 (1985); Easterbrook & Fischel, *supra* note 60, at 1737-39.

64. Note, *supra* note 11, at 1056.

This creates two problems for the target corporation. First, the resulting monetary constraints infringe on the shareholders' rights because they will have involuntarily forgone a potential dividend or an increase in share valuation.[65]

The second problem that greenmail creates is that it restricts the company's daily business activites.[66] Incurring more debt could affect the firm's day-to-day business because funds must be expended to service the debt. That is, the costs of issuing the debt must be paid[67] in addition to the interest payments as they come due.[68] This strain on cash flow will effectively restrict the firm's working capital to the extent that the firm is limited in allocating funds to the various factions of its business.[69] In addition, funds otherwise available for new investments, such as for research and development, are reduced in the same manner. The benefits which accrue to society from research and development certainly justify taking steps to eliminate any device which impedes the ability to further promote such advances.

The negative impact of greenmail on a target corporation is reflected in its share price.[70] When a takeover is first announced, the share price of the target company will increase to reflect the premium over market price that the shareholders[71] anticipate from the new management of the raider. However, empirical studies show that immediately following the announcement of the repurchase agreement (the greenmail payment), the share price drops

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65. If the target company held excess cash, it could pay a dividend or could reinvest the money and transfer the wealth indirectly to the shareholders.

66. Research and development is one type of activity in which a company might engage. New products and innovations generated therefrom can result in enormous profits.

67. The cost of issuing the debt includes designing the debt, maintaining legal counsel, printing the bonds and, of course, paying the underwriters' fee.

68. Interest payments must be made regulary, without fail, whereas shares only require dividend payments when earnings are sufficient. If interest payments are not made, the company goes into default, incurring a number of problems including losing any favorable bond rating it may have had. Even without defaulting, the increase in the debt-to-capital ratio may cause a drop in the company's bond rating. An example of this resulted from the Martin Marietta—Bendix battle. Martin Marietta increased its long term debt from $400 million to $1.3 billion in order to fight the battle. This raised its debt-to-capital ratio from 22% to 44%. As a result, Moodys Investors Service downgraded Marietta's bond rating for senior unsecured from A1 to Baa3. Comment, *supra* note 8, at 294 n.9.

69. Any potential projects that the company could have invested in will be postponed. Also, the capital required to keep the present productivity lines going could be limited.

70. *See* Macey & McChesney, *supra* note 16, at 43; Note, *supra* note 11, at 1051-53. Some argue that shareholders do not benefit from tender offers because takeovers "adversely affect long-term planning and thereby jeopardize the economy . . . ." Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 105 (1979).

71. Block & Miller, *supra* note 3; Bebchuck, *supra* note 41; Easterbrook & Fischel, *supra* note 33; McIntyre, *supra* note 18.

an average of two to seven percent below the price just prior to the announcement of the takeover.[72] Additionally, "[u]nlike the initial increase in price, the decrease is directly attributable to the greenmail payment . . . ."[73] The decrease in share price which follows a greenmail payment reflects the target company's expenditure of funds without any anticipated return on this "investment." As a result, the shareholders directly realize the negative impact of greenmail by incurring a decrease in the value of their shares.

As a result of the negative effect that greenmail has on corporations, greenmail has received a copious amount of attention and concern emanating from the courts, Congress, the Securitites and Exchange Commission, economists, business executives and the press. The emphasis at this time is on the courts and on Congress. While proponents of restricting greenmail are attempting to propose legislative remedies, the courts are forced under existing law to allow most of the defensive tactics to continue.[74]

III. The Legal Implications of Greenmail

Another consideration in evaluating the impact of greenmail is that greenmail discriminates among shareholders by transfering corporate wealth from many shareholders to one, or very few, shareholders.[75] This is an inequity which has been referred to as the "unfairness doctrine."[76] Greenmail is not attacked on this basis because the assertion of the board of directors that it is removing a threat to the company will be presumed valid under the business judgment rule.[77] As a result, greenmail is legally permitted and, in the words of Senator Riegle, "[u]nder current law there is nothing whatsoever illegal about these practices where it is possible to make millions upon millions of easy dollars."[78] This section of this Comment first addresses the legislative attempts at prohibiting greenmail and then considers the potential for legislative remedy. Last is a discussion of the judicial treatment of greenmail.

72. Note, *supra* note 11, at 1053.
73. *Id.* at 1054.
74. *Id.* The business judgment rule prevents judicial scrutiny of the defensive tactics employed by directors of target corporations. *See also supra* note 25 and accompanying text.
75. By paying a premium for only the greenmailer's shares, the target corporation has excluded all the other shareholders from this benefit.
76. This unfairness doctrine requires that shareholders be treated equally. *See supra* note 16.
77. *See supra* notes 24-28 and accompanying text.
78. Macey & McChesney, *supra* note 16, at 52.

A. *Legislation of Greenmail*

In 1984, four legislative proposals were introduced in Congress to combat the problem of greenmail[79] as amendments to the 1934 Securities Exchange Act.[80] They were virtually identical bills, but none were passed.[81]

The key element of the proposals was to prohibit any issuer of shares from buying back its shares at a price above the market level from someone who has held them for less than two years, *unless* the issuer has shareholder approval.[82] This restriction, however, not only infringes on legitimate stock transactions, but also ignores the practical effect of shareholder approval. In the vast majority of cases, shareholders do not actively participate in corporate votes. Past experience has shown that if they do not vote by proxy, they do not vote at all. As a result, the board of directors of a target corporation will not realistically be prevented from making the greenmail payments; doing so merely would be more cumbersome.[83]

Arguably, in the case of mergers, shareholder approval is irrelevant because shareholders act on an uninformed basis and, therefore, are not qualified to make judgments regarding greenmail.[84] Since mergers and takeovers entail many similar problems and complexities, perhaps takeovers should also be left to the board of directors. However, proponents of this idea also call for a stricter judicial review of boards' decisions, that is, a restriction of the application of the business judgment rule.[85] Ultimately, requiring shareholder approval of the boards' actions would not result in prohibiting or even significantly impeding greenmail.

