

# Shareholder Rights

## CA Stockholders to Consider Poison Pill Bylaw Change

*New York Law Journal*

Beth Bar

June 29, 2006

Shareholders of Long Island-based CA Corp. will get a chance to vote on a controversial shareholder rights proposal advanced by a Harvard Law School professor.

CA announced this week that proposals by Harvard professor and CA shareholder Lucian Bebchuk to limit the company's poison pill provisions will be on the agenda of its August annual meeting. CA had previously declined to put the reform to a vote but changed its mind after a Delaware judge declined, for the moment, to decide the issue of whether the changes he sought were permitted by Delaware law. Vice Chancellor Stephen P. Lamb of the Delaware Court of Chancery found, in *Bebchuk v. CA, Inc.*, 2145-N, that the issue was not yet ripe for consideration. <sup>3</sup>Because the proposed bylaw has not yet been adopted by the stockholders and because no other compelling justification exists to trigger this court's jurisdiction, the court concludes that the issue in this case is not yet ripe for consideration,<sup>2</sup> Vice Chancellor Lamb wrote. Faced with a decision that indicates Delaware judges could believe that shareholders have a right to change a company's bylaws, CA announced this week that it would include Mr. Bebchuk's proposed bylaw changes in its July proxy statement. <sup>3</sup>The Delaware court has ruled that it should not decide the legality of the bylaw until our stockholders have first voted on it,<sup>2</sup> said Jennifer Hallahan, a spokesperson for the corporation.

Mr. Bebchuk said in an e-mail statement that he was <sup>3</sup>pleased that the Chancery Court's decision in ... compelled CA to place my pill by-law on the corporate ballot. CA's shareholders will now get the opportunity to vote on the proposal and I hope that they adopt it.<sup>2</sup>

### **Antitakeover Provisions**

The change would require that all of the company's board of directors agree to adopt or extend anti-takeover provisions, commonly referred to as poison pills. Under current rules, adoption of such a measure requires only a majority of the company's 12-member board.

Mr. Bebchuk also asks that any poison pill be reviewed on a yearly basis and that any extension of such a provision beyond a year receive approval from shareholders.

Mr. Bebchuk, who specializes in corporate law and governance, purchased 140 shares of CA stock to give him the right to make his proposal. He has advocated for similar plans at several other corporations. If his proposal is adopted, it would give shareholders more power to control CA's response in the event of a hostile takeover. Backers of such plans say that they help shareholders receive maximum value for their investments. Opponents claim that such changes dilute the ability of directors to manage companies.

CA had asked the Securities and Exchange Commission for a ruling against the bylaw change, but the agency has taken no position. Mr. Bebchuk sued in Delaware, where the corporation is chartered, after it refused to schedule a vote.

In a brief filed in response to Mr. Bebchuk's suit, CA cited §§157 and 141(a) of the Delaware General Corporation Law. It argued that, under those statutes, boards of directors, not stockholders, are vested with the power to create rights and options respecting stock of a Delaware corporation.<sup>2</sup> Section 157 provides that "subject to any provisions in the certificate of incorporation...[rights plans] shall be approved by the board of directors."<sup>2</sup> Additionally, under §141(a), "the business affairs of every corporation...shall be managed by or under the direction of a board of directors."<sup>2</sup> Mr. Bebchuk argued that §109 allows shareholders to enact bylaws "relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders" as long as these bylaws are "not inconsistent with law or with the certificate of incorporation."<sup>2</sup> He said that the court in *Unisuper v. News Corp.*, 2005 WL 3539317, already had held that shareholders may exercise their rights to impose restrictions on a board's ability to exercise its discretion in adopting a poison pill. "In denying the defendant's motion to dismiss that case, [the court] necessarily rejected the very arguments advanced by Defendant CA, Inc. here," he argued.

Vice Chancellor Lamb, however, ruled that deciding whether or not the proposed bylaw could be introduced at this stage would "prematurely resolve a highly contentious and important matter before the court knows what pertinent facts might develop in the future."<sup>2</sup> He also expressed concern about the impact of deciding the bylaw issue before it has even been enacted by shareholders. "[A] ruling would validate the extraordinary idea that this court must immediately rule on the legality of any stockholder proposal as soon as a stockholder has satisfied the SEC's minimal requirements for making such a proposal, and before the bylaw has even been enacted," Vice Chancellor Lamb wrote.

### **CEAn Infinite Loop<sup>1</sup>**

Gordon Smith, a law professor at the University of Wisconsin who is not involved in the case, said there has been an unresolved question as to whether the §109 bylaw power is

subject to §141(a), or whether §141(a) is subject to the bylaw power. <sup>3</sup>It's an infinite loop,<sup>2</sup> Mr. Smith said. <sup>3</sup>To me, this is the biggest unresolved question in Delaware corporate law.<sup>2</sup> As to the impact of CA's decision to include his proposed bylaw in the proxy, Mr. Bebchuk said that Delaware law firms have in the past issued opinions stating that pill bylaws are invalid under Delaware law, and that these letter opinions have been unwarranted. <sup>3</sup>I, therefore, expect that the SEC will no longer permit companies to exclude such proposals, as the SEC has done in the past, and that companies, therefore, will stop excluding them.<sup>2</sup> Mr. Bebchuk was represented by partners Jay W. Eisenhofer, Stuart M. Grant, Michael J. Barry and associate P. Bradford deLeeuw of Grant & Eisenhofer in Delaware.

Mr. Barry said he was surprised that the court did not think the issue was ripe, but was pleased that the case was not dismissed entirely. <sup>3</sup>It wasn't dismissed out of hand, so it will be harder for companies in the future to get no-action letters from the SEC,<sup>2</sup> Mr. Barry said. Partners Raymond J. DiCamillo, associate Elizabeth C. Tucker and associate Addie P. Asay of Richards, Layton & Finger, and partners James C. Morphy and Robert J. Giuffra, Jr. of Sullivan & Cromwell represented CA.

< Beth Bar can be reached at: [bbar@alm.com](mailto:bbar@alm.com).