THE STATE OF STATE ANTITAKEOVER LAW

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This Article is the first to examine systematically state antitakeover law outside Delaware. It conducts a research of all available cases to find whether states with pill endorsement and other constituency statutes follow Delaware’s enhanced fiduciary duties or replace them with weaker standards. It finds substantial variations from Delaware’s law.

Unlike Delaware, most of the states with relatively strong other constituency and pill endorsement statutes do not impose enhanced fiduciary duties on managers in change-of-control situations. Instead, they apply only the ordinary business judgment rule to management’s use of antitakeover tactics.

This Article has implications for antitakeover law, the market for corporate law, and the desirability of federal intervention. In particular, it provides support for adopting Delaware’s enhanced fiduciary duties—Unocal, Revlon, and Blasius—as federally imposed minimum standards. This would not only improve state antitakeover law outside Delaware, but may also result in improvements to Delaware law since Delaware is currently dragged down by other states.

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INTRODUCTION

Antitakeover law, which regulates what management can and cannot do in change-of-control situations, is one of the most heavily researched, debated, and litigated areas in corporate law. While the use of antitakeover devices may serve business purposes, it may also reflect conflicts of interest and weaken the disciplinary power of the market for corporate control.\(^1\)

Since half of all publicly held companies are incorporated in Delaware, the debate over antitakeover law has tended to focus almost exclusively on Delaware law. This law can be straightforwardly summarized. First, although management’s conduct in running the day-to-day affairs of the company is subject to a deferential standard of judicial review under the business judgment rule (“BJR”), managers in change-of-control situations are subject to enhanced fiduciary duties under the Unocal, Revlon, and Blasius standards.\(^2\) Second, while Delaware courts allow management to fight hostile takeovers by using the classic poison pill, they do not allow the use of extreme versions of the pill—the so-called “dead hand” and “slow hand” pills.

But what about non-Delaware antitakeover law, which controls the other half of publicly held companies? To date, no one has examined systematically whether other states follow Delaware standards. Other states have adopted some antitakeover statutes addressing management’s use of defensive tactics, including pill

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\(^2\) For a detailed description of Delaware enhanced standards, see infra Section I.A.
endorsement and other constituency statutes, but conventional wisdom has been that since Delaware case law has allowed managers to use the pill vigorously, these statutes do not create a substantially different regime from Delaware law.\(^3\) To date, however, no one has examined how these statutes are actually applied. And in particular, whether they lead courts to apply similar or different fiduciary duty standards for management use of defensive tactics. This Article will document, for the first time, a systematic study of state antitakeover law. It focuses on one question: what are the standards that courts in states with and without antitakeover statutes—especially pill endorsement and other constituency/directors’ duties statutes, which regulate management’s use of defensive tactics (“Defensive Tactics Statutes” or “DTS”)—apply to managers defending against a

\(^3\)See, e.g., Lucian Arye Bebchuk, Alma Cohen & Allen Ferrell, Does the Evidence Favor State Competition in Corporate Law?, 90 Cal. L. Rev. 1775, 1803 (2002) (“Delaware has a well developed body of case law, which makes the absence of some types of antitakeover statutes practically irrelevant. . . . Because of the large body of Delaware judge-made law upholding the indefinite use of poison pills, there is no need for an antitakeover statute explicitly authorizing the use of poison pills (a poison-pill-endorsement statute) or for an antitakeover constituency statute that provides managers with discretion to defend against bids.”); John C. Coates IV, Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence, 79 Tex. L. Rev. 271, 323 & n.203 [hereinafter Coates, Takeover Defenses] (pointing out that antitakeover rules “were rendered vestigial by judicial approval and widespread adoption of the pill” since with either of them a bidder needs a shareholder vote to complete a takeover). Cf. Roberta Romano, The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters, 23 Yale J. on Reg. 209, 235 (2006) [hereinafter Romano, Laboratory] (“In Delaware, which has neither an other constituency nor a poison pill validation statute, the state supreme court has upheld poison pill defenses, rendering statutory validation unnecessary while it has rejected the broad discretion accorded directors under other constituency statutes, by requiring any consideration of non-shareholder interests to provide a benefit to the shareholders, and by rejecting the propriety of such considerations in a takeover auction. . . . [I]t is plausible to contend that Delaware’s less restrictive approach to takeovers did not have a strong influence on other states. However, state courts still have considerable leeway to evaluate the discretion accorded boards under the statutes, and except for Connecticut, the statutes would appear to be little more than symbolic politics . . . .”). Romano and other scholars have argued that Delaware’s approach to antitakeover law is better than that of other states, but they point mainly to the fact that Delaware has lagged behind other states in legislating antitakeover rules. The few substantive differences to which they point are quite small and related mainly to one statute, Delaware’s business combination statute. See, e.g., Roberta Romano, The Need for Competition in International Securities Regulation, 2 Theoretical Inquiries L. 387, 530–33 (2001) [hereinafter Romano, The Need for Competition].
takeover? Do they follow Delaware enhanced fiduciary duties or do they impose weaker fiduciary duties?

The Article proceeds as follows: Part I will summarize the common understanding of state antitakeover law, focusing on how Delaware fiduciary duties differ from the BJR. Part II will be the heart of the paper. It will report the results of an examination of all available antitakeover case law (108 cases, listed in Appendix A) and a fifty-state survey of DTS.

The results are surprising and differ from common assumptions. The research finds that some states have rejected the Unocal and Revlon standards that impose enhanced managerial duties in Delaware, and shows that it is questionable whether these standards apply in other states. In particular, Part II finds that to the extent we can observe, courts in states with relatively strong (and sometimes even weak) DTS have relied on these statutes to reject the imposition of enhanced duties and apply the BJR. States with no DTS follow Delaware standards. These results, by and large, are supported by comparison of cases before and after the passage of the statutes. Furthermore, in Nevada, where a court decided to follow Unocal and Revlon despite the state’s relatively strong statutes, the legislature stepped in to correct the mistake. Finally, subject to a small number of observations, the findings suggest that extreme pills might be allowed in some other states.

Tables 1 through 3 summarize the results for each standard of fiduciary duty—Unocal, Revlon, and Blasius. Table 4 summarizes the results for extreme pills. Table 6 summarizes the existence and strength of DTS in each of the states. Table 7 summarizes the findings for each state—whether it follows Unocal, Revlon, and Blasius and whether it allows extreme pills, including references to the relevant cases. Thus, together tables 6 and 7 report the legal situation in each of the fifty states. They also provide additional transparency regarding the data and its classification.

4To find all available cases, I searched for the following terms in Westlaw and LexisNexis: “Unocal,” “Revlon,” “Blasius,” “poison pill,” “hostile takeover,” “dead hand pill,” “slow hand pill,” and references for the cases Quickturn and Invacare. The search turned up 108 relevant cases (after eliminating the cases that were litigated in other states’ courts but involved Delaware targets and therefore applied Delaware law).
For many states, there are no available cases. The predictive power of the results for these states is limited because of the small size of each standard sample and omitted variables, among other factors. The study therefore focuses on describing the data. With respect to states that do not have cases or statutes that explicitly reject Delaware standards, the study raises the burden of showing that it is at least possible that they will not follow Delaware standards.

Part III will serve to support these results with evidence concerning the adoption of extreme pills, reported in Table 5. It finds that states with stronger DTS have a relatively high proportion of extreme pills, while having a lower proportion of firms with any pills (extreme or regular). Firms in these states might have adopted extreme pills on the plausible assumptions that they are not invalid per se and that the states do not apply enhanced fiduciary duties to their use.

Part IV will reconsider state antitakeover law in light of these findings. It concludes that boards in some states face a weaker threat of replacement in a hostile takeover than in Delaware. First, in some states a board can “just say no” to a hostile takeover as long as it was adequately informed. Moreover, in some states managers are free of Delaware’s Revlon duty to sell the company to the highest bidder. Thus, they could turn to a “white knight” lower bidder to avoid a hostile takeover. Second, the law in some states may effectively give managers veto power to block hostile takeovers by permitting arrangements that deprive shareholders of access to the proxy machinery.5

The main contribution of this Article is descriptive. Nevertheless, Part V will describe some normative implications. First, this Article suggests that states should not replace Delaware’s standard of enhanced fiduciary duties with the BJR. Second, the Article’s findings have implications for the market for corporate law and the desirability of federal intervention. Over the last three decades, scholars have debated the merits of our system of state corporate

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5 Indeed, firms in other states receive fewer bids and are acquired less frequently than those incorporated in Delaware. See Robert Daines, Does Delaware Law Improve Firm Value?, 62 J. Fin. Econ. 525, 527–28 (2001) [hereinafter Daines, Firm Value].
law. While some argue that it leads to a race to the top, others believe that it leads to a race to the bottom or to no race at all. This Article will show that at least some of the states race to the bottom. Thus, managers have an option, sometimes subject to shareholder approval, to opt into strong protection. At the same time, the analysis shows that, as race-to-the-top proponents have argued, Delaware’s antitakeover law is superior to the law of some (if not many) of the other states in protecting shareholder value. Finally, the Article will show that even though other states do not actively compete with Delaware, they offer managers many choices. Thus, Delaware faces the challenges of designing a package that is superior to all of these options.

A main focus of the race debate has been the normative question of whether state corporate law should be replaced with federal law. This Article will provide support for a new proposal to adopt

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7 See, e.g., Lucian Arye Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harv. L. Rev. 1435, 1440–41 (1992) (finding “a race for the top with respect to some corporate issues but a race for the bottom with respect to others”); William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663, 705 (1974); see also Michal Barzuza, Price Considerations in the Market for Corporate Law, 26 Cardozo L. Rev. 127, 168 (2004) [hereinafter Barzuza, Price Considerations] (arguing that Delaware’s best strategy is to race to the middle, namely, to produce law that suffers from some bias in favor of managers but that is not as biased as the law in other states).


9 Reincorporation requires managers’ initiation and shareholder approval. Thus, if managers want to reincorporate to another state with strong protection they would have to get shareholder support. In many cases, however, the home state offers stronger protection than Delaware and thus managers can achieve stronger protection than offered in Delaware by merely choosing to remain in their home state—a choice for which they do not need shareholder approval.
Delaware’s current enhanced fiduciary duties—*Unocal*, *Revlon*, and *Blasius*—as minimum federal standards. Adopting Delaware’s standards as a floor, instead of introducing new and entirely preemptive federal legislation, would avoid the disadvantages cited by opponents of federal intervention by building on states’ incentives and information. At the same time, it would limit the race-to-the-bottom effect created by the perverse incentives that other states have in the current market for corporate law. Moreover, because even Delaware law is arguably dragged down by competition from other states,10 the adoption of its standards as minimum standards for all states could result in improvements to Delaware law.

I. CURRENT LAW AND CONVENTIONAL WISDOM

To date, research on antitakeover law covers two main sources of regulation of takeover defenses: Delaware case law and other states’ antitakeover statutes. Where Delaware case law has applied enhanced fiduciary duties to change-of-control situations, other states have adopted antitakeover statutes. Section A discusses the fiduciary duties that Delaware applies to managers’ use of defensive tactics in hostile takeovers. Section B discusses the widespread DTS.

A. Describing Delaware’s Higher Standards

This Section describes Delaware standards and argues that they are higher than the highly deferential BJR, which would have shielded managers from liability as long as they made business decisions in good faith and with adequate information.

By and large, Delaware courts have developed three different enhanced fiduciary standards for the three main situations in which managers use defensive tactics. When managers first receive a hostile bid and use defensive tactics to remain independent, *Unocal* applies. When they try to avoid the bid by selling to a friendly buyer or a “white knight,” a higher standard—*Revlon*—applies.

10 See, e.g., Roberta Romano, Competition for Corporate Charters and the Lesson of Takeover Statutes, 61 Fordham L. Rev. 843, 859–60 [hereinafter Romano, Corporate Charters] (“[I]t is arguable that Delaware would not have enacted any takeover legislation in the absence of state competition.”).
And when they defend by interfering with shareholders’ rights to vote, an even higher standard—Blastus—applies.

I. Unocal

The first situation arises when the firm receives a hostile bid—an offer to acquire shares from shareholders at a specified price, typically at a significant premium to market price. Although shareholders would like to tender their shares, managers block the offer with defensive tactics, arguing that the long-term value of the firm is higher than the offer price.

In this situation, when managers rely on defensive tactics in order to remain independent (as opposed to using the defensive tactics to sell the company to a “white knight,” as discussed below), Delaware courts apply the Unocal standard. Under Unocal, the use of defensive tactics is valid only if managers can show that there was a cognizable threat to their firm’s policy and that the defensive measure in question is proportional to the threat posed. The rest of this Section will discuss applications of this test to several key questions in Delaware courts.

a. Poison Pills

Applying Unocal, the Delaware Supreme Court in Moran approved the adoption of an effective legal innovation: the poison pill. The Moran court determined that adoption of the pill meets the Unocal proportionality test. Yet the actual use of the pill in the face of a specific hostile takeover attempt (in Moran the pill was adopted with no hostile takeover in sight) would be subject to individualized judicial scrutiny under Unocal.

While Delaware courts approved the poison pill, they invalidated two extreme types of poison pills—the “dead hand pill” and

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12 Moran v. Household Int’l, Inc., 500 A.2d 1346, 1348 (Del. 1985). The poison pill allows shareholders to buy additional shares of the firm at a significantly discounted price if a hostile bidder acquires more than a specified number of shares, with the threshold typically representing 10–15% of the firm. This right to acquire additional shares is not given to the bidder himself. Thus, with a poison pill in place, a hostile bid becomes unprofitable and often infeasible. If the bidder crosses the threshold ownership fraction and other shareholders exercise their poison pill rights, his share in the company is reduced back to approximately where it was.
the “slow hand pill”—as being inconsistent with management fiduciary duties and exceeding their authority.

b. “Just Say No”

Applying Unocal in Paramount Communications v. Time, the Delaware Supreme Court allowed the target managers to pursue a defensive tactic (the acquisition of a desired merger partner) in the face of a noncoercive takeover bid. The court did not require managers to show that they had a better plan for the company or that they could get a better offer for shareholders. Rather, the court determined that the board was “not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.”

Several scholars interpreted the court’s reasoning as essentially allowing the board to “just say no” to a hostile bid, and therefore applying a standard that brings us back almost to the BJR.

A few years later, the Delaware Supreme Court arguably further empowered management by essentially limiting Unocal’s propor-

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13 The former limits the redemption of the pill only to continuing directors (or their approved successors) and the latter (which is sometimes referred to as the “no hand” pill) makes the pill non-redeemable and non-amendable for a certain period of time.

14 See infra Section III.D.

15 In a previous case, Interco, the Delaware Chancery Court interpreted Unocal to prohibit managers from using a poison pill in the face of a noncoercive takeover bid unless it is used for a limited period of time, to initiate an auction, negotiate a better price for shareholders, or pursue another plan that would maximize shareholder value. See City Capital Assoc. v. Interco, Inc., 551 A.2d 787, 798 (Del. Ch. 1988). This moderate approach inspired Martin Lipton’s famous memorandum recommending that his clients consider moving from Delaware to other states that offer better protection to managers. See Martin Lipton, To Our Clients: The Interco Case (Nov. 3, 1988), quoted in Roe, supra note 8, at 626. The Time court may have responded to this threat. In dicta the Time court disapproved of Interco’s approach. The court has rejected the notion that the only conceivable threat from such a bid is inadequate value to shareholders. Paramount Commc’ns v. Time, Inc., 571 A.2d 1140, 1142 (Del. 1989).