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79. *See supra* note 13. Senator Donald Riegle reintroduced anti-greenmail legislation in the ninety-ninth Congress. S. 286, 99th Cong., 1st Sess. (1985).

80. *See* Greene & Junewisz, *A Reappraisal of Current Regulation of Mergers and Acquisitions*, *supra* note 1, at 653. *See also*, H.R. REP. No. 5693, 98th Cong., 2d Sess. (1984).

81. S. 2851, 98th Cong., 2d Sess. (1984), a major banking reform bill which included a rider prohibiting greenmail, was passed by the Senate, but did not make it through the House. Senator Riegle reintroduced the same anti-greenmail legislation in the 99th Congress. *See supra* note 79; Dennis, *supra* note 63, at 333 n.248.

82. H.R. REP. No. 5693, *supra* note 80.

83. The directors of a target corporation might have to issue a variety of letters and pamphlets explaining the choices facing the shareholders. The directors would try to persuade the shareholders not to offer any shares to the raider and convince them that the best interests of the corporation would be served by voting affirmatively for the directors' proposal. Also, the corporation might have to bear the cost of having the shareholders' meeting. The costs of these procedures effectively fall on the shareholders. This probably would be acceptable if the shareholders' vote would ensure scrutiny of the board by the shareholders. However, the evidence suggests that such a shareholders' vote does not result in such scrutiny. Bebchuck, *supra* note 41, at 1030-31.

84. Smith v. Van Gorkom, 488 A.2d 858, 890 (Del. 1985).

85. *Id.* at 873, 890.

Other less crucial elements in the proposals would also be insufficient to prevent greenmail.[86] One of the proposed amendments would affect the time to file the Schedule 13D (a disclosure form)[87] with the SEC. The present law requires that the statement be filed within ten days after a five percent holding in a corporation has been acquired.[88] The proposal shortened the time to file to forty-eight hours.[89] The rationale behind allowing less than ten days to file is that if the intentions of the potential greenmailer can be disclosed sooner, then the target corporation has more opportunity to fend off the greenmailer.[90] This proposed amendment is directed at takeovers, as well as at greenmail, in order to allow a target corporation more timely notice of a hostile takeover. The implication of more timely notice with respect to greenmail is that if the directors know of the takeover threat sooner, then they will not have to resort to such drastic defensive measures as making greenmail payments.[91] However, the Schedule 13D is not required to be filed until a five percent holding is acquired at which point a successful greenmail attempt could still occur.[92] In all likelihood, the proposal's only effect have would be to reduce the target corporation's costs because the raider would have a smaller holding to be repurchased. Consequently, this proposal involves no specific regulation of greenmail and does not pose a viable means of preventing this practice.

The question then arises whether any legislation could be an effective means of controlling greenmail. Three elements apparently must be satisfied for legislation to successfully prohibit greenmail: First, the law must be able to identify greenmail situations; second, it must propose restrictions to prevent greenmailing; and third, it must not infringe on legitmate stock transactions.

86. H.R. REP. No. 5693, *supra* note 80.

87. *See supra* note 46.

88. 15 U.S.C. § 78m(d) (1982).

89. *See* H.R. REP. No. 5693, *supra* note 80, at 22.

90. If the target corporation knows of the takeover sooner, then it can employ its defensive tactics sooner. The effectiveness of the federal disclosure requirements is emphasized by Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983). In this case, the Icahn group filed a Schedule 13D and included its intention to either take over control *or* sell the acquired shares back to the issuer. *Id.* at 280-81. The court held that this outright disclosure of the intent to greenmail did not violate any federal laws. *Id.* at 285.

91. "Drastic defensive measures" include greenmail, poison pills, white knights and such other tactics.

92. Knowing about the takeover threat sooner will not prevent the target corporation from employing defensive tactics. It merely allows the target corporation to employ them sooner which may decrease the target company's cost to defend. But, the directors' actions will remain essentially the same.

1. Legislative Identification of Greenmail

In effect, greenmail is a disguised takeover attempt. As a result, drafting applicable legislation without infringing on legitimate takeovers is difficult.[93] A raider attempting to greenmail follows identical procedural steps as though intending to make a legitimate takeover. That is, the raider first acquires a five percent holding in the target company and within ten days files a Schedule 13D. Among other items, the statement reveals the raider's intentions to take over the target company and to change management once the takeover is completed. Following the filing of the Schedule 13D, the target company's board of directors attempts to devise a plan to resist the takeover, while the raider issues a tender offer.[94] Shortly after this, the raider distinguishes the greenmail from a legitimate takeover. If the actions by the raider are a legitimate takeover, the raider continues to solicit offers from the shareholders of the target corporation.[95] However, if the raider is attempting to greenmail, then the raider offers the target corporation an agreement whereby the target corporation repurchases the raider's shares at a premium.[96]

Once the raider's holding is sold, the raider is satisfied with having made a profit and the directors of the target corporation are satisfied with knowing that they have continued security in their positions. Therefore, legislation must focus on the time that the raider first offers a repurchase agreement to the target corporation. The existing proposals have done so by limiting an issuer's ability to repurchase its stock. However, even though the proposals have effectively isolated a takeover from greenmail, they have infringed on legitimate share repurchases.

