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William H. Steinbrink

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Management's Response to the Takeover Attempt

*William H. Steinbrink**

Current corporate and securities law theory characterizes attempted acquisitions by means of the tender offer device as an investment decision most appropriately considered by shareholders acting individually, rather than a corporate decision to which management's expertise is best suited. The author challenges the current scope of subject company management's permissible responses to tender offers, rejecting the argument that such a restrictive approach is the inevitable extension of traditional notions of management's fiduciary obligations. He proposes alternative management responses which more fully utilize the unique appreciation of management for the potential impact of a change in corporate control not only on the internal affairs of the corporation, but also on the long range economic interests of subject company's shareholders and on the external community. Mr. Steinbrink then suggests possible means for implementation of such policies both governmentally and through individual corporate action.

MANAGEMENT'S RESPONSE to the typical hostile tender offer often has been characterized as a self-interested effort by the officers and the individual directors of the target company to maintain their entrenched positions, employment, perquisites, and, most importantly, control.[1] Corporate executives have been counseled, without necessarily being dubbed protectors of the corporate weal, to implement various changes in corporate structure, to develop black books, and generally to fight like hell when a takeover attempt looms.[2] The context, thus, is one of a battle between white hats and black hats placed on the different sets of heads in accordance with one's predilection or, more commonly, self-interest as a lawyer, investment banker, labor leader, or state politician.

Although management is a very significant participant in this struggle for hegemony over corporate assets, the legal foundation

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* A.B. (1964), Wittenberg University; LL.B. (1967), Duke University. The author is a partner with the law firm of Jones, Day, Reavis & Pogue in Cleveland. He is admitted to the Ohio Bar.

1. *Full Disclosure of Corporate Equity Ownership in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 35 (1967) (statement of Manuel F. Cohen).

2. *See generally* P. DAVEY, DEFENSES AGAINST UNNEGOTIATED CASH TENDER OFFERS, RESEARCH REPORT, THE CONFERENCE BOARD (1977).

for management's defensive activities has not been thoughtfully modeled. The premise of the following discussion is that management indeed does have, both in fact and in law, a legitimate, central position in the corporate takeover accomplished through a tender offer. To articulate management's role, the current tender offer context must be explored, and alternative responses of management have to be reviewed. Because management's role is not well understood, it is also important to explore what actions can be taken by the shareholders or perhaps state legislatures to articulate further the proper basis for management's response to the takeover attempt.

I. A Changed Environment For Takeovers

As the waging of this corporate warfare has evolved into a less impulsive and more sophisticated process, tolerance for management's interference with a hostile tender offer has waned. Injunctions against offers cannot be obtained easily.[3] Lawyers have recognized a duty in corporate fiduciaries to evaluate responsibly offers that are made, whether or not management is in favor of the combination.[4] Moreover, state takeover statutes have become an obstacle to be cleared instead of a moat protecting corporate fiefdoms.[5]

The focus for this movement has been on the shareholder. As long as the thrust of management's effort is the prevention or destruction of a tender offer, the necessary consequence is that shareholders are denied an opportunity to dispose of their invest-

3. *See, e.g.*, Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 919 (1974) (preliminary injunction to enjoin tender offer on basis of antitrust allegations denied); Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975) (injunction to prevent the voting of shares acquired in tender offer process denied); Scott v. Multi-Amp. Corp., 386 F. Supp. 44 (D.N.J. 1974) (injunction to prevent shares acquired in tender offer from being voted denied). *Cf.* Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) (corporation denied permanent injunctive relief against shareholder who failed to comply with § 13(d) filing requirement, since no irreparable harm shown). For a suggestion that, absent willful noncompliance, offerors will be able to amend defective disclosure statements to correct misstatements or omissions without meaningful penalty under the implications of *Rondeau* and that both preliminary and permanent injunctive relief will be increasingly difficult to obtain, see E. Aranow, H. Einhorn, & G. Berlstein, Developments in Tender Offers for Corporate Control 128–29, 132 (1977) [hereinafter cited as Developments]. *See generally* Connelly, *The Boom in Unfriendly Takeovers*, Institutional Investors (June, 1975).

4. *See* Flom, *Forcing a Friendly Offer*, 32 Bus. Law. 1319 (1976); Small, *Defending Target Companies—General Perspectives*, 32 Bus. Law. 1349 (1976).

5. *Compare* Flom, *The Role of the Takeover in the American Economy*, 32 Bus. Law. 1299 (1976) *with* Vorys, *Ohio Tender Offers Bill*, 43 Ohio B. 65, 73 (1970).

ment on terms that often are superior to what they could obtain in ordinary market transactions. The emphatic underpinning of the securities acts on investor protection, the pervasive notion of shareholder democracy, and common greed are pitted against management's objective of keeping the offer from being made or, at least, completed. It is not surprising, therefore, that management has not fared well on the battlefield or found much assistance or tolerance from regulators and commentators.

A. *The Need for Recognition of A New Corporate Model*

The function and posture of equity investors in professionally managed businesses as they exist in America in the last quarter of the twentieth century need to be reexamined on theoretical and practical planes. A redefinition seems especially pertinent as societal concerns are increasingly given prominence over private economic interests. Management's disassociation from ownership of the corporation must be acknowledged in law and theory as it has been in fact, and equity investors should be recognized as simply an alternative source of capital for the maintenance and operation of the corporation's business.[6] Equity investors may be entitled to rights different from those of other types of capital providers, but their ability to affect and direct the corporation's affairs should be subordinated to the professional management of the corporation. Management should be recognized as possessing the responsibility and power to shape the corporation's business, its development, its return to investors, and its satisfaction of social requirements. It should simultaneously be accountable to a broad spectrum of interests.

Bringing the philosophical and legal analysis of management into conformity with the needs of the twenty-first century should yield a changed perception of management's role in the hostile

6. *See generally* Address by John R. Evans, Comm'r, SEC, to Soc'y of Corp. Secretaries, Middle Atl. Regional Group, Wash., D.C. (Jan. 11, 1978):

> It is apparent, at least to me, that despite various statutes and SEC regulations, shareholder democracy today is much more an appealing concept than an operating reality. Although it is possible to document the current lack of shareholder involvement in corporate affairs, it is a far more difficult task to gauge precisely the degree to which this lack of participation is reflective of general apathy or of frustration with an inadequate corporate governance system. Even though many will disagree, it is my opinion that most shareholders are primarily, if not almost exclusively, interested in a return on their investment through dividends and capital appreciation, and that they do not or cannot devote the time, energy, or resources necessary to become involved in the governance of corporations which they in part own.

tender offer as well. Inflexible legal principles and regulatory requirements now place equity investors at the center of tender offer activities. Conforming these restraints to present-day needs would justify management behaving as it has in the recent past and as it would very much like to today.

Without this necessary evolution in the understanding of business corporations and management's central position therein, an examination must be made of the present legal rules to discern how management is expected to react when an uninvited acquisition attempt is launched and what limitations keep that reaction within the range of public expectations. The process and results of this examination will be significantly affected by the tender offer environment at the time such an examination is made. Thinking about these questions in 1978 should produce a more balanced appraisal of management's role than would have emerged even three years ago, due to the changed applications of the tender offer device and an evolving comprehension of the tender offer process by both investors and the public.

