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STATE REGULATION OF TENDER OFFERS FOR INSURANCE COMPANIES AFTER EDGAR V. MITE

INTRODUCTION

In the 1960's, tender offers¹ became increasingly popular as mechanisms for acquiring corporate control.² Before the Williams Act was passed in 1968,³ the use of tender offers had been virtually unregulated.⁴ The Williams Act sought to fill this gap by giving investors the time and information needed to make an informed investment decision.⁵ Desire for additional protections led to the enactment of general state legislation regulating tender offers.⁶ In addition, most states have

1. A tender offer has been defined as:

A public offer or solicitation by a company, an individual or a group of persons [offeror] to purchase during a fixed period of time all or a portion of a class or classes of securities of a publicly held corporation [target] at a specified price or upon specified terms for cash and/or securities.

E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 70 (1973); see Einhorn & Blackburn, *The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y.L. Sch. L. Rev. 379 (1978); Note, *The Developing Meaning of "Tender Offer" under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250 (1973). The terms "tender offer" and "takeover bid" are synonymous and are used interchangeably in this Note.

2. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2 [hereinafter cited as House Report], reprinted in 1968 U.S. Code Cong. & Ad. News 2811, 2811-12. The number of acquisitions by tender offer rose from eight in 1960 to over 100 in 1966. *Id.* at 2, reprinted in 1968 U.S. Code Cong. & Ad. News at 2812; see Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133, 1136 (1974) [hereinafter cited as *Commerce Clause Limitations*]. The tender offer was considered superior to stock transfers and proxy contests for acquiring control of a corporation. Unlike stock transfers, tender offers did not have to be registered with the SEC. Moreover, the chances of a successful acquisition were much higher by use of a tender offer than in a proxy contest controlled by target management. Increased liquidity of the acquiring companies, increased availability of credit to finance acquisitions, and a desire to expand through merger and acquisition contributed to the increased use of tender offers. *Id.* at 1138-39.

3. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981)); see 6 L. Loss, *Securities Regulation* 3658 (2d ed. Supp. 1969). See *infra* notes 28-44 and accompanying text.

4. See House Report, *supra* note 2, at 2-3, reprinted in 1968 U.S. Code Cong. & Ad. News at 2812. Disclosure of the offeror's identity, associates or the source of his funds was not required. *Id.* The offeror could thus operate with speed and anonymity, thereby circumventing incumbent management without being subject to the federal securities laws governing other forms of acquisition of control.

5. House Report, *supra* note 2, at 3-4, reprinted in 1968 U.S. Code Cong. & Ad. News at 2812-13; S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967) [hereinafter cited as Senate Report].

6. For a listing of states that have enacted general state takeover legislation, see Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 Ohio St. L.J. 689, 690 n.7 (1981). See *infra* note 55.

adopted legislation based on a Model Act,⁷ formulated in 1969 by the insurance industry, designed to regulate tender offers for insurance companies.⁸ State takeover legislation has been challenged on the

7. Insurance Holding Company System Regulatory Act, 2 Official N.A.I.C. Model Insurance Laws Regulations and Guidelines 440-1 (N.A.I.C. 1980) [hereinafter cited as Model Act].

8. Forty-two states have adopted statutes regulating the acquisition of control of a domestic insurer. Ala. Code §§ 27-29-3, -8 to -10, -13 (1975); Alaska Stat. §§ 21.22.010-.050, .130-.170 (Supp. 1982); Ariz. Rev. Stat. Ann. §§ 20-481.02-.08, .22-.23 (1975 & Supp. 1982-1983); Ark. Stat. Ann. §§ 66-5005, -5010 to -5013 (1980); Cal. Ins. Code §§ 1215.2-.3, .8-.10 (West 1972 & Supp. 1982); Colo. Rev. Stat. §§ 10-3-803, -808 to -810, -813 (1973 & Supp. 1982); Conn. Gen. Stat. §§ 38-39b to -39f, -39j to -39l (1981); Del. Code Ann. tit. 18, § 4932 (1974); Fla. Stat. Ann. § 628.461 (West Supp. 1983); Ga. Code Ann. §§ 33-13-3, -8 to -10, -14 to -15 (1982); Idaho Code §§ 41-3802 to -3805A, -3812 to -3813, -3815 (1977 & Supp. 1982); Insurance Holding Company Systems §§ 131.4-.12, .23-.24, .27, Ill. Ann. Stat. ch. 73, §§ 743.4-.12, .23-.24, .27 (Smith-Hurd Supp. 1982-1983); Ind. Code Ann. §§ 27-1-23-2, -7 to -8, -12 (Burns Supp. 1982); Iowa Code Ann. §§ 521A.3, .8-.10, .13 (West Supp. 1982-1983); Kan. Stat. Ann. §§ 40-3304, -3309 to -3310, -3312 (1981); Ky. Rev. Stat. Ann. § 304.24-410 (Bobbs-Merrill 1981); Me. Rev. Stat. Ann. tit. 24-A, § 222(4)-(7), (14), (17)-(18) (Supp. 1982-1983); Md. Ann. Code art. 48A, §§ 494, 500 (1979 & Supp. 1982); Mass. Ann. Laws ch. 175, § 193M (Michie/Law. Co-op. 1977); Minn. Stat. Ann. §§ 60D.02, .07-.09, .12 (West Supp. 1983); Mo. Ann. Stat. §§ 382.040-.090, .240-.270, .300 (Vernon Supp. 1983); Mont. Code Ann. §§ 33-2-1104 to -1106, -1117 to -1120, -1123 (1981); Neb. Rev. Stat. §§ 44-2105 to -2108, -2115, -2117 (1978); Nev. Rev. Stat. §§ 692C.180-.250, .430-.450, .480-.490 (1979); N.H. Rev. Stat. Ann. §§ 401-B:3, :8-.10, :14 (Supp. 1979); N.J. Stat. Ann. §§ 17:27A-2, -7 to -9, -12 (West Supp. 1982-1983); N.M. Stat. Ann. §§ 59-7-5 to -12, -28 to -30, -33 (1978); N.Y. Ins. Law §§ 69-f, -j (McKinney Supp. 1982-1983); N.D. Cent. Code §§ 26-21.2-03, -08 to -10, -13 (Supp. 1981); Okla. Stat. Ann. tit. 36, §§ 1653, 1658-1659 (West 1976 & Supp. 1982-1983); Pa. Stat. Ann. tit. 40, § 459.6 (Purdon 1971 & Supp. 1982-1983); R.I. Gen. Laws §§ 27-35-2, -7 to -9, -12 (1979); S.C. Code Ann. §§ 38-29-60 to -130, -310, -330, -360 (Law. Co-op. 1977); S.D. Codified Laws Ann. §§ 58-5A-3 to -19 (1978); Tenn. Code Ann. §§ 56-10-202 to -207 (1980); Tex. Rev. Civ. Stat. Ann. art. 21.49-1 §§ 5, 11-13, 17 (Vernon 1981); Utah Code Ann. §§ 31-39-2, -7 to -9, -12 (1974 & Supp. 1981); Vt. Stat. Ann. tit. 8, §§ 3683, 3688-3690, 3693 (Supp. 1982); Va. Code §§ 38.1-178.1:1 to :7, 38.1-178.6-.8 (1981); Wash. Rev. Code Ann. §§ 48.31A.020-.050, .120-.130 (Supp. 1982); W. Va. Code §§ 33-27-3, -8 to -9 (1982); Wis. Stat. Ann. § 617.12 (West 1980). The Model Act also regulates insurance holding company systems, which are defined as "two or more affiliated persons, one or more of which is an insurer." Model Act, *supra* note 7, § 1(d), at 440-1. The Act requires registration of insurance holding company systems with the state insurance commissioner and establishes standards for their transactions with affiliates, adequacy of surplus, and dividends and other distributions. *Id.* §§ 4, 5, at 440-12 to 440-15.

Initially, tender offers for securities of insurance companies were not regulated by the Williams Act. See Wilder, *Regulation of the Insurance Industry Under the Proposed Federal Securities Code*, 7 Conn. L. Rev. 711, 718 (1975). In 1970, however, the Act was amended to extend its coverage to tender offers for insurance companies. Act of Dec. 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497 (1970).

grounds that it violates the commerce clause⁹ and is preempted by the Williams Act.¹⁰ The lower courts' decisions have yielded conflicting results.¹¹

In 1982, in *Edgar v. MITE Corp.*,¹² the Supreme Court held that a general takeover statute was unconstitutional as an excessive burden on interstate commerce.¹³ The Court was divided on the preemption issue.¹⁴

9. *E.g.*, *Hi-Shear Indus. v. Campbell*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,804, at 90,032-34 (D.S.C. Dec. 4, 1980); *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 938-41 (S.D. Ohio 1979); *Dart Indus. v. Conrad*, 462 F. Supp. 1, 13-14 (S.D. Ind. 1978).