2. Restrictions Preventing Greenmail

On its face, the proposals' restriction of an issuer's ability to repurchase its own shares could be effective in preventing greenmail. If an issuer could not repurchase its shares, then it would be precluded from accepting a greenmailer's offer to sell back his shares. As a result, although effectively restricting greenmail is a necessary element to successful legislation prohibiting greenmail, it is an easily satisfied element.[97]

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93. *See supra* note 13 for evidence of the failure of recent legislative proposals.
94. *See supra* notes 2 & 46.
95. The raider will not literally "solicit," but will simply keep the tender offer open.
96. This repurchase agreement represents the greenmail payment.
97. The restrictions themselves would be sufficient to prevent greenmail; however, the problem of overlapping with legitimate share repurchases arises once again.

3. Scope of Legislation

Under the proposed legislation, an issuer would be severly restricted in efforts to repurchase its stock.[98] In many instances, a corporation's stock is actively traded in the securities market and investors commonly hold the shares for short periods of time. In fact, depending on the nature of the stock, two years could be a long time to hold onto a block of shares. If an investor were holding a "blue chip" stock,[99] then the investor is likely to hold the shares for a lengthy period of time. However, if the investor were a speculator, then a holding period of less than two years is likely.[100] Therefore, companies which are more inclined to transfer corporate wealth through an increased share price as opposed to simply paying out a dividend will be more attractive to speculators who are far outnumbered by their more conservative counterparts who invest in blue chip stocks. Such corporations consequently will have very few shareholders from whom shares can be repurchased.

A difficult situation arises when there are only a few shareholders who have held their shares for more than two years. They may either not want to sell their shares or, if they do, they will be in a position to demand a premium.[101] This latter case is a result of the basic supply and demand function: Shareholders have a limited supply of a commodity that the buyer wants, resulting in a higher price for that commodity. This is effectively an inadvertent greenmail payment *created by legislation.* In addition, a paradox arises when there are no shareholders who have held their shares for more than two years, thus preventing the issuer from repurchasing its shares altogether. As a result, legislating the prohibition of greenmail poses an undue restraint on stock purchases.

As proposed, the legislation could have an additional adverse effect on the shareholders. Shareholders who want to sell shares but are unable to find a buyer on the open market may be prevented by the proposed legislation from making an offer to the issuer if they have held their shares for less than two years. This

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98. Conceivably this would interfere with free exchange of securities. *See* H.R. REP. No. 5693, *supra* note 80, at 27-28.

99. Blue chip stock is stock that pays a fairly regular dividend. Its low-risk/low-return characteristics are similar to those of an average interest bearing term deposit. Investors consequently tend to treat blue chip stock as term deposits and leave their investment in the stock for a lengthy period of time.

100. A speculator purchases stock expecting that it will increase in price soon. Speculation is riskier than investing in blue chip stock but, when successful, it yields a higher rate of return.

101. If there is only one or very few shareholders willing to sell their stock back to the corporation, then those shareholders will be in a position to ask for more than the market price, assuming that the company is willing to buy their stock.

problem would be compounded if the market share price does not accurately reflect the value of the firm.[102] If there are high agency costs[103] or another reason why the share price is lower than the actual value of the firm, then conceivably shareholders will be prevented from realizing this value in a sale of the shares to the issuer.[104] However, the hardship borne by the many shareholders in allowing greenmail would outweigh the hardship borne by a few in such an isolated instance.[105] Therefore, this unique problem would not create a barrier to legislation if greenmail could effectively be legislatively prohibited.

Any legislative attempt must ultimately consider the restraint on security transactions that it would impose. Controlling greenmail legislatively without infringing on legtimate stock exchanges is extremely difficult. The present, unsuccessful attempts are perhaps illustrative of the difficulty in prohibting greenmail through legislation. The proposed bills not only appeared to infringe on legitimate share repurchases, but also ignored the lack of control shareholders practically exercise over boards of directors. As a result, legislation apparently is not an effective way to control greenmail.

B. *Judicial Response to Greenmail*

A recent case involving a potential greenmail attempt is *Unocal Corp. v. Mesa Petroleum Co.*[106] In this case, Mesa Petroleum Co. attempted to greenmail Unocal Corporation. Mesa owned about thirteen percent of Unocal's outstanding stock.[107] On April 8, 1985, Mesa made a tender offer for sixty-four million shares, or about thirty-seven percent of Unocal's outstanding stock.[108] Unocal's directors attempted to resist the takeover, claiming that it

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102. A company's "true" value will not necessarily be relected in the share price. This could occur for a number of reasons, such as those illustrated in Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). *See* Manning, *supra* note 9.

103. *See supra* note 62 and accompanying text.

104. However, it is uncertain whether the issuing corporation will be willing to pay the higher price for the shares.

105. In greenmail, the majority of shareholders suffer a detriment, whereas in this scenerio, only those shareholders who have held shares for less than two years and cannot find a buyer on the open market would suffer.

106. 493 A.2d 946 (Del. 1985). This was an issue of first impression in the Supreme Court of Delaware.

107. Thirteen percent of the outstanding stock was approximately equivalent to 22,500,000 shares in Unocal. *Id.* at 949.

108. The tender offer was two-tiered. The first tier offered $54 for the first 64 million shares. The second tier was an exchange of securities purportedly worth $54, but which were really "junk bonds." They were called junk bonds because they would be highly subordinated to other debbt securities and would significantly change Unocal's capitalization. *Id.* at 949-50 & 956.

was not in the best interests of the company.[109] They were also not willing to make the greenmail payment in order to remove the threat of the takeover.[110] As a consequence, Unocal's directors tried a new approach: Unocal made an offer to all its shareholders *except* Mesa to buy their shares at a higher price than what Mesa was offering.[111] The rationale behind making this offer was that if the company held the shares, then Mesa could not have obtained control of the company.[112] By removing the threat of takeover, Unocal also removed the threat of greenmail.[113]

Mesa sued Unocal on the basis that Unocal discriminated among its shareholders by making an offer to everyone but Mesa. This was indeed a strong case against Unocal as the offer amounted to shareholder discrimination.[114] In fact, when Unocal requested a preliminary injunction to prevent Mesa from voting its shares at the Unocal shareholders' meeting, the injunction was denied.[115] On the other hand, when Mesa requested a preliminary injunction to prevent Unocal's offer, the injunction was granted.[116] To secure an injunction, the requesting party must show that there is a likelihood that it will win on the merits of the case when it finally goes to trial.[117] Therefore, the judges sitting in equity must have been convinced that Unocal's offer was a case of invalid shareholder discrimination.

