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Notes

The Indiana Business Takeover Act

Introduction

The prosperity of the Sixties developed a new form of corporate investment. Corporations with large stores of retained earnings and working capital were faced with little opportunity for expansion of plants or facilities. As a result, these corporations began to invest their excess capital by acquiring other corporations. Originally, the most attractive means of acquisition was by merger with a smaller firm after obtaining a favorable recommendation from the target management.[1] Often, however, target managements were reluctant for several reasons to approve such effort. In the case of an unfriendly target management, the buyers then directed their efforts toward the shareholders. In an approach called a tender offer, the emphasis shifts to ownership as a means of control, with the acquiring corporation offering to purchase for consideration the shares of the target company. The offer is normally made to all the shareholders of the target company, and is often made despite opposition by the target management. The consideration is either the securities of the offeror or cash. Tender offers have been regulated on both the federal and state levels.

On April 29, 1975, the General Assembly of the State of Indiana enacted the Indiana Business Takeover Act.[2] The Act is a bold effort by Indiana to regulate national tender offers for the stock of Indiana-based companies.[3] This note explains the provisions of the Act, focuses

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[1] Target company is a term used in the general context to designate the company which is to be acquired. Where the specific means of acquisition is a tender offer, the term is defined in Indiana as a corporation or other issuer of securities which is organized in Indiana, has its principal place of business, or a substantial portion of its total assets within the state. IND. CODE § 23-2-3-1(j) (Burns Supp. 1976).

[2] 1975 Ind. Acts, P.L. 263 (April 29, 1975), amending IND. CODE § 23-2-1-1 *et seq.* (Burns 1971) [hereinafter referred to as the Indiana Act or the Act]. The Act is codified at IND. CODE §§ 23-2-3-1 to 12 (Burns Supp. 1976). There is no legislative history to speak of. There are no committee reports and no record of floor debates in either the House or the Senate.

[3] The Indiana Act is most nearly like those of Wisconsin [WISC. STAT. ANN. § 552 (West Supp. 1975)], Minnesota [MINN. STAT. ANN. § 80B (Supp. 1975)], Colorado [Laws 1975, S.B. No. 284 (June 26, 1975), *amending* COL. REV. STAT. § 11-51.5-101 *et seq.* (1973), Blue Sky L. Rep. (CCH), ¶ 9151], South Dakota [S. DAK. CODIFIED LAWS § 47-32-1 *et. seq.* (1976 Supp.)], and Ohio [OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1974)]. *Compare also* the "takeover" laws of Virginia [CODE OF VA. § 13.528 *et. seq.* (Rep. Vol. 1973)], Nevada [REV. STAT. § 78.376 and § 78.377 (1973)], Kansas [K.S.A. § 17-1276 *et. seq.* (1974)], Hawaii [HAWAII REV. STAT. § 22-417E (1975 Supp.)], Idaho [IDAHO CODE

upon the jurisdictional and choice of laws problems, examines the constitutional questions, and finally, offers some suggested statutory solutions to the constitutional and jurisdictional problems which may appear.

The Indiana Act

Before the Indiana Act[4] was passed, tender offers in Indiana were regulated under the federal securities laws,[5] Indiana securities

§ 30-1501 *et seq.* (1976 Supp.)], Utah [Laws 1976, S.B. No. 10 (February 5, 1976), Blue Sky L. Rep. (CCH) ¶ 47,333.], and Delaware [DEL. CODE Title VIII ch. 1 subch. vi § 203 (1976 Supp.)]. In addition, New York has now also passed a similar statute. For a discussion of the New York act and the effect of all state acts on the securities market, *see* Carter, *Blocking Tender Offers With State Law,* Wall St. J. Oct. 3, 1976, § F, at 18.

For a discussion of the Virginia statute, *see* Gibson & Freeman, *Business Associations, The Thirteenth Annual Survey of Virginia Law,* 54 VA. L. REV. 1224 (1968). For a discussion of the Ohio statute, *see* Bromberg, *Tender Offers: Safeguards and Restraints—An Interest Analysis,* 21 CASE W. RES. L. REV. 613 (1970) [hereinafter cited as Bromberg]; Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 CASE W. RES. L. REV. 722 (1970) [hereinafter cited as Shipman]; Sommer, *The Ohio Takeover Act: What Is It?,* 21 CASE W. RES. L. REV. 681 (1970) [hereinafter cited as Sommer].

[4] A case has already arisen under the Indiana Act. On October 15, 1975, United Technologies Corp. (United) made a tender offer for the shares of Otis Elevator Co. (Otis), which was to expire on October 27. The offer price was $42, while the prior close was $31. On the sixteenth, only one day after the announcement of the offer, the Commissioner of Securities of the State of Indiana issued a cease and desist order to United, prohibiting the offer until United complied with the Indiana Act and until the Commisioner ruled pursuant to the Act that the offer was effective. A hearing was held on the offer on October 22 to determine whether United must comply with the Act. On October 27, the Commissioner ruled that Otis was not a target company as defined by the Act, since it was neither incorporated in Indiana nor had its principal place of business or a substantial portion of its assets within the state. As a result, United need not comply with the Act. Otis appealed this ruling to the Marion County Superior Court, as provided by the Act. United removed the appeal to the United States District Court for the Southern District of Indiana on the basis of diversity of citizenship and federal question. On October 28, Otis moved to remand the case back to the state court. This petition was granted and the case remanded on three grounds: (1) the Commissioner is a necessary party to the appeal, because the appeal seeks to reverse his order; (2) the eleventh amendment prohibits an action by the citizen of one state (Otis is a citizen of New York and New Jersey) against another state (the Commissioner represents Indiana); and (3) this appeal is not within the original jurisdiction of the federal court and therefore is not removable. Otis Elevator Co. v. Hafsten, Civil Action #IP 75-619-C(So. D. Ind. October 30, 1975).

Meanwhile, on October 20, the United States District Court for the Southern District of New York ordered United to show cause why a preliminary injunction should not issue against its offer for violation of section 14(b) of the Williams Act, 15 U.S.C. § 78n(d). On October 29, the New York District Court enjoined the offer for violation of §§ 14(d) and 14(e) in falsely stating that United had no plans or proposals for possible merger of Otis' assets. Otis Elevator Co. v. United Technologies Corp., 405 F. Supp. 960 (S.D.N.Y. 1975). United then withdrew its offer. While the appeal in the Indiana state court was pending, the parties settled. On November 3, 1975, United issued a new offer, which eventually succeeded. Copies of the relevant documents are on file at the INDIANA LAW JOURNAL.

[5] The federal securities laws, the Securities Act of 1933 [hereinafter referred to as the 1933 Act] and the Securities and Exchange Act of 1934 [hereinafter referred to as the 1934 Act], are codified at 15 U.S.C. §§ 77 and 78 *et seq.*, respectively.

law,[6] and, in the case of a domestic insurer, the provisions for regulation of domestic insurance companies.[7] Under the new Act, no person may make a takeover offer involving a target company, unless the takeover offer is "effective" within, or exempted by, the provision of the Act, or by regulation or order of the Securities Commissioner.[8]

The literature on tender offers, particularly on the Williams Act, is vast. *See* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL (1973) [hereinafter cited as ARANOW & EINHORN]; A. BROMBERG, SECURITIES LAW—FRAUD §§ 6.1-6.6 (1967) [hereinafter cited as SECURITIES LAW—FRAUD]; L. LOSS, SECURITIES REGULATION, 3647-70 (1961); Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569 (1973); Branson, *Some Suggestions From a Comparison of British and American Tender Offer Regulations*, 56 CORNELL L. REV. 685 (1971) [hereinafter cited as Branson]; Bromberg, *supra* note 3; Brown, *The Scope of the Williams Act and Its 1970 Amendments*, 26 BUS. LAWYER 1637 (1971); Cohen, *A Note On Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAWYER 149 (1966); Fleischer & Mundheim, *Corporate Acquisitions by Tender Offers*, 115 U. PA. L. REV. 317 (1967) [hereinafter cited as Fleischer & Mundheim]; Gibson & Freeman, *Business Associations: The Thirteenth Annual Survey of Virginia Law*, 54 VA. L. REV. 1224 (1968); Hamilton, *Some Reflections On Cash Tender Offer Legislation*, 15 N.Y.L.F. 269 (1969); Hayes & Taussig, *Tactics Of Cash Takeover Bids*, 45 HARV. BUS. REV., March 1967 at 135 [hereinafter cited as Hayes & Taussig]; Henry, *Activities of Arbitrageurs In Tender Offers*, 119 U. PA. L. REV. 466 (1971) [hereinafter cited as Henry]; Krasik, *Tender Offers: The Target Company's Duty of Disclosure*, 25 BUS. LAWYER 455 (1969); Mullaney, *Guarding Against Takeovers—Defensive Charter Provisions*, 25 BUS. LAWYER 1441 (1970); O'Hanlon, *Goodrich's Four-Ply Defense*, FORTUNE, July 1969 at 110; Schmults & Kelly, *Cash Take-over Bids—Defensive Tactics*, 23 BUS. LAWYER 115 (1969) [hereinafter cited as Schmults & Kelly]; Shipman, *supra* note 3; Sommer, *supra* note 3; Wooldridge, *Some Defenses To Takeover Bids*, 1974 J. OF BUS. LAW 202 (1974); Yoran, *Advance Defensive Tactics Against Takeover Bids*, 21 AM. J. OF COMP. LAW 531 (1973); Note, *Cash Tender Offers*, 83 HARV. L. REV. 377 (1969); Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations*, 50 IND. L.J. 114 (1974); Note, *Economic Realities of Cash Tender Offers*, 20 MAINE L. REV. 237 (1968); Note, *The Courts and the Williams Act: Try A Little Tenderness*, 48 N.Y.U.L. REV. 991 (1973) [hereinafter cited as *Try a Little Tenderness*]; Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 SO. CAL. L. REV. 1133 (1974) [hereinafter cited as *Commerce Clause Limitations*]; Note, *Defensive Tactics Employed by Incumbent Management In Contesting Tender Offers*, 21 STANFORD L. REV. 1104 (1969); Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership*, 119 U. PA. L. REV. 853 (1971).

[6] Securities regulation, particularly the registration requirements under Indiana law may be found in IND. CODE §§ 23-2-1-1 to 20 (Burns Supp. 1976).

[7] IND. CODE §§ 27-1-23-1 to 13 (Burns 1971). This chapter has a disclosure requirement very similar to, although not as extensive as, the disclosure required under the Indiana Takeover Act. In addition, hearings are authorized under the review powers of the Insurance Commissioner, who may rule on whether the offer is fair and equitable for the offerees. The provisions of this section, of course, apply only to tender offers for the shares of domestic insurers regulated under Title 27.

[8] IND CODE § 23-2-3-6(a) (Burns Supp. 1976) provides that the Indiana Act shall be administered by the secretary of state by and through the Commissioner of Securities [hereinafter referred to as the Commissioner], who may exercise powers granted to him under IND. CODE § 23-2-1 (Burns 1971). These include the power to deny, suspend, or revoke the registration of a broker-dealer [defined in IND. CODE § 23-2-1-1(c) (Burns 1971)], where he finds the public interest warrants such action and the broker-dealer has either violated a provision of IND. CODE § 23-2-1 (Burns 1971) [IND. CODE § 23-2-1-11(a)(2) (Burns Supp. 1976)] or engaged in dishonest or unethical practices in the securities business [IND. CODE § 23-2-1-11(a)(7) (Burns Supp. 1976)]. These powers may be sufficiently broad to give the Commissioner the power to penalize a broker-dealer for participation in an ineffective tender offer. Therefore, this power may be an indirect means of influencing the acts of foreign offerors with minimal contacts with Indiana.

A takeover offer[9] is defined as an offer to acquire any equity security[10] of a target company pursuant to a tender offer[11] or requests for tenders, if after the acquisition the offeror[12] will be the record or beneficial owner of more than ten percent[13] of the outstanding shares of any class of equity securities. A target company is defined as any corporation or other issuer of securities which is either organized under the laws of the state of Indiana or has its principal place of business or a substantial portion of its total assets in the state.[14]

In addition, IND. CODE § 23-2-3-6(b) (Burns Supp. 1976), empowers the Commissioner to promulgate regulations necessary to enforce the purpose of the Act under IND. CODE § 4-22-2 (Burns 1971).

[9] IND. CODE § 23-2-3-1(i) (Burns Supp. 1976).

The definition of takeover offer does not include:

1) an offer effected by or through a broker-dealer in the ordinary course of his business. IND. CODE § 23-2-3-1(i)(a) (Burns Supp. 1976);

2) an offer for the shares of a company with fewer than one hundred record owners at the time of the offer. IND. CODE § 23-2-3-1(i)(2) (Burns Supp. 1976);

3) an offer, if after the acquisition the total number of shares of the equity securities of the target purchased within the last twelve months does not exceed two percent of the total outstanding. IND. CODE § 23-2-3-1(i)(3) (Burns Supp. 1976);

4) an offer by the issuer to purchase its own shares. IND. CODE § 23-2-3-1(i)(4) (Burns Supp. 1976);

5) an offer approved or initiated by the target company. IND CODE § 23-2-3-1(i)(5) (Burns Supp. 1976); or

6) an offer determined by the Commissioner to be a takeover offer that is not made for the purpose of acquiring control. IND. CODE § 23-2-3-1(i)(6) (Burns Supp. 1976).

Most of the above provisions are standard sections in the other state takeover acts. Exemptions 3, 4, and 6 above are included in the Williams Act §§ 14(d)(8) (A-C), 15 U.S.C. §§ 78n(d)(8)(A-C) (1971). Note, however, that exemption 5 (the uncontested offer) is not included in the Williams Act. This provision is decidedly pro-management, since it is unclear that the informational needs of the offerees are significantly less in uncontested offers.

[10] IND CODE § 23-2-3-1(i) (Burns Supp. 1976) Equity security is defined in IND. CODE § 23-2-3-1(e) (Burns Supp. 1976) in a way which focuses on the voting power of the target company. For example, common stock, any security convertible into common, or any other security may be deemed by the Commissioner an equity security for the protection of investors.

[11] "Tender offer" was intentionally left undefined in the Indiana and federal statutes. The definition is to be made judicially on a case-by-case basis in conformity with the policy of the statute. Smallwood v. Pearl Brewing Co., 489 F.2d 579, 598 (5th Cir. 1974). *See* Brown, *The Scope of the Williams Act and Its 1970 Amendments*, 26 BUS. LAWYER 1637, 1643-44 (1971); Note, *Cash Tender Offers*, 83 HARV. L. REV. 377, 388-89 (1969) [for further discussion of the definition of tender offer].

[12] "Offeror" is defined at IND. CODE § 23-2-3-1(f) (Burns Supp. 1976) as including any individual or company who is making the tender offer for the securities of the shareholders of the target company.

[13] *Compare* the Williams Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1971), where disclosure is required if five percent of the outstanding shares will be owned after acquisition pursuant to the tender offer. In the usual tender offer transaction, the offeror will acquire shares on the open market up to a level just short of the five percent figure. Then, the tender offeror will announce his bid to acquire well over ten percent of the shares. Thus, an offeror will normally comply with the more restrictive federal percentage as a guideline for the time when disclosure is required.

[14] IND. CODE 23-2-3-1(j) (Burns Supp. 1976).

Consequently, the Indiana Act purports to be extraterritorial in effect since it affects out of state shareholders and national corporations.[15]

A takeover offer becomes effective twenty days after a disclosure statement[16] is filed by Indiana counsel with the Commissioner,[17] unless

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[15] Unlike the Blue-Sky laws, which are territorial in effect, the Indiana Takeover Act purports to regulate on a national basis any tender offer for Indiana-based companies. Consequently, difficulties such as commerce clause limitations and jurisdictional problems arise under the Indiana Act. *See* text accompanying notes 120-181 (commerce clause) and 49-119 (jurisdictional problems) *infra.*

[16] IND. CODE 23-2-3-2(e) (Burns Supp. 1976). Federal law requires disclosure under Section 13(d) of the Williams Act, 15 U.S.C. § 78m(d) (1971). The section requires disclosure of:

1) the background and identity of the offeror. Williams Act § 13(d)(1)(A), 15 U.S.C. § 78m(d)(1)(A) (1971);

2) the source and amount of funds used in the tender offer, including in particular a description of the borrowing transaction if any funds are obtained on credit. Williams Act § 13(d)(1)(B), 15 U.S.C. § 78m(d)(1)(B) (1971);

3) any plans or proposals the offeror may have to sell, liquidate, or merge the assets of the target company, if the purpose of the offer is to acquire control. Williams Act § 13(d)(1)(C), 15 U.S.C. § 78m(d)(1)(C) (1971);

4) the number of shares the offeror currently owns or has a right to acquire. Williams Act § 13(d)(1)(D), 15 U.S.C. § 78m(d)(1)(D) (1971);

5) any information as to any contracts, arangements, or understandings the offeror has with any person concerning the shares of the target company. Williams Act § 13(d)(1)(E), 15 U.S.C. § 78m(d)(1)(E) (1971); and

6) any information required by the rules asd regulations of the Securities and Exchange Commission (SEC). Williams Act § 13(d)(1), 15 U.S.C. § 78m(d)(1) (1971).

Pursuant to part (6) above, the SEC issued Reg. § 240.13d-101, requiring disclosure of the following additional information:

1. a description of the offeror's business, a description of its properties, a description of any pending legal and administrative proceedings in which the offeror has recently been a party, and the names, addresses, material business activities, and affiliations in the recent years of all the offeror's directors and executive officers;

2. information as to any contract, arrangements, understandings, or negotiations with any major employee or record or beneficial owner of the target company with respect to the tender offer, the purchase by the offeror from such person otherwise than pursuant to the offer, the retention of any person in his present position or any other position, or the giving or withholding of a favorable recommendation; and

3. a description of the provisions made for disclosure to the offerees.

