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## Chapter 9: Corporations

Michael B. Elefante

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C H A P T E R 9

## Corporations

MICHAEL B. ELEFANTE\*

**§9.1. Development of Partnership Theory of Close Corporations After *Donahue v. Rodd Electrotype Co.***<sup>1</sup> During the 1976 *Survey* year, the Massachusetts appellate courts were presented with cases requiring the application of the Supreme Judicial Court's holding in *Donahue v. Rodd Electrotype Co.*<sup>2</sup> In *Donahue*, the Court held that the stockholders of a close corporation<sup>3</sup> owe to one another the same duty of utmost good faith and loyalty owed by partners to one another.<sup>4</sup> Applying this rule to the specific issue in *Donahue*, the Court decided that when a close corporation purchases shares from a member of the controlling group, each shareholder must also have an equal opportunity to sell a ratable number of his shares to the corporation.<sup>5</sup> Although the Court specifically noted that it was expressing no opinion regarding the application of this standard of duty to transactions to which the corporation was not a party,<sup>6</sup> it did note that the duty would govern "actions relative to the operations of the enterprise and the effects of that operation" on the other shareholders.<sup>7</sup> Thus, following *Donahue*, it remained to be decided how this strict standard would be applied in other situations. During the *Survey* year, the Su-

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\*MICHAEL B. ELEFANTE is a partner in the law firm of Hemenway & Barnes, Boston.

§9.1. <sup>1</sup> 1975 Mass. Adv. Sh. 1295, 328 N.E.2d 505. For a further discussion of *Donahue*, see Elefante, *Corporations*, 1975 ANN. SURV. MASS. LAW §§ 17.1, 17.2, at 455-76; Recent Cases, 89 HARV. L. REV. 423 (1975); Comment, *The Standard of Fiduciary Duty in a Close Corporation: Donahue v. Rodd Electrotype*, 61 IOWA L. REV. 876 (1976).

<sup>2</sup> 1975 Mass. Adv. Sh. 1295, 328 N.E.2d 505.

<sup>3</sup> The Court defined a close corporation as having three characteristics: (1) few shareholders; (2) no ready market for the shares; and (3) substantial participation by the majority shareholders in management. *Id.* at 1306, 328 N.E.2d at 511.

<sup>4</sup> *Id.* at 1315-16, 328 N.E.2d at 515. This strict good faith standard was contrasted with the "somewhat less stringent standard of fiduciary duty" which must be adhered to by directors and shareholders of all corporations in discharge of corporate responsibilities. *Id.* at 1316, 328 N.E.2d at 515-16.

<sup>5</sup> *Id.* at 1323, 328 N.E.2d at 518.

<sup>6</sup> *Id.* at 1315, n. 18, 328 N.E.2d at 515 n. 18.

<sup>7</sup> *Id.* Pointing out that the issues of salaries and dividend policy were not involved in the case, Justice Wilkins did not join in this statement to the extent it implied that the rule governed all operations of a corporation. *Id.* at 1333, 328 N.E.2d at 521 (Wilkins, J., concurring).

preme Judicial Court decided a case involving the application of *Donahue* to the employment decisions of a close corporation.<sup>8</sup> The Appeals Court was presented with a case involving the diversion of the business opportunities of a close corporation.<sup>9</sup>

I. APPLICATION OF *DONAHUE* TO EMPLOYMENT DECISIONS: *WILKES v. SPRINGSIDE NURSING HOME, INC.*<sup>10</sup>

The case decided by the Supreme Judicial Court was *Wilkes v. Springside Nursing Home, Inc.*<sup>11</sup> Springside, the corporation involved, was originally formed by four individuals, each of whom invested an equal amount of money and purchased equal numbers of shares of stock.<sup>12</sup> It was understood that each investor would be a director and would participate actively in the management of the corporation. It was also understood that each of the four individuals, as long as he assumed an active role in its affairs, would receive equal amounts of money from the corporation.<sup>13</sup> The work of operating the corporation's business, a nursing home, was roughly apportioned among the stockholders, all of whom served as directors.<sup>14</sup>

Beginning in 1952, each shareholder withdrew an equal weekly cash amount from the corporation.<sup>15</sup> In February, 1967, after a falling out between two of the shareholders, Wilkes and Quinn, a directors meeting was held at which it was decided to set salaries for the officers and employees.<sup>16</sup> In setting salaries, the plaintiff, Wilkes, was omitted from the list of those to be paid.<sup>17</sup> At the annual stockholders meeting in March, Wilkes was not reelected as an officer or a director and was informed that his services<sup>18</sup> at the nursing home were no longer

<sup>8</sup> *Wilkes v. Springside Nursing Home, Inc.*, 1976 Mass. Adv. Sh. 2135, 353 N.E.2d 657.