The Supreme Court of Delaware recognized that Unocal's offer selectively treated some of its shareholders.[118] However, the court also recognized that invalidating Unocal's offer would not only permit greenmail, but would actually give greenmail the court's seal of approval. As a result, the court held that under these circumstances, shareholder discrimination is acceptable.[119] In ad-

109. The typical response of any board of directors to a takeover threat is to resist it. McIntyre, *supra* note 18, at 1283.

110. At that point, because Mesa had not offered a repurchase agreement, Unocal's directors could not have known if Mesa intended a takeover or greenmail.

111. Unocal made its offer for $72 per share to entice its shareholders to tender to it instead of accepting Mesa's offer of $54 per share. *Unocal*, 493 A.2d at 951.

112. Repurchasing shares, however, also results in a drastic change in capitalization. Unocal would have had substantially more debt than equity which could have caused the problems in the corporation's capital structure explained *supra* notes 48-74 and accompanying text.

113. The threat of takeover is fundamental to the threat of grenmail. *See supra* note 14.

114. *See supra* note 16 for the reverse of the *Unocal* situation.

115. Unocal Corp. v. Mesa Petroleum Co., 616 F. Supp. 149 (W.D. La. 1985).

116. Mesa Partners II v. Unocal Corp., 607 F. Supp. 624 (W.D. Okla. 1985).

117. *Id*; *see also* Unocal Corp. v. Mesa Petroleum Co., 616 F. Supp. 149 (W.D. La 1985).

118. *Unocal*, 493 A.2d at 957.

119. "As we have noted, [the board of directors'] duty of care extends to protecting the corporation and its owners from perceived harm whether a threat originates from third

dressing that issue, the court questioned: "Did the Unocal board have the power and duty to oppose a takeover threat it reasonably perceived to be harmful to the corporate enterprise, and if so, is its action here entitled to the protection of the business judgment rule?"[120]

Having established that the board had the power to oppose the takeover, the court turned to the standards by which the board's actions were to be evaluated. The court considered the business judgment rule, but also recognized that there is an "omnipresent specter that a board may be acting primarily in its own interest, rather than those of the corporation and its shareholders."[121] As a result, the court had "an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."[122] Due to the conflict of interest that the court found, the board had the burden of showing that its decision was made in good faith and on reasonable investigation.[123] The court determined that the board satisfied this test by showing that the majority of the board was comprised of outside independent directors who appeared to have acted in good faith and on reasonable investigation.[124]

To be afforded the protection of the business judgment rule, the Unocal board also had to show that its defensive tactic was reasonable in relation to the threat posed.[125] The court found that Unocal resisted the takeover because of the "inadequacy" of Mesa's tender offer and the reputation of Mesa's president as a greenmailer.[126] The court determined that the tender offer was inadequate because the offer was two-tiered,[127] thereby coercing the shareholders to tender their shares. The "coercive" aspect stemmed from the shareholders' fear of being compelled to settle for the lower valued compensation in the second tier.[128] Unocal argued that its offer was to stop this takeover or, in the alternative, at least to provide those shareholders who would have had to settle for the second tier with more adequate compensation for

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parties *or other shareholders.*" *Id.* at 955 (emphasis added).

120. *Id.* at 953. Delaware statutory and case law encompass well established principles giving the board of directors the power to manage the business affairs of the corporation. This includes protecting shareholders from a perceived harm, regardless of its source.

121. *Id.* at 954.

122. *Id.*

123. *Id.* at 954-55.

124. *Id* at 955.

125. *Id.*

126. *Id.* at 956.

127. *Id.*

128. *Id.*

their shares.[129] In light of the reputation of Mesa's president as a greenmailer, the court held that Unocal's defensive tactic was reasonable given the threat posed.[130]

Mesa argued that Unocal acted unlawfully by discriminating among its shareholders. But in reality, Mesa forced Unocal into a position where it had to discriminate. The question simply was against *whom* was Unocal allowed to discriminate. Unocal either could have discriminated against Mesa, as it did, or it could have discriminated against all the other shareholders by paying Mesa the greenmail. In the latter case, Unocal would have discriminated against the other shareholders because one shareholder, Mesa, would have received a favored treatment by receiving more value for its shares than would have been available to the other shareholders.[131] Therefore, in the case of greenmail, the shareholder discrimination argument fails. Even though the court effectively allowed shareholder discrimination, the *Unocal* decision has not opened the doors to such discrimination. The courts have shown proper restraint in controlling discriminatory offers.

Unilever Acquisition Corp. v. Richardson-Vicks, Inc.[132] is an example of the restraint courts have imposed on those arguing that the *Unocal* case permits discriminatory actions. In this case, Richardon-Vicks issued shares in a manner that would have changed the Richardson group's holding from about thirty-three percent to an absolute majority. This would have permitted Richardson-Vicks to prevent the takeover threatened by Unilever.[133] Richardson-Vicks asserted that although the change in voting rights favored some shareholders over others, this was permissible under *Unocal*.[134] The *Unocal* court, however, specifically limited shareholder discrimination to instances where the court considers it to be an adequate measure to combat a takeover threat.[135] In *Unilever*, the court did not find that shareholder discrimination was appropriate because the magnitude of reducing the transferability of a shareholder's ability to vote at least requires share-

129. *Id.*.

