
The Hostile Poison Pill

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INTRODUCTION

The crux of corporate law lies in the agency problem between shareholder-owners and non-owner managers.¹ Though corporate statutes² and common law have historically attempted to police this agency problem by imposing fiduciary duties on managers,³ the business judgment rule and exculpation clauses,⁴ among other procedural hurdles,⁵ all but insulate directors from accusations of

¹ See DANIEL F. SPULBER, *THE THEORY OF THE FIRM: MICROECONOMICS WITH ENDOGENOUS ENTREPRENEURS, FIRMS, MARKETS, AND ORGANIZATIONS* 268-69 (2009) (examining why agency theory assumes that the separation of ownership and control is a problem, but “the theory of the firm views separation as a source of value”). These two theories represent the two main camps in corporate governance scholarship: those who treat shareholders as principals of the agent-directors and those who treat directors as having inherent powers stemming from the creation of the corporation. See, e.g., ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1967); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983).

² Unlike partnership statutes, corporation statutes rarely explicitly describe either the duty of care or the duty of loyalty, or the business judgment rule, though courts apply these concepts as a matter of course. *But see* DEL. CODE ANN. tit. 8, § 144 (2010) (detailing requirements for an interested transaction to be valid); TEX. BUS. ORGS. CODE ANN. § 21.418 (2016) (titled “Contracts or Transactions Involving Interested Directors and Officers”); MODEL BUS. CORP. ACT § 8.62 (AM. BAR. ASS’N 2010) (describing steps that a director may take before entering into an interested transaction so that the transaction will not be voidable or actionable).

³ See Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 702 (1982) (“The fiduciary principle is an alternative to direct monitoring. . . . [a]cting as a standard-form penalty clause in every agency contract, the elastic contours of the fiduciary principle reflect the difficulty that contracting parties have in anticipating when and how their interests may diverge.”); Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L.J. 71, 76-77 (1989) (positing that fiduciary duties arise out of the implied contract between the shareholders and the board and that the fiduciary duties fill in the “gaps” in the contract).

⁴ DEL. CODE ANN. tit. 8, § 102(b)(7) (2015); see Christine Hurt, *The Duty to Manage Risk*, 39 J. CORP. L. 253, 271 (2014) (describing the practical realities of duty of care claims against a board of directors given both the business judgment rule and an exculpation clause).

⁵ For example, fiduciary duty claims against a board of directors must be brought as a derivative suit, with demand made on the board to sue themselves unless demand would be futile. See DEL. CH. CT. R. 23.1; Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 382-83 (2008) (“Unlike direct shareholder suits, derivative claims must first be filtered through the board of directors, a requirement that theoretically eliminates the possibility of shareholders wasting the corporation’s time and resources on frivolous complaints, but that in reality eliminates most derivative lawsuits.”). *But see* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1761 (2010) (finding that more derivative shareholder suits against Delaware corporations are filed in federal courts

substituting their own decisions for the will of shareholders,⁶ admittedly a heterogeneous group.⁷ One of the few scenarios in which Delaware courts continue to scrutinize managers' decisions is in the context of a breach of the duty of loyalty,⁸ particularly when a conflict of interest arises between an officer or board member and the corporation.⁹ Moreover, Delaware courts purport to analyze more intensely board decisions regarding the acquisition of the company, arguably one of the two most important moments in the life of a corporation.¹⁰ For decades, courts have recognized that directors, particularly manager-directors, may have a conflict of interest in choosing to maintain the status quo over granting shareholders the right to an attractive return, and so engage in additional scrutiny of directors actions in these situations.¹¹ This scrutiny, otherwise known as the *Unocal* test after the seminal case, applies both to board decisions to sell to one bidder over another and to decisions to reject an unsolicited, or hostile, acquisition offer, thereby refusing a transaction that would allow shareholders a vote to sell en masse (or beforehand to speculators) at a premium. However strong the rhetoric

than those filed in Delaware, suggesting a belief that probabilities of success are higher in federal court).

⁶ JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* 1 (2008) ("The purpose of corporate governance is to persuade, induce, compel, and otherwise motivate corporate managers to keep the promises they make to investors.").

⁷ See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 568-71 (2003) (reconciling the theory that shareholders are principals and have "control" over the corporation with the explanation that shareholders delegate that control to directors, who accordingly control the corporation).

⁸ See D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1400 (2002).

⁹ See Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1786 (2004) (finding that after Delaware adopted section 102(b)(7) allowing companies to opt out of liability for the duty of care, the bulk of derivative suits brought in Delaware were duty of loyalty claims involving conflicted director actions).

¹⁰ See Paul L. Regan, *What's Left of Unocal?*, 26 DEL. J. CORP. L. 947, 952-61 (2001) (describing the judicial scrutiny given to defensive tactics in the hostile takeover era of the late 1980s).

¹¹ See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) ("Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.").

of scrutiny, courts, particularly Delaware state courts,¹² have not policed these pro-status quo decisions with a vengeance; if boards can demonstrate that their tactics — from rejection of uninvited but friendly offers to the adoption of defensive tactics against hostile tender offers — are reasonable and proportionate and designed to protect (their) long-term corporate strategy, courts will not second-guess their actions.¹³

Many of the seminal corporate law cases from the late 1980s discuss the validity of various forms of the popular defensive device known as the shareholder rights plan, or poison pill,¹⁴ a tactic boards adopted to ward off hostile bidders. As the era of hostile takeovers ended, a legal equilibrium settled around validating garden-variety poison pills that were not complete practical barriers to the market for corporate control.¹⁵ When enacted, poison pills usually do their job: would-be acquirers make tender offers subject to revocation of the poison pill, the board digs in, some shareholders sell to speculators¹⁶ as offers increase or attract higher competing offers,¹⁷ and the board is legally

¹² See, e.g., *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029, at *16-17 (Del. Ch. May 2, 2014) (distilling the analysis to (1) whether the board sufficiently investigated a threat it reasonably deemed as such and (2) the response to the threat was not coercive).

¹³ See Regan, *supra* note 10, at 949-50 (arguing that “only half of the promise that once was *Unocal* remains”).

¹⁴ See *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1367 (Del. 1995) (further refining the *Unocal* intermediate test under which courts analyze the adoption of poison pills by boards of directors); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 175-76 (Del. 1986) (analyzing a poison pill and other defensive tactics adopted by Revlon to rebuff one bidder, Pantry Pride, for its preferred bidder); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1357 (Del. 1985) (upholding a modern shareholder “rights plan” or poison pill); *Unocal*, 493 A.2d at 958 (upholding a primitive rights plan that the *Unocal* board adopted to thwart potential acquirer Mesa, which would have the effect of diluting shareholder-Mesa once Mesa acquired additional shares in its tender offer).

¹⁵ As used in this Article, a “garden-variety” poison pill is one with an ownership trigger between 15–30% that is redeemable by any current or future board. See *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291-92 (Del. 1998) (holding that a delayed redemption provision barring a newly elected board from redeeming the rights plan for six months if the purpose is to facilitate a transaction with an “interested person” is invalid); *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1190 (Del. Ch. 1998) (rejecting a “dead hand” rights plan).

¹⁶ *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 105 (Del. Ch. 2011) (discussing how at the time of the trial, many of the shareholders were arbitrageurs or “arbs” with short-term interests).

¹⁷ In 2015, *Jos. A. Bank* lowered its 20% poison pill trigger to 10% after Men's Warehouse launched a hostile tender offer. See Rachel Abrams, *Jos. A. Bank Amends Its Poison Pill*, N.Y. TIMES: DEALBOOK (Jan. 3, 2014, 11:36 AM), <http://dealbook.nytimes>.

justified in choosing the highest bidder or even none at all.¹⁸ Scholars disagree on whether poison pills are value-reducing to shareholders in robbing them of higher premiums paid by either the first or subsequent acquirers.¹⁹ However, the Delaware courts have held that in most situations, poison pills are legally valid.²⁰

Against this backdrop of growing deference to boards of directors in implementing poison pills and refusing to redeem them, a new threat to board authority has emerged: the activist shareholder.²¹ These types

com/2014/01/03/jos-a-bank-amends-its-poison-pill/. Eventually, Jos. A. Bank sold to Men's Wearhouse in a negotiated transaction for \$1.8 billion, representing a 56% premium over the market price of its shares when Men's Wearhouse first made an offer. See Maggie McGrath, *Men's Wearhouse Reaches \$1.8 Billion Deal to Acquire Jos. A. Bank*, FORBES (Mar. 11, 2014, 12:58 PM), <http://www.forbes.com/sites/maggiemcgrath/2014/03/11/mens-wearhouse-reaches-1-8-billion-deal-to-acquire-jos-a-bank/#6dd062607b69>; Hayley Peterson, *Men's Wearhouse, George Zimmer Is Waiting for Your Call*, BUS. INSIDER (Dec. 11, 2015, 9:20 AM), <http://www.businessinsider.com/mens-wearhouse-founder-zimmer-interview-2015-12>. In 2014, pharmaceutical company Allergan used its poison pill to ward off bidder Valeant long enough to negotiate an acquisition by Actavis. See Arash Massoudi, *Poison Pill Proves to Be a Deal-Breaker*, FIN. TIMES (Dec. 8, 2015, 5:07 AM), <http://www.ft.com/cms/s/0/60b2a55c-7f16-11e5-98fb-5a6d4728f74e.html#axzz4KRmdEmzB>.

¹⁸ See *In re Holly Farms Corp. S'holders Litig.*, 564 A.2d 342, 349 (Del. Ch. 1989) (upholding target's preferential treatment of one bidder because the terms of that bidder's offer were more favorable to the shareholders). Note that MCI, Inc. used a poison pill to rebuff Qwest's higher bid for the company in favor of its preferred bidder, Verizon, in May 2005. See Yuki Noguchi, *MCI Investor Fighting Merger with Verizon*, WASH. POST (June 16, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/15/AR2005061502254.html> (describing a hedge fund shareholder in MCI as unhappy that the MCI board accepted Verizon's \$8.5 billion offer and rejected Qwest's \$9.74 billion offer); see also *In re RJR Nabisco, Inc. S'holders Litig.*, No. 10389, 1989 WL 7036, at *4 (Del. Ch. Jan. 31, 1989) (holding that it was reasonable for a board of directors to find a lower bid "substantially equivalent" to a higher bid because of nonfinancial aspects of the offer).

¹⁹ See, e.g., Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants*, 55 STAN. L. REV. 885, 892-93 (2002) [hereinafter *Staggered Boards*] (presenting a case study of Union Pacific's unsuccessful bid for Pennzoil at \$84 per share in cash, over a 40% premium, which failed in the face of Pennzoil board's refusal to redeem the pill, resulting in a withdrawal of the tender offer and the decline in share price to \$35 for almost three years until the eventual sale of the company); Julian Velasco, *The Enduring Illegitimacy of the Poison Pill*, 27 J. CORP. L. 381, 384-85 (2002).

²⁰ *Goggin v. Vermillion, Inc.*, No. 6465-VCN, 2011 WL 2347704, at *5 (Del. Ch. June 3, 2011) ("Delaware courts have repeatedly approved of the adoption of a rights plan."). But see *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 29-30 (Del. Ch. 2010) ("Like any strong medicine, however, a pill can be misused.").

²¹ See William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 682-83 (2010) (describing activist shareholders as "the new blockholders" and arguing that these institutions take a page from the

of investors, often activist hedge funds, agitate not for control of a corporation, but instead for access to the board in order to argue for changes in strategy. Defensive tools used against hostile bidders at first seem inapplicable to these types of nuisances; staggered boards and poison pills with typical 15–20% triggers seem irrelevant.²² However, a pair of cases decided in Delaware may give managers an idea of how to cope with these aggressive blockholders. One case, *Air Products and Chemicals, Inc. v. Airgas, Inc.*, allowed a company's board to keep a poison pill in place for over a year even though the bidder did not seem to pose much of a cognizable threat to the corporation.²³ By itself, *Airgas* does not seem to give much relief to a board dealing with a noisy 5% or 10% shareholder. However, just a year earlier, the Delaware Supreme Court blessed a poison pill that would be triggered if a shareholder increased its ownership to 4.99% of the corporation, the lowest ownership threshold to be brought before the court. In *Versata Enterprises, Inc. v. Selectica, Inc.*, the Delaware court upheld the poison pill even though the board did not focus its argument on the threat of a takeover.²⁴ In that case, a “danger to corporate policy and effectiveness” existed because the activist shareholder's creeping purchases would foreseeably constitute an “ownership change” under existing federal tax law and would lead to the loss of certain tax assets, known as net operating loss carryovers (NOLs).²⁵ Because the NOLs were a very large, if unusable, asset to Selectica that would be severely limited under section 382 of the Internal Revenue Code if the ownership change occurred, the court held that the low-trigger rights plan was reasonable and proportionate against a legitimate threat.²⁶ Together, these cases seem to suggest a new weapon to be used against activist shareholders: a poison pill with a very low trigger.²⁷

Unfortunately, the Delaware courts accepted Selectica's argument that the creeping acquisition could involuntarily cause the target

shareholder empowerment playbook to pressure boards of directors to return value to the shareholders).

²² See Stephen Gandel, *Did Bill Ackman Just Kill the Poison Pill?*, FORTUNE (Nov. 6, 2014, 4:10 PM), <http://fortune.com/2014/11/06/bill-ackman-kill-poison-pill/> (“But even Lipton seems to think the poison pill isn't the defense it used to be, particularly in the age of activist investors looking to overthrow boards.”).

²³ *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 55-56 (Del. Ch. 2011).

²⁴ *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586, 599-600 (Del. 2010).

²⁵ See *id.* at 600-01; see also I.R.C. § 382 (2012).

²⁶ See *Selectica*, 5 A.3d at 599-608.

²⁷ See Edward B. Rock, *Shareholder Eugenics in the Public Corporation*, 97 CORNELL L. REV. 849, 891-92 (2012) (concluding that whether a corporation could use an NOL poison pill against an activist hedge fund “is an open question under Delaware law”).

company to lose a large tax asset. The *Unocal* test is supposed to require the board to articulate its rationale for implementing a defensive tactic, foreclosing the opportunity for pretextual arguments.²⁸ However, this analytical technique may not work in the NOL context. Selectica's argument has two problems. First, section 382 does not work as haphazardly as the case seems to suggest; companies do not generally involuntarily face total loss of NOLs and have other tools at their disposal to avoid that negative outcome.²⁹ In addition, the courts accepted Selectica's valuation of its NOLs, a value which almost certainly was not realistic.³⁰ Finally, many corporations that adopt an NOL poison pill will not be as sympathetic as Selectica: most companies do not have NOLs valued at seven or eight times the value of the company; most companies do not have a highly concentrated public float; and most companies will not have edged themselves as close to the section 382 ownership change line.

This Article attempts to shed some light on the operation of section 382, in order to disclose some of the faulty assumptions surrounding the NOL poison pill. In addition, this Article uses a dataset of 155 companies that adopted NOL poison pills to examine what types of firms are using this defensive tactic. A board might argue in good faith (or not) that an NOL poison pill is necessary to defend itself against a strange and diverse cast of characters: the Hostile Acquirer, the Accidental Bungler, and the Bad Faith Saboteur. However, an NOL poison pill necessarily has little or no deterrent effect and no physical effect against any of these actors. In fact, the only shareholder that the NOL poison pill effectively deters is the activist shareholder, suggesting that the use of the poison pill in these cases may be "hostile."

Part I of this Article gives a brief history of the shareholder rights plan and the *Unocal* intermediate scrutiny that continues to be applied to defensive tactics adopted by a board of directors. Part I also

²⁸ *Airgas*, 16 A.3d at 57.

²⁹ Section 382 results in a limitation on the post change corporation's use of NOLs based on the company's market capitalization. *See infra* Part II.B.

³⁰ At various points in the litigation, Selectica possessed over \$150 million of NOLs, which may be used against firm income. As a microcap company worth about \$22 million and with a history of little or no income, the probability that Selectica would be able to use more of the NOLs than allowed after a section 382 ownership change was highly unlikely. *See* Selectica, Inc., Annual Report (Form 10-K) (Jun 30, 2015) ("We have a history of losses and may incur losses in the future. We incurred net losses of approximately \$13.7 million and \$8.2 million for the fiscal years ended March 31, 2015 and 2014, respectively. We had an accumulated deficit of approximately \$288 million as of March 31, 2015.").

analyzes the latest garden-variety poison pill case, *Airgas*. Part II provides some background on net operating losses (NOLs) and the ways in which section 382 of the Internal Revenue Code works to limit the use of NOL carryovers following certain types of ownership changes. Part II also introduces the NOL poison pill, or “tax benefit preservation plan,” and analyzes how the Delaware courts have treated the NOL poison pill in the *Selectica* litigation. Part III discusses the strategic uses of NOL poison pills and Part VI presents some theories suggesting that NOL poison pills are being used for both tax preservation purposes and to thwart activist shareholders. Part V discusses potential amendments to section 382, and Part VI presents some thoughts on how the Delaware courts should respond to NOL poison pills in future shareholder suits. This Article concludes by drawing conclusions from the data surrounding tax benefit preservation plans and these theories.

I. BACKGROUND — THE SHAREHOLDER RIGHTS PLAN
(AKA “POISON PILL”)

A. *Defensive Tactics Against Hostile Takeovers*

In a negotiated merger, shareholders of the target corporation are offered a premium over the market price of their shares in return for providing the hostile bidder with aggregate control of the company. Directors may reject a merger offer out of concern for the terms of the offer or out of concern that a new majority shareholder will negatively impact the directors’ own positions or those of management.³¹ If acquisition offers are rebuffed, the bidder may choose to take the matter directly to the shareholders and make a hostile tender offer.³²

³¹ See *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (“[D]irectors are often confronted with an “inherent conflict of interest” during contests for corporate control “because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.”” (quoting *Stroud v. Grace*, 606 A.2d 75, 82 (Del. 1992))); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 30 (Del. Ch. 2010) (“Human judgment can be clouded by subtle influences like the prestige and perquisites of board membership, personal relationships with management, or animosity towards a bidder.”).

³² The concept of a hostile tender offer is almost always associated with publicly-held corporations in which shares may be purchased on the open market. However, in rare cases, a shareholder rights plan has been adopted by a closely-held corporation for reasons other than defending against a hostile tender offer. See *eBay Domestic Holdings*, 16 A.3d at 32-34 (analyzing shareholder rights plan adopted by the board of *Craigslis, Inc.*, all of the shares of which were held by two individuals and a

Then, the board of the target will communicate to the shareholders its reasons for recommending that the shareholders reject the offers. In addition, the board may implement various defensive tactics or rely on measures it has already adopted, such as a staggered or classified board, a shareholder rights plan or poison pill, or other creative contractual hurdles to a change of control.³³ A reasonable use of a defensive tactic will encourage the original bidder to increase its premium or invite higher bidders;³⁴ an unreasonable use will thwart all bidders and entrench management.³⁵ Therefore, the decision to adopt or maintain a defensive measure may be challenged under the duty of loyalty because the directors' interests may possibly conflict with the interest of the non-bidder shareholders.³⁶ Because of this conflict of interest, shareholder rights plans are initially suspect and do not receive the beneficial presumption of the business judgment rule until the plan is given special scrutiny by the courts.³⁷

corporation, and ultimately deciding that the two shareholders (holding about 75% of the shares) that adopted the plan did not do so "in response to a reasonably perceived threat or for a proper corporate purpose").

³³ For example, a company may have entered into certain material agreements with a "change of control" provision, therefore lessening the value of a company following such a change. Many times the counterparty negotiates for this provision, but recently boards have themselves negotiated for such a provision, earning them the name "proxy put" provisions.

³⁴ See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 181 (Del. 1986) (noting that Revlon's Note Purchase Rights Plan was reasonable because "[f]ar from being a 'show-stopper,' . . . the measure spurred the bidding to new heights, a proper result of its implementation"); see also *eBay Domestic Holdings*, 16 A.3d at 28 ("[R]ights plans (known as 'poison pills' in takeover parlance) fundamentally are defensive devices that, if used correctly, can enhance stockholder value but, if used incorrectly, can entrench management and deter value-maximizing bidders at the stockholders' expense.").

³⁵ See *Bebchuk et al., Staggered Boards*, *supra* note 19, at 892-93 (suggesting that Pennzoil's thwarting of Union Pacific's offer destroyed shareholder value for the company).

³⁶ Interestingly, the *Unocal* case was brought by the bidding shareholder, Mesa, but the case analyzes the possible conflict between the board and the non-bidding shareholders. The Delaware Supreme Court was not concerned with the conflict between the board and the bidding shareholder, which was being discriminated against by being excluded from and diluted by the shareholder rights plan. See Jeffrey N. Gordon, *The Story of Unocal v. Mesa Petroleum: The Core of Takeover Law*, in *CORPORATE LAW STORIES* 227, 232 (J. Mark Ramseyer ed., 2009) ("*Unocal* is also important because it permitted, for the first time in Delaware law, a defensive measure that discriminated against a particular shareholder with respect to payouts made to other shareholders of the same class.").

