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Thomas V. Donnelly

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## RECENT CASE

### THE RESURRECTION OF STATE REGULATION OF CASH TENDER OFFERS: *CARDIFF ACQUISITIONS, INC. V. HATCH*, 751 F.2d (8th Cir. 1984)

The recent conquests of corporate "raiders"<sup>1</sup> such as T. Boone Pickens, Carl Icahn, and others have focused national attention<sup>2</sup> upon a popular corporate takeover device—the cash tender offer.<sup>3</sup> The controversy surrounding tender offers centers on the potential adverse effects that corporate takeovers may have on interested shareholders, the national economy, and the states in which the target corporation is domiciled or does business. While in theory both state<sup>4</sup> and

1. The term "corporate raider" will be used to designate any party who seeks to gain control of a target corporation via a hostile takeover. The term, as used herein, is not limited to acquiring parties who seek control with the intent to liquidate the assets or "bust up" the target company after the takeover.

2. See, e.g., Loomis, *The Comeuppance of Carl Icahn*, FORTUNE, Feb. 17, 1986, at 18 (cover story on Carl Icahn's acquisition of TWA); Petre, *Merger Fees that Bend the Mind*, FORTUNE, Jan. 20, 1986, at 18 (cover story on fees of investment bankers in corporate mergers); Ehrbar, *Have Takeovers Gone to Far?* FORTUNE, May 27, 1985, at 20 (cover story analyzing the benefits and drawbacks of corporate takeovers); Sloan, *Why is No One Safe?* FORBES, March 11, 1985, at 134 (cover story); Greenwald, *High Times for T. Boone Pickens*, TIME MAGAZINE, March 4, 1985, at 57 (cover story detailing the tactics of corporate raider, T. Boone Pickens); Kirkland, *When Paying Off A Raider Benefits The Shareholders*, FORTUNE, April 30, 1984, at 152 (special "Fortune 500" issue).

3. A tender offer is generally defined as a publicly made solicitation to the shareholders of a target corporation to tender their shares to the offeror at the designated price, which is usually above the market price. See E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1973); Einhorn & Blackburn, *The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y.L. SCH. L. REV. 379 (1978); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973).

4. Thirty-eight states have passed legislation regarding corporate takeovers. See ALASKA STAT. §§ 45.57.010 to .120 (1980); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101 to .5-108 (repealed 1984); CONN. GEN. STAT. ANN. §§ 36-456 to -468 (West 1981 & Supp. 1984); DEL. CODE ANN. tit. 8, § 203 (1983); FLA. STAT. ANN. §§ 517.35 to .363 (repealed 1979); GA. CODE ANN. §§ 22-1901 to -1915 (1977 & Supp. 1982); HAWAII REV. STAT. §§ 417E-1 to-15 (1976 & Supp. 1984); IDAHO CODE §§ 30-1501 to -1513 (1980 & Supp. 1985); ILL. REV. STAT. ch. 121 1/2, §§ 137.51 to .70 (repealed 1983); ILL. REV. STAT. ch. 32, § 7.85 (1985); IND. CODE ANN. §§ 23-2-3.1-1 to -3.1-11 (West Supp. 1983-84); IOWA CODE ANN. §§ 502.211 to .215 (West Supp. 1984-85); KAN. STAT. ANN. §§ 17-1276 to -1284 (1981); KY. REV. STAT. ANN. §§ 292.560 to .991 (Bobbs-Merrill 1981 & Supp. 1982); *id.* §§ 271A.396 to .399 (Supp. 1984); LA. REV. STAT. §§ 51:1500 to :1512 (West Supp. 1985); ME. REV. STAT. ANN. tit. 13, §§ 801 to 817 (Supp. 1984-85); MD. CORPS. & ASS'NS CODE ANN. §§ 11-901 to -908 (1985); *id.* §§ 3-601 to -603; MASS. GEN. LAWS ANN. ch. 110c, §§ 1 to 13 (West Supp. 1985); MICH. COMP. LAWS ANN. §§ 451.810 to .814 (West 1983 & Supp. 1985); MINN. STAT. ANN. §§ 80B.01 to .13 (West Supp. 1984); MISS. CODE ANN. §§ 75-72-101 to -121 (Supp. 1985); MO. ANN. STAT. §§ 409.500 to .565 (Vernon 1979); *id.* § 351.407 (Vernon Supp. 1985-86); NEB. REV. STAT. §§ 21-2419 to -2430 (1983); NEV. REV. STAT. §§ 78.376-.3788 (1979)

federal<sup>5</sup> governments currently regulate tender offers, case law has effectively emasculated the power of states to legislate in this area.<sup>6</sup>

The United States Court of Appeals for the Eighth Circuit, however, recently resurrected the notion that states may, to some extent, regulate tender offers. The Eighth Circuit's controversial decision, *Cardiff Acquisitions, Inc. v. Hatch*,<sup>7</sup> upheld the constitutionality of the Minnesota Corporate Take-Overs Act<sup>8</sup> against interstate commerce<sup>9</sup> and supremacy clause<sup>10</sup> challenges. The *Cardiff* decision therefore represents a major departure from the concepts of federalism articulated in the seminal Supreme Court case of *Edgar v. MITE Corp.*<sup>11</sup> and its progeny, and poses practical problems for future corporate acquisitions.

In order to emphasize the impact that the *Cardiff* decision could have, this Recent Case first outlines the historical context in which state and federal securities regulation developed, and examines the corresponding case law. Next, this Recent Case analyzes and evaluates the Eighth Circuit's rationale in upholding the constitutionality of the Minnesota Corporate Take-Overs Act. This Recent Case also assesses the impact that the *Cardiff* decision could have on future judicial and legislative action, and its potential ramifications on hostile corporate acquisitions. In conclusion, this Recent Case suggests

(amended 1981); N.H. REV. STAT. ANN. §§ 421.A:1 to :16 (1983 & Supp. 1985); N.J. STAT. ANN. §§ 49:5-1 to :19 (West Supp. 1985); N.Y. BUS. CORP. LAW §§ 1600 to 1614 (McKinney Supp. 1985); N.C. GEN. STAT. §§ 78B-1 to -11 (1985); OHIO REV. CODE ANN. §§ 1701.83.1 to .83.2, 1707.04.1 to .04.2 (Page 1985); OKLA. STAT. ANN. tit. 71, §§ 431 to 450 (repealed 1985); PA. STAT. ANN. tit. 70, §§ 71 to 85 (Purdon Supp. 1985); S.C. CODE ANN. §§ 35-2-10 to -110 (Law. Co-op. Supp. 1984); S.D. CODIFIED LAWS ANN. §§ 47-32-1 to -48 (Supp. 1983); TENN. CODE ANN. §§ 48-2101 to -2114 (1979 & Supp. 1983); Texas Administrative Guidelines for Minimum Standards in Tender Offers, §§ 065.15.00.100 to .800, reprinted in 3 BLUE SKY L. REP. (CCH) 55,671-55,682; UTAH CODE ANN. §§ 61-4-1 to -13 (repealed 1983); Va. Code §§ 13.1528 to -541 (1978 & Supp. 1983) (amended 1983); WIS. STAT. ANN. §§ 552.01 to .25 (West Special Pamphlet 1983).

5. Federal regulation of cash tender offers is embodied in 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976), popularly known as the Williams Act. For a discussion of the history of the Williams Act, see *infra* notes 30-36 and accompanying text.

6. For an exhaustive list of cases in which state takeover statutes were found to be unconstitutional, see *infra* note 44.

7. 751 F.2d 906 (8th Cir. 1984).

8. MINN. STAT. ANN. §§ 80B.01 to .13 (1984).

9. Interstate commerce challenges to the validity of state takeover statutes center on the belief that state tender offer regulation effects more than just intrastate activities and therefore interferes with Congressional authority under the commerce clause. The commerce clause states that, "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

10. Supremacy clause, or preemption challenges, are based on the proposition that the procedures or purposes of state takeover statutes conflict with the federal Williams Act. The supremacy clause states, in relevant part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme law of the land . . ." U.S. CONST. art. VI, § 2.

11. 457 U.S. 624 (1982).

that explicit federal preemption of tender offer regulation would clarify both the federalism and corporate control problems that arise from the present dual system of regulation, while also ensuring the protection of shareholders.

#### BACKGROUND

Securities regulation in the United States began over 100 years ago<sup>12</sup> with the enactment of state "blue sky" laws.<sup>13</sup> Blue sky laws were designed to protect investors from the fraudulent and deceptive sales of securities.<sup>14</sup> Since state regulation of securities was limited to intrastate activities,<sup>15</sup> the United States Congress perceived a need for regulation on a nationwide scale. Congress therefore enacted the Securities Act of 1933 (1933 Act)<sup>16</sup> and the Securities Exchange Act of 1934 (1934 Act)<sup>17</sup> to ensure investor protection in interstate securities transactions.<sup>18</sup> Congress also made it clear, in section 28(A) of the 1934 Act,<sup>19</sup> that state regulation was not preempted so long as it did not conflict with the federal scheme.

While both state blue sky laws and the federal securities acts were intended to protect potential investors, their respective philosophies were quite different. The federal government premised its legislation upon the belief that

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12. The first known blue sky law can be traced to a 1903 Connecticut statute that required mining and oil corporations to file with the Secretary of State before offering their stock. See L. LOSS & E. COWETT, *BLUE SKY LAW* 5 (1958).

13. The phrase "blue sky laws" is said to have originated in the notion that certain securities had no more substance than the blue sky itself. See *State v. Cushing*, 137 Me. 112, 15 A.2d 740 (1940). See also L. LOSS & E. COWETT, *supra* note 12, at 7 n.22 (citing *Molvey, Blue Sky Law*, 36 CAN. L.R. 37 (1916) (attributing its origin to the fact that promoters were so fraudulent as to sell lots in the blue sky)).