16 Time, 571 A.2d at 1154.

17 That is, the board can refuse to sell the company without having to show that it has a better offer or a better long-term plan.

tionality test to defensive measures that are either coercive or preclusive. In Unitrin, the court held that a defensive measure that is neither preclusive nor coercive is merely required to be within “the range of reasonableness.”

c. Did Delaware Courts Replace Unocal with the BJR?

 _Time_ and _Unitrin_, however, did not replace _Unocal_ with the BJR. Rather, both involved unique circumstances that accounted for their results.

Paramount initiated its hostile bid after Time had already announced merger plans with Warner. Though the merger ultimately became a defensive tactic, that was not its original purpose. Thus, the court was easily convinced that managers genuinely believed the merger plan was good for shareholders. In addition, as the Chancery Court noted, Time’s defensive measure did not completely block Paramount from acquiring Time as it might have if Time had, for instance, both a poison pill and a staggered board. Finally, the _Time_ decision itself did not discuss the use of a poison pill. Even if the _Time_ test is as protective as some people believe, its applicability to the use of a poison pill remains uncertain.

_Unitrin_ was also unusual in that it involved a relatively small number of institutional shareholders holding a significant part of the firms’ shares. As a result, the Delaware Supreme Court adopted the board’s argument that “it is hard to imagine a com-

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20 Barzuza, Price Considerations, supra note 7, at 193.
21 _Time_, 571 A.2d at 1142.
22 See, e.g., Leo E. Strine, Jr., The Professorial Bear Hug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic “Just Say No” Question, 55 Stan. L. Rev. 863, 873 (2002) [hereinafter Strine, Bear Hug]; see also Marcel Kahan, _Paramount_ or Paradox: The Delaware Supreme Court’s Takeover Jurisprudence, 19 J. Corp. L. 583, 605 (1994) (suggesting that under Delaware law “it matters whether, in light of a hostile offer, the board continues on its pre-existing business plan or whether it changes its plan and adopts a defensive alternative”).
pany more readily susceptible to a proxy contest” than Unitrin.25 Second, Unitrin’s defensive tactic—a repurchase program26—did not provide the insiders with a veto power to block the offer.27 In addition, the court found it unpersuasive that insiders with significant holdings would choose a repurchase program that would diminish their share value and dilute their voting power.28 Thus, rather than providing a bright line test as to managers’ power to use defensive tactics, using the words of Vice Chancellor Leo E. Strine, Delaware courts have used a doctrinal route “to sidestep the fundamental Just Say No issue.”29

Moreover, in a subsequent decision, Chesapeake, Vice Chancellor Strine argued that courts should be cautious in accepting a threat of substantive coercion—the risk that shareholders will mistakenly accept an underpriced offer—as a cognizable threat under Unocal, as the Time court did. Strine seemed to embrace the pre-Time suggestion made by Ronald Gilson and Reinier Kraakman that managers who argue for substantive coercion should demonstrate how they expect the target to do better if the company remains independent.30 Along the lines of Gilson and Kraakman’s analysis, Chancellor Strine warns against a wide interpretation of the substantive coercion argument: “[T]he use of this threat as a justification for aggressive defensive measures could easily be subject to abuse. The only way to protect stockholders is for courts to

27 Unitrin, 651 A.2d at 1383; Gordon, supra note 26, at 526 (“The chancery court conjectured that the purpose of the open market purchases was to raise the ownership percentage of this insider group to above 25%, which the chancery court at one point (incorrectly) thought would give the group a veto block under the target’s charter.”).
28 See Unitrin, 651 A.2d at 1383; Gordon, supra note 26, at 526 (suggesting that the court “failed to understand the significance of the insider group’s financial interest”).
29 See Strine, Bear Hug, supra note 22, at 864.
30 See Chesapeake Corp. v. Shore, 771 A.2d 293, 327–29 (Del. Ch. 2000); Ronald J. Gilson & Reinier Kraakman, Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?, 44 Bus. Law. 247, 268 (1989) (“To make such a claim requires more than the standard statement that a target’s board and its advisers believe the hostile offer to be ‘grossly inadequate.’ In particular, demonstrating the existence of a threat of substantive coercion requires a showing of how—and when—management expects a target’s shareholders to do better.”).
ensure that the threat is real and that the board asserting the threat is not imagining or exaggerating it.”

The court also refused to read *Unitrin* as a “reformulation of *Unocal’s* focus on the actual substantive reasonableness of defensive measures.” Thus, *Unitrin’s* “range of reasonableness,” post-*Chesapeake* could be an effective tool in prohibiting certain kinds of defensive tactics.

Finally, and most important, Delaware judges have signaled that when a proxy fight is not a viable path since the firm has a staggered board (or for another reason), it is doubtful that *Time* will apply. Thus, “the extent to which a board of directors with a classified board can deploy a poison pill to ‘just say no’” post-*Time* “still remains a theoretically open issue.”

Given the unique circumstances of *Time* and *Unitrin* and their interpretation by the Delaware Chancery Court, and given Delaware courts’ tendency to apply fact-specific, standard-based tests, it is unlikely that boards in Delaware will get to “just say no” in all circumstances. Moreover, as explained below, *Revlon* and *Blasius* further limit managers’ use of defensive tactics.

2. Revlon

Even if managers are allowed to “just say no,” sometimes pressure on management, brought on perhaps by an increased bid or shareholder clamor, mounts to the point that independence is no

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31 *Chesapeake*, 771 A.2d at 327; see also Allen, Jacobs & Strine, supra note 24, at 1078 & n.30 (noting that “[t]he logical force of *Interco* still resonates in some later decisions,” among them *Chesapeake*).

32 *Chesapeake*, 771 A.2d at 333.

33 Allen, Jacobs & Strine, supra note 24, at 1079–80. Interpreting Delaware law, a federal court allowed a staggered board to sustain the pill in the face of an all-all-cash tender offer at a 27 percent premium. Moore Corp. Ltd. v. Wallace Computer Servs., 907 F. Supp. 1545, 1550–51 (D. Del. 1995). Yet this decision seems to deviate from Delaware law and is not expected to be followed by the Delaware courts. See Allen, Jacobs, & Strine, supra note 24, at 1080 & n.39. (“[T]hat decision is nonauthoritative, since the Delaware state judiciary has not yet spoken on the issue.”); Gordon, supra note 26, at 530 (“[U]nder the approach employed by the Delaware Supreme Court in *Unitrin*, *Wallace* is an incorrectly decided case.”).

34 See e.g., Marcel Kahan & Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205, 1232–40 (2001). This approach, though it has been criticized, might be beneficial for shareholders to some extent since it also imposes uncertainty on managers with respect to the defensive tactics they are allowed to use.
longer an option. It is then that managers may look for a “white knight” to buy the company’s shares at a premium but keep current management in place.

In order to prevent this from becoming a means of evading beneficial hostile takeovers, Delaware courts have decided that managers should not be allowed to prefer a lower bid to a higher one by reasoning that the lower bid arguably has better long-term prospects. Rather, they should simply pick the highest bid for the shareholders.

In particular, under Revlon, if a sale or break-up of the company is inevitable, the board’s role changes “from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.”

In Time, the Delaware Supreme Court limited Revlon, deciding that Time’s acquisition of Warner did not trigger Revlon since it was a merger of equals. Yet Time, as explained above, involved a pre-existing merger plan. Moreover, in a merger of equals, shareholders will still be there to tender to a bidder and remove managers if they are not satisfied. Shareholders will not have the same power if the new entity has a controlling shareholder. Indeed, as the Delaware court held in QVC, a change of control would trigger Revlon. Thus, post-Time, the Revlon standard protects shareholders significantly (even if not fully) in the important case when managers search for a “white knight” in order to frustrate a hostile takeover.

35 If the offer is high and shareholders want to tender, the circumstances may not justify “just saying no” and doing so will not pass the Delaware courts’ scrutiny, as explained supra, Subsection I.A.1. Moreover, even if managers are legally allowed to “just say no” shareholders may threaten to replace management in a proxy fight if they do not sell the company.


38 Id.; see also Kahan, Paramount, supra note 22, at 595–96 (suggesting that the existence of a pre-existing plan was one of the rationales for not triggering Revlon in this case).

39 See Kahan, supra note 22.


41 See Kahan, supra note 22, at 595 (arguing that Paramount is consistent with the “notion that Revlon duties are meant to protect shareholders’ ability to override the board’s decision to reject a tender offer”). Recently the Delaware Supreme Court has
3. Blasius

The third situation arises when managers use a defensive tactic that interferes with shareholder voting rights, to circumvent the hostile bidder’s attempt to use the proxy machinery.

A main consideration in Delaware courts’ decisions to allow managers to use defensive tactics was that shareholders have a safety valve—their voting rights. Thus, when managers faced with a hostile takeover try to block shareholders from exercising their voting rights, Delaware courts require them to meet an almost impossible standard. In particular, they have to convince the court that there was a compelling justification for preventing shareholders from exercising their voting rights.

In Blasius, management increased the number of board seats to the maximum allowed in the bylaws and filled them with its own candidates prior to the annual meeting. Since the firm’s board was staggered, the practical effect was that the insurgents could not take over the board in one election. The court invalidated management’s board-packing attempt on the ground that it had not met its burden to show a compelling justification for the action.

B. Non-Delaware States: Defensive Tactic Statutes

Unlike Delaware, other states have adopted two defensive tactic statutes (DTS)—pill endorsement and other constituency/directors’ duties statutes—that deal with managers’ duties and the factors they may consider in change-of-control situations. Other states clarified three different points regarding Revlon: (1) Revlon is triggered only if the board decides to sell the company and not simply if a shareholder files a schedule 13D; (2) Revlon does not dictate a single process; and (3) to breach their Revlon duties, directors’ conduct has to rise to bad faith; thus the relevant question is whether directors “utterly failed to attempt to obtain the best sale price,” rather than whether they did “everything they (arguably) should have done to obtain the best price.” Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–45 (Del. 2009). Though it is too early to know the exact implications of Ryan, it seems that Ryan does not significantly limit the case on which we are focused, where the board looks for a “white knight” to frustrate a hostile takeover.


43 In a later case the Delaware Supreme Court broadened the applicability of this test to cases in which shareholders are not completely blocked from exercising their voting rights. MM Cos., Inc. v. Liquid Audio Inc., 813 A.2d 1118 (Del. 2003); see also Subramanian, supra note 18, at 681–82.
have also adopted statutes that limit bidder’s actions,\textsuperscript{44} and a few
states—most notably Massachusetts, Pennsylvania, and Ohio—have gone out of their way to empower managers by adopting a
third category: especially potent antitakeover statutes that clearly
exceed Delaware’s protections for management.\textsuperscript{45} The research
here will focus on DTS and their relation to managers’ fiduciary
duties. Because they relate to the use of defensive tactics, they are
more likely to influence the standards that courts apply to manag-
ers’ use of defensive tactics.\textsuperscript{46}

1. Defensive Tactics Statutes (DTS)

Pill Endorsement Statutes permit the use of a poison pill by ex-
plicitly allowing the board to discriminate against one or more
classes of shareholders when it issues rights plans. Twenty-nine
states have adopted such a statute. In many cases, these statutes
were passed to overturn a court’s decision that invalidated a poison
pill.\textsuperscript{47}

\textsuperscript{44} There are three common statutes that limit the bidders: Control Share Acquisition
Statutes typically allow a bidder to exercise his voting rights only after getting ap-
proval from the shareholders; Fair Price Statutes typically require the bidder to pay a
certain price for the remaining shares to prevent the construction of a two-tier acqui-
sition with a low back-end; and Business Combination Statutes typically prevent a bid-
der’s whole acquisition of the firm (a freeze-out merger) for a certain amount of time.
The last type was adopted by Delaware. Delaware adopted a relatively mild version
of this statute (other states typically have a five-year limitation and the Delaware
statute does not apply to a bidder that purchased 85% of the shares). See Romano,
The Need for Competition, supra note 3, at 531–33.

\textsuperscript{45} Massachusetts in 1990 adopted a staggered board statute, which makes staggered
ch. 156B, § 50A(a) (West 2005). Firms can opt out of the staggered board default ei-
nother by a vote of the majority of the board or by a vote of two-thirds of the sharehold-
have adopted disgorgement statutes that require a hostile bidder who acquires control
to pay back to shareholders any profits he makes by selling the company’s shares less
§§ 2571–75 (West 2009); Ohio Rev. Code Ann. § 1707.043(a) (West 2004).

\textsuperscript{46} Another reason to focus on these statutes was that the other antitakeover statutes
did not have a significant role in the courts’ decision. When these statutes seemed to
have an important role, it was noted in the cases analysis below.

\textsuperscript{47} See, e.g., Marcel Kahan & Edward B. Rock, How I Learned to Stop Worrying and
Love the Pill: Adaptive Responses to Takeover Law, 69 U. Chi. L. Rev. 871, 900–01
[hereinafter Kahan & Rock, Stop Worrying].
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Other Constituency/Directors’ Duties Statutes. Thirty-five states have adopted directors’ duties statutes, also known as “other constituency” statutes. Typically, these statutes allow directors to take into account the interests of constituencies other than shareholders and/or the long-term value of the firm. Sometimes, in addition, they apply weaker fiduciary duties on managers’ use of defensive tactics.

2. Circumstances of Adoption

DTS were typically lobbied for by local managers and business groups. In many cases they were passed in order to protect a local firm, sometimes while an actual battle for control was taking place. Since managers in such situations chose to lobby rather than amend their corporate charter with shareholder approval to include these terms, these statutes are thought to give managers more authority than shareholders would have approved.

3. Delaware Case Law Renders DTS Unnecessary

DTS are considered not to deviate significantly from Delaware law, because of the protection that Delaware courts have given managers.

To begin with, although Delaware did not adopt a pill endorsement statute, Delaware courts, as noted above, approved the use of the poison pill in Moran by determining that the adoption of the pill met the Unocal proportionality test. Thus, pill endorsement statutes are considered merely to replicate Delaware law.


49 See, e.g., Henry Butler, Corporation-Specific Anti-takeover Statutes and the Market for Corporate Charters, 1988 Wis. L. Rev. 365, 375–76 (1988) (describing how the antitakeover statutes in Minnesota and Indiana were passed to protect local firms from a pending takeover); Romano, supra note 48, at 461–62 & n.11 (listing over a dozen examples in which antitakeover statutes were passed to protect local firms).


51 See Bebchuk, Cohen & Ferrell, supra note 3; Coates, Takeover Defenses, supra note 3; Romano, Laboratory, supra note 3; Romano, The Need for Competition, supra note 3.
Other constituency/directors’ duties statutes also do not deviate significantly from Delaware law unless they explicitly apply weaker standards to managers. Managers in Delaware may take into account the interests of other constituencies (though only to a limited extent). More important, the argument goes, the freedom Delaware courts have given managers in using the poison pill is sufficiently strong to make these statutes redundant.

Because antitakeover statutes that limit the bidder’s options are also not considered to deviate much from Delaware law, the general assumption has been that, with the exception of states with extreme statutes, Delaware law is not very different from other states’ law. To be sure, Professor Roberta Romano and other scholars have argued that Delaware’s approach to antitakeover law is better than that of other states, but they point mainly to the fact that Delaware lags behind other states in legislating antitakeover rules. The few substantive differences they point to are quite small and relate mainly to one statute, Delaware’s business combination statute.

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52 Only to the extent that they provide benefits to shareholders, and not if a sale of the firm is inevitable. See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (“[S]uch concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.”).