³⁷ See Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 *TEX. L. REV.* 261, 261-62

B. Shareholder Rights Plans

The defensive “poison pill,” or shareholder rights plan, is a tactic of the board of directors to fend off would-be hostile bidders that is subject to heightened scrutiny in theory, but in practice, has become generally accepted as within the purview of acceptable board actions.³⁸ These rights plans have endless variations, but typically are triggered when a would-be acquirer increases its ownership to a substantial threshold, such as 15–20% of the outstanding stock.³⁹ Upon being triggered, the plan would confer some sort of benefit to the shareholders other than the acquirer and would impose a corresponding cost on the acquirer.⁴⁰ The most common type of shareholder rights plan would trigger a right of all non-bidder shareholders to purchase shares equal to their holdings at a deep discount, such as 50% of the market value, thus diluting the bidder’s accumulated shares and increasing the number of shares remaining to be purchased.⁴¹ The true value of the poison pill is in its deterrent value.⁴² The pill has neither the legal or practical force of preventing

(2001) (describing this “proactive review” by courts and finding it lacking).

³⁸ See, e.g., *In re Gaylord Container Corp. S’holders Litig.*, 753 A.2d 462, 474-75 (Del. Ch. 2000) (“In itself, the *Unocal* test is a straightforward analysis of whether what a board did was reasonable.”).

³⁹ See Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 39, 56 (2012) (noting that of the 805 publicly-held companies that had poison pills, the trigger was higher than 10% in 85% of them and higher than 15% in 24%); Nicholas Even et al., *How Low Can You Go?: An Insiders’ Perspective on Selectica v. Versata and NOL Poison Pills*, 39 No. 2 SEC. REG. L.J. 1 (2011) (noting that a typical poison pill has a 20% or 15% trigger and that as of March 31, 2011, approximately 785 public companies had adopted such pills).

⁴⁰ For example, a rights plan might confer on non-triggering shareholders the right to purchase more common stock at a steep discount, diluting the acquirer. Or, the rights plan might issue non-triggering shareholders debt securities that would have the right to be redeemed upon a change of control, increasing the purchase price for the acquirer.

⁴¹ See Alan M. Long, Note and Comment, *Locking the Boardroom Door: What Can Georgia Courts Learn from Recent Delaware Poison Pill Decisions?*, 32 GA. ST. U. L. REV. 727, 730-31 (2016) (giving an overview of variations of shareholder rights plans).

⁴² Many commenters point to the fact that public companies with poison pills in place have declined substantially. See Jessica Hall, *Poison Pills Drop to Lowest Level in 20 Years*, REUTERS (Mar. 30, 2010, 4:59 PM), <http://www.reuters.com/article/us-dealtalk-poisonpills-idUSTRE62T5D320100330> (citing SharkRepellent as reporting that adopted poison pills fell in public companies from over 2,000 in 2001 to about 1,000 in 2010). Of course, a company can adopt an “on-the-shelf” poison pill at any time. See Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 911 (2013) (positing that increasingly concentrated institutional investor

an acquisition; instead, its economic force increases the ultimate cost to the acquirer beyond that which a reasonable acquirer would be willing to pay for the target. If the target miscalculates the cost of the pill or the appetite of the bidder, then the triggering of the plan becomes a small hurdle, not a wall. However, a board of directors could continually “reset” a shareholder rights plan to further hinder and ultimately stop the highly motivated bidder.

The concept of a shareholder rights plan as a defensive tactic was first upheld by the Delaware Supreme Court in 1985 in *Unocal Corp. v. Mesa Petroleum Co.*,⁴³ then blessed more specifically by the same court in *Moran v. Household International, Inc.*⁴⁴ that same year. Though the court held that the board of directors in *Unocal* had not breached its fiduciary duties in adopting the shareholder rights plan to thwart Mesa’s two-tier tender offer, the *Unocal* case provides a two-part test with which to analyze specific shareholder rights plans⁴⁵ and other defensive board tactics.⁴⁶ Often described as “intermediate” scrutiny

ownership and its pressure on management has decreased the maintenance of poison pills).

⁴³ 493 A.2d 946 (Del. 1985). See generally Andrew G.T. Moore II, *The Birth of Unocal — a Brief History*, 31 DEL. J. CORP. L. 865 (2006).

⁴⁴ 500 A.2d 1346 (Del. 1985).

⁴⁵ If a shareholder rights plan is part of an arsenal of tactics designed to favor one bidder over another, then the tactics working together may be scrutinized under the analysis provided in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). Under this analysis, a board of a company that has chosen to put the company up for sale must satisfy its *Revlon* duties to procure the best available transaction for the shareholders. See *id.* at 182 (stating that once “the break-up of the company was inevitable[,]” the “duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit” and the directors moved from being “defenders” to “auctioneers”); see also *In re Micromet, Inc. S’holders Litig.*, No. 7197-VCP, 2012 WL 681785, at *5-*14 (Del. Ch. Feb. 29, 2012) (analyzing defensive arsenal, including a poison pill, as actions that may breach *Revlon* duties when the sale of the company became inevitable); *In re Orchid Cellmark Inc. S’holder Litig.*, No. 6373-VCN, 2011 WL 1938253, at *4-*8 (Del. Ch. May 12, 2011) (analyzing poison pill and its carve out as part of various defensive tactics to protect merger agreement); J. Travis Laster, Lecture, *Revlon Is a Standard of Review: Why It’s True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 11 (2013) (“The *Revlon* decision really was applying *Unocal*, just as the Delaware Supreme Court said.”).

⁴⁶ See *In re Ebix, Inc. Stockholder Litig.*, No. 8526-VCN, 2014 WL 3696655, at *7-*13 (Del. Ch. July 24, 2014) (holding that plaintiffs stated a “reasonably conceivable claim” under *Unocal* for challenging an Acquisition Bonus Agreement giving the CEO a hefty payout in the event of an acquisition, which the board described as being adopted for various reasons, including “the potential threat of the Company itself being an acquisition target”); *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 258 (Del. Ch. 2013) (applying *Unocal* to a “proxy put” in a \$4.3 billion trust indenture that

when compared with ordinary breach of fiduciary duty analysis under the business judgment rule, the *Unocal* test “smokes out self-interest and pretext” in “situations where boards of directors make decisions that have clear implications for their continued control.”⁴⁷ The first prong of the test is process-oriented: whether the board has “reasonable grounds for believing that a danger to corporate policy and effectiveness existed.”⁴⁸ In deciding this question, a court might analyze the steps that a board took to conclude whether a threat existed.⁴⁹ This threat could be directly to the corporation or to the shareholders in the form of a coercive offer (structural coercion) or inadequate offer (substantive coercion).⁵⁰ Second, the defensive action the board takes should be “reasonable in relation to the threat posed.”⁵¹ Though the *Unocal* court recognized that in acting to prevent unsolicited tender offers, directors, or the board as a whole, may be acting in their own interest and not the interest of shareholders, the board’s adoption of its poison pill was found to have passed the *Unocal* test because of the coercive nature of known corporate raider T. Boone Pickens’ two-tier bid.⁵²

operated to trigger repayment upon a “change of control,” which included a change in the majority of the members of the board of directors unless the original board consented); *Hills Stores Co. v. Bozic*, 769 A.2d 88, 107-09 (Del. Ch. 2000) (applying *Unocal* to “proxy put” provisions in severance agreements and a credit agreement); see also Mark H. Mixon, Jr., Comment, *Regulating Proxy Puts: A Proposal to Narrow the Proper Purpose of Proxy Puts After Sandridge*, 17 U. PA. J. BUS. L. 1313, 1355 (2015) (distinguishing between debt covenants that address “Identity Risk” and those that address “Event Risk”).

⁴⁷ See *Sandridge Energy*, 68 A.3d at 258-59.

⁴⁸ See *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995). Because of the process nature of the first prong, some commenters have noted its strong similarity to a duty of care inquiry. See Thompson & Smith, *supra* note 37, at 282-83 (arguing that the showing that a board “had reasonable grounds for believing there was a danger to corporate policy and effectiveness” is very similar to the showing required to rebut the business judgment rule).

⁴⁹ See *Yucaipa Am. All. Fund II, L.P. v. Riggio*, 1 A.3d 310, 345-46 (Del. Ch. 2010) (holding that “[a]lthough its process was not ideal” when adopting the poison pill, the board was “appropriately informed” and guided by both independent directors and outside legal advisors).

⁵⁰ See *City Capital Assocs. Ltd. P’ship v. Interco Inc.*, 551 A.2d 787, 797-98 (Del. Ch. 1988) (outlining when a hostile bid is threatening to the corporation, threatening to the voluntariness of a shareholder’s decision to tender, and threatening to the economic interests of the shareholders).

⁵¹ See *Unitrin*, 651 A.2d at 1373. The threat may be from a hostile tender offer of a proxy contest threat to elect outside directors. See *Yucaipa*, 1 A.3d at 345-46.

⁵² *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 956 (Del. 1985) (“Here, the threat posed was viewed by the *Unocal* board as a grossly inadequate two-tier coercive tender offer coupled with the threat of greenmail.”).

Legitimate shareholder rights plans can forestall tender offers, but they may not preclude them. In fact, later cases seem to focus less on the magnitude of the threat than on whether the defensive tactic is preclusive, suggesting that a preclusive tactic is disproportionate to most threats.⁵³ In other words, a shareholder rights plan should leave open the possibility that, even with the pill in place, a bidder could launch a successful proxy contest and replace the board of directors.⁵⁴ Additionally, a newly appointed board (or a board converted to the vision of the bidder) must be able to redeem a shareholder rights plan under the terms of the plan. The simultaneous existence of a staggered board may lengthen the number of months necessary for a proxy contest to be successful in changing the board, but this structure does not make a poison pill preclusive; however, a shareholder rights plan that may not be redeemed by the board might be.⁵⁵

The ultimate decision to uphold the board's actions in *Unocal*, while simultaneously purporting to subject the decision and future similar ones to greater scrutiny, may have foreshadowed the ultimate success of board-adopted⁵⁶ poison pills.⁵⁷ Currently, shareholder rights plans

⁵³ See *Yucaipa*, 1 A.3d at 336 (characterizing *Moran* and *Unitrin* as ultimately being concerned with whether a poison pill, together with any related defensive arsenal, "was preclusive in the precise sense of making it unrealistic for an insurgent to win a proxy contest").

⁵⁴ See Thompson & Smith, *supra* note 37, at 292-93 (arguing that the "proportionality" prong was not particularly suited to judicial review and so evolved in *Unitrin* into the question of "whether the defensive measures were (1) coercive or preclusive or (2) outside the range of reasonableness"); see also *Unitrin*, 651 A.2d at 1386-88.

⁵⁵ Therefore, "dead hand" and "no-hand" poison pills are suspect. See *Quickturn Design Sys., Inc., v. Shapiro*, 721 A.2d 1281, 1289, 1291-92 (Del. 1998) (holding that a delayed redemption provision barring a newly elected board from redeeming the Rights Plan for six months is invalid if the purpose is to facilitate a transaction with an "interested person"); *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180, 1190, 1192 (Del. Ch. 1998) (rejecting a "dead hand" rights plan).

⁵⁶ Notably, the *Unocal* test applies to shareholder challenges of decisions of a board of directors adopting or refusing to redeem shareholder rights plans. A poison pill adopted by the non-bidding shareholders would seem to be impervious to a bidder's challenge under a similar duty of loyalty analysis. In Canada, Securities Commissions frequently refuse to uphold shareholder rights plans, even when adopted by non-bidding shareholders out of concern for the public interest. See *Notice of National Policy 62-202 and Rescission of National Policy Statement No. 38 Take-Over Bids — Defensive Tactics* (1997), 20 O.S.C. Bull. 3525 (Can.), http://www.osc.gov.on.ca/en/SecuritiesLaw_pol_19970704_62-202_fnp.jsp; *HudBay Minerals, Inc. and Augusta Resource Corp.*, 2014 B.C. Sec. Com. 154 (Can.) (citing a nonexhaustive list of factors as to when a poison pill should be invalidated, including "whether shareholder approval of the rights plan was obtained," "when the plan was adopted," "whether there is broad shareholder support for the continued operation of the plan,"

may be used creatively for numerous purposes, including “to respond to an underpriced bid, counter the tender offeror’s timing and informational advantages, and force the hostile acquirer to negotiate with the board” and also to “protect the value of a corporate asset” or “block a creeping takeover.”⁵⁸ Until recently, courts seemed to recognize a line over which a board, in refusing to redeem a shareholder rights plan, could not cross.⁵⁹ At some point in time, a poison pill would have either worked to attract higher bidders or force an original bidder to raise the price⁶⁰ and correct any coercive qualities⁶¹ of the tender offer; shareholders would have had time to

and “the likelihood that, if given further time, the target company will be able to find a better bid or transaction”). In Australia, boards of directors may not adopt a shareholder rights plan without stockholder approval. See *Miramar Police Officers’ Ret. Plan v. Murdoch*, No. 9860—CB, 2015 WL 1593745, at *2 (Del. Ch. Apr. 7, 2015).

⁵⁷ See Thompson & Smith, *supra* note 37, at 284-85 (presenting data that from 1985-2000, in every case analyzing defensive tactics under *Unocal*, the Delaware Supreme Court never “found defensive tactics to be disproportionate outside of a Revlon context”); see also *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 259 (Del. Ch. 2013) (“Of course, the mere fact that the court uses a heightened reasonableness standard does not mean that the directors will fail to satisfy it.”); *Goggin v. Vermillion, Inc.*, No. 6465—VCN, 2011 WL 2347704, at *5 (Del. Ch. June 3, 2011) (“Delaware courts have repeatedly approved of the adoption of a rights plan.”).

⁵⁸ See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 29 (Del. Ch. 2010).

⁵⁹ See Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 862 (2006) (praising the *Unocal* test for striking the right balance between accountability and authority and noting that “[o]nly if the directors had the ultimate decision-making authority, rather than the incumbent management, will the board’s conduct pass muster”).

⁶⁰ See Jordan M. Barry & John William Hatfield, *Pills and Partisans: Understanding Takeover Defenses*, 160 U. PA. L. REV. 633, 636-37 (2012) (arguing that the authors’ models “suggest that poison pills enable target shareholders to extract value from acquirers by empowering corporate insiders. Even though these insiders are unfaithful agents of the shareholders, their superior information and higher reservation price can ultimately redound to the shareholders’ benefit.”).

⁶¹ The seminal poison pill cases, *Unocal* and *Moran*, featured 1980s-style two-tier coercive bids designed to motivate shareholders to tender early at a high price or be squeezed out at a lower price or with less attractive consideration, such as junk bonds. Cf. *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 116 (Del. Ch. 1986) (holding the bid in question to be structurally coercive). Perhaps because of regulatory amendments to the Williams Act requiring all tendering shareholders to receive the best price offered, and partial tender offers to purchase tendered shares pro rata, the two-tier bid has been absent from the tender offer scene for a while. Modern cases involve straightforward offers, which, particularly if all-cash offers for all shares, can only be seen as a “threat” if inadequate in price. See, e.g., *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 56-57 (Del. Ch. 2011) (describing the theory of “substantive coercion” created by a “non-discriminatory, all-cash, all-shares, fully financed offer”).

evaluate a bidder's proposal and any board response; and a board would have had time to formulate a competing strategy. At that time, if the only threat the final offer poses is that shareholders will follow their own judgment instead of the board's, then the poison pill, depriving shareholders of that choice, may be a disproportionate response.⁶² After *Air Products and Chemicals, Inc. v. Airgas, Inc.*,⁶³ however, boards may be able to "just say no."⁶⁴

C. *Air Products and Chemicals, Inc. v. Airgas, Inc.*

Though early cases emphasized that a poison pill must be reasonable in relation to a tender offer that the board rationally and reasonably believes is threateningly "inadequate" and "coercive,"⁶⁵ case law has developed to allow a board to use the tactic when a hostile tender offer poses a legitimate threat to the corporate enterprise.⁶⁶ Though the rationale for the poison pill was initially grounded in giving shareholders time to evaluate tender offers in light of developing information, including analysis of the board of directors regarding the offer and even juggling competing offers, the poison pill has become justified in terms of board discretion and power. Poison pills should work to eliminate shareholders' lack of information and vulnerability to coercion, but after some amount of time, the board should allow the shareholders to vote on whether to continue to ward off a bidder. At some point, the "threat" inherent in the tender offer

⁶² See *City Capital Assocs. v. Interco, Inc.*, 551 A.2d 787, 798 (Del. Ch. 1988) ("Perhaps there is a case in which it is appropriate for a board of directors to in effect permanently foreclose their shareholders from accepting a noncoercive offer [A] review of the facts here show this [case] not to be it.").

⁶³ See *Airgas*, 16 A.3d at 129 (stating explicitly that the "case does not endorse 'just say never'" but allows such action by boards acting in "good faith and in accordance with their fiduciary duties").

⁶⁴ See *Thompson & Smith*, *supra* note 37, at 315 (predicting in 2001 that case law precedents were moving in such a direction that a "just say no" defense might be upheld in "a context in which a board of directors attempts to stonewall a hostile takeover bid indefinitely").

⁶⁵ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958 (upholding a first-generation rights plan that benefitted non-acquiring shareholders at the expense of diluting the acquiring shareholder, *Mesa Petroleum*).

⁶⁶ See Troy A. Paredes, *The Firm and the Nature of Control: Toward a Theory of Takeover Law*, 29 IOWA J. CORP. L. 103, 167-71 (2003) (arguing that a board should have more power to defend against a bid that the board identifies as a threat to "preexisting business plan or strategy adopted by the target board" than against a bid the board identifies as inadequate). Note that in cases involving the use of defensive tactics against a proxy contest, the non-monetary threat is always to corporate strategy.

should become minimal — the bidder will raise an inadequate price, shareholders will be able to evaluate whether the price is inadequate — and the defensive mechanism of a poison pill would then become disproportionate. However, courts have recently allowed the board to decide not only when but also if the company is for sale, even in the face of a non-coercive, above-market, all-cash offer.

To this point, the Delaware Chancery Court somewhat reluctantly upheld a poison pill in *Air Products and Chemicals, Inc. v. Airgas, Inc.*,⁶⁷ which held off an open tender offer for twelve months, during which time shareholders were given ample opportunity to evaluate the offer and no competing bids appeared.⁶⁸ Though the court answered emphatically that “[a] board cannot ‘just say no’ to a tender offer,” the court found that the Airgas board met its *Unocal* burden.⁶⁹ The threat the board identified was an inadequate price, and the poison pill was “within a range of reasonable responses proportionate to that threat.” Though the Court of Chancery did not want to foreclose a situation in which the Delaware courts would not support a board maintaining a poison pill indefinitely in the face of a tender offer, finding such a situation seems to be in the hands of the Delaware Supreme Court in a future case.⁷⁰ However, the theory under which the board is able to continue to use defensive tactics to protect the shareholders from nothing more than an opportunity to make a fully informed decision about their own investment seems unpersuasive.⁷¹

⁶⁷ See *Airgas*, 16 A.3d at 57-58 (reasoning that though “Airgas’s poison pill has served its legitimate purpose,” the court would not “substitute [its] business judgment for that of the Airgas board”); see also Steven M. Davidoff, *A Case Study: Air Products v. Airgas and the Value of Strategic Judicial Decision-Making*, 2012 COLUM. BUS. L. REV. 502, 503 (2012) (“While Delaware Chancery Court judges had been indicating for years that they were inclined to force the redemption of a shareholder rights plan in similar circumstances, the Delaware Supreme Court had signaled its contrary inclinations earlier in the fall of 2010.”).

⁶⁸ See *Airgas*, 16 A.3d. at 57 (reflecting that the Airgas poison pill “served its legitimate purpose” by giving the company “more time than any litigated poison pill in Delaware history” to raise the bid by \$10 per share, to inform shareholders about the target board’s corporate strategy and to give them “four quarters of improving financial results” (emphasis in original)).

⁶⁹ *Id.* at 54-55.

⁷⁰ See *id.* at 55, 57 (“I am constrained by Delaware Supreme Court precedent to conclude that defendants have met their burden under *Unocal* to articulate a sufficient threat that justifies the continued maintenance of Airgas’s poison pill.”); Davidoff, *supra* note 67, at 504-05 (suggesting that Chancellor Chandler “made the strategic decision to express his dissatisfaction with this ruling” in hopes that the Supreme Court would then be forced to refine its poison pill jurisprudence and noting that the *Airgas* case could be easily distinguished and limited to its own facts).

⁷¹ Whether or not the Air Products’ final bid for *Airgas* was substantively coercive

Following *Airgas*, boards of directors seem to face little scrutiny from ex-post challenges to adoptions of shareholder rights plans and decisions not to redeem in the face of a committed bidder.⁷² Only ex-ante strategies by shareholders, such as anti-pill charter provisions and shareholder agreements, would seem to place real boundaries on board behavior.⁷³ However, negotiating these types of agreements or charter amendments is difficult for widely-dispersed shareholders and

as inadequate is open to debate. In November 2015, Air Liquide and Airgas entered into an acquisition agreement whereby Air Liquide would purchase the company for \$143 per share. Maria Armental & Alison Sider, *Air Liquide to Buy Airgas for \$10.3 Billion*, WALL STREET J., Nov. 17, 2015, at B1. Though this price represents a 104% increase over the \$70 offer from 2010, the S&P 500 index has also increased during the same time period, though not as dramatically. See *S&P 500 (^GSPC): Historical Data*, YAHOO! FIN., <https://finance.yahoo.com/quote/%5EGSPC/history?period1=1291622400&period2=1447660800&interval=1d&filter=history&frequency=1d> (showing that from the opening of markets on December 1, 2010 to the closing on November 16, 2015, the S&P 500 Index increased 73.03%).