14. L. LOSS & E. COWETT, *supra* note 12, at 3.

15. The intrastate nature of state blue sky laws supported their constitutionality. See *Hall v. Geirger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568 (1917). The validity of such laws was not affected by the Supreme Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982), which invalidated the Illinois Business Takeover Act.

16. 15 U.S.C. § 77(a)-(h), 77(j) (1982). The 1933 Act is primarily concerned with the initial distribution of securities and requires certain issuers to file registration statements with the SEC and distribute a prospectus to potential buyers. The prospectus must contain information that would enable the investor to make an informed decision on whether to buy the offered stock. See generally H. SOWARDS, *FEDERAL SECURITIES ACT* 102 (1984).

17. 15 U.S.C. §§ 78a-78kk (1982). The 1934 Act primarily regulates the post distribution trading of stock rather than its initial issuances, and also is concerned with the functioning of securities markets. See generally E. GADSBY, *FEDERAL SECURITIES EXCHANGE ACT* 1.01 (1984).

18. See H.R. REP. NO. 85, 73d Cong., 1st Sess. (1933); S. REP. NO. 47, 73d Cong., 1st Sess. 6-7 (1933).

19. Section 28(a) provides that: "Nothing in this chapter shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder." 15 U.S.C. § 78bb(a) (1976). See *infra* note 135 and accompanying text for support of the proposition that § 28(a) is not applicable to the Williams Act.

investors are best protected through full disclosure of all material information regarding a securities transaction.<sup>20</sup> State legislation, on the other hand, evidenced a more paternalistic approach by often addressing the substantive or qualitative aspects of the securities involved.<sup>21</sup> This philosophical divergence foreshadowed much of the difficulty surrounding subsequent tender offer legislation.

Since neither state blue sky laws nor the federal securities acts addressed the takeover device of the cash tender offer, a large gap developed in the regulatory scheme. Parties who sought to gain control of a corporation could circumvent the registration and disclosure requirements associated with proxy fights<sup>22</sup> and exchange offers<sup>23</sup> by making a direct cash offer to the shareholders of the target corporation for their common stock at a premium over the market price.<sup>24</sup> The offeror thereby avoided two events that triggered state and federal securities laws: the issuance of securities and the solicitation of proxies. Cash tender offers also enabled the acquiring party to deal directly with the corporation's shareholders rather than the often hostile incumbent management.<sup>25</sup> As a result, the tender offer became a favorite

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20. The federal disclosure requirements evidence Congress' "market approach" to shareholder protection; this approach allows the investor to determine the merits of the proposed transaction after both sides have presented all relevant information. See S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 3, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811. See also *Great W. United Corp. v. Kidwell*, 557 F.2d 1256, 1276 (1978), rev'd on other grounds sub nom. *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

21. See L. LOSS & E. COWETT, *supra* note 12, at 36-38 (noting that state disclosure requirements are significant only with respect to the quality of the information, rather than its mere sufficiency).

22. Proxy solicitation, which was the favored means of usurping control from incumbent management prior to the use of cash tender offers, is regulated under the 1934 Act. See also E. ARANOW & H. EINHORN, *supra* note 3, at 65-66.

23. Exchange offers, in which the acquiring corporation offers to purchase the shares of the target corporation in exchange for its own stock, constitute an issuance of securities and are therefore subject to regulation under 15 U.S.C. § 77e.

24. For extensive analyses of the rationale for offering substantial premiums to target shareholders, compare Easterbrook & Fischel, *The Proper Role of Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1165-74 (1981) (espousing the "efficient capital market theory" that the price of a stock reflects its value since it embodies all known information about the company) with Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 106-08 (1979) (articulating the view that the market price of a stock is not indicative of its value and that premiums on offers take advantage of that discrepancy). See also Penn, *Premiums: What Do They Really Measure?* 16 MERG. & ACQ. 30-34 (1981).

25. While shareholders are primarily interested in the stock for investment purposes and will tender their shares if it is profitable to do so, management has the additional interest of retaining their employment positions in the target corporation. As a result, incumbent management may reject profitable offers in order to retain those positions. See *infra* notes 168-69 and accompanying text.

vehicle for corporate acquisitions during the 1960's.<sup>26</sup>

Because the tender offer was not subject to either branch of the dual system of securities regulation, numerous abuses arose. For instance, the identity and intent of offerors were often unknown since there were no registration or disclosure requirements.<sup>27</sup> An offeror could also pressure shareholders into selling their stock by offering a substantial premium over the current market value, leaving the offer open for a very short time, and disclosing only certain information.<sup>28</sup> The combination of the high premium and short time period often discouraged shareholders from holding their stock to determine if the offer was actually in their best interest.

In 1968, Virginia became the first state to respond to the abuses involved in cash tender offers.<sup>29</sup> Four months after the enactment of the Virginia takeover statute, Congress passed the Williams Act<sup>30</sup> to amend the Securities Exchange Act of 1934. Congress designed the Williams Act to close the gap that cash tender offers had created in the federal scheme of regulation.<sup>31</sup> Subsequent to the Williams Act, thirty-seven states passed corporate takeover acts to regulate cash tender offers.<sup>32</sup>

The purpose of the Williams Act was two-fold. Congress structured the Act to ensure that the shareholders of the target corporation could make an informed decision as to whether to tender their stock to the offeror.<sup>33</sup> Also, in order to protect shareholder's interest, Congress carefully designed the Act to maintain an equilibrium between the offering and target corporations during cash tender offers.<sup>34</sup> Implicit in this design was the prevalent belief

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26. See E. ARANOW & H. EINHORN, *supra* note 3, at 393, 395. Various factors have been espoused as influencing the rash of takeovers that appeared in the 1960's, including: the increase in liquidity of acquiring corporations during that period, the increase in availability of credit, low price/earnings ratios of target corporations, and the ease of acquiring corporate control. See, e.g., Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1137-39 (1974).

27. See H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811.

28. *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 29 (1977).

29. VA. CODE §§ 13.1-528 to -541 (1978) (effective Mar. 5, 1968).

30. 15 U.S.C. §§ 78m(d)-(e); 78n(d)-(f) (1982).

31. See S. REP. NO. 550, 90th Cong., 1st Sess. 2-4 (1967), H.R. REP. NO. 1711 90th Cong., 2d Sess. 2-4, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811. See also *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 22 (1977).

32. All of those states listed in note 4 *supra*, except Virginia, passed their statutes after the Williams Act.

33. See *MITE*, 457 U.S. at 633, *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 35 (1977); *Rondeau v. Moseinee Paper Corp.*, 422 U.S. 49, 58 (1975); S. REP. NO. 550, 90th Cong., 1st Sess. 3-4 (1967). The Congressional intent to provide shareholder protection was to be achieved through full and fair disclosure of relevant information rather than qualitative review of the transaction itself. See *supra* note 20.

34. As the Supreme Court stated in *MITE*: "But it is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover

on the federal level that corporate takeovers were not necessarily harmful to either the shareholder or the economy.<sup>35</sup> In order to achieve the goals of shareholder protection and control neutrality, the Williams Act required the offeror to disclose material information concurrently with the commencement of a tender offer.<sup>36</sup>

State takeover legislation, on the other hand, continued to manifest the protective or paternalistic ideology apparent in their blue sky laws.<sup>37</sup> This paternalism resulted from the state's desire to protect resident shareholders and corporations, and to maintain its fiscal integrity. To ensure resident shareholder protection, state legislation often required hearings on the adequacy of corporate disclosure, merit review of the proposed transactions, and suspension of tender offers for failure of compliance.<sup>38</sup> States also sought to protect the financial basis of their economy.<sup>39</sup> The liquidation or reincorporation of companies domiciled or doing business in a given state

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bidder." *MITE*, 457 U.S. at 624; *See also* H.R. REP. NO. 1711, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811; S.E.C. Rel. No. 34-16384, [1979-80] FED. SEC. L. REP. (CCH) ¶ 82,373 at 82,577 (Nov. 29, 1979). *But see* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 522 (1979) (stating that the neutrality concept was not a purpose, but rather a byproduct of the intent to protect shareholders).

35. The Supreme Court noted that Congress gradually came to see that takeovers served the useful purpose of "providing a check on entrenched but inefficient management." *MITE*, 457 U.S. at 633 (citing S. REP. NO. 550, 90th Cong., 1st Sess. 3-4 (1967)). The legislative history of the Williams Act indicates that the first bill proposed by Senator Williams was specifically designed to protect incumbent management. S. 2731, 89th Cong., 1st Sess., 111 CONG. REC. 28,256 (1965). However, Congress' desire to prevent takeovers evolved instead into a concern for protecting the affected shareholders. As the purpose of the legislation changed, the notion that corporate takeovers were per se harmful was replaced with the belief that such changes in control were often beneficial to the target's shareholders. *See* Note, *Attack-Casualties in the Battle for Corporate Control—MITE Corp. v. Dixon*, 30 DE PAUL L. REV. 989, 994-95 (1981). *See also* Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 217-18 (1977).

36. The procedural aspects of the Williams Act are as follows: an offering party who seeks to acquire five percent or more of a target corporation's shares must file a Schedule 14D-1 with the SEC while simultaneously commencing the tender offer. The schedule requires disclosure of the offeror's identity, the source of its funds, its current holding in the target, and its intent upon acquisition of control. The offeror must deliver this information to both the target company and its shareholders. The offeror must purchase all shares tendered at the same price. Shareholders may withdraw tendered shares within a specific time frame. Thus, with the required filing, the offer could be commenced, and the tendered stock purchased, subject only to shareholders' right to withdraw.