10. *E.g.*, *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1222-24 (D.N.J. 1981); *Joseph E. Seagram & Sons v. Marley*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,246, at 91,618-21 (W.D. Okla. July 17, 1981); *Sharon Steel Corp. v. Whaland*, 121 N.H. 607, 613-17, 433 A.2d 1250, 1253-56 (1981), *vacated and remanded sub nom.* *Sharon Steel Corp. v. Insurance Comm'r*, 102 S. Ct. 3474 (1982).

11. *Compare* *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1279, 1286 (5th Cir. 1978) (Idaho general takeover statute violates commerce clause and is preempted), *rev'd on other grounds sub nom.* *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979) *and* *Empire, Inc. v. Ashcroft*, 524 F. Supp. 898, 903-06 (W.D. Mo. 1981) (Missouri general takeover statute violates commerce clause and is preempted) *with* *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 938, 941 (S.D. Ohio 1979) (Ohio general takeover statute upheld) *and* *City Investing Co. v. Simcox*, 476 F. Supp. 112, 116 (S.D. Ind. 1979) (Indiana general takeover statute upheld), *aff'd*, 633 F.2d 56 (7th Cir. 1980). Commentators have also reached different conclusions about the constitutionality of state takeover legislation. *Compare* *Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 23, 31 (1976) (statutes are unconstitutional) *and* *Commerce Clause Limitations, supra* note 2, at 1173 (same) *with* *Sargent, supra* note 6, at 729-30 (statutes are constitutional) *and* *Note, The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. Rev. 872, 877-78 (1978) (same) [hereinafter cited as *A Response to Great Western*].

12. 102 S. Ct. 2629 (1982). The Court first held that the case was not moot because the Illinois Secretary of State indicated that he intended to enforce the penalties provided in the challenged statute against MITE and therefore a reversal of the lower court's decision would expose MITE to civil and criminal liability. *Id.* at 2635 (White, J., joined by Burger, C.J., Blackmun, Stevens & O'Connor, JJ.). Three Justices dissented on the mootness issue. *Id.* at 2648 (Marshall, J., dissenting, joined by Brennan, J.); *id.* at 2652 (Rehnquist, J., dissenting). Justice Powell agreed that the case was moot, but concurred in the judgment. *Id.* at 2643 (Powell, J., concurring). As a result, only six Justices reached the merits of the case.

13. *Id.* at 2641-43 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.). Justice Blackmun did not join this part of the Court's opinion. *Id.* at 2633.

14. *See id.* at 2635-40 (White, J., joined by Burger, C.J., Blackmun, J.) (statute preempted); *id.* at 2643 (Powell, J., concurring) (statute not necessarily preempted); *id.* at 2647-48 (Stevens, J., concurring) (same). Justice O'Connor did not reach the preemption issue. *Id.* at 2643 (O'Connor, J., concurring). *See infra* notes 146-49 and accompanying text. The Seventh Circuit held that the statute violated the commerce clause and was preempted by the Williams Act. *MITE Corp. v. Dixon*, 633 F.2d 486, 502-03 (7th Cir. 1980), *aff'd sub nom.* *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

The effect of the *MITE* decision on state insurance legislation regulating tender offers is unclear.¹⁵ Before *MITE*, some courts had struck down state regulation of tender offers for insurance companies, reasoning that the legislation was subject to the same constitutional infirmities as general state takeover legislation.¹⁶

This Note contends that state regulation of tender offers for insurance companies is a permissible exercise of the states' traditional power to regulate the insurance industry. Part I surveys the state and federal regulatory schemes currently in place. Parts II and III analyze the commerce clause and preemption challenges to state insurance takeover legislation.

I. THE REGULATORY SCHEME

A. Federal Statutes

1. The McCarran-Ferguson Act

Since 1868, when the Supreme Court held that the issuance of an insurance policy is not a transaction in commerce and therefore not subject to federal regulation under the commerce clause,¹⁷ insurance companies' activities have been subject to state regulation.¹⁸ In 1944,

15. The effect of the decision on general state takeover legislation is also unclear. Since the *MITE* decision, the trend has been for courts to hold that general state takeover statutes are unconstitutional. *Telvest, Inc. v. Bradshaw*, 697 F.2d 576, 581-82 (4th Cir. 1983) (statute violates commerce clause; preemption issue not addressed); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 565-68 (6th Cir. 1982) (same); *National City Lines v. LLC Corp.*, 687 F.2d 1122, 1134-35 (8th Cir. 1982) (statute violates commerce clause and is preempted by Williams Act); *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522, 532 (D. Md. 1982) (same); *Esmark, Inc. v. Strode*, 639 S.W.2d 768, 773-74 (Ky. 1982) (statute violates commerce clause; preemption issue not addressed). *But see Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1035-40 (1st Cir. 1982) (Massachusetts takeover statute not preempted; case remanded for determination of commerce clause claim). Ohio has recently enacted general state takeover legislation regulating takeovers for targets incorporated in Ohio. 1983 Ohio Legis. Bull. 1-25 (Anderson). The legislation was designed to overcome the constitutional infirmities noted in *MITE*. *See Vilkin, Tender Offer War Heats Up Again*, Nat'l L.J., Dec. 13, 1982, at 3, col. 1.

16. *Gunter v. AGO Int'l B.V.*, 533 F. Supp. 86, 90 (N.D. Fla. 1981) (Florida insurance takeover statute preempted by the Williams Act); *National City Lines v. LLC Corp.*, 524 F. Supp. 906, 911-12 (W.D. Mo. 1981) (Missouri insurance takeover statute violates the commerce clause and is preempted by the Williams Act), *aff'd*, 687 F.2d 1122 (8th Cir. 1982). *But see John Alden Life Ins. Co. v. Woods*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,617, at 93,065-66 (D. Idaho Dec. 19, 1981) (Idaho insurance takeover statute does not violate the commerce clause and is not preempted); *Sun Life Group, Inc. v. Standard Life Ins. Co.*, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,314, at 97,118 (S.D. Ind. Mar. 12, 1980) (Indiana insurance takeover statute not preempted).

17. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868).

18. *See SEC v. National Sec., Inc.*, 393 U.S. 453, 458 (1969); Gerber, *Governmental Regulation of Insurance*, in *Property and Liability Insurance Handbook* 985-

however, the Court held that an insurance company conducting a substantial part of its business across state lines was engaged in interstate commerce and therefore subject to federal regulation under the Sherman Act.¹⁹ Congress responded by passing the McCarran-Ferguson Act,²⁰ which provides in part:

The business of insurance . . . shall be subject to the laws of the several States No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance²¹

Although the legislative history of the McCarran-Ferguson Act indicates that Congress was concerned primarily with the amenability of insurance companies to federal antitrust regulation,²² it also reveals Congress' express intent not to interfere with state regulation of the insurance business.²³ The statute, however, does not define the "business of insurance" nor does the legislative history provide any guidance.²⁴

Traditionally, the business of insurance has been considered the relationship between the insurance company and the policyholder.²⁵ The Supreme Court has held, however, that the regulation of the insurance company/shareholder relationship is governed by securities regulations and thus not within the purview of the McCarran-Ferguson

86 (J. Long & D. Gregg eds. 1965); Comment, *The National Securities Case: The Supreme Court and Rule 10b-5*, 69 Colum. L. Rev. 906, 907 (1969) [hereinafter cited as *The National Securities Case*].

19. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539, 553 (1944).

20. 15 U.S.C. §§ 1011-1015 (1976). The legislative history of the McCarran-Ferguson Act indicates that Congress was aware of uncertainty about the constitutionality of state regulation of insurance after the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). H.R. Rep. No. 143, 79th Cong., 1st Sess. 2, reprinted in 1945 U.S. Code Cong. Serv. 670, 671. Therefore, the purpose of the Act was to ensure the continued regulation of the business of insurance by the states. *Id.* at 3, reprinted in 1945 U.S. Code Cong. Serv. at 672.

21. 15 U.S.C. § 1012 (1976).

22. H.R. Rep. No. 143, 79th Cong., 1st Sess. 2-3, reprinted in 1945 U.S. Code Cong. Serv. 670, 671-72.

23. *Id.* at 2, reprinted in 1945 U.S. Code Cong. Serv. at 671; see *SEC v. National Sec., Inc.*, 393 U.S. 453, 459 (1969).

24. *SEC v. National Sec., Inc.*, 393 U.S. 453, 459-60 (1969); see Note, *Federal Regulation of Insurance Companies: The Disappearing McCarran Act Exemption*, 1973 Duke L.J. 1340, 1345 [hereinafter cited as *The Disappearing McCarran Act Exemption*].