B. *The Role of Tender Offers in 1978*

There is little comprehensive analytical data about the impact of tender offers; it is, therefore, difficult to make simple assertions with respect to target companies and takeovers generally.[7] However, it cannot be gainsaid that there has been a significant change in the types of companies involved in takeover contests. The tender offer has become an acceptable acquisition device. It is no

7. Examining the methods by which various managements have responded to takeover attempts and assessing the results of those diverse responses is far more difficult given the marked insufficiency of data than speculating about the breadth of management's ability to respond. Although there is a high likelihood that information gathered through personal observation may be incomplete, a limited set of conclusions can be set forth on the basis of practical experience. The first operating assumption is that once a takeover bid is proposed openly, the fate of the company is almost irreversibly set. It is unlikely to continue as an independent company. Either it will change hands as the result of a contested takeover attempt, or it will engage in a negotiated transaction with another party. It also appears that some companies, when faced with an unsolicited takeover offer, strive diligently to improve that offer but nonetheless yield to the acquisition demand of the offeror.

A much more meaningful analysis of management's response to takeover attempts would be possible if a greater amount of empirical data were at hand in easily usable form. To reach a conclusion on the ultimate question of whether takeover bids are economically and socially desirable, such information must be collected about the aims and consequences flowing from a takeover. A probe into management's motivation in opposing takeover attempts would also be instructive as to how much latitude management should be given to carry out that opposition. Studies of this type should necessarily go beyond the consequences to investors and try to reach the various noninvestment considerations.

longer the tool solely of raiders and plunderers or of less objectionable acquisition-oriented empire-builders.[8] While more companies are thus using and are interested in using the tender offer,[9] the types of companies whose shares are the subject of offers have also changed. Tender offers have been used in acquisitions of very large companies; it is no longer, if it ever was, a technique useful only for corporations having a modest aggregate stock market value.

There also has been an evolution in the way that takeovers are accomplished. The totally unforeseen blitzkrieg, "Saturday night special" offer seems to have disappeared. The "bear-hug"[10] and its numerous variants have become the common tack of the lawyers and investment bankers advising offerors. This change in tactics has been in part an adjustment to the prenotification and extended minimum duration periods for takeover offers required under the state takeover statutes.[11] It also reflects an attempt to deal with the more troublesome defensive techniques employed by management.[12]

A much more competitive situation has emerged to alter further the tender offer gambit. A publicly announced intention to make an offer and even an actual announced offer are often met promptly with a higher offer by another suitor, either acting at the instigation of the target company's management or on its own assessment of the acquisition opportunity. Multiple offers, both solicited and unsolicited, are thus becoming the normal situation.

In addition to these developments in the takeover process, the nature of target companies has changed or, perhaps more correctly, the public perception of those companies has changed. Opponents of restrictive tender offer regulation would be hard-

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8. *See* P. DAVEY, *supra* note 2, at 1-3.

9. *See* DEVELOPMENTS, *supra* note 3, at vi.

10. *See* Greenhill, *Structuring an Offer*, 32 BUS. LAW. 1305, 1308 (1976).

11. *See, e.g.*, N.Y. BUS. CORP. LAW §§ 1600-1613 (McKinney Cum. Supp. 1977) (20-70 days from date of filing to effective date of tender offer).

12. Aranow, Einhorn, and Berlstein list many of the defensive tactics used by subject company management. Among other things, these include

> establishment of Employee Stock Ownership Plans . . . [under] the Employee Retirement Income Security Act of 1974 (ERISA), . . . [l]itigation challenging the offer as violative of: (1) Sections 13(d), 14(d), and 14(e); (2) antitrust laws; (3) margin requirements; (4) Interstate Commerce Act; (5) Public Utility Holding Company Act; (6) Federal Communications Act; (7) Investment Company Act; (8) state securities laws . . . [c]reation of incompatibility of target and offeror by the acquisition of another company . . . [and] negotiation of defensive merger.

DEVELOPMENTS, *supra* note 3, at 197, 199, 200 (citations omitted).

pressed to argue that the companies involved in the most prominent hostile takeovers in 1976 and 1977 were managed by inefficient executives who needed to be replaced by more competent managers who could better utilize the productive assets of the target company.[13] Again, while meaningful data has not been collected and made generally available, the common belief is that the typical target companies today are successful participants in their particular fields and are managed by able personnel.[14] The criteria used in identifying target company candidates thus appear to have become the same criteria, from a business perspective, as those used to select acquisition candidates generally. Stated differently, the tender offer has been added to the package of routine alternatives an acquisitive company can utilize.

In the course of this maturing of the tender offer, the general perception of management's role has also evolved. The knee jerk opposition to a takeover attempt,[15] whatever the price, has gone out of style. Corporate executives and directors are expected to give due consideration to the interests of shareholders when an acquisition or takeover offer is made.[16] Management is also expected, by shareholders and others, to try to find a better deal, whatever that may be.[17]

II. Sources of Management's Role

The Williams Act amendments[18] to the Securities Exchange Act of 1934,[19] the state takeover statutes, and the tactics employed by offerors take into account to differing extents management's role in the takeover process. Yet, no consistent model of that role has been drawn.[20] The federal and state legislation seem to proceed[21] from divergent positions.[22] The federal law presupposes that incumbent management has a limited function to perform

13. *See* Ehrbar, *Corporate Takeovers Are Here to Stay*, FORTUNE, May 8, 1978, at 91; Wall St. J., Sept. 6, 1978, at 1, col. 6.

14. *See* Troubh, *Characteristics of Target Companies*, 32 BUS. LAW. 1301, 1301 (1976).

15. *See* Flom, *supra* note 4, at 1319.

16. *See* Butler, *Management's Responsibilities in Responding to a Takeover*, 7TH ANN. INST. SEC. REG. 221, 227-28 (1975); Small, *Defending Target Companies—General Perspectives*, 32 BUS. LAW. 1349, 1349 (1976).

17. P. DAVEY, *supra* note 2, at 23.

18. 15 U.S.C. §§ 78m(d), 78m(e), 78n(a)-78n(f) (1976).

19. 15 U.S.C. §§ 77a-77bbb (1976).

20. *See* Cohen, *Tender Offers and Takeover Bids*, 23 BUS. LAW. 611, 616-17 (1968).

21. *See generally* 28 CASE W. RES. L. REV. 955 (1978).

22. The Williams Act amendments appear to contemplate that management's only role in a tender offer is to make a *recommendation* to security holders with respect to ac-

and that, in fact, management needs to be restrained in its participation in the takeover process.[23] The state statutes, on the other hand, often give to management a central responsibility in the takeover process.[24] In simplest terms, the state takeover statutes have been enacted to affirm the natural function of management which the federal legislation almost denies. These competing statutory interpretations have allowed offerors to try to cast management's responsibility in the tender offer context in a way that permits offerors to restrain management opposition to the takeover attempt.[25]

Notwithstanding the intense takeover activity in recent years and the accompanying abundance of lawsuits and resulting reported decisions, there is very little case law directly pertinent to the analysis of management's role. The propriety of certain defensive tactics, particularly the issuance of shares to friendly entities, has been explored in various decisions,[26] but the holdings in those cases do not afford a broad analysis of management's range of conduct.[27] Litigation arising from the takeover attempts directed

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ceptance of the offer. *See* 15 U.S.C. § 78(n)(d)(4) (1976). Such recommendations are subject to the general antifraud provision contained in § 14(e), 15 U.S.C. § 78(n)(e) (1976).

23. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2813–14.

24. Many of the state statutes are applicable only when the board of directors of the target company has neither approved nor recommended the tender offer. *E.g.*, N.Y. BUS. CORP. LAW § 1601(b)(5) (McKinney Cum. Supp. 1977); OHIO REV. CODE ANN. § 1707.041(A)(1)(d) (Page Supp. 1976); WIS. STAT. ANN. § 552.01(5)(e) (West Spec. Pamph. 1978). The premise for this oft-criticized exception is that shareholders do not require the protections provided by these statutes when the management has negotiated with the offeror and has ultimately approved the offer. Many state statutes also look to management to decide whether the protection of shareholders requires a hearing on the disclosures surrounding and, in some instances, the fairness of the offer. *E.g.*, CONN. GEN. STAT. ANN., § 36–347e to 36–347f (West Cum. Supp. 1978); OHIO REV. CODE ANN. § 1707.041(B)(1)(b) (Page Supp. 1976).

25. For example, offerors sometimes use the "bear-hug" approach to bypass the opposition of management by telling management that they have a duty to put the offer immediately before their shareholders. In fact, a "bear-hug" type offer is often furnished to each member of the board of directors in anticipation that one director will fear personal liability if he fails to disclose the offer to the shareholders. Consequently, he will go public himself or force the corporation to make an announcement.

26. *See, e.g.*, Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975); Oscar Gruss & Son v. Natomas Co., [1977–1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,258 (N.D. Calif. 1976); Northwest Indus., Inc., v. B.F. Goodrich Co., 301 F. Supp. 706, 712 (N.D. Ill. 1969); Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769 (1967). *Cf.* Chicago Stadium Corp. v. Scallen, 530 F.2d 204 (8th Cir. 1976) (issuance of shares to target president).

27. The affirmation in Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 40–41 (1977), of the significance of state corporation law in takeover contests may encourage litigants and judges to look more closely at management's response to takeover attempts.

against Gerber Products Company, Sunshine Mining Company, and Medusa Corporation,[28] may provide guidance on management's ability to oppose offers that some shareholders may consider attractive. Without a meaningful body of decisional law, finding and exploring management's justifiable role in the corporate takeover involves looking at the package of legal rules within which corporate managers are bound and then considering the alternative functions that management may exercise in tender offer transactions.

A. *The Failure of Corporation Law to Recognize the Takeover as a Legitimate Acquisition Device*

Corporate statutes and corporate common law are only indirectly pertinent to what management does when a takeover is attempted. This silence of corporation law ought not be taken, however, as a determination that management does not have a role. Rather, that silence exists primarily because modern corporation law statutes were drafted prior to the recent period during which tender offers have been used with great frequency.[29] The

28. These three cases aptly illustrate the different factual contexts in which shareholders may believe that they have been injured by the reaction of the company's management to a takeover attempt. In April 1977, Anderson, Clayton & Co. announced its intention to offer to purchase shares of Gerber Products Company at $40 per share. Subsequently, the intended offering price was reduced to $37, and finally the proposed offer was withdrawn. The Gerber management had been successful in using the Michigan takeover statute, lawsuits, and other tactics in keeping the offer from being made. Berman v. Gerber Prods. Co., No. 77–402 (W.D. Mich. July 19, 1978). The Sunshine Mining Company management was not as successful as Gerber in using the Idaho takeover statute and the federal securities laws to stop the offer by Great Western United Corporation. When that offer was finally made in October of 1977, it was $1.75 per share less than had been proposed by Great Western in March 1977. Medusa Corporation had received takeover overtures from Moore-McCormack Resources, Inc. but rejected them shortly before Medusa reached an agreement in principle providing for a combination with Ogleby-Norton Company. The Moore-McCormack offer did not materialize, and the Ogleby-Norton transaction was called off. In both Gerber and Medusa, shareholders can complain about a lost opportunity to sell their shares at a price substantially above the recent market price, and in the Sunshine Mining situation, shareholders can claim that they were damaged because management's unsuccessful attempt to stop Great Western's partial offer caused a reduction in the price ultimately paid.

The Fifth Circuit's recent decision in Great W. United Corp. v. Kidwell, No. 77–2809 (5th Cir. Aug. 10, 1978), is not encouraging to the cause of successful management opposition. The court of appeals, affirming the judgment of the district court, held that the Idaho takeover provisions, IDAHO CODE §§ 30–1501 to 1513 (Cum. Supp. 1975), were preempted by federal regulation and invalid under the commerce clause. *See generally* 28 CASE W. RES. L. REV. 955 (1978).

29. The Model Business Corporation Act, which has served as the basis of the corporation statutes for more than half the states, was initially published in 1950 and revised and

continuation of that silence in recently adopted statutes[30] is disquieting, but largely results from a failure to see the tender offer as simply an alternative device for effecting a corporate acquisition. Even those state takeover statutes that do acknowledge management's critical involvement in tender offers regulate the takeover either as part of the regulation of securities transactions[31] or as an activity distinct both from securities transactions and corporation activities.[32]

While a tender offer can be used as an expeditious way of acquiring a significant but not controlling block of stock, it is more usually employed as a first and anticipated major step in the total acquisition of a company. Offerors frequently state in the documents required by the Williams Act that they intend to seek control of the target company and that, following the immediate tender offer, they may engage in a subsequent tender offer, a merger, or another form of transaction to achieve that objective.[33]

Other forms of acquisitions are contemplated by state corporation laws and procedures enacted universally to regulate the manner in which such acquisitions are accomplished. Statutory mergers are transactions that can be carried out only because of, and in absolute compliance with, specific statutory procedures.[34] Sales of substantially all the assets of a business[35]and, in some circumstances, acquisition of all the shares of a company[36] are not enabled by statutes, but both statutory corporate law and case law have placed limitations on such transactions, most importantly with respect to director and shareholder authorization.

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republished in 1969. MODEL BUS. CORP. ACT ANN. 2d § 1, ¶ 2 (1970 & Supps.). The General Corporation Law of the State of Delaware was substantially revised in 1967.

30. *E.g.*, CAL. CORP. CODE §§ 1100–1111, 25140–25705 (West 1977).

31. *See, e.g.*, OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1976).

32. *See, e.g.*, MICH. COMP. LAWS §§ 451.901-.917 (Cum. Supp. 1977); PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1976). *But see* DEL. CODE tit. 8, § 203 (Cum. Supp. 1977) (state takeover provisions included as a section of the state's General Corporation Law).