37. The paternalistic nature of state takeover legislation is often apparent in the legislative history of such acts. *See*, for example, *infra* notes 146-48 and accompanying text. *See also* Steinberg, *State Law Developments: The Pennsylvania Anti-Takeover Legislation*, 12 SEC. REG. L.J. 184-91 (1984) (analyzing the intent of the Pennsylvania legislature in enacting its anti-takeover statute).

38. *See generally* Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 5-9 (1976).

39. *See* Note, *supra* note 34, at 528; Note, *supra* note 35, at 998.

could significantly decrease tax revenues and increase unemployment.<sup>40</sup>

Controversy over the validity of state takeover statutes quickly arose since they frequently imposed substantial burdens on acquiring corporations. Enforcement of the statutes often threatened to delay or totally frustrate nationwide tender offers. *Great Western United Corp. v. Kidwell*, decided in 1978, was the first significant federal appellate court decision in this area.<sup>41</sup> In *Kidwell*, the Fifth Circuit found that the Idaho Takeover Statute<sup>42</sup> violated the commerce clause and supremacy clause of the Constitution.<sup>43</sup> The *Kidwell* decision portended numerous invalidations of other state takeover statutes on either interstate commerce or preemption grounds.<sup>44</sup> Yet, it was not until

40. See Note, *supra* note 35, at 998.

41. 577 F.2d 1256 (5th Cir. 1978).

42. IDAHO CODE § 30-1501-13 (Supp. 1977). The Idaho statute was substantially similar to the Illinois statute struck down in *MITE*.

43. The Fifth Circuit found that the Idaho Takeover Statute was preempted by federal legislation since the state's fiduciary approach was incompatible with the Williams Act's market approach to investor protection. The Idaho act therefore tipped the balance created by the Williams Act in favor of the target management and frustrated the purpose of the federal regulation. *Kidwell*, 577 F.2d at 1279-80. In addition, the court invalidated the Idaho Takeover Statute under the commerce clause on the ground that the burdens on interstate commerce were disproportionate to the benefits that the act provided.

44. See, e.g., *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982) (Missouri statute violates commerce clause and supremacy clause); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980) (New Jersey statute violates supremacy clause); *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980) (Illinois statute violates commerce and supremacy clauses), *aff'd sub nom. Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978) (Idaho statute violates commerce and supremacy clauses), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Natomas Co. v. Bryan*, 512 F. Supp. 191 (D. Nev. 1981) (Nevada statute violates commerce and supremacy clauses); *Crane Co. v. Lam*, 509 F. Supp. 782 (E.D. Pa. 1981) (Pennsylvania statute violates commerce and supremacy clauses); *Seagram & Sons v. Marley*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,246 (W.D. Okla. July 17, 1981) (Oklahoma statute violates commerce clause); *Empire, Inc. v. Ashcroft*, 524 F. Supp. 898 (W.D. Mo. 1981) (Missouri statute violates commerce and supremacy clauses); *Hi-Shear Indus. v. Campbell*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,804 (D.S.C. 1980) (South Carolina statute violates commerce and supremacy clauses); *Brascam Ltd. v. Lassiter*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,247 (E.D. La. 1979) (Louisiana statute violates supremacy clause); *Dart Indus. v. Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978) (Delaware statute violates commerce and supremacy clauses); *Kelly ex rel. McLaughlin v. Beta-X Corp.*, 103 Mich. App. 51; 302 N.W.2d 596 (1981) (Michigan statute violates supremacy clause); *Eure v. Grand Metropolitan Ltd.*, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,694 (N.C. Super Ct. 1980) (North Carolina statute violates supremacy clause). *But see City Investing Co. v. Simcox*, 476 F. Supp. 112 (D. Ind. 1979) (Indiana statute not violative of commerce or supremacy clauses), *aff'd on other grounds*, 633 F.2d 56 (1980); *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979) (Ohio statute not violative of commerce or supremacy clauses); *Sharon Steel Corp. v. Whaland*, 121 N.H. 607, 433 A.2d 1250 (1981) (New Hampshire statute not violative of commerce or supremacy clauses), *vacated and remanded*, 458 U.S. 1101 (1982) (vacated and remanded for consideration in light of *Edgar v. MITE Corp.*), *rev'd*, *Sharon Steel Corp. v. Whaland*, 466 A.2d 919 (N.H. 1983) (New Hampshire statute violates commerce clause); *Wylain, Inc. v. TRE Corp.*, 412 A.2d 338 (Del. Ch. 1980) (Delaware statute not violative of commerce or supremacy clauses).



the United States Supreme Court's 1982 decision in *Edgar v. MITE Corp.*<sup>45</sup> that the fate of state takeover legislation was apparently sealed.

In *MITE*, the Supreme Court found the Illinois Business Takeover Act<sup>46</sup> to be unconstitutional on the ground that it impermissibly burdened interstate commerce.<sup>47</sup> In part, the Illinois statute provided for: a precommencement waiting period after registration with the Secretary of State, merit review of the transaction, and extraterritorial (nonresident) restraint of nationwide tender offers.<sup>48</sup> The Court applied the commerce clause test articulated in *Pike v. Bruce Church, Inc.*,<sup>49</sup> to determine whether the burdens imposed by the Illinois act on interstate commerce were excessive in relation to the local state interests.<sup>50</sup> The Court first noted that the Secretary's authority to delay an offer in Illinois threatened nationwide tender offers. Such a delay could deny nonresident shareholders the right to make a premium upon the sale of their stock, hinder the reallocation of investor capital to its highest level, and deprive incumbent management of the incentive to perform well.<sup>51</sup> The Court then found that while the state had an interest in protecting resident shareholders, no such interest existed with respect to nonresident shareholders.<sup>52</sup> Even with respect to resident shareholders, the Court determined that the Illinois legislation was inconsistent since there were no registration requirements for a self tender offer by the target corporation, and the Williams Act had already provided for material disclosure to all shareholders.<sup>53</sup> The Court therefore concluded that the act was unconstitutional because it imposed

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45. 457 U.S. 624 (1982).

46. ILL. REV. STAT. ch. 121 1/2, §§ 137.51 to .70 (repealed 1983).

47. 457 U.S. at 643. Justice White, who delivered the opinion of the Court, found the statute to be objectionable on both supremacy clause and commerce clause grounds. However, a majority of the Justices only concurred with the commerce clause rationale. Only six of the nine Justices actually decided the merits of the case since there was a threshold issue of whether the controversy was moot. The status of the preemption challenge to state regulation of tender offers was not conclusively resolved.

48. *Id.* at 634-36.

49. 397 U.S. 137 (1970). In *Pike*, the Supreme Court invalidated an Arizona act that prohibited growers of cantaloupes in Arizona from shipping their goods out of state for packaging. In making this determination, the court found that the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

50. *MITE*, 457 U.S. at 644-45. In Part V-A of Justice White's opinion, in which a majority of the Court did *not* concur, the Illinois statute was deemed unconstitutional on the ground that it directly interfered with interstate commerce. A state statute that directly burdens interstate commerce is necessarily invalid regardless of the state's interest or purpose. *Id.* at 642-43 (citing *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925)).

51. 457 U.S. at 643 (citing Easterbrook & Fischel, *The Proper Role of Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1173-74 (1981); Fischel, *Efficient Capital Market Theory, The Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEXAS L. REV. 1, 5, 27-28, 45 (1978); H.R. Rep. No. 94-1373, p. 12 (1976)).

52. *MITE*, 457 U.S. at 644. Justice White stated that, "Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." *Id.*

53. *Id.* at 645.

a "substantial burden on interstate commerce which outweigh[ed] its putative local benefits."<sup>54</sup> A majority of the Court did not, however, agree that the Illinois statute was preempted by the Williams Act.<sup>55</sup>

The impact of *MITE* was immediate and substantial. While *MITE* arguably allowed some room for state regulation of tender offers,<sup>56</sup> subsequent courts effectively precluded any such regulation.<sup>57</sup> The first federal appellate court to decide the constitutionality of a state takeover statute after the *MITE* decision was the Eighth Circuit in *National City Lines, Inc. v. LLC Corp.*<sup>58</sup> The *National City Lines* court held that the Missouri Takeover Bid Disclosure Act<sup>59</sup> was preempted by the Williams Act since Missouri allowed for delay in commencing the offer, provided for additional disclosure requirements, and discriminated between the offeror and incumbent management with respect to the dissemination of information.<sup>60</sup> The court also summarily invalidated the state act under the commerce clause since it was substantially similar to the unconstitutional Illinois act.<sup>61</sup> *National City Lines* established the trend for further judicial restriction of state regulation of tender offers.<sup>62</sup>

Subsequent to *National City Lines*, state legislatures structured their takeover statutes to lessen the burdens on interstate commerce and to

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54. *Id.* at 646.

55. *See supra* note 47. Only Justice White, Chief Justice Burger, and Justice Blackmun joined in the preemption rationale.

56. 457 U.S. at 646 (Powell, J., concurring). Justice Powell indicated that the Court's commerce clause rationale left some room for state regulation. Also, Justice Stevens noted that Congress' neutrality policy did not prohibit state protective legislation for incumbent management. *Id.* at 655 (Stevens, J., concurring). *See also*, Warren, *Developments in State Takeover Regulation: MITE and Its Aftermath*, 40 *Bus. Law.* 671, 685-86 (1985).