<sup>9</sup> *Cain v. Cain*, 1975 Mass. App. Ct. Adv. Sh. 1121, 334 N.E.2d 650.

<sup>10</sup> 1976 Mass. Adv. Sh. 2135, 353 N.E.2d 657.

<sup>11</sup> *Id.*

<sup>12</sup> Each invested \$1,000 and received ten shares of \$100 par value stock in Springside. *Id.* at 2138-39, 353 N.E.2d at 659.

<sup>13</sup> *Id.* at 2139, 353 N.E.2d at 660.

<sup>14</sup> Of the four participants, Wilkes was in charge of the maintenance of the physical plant and grounds; Riche supervised the kitchen facilities; Pipkin was responsible for medical problems; and Quinn handled the administrative aspects and served as the coordinator for communication among the four. *Id.* at 2139-40 n.8, 353 N.E.2d at 660 n.8. In 1959, Pipkin sold his shares to Connor, who was known to Wilkes, Riche, and Quinn through past financial transactions, and who was elected a director and served as a financial adviser. *Id.* at 2140-41, 353 N.E.2d at 660.

<sup>15</sup> *Id.* at 2140, 353 N.E.2d at 660.

<sup>16</sup> Although the corporate by-laws provided that the directors, subject to stockholder approval, could set salaries, this power had never been exercised, and payments to the four shareholders had been made through informal unanimous consent of all four of the participants. *Id.* at 2141 n.10, 353 N.E.2d at 661 n.10.

<sup>17</sup> *Id.* at 2142, 353 N.E.2d at 661.

<sup>18</sup> See note 14 *supra*.

desired.<sup>19</sup> There was no evidence that Wilkes' performance involved any misconduct or neglect of duties.<sup>20</sup>

Wilkes filed a bill in equity in the Probate Court for Berkshire County naming the three other participants and the Corporation as defendants, and seeking, *inter alia*, damages in the amount of the salary he would have received as a director and officer of Springside.<sup>21</sup> He based his action on the theory that his former colleagues had breached a partnership agreement that had been entered into prior to incorporation. After receiving the master's report, the probate court dismissed Wilkes' action.<sup>22</sup>

On direct appeal to the Supreme Judicial Court, Wilkes also argued that the defendants, as majority stockholders, breached the fiduciary duty owed to him as a minority stockholder.<sup>23</sup> Since it was conceded that Springside was a close corporation as defined in *Donahue*,<sup>24</sup> the Court acknowledged that the stockholders owed to one another the utmost good faith and loyalty.<sup>25</sup> After analyzing the defendants' actions in light of this standard, the Court ruled that the three majority shareholders had breached their fiduciary duty to Wilkes.<sup>26</sup>

In reaching its decision, the Court recognized that the close corporation form supplies majority stockholders with the opportunity to oppress, disadvantage, or "freeze-out" minority shareholders.<sup>27</sup> The Court pointed out that a particularly effective method of freezing out minority shareholders is through the manipulation of corporate offices and employment.<sup>28</sup> It also pointed out that denial of employment or corporate office could be especially pernicious where that denial frustrated the minority shareholder's purposes in entering the corporate venture.<sup>29</sup>

<sup>19</sup> 1976 Mass. Adv. Sh. at 2142, 353 N.E.2d at 661.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2135-36, 353 N.E.2d at 658-59.

<sup>22</sup> *Id.* at 2136, 353 N.E.2d at 659.

<sup>23</sup> *Id.* at 2137, 353 N.E.2d at 659.

<sup>24</sup> See note 3 *supra*.

<sup>25</sup> 1976 Mass. Adv. Sh. at 2143-44, 353 N.E.2d at 661-62.

<sup>26</sup> Since the issue of damages had not been fully explored, the Court remanded to the probate court for a determination of the amount of damages. *Id.* at 2151-52, 353 N.E.2d at 664-65. The Court did note that since Wilkes was at all times prepared to work for the corporation, his damages should not be diminished on the grounds that his duties were performed by others. *Id.* at 2151 n.15, 353 N.E.2d at 664 n.15.