17 C.F.R. § 240.13d-101 (1975).

The disclosure provisions of the Indiana Act are virtually identical. IND. CODE §§ 23-2-3-2(i)(1-7) (Burns Supp. 1976). As a result, full compliance with the disclosure requirements of the Williams Act can be achieved by compliance with the provisions of the Indiana Act. The similarity between the disclosure required under the two acts is strong testimony that the purpose of the Indiana Act is identical to that of the federal act—disclosure for the protection of investors. The sole difference in the disclosure sections of the Indiana and Williams Acts is that full disclosure is only made to the SEC under the Williams Act. Under the Indiana Act, a copy of the disclosure statement must also be sent to the target company as the representative of the offerees. This may sound like a great advantage for the target company. The advantage, however, is at most of minimum value, since the target company is at best saved a trip to the SEC to obtain a copy. 15 U.S.C. § 78m(d) (1971); IND. CODE § 23-2-3-2(b) (Burns Supp. 1976).

[17] IND. CODE § 23-2-3-2(e) (Burns Supp. 1976). Under the Williams Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1971), the offer may become effective at any time after disclosure is made. On the other hand, if the tender offer requires the issuance of securities as part of an exchange offer, then the registration requirements of the 1933 Act must be

the Commissioner orders a hearing.[18] The offeror must also send a copy of the disclosure statement to the target company and publicly disclose by press release to the leading financial wire services the material terms of the offer no later than the date of the filing.[19]

The Indiana Act also requires that an effective takeover offer contain certain provisions. First, offeree shareholders must have a right to withdraw all tendered shares at any time until three days before the expiration of the offer.[20] Second, if the offer is for less than all the outstanding shares and a greater number of shares is tendered than the offeror has promised or is willing to accept, the offer must accept the tenders pro rata.[21] Third, if the offeror, during the period of the offer, varies its terms by increasing the consideration, he must also pay the increased consideration to all shareholders who tendered before the increase.[22] Fourth, no offer is allowed during the pendency of any administrative or injunctive proceeding brought by

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met. Under § 8 of the 1933 Act, 15 U.S.C. § 77h (1971), a ten-day advance filing of a disclosure statement to the SEC is required. The twenty-day advance filing is also required under the Indiana Act. Thus, an offeror may fully comply with all the registration filing requirements of the Williams Act by complying with the more stringent requirements imposed by the Indiana Act and the 1933 Act.

18 The Commissioner may, in the interests of the offerees, accelerate the effectiveness of the offer if the target company consents and all the provisions of the Act have otherwise been met. Except for the provision requiring the approval of the target company, this feature is very appealing, and meets some of the criticism which may be directed at the Act's effects on the timing of tender offers. For example, if the Commissioner were satisfied with the equity and fairness of the tender offer, he could then allow the mechanisms of the Act to move at a faster pace. In this way, the time advantage, the principal asset of the offeror, could be restored in bona fide offers. This discretion in the hands of the Commissioner may be necessary in order that the Act function fairly. *See* text accompanying notes 235-36 *infra.*

Unlike the Indiana Act, the Williams Act requires judicial enforcement. However, administrative enforcement is no unique provision, since the SEC is empowered to enforce the mechanics of the 1933 Act requirements for the registration of a public offering of securities. § 8, 15 U.S.C. § 77h (1971).

19 IND. CODE § 23-2-3-2(b) (Burns Supp. 1976).

20 IND. CODE § 23-2-3-5(a) (Burns Supp. 1976). Compare Williams Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (1971), which requires that the offerees have the right to withdraw any tender for the first seven days after the announcement of the offer, or at any time more than sixty days after the announcement. For offers lasting from one to ten days or over sixty days, compliance with the federal withdrawal provision will at least satisfy the requirements under the Indiana Act. For all other offer periods, the opposite is true.

21 IND. CODE § 23-2-3-5(b) (Burns Supp. 1976). Compare Williams Act § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1971). The section requires pro rata acceptance of tenders received in the first ten days if those tenders exceed the number the offeror is bound or willing to accept. As a result, if an offeror complies with the Indiana Act by agreeing to pro rata acceptance of all shares tendered regardless of the time of receipt, the offeror will have also complied with the provisions of the Williams Act. Note that the offeror need not accept fractional shares.

22 IND. CODE § 23-2-3-5(c) (Burns Supp. 1976). This is a standard provision of all other state acts and the Williams Act § 14(d)(7), 15 U.S.C. § 78n(d)(7) (1971).

the Commissioner against the offeror for any violation of the Act.[23] Finally, the offer must be made to Indiana shareholders on the same basis as it is made to all other shareholders.[24]

In addition, the Commissioner may order a hearing in his discretion for the protection of the offerees, and shall order a hearing upon the request of the target company.[25] A hearing must be ordered before the offer becomes effective, that is, within twenty days after filing.[26] The hearing must begin within twenty days after the order.[27] The ruling by the Commissioner must follow within sixty days the conclusion of the hearing.[28] In the ruling, the Commissioner must decide three major issues: 1) whether the disclosure statement gives full and fair disclosure of all material information required by the Act;[29] 2) whether the offer is fair and equitable to the offerees;[30] and 3) whether the offer

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23 Ind. Code § 23-2-3-5(d) (Burns Supp. 1976). This section is modelled on similar provisions in the Wisconsin [Wisc. Stat. Ann. § 552.11(5) (West Supp. 1975)] and Minne-

24 Ind. Code § 23-2-3-5(e) (Burns Supp. 1976). Only Virginia, Delaware, and Nevada have no similar requirement. Note that, although the federal statute does not expressly pro-
or amended offer while contesting the validity of the first attempt.
hibit discrimination, discriminatory offers would nonetheless appear to conflict with the spirit of the Williams Act. *Cf.* Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267, 273 (S.D.N.Y. 1975); *Bromberg, supra* note 5, at 663-64.

25 Ind. Code § 23-2-3-2(e) (Burns Supp. 1976). On the other hand, the Williams Act provides for judicial enforcement, leaving the SEC with only a rulemaking function. However, under section 8(b) of the 1933 Act, the SEC may order a hearing, delay effectiveness, or demand a correction for the protection of investors. 15 U.S.C. § 77h(b) (1971). In addition, the SEC may issue a stop order, prohibiting offers under an improper registration. 15 U.S.C. § 77h(d) (1971). Consequently, the powers granted the SEC under the 1933 Act are remarkably similar to those given to the Indiana Commissioner.

26 The Commissioner has power only to accelerate or delay effectiveness. Ind. Code § 23-2-3-2(e) (Burns Supp. 1976). The implication is therefore clear that he cannot cancel effectiveness of an offer by ordering a hearing. Once effective, the offer must con-
federal legislation. It prevents an offeror in violation of the Act from proposing a new
tinue. It may not be stopped.

27 Ind. Code § 23-2-3-2(f) (Burns Supp. 1976).

28 *Id.*

29 Ind. Code § 23-2-3-2(f) (Burns Supp. 1976). This ruling is guided by the concept
sota [Minn. Stat. Ann. § 80B.03(5) (Supp. 1975)] statutes, but was not included in the
that disclosure must be made to ensure an intelligent investor decision on the tender, since the investor's dilemma is the focal point of all takeover legislation.

30 *Id.* The power to determine whether the offer is fair and equitable for the offerees is generally derived from the securities laws of the state. *See* notes 237-38 *infra*. In Indiana, the securities regulations do not expressly authorize such a determination in the registration process. Under Ind. Code § 23-2-1-7(a)(1) (Burns Supp. 1976), a review of the fairness of the *disclosure* is authorized. Similarly, under § 23-2-1-7(a)(8), the Commissioner can deny registration when "the offering has worked or tended to work a fraud on the purchaser, or would so operate." In addition, under the insurance provisions, a determination whether the offer is fair and equitable for the offerees is expressly authorized. Ind. Code § 27-1-23-2(d)(1)(iv) (1971).

is to be made to all shareholders on substantially equal terms.[31] Appeal of the Commissioner's ruling is of course allowed.[32]

Finally, the Act contains a general antifraud provision,[33] and a provision specifically covering fraudulent recommendations and solicitations.[34] Criminal[35] and civil[36] liability is imposed for violations of the pro-

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[31] IND. CODE § 23-2-3-2(f) (Burns Supp. 1976). In contrast, under the federal regulatory scheme, the SEC under the 1933 Act and the courts under the Williams Act amendments to the 1934 Act are only allowed to review the completeness of the disclosure. The federal statutes are predicated on the premise that full disclosure is sufficient protection for the average investor. The Indiana Act, however, requires the Commissioner to judge the substantive fairness of the offer. This is a function that is not granted to either the SEC or the courts under the federal statutes. Thus, this grant of power represents a significant deviation from the plan of federal regulation.

[32] IND. CODE § 23-2-3-11 (Burns Supp. 1976). An appeal of the Commissioner's ruling may be made by any party to the circuit or superior court of the county in which the target has its principal office, or Marion county. A trial de novo is held with precedence in time over all other disputes pending in that court. However, an appeal will not in itself affect the efficacy of the ruling during the pendency of the appeal, unless the court stays the ruling. In general, the ruling of the Commissioner has a "presumptive effect," and the ruling will be effective during the appeal. Thus, if the Commissioner should rule in favor of the offer, the offer will continue to be effective during the appeal period. *See also* the discussion in the text accompanying notes 233-36, *infra*.

[33] IND. CODE 23-2-3-4 (Burns Supp. 1976). The antifraud provision prohibits any fraudulent, deceptive, or manipulative act in connection with a takeover, including without limitation:

a) participation in a takeover not effective or exempted under the Act. IND. CODE § 23-2-3-4(a) (Burns Supp. 1976);

b) sale by any official of the target company at a price higher than the offer price, unless at the existing market price. IND. CODE § 23-2-3-4(c) (Burns Supp. 1976);

c) publication or use in connection with the offer of any untrue statement or misleading omission of a material fact. IND. CODE § 23-2-3-4(b) (Burns Supp. 1976); and

d) acquisitions by the offeror alongside the offer. IND. CODE § 23-2-3-4(d) (Burns Supp. 1976).

A general antifraud provision similar to the above provisions is included in the Williams Act § 14(e), 15 U.S.C. § 78n(e) (1971).

In addition, the Indiana Act also requires that copies of all publications, advertisements, and letters sent by either the target company or the offeror, soliciting or requesting acceptance or rejection of the offer, must be filed with the Commissioner and sent to the opposite party at least three full business days before release to the offerees.

[34] IND. CODE § 23-2-3-3(a) (Burns Supp. 1976). An additional antifraud provision is specifically attached to § 23-2-3-3(a). IND. CODE § 23-2-3-3(b) (Burns Supp. 1976).

[35] IND. CODE § 23-2-3-9 (Burns Supp. 1976). Section (9) provides criminal liability for the following violations:

1) for failure to file a disclosure statement required by the Act, the penalty is imprisonment of up to one year or a fine of up to $5000, or both. IND. CODE § 23-2-3-9(a) (Burns Supp. 1976);

2) for intentional representation of a material fact known to be false or intentional omission of a material fact known to be necessary to make other representations to the Commissioner not misleading, the penalty is imprisonment of one to five years or a fine of up to $10,000, or both. IND. CODE § 23-2-3-9(b) (Burns Supp. 1976);

3) for intentional publication of a material fact known to be false or intentional omission of a material fact known to be necessary to make other representations in a publication by or for him not misleading, the penalty is 1-5 years imprisonment or a fine of up to $10,000, or both. IND. CODE § 23-2-3-9(c) (Burns Supp. 1976); and

4) for any knowing violation of any other provision for which a criminal penalty has not otherwise been provided, the penalty is imprisonment of up to one year or a fine of up to $1000, or both. IND. CODE § 23-2-3-9(d) (Burns Supp. 1976).

visions of the Act. In order to ensure enforcement of the Act, the Commissioner is not only granted broad investigatory and administrative powers,[37] but is also authorized to promulgate rules and regulations to effectuate the purpose of the legislation.[38]

The Federal Securities Laws

The relevant federal securities laws are embodied in the Securities Act of 1933[39] and the Securities Exchange Act of 1934.[40] The 1933 Act contains the requirements for registration of offering transactions. In an exchange tender offer, the shares of the offeror company are exchanged for the shares of the target company. As a result, the exchange offer includes an issuance of shares by the offeror, which must comply with the 1933 Act. Since the offerees become new shareholders in the offeror's company, the imposition of the full disclosure requirements of the 1933 Act is clearly justified in the interest of offeree

[36] IND. CODE § 23-2-3-10 (Burns Supp. 1976). The Act provides that any offeror who purchases an equity security by a takeover offer not in compliance with the Act or by means of a false statement or misleading omission of a material fact, shall be liable to his seller. The seller may, upon tender of consideration, recover the security plus any income received by the purchaser, or damages, plus expenses. Damages are measured by the difference between the larger of the market value at the date of the purchase by the offeror or its present value and the persent value of the consideration paid by the offeror at the tender. IND. CODE § 23-2-3-10(a)(1-2) (Burns Supp. 1976).

Similarly, although a shareholder has not tendered, he may sue for civil remedy, but may recover only damages plus expenses. IND. CODE § 23-2-3-10(b) (Burns Supp. 1976). The three year statute of limitations on all civil remedies does not begin to run until discovery. IND. CODE § 23-2-3-10(d) (Burns Supp. 1976). In addition, the principal of a violator of the Act or any agent assisting in a violation of the Act by his principal is jointly and severally liable to the same extent as the violator. IND. CODE § 23-2-3-10(c) (Burns Supp. 1976).

[37] IND. CODE § 23-2-3-8(a) (Burns Supp. 1976). The Commissioner may investigate and, if necessary, issue cease and desist orders for any actual or suspected violation of the Act. Moreover, he may sue with full subpoena powers to enjoin any violations. Upon a proper showing, a court may grant a preliminary or permanent injunction or temporary restraining order, or may order rescission of any sale, purchase, or tender determined to be unlawful under the Act. *Id.*

In addition, the offeror, target company, or any record or beneficial owner of any target equity security may sue to enjoin a violation. Upon a proper showing, the court may order any of the above remedies. IND. CODE § 23-2-3-8(b) (Burns Supp. 1976). For a discussion of the standing problem under section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b) and the Williams Act, *see* Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569 (1973).

Exempted from regulation are domestic insurers regulated under Title 27, financial institutions regulated by the department of financial institutions under Title 28, corporations regulated by the Public Service Commission, bank holding companies, public utilities, public utility holding companies, national banking associations, and any savings and loan association subject to regulation by a federal agency. IND. CODE § 23-2-3-12 (Burns Supp. 1976).

[38] IND. CODE § 23-2-3-6(b) (Burns Supp. 1976).

[39] The 1933 Act is codified at 15 U.S.C. § 77 *et seq.* (1971).

[40] The 1934 Act is codified at 15 U.S.C. § 78 *et seq.* (1971).

protection. The Indiana Act has offeree protection provisions surprisingly similar to those embodied in the 1933 Act, the most important of which are advance notice filing provisions and administrative enforcement.[41] Since the Indiana Act also regulates cash offers, the Act can be viewed as simply extending to all tender offers a scheme of regulation similar to that already imposed by federal law on exchange offers. Thus, the provisions of the Indiana Act are neither revolutionary nor unique. Whereas the 1933 Act registers the *sale* of securities to the public, the Indiana Act registers the *purchase* of the securities from the public.

However, the 1968 Williams Act amendments to the 1934 Act[42] provide the federal regulatory provisions for cash tender offers. The disclosure and shareholder protection provisions are far less stringent than those incorporated into the 1933 Act or the Indiana Act. Even though the congressional purpose in enacting the Williams Act was to increase investor protection during cash tender offers, Congress was determined to balance the interests of the offeror and target companies. The legislative history of the Williams Act can provide some insight. For example, in his comments introducing the bill, Senator Williams said,

> I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.[43]

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[41] *See* notes 16-17, *supra* (advance notice) and notes 8, 18, 28, 30-31, *supra* (SEC's power to review) & text accompanying.

[42] The Williams Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454, *amending* 15 U.S.C. §§ 78m and 78n (1971) is codified at 15 U.S.C. §§ 78m(d), 78n(d) and 78n(e) (1971). In addition to requirements of the Williams Act, Rule 10(b)-5, promulgated by the SEC under the 1934 Act, also provides a private right of action to remedy fraudulent or misleading actions in connection with the sale or purchase of securities. 17 C.F.R. § 240.10b-5 (1975).

[43] 113 CONG. REC. 854-55 (1967). *See also* 113 CONG. REC. 24665-66 (1967) [floor discussion between Senators Javits and Williams on the purpose and effects of the Williams Act]. The House Report also adds further insight into the purpose of the Williams Act.

> It was urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company. The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

Therefore, the purpose of the Williams Act was to protect investors without making the statute a weapon for incumbent management.

However, if the Williams Act was designed to protect shareholders, why were its provisions far less stringent than those imposed by the 1933 Act, when thirty-five years of close regulation of securities transactions had followed the passage of the 1933 Act before Congress enacted the Williams Act? For example, if Congress enacted less stringent regulation of cash offers because such regulation would not be beneficial to cash offers, then further regulation would seem to be precluded by the enactment of the Williams Act. Three bases of justification underlie this view. First, since cash offers proceed with

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> While the bill may discourage tender offers or other attempts to acquire control by some who are unwilling to expose themselves to the light of disclosure, the committee believes this is a small price to pay for adequate investor protection.

H.R. Rep. 1711, 90th Cong. 1st Sess. (1968), 1968 U.S. CODE, CONG. & AD. NEWS 2811, 2813. The purpose of the Williams Act was therefore to protect investors without making the statute a weapon for incumbent management.

In order to fully understand the role the Williams Act plays in the entire federal regulatory scheme, one must understand the two major pieces of legislation—The 1933 and 1934 Acts. They were enacted to protect investors from fraudulent offerings of securities in illusory companies and to ensure the basic integrity of securities exchanges. The purpose of the 1930's acts was to instill in consumers a feeling of confidence in the basic fairness of securities transactions. The Williams Act has not changed that. As a result, in a post-Williams Act case, the Supreme Court quoted with approval its language in a pre-Williams Act decision. The Court said that the 1934 Act (which the Williams Act amends) embraces a ". . . fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." Affiliated Ute Citizens v. United States, 406 U.S. 128, 150 (1971) quoting from SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963).