33. *E.g.*, Proposed offer by a wholly-owned subsidiary of Kennecott Copper Corporation to purchase shares of the Carborundum Corporation (November 29, 1977); offer by a wholly-owned subsidiary of Northwest Industries, Inc. to purchase shares of Coca-Cola Bottling Company of Los Angeles (October 19, 1977); offer by J.Ray McDermott & Co., Inc. to purchase shares of the Babcock & Wilcox Company (August 14, 1977); offer by Anderson, Clayton & Co. to purchase shares of Gerber Products Company (May 18, 1977).

34. *E.g.*, DEL. CODE tit. 8, § 251 (1977); OHIO REV. CODE ANN. § 1701.78 (Page Supp. 1977).

35. *See, e.g.*, OHIO REV. CODE ANN. § 1701.76 (Page Supp. 1977).

36. *Id.* § 1701.83.

B. *Management—The Inherent Quarterback in Acquisitions*

The critical aspect of these statutes for purposes of discerning management's role in the takeover is the responsibility entrusted to management. In general, the statutes contemplate that an agreement will be negotiated and executed by authorized officers of the company. That agreement customarily must be approved by the board of directors of the company. While transactions of this type have a profound effect upon each individual stockholder's investment, management unequivocally has been given the responsibility of instigating the transaction, shaping it, approving it, and finally presenting it to shareholders for their ultimate acceptance or rejection.

It makes sense that management should have such a pervasive presence in transactions in which the ownership of the business is going to be changed. Management, broadly speaking, is the best informed group with respect to the factors that are critical in determining the value of a business. It understands, at least better than most shareholders, the strengths and weaknesses of the corporation's business, both on an industrial level and within the particular corporation. It also has developed and knows the future plans for the company: the new products or services that will be developed, the lead time to be incurred before capital expenditures become productive, and the critical elements of the competitive puzzle.

Not only is management more knowledgeable than the ordinary shareholder about the worth and prospects of the corporation, management is the natural leader of the investors in determining whether the corporation can or should continue as an independent entity. Management has the means and capacity to contact substantially all investors in the enterprise, and it has the factual foundation for identifying the course the corporation should chart.

The exercise by management of its leadership position and its use of its vast knowledge about the corporation are circumscribed by the fiduciary obligation that professional management owes to the equity investors in the corporation. As stewards of the collective investment of numerous individual shareholders, corporate executives and directors cannot disregard investors' interests in order to protect management's special, peculiar interests in the con-

text of a takeover attempt.[37] Yet, it is assumed so casually by many persons that management cannot be trusted to act in any manner other than out of its own self-interest, when a tender offer is made for the purpose of changing control of the company.

Why is it that management should be distrusted in the takeover context when its participation is not only tolerated but in fact mandated in negotiated acquistions? A clear affirmation of management's obligation to carry out its function in full accordance with its primary responsibility to shareholders must accompany a recognition of the tender offer as an alternative technique for completing an acquisition and an acknowledgement of management's position as identical to that occupied in conventional statutory merger or sale. The American instinct for the pragmatic solution should be allowed to overcome distinctions in techniques and procedures that obscure the essential commonality of corporate transactions. Regarding the tender offer as a simple stock transaction between a potential and an existing investor is nonsense. A tender offer is an acquisition alternative, and management's imperative participation cannot be responsibly denied.

III. Alternative Management Responses

Assessment of management's role necessarily requires an examination of the various ways in which it may seek to exercise that role. It may act as a facilitator of a takeover bid, or it may seek to employ all the corporation's resources to ward off an uninvited attempt to take over the company. While the particular alternative followed will indeed alter the analysis, the same conclusion should obtain: management's response—in terms of favoring or opposing an offer—is not relevant; the reasons for that response, whatever they may be, are the critical inquiries.

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37. Northwest Indus., Inc. v. B.F. Goodrich Co., 301 F. Supp. 706 (N.D. Ill. 1969), is one of a limited group of cases directly considering management's responsibility in the takeover context. There it was noted that:

> In arriving at such judgment [whether or not an offer is detrimental to the company and its stockholders], management should be scrupulously fair in considering the merits of any proposition submitted to its stockholders. The officers' and directors' informed opinion should result from that strict impartiality which is required by their fiduciary duties.

Id. at 712-13.

A. *Management May Facilitate a Tender Offer Bid*

There ought to be little dispute about management's capacity to facilitate a takeover bid and to solicit favorable shareholder response. Many of the state statutes recognize that the protections which they provide are not required if management does in fact recommend the takeover offer to its investors.[38] Similarly, the Williams Act contemplates that management may wish to recommend a particular offer.[39] The "bear-hug" approach that has been devised by offerors contains the hope that public awareness of a proposed offer will push a reluctant management to support an uninvited offer.

Needless to say, recommendation of an offer must be consistent with management's responsibilities to investors. Appropriate relief presumably would be afforded shareholders who prove that management in effect was bribed into supporting an offer it did not solicit.[40]

Management's ability to facilitate a takeover bid clearly illustrates the tender offer as an alternative acquisition device. It is probable that the decision by management to support the offer will have come only after there has been some negotiation with respect to the terms of the offer. Hence, management will have been in a position to use its superior knowledge of the company's business and to perform as a leader for the shareholders.[41]

B. *Management Solicitation of Competing Offers*

Is management justified in seeking an alternative offer? This practice has been utilized repeatedly as a defense to an unwelcome offer. Assuming that the alternative does in fact materialize, there should not be any objection to this tactic. At the simplest level, shareholders may receive increased consideration for their

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38. N.Y. BUS. CORP. LAW § 1601(b)(5) (McKinney Cum. Supp. 1977); OHIO REV. CODE ANN. § 1707.041(A)(1)(d) (Page Supp. 1975); WIS. STAT. ANN. § 552.01(5)(e) (West Spec. Pamph. 1977).

39. *See* 15 U.S.C. § 78n(d)(4) (1976).

40. *Cf.* Northwest Indus., Inc. v. B.F. Goodrich Co., 301 F. Supp. 706 (N.D. Ill. 1969) (preliminary injunction denied to minority shareholders in suit to enjoin target company management from exchanging its common stock with a joint venturer to defeat a takeover attempt since no proof of fraud or breach of fiduciary duties by target company directors).

41. The late 1977 tender offer for shares of the Carborundum Company by Kennecott Copper Corporation exemplifies this proposition. Following an offer by Eaton Corporation, which Carborundum's management deemed inadequate, a virtual auction was conducted to arrive at a more favored arrangement with Kennecott. Wall St. J., Nov. 17, 1977, at 10, col. 2-3.

shares or all shareholders may receive the opportunity to participate fully in the change in ownership. Particularly during 1976 and 1977, there were several instances in which a second or third bidder entered the game and put more money on the table for investors.[42]

In lieu of seeking a higher cash offer, management may try to find a transaction involving securities that has tax consequences more desirable to all or certain shareholders.[43] Achieving a different tax result may also involve a higher priced offer, but in some circumstances in which securities are issued such a result may mean a lower offer with the difference arguably being justified on the basis of immediate tax savings.

Management may seek out an alternative situation, involving either a competitive cash offer or a negotiated transaction, simply because it does not like the offeror. Companies have personalities and reputations; they are, after all, extensions of the people who run them. Management may believe that the future prospects for the corporation's business will be better assured with another offeror in charge. More realistically, management may feel that it, as a group of executives, will be able to work more cooperatively in an ongoing enterprise with the managers of one offeror as opposed to those of another. The economic package presented to shareholders in such a circumstance ultimately may be the same as, better, or worse than that put forth by the offeror.