⁷² But see *La. Mun. Police Emps.' Ret. Sys. v. Fertitta*, No. 4339-VCL, 2009 WL 2263406, at *8 (Del. Ch. July 28, 2009) (denying a motion to dismiss breach of duty of loyalty action against a board from not using a poison pill to thwart major shareholder's "creeping" acquisition of control without a premium, stating "[t]he failure to act in the face of an obvious threat to the corporation and the minority stockholders instead supports a reasonable inference that the board breached its duty of loyalty in choosing not to cross Fertitta").

⁷³ See *Miramar Police Officers' Ret. Plan v. Murdoch*, No. 9860-CB, 2015 WL 1593745, at *2 (Del. Ch. April 7, 2015) (stating that under Delaware law, boards may implement shareholder rights plans "at any time without stockholder approval, subject to the directors' fiduciary duties, any limitations in the corporation's charter or bylaws, and any restrictions in a valid and enforceable agreement to which the corporation is a party"). In *Murdoch*, the court was asked to determine whether a settlement agreement between shareholders and the board of one corporation restricting the board's ability to maintain a shareholder rights plan for longer than one year was binding on a subsequently created and spun-off subsidiary whose shares were distributed to the original shareholders. See *id.* at *3, *7-13 (holding that newly created subsidiary was not bound by the settlement agreement); see also *In re Sirius XM S'holder Litig.*, No. 7800-CS, 2013 WL 5411268, at *7 (Del. Ch. Sept. 27, 2013) (refusing to entertain remaining shareholders' argument that the board breached its fiduciary duty by adhering to Investment Agreement with large investor not to adopt a poison pill or other tactic to thwart its potential future acquisitions of Sirius XM stock). Note that in *Sirius*, then Vice-Chancellor Strine pointed out that the shareholders could have challenged the board's decision to enter into the Investment Agreement at the time it was executed, but that any challenge was then time-barred. Vice-Chancellor Strine did not opine as to whether such a challenge would have been successful, but the court did note that at the time of the Investment Agreement, Sirius desperately needed the infusion of capital and that the agreement was arms-length. See *id.* at *4-5, *7.

boards; these types of restrictions on board power can occur during settlement negotiations or between the board and large investors.⁷⁴

As much as *Airgas* seems to validate a board's decision to keep a garden-variety poison pill in place indefinitely, the case's true importance cannot be stated without referring to a case decided six months earlier: *Versata Enterprises, Inc. v. Selectica, Inc.*⁷⁵ If *Airgas* stands for the proposition that a board may be able to "just say no," then the ruling by the Delaware Supreme Court in *Selectica* seems to answer the question of "how low can the board go"⁷⁶ in setting the percentage ownership trigger for a poison pill.⁷⁷ The poison pill in question was a newer creation, a "tax benefits preservation plan," and the articulated threat that this defensive tactic was designed to combat is the intentional or inadvertent triggering of section 382 of the tax code, which would eliminate certain valuable tax assets.

II. LIMITATIONS ON NET OPERATING LOSS CARRYFORWARDS

To understand the tax benefits preservation plan, or NOL poison pill, some explanation of net operating losses and net operating loss carryforward is necessary.

A. Section 172 — Net Operating Loss Carryforwards

The U.S. tax regime is based on net income, which allows for deduction of losses against income.⁷⁸ Net operating losses⁷⁹ are available to a taxpayer corporation in subsequent years, should a corporation not have taxable income with which to offset those losses in a given year.⁸⁰ Section 172 of the Code allows a taxpayer to carry back losses for the immediately preceding two taxable years and carry

⁷⁴ See D. Gordon Smith, Matthew Wright & Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 130 (2011) ("Given the obstacles, it is not surprising that shareholders in public corporations rarely enter into governance contracts with each other or with the corporation, aside from the two organizational documents of the corporation: the charter and the bylaws.").

⁷⁵ *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586 (Del. 2010).

⁷⁶ See Even et al., *supra* note 39.

⁷⁷ See *Selectica*, 5 A.3d at 589 (upholding a board's decision to adopt, maintain, and trigger a poison pill with a 4.99% trigger).

⁷⁸ See generally Jacob Nussim & Avraham Tabbach, *Tax-Loss Mechanisms*, 81 U. CHI. L. REV. 1509 (2014) (discussing the theoretical underpinnings of treating losses as deductions or credits).

⁷⁹ I.R.C. § 172(c) (2012) (defining a "net operating loss" as "the excess of the deductions allowed by this chapter over the gross income").

⁸⁰ See *id.* § 172(b)(1)(A).

over remaining losses for the next twenty taxable years.⁸¹ Unused portions of NOLs may continue to be used in each taxable year up to the twentieth year following the taxable year in which the loss occurred.⁸² The historical reason for allowing NOL carryovers is sound: projects or businesses of a taxpayer have a lifespan that does not fit into a regular fiscal year of twelve months.⁸³ Losses may occur before profits on the same project; therefore, allowing the losses to be usable at the time the project becomes profitable allows for offset without either creating a refund in earlier years or losing the ability to offset the loss completely.⁸⁴ To that end, notwithstanding the arbitrary twelve-month reporting period, operating losses may be carried forward or back.⁸⁵ However, the ability to use current NOLs to shelter past and future income has varied greatly over the years, with Congress extending, contracting and eliminating periods for both carrybacks and carryforwards.⁸⁶

For the past century, courts and legislators have questioned whether an acquiring corporation should be able to use NOL carryovers that belonged to the target corporation after the target had been subsumed and extinguished as a separate entity.⁸⁷ Though surviving corporations

⁸¹ *Id.* (“Except as otherwise provided in this paragraph, a net operating loss for any taxable year (i) shall be a net operating loss carryback to each of the 2 taxable years preceding the taxable year of such loss, and (ii) shall be a net operating loss carryover to each of the 20 taxable years following the taxable year of the loss.”).

⁸² *Id.* § 172(b)(2) (“The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried.”).

⁸³ See Daniel L. Simmons, *Net Operating Losses and Section 382: Searching for a Limitation on Loss Carryovers*, 63 TUL. L. REV. 1045, 1051 (1989) (“The original [382]’s avowed purpose was to mitigate the harshness of the annual accounting system that otherwise allowed the taxpayer to offset only the current year’s income with net losses.”).

⁸⁴ Note that various theories of income may treat individual taxpayers and corporate taxpayers differently with regard to averaging income over time horizons. See Mark Hoenig, *Trafficking in Net Operating Losses: What’s So Bad?*, 145 TAX NOTES 919, 922 (2014) (explaining the theory that corporations as legal fictions that do not bear the ultimate losses or reap the rewards of successes).

⁸⁵ Under I.R.C. § 172, a corporation can “carry back” its net operating losses to the previous two tax years and “carry over” for the next twenty years to offset taxable income. I.R.C. § 172(b)(1)(A) (2012). Specific types of taxpayers are allowed to carry back for five tax years. *Id.* § 172(b)(1)(F). In addition, NOLs from 2008 and 2009 were also given extended carryback periods. *Id.* § 172(b)(1)(H) (repealed 2014).

⁸⁶ See Hoenig, *supra* note 84, at 920.

⁸⁷ See HOWARD E. ABRAMS, RICHARD L. DOERNBERG & DON A. LEATHERMAN, *FEDERAL CORPORATE TAXATION* 347 (7th ed. 2013) (“Congress has since 1954 wrestled with the

and acquiring corporations succeed to all assets and liabilities of the target corporation,⁸⁸ the purchasing of a tax asset was seen as frustrating the purpose of the carryover rule. On one end of the spectrum, regulators may not want taxpayers to be able to transfer tax benefits from one entity to another,⁸⁹ but on the other end of the spectrum, regulators may also feel wary about allowing the same entity to enjoy the tax benefits when the entity has new owners.⁹⁰ Though equity may support having an entity use current losses from various projects to offset future profits from those projects, once an entity is acquired, those projects may be ended.⁹¹ In the worst-case scenario, a defunct or insolvent business with an abandoned business plan may be purchased solely for its NOL tax asset.⁹² Acquisitions with the primary

perceived problem of ‘trafficking’ in NOLs.”).

⁸⁸ See, e.g., CAL. CORP. CODE § 1107(a) (2016) (“Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them.”); DEL. CODE ANN. tit. 8, § 259(a) (2016) (“When any merger or consolidation shall have become effective under this chapter . . . all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations . . .”); TEX. BUS. ORGS. CODE ANN. § 10.008(a) (2016) (“When a merger takes effect: . . . (2) all rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, subject to any existing liens or other encumbrances on the property, in one or more of the surviving or new organizations as provided in the plan of merger without: (A) reversion or impairment; (B) any further act or deed; or (C) any transfer or assignment having occurred . . .”).

⁸⁹ See *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 441 (1934) (disallowing carryovers for corporation that was reorganized under a new charter, even with the same business and same shareholders).

⁹⁰ See *Lisbon Shops, Inc. v. Koehler*, 353 U.S. 382, 390 (1957) (applying a predecessor to current section 382 to a new loss corporation after seventeen separate corporations were merged into one because income “was not produced by substantially the same businesses which incurred the losses”). These regulatory choices are just one set that could be made. One could also argue that tax benefits should be freely transferable, but that is not the topic of this Article.

⁹¹ See ABRAMS ET AL., *supra* note 87, at 347 (“On one hand, the carryover provisions perform an averaging function that allows corporations to overcome the limits of our annual accounting system. On the other hand, where NOLs are used to offset totally unrelated income (such as the acquisition of a corporation solely to obtain its NOLs), no legitimate averaging function seems to be performed.”).

⁹² Arguably, this outcome is not absolutely unjust. The increased purchase price for the tax assets will repay selling shareholders for the loss of their capital. However, to the extent that the purchaser and seller split the value of the tax assets and the purchaser retains some value, then the Treasury could be said to be subsidizing the

purpose of purchasing NOLs were deemed suspect as “trafficking” in a tax asset.

B. Section 382 — Limitations on NOL Carryovers

1. Acquisitions as Trafficking in NOL Tax Assets

Acquisitions of a target corporation by a separate corporation occur for a variety of good and bad reasons, from operational synergy to managerialism. The amalgam of Company A and Company B may be greater than the sum of its parts,⁹³ not only because of economies of scale and scope. The managers of Company A may be more skilled than the managers of Company B at utilizing the assets of Company B. In this situation, those new managers may “redeploy” the assets by selling them for more than the full purchase price of Company B.⁹⁴ On a more cynical note, the new managers may merely have wanted to make an acquisition of Company B to increase their own fiefdoms and demand more compensation.⁹⁵ Or, Company A may have wanted to eliminate a competitor and move prices higher.⁹⁶ In another scenario, Company A may have want to hire the employees of Company B, and an acquisition seemed the easiest way to accomplish that feat.⁹⁷

Company A may also wish to acquire Company B for certain tax attributes. In the absence of regulation, Company B may be unprofitable, but may still command a premium for its shares if Company A could use its unused NOLs to shelter Company A’s

transaction. See Simmons, *supra* note 83, at 1061. This recoupment theory competes with an opposing theory that recoupment subsidizes failing businesses. See *id.* at 1069.

⁹³ See PETER V. LETSOV, *CORPORATE MERGERS AND ACQUISITIONS* 4 (2006) (describing the “synergy” explanation for firm combinations).

⁹⁴ See Timothy M. Hurley, *The Urge to Merge: Contemporary Theories on the Rise of Conglomerate Mergers in the 1960s*, 1 J. BUS. & TECH. L. 185, 191 (2006) (“[M]any believed that a conglomerate could improve the operations of a company simply by acquiring it and adding it to the conglomerate’s existing network of managerial techniques and resources.”).

⁹⁵ See Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 RUTGERS L. REV. 513, 519-20 (1993) (discussing the managerialism theory that managers will “pursue corporate growth to maximize their own utility”); Easterbrook & Fischel, *supra* note 3, at 706-07 (identifying certain control transactions that do not produce gains, such as acquisitions for “the self-aggrandizement of buyers” and “looting”).

⁹⁶ See Hurley, *supra* note 94, at 195 (“The direct acquisition of another corporation is one of the most effective ways a company can increase its economic power.”).

⁹⁷ See John F. Coyle & Gregg D. Polsky, *Acqui-Hiring*, 63 DUKE L. J. 281, 294 (2013).

income. In the hands of Company B, the NOLs are virtually worthless, but in the hands of New Company AB, the NOLs are valuable. However, under a theory that acquisitions should be tax-neutral, i.e., companies should engage in acquisitions based on non-tax factors, with the tax code neither encouraging or discouraging the acquisition, Congress and the IRS have continually stressed through statute and regulation that acquirers may not traffic in or benefit from the NOLs of the acquired.⁹⁸ Under current law, in the event of the acquisition of Company B under most circumstances, the unused NOLs, no matter how large, will be subject to a substantial annual limitation to Company A.⁹⁹

Whether or not acquisitions for the primary purpose of succeeding to the loss carryovers of a target should be prohibited is an open question. Taxpayers engage in a number of economic activities with tax planning purposes that are not prohibited. Furthermore, if the acquirer and target calculate the value of the carryovers in the hands of the acquirer into the purchase price, then the shareholders of the target should be compensated for the use of the NOLs.¹⁰⁰ If, as one argument proceeds, the taxpayers that suffered the economic loss triggering the loss carryover should be the only ones who may receive the economic benefit of the carryover, then the purchase price ensures that this happens. The acquirer will be able to have an economic benefit from the carryovers in later years, but the acquirer presumably purchased that benefit.¹⁰¹

Courts at first looked to whether the corporate form of the target or the acquirer was extinguished, then moved to a more substantive

⁹⁸ See William M. Davidow, Jr., *Limitations Imposed by the Tax Reform Act of 1986 on a Corporation's Use of Net Operating Loss Carryovers After an Ownership Change*, 17 U. BALT. L. REV. 331, 335 (1988) (describing the argument in the Senate Finance Committee Report that the law prior to the 1986 tax reforms was too lax in allowing acquiring corporations to achieve free transferability of tax benefits).

⁹⁹ See Annette M. Ahlers, *Section 382 Issues Raised in an Acquisition of a Loss Corporation by a Private Equity Group*, 2012 TAX UPDATE, no. 4 (Pepper Hamilton LLP, Los Angeles, Cal.), <http://documents.lexology.com/393b175c-b8fe-48b1-b54d-bba990a46733.pdf> ("While it may seem tantalizing to a buyer to see \$100 million in NOLs on the books of a potential target company, it will take a significant amount of due diligence and analysis to assess whether those NOLs will have value to a private equity buyer.").

¹⁰⁰ This equation may not be perfectly balanced, however. If the target is selling a benefit worth \$100x in the hands of the acquirer but worth \$0x in the hands of the target, the target may rationally accept any price between \$0x and \$100x for the benefit. However, if there are numerous bidders, the price should approach \$100x.

¹⁰¹ Again, the purchase price may not fully reflect the value of the tax benefit in the hands of the acquirer.

“continuity of business” test.¹⁰² Congress attempted to codify specific rules that would govern when acquiring corporations could use NOLs of an extinguished target in both the Revenue Act of 1943,¹⁰³ 1954 amendments to the Code,¹⁰⁴ and the Tax Reform Act of 1976.¹⁰⁵ Eventually, Congress arguably clarified the issue with new Internal Revenue Code section 382 as part of the 1986 tax reforms.¹⁰⁶ Section 382 creates complex rules limiting the use by acquirers of NOL carryovers of target corporations.¹⁰⁷ As long as the new corporation continues the business enterprise of the old corporation, the NOLs do not disappear, but their use is limited to the value of the target at the time of the acquisition multiplied by the risk-free rate of return.¹⁰⁸ This formula is intended to mimic the value of the NOLs to the target, taking into account the probability that the target would be able to use the NOLs before expiration.¹⁰⁹ In other words, this formula is

¹⁰² See Hoenig, *supra* note 84, at 926.

¹⁰³ Revenue Act of 1943, § 129, 56 Stat. 856 (current version at I.R.C. § 269(a) (2012)) (disallowing the use of NOLs by an acquiring company if “the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy”).

¹⁰⁴ Adding new sections 381 and 382, which, working together, allowed for the use of historical NOLs in certain tax-free reorganizations and in others as long as there was some continuity of the historical business. See Hoenig, *supra* note 84, at 925 n.35 (“Despite the articulated goal in the Senate report, the statute clearly permitted complete survival and use of the loss carryovers as long as some part of the old loss corporation business was continued, and it permitted the use of those surviving losses to offset not only the historical business’s income, but also to offset income from new businesses.”).

¹⁰⁵ Because of delays in implementation of the 1976 amendments to section 382, few provisions were ever effective before their repeal in 1986. See Hoenig, *supra* note 84, at 927 (explaining that various provisions were effective in 1984 while some were due to take effect on January 1, 1986, the year of their repeal).

¹⁰⁶ I.R.C. § 382(a) (2012) (“The amount of the taxable income of any new loss corporation for any post-change year which may be offset by pre-change losses shall not exceed the section 382 limitation for such year.”). Section 382 creates a regime under which all NOLs will be lost to the new loss corporation if there is no “continuity of business enterprise,” and NOLs will be drastically limited if there is. *Id.* § 382(c)(1) (“Except as provided in paragraph (2), if the new loss corporation does not continue the business enterprise of the old loss corporation at all times during the 2-year period beginning on the change date, the section 382 limitation for any post-change year shall be zero.”).

¹⁰⁷ See *id.* § 382(b)(1) (“Except as otherwise provided in this section, the section 382 limitation for any post-change year is an amount equal to (A) the value of the old loss corporation, multiplied by (B) the long-term tax-exempt rate.”).

¹⁰⁸ See *id.*

¹⁰⁹ See DAVID ELKINS, BEHIND THE SCENES OF CORPORATE TAXATION 608 (2013) (“The

intended to make the parties' incentives to sell the target and purchase the target neutral as to the NOLs.¹¹⁰

Section 382 applies not only to transactions normally considered acquisitions, but also to any "ownership change" which may or may not result in a change in control from one person or group to another. To risk oversimplifying a complex determination, if one or more shareholders with five percent (5%) or more ownership of a company increases that ownership percentage by 50 percentage points in three years, then an ownership change triggering the rule occurs.¹¹¹ The easiest example is an outsider shareholder (an individual or another entity, Company B) purchasing shares in Company A for the first time in 2013, then purchasing additional shares, resulting in an ownership percentage of 51% by 2015.¹¹² This rule ensures not only that an acquirer will not purchase a failing company merely for tax assets, but also that the acquirer cannot effectuate the same result with creeping purchases over a relatively short time period. Another easy illustration of ownership change occurs when Company A acquires or merges with Company B.¹¹³ In certain circumstances, Company B and Company A could achieve a tax-free reorganization that did not result

idea behind the section 382 limitation is that Congress did not want the new loss corporation to be able to deduct the NOL more quickly than the pace at which the old corporation would have been able to deduct it.").

¹¹⁰ See Richard L. Parker, *The Innocent Civilians in the War Against NOL Trafficking: Section 382 and High-Tech Start-Up Companies*, 9 VA. TAX REV. 625, 639-40 (1990) (referring to this approach as the "neutrality principle").

¹¹¹ See I.R.C. § 382(g)(1) (2012) ("There is an ownership change if, immediately after any owner shift involving a 5-percent shareholder or any equity shift (A) the percentage of the stock of the loss corporation owned by 1 or more 5-percent shareholders has increased by more than 50 percentage points, over (B) the lowest percentage of stock of the loss corporation (or any predecessor corporation) owned by such shareholders at any time during the testing period.").