130. *Id.*

131. Greenmail inevitably involves shareholder discrimination. As a result, it is hypocritical for a greenmailer to argue its case on the basis of being discriminated against.

132. 618 F. Supp. 407 (S.D.N.Y. 1985).

133. Once the board held majority voting rights, it would have refused to tender shares to the raider, thereby terminating the takeover.

134. The board's rationale was that discriminatin among stockholders was permissible "when authorized by the stockholders or under extreme circumstances . . . ." *Unilever*, 618 F. Supp. at 409.

135. "However, these cases are not applicable where the discrimination strips the shareholder of the ability to transfer voting rights without prior warning, compensation or shareholder authorization . . . ." *Id.* at 410.

holder approval.[136]

Effectively, *Unocal* announces that the Delaware courts recognize the problem of greenmail and will permit actions by the board of a target corporation which frustrate greenmailers' attempts. However, there are three potential criticisms of *Unocal*: First, controlling greenmail is really a legislative function; second, the holding is too narrow; and finally, the decision further perpetuates management entrenchment. The previous discussion of legislative attempts addressed the first criticism and concluded that due to the potential infringement on legitimate security transactions, legislation is not an effective method of prohibiting greenmail.

The second criticism, which asserts that the holding in *Unocal* is too narrow, addresses the fact that it was based on the greenmail reputation of Mesa's president and the inadequacy of the tender offer. That is, if the president of the greenmailing company does not have a greenmailing reputation, and the tender offer is "adequate," then the greenmail can proceed. This, however, ignores the context in which the court examined these factors.[137] The court looked at these elements as an indication of whether the defensive tactic by the board was reasonable in relation to the threat posed. The court looked to other items as well such as the "nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders . . . , the risk of the nonconsummation, and the quality of securities being offered in the exchange."[138] These items, including the adequacy of the tender offer plus the reputation of the raider, were examined by the court as a whole in determining the reasonableness of the board's actions. Essentially, the court examined whether the board was dealing with a greenmail situation and if it dealt with the threat properly.

If a company makes a legitimate tender offer, according to *Unocal* it will be required to show that its offer is "adequate."[139] Mesa's offer failed this test as the court found it inadequate due to its coercive two-tiered nature. Restricting two-tiered offers has been suggested as a remedy to eliminate a raider's ability to "coerce" the shareholders into tendering their shares.[140] Such offers

136. *Id.*

137. The *Unocal* court relied on a total of six factors collectively and did not isolate the reputation of the raider or the adequacy of the tender offer as determinative. *Unocal*, 493 A.2d at 955.

138. *Id.* "Constituencies" refers to "creditors, customers, employees, and perhaps even the community generally . . . ." *Id.*

139. *See id.* at 956.

140. *See* Dennis, *supra* note 63, at 281-83.

cause shareholders to tender for fear of being forced to accept the back-end, lower-valued compensation without due consideration for the price of the compensation offered in the front-end or for the adequacy of the tender offer in general. However, the Delaware court did not ban outright two-tiered offers; rather, the court considered the nature of the tender offer in conjunction with certain elements in determining whether the Unocal board of directors' actions were reasonable with respect to the threat posed. Consequently, if a tender offer is not two-tiered, the court might not be willing to accept such drastic defensive measures as a $6.1 billion discriminatory self-tender offer.

Finally, the court granted Unocal's board of directors more deference due to the fact that it had a majority of independent directors.[141] The rationale supporting the court's deference is that if the directors are not active in management, their decisions will not be affected by the desire to further perpetuate their control in management.

In conclusion, in reviewing a board's defensive action to a takeover/greenmail threat, the Supreme Court of Delaware will consider the following: the reputation of the raider, the nature and timing of the tender offer (including the quality of the compensation being offered in the exchange), questions of illegality, the impact on contituencies, the risk of non-consumation and whether the board consists mainly of independent directors. In light of the above elements, the court will then decide whether the directors' defensive measure was reasonable with respect to the threat posed and whether the board acted in good faith.

The third criticism of *Unocal* is that it reinforces management entrenchment.[142] Although *Unocal* offers directors the freedom to thwart a greenmail threat, its solution simply results in a more equitable distribution of corporate wealth and does not solve the fundamental underlying problem of management entrenchment. The court's solution is only a temporary measure which alters the *effect* of greenmail, but certainly not its *cause.* As a result, this Comment proposes an alternative to solving the greenmail problem which might effectively attend to all the defensive tactics by attacking management entrenchment.

141. Delaware is inclined to find that the board acted in good faith if the board is comprised mostly of independent directors. *See* Aronson v. Lewis, 473 A.2d 805, 815 (Del. 1984); Puma v. Marriott, 283 A.2d 693, 695 (Del. Ch. 1971).

142. This criticism stems from the fact that the directors will be able to perpetuate their control by either making a self-tender offer or by making the greenmail payment.

IV. An Administrative Tribunal

Substantial controversy has raged over the validity of various defensive tactics employed by target corporations. Most literature calls for the permission or prohibition of a particular defensive measure,[143] rather than the questioning of the source of authority to employ defensive tactics in general. This section proposes a solution to the takeover defense problems by focusing on the *ability* of target corporations to employ such defensive mechanisms. Instead of simply concluding that certain defenses such as greenmail are valid, this proposal will concentrate on the directors' motives.

On the one hand, some commentators argue that the business judgment rule should apply in the context of tender offers.[144] On the other hand, some argue that the directors of a target company should maintain complete passivity, thereby eliminating the need for the business judgment rule in cases of tender offers.[145] Both of these extreme positions rely on flawed assumptions.