In an exchange between a major corporation and a mass of small investors, the distribution of information will naturally be unequal, especially because the offerees are uncertain of the future of the target. *See* Bromberg, *supra* note 3, at 661-62. The purpose of the Williams Act disclosure provisions was to remedy the unequal distribution. Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1971); Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. REV. 991, 994 (1973). Thus, the standard for disclosure is sufficient information so that the investor's decision will be predicated upon a knowledgeable and informed evaluation of the alternatives. Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267, 273 (S.D.N.Y. 1975). This standard is defined to be material information. For a discussion and comment on the standard for material information, *see* Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations*, 50 IND. L.J. 114, 122-30 (1974). However, the disclosure rules must not be too restrictively construed.

> Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent management to protect its own interests against the desires and welfare of the shareholders.

Electronic Specialty Co. v. Int'l Control Corp., 409 F.2d 937, 948 (2nd Cir. 1969).

Similarly, in Susquehanna Corp. v. Pan American Sulphur Co., 423 F.2d 1075 (5th Cir. 1970), the court said:

> The person or corporation filing a Schedule 13D statement need not necessarily walk a tortuous path. He must, of course, be precise and forthright in making full and fair disclosure as to all material facts . . . .

Id. at 1085.

speed and surprise, delaying regulation would be detrimental to cash offers.[44]

Second, the most obvious justification may be that the offerees in a cash offer have interests far less substantial than those of offerees in an exchange offer, since cash offerees do not acquire new shares, but rather receive cash. The cash offer transaction is a disinvestment on the part of these offerees, rather than an investment in a new company. Thus, they may require less protection than an offeree who is acquiring new shares by exchange. However, this view is somewhat fallacious. Under the Williams Act and especially under the Indiana Act, there is a strong risk of minority stockholder status through pro rata acceptance.[45] For example, in a successful bid, many offerees will become minority shareholders in a company under new control, because only a portion of their tenders can be accepted. Consequently, they are "acquiring" a small number of shares in a "new" company controlled by the offeror and, therefore, they deserve the protection afforded offerees under the 1933 Act. The risk of minority shareholder status is especially pressing when one realizes that a stockholder who strongly fears the results of a successful tender offer will wish to tender. Such action only increases the number of shares tendered, which strengthens the likelihood of pro rata acceptance of a large number of tenders. Consequently, the only safe protection for an investor who fears the success of an unfavorable tender offer is to sell his stock in the open market.[46] This is the only sure way to avoid any risk of minority

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[44] However, there is evidence that such regulation would not be detrimental to cash offers. Under the British scheme of tender offer regulation, which slows the otherwise speedy progress of a tender offer, offerees have more confidence in the fairness of the offer. That confidence has made tender offers more likely to succeed, because the offerees are not committed to an opposition based on mistrust. In addition, experience has shown that the passage of the 1933 and 1934 Acts has increased consumer confidence, which has increased consumer investment in corporate securities. *See* Branson, *supra* note 5.

[45] The pro rata acceptance requirements under the federal and Indiana statutes are discussed in the text accompanying note 21, *supra*. The risk of pro rata acceptance is much smaller under the federal statute, where pro rata acceptance is required only for the first ten days. Thus, only those stockholders who tardily tender risk having their tenders completely refused. However, under the Indiana Act, the risk is more pressing. Pro rata acceptance is required of all shares tendered. Thus, all current stockholders risk the chance of becoming holders of a very small minority of shares in a radically different company, which is the price paid under the Indiana Act for the freedom from the cohesion to make a quick decision. This "new" investment is a very risky one. Thus, the offerees need full disclosure of the intentions of the new management in order to make a wise decision and adequate protections in order to execute it.

[46] The offerees face a serious dilemma. The more frightful the offeror looks as a potential majority shareholder, the greater is the offeree's fear of minority shareholder status, and the more likely the offeree will tender his shares, a reaction which will only encourage the success of the offer, require pro rata acceptance, and thereby ensure minority status. Of course, the offeree can refuse to tender so as to defeat the offer. What then of the other offerees? What if they have sufficiently tendered so as to make the offer a

shareholder status. As a seller in the open market to the highly sophisticated group of arbitrageurs, the average offeree will need sufficient information on which to base his decision and adequate protection in order to execute it.[47] The Indiana Act attempts to provide the average offeree with this information and this protection.

Third, while in passing the Williams Act Congress may have intended only to authorize some minimum amount of control to increase investor protection, it was most concerned with maintaining a balance between the offeror and the target. In other words, Congress may not have felt that certain regulatory provisions would be detrimental to tender offers. Instead, Congress may have believed that inclusion of specific provisions would simply have shifted the balance toward incumbent management. If this justification is indeed correct, then the Congressional opposition to certain regulatory provisions focused more upon their effect on the balance between the offeror and target management. Indeed, most of the regulatory provisions included in the Indiana Act but not in the Williams Act emphasize offeree protection, rather than discouraging the use under fair conditions of tender offers. Accordingly, any constitutional analysis of a state act under the Supremacy Clause should focus upon its effect on this balance. A state may then permissibly[48] increase the regulation so long aa the balance is maintained. Evidence will also be presented to support this view.

In comparison to the federal statutes, then, the Indiana Act may be viewed as a mirror of the 1933 Act, applied to all tender offers. In some respects, the Act is not at all unique and simply parallels the registration requirements of the 1933 Act. However, the regulation

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success? The offeree who held out is then left in the cold. Consequently, the only sure remedy is to sell the shares in the open market to the professional arbitrageurs. As a result, the offerees are not only confronted with what is tantamount to a forced sale of their shares, but also with a sale position at a decided disadvantage to that of the horde of arbitrageurs who make an attractive living trading on these arrangements.

[47] The information needed by the offerees is of three types. First, the offeree must decide if he personally likes the prospects of the offerors as a majority shareholder in control. Will the offeror enhance his investment? Or will his investment be sacrificed to the whims of the majority? Second, the offeree must make a decision on the perceived success of the offer. Of course, the offeror cannot be compelled to divulge the acceptance rate of the offer. However, if the offeree has adequate information, he can at least judge for himself what he feels the other offerees perceive to be the chances for success. Finally, if the offeree dislikes the offeror as a prospective majority stockholder in control, even if the offeree is uncertain of the offer's success, he will choose to sell his shares in the marketplace. *See* note 46, *supra*. Since the offeree is then forced to deal with a large group of professional speculators, he deserves adequate disclosure of the terms of the offer. In this way, at least some of the informational gap between the offerees and the professionals will be closed.

[48] *See generally* notes 182-259, *infra*, and text accompanying.

of cash offers is a significant departure from the provisions of the Williams Act.

LEGISLATIVE JURISDICTION

Takeover legislation such as the Indiana Act is unusual[49] because of its extraterritorial approach to regulating tender offers. The Indiana Act seeks to regulate all offers made within and without the state if the target company is organized under Indiana law, or has its principal place of business, or a substantial portion of its total assets in Indiana.[50] The Act does not assert its control upon a strict territorial blue sky approach[51] of regulating only offers made within the state;[52] it asserts extraterritorial control by prohibiting takeover offers involving target corporations unless the offer is "effective" under the Act.[53]

Since the Act regulates not only domestic corporations, but also foreign corporations having their principle place of business or a substantial portion of their total assets within the state, the extraterritorial nature of the Act may have a disruptive effect upon these corporations. A "nightmare" situation is foreseeable in which two boards of directors claim control of a corporation because the offeror made a successful tender offer which was not "effective" under the Indiana Act but which was recognized by the state of incorporation of the target.[54] Should this disruption become so great that a need for

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[49] Takeover legislation is unusual because tender offers involve a solicitation to sell shares which is closely analogous to solicitation to purchase shares which are governed by state blue sky laws. *See* Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1137 [hereinafter cited as Reese & Kaufman]. Yet they have the effect of shifting corporate control, a matter which is usually regulated by the state of incorporation. *See* text accompanying notes 82-87. *Cf.* Shipman, *supra* note 3.

[50] IND. CODE § 23-2-3-1(j) (Burns Supp. 1976). In litigation, the statutory language of "substantial portion of total assets" has been construed to require that the Indiana based assets represent a substantial amount in proportion to the total assets of the target, and not merely that the Indiana based assets amount to a substantial dollar value. United Technologies v. Otis Elevator, Ind. Sec. Comm'r ruling [on file with the INDIANA LAW JOURNAL.]

[51] *Commerce Clause Limitations*, *supra* note 5, at 1153. The Supreme Court has held this type of regulation to be constitutional. *See*, Hall v. Geiger-Jones Co., 242 U.S. 539, 550-51 (1917). *See generally* L. Loss & E. COWETT, BLUE SKY LAW (1958).

[52] A territorially based takeover act would be ineffective. "If the state were to regulate all tender offers to its residents for their stock in all corporations wherever located, offerors could simply avoid soliciting in those states." Local shareholders could sell on the open market for slightly less than the amount of the offer (the offer causing the stock to rise in valuation). Arbitrageurs would then probably buy the shares and tender them to the offeror. The effect would only be to deny local shareholders the full premium price. ARANOW & EINHORN, *supra* note 5, at 157, 158.

[53] IND. CODE § 23-2-3-2 (Burns Supp. 1976).

[54] It is also likely that the offer may be controlled by the law of several states. Delaware has recently promulgated a tender offer law which controls only those offers

national uniformity is felt, this need could be fulfilled by either constitutional prohibition under the fourteenth amendment due process clause, the full faith and credit clause, or the commerce clause, federal pre-emption of the field or national incorporation.[55]

To determine whether Indiana has legislative jurisdiction[56] it is necessary to decide what the purpose of the statute is, so as to determine whether the state has a sufficient interest to meet constitutional requirements. There appear to be at least two possible interests: (1) protection of Indiana industry and (2) shareholder protection.[57] However, the protection of Indiana industry and the concomitant protection of both employment and tax revenues deriving therefrom raise serious constitutional questions under the commerce clause.[58] The normal purpose of takeover legislation is shareholder protection.[59] The Indiana

made for targets incorporated under Delaware law. DEL. CODE ANN. tit. 8, § 203, ch. I, subchapter VI (1976). The practical result of a combination of laws such as that of Indiana and Delaware is that the offeror will be confronted with defensive litigation in several states whose acts require varying degrees and methods of disclosure.

55 *See* Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 479-80 (1968). The constitutional problems will be discussed *infra*.

56 [T]he effect to be given to the law of a sister state generally turns on whether the state itself has the right to reach and govern a particular transaction, or property, or person, because of some relationship which confers what roughly may be described as "legislative jurisdiction."

Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 11 (1945).

57 Draftsman's Memorandum by Gregory D. Buckley, pp. 5-6, on file at the INDIANA LAW JOURNAL. *Cf.*, ARANOW & EINHORN, *supra* note 5, at 153-158.

58 The purpose of the statute may have to be the protection of all shareholders of the target company for the Act to have a valid legislative purpose. The protection of local industry from relocation as the legislative purpose may cause the Act to be "virtually *per se* illegal." ARANOW & EINHORN, *supra* note 5, at 158. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970); text accompanying notes 152-57 *infra*.

The protection of Indiana industry as a purpose implies a possible use of the Act to defeat tender offers where the offeror would remove the industry from the state. The main criticism of most state takeover acts is that they were enacted to protect local inefficient managements from attacks by corporate raiders. Congress expressly rejected this approach in a bill presented by Senator Williams only one year before the present version of the Williams Act was enacted. A state act founded upon such a purpose will have commerce clause and pre-emption problems. *See* discussion commencing at note 152 *infra*.

59 Virginia bases its takeover statute upon the power of the state over Virginia corporations. Freeman, *Business Associations, The Fifteenth Annual Survey of Virginia Law*, 56 VA. L. REV. 1536, 1537 (1970). The purpose of the Virginia Act is to protect all shareholders of businesses incorporated under Virginia Law. Gibson & Freeman, *Business Associations, The Thirteenth Annual Survey of Virginia Law*, 54 VA. L. REV. 1224, 1242 (1968).

Ohio bases its takeover act upon the premise that a bid is essentially an internal affairs matter which it may reasonably regulate on a global basis. Shipman, *supra* note 3, at 741-48.

Federal legislation in the area (The Williams Act) also has shareholder protection as its purpose. *See* Bromberg, *supra* note 3, at 677; *Commerce Clause Limitations*, *supra* note 5, at 1139 n. 62.

Act seeks not to protect all shareholders within the state[60] but only to protect all shareholders of businesses incorporated under Indiana law or having substantial contacts with the state.

Sufficiency of the Interest: Due Process

For Indiana to have an interest giving rise to legislative jurisdiction, the state's interest must be sufficient to meet the demands of the fourteenth amendment due process clause.[61] An interest which will support a state's application of its own law in a conflicts of law situation is also sufficient to give the state legislative jurisdiction.[62] The due process standard for determining the propriety of the application by the forum state of its own law to a given situation is developed in *Home Insurance Co. v. Dick*[63] and *Clay v. Sun Insurance Office, Ltd.*[64] In *Dick,* a citizen of Texas sued a Mexican corporation in a Texas court on a fire insurance policy for the loss of a tug.[65] The policy was made in Mexico by a Mexican company subject to Mexican law, covering a ship in Mexican waters and issued to a Mexican who later duly assigned the policy to Dick.[66] Dick wished Texas law to apply in order to avoid the Mexican one-year statute of limitations.[67] In *Dick,* the Supreme Court held that a state may not apply its law where the matter litigated had no relation to the state.[68] The Court said that a state "may not abrogate the rights of parties beyond its

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[60] To protect all shareholders within the state the Act would have to be territorially based. *See* note 52 *supra,* for an explanation of the disadvantages of a territorially based takeover act.

[61] In their discussion of the constitutionality of the extraterritorial impact of state tender offer regulation, ARANOW & EINHORN, *supra* note 5, state:

> [T]he issue must be framed in terms of whether the local benefits which are derived from regulation of securities transactions that take place outside the state between nonresident investors justify the burdens imposed on interstate commerce by this type of regulation.

Id. at 158.

This confuses the issue of legislative jurisdiction with that of whether interstate commerce is unduly burdened. The former issue, specifically whether Indiana may regulate transactions occurring outside of its borders, is properly seen as a due process problem and is answered by ascertaining whether the state has sufficient interest in the transaction to justify regulating it. *See* notes 56-77 *supra* and text accompanying. As this note argues, because tender offers involve a potential internal corporate restructuring, Indiana should have jurisdiction to regulate even tender offers which occur outside its borders, when made for companies incorporated within Indiana. *See* notes 78-91 *infra* and text accompanying.

[62] *See* note 56 *supra.*

[63] 281 U.S. 397 (1930).

[64] 377 U.S. 179 (1964).

[65] 281 U.S. at 402.

[66] *Id.* at 403.

[67] *Id.* at 404-05.

[68] *Id.* at 410. *See also* Reese & Kaufman, *supra* note 49, at 1129.

borders having no relations to anything done or to be done within them."[69]

In *Clay v. Sun Insurance Office, Ltd.*, the plaintiff, a resident of Illinois, purchased in Illinois an insurance policy with a 12-month period of limitation clause from Sun Insurance, an alien corporation licensed to do business in Illinois, Florida, and several other states.[70] The plaintiff then moved to Florida and became a resident there only a few months later. The Court held that it would not violate due process to apply the Florida five-year statute of limitations which nullified clauses with less lengthy periods.[71] In finding sufficient activity, the Court noted the "world-wide" nature of the policy, the plaintiff's residency within the state of Florida, and that the insurer was licensed within that state and thus had an expectancy of being sued there.[72]

A comparison of *Dick* and *Clay* shows that where the state has no interest, application of its law will violate due process, but that if a state has some interest, then the requirements of the due process clause have been met.[73] Due process does not require that the state's interest be dominant, or outweigh all other states' interests.[74]

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[69] 281 U.S. at 410.

[70] 377 U.S. 179, 180 (1964).

[71] *Id.* at 181-82.

[72] *Id.* at 182.

[73] Brainerd Currie found the Supreme Court's approach in *Dick* to be an interest analysis. Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 43, 44 (1958). His general conclusion that the full faith and credit and due process clauses require only that a state have a legitimate interest is advanced at 75-76. In *Clay*, Justice Douglas concluded that Florida had ample "contacts" for either full faith and credit or due process. 377 U.S. 179, 183 (1964). It is the author's opinion that Douglas' use of the word "contacts" is indicative of an interest analysis. The imprecision of the word "contact," used interchangeably with "interest," in reference to the constitutional standard required to meet due process or full faith and credit is demonstrated in a student work commenting on *Clay*, which discussed prior Supreme Court decisions based on an interest analysis, and then in discussing *Clay*, shifted to a "contacts" analysis. *See* Note, 16 SYRACUSE L.REV. 128 (1964).

In analyzing the magnitude of interest required, it should be noted that both *Dick* and *Clay* dealt with the limitations, statutory or contractual, to be applied to insurance contracts, an issue which could be termed "procedural," in comparison to "substantive" intrusion by Indiana in regulating tender offers beyond its border. To the extent such a distinction is tenable, tender offer regulation would tend to have a greater disruptive impact on corporate affairs than would the application of the statute of limitations of the insured's residence upon the insurance industry. *See* Hanna v. Plumer, 380 U.S. 460, 475 (1965) (concurring opinion by Harlan, J., relating the distinction between "procedural" and "substantive" to whether the choice of rule would "affect . . . primary decisions respecting human conduct. . . .").

[74] The RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) generally follows an interest approach by requiring that the state have a reasonable relationship to the occurrence. *See Id.* §9. However, the RESTATEMENT provides that as to matters peculiar to corporations, the law of the state of incorporation should apply except in the unusual case where another state "has a more significant relationship." *Id.* § 302(2). *See also, Id.* § 302, Illustration 2 (the law of state *Y*, the state of incorporation, should apply where 20% of

In determining if Indiana has an interest sufficient for purposes of the due process clause, it is necessary to look to the state's purpose in enacting the legislation. If protection of industry and employment within the state is a valid purpose, then Indiana should have a sufficient interest to achieve this purpose where the target company is incorporated, has its principal place of business, or has a substantial portion of its assets within the state.[75] Assuming, however, that the commerce clause overrides the above purpose,[76] it is then necessary to determine whether shareholder protection is a sufficient interest to justify Indiana's regulation of tender offers. It must be noted that Indiana does not attempt to protect Indiana shareholders by regulating all tender offers made within the state. Indiana regulates only those offers where the target is incorporated, has its principal place of business, or a substantial portion of its total assets within the state. Indiana is protecting all shareholders of businesses which are within the definition of a "target company."[77] It is thus necessary to examine the state's interest in the target company.