53 See, e.g., Bebchuk, Cohen & Ferrell, supra note 3, at 1803. One potential effect of these statutes is the possibility that other constituency statutes will lead courts to provide more protection to employees. Scholars, however, were skeptical about even this potential effect. See, e.g., Romano, Laboratory, supra note 3, at 235 (“[S]tate courts still have considerable leeway to evaluate the discretion accorded boards under the statutes, and except for Connecticut, the statutes would appear to be little more than symbolic politics because they have no enforcement mechanism: Non-shareholder constituents have no standing to sue boards to require their interests to be considered in responding to a bid.”).

54 Statutes that regulate the bidder’s behavior are also believed to have little bite because mere board or shareholder approval usually satisfies their requirements, which, given the pill, is a necessary condition for a takeover anyway. See, e.g., Coates, Takeover Defenses, supra note 3, at 323 & n.203. Moreover, requiring shareholder approval has positive effects since it works to prevent pressure to tender.

55 See, e.g., Roberta Romano, The Need for Competition, supra note 3, at 530–33.

56 Id.
II. TAKEOVER LAW IN STATES OTHER THAN DELAWARE

This Part conducts a systematic analysis of other states’ takeover law. Section A explains the question that this paper attempts to answer. Section B discusses the research design and methodology. Section C discusses findings regarding other constituency and pill endorsement statutes. Section D conducts a systematic review of all of the available cases to determine the fiduciary duties applied by courts in other states. Section E conducts similar case review to find the courts that allowed extreme pills and whether they relied on DTS in allowing them.

A. The Question: Do Courts in States with Antitakeover Statutes Follow Delaware Enhanced Fiduciary Duties?

Though DTS may not be significantly different from Delaware law, it is possible that they may lead to imposing fiduciary duties standards on managers’ use of defensive tactics that are weaker than Delaware standards.

First, some anecdotal evidence from case law suggests that these statutes may lead to weaker fiduciary duties. Take for example the famous Invacare case, which approved a dead hand pill in Georgia. A close reading of Invacare suggests that the DTS played an important role in the decision. In particular, the Invacare court relied on Georgia’s pill endorsement and other constituency statutes to validate Healthdyne’s dead hand pill and to replace Delaware’s compelling justification standard with the BJR for intervention in the shareholder vote.

Second, on a general level, Delaware legislatures and judges have more reasons to protect shareholders than do other states’ legislatures and judges. Other states are susceptible to lobbying by local groups, and unlike other states, Delaware can charge a higher price if it provides better shareholder protection. These

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58 See discussion infra Section II.F.
59 See, e.g., Romano, supra note 48 (describing lobbying for antitakeover rule in Connecticut); see also Romano, Laboratory, supra note 3, at 231 (describing how the Pennsylvania redemption rights statute was passed to aid Scott Paper Corporation to prevent a hostile takeover by Brascan Ltd.).
60 See Barzuza, Price Considerations, supra note 7, at 132 (2004).
differences, which account for the legislation of these states’ anti-takeover statutes, may also result in differences in the states’ case law when applied by state judges. To be sure, state law often is applied by federal judges to whom these arguments apply only to a limited extent.\textsuperscript{61} Yet federal judges also do not share the benefits of charging a higher price for better shareholder protection. In addition, in interpreting state law, they may tend to follow the state courts’ interpretation of the state’s statutes. In our sample several federal cases have explicitly followed state cases.\textsuperscript{62}

Finally, a closer and systematic look at the statutes themselves suggests that this may happen. Some other constituency/directors’ duties statutes explicitly apply the BJR in change-of-control situations. Similarly, some pill endorsement statutes explicitly allow the board to implement an extreme pill.

Thus, the question that ought to be asked is what relationship, if any, exists between DTS and fiduciary duties? When the legislature has explicitly told the courts to apply the BJR in its standard form, presumably they will do so. What about the states that have pill endorsement or other constituency statutes but do not explicitly reject \textit{Unocal} and \textit{Revlon}? They may or may not decide to follow the Delaware standards.

In the following Sections, I conduct a systematic inquiry into takeover cases and statutes in other states to answer this question. As shown below, the systematic research suggests that to the extent observable, courts rely on DTS to apply weaker fiduciary duties on management when using defensive tactics and to approve dead hand and slow hand pills.

\textsuperscript{61} It is difficult to know what proportion of takeover cases is decided by federal judges. The proportion of federal cases decided by federal judges in this Article’s sample is probably higher than the real proportion since federal cases are more available than state cases. Email from Kent Olson, Director of Reference, University of Virginia School of Law, to Michal Barzuza, Professor of Law, University of Virginia School of Law (Oct. 14, 2008) (on file with author).

\textsuperscript{62} See, e.g., IBS Fin. Corp. v. Seidman & Assocs., 136 F.3d 940, 950 (3d Cir. 1998); Dynamics Corp. of Am. v. WHX Corp., 967 F. Supp. 59 (D. Conn. 1997). No federal case in the sample has explicitly deviated from a state interpretation.
The research covers all DTS and all available antitakeover cases in states other than Delaware.

1. Statutes

This research included a close reading of the pill endorsement and other constituency statutes in all of the states.

As explained above, among antitakeover statutes, DTS are the ones that should most influence the standards of fiduciary duties since they apply to the use of defensive tactics. As a result, the research focused on the DTS.

An examination of the pill endorsement and other constituency statutes in all states reveals that these statutes vary in strength across states. I therefore classify them using criteria explained below. Table 6 summarizes the existence and strength of each of these statutes in each of the states.

2. Cases

The case research was directed toward answering the following questions: (1) what is the standard that each state applies to the use of defensive tactics, and in particular, does it follow Delaware’s standards in (a) Unocal, (b) Revlon, and (c) Blasius; (2) has the state approved the use of dead hand and slow hand pills that limit a future board’s ability to redeem the poison pill?

To answer these questions, I conducted searches in Westlaw and LexisNexis for each of the following terms: “Unocal,” “Revlon,” “Blasius,” “poison pill,” “hostile takeover,” “dead hand pill,” and “slow hand pill.” I also checked citing references for the cases Quickturn and Invacare. The search yielded 108 cases (after eliminating the cases in other states that involve Delaware firms, and therefore apply Delaware law). The list of cases is available in Appendix A.

States do not publish all of their cases. Westlaw and LexisNexis report many unpublished cases, but not all of them.63 Since West-
law and LexisNexis do not cover exactly the same cases, the searches described above were conducted in each database. In some states there were no cases on point, either because the issue was never litigated in the state or because the cases on point were not published.

As mentioned above, the predictive power of the overall results for states with no available cases is limited. First, the number of cases that are relevant to each of the standards is quite small. Second, the results may be driven by omitted variables. Therefore, the study focuses on describing the data. For states that do not have available cases or statutes that explicitly reject Delaware standards, the goal is merely to raise the burden to show that it is possible that they would apply weaker standards.

For each standard (Unocal, Revlon, and Blasius), I report which states followed it, which states rejected it, and the DTS these states had at the time. The results appear in Table 1 for Unocal, Table 2 for Revlon, and Table 3 for Blasius.

Similarly, I report which states approved, and which rejected, the “dead hand” and “slow hand” pills and whether the courts relied on DTS in their decisions. The results appear in Table 4.

Finally, Table 7 summarizes the findings for all of the states. In particular, Table 7 reports whether or not each state follows each of Delaware’s standards: Unocal, Revlon, and Blasius, and whether or not the state allows the use of extreme pills. In addition, Table 7 also reports the cases that I rely on in each state for my determination. This Table fulfills two purposes. First, it provides a full description of the legal standards that apply in each of the fifty states. It is my hope that this information will be useful for corporate teachers and practitioners. Second, it summarizes the data in a transparent manner. Some of the cases here are being analyzed for the first time. Clearly, these cases are open to interpretation, but including the specific cases makes it easy for readers to make their own judgment of these cases.

versity of Virginia School of Law, to Michal Barzuza, Professor of Law, University of Virginia School of Law (Oct. 14, 2008) (on file with author).

“One possible omitted variable is state politics—it is possible, if not likely, that state politics drives the statutes and also elected judges’ opinions.
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C. Review of States’ Other Constituency/Directors’ Duties and Pill Endorsement Statutes

This Section reviews the defensive tactics statutes across states. The findings are summarized in Table 6 at the end of this Article.

1. Other Constituency/Directors’ Duties Statutes

These statutes typically deal with the latitude that directors should have in using their judgment when defending against hostile takeovers. Examination of these statutes reveals that they vary considerably across states.

First, statutes in six states—Maryland, Indiana, North Carolina, Ohio, Pennsylvania, and Virginia—explicitly apply the BJR or reject the notion of enhanced duties with respect to change-of-control situations. For instance, the North Carolina statute explicitly applies the BJR, stating that “duties of a director weighing a change-of-control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section.” Similarly, the Indiana statute rejects other states’ enhanced fiduciary duties: “[c]ertain judicial decisions in Delaware and other jurisdictions . . . that impose a different or higher degree of scrutiny on actions taken by directors in response to a proposed acquisition of control of the corporation, are inconsistent with the proper application of the BJR under this article.” These statutes are classified as strong and denoted by “S” in Table 6. If the statute

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66 Ind. Code Ann. § 23-1-35-1(f) (LexisNexis 1999) (determining that the heightened scrutiny applied by Delaware to transactions that might result in a change-of-control is inconsistent with Indiana law that applies the BJR to such acts).
68 Ohio Rev. Code Ann. § 1701.59(C) (LexisNexis 2004) (applying the BJR to actions that include a change in control).
69 15 Pa. Cons. Stat. Ann. § 1715(d) (West 1995) (determining that “there shall not be any greater obligation to justify, or higher burden of proof with respect to, any act . . . relating to . . . proposed acquisition of control of the corporation than is applied to any other act as a board of directors . . .”).
applies the BJR only to the disinterested directors or only to acts that do not interfere with shareholder franchise, it is classified as “S-.”

These findings show that Delaware’s enhanced fiduciary duties clearly do not apply in at least six states. But as I show below, there are many other states in which enhanced duties either clearly or most likely do not apply.

One state, Massachusetts, has a statute that applies the BJR, but not explicitly to change-of-control situations. I denote this immediately strong statute with “I+.” The rest of the statutes do not apply the BJR, but rather allow directors to take into account different considerations in a change-of-control situation such as the interests of other constituencies, long term value of the firm and “all other pertinent factors.” There are also some differences among these statutes.

Some of these statutes allow directors either to benefit other constituencies at the expense of shareholders or to consider the long-term interests of the firm, including the possibility that these interests may be best served by the continued independence of the corporation. I classify them as intermediate and denote them by “I.” Other statutes merely allow directors to take into account the interests of other constituencies or the long-term interests of the corporation, without explicitly stating that they can do so at the expense of shareholder value. I classify them as weak and denote them by “W.”

2. Pill Endorsement Statutes

Recall that for the pill to work, managers must be able to exclude the bidder from participating in the right to purchase shares at a discount. Thus, pill endorsement statutes explicitly allow the board to discriminate against the bidder.  

74 See, e.g., section (b) to the Connecticut pill endorsement statute: (b) The terms and conditions of such rights, options or warrants, including those outstanding on October 1, 2003, may include, but are not limited to, restrictions or conditions that: (1) Preclude or limit the exercise, transfer or receipt of such rights, options or warrants by any person or persons owning or offering to acquire a specified number or percentage of the outstanding shares or other securities of the corporation or by any transferee or transferees of any such person or persons[.]
Pill endorsement statutes also vary in their strength across the states. Some of them explicitly allow the board to limit a future board in redeeming the pill (that is they explicitly endorse extreme pills). I classify them as strong and denote them by “S.” The “S” classification also includes statutes that give control over the pill exclusively to the board. The power of the board is important since, as discussed below, an inevitable question that comes up with extreme pills is whether or not the current board has the power to limit the future board.\(^75\)

Some of these statutes reject the notion of enhanced fiduciary duties regarding the use of the poison pill. I classify them as Intermediate plus and denote them by “I+.” “I” stands for statutes that give the board nonexclusive power to adopt a pill or merely allow the corporation to adopt a poison pill with no reference to the board. “W” stands for statutes that explicitly subject the use of the pill to judicial review.\(^76\)

D. Results: Fiduciary Duties in States’ Antitakeover Case Law

This Section discusses the standards courts in other states apply to the three different uses of defensive tactics described above: resisting a hostile bid (Unocal); preferring a “white knight” (Revlon); and impeding shareholder voting rights (Blasius).

The results are reported according to the following categories: states with strong other constituency/directors’ duties statutes; states with intermediate other constituency/directors’ duties statutes; states with weak other constituency/directors’ duties statutes; and states with no other constituency/directors’ duties statutes. For each category I report all existing results. If there is no result reported, it is because no available cases were found in the category.

In this Section I focus on other constituency/directors duties stat-

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\(^76\) See discussion infra Section II.D.

Heith Rodman offers a somewhat similar classification. See Heith D. Rodman, Death Toll for the Dead Hand?: The Survivability of the Dead Hand Provision in Corporate America, 48 Emory L.J. 991, 1017–18 (1999). He classifies statutes that give the board the sole discretion to adopt a pill as strong; statutes that refer to the board but do not give it exclusive power over the pill as intermediate; and statutes that do not include any reference to the board and statutes that subject the issuance of the pill to judicial review as weak.
utes since they seem to matter the most for the fiduciary standards (for extreme pills, the pill endorsement statutes turned out to be more significant, so I report those cases under categories of pill endorsement statutes in Section F). When the pill endorsement statute played an important role in the case, I report that as well.

Finally, in addition to the summary tables, I conduct an analysis of the cases, the judges’ rhetoric with respect to what they relied on to reach their decision, and whether it mattered that the state had antitakeover statutes.

At the end of each Subsection, I include a table that summarizes the results for each standard and category. I also detail the number of states that have similar statutes. As I explained above, the predictive power of the results for states that do not have available cases is limited.

1. Managers’ Use of Defensive Tactics to Remain Independent—Do States Follow Unocal?

Under Unocal, as discussed above, when managers use defensive tactics to remain independent they have to show that there was a threat to firm policy and that the defensive tactic was proportional to the threat posed.

a. Cases that Did Not Follow Unocal

Research into the cases and statutes reveals the following. First, not surprisingly, all of the states that have strong forms of other constituency/directors’ duties statutes (statutes that explicitly apply the BJR or reject the notion of enhanced duties for change-of-control situations) for which we have cases—Indiana, Pennsylvania, Maryland, and Virginia—did not apply Unocal enhanced duties.  

Second, when the other constituency/directors’ duties statute is intermediate (that is, when it explicitly allows the board to take into account either the interests of other constituencies at the expense of shareholders or long-term interests at the expense of short-term goals), courts also did not apply Unocal.

There is one state that has an intermediate plus other constituency/directors’ duties statute and a pill endorsement statute for which I found an authority—Massachusetts. In Lawrence B. Seidman v. Central Bancorp, the Supreme Court of Massachusetts replaced Unocal enhanced duties with the BJR. Massachusetts’ pill endorsement statute applies the BJR to the decision to adopt a poison pill. It does not apply, however, to the use of the pill. Thus, the court had to decide what standard should apply to the actual use of the poison pill in the face of a hostile takeover.

Massachusetts’ other constituency statute is uncommon in stating that the “fact that a director . . . performed his duties [in a manner consistent with that section] shall be a complete defense to any claim asserted against him.” But it lacks a specific provision applying to change-of-control situations.

Based on this statute and the pill endorsement statute, the Seidman court applied the BJR to the use of a poison pill. The court rejected the plaintiff’s argument that the court should apply Unocal duties as a gloss on the statute. Referring to the legislative intent, the court interpreted these statutes as providing clear guidance:

\[\text{References}\]

\[\text{Citations}\]
In responding to the arguments by the PL Capital Group that this Court should either import the proportionality doctrine in \textit{Unocal}, or aspects of the Massachusetts common law relating to fiduciary duties of directors, as a gloss on the protective reach of Sec. 65, the Court is reminded of Justice Cardozo’s eloquent comments on the role of the judge . . . .