¹¹² See Temp. Treas. Reg. § 1.382-2T(c)(2) (2007) (as amended by the Tax Reform Act of 1986). The first example presents "C" purchasing all the shares of "A" and "B" in corporation "L." A and B each owned 40% of L, with 20% owned by unrelated individuals. *Id.* "C's acquisition of 80 percent of L stock results in an ownership change because C's percentage ownership has increased by 80 percentage points as of the testing date, compared to his lowest percentage ownership in L at any time during the testing period (0 percent)." *Id.*

¹¹³ See *id.* § 1.382-2T(e)(2)(iv) ex. 1. A owns 100% of the stock of L, and B owns 100% of the stock of P. L and P effectuate a tax-free reorganization under section 368(a)(1)(A), with P the surviving corporation. A owns 25% of P, and B owns 75% of P following the merger. An ownership change has resulted with respect to P (B's ownership percentage in the new loss corporation has increased by 75 percentage points over his lowest percentage of stock ownership in L, zero), so any pre-change losses of L are subject to limitation. *Id.*

in an ownership change if the original shareholders of Company A, the loss corporation, have resulting ownership percentages in the new company that do not cross the 50% threshold.¹¹⁴ Finally, many corporations are able to retain their NOLs if a reorganization takes place during a bankruptcy proceeding.¹¹⁵

If in any of these examples an ownership change has occurred, Company A will lose all of the NOL carryovers if Company A does not continue the business enterprise; but if it does, then it will then encounter a “382 limitation.” Under the 382 limitation, Company A can only use the NOL carryovers in an amount equal to the value of the company as calculated by the value of its outstanding stock, multiplied by the long-term tax-exempt rate, which is currently 2.65%.¹¹⁶ If Company A had 100x NOLs and outstanding stock worth 100x, then the acquiring company can use 2.8x NOLs in the first year, with 97.2x as a NOL carryover for the next year.¹¹⁷ Note that an ownership change that causes a 382 limitation affects large corporations much less than it would affect a small corporation. For example, if Citigroup were to encounter an “ownership change,” then that would limit the corporation to using a little over \$3 billion a year in NOL carryovers.¹¹⁸

In many of these scenarios, the management or at least a major shareholder has control over whether a purchasing decision will be made to trigger the limitation of the NOL carryovers. The company will decide whether to be acquired, whether to be merged into another corporation or whether to engage in other “equity structure shift,”¹¹⁹ transactions that can trigger a 382 limitation such as a public

¹¹⁴ See *id.* § 1.382-2T(e)(2)(iv) ex. 2 (showing that under similar circumstances, the pre-change losses of the surviving corporation may still be used without limitation because there has not been an increase in 50 percentage points in the ownership of A or B in the surviving corporation).

¹¹⁵ See I.R.C. § 368(a)(1)(G) (2012); Diane Lourdes Dick, *Bankruptcy's Corporate Tax Loophole*, 82 *FORDHAM L. REV.* 2273, 2295-97 (2014).

¹¹⁶ Rev. Rul. 2016-4, 2016-6 I.R.B. 300 tbl. 3 (stating the long-term tax-exempt rate for ownership changes for February 2016).

¹¹⁷ See ELKINS, *supra* note 109, at 608-10 (providing an example of an \$8 million loss corporation with an NOL of \$7.5 million). Following an ownership change, the new loss corporation would have a 382 limitation in each taxable year equal to \$8 million multiplied by a hypothetical 3% long-term tax-exempt rate, or \$240,000. *Id.* at 610.

¹¹⁸ As of February 19, 2016, the market capitalization of Citigroup, Inc. is over \$115 billion. Multiplied by the long-term tax-exempt interest rate for this month, the 382 limitation would be \$3.05 billion per year.

¹¹⁹ I.R.C. § 382(g)(3) (2012) (“equity structure shift” defined as any of certain types of 368 reorganizations).

offering.¹²⁰ However, management-triggered scenarios are not the only situations in which section 382 operate. A shareholder or group of shareholders may inadvertently cause an “ownership change,” after an “owner shift,”¹²¹ particularly in a corporation with concentrated ownership and a small capitalization. In addition, a 382 limitation may be triggered by a bad faith shareholder, triggering an ownership change by making creeping open market purchases. Such an occurrence would be a lose-lose situation for the corporation: none of the benefits of a merger or influx of capital, but all of the downside of losing a valuable tax asset.

For example, a hostile tender offer executed by a potential acquirer could trigger the limitations of section 382 if, as a group, the bidder and other 5% shareholders increase their aggregate holdings by 50 percentage points within three years. If any 5% shareholder, whether hostile acquirer, insider or otherwise, causes an “owner shift,” then this triggers an inquiry as to whether the corporation experienced an “ownership change” over the three years ending on the date of the owner shift.¹²² Moreover, an ownership change will occur if during that three-year period, a group of 5% shareholders *in the aggregate* increase their ownership percentages by more than 50 percentage points.¹²³ For example, if ten shareholders began the period with 4% ownership, but each separately increased their ownership to 9.5%, then section 382 would be triggered by this “ownership change.”¹²⁴ Theoretically, this means that multiple shareholders could independently and unknowingly trigger section 382. Because of the possibility of such an occurrence, section 382 requires companies to track which shareholders own 5% or more of the company. And, because of this possibility, corporations may have an interest in

¹²⁰ See Temp. Treas. Reg. § 1.382-2T(e)(1)(iii) ex. 5 (2007) (as amended by the Tax Reform Act of 1986) (giving, as an example, a corporation with 1 million outstanding shares conducting a public offering of 2 million shares to new shareholders, none of whom own 5%; however, all the public shareholders are treated as one 5% shareholder group, which increased its percentage ownership from zero to 66.67%, triggering an ownership change).

¹²¹ See I.R.C. § 382(g)(2).

¹²² *Id.* § 382(g)(1). Note that all shareholders holding less than 5% of the ownership of a corporation are treated as one 5% shareholder in calculating whether an ownership change has occurred. *Id.* § 382(g)(4)(A).

¹²³ See Temp. Treas. Reg. § 1.382-2T(c)(4) (as amended by the Tax Reform Act of 1986).

¹²⁴ See I.R.C. § 382(g)(1). Each shareholder would be treated as a 5% shareholder, and an ownership change would be determined by calculating the net increase in each shareholder’s ownership from its lowest level during the testing period. *Id.*

ensuring that shareholders do not accidentally trigger section 382 and limit the future use of NOL carryovers. To ward against an inadvertent ownership change, a board may propose that shareholders approve an amendment to the articles of incorporation to restrict transfers, allowing the board to void transfers that jeopardize the NOLs.¹²⁵ However, the hostile bidder scenario should be limited to a small group of firms: publicly-traded firms with small capitalization, concentrated in the hands of relatively few shareholders.

If regulators were particularly concerned with curbing tax-motivated acquisitions, then section 382 may have the (intended or unintended) consequence of prohibiting harmless shareholder purchases with tax-neutral purposes and no change of control effects. However, whether inadvertent shareholder purchases pose a tangible problem to many firms seems to be an open question.¹²⁶ Though boards of directors instituting defensive measures against hostile bidders argue the plausible danger of section 382 limitations as justifying their actions, little exists in the case law or scholarly record to indicate an ongoing problem. In the 30 years following the tax reforms of 1986, “there appears to be no major industry-based complaint or effort at significant change or repeal” of section 382.¹²⁷ Section 382 may seem like a draconian rule putting publicly-held corporations constantly at risk of losing NOLs unintentionally. However, if corporations were truly under this threat, one would expect to see more complaints regarding section 382.¹²⁸ For instance, during the financial crisis, the Department of Treasury issued several notices liberalizing section 382’s impact,¹²⁹ including I.R.S. Notice 2008-83,¹³⁰ which provided

¹²⁵ See Mark C. Van Deusen, *A Primer on Protecting Tax Losses from a Section 382 Ownership Change*, WM. & MARY ANN. TAX CONF. 20 (2010), <http://scholarship.law.wm.edu/tax/20/>.

¹²⁶ Though closely-held corporations would seem to be more limited by section 382, note that an individual and that individual’s spouse, parents, children, and grandchildren will be treated as one individual, thus allowing for most intra-family transfers without triggering an owner shift. See I.R.C. § 382(l)(3)(A).

¹²⁷ Hoenig, *supra* note 84, at 936.

¹²⁸ See generally Parker, *supra* note 110 (predicting in 1990 that new section 382 would create particular problems for start-up companies seeking to engage in new financing rounds).

¹²⁹ See, e.g., I.R.S. Notice 2010-2, 2010-2 I.R.B. 251 (clarifying that shares that Treasury acquired or eventually redeemed or sold under the TARP plan would not cause an ownership change under section 382); I.R.S. Notice 2009-14, 2009-7 I.R.B. 516 (providing more guidance following Notice 2008-100). The financial industry was not the only recipient of section 382 liberalization. Congress added subsection (n) to section 382, which states that the limitation on NOL carryovers “shall not apply in the case of an ownership change which is pursuant to a restructuring plan of a taxpayer

that a section 382 limitation would not apply to bank taxpayers' losses related to loans and bad debts.¹³¹ In this instance, Treasury was liberalizing section 382 to avoid its harshest result, but seemed to be responding to a specific situation¹³² — the need to have quick bank consolidations in order to save struggling banks in a private market solution. Instead of being embraced, the Notice was challenged as an overstepping of Treasury's authority and was eventually revoked by Congress.¹³³

which is required under a loan agreement or a commitment for a line of credit entered into with the Department of the Treasury under the Emergency Economic Stabilization Act of 2008, and is intended to result in a rationalization of the costs, capitalization, and capacity with respect to the manufacturing workforce of, and suppliers to, the taxpayer and its subsidiaries." This amendment addressed the specific case of General Motors. See Cheryl D. Block, *Measuring the True Cost of Government Bailout*, 88 WASH. U. L. REV. 149, 210 (2010).

¹³⁰ I.R.S. Notice 2008-83, 2008-42 I.R.B. 905 ("For purposes of section 382(h), any deduction properly allowed after an ownership change (as defined in section 382(g)) to a bank with respect to losses on loans or bad debts (including any deduction for a reasonable addition to a reserve for bad debts) shall not be treated as a built-in loss or a deduction that is attributable to periods before the change date.").

¹³¹ See generally Nathaniel S. Cushman, *The Impact of Illegal Tax Guidance: Notice 2008-83*, 62 TAX LAW. 867 (2009) (arguing that I.R.S. Notice 2008-83 was outside the authority of Treasury because it changed section 382 rather than merely interpreting it). Notice 2008-83 was part of a panoply of efforts of the executive and legislative branches during the 2008 financial crisis to preserve the financial system and served to encourage acquirers to purchase failing financial institutions or otherwise invest large amounts of capital in them. See I.R.S. Notice 2008-83, 2008-42 I.R.B. 905. The merger of Wells Fargo and Wachovia is often mentioned in connection with Notice 2008-83. *Id.* Notice 2008-100, Notice 2009-14 and Notice 2010-2 created other exceptions for ownership changes caused by the U.S. government as an investor. See I.R.S. Notice 2010-2, 2010-2 I.R.B. 251; I.R.S. Notice 2009-14, 2009-7 I.R.B. 516; I.R.S. Notice 2008-100, I.R.B. 2008-44.

¹³² See Block, *supra* note 129, at 218-20 (describing how I.R.S. Notice 2008-83 was aimed at providing support to either Wells Fargo or Citigroup's acquisition of ailing Wachovia and how unpopular the Notice was with legislators and commentators); see also Leandra Lederman, *What Do Courts Have to Do with It?: The Judiciary's Role in Making Federal Tax Law*, 65 NAT'L TAX J. 899, 912 (2012) (describing the backlash against the Notice). Senator Charles Grassley requested that the Office of Inspector General open an inquiry into I.R.S. Notice 2008-83 based on suspicions of favoritism toward Wells Fargo, but the inquiry found no evidence of favoritism. See Rich Delmar, Counsel to the Inspector Gen., Memo to Eric M. Thorson, Inspector Gen. (Sept. 3, 2009), <https://www.treasury.gov/about/organizational-structure/ig/Documents/Inquiry%20Regarding%20IRS%20Notice%202008-83.pdf> (last visited Feb. 24, 2016).

¹³³ See Cushman, *supra* note 131, at 892 (arguing that taxpayers should not be allowed to rely on the "illegal tax guidance" of Notice 2008-83, but the statutory revocation did not apply retroactively and allowed for that reliance).

2. The Tax Benefit Preservation Plan (“NOL Poison Pill”)

The poison pill, with a 15–30% trigger, is a staple of the anti-takeover arsenal that management can deploy against hostile takeovers. Obviously, the lower the percentage ownership an acquirer is able to amass before the poison pill is triggered, the harder it is for the acquirer to launch a proxy fight to get enough other shareholders to vote out management. If an acquirer can purchase 30%, then it only has to gather holders of 21% to vote with it, and so on. But the lower the trigger, the more difficult the “plan B” proxy fight becomes. Notably, the availability of the “plan B” proxy fight is what makes the poison pill reasonable and not preclusive in the eyes of the courts. The lower the trigger, the less reasonable the poison pill would seem to be because the “plan B” proxy fight becomes less and less realistic. Recently, a 10% trigger on a garden-variety poison pill was blessed by the Delaware Chancery Court,¹³⁴ representing a new level of deference.

The NOL poison pill, or “tax benefit preservation plan,” however, has an even lower trigger. These poison pills have triggers between 4 and 5%. For this type of poison pill, the “threat” to the corporation is articulated not as a threat to corporate strategy, or even a coercive or inadequate tender offer. Instead, the threat is to a corporate asset, the valuable NOLs.¹³⁵ The poison pill then operates to protect the asset by deterring new shareholders from becoming 5% shareholders. Note that the section 382 limitation is not triggered because a shareholder crosses the 5% threshold; rather, 5% shareholders trigger an examination of whether 5% shareholders as a group have increased their holdings by more than 50 percentage points over three years. Though 5% seems like a logical threshold, given the fact that “5%” appears in the wording of section 382, that threshold is vastly overinclusive.

With a garden-variety poison pill deployed against a hostile bidder or an activist attempting a proxy contest, the poison pill has one selling point: it works. Bidders who are looking to purchase control do

¹³⁴ *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029, at *26 (Del. Ch. May 2, 2014) (upholding Sotheby’s shareholder rights plan, which created a 10% trigger for shareholders who file a Schedule 13D with the SEC, versus a 20% trigger for shareholders who file a Schedule 13G).

¹³⁵ See Paul H. Edelman & Randall S. Thomas, *Selectica Resets the Trigger on the Poison Pill: Where Should the Delaware Courts Go Next?*, 87 *IND. L.J.* 1087, 1098 (2012) (“This new form of rights plan is designed to protect these firms’ NOLs against the possibility that share-ownership changes might cause the company to lose or limit its ability to use its NOLs to reduce its future tax liabilities.”).

not want to be diluted after acquiring 15, 20, or 30% of a company. In addition, if the pill were triggered, purchasing control becomes more expensive. How an NOL poison pill actually works against the stated threat it is designed to thwart is more unclear. The very low trigger means the dilution affect is muted against a hostile bidder, and its existence would not deter the inadvertent purchaser. This Article argues that the true purpose of the NOL poison pill is to ward off activist shareholders, who do not intend to gain control of a firm but merely maintain a sufficiently large position to pressure management.

The first corporation to adopt an NOL poison pill did so in December 1998.¹³⁶ One year later, a second corporation followed suit,¹³⁷ and a third in 2000.¹³⁸ Three more corporations added NOL poison pills in 2002,¹³⁹ three more in 2003,¹⁴⁰ one more in 2004,¹⁴¹

¹³⁶ See Oakhurst Co., Inc. (now Sterling Construction Company, Inc.), Current Report (Form 8-K) (Dec. 29, 1998) (reporting the adoption of a new shareholder rights plan with a trigger of 4.5%). Interestingly, in the SEC filing, the company does not mention its new operating loss carryovers or the need to protect them. *See id.* at 7 (“The Rights are designed to deal with the problem of a raider using what the Board of Directors perceives to be coercive tactics to deprive the Company’s Board of Directors and stockholders of any real opportunity to determine the destiny of the Company by forcing the raider to negotiate with the Company’s Board of Directors.”).

¹³⁷ See Wilshire Real Estate Investment Trust Inc. (now Fog Cutter Capital Group Inc.), Current Report (Form 8-K) (Dec. 23, 1999) (reporting the adoption of a shareholder rights plan with a trigger of 5% and reproducing a letter from Andrew A. Wiederhorn, the CEO and Chairman of the Board, which states, “We believe that the Stockholder Rights Plan represents a sound and reasonable means of protecting the Company’s net operating loss carry forwards.”).

¹³⁸ See Maxicare Health Plans, Inc., Schedule 14A Proxy Statement (June 13, 2000) (providing shareholders with information on a proposed “Restricted Transferability of Capital Stock” charter amendment “to provide the Company the opportunity to utilize its net operating loss (NOL) carryforwards” and also reporting that “[i]n order to further protect the Company’s NOLs from the impact of an ownership change,” the Board amended the Shareholders Right Plan to lower the trigger to 5%). If a company has a charter amendment restricting share purchases over 5%, the need for an NOL poison pill is unclear.

¹³⁹ See Softnet Sys., Inc. (now American Independence Corp.), Current Report (Form 8-K) (July 31, 2002) (reporting that the company adopted a Preferred Share Purchase Rights Plan with a trigger of 4.99% and that “[t]he rights are designed to protect the tax benefits associated with the Company’s net operating loss carryforwards.”); Criimi Mae Inc., Current Report (Form 8-K) (Jan. 25, 2002) (reporting the adoption of a shareholder rights plan with a 5% trigger, acknowledging that “[t]he Rights have certain anti-takeover effects [and] . . . [t]he Rights will cause substantial dilution to a person or group who attempts to acquire the Company on terms not approved by the Company’s Board of Directors”); *HomeGold to Carry Over Tax Benefit*, NAT’L MORTGAGE NEWS (Feb. 25, 2002), <https://www.highbeam.com/doc/1G1-83238552.html>.

¹⁴⁰ See BNS Holding Inc., Current Report (Form 8-K) (Oct. 7, 2003) (reporting

and five more in 2005.¹⁴² Of these fifteen companies, only three had a market capitalization of over \$50 million, and none more than \$161 million.¹⁴³ These types of “nanocap” companies are the most at risk of losing NOL tax assets; though their stocks are publicly traded (some over-the-counter), their public floats are small and concentrated. An ownership change would be easier to accomplish intentionally or unintentionally in a nanocap company.

that the Board of Directors amended the company’s Rights Agreement to lower the trigger to 4.99% and including a press release that explained that “[t]he amendment will assist in limiting the number of 5% or more owners and thus reduce the risk of a possible “change of ownership” under Section 382”); Geoworks Corp. (now NCM Services Inc.), Amendment No. 1 (Form 8-A) (May 19, 2003) (lowering the trigger of Rights Agreement to 4.99% “to seek to prevent possible limitations on the Company’s use of its Federal net operating loss carryforwards and certain income tax credits.”); Crown Crafts, Inc., Amendment No. 1 (Form 8-A/A) (April 29, 2003) (reporting amendments to the company’s Rights Agreement as of April 29, 2003 with a trigger of 5% “to protect the Company’s ability to carry forward its net operating losses (“NOLs”) and, thus protect shareholder value”).

¹⁴¹ See *Wilhelmina Int’l, Inc.*, Current Report (Form 8-K) (June 30, 2004) (reporting that the company completed an offering of Series A Preferred Stock, and pursuant to that transaction, amended its Shareholder Rights Agreement trigger from 15% to 5% “to ensure the preservation of the Company’s net operating loss carryforwards”).

¹⁴² See *Cygnus, Inc.*, Current Report (Form 8-K) (Oct. 17, 2005) (reporting the adoption of a Rights Agreement with a trigger of 4.95% and including a press release explaining that “The plan, among other things, encourages potential acquirers of Cygnus to negotiate with the Board of Directors of Cygnus so as to enhance the Board’s ability to achieve the best possible value for all of the Company’s stockholders. The plan is also designed to protect the Company’s net operating loss (“NOL”) carryforwards for tax purposes”); *CoSine Commc’ns Inc.*, Current Report (Form 8-K) (Sept. 8, 2005) (reporting that the company adopted a stockholders rights plan with a trigger of 5% “to protect stockholder value by protecting the Company’s stockholders from coercive takeover practices or takeover bids that are inconsistent with their best interests, and by protecting the Company’s ability to carry forward its net operating losses (“NOLs”).”); *Wheeling Pittsburgh Corp.*, Current Report (Form 8-K) (Feb. 18, 2005) (reporting that the company adopted a Rights Agreement with a trigger of 4.99% so purchasers would not “jeopardize or endanger the availability to the Company of its net operating loss carryforwards to be used to offset its taxable income”). According to data provided by SharkRepellent, Bayou Steel Corporation and JPS Industries, two non-reporting companies, also adopted NOL poison pills in 2005. See SHARKREPELLENT, <https://sharkrepellent.net/> (last visited July 12, 2016).

¹⁴³ See *infra* APPENDIX A (listing 155 unique companies that adopted an NOL poison pill between December 29, 1998 and February 27, 2014). This exhaustive list of companies was provided by SharkRepellent. The author then hand-gathered market capitalization data by examining SEC filings close in time to the adoption of the NOL poison pill.

However, the NOL poison pill soon became more widespread among companies with various market capitalizations.¹⁴⁴ Interestingly, the NOL poison pill became popular among nanocap and microcap companies and, on the other end of the spectrum, companies with capitalizations over \$1 billion. By the end of 2007, of the twenty-four companies with NOL poison pills, twenty-two companies were microcap or nanocap companies and two had capitalizations of over \$1 billion.¹⁴⁵ In a set of 155 unique corporations that adopted NOL poison pills between 1998 and March 1, 2014, 111 could be described as microcap (under \$300 million capitalization), with sixty-six of those being nanocap companies (under \$50 million capitalization). However, twenty-six of those 155 firms had market capitalizations of over \$1 billion at the time the NOL poison pill was adopted.¹⁴⁶ Part IV will explore some explanations for this bimodal distribution of NOL poison pill firms.¹⁴⁷

C. The NOL Poison Pill in the Delaware Courts

1. *Versata Enterprises, Inc. v. Selectica, Inc.*

To date, the Delaware courts have been faced with only one NOL poison pill, and the facts of that case may be fairly specific. In *Versata Enterprises, Inc. v. Selectica, Inc.*, the Delaware Supreme Court upheld a tax benefit preservation plan, NOL poison pill, without a threat of a change-of-control takeover.¹⁴⁸ Though the purchasing shareholder, Trilogy, had made numerous offers to acquire Selectica, the board articulated the danger as a threat to a corporate asset because an ownership change, under section 382, could possibly lead to the loss of certain tax assets, NOL carryovers.¹⁴⁹

¹⁴⁴ See generally *infra* APPENDIX A.