25. *SEC v. National Sec., Inc.*, 393 U.S. 453, 459-60 (1969); accord *American Gen. Ins. Co. v. FTC*, 359 F. Supp. 887, 896 (S.D. Tex.), *aff'd*, 496 F.2d 197 (5th Cir. 1974); 19 J. Appleman & J. Appleman, *Insurance Law and Practice* § 10,321, at 10 (1982); see 2 R. Anderson, *Couch on Insurance* § 21:1 (2d ed. 1959).

son Act exemption.²⁶ Thus, state regulation of insurance company securities is permissible only if not preempted by federal securities laws.²⁷

2. The Williams Act

The Williams Act²⁸ regulates cash tender offers and exchange offers for equity securities of publicly traded companies.²⁹ Congress recognized that tender offers are an efficient means for the acquisition of corporate control, and therefore did not intend to hinder such offers.³⁰ Rather, Congress sought to protect investors by providing them with sufficient information to make informed decisions about the offer within the short time periods in which takeovers are consummated.³¹

The Williams Act is a disclosure statute with certain substantive provisions.³² A disclosure statement must be filed upon rapid accumulation of a company's equity securities, which normally occurs prior to a takeover bid.³³ When an offer is made to the shareholders, an

26. SEC v. National Sec., Inc., 393 U.S. 453, 460-61 (1969); see *The National Securities Case*, *supra* note 18, at 909; *The Disappearing McCarran Act Exemption*, *supra* note 24, at 1347-48.

27. SEC v. National Sec., Inc., 393 U.S. 453, 461 (1969).

28. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981); see 6 L. Loss, *supra* note 3, at 3658.

29. 15 U.S.C. § 78n(d) (1976). For a comprehensive discussion of the Williams Act provisions, see Brown, *The Scope of the Williams Act and its 1970 Amendments*, 26 Bus. Law. 1637 (1971); Fogelson, Wenig & Friedman, *Changing the Takeover Game: The Securities and Exchange Commission's Proposed Amendments to the Williams Act*, 17 Harv. J. on Legis. 409, 412-21 (1980) [hereinafter cited as Fogelson].

30. See House Report, *supra* note 2, at 4, reprinted in 1968 U.S. Code Cong. & Ad. News at 2813-14; Senate Report, *supra* note 5, at 3-4.

31. House Report, *supra* note 2, at 2-3, reprinted in 1968 U.S. Code Cong. & Ad. News at 2812-13; Senate Report, *supra* note 5, at 3.

32. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981); see House Report, *supra* note 2, at 7-11, reprinted in 1968 U.S. Code Cong. & Ad. News at 2817-21. See *supra* note 29.

33. 15 U.S.C. § 78m(d)(1) (1976 & Supp. V 1981). Any person who acquires beneficial ownership of more than five percent of any class of publicly traded equity securities must file an informational statement with the Securities and Exchange Commission and send a copy to the issuer of the security and to the exchange where the security is traded. *Id.* The disclosures are made on a Schedule 13D. 17 C.F.R. § 240.13d-1(a) (1982). The required information includes disclosure of the acquirer's identity, the source and amount of funds used to make the acquisition, the purpose of the acquisition, the number of shares already beneficially owned and any contracts or arrangements in existence with respect to any securities of the issuer. 15 U.S.C. § 78m(d)(1)(A)-(E) (1976). A "beneficial owner" is "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) [v]oting power which includes the power to vote, or to direct the voting of, such security; and/or, (2) [i]nvestment power which includes the power to dispose, or to direct the disposition of, such security." 17 C.F.R. § 240.13d-3(a) (1982); see *id.* § 240.14d-1(b)(4).

informational statement must be filed with the Securities and Exchange Commission (SEC) and sent to the target company.³⁴ If the amount of the offer is increased before the offer expires, the increased consideration must be paid for all shares "taken up."³⁵ Offerors must purchase tendered shares on a pro-rata basis,³⁶ and shareholders have limited withdrawal rights.³⁷ The statute contains a broad proscription of fraud.³⁸

The substantive provisions of the Williams Act have been criticized as inadequate.³⁹ In 1979, the SEC promulgated new rules designed to meet these criticisms.⁴⁰ The new rules extend shareholders' with-

34. 15 U.S.C. § 78n(d)(1) (1976). This section regulates any tender offer for any class of equity security that must be registered under § 12 of the Securities Exchange Act of 1934, *id.* § 78l, or that is exempt from registration under § 12(g)(2)(G) of the Securities Exchange Act of 1934, *id.* § 78l(g)(2)(G) (exempts securities issued by a state-regulated insurance company), if after consummation of the offer, the offeror would be the beneficial owner of more than five percent of that class. *Id.* § 78n(d)(1). The offeror must disclose the information required by Schedule 13D, see *supra* note 33, as well as the following information required by Schedule 14D: 1) the background and identity of the target; 2) the background and identity of the offeror; 3) past contacts, transactions or negotiations between the offeror and the target; 4) the source and amount of funds or other consideration to be used for the acquisition; 5) the purpose of the tender offer and plans or proposals of the offeror including merger, reorganization or liquidation of the target or sale of assets of the target or change in the management, capitalization or dividend policy of the target; 6) the amount of shares of the target already beneficially owned, see *supra* note 33; 7) any contracts or arrangements in existence with respect to any securities of the target; 8) arrangements with persons retained by the offeror to make solicitations or recommendations in connection with the offer; 9) current financial information about the offeror; and 10) any additional information necessary. 17 C.F.R. § 240.14d-100 (1982).

35. 15 U.S.C. § 78n(d)(7) (1976).

36. *Id.* § 78n(d)(6). When an offer is made for less than all the outstanding shares of the class and a greater number of shares is tendered within ten days after the offer is first made or within ten days after notice of any increase in the consideration offered, the offeror must take up the shares on a pro-rata basis according to the number of shares tendered by each shareholder. *Id.*

37. *Id.* § 78n(d)(5). Shareholders may withdraw shares tendered during the first seven days of the offer or, if not already purchased, at any time after 60 days from the date of the original offer. See *id.*; House Report, *supra* note 2, at 10, reprinted in 1968 U.S. Code Cong. & Ad. News at 2820.

38. 15 U.S.C. § 78n(e) (1976). The anti-fraud provision proscribes false or misleading statements and fraudulent or manipulative acts by the offeror, target management or any other person in connection with the offer. *Id.*; see 17 C.F.R. §§ 240.14e-1 to -3 (1982).

39. *State Takeover Statutes and the Williams Act (A Report of the Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee)*, 32 Bus. Law. 187, 189 (1976); see E. Aranow, H. Einhorn & G. Berstein, *Developments in Tender Offers for Corporate Control* xix (1977); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 722-23 (1970).

40. Regulation 14D, 17 C.F.R. §§ 240.14d-1 to -101 (1982) (effective Jan. 7, 1980); Regulation 14E, *id.* §§ 240.14e-1, -2 (same); see Note, *The Effect of the New*

drawal⁴¹ and proration rights⁴² and establish a minimum period during which the offer must be kept open.⁴³ In addition, Rule 14d-2 requires that an offer be commenced or abandoned within five days after it is publicly announced.⁴⁴

B. State Regulation of Tender Offers for Insurance Companies

In the 1960's, insurance companies became increasingly popular targets of takeover bids by large conglomerates seeking to use insurance companies' large reservoirs of liquid assets to finance their continued growth in non-insurance areas.⁴⁵ In 1969, the National Association of Insurance Commissioners adopted the Insurance Holding Company System Regulatory Act (Model Act)⁴⁶ to address the perceived abuses and potential harm to shareholders and policyholders in takeovers of insurance companies.⁴⁷ The Model Act has been adopted in some form by almost all states⁴⁸ and is used for the purpose of analysis in this Note.

The Model Act requires the approval of the state insurance commissioner before any person may acquire control of a domestic insurer.⁴⁹ The acquiring person must file a detailed disclosure statement with

SEC Rules on the Constitutionality of State Takeover Statutes, 8 Fordham Urb. L.J. 913, 913 (1980) [hereinafter cited as *New SEC Rules*]. The SEC has also proposed amendments to the Williams Act to correct certain perceived deficiencies. Proposed Bill to Amend Williams Act, reprinted in *Legislative Proposals on Tender Offers, Beneficial Ownership, Issuer Repurchases*, Sec. Reg. & L. Rep. (BNA) No. 542 Spec. Supp. at 20 (Feb. 27, 1980) [hereinafter cited as Proposed Bill]; see Fogelson, *supra* note 29, *passim*. Congress has not acted on these proposals.

41. 17 C.F.R. § 240.14d-7 (1982). In addition to the statutory withdrawal right period, see *supra* note 37, shareholders may withdraw tendered securities during the first 15 business days after commencement of the offer, and if not already taken up, during the ten business days following the commencement of a competing offer. 17 C.F.R. § 240.14d-7(a) (1982).

42. 17 C.F.R. § 240.14d-8 (1982). An offeror may extend the statutory proration period. *Id.* See *supra* note 36.

43. 17 C.F.R. § 240.14e-1(a) (1982) (offers must be held open for at least 20 business days from the date first made).

44. *Id.* § 240.14d-2(b).