<sup>27</sup> *Id.* at 2144, 353 N.E.2d at 662. See *Donahue*, 1975 Mass. Adv. Sh. 1295, 1309, 328 N.E.2d 505, 513. The term "freeze-out" has come to imply "a purpose to force a liquidation or sale of the stockholder's shares, not incident to some other wholesome business goal." Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1192-93 (1964) (emphasis in original).

<sup>28</sup> 1976 Mass. Adv. Sh. at 2145, 353 N.E.2d at 662. See F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS §3.06, at 78-80 (1975).

<sup>29</sup> 1976 Mass. Adv. Sh. at 2146-47, 353 N.E.2d at 662-63. For example, a guaranty of employment may have been a primary reason for a minority shareholder's investment. F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS §3.06, at 78-79 (1975); Hancock, *Minority Interests in Small Business Entities*, 17 CLEV.-MAR. L. REV. 130, 132-33

The *Wilkes* Court was troubled, however, by the application of the *Donahue* standard to the situation before it which involved the election of officers and directors and determination of employment policies,<sup>30</sup> because an untempered application of this strict standard might hinder effective corporate management. The Court indicated that the interests of minority shareholders should be weighed against the need for discretion in effective management and the majority shareholders' property right of "selfish ownership."<sup>31</sup> Therefore, the Court stated that when a minority shareholder alleges a breach of fiduciary duty by the majority, it would apply a two-part analysis to the actions of the controlling shareholders. First, the Court would ask whether the controlling group could demonstrate a legitimate business purpose for its action.<sup>32</sup> Second, if a business purpose were advanced, the minority would be allowed to show that the legitimate purpose could have been achieved through an alternative course of action less harmful to the interests of the minority.<sup>33</sup> Thus, the legitimate purpose would be balanced against the practicability of a less harmful alternative. Since no evidence of misconduct or disruption on Wilkes' part was presented, the Court found there had been no legitimate business purpose served by his removal,<sup>34</sup> and thus the majority's action was designed as a freeze-out.<sup>35</sup>

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(1968); *Symposium—The Close Corporation*, 52 NW. U.L. REV. 345, 392 (1957); Recent Cases, 89 HARV. L. REV. 423, 427 (1975). Furthermore, since the earnings of a close corporation are distributed mainly in salaries, bonuses, and retirement benefits, the minority shareholder may depend on his salary as the principal return on his investment. F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS §3.06, at 78 (1975).

<sup>30</sup> 1976 Mass. Adv. Sh. at 2147, 353 N.E.2d at 663. In *Donahue*, for example, the Court recognized that dividend and employment policies are within the discretion of the directors. 1975 Mass. Adv. Sh. at 1310-11, 328 N.E.2d at 513. See, e.g., *Crocker v. Waltham Watch Co.*, 315 Mass. 397, 402, 53 N.E.2d 230, 233 (1944).

<sup>31</sup> 1976 Mass. Adv. Sh. at 2147, 353 N.E.2d at 663. The concept of fiduciary duty, of course, conflicts with the property concept of selfish ownership. See *Symposium—The Close Corporation*, 52 NW. U. L. REV. 345, 395 (1957).

<sup>32</sup> 1976 Mass. Adv. Sh. at 2148, 353 N.E.2d at 663. The business purpose test has been advanced in the context of freeze-outs, because it is unlikely that a corporate purpose, rather than a personal one, motivates an action where there is no benefit to the corporation. See *Elefante, Corporations*, 1975 ANN. SURV. MASS. LAW §17.1, at 458; *Vor-enberg, Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1192-93 (1964).

<sup>33</sup> 1976 Mass. Adv. Sh. at 2149, 353 N.E.2d at 663. See *Schwartz v. Marien*, 37 N.Y.2d 487, 335 N.E.2d 334, 373 N.Y.S.2d 122 (1975), where the court stated that a departure from the fiduciary duty owed by the directors of a close corporation to the stockholder can be justified, if at all, by showing that a bona fide business objective was sought which could not have been achieved through other means less harmful to the shareholder. *Id.* at 492, 335 N.E.2d at 338, 373 N.Y.S.2d at 127. See also Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630, 1638 (1961); Comment, *Corporate Freeze-Outs Effected by Merger: The Search For a Rule*, 37 U. PITT. L. REV. 115, 132-33 (1975).