¹⁴⁵ The two billion-dollar companies were USG Corporation, with a public float held by nonaffiliates of \$2.9 billion, and Charter Communications, Inc., with a public float held by nonaffiliates of \$1.5 billion. See *infra* APPENDIX A.

¹⁴⁶ An additional three companies had common stock held by nonaffiliates that amounted to just under \$1 billion, suggesting that the total market capitalization for those three was also over \$1 billion. See *infra* APPENDIX A (Eastman Kodak Company, \$963 million; Lear Corporation, \$984.7 million; The Ryland Group, Inc., \$908.8 million).

¹⁴⁷ See *infra* Part IV.

¹⁴⁸ See *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586 (Del. 2010).

¹⁴⁹ *Id.* at 594 (describing the board's adoption of the NOL poison pill to replace its former plan with a 15% trigger after conducting a "Section 382 ownership analysis" that revealed that within the past three years, 5% shareholders had increased their ownership by 40 percentage points).

Selectica, a struggling, publicly-traded microcap¹⁵⁰ company, had an estimated \$165 million in NOLs,¹⁵¹ though its market capitalization was only \$23 million.¹⁵² In addition, Selectica's outstanding stock was concentrated in a handful of shareholders; twenty-two shareholders owned 62% of the stock.¹⁵³ Because of substantial stock ownership and turnover by a small number of investors, Selectica estimated that it might have already lost \$24.6 million of NOLs due to changes in ownership in the past and was reaching the 50% threshold.¹⁵⁴ However, and most importantly, a competitor and large judgment creditor of Selectica, Trilogy, Inc. and its subsidiary, Versata Enterprises, had increased its holdings on the open market to 6.7% and were interested in acquiring the troubled company.¹⁵⁵ Following the Trilogy purchases in Fall 2008, Selectica amended its original Shareholder Rights Plan to lower the 15% trigger to 4.99%.¹⁵⁶

Selectica is a notable case for a number of reasons, most remarkably because it is the one acquisition in recent memory in which the acquirer triggered the poison pill; moreover, the target then reset the poison pill.¹⁵⁷ Probably because the dilution of the bidder at such a low trigger resulted in a relatively small loss, Trilogy was not deterred either before or after the poison pill went into effect.¹⁵⁸

¹⁵⁰ The court refers to Selectica as a "microcap" company. However, companies with a capitalization of less than \$50 million are referred to as "nanocap" companies. See *Microcap Stock: A Guide for Investors*, U.S. SEC. & EXCHANGE COMMISSION (Sept. 18, 2013), <https://www.sec.gov/investor/pubs/microcapstock.htm>.

¹⁵¹ *Selectica*, 5 A.3d at 592.

¹⁵² *Id.* at 590.

¹⁵³ *Id.* at 603.

¹⁵⁴ *Id.* at 591.

¹⁵⁵ *Id.* at 596. Trilogy made two offers in the summer of 2008 for all of the assets of Selectica: one for \$6 million plus cancellation of the \$7.1 million that Selectica owed Trilogy and one for \$10 million plus the cancellation of indebtedness. *Id.* at 593.

¹⁵⁶ See *Selectica, Inc.*, Current Report (Form 8-K) (Nov. 17, 2008) (including a press release whereby the company explains that "[i]n addition to protecting the company's net operating loss carryforwards and tax credits, the amended rights plan is designed to assure that all stockholders of the company receive fair and equal treatment in the event of any proposed takeover of the company, to guard against two-tier or partial tender offers, open market accumulations and other tactics designed to gain control of the company without paying all stockholders a fair price, and to enhance the board's ability to negotiate with a prospective acquirer").

¹⁵⁷ See *Selectica*, 5 A.3d at 598.

¹⁵⁸ Once Trilogy's purchases triggered the poison pill, the board of Selectica had ten business days to decide whether to let the poison pill go into effect or exempt Trilogy. During those ten days, the Board attempted to negotiate a standstill agreement, but Trilogy attempted to negotiate for payments related to its judgment against Selectica, repurchase of its stock, and other valuable consideration. See

Finally, the Delaware Court of Chancery entered a declaratory judgment for Selectica that the board of director's decision to adopt an NOL poison pill is valid and enforceable, and the Delaware Supreme Court affirmed that decision.¹⁵⁹ In so doing, the court employed a *Unocal* analysis and found that the Selectica board reasonably considered the possible loss of a large corporate asset such as the NOLs a dangerous threat, thus meeting the first prong of the test.¹⁶⁰ Secondly, the court found that as a response to that threat, the NOL poison pill was neither coercive or preclusive.¹⁶¹ The court relied on the testimony of expert witnesses that Trilogy could still mount a proxy contest with an ownership percentage of 4.99%, particularly when such a contest would entail communicating with a small number of shareholders to reach a majority.¹⁶² Because the NOL poison pill was not preclusive, the court then found that the tactic was within the range of reasonable options available to the board to respond to the threat of losing the NOLs.¹⁶³ In other words, the Delaware Supreme Court blessed the use of a poison pill with a 4.99% trigger.

Combined with the *Airgas* precedent allowing boards to keep poison pills in place for an indefinite period of time, the *Selectica* case seems to portend a bleak future for activist shareholders and potential bidders, not to mention premium-loving shareholders, if any firm with NOLs may adopt a poison pill with a 4–5% trigger. The *Selectica*

Answering Brief on Appeal and Opening Brief on Cross-Appeal of Appellee/Cross-Appellant at *1, *Selectica*, 5 A.3d 586 (No. 4241-VCN), 2010 WL 2464491. Trilogy did not seem to value the NOL carryovers as an asset; as Selectica's largest creditor, Trilogy might act to protect an asset of its debtor if that asset were valuable. *See id.*

¹⁵⁹ *See Selectica, Inc. v. Versata Enters.*, No. 4241-VCN, 2010 WL 703062, at *25 (Del. Ch. Feb. 26, 2010), *aff'd*, 5 A.3d 586 (Del. 2010).

¹⁶⁰ *See Selectica*, 5 A.3d at 599-600 (finding that the board spent sufficient time on the question and relied on outside experts).

¹⁶¹ *See id.* at 601 (using as a test for preclusivity whether a successful proxy fight would be "realistically unattainable"); *see also* Edelman & Thomas, *supra* note 135, at 1103 (describing this test as "less onerous" for boards than the Court of Chancery's test and unclear how it is consistent with the "dissident-friendly" tests of *Moran* and *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003)).

¹⁶² *See Selectica*, 5 A.3d. at 602-03 (citing Professor John C. Coates IV and Peter C. Harkins for the proposition that proxy contests in micro-cap companies have been successful even when the challenger began with a percentage ownership less than 5.49%). However, Trilogy's expert witness testified that there was only a single example of a successful proxy contest waged by a challenger owning less than 5%, and in that case the firm did not have a staggered board. *See* Appellants' Reply Brief and Cross Appellees' Answering Brief at *22-*23, *Selectica*, 5 A.3d 586 (No. 4241-VCN), 2010 WL 2603844.

¹⁶³ *See Selectica*, 5 A.3d. at 605.

holding may be cabined to its unique facts,¹⁶⁴ or this opinion from the Delaware Supreme Court may bind the Chancery Court with any low-trigger poison pill in front of it. If the high court holds that a 5% threshold is not preclusive and does not forestall reasonable chances of success in a proxy contest, then it seems that a 5% trigger for any poison pill, NOL poison pill or not, should be upheld, at least in a nanocap or microcap corporation. *Airgas* seems to represent the lowest threshold for the “threat” prong of the *Unocal* test, and *Selectica* seems to represent the lowest threshold for the “preclusive” prong. A lingering question is whether the two prongs have to relate to one another in a proportionate way: if the threat in *Selectica* had been as minimal as in *Airgas*, would the court then find the “nonpreclusive” 4.99% trigger within the range of reasonableness?

2. Is NOL Impairment a Reasonable Threat?

The first prong of the *Unocal* test is whether the board reasonably identified a threat to the corporation or the shareholders.¹⁶⁵ The Delaware Supreme Court seemed to accept that the potential loss of *Selectica*’s \$165 million NOLs was a threat or at least that the board was reasonable in its determination that the NOLs were important.¹⁶⁶ Implicit in that finding is both that the Board was reasonable in determining that (1) the NOLs were worth \$165 million to *Selectica* and (2) any bidder crossing a 5% threshold would impair the NOLs.¹⁶⁷ Whether the NOLs were worth \$165 million to *Selectica* seems questionable.¹⁶⁸ The value of the carryover to the corporation should

¹⁶⁴ See *id.* at 607 (“The fact that the NOL poison pill was reasonable under the specific facts and circumstances of this case, should not be construed as generally approving the reasonableness of a 4.99% trigger in the Rights Plan of a corporation with or without NOLs.”).

¹⁶⁵ See *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995).

¹⁶⁶ See *Selectica*, 5 A.3d at 600 (supporting the finding of the Court of Chancery that “the Board was reasonable in concluding that *Selectica*’s NOLs were worth preserving and that *Trilogy*’s actions presented a serious threat of their impairment”).

¹⁶⁷ See *id.* at 606.

¹⁶⁸ *Selectica* did not undertake an investigation of a “formal estimate of the probability or likelihood of future use of the NOLs or the expected size of the tax benefit that might arise from such a use” See Answering Brief on Appeal and Opening Brief on Cross-Appeal of Appellee/Cross-Appellant at *33, *Selectica*, 5 A.3d 586 (No. 4241-VCN), 2010 WL 2464491; see also Peter B. Siegal, *Using Appraisal to Protect Net Operating Loss Carryforwards*, 106 Nw. U. L. REV. 927, 942 (2012) (“By placing the responsibility for valuing NOLs in the hands of the very people who have the strongest systemic incentive to overvalue them, the NOL pill renders § 382 nearly useless.”).

represent the present value of the amount of the carryover that will be usable in any future taxable years before they expire.¹⁶⁹ If Selectica does not have sufficient income to offset expenses it incurs in future years, then Selectica will never use any of those NOL carryovers.¹⁷⁰ If not, then the present value of the NOL carryovers is zero.¹⁷¹ Trilogy could have reasoned that without an acquisition, and an influx of capital, Selectica would not have ever made use of its \$165 million NOLs, making them wholly or partially worthless.¹⁷² Companies are required to account for this probable value in their financial statements and mark down the value of this tax asset only if it is more likely than not that the NOLs will be fully used.¹⁷³

¹⁶⁹ See J. Mark Ramseyer & Eric B. Rasmusen, *Can the Treasury Exempt Its Own Companies from Tax?: The \$45 Billion GM NOL Carryforward* 9 (Harvard Law & Econ., Discussion Paper No. 690, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873429 (noting that under GAAP, NOLs are not discounted to present value for accounting purposes); Simmons, *supra* note 83, at 1058-59.

¹⁷⁰ At the time Selectica implemented its poison pill in 2009, it had not recorded a net profit since 2000, the time of its initial public offering. See Appellants Versata Enters., Inc.'s and Trilogy Inc.'s Opening Brief at *5-*6, *Selectica*, 5 A.3d 586 (No. 4241-VCN), 2010 WL 2218070.

¹⁷¹ The Delaware Supreme Court opinion's retelling of the facts mentions a possibility that Selectica might have retained its NOLs by merging its "shell" with a "profitable operating company." See *Selectica*, 5 A.3d at 591. Under section 382, this type of merger would almost certainly result in a 382 limitation. Later, the facts mention that Selectica was contemplating a "merger of equals." See *id.* at 592. In order for that merger not to be an "ownership change," Selectica would have had to merge with a corporation of approximately the same value, with its current shareholders not increasing their percentage ownership in the new loss corporation substantially above their current ownership. The facts also mention the possibility of a going-private transaction, which most likely would also trigger section 382 unless an existing group that already owned over 50% would be the eventual owners of 100% of the private company. See *id.*; see also Treas. Reg. § 1.382-2 (2016).

¹⁷² Under financial accounting rules, NOLs are recorded as a deferred tax asset, but are valued as the gross amount of NOLs multiplied by the firm's tax rate. The NOLs may be recorded as a lower value if the firm believes the value to be impaired under FASB ASC 740. See Sarah J. Webber & Karie Davis-Nozemack, *NOL Poison Pills: Using Corporate Law for Tax Purposes*, 117 J. TAX'N. 312, 313 (2012) ("A long track record of losses or very large losses could be evidence of impaired usage."). Additionally, the value of the deferred tax asset is not discounted for the time value of money and firms do not have to consider the NOLs impaired if future profitability of the company is more likely than not. See Ramseyer & Rasmusen, *supra* note 169, at 2-3.

¹⁷³ See Selectica, Inc., Annual Report (Form 10-K) (July 9, 2013) ("Based upon the weight of available evidence, which includes our historical operating performance and the reported cumulative net losses in all prior years, we have provided a full valuation allowance against our net deferred tax assets. We will continue to evaluate the realizability of the deferred tax assets on a quarterly basis.").

At some point in time, a company may determine that an influx of capital or outright sale is worth the loss of the NOL carryovers, which may or may not be used.¹⁷⁴ Prior to Trilogy beginning its additional purchases, Selectica was anticipating a potential sale, even one that would cause a section 382 ownership change and it had not permanently replaced its CEO because of that very real potential.¹⁷⁵ In fact, an acquisition might make the NOLs have a nonzero value, with the acquirer being able to use at least a small percentage of the NOLs each year against the acquirer's profits instead of none of them.¹⁷⁶ The existence of section 382 does not make the economics of an acquisition untenable; whether or not NOLs may be used in whole or in part after an acquisition is just one variable in making an acquisition decision.¹⁷⁷ Companies voluntarily choose to impair NOLs in a variety of ways, presumably because without a change in the course of action, the NOLs are not worth very much.¹⁷⁸ In fact, the majority of firms contemplating an initial public offering make this decision.¹⁷⁹

¹⁷⁴ See Simmons, *supra* note 83, at 1084 (“A loss corporation contemplating a disposition of assets that would entail a transfer of loss carryovers must determine whether the consideration offered for the whole package exceeds the present value of continuing the loss enterprise.”).

¹⁷⁵ See Answering Brief on Appeal and Opening Brief on Cross-Appeal of Appellee/Cross-Appellant at *10-*11, *Selectica*, 5 A.3d 586 (No. 4241-VCN), 2010 WL 2464491 (“One category [of likely bidders] consisted of large software companies, who might view Selectica's products as strategically complementary to their own, and might be prepared to acquire the whole Company at a premium and to accept a Section 382 change of ownership (with the result that the buyer could use Selectica's NOLs only in small increments over many years).”).

¹⁷⁶ Selectica currently was not using any of its NOL carryovers, but an acquirer could have used approximately \$23 million multiplied by 5.49% (the long-term tax exempt rate for January 2009), or \$1.26 million each year. See *Selectica*, 5 A.3d at 590.

¹⁷⁷ See *Capshaw v. Schieck*, 44 P.3d 47, 49 (Wyo. 2002) (supporting indemnification claim of buyers of company which, when attempting to use prechange losses with a 382 limitation, discovered that total amount of prechange losses was lower than expected following an IRS audit).

¹⁷⁸ See WithumSmith+Brown, *Tax Aspects of the Facebook IPO (Alternate Title: Mark Zuckerberg Could Buy Most of Europe with His 2012 Tax Bill)*, DOUBLE TAX'N (Feb. 4, 2012), <http://double-taxation.com/2012/02/04/tax-aspects-of-the-facebook-ipo-alternate-title-mark-zuckerberg-could-buy-most-of-europe-with-is-2012-tax-bill/> (hypothesizing that Facebook's Form S-1 showed deferred tax assets (NOLs) because of a possible 382 ownership change during financing rounds prior to making a profit and that if not, any 382 ownership limitation caused by the IPO would be negligible given Facebook's large capitalization number multiplied by the long-term tax-exempt rate).

¹⁷⁹ See Eric James Allen, *The Information Content of the Deferred Tax Valuation Allowance: Evidence from Venture Capital Backed IPO Firms* (Sept. 30, 2012) (unpublished Ph.D. dissertation, University of California, Berkeley), <http://papers.>

Though hindsight is not a good test of whether a prior determination that NOLs were potentially usable was reasonable, Selectica seems to have had trouble after 2010 using its NOL carryovers. As of March 31, 2013, Selectica reported having \$186.6 million in federal deferred tax assets, and \$93 million in state deferred tax assets.¹⁸⁰ However, Selectica issued various equity securities and convertible securities in May 2013.¹⁸¹ As of June 30, 2013, Selectica reported that its tax deferred assets were \$2.1 million, presumably because of the triggering of section 382 limitations.¹⁸² None of this is to say that a company should not be able to choose when it will receive capital in exchange for issuing equity that will impair its NOL carryovers. However, the fact that Selectica chose to accept \$9 million knowing that it would result in it losing the ability to fully utilize almost \$185 million in carryovers suggests that Selectica valued those carryovers internally at something close to zero.

Second, the court quickly dispensed with analyzing whether the board correctly determined that Trilogy threatened to trigger the section 382 limitation by becoming more than a 5% shareholder.¹⁸³ Because of recent share transfers, Selectica as a taxpayer needed to be concerned with any further acquisitions of stock by 5% shareholders. However, in other companies, particularly companies with a larger and more dispersed float, this assumption will not hold.

III. NOL POISON PILLS IN PRACTICE

A. Possible NOL Poison Pill Uses

Poison pills are a tactic designed to ward off hostile acquisitional shareholders,¹⁸⁴ but section 382 was designed to dis-incentivize friendly acquisitional shareholders from acting in concert with the

ssrn.com/sol3/papers.cfm?abstract_id=2161340 (finding that 82% of IPO firms reduce the value of their deferred tax assets to zero because of the 382 limitation).

¹⁸⁰ See Selectica, Inc., Annual Report (Form 10-K) (June 17, 2013).

¹⁸¹ See Selectica, Inc., Notice of Exempt Offering of Securities (Form D) (June 5, 2013) (reflecting a total offering amount of \$10,575,745, out of which \$9,410,322 had been sold).

¹⁸² See Selectica, Inc., Quarterly Report (Form 10-Q) (August 14, 2013).

¹⁸³ *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586, 600 (Del. 2010).

¹⁸⁴ See Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1037 (2002) (“September of this year will mark the twentieth anniversary of the publication of my memorandum recommending that companies adopt the poison pill, which I invented in the summer of 1982 to deal with the takeover abuses that emerged in the 1970s and had become endemic by the end of the decade.”).

target board for purely tax reasons. However, the *Selectica* board makes the argument that the perhaps unintended consequence of section 382 is to make corporations potential victims not of friendly acquisitional shareholders, but also of hostile acquisitional shareholders (Hostile Acquirers), volatile shareholders (Accidental Bunglers), sabotaging competitor shareholders (Bad Faith Saboteurs), or a combination.¹⁸⁵ In fact, the Delaware Supreme Court agreed that a shareholder rights plan could be used in contexts other than a hostile takeover, though the court maintained that the *Unocal* test would still apply to the plan.¹⁸⁶ If the NOL poison pill has a legitimate use, that of a proportionate response to a legitimate threat to corporate effectiveness, then that defensive tactic must theoretically prevent at least one of these three groups from partially or wholly impairing the NOL tax asset. However, an NOL poison pill with a 4.99% trigger does not discourage or impede any of these three shareholders from impairing the NOLs. This Article argues that the NOL poison pill is adopted to thwart a very different type of shareholder, the Activist Shareholder, not from impairing a tax asset, but from gaining enough ownership to pressure the board.

1. Hostile Acquirers

Any acquirer valuing a potential target understands that section 382 limits the ability of the acquirer to use NOLs following the acquisition.¹⁸⁷ If the shareholder wants to acquire the target, then it must have already factored in the loss of the NOLs in its post-acquisition valuation of the target; therefore, an acquirer would in most circumstances value the NOLs at zero if contemplating an acquisition.¹⁸⁸ True Hostile Acquirers will not want the accumulated

¹⁸⁵ If the shareholders of *Selectica* had not inadvertently approached triggering the 318 limitation, then Trilogy's purchases would not have been enough to trigger the 318 limitation alone. See *Selectica*, 5 A.3d at 599.

¹⁸⁶ See *id.* ("Any NOL poison pill's principal intent, however, is to prevent the inadvertent forfeiture of potentially valuable assets, not to protect against hostile takeover attempts. Even so, any Shareholder Rights Plan, by its nature, operates as an antitakeover device. Consequently, notwithstanding its primary purpose, a NOL poison pill must also be analyzed under *Unocal* because of its effect and its direct implications for hostile takeovers."); see also *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029, at *15 (Del. Ch. May 2, 2014).