One could argue that this case turned out this way because Massachusetts’ constituency statute was not typical. The court, however, seemed to focus on the legislative intent more than on the statute’s language. More important, the rest of the results support the observation that intermediate and sometimes even weak other constituency statutes have led to the rejection of \textit{Unocal}, especially when combined with another factor.

Significantly, there is not even a single state with an intermediate other constituency statute whose courts applied \textit{Unocal}. Rather, all of the available cases from states with intermediate statutes, and one from a state with a weak statute, refused to apply \textit{Unocal}.

First, in \textit{IBS Financial Corp. v. Seidman \\& Associates}, the Third Circuit rejected \textit{Unocal} in dicta. Relying on the state’s other constituency statute, the court stated that “unlike Delaware, New Jersey has chosen not to apply heightened scrutiny to director action taken in defense against a proposed acquisition.”

Second, in \textit{Dynamics Corp. of America v. WHX Corp.}, the U.S. District Court for the District of Connecticut applied the BJR to a selective use of the pill, relying on New York’s pill endorsement and other constituency statutes.

\footnote{\textit{IBS Fin. Corp. v. Seidman \\& Assocs.}, 136 F.3d 940, 949–50 (3d Cir. 1998). The case involved intervention in shareholder franchise, but no hostile takeover. Thus, \textit{Unocal} appeared only in dicta. Regarding the intervention in shareholder franchise, the court determined that the Delaware high standard from \textit{Blasius} applied.}

\footnote{967 F. Supp. 59, 64–65 (D. Conn. 1997).}
The focus of the case was a sale to a “white knight,” so *Unocal* was not mentioned explicitly in the case. Yet since the court determined that under New York law the BJR applies to directors’ use of defensive tactics, it implicitly rejected *Unocal.* Since the case focuses on *Revlon* circumstances, however, I will discuss it here only shortly and will discuss it in more details in the next section.

The *Dynamics* court first distinguished Delaware cases, saying that “even if they are controlling, they are distinguishable from the facts of this case.” But the court went on to determine that the BJR applied.

The New York pill statute is especially weak since it applies judicial scrutiny to the use of the pill. Its other constituency statute is also weak. The statute was amended to add more considerations managers could take into account, but it still remained weak even after the amendment. Nevertheless, the *Dynamics* court interpreted the New York statutory scheme to suggest that the BJR should apply to the Dynamics board, stating that “[w]hile there is no doubt that WHX would be on much stronger footing if Delaware’s corporation law applied here, DCA is a New York corporation.”

Moreover, in applying the BJR the court followed a decision by the Supreme Court of the state of New York (the basic trial court of general jurisdiction in New York state) on the same transaction in a different petition, *Steiner v. Losyniak*, which also determined that in New York the BJR applies to managers’ use of defensive tactics.

These two cases suggest that even a weak other constituency statute may lead to the rejection of Delaware enhanced fiduciary duties (especially if there is an additional factor such as an amendment to the statute).
The Dynamics and Steiner cases are especially informative for two reasons. First, the board had decided to sell, which in Delaware triggers an even higher standard than Unocal. Second, the Dynamics board was staggered. As explained above, it is doubtful whether the “just say no” defense in Delaware applies to a staggered board. Less on point but also telling is the Invacare case mentioned above. In Invacare, a federal district court held that the requirement of a compelling justification—the standard that Delaware applies under Blasius to managers’ interference with the shareholder franchise—was not consistent with Georgia’s weak other constituency statute. The court did not have to discuss Unocal, nor did it say that the BJR replaces Delaware enhanced duties as the Dynamics court did. It is possible, however, that if the court had chosen not to impose higher duties on managers when they interfered with shareholder voting, it would also have chosen not to intervene under less threatening Unocal conditions in which managers’ acts do not amount to interference with shareholders’ voting rights.

The research produced one case from a state that has an intermediate other constituency statute and no pill statute. In Torchmark Corp. v. Bixby, a federal district court applying Missouri law distinguished Unocal based on the fact that the defensive tactics at issue were not adopted in the face of a hostile takeover. As a result, the court held that Missouri directors should have the protection of the BJR. Delaware courts, however, have applied Unocal to directors’ adoption of defensive tactics in Moran even when there was no hostile takeover in sight. Thus, despite the Torchmark court’s attempts to distinguish Unocal, Torchmark represents a departure from Delaware law.

Finally, in Nevada, where a court applied Unocal regardless of Nevada’s intermediate DTS, the legislature stepped in to correct it as described below.

at 63 (“[W]e are not convinced, particularly in light of the 1988 amendments to the New York statute, that Delaware cases should be controlling.”).

92 Id. at 62. To be sure, the board was staggered in the bylaws and therefore could be de-staggered in a shareholder vote. Yet the Dynamics board also “raised the threshold for a written request for special meetings by shareholders from 25% to 66.6% of the issued and outstanding shares.” Id. at 61–62.


b. Cases that Followed Unocal

The second line of cases consistent with the observation that the statutes matter includes cases from states with weak statutes or no statutes at all. First, courts in states that had weak statutes—Illinois and Wisconsin—applied Unocal. Second, courts in states that had no statutes at all when the case was decided—Arkansas, Florida, Indiana, Kansas, Maryland, and Minnesota—applied Unocal, except for one case applying New York law (before the original statute was enacted), where the court suggested it would not recognize enhanced duties.

c. Before and After

Before and after comparison suggests that the statute both mattered in rejecting Unocal and that they reflected pre-existing political environments that may have contributed to the rejection of Unocal.

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99 Dynamics Corp. of Am. v. CTS Corp., 805 F.2d 705, 708 (7th Cir. 1986) (applying Unocal under Indiana law before the passage of its other constituency statute).
103 Referring to Unocal, the U.S. Court of Appeals for the Second Circuit, applying New York law, said that “[a]lthough in other jurisdictions, directors may not enjoy the same presumptions per the business judgment rule, at least in a takeover context, under New York law, the initial burden of proving directors’ breach of fiduciary duty rests with the plaintiff.” See Hanson Trust PLC v. ML SCM Acquisition, Inc. 781 F.2d 264, 273 (2d Cir. 1986) (internal citation omitted). Yet the case eventually applied Revlon and found directors liable for approving a lock-up option in an LBO transaction. Id. at 277–83.
There are two states for which I found authority before and after the adoption of a statute—Maryland and New York. In Maryland, a federal district court applied *Unocal* before the adoption of the statute, but after the statute was adopted a Maryland state court rejected it.\(^\text{104}\) In New York, after the amendment to the statute, the court replaced *Unocal* with the BJR.\(^\text{105}\) Prior to the initial adoption of the statute the *Hanson* court rejected *Unocal* in dicta, stating that New York law protects shareholders less than Delaware law.\(^\text{106}\) Yet, unlike *Dynamics* the *Hanson* court eventually applied *Revlon*. Accordingly, in *Dynamics* the court quoted *Hanson* to suggest that even before the passage of its statute New York was more favorable to managers than Delaware, and now even more so.\(^\text{107}\)

**d. Legislature Override—Nevada**

The last piece of evidence that supports the analysis is the example of Nevada, in which the legislature stepped in when it was not clear whether the court followed the message in the antitakeover statutes not to follow *Unocal* and *Revlon*. Nevada had an intermediate other constituency statute and an intermediate pill statute. In *Hilton Hotels Corp. v. ITT Corp.*, the U.S. District Court for the District of Nevada noted in dicta that “[t]his Court will not eliminate the principles articulated in *Unocal*, *Blasius* and *Revlon* and the common law duties of care and loyalty without any indication

\(^\text{104}\) Compare NCR Corp. v. Am. Tel. and Tel. Co., 761 F. Supp. 475, 499–500 (S.D. Ohio 1991) (applying *Unocal* under Maryland law before the passage of the statute), with Hudson v. Prime Retail, Inc., No. 24-C-03-5806, 2004 WL 1982383, at *11 (Md. Cir. Ct. Apr. 1, 2004) (“*Unocal*. . . should not be applied in Maryland” after passage of the statute) (quoting James J. Hanks, Jr., Maryland Corporation Law § 6.6[b], at 176.1 (Supp. 2003)). In New Jersey, the use of the pill was prohibited before the pill endorsement statute was adopted, see Minstar Acquiring Corp. v. AMF Inc., 621 F. Supp. 1252, 1257–59 (S.D.N.Y. 1985), and allowed afterwards, see Vestcom Int’l v. Chopra, 114 F. Supp. 2d 292, 300 (D.N.J. 2000). Since these decisions focused on the pill however, they do not necessarily have implications for fiduciary duties (*Vestcom* did not discuss the fiduciary duties that apply to the use of the poison pill).

\(^\text{105}\) *Dynamics* Corp. of Am. v. WHX Corp., 967 F. Supp. 59, 64 (D. Conn. 1997).

\(^\text{106}\) See *Hanson Trust*, 781 F.2d at 273. The court however applied *Revlon*. See discussion infra note 138 and accompanying text.

\(^\text{107}\) See *Dynamics*, 967 F. Supp. at 63 (“As Judge Oakes noted in his concurring opinion in *Hanson Trust*, (which was decided before New York passed the ‘poison pill’ legislation), Delaware law favors bidders more than even the pre-existing New York law.”) (internal citation omitted).
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from the Nevada Legislature or the Nevada Supreme Court that that is the legislative intent.”

Hilton Hotels, however, did not deal with a typical defensive tactic, but rather with one that interfered with the shareholder franchise. In response to a hostile takeover threat, the ITT board decided to split ITT into three new entities and to create a classified board for the largest entity among the three, all without obtaining shareholder approval. In doing that, the board circumvented the requirement for a shareholder approval to implement a staggered board. In such a case, Delaware, as well as many other states, would apply the Blasius standard—which requires managers to show a compelling justification for their acts—because of the importance of shareholder voting power as a safety valve in the presence of a pill. Thus the court’s decision to follow Delaware law may have been limited to these circumstances.

To clear up any doubt, however, two years after Hilton Hotels, Nevada’s legislature added an exception to its law, which now applies Unocal duties only when the defensive tactic impedes the shareholders’ right to vote (under which circumstances Delaware applies the higher Blasius standard). The legislative history suggests that the amendment was intended to ensure that the Hilton Hotels case was limited to circumstances that involve interference with shareholder voting rights. Otherwise, Nevada courts should not follow Delaware law, but rather apply the BJR to managers’ use of defensive tactics:

[T]he members of the Executive Committee agree with the Hilton II Court’s emphasis on the importance of the stockholder franchise. They believe the Court’s action in enjoining the ITT restructuring plan was correct because the plan did infringe on the powers of the stockholders to remove directors under the circumstances. However, the Executive Committee believes the decision contained language which could be interpreted too broadly.

109 Id. at 1344. By splitting the company, the managers circumvented the need for shareholder approval since ITT became the shareholder of ITT Destinations.
110 Indeed, in the earlier case of Horwitz v. Southwest Forest Industries, 604 F. Supp. 1130, 1134–35 (D. Nev. 1985), the court applied the BJR to the decision to adopt a poison pill.
and wish to clarify Nevada law by changing NRS 78.138. If actions taken in response to takeover threats do not involve the disenfranchisement of stockholders the directors should obtain the benefits of the business judgment rule without first having to establish (i) that management had reasonable grounds to believe a danger existed to the corporation, and (ii) that the response to the takeover danger was reasonable.\textsuperscript{112}

Thus, when Nevada seemed to have deviated from the rule of thumb suggested by this Article, its legislature quickly stepped in to correct the deviation.

e. Applying Unocal—A Summary

Table 1 summarizes the results of reviewing all available cases. All cases in states with strong and intermediate other constituency statutes did not apply Unocal, although one case’s language seemed to accept it (in Missouri). One state with a weak statute (that was amended to be stronger—but remained weak) rejected Unocal. Table 7 reports these results by states including references to the relevant cases.

The findings summarized in Table 1, together with before and after analysis and the Nevada example, support the observation that states with relatively strong statues replaced Unocal with the BJR.

\textbf{Table 1}

\textbf{Applying/Rejecting Unocal}

<table>
<thead>
<tr>
<th>Other Constituency/ Directors’ Duties Statutes</th>
<th>Total Number of Available Cases</th>
<th>Applied Unocal</th>
<th>Rejected Unocal</th>
</tr>
</thead>
<tbody>
<tr>
<td>States (cases) with statutes that specifically apply the BJR</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Indiana Pennsylvania Maryland (after</td>
</tr>
</tbody>
</table>

f. Unocal Across States

Table 6 reports information on DTS’ strength by states. Twenty-nine states have other constituency statutes that are either strong or intermediate and therefore could reject Unocal. Seven states have strong statutes and would almost certainly reject Unocal. Two states—Arizona and Connecticut—have other constituency statutes that require their managers to take into account the interests of other constituencies.113 Though I could not find case authority in either of these states, Unocal is not likely to apply in either of them since under these statutes managers are sometimes not even allowed to maximize shareholder value, which is the assumption that underlies the Unocal test. Twelve more states have an intermediate other constituency/directors duties statute and a pill endorsement statute. They might also reject Unocal and replace it with the BJR. Finally, given the examples above, it is also possible that some of the other states that have weak statutes would tend to reject Uno-

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The other eleven states, which do not have any statute at all, would probably apply *Unocal*.

2. Managers’ Power to Resist Takeovers When the Firm Is for Sale: Do States Follow *Revlon*?

When the firm is for sale, as discussed above, *Revlon* requires directors in Delaware to act as auctioneers so as to maximize the sale price for shareholders. When *Revlon* is triggered directors are not allowed to take into account the interests of other constituencies. Unlike *Unocal* duties, *Revlon* duties are, to some extent, inconsistent with other constituency statutes. Thus, it may not come as a surprise if courts in states with other constituency statutes reject *Revlon*.

Nevertheless, courts still have significant flexibility under the new statutes and may still follow Delaware’s approach. For instance, courts could decide that while directors are allowed to take into account the interests of other constituencies in defending against a hostile takeover, they are not allowed to do so when the firm is for sale. Or, courts in states with weak statutes could interpret them as allowing directors to take into account the interests of other constituencies, but only as long as those interests are aligned with the shareholders’ interests.

As this section shows, however, courts have not chosen that approach. Rather, they allow directors to prefer a “white knight’s” lower offer on the ground that this buyer would better protect other constituencies. Moreover, in some cases courts not only allowed considerations of other constituencies but even went as far as to apply the BJR to directors’ use of defensive tactics.

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115 See, e.g., Romano, *Laboratory*, supra note 3, at 235 (“[I]t is plausible to contend that Delaware’s less restrictive approach to takeovers did not have a strong influence on other states. However, state courts still have considerable leeway to evaluate the discretion accorded boards under the statutes . . . .”).

116 Recall that weak statutes do not explicitly say that the board could consider the interests of other constituencies at the expense of shareholders. Alternatively, if the courts wanted to provide directors with more discretion, they could apply this requirement only to *Revlon* circumstances.
a. States that Did Not Follow Revlon

Not surprisingly, all of the states with statutes that applied the BJR explicitly for which I found published cases—Indiana, Ohio, Pennsylvania, North Carolina, Maryland, and Virginia—rejected Revlon duties.117

I was not able to find any case authority for states that have an intermediate other constituency/directors duties statute. I was able to find cases for states that have weak other constituency statutes—New York, Wisconsin, Missouri, and Illinois. Two cases from these states rejected Revlon duties (one of them distinguished Revlon while rejecting it); one purported to apply Revlon but effectively applied a more lenient standard; and one distinguished Revlon, which suggests that it may have been willing to follow the case under other circumstances. Among these authorities, at least one suggests that the statute can serve as a basis to apply the BJR. That is, the courts not only allow directors to take into account the interests of other constituencies but go the additional mile to defer to directors as long as they were adequately informed.