Corporations Incorporated in Indiana:

The Internal Affairs Argument

Indiana can be said to be protecting shareholders by regulating the manner in which an Indiana corporation, or a corporation having its principal place of business or a substantial portion of its total assets within the state, may be taken over. Indiana's power to regulate the course of such takeovers would seem to be consistent with the state's power to regulate the internal affairs of domestic corporations,[78] for

the assets and shareholders are within it, 20% of the assets and shareholders are in state *Z*, and 40% of the assets and shareholders in state *X* where states *Y* and *Z* have the same policy concerning the internal affair.) The RESTATEMENT contemplates that even where the organic structure or internal administration of the corporation is involved, a state other than that of incorporation may apply its law if its interest is clearly superior to the interest of all other states. *Id.* § 302, comment g.

It thus appears that the RESTATEMENT requires a greater interest where the matter is distinct to a corporation than does the due process clause, which appears to require only an interest. While Indiana's interest in regulating the takeover of foreign target corporations might arguably be valid, it would not appear to be more significant than the interest of the state of incorporation.

[75] Indiana would appear to have a valid interest in regulating tender offers for the protection of all shareholders of businesses incorporated in Indiana as a matter under the control of the state's corporate law.

[76] *See* text accompanying notes 152-57 *infra.*

[77] IND. CODE § 23-2-3-1(j) (Burns Supp. 1976). The Act exempts certain target corporations. *See* note 37 *supra.*

[78] *See* notes 49, 59 *supra.*

where corporate internal affairs[79] are involved, to some uncertain extent there is a constitutional requirement that the law of the state of incorporation be applied.[80] The commentators argue that the full faith and credit clause requires that where corporate internal affairs are involved a state, other than the incorporating state, must have a greater interest to apply its own law.[81]

Before examining the impact of full faith and credit in this area, the question of whether a tender offer can properly be characterized as an internal affair of the target corporation must be addressed. One commentator, while conceding that corporate action is missing, that the formal structure of the target remains unchanged, and that the bid involves diverse rather than uniform decisions of shareholders to tender, nevertheless argues that tender offers are internal affairs transactions.[82] That commentator states that under common law the success of the bid will create a fiduciary relationship between the offeror, the

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[79] The term "internal affairs" in this discussion refers to considerations weighed in determining the proper choice of law, rather than whether a foreign court has jurisdiction. The modern view is that the principles of forum non conveniens govern whether a court will accept jurisdiction over a foreign corporation. *Compare* Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947)*with* Williams v. Green Bay & W.R.R., 326 U.S. 549 (1946). *See also* Latty, *Pseudo-Foreign Corporations*, 65 YALE L. J. 137, 144 (1955); Note, *Forum Non Conveniens As a Substitute for the Internal Affairs Rule*, 58 COLUM. L. REV. 234 (1958); Note, *Jurisdiction of Actions Involving Internal Affairs of Foreign Corporation*, 42 IOWA L. REV. 90 (1956); Note, *Forum Non Conveniens and the "Internal Affairs" of a Foreign Corporation*, 33 COLUM. L. REV. 492 (1933). The use of the internal affairs doctrine as a determinent in choice of law rests upon the belief that uniformity, corporate efficiency, predictability, ease of application, and equality of shareholders' rights are advanced by having the laws of the state of incorporation govern such matters. *See* Reese & Kaufman, *supra* note 49 at 1125-27.

[80] Shipman, *supra* note 3, at 742, relying upon the fraternal benefit association case, Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947), and upon cases enforcing shareholder assessments in foreign jurisdictions, *e.g.*, Broderick v. Rosner, 294 U.S. 629, 643 (1935), *citing* Converse v. Hamilton, 224 U.S. 243, 260 (1912). But support for the proposition that the internal affairs rule is constitutionally compelled is weak. In Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964), the Court limited *Wolfe* to its peculiar facts and refused to extend the fraternal benefit line of cases to corporations in general. *Broderick* is likewise distinguishable. *See* Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 342-43 (1952). Chief Justice Stone, in analyzing a similar factual situation, found that Georgia had an interest in determining whether its citizens had assented to the membership obligations imposed by New York law, Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 210-11 (1941). In view of the Court's interest approach, it is doubtful whether Justice Brandeis' mechanical approach in *Broderick* would be followed today. *See* Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 75 (1958); Reese & Kaufman, *supra* note 49, at 1139 (supporting Shipman's position); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 490-91 (1959).

[81] *See*, Shipman, *supra* note 3, at 742; Reese & Kaufman, *supra* note 49, at 1129-32. Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 477.

[82] Shipman, *supra* note 3, at 743-44.

corporation, and its security holders.[83] Internal affairs are defined as those matters involving the relations *inter se* of the corporation, its shareholders, directors, and officers.[84] Proxy solicitations and mergers are considered as within the scope of this definition.[85] A successful tender offer shifts control and will usually cause a change in either management or its policies.[86] Thus, a takeover bid is functionally similar to a proxy solicitation,[87] and where the tendering shareholder receives securities from the offeror corporation, the result is very similar to a merger, a classic internal affairs matter.[88] This approach concentrates upon what is the actual purpose and effect of the purchase of securities pursuant to a tender offer. The commentator thus comes to the conclusion that the operative effect of a tender offer affects the relations *inter se* of the corporation, its shareholders, directors, and officers in a way sufficiently analogous to classical internal affairs matters to justify the state of incorporation's regulation of the offer.

It may be argued that tender offers are not internal affairs transactions because that doctrine can only apply to existing intracorporate relationships.[89] The argument is that since there exists no legal relationship between the target and the offeror, who is only a potential shareholder, there is no existing intracorporate relationship, and as a result the internal affairs doctrine cannot apply.[90] This argument views tender offers as involving nothing more than a simple purchase and sales of securities.[91] However, that argument fails to consider the essence of the transaction which is the shift in corporate control. The argument is thus too formalistic, does not deal with the intention of the offeror, and ignores the premium being paid for corporate control.

Foreign and Pseudo Foreign Corporations

The question remains as to what interest Indiana has in protecting stockholders of foreign corporations with their principal place

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[83] *Id.* at 744.

[84] RESTATEMENT (SECOND) OF CONFLICT OF LAWS Chapter 13, Topic 5, Introductory Note (1971).

[85] *See* Shipman, *supra* note 3, at 743-44.

[86] *Id.*

[87] *Id.* at 744, 745. Shipman, *citing* to H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968), stated, "Congress, in passing the Williams Bill, found takeover bids functionally similar to proxy fights."

[88] *Id.* at 744.

[89] *Commerce Clause Limitations, supra* note 5, at 1154.

[90] *Id.*

[91] The argument has also been made that the determination of who may be a shareholder should be controlled by blue sky legislation which is based on territorial jurisdiction. *See Commerce Clause Limitations, supra* note 5, at 1154.

of business or a substantial portion of their assets within the state. Indiana would not appear to have an interest in regulating the internal affairs of foreign corporations.[92] The interest in regulating tender offers would then have to be the protection of Indiana shareholders by requiring the protection of all shareholders through regulation of takeover bids for target corporations.[93] This interest may be invalid because it impinges upon the possible interests of other states in regulation,[94] and absent a finding that target companies are more likely to have Indiana shareholders, the interest is too attenuated for the due process clause.[95]

However, there are several cases which recognize the ability of foreign states to control the internal affairs of "pseudo-foreign"[96] corporations.[97] In *Western Airlines, Inc. v. Sobieski*,[98] a leading case concerning the regulation of "pseudo-foreign" corporations, Western, incorporated in Delaware, wished to change shareholders' cumulative voting rights to straight voting. Western's principal place of business

[92] A state has a limited degree of power to regulate the conduct of foreign corporations. It may not exclude foreign corporations engaged solely in interstate commerce. Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961). A state may exclude a corporation from intrastate commerce, South Carolina *ex rel.* Phoenix Mutual Life Ins. Co. v. McMaster 237 U.S. 63, 72 (1915), and thus its entry into the state may be subject to conditions, including regulation of dividend payments. International Ticket Scale Corp. v. United States, 165 F.2d 358 (2d Cir. 1948); German-American Coffee Company v. Diehl, 216 N.Y. 57, 109 N.E. 875 (1915) (Cardozo, J.). *See also*, Baraf, *The Foreign Corporation—A Problem in Choice-Of-Law Doctrine*, 33 BROOKLYN L. REV. 219, 224-34 (1967); Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 450-52 (1968). It would not appear however that Indiana is seeking to regulate on the basis of its power to control entry because, while the Act is based upon the state contact with the target, the state is regulating the offeror.

[93] *See* note 52 *supra* (stating the ineffectiveness of territorially based tender offers).

[94] Where only a "substantial portion of the total assets" are within Indiana, several states may have an interest in regulating the tender offer. The effect of the Act in this situation is to force Indiana law upon other interested states. This effect of requiring a subordination of another state's interest may violate full faith and credit. *Cf.*, Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 210-11 (1941).

[95] To determine whether a state has a sufficient interest, compare the factual situation in Home Ins. Co. v. Dick, 281 U.S. 397 (1930), *supra*, text accompanying notes 63-69 and Clay v. Sun Ins. Co., 377 U.S. 179 (1964), *supra*, text accompanying notes 70-72. To the Court in *Clay*, the application of the forum state's law appeared to be more "equitable" or "fair" because of the nature of the insurance policy and the insurers being licensed in the state. Thus, in effect, the due process test for legislative jurisdiction may be a "fairness" test as it is for personal jurisdiction. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1957).

[96] A pseudo-foreign corporation is a corporation incorporated outside of the forum state but having its principal place of business and its major activities centered in the forum state. *See*, Latty, *Pseudo-Foreign Corporations*, 65 YALE L. J. 137 (1955).

[97] Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317 (5th Cir. 1959), *cert. denied*, 361 U.S. 885 (1959); Western Airlines, Inc., v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961); State *ex rel.* Weede v. Bechtel, 239 Iowa 1298, 31 N.W.2d 853 (1948), *cert. denied*, Bethtel v. Thatcher, 337 U.S. 918 (1949); Toklan Royalty Corp. v. Tiffany, 193 Okl. 120, 141 P.2d 571 (1943).

[98] 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961).

was California.[99] The California Corporations Commissioner found that the change in voting rights would constitute a "sale" or "exchange" under state securities law.[100] In reversing a lower court's decision adverse to the Commissioner, the appellate court wrote:

> [T]o achieve overall fair play and substantial justice, the fiction of Delaware residence should yield to the totality of California contacts so as to require, in addition to compliance with the Delaware law, the approval of the California Corporations Commissioner as a condition to eliminating the right of cumulative voting by the shareholders.[101]

California's power to regulate sales and exchanges of securities is based upon a territorial, blue sky approach.[102] To the extent that such contact comprises "localization" of the foreign corporation, so that uniform treatment as between locally incorporated companies and pseudo-foreign companies becomes desirable, then application of the law of the forum state is not merely a defensible, but a practical policy.[103] However, insofar as California goes beyond regulation of securities and regulates the internal affairs of Western, its jurisdiction is based upon Western's extensive contacts with California. *Western Airlines* is precedent for the use of a territorial regulatory system having an extraterritorial impact in an area which the controlling law has often been considered to be that of the state of incorporation.[104] The Indiana Act, of course, is extraterritorial in scope and bases its jurisdiction on either the activity or the incorporation of the target in the state. While the jurisdictional basis of the two situations are different, the effect of the *Western Airlines* case and the Act are similar because they both regulate matters which are arguably internal affairs of foreign corporations and do so on the basis of the corporation's activity within the state.

Full Faith and Credit Limitations

The question remains whether it is constitutionally required that the state have the dominant interest where it is not the state of incorporation and the organic structure or internal administration of the corporation is affected. The due process clause apparently requires only

[99] 191 Cal. App. 2d at 400, 12 Cal. Rptr. at 720. California residents held over 30% of the company's outstanding shares, *id.* at 402. About 34% of Western's passenger traffic was completely within the state and 55% either originated or terminated there, and approximately 75% of its tangible property was in California. Reese & Kaufman, *supra* note 49, at 1119.

[100] 191 Cal. App. 2d at 403, 12 Cal. Rptr. at 721-22.

[101] *Id.*

[102] Shipman, *supra* note 3, at 753. *See* note 51 *supra.*

[103] Latty, *Pseudo-Foreign Corporations*, 65 YALE L. J. 137, 165-66 (1955).

[104] *See* Reese & Kaufman, *supra* note 49, at 1125-27.

an interest.[105] The full faith and credit clause, however, also imposes limitations upon the state in the application of its own law.

In *John Hancock Mutual Life Insurance Co. v. Yates*[106] the insurance policy was "applied for, issued and delivered, in New York" one month prior to the policy holder's death.[107] The widow beneficiary after the death of her husband moved to Georgia and filed suit.[108] In *Yates*, the Supreme Court compared the situation to that in *Dick* and held that Georgia must give full faith and credit to New York law when Georgia had no contacts with the controversy to which its law could apply.[109] It would thus appear that, at least in some circumstances, the requirements of due process and full faith and credit are coextensive. If the two clauses are coextensive in regulating tender offers, the due process tests discussed above should provide sufficient guidance.

However, circumstances exist where the purpose behind the full faith and credit clause might cause it to be a further limitation than the due process clause. It has been stated that the purpose of the full faith and credit clause is "to confer some of the benefits of a unified nation while at the same time safeguarding the essential interests and powers of the states.[110] Thus as one commentator stated:

> [T]o determine whether the full faith and credit clause places a further limitation on a state's choice of law than is imposed by the due process clause, the interest of the state which gives it the reasonable contact essential under due process is to be weighed against the need for national uniformity . . . .[111]

The Supreme Court has made it clear that the demand of full faith and credit is not absolute and does not compel a state to subordinate its public policy to the statutory law of another state.[112] Furthermore,

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105 *See* Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964).

106 299 U.S. 178 (1936).

107 *Id.* at 179.

108 The action began in City Court of Carrollton. The defendant appealed to the Court of Appeals of Georgia, Division 2 where the judgment was affirmed. 50 Ga. App. 713, 179 S.E. 239 (1935). The Supreme Court of Georgia on *certiorari* from Court of Appeals affirmed. 182 Ga. 213; 185 S.E. 268 (1936). The Supreme Court granted *certiorari* 299 U.S. 525 (1936).

109 299 U.S. 178, 182.

110 Reese & Kaufman, *supra* note 49, at 1130. *See* Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 477 (1959).

111 Weintraub, *supra* note 110, at 477. *See* Reese & Kaufman, *supra* note 49, at 1132.

112 *See* Crider v. Zurich Ins. Co., 380 U.S. 39 (1965); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Gaillard v. Field, 381 F.2d (10th Cir. 1967) (Oklahoma need not render full faith and credit to California buyers of gas and oil lease options, so as to void sale under California securities law, where Oklahoma does not recognize such interests as securities and excludes them

the Court has never decided whether full faith and credit demands that the law of the state of incorporation apply to corporate internal affairs matters.[113] Despite the Court's failure to so hold, at least two commentators feel that the need for national uniformity in dealing with corporate internal affairs outweighs the states' interests, so that full faith and credit demands that only the one law should apply.[114] A state, to apply its own law, should have a more serious interest and closer connection to the corporation than is necessary for due process.[115]

It appears that if the Supreme Court should follow the urging of some commentators, the full faith and credit clause would require that for a state other than the state of incorporation to apply its law, it should have the dominant interest in regulation or at least a very significant relationship to the corporation.[116] The commentators' view of full faith and credit in the corporate internal affairs situation would limit the power of states to apply their law to the internal affairs of foreign corporations within their states. The question raised by the Business Takeover Act is whether Indiana, if it based its interest for legislative jurisdiction on the internal affairs doctrine, would also have the power to regulate the internal affairs of corporations not incorporated in Indiana without violating full faith and credit. It appears that the only constitutionally commanded restriction is that the state have an interest.[117] Of course, the interest must be valid, which includes validity under the commerce clause. It is difficult to find an interest in foreign corporations where the only purpose of the statute and the state's only interest is shareholder protection.

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from its securities act). *Contra*, Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 607-10, 625 (1947). *But see* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 183 (1964) (characterizing Wolfe as "a highly specialized decision dealing with unique facts. . . .").

113 A. EHRENZWEIG, A TREATISE ON THE CONFLICTS OF LAWS, 415 (1962). Ehrenzweig believes that a state will not violate full faith and credit by refusing to apply the law of the state of incorporation until the Supreme Court holds that the law of incorporation must be so applied.

114 Reese & Kaufman, *supra* note 49, at 1132; R. LEFLAR, AMERICAN CONFLICTS LAW, 129-30 (1968). *But see*, Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 447 (1968) (a state with a substantial and valid interest could apply its own law to a foreign corporation even if full faith and credit is expanded to apply to the statute of the state of incorporation).

115 Reese & Kaufman, *supra* note 49, at 1139. The authors state that "[A] state in which a foreign corporation does only a small fraction of its business probably would violate full faith and credit if it applied its own law rather than that of the state of incorporation to hold the payment of a dividend [usually an "internal affair"] illegal." *Id.*

116 *See* notes 114, 115 *supra* and text accompanying. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971). *See also* text accompanying note 75 *supra.*

117 *See* notes 73, 112 *supra* and text accompanying.

Indiana's sister states will not be compelled to apply the Indiana Act if they have an interest sufficient to justify applying their own law. Nevertheless, a state with an interest may choose not to apply its own law if another choice would better promote the relevant policy considerations.[118] Where the target is not incorporated within the state, it is likely that other states will have interests. Thus, it may be that the Indiana Act will not be applied by its sister states when the target has its principal place of business or a substantial portion of its assets in Indiana.[119] To the extent that Indiana law is not applied by its sister states, the effectiveness of the Act in furthering the state interest will be decreased.

