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## **Court Emphasizes *Unocal* Is Proper Standard For Review of Board's Adoption and Maintenance of Rights Plan**

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**Digest by Vanessa R. Tiradentes**

In *Yucaipa American Alliance Fund II, L.P., et. al v. Riggio, et. al.*, C.A. No. 5465-VCS (Del. Ch. August 11, 2010), the Court of Chancery entered a post-trial opinion dismissing a challenge to a poison pill adopted by the board of Directors of Barnes & Noble, Inc. (“B&N”) to deter insurgent funds from gaining voting control of the company without paying a reasonable control premium. Yucaipa American Alliance Fund II, L.P. and Yucaipa American Alliance (Parallel) Fund II, L.P. (collectively, “Yucaipa”), funds controlled by billionaire investor Ronald Burkle, increased their stake in B&N from approximately 8% to 18% over a period of four days, following a transaction by B&N to acquire a college bookstore chain. In response, the board of directors of B&N adopted a poison pill which was triggered when a shareholder acquired over 20% of the outstanding stock and prevented two or more shareholders from joining together to take control of the company (the “Rights Plan”). Though the pill’s 20% threshold did not apply to Riggio, the founder of B&N, or his family, who collectively own about 30% of the outstanding stock, it also limited Riggio from increasing that stake.

The Court of Chancery dismissed all of Yucaipa’s breach of fiduciary claims and counts for declaratory judgment, finding that the board’s decision to implement the rights plan was “a good faith, reasonable response to a threat to Barnes & Noble and its stockholders.” *Yucaipa American Alliance Fund II, L.P., et. al v. Riggio, et. al.*, C.A. No. 5465-VCS, slip op. at 87 (Del. Ch. August 11, 2010). The Court declined to “reverse decades of settled law,” rejecting Yucaipa’s argument that entire fairness review or *Blasius*’s “compelling justification” standard should be used to evaluate the board’s actions. (*Id.* at 32.) In applying the *Unocal* standard of review, the Court found that the B&N directors made a good faith, reasonable judgment that the company faced a threat and that the Rights Plan was a reasonable, proportionate response to the perceived threat. Signaling a potential disagreement on the Court, Vice Chancellor Strine suggested a more pragmatic application of the *Unocal* preclusivity analysis than Vice Chancellor Noble applied in *Selectica, Inc. v. Versata Enterprises, Inc.*, 2010 WL 703062, at \*22 (Del. Ch.): “In my view, if a defensive measure does not leave a proxy insurgent with a fair chance for victory, the mere fact that the insurgent might have some slight possibility of victory does not render the measure immune from judicial proscription as preclusive.” *Yucaipa*, slip op. at 45 n.182. With *Selectica* on appeal to the Delaware Supreme Court, Court watchers should stay tuned. In this case, however, preclusivity was not at issue as all parties agreed that *Yucaipa* not only had a fair chance to prevail, but was also the likely favorite in a proxy contest. (*Id.*)