The New York and Wisconsin statutes merely allow the boards to take into account the interests of other constituencies or the long-term value of the firm, without stating explicitly that they can do so at the expense of shareholders’ short-term value.118 But courts in both states have relied on these statutes to reject Revlon. Applying New York law in Dynamics, the District Court for the District of Connecticut did not apply Delaware standards in light of New York’s poison pill statute, which incorporates directors’ duties

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from its other constituency statute. As noted above, New York’s poison pill statute is especially weak, since it explicitly subjects the use of the pill to judicial review. Thus, one could argue that, at least when a pill is involved, Revlon should apply under New York law. Yet the court did not pursue this avenue.

The court started by saying that even if Delaware cases apply they were distinguishable on the basis of the facts of this case. Unlike Revlon, the lock-up was not draconian, and the no-shop agreement included a fiduciary out. In addition the court found that the offer of the “white knight,” CTS, was significantly superior to the WHX offer at the time the break up fee was given. Yet at least as a matter of policy, it is not utterly clear that Revlon should not have applied to the facts of the case. CTS issued a cash tender offer with CTS shares at the back end. The break-up fee, though not absolutely high ($3 million if the deal does not consummate, plus a nonrefundable $2 million fee paid on signing), constituted more than 2% of the value of the deal (approximately $200 million). Furthermore, the sale agreement provided DCA’s three top executives with a ten-year employment contract, and one of them with a package of CTS’ options.

More important, while distinguishing this case from Revlon the court also acknowledged the differences in the states’ law, saying

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119 See Dynamics Corp. of Am. v. WHX Corp., 967 F. Supp. 59, 64–65 (D. Conn. 1997).
120 See N.Y. Bus. Corp. Law § 505(a)(2)(ii) (McKinney 2003) (providing that the use of the pill “shall be subject to judicial review in an appropriate proceeding in which the courts formulate or apply appropriate standards in order to insure that such limitations or conditions are imposed, enforced or waived in the best long-term interests and short-term interests of the corporation and its shareholders considering, without limitation, the prospects for potential growth, development, productivity and profitability of the corporation”).
121 Id. at 63.
122 Id. at 64, 66.
123 Id. at 65–67.
124 Thus, the offer was not clearly noncoercive, as was Pantry Pride’s all-cash offer for Revlon.
125 Indeed, in response to the deal with CTS, Dynamics’ shares closed at $44.375, significantly less than the cash offer ($55) and its pre-deal value. CTS shares, on the other hand, rose 75 cents to $61.75. CTS to Acquire Dynamics Corp. of America for 1.35 Times Revenue in Bid to Thwart WHX, 945 Wkly. Corp. Growth Rep. 9031 (May 19, 1997), available at http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=9707076106&site=ehost-live.
that “[w]hile there is no doubt that WHX would be on much stronger footing if Delaware’s corporation law applied here, DCA is a New York corporation and as such the decisions of its Board must be reviewed under New York['] corporation law standards.” The court then explained that New York law applies the BJR instead of the Revlon standard:

Actions taken by board members are reviewed by a court using the business judgment rule. As described by the New York state courts, the business judgment rule bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. 

Thus, the court applied the BJR to a Revlon situation, merely requiring managers to be informed and not conflicted. As discussed above, a similar approach was adopted in a different petition on the same transaction by the New York Supreme Court in Steiner v. Losyniak.

Similarly, applying Wisconsin law in Safety-Kleen Corp. v. Laidlaw Environmental Services, the U.S. District Court for the Northern District of Illinois determined that in light of Wisconsin’s constituency statute “the court cannot agree that maximizing short term shareholder value, that is, getting the highest price at the time of the tender, is the only interest the board may legitimately pursue.” The court did not go as far as the Dynamics court in applying the BJR to all change-of-control situations. Instead, it accepted Delaware’s notion of enhanced duties for change-of-control situations. Nevertheless, the court relied on Wisconsin’s other constituency statute to reject Revlon by allowing directors to take into account the interests of other constituencies even though the offer the board preferred did not include a binding promise to protect these interests.

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126 Dynamics Corp. of America v. WHX Corp., 967 F. Supp. 59, 64 (D. Conn. 1997).
127 Id.
128 See supra note 90 and accompanying text.
130 Id. (“[W]hile Laidlaw is correct that Safety-Kleen exacted no binding promises from Philip respecting other constituency, the Board was not unreasonable in findings that Philip’s stated intention to keep Safety-Kleen’s headquarters in operation and
Applying Missouri law, the U.S. District Court for the District of Kansas in *Flake v. Hoskins* determined that Missouri law follows Delaware law. In particular, the court determined that Missouri’s antitakeover statute should be interpreted such that “[a]ny consideration of other constituencies must . . . have at least a reasonable relationship to the general interests of shareholders.” Yet this is not the right interpretation of Delaware law. In Delaware, managers in an auction are required to take into account only the interests of shareholders. The standard that the *Flake* court applied is the standard that Delaware applies when managers use defensive tactics to remain independent. So while the *Flake* court did not apply the BJR, it did not follow *Revlon* either. It instead applied an intermediate standard—between *Revlon* and the BJR.

Finally, applying Illinois law when Illinois had a weak statute, the U.S. District court for the Northern District of Illinois in *Wieboldt Stores, Inc. v. Schottenstein* distinguished *Revlon* based on the facts of the case. Accordingly, it may have been willing to apply *Revlon* under other circumstances.

**b. States that Followed Revlon**

Further support for the hypothesis that statutes matter is that states without such statutes—California, Michigan, and Texas—adopted *Revlon*.

This hypothesis is supported by the analysis of case law before and after the adoption of other constituency/directors’ duties statutes for Indiana and New York. In both states, the adoption of these statutes led courts to reject *Revlon*.

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132 Id. at 1214.
136 *O’Neill v. Church’s Fried Chicken, Inc.*, 910 F.2d 263, 267 (5th Cir. 1990) (applying *Revlon* under Texas law before the passage of its other constituency statute).
137 Compare *Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 716–17 (7th Cir. 1986) (approving application of *Revlon* under Indiana law before the implementation of the statute), with *Shepard v. Meridian Ins. Group*, 137 F. Supp. 2d 1096, 1113 (S.D. Ind. 2001) (rejecting *Revlon* under Indiana law after the implementation of the statute).
Finally, this hypothesis is supported by the analysis of case law before and after the adoption of other constituency/directors’ duties statutes. We have authorities before and after the adoption of other constituency statutes for Indiana,¹³⁹ and New York.¹⁴⁰ In both states, the adoption of these statutes led courts to reject *Revlon*.

d. Applying *Revlon*—Summary

In sum, this Section has shown that states with strong and intermediate statutes have rejected *Revlon* and applied the BJR; some states with weak statutes have also rejected *Revlon* but some did not go so far as to apply the BJR; and states with no statutes followed *Revlon*.

**Table 2**

<table>
<thead>
<tr>
<th>Other Constituency/ Directors’ Duties Statutes</th>
<th>Total Number of Available Cases</th>
<th>Applied <em>Revlon</em></th>
<th>Rejected <em>Revlon</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>Statutes that Specifically Apply the BJR</td>
<td>6</td>
<td>0</td>
<td>6 Indiana, Ohio, Pennsylvania, North Carolina, Maryland, Virginia</td>
</tr>
<tr>
<td>Intermediate Statutes</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Weak Statutes</td>
<td>4</td>
<td>1 Illinois</td>
<td>3 New York</td>
</tr>
</tbody>
</table>

¹³⁹ Compare Hanson Trust PLC v. ML SCM Acquisition Inc., 781 F.2d 264, 277–83 (2d Cir. 1986) (applying *Revlon* under New York law before implementation of the statute), with Dynamics Corp. of Am. v. WHX Corp., 967 F. Supp. 59, 64 (D. Conn. 1997) (applying the BJR instead of *Revlon* under New York law after implementation of the statute).

¹⁴⁰ Before the implementation of the statute: Dynamics Corp. of Am. v. CTS Corp., 805 F.2d 705 (7th Cir. 1986) (approving application of *Revlon*); after the implementation of the statute: Shepard v. Meridian Ins. Group, Inc., 137 F. Supp. 2d 1096 (S.D. Ind. 2001) (rejecting *Revlon* under Indiana law).

¹⁴¹ Before implementation of the statute: *Hanson Trust*, 781 F.2d 264 (applying *Revlon*); after implementation of the statute: *Dynamics Corp.*, 967 F. Supp. 59 (applying the BJR instead of *Revlon*).
There are thirty-five states in which there is at least a weak form of the other constituency/directors duties statute. Thus, according to the available cases, it is possible that Revlon duties do not apply in some or all of these thirty-five states. That is, directors in these states may not have a duty to auction the firm when the firm is for sale.

3. Managers’ Power to Interfere with the Shareholder Franchise: Do States Follow Blasius?

Under Blasius, if managers interfere with the shareholder franchise to defend against a hostile takeover, they have the burden of showing a compelling justification for their action.

a. States that Follow Blasius

Because of the importance of shareholder voting rights as a safety valve to counterbalance managers’ power, it is not surprising that states tend to follow Delaware in requiring managers to show compelling justifications in these cases. Indeed, various states—Michigan, Nevada, New York, and Massachusetts—have

### Table: No Statutes

<table>
<thead>
<tr>
<th>Wisconsin</th>
<th>Missouri</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>California Michigan Texas</td>
<td>0</td>
</tr>
</tbody>
</table>

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142 The Nevada statute’s amendment, however, seems to apply a weaker standard—the Unocal test—to intervention in shareholder voting rights. See Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342 (D. Nev. 1997); Shoen v. Amerco, 885 F. Supp. 1332, 1340–41 & n.22 (D. Nev. 1994). There are no Nevada cases, or cases citing Nevada law, clarifying whether the amendment adopts a more lenient Unocal standard or whether the amendment was using Unocal to describe heightened fiduciary duties, and thus might apply a “compelling justification” standard for Blasius situations. It is thus possible that Nevada courts would interpret the statute’s proportionality test to require managers to meet Blasius’ “compelling justification” requirement.
adopted Delaware’s *Blasius* test or other enhanced fiduciary standard (as opposed to the BJR).145

There are no available cases from states with strong other constituency/directors’ duties statutes; it is possible that these states with strong other constituency statutes would reject *Blasius*. Three cases from states with strong antitakeover statutes seem to have applied *Blasius*. Yet the first, *Jewelcor Management, Inc. v. Thistle Group Holdings Co.*,146 did not involve an acquisition and therefore did not apply Pennsylvania’s other constituency statute, which applies the BJR to disinterested directors who act in relation to an acquisition.147 Similarly, in another case involving Pennsylvania corporate law, the court in *Warehime v. Warehime* indicated that the reasoning in *Blasius* was persuasive, but this case also did not involve an acquisition.148 In the third case, *Ipalco Enterprises, Inc. v. PSI Resources, Inc.*,149 the board had violated an Indiana statute by delaying an annual meeting. The court responded:

[T]he court is aware that, unlike under Delaware law, Indiana corporate directors are not held to a particularly higher level of scrutiny in the context of corporate takeovers. Ind. Code § 23-1-35-1(f). However, the court’s business-judgment-rule analysis here focuses only on the PSI board’s setting the annual meeting of shareholders under Indiana Code 23-1-29-1(a) . . . . No level of deference justifies a corporate board’s blatant disregard of a statutory deadline.150

Other than these three cases justified by unique statutory circumstances, there are no available cases on point in states with strong other constituency/directors’ duties statutes. Courts in these states are likely to reject *Blasius* since these statutes reject the notion of enhanced duties in change of control situations.

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145 In addition, the Court of Appeals for the Third Circuit applied *Blasius* under New Jersey law, but only because it was not a change-of-control situation. IBS Fin. Corp. v. Seidman & Assocs., 136 F.3d 940, 949–51 (3d Cir. 1998).
150 Id. at *13 n.9.
b. One State That Did Not Follow Blasius

In one case with a weak other constituency/directors duties statute and a strong pill statute, the application of the BJR was extended not only to the poison pill but also to defensive tactics that interfered with shareholder franchise. In *Invacare*, the plaintiffs argued that since the continuing directors’ provision in a dead hand pill interfered with the exercise of shareholder voting rights, the court should require directors to show a compelling justification for their actions. The *Invacare* court rejected this argument, stating that “a ‘compelling justification’ requirement is inconsistent with the standard set forth in [Georgia’s statutory fiduciary duties].”\(^{151}\) It is possible that some of the other states—especially those that choose to adopt the strong version of other constituency/directors duties or pill endorsement statutes—will follow Georgia in that respect. Generally, however, it seems that states overwhelmingly follow *Blasius*.

*Table 3*

**Applying/Rejecting Blasius**

<table>
<thead>
<tr>
<th>Other Constituency/ Directors’ Duties Statute</th>
<th>Total Number of Available Cases</th>
<th>Applied Blasius</th>
<th>Rejected Blasius</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statutes that Specifically Apply the BJR</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Intermediate Statutes</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Weak Statutes</td>
<td>2</td>
<td>1</td>
<td>1 Georgia</td>
</tr>
</tbody>
</table>

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\(^{151}\) *Invacare Corp. v. Healthdyne Techs., Inc.*, 968 F. Supp. 1578, 1581 (N.D. Ga. 1997). Similarly, the Court of Appeals of North Carolina has “decline[d] to adopt the Delaware common law standard of ‘enhanced judicial scrutiny’” for its evaluation of a board’s election procedures. *Hammonds v. Lumbee River Elec. Membership Corp.*, 631 S.E. 2d 1, 14 (N.C. Ct. App. 2006). Yet the firm—Lumbee River Electric Membership Corporation—was subject to the “Electric Membership Corporation Act.” Id. at 4. In deciding to reject the enhanced standards test, the court referred to “N.C. Gen.Stat. § 117-14 (a rural electric cooperative board of directors ‘shall have power to do all things necessary or convenient in conducting the business of a corporation[,]’”). Id. at 14.
To summarize, states unsurprisingly tend to follow *Blasius* as a result of the importance of voting rights. Except for one state that rejected it, all states apply enhanced fiduciary duties to *Blasius*. Two states—New York and Nevada—seem to replace *Blasius* with *Unocal* for intervention with shareholders’ voting rights. It is possible that the seven states with strong other constituency statutes would reject *Blasius*, but since I found no cases from states with strong statutes, there is no support for that. Two other states with strong pill statutes may also reject *Blasius* as the *Invacare* court did. By and large, however, states are likely to follow *Blasius*.