57. *See, e.g.*, *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425 (10th Cir. 1983) (Oklahoma takeover statute declared unconstitutional); *Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983) (Virginia statute held unconstitutional); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982) (Michigan takeover act held unconstitutional); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982) (Missouri statute declared unconstitutional); *Sharon Steel v. Whaland*, 466 A.2d 919 (N.H. 1983) (New Hampshire takeover statute held unconstitutional); *Esmark, Inc. v. Strode*, 639 S.W.2d 768 (Ky. 1982) (Kentucky act found unconstitutional).

58. 687 F.2d 1122 (8th Cir. 1982). *National City Lines, Inc.*, a Delaware corporation, commenced a tender offer for all of the outstanding common stock of LLC Corp. LLC was also a Delaware corporation and had a subsidiary insurance company domiciled in Missouri. Concurrent with the tender offer, National brought suit in the federal district court to enjoin enforcement of the Missouri Takeover Act, and the district court ultimately granted the preliminary injunction.

59. MO. ANN. STAT. §§ 405.500 to .565 (Vernon 1979).

60. 687 F.2d at 1128.

61. *Id.* The court did not analyze the commerce clause challenge, but merely invalidated the Missouri act on the ground that there were "no sufficient distinctions between the Illinois and Missouri Takeover Acts." *Id.*

62. *See supra* note 57.

minimize conflicts with the Williams Act.<sup>63</sup> Yet, the judicial trend established by *MITE* and *National City Lines* continued. In *Martin-Marietta Corp. v. Bendix Corp.*,<sup>64</sup> the Sixth Circuit Court of Appeals anticipated and rejected the argument that an extraterritorial provision of the Michigan Take-Over Offers Act<sup>65</sup> could be severed in order to render the act, as a whole, constitutional.<sup>66</sup> The court stated that even an injunction that affected only resident shareholders could impermissibly burden interstate commerce if the stock held by resident shareholders was needed to comply with a "minimum number of shares" provision in a nationwide offer.<sup>67</sup> In *Mesa Petroleum Co. v. Cities Service Co.*,<sup>68</sup> the Tenth Circuit struck down the Oklahoma Take-Over Bid Act<sup>69</sup> on commerce clause grounds even though the act did not contain a pre-commencement waiting period or provide for delayed hearings.<sup>70</sup> The *Mesa* court stated that similar to the invalidated Illinois act, the Oklahoma statute contained the fatal flaw of permitting a state to block a nationwide offer under the guise of protecting resident shareholders.

Thus, while a dual system of takeover regulation theoretically existed, the *MITE* decision and its progeny thwarted any attempts at state regulation. State takeover legislation was most commonly invalidated under

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63. For additional discussion on state experimentation with takeover statutes, see *infra* notes 161-66 and accompanying text.

64. 690 F.2d 558 (6th Cir. 1982). The facts in *Martin-Marietta* were rather intriguing. On August 25, 1982, Bendix Corporation commenced a tender offer for 54% of Martin-Marietta's shares. Martin-Marietta, in turn, began a counter tender offer for 50% of the outstanding stock of Bendix on August 30, 1982. At the same time that Martin-Marietta commenced the counter tender offer, it also brought suit in the federal district court seeking injunctive relief against enforcement of the Michigan Take-Over Offers Act. Relief was denied by the district court, and Martin-Marietta thereupon enlisted the aid of United Technologies to commence a second offer. The second request for injunctive relief was again denied on the ground that Martin-Marietta and United Technologies had not shown that their allegations of the statute's unconstitutionality would not likely succeed on its merits. On appeal, the Sixth Circuit Court of Appeals reversed.

65. MICH. COMP. LAWS ANN. §§ 451.901 to .918 (West Supp. 1983-84).

66. The extraterritorial provision that the court found objectionable stated: "An offeror may not make a take-over offer which is not made to security holders in this state on substantially the same terms as the offer is made to security holders outside this state." *Id.* § 451.911. The court stated that the quoted provision expressly made the balance of the Michigan Act applicable to out-of-state transactions, and that the state had no legitimate interest in protecting non-resident shareholders. 690 F.2d at 566.

67. Since the acquiring party wants to ensure that it will gain control of the target corporation through its cash tender offer, it will often condition the offer upon the event that enough shares are tendered to enable the offeror to acquire at least 50% of the outstanding common stock in the target. For a discussion of the mechanics involved in making cash tender offers see E. ARANOW & H. EINHORN, *supra* note 3.

68. 715 F.2d 1425 (10th Cir. 1983).

69. OKLA. STAT. ANN. tit. 71, §§ 431 to 4509 (West 1981).

70. 715 F.2d at 1430 n.7.

the commerce clause holding in *MITE*, but had also been held to be preempted by the Williams Act.

CARDIFF ACQUISITIONS, INC. v. HATCH<sup>71</sup>

*Facts and Procedural History*

On November 4, 1984, the plaintiff, Cardiff Acquisitions, Inc. (Cardiff) commenced a tender offer for all of the outstanding shares of Conwed Corporation by filing a Schedule 14D-1<sup>72</sup> with the Securities Exchange Commission (SEC).<sup>73</sup> Cardiff is a wholly owned subsidiary of Cardiff Equities Corporation<sup>74</sup> and was formed by Cardiff Equities for the purpose of making the subject tender offer. Both Cardiff and Cardiff Equities are Delaware corporations with their principal places of business in California.<sup>75</sup> The target of the tender offer, Conwed Corporation (Conwed), also a Delaware corporation, had its principal place of business in Minnesota.<sup>76</sup>

The material terms of the offer, as detailed in the Schedule 14D-1, provided that all shares tendered before December 4, 1984 would be purchased by Cardiff at \$21.50 per share.<sup>77</sup> Cardiff, however, expressly conditioned the tender offer upon a minimum number of shares being tendered by Conwed's shareholders.<sup>78</sup> Also, Cardiff was permitted to commence purchasing the offered shares on November 28, 1984, sixteen business days after commencement of the offer.<sup>79</sup>

In addition to filing the Schedule 14D-1 with the SEC, Cardiff also filed a Registration Statement with the Minnesota Commissioner of Commerce on November 5. The registration was required since Conwed was a "target corporation"<sup>80</sup> as defined in the Minnesota Corporate Take-Overs Act.<sup>81</sup> Concurrent with filing the Registration Statement, Cardiff brought suit in the federal district court of Minnesota seeking a temporary restraining order

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71. 751 F.2d 906 (8th Cir. 1984).

72. Cardiff Acquisitions, Inc. v. Hatch, 597 F. Supp. 1493, 1495 (1984). Schedule 14D-1 is a form that a purchaser of shares must file if it intends to make a tender offer for the outstanding shares of a target corporation.

73. *Id.*

74. The terms "plaintiff" and "Cardiff," as used herein, shall refer to both Cardiff Acquisitions, Inc. and Cardiff Equities Corporation.

75. 597 F. Supp. at 1495.

76. *Id.* Also, at least 20% of Conwed's stock was held by Minnesota residents. *Id.* at 1496.

77. It is not clear from the record how much the offering price exceeded the market price of Conwed's common stock.

78. 597 F. Supp. at 1495.

79. *Id.*

80. The Minnesota act defined a "target company" as "an issuer of publicly traded equity securities which has at least 20 percent of its equity securities beneficially held by residents of this state and has substantial assets in this state." MINN. STAT. § 80B.01(9).

81. 597 F. Supp. at 1496.

against enforcement of the Minnesota act. Cardiff alleged that the takeover act was unconstitutional. The district court denied the restraining order and set a hearing date for the plaintiff's motion for a preliminary injunction.<sup>82</sup> However, prior to the preliminary injunction hearing, on November 8, 1984, the Commissioner ordered temporary suspension of Cardiff's tender offer in Minnesota on the ground that Cardiff had failed to make full disclosure under the Take-Overs Act.<sup>83</sup>

On November 15, 1984, the district court denied Cardiff's motion for a preliminary injunction and also rejected its request for an injunction pending appeal of the decision.<sup>84</sup> The district court found that Cardiff had not shown that it was likely to succeed on the merits of the controversy.<sup>85</sup> The court analyzed and rejected Cardiff's interstate commerce and preemption challenges to the validity of the Minnesota act, and upheld the act's constitutionality.<sup>86</sup> Cardiff then moved for an expedited appeal and the Eighth Circuit Court of Appeals granted that motion.<sup>87</sup>

On appeal, in *Cardiff Acquisitions, Inc. v. Hatch*,<sup>88</sup> the Eighth Circuit severed certain aspects of the Minnesota act that it determined were invalid and upheld the constitutionality of the act as a whole.<sup>89</sup> The court of appeals thereby affirmed the lower court's dismissal of the complaint for preliminary injunction.

#### *Eighth Circuit's Rationale*

In *Cardiff*, the Eighth Circuit determined that the Minnesota act was not facially unconstitutional. In reaching this result, the court narrowly construed

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82. *Id.* The preliminary injunction motion sought to enjoin the Commissioner of Commerce and Attorney General of Minnesota from enforcing provisions of the act.

83. *Id.* The Commissioner then scheduled a hearing on the matter for November 16, 1984.

84. *Id.* at 1500. The parties had stipulated that the decision on the preliminary injunction would also be dispositive of the request for permanent injunction.

85. *Id.* at 1497. The district court noted that the relevant factors in determining the issuance of a preliminary injunction were: 1) the threat of irreparable harm to the movant, 2) the resulting injury to the other parties, 3) the probability of the movant's success on the merits, and 4) the public interest. *Id.* at 1496 (citing *Dataphase Sys. Inc. v. CL Sys. Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)). The district court stated that the merits criterion was dispositive in the subject controversy since the other factors weighed equally for both parties. *Id.* at 1496-97.