COMMERCE CLAUSE

Enforcement of the Takeover Act may constitute an impermissible burden on interstate commerce. The test to determine whether a state statute places an unconstitutional burden on interstate commerce was set out recently by the Supreme Court in *Pike v. Bruce Church, Inc.*,[120] in which the Court said that:

> Where the statute regulates even-handedly 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.[121]

This language and other case law suggest that the courts employ a three-stage analysis under the commerce clause. First it is inquired whether the ends of the state scheme are legitimate. Second it is determined whether the means chosen by the state are reasonably well adapted to effectuate its ends. Finally, the effectiveness of the regulation is balanced against the burden which it places on interstate commerce.[122]

[118] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); R. LEFLAR, AMERICAN CONFLICTS LAW 241-65 (1968). Leflar summarizes the list of considerations to: (A) Predictability of results; (B) Maintenance of interstate and international order; (C) Advancement of the judicial task; (D) Advancement of the forum's governmental interests; and (E) Application of the better rule of law. Indiana in determining whether to apply its own law should weigh these factors, and decline to enforce the Act where enforcement would not promote the above factors.

[119] THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971) would call for the application of the law of the state of incorporation unless Indiana had a more significant relationship than principal place of business or location of assets. It is unlikely that the foreign forum would apply Indiana law unless the target was a "pseudo-foreign" corporation within Indiana. *See id.* § 302, comment g.

[120] 397 U.S. 137 (1970).

[121] 397 U.S. at 142.

[122] South Carolina State Highway Dept. v. Barnwell Bros. Inc., 303 U.S. 177 (1938) sets out the first two stages. The court is to inquire "whether the state legislature . . . has acted within its province, and whether the means of regulation chosen are reasonably

A court should not look too closely at the reasonableness of the means chosen,[123] but in the balancing process it may undertake a fairly extensive examination of the burdens on interstate commerce and the local interest involved, as well as evaluating the effectiveness of the means chosen.[124] The Court has also indicated that the burdens on interstate commerce must be more than merely speculative in order to strike down a state act under the commerce clause.[125]

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adapted to the end sought." *Id.* at 190. *Barnwell* did not expand on the first stage, involving as it did a subject "peculiarly of local concern." *Id.* at 187. However, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) and Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) do provide examples of illegitimate state ends, *i.e.*, the securing of an economic advantage for one state at the expense of sister states. Foster-Fountain Packing Co. v. Haydel, 278 U.S. at 10; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. at 521-22. This kind of "Balkanization" is said to be what the commerce clause was drafted to prevent. *See* Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (concurring opinion of Mr. Justice Jackson); F. FRANKFURTER, THE COMMERCE CLAUSE 117 (1964) (epilogue by Mendelson). *See also* Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).

At the second stage, a danger exists that a court will usurp the legislative function by second guessing the choice of means, from among those available, that was made by the legislature. Accordingly, courts are not to require at this stage that the legislature have chosen the best means available for the effectuation of its ends. *See* South Carolina State Highway Dept. v. Barnwell Bros. Inc., 303 U.S. at 190-91; Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R., 393 U.S. 129, 238-39 (1968).

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959), and Pike v. Bruce Church, Inc., *supra*, all illustrate the balancing stage. In *Southern Pacific*, Chief Justice Stone indicated the Court's willingness to undertake the balancing process, saying:

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, . . . affords some protection from state legislation inimical to the national commerce, and that in some cases, where Congress has not acted, this Court and not the state legislature is under the commerce clause the final arbiter between competing demands of state and national interests.

325 U.S. at 769.

Southern Pacific, *Bibb*, and *Pike* also indicate that at this stage, the effectiveness of the means used in accomplishing the ends of the state becomes relevant. *See Southern Pacific*, 325 U.S. at 781-82 and *Bibb*, 359 U.S. 529-30, both weighing the actual protection provided to the local interest against the burden on interstate commerce. *See also Pike*, 397 U.S. at 142, indicating that the availability of more efficient or less burdensome means will affect the result.

See generally, Note, *Use of the Commerce Clause to Invalidate Anti-Phosphate Legislation: Will it Wash?*, 45 U. COLO. L. REV. 487 (1974), which suggests that, because of the possibilities inherent in the balancing stage for usurpation of a legislative function, the courts should either indulge a presumption of the legitimacy of the state act at this stage in the analysis, or abandon balancing altogether. *Id.* at 492. *Cf.* Mr. Justice Black's dissent in *Southern Pacific*, 325 U.S. at 784. Balancing may be less appropriate in cases where the legislation burdens local as well as foreign business, because at least some of the businesses being burdened will have political influence in the state's legislature. *See* Dunham, *Congress, the States and Commerce*, 8 J. PUB. L. 47, 58 (1959). That ought not to affect the analysis in this case; because Indiana is not a state with a heavy concentration of corporate wealth, the Takeover Act will probably have its primary impact on the citizens of other states.

[123] *See* note 122 *supra*.

[124] *Id.*

[125] "[S]tate laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment." Southern Pacific Co.

The Indiana Act is subject to challenge at all three stages of review. The Act contains no purpose clause,[126] and there is very little in the way of legislative history.[127] Its purpose, therefore, must be gleaned from an analysis of the provisions of the Act, and what they seem intended to accomplish.[128] Under the most favorable interpretation of the Indiana Act, it has as its purpose the protection of stockholders of the target corporation during tender offers.

Through its disclosure[129] and waiting period[130] provisions, the Takeover Act will provide offerees with information which the legislature has determined to be relevant to a decision whether or not to tender, and will also give shareholders the time needed to reach a decision. Information about the offeror is part of the disclosure that must be made.[131] And the offeror must disclose whatever plans it has for the target company should the tender offer succeed.[132] These plans may affect the value of shareholders' retained stock,[133] and the outlook for future dividends, information which is central to a decision whether to tender. And these plans will be of particular interest to local shareholders, who may be concerned about any relocation schemes which the offeror has in mind.

The Act also provides that the shareholder have adequate time to decide whether to tender. Before the advent of tender offer regulation, the typical offer was a fast moving, high pressure affair.[134] If more

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v. Arizona, 325 U.S. 761, 770 (1945), *quoting* Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 8 (1943).

[126] *See* IND. CODE § 23-2-3-1 *et seq.* (Burns Supp. 1976).

[127] Certain drafts of the Act as submitted to and changed by the legislature, proposed amendments, and a draftsman's memorandum are on file with the INDIANA LAW JOURNAL. There were no published hearings, committee reports, or floor debates.

[128] A purpose clause would only serve initially to focus attention even if it were present; it would not effectively shield an examination of the operative provisions of the Act. "One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose. It is open to him to show that in their practical operation its provisions directly burden or destroy interstate commerce." Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928). *See also* E.T. CRAWFORD, STATUTORY CONSTRUCTION 356 (1940). *Cf.* Carter v. Carter Coal Co., 298 U.S. 238, 288-89 (1936); F.R. DICKERSON, LEGISLATIVE DRAFTING, 107-08 (1954).

[129] IND. CODE § 23-2-3-2(c) (Burns Supp. 1976).

[130] IND. CODE § 23-2-3-2(b),(c) (Burns Supp. 1976).

[131] *See* note 16 *supra.*

[132] IND. CODE § 23-2-3-2(c)(3) (Burns Supp. 1976).

[133] In a successful tender offer, if more than the required number of shares are tendered, the pro rata takeup provisions of the Indiana Act, IND. CODE § 23-2-3-5(b) (Burns Supp. 1976) and the Williams Act, 15 U.S.C. § 78n (6) (1971) may result in making a significant number of shareholders into minority shareholders, who would be faced with the choice of either selling their stock at its appraised value or submitting to the control of the successful offeror.

[134] If you are a shareholder, you may suddenly be forced to decide whether or not to dispose of a portion of your investment portfolio. Whether to accept or reject

shares were tendered than the offeror wished to purchase, the shares would be taken on a first-come, first-served basis.[135] This meant that a shareholder who took the time to analyze the situation stood the risk of being passed over when shares were taken up. The waiting period prior to effectiveness of the offer and the withdrawal period will allow shareholders time to decide. And the provision for full pro rata takeup will relieve the pressure which has been generated in the past by first-come, first-served tender offers.

Shareholders will also wish to gauge the prospects for the success of the tender offer. Those shareholders favoring the offeror will wish to know the chances for success before deciding how actively they should aid the offer by tendering stock. Shareholders opposed to the offer will, depending on the likelihood of success, either hold their stock and thereby help to defeat the offer, or sell on the open market to avoid becoming minority shareholders.[136] And those shareholders who are interested in realizing a capital gain either by tendering their shares or by selling them on the open market as the price rises[137] will also want to know the chances for success of the offer. The provision of the Take-over Act which requires disclosure of the offeror's present holdings of the target's stock[138] will aid shareholders somewhat in making these determinations,[139] since a tender offer made by an offeror who has previously gained a substantial position in the target company is more likely to be successful.[140] The Act's advance disclosure and waiting period provisions may also provide greater information to the offerees, since the market will have greater time to react to the offer. Arbitra-

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> a tender is a decision vital to you as an investor; yet often it must be made hurriedly, under pressure, and without the bidder's full disclosure of all material facts.

Hayes & Taussig, *supra* note 5, at 135. These authors found that 30% of the tender offers that they studied lasted between 11 and 15 days. *Id.* at 141. *See also* Branson, *supra* note 5, at 740; Brudney, *A Note on Chilling Tender Solicitations*, 21 RUTGERS L. REV. 609, 638-39 (1967) [hereinafter cited as Brudney].

[135] *See* Brudney, *supra* note 134, at 639.

[136] *See* note 133 *supra*.

[137] Henry, *supra* note 5, describes how people buy stock at its market price so that they can realize a profit by tendering the same stock at the premium tender offer price. Their activities will raise the price of the stock, if they are buying.

[138] IND. CODE § 23-2-3-2(c)(4) (Burns Supp. 1976).

[139] Branson, *supra* note 5, at 745.

[140] Hayes & Taussig, note 5 *supra*, at 139. However, the 1970 amendments to the Williams Act may have the effect of minimizing any differences based on the offeror's pre-offer position in the target. Section 13(d), 15 U.S.C. § 78m(d) was amended to require the filing of a schedule 13D when a person becomes the owner of 5% or more of a class of securities of a corporation. So, most offerors will acquire just under 5% before making the offer. If an offer was for 51% of 100,000 shares, whether an offeror owned 2% (2,000) or 4.9% (4,900) of the target's shares would seem to make little difference. He would still have to acquire either 46,100 or 49,000 shares in order to be successful, and the extra 2,900 shares would be of little predictive value.

geurs will have had an opportunity to acquire large blocks of shares, and their activities will tend to indicate the offer's chances of success as viewed by highly sophisticated investors.[141]

Some benefits should also flow from the Commissioner's review of the fairness of the offer.[142] In both cash and exchange offers, the Commissioner may review the ability of the offeror to pay for whatever shares are eventually taken up and may estimate what the offeror's financial condition will be after payment has been made.[143] This will be of value to the potential minority shareholders in a cash offer, and to all shareholders in an exchange offer.[144]

Critics of the Act, and similar legislation has attracted its share,[145] will characterize the purpose of the Act not as shareholder protection, but as the preservation of local industry, jobs and tax revenues by insulating incumbent management from attack by tender offer.[146] The

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141 *See* Henry, *supra* note 5, at 470. It could be, however, that the average investor would not know how to interpret the price movements discussed in this article, and so will be unable to use the information. *Cf. Commerce Clause Limitations, supra* note 5, at 1151, suggesting that advance disclosure will cause market disruptions which could result in suspension of trading in the target's stock. The author relies on a New York Stock Exchange review of the Ohio Act, OHIO CODE ANN. § 1707.041 *et seq.* (1975 Supp.), when it was before the Ohio legislature. The review alleged that the bill's twenty-day advance disclosure section would create difficult conditions in the market which could result in a temporary suspension of trading. 1 BNA SEC. REG. & L. RPT. A-12 (1969). The N.Y.S.E. asked for an exemption for N.Y.S.E.-listed corporations from the provisions of the Ohio act. *Id.* at A-11.

142 IND. CODE § 23-2-3-2(e), (f) (Burns Supp. 1976).

143 In an exchange offer by General Host for Armour Co., the Wisconsin Commissioner of Securities denied registration of the securities proposed to be exchanged by General Host. The Commissioner found:

> 6. If the General Host exchange offer is successful, the amount of its 7% Subordinated Debentures and Warrants which would then be outstanding would be unreasonably large in proportion to the other classes of its securities, giving due consideration to all relevant factors.
>
> 7. The historical consolidated cash flow of General Host, computed giving due consideration to all relevant factors and adjusted for the issuance of its 7% Subordinated Debentures and the other securities mentioned above, does not appear sufficient to cover the interest requirements on the 7% Subordinated Debentures proposed to be offered to the Armour common stockholders.
>
> 8. By reason of the findings in paragraphs 6 and 7 above, it does not appear that the proposed General Host exchange offer is fair or equitable to or in the interests of the Armour common stockholders or debenture holders.

Release of Wisconsin Office of Commissioner of Securities, Feb. 10, 1969, [1954-71 Transfer Binder] CCH BLUE SKY L. RPTR. ¶ 70,805 (1969).

144 The Commissioner should not, however, review the adequacy of the consideration involved, because that should be a judgment to be made by the individual offerees. *See* notes 237-39 *infra* and text accompanying.

145 *See, e.g.*, ARANOW & EINHORN, *supra* note 5; Brudney, *supra* note 134; Hayes & Taussig, *supra* note 5; Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231; *Commerce Clause Limitations, supra* note 5.

146 "Thinly disguised as legislation for the protection of investors, these statutes cannot in any practical sense be viewed as anything more than attempts to protect incumbent management and local industry." ARANOW & EINHORN at 172. *See also id.* at 153.

provision exempting negotiated offers from the operation of the Act[147] evidences such a purpose. Shareholders of companies which negotiate tender offers will be left without the protection of the Act. The implication is that the Indiana legislature was not at all interested in protecting shareholders, but merely in setting up a procedural labyrinth to be negotiated by a hostile tender offeror.[148] A more favorable inference is that the legislature believed that investors would be adequately protected in negotiated tender offers by the fiduciary responsibilities of management and other restrictions on their actions.[149] Such a facially valid legislative judgment should not be open to court challenge.[150] The courts should not require that states adopt the most perfect means available to accomplish the statutory purpose.[151]

If it were found that the purpose of the Act was to insulate management of local industry from attack by tender offer, the Act may then be held to violate the commerce clause. In *Pike v. Bruce Church, Inc.*,[152] the Supreme Court said:

> [T]he court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.[153]

The issue here is whether erecting a barrier against attacks on local management has the unconstitutional effect of "requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." Certainly in *Pike*[154] this was the effect of the

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"The ultimate adverse effect of these statutes may be to prohibit tender offers . . . ." *Commerce Clause Limitations, supra* note 5, at 1133.

147 IND. CODE § 23-2-3-1(i)(5) (Burns Supp. 1976). This provision was not in the original bill as introduced in the Indiana Senate, but was added while the bill was in committee. *See* Senate Bill 188, introduced 1-7-75, and same, as reported out of committee on 2-27-75, on file with the INDIANA LAW JOURNAL.

148 Timing is said to be crucial to the success of a tender offer, and the Act severely disrupts an offer's timing. Timing is important because an offeror who can surprise target management has a few days in which to obtain tenders before management can react with any defensive strategies. With advance notice and extended withdrawal, target management will have time to plan ways to defeat the offer. *See* the discussion of defensive tactics at notes 162-170 *infra* and text accompanying. If enough time is given to target management, it may be able to block the offer before any shares have been tendered. *See* ARANOW & EINHORN *supra* note 5, at 19; Hayes & Taussig, supra note 5, at 139; Branson, *supra note* 5 at 725-26; Bromberg, *supra* note 3, at 651; *Commerce Clause Limitations, supra* note 5, at 1134-36.

149 *See* Shipman, *supra* note 3, at 729.

150 *See* note 123 *supra* and text accompanying.

151 *See* notes 122-24 *supra* and text accompanying.

152 397 U.S. 137 (1970).

153 397 U.S. at 145.

154 *See id.* at 140, 145. *See also* Toomer v. Witsell, 334 U.S. 385 (1948). In that case a South Carolina statute required that shrimp boats fishing in the state's territorial waters

state acts under challenge. The state had decreed that certain operations must be done within its borders.[155] The Indiana regulations may discourage the making of some tender offers and impede the success of still others. Indeed, some offerors might plan to move assets or operations outside the state, while others will purchase, maintain, and profit from continued operation of going concerns within the state. The effect of requiring that business operations stay in the state is both too remote and too speculative, especially when compared with *Pike* and similar cases,[156] to justify the conclusion that the Act puts an unconstitutional burden on interstate commerce.[157]

Tender offers have been defended as a means by which an entrenched but inefficient management can be replaced or prodded into effective leadership.[158] However this theory should not rise to a constitutional argument.[159] The commerce clause mandates that trade among

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unload their catch in South Carolina. *Id.* at 391. This was held to impose an unconstitutional burden on interstate commerce. *Id.* at 406.

[155] 397 U.S. at 138.

[156] *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); H.P. Hood & Sons, Inc., v. DuMond, 336 U.S. 525 (1949); Toomer v. Witsell, 334 U.S. 385 (1948).

[157] *See* note 122 *supra*.

[158] S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967) [hereinafter cited as S. REP. 550]. The conclusion that target corporations are characterized by inefficient management is certainly open to challenge. "[I]t is a misconception to picture tender offers made solely in the context of bad management. Tender offers are also made in situations characterized by efficient management . . . ." Note, *Economic Realities of Cash Tender Offers*, 20 ME. L. REV. 237, 254 (1968), which surveyed the 18 tender offers made for New York Stock Exchange companies during the first six months of 1967. ARANOW & EINHORN, *supra* note 5, at 2, conclude that a relatively low price-earnings ratio is the most important factor is assessing a corporation's vulnerability to a tender offer. Other factors are declining earnings, excess liquidity, and concentrated share ownership. *Id.* at 4-6. However Hayes & Taussig, *supra* note 5, whose survey covered all tender offers for a ten year period, conclude that poor performance, declining dividends, and excess liquidity are the significant characteristics. *Id.* at 142. Compare the situation of B.F. Goodrich at the time Northwest Industries attempted a takeover of Goodrich. O'Hanlon, *Goodrich's Four-Ply Defense*, FORTUNE, July, 1969 at 110, gives a picturesque account.