As explained below, given the overall protection that managers have in other states as a result of the application of the BJR, they would rarely need to interfere with shareholders’ voting rights. Thus, whether or not their state applies *Blasius* may not be a significant question for them.152

<table>
<thead>
<tr>
<th></th>
<th><em>Unocal to Blasius</em> circumstances)</th>
<th>(S Pill Statute)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Statutes</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Michigan</td>
<td>0</td>
</tr>
</tbody>
</table>

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152 The application of *Blasius* by courts in other states could have been important if the plaintiffs managed to include acts that in Delaware trigger *Unocal or Revlon* but not *Blasius*. Yet all of the available cases deal with acts that are typical examples of intervention in shareholder franchise. See IBS Fin. Corp. v. Seidman & Assoc., 136 F.3d 940, 949–51 (3rd Cir. 1998) (citing *Blasius* and rejecting a board’s attempt to reduce the number of seats because it was designed to thwart shareholder voting rights); Simon Prop. Group, Inc. v. Taubman Ctrs., Inc., 261 F. Supp. 2d 919 (E.D. Mich. 2003) (involving a corporate bylaws amendment designed to limit ability of shareholders to call special meetings); Int’l Specialty Prods., Inc. v. Dexter Corp., No. 3:00-CV-157 JBA, 2000 WL 35453111 (D. Conn. July 27, 2000) (involving an attempt by the board to circumvent voting rights by selling a corporation through piecemeal sales, which thus avoided Connecticut’s statutory requirement of having a shareholder vote when “substantially all” of the company’s assets were for sale); Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342 (D. Nev. 1997) (involving an attempt to stagger the board and split into three new companies as a response to a tender offer); *Invacare*, 968 F. Supp. 1578 (involving an attempt to invalidate a “continuing directors” provision); ER Holdings, Inc. v. Norton Co., 735 F. Supp. 1094 (D. Mass. 1990) (involving an attempt to delay a shareholder meeting); Warehime v. Warehime, 777 A.2d 469, 478–80 (Pa. Super. Ct. 2001) (citing *Blasius* to reject a board’s attempt to reclassify shares’ voting rights). I thank Eric Talley for this point.
E. Summary—Standards Across States

Table 7 summarized the law across states. Its positive findings are that Unocal duties were rejected either by statute or by courts in eleven states—Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, and Virginia. Unocal was followed in eleven states—Arkansas, California, Florida, Illinois, Kansas, Michigan, Minnesota, Missouri, Oregon, Texas, and Wisconsin. For the rest of the states there were no available cases on point.

Revlon was rejected in nine states—Indiana, Maryland, Nevada, New York, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin—and followed in six—California, Illinois, Kansas, Michigan, Minnesota, and Texas.

Thus, if we look at all available positive cases on balance the rejection of Unocal and Revlon is not a marginal phenomenon.

F. The Status of the Dead Hand and the Slow Hand Pills

This Section focuses on an extreme defensive measure: versions of the pill that were intended to block the proxy fight path.

The sample here is especially small. Furthermore, the summary of cases results does not reveal new information because I did not find any case that was not already discussed before. Finally, the proposition that these statutes may have a role in the approval of extreme pills has been raised before by Heith Rodman. Therefore, the contribution of this Section is more limited. It conducts a close analysis of the cases that demonstrate the role that antitakeover statutes had in validating extreme pills. The analysis raises the possibility that extreme pills would be allowed in other states, especially in states with relatively strong statutes.

153 Before the amendment to its other constituency statute.
154 Before the passage of its other constituency statute.
155 Before the amendment to its other constituency statute.
156 Before the passage of its other constituency statute.
157 See Rodman, supra note 76, at 993, 1014–18 ("[V]arious states’ corporate codes likely will be battlegrounds over the survivability of dead hand provisions in the future."). Rodman’s classification of statutes is somewhat different from the classifications this Article adopts. See supra note 76. Also, this Section conducts a closer analysis of the cases to show the role that the statutes had in approving the extreme pills.

An understanding of the extent to which the statutes matter first requires an examination of Delaware law. The Delaware Court of Chancery, in *Carmody v. Toll Brothers, Inc.*, determined that by issuing a “dead hand pill” that prohibited new directors from redeeming the pill, directors exceeded their statutory authority and breached their fiduciary duties under *Unocal* and *Blasius*.158

The court found that directors do not have authority to issue a dead hand pill under Delaware law since this pill creates differences in directors’ voting power and interferes with directors’ power to manage the firm, which under Sections 141(a) and 141(d) of the Delaware Code could be altered only in the certificate of incorporation.159

The court also found that the dead hand pill could not pass *Unocal*’s proportionality test because the pill was preclusive160 and coercive.161 Finally, the court determined that since the extreme pill will preclude a proxy contest162 the board has to show a compelling justification for its use.

In a subsequent decision, *Quickturn Design Systems, Inc. v. Shapiro*, the Supreme Court of Delaware struck down a slow hand pill that barred any redemption or amendment to the pill by a newly elected board for six months after taking office.163 Unlike the Court of Chancery, the Supreme Court of Delaware focused solely on the board’s authority to limit the default power afforded directors when the charter has not been modified as required by Section 141(a).164

Since Delaware cases have relied on boards’ authority pursuant to Section 141(a) to strike down these pills, one might expect that in other states the validity of extreme pills will turn on whether

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159 Id. at 1190–92.
160 The court ruled that the claim that the dead hand pill “‘disenfranchises shareholders by forcing them to vote for incumbent directors or their designees’” is sufficient to claim coerciveness. Id. at 1195 (quoting plaintiff’s complaint).
161 Id.
162 Id. at 1194.
163 721 A.2d 1281, 1289 (Del. 1998).
management has statutory authority similar to management’s authority in Delaware.

As the research shows, however, the main difference between states that approved the dead hand or the slow hand pill and Delaware was that the states that approved extreme pills had relatively strong DTS, and not that they had different rules regarding board authority. These states’ rules on board authority were by and large similar to Delaware’s, and the few differences they had were not decisive in the courts’ decisions. Thus, the status of the dead hand and the slow hand pills in other states appears to turn on whether the states had DTS and how strong these statutes were.\textsuperscript{165}

In the first case that allowed a dead hand pill, \textit{Invacare}, Healthdyne’s rights plan had a “continuing director” provision that prohibited new board members from making changes to the pill. The District Court for the Northern District of Georgia upheld Healthdyne’s dead hand pill.\textsuperscript{166}

Georgia’s Corporate Code, like Delaware’s Section 141, delegates the power to manage a corporation to its board of directors.\textsuperscript{167} To be sure, unlike Delaware code, which requires limitations on this power to be included in the certificate of incorporation, Georgia’s code accepts limitations in the bylaws or shareholders’ agreements. Yet the dead hand pill in \textit{Invacare} did not meet any of these requirements. Thus, the \textit{Invacare} court referred to Georgia’s pill endorsement statute in validating the dead hand pill.\textsuperscript{168}

Since Georgia’s pill endorsement statute gives the board the sole discretion to set the conditions of the rights plan,\textsuperscript{169} and since the comment to the statute states that “the discretion granted to the board of directors to issue rights . . . is intended to be limited only by the directors’ fiduciary obligations to the corporation,”\textsuperscript{170} and

\textsuperscript{165} See Rodman, supra note 76, at 1016 (“The variations between the Delaware and New York statutes, on one hand, and the Georgia statute, on the other, played an important role in determining the outcomes of the three cases discussed in the Introduction to this Comment. Specifically, differences between the Georgia statute endorsing poison pills and the New York and Delaware equivalents largely explain the decisions in each case.”).
\textsuperscript{168} Invacare, 968 F. Supp. at 1580.
since the statute provides that the pill terms’ are not required to be included in the articles of incorporation, the court held that a current board has the power to create a pill that limits the power of a future board. The *Invacare* court referred also to Georgia’s Fair Price and Business Combination statutes, “not[ing] that Georgia corporate law embraces the concept of continuing directors as part of a defense against hostile takeovers.”

Similarly, referring to Pennsylvania’s pill endorsement and other constituency statutes, the U.S. District Court for the Eastern District of Pennsylvania upheld a slow hand pill in *AMP Inc. v. Allied Signal Inc.* Pennsylvania’s pill statute is intermediate but its other constituency statute applies the BJR to disinterested directors.

The *Allied* court started by explaining that Pennsylvania pill statute “grants the board of directors broad power to adopt shareholder rights plans.” The court then determined that since the pill statute provides that a Pennsylvania corporation “may adopt a poison pill and may set forth “such terms as are fixed by the board of directors” and since under its fiduciary duties statute, “[d]irectors are not required to redeem any rights . . . solely because of the effect such action might have on a potential or proposed acquisition,” and since the BJR applies to all of the decisions of the disinterested directors in Pennsylvania, the board had the authority to adopt a slow hand pill and did not breach its fiduciary duties in doing so.

Finally, in New York, the Supreme Court of New York County invalidated a dead hand pill in *Bank of New York Co. v. Irving Bank Corp.*, finding that the board had no authority to limit the

---


172 *Invacare*, 968 F. Supp. at 1580. The *Invacare* court made no reference to Georgia’s other constituency statute, perhaps because its other constituency statute was weak and there was sufficient support in other statutes.


174 Nos. 98-4405, 98-4058, 98-4109, 1998 U.S. Dist. LEXIS 15617 (E.D. Pa. Oct. 8, 1998). AMP’s board replaced its dead hand provision with a no hand proposal providing that the pill would become non-redeemable and non-amendable until the pill expired, which was in approximately 14 months. See id. at *5–6.

175 Id. at *11.

176 Id. at *13–14.

177 Id. at *14.
power of the insurgents to redeem the pill. New York is different from other states in that under New York statute, limitations imposed on the board’s power are sometimes contingent on approval by all of the firm’s shareholders. Thus, Irving provides less support to the observation that antitakeover statutes matter, though it not inconsistent with these observations since New York’s other constituency and pill endorsement statutes were only weak. Indeed, the Invacare court distinguishes Irving both based on New York special shareholder approval requirement\(^{179}\) and based on Georgia’s takeover statutes, which New York lacks.\(^{180}\)

There are no other available cases that ruled on the dead hand or the slow hand pills,\(^{181}\) but in two states—Maryland and Virginia—the slow hand pill is explicitly allowed by statute.

1. Extreme Pills—Summary

Table 4 summarizes the search results. As it shows, the states that invalidated pills had no, or only weak, DTS. The states that approved extreme pills—Georgia and Pennsylvania—had at least one strong statute (pill endorsement or other constituency).

<table>
<thead>
<tr>
<th>Table 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extreme Pills</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
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<th>Prohibit Extreme Pills</th>
</tr>
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<td>1 Georgia</td>
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</tr>
<tr>
<td>Intermediate Pill Statutes</td>
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<td>1 Pennsylvania (S-</td>
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</tr>
</tbody>
</table>


\(^{179}\) The court noted that the Georgia statute does not have the same requirement as in New York that a restriction on the board’s power to manage the business of the corporation must be authorized by all of the shareholders on the certificate of incorporation. 968 F. Supp. at 1580.


2. Extreme Pills in Other States?

This sample is admittedly small. Combined with the analysis of the cases, the results suggest that it is at least possible that some other courts will follow this approach. In particular, it is possible that some of the eight states that have at least one strong DTS (four in addition to the states that validate extreme pills), will also validate extreme pills.

In addition, since our classification found the pill statute in Allied only to be intermediate, and since states that invalidated the extreme pill had only weak statutes, it may even be possible (though not likely) that some of the twenty states with at least two intermediate statutes will uphold strong forms of the poison pill.

III. FIRMS WITH EXTREME PILLS

To provide further support for the results reported in Part III, I report new data on the number and proportion of firms that have extreme pills relative to the proportion of firms with any pills (extreme or regular) in different states according to their DTSs.

This comparison is informative for at least two reasons. First, it could provide information on what firms believe to be the law in some states relative to others. For example, if the proportion of firms with dead hand or slow hand pills relative to the proportion of any pills is higher in other states than in Delaware, it could suggest that firms believe these pills are more likely to be allowed outside of Delaware.

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[182] See also Rodman, supra note 76, at 1020–21 (“Those states with both strong-form poison pill endorsements and other-constituency statutes are particularly likely to uphold a dead hand provision. . . . Other states, such as Pennsylvania, Rhode Island and Ohio, with historically pro-management corporate codes, also are likely to follow Georgia in upholding the provision.”) (internal citation omitted).
Second, a higher proportion of firms with extreme pills relative to any pills outside of Delaware could also suggest that firms believe that fiduciary duties in change-of-control situations are weaker in other states since the dead hand pill failed *Unocal*’s proportionality test and *Bslasius*’ compelling justification standard in Delaware.

To be sure, a high proportion of extreme pills could reflect a selection bias rather than an indication of how managers believe the law to be. For instance, if firms that need more protection choose states with stronger antitakeover statutes, then these firms also are more likely to adopt extreme pills regardless of what they think of the state law.

Firms’ choices of where to incorporate, however, are quite limited; firms generally incorporate either in Delaware or in their home states. Even if they self-select, firms in these states have better protection than firms in states with no antitakeover statutes by virtue of the statutes themselves. Thus, for substitution effects, these firms may have less need for extreme pills. Finally, and most importantly, if such selection occurs, it should also affect the overall number of firms with pills—both regular poison pills and extreme pills—that firms adopt. Thus, if states with strong DTS have a significantly higher ratio of firms with extreme pills but do not have a significantly higher ratio of firms with any pills (including firms with regular pills and firms with extreme pills), it is less likely that a selection bias of the sort described is driving the results.

Using Sharkrepellent.net, a searchable database that “compiles information from a company’s articles of incorporation, bylaws, state takeover law and shareholder rights plan (poison pill) to build a comprehensive defense profile—including all source documents,” I have collected data on firms with dead hand or slow

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184 It is still possible, however, that a selection bias of a different kind, which I have not anticipated, is driving these results.

185 See SharkRepellent.net, https://www.sharkrepellent.net (“[The database] currently offers comprehensive defense profiles for companies in the following universes: S&P 1500, Fortune 500, Nasdaq-100, Dow Jones Industrials, initial public offerings (IPOs) from January 1, 1999 to present, high profile targets of M&A deals announced...”)
hand pills in each of the fifty states. Data on the number of incorporated firms in each state were collected from Compustat on August 14, 2008.

Table 5 summarizes the results. It provides data on the absolute number of extreme pills as well as the proportion of such pills out of the number of incorporated firms (column 6) the proportion of any pills out of the number of incorporated firms (column 5) and the proportion of extreme pills out of the number of any pills (column 7). The Table provides aggregate information for the following categories: states in which the pill is explicitly allowed (Georgia, Maryland, Pennsylvania and Virginia); states in which it is explicitly prohibited (Delaware and New York); and states in which the legal situation is unknown, according to two categories—states with at least one strong statute or two intermediate statutes, and all other states (that is, states that do not have at least one strong statute or two intermediate statutes).

At the state level there are significant variations sometimes attributable to the small number of incorporations in a particular state. Thus, the analysis will focus on the aggregate level. The table also reports the data on a state by state basis, which by and large, is not inconsistent with the analysis.

The data reported in the table are likely underinclusive: poison pills can be adopted very quickly, so firms have few incentives to hold extreme pills in place when they do not face a hostile take-over, especially given the reputational effects such pills may have.\footnote{See Coates, supra note 3, at 287 (explaining that a pill can be adopted “in a single business day”).}

Thus, the analysis focuses on the relative data.

As Table 5 shows the states where the extreme pills are allowed have the highest proportion of extreme pills out of any pills: 31.3%.
Georgia, Maryland, Pennsylvania, and Virginia, have on average a higher proportion of firms with extreme pills (3.3% relative to the average ratio of extreme pills of 0.8%). Their proportion of firms with any pill in each state is lower than average (10.6% relative to the average ratio of firms with any pill of 16.4%), suggesting that selection bias is not driving the results regarding the extreme pills.  

At the other end of the spectrum—in Delaware and New York, where the pills are prohibited—the average proportion of extreme pills to any pills is 2.5%.

The proportion of firms with extreme pills in Delaware (0.5%) is much smaller than the average proportion (0.8%). This result stands in contrast to the proportion of regular poison pills in Delaware (20.3%), which is higher than the average proportion of regular pills (16.4%).