86. See 597 F. Supp. at 1498. With respect to Cardiff's interstate commerce challenge, the court stated that although the Minnesota Commissioner's suspension of the offer could result in the frustration of a nationwide tender offer and prevent shareholders of Conwed from recognizing a premium on the sale of their stock, such burdens on interstate commerce were merely incidental. *Id.* The court found that the state's interest in requiring the offeror to disclose the impact that the tender offer would have specifically in Minnesota outweighed the slight burdens on interstate commerce. *Id.* With respect to the supremacy clause challenge, the court held that while some conflict did in fact exist between the Minnesota act and the Williams Act, that conflict was not so material as to frustrate the Williams Act's purpose of providing shareholder protection. *Id.*

87. *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984).

88. *Id.*

89. *Id.* at 909.

the Take-Overs Act to be substantially consistent with the Williams Act, not impermissibly burdensome on interstate commerce, and protective of local shareholders' interests.<sup>90</sup> Judge Heaney, writing for the court, analyzed the facial constitutionality of the act against interstate commerce and supremacy clause challenges, and then addressed the issue of whether the statute had been constitutionally applied by the Commissioner to Cardiff's tender offer.

The court first rejected Cardiff's interstate commerce challenge. The court found that under the Supreme Court's holding in *Edgar v. MITE Corp.*, which struck down the Illinois Business Takeover Act<sup>91</sup> as an impermissible burden on interstate commerce, a state statute may incidentally affect interstate commerce so long as the local benefits resulting from the statute outweighed those effects.<sup>92</sup> The court then indicated that Minnesota's takeover act was carefully structured to minimize its extraterritorial impact, and did not contain any of the provisions that the Supreme Court had previously found objectionable.<sup>93</sup> First, unlike the Illinois statute,<sup>94</sup> the Minnesota act does not require notification prior to filing the registration statement, and prohibits both the offeror and the target corporation from disseminating information while an offer is suspended.<sup>95</sup> Second, unlike the procedure involved under the Illinois statute,<sup>96</sup> in Minnesota the registration becomes effective at the time of filing. Also, although the Minnesota Commissioner can temporarily suspend an offer, the entire hearing process must be completed within sixteen calendar days.<sup>97</sup> Any possible delay would therefore be within the minimum required offering period of twenty business days that is specified by the Williams Act.<sup>98</sup> Third, the court found that while the Minnesota act provides the Commissioner with the authority to "prescribe different time limits"<sup>99</sup> than those previously mentioned, this provision was

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90. *Id.* The court's narrow construction of the Minnesota act, as well as its severing of several unconstitutional provisions and labeling certain acts by the Commissioner as "unauthorized" rather than unconstitutional, evidence its strained attempt to uphold the act's validity. See *infra* text accompanying notes 119-57.

91. ILL. REV. STAT. ch. 121 1/2, §§ 137.51 to -70 (repealed 1983).

92. 751 F.2d at 909, 911.

93. *Id.* at 909.

94. The Illinois act required the offeror to notify the Secretary of State, and the target, 20 days before commencing the offer. During this time period, only the incumbent management was permitted to disseminate information regarding the offer. ILL. REV. STAT. ch. 121 1/2, §§ 137.54E, 137.54B (repealed 1983).

95. MINN. STAT. § 80B.05(4).

96. The Illinois act allowed the Secretary to postpone the effectiveness of a tender offer indefinitely while it held hearings regarding the registration. ILL. REV. STAT. ch. 121 1/2 § 137.57C-D.

97. MINN. STAT. § 80B.03(5).

98. The SEC requires an offer to be held open to the shareholder of a target corporation for 20 business days. 17 C.F.R. § 240.143-1 (1984).

99. MINN. STAT. § 80B.03(5). The Minnesota act states, in relevant part, "the commissioner may prescribe different time limits than those specified in this subdivision by rule or order." *Id.*

used only to expedite hearings and not to delay the procedures.<sup>100</sup> Fourth, the Minnesota act did not authorize the suspension of tender offers on the ground that they were inequitable or unfair, as did the Illinois act.<sup>101</sup> Finally, in contrast to the Illinois act,<sup>102</sup> the Minnesota statute took effect only when the target company had at least twenty percent of its shareholders and a "substantial" amount of assets located in that state, or was domiciled in the state.<sup>103</sup> The court therefore concluded that, contrary to the statute rejected in *MITE*, the Minnesota act posed little threat of adversely affecting interstate commerce.

In addition to pointing out the distinctions between the Illinois and Minnesota statutes, the court also repudiated Cardiff's argument that although the Minnesota statute's burdens may indeed be less, the fact that the benefits derived from the act were merely de minimis should lead to the same result as that obtained in *MITE*. Cardiff first argued that since most of the information required to be disclosed under the Minnesota statute was already covered by the Williams Act, the additional disclosure did not enhance shareholder interest.<sup>104</sup> The court noted, however, that resident

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100. 751 F.2d at 911. The court first noted that the provision did not explicitly allow for extensions and that expedited procedures had been used in the earlier case of *Edudata Corp. v. Scientific Computers, Inc.*, 746 F.2d 429 (8th Cir. 1984). Thus, Judge Heaney stated that "we have no reason to believe the Minnesota Act will be applied in a manner which creates burdensome delay." *Cardiff*, 751 F.2d at 911. Judge Heaney's proposition, however, relates to the constitutionality of the provision as *applied* rather than its facial constitutionality.

101. 751 F.2d at 914. The court stated that the Commissioner was authorized to review the adequacy of disclosure so long as it was limited to its sufficiency. This reasoning, however, appears somewhat paradoxical since "sufficiency" and "adequacy" have two clearly distinct meanings.

102. The Illinois act defined a target company more broadly than the Minnesota act. The Illinois statute applied when 10% of a corporation's shares were held by Illinois residents or when two of the following criteria were met: 1) its principal executive office was in Illinois, 2) it was incorporated in Illinois, or 3) at least ten percent of its stated capital and paid-in surplus was in Illinois. ILL. REV. STAT. ch. 121 1/2, § 137.52-10(2) (repealed 1983).

103. MINN. STAT. § 80B.01(9).

104. 751 F.2d at 911. The Minnesota act's disclosure requirements are as follows:

Under section 80B.03(6)(a)-(e), an offeror must disclose: (a) information about its background and identity; (b) the source of the funds to be used in making the purchase and the material terms of any financing arrangements; (c) the purpose of the purchase and the offeror's plans for the business, including any plans to liquidate the company, to make major changes in its corporate structure or to materially alter its relationship with suppliers, customers, or communities in which it operates; (d) the extent of the offeror's holdings in the target company; and (e) the material terms of any contract, arrangement, or understanding with any other person with respect to the equity securities or the issuer whereby the person filing the statement has or will acquire any interest in additional equity securities of the issuer, or is or will be obligated to transfer any interest in the equity securities to another.

*Id.* at 911 n.5. In addition, § 80B.03(2)(c) requires:

[I]nformation concerning [the offeror's] organization and operations, including the year, form and jurisdiction of its organization, a description of each class of equity security and long term debt, a description of the business conducted by the offeror

shareholders would be protected by simultaneous enforcement of state and federal disclosure requirements since the SEC did not have the resources to effectively evaluate all of the forms.<sup>105</sup> Cardiff also contended that the additional disclosure requirements (those not covered by the Williams Act) were clearly burdensome on interstate commerce and did not serve a legitimate function. The court rejected this argument by stating that the additional information, which related to the economic impact that the tender offer would have on the state, aided shareholders in deciding whether to sell their stock.<sup>106</sup> Thus, the circuit court rejected Cardiff's argument that the Minnesota Corporate Take-Overs Act was facially violative of the interstate commerce clause.

The second phase of the court's analysis centered on the facial validity of the Minnesota act under the supremacy clause. The court's determinations under this analysis are particularly interesting in that while certain provisions of the act were found to be unconstitutional, the act itself was deemed valid under the supremacy clause.<sup>107</sup> The court first noted that section 28(a) of the 1934 Act,<sup>108</sup> which allowed state regulation of securities so long as it did not conflict with federal law, clearly applied to the Williams Act. The court also indicated that the *MITE* decision did not divulge the Supreme Court's stance on the preemption issue since the majority had only agreed on the interstate commerce challenge.<sup>109</sup>

The *Cardiff* court, however, did recognize that its prior decision in *National City Lines v. LLC Corp.*,<sup>110</sup> in which the Missouri Takeover Bid Disclosure Act<sup>111</sup> was invalidated in part on the ground that it was preempted by the Williams Act, was somewhat relevant to the present controversy. The *Cardiff* court first noted that *National City Lines* was distinguishable since

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and its subsidiaries and any material changes therein during the past three years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three years, and financial statements of the offeror in such form and for such period of time as the commissioner may by rule prescribe[.]

*Id.* at 911 n.5. The Williams Act, on the other hand, requires disclosure of the offeror's background and identity, its source of offering funds, its purpose in seeking control, and the extent of the offeror's holdings in the target company.

105. 751 F.2d at 912. The court cited *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707 (5th Cir. 1984), in which the SEC filed an amicus brief stating that it could not police the truthfulness of all 13(d) reports.

106. 751 F.2d at 912.

107. *Id.* at 915.

108. *See supra* note 19.

109. 751 F.2d at 913. *See supra* note 47.

110. 687 F.2d 1122 (8th Cir. 1982). For an analysis of the Eighth Circuit's holding in *National City Lines*, see *supra* notes 58-61 and accompanying text.