The first argument, which calls for strict adherence to the business judgment rule, is advocated by noted commentator Martin Lipton. Lipton argues that hostile tender offers are detrimental to the economy because they jeopardize long term planning, encourage speculation and divert resources away from productive investment.[146] This argument is premised on the fact that directors must consider a number of variables when deciding to defend a takeover[147] and on the conclusion that directors are best suited to make these decisions. Lipton notes that "[w]hile as far as is known no director has ever been held liable for the rejection of a takeover bid, almost every successful takeover defense results in shareholder lawsuits against the directors of the target."[148] This statement appears to undermine Lipton's argument in that if successful takeover defenses lead to shareholder lawsuits against the directors, there appears to be a general impression among shareholders that their interests have not been the motivation underlying the directors' actions. This, combined with the fact that directors who fight takeovers are not found liable for their actions,

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143. *See, e.g.*, Dennis, *supra* note 63; Macey & McChesney, *supra* note 16; Note, *supra* note 11; Comment, *supra* note 8.

144. *See, e.g.*, Lipton, *Takeover Bids in the Target's Boardroom; An Update After One Year*, 36 Bus. Law. 1017 (1981); Lipton, *Takeover Bids in the Target's Boardroom: A Response to Professors Easterbook and Fischel*, 55 N.Y.U. L. Rev. 1231 (1980); Lipton, *supra* note 70.

145. *See, e.g.*, Easterbrook & Fischel, *supra* note 3.

146. Lipton, *supra* note 70, at 104, 110, 113-14.

147. An example of some of the variables the directors must consider were listed in *Unocal. See supra* notes 137-38 and accompanying. text.

148. Lipton, *supra* note 70, at 101.

indicates that the business judgment rule is *too* protective since it virtually precludes shareholders from enforcing their rights against directors. To that extent, the business judgment rule enables the directors to act in their own self interest.

Additionally, Lipton's argument is flawed because it contends that the decision to defend against a takeover is no different from decisions concerning capital expenditures, new product introductions or adoption of new processes.[149] The comparison is erroneous in that the latter types of decisions do not present the immediate threat to the security of the directors' positions as does a takeover.[150] This, combined with Lipton's reference to the ease with which directors can satisfy the good faith/reasonable basis requirements of the business judgment rule,[151] suggests that Lipton is somewhat altruistic in his disregard for the "omnipresent specter"[152] that the directors may act in their own self interest without regard to the corporation or the shareholders. Lipton's emphasis on the many variables that the target directors must consider when faced with a takeover are certainly justified, but is his argument for continued *carte blanche* warranted?

Easterbrook and Fischel, two well-noted professors, think not.[153] They suggest total passivity on behalf of target directors, allowing shareholders to make the decision. This extreme position is also premised on some weak assumptions. Although they offer a good argument that tender offers are beneficial, it is also true that some tender offers are simply inadequate and should be rejected.[154] In fact, in some cases, the target directors may be forced by their fiduciary duty to thwart the takeover.[155] In that event, the extreme change in law suggested by Easterbrook and Fischel would contradict the directors' obligations.[156]

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149. *Id.* at 120.

150. A dominant motive for waging a takeover battle is the expected increase in the target's profits by changing management. Therefore, managers and directors naturally feel threatened by a takeover to such an extent that they will attempt to thwart the takeover to protect their positions. *See generaly* McIntyre, *supra* note 18.

151. Lipton, *supra* note 70, at 105.

152. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

153. *See* Easterbrook & Fischel, *supra* note 33.

154. A target company's rejection of a takeover on any one of the following grounds is reasonable: inadequate price, wrong time to sell, illegality, adverse impact on constituencies other than shareholders, risk of nonconsummation, failure to provide equally for all shareholders and doubt as to quality of the raider's securities in an exchange offer. Lipton, *supra* note 70, at 122-23.

155. The board of directors owes the shareholders a fiduciary duty to act in the shareholders' best interests. If a tender offer is truly inadequate, then the directors should defend against the takeover, preferably by soliciting a higher bid from another raider. Bebchuck, *supra* note 41, at 1030.

156. Lipton argues for a scenerio that could immunize directors from breaching their fiduciary duty, whereas Easterbrook and Fischel argue for a situation that could prevent

One must also question the ability and feasibility of the shareholders to make an informed decision to accept or reject a tender offer. The assertion that shareholders should make the decision to defend tends to ignore many factors normally considered by target directors in a takeover situation.[157] As a result, defensive tactics are best dealt with on a case-by-case basis as opposed a to legislative basis. Also, requiring target directors to maintain a passive role would feed the consuming fire of the coercive two-tiered offer.[158]

These two extreme positions not only emphasize the controversy that exists regarding the application of the business judgment rule to defend a takeover, but also represent the dichotomy in the potential solutions to the problem. This section proposes a solution which is a hybrid of these two schools of thought.

The negative impact of greenmail on shareholders is an example of some of the problems existing in corporate takeover battles.[159] Despite this, some take the even more extreme position that greenmail is not necessarily bad.[160] This is because there exist so many variables in each greenmail situation that a generalization becomes inaccurate. This point is even more valid with respect to other defensive tactics which have not received such strong negative commentary as greenmail.[161] As a result of this dichotomy of approaches, a case-by-case analysis by an administrative tribunal ultimately may be the most effective method of determining whether the directors have acted in a purely self motivated manner or whether shareholder interests supported their actions. Such a proposal is not a complete abandonment of the business judgment rule, but rather is a more tailored application of the rule.[162] Depending on the circumstances, an administrative tribunal could look beyond the rule to ascertain whether the interests of the shareholders were truly served. It is the interests of the shareholders which would be the ultimate test.

Creating a very limited exception to the business judgment rule, as this Comment suggests, would involve incurring all the negative ramifications previously discussed. To briefly reiterate, claiming

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directors from fulfilling their duty. The solution appears to lie somewhere between these extreme positions.