¹⁸⁷ See *Simmons*, *supra* note 83, at 1084 (noting that because of section 382, "[t]he purchaser is indifferent to the acquisition of net operating loss carryovers because it must pay the current present value of the future tax savings (less an appropriate risk factor)").

¹⁸⁸ See Thomas W. Bottomlee, Jason S. Bazar & Arthur C. Walker, *Don't Ignore a*

NOLs of a target issuer to be severely limited or to disappear — that would make an acquisition less attractive, particularly if the NOLs are a substantial asset of the corporation.¹⁸⁹ In other words, if the NOLs are worth anything substantial, a bidder will not engage in a hostile takeover. However, if the NOLs are not worth much because they are large with respect to the value of the corporation or because the target will likely never use them, then a Hostile Acquirer will not care whether section 382 is triggered or not. Therefore, an NOL poison pill will never have any use against a true Hostile Acquirer. In addition, though most poison pills work by dilution of the acquirer's shares, dilution when a shareholder holds only 5% is not as economically damaging as dilution at a threshold of 15–20%, particularly when the target has a small capitalization.¹⁹⁰ Then, the pill must be reset to stop any further increases of share ownership.

2. Accidental Bunglers

As the Selectica board found, companies with concentrated ownership and small public floats may be at risk of triggering section 382 due to otherwise innocuous trading.¹⁹¹ Accidental Bunglers may be a threat to this tax asset not because of a bad faith purpose, but because these shareholders may trigger the section 382 limitations by

Target's NOLs: The Price and Structure of Your Deal Can Depend on Them, 9 M&A J., June 2009, at 19. The parties could conceivably structure a section 368 reorganization such that the section 382 limitation would not be triggered, but the options for that structure are fairly narrow. For example, the parties could structure the acquisition as a taxable asset sale, with the selling corporation retaining the NOLs and using them to offset the taxable gain. The acquiring corporation would then own the assets with a stepped-up basis, increasing the value of the acquisition.

¹⁸⁹ See *Selectica*, 5 A.3d at 599 n.15 (quoting the Court of Chancery that “typically, companies with large NOLs would not be at risk of takeover attempts if the NOLs are the company’s principal asset, as the takeover would likely trigger a change in control and impair the asset”).

¹⁹⁰ Selectica’s poison pill, when triggered, reduced Trilogy’s interest from 6.7% to 3.3%. See *id.* at 590. According to the court, the market capitalization was roughly \$23 million, making Trilogy’s beginning interest worth about \$1.5 million. See *id.* In 2011, Selectica eventually settled with Trilogy and repaid \$4.5 million to its creditor, repurchased its stock, and paid Trilogy \$1 million in consulting fees. See *Selectica, Inc.*, Current Report (Form 8-K, Exhibit 10.1) (Sept. 21, 2011) (Comprehensive Settlement Agreement referencing a settlement payment of \$4,461,574 and another payment of \$472,047.56 for Versata’s stock, as well as two payments of \$500,000 each under a separate Services Agreement).

¹⁹¹ See *Selectica*, 5 A.3d at 594 (concluding that because of heavy trading by minority shareholders in its small public float, Selectica was close to an accidental “ownership change”).

accident. Though the Delaware Supreme Court recognized that the “principal intent” of an NOL poison pill “is to prevent the inadvertent forfeiture of potentially valuable assets,”¹⁹² such a tactic will not and cannot prevent Accidental Bunglers. An NOL poison pill, like any type of poison pill, has no physical effect on trading. The pill cannot prevent or void trading.¹⁹³ Accidental Bunglers will accidentally trigger the poison pill just as they would accidentally trigger section 382. Notice of such a poison pill would probably only deter them to the same extent as would a notice explaining the threshold rules, a far less drastic proposition.

3. Bad Faith Saboteurs

Selectica is an interesting case because the bidder was not just a Hostile Acquirer. Trilogy was a competitor of *Selectica*, had secured enforceable judgments against *Selectica* for patent infringement, and was a competitor with *Selectica* in “the relatively narrow market space of contract management and sales configuration.”¹⁹⁴ Because of Trilogy’s unique stance as a shareholder, normal motivations that would prevent the Hostile Acquirer from triggering the poison pill or jeopardizing the utilization of NOLs were not present. In the worst light, Trilogy could best be described as a Bad Faith Saboteur. Trilogy may have had an end goal of (1) acquiring *Selectica* in a friendly merger; (2) convincing management to sell particular assets to Trilogy; (3) forcing *Selectica* into bankruptcy, where Trilogy may be a senior secured creditor and able to purchase *Selectica* with its preexisting debt;¹⁹⁵ or (4) gaining leverage designed to force management to repay its debt. Even if Trilogy was aiming for the first option, the friendly merger, it may still not value the NOLs close to \$165 million. But, if Trilogy was more interested in any of the other three options, triggering a section 382 limitation may actually advance that goal. One could imagine a scenario in which a shareholder may want to trigger section 382 to drive a competitor or a debtor into bankruptcy.

¹⁹² *Id.* at 599.

¹⁹³ See Van Deusen, *supra* note 125, at 18-19 (“A section 382 poison pill merely discourages shareholders from engaging in transactions that could cause percentage point increases. A section 382 poison pill would not prevent or void a transaction that produces a percentage point increase.”).

¹⁹⁴ *Selectica*, 5 A.3d at 590.

¹⁹⁵ See Michelle M. Harner, *Activist Distressed Debtholders: The New Barbarians at the Gate?*, 89 WASH. U. L. REV. 155, 169 (2011) (“[T]he objective of debtholders in a loan-to-own scenario is ownership of the company either through a credit bid in an asset sale or a debt-to-equity exchange.”).

The Bad Faith Saboteur seems like an appropriate focus for a board of director's arsenal of weapons. However, if the saboteur wants to harm the company by triggering the NOLs intentionally, then the NOL poison pill does not do much to the saboteur. In fact, the actual operation of the poison pill, issuing additional shares to existing shareholders in a non-pro rata fashion (the Bad Faith Saboteur does not get the opportunity to purchase more shares), may even push a company closer to an ownership change. Just as was displayed in *Selectica*, a Bad Faith Saboteur may believe the cost of dilution to be worth the benefit of causing a competitor to lose a valuable asset.¹⁹⁶

Target boards may argue that a low-trigger poison pill allows the board to keep track of 5% shareholders and to be warned when a new shareholder crosses that threshold. However, for a publicly-held corporation, Rule 13d-1 of the Securities Exchange Act of 1934 requires 5% shareholders to file either a Schedule 13D or Schedule 13G, thus alleviating that concern.¹⁹⁷

B. *Strategic Uses of the NOL Poison Pill*

The danger after *Selectica*, however, is that the NOL poison pill will be used not against Mesa Petroleum-like shareholders or even Trilogy-like shareholders, but against the much more common activist shareholder.¹⁹⁸ These shareholders do not wish to take control of a corporation,¹⁹⁹ but rather work from a substantial minority stake to pressure boards to pursue avenues that maximize shareholder wealth.²⁰⁰ In a large publicly-held corporation, boards of directors face

¹⁹⁶ One could argue that *Selectica*'s competitor, Trilogy, had every incentive to trigger a "change of ownership" of the struggling firm because even though it cost Trilogy a small sum, the loss may have been worth much more to *Selectica*. See Answering Brief on Appeal and Opening Brief on Cross-Appeal of Appellee/Cross-Appellant at *4, *Selectica*, 5 A.3d 586 (No. 4241-VCN), 2010 WL 2464491 ("The extensive record reflects that Trilogy took the unprecedented step of deliberately triggering a poison pill — exposing its equity investment of under \$2 million to dilution — primarily in an effort to extract substantially more value for the other two 'legs' of the 'stool' [that is, Trilogy's relationship as creditor and competitor].").

¹⁹⁷ 17 C.F.R. § 240.13d-1 (2016).

¹⁹⁸ See Edelman & Thomas, *supra* note 135, at 1128-29 (describing the use of poison pills against "hedge funds that have acted as shareholder-activist investors on issues related to governance and strategy").

¹⁹⁹ See Brian R. Cheffins & John Armour, *The Past, Present and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 58-60 (2011) (distinguishing between the "market for control" with traditional bidders and the "market for influence" with activist shareholders).

²⁰⁰ See William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375,

very little threat from hostile takeovers, which require large amounts of cash or debt and which are easily staved off by ordinary poison pills and other tactics.²⁰¹ However, boards may find their work made more difficult by noisy activist shareholders who threaten proxy fights unless their agendas and plans are considered. The greater the stake an activist shareholder has, the larger the megaphone.²⁰² Obviously, activist shareholders can create value or destroy it,²⁰³ depending on the particular agendas and personalities involved. Recently, the Delaware courts upheld poison pills specifically designed to thwart activist shareholders, not tender offer bidders.²⁰⁴ By allowing target companies to set ownership levels differently depending on the identity or motivations of the shareholder, the Delaware courts have

1383 (2007) (distinguishing between private equity funds, which “actively reshape[] business plans, but [do] so behind closed doors over periods of years” with hedge funds, which “tell managers how to realize the value and to challenge publicly those who resist their advice”).

²⁰¹ In 2012, Netflix adopted a poison pill with a 10% trigger to thwart the overtures of Carl Icahn, who had acquired a 9.98% stake. The Netflix plan was similar to Sotheby’s plan in *Ruprecht* in that shareholders who file a Schedule 13G with the SEC instead of a Schedule 13D can acquire up to 20% of Netflix stock without triggering the poison pill. See *Netflix Adopts Poison Pill*, N.Y. TIMES (Nov. 5, 2012, 1:28 PM), http://dealbook.nytimes.com/2012/11/05/netflix-adopts-poison-pill/?_r=0. Schedule 13D and 13G are mandatory reporting devices for shareholders acquiring 5% or more of a publicly-held corporation. See 17 C.F.R. § 240.13d-1 (2016). After crossing that threshold, a shareholder has 10 days to file Schedule 13D; however, a shareholder could file Schedule 13G instead if, among other things, the shareholder “acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer.” *Id.* Therefore, the Netflix and Sotheby’s poison pills have different triggers for active investors and passive investors.

²⁰² See Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, J. CORP. L. 681, 697 (2007) (reporting empirical findings that out of fifty-two activist efforts on public companies by hedge funds, twenty-six funds had stakes of at least 9.5%). Notable for the purposes of this Article, only five of the hedge fund activists launching campaigns had less than a 4.9% stake. See *id.*

²⁰³ See Bernard S. Sharfman, *Activist Hedge Funds in a World of Board Independence: Creators or Destroyers of Long-Term Value?*, 2015 COLUM. BUS. L. REV. 813, 827 (2015) (describing activist hedge funds as “information traders” who invest resources to gather and analyze information about a firm, and continually provide information to the market about managerial inefficiencies and that firm).

²⁰⁴ See *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029, at *1, *10 (Del. Ch. May 2, 2014) (upholding Sotheby’s shareholder rights plan, which created a 10% trigger for shareholders who file a Schedule 13D with the SEC, versus a 20% trigger for shareholders who file a Schedule 13G); *Yucaipa Am. All. Fund II, L.P. v. Riggio*, 1 A.3d 310, 313 (Del. Ch. 2010) (upholding a shareholder rights plan that limited Yucaipa to an ownership stake of 20%, but allowing its CEO to have a 30% stake).

blessed “two-tier” defense tactics even though “two-tier” bids have been relegated to history.²⁰⁵

The *Selectica* decision further empowers boards targeted by activist shareholders by allowing boards to defend themselves from noisy shareholders by setting very low triggers.²⁰⁶ Though the *Unocal* analysis is supposed to work to flesh out management’s pretextual arguments against a hostile bidder, the analysis works in the NOL poison pill to give credibility to the pretextual concern over tax assets. Instead, articulating a need to protect NOLs may give cover to entrenched management to protect itself.²⁰⁷ Following the *Sotheby’s* decision, which allowed a large corporation to set an anti-activist pill trigger at 10%, a similarly situated firm with NOLs could articulate a facially valid tax reason to set a pill with a trigger half as large. By setting a poison pill with a trigger of 4.99%, companies can limit the influence of noisy activist shareholders²⁰⁸ and can ensure that required

²⁰⁵ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 956 (Del. 1985) (“Here, the threat posed was viewed by the Unocal board as a grossly inadequate two-tier coercive tender offer coupled with the threat of greenmail.”). Mesa’s suspect bid separated the selling shareholders into two groups: early sellers and later sellers. Shareholder rights plans legally separate shareholders into two groups: non-acquiring shareholders and acquiring shareholders.

²⁰⁶ See Siegal, *supra* note 168, at 942 (“By limiting the ownership share and attendant voting power that a potential acquirer can obtain before challenging an incumbent board, the NOL pill seriously threatens the interests of activist shareholders.”).

²⁰⁷ See Thomas J. Boulton & Terry D. Nixon, *Tax Benefit Preservation Plans 3* (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2438003 (finding support for an entrenchment hypothesis by examining 118 firms that adopted tax benefit preservation plans between 1998 and 2011 and finding abnormal returns associated with the announcement of those plans). In addition, the authors found that abnormal returns for firms with NOLs were associated with the timing of the *Selectica* Delaware Supreme Court decision, but no abnormal returns for firms without NOLs during that same time period. See *id.* at 21; see also Stephanie A. Sikes, Xiaoli Tian & Ryan Wilson, *Investors’ Reaction to the Use of Poison Pills as a Tax Loss Preservation Tool*, 57 J. ACCT. & ECON. 132, 141 (2014) (finding “significant negative market reaction to the announcement of NOL poison pill adoptions, suggesting that investors believe the potential agency costs resulting from the poison pill adoptions will exceed any potential tax benefits”).

²⁰⁸ For example, Carl Icahn’s investment firms purchased 8.9% of the outstanding stock of Dell, Inc., complicating and delaying the eventual management-led buyout of that firm. See Miles Weiss, *Carl Icahn Withdraws His Appraisal Request for Dell Stake*, BLOOMBERG (Oct. 4, 2013, 1:16 PM), <http://www.bloomberg.com/news/articles/2013-10-04/icahn-says-he-withdrew-request-for-appraisal-on-dell>; see also Connie Guglielmo, *You Won’t Have Michael Dell to Kick Around Anymore*, FORBES, Nov. 18, 2013. Icahn also reportedly purchased a 10% stake in Netflix in 2012, prompting changes in business strategy. See Steven Bertoni & Nathan Vardi, *Armed & Dangerous*, FORBES, Apr. 15, 2013 (describing how firms adopt poison pills in response to

shareholder votes for acquisitions and other major corporate changes are easier for boards to manage because investors with smaller holdings are less likely to withhold proxies or launch proxy fights.

Finally, a universal 4.99% cap on investor ownership would also have a devastating effect on new or proposed pro-shareholder corporate governance reforms. Recent SEC proposals to allow some forms of shareholder proxy access have conditioned shareholder rights on significant shareholder stakes.²⁰⁹ If large shareholder stakes become impossible for many companies, then these reforms will become meaningless.²¹⁰

C. Section 382 Ownership Limit in Articles of Incorporation

A firm that believes it is in danger from either the Accidental Bungler, Hostile Acquirer, or Bad Faith Saboteur has an alternative, more effective defensive device. A charter provision preventing shareholders from becoming 5% shareholders or trading at levels otherwise threatening an ownership change can guard against impairment of NOLs, but at the same time not work to entrench management.²¹¹ Under such a charter provision, approved by the shareholders, transfers violating the provision could be voided by the board of directors. This strategy has been blessed by the I.R.S., which takes the position that if the board voids the transfer, an ownership change did not occur and any temporary increase will not be included in a future ownership change calculation.²¹² In most cases, only boards

investments by Carl Icahn).

²⁰⁹ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 mandated that the SEC adopt a proxy access rule. See J.W. Verret, *Defending Against Shareholder Proxy Access: Delaware's Future Reviewing Company Defenses in the Era of Dodd-Frank*, 36 J. CORP. L. 391, 393 (2011). This rule, Rule 14a-11, required shareholders to have a minimum ownership of 3% before gaining access to the firm's proxy materials. See *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1147-48 (D.C. Cir. 2011). However, this controversial rule was invalidated by judicial action and a successor rule was not proposed. See *id.* at 1156.

²¹⁰ The SEC responded to the *Business Roundtable* decision by amending Rule 14a-8 to allow shareholders to propose proxy access for a specific firm in a shareholder proposal; according to one researcher's findings, the majority of proxy access proposals retained the 3% ownership requirement of vacated Rule 14a-11. See Shifeng Ni, *Proxy Access Revisited: Regulatory Function of the Rule 14a-11 Formula*, CLS BLUE SKY BLOG (Oct. 30, 2015), <http://clsbluesky.law.columbia.edu/2015/10/30/proxy-access-revisited-regulatory-function-of-the-rule-14a-11-formula/>.

²¹¹ See Van Deusen, *supra* note 125, at 19 ("A section 382 ownership limit likely would provide the most protection from an ownership change.").

²¹² See, e.g., I.R.S. Priv. Ltr. Rul. 2000837027, 2008 WL 4185359 (Sept. 12, 2008) ("For purposes of determining whether a 'testing date' or an 'ownership change' has

who could truly articulate the need for what amounts to restricted shares would be able to convince shareholders to agree to amend the articles of incorporation. Large, publicly-held corporations would not be able to convince investors to own similarly restricted shares or might suffer a share discount if such restrictions were in the IPO charter. Theoretically, such a charter provision could not be used strategically by a board against specific activist shareholders.

IV. WHO IS USING THE NOL POISON PILL?

NOL poison pills may be used either defensively, against Hostile Acquirers, Accidental Bunglers or Bad Faith Saboteurs, or strategically, against the specter of activist shareholders. To determine which is happening in the market, the author has looked at the universe of publicly-held companies that have adopted NOL poison pills between January 1998 and February 2014, which amounts to 155 unique firms.²¹³ Over eighty percent of the firms in the dataset adopted the NOL poison pills after January 2008, and in 2009, forty-four firms adopted poison pills, four times as many as in 2008,²¹⁴ suggesting that the worsening economy during the financial crisis of 2008²¹⁵ may have spurred interest in protecting growing NOL carryovers.²¹⁶ Another trend the data suggests relates to the industries of the adopting firms. Of the 155 firms in the dataset, forty-five (29%) firms are in the Finance, Insurance and Real Estate Industries (SIC Code 6000-6999).

occurred for Controlled within the meaning of Section 382 and the underlying Treasury Regulations at any time on or after the Split-Off, and provided that the Transfer Restrictions are enforceable under State C law (as described in representation (f) and enforced according to their terms, any purported acquirer of Controlled Stock in contravention of the Transfer Restrictions will not be considered as acquiring ownership of such Controlled Stock.”). Depending on the state of incorporation, an amendment implementing restrictions on stock may be valid only on shares issued after the amendment and on shares that voted in favor of the amendment. *See, e.g.,* VA. CODE ANN. § 13.1-649 (2015) (“A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction.”).

²¹³ *See infra* APPENDIX A.

²¹⁴ *See infra* APPENDIX B.

²¹⁵ *See generally* Robert Rich, *The Great Recession of 2007–09*, FED. RES. BANK (Nov. 22, 2013), <http://www.federalreservehistory.org/Events/DetailView/58> (detailing the “Great Recession,” which began in December 2007 and lasted until June 2009).

²¹⁶ *See* FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 394 (2011) (reporting that in 2009, 61,000 business firms filed for bankruptcy protection in the U.S., compared with less than 20,000 firms in 2006).

This classification includes national banks, state banks, insurance companies, and securities brokers.²¹⁷ The outsized representation of this industry seems reflective of the global financial crisis that had a substantial impact on those associated businesses.²¹⁸ Relatedly, the next most numerous SIC code is 1531 (Operative Builders).²¹⁹

In addition to the plunging economy, another factor that may have led to increased adoptions in 2009, 2010, and 2011²²⁰ was the *Selectica* case, which went to trial in the spring of 2009. The NOL poison pill in that case was upheld by the Delaware Court of Chancery in early 2010.²²¹ Firms may have been watching that case to decide whether to adopt an NOL poison pill.²²²

If either the Defensive Acquisition Hypothesis or Defensive Saboteur Hypothesis is correct, then firms adopting NOL poison pills out of necessity should have small capitalizations, concentrated ownership, perhaps be at some risk of a hostile takeover because of industry or otherwise, and have a significant amount of NOL carryovers compared to fair market value of their outstanding shares. These firms are most at risk of a section 382 “ownership change,” and would have a smaller limitation on post-change use of the NOLs using the calculation of market capitalization multiplied by the long-term tax-exempt rate. However, if the Strategic Board Hypothesis is correct, then firms adopting NOL poison pills will have large market capitalizations, will have smaller amounts of NOL carryovers compared to fair market

²¹⁷ See *infra* APPENDIX A (showing eighteen Depository Institutions (SIC 6000-6099); five Nondepository Institutions (SIC 6100-6199); one Securities & Commodities Broker Dealers (SIC 6200-6299); eleven Insurance Carriers (SIC 6300-6399); four Real Estate firms (SIC 6500-6599); and six Holding & Investment Operatives (SIC 6700-6799)). Many of these companies may have participated in the TARP program, which may have resulted in the U.S. government taking equity positions in them. However, neither the investment nor the redemption of that investment triggered section 382 by virtue of I.R.S. Notices. See *supra* note 129 and accompanying text.

