



Takeovers and the Poison Pill

A wave of corporate takeovers is about to sweep across Japan. Now is the time to examine how to deal with it and to implement procedures, because management decisions now can forestall mistakes later.

It was my fortune – good or bad – to be in the center of one of the most significant takeover battles in the United States. The outcome was finally settled in the Supreme Court of the State of Delaware, where many large American corporations are incorporated and which has the best-established case law on a company law matters.

Our case, which we won, validated the “poison pill” anti-takeover device, later adopted by thousands of other American companies. It also provides an excellent example of how to build protections that will withstand challenges.

Where a company's life is at stake, there is no substitute for experience, since action must be taken swiftly and accurately. Planning is essential and there is no room for mistakes.

My perspective is different from many outside advisors who work in this field, because there is something unique in dealing with the very survival of one's own company, as opposed to that of a client. I know the feelings of company people, from having been one of them myself. I have gone through this process, I helped deal with the issues and I spent a great deal of time advising the directors who had to make the key decisions.

The company in question was Household International, Inc. In 1984, Household had about 77,000 employees and was one of the top 100 companies in the United States. Originally Household Finance Company (HFC), a consumer loan company that remained its core business, it had diversified into other fields such as transportation, manufacturing and merchandising in order to smooth its earnings cycles. Its businesses included National Car Rental, Von's Grocery, a bank, and an insurance company and, for a time, even a commercial airline. Shortly before this, we had greatly expanded the manufacturing subsidiaries by adding the several businesses of the Wallace Murray Corporation. Wallace Murray was purchased from the private investment firm of Dyson-Kissner-Moran, based in New York City, which became the single largest shareholder of Household. John A. Moran, chief executive of DKM, became a director of

Household.

A takeover wave struck American industry hard in the 1980s. Several factors permitted this, including low company stock prices in relation to asset values, changes in laws and financial markets and a group of takeover professionals including investment bankers, law firms, proxy contest firms and risk arbitrageurs who invested as soon as a hostile bidding war commenced. Above all was the availability of ready money, in that case from the issuance of junk bonds, which allowed the rise of many corporate raiders who previously could not have gotten funds for such activities.

In the middle of this activity was Mr. Moran, himself a private investor rather than an operating executive. He could not fail to notice the large returns such bidders were making, even in those rare cases in which they were defeated. In private conversations with Donald C. Clark, Chairman of Household, he speculated that a group of key executives led by DKM could buy out the shareholders of Household, “going private” in a “leveraged buy-out,” to use the popular terms, and they then could sell off the pieces at vast profits.

Mr. Clark, on the other hand, had spent his entire career at Household and had only become Chairman in January 1984. He saw opportunities for better profits, and while he admitted publicly that there might be some “selective pruning” of less profitable units, he rather liked the company the way it was. Moreover, he reasoned that if vast profits were to be made from selling off undervalued pieces, perhaps the benefits should go to the existing shareholders.

In any case, in the investment climate of that time, Mr. Clark, correctly in my opinion, felt that Household was in a most vulnerable position. The availability of funds meant that a raider might begin a bidding war at any time. Even Mr. Moran, who as a director had particularly deep knowledge of company asset values, might be tempted to do so. Household's chief legal officer had recent left the company, and as his successor had not yet come on board, Mr. Clark asked me, the second-ranking lawyer, to bring in expertise to advise on how to handle hostile takeover battles. It quickly became apparent that we needed more than was available from our traditional law firms, and the decision was made to retain one of the leading experts in the area, Martin Lipton of Wachtell, Lipton, Rosen & Katz.

Mr. Lipton, clearly the leading anti-takeover

defense specialist today, already had given this matter much thought and had developed a device to deter hostile takeovers that became known as the “poison pill.” He had even gotten another company, Crown Zellerbach Corporation, to adopt a poison pill to block a takeover, but in that case the raider had sufficient funds and patience to overcome the pill.

To shorten the story, Household's Board of Directors adopted the poison pill device over the objection of Mr. Moran, who filed suit with DKM to declare it void as outside the scope of the Board's powers.

However, it is important to understand that the methods and procedures used in approving the pill were significant in our winning the case.

“Poison pill” is just a nickname. What the Board approved was a Preferred Share Purchase Rights Plan. It is a highly technical device to create a practical barrier to unfriendly takeovers.

To summarize, the Household Plan provided that holders of Household Common Stock are entitled to one Right per common share under certain triggering events. The Rights would be activated upon either (1) announcement of a tender offer for 30 percent of Household's shares or (2) acquisition of 20 percent of Household's shares by any single entity or group.

In case (1), the Rights are issued and immediately exercisable to purchase 1/100 share of new preferred stock for \$100 and are redeemable by the Board for \$.50 per Right. If (2) occurs, the Rights are issued and become non-redeemable and are exercisable to purchase 1/100 of a share of preferred. However, if a Right is not exercised to buy preferred and a merger or consolidation then occurs, the holder can exercise each Right to purchase \$200 of the common stock of the tender offeror for \$100. This latter provision is called the “flip-over” and was challenged in the lawsuit.

The “flip-over” provision makes a “close-out” merger to eliminate minority shareholders uneconomic to all but the most powerful hostile raiders. It is the pill on which they choke and its deterrent effect – while not absolute – most definitely encourages them to negotiate or go away.