157. *See supra* notes 137-38 and accompanying text.

158. *See Unocal*, 493 A.2d at 956.

159. *See supra* notes 48-74 and accompanying text.

160. *See* Macey & McChesney, *supra* note 16.

161. For example, poison pills have received mixed reviews although they have been permitted by the courts. *See, e.g.*, Moran v. Household Int'l, Inc., 490 A.2d 1059 (Del. Ch. 1985).

162. For a discussion of the business judgment rule, *see supra* text accompanying notes 24-47.

that they simply are not equipped to make business decisions, the courts refuse to second-guess a board of directors. If the directors were subject to liability for their business decisions, they would effectively be inhibited from holding a position on a board of directors and, for those individuals who were brave enough to hold such a position, would be prevented from making appropriate decisions. This proposal does not call for a complete repeal of the business judgment rule. Rather, it calls for a closer review of business decisions limited to takeovers and tender offers and *only* in specific instances. Arguably, even in "specific instances," existing courts would not be qualified to evaluate the directors' decisions.[163] As a result, this Comment proposes to create an administrative tribunal that would be qualified to look more closely at the decisions of directors. The following section proposes the structure, nature and jurisdiction necessary for a tribunal to succeed as a remedy to the problems existing in corporate takeover battles.[164]

A. The Organizational Structure

A tribunal established to deal with takeover and tender offer problems necessarily affects the subject matter governed by the SEC and should, therefore, be affiliated with the SEC.[165] The tribunal would be included within the SEC budget allocation from Congress, but would be a completely separate entity. This affiliation is tenuous to isolate any bias the SEC may have. The SEC would not have control over screening the cases brought before the tribunal which would be those normally coming before the courts. Therefore, the types and number of cases heard on the subject would not be altered.

So that the role of the SEC in dealing with court cases under its realm of power is not altered, the legislation creating the tribunal would provide the SEC with the right of intervention. This would enable the SEC both to bring cases and to be a party to cases, thereby maintaining the *status quo*.[166] Such a structure would not affect the power that the SEC presently has, but would simply

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163. "[C]ourts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments." Auerbach v. Bennet, 47 N.Y.2d 619, 630, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 926 (1979).

164. This proposal simply suggests a general overview of the make-up of a tribunal. It does not purport to establish the complex details inherent in creating a new tribunal. Such a task is perhaps best left to another law review article.

165. The SEC has regulatory power to enforce the Securities Exchange Act of 1934. This Act stipulates regulations for tender offers and takeovers.

166. That is, the SEC would be able to bring an action for violation of the Securities Exchange Act of 1934 in the tribunal instead of in the courts when a tender offer or takeover is involved.

change the setting in which cases under SEC jurisdiction would be brought.

To maintain the severability of the SEC from the tribunal, the SEC would not be the body to which appeals are made. The right of appeal would be maintained, but appeals would be made to the existing court system. Again, this would prevent any bias that the SEC may have from affecting the cases brought before the tribunal.

In summation, the tribunal would be affiliated with the SEC but only to the extent that the two bodies would be funded under the same congressional budget allocation. This would result in maintaining the types and number of cases now brought before the judiciary, as well as preventing any bias of the SEC from affecting the outcome of these cases.

What is more likely to affect the outcome of the cases is the nature of such a tribunal. Under this proposal, it would be organized in a fashion that would ultimately render it a "qualified" court.

B. *The Nature of the Tribunal*

The qualifications of the adjudicators would include the expertise necessary to closely evaluate the business decisions of directors. Ultimately, the panel members would have backgrounds in economics, accounting, tax, finance and law. These qualifications would give the tribunal the foundation on which to develop and refine its skills until, ultimately, it would have the requisite background to closely scrutinize the decisions of directors when necessary.[167]

The tribunal would hear cases just as the present courts do, applying existing law. However, there would be a different level of scrutiny afforded the business decisions of directors faced with a takeover. The tribunal would be in a position to give the directors' decisions a stricter review, depending on the nature of the tender offer and other considerations.[168] For example, if the tender offer was a coercive two-tiered offer,[169] then the tribunal would afford the directors more deference in defending the takeover than if the tender offer was a one step proposal which offered a share price significantly above the market trading price. The flexible nature of the tribunal would permit it to adhere to the business judgment

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167. An impetus to create tribunals in other fields of law, as well as this one, is the expertise that tribunals and specialized courts gain when continuously faced with the same subject matter.

168. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

169. *See, e.g.*, *id.* at 956.

rule when it determined that the interests of the shareholders were served and to ignore the rule when it established that the directors were not acting in the best interests of the shareholders.

Some have argued that relying on the business judgment rule best serves shareholders' interests.[170] However, if the rule is relied on to its present extent, the question of whose interests were served will never be addressed. Again, as long as there is no showing of bad faith or self-dealing, the directors' actions will be protected.[171] By submitting the question to a qualified tribunal, the true question could be addressed and not simply avoided as is the present practice.[172] Eventually, the tribunal would develop an expertise in evaluating corporate takeover business decisions and thereby would promote justice by ensuring that shareholders' interests are the ultimate concern.

During its initial development, the tribunal would not have the expertise that it would gain over time. This cost to the business community or society, if any, would be minimal compared to the long term benefits. The higher level of justice resulting from a more detailed scrutiny on a case-by-case basis would result in solutions which would be substantially more likely to preserve the best interests of shareholders. Additionally, the cost of the short term deficiencies of the tribunal must be considered in light of the cost of the present legal remedy.[173] The initial cost of the tribunal would be comparable to the cost of management entrenchment presently borne by the shareholders. As a result, the initial cost of the proposed tribunal would be outweighed by the long term gain.