In each of these situations, the motive of management in seeking the alternative can be characterized differently. Most likely, there will be a combination of motives. In any event, management ought to be permitted, indeed perhaps required, to seek alterna-

42. Examples of alternative, competing offers during 1977 include the following:

Subject company	*First offer*	*Alternative offer*
Milgo Elec. Corp.	$25 exchange offer by Applied Digital Data Systems, Inc.	$36 by Racal Elec. Ltd.
The Babcock & Wilcox Co.	$42 by United Technologies Corp.	$65 by J. Ray McDermott & Co., Inc.
Coca-Cola Bottling Co. of Los Angeles	$30 by MCA, Inc.	$40 by Northwest Indus., Inc.
The Carborundum Co.	$47 by Eaton Corp.	$66 by Kennecott Copper Corp.

43. *See* Geller v. Bohen, [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,429, at 98,028 n.3 (E.D.N.Y. June 17, 1969) (Allis-Chalmers preferred General Dynamics over Ling-Temco-Vought). *See generally* I.R.C. § 368 (a) (1) (B); Chatlos, *The SEC vs. Investors on Tender Offer*, 56 HARV. BUS. REV. 6 (1978).

tive transactions for any one of the reasons noted or for any other sound reason. If the alternative transaction is completed, shareholders will have benefited to the extent that the price was higher, the offer was extended to all shareholders, the offer had more favorable tax consequences for most shareholders, or in other ways.

In those circumstances in which management is motivated more by the quality of the fit and less by the price, the alternative transaction may be less valuable in economic terms to shareholders. It is similarly possible that an alternative transaction that is attractive to some investors because of their personal tax circumstances will not be beneficial to all shareholders, particularly speculators, and may result in at least some shareholders being afforded an inferior economic opportunity.

If management can find an alternative deal without thwarting the initial bid, there is little basis for objection to any of these alternative actions, since shareholders have not been foreclosed from any of the choices originally available to them. However, once management resorts to litigation or other defensive practices while it tries to find or negotiate a more attractive offer, it will have swung the power and assets of the corporation against a bidder that, if management succeeds, will be precluded from putting its offer before the investors in the company.

In light of the ever-present fiduciary obligation of management, the board of directors and the executive officers of a target company should be justified in taking such reasonable action as they deem appropriate to frustrate or delay an unsolicited takeover attempt, when the objective of their actions is to develop an alternative transaction.[44] Inquiry into the merits of that alternative or its economic value in comparison with the uninvited takeover bid is not warranted unless there is a clear showing that management is acting solely out of self-interest to the detriment of other shareholders. In essence, management should be given wide latitude in pursuing alternatives to an unsolicited offer. These propositions should be valid whether or not management is primarily motivated to seek a higher price for the company's stock, to obtain tax-free or partially tax-free treatment for the transaction, or even

44. *See* Northwest Indus., Inc. v. B.F. Goodrich Co., 301 F. Supp. 706 (N.D. Ill. 1969). "After taking these steps, the company may then take any step not forbidden by law to counter the attempted capture." *Id.* at 713. *See also* note 37 *supra*.

to find a company with which management could work harmoniously.

Allowing management, instead of the individual shareholders, to determine which offer should be acted upon by the shareholders follows from the nature of a takeover attempt. Although the tender offer involves the separate decisions and transactions of every shareholder, the result of their individual actions is a collective decision with respect to a change in the control and ownership of the company. A transaction of that nature affects all shareholders, as well as employees and other persons interested in the company's business. Hence, a better decision should occur if it is made by the entity, acting through the management, rather than occurring as a consequence of uncoordinated individual actions by shareholders.

Shareholders are not without recourse if they disagree with the alternative chosen by management. They can sell their shares in the trading market, albeit at a price probably lower than would have been available if the tender offer had been made and, most importantly, had been completed in accordance with its terms. Shareholders further have the annual, and perhaps more frequent, opportunity to oust the existing management if sufficient numbers of shareholders choose to do so. Finally, shareholders are protected by the availability of a derivative action if management fails to act in accordance with its fiduciary obligations.[45]

C. *Management May Forestall an Offer to Await Better Conditions*

In lieu of seeking a different offer from another acquisitive company, management may want to forestall the unilateral offer until better market conditions exist. Without necessarily making an immediate decision that one or more alternative plans is preferable, management may believe that more time is required for the investing public to assess the worth of the company and to bid up the price of its stock accordingly. Significant capital investments may have been made without the benefits of those investments having been realized by virture of an increase in their market price. Product or market development activities may involve a substantial lag before an anticipated increase in volume is

45. *See* Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769 (1967) (court cancelled transaction in which target company issued stock to a third party in an attempt to defeat control by offeror, as breach of fiduciary duty by directors).

realized. Equally likely, the stock market may have gone into one of its too frequent downspins, taking with it the price of the company's stock, notwithstanding improvements in the company's fundamentals.

Management's decision to delay or impede an offer in these circumstances may well be inconsistent with the preference of some investors. Their economic circumstances may favor an immediate opportunity to liquidate their investment over waiting for a higher price. Other investors may disagree with management's assessment of the company's future; they may regard the proposed offer as providing the most generous offer available in the foreseeable future.

Surely management is not governed by a minority element of shareholders who are unwilling to wait to learn if developments will yield a higher price. Yet, one of the options that management does have is to recommend openly and adamantly against acceptance of the offer without undertaking any steps that would stop the offer from being made. If management can be successful in convincing investors of its view of the company's prospects, then only impatient investors will accept the offer or sell in the market. That conclusion may be appropriate for an academic debate, but it lacks a common sense appreciation of the dynamics of a tender offer.

Management likely regards a potential new investor bent on acquisition as carcinogenic. Once the uninvited takeover artist has gained even a modest equity position, the future of the company is probably restricted. While management may be able to improve the financial position and results of operations of the company over a short period of time, it may not be able to interest other companies in making an attractive acquisition offer because of the preemptive position of the unwanted shareholder.

Therefore, management ought to be allowed to act in a manner which it believes will ultimately benefit the greatest number of investors, even though its acquiescence in a present tender offer is favored by certain shareholder factions. This is consistent with the business judgment rule[46] which enables management to conclude

46. Under the business judgment rule courts may disallow shareholder challenges to decisions made by the board of directors if the board has adhered to its fiduciary obligations. The rule has been employed in tender offer cases when a specific defensive tactic is under challenge. *See* Northwest Indus., Inc. v. B.F. Goodrich Co., 301 F. Supp. 706, 711-13 (N.D. Ill. 1969). *But see* Klaus v. Hi-Shear Corp., 528 F.2d 225, 233-34 (9th Cir. 1975) (where the court scrutinized director activity for "compelling business purpose"

that a better acquisition arrangement can be obtained if the stock market improves, if the general economic environment regains needed confidence, if the company establishes a stronger and more consistent performance, or if present initiatives of the company are fully realized. The scope of management's action to implement its decision to prevent an untimely offer should encompass reasonable employment of the company's assets to dissuade, forcefully if necessary, the offeror.[47]

D. *Management May Stonewall an Offer*

Behind the question of whether management can fight while biding its time for a better situation is the more difficult inquiry of whether the directors and executive officers may stonewall a tender offer. May they oppose and obstruct all offers whatever the price or terms offered? May they adamantly oppose and openly fight a particular offer however fair its price and terms on the ground that management does not want the company to be swallowed up, at least not by the immediate, aggressive business enterprise?