<sup>34</sup> 1976 Mass. Adv. Sh. at 2149-50, 353 N.E.2d at 663-64. To the contrary, Wilkes had competently discharged his duties and was apparently willing to continue to do so. *Id.* at 2150, 353 N.E.2d at 664.

<sup>35</sup> The Court also noted that the basis of the majority's action may well have been to pressure Wilkes into selling his shares below value back to the corporation. *Id.* at 2150 n.14, 353 N.E.2d at 664 n.14.

In *Wilkes*, the Supreme Judicial Court applied the *Donahue* holding to the determination of corporate salary policies and the election of officers and directors, an area which has traditionally been viewed as one of the least appropriate for judicial supervision.<sup>36</sup> Justice Wilkins' concurring opinion in *Donahue* specifically questioned the wisdom of the application of the *Donahue* rationale to this area of corporate operations.<sup>37</sup> The reluctance of courts to intrude in this area has been based on both the principle that effective management requires a large measure of discretion exercised without concern for justifying decisions to some supervising authority<sup>38</sup> and the principle of majority control.<sup>39</sup>

The *Wilkes* Court responded to difficulties created by intrusion into this area by adopting the business purpose test to distinguish between permissible and impermissible corporate actions.<sup>40</sup> The business purpose test has been advanced in the context of minority freeze-outs.<sup>41</sup> The test is viewed as an effective means of distinguishing between actions motivated by a corporate, and thus legitimate, purpose, and actions motivated by an individual, and thus selfish, purpose of the majority stockholder-directors.<sup>42</sup> By requiring that action be justified or motivated by a business purpose, the test operates so that in those areas where corporate action impinges significantly on the interests of minority stockholders, the action will be sustained only if intended to further a purpose of the corporation as a whole and as an on-going business entity.

The Court's emphasis on the business purpose test, however, is surprising in light of their decision in *Donahue*. The business purpose test requires that some challenged corporate action be justified from the viewpoint of the corporation; whereas, the holding in *Donahue* was not that stockholders owed a duty to the corporation, but that they owed a duty to each other as joint participants.<sup>43</sup> The business purpose test's emphasis on a corporate justification seems inappropriate in the

<sup>36</sup> See F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS §3.03, at 60 (1975).

<sup>37</sup> 1975 Mass. Adv. Sh. at 1333, 328 N.E.2d at 521 (Wilkins, J., concurring). See note 7 *supra*.

<sup>38</sup> See *Donahue*, 1975 Mass. Adv. Sh. at 1310-11, 328 N.E.2d at 513, Crocker v. Waltham Watch Co., 315 Mass. 397, 402, 53 N.E.2d 230, 233 (1944). This principle is commonly referred to as the "business judgment" rule. F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS §3.03, at 59 (1975); Hancock, *Minority Interests in Small Business Entities*, 17 CLEV.-MAR. L. REV. 130, 131-32 (1968).

<sup>39</sup> See F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS §3.03, at 59-60 (1975).

<sup>40</sup> 1976 Mass. Adv. Sh. at 2148-49, 353 N.E.2d at 663.

<sup>41</sup> See Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1192-1200 (1964).

<sup>42</sup> Schwartz v. Marien, 37 N.Y.2d 487, 492, 335 N.E.2d 334, 338, 373 N.Y.S.2d 122, 127 (1975); Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1192-96 (1964). Although freeze-outs serving corporate purposes are rare, such freeze-outs do exist. See Elefante, *Corporations*, 1975 ANN. SURV. MASS. LAW §17.1, at 458.

<sup>43</sup> 1975 Mass. Adv. Sh. at 1315-16, 328 N.E.2d at 515.

context of rules governing stockholders' duties to each other. A situation could arise in which the business purpose test would be satisfied, even though the shareholders had not fulfilled their duty of utmost good faith and loyalty to one another. For example, assume that the corporation in *Wilkes* had faced shrinking revenues and needed to reduce its payroll; that the functions performed by Wilkes could most easily be eliminated; and that as a result Wilkes' employment and salary had been terminated. On those facts, a decision to terminate Wilkes might well have served a legitimate business purpose. Nevertheless, the emphasis in *Donahue* on the duties of stockholders to each other would seem to undercut a decision having such a disproportionate impact.