111. MO. ANN. STAT. §§ 409.500 to .565 (Vernon 1979).



the Missouri statute was very similar to the Illinois statute struck down in *MITE*.<sup>112</sup> Yet, the court did find certain provisions in the Minnesota act that authorized the Commissioner to prescribe additional disclosure requirements to be unconstitutional because they resembled provisions similar to those in the Missouri act. These sections were held to be unconstitutionally vague.<sup>113</sup> The *Cardiff* court upheld the remaining disclosure requirements, and also found that it was permissible for the Commissioner to evaluate the sufficiency of the information disclosed.<sup>114</sup>

With respect to the constitutionality of the Minnesota statute as applied, Judge Heaney found some aspects to be "unauthorized," but upheld its overall application.<sup>115</sup> The court affirmed the Commissioner's finding that Cardiff had disclosed insufficient facts regarding its source of financing and its plans to liquidate Conwed after gaining control.<sup>116</sup> The Commissioner's demand that Cardiff characterize certain lawsuits and discuss their "value and propriety," however, was deemed to be beyond the authority granted by the act.<sup>117</sup> Similarly, the court found the Commissioner's request that Cardiff disclose that its potential two-tier tender offer violated the act was also beyond the Commissioner's authority.<sup>118</sup>

Thus, the Eighth Circuit Court of Appeals held that the Minnesota Corporate Take-Overs Act was constitutional both on its face and as applied. The court determined that the slight burdens on interstate commerce were outweighed by the state's legitimate interest in protecting its resident shareholders. The facial validity of the takeover act withstood supremacy clause challenges even though certain provisions were deemed unconstitutionally vague. The court also found that the act had been constitutionally applied even though certain acts of the Commissioner were deemed to be "unauthorized" by the statute.

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112. 751 F.2d at 913. The court in *National City Lines* summarily upheld the interstate commerce challenge since the Missouri act resembled the Illinois act.

113. 751 F.2d at 914.

114. See *supra* note 101. The court qualified the Commissioner's power of review by stating that he "has no authority to suspend the effectiveness of a tender offer on the ground that the quality of the facts alleged do not satisfy him." 751 F.2d at 914.

115. 751 F.2d at 914-16. The court's characterization of certain acts by the Commissioner as "unauthorized" allowed the court to avoid the issue of the Minnesota act's constitutionality as applied. The distinction between "unauthorized" and unconstitutional, however, is not at all clear.

116. *Id.* at 915.

117. *Id.* at 916.

118. *Id.* A "two-tier" offer essentially involves a cash tender offer followed by a merger in which shareholders who did not initially tender their stock receive the securities of the offering corporation at a value less than the initial offering price. This form of acquisition raises potential fairness problems under the Williams Act. See Steinberger, *Corporate Takeovers-Cash Tender Offers, Exchange Offers, and Target Defense*, in *BUSINESS ACQUISITIONS* 167 (2d ed. & Supp. 1983).

ANALYSIS AND CRITIQUE OF THE *CARDIFF* DECISION

The Eighth Circuit's holding in *Cardiff*, while philosophically innovative, is inconsistent with prior law.<sup>119</sup> The decision is not only incompatible with its previous holding in *National City Lines*, but also reflects an unsound application of the *MITE* holding. The *Cardiff* decision does, however, support the legitimate proposition that there are some limitations to the far-reaching implications of *MITE*.<sup>120</sup>

To begin with, the court's analysis of Cardiff's interstate commerce challenge was incomplete. While the court correctly found that the burdens resulting from the Minnesota act were not as material as those under the invalidated Illinois statute, the court did not adequately identify what the remaining burdens were and how they were outweighed by the state's interest. One potential adverse effect of the act that the court should have considered is that one corporation could be delayed or prohibited from acquiring the shares of another corporation by a state in which neither was incorporated.<sup>121</sup> For example, in the subject case, a Minnesota statute was invoked by one Delaware corporation to frustrate another Delaware corporation's hostile tender offer. A second burden is that if the minimum number of shares are not tendered because of the Minnesota act, nonresident and resident shareholders of Conwed would be denied the opportunity to realize a premium upon the sale of their stock to Cardiff.<sup>122</sup> Also, as the district court indicated, "the very existence of the Minnesota Act may tend to limit the number of takeover attempts of corporations which have a substantial nexus with the state," and thereby lessen the efficiency of incumbent management.<sup>123</sup> An additional burden that would result from application of state takeover statutes in general would be the onerous task of complying with various state disclosure requirements and litigating the numerous legal controversies that would arise in each state.<sup>124</sup>

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119. See *supra* notes 42-70 and accompanying text for a discussion of the law prior to *Cardiff*.

120. While *MITE* was limited to the validity of state takeover regulation in particular, one federal district court has gone so far as to say that federal regulation of securities has superseded state legislation in general. See Warren, *supra* note 56, at 685 (citing *Conkling v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 575 F. Supp. 760, 761 (D. Mass. 1983)).

121. Justice White supported the belief that the Illinois Act *directly* burdened interstate commerce by noting that "the Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *MITE*, 457 U.S. at 642-43. Despite the fact that this part of Justice White's opinion as applied to the Illinois statute was not joined in by a majority of the Court, the statement itself is nonetheless valid as a premise of constitutional law.

122. *Id.* at 643.

123. *Cardiff*, 597 F. Supp. at 1495. The deterrent effect that state takeover statutes may have on future hostile corporate acquisitions is discussed *infra* in the "Impact" section of this Recent Case.

124. See *MITE*, 457 U.S. at 642. The Court opined that "if Illinois may impose such

The court did not address these factors in its interstate commerce analysis. Instead, the court merely elucidated the discrepancies between the Illinois and Minnesota takeover acts and repudiated the alleged burdens that would ensue from one state's disclosure requirements. Even in these areas, however, the court's findings are tenuous. For instance, the court approved state disclosure requirements that duplicate those required by the Williams Act.<sup>125</sup> Yet, while the burden of providing such information is not great, the state's interest in demanding it would be nonexistent. The *Cardiff* court, however, justified such disclosure by asserting that the SEC's inadequate review of federal disclosure forms fails to adequately protect resident shareholders.<sup>126</sup> This proposition, however, directly conflicts with the Eighth Circuit's previous statement in *National City Lines* that state agencies should not second-guess SEC determinations.<sup>127</sup> Also, the court's statement that additional disclosure requirements pertaining to the economic impact of the tender offer in Minnesota would help resident shareholders decide whether or not to sell their stock is unsound. Shareholders hold stock for investment purposes; only information that relates to the potential profitability of the transaction is relevant.<sup>128</sup> Considerations regarding the effect of tender offers on employees and suppliers do not reflect the state's interest in protecting its shareholders, but merely evidence its protectionistic approach to securities regulation. That the state was not primarily interested in shareholder protection is also reflected in the act's failure to prohibit target corporations from commencing tender offers for their own shares without registration and disclosure requirements.<sup>129</sup>

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regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled." See also Note, *supra* note 35, at 1018 (stating that the potential for chaos and balkanization that could result from different, yet concurrent, state takeover statutes is proper grounds for concern).

125. The principal additional disclosure requirements that the Minnesota act contained were those pertaining to the economic effects that the tender offer would have in that state. See *supra* note 104 for a detailed discussion of Minnesota's disclosure requirements.

126. See *supra* note 105 and accompanying text.

127. The court in *National City Lines* stated that Missouri's attempt to second guess material disclosure requirements promulgated by the SEC could not stand. 687 F.2d at 1132 (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 152, 171 (1963)).

128. It is ironic that the best support for the proposition that additional disclosure requirements are invalid is set forth in the Eighth Circuit's prior holding in *National City Lines*, in which the court stated:

However, '[d]isclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures.' . . . Similarly, the Supreme Court warned in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448, 96 S.Ct. 2126, 2131, 48 L.Ed.2d 757 (1976), that excessive disclosure requirements 'may accomplish more harm than good' by confusing shareholders. Such a result conflicts with the Williams Act's goal of unfettered choice by well-informed investors.

*Id.* at 1131 (citations omitted).

129. See *MITE*, 457 U.S. at 644. Justice White, writing for a majority, stated that the Illinois

The court's analysis of Cardiff's supremacy clause challenge is similarly underdeveloped, and is also somewhat unusual. While the court conceded that certain provisions in the Minnesota act unconstitutionally empower the Commissioner to prescribe disclosure requirements not delineated in the federal Williams Act,<sup>130</sup> the court upheld the validity of the takeover act as a whole.<sup>131</sup> The basis for the court's authority to sever from a statute certain sections that would otherwise render it unconstitutional is not clear.<sup>132</sup> The court apparently distinguished these provisions from those employed in the invalidated Missouri statute on the ground that they were unconstitutionally vague rather than violative of the supremacy clause.<sup>133</sup>

Apart from the severability issue, the court's discussion of Cardiff's preemption challenge under the supremacy clause was not comprehensive. A threshold issue that the court only summarily addressed was the possibility that § 28(a) of the 1934 Act,<sup>134</sup> which granted states concurrent jurisdiction in securities regulation, was not applicable to the Williams Act. While support for the proposition that the Williams Act explicitly preempted state cash tender offer regulation is not strong,<sup>135</sup> the mere existence of such arguments is indicative of the more common notion that general securities regulation and tender offer regulation are distinct areas.

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act's exemption of a corporation's acquisition of its own shares was inconsistent with the avowed legislative intent of protecting shareholders. *But see* Cardiff Acquisitions, Inc. v. Hatch, 597 F. Supp. 1493, 1499-1500 (D. Minn. 1985) (stating that an exemption for self tender offers is not inconsistent with the Williams Act since the target's shareholders already know all the relevant data pertaining to the transaction).

130. 751 F.2d at 914.