²¹⁸ See FIN. CRISIS INQUIRY COMM’N, *supra* note 216, at 400-01 (reporting that between January 2009 and the end of December 2010, 297 banks failed in the U.S.).

²¹⁹ See *infra* APPENDIX A; see also FIN. CRISIS INQUIRY COMM’N, *supra* note 216, at 391 (reporting that unemployment in the construction industry averaged 19.1% in 2009 and 20.6% for the first eleven months of 2010).

²²⁰ See *infra* APPENDIX B (showing forty-four adoptions in 2009 and twenty-two adoptions each in 2010 and 2011, up from a previous all-time high of eleven in 2008).

²²¹ *Selectica, Inc. v. Versata Enters.*, No. 4241-VCN, 2010 WL 703062, at *25 (Del. Ch. Feb. 26, 2010), *aff’d*, 5 A.3d 586 (Del. 2010).

²²² In addition, there may be a law firm factor at work; certain law firms may have started advising their clients about NOL poison pills beginning in 2009. However, at this time the dataset does not speak to whether there is such a pattern.

value of outstanding shares, will have less concentrated public ownership, and will have more risk of being the target of an activist hedge fund or other agitating investor than a hostile takeover. If, however, the firms who have adopted NOL poison pills appear to be a random slice of publicly-held companies, then none of these theories may be behind the trend. The data seem to give support to both the Defensive Acquisition/Defensive Saboteur Hypotheses and the Strategic Board Hypothesis.²²³

A. *The Microcap Companies*

Of the 155 firms in the dataset, 110, or just over seventy percent, are microcap firms and have market capitalizations of under \$300 million, and sixty-six of those firms are nanocap companies, with market capitalizations of under \$50. For many of these firms, protecting the NOL assets could be the primary impetus behind the low-trigger poison pill.²²⁴ As the *Selectica* court noted, the NOL poison pill may be the most useful to preserve tax assets when a company has a very small capitalization. The *Selectica* court noted that the firm had a capitalization of \$23 million,²²⁵ but only thirty-three firms in the dataset out of 144 are as small as *Selectica* or smaller.

For many of these microcap and nanocap firms, particularly if such firms had large NOL carryovers, a Delaware court would almost certainly uphold an NOL poison pill after *Selectica*.²²⁶ Whether or not the NOL poison pill would actually meet its goal in any of these cases, however, is an open question. The poison pill has no physical effect on

²²³ See *infra* APPENDIX C. The data indicates that NOL poison pills have mainly been adopted by companies with either very small or very large market capitalizations, and less commonly by mid-sized companies. *Id.* Microcap companies have concerns both about volatility leading to an ownership change and being a takeover target; these concerns are not as salient for very large firms. Mid-sized firms would have more reason to adopt these plans for those reasons than large firms.

²²⁴ But see *Oakhurst Co.*, Current Report (Form 8-K) (Dec. 29, 1998) (stating as the reason for the rights plan not any tax assets but “the problem of a raider using what the Board of Directors perceives to be coercive tactics to deprive the Company’s Board of Directors and stockholders of any real opportunity to determine the destiny of the Company by forcing the raider to negotiate with the Company’s Board of Directors”).

²²⁵ *Selectica*, 2010 WL 703062, at *2. *Selectica, Inc.* adopted its NOL poison pill on November 17, 2008. *Id.* at *7. For the fiscal year ending March 31, 2009, *Selectica* reported that the aggregate value of its common stock not held by affiliates was a little over \$29 million. See *Selectica, Inc.*, Annual Report (Form 10-K) (July 9, 2009); *infra* APPENDIX A (showing *Selectica*’s valuation).

²²⁶ See *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586, 600-01 (Del. 2010) (finding that the threat of losing a large tax asset satisfied the first prong of the *Unocal* test).

the purchaser of shares; if the purchaser is unaware or unconcerned, the pill will not be able to block the purchaser's trading and will result in the shareholders participating in the rights plan increasing their percentages. In the case of the Bad Faith Saboteur, the NOL poison pill may slow the purchaser down, but might not be able to prevent an ownership change given the operation of the poison pill and a committed Bad Faith Saboteur. Likewise, if a Hostile Acquirer has already valued the NOL tax assets as zero following an acquisition, then the deterrence value of the NOL poison pill is merely dilution, at a very low ownership level.

B. *The Billion-Dollar Companies*

Though the fact that seventy percent of firms adopting NOL poison pills are microcap companies should not be surprising and supports the typical arguments for adopting a tax benefit preservation plan, the existence of very large firms in the dataset is counterintuitive. In fact, very large firms are the second biggest adopters of the NOL poison pill.²²⁷ The presence of twenty-seven firms with market capitalizations of over \$1 billion²²⁸ (and four more whose market capitalizations hover close to that mark)²²⁹ in the dataset, 17.42% of firms who adopted NOL poison pills during the time period, strongly supports the Strategic Board Hypothesis. In 2009, eleven out of forty-four firms that adopted NOL poison pills were billion-dollar companies.²³⁰ The three largest firms in the dataset are American International Group (AIG), Ford Motor, and Citigroup, with market capitalizations of

²²⁷ See *infra* APPENDIX C.

²²⁸ For comparison, the SEC uses a \$700 million market capitalization (held by non-affiliates) as the dividing line between "Well-Known Seasoned Issuer" (WKSI) and "Seasoned Issuer." See 17 C.F.R. 230.405 (2016). The dataset contains thirty-one WKSIs (20%). See *infra* APPENDIX A.

²²⁹ These firms are J.C. Penney Company, Inc.; Ally Financial; ARIAD Pharmaceuticals, Inc.; CapitalSource Inc.; US Airways Group, Inc.; KB Home; AOL Inc.; The Howard Hughes Corporation; Eastman Kodak Company; Level 3 Communications, Inc.; American International Group, Inc.; Tenet Healthcare Corporation; GenOn Energy, Inc.; Dendreon Corporation; Synovus Financial Corp.; Ford Motor Company; D.R. Horton, Inc.; CIT Group Inc.; Toll Brothers, Inc.; Citigroup Inc.; Sirius XM Holdings Inc.; Mirant Corporation; PulteGroup, Inc.; Centex Corporation; tw telecom inc.; Lear Corporation; The Ryland Group, Inc., Reinsurance Group of America, Inc.; Charter Communications, Inc.; and USG Corporation.

²³⁰ See *infra* APPENDIX A (listing tw telecom inc.; KB Home; Centex Corporation; Citigroup Inc.; PulteGroup, Inc.; Mirant Corporation; Sirius XM Holdings Inc.; Toll Brothers, Inc.; CIT Group Inc.; D.R. Horton, Inc.; and Ford Motor Company as adopting NOL poison pills in 2009).

approximately over \$10 billion as of the date of adoption. These firms do not seem at risk for either an unintentional “ownership change” under section 382 or a completed hostile takeover, given the availability of other tried and true defensive tactics. Hostile bids still occur, but generally result either in the board rebuffing the offeror, the offeror raising the price, or the board finding a different acquirer.²³¹ Though shareholder proxy advisor services have pressured firms to de-stagger boards²³² and forego other draconian defensive tactics, case law is on the side of the board of directors that wants to reject an unsolicited bid and adopt a garden-variety poison pill.²³³ However, these firms may be particularly attractive to activist shareholders.²³⁴ In fact, activist shareholders may join with unsolicited bidders in increasing pressure on boards to seek value for shareholders.²³⁵

V. REFORMING SECTION 382?

Though *Selectica* paints a picture of a corporation trembling in fear that its NOLs will be destroyed by either Accidental Bunglers or Bad Faith Saboteurs, to date no broad-based clamor for section 382 has emerged. The financial crisis undoubtedly resulted in large numbers of firms with large NOLs, but presumably the other modern-day

²³¹ See Jen Wieczner, *Why Mylan Just Lost the Largest Hostile Takeover Battle Ever*, FORTUNE (Nov. 13, 2015), <http://fortune.com/2015/11/13/mylan-loses-hostile-bid-perrigo/> (detailing the failed hostile bid of Mylan for Perrigo, explaining “rarely do deals happen under hostile conditions: [s]ince 2000, completed takeovers of unwilling targets have been worth less than \$10 billion each”); see also David Gelles, *Hostile Takeover Bids for Big Firms Across Industries Make a Comeback*, N.Y. TIMES, June 13, 2014, at B1 (“Constraints on hostile deal making remain. Such efforts require a commitment of resources and the willingness to engage in war of words with a reluctant target, all without any guarantee of success.”)

²³² See Andrew A. Schwartz, *Corporate Legacy*, 5 HARV. BUS. L. REV. 237, 240-43 (2015) (“Nearly all public companies have abandoned [takeover defenses] under the advice and pressure of shareholder advocates.”).

²³³ See Robert Anderson IV, *The Long and Short of Corporate Governance*, 23 GEO. MASON L. REV. 19, 25 (2015) (“The prospects for the hostile takeover as a solution to corporate governance problems were effectively squashed by Delaware’s case law and statutory enactments in the late 1980s and early 1990s . . .”).

²³⁴ See Tom Braithwaite, *US Banks Can’t Ignore Shareholder Activism*, FIN. TIMES (Oct. 29, 2012, 6:04 PM), <http://on.ft.com/Ub0xsS> (reporting on shareholder activism at State Street and Citigroup); Ben McLannahan & Stephen Foley, *AIG’s Chief Executive Begins Fightback Against Activist Investors*, FIN. TIMES (Dec. 29, 2015, 4:31 PM), <http://on.ft.com/1ko07TZ> (discussing Carl Icahn’s pressure on AIG’s CEO Peter Hancock to conduct asset sales).

²³⁵ See Gelles, *supra* note 231 (“In some ways, the threat of activists has replaced the threat of hostile deal making. Companies now prepare for activist investors as they once did for hostile bidders.”).

recession from March 2001 to November 2001 also caused NOLs restricted under the same section 382. If section 382 is having such significant unintended consequences, such as giving Bad Faith Saboteurs significant power over competitors or causing firms to haphazardly lose valuable tax assets, then section 382 should be reformed. However, this Article does not argue that section 382 is causing as much turmoil as the recent uptick in NOL poison pills would indicate, further bolstering the hypothesis that NOL poison pills are being used against activist shareholders, not any group that actually threatens NOL carryovers. Companies most at risk of having an inadvertent adverse section 382 event are publicly-held nanocap and microcap companies, and perhaps that universe is so sufficiently small that the problem of an accidental triggering event is isolated and rare. A survey of case law, requests for administrative guidance, or even congressional testimony suggest that the involuntary loss of NOL carryovers is not a widespread problem.²³⁶

That being said, if section 382 is providing cover for boards to act strategically against activist shareholders, then perhaps amending that section could take away this weapon. For example, the rule could provide that shareholders who file a Schedule 13D or otherwise launch a tender offer will not be considered in the calculation of an ownership change unless that shareholder becomes a 10% shareholder. Again, even this reform may not be necessary.

VI. RESHAPING NOL POISON PILL JURISPRUDENCE

If the Delaware courts once again face a shareholder suit in which a shareholder claims that a board of directors has breached the duty of loyalty by adopting or maintaining an NOL poison pill with a low trigger, then hopefully the courts will use the *Unocal* test to ensure that the company is using such a pill in good faith. If the *Unocal* analysis is supposed to ferret out pretextual arguments by boards for defending the company against disfavored share purchasers, then

²³⁶ For example, a search for 382 & “net operating loss” in Westlaw Congressional Testimony database in the past three years returned forty-four results, few of them relevant to this inquiry. When speakers do testify to Congress regarding section 382, they generally are asking for more generous carrybacks, up-front expensing, or exemptions for research and development NOLs. See, e.g., *Fostering the Competitive Edge: Examining the Effect of Federal Policies on Competition, Innovation, and Job Growth: Hearing Before the H. Comm. on Science, Space & Tech.*, 112th Cong. (2012) (statement of Ron Cohen, President and CEO, Acorda Therapeutics) (arguing for the exemption of research and development NOLs from the 382 limitation and for exemptions from “ownership change” for certain types of venture financing).

courts should not accept that any corporation with NOLs is justified in using an NOL poison pill against a 5% shareholder. Under the first prong of the *Unocal* test, the court should in fact determine whether the board is pre-textually claiming a fear that the NOLs will be impaired. Some factors the court should consider are whether the firm has a small capitalization, whether the value of the NOLs are large in comparison with the firm's net income or other financial metric, whether the firm has attempted to put a transfer limitation in its charter, and whether the firm is reasonably valuing its NOLs in terms of being able to use them to offset income before expiration.

Under the second prong of the *Unocal* test, courts should consider carefully whether a 4.99% or similar trigger has a preclusive effect on a proxy fight. Most firms will not be like *Selectica*, with a small number of shareholders in addition to a small market capitalization. For example, a 4.99% shareholder at Citigroup or Ford Motor Corporation launching a proxy fight would have a much lower probability of success given the highly dispersed nature of the public shareholders.

The worst outcome would be that the holding in *Airgas* and the special facts of *Selectica* pave the way for corporate boards to survive a *Unocal* analysis with a lower threshold for both prongs. That is, any uninvited tender offer constitutes a sufficient threat, and a very low threshold trigger restricting share ownership is not preclusive. If so, then any corporation with a low-trigger poison pill will be aided by the courts, NOLs or not.

In the closely-held context, another Delaware case, *eBay v. Newmark*,²³⁷ seems to hold some insight into the low-trigger poison pill.²³⁸ In that case, two of the three shareholder-directors of Craigslist adopted a poison pill and a staggered board to further isolate the third shareholder, eBay.²³⁹ Because the two individual founder-shareholders were parties to a shareholder agreement, eBay could not possibly acquire the company through purchases or a gain control through a proxy contest.²⁴⁰ However, combined with a dilutive issuance that decreased eBay's percentage from 28.4% to 24.9%, the founder-shareholders may have hoped to convince eBay to sell its shares to the company or themselves. The Delaware Chancery Court ordered

²³⁷ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

²³⁸ See Joseph M. Grieco, Note, *The Ever-Evolving Poison Pill: The Pill in Asset Protection and Closely-Held Corporation Cases*, 36 DEL. J. CORP. L. 625, 637-38 (2011) (connecting the two cases, *Selectica* and *eBay*, as the two cases in which a poison pill is analyzed in a non-takeover context).

²³⁹ *eBay*, 16 A.3d at 6.

²⁴⁰ *Id.* at 31.

rescission of the poison pill.²⁴¹ Applying the *Unocal* test, Chancellor Chandler found that the directors could not have reasonably concluded that a legitimate threat existed.²⁴² The founders argued that even though eBay could not gain control during their lifetimes, following their deaths, eBay might gain control and destroy the Craigslist corporate culture.²⁴³ Chancellor Chandler determined that the board had not sufficiently identified the existence of a “distinctively predictable craigslist culture” that promoted stockholder value and had also not proved that the rights plan was adopted to preserve that corporate culture.²⁴⁴ Instead, the court found the rights plan was adopted to punish eBay for (legally) competing with Craigslist.²⁴⁵

Similarly, though a tax asset, like corporate culture, may have value, a board of directors should have to articulate that asset’s connection to stockholder value. At what point will the NOL have value to the shareholders and how much are good starting points in this inquiry. In addition, a court should inquire as to whether the board adopted the NOL poison pill to protect tax assets or to achieve a different goal.

CONCLUSION

Whether one subscribes to the agency theory of shareholder primacy or the contractarian theory of director primacy, boards of directors have great discretion in determining whether, when, and how to sell the corporation. Defensive tactics, like poison pills, can be tools in wielding that discretion in the service of creating shareholder value. However, a poison pill either to oppress a minority shareholder, as in *eBay v. Newmark*, or to minimize the impact of activist shareholders, seems to exceed the “maximum dosage” of the pill. The

²⁴¹ *Id.* at 35.

²⁴² *See id.* at 31-33 (noting that *Unocal* could be used in a closely-held or publicly-held context).

²⁴³ *See id.* at 32 (“Jim and Craig ask this Court to validate their attempt to use a pill to shape the future of the space-time continuum.”).

²⁴⁴ Chancellor Chandler pointed out that the culture Jim and Craig were describing was actually designed not to enhance shareholder value, i.e., the culture focused on not monetizing Craigslist. *See id.* at 34 (“Jim and Craig did prove that they personally believe Craigslist should not be about the business of stockholder wealth maximization, now or in the future.”). *But see* David A. Wishnick, Comment, *Corporate Purpose in a Free Enterprise System: A Comment on eBay v. Newmark*, 121 YALE L. J. 2405, 2412-13 (making the interesting argument that given Delaware’s penchant for private ordering, shareholder maximization should be merely the default purpose of a for-profit corporation).

²⁴⁵ *See eBay*, 16 A.3d at 35.

NOL poison pill, while facially plausible as a tool to protect tax assets from impairment, may be a stepping stone to a low-trigger anti-shareholder pill.²⁴⁶ Instead of warding off uninvited potential acquirers, the pill could ward off shareholder voice.

If an NOL poison pill was self-enforcing, like a charter amendment restricting transfers of shares, then it would work against the various types of shareholders that could impair tax assets. However, the Accidental Bungler seems hard to deter because she (individually or as a group) is not paying attention anyway and the Bad Faith Saboteur is fairly motivated but thankfully rare. The Hostile Acquirer, though more prevalent, seems unimpaired by the NOL poison pill. Logically, then, the most effective and probable use of the NOL poison pill is to thwart activist shareholders, with the existence of the deferred tax asset providing pre-textual cover for the board. As the saying goes, “hard cases make bad law,”²⁴⁷ and that may be the case with *Versata Enterprises, Inc. v. Selectica, Inc.*²⁴⁸ The target in that case was very peculiar: small, concentrated capitalization, publicly-held, with abnormally large NOLs.²⁴⁹ Moreover, the would-be acquirer was unique: a shareholder, a judgment creditor, and a competitor.²⁵⁰ Perhaps *Selectica* will be cabined to its specific set of facts, a situation in which a bizarre competitor threatened a tax asset of at least possible value and in which a proxy contest would have required recruiting only a few other shareholders, though most had interests adverse to the competitor. Or, following rulings in *Selectica*, *Airgas*²⁵¹ and *Ruprecht*,²⁵² boards will feel empowered to hold activist shareholders at arm’s-length back behind the 5% line with an NOL poison pill with a low trigger. Following *Selectica*, any target with NOLs will be able to

²⁴⁶ See Rock, *supra* note 27, at 891-92 (suggesting that an NOL poison pill could be used by a corporate board to choose its own shareholders).

²⁴⁷ See *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (“Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance . . . but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”).

²⁴⁸ 5 A.3d 586 (Del. 2010).

²⁴⁹ See *id.* at 590.

²⁵⁰ See *id.*

²⁵¹ *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011); see discussion *supra* Part I.C.

²⁵² *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029 (Del. Ch. May 2, 2014) (upholding Sotheby’s shareholder rights plan, which created a 10% trigger for shareholders who file a Schedule 13D with the SEC, versus a 20% trigger for shareholders who file a Schedule 13G).

convince a court of the threat to that tax asset, though outside of this context, taxpayer do not complain of the vagaries of section 382. In the worst case, taxpayers with or without NOLs will be able to use a garden-variety poison pill with a very low trigger. Because *Airgas* set a low bar for what constitutes a threat under *Unocal* and because *Selectica* set a high bar for what constitutes a preclusive reaction to that threat, the next poison pill case may put the last nail in the *Unocal* test's coffin. If *Airgas* stood for the proposition that boards can "just say no," the next case will decide whether boards can "just say go."

APPENDIX A

NOL Poison Pill Companies (Dec. 29, 1998 – Feb. 27, 2014)

	Company Name ²⁵³	Adoption Date	SIC Code	Market Capitalization ²⁵⁴
1	Winland Electronics	2/27/2014	3823	2,286,807
2	Aetrium Incorporated	2/13/2014	2452	5,633,500
3	J. C. Penney Company, Inc.	1/27/2014	5311	2,462,547,444
4	Ally Financial	1/9/2014	6172	10,500,000,000
5	Tix Corporation	11/12/2013	7830	28,877,193 ²⁵⁵
6	ARIAD Pharmaceuticals, Inc.	10/31/2013	2836	3,100,000,000

²⁵³ The list of companies that adopted NOL poison pills during this time period was provided by a database called Shark Repellent. See SHARK REPELLENT, <https://sharkrepellent.net/> (last visited July 12, 2016). The data relating to SIC codes and market capitalization was hand-collected from information provided by each company in its filings with the SEC, unless otherwise noted.

²⁵⁴ Unless otherwise noted, for purposes of this data, "market capitalization" means the value given by such firm in its Annual Report on Form 10-K filed for the year in which the firm adopted an NOL poison pill as the aggregate value of common stock held by non-affiliates. Because this amount does not include common shares held by affiliates, the actual market capitalization would be somewhat higher for each firm.

²⁵⁵ Tix Corporation is not a reporting company and does not choose to file Annual Reports with the SEC or on its website. This market capitalization was derived from the number of outstanding shares (23,669,831) entitled to vote at its 2013 annual meeting as of the record date, October 11, 2013, at the share price on November 15, 2013 (\$1.22/share). See Tix Corporation, Proxy Statement, at 2 (Oct. 21, 2013), edg1.precisionir.com/irwebsites/tixcorp/Tix_2013_Proxy_Statement.pdf.