The Court's invitation to minority shareholders to prove that the business purpose advanced by the majority could have been accomplished by means less harmful to the minority seems to shift the focus back to the relations of the stockholders to each other.<sup>44</sup> In the example given, the minority would presumably have the opportunity to prove that the necessary savings could be achieved by an action having an equal impact on all stockholders. Thus, in including the option of showing a less restrictive alternative action, the Court focused the analysis on the impact of actions on the relationship of the stockholders to each other.<sup>45</sup>

In the Court's explication of the duty owed to Wilkes, however, it appears that, at least in the area of salary-dividend policy, utmost good faith does not demand absolute equality. The Court indicated that on the facts before it the duty of utmost good faith and loyalty would require at a minimum that the majority consider that: (1) there was a longstanding policy that each stockholder would be a director and employee; (2) that Wilkes was one of the four original participants; (3) that Wilkes expected to continue his participation in corporate decisions; and (4) that Wilkes could not expect to receive any return on his investment if his salary were eliminated.<sup>46</sup> The Court's enunciation of these factors certainly differs from its adoption of a rule of equality in the stock purchase area.<sup>47</sup> It suggests that even though the majority was under a duty to consider the impact of its decision on Wilkes, it was under no absolute duty to treat him equally. Thus, it could be inferred that the Court might allow action short of a complete termination of his relationship, but still having a disproportionate impact on the minority shareholder's interest.

<sup>44</sup> 1976 Mass. Adv. Sh. at 2149, 353 N.E.2d at 663.

<sup>45</sup> Compare *Wilkes*, 1976 Mass. Adv. Sh. at 2149, 353 N.E.2d at 663, with *Schwartz v. Marien*, 37 N.Y.2d 487, 492, 335 N.E.2d 334, 338, 373 N.Y.S.2d 122, 127 (1975), where the burden of showing no less harmful alternative would be on the majority shareholders. See also Comment, *Corporate Freeze-Outs Effected by Merger: The Search for a Rule*, 37 U. PITT. L. REV. 115, 132 (1975).

<sup>46</sup> 1976 Mass. Adv. Sh. at 2150-51, 353 N.E.2d at 664.

<sup>47</sup> See *Donahue*, 1975 Mass. Adv. Sh. at 1322-24, 328 N.E.2d at 518.

A question that may arise after *Wilkes* is whether majority stockholders may in some cases prefer their individual interests over the rights of minority shareholders. In *Donahue*, the Court stressed the resemblance of the close corporation to the partnership and the necessity of trust and utmost confidence.<sup>48</sup> In *Wilkes*, however, the Court stated “[t]he majority, concededly, have certain rights to what has been termed ‘selfish ownership’ in the corporation which should be balanced against the concept of their fiduciary obligation to the minority.”<sup>49</sup>

The Court’s statement with respect to “selfish ownership” was included in the Court’s discussion of the need to allow maneuvering room on the part of corporate managers to establish corporate business policy.<sup>50</sup> Thus, the Court may have meant merely to amplify its assertion that effective management requires a certain amount of discretion. The statement could be read, however, to imply that the majority has a right to further its own selfish interest to a certain extent.<sup>51</sup> The idea that majority stockholders may in some cases prefer their individual interests is inconsistent with the partnership analogy so strongly embraced in *Donahue*<sup>52</sup> and affirmed in *Wilkes*.<sup>53</sup> Thus, if the reference to selfish ownership presages an inclination to stake out some ground upon which the majority may assert its individual interests, its introduction into the developing *Donahue* rationale promises to increase the amount of uncertainty in predicting that development.

An issue that the *Wilkes* opinion did not have to consider was whether the failure to elect Wilkes as an officer and director could be reached by injunctive action. By the time the appeal in the case was decided, the corporation apparently had been dissolved.<sup>54</sup> Furthermore, Wilkes’ complaint primarily sought monetary relief.<sup>55</sup> In analyzing the case, however, the Court placed some emphasis on the loss to a squeezed-out minority shareholder of the ability to participate in the management of the corporation.<sup>56</sup> The Court also found

<sup>48</sup> *Id.* at 1315-16, 328 N.E.2d at 515.

<sup>49</sup> 1976 Mass. Adv. Sh. at 2147, 353 N.E.2d at 663.

<sup>50</sup> *Id.* at 2147-48, 353 N.E.2d at 663.