The conventional analysis of this response is that at some price and on some set of terms management's interest in preventing the takeover can be regarded only as the selfish desire of the executive officers and directors to maintain the economic and social rewards that emanate from running a publicly held corporation. The general feeling is that a director's and an officer's fiduciary obligation requires that uncompromising ideas be put aside as other, more broadly-based objections to the takeover are undercut by a good price and other attributes of an attractive offer.[48]

To decide that management cannot say, "Never, at any price," requires necessarily that the economic interests of the shareholders be given primacy, and as a corollary, that other considerations be ignored. Are not non-investor interests also relevant? For ex-

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rather than applying business judgment rule). The policy underlying the rule may not be applicable to management decisions to reject or oppose an acquisition offer inasmuch as those decisions directly bear on the immediate value of a shareholder's investment. However, as noted in the text, there are sufficient reasons to allow management broad latitude in making such choices.

47. The use of corporate funds to defend a takeover attempt is discussed generally in E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 228-29 (1973).

48. *Cf.* Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769 (1967) (target management cannot defeat a tender offer for its corporation by issuing new shares where the offeror corporation is well-managed and has no history of liquidation following business combinations).

ample, why is not preservation of locally-controlled businesses cognizable? What about avoidance of economic power concentration? Should not consideration be given to the impact that a change in control will have on communities affected by the presence of the company?

Accepting investor economic interests as a set of highly pertinent considerations in acting upon a proposed takeover bid, management still must face heterogeneous shareholders. The shareholders may include the company's founder or his descendants, other long-term investors, company employees and officers, nonprofessional traders, and risk arbitrageurs who know little about the company beyond its stock market quotation and its susceptibility to instant profit. Once again, the observation that leaps out is the contrast between the offeror's myopic focus on the quality of the price offered without regard to any duties to target shareholders other than those required by federal and state disclosure requirements and by an arguable "anticipatory fiduciary duty"[49] and management's focus upon a diverse spectrum of interterests pushing and pulling at its decisionmaking process. In fashioning its response, management must discriminate; it must select; it must balance alternatives.

If one concludes that management should be permitted to evaluate interests other than the immediate return to investors in deciding how to respond to an unsolicited takeover attempt, there may be particular circumstances which justify management's decision that the adequacy of the price offered is not determinative of whether the takeover bid is in the best interests of the company. That judgment can be reached analytically, as opposed to emotionally, only after consideration of the interests pertinent to deciding whether a takeover should be allowed to be accomplished.

IV. Noninvestor Interests to be Considered

One way to handle this vexatious analysis of legitimate interests is to confine consideration of a proposed takeover bid to those matters that are the subject of state corporation law and federal and state securities law. The line of this argument would be that any other interests are not within the province of corporate management but are determined and applied exclusively by government—principally the federal government. Hence, concern about

49. *See* Coffey, Book Review, 124 U. Pa. L. Rev. 268, 273-76 (1975).

avoiding economic concentration, under this analysis, would be relegated to the applicable federal and state antitrust laws and their regulatory mechanisms. Similarly, more general questions of economic parochialism would be determined solely by the United States Congress in accordance with its power to regulate interstate commerce.

Adopting this line of reasoning involves turning the American economic and corporate system inside out; the argument's premise is that management is not permitted to make decisions outside the realm of corporation law and securities regulation. An approach more consistent with the American economic and political system is to give management wide berth to reach conclusions about matters affecting the destiny of the corporation, subject always to an insistent demand that management not act in a manner that advances its own personal interests to the detriment of investors.

Giving credence to management's advancement of noninvestor interests is made difficult because those interests can obscure suspect selfish interests. The sincerity of management's concern for such interests is difficult to prove or disprove in contrast to more readily ascertainable economic distinctions. That concern likewise cannot be isolated easily from more emotionally-oriented management motivations. Notwithstanding the difficulty in ascertaining, and if necessary proving in litigation, the bases for management's opposition, management should still be allowed to impede a takeover bid on bases other than its ability to come up with more money for investors by taking an alternative route.

A. *Corporate Investments Are Not Cash Equivalents*

Has the debate about an efficient market, the adequacy of America's capital markets, and the liquidity of a multitier trading complex converted securities in publicly-held corporations into little more than cumbersome forms of currency, carrying an unusual chance for loss or gain? All publicly-traded securities represent prior decisions by entrepreneurs or more conventional investors that a particular business opportunity warranted a commitment of funds. Those funds were entrusted to managers not only to enhance the wealth of the investors, but also to anticipate, probably unwittingly, the furtherance of the economic well-being of other affected persons.

The success of America's capital system appears to flow in part from the liquidity that is afforded initial investors. The prospect of

liquidity apparently is necessary to induce original investors to put up cash, and liquidity in turn apparently requires investors of all types, including speculators and other persons whose funds constitute part of the investment base.

Is it essential to the maintenance of that capital system that takeover bids not be thwarted by management, regardless of the worthiness of its objectives? Indeed, the inability of businesses to raise new equity capital in recent years belies any positive benefit that uninvited takeovers bring to the capital markets. Moreover, it seems reasonable to assume just the opposite: the ease with which corporate investors can carry out takeovers results in diversion of funds that otherwise might be available for original investments. Somehow, the means seem to have become more important than the end. The ability of investors to speculate, sell, and profit has obfuscated the objective of making money available to business enterprises so that wealth, jobs, and higher standards of living can be achieved.

Securities transactions, including tender offers, are a significant aspect of the overall American economic system. Corporate managements make use of that aspect when they raise capital for the expansion of business. However, by raising money in the public markets and by participating in the ongoing trading markets a corporation and its management do not thereby become absolutely subservient to the interests of investors. The important corollary of that observation is that the interest of a shareholder with respect to his investment is not paramount to the manifold interests that corporate management must accommodate as it plays out the isolated participation of the company in the overall economic system.

The implication of this reasoning for management's response to the takeover is that management justifiably has more things to think about when confronted by an unsolicited takeover attempt than whether the average investor in the company will come out ahead on his investment. Those other considerations, whatever they may be in each individual situation, must be given persuasive relevance when attempting to decide whether management can responsibly oppose an unsolicited takeover attempt and utilize the assets of the company to thwart the undesired acquisition.

B. *Consequences to Local Interests is a Permissible Concern*

The implications of acquisitions generally and of tender offers particularly on the fears of local communities and companies are unclear. There is no adequately developed analysis for gauging whether management's apprehensions in this regard are justified. In the absence of meaningful conclusions, management's fears, anxieties, and suspicions cannot be ignored.

