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Chancery Opens Trial On Williams' 'Nuclear' Takeover Defense

By **Jeff Montgomery**

Law360 (January 12, 2021, 5:56 PM EST) -- A Williams Cos. director who recommended an unprecedented poison pill takeover defense adopted by the company last year acknowledged during a Delaware Chancery Court trial Tuesday that no active investor threat prompted deployment of the "nuclear" deterrent to stockholder activism.

Charles I. Cogut, who retired from Simpson Thacher Bartlett LLP in 2012 and joined Williams' board in 2016, testified at the opening of a three-day stockholder class suit before Vice Chancellor Kathaleen S. McCormick, seeking rulings that the shareholder rights agreement is invalid and unenforceable, and that directors breached their fiduciary duties by adopting it.

The poison pill, adopted in late March, granted the natural gas pipeline giant's shareholders a right to buy twice the number of preferred shares of common stock as the trigger price would ordinarily allow. If a buyer bent on a takeover acquired a 5% regular stake, the company could thwart the move, initially, by exercising the rights, diluting the presumed takeover party — ineligible for the rights exercise — and voting down the threat with allied shareholders.

A majority of poison pill plans trigger when investors accumulate 15% or more of a company's stock, although lower triggers are found in cases where companies have sizeable holdings of tax-advantaged net operating losses, and are trying to prevent raids by investors drawn to those assets. Williams' plan was the only one to feature a 5% trigger.

"This was not a traditional stockholder rights plan, as far as I was concerned," Cogut testified.

He said later the defensive move was prompted by a steep drop in Williams' stock price and risk to the company as the global COVID-19 crisis spread, and said he felt that uncertainties created by the pandemic were "clearly a sufficient concern" warranting the corporate action.

"The shareholder rights plan is the nuclear weapon of corporate governance, and nobody wants to see it explode. The company is not looking to create a gotcha," Cogut said. "Presumably, rational investors are not looking to be diluted. Nuclear weapons are deterrents that force people to talk to one another."

Gregory V. Varallo of Bernstein Litowitz Berger & Grossman LLP, counsel to the stockholders, noted that Williams' pill could trigger even if a group of stockholders are only believed to be communicating and potentially acting together, provided their combined holdings exceed 5%. The percentage trigger could kick in even if some of the shareholders are unaware their contacts are being combined with third parties, potentially suppressing interaction among investors.

"It would have a chilling effect on the ability of a client of mine to be able to speak to another person about Williams," Steven Wolosky, an attorney who holds 5,500 shares of Williams and who is one of the suing investors, testified at the start of the trial.

"To me, the adoption of this type of plan is meant to stifle and chill conversations among shareholders and communications among shareholders," Wolosky said. "In my view, communication among shareholders generally, over the long term, helps the value of a company."

Cogut, who practiced in mergers, acquisitions and corporate governance for most of his more than 40-year career, said the pandemic represented an unprecedented threat, and said the poison pill measure was prompted by a steep plunge in the company's stock price.

Williams shares fell from $23.72 to $14.15 between Dec. 1, 2019, and March 1, 2020, but had recovered to $22.47 on Tuesday.

The stockholder suit observed that Williams' board adopted the one-year measure without a stockholder vote, just ahead of an annual meeting. The move prompted negative reactions from some larger investors concerned about board transparency, including from BlackRock Investments and Institutional Shareholder Services.

Cogut told Andrew Ditchfield of Davis Polk & Wardwell LLP, counsel to Williams, that "the fact that the company had to deal with activists before was not a motivating factor, but it was certainly in the background."

The stockholder suit argued that Williams' move is subject to "enhanced scrutiny" under a test established in the 1985 Unocal Corp. v. Mesa Petroleum decision, which guides rulings on whether a company's actions should be given deference afforded to ordinary business judgment and whether its duty of loyalty to stockholders comes into play.

Cogut said he was "familiar with the dislocation that can be caused by activists, and thought the stock price would create a certain amount of opportunism availability for those people" who invest in that way.

"I wasn't really concerned that the price was low, I was concerned about taking management's eye off the challenges in managing the pandemic and having to deal with activists looking to influence control," Cogut said.

Testimony was to continue Wednesday.

The stockholders are represented by Gregory V. Varallo, Mark Lebovitch and Thomas G. James of Bernstein Litowitz Berger & Grossman LLP, Michael J. Barry, Christine M. Mackintosh and Kelly L. Tucker of Grant & Eisenhofer PA, and Jeremy S. Friedman and David F.E. Tejtel of Friedman Oster & Tejtel PLLC.

The Williams Cos. are represented by William M. Lafferty, Kevin M. Coen, Lauren K. Neal and Sabrina M. Hendershot of Morris Nichols Arsht & Tunnell LLP and Andrew Ditchfield, Brian M. Burnovski and Mari Byrne of Davis Polk & Wardwell LLP.

The case is The Williams Cos. Stockholder Litigation, case number 2020-0707, in the Court of Chancery of the State of Delaware.

--Editing by Marygrace Murphy.