<sup>51</sup> In support of its statement, the Court cited, *inter alia*, Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986 (1957), where the author suggests that in analyzing cases involving the sale of control, courts have applied fiduciary standards only to prevent the most extreme cases of overreaching. *Id.* at 1013-15. Freezing-out minority shareholders, however, is given as an example of an action exceeding “certain bounds of fairness.” *Id.* at 1014-15.

<sup>52</sup> 1975 Mass. Adv. Sh. at 1315-16, 328 N.E.2d at 515.

<sup>53</sup> 1976 Mass. Adv. Sh. at 2143-44, 353 N.E.2d at 661-62.

<sup>54</sup> *Id.* at 2151-52, 353 N.E.2d at 664-65.

<sup>55</sup> *Id.* at 2136, 353 N.E.2d at 659.

<sup>56</sup> *Id.* at 2146-47, 353 N.E.2d at 662-63. See F. O’NEAL, “SQUEEZE-OUTS” OF MINORITY SHAREHOLDERS §3.06, at 78-79 (1975) discussing the elimination of minority shareholders from the directorate.



that the failure to re-elect Wilkes as an officer and director was not justified by any business purpose.<sup>57</sup> The Court's opinion suggests, therefore, that a remedy might well have been available for the failure of the stockholders and directors of Springside to re-elect Wilkes to the offices he had held. The obvious remedy would have been an order to take the necessary steps to elect Wilkes. However, this might have run afoul of the reluctance of courts to order the performance of discretionary acts.<sup>58</sup> To avoid that difficulty, the Court might have found that the other stockholders and directors had agreed to elect Wilkes to the positions he held.<sup>59</sup>

## II. APPLICATION OF *DONAHUE* TO DIVERSION OF BUSINESS OPPORTUNITIES: *CAIN V. CAIN*<sup>60</sup>

In *Cain v. Cain*,<sup>61</sup> two brothers, John and Patrick Cain, were the sole equal shareholders of Airport Express, Inc., a Massachusetts close corporation<sup>62</sup> engaged in the trucking business at the Boston airport. Airport was purchased by Patrick in 1969, at which time it was an existing corporation. In 1971, John and Patrick executed an agreement providing that profits and losses would be shared equally, and that each "partner" would devote his entire time to the business.<sup>63</sup> John subsequently received fifty percent of the outstanding shares of Airport.<sup>64</sup> In March, 1972, John cancelled all agreements between himself and Patrick and offered to sell his shares to the corporation.<sup>65</sup> Airport did not accept the offer and continued operations with John remaining an officer, director, and shareholder.<sup>66</sup> John and Patrick drew equal salaries.<sup>67</sup>

In May, 1974, one of Airport's largest accounts transferred its business to Airfreight Specials, a sole proprietorship owned by John.<sup>68</sup> In June, 1974, Patrick and Airport filed an action against John. Patrick sought an accounting to recover the defendant's fifty percent stock interest and damages arising from breach of the partnership agreement.<sup>69</sup> Airport sought damages arising from the defendant's

<sup>57</sup> 1976 Mass. Adv. Sh. at 2149-50, 353 N.E.2d at 663-64.

<sup>58</sup> See F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS §3.06, at 78-80 (1975).

<sup>59</sup> See 1976 Mass. Adv. Sh. at 2136, 2150, 353 N.E.2d at 659, 664.

<sup>60</sup> 1975 Mass. App. Ct. Adv. Sh. 1121, 334 N.E.2d 650.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1128, 334 N.E.2d at 654. See note 3 *supra*.

<sup>63</sup> 1975 Mass. App. Ct. Adv. Sh. at 1122 n.2, 334 N.E.2d at 652 n.2.

<sup>64</sup> *Id.* at 1122-23, 334 N.E.2d at 652.

<sup>65</sup> *Id.* at 1123-24, 334 N.E.2d at 652-53.

<sup>66</sup> In 1972, John was elected treasurer, clerk, and a director of Airport. The two brothers and their wives were the only directors. *Id.* at 1123, 334 N.E.2d at 652.

<sup>67</sup> *Id.* at 1124, 334 N.E.2d at 653.