45. Kennedy, *State Insurance Commissioner Involvement in Takeovers of Insurers: An Overview of Procedures and Some Constitutional Considerations*, 17 Forum 374, 375 & n.10 (1981); Note, *The Insurance Holding Company Phenomenon and the Search for Regulatory Controls*, 56 Va. L. Rev. 636, 641-42, 644 (1970) [hereinafter cited as *The Search for Regulatory Controls*]; see Wilder, *supra* note 8, at 718.

46. Model Act, *supra* note 7, at 440-1 to 440-19.

47. See Kennedy, *supra* note 45, at 375-76; *The Search for Regulatory Controls*, *supra* note 45, at 648-49.

48. See *supra* note 8 and accompanying text.

49. Model Act, *supra* note 7, § 3(d), at 440-6 to 440-7. "Control [is] presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent or more of the voting securities of any other person." *Id.* § 1(c), at 440-1. "Person" is defined as "an individual, a corpora-

the insurance commissioner and simultaneously provide a copy to the target company management.⁵⁰ A public hearing to determine whether the acquisition will be approved must be held after the offeror's statement is filed.⁵¹ The Model Act authorizes the commissioner to disapprove the acquisition if it would be detrimental to the state's insurance industry⁵² or to the interests of either the policyholders⁵³ or the shareholders.⁵⁴ Tender offers for insurance companies may also be regulated by general state takeover statutes.⁵⁵ The constitutionality of these statutes as applied to insurance companies is not addressed in this Note.

tion, a partnership, an association, a joint stock company, a trust, an unincorporated organization, [or] any similar entity." *Id.* § 1(f), at 440-2. "Domestic insurer" is not defined in the Model Act. However, in all states a domestic insurer is any insurer incorporated or organized under the laws of that state. *E.g.*, N.Y. Ins. Law § 4(15) (McKinney 1966); S.C. Code Ann. § 38-1-20(5) (Law. Co-op. 1977); S.D. Codified Laws Ann. § 58-1-2(6) (Supp. 1982). The Model Act also provides that "for the purposes of [section 3] a domestic insurer shall include any other person controlling a domestic insurer unless such other person is either directly or through its affiliates primarily engaged in business other than the business of insurance." Model Act, *supra* note 7, § 3(a)(1), at 440-4.

50. Model Act, *supra* note 7, § 3(a)-(b), at 440-4 to 440-6. The required disclosures are: 1) the background of the offeror; 2) the source and amount of funds used to make the acquisition; 3) audited financial information of the acquiring party for each of the preceding five years; 4) plans of the acquiring party to liquidate the insurer, sell its assets, or change its business, corporate structure or management; 5) the number of shares sought and the terms of the offer; 6) the number of shares already beneficially owned; 7) a description of any contracts or arrangements in existence with respect to any securities of the issuer; 8) a description of shares of the target purchased by the offeror within the preceding twelve months; 9) a description of recommendations made by the offeror to purchase the target's securities within the preceding twelve months; 10) copies of the tender offer and related solicitation materials; 11) the terms of the broker-dealer arrangements with respect to the offer; and 12) any other information that the commissioner may prescribe as necessary for the protection of the policyholders and shareholders of the target or in the public interest. *Id.* § 3(b)(1)-(12), at 440-4 to 440-6.

51. Model Act, *supra* note 7, § 3(d)(2), at 440-7. The hearing must be held within 30 days after the disclosure statement is filed; a determination must be made within 30 days after the conclusion of the hearing. *Id.* There is no time limit on the duration of the hearing. *See id.*

52. *Id.* § 3(d)(1)(i)-(ii), at 440-6.

53. *See infra* notes 156-61 and accompanying text.

54. *See infra* notes 162-63 and accompanying text.

55. *See, e.g.*, Conn. Gen. Stat. Ann. §§ 36-456 to -468 (West 1981 & Supp. 1982); Mass. Ann. Laws ch. 110C, §§ 1-13 (Michie/Law. Co-op. Supp. 1982); Pa. Stat. Ann. tit. 70, §§ 71-85 (Purdon Supp. 1982-1983). Only takeover bids for domestic insurers are regulated by a state's version of the Model Act. *See supra* note 49 and accompanying text. General state takeover statutes may provide for regulation of a bid for a foreign insurer. The jurisdictional provisions of such statutes generally extend to tender offers for companies incorporated in the state or with substantial assets in the state or with its principal place of business or principal executive offices within the state. *E.g.*, Conn. Gen. Stat. Ann. § 36-457(a) (West 1981 & Supp. 1982); N.J. Stat. Ann. § 49:5-2(m) (West Supp. 1982-1983); N.Y. Bus.

Insurance takeover statutes are potentially in conflict with the federal regulatory scheme because the regulation of insurance company securities transactions is governed by federal securities law.⁵⁶ If the statutes unduly burden interstate commerce or substantially interfere with the federal scheme of takeover regulation, they will not survive a constitutional challenge.

II. THE COMMERCE CLAUSE CHALLENGE

The commerce clause grant of power to Congress "[t]o regulate Commerce . . . among the several States"⁵⁷ does not preclude all state regulation of commerce.⁵⁸ However, states may not regulate a subject matter requiring a uniform national rule.⁵⁹ Furthermore, a regulation that discriminates against interstate commerce⁶⁰ or protects local economic interests is impermissible.⁶¹ If these prerequisites are met, the

Corp. Law § 1601(a) (McKinney Supp. 1982-1983). Thus, a bid for an insurance company may be subject to a state's version of the Model Act as well as other states' general takeover statutes.

While the individual general takeover statutes vary, many of their provisions are essentially the same. The statutes require notice to the state securities commissioner and a waiting period after the notice before the offer may commence. *E.g.*, Colo. Rev. Stat. § 11-51.5-104(1) (Supp. 1982); Del. Code Ann. tit. 8, § 203(a)(1) (Supp. 1980); Hawaii Rev. Stat. § 417E-3(f) (1976). Most statutes exempt offers acceptable to management. *E.g.*, Ga. Code Ann. § 14-6-1(9)(B)(ii) (1982 & Supp. 1982); Ky. Rev. Stat. Ann. § 292.560(1)(c) (Bobbs-Merrill 1981); N.J. Stat. Ann. § 49:5-2(1)(2)(e) (West Supp. 1982-1983). In some states, the state securities commissioner may stop the offer based on his evaluation of its fairness to shareholders. *E.g.*, Me. Rev. Stat. Ann. tit. 13, § 804(1)(B)(2) (Supp. 1982-1983); Minn. Stat. Ann. § 80B.03(5) (West Supp. 1983); Wis. Stat. Ann. § 552.05(5) (West Spec. Pamph. 1982). Failure to comply with the statute may result in an injunction or criminal penalties. *E.g.*, Ark. Stat. Ann. §§ 67-1264.8, .10 (1980); Minn. Stat. Ann. §§ 80B.09-.10 (West Supp. 1983); Pa. Stat. Ann. tit. 70, §§ 81-82 (Purdon Supp. 1982-1983).

56. Wilder, *supra* note 8, *passim*; see SEC v. National Sec., Inc., 393 U.S. 453, 459-60 (1969); 15 U.S.C. § 78n(d) (1976).

57. U.S. Const. art. I, § 8, cl. 3.

58. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 140 (1973); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 553 (1949) (Black, J., dissenting); see L. Tribe, American Constitutional Law §§ 6-2 to -5 (1978).

59. See Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945); Wabash, St. L. & Pac. Ry. v. Illinois, 118 U.S. 557, 577 (1886); Cooley v. Board of Wardens, 53 U.S. 318, 339, 12 How. 299, 318 (1851); L. Tribe, *supra* note 58, § 6-4.

60. *E.g.*, Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 350-51 (1977); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 381 (1976).

61. *E.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 352-53 (1977); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 530-31 (1949); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935); see L. Tribe, *supra* note 58, at §§ 6-6 to -7.

nature and importance of the state interest must be weighed against the nature and extent of the burden it places on interstate commerce.⁶² In *Pike v. Bruce Church, Inc.*,⁶³ the Supreme Court set forth the balancing test to be used:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.⁶⁴

In *Edgar v. MITE Corp.*,⁶⁵ the Supreme Court struck down the general Illinois takeover statute⁶⁶ as unconstitutional under the *Pike* test.⁶⁷ The Court objected to the Illinois Act's "nationwide reach which purport[ed] to give Illinois the power to determine whether a tender offer may proceed anywhere."⁶⁸ Although the effect the *MITE* decision will have on the validity of state insurance takeover statutes is unclear, the analysis used by the Court provides guidance for the examination of the validity of the Model Act provisions.

A. Need for a Uniform National Rule

A strong argument can be made that in light of the national character of the securities market, securities regulation demands a uniform national rule.⁶⁹ The securities field, however, has traditionally been subject to cooperative federal and state regulation.⁷⁰ The need for a

62. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371-72 (1976); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 770-71 (1945); see L. Tribe, *supra* note 58, § 6-5, at 326.

63. 397 U.S. 137 (1970).