The relevance of the impact of a takeover on a company's broad community will vary with the circumstances. The change in ownership and control of a company that is the dominant economic factor in a small or medium-sized American city is surely of more real economic moment than the wresting of control of a company managed from a twelve-room suite of offices on Park Avenue in New York City. Likewise, the consequences of a takeover of what has been a family-dominated company can be expected to be of much greater concern to management than handing over the reins of a company that already has been passed among several different controlling owners.

It is not intended by this discussion to quantify noninvestor interests of this type. Rather, the idea being asserted is that management is entitled to consider such factors for whatever they may be worth in a given takeover situation. Hence, even when the price is high, management ought to be justified in refusing to sell if it reasonably believed that such a sale would jeopardize substantial noninvestor interests.

C. *Management May Oppose Frustration of its Reasonable Business Objectives*

In deciding to oppose a takeover, management may be acting out of the natural desire to realize the plans that it has established for the company and to achieve the objectives it has identified. A cynic would state that proposition by suggesting that management should be entitled to oppose a takeover attempt simply because management wants to stay in control. Is this such an objectionable basis for management opposition?

If shareholders are unhappy with management, they have the ability to replace management. If an individual shareholder is disenchanted with the company, he has the further option of selling his shares in the public market and putting his money into some other venture. There seems to be little justification, however, for giving shareholders the added ability to divert control of the cor-

poration when a well-financed outsider decides that it wants to make the decisions for the company's future. Corporate management becomes then a bully game, and the shareholders' greed is the ball with which the game is played.

This brief review of noninvestor interests has not been offered as a comprehensive analysis of the merits of various specific areas of concern. It is intended to illustrate the necessity of opening up the permitted scope of management's consideration when it is confronted by an uninvited takeover offer. Management owes investors the duty of a fiduciary, but that duty should not be allowed to foreclose conduct that advances legitimate noninvestor interests.

V. ESTABLISHING A FOUNDATION FOR MANAGEMENT'S RESPONSE

Managements and their lawyers have developed and implemented, particularly in recent years, varied defensive programs designed to maintain the independence of the company. It is fair to observe that the arsenal of tender offer defenses has not been a match for the determined and well-financed offeror. The standard package of defenses recommended by investment bankers or legal counsel has concentrated primarily on beating the offeror once the offer has been put forward.[50] Few of the usual anti-tender offer devices have dealt with the ultimate objective: establishing the entitlement of the company to remain independent. By using tactical devices instead of elements of a fundamental strategy, management has, at worst, revealed its concern with preserving its own economic advantages and, at best, failed to present its defensive program in a way that would induce sympathy among the public and, where necessary, the judiciary.

A. *Common Defensive Techniques are Inadequate*

Perhaps one of the earliest recommendations for the potential takeover candidate was the development of a black book and the implementation of a general preparedness program. The essence of this notion is to have at hand a detailed battle plan that can be put into effect on a moment's notice, without having to take the time necessary to develop information and documentation that will be used in the defense. Hence, timetables, participants' lists,

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50. *See generally* Fleischer, *Defensive Tactics in Tender Offers*, 9 REV. SEC. REG. 853 (1976).

drafts of public communications, and even drafts of pleadings are put into such shape that the completion of a few blanks allows management to oppose a surprise offer with confidence and efficiency. The black book concept, however, has gone out of style in its purest form. Advisors have become concerned that the existence of such a kit creates a false delusion of security, and lawyers have worried that a drawer full of canned material can be used to establish management's intent to preserve its own self-interest to the detriment of shareholders.

The types of material contained in a black book are still being prepared by lawyers for their worried clients, but the emphasis has changed to preparation of the management state of mind. Thus, boards of directors are given orientation with respect to the takeover process, the possibility of multiple offers, the payment of premiums, and other pertinent information. The intent is to eliminate any doubt or uncertainty in the minds of individual directors so that when they are faced with an uninvited takeover bid, they can concentrate on the merits of the offer and thus fulfill their obligation to investors. Simultaneously, the general preparation process is meaningful in helping management identify inadequacies in its shareholder relations program, its public communications generally, and its utilization of the assets employed in or available to the business.

Managements also have instigated changes in the company's charter and bylaws. Certain of these ideas are carryovers from the concern about proxy contests. The board of directors may be classified and the election of the directors staggered;[51] the ability of shareholders to call a special meeting may be made more difficult;[52] and removal of directors without cause may be precluded.[53]

These and similar innovations would impede an offeror from exercising the control that it otherwise has gained through a tender offer. By raising the possibility that achievement of actual control will be frustrated, these defensive devices discourage offerors from initiating takeover bids. To the extent that these devices

51. *See, e.g.*, Proxy Statement, Management of Elgin Nat'l Indus., Inc. (April 15, 1977) (for annual meeting of stockholders on May 11, 1977); Proxy Statement, Management of Lodge & Shipley Co., (March 16, 1977) (for annual meeting of stockholders on April 26, 1977).

52. *See, e.g.*, Proxy Statement, Management of Tremco Inc. (March 19, 1977) (for annual meeting of stockholders on April 20, 1977).

53. *See, e.g.*, Proxy Statement, Management of Barnes Eng'r Co. (Sept. 14, 1977) (for annual meeting of stockholders on October 31, 1977); Proxy Statement, Management of Ceco Corp. (March 28, 1976) (for annual meeting of stockholders on April 29, 1976).

are permitted under the laws of the state of incorporation of the target company, are consistent with its charter documents, and are, in most instances, expressly approved by shareholders, there should be little objection to the propriety of these types of defenses.[54]

There ought to be objection to these defenses, however, on the more basic ground that they are unlikely to work. The dynamics of the takeover process are such that management's decision to continue to fight an offeror or to try to make peace is almost always made—in favor of peace—before these techniques can be utilized.[55]

Managements did conceive of a more effective technique—one that works directly on the question of whether the offer may be made—in the state takeover statutes. Until the recent adoption of such statutes by a considerable number of states, the very few states that had adopted them seemed to provide a restful haven for worried executives. The validity of these statutes has always been questioned and recently has been challenged directly.[56] Unlike the black book and the use of structural barriers, the takeover statutes aid management by giving it an additional tool—time—and another forum—the state administrative agency—in which a takeover bid can be fought after it has been announced.

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54. The New York Stock Exchange has vacillated on this point. Its current position is as follows:

> For many years the Exchange has encouraged the broadening of shareownership in a climate of corporate democracy and has endeavored to preserve the basic right of stockholders to participate in the corporate affairs of the companies which they own by requiring an informed and convenient method of voting in proportion to their investment in the Company. . . .
>
> The Exchange has an ongoing concern as to the possible implications of certain so-called "defensive tactics" which would in effect discriminate between shareholders.
>
> Generally speaking, and [*sic*] arrangement which could be applied uniformly to all transactions of similar nature and without regard to the parties involved, normally, would not be viewed as objectionable. On the other hand any proposal which results in either discrimination against an existing substantial stockholder or discouragement of anyone seeking to make a substantial investment would appear to raise substantial questions as to whether or not it constitutes an infringement on the voting philosophy of the Exchange.

NYSE COMPANY MANUAL A-30–31.

55. Among the examples of this resignation during 1977 was the ultimate acquiescence by the management of Sunshine Mining Company in the partial offer by Great Western United Corporation. *See* note 28 *supra*.