<sup>68</sup> *Id.* Two employees of Airport also left and began work for Specials. There was an additional conflict regarding whether Specials had taken over another of Airport's accounts. *Id.*

<sup>69</sup> *Id.* at 1125, 334 N.E.2d at 653.

competition, the recovery of the salary payments made to the defendant, and an injunction against continuing competition.<sup>70</sup> None of the requested relief was granted by the lower court.<sup>71</sup>

On appeal, the Appeals Court sustained the dismissal of the shareholder's individual partnership claims.<sup>72</sup> As to the corporation's claims, however, the court held that John's actions were a clear breach of his fiduciary duty as an officer and director of the corporation.<sup>73</sup> Thus, Airport was entitled both to damages arising from the defendant's competition, including his profits and the excess of the salary paid him over the fair value of his services, and to an injunction against the competition of the defendant so long as he remained a stockholder, officer, or director of Airport.<sup>74</sup>

The result reached by the court with respect to the corporation's claims is consistent with the conventional corporate law analysis applicable to the situation where an officer and director has a duty to protect the interests of the corporation.<sup>75</sup> This duty includes the duty not to divert corporate opportunities and not to compete with the corporation, at least in areas directly involving his duties as an officer and director. Thus, the court correctly ruled that the defendant's behavior was inconsistent with those duties.

In dicta, however, the *Cain* court went beyond this holding and suggested that the defendant's behavior should be analyzed from the point of view of *Donahue*.<sup>76</sup> It read *Donahue* as creating for the stockholders of a close corporation a duty of utmost good faith and loyalty to the corporation as well as to the other stockholders.<sup>77</sup> It is not clear, however, whether the *Donahue* opinion was intended by the Supreme Judicial Court to create a new standard of loyalty to the corporation as well as among stockholders. As support for its conclusion that *Donahue* did create such a standard, the Appeals Court relied on the statement in *Donahue* that:

[S]tockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. . . . [They] must discharge their management and stockholder responsibilities in conformity with this strict good faith standard [and] may not act . . . in derogation

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1126-27, 334 N.E.2d at 653-54.

<sup>73</sup> *Id.* at 1131, 334 N.E.2d at 655.

<sup>74</sup> *Id.* at 1135-37, 334 N.E.2d at 657-58.

<sup>75</sup> *Anderson Corp. v. Blanch*, 340 Mass. 43, 50, 162 N.E.2d 825, 830 (1959); *Production Machine Co. v. Howe*, 327 Mass. 372, 377-78, 99 N.E.2d 32, 35-36 (1951); Note, *Fiduciary Duty of Officers and Directors Not to Compete With the Corporation*, 54 HARV. L. REV. 1191, 1197 (1941).

<sup>76</sup> 1975 Mass. App. Ct. Adv. Sh. at 1128, 334 N.E.2d at 654.

<sup>77</sup> *Id.* at 1128-29, 334 N.E.2d at 654-55.

of their duty of loyalty to the other stockholders and to the corporation.<sup>78</sup>

Although the *Donahue* Court clearly referred to the duty of loyalty to the corporation, there is no other reference in *Donahue* to this strict duty of loyalty owed to the corporation. In discussing the difficulty encountered by plaintiffs challenging directors' actions relative to dividend and employment policies, in fact, the *Donahue* Court noted "[i]t would be difficult for the plaintiff in the instant case to establish breach of a fiduciary duty owed to the corporation . . ."<sup>79</sup> Thus, the language in *Donahue* does not appear to suggest that the Court viewed the traditional duty of stockholders and directors to the corporation as having been changed.

Furthermore, it would not seem that the *Donahue* opinion was intended to reach the duty of stockholders to the corporation. The rationale of the opinion was that since the resemblance between close corporations and partnerships was sufficiently close, the duties among the participants in both entities ought to be the same.<sup>80</sup> The opinion also suggested generally that the mechanics of corporations would not be available to the stockholders of close corporations where the use of such mechanics might disadvantage other stockholders. The analogy upon which *Donahue* was based was thus an analogy to a situation in which there was no separate legal entity. It would be strange, therefore, if the application of the law of partnerships to corporations was intended to affect the peculiarly corporate question of the relationship of stockholders, officers, and directors to the corporation.