If Delaware attracted firms with less need for protection, one would also expect to see a lower ratio of firms with any pills in Delaware. Since the frequency of pills in Delaware is relatively high, it is not likely that selection bias explains the relatively low ratio of extreme pills in Delaware. Rather, it is more likely that managers do not adopt extreme pills because they perceive Delaware law as less hospitable than other states’ laws to extreme pills.

In between these two categories the ratio of extreme pills is increasing with the strength of the statutes. The proportion in states with a least one “S” or two “I” statutes is 6.8%, and in all other states (states that do not have at least two intermediate statutes) is 3.1%. The difference between these two categories is statistically significant at the 5% level.

187 There is at least no selection bias of the type previously discussed, where the state has a high ratio of extreme pills, since the state attracts firms that need more protection. It is more likely that the state has a high ratio of extreme pills because they are valid under state law.

188 Delaware has a relatively significant absolute number of firms with extreme pills, but only because of the large number of firms incorporated there. One could ask why Delaware has firms with extreme pills at all. Presumably, some firms may choose to adopt extreme pills despite their illegality assuming that they may create some deterrence effect, especially if the costs of litigation are expected to be high relative to the potential benefits. This is another reason why the relative number is more important than the absolute one.
### Table 5

<table>
<thead>
<tr>
<th>State of Incorporation</th>
<th>Total Firms</th>
<th>Total Poison Pills</th>
<th>Total Extreme Pills</th>
<th>Total Poison Pills/Total Firms</th>
<th>Total Extreme Pills/Total Firms</th>
<th>Total Extreme Pills/Total Pills</th>
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<tbody>
<tr>
<td><strong>I. States in Which Extreme Pills Are Allowed</strong></td>
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<td></td>
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<td><strong>II. States with at Least One Strong/Two Intermediate Statutes</strong></td>
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<td></td>
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</tr>
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</table>

**IV. States in Which Extreme Pills Are Not Valid**

<table>
<thead>
<tr>
<th>Aggregate</th>
<th>Votes for</th>
<th>Votes against</th>
<th>Percent for</th>
<th>Percent against</th>
<th>Percent Invalid</th>
</tr>
</thead>
<tbody>
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<td>1255</td>
<td>16.4%</td>
<td>0.8%</td>
<td>5.0%</td>
</tr>
</tbody>
</table>

**Delaware**

| Delaware | 3952 | 804 | 20.3% | 0.5% | 2.5% |

**New York**

| New York | 245 | 21 | 8.6% | 0.4% | 4.8% |
IV. RECONSIDERING STATE ANTITAKEOVER LAW: HOW OTHER STATES’ LAWS ARE DIFFERENT FROM DELAWARE LAW

The direct implication of this study is that in some states there are no enhanced fiduciary duties in change-of-control situations unless there is interference with shareholder voting (and even then it is possible, though less likely, that some states will not impose higher duties on management). The famous Unocal and Revlon duo taught in corporations courses and followed by academics simply does not apply to some firms. The BJR or other weakened duties replace them either explicitly in states’ statutes or in states’ case law. As a result, managers in those firms have wide latitude to use defensive tactics, and as long as they do not have a direct conflict of interest and are adequately informed, they will enjoy the protection of the BJR.

In the following Section, I will focus on several concrete implications of these results. Although I discussed above how Delaware law is different from the BJR, I will further discuss some of these differences here.

A. “Just Say No”

The first implication of applying the BJR to the use of defensive tactics is that managers who receive a hostile takeover bid but wish to remain independent fulfill their fiduciary duties by merely being adequately informed.

To be sure, Delaware, in Time, arguably allowed managers in some circumstances to “just say no.” Yet as explained above, Time involved special circumstances. Thus, Time does not support the proposition that a board will always get to “just say no.” Indeed, as three of the most prominent Delaware judges suggest, it “is doubtful that courts will establish a bright-line precedent that gives boards carte blanche to ‘just say no.’ Rather, boards will continue to be subjected to a probing case-specific review in which the court will adjudicate the propriety of the board’s reasons for saying no.”189

Conversely, applying the BJR to the use of defensive tactics creates a predictable bright-line rule that allow managers to “just say

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189 Allen, Jacobs & Strine, supra note 24, at 1094.
For instance, in *WLR Foods v. Tyson Foods* the board of WLR was determined to remain independent. The Fourth Circuit affirmed the district court determination that the Virginia fiduciary duties statute “allows an inquiry only into the processes employed by corporate directors in making their decisions regarding a takeover, and not into the substance of those decisions.”

Thus, under the BJR, hostile bidders should have weaker incentives to search for targets and managers should be less disciplined by the market for corporate control.

**B. Managers’ Power to Look for a “White Knight”**

Moreover, the law in some other states deviates from Delaware law in another important way—it applies weaker fiduciary duties than Delaware does when managers choose to sell the company.

Delaware courts, as discussed above, determined in *Revlon* that when the sale or a break-up of the company is inevitable, managers must act as auctioneers.

As shown above, in several states managers can take into account the interests of other constituencies in preferring a white knight over a hostile bidder. Moreover, in some states (some by statutes and one by case law), courts have gone as far as to apply the BJR when the firm is for sale.

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190 To be sure, the BJR is usually described as a standard rather than a bright-line rule. But since it provides managers protection from liability as long as they do not have any self-interest (the conflict of interests inherent in hostile takeover is not considered self-interest for that purpose) and were adequately informed, it functions as a quite clear bright-line rule.

191 65 F.3d 1172, 1175 (4th Cir. 1995).

192 Id. at 1182.

193 See discussion supra Subsection I.A.2.

194 Taking into account the interests of other constituencies may be superior under some circumstances to focusing solely on shareholders’ value. For instance, sometimes taking the interests of other constituencies would lead to better maximization of aggregate value. See, e.g., Douglas G. Baird & M. Todd Henderson, Other People’s Money, 60 Stan. L. Rev. 1309, 1327–33 (2008) (proposing two alternatives to current law—a fiduciary duty to the firm as a whole or a contract-based approach to fiduciary duties). Yet, the specific context of hostile takeovers raises the concern that managers will abuse these considerations to defend against an efficient hostile acquisition.

195 At least two cases explicitly suggest that, as a result, managers would not have to sell to a higher bidder as long as they have been adequately informed. See First Union Corp. v. Suntrust Banks, Inc., No. 01-CVS-10075, 01-CVS-8036, CIV. A. 01-CVS-4486, 2001 WL 1885686 (N.C. Super. Ct. Aug. 10, 2001); Willard ex rel. v. Moneta
This difference is significant because when managers use defensive tactics to remain independent it is possible, especially if the offer is high, that shareholders’ pressure to sell would mount to the point that managers find it difficult to resist. In these circumstances managers may look for a “white knight” as an easy way to reject an offer that shareholders support.

C. Veto Power to Block Hostile Takeovers

The previous parts have shown that managers in some states can “just say no” to a hostile takeover and, at the very least, can turn to a white knight when shareholder pressure mounts. Together, these two options may already be sufficient to deter bidders significantly. As this Section shows, the law in some other states might also provide managers with the power to block hostile takeovers completely.

1. Applying the BJR to Staggered Boards

The available cases suggest that in some states the BJR could apply to staggered boards. In the one case that clearly involved a staggered board—Dynamics—the court applied the BJR to managers’ use of the pill even though the state had only a weak DTS. In other cases that applied the BJR there was no indication that the treatment of a staggered board would be different from the treatment given to a board that is not staggered. Finally, in some states the BJR applies by statute and thus probably applies to staggered boards.

If the BJR applies to a staggered board using the pill it would be almost impossible for a bidder to take over the company. With the BJR, managers can “just say no” as long as they are adequately informed and the bidder will not have the proxy fight path available to him. Such a bright-line rule is not consistent with Delaware law where it is doubtful that a staggered board would have the power to “just say no” under any circumstances.

Bldg. Supply, 515 S.E.2d 277, 284 (Va. 1999) (finding that § 13.1-690 does not require a director to maximize profits by accepting the highest bid when selling the assets of a corporation, but instead need only “act in accordance with ‘his good faith business judgment of the best interests of the corporation’”).

106 See Dynamics Corp. of Am. v. WHX Corp., 967 F. Supp. 59, 64 (D.Conn. 1997).
2. Allowing Extreme Pills

Finally, given the reasoning of the cases and the findings on patterns of adoption of extreme pills it is possible that extreme pills would be valid in states that have not yet explicitly approved them. Extreme pills limit the ability of a new board to redeem the pill and thus effectively provide an existing board with veto power to fight hostile takeovers. Thus, in some states, even non-staggered boards may have veto power to essentially block a hostile takeover.

V. NORMATIVE IMPLICATIONS

In the following Part, I will discuss some normative implications that arise from the findings here. The main purpose of this Article and its primary contribution, however, is descriptive. Thus, one could disagree with these implications but still find the rest of the Article useful.

A. Policy Implications for State Antitakeover Law

Academics have consistently argued that some limitations on using defensive tactics are desirable. In fact, a significant body of literature argues that managers should be completely prohibited from using defensive tactics, or at the very least should bring such tactics to shareholder approval.197

The question of what exactly antitakeover law should look like—whether managers should be completely prohibited from using defensive tactics as some commentators have suggested, or whether they should be entitled to use them only with shareholder approval, and only in specific circumstances—is beyond the scope of this paper.

Rather, the goal here is more modest: given the findings of this paper, the analysis suggests that states should not apply the high

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197 See, e.g., Lucian Arye Bebchuk, The Case Against Board Veto in Corporate Takeovers, 69 U. Chi. L. Rev. 973, 975 (2002) [hereinafter Bebchuk, Board Veto] (arguing against board veto power in hostile takeovers); Easterbrook & Fischel, Proper Role, supra note 1, at 1164 (arguing for a rule of managers’ passivity in the face of a hostile takeover); Ronald J. Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819, 865–69 (1981) (arguing that managers should provide information and propose alternatives but only shareholders should have the power to decide to reject a bid).
Providing managers with the protection of the BJR as a bright-line rule is not desirable for several reasons. First, it essentially replaces the judgment of shareholders with that of managers, depriving the former of the power to decide whether to accept an offer.\textsuperscript{198}

To be sure, in some circumstances it may be valuable to deprive shareholders of this power, or at least provide them with the option to commit not to use this power. If shareholders had the absolute power to reject certain defenses, managers could use other, presumably more harmful, defensive tactics.\textsuperscript{199} Moreover, managers may employ a more successful selling strategy when shareholders’ hands are tied.\textsuperscript{200} Yet, while depriving shareholders of this power in some circumstances is desirable, a categorical rule that commits this power exclusively to the board, regardless of shareholder choice, is also unlikely to benefit shareholders since it will raise significantly the likelihood and costs of opportunism. Indeed, the commentators who object to an absolute shareholder choice regime do not advocate applying the BJR to managers’ use of defensive tactics.\textsuperscript{201}

Second, anticipating managers’ ability to use their veto power, hostile bidders should have only limited incentives to invest in searching for a target and placing a hostile bid. Indeed, Robert Daines has found that firms in Delaware were more likely to at-
tract takeover bids and be acquired than firms incorporated in other states.\footnote{202}{See Daines, Firm Value, supra note 5, at 527.}

Third, managers under these regimes would know that they are less vulnerable to a hostile takeover and thus face weaker disciplinary pressure from the market for corporate control.

Finally, shareholders have not initiated an adoption of antitakeover statutes to their charters, nor have they voted to approve antitakeover rules that lead to these standards. Instead of bringing these rules to a shareholders’ vote, managers have chosen lobbying the legislature to impose them on their firms, presumably out of a concern that shareholders will not support them.\footnote{203}{See, e.g., Bebchuk & Ferrell, supra note 18, at 1188–89; Romano, Corporate Charters, supra note 10, at 854–55.}

Indeed, there is no support among commentators for applying the highly deferential BJR as a bright-line rule to managers’ use of defensive tactics. In fact, most academics think that Delaware antitakeover law either achieves the right balance or provides managers with excessive protection.\footnote{204}{See, e.g., Jennifer Arlen & Eric Talley, Unregulable Defenses and the Perils of Shareholder Choice, 152 U. Pa. L. Rev. 577, 658 n.174 (2003) (“Yet our results do not suggest that a stronger managerial choice regime than Delaware’s would enhance firm value. To the contrary, the analysis above suggests that weakening Delaware’s regime by making managerial authority less certain could increase firm value.”); Bebchuk & Ferrell, supra note 18, at 1185 (“[T]he Delaware courts have left the reasoning of all these commentators, even those sympathetic to some types of defensive tactics, far behind by endorsing a much more expansive license for managerial use of poison pills and ‘just say no.’”); Kahan, supra note 22, at 592 (suggesting that Delaware law achieves a “reasonable middle-ground between fear of director self-entrenchment on one side, fear of court intrusion on the other side, and fear of ignorant and rushed shareholder decisions on the third side—a middle ground”); Marcel Kahan & Edward B. Rock, Corporate Constitutionalism: Antitakeover Charter Provisions as Precommitment, 152 U. Pa. L. Rev. 473, 484–89 (2003) [hereinafter Kahan & Rock, Precommitment] (arguing that Delaware law rightfully allows shareholders to divest their power to the board to defend against a hostile bid); Kahan & Rock, Stop Worrying, supra note 47, at 901–03 (arguing that Delaware law encourages bilateral decision making which is likely to be welfare enhancing).}

Martin Lipton, a long-time counselor for target management and the inventor of the poison pill, was the only commentator who called for applying the hands-off BJR to managers’ use of defensive tactics,\footnote{205}{See Martin Lipton, Takeover Bids in the Target’s Boardroom, 35 Bus. Law. 101, 115–16 (1979).} yet even he was not...
clearly suggesting applying it as a bright-line rule, and eventually acknowledged that Delaware’s compromise has worked well.206

B. Implications for the Debate over the Market for Corporate Law

The results of this Article have implications for one of the most hotly contested issues in the debate over the desirability of our system of state corporate law. While some suggest that our system of state corporate law creates competition for incorporations that induces states to produce efficient corporate laws,207 others doubt that such competition is desirable208 or that it even exists.209 Race-to-the-bottom scholars have argued that the current system induces states to cater to managers’ interests at the expense of shareholders. Race-to-the-top scholars have argued that market forces align managers’ incentives with those of shareholders, and that federal intervention would be worse. Scholars from both schools have focused on antitakeover law as a litmus test for the performance of this system.

Race-to-the-bottom scholars point to states’ antitakeover laws to support their view. The fact that antitakeover law provides excessive protection to managers, they argue, suggests that states race to

206 See Martin Lipton, Pills, Polls, and Professor Redux, 69 U. Chi. L. Rev. 1037, 1046 (2002) (“Put to the practical test during the half-decade of intense hostile takeover activity that ensued, the new Delaware paradigm has worked well.”).


209 See generally Bebchuk & Hamdani, supra note 8; Marcel Kahan & Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205 (2001); Kahan & Kamar, The Myth, supra note 8.
the bottom and that some form of federal intervention is desirable. 210

Race-to-the-top scholars do not challenge the assessment of state antitakeover law. Like race-to-the-bottom scholars, they view it as providing managers with excessive power. Thus, race-to-the-top scholars find the state of affairs puzzling. 211 To reconcile their favorable view of state competition with their unfavorable view of the product of this competition, race-to-the-top proponents have pointed to the behavior of Delaware, the dominant state in the market for corporate law, as an indication that the race is indeed one to the top. 212 Roberta Romano, Frank Easterbrook, and Daniel Fischel have argued that Delaware was late to adopt antitakeover statutes, 213 and that the statute that Delaware eventually adopted—a control share acquisition statute—was relatively mild. 214 While they focused on Delaware’s behavior they did not point to substantive differences between Delaware and other states.