131. *Id.* In summarizing the court's analysis of the facial validity of the Minnesota act, Judge Heaney stated, "because we find that the Act is, with a few exceptions, constitutional on its face, we must also analyze whether the Act is constitutional as applied . . ." *Id.*

132. While the Supreme Court in *Dorchy v. Kansas*, 264 U.S. 286, 290 (1923), stated that "a statute bad in part is not necessarily void in its entirety," it also noted that valid provisions cannot be severed from unconstitutional sections unless the legislature intended that unobjectionable provisions stand when others are invalidated. Unlike the situation in *Dorchy*, in which the Court did allow severance, the Minnesota act contains no expression of legislative intent to let valid provisions stand when others are deemed unconstitutional. *See* *Martin-Marietta Corp. v. Bendix*, 690 F.2d 558 (6th Cir. 1982) (rejecting the argument that an extraterritorial provision could be severed to render the statute constitutional); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1285-86 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.* 443 U.S. 173 (1979). *But see* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510, 527 (1979) (stating that a commerce clause analysis should be applied to separate provisions of state takeover statute rather than the entire act).

133. It is not clear, however, what distinction there is between the concepts of vagueness and preemption with respect to the severability issue.

134. *See supra* note 19.

135. The Williams Act does not explicitly mention the preemption issue and it has therefore been assumed that § 28(A) was meant to apply to the Act. *See* *MITE*, 457 U.S. at 631. However, as noted in *Langevoort*, *supra* note 35, at 247, the applicability of 28(A) to tender offers is questionable since it was enacted in 1934 to preserve state blue sky laws, before state takeover statutes existed. *See also* Note, *supra* note 132, at 519 n.63 (stating that courts often treat such savings clauses as inapplicable in preemption issues).

Whether or not state tender offer regulation is preempted outright by the Williams Act, the Minnesota statute is in effect preempted if it conflicts with the federal regulation or frustrates its objectives.<sup>136</sup> While the Eighth Circuit correctly pointed out that the *MITE* Court did not invalidate the Illinois act under the supremacy clause,<sup>137</sup> the preemption tests articulated by Justice White are still pertinent. The *Cardiff* court's avoidance of the *standards* applied in *MITE* on the ground that the Supreme Court Justices did not agree on the *purpose* of the Williams Act was therefore not justified. The court should have focused its preemption analysis on the issue of whether the Minnesota statute frustrated the purposes or procedures of the Williams Act.<sup>138</sup> Instead of applying the *MITE* analysis, however, the court looked toward its prior holding in *National City Lines* for support in rejecting the preemption argument.<sup>139</sup>

Had the *Cardiff* court applied the traditional preemption tests outlined in *MITE*, it would first have determined whether it was procedurally possible for an offeror to comply with both the Minnesota Take-overs Act and the federal Williams Act.<sup>140</sup> Since an offer immediately takes effect upon registration under the Minnesota act, and the potential hearing process must be completed within the offering time frame prescribed by federal law, there are no apparent procedural conflicts.<sup>141</sup> This finding, however, is not dispositive of the preemption analysis, for if the Minnesota act frustrates the purposes of the Williams Act it must still be invalidated.<sup>142</sup>

The Williams Act has the dual purpose of protecting shareholders and maintaining a neutral balance between the offering and target corporations.<sup>143</sup> Justice Powell's statement in *MITE* that the Williams Act neutrality stance could encompass state legislation that protects incumbent management is both inherently illogical and unsupported by the Williams Act's legislative

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136. See *MITE*, 457 U.S. at 631. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 384-86 (1978).

137. See *supra* note 47.

138. 457 U.S. at 631. The *MITE* Court stated that a state statute is invalid if it actually conflicts with a valid federal act and cited *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), for the proposition that:

A conflict will be found 'where compliance with both federal and state regulation is a physical impossibility,' . . . or where the state 'law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'

457 U.S. at 631 (citations omitted).

139. However, as discussed *infra* at notes 154-57 and accompanying text, the court's reliance on *National City Lines* was equally unpersuasive.

140. See *MITE*, 457 U.S. at 631.

141. See *supra* notes 97-98 and accompanying text for a comparison of the requirements of the Minnesota act and the Williams Act.

142. *MITE*, 457 U.S. at 631.

143. See *supra* notes 33-35 and accompanying text for an analysis of the dual purpose of the Williams Act.

history.<sup>144</sup> Moreover, the Eighth Circuit's reliance on Justice Powell's statement to avoid entirely the application of the traditional preemption test was unsound. Rather, the court should have measured the effects of the Minnesota act against the objectives of the Williams Act to decide whether a conflict in fact existed.<sup>145</sup>

An examination of the Minnesota legislature's intent in passing the act would commence an analysis of whether a conflict existed. The Minnesota legislature's "findings" with respect to takeovers evidence an intent to protect incumbent management.<sup>146</sup> In fact, of the eight legislative findings, only two are concerned with the economic interests of shareholders.<sup>147</sup> The remaining findings are concerned with such potential problems as exaggerated "focus on short-term [corporate] performance," the employment of the state's citizens, the viability of its industry, and other economic implications for the state.<sup>148</sup> While these may be legitimate state interests in other contexts, they are clearly contrary to the Williams Act's dual purpose of protecting shareholders and maintaining a neutral balance between the opposing parties.<sup>149</sup>

The Minnesota act also conflicts with the Williams Act in numerous other respects. First, as both the *MITE* Court and the legislative history indicate, the Williams Act was expressly designed to prevent unreasonable delay in

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144. *MITE*, 457 U.S. at 646-47 (Powell, J., concurring). Any state legislation "designed to assure . . . greater protection to interests that include . . . those of incumbent management" would necessarily be detrimental to the raider and therefore tip the delicate balance created by the Williams Act. See *supra* notes 33-35 and accompanying text.

145. The test, as articulated by Justice White in *MITE*, is whether the state statute "frustrates the objectives of the Williams Act in some substantial way." 457 U.S. at 632.

146. The Minnesota legislature's "findings" are as follows:

The legislature finds that take-overs, particularly hostile take-overs: (1) exaggerate the tendency of many businesses to focus on short-term performance to the detriment of such long-term societal interests as increased research and development, improved productivity, and the modernization of physical plant and employee capabilities; (2) are often inconsistent with the economic interests of shareholders; (3) in many instances threaten the jobs and careers of Minnesota citizens and undermine the ethical foundations of companies, as when jobs are eliminated and career commitments to employees are breached or ignored; (4) often result in plant closings or consolidations that damage communities dependent on the jobs and taxes provided by these plants; (5) not infrequently wipe out long-standing customer/supplier relationships and the stability and continuity which these relationships provide throughout society; (6) frequently tie up billions of dollars of scarce capital that could be more effectively applied; (7) all too often stifle, and ultimately destroy, the entrepreneurial, innovative spirit of creative individuals in independent firms; and (8) are usually conducted in an atmosphere and pursuant to laws that do not provide a reasonable opportunity for affected parties to make informed decisions.

147. See *supra* note 146, "findings" number 2 and number 8.

148. See *supra* note 146.

149. The state's interest in protecting its fiscal integrity by keeping corporations that supply both tax revenues and substantial employment within its jurisdiction is clearly inconsistent with the mandates of the Williams Act. See *supra* notes 33-35 and accompanying text.

tender offers since additional time provides the target company with a powerful weapon to combat takeovers.<sup>150</sup> It is quite apparent, however, that the Minnesota Commissioner's authority to suspend a tender offer within his jurisdiction could delay, and possibly ruin, an otherwise valid tender offer. Second, the Minnesota act does not regulate a target company's tender offer for its own outstanding shares. This omission reveals that shareholder protection and offeror/target neutrality are not the main concerns of the act.<sup>151</sup>

Finally, the Minnesota act's disclosure requirements also conflict with the Williams Act. The Williams Act requires the disclosure of very specific information so as not to undermine the balance between the bidder and incumbent management; limited disclosure also prevents shareholders from being overwhelmed with irrelevant information.<sup>152</sup> The Minnesota act's additional disclosure requirements, however, violate both of these precepts. For example, information relating to the economic impact of the tender offer on the state is simply not relevant to an investment decision and therefore serves only to confuse the shareholder.<sup>153</sup> The additional irrelevant disclosure could also sway shareholders not to tender their stock and thereby upset the delicate balance created by the Williams Act. Thus, application of the traditional preemption analysis, which the *Cardiff* court chose to ignore, suggests that the Minnesota act would violate the supremacy clause and therefore be unconstitutional.

Even under the Eighth Circuit's explicit approach in deciding the preemption issue, however, the court's conclusion is not justified by the facts. In its preemption analysis, the court relied paradoxically on its prior decision in *National City Lines*, in which the Missouri Takeover Bid Disclosure Act was invalidated under both the supremacy clause and commerce clause.<sup>154</sup> The court rejected Cardiff's argument that the Minnesota act contained provisions that were strikingly similar to those that doomed the constitutionality of the Missouri act.<sup>155</sup> The court found that the Missouri act's provisions were "much broader and more open-ended."<sup>156</sup> In the very next

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150. See *MITE*, 457 U.S. at 636-38 (outlining in detail the legislative intent to avoid delay in tender offers since delay can frustrate valid corporate acquisitions). See also *Langevoort*, *supra* note 35, at 238.

151. See *supra* note 129.

152. See *supra* note 128 for a discussion of the Eighth Circuit's prior decision in *National City Lines*, in which the court supported its proposition that additional state disclosure requirements are contrary to shareholder protection.

153. *Supra* note 128 and accompanying text.

154. See *supra* notes 58-62 and accompanying text for a discussion of the *National City Lines* decision.

155. The Missouri statute provided for disclosure of "such additional information as the commissioner may require as necessary in the public interest or for the protection of investors." MO. REV. STAT. § 409.515 (1979).