In a lengthy opinion, the Delaware Court of Chancery (the court of original jurisdiction on matters of corporate law) upheld the Rights Plan as a proper exercise of business judgment by the Household Board, rejecting the claim that it was outside its scope of

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authority. *Moran v. Household International, Inc.*, Del.Ch. 490 A.2d 1059 (1985). The Supreme Court of Delaware affirmed that judgment in *Moran v. Household International, Inc.*, 500 A.2d. 1346 (1985). (The Supreme Court opinion may be found on the Internet at <http://www.law.unlv.edu/faculty/rflawless/mergers/moran.htm>.)

Space does not permit a full analysis here of the Household decision, but I do want to note the intelligent way in which the Rights Plan was adopted by the Board, and the careful way in which Mr. Lipton managed the process.

First, there was in fact no actual takeover pending at the time of the Board meeting. Second, Mr. Lipton and his firm planned the Board meeting, including writing the agenda and minutes of the meeting, which later became part of the court record. Mr. Lipton and others from his firm, plus representatives of Goldman, Sachs & Co., Household's investment advisors, attended the meeting and led the discussion. Mr. Lipton said that he had been consulted by the Board to comment on the risk of "bust-up" corporate takeovers, in which acquirers seek to finance a takeover by selling pieces of the acquired company, and on the effects, even in the absence of an actual "bust-up" attempt, on vital employees and others important to the business. He presented the Rights Plan as a method of enhancing the Board's bargaining power in the event of such a "bust-up" effort. In other words, it offered the Board an opportunity to exercise its business judgment in a planned manner.

In my opinion, the case challenging the poison pill was won at that point.

After describing this fact situation, the Court then found that the Board had met the test of having "acted on an informed basis, in good faith and in an honest belief that the action was taken in the best interests of the company."

Perhaps equally important, the Supreme Court ruled that the Rights Plan did not deter all tender offers, since the Board would be required to exercise its business judgment again in reviewing any specific proposal that came before them. In addition, the same standard would apply to their consideration of any proposal to redeem the Rights.

The Household case shows that it is possible to implement intelligent takeover defenses, ones that will stand up to close examination by opponents, by the media, by the courts and equally important, by public opinion.



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企業買収の波が日本中に押し寄せようとしている。いまこそ、買収に対し如何に対処するか真剣に検討すべき時がきている。なぜなら、今の経営者の決定が、その失敗を未然に防ぐことになるからである。

私が、合衆国で最も重要な買収戦争の1つの中心にいたことは、良いにしろ悪いにしろそれが私の運命であった。その結果は、多くのアメリカ大企業が会社を設立し、会社法の事例において最もよく確立した判例法を有する場所であるデラウェア州最高裁判所において最終的に決定された。

我々が勝訴したこのケースは、買収防衛策「ポイズンピル（毒薬条項）」と評価され、後に他の何千社ものアメリカ企業によって採用された。

984年当時の私は、ハウスホールド・インターナショナル インクという、7万7000人の従業員をかける合衆国のトップ100会社の1つであった会社で、主席法務部長が空席のなか、法務部でNo.2のポジションにあり、多くの法務に携わり、主要な決定をしなければならなかった取締役に助言をすることに多くの時間を費やしていた。この会社は輸送、製造分野他にナショナル（レンタカー）、ヴォンズ（グロサリーストア）、銀行、保険会社、及び一時は航空業にさえ及ぶまさしく多角的な経営をしていた。

この会社が、敵対的買収の標的となったのである。状況は、私達の関連会社であったウォレス・マレー・コーポレーションを、ニューヨークを拠点とする投資会社のDyson-Kissner-Moran (DKM) が買収し、ハウスホールド・インターナショナルの単独の筆頭株主になった事に始まる。そして、DKMのチーフエグゼクティブであるジョンAモランが、ハウスホールド・インターナショナルの取締役に就任することになった。そうした中で、私はこの分野で著名なWachtell, Lipton, Rosen & Katz法律事務所のマーチンリプトン弁護士にこの件の処理を委任した。このリプトン弁護士は、この事件を契機に敵対的買収の防衛策としての“ポイズンピル”と呼ばれるものを生み出したのである。このポイズンピルというのはもちろんニックネームで、正式には優先株引受権をいう。詳しい説明は割愛するが、ハウスホールド・インターナショナルが敵対的買収を阻止するために、ある条件の下普通株1株に対して優先株引受権を1つ株主に付与するとしたのである。ある種の条件とは、

(1) 30%の公開買い付けが発表された場合、又は(2) 1つの単体又はグループによって20%の会社の株を取得された場合に、(1)の場合には、会社はただちに新優先株の百分の1を100ドルでただちに買い受ける権利を株主に付与し、当該権利を会社は50セントで買い戻すこともできるとし、(2)の場合には会社は権利を買い戻ししないが、新優先株の百分の1を買い受ける権利を付与する。もし当該権利を行使せずに、会社が合併した場合には、株主は買収者の200ドル分の普通株を100ドルで買い受けることができるとなっている。この最後の条項は、いわゆる「Flip-over(ひっくり返す)」と呼ばれ、後に訴訟の対象となる。このポイズンピルを我が社の取締役会が決議した事に関して、当時買収会社からやってきていたジョンAモランが無効の訴えをデラウェア州裁判所において提起した。結局一審、二審ともハウスホールド・インターナショナルのポイズンピルによる防衛策は支持されることとなった。(詳しい法的分析に関しては、原文及び本文中ホームページを参照されたい。) このハウスホールド・インターナショナルの事件は、理にかなった企業買収防衛策をとることは可能であり、そのような防衛策は、時として相手方の、又はメディアの、裁判所のものと同様に重要である世論の注意深い批評に対して真っ向から立ち向かうことを示すよい事例である。