64. *Id.* at 142. The regulation is also not permitted "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); see L. Tribe, *supra* note 58, § 6-12, at 341-42. The basic provisions of the Model Act—requirements of notice to and approval by the state insurance commissioner—appear necessary for the protection of policyholders. Determination whether a lesser amount of disclosure could adequately meet the needs of the commissioner is beyond the scope of this Note.

65. 102 S. Ct. 2629 (1982).

66. Illinois Business Take-Over Act §§ 1-20, Ill. Ann. Stat. ch. 121½, §§ 137.51-.70 (Smith-Hurd Supp. 1982-1983).

67. 102 S. Ct. at 2641 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.).

68. *Id.* at 2642 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.).

69. See Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L.J. 663, 696-700 (1974); *A Response to Great Western*, *supra* note 11, at 920; *Commerce Clause Limitations*, *supra* note 2, at 1165-66.

70. See *Santa Fe Indus. v. Green*, 430 U.S. 462, 478-79 (1977); *Cort v. Ash*, 422 U.S. 66, 84-85 (1975); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414

uniform national rule in the insurance industry is even less compelling due to the states' responsibility to protect policyholders.⁷¹

B. Protectionist Economic Legislation

States may not protect local economic interests by limiting access of out-of-state sellers to local markets.⁷² State takeover legislation seeking to protect incumbent management from out-of-state bidders is arguably impermissible.⁷³ The approval requirement of state takeover statutes may favor target management by decreasing the chance of a successful takeover.⁷⁴ Many courts, including the *MITE* Court,⁷⁵ have viewed general takeover statutes that exempt tender offers acceptable to management⁷⁶—"friendly offers"—as evidence of such protectionist regulation.⁷⁷ Although the presence of such an exemption has not been determinative, it may cast doubt on the state's asserted purpose

U.S. 117, 138 (1973); *SEC v. National Sec., Inc.*, 393 U.S. 453, 461 (1969); Securities Exchange Act of 1934 § 28(a), 15 U.S.C. § 78bb(a) (1976), amended by Act of Oct. 13, 1982, Pub. L. No. 97-303, § 4, 1982 U.S. Code Cong. & Ad. News (96 Stat.) 1409.

71. This responsibility stems from the grant of power in the McCarran-Ferguson Act, which mandates that the states shall regulate the insurance company/policyholder relationship. See *supra* notes 20-25 and accompanying text.

72. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 532-33 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); see *L. Tribe, supra* note 58, § 6-6, at 328.

73. See *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1282 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U. L. Rev. 767, 768-69 (1971); Wilner & Landy, *supra* note 11, at 18; *Commerce Clause Limitations, supra* note 2, at 1159.

74. *MITE Corp. v. Dixon*, 633 F.2d 486, 494-95 (7th Cir. 1981), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982); *Crane Co. v. Lam*, 509 F. Supp. 782, 788 (E.D. Pa. 1981); *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1220-21 (D.N.J. 1981).

75. Model Act, *supra* note 7, § 3(a), at 440-4.

76. The Illinois statute challenged in *MITE* exempted a corporation's acquisition of its own shares. Illinois Business Take-Over Act, § 2.09(4), Ill. Ann. Stat. ch. 121½, § 137.52-9(4) (Smith-Hurd Supp. 1982-1983); see *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2634 & n.4 (1982). In *MITE*, the target's management sought to defeat the takeover attempt by making a competing tender offer for its own shares. *Id.* Most state statutes with a "friendly offer" exemption exclude all offers acceptable to management from coverage. See *supra* note 55.

77. See, e.g., *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1278 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Joseph E. Seagram & Sons v. Marley*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,246, at 91,620-21 (W.D. Okla. July 17, 1981); see *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2642 (1982) (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.). This analysis implicitly assumes that target management is normally more hostile to takeover bids by out-of-state offerors. See *Commerce Clause Limitations, supra* note 2, at 1157-59.

of shareholder protection.⁷⁸ Under the Model Act, however, all forms of acquisition of control—including “friendly” acquisitions—are regulated and subject to the insurance commissioner’s approval.⁷⁹

Furthermore, although the Model Act may confer incidental benefits upon local interests, its purpose is not to reduce competition by limiting the access of out-of-state insurers to the market.⁸⁰ To the contrary, a specific ground for disapproval of any offer is that the acquisition would tend to have an anti-competitive effect on the insurance industry in the state.⁸¹

Thus, state insurance takeover legislation as provided in the Model Act should prevail against a challenge that it constitutes protectionist economic legislation. It must still be established, however, that the state interests protected are legitimate, and that the legislation does not unduly burden interstate commerce.⁸²

C. Balancing Test

1. State Interest

A state has a legitimate interest in regulating the internal affairs of a corporation organized under its laws.⁸³ State corporate law protects investors by regulating certain techniques used to effect change in the corporate structure, such as the transfer and voting of shares, mergers,

78. See *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2642 (1982) (White, J., joined by Burger, C.J., Powell, Stevens & O’Connor, JJ.); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1278 (5th Cir. 1978), *rev’d on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). *But see* *AMCA Int’l Corp. v. Krouse*, 482 F. Supp. 929, 938 (S.D. Ohio 1979) (friendly offer exemption is merely an efficient allocation of limited state resources).

79. See Model Act, *supra* note 7, § 3(a), at 440-4. The Model Act does exclude tender offers or other acquisitions by the issuer of its own stock. *Id.* However, retention of control by the issuer through the acquisition of its own stock is regulated and subject to the insurance commissioner’s approval under most state insurance statutes. See, e.g., Conn. Gen. Stat. § 38-34 (1981); Tex. Rev. Civ. Stat. Ann. art. 21.49-1 § 5(h) (Vernon 1981). State insurance takeover regulation should include regulation of tender offers made by the issuer for the purpose of retaining control.

80. The purpose of the Model Act is to protect policyholders and shareholders of domestic insurers, as indicated by the disclosure requirements and grounds for disapproval. Model Act, *supra* note 7, § 3(b)(12), (d)(1), at 440-6 to 440-7; see *John Alden Life Ins. Co. v. Woods*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,617, at 93,064-65 (D. Idaho Dec. 19, 1981); Idaho Code § 41-3801A (Supp. 1982).

81. Model Act, *supra* note 7, § 3(d)(1)(ii), at 440-6.

82. See *supra* notes 62-64 and accompanying text.

83. *Cort v. Ash*, 422 U.S. 66, 84 (1975); *AMCA Int’l Corp. v. Krouse*, 482 F. Supp. 929, 939 (S.D. Ohio 1979); *City Investing Co. v. Simcox*, 476 F. Supp. 112, 116 (S.D. Ind. 1979), *aff’d*, 633 F.2d 56 (7th Cir. 1980); see *Sargent*, *supra* note 6, at 725; *Shipman*, *supra* note 39, at 741-45; *A Response to Great Western*, *supra* note 11, at 922 & n.374.

dissolutions and proxies.⁸⁴ Because the tender offer is a means of effecting change in the corporate structure, the state arguably has a legitimate interest under the internal affairs doctrine in regulating the offer.⁸⁵ Some courts, including the *MITE* Court, however, have not been persuaded by this analysis.⁸⁶

In *MITE*, the internal affairs analysis did not lend support to the validity of the Illinois statute because the statute permitted regulation of tender offers for companies not incorporated in Illinois.⁸⁷ The jurisdiction of the Model Act, however, is limited to domestic companies,⁸⁸ and thus the Act does not regulate the affairs of foreign insurers. The *MITE* Court also stated that the internal affairs analysis was irrelevant because "[t]ender offers contemplate transfers . . . to a third party and do not themselves implicate the internal affairs of the target company."⁸⁹

The acquisition of an insurance company, however, does have internal affairs implications because it affects the interests of the policyholder. Unlike the shareholder, who by tendering his shares terminates his relationship with the target company, the policyholder has a continuing, long-term interest in the remaining company. Insurance takeover regulation seeks to protect this interest by assuring the continued solidity and solvency of insurers;⁹⁰ any change in the control and management of an insurance company may affect its solvency and therefore its ability to pay future policyholder claims. Moreover, while shareholders tendering their shares in a takeover bid are protected by the provisions of the Williams Act,⁹¹ policyholders receive no

84. See Sargent, *supra* note 6, at 724; Shipman, *supra* note 39, at 741-45; see, e.g., Del. Code Ann. tit. 8, §§ 201-202, 212, 215, 217, 219, 251-262 (1974 & Supp. 1980); N.Y. Bus. Corp. Law §§ 609, 620, 622, 901-910 (McKinney 1963 & Supp. 1982-1983).

85. *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 939 (S.D. Ohio 1979); see *City Investing Co. v. Simcox*, 476 F. Supp. 112, 116 (S.D. Ind. 1979), *aff'd*, 633 F.2d 56 (7th Cir. 1980).

86. *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2642-43 (1982) (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.); *Crane Co. v. Lam*, 509 F. Supp. 782, 789 (E.D. Pa. 1981); see *Hi-Shear Indus. v. Campbell*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,804, at 90,033 (D.S.C. Dec. 4, 1980).