The final, and perhaps the most important consideration in creating a tribunal, is the jurisdiction afforded such a tribunal. This is the topic of the following section.

C. Jurisdiction of the Tribunal

To ensure the success of the proposed tribunal, it must have exclusive jurisdiction over the tender offer/takeover subject matter encompassed by the Securities Exchange Act of 1934. If exclusive jurisdiction were not allowed, the inconsistencies between adjudicating bodies would create more problems than would be solved. However, exclusive jurisdiction would create problems where a

170. *See generally* Macey & McChesney, *supra* note 16.
171. *See generally* notes 24-47 and accompanying text.
172. "[T]he business judgment rule does not express the measure by which a court determines whether management has discharged its duty of care; rather, its application reflects a conclusion that the management action in question will not be reviewed at all." Gilson, *supra* note 28, at 822.
173. The present costs are the agency costs of management entrenchment which causes suboptimal management efficiency. *See supra* notes 60-63 and accompanying text.

case concerned a variety of issues. To address this problem, the legislation creating the tribunal would provide that the doctrine of primary jurisdiction would apply.[174] As a result, where a case arises in the traditional courts, the presiding judge would be required to determine if the administrative tribunal had primary jurisdiction and, if it did, the case would be deferred to the tribunal. To ensure that the state courts also followed this doctrine, the legislation creating the tribunal would also state that the federal government preempted the field.[175] Only with exclusive federal jurisidiction could the tribunal develop the standards and expertise necessary to justify piercing the protection of the business judgment rule.[176]

There would be a right of appeal allowed into the existing judicial system. However, the standard of review on appeal would be strictly applied.[177] This would result in the appellate court being able to reverse the tribunal's decision only in limited circumstances. This would preserve the jurisdiction of the tribunal by creating a system that would effectively compel litigants to turn initially to this tribunal for a remedy. The appropriate standard of review would assure the tribunal that its decisions would not be easily overturned and would assist the tribunal in developing and refining its expertise.

If appellate courts were always given the power of *de novo* review, the very purpose of creating a tribunal with specific expertise would be meaningless. To do so would effectively force the appellate court to make decisions that it has continually asserted it is not qualified to make. Additionally, the fear of the ramifications of completely eliminating the business judgment rule could be fully realized.[178] Therefore, it is necessary to give the tribunal a significant amount of deference.

The tribunal thus would be implementing exclusive federal jurisdiction in regard to tender offer/takeover issues under the Securities Exchange Act of 1934. To preserve this jurisdiction, a strict review process would be implemented. The tribunal's exclusive jurisdiction would give it the opportunity to gain expertise to delve into the decisions of directors in protecting the best interests

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174. Primary jurisdiction is applicable to many administrative tribunals.

175. Explicit preemption would prevent the state courts from asserting jurisdiction in this particular field.

176. If the tribunal had to function along with other courts hearing the same matters, the inconsistencies which would arise would defeat the tribunal's purpose to create a consistent and reliable standard of law in the field of tender offers.

177. Generally, standards of review range from abuse of discretion to *de novo* review.

178. *See generally supra* notes 24-47 and accompanying text for a discussion of the business judgement rule.

of shareholders.

The structure, nature and jurisdiction of the proposed tribunal are designed to create a setting in which the business community and the law can be assured that the interests of the shareholders are protected. As mentioned, these characteristics would afford the tribunal the ability to look beyond the business judgment rule in evaluating the decisions of directors, but only on a very selective basis, depending on the particular circumstances. Eventually, the decisions of the tribunal, combined with the directors' limited fear of incurring liability for acting in their self interest, would result in a convergance of the interests of shareholders and directors. More specifically, directors would be compelled to permit a takeover if it were in the best interests of the shareholders. Given that directors would not want a takeover to occur, they would try to make their corporation an unattractive target by maximizing efficiency so that it would not be the type of undervalued company prone to a takeover. The resulting increased profits would benefit both the shareholders and society.

CONCLUSION

A board of directors' decision to defend a takeover is protected by the business judgment rule. The directors need only show that they acted in good faith and upon reasonable investigation. This burden is so easily satisfied that directors can consequently act in their own self-interests rather than in the shareholders' best interests. This problem is accentuated in the context of a takeover where the interests of the directors to secure their positions does not coincide with the shareholders' interests in maximizing the rate of return on their investment.

The tactic of greenmail employed in this discussion illustrates the negative effect that blanket director protection has on corporations and shareholders in the context of a takeover.[179] It also shows the need for the law to address defensive tactics.

Although there have been legislative attempts to prohibit greenmail, they have been unsuccessful up to the present time.[180] This is likely a reflection of the difficulty in making generalizations about greenmail and even more so with regard to other defensive tactics. The underlying reason for the lack of success in controlling greenmail is that since so many different considerations exist in each case, banning the tactic outright is difficult.[181] Also, the

179. *See generally supra* notes 48-74 and accompanying text.
180. *See supra* note 13.
181. *See supra* notes 137-38 and acompanying text.

directors may be faced with a takeover that is truly not in the best interests of a corporation so that employing defensive tactics would be warranted.[182] As a result, a case-by-case analysis is the optimal method of deciding whether the directors have acted in the best interests of the corporation and shareholders.

Under present law, the courts are forced to grant directors great deference in defending a takeover and consequently refuse to determine if the defense was in the best interests of the shareholders. On the other hand, the business judgment rule is necessary to ensure that directors can make proper business decisions without fear of liability. As a result, this Comment proposes that a qualified administrative tribunal be created. Such a tribunal would gain expertise over time so that it could justly scrutinize the decisions of directors in the context of a takeover, but *only* where it appears that the directors did not act in the interests of the corporation or shareholders. Ultimately, such a system would force directors to defend a takeover only where they could show that they are acting in the best interests of the corporation and the shareholders.

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182. *See supra* note 154.