This Article has demonstrated that significant differences exist between states. In particular it has shown that the antitakeover law in other states provides managers with protection that may destroy significant value to shareholders; protection that none of these scholars has ever supported. Thus, the analysis suggests that at least a significant part of the market is racing to the bottom, with Delaware performing better but still being dragged down by other states.

These findings require race-to-the-top scholars to take into account the fact that the bottom of the market is lower than they previously had perceived it to be, and that in some cases managers can get significant protection by merely opting to remain in their home state rather than initiate a move to Delaware.

At the same time, the analysis strengthens race-to-the-top proponents’ argument that Delaware is better than other states. Thus,

210 See, e.g., Bebchuk & Ferrell, supra note 18, at 1197–99.
211 See, e.g., id., at 1193–94.
212 See, e.g., id., at 1196–97; Romano, Empowering Investors, supra note 6, at 2383–88; Romano, The Need for Competition, supra note 3, at 532–35.
213 See, e.g., Easterbrook & Fischel, Economic Structure, supra note 6, at 219; Romano, The Need for Competition, supra note 3, at 531 (“[I]n contrast to its position as an innovator of corporation code provisions, Delaware has persistently been a laggard behind other states in the takeover statute context.”).
214 See Winter, Shareholder Protection, supra note 207, at 288.
as the following Section shows, the analysis calls for a solution that preserves Delaware’s advantages but also limits the distorted incentives of some of the other states.

The analysis also has some implications for the no-competition account. Two influential studies have shown that other states do not make, and are not likely to make, serious attempts to compete with Delaware because of lack of incentives and significant barriers to entry.215 This paper has shown that variations in antitakeover law provide managers and shareholders with options from which to choose. Thus, even if other states do not compete with Delaware, Delaware is limited by the fact that other states offer many different packages to managers and shareholders.

C. Implications for the Desirable Form of Federal Intervention: Delaware Standards as Federal Minimum Standards

The debate over the market for corporate law has focused on whether, and to what extent, federal intervention in corporate law is desirable. Race-to-the-bottom scholars have argued for some form of federal intervention to improve antitakeover law, from direct intervention, through federal minimum standards, to optional federal antitakeover law.216 Race-to-the-top scholars have argued that the current system provides states with strong incentives to invest in corporate law217 and to obtain information about corporations’ needs.218 Federal law lacks the incentives and the information

22 See Bebchuk, Desirable Limits, supra note 7, at 1510 (arguing for federal rules, or at least federal minimum standards, with respect to self-dealing transactions, taking of corporate opportunities, freeze-out mergers, all aspects of takeover bids and proxy contests, and limitations on dividends); Cary, supra note 7, at 701 (proposing that Congress adopt federal standards for corporate responsibility); see also Bebchuk & Ferrell, New Approach, supra note 208, at 162–63 (advocating a middle ground between federal nonintervention and mandatory federal regulation, including a federal process rule that would establish a process by which companies could switch from one state to another).
217 See, e.g., Fischel, supra note 207, at 923.
218 See, e.g., Winter, Shareholder Protection, supra note 207, at 291 (“Because federal legislation does not face direct competition with other legal systems, the behavior of investors under differing rules cannot be observed and we can only theorize about which rules optimize the underlying economic relationships.”).
that competition provides and is less likely to be responsive to changes in corporate needs over time.\textsuperscript{219}

A possible solution to this problem would be to have Delaware’s enhanced fiduciary duties as federally-mandated minimum standards.\textsuperscript{220} That is, a federal law could determine that managers should, at a minimum, face enhanced duties in change-of-control situations. States, if they want, could impose stricter fiduciary duties on managers but they could not impose weaker ones. Adopting Delaware standards as minimum standards will maintain the advantages of the current system, and by piggybacking on Delaware law it will benefit from Delaware’s information and responsiveness. At the same time, the downside of the system will be diminished. Moreover, minimum standards that adopt Delaware law actually piggyback on Delaware’s current information and therefore would not pose the oft-cited risk of federal intervention—uninformed regulation.

Furthermore, minimum standards that are identical to Delaware law could boost Delaware’s protection of shareholder interests. Delaware is being pushed to the bottom by other states’ choices. Delaware legislated its antitakeover statute only after many other states had passed up to five different kinds of antitakeover statutes,\textsuperscript{221} out of fear that firms might leave Delaware.\textsuperscript{222} Delaware judges gave managers power to use the pill to “just say no” in \emph{Time} after the possibility of mass migration from Delaware became a real threat.\textsuperscript{223} Thus, if other states had to adhere to Delaware’s current standards rather than their own lower standards, Delaware could afford to increase its standards and still maintain its incorporations.

\textsuperscript{219} See Fischel, supra note 207, at 922; Winter, Shareholder Protection, supra note 207, at 291.

\textsuperscript{220} Others have proposed to adopt federal minimum standards, but no one has proposed to adopt Delaware standards for that purpose. See, e.g., Bebchuk, Desirable Limits, supra note 7, at 1510 (proposing to adopt federal rules, or at least federal minimum standards, with respect to, among other things, takeover law); Cary, supra note 7, at 701 (proposing to adopt minimum federal standard).

\textsuperscript{221} See Romano, Corporate Charters, supra note 10, at 855.

\textsuperscript{222} See Kahan & Kamar, The Myth, supra note 8, at 740 n.229.

\textsuperscript{223} See, e.g., Roe, Delaware’s Competition, supra note 8, at 631–32.
The corporate laws of states other than Delaware govern almost half of all publicly traded corporations,\textsuperscript{224} and thus have significant influence on our economy.\textsuperscript{225} Moreover, the laws of other states influence Delaware law.\textsuperscript{226} Nevertheless, these laws have not previously been subject to systematic empirical investigation and comprehensive theoretical analysis.

This Article is the first to study antitakeover law in other states systematically. Its findings suggest that the antitakeover law that governs a significant portion of our firms departs significantly from conventional wisdom. Some states clearly do not apply \textit{Unocal} and \textit{Revlon} enhanced duties, and some other states are not likely to apply them. This Article also demonstrated that extreme versions of the pill may be allowed in some states.

Given these findings, the Article proposes that Delaware standards be adopted as federal minimum standards for antitakeover law.

\textsuperscript{224} See, e.g., Bebchuk & Cohen, Firms’ Decisions, supra note 183, at 389 (finding that Delaware attracts 58\% of all publicly traded incorporation).

\textsuperscript{225} Indeed, the companies at the center of two major corporate scandals that transformed our economy and legislative environment—Enron and WorldCom—were not incorporated in Delaware (Enron was incorporated in Oregon and WorldCom in Georgia).

\textsuperscript{226} See, e.g., Romano, Corporate Charters, supra note 10, at 859–60 (“[I]t is arguable that Delaware would not have enacted any takeover legislation in the absence of state competition.”).
Table 6
Pill Endorsement and Other Constituency/Directors’ Duties Statutes

<table>
<thead>
<tr>
<th>State</th>
<th>Pill Endorsement Statutes</th>
<th>Other Constituency/Directors’ Duties Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Strength</td>
<td>Effective Date</td>
</tr>
<tr>
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<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Alaska</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Arizona</td>
<td>0</td>
<td>I (+shall)</td>
</tr>
<tr>
<td>Arkansas</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>California</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Colorado</td>
<td>1</td>
<td>1989</td>
</tr>
<tr>
<td>Connecticut</td>
<td>I</td>
<td>2003</td>
</tr>
<tr>
<td>Delaware</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Florida</td>
<td>I</td>
<td>1989</td>
</tr>
<tr>
<td>Georgia</td>
<td>S</td>
<td>Adopted 1989; Amended 2000</td>
</tr>
<tr>
<td>Hawaii</td>
<td>I</td>
<td>1988</td>
</tr>
<tr>
<td>Idaho</td>
<td>I</td>
<td>1988</td>
</tr>
<tr>
<td>Illinois</td>
<td>I</td>
<td>1989</td>
</tr>
<tr>
<td>Indiana</td>
<td>I</td>
<td>1986</td>
</tr>
<tr>
<td>Iowa</td>
<td>I</td>
<td>1989</td>
</tr>
<tr>
<td>Kansas</td>
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</tr>
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<td>Kentucky</td>
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<td>S</td>
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<td>I</td>
<td>No enhanced duties for use of the pill</td>
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<tr>
<td>Michigan</td>
<td>I</td>
<td>2001</td>
</tr>
<tr>
<td>Minnesota</td>
<td>0</td>
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2009]  The State of State Antitakeover Law  2041

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<tr>
<td>Mississippi</td>
<td>I 1990</td>
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</tr>
<tr>
<td>Nebraska</td>
<td>0 W 2007</td>
<td></td>
</tr>
<tr>
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<td>I 1999</td>
<td>S-BJR applies except for interference in voting 1991; Amended 2004</td>
</tr>
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<td>0 0</td>
<td></td>
</tr>
<tr>
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<td>I 1989</td>
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<td>New York</td>
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</tr>
<tr>
<td>North Carolina</td>
<td>W 1990</td>
<td>S 1993</td>
</tr>
<tr>
<td>North Dakota</td>
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<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>I 1986</td>
<td>S 1984</td>
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<td>I 1990</td>
</tr>
<tr>
<td>South Dakota</td>
<td>1990 I</td>
<td></td>
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<td>I 2001</td>
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<td>I 1988</td>
</tr>
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<td>Texas</td>
<td>0 I 2006</td>
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<tr>
<td>Utah</td>
<td>1989</td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>0 I 1998</td>
<td></td>
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<td>S 1990</td>
<td>S 1988</td>
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<td>Washington</td>
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<td>W 1987</td>
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<tr>
<td>Wyoming</td>
<td>0 I 1990</td>
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Table 7
This table reports results for all states regarding whether they follow Delaware’s standards and whether they allow Extreme Pills.

<table>
<thead>
<tr>
<th>State</th>
<th>Unocal</th>
<th>Revlon</th>
<th>Blasius</th>
<th>Dead Hand or No Hand</th>
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<tbody>
<tr>
<td>Alabama</td>
<td></td>
<td></td>
<td></td>
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<td>Alaska</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Arizona</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>Yes</td>
<td>(Hall v. Staha)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>California</td>
<td></td>
<td>Yes (Heckmann v. Ahmanson)</td>
<td>Yes</td>
<td>(Southern Union v. Southwest Gas); somewhat conflicting earlier authority (Jewel Company)</td>
</tr>
<tr>
<td>Colorado</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Delaware</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>District of Columbia</td>
<td>Yes—before statute (In'l Ins. Co. v. Johns)</td>
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<td></td>
<td>No</td>
<td>(Invacare)</td>
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<td>Hawaii</td>
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<td>State</td>
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<td>Status After Statute Amendment</td>
<td>Case References</td>
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<tr>
<td>Illinois</td>
<td>Yes—prior to statute’s amendment in 1989 but after original version that was weak (Wieboldt Stores)</td>
<td>Yes in dicta (distinguishing Revlon)—prior to statute’s amendment in 1989 but after original version that was weak (Wieboldt Stores)</td>
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<td>Indiana</td>
<td>No—after statute (Shepard v. Meridian Ins. Group)/Yes—before statute (Dynamics Corp. of America v. CTS Corp.)</td>
<td>No—after statute (Shepard v. Meridian Ins. Group, Inc.)/Yes—before statute (Dynamics Corp. of Am. v. CTS Corp.)</td>
<td>No by statute (Yes if there was a statutory violation, Ipalco Enters. v. PSI Resources)</td>
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<td>Iowa</td>
<td>Implicitly adopts (Burcham v. Unison Bancorp, Inc.)</td>
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<td>No by statute (Yes if there was a statutory violation, Ipalco Enters. v. PSI Resources)</td>
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<td>Kansas</td>
<td>Yes (Burcham v. Unison Bancorp, Inc.)</td>
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<td>No by statute (Yes if there was a statutory violation, Ipalco Enters. v. PSI Resources)</td>
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<tr>
<td>Kentucky</td>
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<td>No by statute (Yes if there was a statutory violation, Ipalco Enters. v. PSI Resources)</td>
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<td>Louisiana</td>
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<td>No by statute (Yes if there was a statutory violation, Ipalco Enters. v. PSI Resources)</td>
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<td>Maine</td>
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<td>No by statute (Yes if there was a statutory violation, Ipalco Enters. v. PSI Resources)</td>
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<td>Maryland</td>
<td>No (Hudson v. Prime Retail)</td>
<td>No—after the statute (Jasinoover v. Rouse)/Yes—before statute</td>
<td>Yes by statute</td>
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<td>Massachusetts</td>
<td>No (Seidman v. Central Bancorp, Inc.)</td>
<td>Yes (ER Holdings, Inc. v. Norton Co.)</td>
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<td>State</td>
<td>Yes—before statute</td>
<td>No by statute</td>
<td>Yes—before statute</td>
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<td>Michigan</td>
<td>Yes (Simon Property Group, Inc. v. Taubman Centers, Inc.)</td>
<td>No (only when there is intervention in shareholder franchise, Hilton Hotels v. ITT Corp.; + Nev. Rev. Stat. Ann. § 78.139 (West 2008)).</td>
<td>Yes (Simon Property Group, Inc. v. Taubman Centers, Inc.)</td>
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<tr>
<td>State</td>
<td>Antitakeover Law Before Statute</td>
<td>Antitakeover Law After Statute</td>
<td>Antitakeover Law by Statute</td>
<td>Note</td>
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<td>New York</td>
<td>No—before statute (<em>Hanson Trust</em>); No—after amended statute (<em>Dynamics</em>)</td>
<td>No—after statute (<em>Dynamics Corp. v. WHX Corp</em>); Yes—before statute (<em>Hanson Trust</em>)</td>
<td>Yes—applied <em>Unocal</em> test to <em>Blasius</em> circumstances (<em>Int’l Banknote Co., Inc. v. Muller</em>)</td>
<td>No (<em>Irving Bank</em>)</td>
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<td>No, but based on a specific act in a race discrimination suit (<em>Hammonds v. Lumbee River Elec. Membership Corp.</em>)</td>
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<td>No (<em>First Union</em>)</td>
<td>No (<em>First Union</em>)</td>
<td>No by statute</td>
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<td>Ohio</td>
<td>No by statute</td>
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<td>No by statute</td>
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<td>Oklahoma</td>
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<td>Oregon</td>
<td>Yes (<em>Kahn v. Sprouse</em>)</td>
<td>No (<em>Lewis v. Celina Fin. Corp.</em>)</td>
<td>No by statute</td>
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<td>South Carolina</td>
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<td>Tennessee</td>
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<td>Texas</td>
<td>Yes (<em>A. Copeland Enterprises, Inc. v. Guste</em>)</td>
<td>Yes (<em>A. Copeland Enterprises, Inc. v. Guste</em>)</td>
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<td>Utah</td>
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<td>Statute Requirement</td>
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<td>Vermont</td>
<td>No (WLR Foods, Inc. v. Tyson Foods)</td>
<td>No by statute</td>
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<td>Yes by statute</td>
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<td>West Virginia</td>
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<td>Yes by statute</td>
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<td>Wisconsin</td>
<td>Yes (Amanda)</td>
<td>No (Safety-Kleen)</td>
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<td>Wyoming</td>
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APPENDIX

20. Dynamics Corp. of Am. v. CTS Corp., 805 F.2d 705 (7th Cir. 1986).
33. Gelco Corp. v. Coniston Partners, 811 F.2d 414 (8th Cir. 1987).
2009] The State of State Antitakeover Law

41. Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986).
79. Radol v. Thomas, 772 F.2d 244 (6th Cir. 1985).
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