87. 102 S. Ct. at 2643 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.).

88. Model Act, *supra* note 7, § 3(a), at 440-4. See *supra* note 49 and accompanying text.

89. 102 S. Ct. at 2643 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.).

90. See Model Act, *supra* note 7, § 3(b), (d), at 440-4 to 440-7; see also R. Keeton, *Basic Text on Insurance Law* § 8.3, at 554 (1971).

91. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981); see *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 35 (1977); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975); House Report, *supra* note 2, at 4, reprinted in 1968 U.S. Code Cong. & Ad. News at 2813-14.

similar federal protection.⁹² Their only protection lies in the state's power to regulate the insurance industry.⁹³

The Model Act is also designed to protect shareholders.⁹⁴ Although protection of out-of-state investors is permissible, it may not be used to justify state takeover legislation.⁹⁵ The *MITE* Court stated, however, that protection of resident investors is a legitimate state interest.⁹⁶

2. Burden on Interstate Commerce

The threshold of permissibility for state regulation under the commerce clause is that any burden on interstate commerce be "only incidental"; direct regulation is not permissible.⁹⁷ A plurality of the *MITE* Court concluded that the Illinois statute constituted direct regulation of interstate commerce.⁹⁸ The conclusion was based on the scope of the statute's jurisdictional provision,⁹⁹ which covered tender offers in which either ten percent of the target's shareholders were Illinois residents or two of the following three conditions were met:

92. Federal regulation of tender offers provides solely for protection of investors. See *supra* note 91.

93. Regulation of the policyholder/insurance company relationship has been the responsibility of the states since the enactment of the McCarran-Ferguson Act. See *supra* notes 20-25 and accompanying text. To avoid duplicative regulation of tender offers for insurance companies, only one state should be allowed to assert jurisdiction over an offer. Although all policyholders will not necessarily be residents of the state in which the insurance company is incorporated, that state is in the best position to protect policyholders' interests.

94. See Model Act, *supra* note 7, § 3(a), at 440-4. The Model Act requires that no offer may be commenced until the shareholders have received a statement containing the information required by the Act, thereby ensuring that shareholders have adequate information with which to make a decision. *Id.* See *supra* notes 47, 50 and accompanying text.

95. *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1283 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1224 (D.N.J. 1981); see *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2642 (1980) (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.).

96. *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2642 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.) (1982); *accord* *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1283 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Crane Co. v. Lam*, 509 F. Supp. 782, 789 (E.D. Pa. 1981).

97. *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2640 (1982) (White, J., joined by Burger, C.J., Stevens & O'Connor, JJ.) (emphasis omitted); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

98. *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2640-41 (1982) (White, J., joined by Burger, C.J., Stevens & O'Connor, JJ.).

99. *Id.* at 2641 (White, J., joined by Burger, C.J., Stevens & O'Connor, JJ.).

the target had its principal executive office in Illinois, was organized under the laws of Illinois, or had at least ten percent of its stated capital and paid-in surplus in Illinois.¹⁰⁰ Therefore, the statute applied regulates a tender offer for a target that had no shareholders residing in Illinois and was not incorporated in Illinois.¹⁰¹

In contrast, the Model Act's regulation of takeover bids is limited to domestic insurance companies.¹⁰² Any burdens on interstate commerce are "only incidental."¹⁰³ These burdens may include the potential obstruction of the tender offer due to the approval requirement, possible disruption in the trading and the orderly regulation of the national securities market due to the delay necessitated by a hearing, and the increased cost of a takeover attempt due to the disclosure and hearing requirements.¹⁰⁴

The *MITE* Court was concerned primarily with the potential obstruction of a tender offer and the resultant nationwide "chilling effect" on tender offers caused by the broad jurisdictional reach of the Illinois statute.¹⁰⁵ This defect is not found in the Model Act, however; its jurisdiction is limited to domestic insurance companies.¹⁰⁶

Although not addressed by the *MITE* Court, compliance with the additional disclosure and hearing requirements of the Model Act may substantially increase the cost of a takeover attempt, thereby deterring tender offers.¹⁰⁷ Further, a hearing requirement may delay either the commencement of a takeover bid, or if the offer commences subject to the hearing requirement, the completion of an acquisition. Either delay may disrupt trading in securities of both the offeror and the target of a tender offer,¹⁰⁸ thereby placing a burden on the orderly

100. Illinois Business Take-Over Act § 2.10, Ill. Ann. Stat. ch. 121½, § 137.52-10 (Smith-Hurd Supp. 1982-1983).

101. 102 S. Ct. at 2641 (White, J., joined by Burger, C.J., Stevens & O'Connor, JJ.).

102. Model Act, *supra* note 7, § 3(a), at 440-4. See *supra* note 49 and accompanying text.

103. See *supra* note 64 and accompanying text.

104. See *supra* notes 49-54 and accompanying text.

105. 102 S. Ct. at 2641-42 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.).

106. Model Act, *supra* note 7, § 3(a), at 440-4. See *supra* note 49 and accompanying text.

107. *Cf.* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1286 (5th Cir. 1978) (burdensome disclosure requirements will discourage prospective offerors), *rev'd on other grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979). See *supra* notes 50-51 and accompanying text.

108. Empire, Inc. v. Ashcroft, 524 F. Supp. 898, 904 (W.D. Mo. 1981); see Wilner & Landy, *supra* note 11, at 23; *Commerce Clause Limitations*, *supra* note 2, at 1151-52; *cf.* Dart Indus. v. Conrad, 462 F. Supp. 1, 10, 14 (S.D. Ind. 1978) (delay created by compliance with provisions of Delaware general takeover statute creates disruption in national securities market).

regulation of the national securities market. Delay, however, can have a positive effect; it may foster competition, which would make the marketplace more efficient and bring an increased price to shareholders.¹⁰⁹

3. Balance

The Model Act is "even-handed" because it applies to all techniques for acquisition of control of a domestic insurance company.¹¹⁰ The state has a strong, legitimate interest in such regulation¹¹¹ which far exceeds that advanced by Illinois in the *MITE* case. The only legitimate interest of Illinois to justify the legislation was the protection of resident investors.¹¹² The *MITE* Court, while finding this interest insufficient on the facts of the case,¹¹³ recognized that there might be circumstances in which state interests would be sufficient to justify state takeover legislation.¹¹⁴ By providing policyholders relief from financial loss and the fear of loss, the insurance industry plays an important role in the United States economy.¹¹⁵ Therefore, the state interest in protecting policyholders combined with its interest in the protection of resident shareholders is substantial and should tip the balance in favor of state insurance takeover regulation.

Because the Model Act regulates only tender offers for domestic insurance companies,¹¹⁶ its burdens on interstate commerce are substantially less onerous than those of the Illinois statute. Such burdens are not "clearly excessive"¹¹⁷ in relation to the benefits accorded the

109. See *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1283-85 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *A Response to Great Western*, *supra* note 11, at 902 & n.213; Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L.J. 510, 524 (1979).

110. Model Act, *supra* note 7, § 3(a), at 440-4. See *supra* note 49 and accompanying text.

111. See *supra* pt. I(A)(1).

112. See 102 S. Ct. at 2642 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.).

113. *Id.* at 2641-43 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.).

114. See *id.* at 2642 (White, J., joined by Burger, C.J., Powell, Stevens & O'Connor, JJ.); *id.* at 2643 (Powell, J., concurring); *id.* at 2648 (Stevens, J., concurring).

115. Loman, *Insurance in Society*, in *Property and Liability Insurance Handbook* 3 (J. Long & D. Gregg eds. 1965). Insurance is important to the individual policyholder because it provides relief from loss and fear of loss as well as facilitating private finance of property such as homes and automobiles. *Id.* at 6-9. In the business community, insurance may provide accuracy in prediction of production costs, relief from financial loss and the facilitation of financing of capital assets. *Id.*

116. Model Act, *supra* note 7, § 3(a), at 440-4. See *supra* note 49 and accompanying text.

117. See *supra* note 64 and accompanying text.

resident shareholders and the otherwise unprotected policyholders. Therefore, state regulation of tender offers for insurance companies in accordance with the Model Act does not violate the commerce clause.

III. THE PREEMPTION CHALLENGE

Even if state insurance takeover legislation is permissible under the commerce clause, it may be preempted under the supremacy clause.¹¹⁸ Federal takeover legislation may have "occupied the field,"¹¹⁹ thereby preempting all state legislation. Such occupation may be indicated by express statutory language or the legislative history of the statute, or may be implicit in the purpose and effect of the statute.¹²⁰

State legislation is also preempted if it conflicts with federal legislation.¹²¹ Direct conflict exists when simultaneous compliance with both federal and state regulations is impossible.¹²² Conflict is indirect when, although compliance with both regulations is possible, compliance with the state regulation frustrates the "purposes and objectives" of the federal regulation.¹²³

Although the *MITE* majority did not hold that the Illinois statute was preempted by the Williams Act,¹²⁴ lower courts before and after the *MITE* decision have struck down state takeover legislation on preemption grounds.¹²⁵ Therefore, the provisions of the Model Act must be analyzed carefully in relation to the objectives and provisions of the Williams Act.