156. 751 F.2d at 914. The Minnesota provision was essentially the same as the invalidated Missouri section in that it permitted the commissioner to require other disclosure that would affect shareholders' evaluations. MINN. STAT. ANN. § 80B.034(A).

paragraph, however, the *Cardiff* court did find that the Minnesota provisions were unconstitutionally vague.<sup>157</sup> Therefore, apart from the unusual way in which the court severed unconstitutional provisions from the Minnesota act, the analysis is also inherently inconsistent and contrary to its prior decision in *National City Lines*.

While the *Cardiff* decision was admittedly rendered on an expedited basis, the lack of an in-depth analysis of the prior law in the area and the application of only a cursory review of Cardiff's arguments rendered the decision both incomplete and inconsistent. While the decision admittedly serves as an acknowledgement that there are some parameters to a comprehensive federal securities regulatory scheme, its condonation of the Minnesota act permitted an over-extension of state authority to regulate tender offers.

#### IMPACT OF THE *CARDIFF* DECISION

While the Eighth Circuit Court of Appeals' holding in *Cardiff* is decidedly contrary to the current trend in other jurisdictions,<sup>158</sup> it could have a substantial impact in numerous areas. First, the decision has profound implications for the federalism issues surrounding securities regulation. The dual federal/state system of regulating securities, while presumably extended to the cash tender offer under the Williams Act,<sup>159</sup> was severely restricted by judicial determinations. The *Cardiff* decision, however, suggests that states may in fact play a substantial role in the regulation of nationwide corporate takeovers when they affect resident shareholders. Residual state authority to regulate tender offers under the police power is therefore substantially increased.<sup>160</sup> While the split of judicial opinion in the federal circuits as to the validity of post-*MITE* takeover acts suggests further clarification by the Supreme Court, the exact roles of state and federal governments will remain unclear. Since state regulation of tender offers is essentially duplicative of the federal scheme in many respects, and conflicts with the Williams Act in others, it is submitted that explicit Congressional preemption in this area would alleviate much of the federalism ambiguities.

The *Cardiff* decision will also significantly influence future state takeover legislation. Subsequent to *MITE*, state legislatures experimented with different types of statutes to regulate corporate takeovers.<sup>161</sup> In addition to the

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157. 751 F.2d at 914.

158. See *supra* note 44 for a list of judicial invalidations of state takeover statutes.

159. Section 28(A) of the 1934 Act arguably preserves state authority to regulate tender offers. See *supra* notes 19 and 135 and accompanying text.

160. For a discussion of the limits of state power to regulate commerce, see Note, *supra* note 35, at 1014 n. 165. See generally L. TRIBE, *supra* note 136, at 319-36.

161. Approximately eight states have passed takeover legislation since *Mite*. See HAWAII REV. STAT. §§ 417E-1 to -15 (1976 & Supp. 1984); ILL. REV. STAT. ch. 32, § 7.85 (1985); KY. REV. STAT. §§ 271A.396 to .399 (Supp. 1984); LA. REV. STAT. §§ 51:1500 to :1512 (West Supp. 1985); MD. CORPS. & ASS'NS CODE ANN. § 3-601 to -603 (Supp. 1984-85); MO. ANN. STAT. § 351.407 (Vernon Supp. 1985-86); OHIO REV. CODE ANN. §§ 1701.83.1 to .83.2 (1985); PA. STAT. ANN. tit. 15, §§ 1408(B), 1409.1(C), 1910 (Purdon Supp. 1984-85).



statutes invalidated in *Bendix*<sup>162</sup> and *Mesa Petroleum*,<sup>163</sup> states have attempted to circumvent the *MITE* decision in several other ways. For instance, states have included anti-takeover provisions in their corporation acts rather than their securities acts,<sup>164</sup> regulated only certain harmful aspects of takeovers such as two-tier tender offers,<sup>165</sup> or increased the nexus requirements of target corporations to the state.<sup>166</sup> Since the validity of these innovative takeover provisions has not yet been determined, future state legislation will probably be modeled after the Minnesota act rather than the untested, more creative statutes.<sup>167</sup> If other states follow Minnesota's lead, it is probable that either an irreconcilable conflict between the federal circuits will develop, or a new judicial trend in the area of state regulation of tender offers will be established.

Perhaps the most profound impact that could result from the *Cardiff* decision is its potential practical ramifications on corporate acquisitions. The battles between corporate "raiders" and incumbent target management are currently the focus of national attention and have spawned voluminous articles on the benefits and drawbacks of such acquisitions.<sup>168</sup> At the heart of the takeover controversy lies the question of what steps the target management may validly take to prevent a hostile takeover. While the decisions of corporate directors have traditionally been upheld so long as a rational business judgment was advanced,<sup>169</sup> this standard has been criticized in the context of hostile tender offers. In such situations, the business judgment

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162. See *supra* notes 64-67 and accompanying text.

163. See *supra* notes 68-70 and accompanying text.

164. See OHIO REV. CODE ANN. §§ 1701.83.1 to .83.2 (1985). The Ohio Control Share Acquisition Act provides a "mechanism for shareholder review of proposed control share acquisitions." Note, *Has Ohio Avoided the Wake of MITE? An Analysis of the Constitutionality of the Ohio Control Share Acquisition Act*, 46 OHIO ST. L.J. 203, 207 (1985) (arguing that Ohio's new legislation is constitutional).

In addition, Illinois recently passed legislation patterned, in some aspects, after the Pennsylvania takeover legislation, PA. STAT. ANN. tit. 15, §§ 1408(B), 1409.1(C), 1910 (Purdon Supp. 1984-85). The Illinois legislation is included in the state's corporation laws and essentially regulates second step transactions in takeovers, such as mergers and sales of assets, to protect interested shareholders. For analyses of the Pennsylvania statute, see Comment, *The 1983 Amendments to Pennsylvania's Business Corporation Law: Unconstitutional? MITE Be*, 89 DICK. L. REV. 401 (1985), and Steinberg, *supra* note 37.

165. See MD. CORPS. & ASS'NS CODE ANN. §§ 3-601 to 3-603 (Supp. 1984). The Maryland statute regulates the second-stage "freeze outs" or forced mergers that often follow tender offers. See Note, *Second Generation State Takeover Legislation: Maryland Takes a New Tack*, 83 MICH. L. REV. 433 (1985).

166. See The Wisconsin Corporate Take-Over Law, WIS. STAT. ANN. §§ 551.01 to .25 (West Special Pamphlet 1983).

167. HAWAII REV. STAT. §§ 417E-1 to -15 (1976 & Supp. 1984).

168. See Easterbrook & Fischel, *supra* note 24; Lipton, *supra* note 24; E. ARANOW & H. EINHORN, *supra* note 3.

169. See Lipton, *supra* note 24.

rule enables target managements to protect their own employment at the expense of shareholder profits.<sup>170</sup>

Courts have recently upheld many of the defensive tactics that incumbent management have used to thwart hostile tender offers.<sup>171</sup> Yet, due to judicial restriction, state takeover regulation has not played a significant role in these control battles. The *Cardiff* decision, however, may encourage states to use their takeover acts as a shield to protect domestic businesses from takeover attempts. As a long-range preventive measure, or even upon immediate threat of takeover, companies could reincorporate in states with strong anti-takeover legislation. The Eighth Circuit's holding in *Cardiff* would provide a strong deterrent to hostile takeover attempts in jurisdictions with statutes similar to Minnesota's.

As a corollary to the proposition that corporations would migrate to states with stringent takeover regulation, it is also apparent that other states would pass similar statutes to preserve their own fiscal integrity. The resulting case law would attempt to define the parameters of valid state tender offer regulation, but the determinations in different jurisdictions would vary.

Therefore, it is possible that the use of state regulation as a defensive weapon in control battles would incite the adoption of these statutes in other states. The result would be an increase in litigation surrounding hostile takeovers. This, in turn, would raise the cost of corporate acquisitions to a point that could render them economically unfeasible. The uncertainty and expense of litigating in every state with a seemingly valid takeover act could deter numerous acquisitions and result in inefficient corporate management. Congressional preemption of tender offer legislation would alleviate both the problem of disparity in judicial determinations concerning the validity of state takeover acts and create a healthier economic environment for corporate management.

#### CONCLUSION

In *Cardiff*, the Eighth Circuit rejected the recent judicial trend of restricting state regulation of corporate takeovers. Yet, an analysis of the opinion itself, as well as its potential impact on securities regulation, reveals that the court's holding was not justified from a legal or economic perspective. The Eighth Circuit's prior decision in *National City Lines* and the Supreme Court's holding in *MITE* both mandate that the Minnesota act be deemed uncon-

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170. The "business judgment rule" has been attacked as being inappropriate in hostile acquisitions since the directors of the target corporation may have a conflict of interest in choosing to defend against a takeover. See Easterbrook & Fischel, *supra* note 24; Gilson, *The Case Against Shark Repellant Amendments: Structural Limitations On The Enabling Concept*, 34 STAN. L. REV. 775, 805 (1982).

171. See *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1982); *Siebert v. Milton Bradley Co.*, 405 N.E.2d 131 (Mass. 1980); *Young v. Valhi*, 382 A.2d 1372 (Del. Ch. 1978).

stitutional. The adverse effects that the decision could have on future corporate acquisitions also weigh against the propriety of the court's holding. In conclusion, it is submitted that Congress should enact legislation to preempt state regulation of tender offers in order to facilitate future judicial determinations and thereby relieve many of the burdens associated with the acquisition of corporations. Explicit federal preemption of cash tender offer regulation would protect interested shareholders, encourage efficient management, and foster a healthy national economy.

*Thomas V. Donnelly*