[159] The assertion that tender offers promote efficient management because they primarily attack companies with inefficient management does not provide a ground for holding the Act unconstitutional under the commerce clause. It requires the postulate that the commerce clause prohibits the states from protecting inefficient management, and also presupposes a finding that tender offers are made for corporations with inefficient management. Pike v. Bruce Church Inc., 397 U.S. 137 (1970), was concerned with the state requiring that packing operations be performed within Arizona rather than California, which is not the same thing as protecting corporate managers from being replaced. *Compare* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) *with* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949). All of these cases involved a much more certain burden on the nation's commerce than may arise from insulating inefficient corporate managers. Furthermore, tender offers may be made for a number of reasons, as the draftsmen of the Williams Act were aware. "It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company." S. REP. 550, *supra* note 158, at 3. And, a company may have quite efficient management, yet be undervalued. It would be an appealing target for just that reason. *See* Note, *Economic Realities of Cash Tender Offers*, 20 ME. L. REV. 237, 254 (1968), con-

the states be unrestricted by local regulations serving relatively insignificant purposes;[160] however this does not mean that all businesses must be managed efficiently.[161]

There is a related and more substantial objection to the Indiana Act. The Act's provisions make tender offers more difficult and may therefore discourage the making of them. By restricting or eliminating this form of trading in the securities of subject corporations, the Act would impede interstate commerce. And if shareholder protection is the goal, the Act may in some ways be counterproductive, since it may destroy a potential market for the very shareholders it purports to protect.

It has been said that surprise is a major advantage in a successful tender offer.[162] The more quickly the tender offer opens and closes, the less time is available for target management to employ any of the many defenses that are available to it.[163] These defenses may include, among other things, communications with shareholders; persuading a third party, friendly to management, to make a competing tender offer; raising the possibility of or consummating a merger with a third party; acquiring a third party which will create antitrust problems for the offeror if the offer is successful; and engaging in dilatory litigation.[164] In general, the odds are on the side of target management already, and giving the target extra time to react, by use of a waiting period, or an extended withdrawal period, will make it virtually impossible to make

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cluding that bidders may be seeking to realize a profit by purchasing undervalued companies.

[160] *See* note 3 *supra* and text accompanying.

[161] *See* note 159 *supra.*

[162] ARANOW & EINHORN, *supra* note 5, at 161.

[163] Schmults & Kelly, *supra* note 5; Yoran, *Advance Defensive Tactics Against Takeover Bids*, 21 AM. J. COMP. L. 531 (1973) and Note, *Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers*, 21 STAN. L. REV. 1104 (1969) analyze the available tactics. A new one has recently appeared on the scene. In an attempt to discourage a tender offer by General Cable Corp., Microdot Inc. said that it would request shareholder authorization to liquidate. Wall St. Journal, Jan. 16, 1976, at 22, col. 1. (midwest ed.).

[164] Target management may also seek to enjoin the tender offer because of violations of the Indiana Act or the Williams Act. Indeed, as evidenced by the hearing provisions, IND. CODE § 23-2-3-2(f) (Burns Supp. 1976), the Act appears structured so that target management will enforce it. Some case law under the Williams Act has developed rather strict standards for injunctive relief, *e.g.* Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969); *but see* note 212 *infra.* These should be followed under the Indiana Act, with investor protection as the touchstone. Target management should not be able to block legitimate tender offers and thus deprive stockholders of this market for their shares by raising frivolous claims for injunctive relief. *See* Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations*, 50 IND. L.J. 114, 129-30 (1974); *cf.* discussion of the hearing process at notes 230-36 *infra* and text accompanying.

a successful offer.[165] Two commentators make the explicit point that the offeror must very carefully time the offer and maintain tight secrecy before the time to announce the offer.[166]

Beyond providing management with more time to defend against the offer, the Indiana Act enables the target to engage in delaying tactics through the complex and detailed disclosure which is required.[167] The target management will inevitably find fault with the offeror's attempts to comply with the Act,[168] and on that basis seek an injunction against the tender offer, or persuade the Commissioner to engage in a detailed hearing before declaring the offer to be effective.[169] The chances for success of the offer are further decreased by reducing the amount of pressure that can be put on shareholders to tender. As has already been explained,[170] this is the effect of full pro rata takeup, an extended withdrawal period, and the waiting period. Moreover, the legal uncertainties which will be generated by the Act will tend to discourage offerors.

To summarize, there is at least strong theoretical argument that the Indiana Act will severely discourage the making of a tender offer for a subject corporation. If this argument is correct, the Act will burden interstate commerce in the stock of subject corporations. However, it may be difficult to establish the existence of this burden to the satisfaction of constitutional standards.[171] There are few empirical data to support the theory that a statute of this sort will discourage and impede tender offers. Yet the commentators seem to be in agreement that this will be the effect,[172] and the Act was drafted after much of this commentary had been digested by the securities bar.[173]

Assuming that the Act does impose a burden on interstate commerce, that is not the end of the analysis. The burdensome provisions

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[165] *See* Hayes & Taussig, *supra* note 5, at 139; *Commerce Clause Limitations, supra* note 5, at 1136.

[166] Hayes & Taussig, *supra* note 5, at 139.

[167] *See* note 16 *supra.*

[168] *See* Note, *The Courts and the Williams Act: Try a Little Tenderness,* 48 N.Y.U. L. REV. 991 (1973).

[169] *See* note 18 *supra.*

[170] *See* notes 134-35 *supra* and text accompanying.

[171] *See* note 125 *supra* and text accompanying. For a discussion of the problems of proof of such legislative facts, and a suggestion that expert testimony at trial be relied on to help answer questions like how much a regulation will burden interstate commerce, *see* Karst, *Legislative Facts in Constitutional Litigation,* 1960 SUPREME COURT REVIEW 75, 99-109.

[172] *See, e.g.,* ARANOW & EINHORN, *supra* note 5, at 265; Hayes & Taussig, *supra* note 5, at 145; Sommer, *supra* note 3, at 682; *Commerce Clause Limitations, supra* note 5, at 1136.

[173] The Act was drafted in the spring of 1975. Most of the commentary listed in note 5 had been published by then.

of the Act are the very provisions that will benefit shareholders of subject corporations.[174] The Indiana legislature may well have thought that this burden was worth the benefit[175] of providing shareholders with the opportunity to make rational and deliberate decisions regarding the future of their investment.[176] Moreover, some of the defensive tactics that target management may now have time to employ will also benefit shareholders.[177] A tender offer may prod management into declaring a dividend. Defensive mergers and competing offers, which management may try to arrange, will provide shareholders with additional options in disposing of their stock. The objectionable features of the Act are therefore incidents of what may operate as a scheme of investor protection.

As in so many areas of the law, balancing is necessary. As the Act stands now, the scale appears to tip toward an impermissible burden. If indeed a chilling effect on interstate commerce is present, the shareholder benefits to be gained from the legislation will be severely reduced. If a tender offer is never made, there is no need for management to present shareholders with alternatives in the form of merger proposals or competing tender offers. There is also no spur to declare greater dividends. If a tender offer will never be made, shareholders will not have the opportunity to use the time provided to pass on its virtues and deficiencies. With shareholder benefits thus rendered meaningless, any burden on commerce would be unreasonable, and under prevailing commerce clause doctrine, unconstitutional.

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[174] Indeed, to the extent that a tender offer's success depends on the pressures that offerors can place on stockholders, especially in a depressed market, tender offers are inhibited precisely because the shareholder is relieved of that pressure by the state. *See* Smallwood v. Pearl Brewing Co., 489 F.2d 579, 597 (5th Cir. 1974).

[175] *See* note 122 *supra* and text accompanying.

[176] The District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was "pure speculaion."

Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R., 393 U.S. 129, 138-39 (1968).

[177] Schmults & Kelly, *supra* note 5; Note, *Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers*, 21 STAN. L. REV. 1104, 1127-28 (1969). Those which do not serve the interests of shareholders should be prohibited during the course of the offer. The Commissioner should have the power to do this under the antifraud and antimanipulation sections of the Act. The British have adopted this approach, prohibiting any action by the target which would tend to frustrate a bona fide tender offer. Branson, *supra* note 5, at 732. For discussion of the fiduciary obligations which target management owes to the shareholders during a tender offer, *see* Krasik, *Tender Offers: The Target Company's Duty of Disclosure*, 25 BUS. LAW. 455 (1969) and Yoran, *Advance Defensive Tactics Against Takeover Bids*, 21 AM. J. OF COMP. L. 531 (1973).

This is not to say that the Act should be abandoned. It may be possible to amend or administer it in such a way that it will not unduly discourage bona fide tender offers. The primary objection to the Act is the added opportunity which it provides to target management to defend against the tender offer. Since this results primarily from the advance notice and waiting period provided by the Act, a shortening of the waiting period would reduce this opportunity. Advance notice might still be of value to shareholders, because it would provide a period during which they can analyze the situation and would not be able to tender. A period of five to seven days may be appropriate. This could allow target management itself to communicate with shareholders, but may not be long enough for it to employ some of the more complex defensive strategies which require dealings with third parties. Another method could be to limit the defensive tactics that could be used by management to those in which the benefits to shareholders outweigh the impeding effect on the tender offer. This would be consistent with a scheme of investor protection, and would bolster the case for the Act's validity. An example of a defensive tactic that would not pass this test would be the modification of existing contracts with suppliers, customers, or creditors, so that in the event of a successful tender offer, contracts would be cancelled and loans accelerated.[178] Another example might be for management to issue new stock and place it in friendly hands in order to dilute the offeror's strength.[179] Application of this principle to other defensive tactics by target management would be an extension of existing law, but it would not be without precedent.[180] In

[178] Note, *Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers*, 21 STAN. L. REV. 1104, 1109 (1969), speaking of contractual obstacles, concludes that blatant attempts by management to secure its incumbency are a violation of its fiduciary duty to shareholders.

[179] This can be done by issuing new stock and placing it in friendly hands, by exercising options if friendly people hold substantial options, and by converting other convertible securities to the class for which the tender offer is made. Delaware has disapproved of tactics like these when they are obviously engaged in for the purpose of defeating a tender offer. In Condec Corp. v. Lunkenheimer Co., 230 A.2d 769 (Del. Ct. of Chancery, 1967), after plaintiff had purchased slightly over 50% of defendant's shares pursuant to a tender offer, defendant issued 75,000 previously authorized shares and executed an agreement to place them in friendly hands. The court concluded that, despite defendant's justifications for the action, its primary purpose in issuing the stock was to prevent control from passing to plaintiff. The court characterized this as depriving plaintiff of its right to assert voting control "by what is virtually a corporate legerdemain," and ordered the 75,000 shares cancelled. 230 A.2d at 777.

[180] *See* discussion of Condec Corp. v. Lunkenheimer Co., 230 A.2d 769 (Del. Ct. of Chancery, 1967) in note 179 *supra*. Tender offer statutes recently enacted in Idaho, South Dakota and Utah all require that the target company make a shareholder list available to the offeror. IDAHO CODE § 30-1505(3) (Cum. Supp. 1976); S.D. COMPILED LAWS ANN. § 47-32-12(3) (Cum. Supp. 1976); 1976 UTAH LAWS, S. 10, § 7(6), reported at [1976] BLUE SKY L. REP. (CCH) ¶ 47,333.

Britain, where the tender offer was employed before it took hold in this country, management is prohibited from engaging in any tactics during the course of the offer which would frustrate a bona fide tender offer.[181]

It is, of course, desirable that a tender offer be decided on its merits rather than on the relative abilities of the antagonists to manipulate the shareholders. It may be possible for the Commissioner to adopt some rules along those lines, pursuant to the rulemaking power which the Act vests in the Commissioner. However, this would be a very drastic change in the present structure of the Act. With the exception of proscribing tactics that border on more traditional notions of fraud or manipulation, it is doubtful that the Commissioner could engage in such amendment by executive fiat. If this cannot be done, the Act should be amended to allow rules controlling defensive tactics, and neutralizing much of the advantage that the Act now provides target management through its advance disclosure, waiting period, and extended withdrawal period provisions. Rules of the sort proposed would restore the balance between target management and tender offeror to the benefit of the shareholders, and would meet some of the constitutional objections to which the Act is subject.

PREEMPTION

The Indiana Act's regulation of tenders for local companies may be preempted by the force of the Williams Act, which regulates tender offers on the federal level. The supremacy clause invalidates any state law or state action which interferes with or obstructs the exercise of federal power,[182] thereby permitting the federal government to effectuate national policy pursuant to the Constitution.[183] The traditional test of preemption, in the absence of specific congressional provision, was established in *Hines v. Davidowitz*[184] and *Rice v. Sante Fe Elevator Corp.*,[185] and reaffirmed by the Court in *City of Burbank v. Lockheed Air Terminal Inc.*[186] The test, very simply stated, is whether Congress intended to preempt state law in passing the legislation. That intent may be evidenced by a congressional scheme of regulation so pervasive that it is reasonable to infer that Congress left no room for the states to supplement it; or by a federal interest in the field so dominant that the

[181] Branson, *supra* note 5, at 716, 732.

[182] *See* Swift & Co. v. Wickham, 382 U.S. 111, 120 (1965); Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896).

[183] *See* Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239-40 (1967); Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 210-11 (1824).

[184] 312 U.S. 52 (1941).

[185] 331 U.S. 218 (1947).

[186] 411 U.S. 624 (1973).

states are precluded from enforcing laws on the same subject; or by a conflict between the goals sought to be achieved by Congress and the effects of the state statute or regulation.[187]

Preemption of state law by a federal statute is a serious legislative decision not lightly to be presumed. In *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware,*[188] the question was the possible preemption of a state act by a rule adopted, pursuant to the 1934 Act, by the New York Stock Exchange. The Court held that preemption analysis was to be tempered by an attempt, whenever possible, to reconcile the two statutes.[189] There should be no preemption absent persuasive reasons for it,[190] and a conflicting law should be preempted only to the extent necessary to protect the aims of the federal legislation.[191]

The Williams Act is a part of the 1934 Act,[192] which contains an explicit non-preemption provision, section 28(a), reading in part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.[193]

This section in itself may dispose of the first two possible grounds for preemption under the Williams Act—a pervasive federal scheme and a dominant federal interest.[194] In this section Congress made clear that the scheme of regulation enacted was not so pervasive that the states could not also act in the area. Congress also recognized that the federal interest in securities regulation was not so dominant that the states were to be excluded.[195]

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[187] *Id.* at 633. It should always be possible to comply with both the Indiana Act and the Williams Act, since both Acts merely prescribe minimums, and compliance with the stricter of the two will automatically mean compliance with the other. *See,* discussion of timing, note 17 *supra* and text accompanying; withdrawal rights, note 20 *supra* and text accompanying; disclosure, note 16 *supra* and text accompanying; and pro rata takeup, note 21 *supra* and text accompanying.

[188] 414 U.S. 117 (1973).

[189] 414 U.S. at 127.

[190] *Id.* at 139.

[191] *Id.* at 127.

[192] *See* note 5 *supra* (The 1934 Act); note 42 *supra* (The Williams Act).

[193] 15 U.S.C. § 78bb(a) (1970).

[194] *See* Note, *SEC Rulemaking Authority and the Protection of Investors: A Comment on the Proposed "Going Private" Rules,* 51 IND. L.J. 433, 441 n. 44 (1976). However, it has been said that this type of saving clause is often given minimal effect by the Supreme Court. Note, *Preemption as a Preferential Ground: A New Canon of Construction,* 12 STAN. L. REV. 208, 213-14 (1959) [hereinafter cited as *Preemption as a Preferential Ground*].

[195] Some have argued that § 28(a) of the Securities Exchange Act in practice provides for preemption under the qualifying clause, "insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." *See Commerce Clause Limitations, supra* note 5, at 1133. However, in this context, Congress may well have in-

Even if section 28(a) is disregarded, a pervasive scheme of national regulation and a dominant federal interest, the first two grounds of preemption, are probably not present in the case of tender offer regulation. *Burbank*[196] and *Pennsylvania v. Nelson*[197] offer examples of the kind of pervasive federal scheme that preempts state action of any sort, since local regulation could only interfere with the efficient administration of the federal program involved. In *Burbank*, there was potential interference with the FAA's delicate task of coordinating air traffic schedules.[198] And in *Pennsylvania v. Nelson*, the Court concluded that state action in the field of sedition control interfered with the work of the FBI and the CIA.[199] In fact, the FBI had requested that the states stay out of the area.[200] The SEC has taken no comparable action in the tender offer area.[201] *Burbank* and *Pennsylvania v. Nelson* suggest that preemption demands a federal scheme in which any state action would present the threat of interference with its workings.[202]

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tended a narrow interpretation of the word "conflict", such as impossibility of performance of both statutes. *Cf.* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 45 (1966); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). Compliance with the conflicting schemes of regulation in *Bibb* would have required remodeling of trucks while they were on an interstate run.

Congress must have been cognizant of the states' role in securities regulation, including refusal by some states to approve transactions permitted under federal law. *See, e.g.*, Release of Wisconsin Office of Commissioner of Securities, Feb. 10, 1969, [1954-71 Transfer Binder] CCH BLUE SKY LAW RPTR. ¶ 70,805 (1969), which denied registration to warrants and debentures proposed to be issued in an exchange offer. Congress may have meant for the states to continue to play that role, at least if state law could be observed without a violation of federal law.

An earlier draft of what was to become § 28(a) contained a much broader preemption section than did the final bill. S. 2693, 73d Cong., 2d Sess. § 26(a) (1934) provided:

> The rights and remedies provided by this Act shall be in addition to any and all other rights and remedies that may exist at law or in equity, except that this Act shall supersede such laws of any State as are inconsistent with the provisions or purposes of this Act and such laws of any State as provide for the supervision or regulation of the administration or conduct of business on any exchange which is licensed by the Commission.

6 J. ELLENBERGER & E. MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, 6435 (1973).

[196] 411 U.S. 624, 633 (1973).

[197] 350 U.S. 497 (1956).

[198] 411 U.S. at 627, 633-34, 639.

[199] 350 U.S. at 504.

[200] *Id.* at 506.