118. U.S. Const. art. VI, cl. 2; see L. Tribe, *supra* note 58, § 6-23.

119. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947); accord *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956); see L. Tribe, *supra* note 58, § 6-25; Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 625 (1975) [hereinafter cited as *Preemption Doctrine*].

120. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); see L. Tribe, *supra* note 58, § 6-25. If there is no express language of preemption in the statute, courts will look for a pervasive scheme of federal regulation, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 159-63 (1942), or a dominant federal interest in the subject matter of the regulation, e.g., *Pennsylvania v. Nelson*, 350 U.S. 497, 504-07 (1956) (national security); *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) (foreign affairs).

121. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); see L. Tribe, *supra* note 58, § 6-24; *Preemption Doctrine*, *supra* note 119, at 626 & n.20.

122. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); L. Tribe, *supra* note 58, § 6-24, at 377-78.

123. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see L. Tribe, *supra* note 58, § 6-24, at 378-79.

124. See *supra* note 14 and accompanying text.

125. For post-*MITE* decisions, see *National City Lines v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982); *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522 (D.

A. Federal Occupation of the Field

Courts have consistently held that federal securities regulation does not occupy the field.¹²⁶ The coexistence of federal securities laws and state blue sky laws supports this finding.¹²⁷ Also, the Securities Exchange Act of 1934 contains a savings clause specifically permitting some state regulation.¹²⁸ Further, the statutory language and legislative history of the Williams Act are devoid of any intent to occupy the field.¹²⁹ The Williams Act is intended to be a minimum disclosure statute, not a pervasive scheme of regulation.¹³⁰ Although the SEC has requested Congress to amend the Williams Act to preempt all state takeover legislation,¹³¹ Congress has not acted on this proposal.

B. Direct Conflict

Rule 14d-2 requires that an offer be commenced or abandoned within five days after it is publicly announced.¹³² Simultaneous compliance with the Rule and state statutes requiring a waiting period of

Md. 1982). For pre-MITE decisions, see *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Empire, Inc. v. Ashcroft*, 524 F. Supp. 898 (W.D. Mo. 1981); *Brascan, Ltd. v. Lassiter*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,247 (E.D. La. Apr. 30, 1979).

126. See, e.g., *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2635 (1982) (White, J., joined by Burger, C.J., Blackmun, J.); *Hi-Shear Indus. v. Campbell*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,804, at 90,030 (D.S.C. Dec. 4, 1980); *Hi-Shear Indus. v. Neiditz*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,805, at 90,036 (D. Conn. Dec. 3, 1980); *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 934-35 (S.D. Ohio 1979).

127. See Sargent, *supra* note 6, at 704-05; *A Response to Great Western*, *supra* note 11, at 909.

128. Securities Exchange Act of 1934 § 28(a), 15 U.S.C. § 78bb(a) (1976), amended by Act of Oct. 13, 1982, Pub. L. No. 97-303, § 4, 1982 U.S. Code Cong. & Ad. News (96 Stat.) 1409.

129. See *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2635 & n.6 (1982) (White, J., joined by Burger, C.J., Blackmun, J.); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1275 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Empire, Inc. v. Ashcroft*, 524 F. Supp. 898, 903 (W.D. Mo. 1981); *Natomas Co. v. Bryan*, 512 F. Supp. 191, 192 (D. Nev. 1981).

130. See *MITE Corp. v. Dixon*, 633 F.2d 486, 491 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982); *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 934-35 (S.D. Ohio 1979); *Joseph E. Seagram & Sons v. Marley*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,246, at 91,620 (W.D. Okla. July 17, 1981).

131. Proposed Bill, *supra* note 40, at 23. The SEC stated that state takeover statutes should be preempted because they are inconsistent with uniform, national control of tender offers. *Id.* at 29; see Fogelson, *supra* note 29, at 440-51.

132. 17 C.F.R. § 240.14d-2(b) (1982).

more than five days is thus impossible.¹³³ Since the enactment of Rule 14d-2, courts have struck down general state takeover statutes on the ground that a longer waiting period conflicts with the Rule.¹³⁴ The Model Act imposes no waiting period requirement¹³⁵ and thus creates no readily apparent conflict with the Williams Act. The Model Act's hearing requirement, however, may conflict with the Rule by delaying the commencement of the offer more than five days.¹³⁶ The United States District Court for the Southern District of Indiana, reviewing Indiana's insurance statute,¹³⁷ which is virtually identical to the Model Act, found no direct conflict with the Rule.¹³⁸ The court interpreted the Indiana statute as permitting the offer to go forward provided it was conditioned upon the subsequent approval of the insurance commissioner.¹³⁹ The Alabama insurance statute specifically provides for this interpretation.¹⁴⁰ Because the Model Act may be construed as allowing the offer to go forward in accordance with the Rule, direct conflict should not be found.¹⁴¹ To avoid the possibility of preemption, however, all state insurance legislation should be amended to

133. See Bloomenthal, *The New Tender Offer Regimen, State Regulation, and Preemption*, 30 Emory L.J. 35, 59-60 (1981); Pozen, *Rule 14d-2(b) Under the '34 Act and State Regulation of Takeover Bids*, in Twelfth Annual Institute on Securities Regulation 228 (PLI 1981); *New SEC Rules*, *supra* note 40, at 931-32. The SEC has stated that adoption of the Rule has created a conflict with state waiting period requirements "so direct and substantial as to make it impossible to comply with both sets of requirements as they presently exist." SEC Rel. No. 34-16,384, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,373, at 82,584 (Nov. 29, 1979).

134. *E.g.*, *Natomas Co. v. Bryan*, 512 F. Supp. 191, 192-93 (D. Nev. 1981); *Canadian Pac. Enters. (U.S.) v. Krouse*, 506 F. Supp. 1192, 1204 (S.D. Ohio 1981); *Eure v. Grand Metropolitan, Ltd.*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,694, at 98,648 (N.C. Super. Ct. Apr. 18, 1980). The *MITE* Court did not address the Rule 14d-2 issue. The offer in *MITE* was made in January of 1979. *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2633 (1982). Rule 14d-2 was not effective until January 7, 1980. See *supra* note 40.

135. See Model Act, *supra* note 7, § 3(a), at 440-4.

136. The hearing must be held within 30 days after the offeror files an informational statement with the insurance commissioner. At least 20 days notice must be given to the offeror and seven days notice to the target company before the hearing may be held. The commissioner must reach a decision within 30 days from the conclusion of the hearing. *Id.* § 3(d)(2), at 440-7. No time limit is placed on the duration of the hearing. See *id.*

137. Ind. Code Ann. §§ 27-1-23-2, -7 to -8, -12 (Burns Supp. 1982).

138. *Sun Life Group, Inc. v. Standard Life Ins. Co.*, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,314, at 97,117-18 (S.D. Ind. Mar. 12, 1980).

139. *Id.*

140. Ala. Code § 27-29-3(a)(2) (1975).

141. See SEC Rel. No. 34-16,623, Sec. Reg. & L. Rep. (BNA) No. 544, at G-1 (Mar. 12, 1980). The SEC stated:

Nothing in the rules prohibits offers under the terms of which the acceptance for payment is conditioned upon fulfillment of a condition requiring regulatory approval. The Commission recognized in Release No. 34-16,384

permit an offer to proceed in conformity with Rule 14d-2, conditioned upon the approval of the insurance commissioner.

C. Indirect Conflict

1. Investor Protection

It has been argued that the purpose of general state takeover statutes is protection of target management, which conflicts with the investor protection purpose of the Williams Act.¹⁴² Many courts have found that the hearing provisions of state takeover statutes that delay commencement of an offer protect target management by impeding both the occurrence and progress of tender offers.¹⁴³ An approval requirement may also deter takeover bids.¹⁴⁴ These provisions therefore arguably disrupt the balance between the offeror and target management—"neutrality"—created by the Williams Act.¹⁴⁵

that regulatory approvals may be required before a bidder will be permitted to actually purchase shares. The nature and extent of any such condition must be fully described in the bidder's tender offer materials.

Id. Furthermore, there is a judicial preference to harmonize federal and state regulation whenever possible and not to find the state statute preempted. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973); *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 423 n.29 (1973); *Goldstein v. California*, 412 U.S. 546, 553-54 (1973).

142. See *Moylan, State Regulation of Tender Offers*, 58 Marq. L. Rev. 687, 690, 702 (1975); *Commerce Clause Limitations*, *supra* note 2, at 1169-70.