7	The Dolan Company	9/17/2013	7389	191,045,862
8	Transcept Pharmaceuticals, Inc. ²⁵⁶	9/13/2013	2834	48,144,662
9	SED International Holdings, Inc.	9/9/2013	5045	10,100,000
10	IMPAC Mortgage Holdings, Inc.	9/3/2013	6798	66,000,000
11	CapitalSource Inc.	7/22/2013	6022	1,825,859,491
12	iGo, Inc.	6/20/2013	3577	8,000,000
13	A V Homes, Inc.	6/19/2013	1531	272,056,141
14	Digirad Corporation	5/23/2013	3845	40,509,124
15	US Airways Group, Inc.	2/13/2013	4512	2,150,000,000
16	Broadwind Energy, Inc.	2/12/2013	3360	45,807,796
17	BBX Capital Corporation	2/7/2013	6035	90,100,000
18	Integrated Electrical Services, Inc.	1/24/2013	1731	39,100,000
19	Krispy Kreme Doughnuts, Inc.	1/14/2013	5400	414,100,000
20	First Security Group, Inc.	10/24/2012	6021	5,900,000
21	HomeTrust Bancshares, Inc.	9/25/2012	6035	271,900,000
22	Old Second Bancorp, Inc.	9/12/2012	6022	17,300,000
23	Horizon Lines, Inc.	8/27/2012	4400	4,600,000
24	AOL Inc.	8/26/2012	7374	2,600,000,000
25	Vonage Holdings Corp.	6/7/2012	4813	344,612,156
26	Dendreon Corporation	5/4/2012	2834	1,120,026,053
27	Myrexix, Inc.	3/29/2012	2834	69,028,808

²⁵⁶ Now Paratek Pharmaceuticals, Inc.

28	The Howard Hughes Corporation	2/24/2012	6798	2,300,000,000
29	Makemusic, Inc.	2/21/2012	7372	11,427,417
30	SofTech, Inc.	2/3/2012	7373	1,085,391
31	Unwired Planet, Inc. ²⁵⁷	1/28/2012	7372	134,990,661
32	Steel Excel Inc.	12/20/2011	1389	209,300,000
33	Internet Patents Corporation ²⁵⁸	11/23/2011	7389	20,112,000
34	Independent Bank Corporation	11/15/2011	6022	16,550,000
35	ModusLink Global Solutions, Inc.	10/17/2011	7389	262,880,716 ²⁵⁹
36	FNBH Bancorp, Inc.	10/14/2011	6021	1,268,609
37	USEC Inc. ²⁶⁰	9/29/2011	1400	395,400,000
38	Novation Companies, Inc.	9/15/2011	6531	37,949,000
39	Biota Pharmaceuticals Inc. ²⁶¹	8/25/2011	2836	216,835,372
40	Rentech, Inc.	8/5/2011	2870	228,300,000
41	Eastman Kodak Company	8/1/2011	3861	963,000,000
42	Harbor BioSciences, Inc.	7/29/2011	2834	7,372,544
43	MedCath Corporation	6/13/2011	8062	283,800,000
44	Comstock Holding Companies, Inc.	5/6/2011	1531	14,209,972
45	Onvia, Inc.	5/4/2011	7389	22,995,805
46	Level 3 Communications, Inc.	4/10/2011	4813	2,990,000,000

²⁵⁷ Now Great Elm Capital Group, Inc.

²⁵⁸ Formerly Prism Technologies Group, Inc.

²⁵⁹ A Form 10-K covering the date of adoption is not available. This figure is for the fiscal year ended July 31, 2011, or the week prior to the adoption.

²⁶⁰ Now Centrus Energy Corp.

²⁶¹ Now Aviragen Therapeutics, Inc.

47	CommunityOne Bancorp	4/15/2011	6021	4,600,000
48	American International Group, Inc.	3/9/2011	6331	12,986,000,000
49	Blackstone Mortgage Trust, Inc. ²⁶²	3/3/2011	6798	85,956,988
50	United Community Banks Inc.	2/22/2011	6022	594,196,291
51	Retail Ventures, Inc.	2/7/2011	5331	228,988,886
52	Tenet Healthcare Corporation	1/7/2011	8062	2,576,016,843
53	SatCon Technology Corporation	1/6/2011	3674	218,914,302
54	Columbia Laboratories, Inc. ²⁶³	11/29/2010	2834	61,950,645
55	GenOn Energy, Inc.	11/23/2010	4911	1,334,952,151
56	Central Pacific Financial Corporation	11/23/2010	6022	42,804,000
57	Fidelity Southern Corporation	11/18/2010	6022	44,163,154
58	Anchor BanCorp Wisconsin Inc.	11/05/2010	6036	13,700,000
59	Leap Wireless International, Inc.	9/13/2010	4812	801,693,696
60	Triad Guaranty Inc.	9/13/2010	6351	2,569,424
61	The PMI Group, Inc.	8/12/2010	6351	403,800,000
62	Ditech Networks, Inc.	7/7/2010	3661	17,359,619

²⁶² Formerly Capital Trust, Inc.

²⁶³ Now Juniper Pharmaceuticals, Inc.

63	Extreme Networks, Inc.	6/30/2010	3576	256,400,000
64	The Allied Defense Group, Inc.	6/24/2010	3480	29,471,514
65	Palm Harbor Homes, Inc.	6/22/2010	2452	32,515,711 ²⁶⁴
66	SMTC Corporation	6/9/2010	3672	41,200,000
67	Autobyte Inc.	5/26/2010	7370	51,000,000
68	THQ Inc.	5/11/2010	7372	273,100,000
69	Synovus Financial Corp.	4/26/2010	6021	1,838,002,043
70	Sterling Financial Corporation	4/14/2010	6036	28,000,000
71	Abraxas Petroleum Corporation	3/16/2010	1311	191,912,033
72	Centerline Holding Company	3/5/2010	6500	39,200,000
73	Sajan, Inc. ²⁶⁵	2/25/2010	7389	10,146,573
74	Ambac Financial Group Inc.	2/2/2010	6351	192,435,130
75	Pendrell Corporation ²⁶⁶	1/29/2010	6794	247,684,867
76	Institutional Financial Markets, Inc. ²⁶⁷	12/21/2009	6211	43,200,000
77	Hancock Fabrics, Inc.	11/12/2009	5940	17,529,757
78	U.S. Concrete, Inc.	11/5/2009	3272	64,377,699
79	James River Coal Company	11/3/2009	1221	336,982,000
80	American Axle & Manufacturing Holdings, Inc.	10/30/2009	3714	160,400,000
81	Asure Software, Inc. ²⁶⁸	10/28/2009	7373	5,830,460 ²⁶⁹

²⁶⁴ This figure is from the issuer's Annual Report on Form 10-K for the year ended March 26, 2010, the last year for which an annual report is publicly available.

²⁶⁵ Formerly Mathstar, Inc.

²⁶⁶ Formerly ICO Global Communications (Holdings) Ltd.

²⁶⁷ Formerly Cohen & Co.

²⁶⁸ Formerly Forgent Networks, Inc.

82	West Coast Bancorp	10/23/2009	6022	32,090,000
83	Radian Group Inc.	10/9/2009	6351	223,726,164
84	Century Aluminum Company	9/29/2009	3334	285,000,000
85	Interstate Hotels & Resorts, Inc.	9/24/2009	7011	78,697,381 ²⁷⁰
86	BFC Financial Corporation	9/21/2009	6035	10,800,000
87	Energy Conversion Devices, Inc.	9/30/2009	3674	483,500,000
88	Ford Motor Company	9/11/2009	3711	36,667,239,288
89	SFN Group, Inc.	9/9/2009	7363	210,526,156
90	EasyLink Services International Corp.	8/25/2009	7371	37,470,298
91	D.R. Horton, Inc.	8/19/2009	1531	2,802,403,000
92	Cinedigm Corp.	8/10/2009	7841	31,496,000
93	Mindspeed Technologies, Inc.	8/9/2009	3674	36,000,000
94	PMA Capital Corporation	8/6/2009	6331	144,452,431
95	Furniture Brands International, Inc. ²⁷¹	8/3/2009	2510	147,589,000
96	CIT Group Inc.	8/12/2009	6172	7,287,295,487 ²⁷²
97	Beazer Homes USA, Inc.	7/31/2009	1531	39,641,446
98	Solutia Inc.	7/27/2009	2800	583,700,000

²⁶⁹ This figure is from the issuer's Annual Report on Form 10-K for the fiscal year ended July 31, 2009, two months prior to the adoption date, which is the last publicly available annual report for this issuer.

²⁷⁰ This figure is from the issuer's Annual Report on Form 10-K for the fiscal year ended Dec. 31, 2008, ten months prior to the adoption date, which is the last publicly available annual report for this issuer.

²⁷¹ Now FBI Wind Down Inc.

²⁷² This figure is the value of the issuer's common stock as of the date the issuer emerged from bankruptcy protection on February 26, 2010; however, the value of the original common stock that was cancelled pursuant to the bankruptcy was listed as \$842,945,475 as of June 30, 2009.

99	Tri-S Security Corporation	7/16/2009	7381	6,981,505 ²⁷³
100	MGIC Investment Corporation	7/7/2009	6351	535,000,000
101	Destination XL Group, Inc. ²⁷⁴	6/29/2009	5651	62,300,000
102	Toll Brothers, Inc.	6/17/2009	1531	2,807,990,000
103	Opnext, Inc.	6/18/2009	3674	154,622,572
104	Citigroup Inc.	6/9/2009	6021	16,300,000,000
105	Arlington Asset Investment Corp.	6/1/2009	6799	56,000,000
106	ALJ Regional Holdings, Inc.	5/13/2009	7389	10,219,671 ²⁷⁵
107	Sirius XM Holdings Inc.	4/28/2009	4832	1,670,079,432
108	Power-One, Inc.	4/23/2009	3679	134,187,000
109	Youbet.com Inc.	3/31/2009	7990	99,100,000
110	Mirant Corporation	3/26/2009	4911	2,283,856,245
111	Quixote Corporation	3/16/2009	3089	54,246,888
112	CIFC Corp. ²⁷⁶	3/11/2009	6199	28,255,178
113	PulteGroup, Inc.	3/5/2009	1531	1,890,933,614
114	Centex Corporation ²⁷⁷	2/24/2009	1531	2,010,000,000
115	CLST Holdings, Inc.	2/5/2009	5065	1,632,996
116	Footstar, Inc.	2/4/2009	2834	19,800,000

²⁷³ This figure is from the issuer's Annual Report on Form 10-K/A for the fiscal year ended December 31, 2008, seven months prior to the adoption date, which is the last publicly available annual report for the issuer.

²⁷⁴ Formerly Casual Male Retail Group Inc.

²⁷⁵ ALJ Regional Holdings was not a reporting company until 2016, and as such has not yet filed Annual Reports with the SEC. This market capitalization was derived from the number of shares listed as outstanding in ALJ's own unaudited financials as of September 30, 2009 at the market price on that day of \$.21/share. See ALJ REGIONAL HOLDINGS, INC., ANNUAL REPORT FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2009, (2009) www.aljregionalholdings.com/clientcontent/alj/docs/Sept09Annual.pdf. The market price for ALJ shares on September 30, 2009 is available at *ALJ Regional Holdings, Inc. Common Stock Historical Stock Prices*, NASDAQ, www.nasdaq.com/symbol/aljj/historical (last visited Sept. 21, 2016).

²⁷⁶ Formerly Deerfield Capital Corp.

²⁷⁷ Now Centex LLC.

117	KB Home	1/22/2009	1531	1,321,039,890
118	CNO Financial Group, Inc. ²⁷⁸	1/20/2009	6321	430,000,000
119	tw telecom inc.	1/20/2009	4813	1,500,000,000
120	Lear Corporation	12/23/2008	3714	984,714,024
121	The Ryland Group, Inc.	12/17/2008	1531	908,752,014
122	Selectica Inc.	11/17/2008	7372	29,009,803
123	Woodbridge Holdings Corporation	9/29/2008	6552	88,200,000
124	Rural/Metro Corporation	9/15/2008	4100	21,000,000
125	Hovnanian Enterprises, Inc.	7/29/2008	1531	443,351,894
126	Reinsurance Group of America, Inc.	6/1/2008	6311	2,600,000,000
127	EDCI Holdings Inc.	4/2/2008	3663	28,600,000
128	The Management Network Group Inc. ²⁷⁹	3/27/2008	8742	24,500,000
129	Stamford Industrial Group, Inc.	2/11/2008	3460	53,225,106
130	Black Diamond, Inc. ²⁸⁰	2/7/2008	3949	76,900,000
131	Signature Group Holdings, Inc. ²⁸¹	10/23/2007	5063	15,651,056 ²⁸²

²⁷⁸ Formerly Consec, Inc.

²⁷⁹ Now Cartesian, Inc.

²⁸⁰ Formerly Clarus Corp.

²⁸¹ Now Real Industry, Inc. Signature Group Holdings, Inc. was the successor in bankruptcy to the legacy business of Fremont General Corporation, which filed for bankruptcy protection in June 2008 and emerged from bankruptcy as Signature in June 2010.

²⁸² This figure is from the issuer's Annual Report on Form 10-K for the fiscal year ended December 31, 2009, which purported to make current the company's filing obligations since fiscal year 2007. However, the market capitalization listed is as of June 30, 2009 only.

132	Charter Communications, Inc.	8/13/2007	4841	1,500,000,000
133	Star Gas Partners, L.P.	6/7/2007	5990	245,969,000
134	EDEN Bioscience Corporation	6/1/2007	5200	5,404,871
135	DGT Holdings Corp. ²⁸³	1/22/2007	3679	21,499,215
136	Web.com, Inc.	8/4/2006	7389	90,000,000
137	Hilltop Holdings Inc. ²⁸⁴	7/11/2006	6022	359,600,000
138	NOVT Corporation	5/31/2006	3845	16,050,000 ²⁸⁵
139	USG Corporation	1/30/2006	3270	2,882,045,000
140	SWK Holdings Corporation ²⁸⁶	1/26/2006	6159	63,857,628
141	Cygnus, Inc.	10/17/2005	2834	12,302,775 ²⁸⁷
142	CoSine Communications Inc.	9/1/2005	3576	9,669,668
143	JPS Industries Inc.	5/2/2005 ²⁸⁸	2211	24,610,362

²⁸³ Formerly DEL Global Technologies Corp.

²⁸⁴ Formerly Affordable Residential Communities Inc.

²⁸⁵ This figure is from the issuer's Annual Report on Form 10-K for the fiscal year ended December 31, 2005, six months prior to the adoption date, which is the last annual report publicly available. NOVT Corporation deregistered its common stock with the SEC on August 11, 2006. See NOVT Corporation, Current Report (Form 8-K) (Aug. 11, 2006).

²⁸⁶ Formerly Kana Software, Inc.

²⁸⁷ This figure is from the issuer's Annual Report on Form 10-K for the fiscal year ended December 31, 2004, ten months prior to the adoption date, which is the last annual report publicly available. Cygnus, Inc. was granted a no-action letter from the SEC relieving the company of its duty to file a Form 10-K for 2005 due to its dissolution and liquidation in early 2006. See Cygnus, Inc., Current Report (Form 8-K) (Mar. 28, 2006).

²⁸⁸ Sharkrepellent.net reports that JPS Industries adopted an NOL poison pill as of this date; however, JPS Industries was not a reporting company, so there is no publicly available document evidencing this. However, trade publications noted the adoption of the plan at the time, and the May 2005 plan was referenced in documents filed pursuant to JPS Industries' acquisition by Handy & Harman Ltd. See *Companies in Controversy Shore Up Protections*, MERGERS & ACQUISITIONS (July 1, 2005), www.themiddlemarket.com/maj/20050701/31659-1.html; Handy & Harman Ltd., Current Report (Form 8-K) (June 1, 2015) (reporting that Handy & Harman was

144	Bayou Steel Corporation	3/8/2005	3312	90,000,000 ²⁸⁹
145	Wheeling-Pittsburgh Corporation	2/14/2005	3312	161,000,000
146	Wilhelmina International, Inc. ²⁹⁰	6/18/2004	8742	11,386,024
147	BNS Holding Inc.	10/6/2003	6500	15,137,220
148	NCM Services Inc. ²⁹¹	5/15/2003	9995	3,584,377
149	Crown Crafts, Inc.	4/29/2003	2211	3,727,011
150	American Independence Corp.	7/29/2002	6321	38,608,000
151	CRIIMI Mae Inc.	1/23/2002	6798	97,381,769
152	HomeGold Financial, Inc.	1/10/2002	6141	6,300,000 ²⁹²
153	Maxicare Health Plans, Inc.	6/6/2000	6324	22,585,305
154	Fog Cutter Capital Group Inc. ²⁹³	12/23/1999	5812	21,960,991
155	Sterling Construction Company, Inc. ²⁹⁴	12/29/1998	1600	4,298,385

acquiring JPS Industries and that JPS Industries was amending its 2005 shareholder rights plan to allow for the acquisition).

²⁸⁹ This price is derived from news reports that Black Diamond Capital Management LLC purchased all the stock of Bayou Steel on June 1, 2006 for \$150 million, which represented a 66.67% premium over the existing share price. See Bayou Steel Announces Closing of Acquisition, BUSINESS WIRE (June 1, 2006, 4:40 PM), www.businesswire.com/news/home/20060601005969/en/Bayou-Steel-Announces-Closing-Acquisition.

²⁹⁰ Formerly New Century Equity Holdings.

²⁹¹ Formerly Geoworks Corporation.

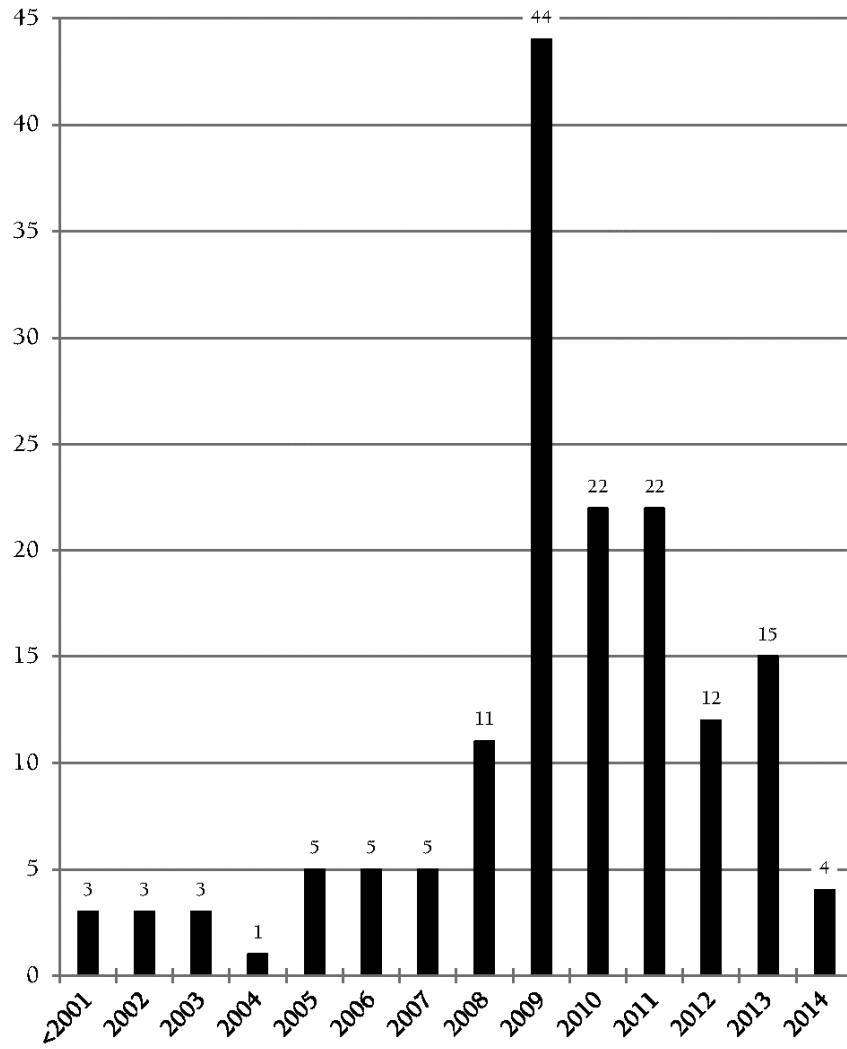
²⁹² This figure is from the issuer's Annual Report on Form 10-K for the fiscal year ended December 31, 2001, ten days prior to the adoption date, which is the last annual report publicly available. In March 2003, prior to filing a Form 10-K for 2002, the company filed for bankruptcy protection. See Homegold Financial, Inc., Current Report, (Form 8-K) (June 30, 2003).

²⁹³ Formerly Wilshire Real Estate Investment Trust Inc.

²⁹⁴ Formerly Oakhurst Company, Inc.

APPENDIX B

Adoptions by Year (Jan. 1998 – Feb. 27, 2014)



APPENDIX C

Adoptions by Market Capitalization and Year