[201] *But see* note 217 *infra*, and the New York Stock Exchange statement on the Ohio Act at 1 BNA SEC. REG. & L. REP. A-11 to A-12 (1969), suggesting the need for an exemption for N.Y.S.E.-listed corporations. For a discussion of the role of administrative agency attitudes in preemption cases, see Note, *Federal Pre-emption of State Laws: The Effect of Regulatory Agency Attitudes on Judicial Decisionmaking*, 50 IND. L.J. 848 (1975).

[202] Although the Williams Act may be said to be complex, the test of a pervasive federal scheme should require more than mere complexity in the regulatory system. *See* New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973).

> We reject, to begin with, the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions. . . .The

Enforcement of the Indiana Act, however, need not conflict with the SEC's administration of the Williams Act.[203]

Nor is the federal interest in securities regulation so dominant that the states may not act. Historically, the states were the first to act in this field, stepping in to fill a need long before Congress had acted.[204] Given the traditional role of the states in this area, the federal interest in the field cannot be termed so dominant that the area is one of exclusive federal concern. Nor is the need for uniformity of regulation great enough to require preemption. Uniformity would provide convenience to some of the participants in a tender offer.[205] But convenience alone is not a decisive ground for preemption, and a dominant national interest in uniformity, in the abstract, seems to have declined in importance as a ground for preemption.[206]

Although there is no dominant federal interest or pervasive federal regulatory scheme which preempts the field, it must also be asked whether the Indiana Act frustrates or conflicts with the federal legislation. A state act which prevents the full accomplishment of the purposes of a valid congressional enactment may be preempted.[207] *Perez v. Campbell*[208] suggests the obvious, that the state and federal statutes must first be construed, to determine their purposes and effects, and then compared, to discover conflict or frustration of purpose.[209] Since the Williams Act is remedial legislation, it is to be construed broadly to

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> subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem.

Id. at 415 (citations omitted).

203 *See* note 187 *supra*.

204 The first Blue Sky law was passed by Kansas in 1911, Kan. L. 1911, c. 133, 22 years before Congress acted. *See* L. Loss & E. Cowett, Blue Sky Law 7 (1958).

205 An offeror who would have to file only one disclosure statement would certainly benefit. Target management would also benefit from uniformity because it would know what actions it could take across the country.

206 In Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117 (1973), the Court stressed the effect of the state act on the policy goals of the federal act, at the same time recognizing that Congress has shared securities regulation with the states. The Court said:

> Convenience in exchange management may be desirable, but it does not support a plea for uniform application when the rule to be applied is not necessary for the achievement of the national policy objectives reflected in the Act. Indeed, Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation.

Id. at 136-37.

207 Perez v. Campbell, 402 U.S. 637, 649 (1971); Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896). There is no conflict between the two acts in the sense of impossibility of performance of both acts. *See* note 187 *supra*.

208 402 U.S. 637 (1971).

209 402 U.S. at 649.

effect the purpose of Congress.[210] This premise, however, may propagate confusion. It does not mean that a broad purpose is to be imputed to the Williams Act simply because it is remedial legislation, but only that once the purpose is ascertained, it is to be given its full effect. The problem is to define the Act's purpose.

In *Rondeau v. Mosinee Paper Corp.*,[211] the Supreme Court said:

> The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party. . . . The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the "extreme care" which was taken "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."[212]

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[210] *See, e.g.*, Cattleman's Inv. Co. v. Fears, 343 F. Supp. 1248 (W.D. Okla. 1972) where that court stated that "[t]he [Williams] Act is . . . a remedial statute and should be interpreted liberally to carry out the legislative intent." *Id.* at 1251. The court went on to add:

> [It is a] familiar cannon [sic] of statutory construction that remedial legislation should be construed broadly to effectuate its purposes. The Securities Exchange Act quite clearly falls into the category of remedial legislation.

Id., *quoting* Tcherepnin, v. Knight, 389 U.S. 332, 336 (1967).

[211] 422 U.S. 49 (1975).

[212] 422 U.S. 49, 58-9 (1975). The Court went on to hold that failure to file a schedule 13D on time, in the absence of a takeover attempt and of any actual harm to shareholders, was not grounds for injunctive relief. *Id.* at 56, 65. It thus supported a line of cases in which circuit courts had said that the Williams Act was not intended to provide management with tools to support their incumbency. Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969); Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842 (2d Cir. 1970); Susquehanna Corp. v. Pan American Sulphur Co., 423 F.2d 1075 (5th Cir. 1970). *See also* General Time Corp. v. American Investors Fund, Inc., 283 F. Supp. 400 (S.D.N.Y. 1968). "The incumbent management has no protected interest in remaining in power." *Id.* at 403. *But cf.* Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir. 1974), which said that the immediate purpose of the Williams Act was to protect against corporate raiders and the time pressures tender offers exercised on offerees. *Id.* at 597. A contrary view is that recent cases have been granting injunctions for mere technical violations. Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. Rev. 941 (1973).

It should be noted that *Mosinee* dealt with a violation of 13D, which only requires disclosure after acquisition of 5% of a class of equity securities, 15 U.S.C. § 78m(d)(19). Unless the acquisition is a stepping stone for a tender offer, a tardy disclosure results in little if any harm.

> The short of the matter is that none of the evils to which the Williams Act was directed has occurred or is threatened in this case. Petitioner has not attempted to obtain control of respondent, either by a cash tender offer or any other device. Moreover, he has now filed a proper Schedule 13D, and there has been no suggestion that he will fail to comply with the Act's requirement . . . .

Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 59 (1975).

Thus, it may be said that the Williams Act had as its purpose the promotion of tender offers within certain guidelines, and that a state act which hinders tender offers to a greater extent conflicts with that purpose and is preempted.

In a footnote to the *Mosinee* opinion, the Court did come close to saying that Congress favored tender offers, saying:

> [T]he Report also recognized "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management."[213]

It should be recognized that the Court overstated the point of the Senate Report, which was, in fact, considerably more equivocal about the value of tender offers.[214] The legislative history does not establish that Congress favored tender offers;[215] nor does it show that Congress wished to promote them. Rather, Congress simply recognized the strong current of opinion favoring little or no tender offer regulation. The congressional view on tender offers is embodied in the Williams Act. Any ambiguities in the Report indicate that although Congress was aware of the conflicting attitudes toward tender offer regulation, it took no position on tender offers other than that taken in the Williams Act itself.[216] The Williams Act deals with disclosure and investor protection, and takes no positive steps to promote tender offers.[217] Before the Indiana Act is preempted on the ground that it discourages tender offers, there should

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[213] 422 U.S. at 58, n.8.

[214] It was strongly urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company.

S. REP. 550, *supra* note 158, at 3. The House Report was similar, omitting only the word "strongly." H.R. REP. No. 1711, 90th Cong., 1st Sess. 3 (1967), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2813.

[215] During floor debate on the Wililams Act, Sen. Javits expressed the thought that tender offers should not be condemned, because "Sometimes stockholders do very well because of tenders, especially competitive tenders." Sen. Williams assured him that there was no intent in the bill to prohibit tender offers and added, "I think it might encourage them." 113 CONG. REC. 24665 (1967). It would seem that if the bill's sponsor had wanted to promote tender offers, he would have been far less equivocal in his reply.

[216] *See* H.K. Porter Co., Inc. v. Nicholson File Co., 482 F.2d 421, 423 (1st Cir. 1973): "Little in the legislative history suggests that Congress was motivated by concern for the plight of frustrated tender offerors or, for that matter, the incumbent management of the target."

[217] "The takeover bid bill was designed to put cash tender offers and other block acquisitions on the same footing as proxy contests for control. It was not intended either to encourage or discourage such offers or acquisitions . . . ." SEC, 34TH ANNUAL REPORT 10 (1969). *See generally*, Note, *Federal Pre-emption of State Laws: The Effect of Regulatory Agency Attitudes on Judicial Decisionmaking*, 50 IND. L.J. 848 (1975).

be more evidence of a congressional purpose to promote tender offers than in fact there is.[218]

Although the Indiana Act need not be preempted because it may discourage tender offers, it may be preempted nonetheless if it disrupts a congressionally established balance of regulation.[219] There is fairly conclusive evidence that Congress intended in the Williams Act to preserve the balance of power between offeror and management.[220] The Senate Report accompanying the Williams Bill stated:

> The committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The bill is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.[221]

This may be taken to mean that Congress wished to establish affirmatively a then-existing balance of power. Another indication that Congress established a balance is the abandonment of a section of the original bill that would have required advance filing by the offeror.[222] This provision was seen as certain to impose an undesirable burden on potential offerors.[223] Any state law interfering with such a congressionally established balance between offeror and target would frustrate the purpose of Congress and would be preempted.

Given that the purpose of the Williams Act was to maintain a balance of power between the offeror and target companies, in order to avoid preemption the Indiana Act must not upset this congressionally adopted balance. However, since the Williams Act establishes only minimum standards,[224] there is no indication that a state may not more enthusiastically protect shareholders, so long as the congressionally

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[218] *See* note 215 *supra*.

[219] *See* note 187 *supra* and text accompanying. A conflict between the two statutes would exist if the effect of the state statute were to prevent the full effectuation of the purposes of the federal statute, which may include the maintenance of a balanced system of regulation in the area of tender offers. *See* Swift & Co. v. Wickham, 382 U.S. 111, 120 (1965); Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896); Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 210-11 (1824).

[220] A balance of this sort can be established without specific statutory language declaring that it has been struck. *Cf.* notes 216-17 *supra* and text accompanying.

[221] S. Rep. 550, *supra* note 158, at 3. When Sen. Williams first introduced the Williams Act, he remarked, "I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids." 113 Cong. Rec. 854 (1967).

[222] *See* Securities Law-Fraud, *supra* note 5, § 6.3; Cohen, *supra* note 5, at 152-53.

[223] *See* Securities Law-Fraud, *supra* note 5, § 6.3; Cohen, *supra* note 5, at 152-53.

[224] *See* discussion in text accompanying notes 16 (disclosure), 17 (advance notice), and 21 (pro rata acceptance), where it is shown that no impossibility of performance exists between the two acts.

created balance between the offeror and target is substantially preserved.[225] Moreover, although Congress recognized that broader disclosure would be a burden on the offeror, such disclosure may be justified by the benefits which will accrue to the shareholders.[226] It follows that the Indiana Act must be analyzed from two aspects. First, does the Indiana Act upset the balance created by the Williams Act? Second, if this balance is indeed upset, is the burden on the offeror justified by some substantial benefits which accrue to the shareholders?

One area of conflict between the two statutes creating a possible imbalance is in the review and enforcement process.[227] Since the SEC has merely a rulemaking function under the 1934 Act, the Williams Act must be judicially enforced.[228] Resort to judicial enforcement,[229]

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[225] While the bill may discourage tender offers . . . [by those] who are unwilling to expose themselves to the light of disclosure, the committee believes this is a small price to pay for adequate investor protection.

S. REP. No. 550, *supra* note 158, at 3-4.
The quotation above from the Senate report indicates that some burden on tender offers could nonetheless be justified by the protection the provisions give investors. Perhaps, then, many of the provisions of the Indiana Act which so severely burden the offeror can be justified on the basis of the benefits accruing to investors.

[226] *See* H.R. REP. No. 1711, 90th Cong., 1st Sess. 3, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2813; note 43, *supra.* Therefore, in addition to seeking to strike a balance between offeror and target, Congress was also willing to justify its regulation on the basis of investor protection. Consequently, even if the regulation by the state disrupts the congressionally created balance, the state statute might survive preemption analysis purely by its protection of investors. In other words, it may not be enough to simply say that the state regulation disrupts the balance in order to strike it down under the preemption theory. If the state act complies with the spirit of the Williams Act, by imposing a burden on the offeror or the target that is strongly justified by investor protection, the disruption of the balance may be irrelevant.

[227] *See* discussion in the text acompanying notes 25-38, *supra.*

[228] At trial, most plaintiffs now seek injunctive relief, which requires a showing of probable success on the merits *and* irreparable harm. Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2nd Cir. 1973). *See also* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-59 (1975) *rev'g*, 500 F.2d 1011 (7th Cir. 1974) (reversing the lower court decision that irreparable harm was not needed for injunctive relief against a technical violation); Ozark Air Lines, Inc. v. Cox, 326 F. Supp. 1113, 1119 (E.D.Mo. 1971). Some courts have used a "balancing of the equities" approach instead of the irreparable harm requirement. *See* Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 803-04 (2nd Cir. 1969); Otis Elevator Co. v. United Technologies Corp., 405 F. Supp. 960, 973 (S.D.N.Y. 1975) (the hardships on the offerees considered the central concern in weighing the equities). However, for a criticism of the above standard for injunctive relief, *see* Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations*, 50 IND. L.J. 114, 129-30 (1974). In addition, for a possible solution to the problems, *see id.* at 137-41.

[229] The opinions of the many courts that have ruled on the Williams Act have varied. For a discussion of the conservative position assumed by the early courts, *see* Binder, *The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 636-41 (1973); *Try a Little Tenderness, supra* note 5, at 1000-05. The courts cited three basic reasons for the conservative view of the Williams Act. 1) In the Williams Act, Congress required only generalized disclosure, not disclosure burdensome to the offeror of a legitimate offer. 2) The Williams Act was not meant to be a mere tool for incumbent management. *Try a Little Tenderness, supra* note 5, at 1002-03. For example, the court in Electronic Specialty Co. v. Int'l Control Corp., 409 F.2d 937 (2nd Cir. 1969), said:

however, has posed two problems. On the one hand, the courts have been unable to fashion a suitable remedy, since the harm to the parties will have accumulated during the progress of the lawsuit.[230] On the

> On the other hand, we do not mean at all that interlocutory relief should be given lightly. To the contrary, district courts must be vigilant against resort to the courts on trumped-up or trivial grounds as a means for delaying and thereby defeating legitimate tender offers.

Id. at 947.

3) A suitable remedy is often very difficult to develop in tender offer litigation, especially during the later stages of the offer. In *Electronic Specialty*, for example, the court also said,

> To afford an opportunity for withdrawal would be the idlest of gestures now, since ELS [Electronic Specialty] stock purchased by ICC [Int'l Control] at $39 is selling around $26-$27, and compulsory rescission is out of the question. Divestiture of 1,200,000 shares of ELS probably would involve certain and huge loss. Even if ICC could find a purchaser at the present market, the amount of loss would approach $15,000,000. If the stock had to be sold in small quantities over a period, ICC would likely suffer still greater loss and the prospect would hang heavy over the nontendering stockholders of ELS. Permanent deprivation of voting rights and an injunction against the solicitation of proxies would be just as detrimental.

Id. at 947-48.

However, in recent cases the courts have given the statute a more liberal interpretation. Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations,* 50 IND. L.J. 114, 130-41 (1974); *Try a Little Tenderness, supra* note 5, at 1005-11. *Cf.* Texasgulf, Inc. v. Canada Dev. Corp., 366 F. Supp. 374, 420-21 (S.D. Tex. 1973) (disclosure of material information is required; materiality is judged by the value of information to a reasonable prototype investor, i.e., if, had the information been available in proper form, a prototype investor would have made a contrary decision); Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 251 (2nd Cir. 1972) (requiring disclosure of contingent events which have a good possibility of success); Corenco Corp. v. Schiavone & Sons, Inc., 362 F. Supp. 939, 949 (S.D.N.Y. 1973), *aff'd*, 488 F.2d 207 (2nd Cir. 1973) (disclosure not restricted to information specifically enumerated in § 13(d) of the Williams Act). In *Corenco,* the offeror's testimony was very revealing. He withheld information, "simply [because] we want people to tender their stock. . . ." *Id.* at 949. The more liberal view of the Williams Act is supported on three grounds. First, the acceptance of a tender offer in violation of the Williams Act is an illegal act by the offerees, and injunctive relief is needed to prohibit the opportunity for illegality. *Try a Little Tenderness, supra* note 5, at 1008. *Cf.* Gulf & Western Ind., Inc. v. Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687 (2d Cir. 1973). Second, injunctive relief at the preliminary stages of an offer is less costly for all parties, even though it may in many cases block the offer. *Id.* at 1009. Finally, a view like that taken in *Electronic Specialty*—that no relief can be granted even after a clear violation—is in plain conflict with the purpose of Congress in passing the Williams Act. *Id.* at 1012-13. *But see* Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) (injunctive relief for a mere technical violation denied), for the most recent Supreme Court interpretation. The *Mosinee* case can be distinguished, however, from typical tender offer litigation. *See* the text accompanying note 212, *supra.*

[230] Since recent courts have been more favorably inclined to grant relief for technical violations, *see* note 229, *supra,* the view that the courts have been unable to give adequate relief is no longer as valid as was the case in the early 1970's. *See Try a Little Tenderness, supra* note 5, at 1007-11.

On the other hand, some recent decisions, in order to allow the offer to go forward and to facilitate divestiture, have instituted hold separate orders. These orders require the offeror, after successful completion of the tender offer, to hold and maintain the target company as a separate, viable, and going concern. Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2nd Cir. 1974); Copperweld Corp. v. Imetal, Inc., 403 F. Supp. 579 (W.D.Pa. 1975); ICM Realty v. Cabot, Cabot & Forbes Land Trust, 378 F. Supp.

other hand, even if the suit arises during the early stages of the offer, the delay caused by the trial is often sufficient to discourage even the most scrupulous tender offerors.[231] Indeed, this delay has made the lawsuit a favorite defensive tactic.[232] As a result, judicial enforcement of the Williams Act has generally proved to be either too little or too late.

The disclosure requirements of the Indiana Act, on the other hand, offer more effective protection of shareholders. The Indiana Act is administratively enforced by the Securities Commissioner, a procedure which has several important effects. First, since the hearings are held before the offer becomes effective, a remedy can more effectively be developed to suit the violation.[233] For example, if the violation is in some minor detail, the offeror can easily correct it, since the offer is still ineffective. No one will have been hurt by the improper disclosure, and the corrected offer can then proceed on schedule.[234] Similarly, under the provisions governing appeals from the Commissioner's ruling, a scrupulous offeror is protected from appeals interposed merely to impede the progress of a fair offer.[235] Moreover, the hearings ordered by the Commissioner can be conducted in a few days, minimizing the delay arising

918 (S.D.N.Y. 1974); Maryland Cas. Co. v. American General Ins. Co. 232 F. Supp. 620 (D.D.C. 1964).