143. *E.g.*, *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2638-39 (1982) (White, J., joined by Burger, C.J., Blackmun, J.); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1278 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Gunter v. AGO Int'l B.V.*, 533 F. Supp. 86, 89-90 (N.D. Fla. 1981); see *National City Lines v. LLC Corp.*, 524 F. Supp. 906, 910-11 (W.D. Mo. 1981), *aff'd*, 687 F.2d 1122 (8th Cir. 1982); *Dart Indus. v. Conrad*, 462 F. Supp. 1, 12-13 (S.D. Ind. 1978).

144. See *supra* note 74 and accompanying text.

145. See House Report, *supra* note 2, at 4, *reprinted in* 1968 U.S. Code Cong. & Ad. News at 2813; Senate Report, *supra* note 5, at 3. The requirements of "neutrality" under the Williams Act have been the subject of dispute. One approach is based on the belief that "neutrality" is itself an objective of the Williams Act and that Congress established the prerequisites for such "neutrality" when it formulated the provisions of the Williams Act regulating tender offers. Therefore, state provisions differing from those of the Williams Act that operate to upset the "neutrality" envisioned by Congress are preempted. *MITE Corp. v. Dixon*, 633 F.2d 486, 495-99 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982); see *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1279-80, (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Wilner & Landy*, *supra* note 11, at 25-29.

Alternatively, it has been argued that the sole purpose of the Williams Act is investor protection. See *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 936-37 (S.D. Ohio 1979); *Sargent*, *supra* note 6, at 713; *A Response to Great Western*, *supra* note 11, at 913-15. Neutrality is merely the policy adopted to achieve this purpose. *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 29-30 (1977) (Tender offeror is not intended

Of the five Justices addressing the preemption issue in *MITE*,¹⁴⁶ three determined that the balance envisioned by the Williams Act provisions is a major, inseparable aspect of investor protection,¹⁴⁷ and any state takeover legislation that disrupts this balance would therefore conflict with the Williams Act.¹⁴⁸ The two remaining Justices, however, stated that the Williams Act's neutrality policy does not necessarily prohibit "state legislation designed to assure . . . greater protection to interests that include but often are broader than those of incumbent management."¹⁴⁹

Even if the Williams Act does prohibit state regulation that provides additional protections to target management, the hearing and approval requirements of the Model Act should not upset the balance in takeover bids for insurance companies. Offers may go forward in accordance with Rule 14d-2 provided they are conditioned on approval by the insurance commissioner.¹⁵⁰ However, a reasonable time limit should be placed on the duration of the hearing to avoid any unnecessary disruption in the securities market.¹⁵¹ Furthermore, because approval is required for all forms of acquisition of control of a domestic insurance company,¹⁵² target management will not be able to exclude from regulation offers that it finds acceptable.

2. The Market Approach

The provision of the Model Act that requires approval of a takeover by the insurance commissioner arguably frustrates the objective of the Williams Act of promoting informed decision-making by investors—the "market approach."¹⁵³ Many courts have found that general state

beneficiary of Williams Act, and therefore does not have standing to sue.). The provisions of the Williams Act do not constitute a statutory formula for "neutrality," and therefore, if the state provisions support the goal of investor protection, they will not be preempted solely on the ground that they contain provisions different from the Williams Act. See *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 936-38 (S.D. Ohio 1979); Sargent, *supra* note 6, at 713; *A Response to Great Western*, *supra* note 11, at 913-15.

146. See *supra* note 14.

147. 102 S. Ct. at 2636-37 (White, J., joined by Burger, C.J., Blackmun, J.)

148. *Id.* at 2637 (White, J., joined by Burger, C.J., Blackmun, J.).

149. *Id.* at 2643 (Powell, J., concurring); *accord id.* at 2648 (Stevens, J., concurring).

150. See *supra* notes 136-41 and accompanying text.

151. See *supra* note 136.

152. See *supra* note 49 and accompanying text.

153. See *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1276 (5th Cir. 1978) (general state takeover legislation), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Gunter v. AGO Int'l B.V.*, 533 F. Supp. 86, 90 (N.D. Fla. 1981) (insurance state takeover legislation); *National City Lines v. LLC Corp.*, 524 F. Supp. 906, 911 (W.D. Mo. 1981) (same), *aff'd*, 687 F.2d 1122 (8th Cir. 1982); *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1217 (D.N.J. 1981) (general state takeover legislation).

takeover legislation requiring the state securities commissioner's approval conflicts with the market approach adopted by the Williams Act by substituting the commissioner's decision for the investors' decisions.¹⁵⁴

Unlike such provisions in general state takeover legislation, however, the approval requirement in the Model Act is designed primarily to protect policyholders.¹⁵⁵ Most grounds for disapproval of an offer relate to concerns about the financial solvency and stability of the target after the takeover. The commissioner considers how the following will affect the policyholders' interests: 1) the qualifications of the remaining company to carry on the business of insurance;¹⁵⁶ 2) the financial stability of the offeror;¹⁵⁷ 3) the plans of the offeror to liquidate the target or sell its assets;¹⁵⁸ 4) the plans of the offeror to merge or consolidate the target or make any other change in its corporate structure and control;¹⁵⁹ 5) the competence, integrity and experience of the offeror's management;¹⁶⁰ and 6) the effect of the takeover on competition in the insurance industry in the state.¹⁶¹ These grounds do not constitute a substitution of the insurance commissioner's decision for the investor's decision, but rather a means to protect otherwise defenseless policyholders. After the policyholders' interests are safeguarded, the investor still decides whether to tender his shares.

The Model Act also allows the insurance commissioner to disapprove a takeover if the terms of the offer are deemed unfair to the target's shareholders¹⁶² or if the financial stability of the offeror after the takeover might jeopardize the interests of any remaining shareholders.¹⁶³ Because these grounds for disapproval frustrate the objective of Congress to allow the investor to make his own decision,¹⁶⁴ they should not be included in any state insurance takeover legislation.

154. *E.g.*, *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2639-40 (1982) (White, J., joined by Burger, C.J., Blackmun, J.); *Gunter v. AGO Int'l B.V.*, 533 F. Supp. 86, 90 (N.D. Fla. 1981); *National City Lines v. LLC Corp.*, 524 F. Supp. 906, 911 (W.D. Mo. 1981), *aff'd*, 687 F.2d 1122 (8th Cir. 1982); *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1220 (D.N.J. 1981).

155. See Model Act, *supra* note 7, § 3(b)(12), (d)(1)(i)-(iii), (v)-(vi), at 440-6 to 440-7.

156. *Id.* § 3(d)(1)(i), at 440-6.

157. *Id.* § 3(d)(1)(iii), at 440-7.

158. *Id.* § 3(d)(1)(v), at 440-7.

159. *Id.*

160. *Id.* § 3(d)(1)(vi), at 440-7.

161. *Id.* § 3(d)(1)(ii), at 440-6.

162. *Id.* § 3(d)(1)(iv), at 440-7.

163. *Id.* § 3(d)(1)(iii), at 440-7.

164. See *supra* notes 153-54 and accompanying text.

3. Disclosure

Some courts have found that additional disclosure requirements impede Congress' objective of promoting informed decision-making.¹⁶⁵ This argument is based on the principle that at some point, disclosure is subject to diminishing returns and therefore additional disclosure may confuse the average investor.¹⁶⁶ This analysis is faulty, however, because it assumes that Congress has determined the proper amount of disclosure required for informed decision-making.¹⁶⁷ The Williams Act is a minimum disclosure statute¹⁶⁸ and, as in other areas of securities regulation, states may require additional disclosure.¹⁶⁹ Furthermore, the additional disclosure requirements of the Model Act are justifiable considering the special interest of the state in protecting policyholders.¹⁷⁰ The additional disclosure is provided to the state insurance commissioner,¹⁷¹ who has the requisite expertise to interpret it. Investors will therefore not be confused by the additional information.

CONCLUSION

State regulation of takeover bids for insurance companies provides protection for policyholders, who are not protected by the Williams Act. As provided under the Model Act, such regulation does not constitute a direct or impermissibly excessive burden on interstate commerce. This regulation is not preempted by the Williams Act if carefully drawn to permit an offer to go forward and be consummated on a timely basis. The insurance commissioner's approval may be required provided his decision is limited to policyholder protection considerations. In addition to protecting the interests of policyholders, shareholders are provided with additional protection they would not have been afforded under the Williams Act.

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165. *E.g.*, *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1278-79 (5th Cir. 1978), *rev'd on other grounds sub nom.* *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Dart Indus. v. Conrad*, 462 F. Supp. 1, 13 (S.D. Ind. 1978); *see Wilner & Landy, supra* note 11, at 25-26.

166. *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976); *A Response to Great Western, supra* note 11, at 917; *see Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1280 (5th Cir. 1978), *rev'd on other grounds sub nom.* *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *E. Aranow, H. Einhorn, & G. Berlstein, supra* note 39, at 219-20.

167. *See A Response to Great Western, supra* note 11, at 917-19.

168. *See supra* note 130 and accompanying text.

169. *See supra* notes 126-28 and accompanying text.

170. *See supra* notes 91-93 and accompanying text.

171. Model Act, *supra* note 7, § 3(a), at 440-4.