Mark Lebovitch Featured in Wall Street Journal Article Tracing Impact of 'Poison Puts' on Corporate Mergers - The Latest Effort To Undermine Shareholder Rights?

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History has shown that corporate directors and senior executives often use creative devices to protect their own interests at the expense of shareholders. Dennis K. Berman, in his article for the *The Wall Street Journal*, explains that “Poison Puts” are just the latest device gaining popularity as a way to maintain control of the company and obstruct deals that may benefit shareholders.

“[T]he poison put is playing an unnoticed role in preventing a wave of deals. When a company takes out a loan or issues debt, the contract often requires that it pay back those debts in full when it buys a company or sells itself. That is the ‘put’ part -- because it protects bondholders. Sometimes companies must accelerate the payments when there is turnover in board or management. The idea is to protect lenders, ensuring that they are getting the kind of credit risk for which they originally bargained.”

However, because of Poison Puts, deals that can benefit shareholders may be undermined. For example, according to the article, Poison Puts may have complicated a pending sale of telecommunications firm Embarq Inc. to Century/Tel Inc. in November 2008 by making the acquisition unfeasible. As Mr. Lebovitch, quoted in the *Journal*, states, "For a levered-up company, it's a foolproof anti-activism device."

Activist investors, including some of the country's most prominent public pension funds, are fighting to protect shareholder interests. On March 24, 2009, BLB&G and its client the San Antonio Fire and Police Pension Fund filed a Complaint in Delaware state court against Amylin Pharmaceuticals, Inc. and its Board alleging violations of fiduciary duties by management and the Board arising from their adoption of defensive measures – including Poison Puts – in two debt instruments.

In 2007, amid takeover speculation, Amylin embedded Proxy Puts in its indenture agreement for $575 million of convertible notes and its $140 million credit agreement. The Proxy Puts expose the Company to immediate repayment and repurchase obligations if Amylin shareholders elect a board of directors that does not include a majority of the incumbent directors, or directors approved by the incumbent directors. These obligations could require Amylin to remit more than $900 million – an amount exceeding one-half of the Company’s current $1.7 billion market value. The Complaint seeks to invalidate the Proxy Puts, and require the Board to approve the nomination of a new slate of directors put forth by two other shareholders, Icahn Capital LP and Eastbourne Capital Management slates for shareholder consideration at the Company’s 2009 annual meeting. The Complaint also demands that Amylin correct coercive and misleading disclosures in its 2008 annual report.