56. Great W. United Corp. v. Kidwell, 439 F. Supp. 420 (N.D. Tex. 1977), *aff'd*, No. 77–2809 (5th Cir. Aug. 10, 1978); *see* note 28 *supra*.

B. *Companies Should Consider a Declaration of Independence*

In responding to takeover attempts, management needs to refocus its efforts. Instead of establishing methods for fighting a determined offeror, management ought to have its shareholders decide before a crisis occurs whether they want to receive and evaluate takeover bids or whether they prefer to keep the company independent.

The ability of management to forcefully oppose a takeover attempt would be greatly enhanced if the shareholders previously had adopted a resolution to the effect that the interests of shareholders, employees, and the communities affected by the company would best be served by the continued independence of the company and that management therefore should take such action as would be appropriate to prevent the company from foregoing that independence.[57] In the event the sentiment of the company's shareholders changed, such a resolution could be rescinded or modified. In the meantime, management would have a justification for interceding in any attempt to change the fundamental ownership of the business.

Such a declaration of independence should be persuasive with a court and should in any event substantially eliminate any suggestion that management is acting solely out of its own self-interest. A declaratory statement by the shareholders of their preference, however, is merely that: a present affirmation of an objective. To accomplish the stated goal of avoiding a takeover, more dynamic action by shareholders is required.

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57. This objective appears to have prompted the adoption in September 1977 of a social justice policy by the Board of Directors of Control Data Corporation. That policy, in essence, states that the corporation has a commitment to its employees, their communities, and the company's customers and that an unwanted takeover can adversely affect that commitment. To further establish management's justification in opposing certain takeovers, Control Data's management proposed the amendment of its certificate of incorporation to provide that:

> The Board of Directors of the Corporation, when evaluating [certain takeover and related transactions], shall . . . give due consideration to all relevant factors, including without limitation the social and economic effects on the employees, customers, suppliers and other constituents of the Corporation and its subsidiaries and on the communities in which the Corporation and its subsidiaries operate or are located.

Proxy Statement, Management of Control Data Corp. (March 20, 1978) (for annual meeting of stockholders on May 3, 1978).

C. *Shareholders Could Insist on Approving Changes in Control and Having Dissenters' Rights*

By comparing the takeover accomplished by means of a tender offer to other forms of acquisition, shareholders could have the same types of rights and remedies as those afforded them in connection with statutory mergers, sales of substantially all the assets, or other conventional acquisition transactions. In essence, those rights and remedies involve shareholder approval of the change in control and the availability of dissenters' or appraisal rights for those shareholders who disapprove of the acquisition.[58]

Since a tender offer involves an exchange between an existing shareholder and another person and does not involve the subject company directly as a party, there is not the usual opportunity for regulation of transactions by the corporation or limitations upon the activities of the subject company's board of directors in connection with the acquisition transaction. However, with a little ingenuity, substantive protection of shareholder interests can be enforced in the context of an atypical transaction.

To achieve some form of shareholder vote upon a change in control, it might be necessary to disenfranchise shares acquired by a shareholder or group of shareholders under common control with another business organization unless such acquisition of control were approved by a vote of shareholders. The definition of control could vary depending upon the circumstances but presumably would be in the range of twenty-two to thirty-five percent. The required shareholder vote could be among either the holders of record prior to the acquisition of control or only those holders unaffiliated with the person attempting to acquire control. Needless to say, the drafting of such a provision, whether accomplished as an amendment to the articles of incorporation or as a change in the statutory corporation law, would entail extreme care and thoughtfulness. The basic notion, however, is simple: fundamental changes in corporate ownership and control should not be accomplished without broadly based shareholder approval.

In lieu of, or in addition to, creating a limitation upon the actual acquisition of control, a remedy could be afforded to those

58. In Lynch v. Vickers Energy Corp., 351 A.2d 570 (Del. Ch. 1976), *rev'd on other grounds*, 383 A.2d 278 (Del. 1977), the court characterized the minority shareholder's claim as one for appraisal rights in the context of a tender offer and noted that no such relief was now available under either the Delaware statute or equitable principles. 351 A.2d at 576.

shareholders who find themselves in a minority position, either in effect or in fact. Again, by defining a change in control as the acquisition of a stated percentage of the common stock of the company, shareholders could be given the right to be paid the fair value of their shares upon an unapproved change in control. The determination of fair value could be handled much as it is in present dissenters' rights statutes,[59] or it could be achieved through application of a predetermined formula referring to such factors as book value, recent market values, and similar indicia of value.[60]

The thrust of both these approaches is prevention of a unilateral valuation of the company and a seizure of control based on that value. The prospect of shareholder approval or of dissenters' rights would encourage an offeror to negotiate a transaction. The process of negotiation implies both the ability to bargain for the best price available and the ultimate alternative of saying "No." By giving the negotiation process a set of guidelines with respect to the fair value that shareholders require, management would both know the objective of its shareholders and be conscious that it could not oppose offers within that objective simply because they were unattractive to management.

Neither of these approaches, whether used jointly or separately, absolutely precludes a tender offer or the acquisition of a controlling position by use of a tender offer. Rather, they put an offeror on notice that its plan to take control of the company will be realized only if it can convince the shareholders that such a change makes sense and that the consideration to be offered for the shares indeed represents a fair value for the company at the present time.

VI. CONCLUSION

Lawyers counseling clients that are considering making a takeover bid or corporations faced with an imminent or present uninvited offer, as well as judges deciding challenges with respect to management conduct in the course of the tender offer, need a con-

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59. *See, e.g.*, DEL. CODE tit. 8, § 262 (Cum. Supp. 1977); OHIO REV. CODE ANN. § 1701.85 (Page Supp. 1976).

60. This tack was taken by the shareholders of Rubbermaid, Inc. when they added to their Amended Articles of Incorporation the right of shareholders to have shares redeemed at a formula price upon a change in control caused by a tender offer. Proxy Statement, Management of Rubbermaid, Inc. (March 24, 1978) (for annual meeting of shareholders on April 25, 1978).

ceptual framework for reaching judgments. Such a structure cannot be discerned from the reported decisions. Reference to general principles of fiduciary duty provides some guidance but may lead to a faulty, overly simple analysis of the diverse criteria in tender offer decisionmaking.

The rhetoric of proponents of the tender offer device suggests that management confronted by a takeover attempt must divorce the needs of the ongoing business and its broad community from the needs of shareholders, especially those shareholders with no commitment to the continued independence of the corporate entity. Thoughtful consideration, however, suggests that management ought to be able to respond to a takeover attempt in different ways. It may facilitate the offer being made to shareholders; it may seek out better alternative transactions involving the acquisition of the company; it may thwart a takeover attempt until general economic or particular company fortunes improve; and it may simply say that a change in control is not desirable.

While a foundation for these various reactions is discernible upon exploration of the use of the tender offer technique as an acquisition device, management's basis for opposing unnegotiated takeover attempts would be strengthened by the adoption of shareholder resolutions or charter amendments to the effect that a change in control is not to occur unless expressly approved by shareholders and upon payment of a price fair to all investors.