In addition, one commentator has recommended what he calls a "conditional injunction" as a solution for the severity and time delay problems inherent in injunctive relief. The idea is that an offeror who improperly discloses would be enjoined conditionally, the condition being his failure to properly amend his disclosure. If he amends the disclosure to comply with the guidelines of the Williams Act, say, then the injunction is lifted and the offer resumes. Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations*, 50 IND. L.J. 114, 130 (1974). This is remarkably similar to the review under the Indiana Act, since the Commissioner's ruling is delivered early, at a time when amendment with substantial harm is still relatively easy.

[231] *Try a Little Tenderness*, *supra* note 5, at 1012-13. *See* the text accompanying notes 234-36, *infra*.

[232] For a discussion of the use of a lawsuit as a defensive tactic, *see* Hayes & Taussig, *supra* note 5, at 146; *Schmultz & Kelly*, *supra* note 5, at 129-30.

[233] *See* notes 228-30 *supra*.

[234] Compare this result with the problems in Otis Elevator Co. v. United Technologies Corp. 405 F. Supp. 960 (S.D.N.Y. 1975), *supra* note 4. United made several revisions of its offer during the litigation, contributing to the confusion to which Otis most objected. Under the Indiana Act, United could have obtained a quicker ruling on the offer and its amendments. More importantly, the offer would still have been ineffective during the hearing process, so that all the revisions of the offer would not have so confused the stockholders.

[235] Under IND. CODE § 23-2-3-11 (Burns Supp. 1976), the ruling of the Commissioner at the end of the hearings remains in effect during the appeal process. Although the Act allows the circuit or superior court to stay the ruling under proper circumstances, the language clearly indicates that the ruling should not normally be stayed by the reviewing courts. Indeed, the Indiana Act eliminates the power to stay the Commissioner's ruling. Moreover, the amendments give the Commissioner's ruling the status of prima-facie evidence in the appeal. Consequently, when the Commissioner rules that the disclosure is sufficient, an appeal of his ruling will not further slow the progress of the offer. Thus, a ruling on the disclosure can be delivered at an early date without giving the target company an easy weapon to continually delay a legitimate offer. *See* note 230 *supra*.

from litigation.[236] The Indiana Act can therefore provide speedy and effective enforcement of tender offer disclosure regulations. If the review process is properly conducted, the offeror will not be burdened severely. As a result, the Indiana Act may be more effectively enforced than the Williams Act, while substantially preserving the balance intended by Congress. The offeror is subjected to the scrutiny of independent review by the Securities Commissioner, thus relieving the target company and the offerees of much of the burden of prosecuting possible violations; nonetheless, the offeror will in turn benefit from quicker initial rulings on the adequacy of the disclosure and the additional protection from appeals designed solely to delay the offer. Thus, the offeror is both burdened and benefited in a way which maintains the congressionally-intended balance, while further protecting shareholders. Consequently, no preemption problem should arise because the balance has been maintained.

However, unlike the Williams Act, the Indiana Act requires more than just fair disclosure. The Commissioner has the power to determine if the offer is fair and equitable.[237] Beyond the effect substantive review

[236] Under IND. CODE § 23-2-3-2(e-f) (Burns Supp. 1976), the review and hearing process could take a very long time. *See* notes 25-32 *supra* and text accompanying. The Act merely establishes the maximum period of time the process can remain dormant. However, the Commissioner can expedite the process through his own energetic efforts. For example, in the United Technologies' bid for Otis Elevator stock, *see* note 4 *supra*, Commissioner Hafsten moved the hearing process on a rapid schedule. Instead of waiting twenty days for Otis, the target company, to demand a hearing, the Commissioner issued a cease and desist order one day after the offer was announced. The hearing began five days later, and a ruling was delivered on Oct. 27, just twelve days after the announcement. This type of energetic action from the Commissioner will minimize the criticism that the Indiana Act eliminates the advantage of speed. However, instead of depending on the efforts of the Commissioner, Indiana should amend the Act to reduce the dormant periods between filing, hearing order, the hearing, and the ruling to levels which will not allow the Indiana Act to be a mere tool for delaying legitimate tender offers.

[237] IND. CODE § 23-2-3-2(e) (Burns Supp. 1976). *See* notes 25-32 *supra* and text accompanying (discussion of enforcement of this provision); notes 227-32 *supra* and text accompanying (discussion of effect of § 2(e) on balance between offeror and target company). This review provision can be seen as an extension of similar powers exercised under the state securities laws. Although Indiana has no identical provision for review of registration statements, IND. CODE § 23-2-1-7(a)(1) (Burns Supp. 1976) contains a general prohibition against fraudulent acts or violations of IND. CODE. § 23-2-1-1 *et seq.* (Burns 1971) in the registration statements, other states give the commissioners power to regulate the substantive fairness of the offer. *See* In the Matter of the Proposed Exchange Offer by Northwest Industries, Inc. of Certain Debentures, Preferred Stock, and Warrants to Holders of Shares of Common Stock of the B.F. Goodrich Company, File No. 24040 (Ohio Dep't of Commerce, Div. of Sec. May 1, 1969) CCH BLUE SKY L. REP. 70,816; Release of Wisconsin Office of Commissioner of Securities, CCH BLUE SKY L. REP. 70,805 (Feb. 10, 1969) (where the Wisconsin Securities Commissioner ruled that General Host's offer was unfair and blocked its application to Wisconsin shareholders, because the financial statements of General Host indicated that it would have difficulty servicing the debt and preferred stock payments on the securities Armour's (the target) shareholders would receive in the exchange).

of the offer may have on the balance of power between the offeror and target,[238] such a review frustrates the policy underlying the Williams Act. That policy demands disclosure of information sufficient to enable the shareholders to make an intelligent decision; the shareholder, however, remains the final arbiter of the economic worth of the offer.[239] Since the Commissioner may deny effectiveness to an offer which he believes unfair to the shareholders, the Act may deny shareholders the right, preserved under the Williams Act, to judge the ultimate value of the offer. Therefore, although the review process may not in fact disrupt the balance of power established by Congress, it nevertheless conflicts with the Williams Act at least in spirit. As a result, this provision should be amended so as to coalesce with the federal scheme, which emphasizes the rights of the shareholders as arbiters of the offer.

A second group of provisions which may disrupt the balance of power between the parties is that which regulates the timing[240] of the tender offer.[241] Despite the shareholder benefits that additional time

However, the justification for the regulation of the substantive fairness under state securities laws is territorial, while the Indiana Act proposes to have extraterritorial powers. Thus, a more powerful justification for the substantive review by the Indiana Commissioner is the doctrine of internal affairs. *See generally* notes 78-91 *supra* and text accompanying.

238 The review of the substantive fairness of the offer by the Commissioner may tip the balance intended by the Williams Act in two ways: (1) only the actions of the offeror are reviewed for the fairness to the offerees, while no review of the action of the target company is made; and (2) if the process becomes a long, fact finding review, the delay from the hearings will eliminate one of the offeror's last advantages—speed. That delay will benefit target company management *and* burden the offeror.

239 The intent of Congress was not to make the decision for the stockholder, but to provide him with all the "material" information he would need to make his own decision. Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations*, 50 IND. L.J. 114, 122 (1974). *Cf.* SECURITIES LAW—FRAUD, *supra* note 5; *Try a Little Tenderness, supra* note 5, at 998-1000 (discussion of inequitable distribution of information). The purpose was to correct the unequal distribution of information so that the offeree, not the government, could make the decision.

240 *See* note 17 *supra*. For a good discussion of the importance of time to a cash offer, *see* Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations*, 50 IND. L.J. 114, 119-22 (1974). As a thumbnail guide on the average speed of tender offers, an old study indicated the median period is seventeen days. Hayes & Taussig, *supra* note 5, at 141. In addition, the New York Stock Exchange Company Manual A-180 suggests preferred timing schedules. "While it is desirable that a period of about 30 days be used, a tender offer should remain open for a minimum of 10 days, so that all stockholders, even though they live at a distance, will have ample opportunity to learn of the tender offer and to tender the shares." As quoted in Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267, 275, n.1 (S.D.N.Y. 1975).

241 The New York Stock Exchange claimed that the advance filing requirement in state statutes would cause severe disruption in the trading of the stock of the target company. Therefore, the exchange wished to be exempted from state laws. *See* 1 BNA SEC. REG. & L. REP. A-11, A-11-12 (June 4, 1969). The motive for this was probably not that the advance notice is such a disruptive factor, but that the Exchange did not wish to comply with the numerous state laws which are more far reaching than the federal provisions. Tender offers, by nature, disrupt trading in the target company. The advance notice requirement at most simply prolongs for a few days this disruption. On the other

might provide,[242] "speed is an asset of the offeror which the [Williams] Act does not dislodge."[243] The Williams Act conspicuously omits any advance notice[244] requirement and contains weaker withdrawal[245] or pro rata acceptance[246] provisions. The Indiana Act, on the other hand, requires advance notice of an offer[247] and imposes both liberal withdrawal[248] and pro rata acceptance[249] requirements. An advance notice requirement is certainly no new provision, since it was incorporated in the registration provisions of the 1933 Act.[250] However, advance notice requirements were discussed at length in the enactment of the Williams Act.[251] The rejection of this provision is strong evidence that Congress felt that advance notice filing was detrimental to tender offers. Congress could also have determined that imposition of an advance notice requirement on offerors would shift the balance too much in favor of target companies. In other words, the objection may not have been to the principle of advance notice, but rather to its effect on the balance of power. If that be the case, then Indiana may impose an advance notice requirement, so long as the balance is maintained.

In general, an advance notice provision will tip the balance in favor of the target company, since the chief advantages of the offeror, speed and surprise, are thereby eliminated.[252] Professor Branson offers evi-

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hand, with the advance notice, the offer can be conducted at a slower pace, with less need for wild, spontaneous accusations from the parties. Each party will have sufficient time to prepare informative arguments in support of their positions *and* take their claims to the Commissioner. In any event, Britain has adopted a slower approach to the timing issue without any significant increase in disruption. *See* notes 252-53 *infra*. During the hearing process, Congress reviewed an advance filing provision, but that provision was never included in the final notice. Hayes & Taussig, *supra* note 5, at 145. Such a view is very strong evidence that any state advance filing provision may in fact conflict with the Williams Act and be preempted by it. On the other hand, Congress may simply have felt that an advance notice requirement in the Williams Act would tip the balance too much in favor of the target. Thus, the objection may not have been against the principle of advanced filing, but only its applications under the Williams Act.

[242] *See* Bromberg, *supra* note 3, at 662-63 (the swiftness with which tender offers are conducted makes the protection supposedly provided by the withdrawal and pro rata rights under the Williams Act virtually useless). *But see Try a Little Tenderness, supra* note 5, at 999 (the safeguard does not protect the offerees).

[243] Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267, 275 n. 1 (S.D.N.Y. 1975). *See* note 241 *supra* (Congress rejected a prior notice provision).

[244] *See* note 124 *supra*.

[245] *See* note 126 *supra*.

[246] *see* note 127 *supra*.

[247] *See* note 124 *supra* and text accompanying.

[248] *See* note 126 *supra* and text accompanying.

[249] *See* note 127 *supra* and text accompanying.

[250] § 8, 15 U.S.C. § 77h (1971).

[251] *See* note 222 *supra*.

[252] *See* Hayes & Taussig, *supra* note 5, at 145; *Commerce Clause Limitations, supra* note 5, at 1169. *But see,* Branson, *supra* note 5. Although British takeover legislation does not require advance notice disclosure, the offeror is required to keep his offer open for at least twenty-one days. The legitimate tender offers are not adversely affected by the passage

dence that some delay will not discourage legitimate, fair tender offers. Under British law, for example, although advance notice is not required, the offer must be kept open for at least 21 days. Branson notes that the 21-day rule has not discouraged tender offers in Britain. Indeed, tender offers are viewed more favorably there than in the United States, because there is less pressure on shareholders to make a hasty decision based on little information.[253]

Under the Indiana provisions, target management has adequate time to prepare useful studies and analyses of the future of the target and its present market value. The offeror will also be able to amend the terms of the offer without the confusion that normally attends such amendments, since the offer will not yet be effective.[254] In this sense, the Indiana Act may offer the benefits of the British practice, with everything done under much less pressure.

The delay provisions, however, do handicap the offeror in practical terms, so much so that it may be doubtful that these provisions can survive preemption analysis, even in light of the benefits to the investing public. Perhaps by imposing counterbalancing restraints on the target management, the Indiana legislature could preserve the delay provisions which are of great importance to shareholders, without unreasonably tipping the scales against the offeror contrary to the congressional scheme. The actions of incumbent management may be restrained, for example, so as to offset the burdens imposed by the timing provisions on the offeror, and to enhance investor protection. Preserving the balance between offeror and target need not mean preserving the precise regulatory scheme chosen by Congress. Although the Indiana Act as it stands offers excessive tactical advantage to incumbent management,[255] an amendment of the Act incorporating restrictions on the target's use of defensive tactics,[256] the adoption of strict standards for injunctive relief, and an expeditious and even-handed hearing system

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of a few days. Branson, *supra* note 5, at 724-25. The burden on the less bona fide offers is a small price to pay for the benefits that will accrue to the offerees by the extra time. *Cf.* H.R. REP. No. 1711, 90th Cong., 1st Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811 (the House report said the burden of disclosure to the offeror who is afraid to subject his terms to the light of disclosure is a small price to pay for investor protection.) In addition, advance filing of disclosure statements is required for registration of securities. Securities Act of 1933 § 8(a), 15 U.S.C. 77h(a) (1970). The registration of securities has not only protected investors, but also enhanced the public confidence in the securities industries. 113 CONG. REC. 24664 (Sen. Williams Comments).

[253] Branson, *supra* note 5.

[254] *See* note 234 *supra.*

[255] *See* notes 162-73 *supra* and text accompanying.

[256] *See* notes 178-81 *supra* and text accompanying.

would not only further increase the protection of shareholders, but would also maintain the congressionally-adopted balance of power.

There is some evidence that Congress anticipated state legislation in this field. At the time the Williams Act was enacted, Virginia had already adopted its own statute in the area.[257] Congress may have adopted a neutral position in the contest between the offeror and management precisely because it was unsure what effect federal legislation would have on tender offers. Congress has been sensitive to the impact of the Williams Act, as evidenced by the 1970 Amendments.[258] It is consistent with this tentative congressional attitude to allow the states to perform a laboratory function in an unsettled area. Although Congress is free to bar state participation, it may also profit from the experience of states which adopt modified tender offer schemes, and amend the federal scheme accordingly. This suggests that state modification of the national scheme for the regulation of tender offers should not fall victim to preemption, and that the Indiana Act, at least if modified as herein proposed, would survive under the Supremacy Clause.[259]

CONCLUSION

Although the Indiana Business Takeover Act incorporates many devices already used in the regulation of corporate power and of securities, the use of these devices creates constitutional difficulties for the Act. Although other provisions of state corporation laws which control power relationships have extraterritorial impact, because the Act regulates the sale of securities, its extraterritorial reach raises additional due process issues. However, the proper analysis of this due process question requires only that the state have an interest in legislating. That interest in this case is the protection of shareholders of the target corporation during the struggle for control over it. Conceptually, this can be viewed as the regulation of corporate internal affairs, a traditional concern of the states as regards corporations whose charters they issue. Where the corporation has such extensive dealings within the state that it is within the definition of a psuedo-foreign corporation, courts have

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257 Code of Virginia § 13.1-528 *et seq.* (1950), effective March 5, 1968. CCH BLUE SKY L. REP. ¶ 49,228. The Williams Act was not passed until July 29, 1968. *See* note 42 *supra*. "But Congress, embroiled in controversy over policy issues, rarely anticipates the possible ramifications of its acts upon state laws." *Pre-emption as a Preferential Ground*, *supra* note 194, at 209.

258 Pub. L. 91-567 among other things lowered the point at which a person's holdings require the filing of Schedule 13D from 10% to 5%. 15 U.S.C. § 78m(d) (1971).

259 Courts probably will not do this. The enforcement of the Supremacy Clause is, after all, the job of the courts. *See Pre-emption as a Preferential Ground*, *supra* note 194, at 209-10.

allowed states to intervene in areas which are considered corporate internal affairs. However, a state interest in the protection of its citizen shareholders, as opposed to shareholders of its citizen corporations, is probably not sufficient to justify extraterritorial regulation. The resolution of these issues is by no means clear, but the interests of certainty and uniformity will be served if the Act is limited in its application to corporations incorporated within the state of Indiana. This is the traditional criterion for choice of laws problems, but pseudo-foreign corporations have increasingly been subjected to the laws of the forum state. A limitation of the application of the Act to corporations incorporated in Indiana would alleviate both due process and hard choice of laws problems.

Because the Act requires the transfer of corporate securities which may take place in interstate commerce, it raises commerce clause problems. Most commentators would apparently agree that, as it stands, the Act will inhibit commerce in these securities; this inhibition will at the same time render meaningless many of the benefits which the Act would provide shareholders. A modification of two features of the Act is suggested. The first is to shorten the advance notice period to a length of time which would provide the commissioner time to act whenever necessary, and yet not provide the target company with so much advance warning that defeat of the offer is inevitable. The second is to restrict the defensive tactics available to the target corporation to those which will benefit shareholders and are not intended solely to frustrate the offer.

Because of federal regulation of tender offers under the Williams Act, there are also preemption problems. In part these are met by the non-preemption section of the 1934 Act, which limits preemption to cases of actual conflict. However, since the Williams Act's regulation of tender offers establishes a balance between the parties, a state act which disrupts this balance, as Indiana's Act does, would conflict and be preempted. It is suggested that balance does not mean identity of regulatory schemes, and if the Indiana Act can be modified so as to weigh on target and offeror in roughly the same proportions as the Williams Act, there would be no conflict. The changes suggested to redress the commerce clause burdens will also apply here.

Finally, the Williams Act has not proved entirely satisfactory, especially because it has spawned so much litigation. A system of advance disclosure and administrative review could work much more smoothly and keep tender offers out of the courts. The Indiana Act should be a

step in the direction of speedy review of disclosure and steady progress toward the resolution of a tender offer. As such, its operation should be studied as a laboratory function rather than immediately be preempted.

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