The wavering from the partnership analogy exhibited by both the *Wilkes* and *Cain* decisions may make no practical difference in many cases. However, the increasingly confused rationale may create serious problems for corporate law practitioners. *Donahue*, after all, represented a rather dramatic break from the law as it existed previously.<sup>81</sup> The obvious question faced by practitioners is what impact ought to be accorded *Donahue* in circumstances beyond its holding. In answering that question, it would be helpful if one could at least rely upon a consistent rationale. However, the *Cain* decision and, to a lesser extent, the *Wilkes* decision, suggest that the rationale of *Donahue* may not simply be the partnership analogy, but some more general tightening of fiduciary standards. If so, the basis and extent of that tightening are not apparent. Since the corporate law area is one where people commonly base their actions on legal advice sought in advance, and where the economic stakes may be high, certainty and predictability are to be prized. The movement toward a more ethical

<sup>78</sup> 1975 Mass. Adv. Sh. at 1315-16, 328 N.E.2d at 515 (footnotes and citations omitted; emphasis added).

<sup>79</sup> *Id.* at 1310 n.14, 328 N.E.2d at 513 n.14 (emphasis in original).

<sup>80</sup> *Id.* at 1304-08, 328 N.E.2d at 511-12.

<sup>81</sup> See Elefante, *Corporations*, 1975 ANN. SURV. MASS. LAW §17.1, at 465.

climate in close corporations is welcome. It would be unfortunate, however, if that movement continued to be characterized by the kind of uncertainty exhibited in *Cain* and *Wilkes*.

**§9.2. Regulation of Take-Over Bids: Chapter 121 of the Acts of 1976.** In May of 1976, the Legislature enacted chapter 121 of the Acts of 1976 entitled "Regulation of Take-Over Bids in the Acquisition of Corporations" (the "Act") that added to the General Laws a new chapter 110C regulating take-over bids. A take-over bid is defined as any acquisition of or offer to acquire, pursuant to a tender offer, any equity security<sup>1</sup> of a corporation organized under the laws of Massachusetts or having its principal place of business in the Commonwealth<sup>2</sup> if, after the acquisition, the acquiror directly or indirectly is the beneficial owner<sup>3</sup> of more than ten percent of any class of the equity securities of the corporation.<sup>4</sup> The Act exempts from the definition of take-over bid a number of transactions, including: (1) an offer made pursuant to an effective registration statement under the Securities Act of 1933;<sup>5</sup> (2) an offer made by a corporation to acquire its own securities;<sup>6</sup> (3) an offer to which the target corporation has consented by action of its board of directors;<sup>7</sup> and (4) an offer to ac-

§9.2. <sup>1</sup> "Equity security" is defined as:

[A]ny shares or similar securities, or any securities convertible into such securities, or carrying any warrant or right to subscribe to or purchase such securities, or any such warrant or right, or any other security which, for the protection of security holders, is treated as an equity security pursuant to [G.L. c. 110A, §401(K)].

Acts of 1976, c. 121, §1.

<sup>2</sup> A corporation's "principal place of business" is "the corporate headquarters where the general executive offices are located and from which the corporation's activities are controlled and directed by executive officers of the corporation." Acts of 1976, c. 121, §1.

<sup>3</sup> Stock owned by associates and affiliates of the offeror is also included. An "affiliate" is defined as "any person controlling, controlled by, or under common control with an offeror." *Id.* An "associate" is:

(1) Any corporation or other organization of which the offeror is an officer or partner or is, directly or indirectly, the beneficial owner of ten per cent or more of any class of equity securities; (2) Any person who is, directly or indirectly, the beneficial owner of ten per cent or more of any class of equity securities of the offeror; (3) Any trust or other estate in which the offeror has a substantial beneficial interest or as to which the offeror serves as a trustee or in a similar fiduciary capacity; and (4) Any relative or spouse of the offeror or any relative of such spouse who has the same home as the offeror.

*Id.*

<sup>4</sup> An acquiror is deemed the beneficial owner of equity securities if he has "the right to acquire through the exercise of presently exercisable options, warrants, or rights or through the conversion of presently convertible securities . . ." *Id.*

<sup>5</sup> 15 U.S.C. §77a *et seq.* (1970).

<sup>6</sup> Also exempt is an offer to acquire securities of a subsidiary as long as the offeror beneficially owns at least two thirds of the subsidiary's voting securities. Acts of 1976, c. 121, §1.

<sup>7</sup> *Id.*

quire the equity securities of any corporation having a total number of stockholders less than twenty-five.<sup>8</sup>

The Act sets forth certain procedural requirements. No take-over bid may be made unless the offeror: (1) publicly announces its terms at least thirty days prior thereto; (2) files with the Secretary of the Commonwealth and the target company certain required information; and (3) pays the Secretary a filing fee of one thousand dollars to defray the cost of any investigation the Secretary may make.<sup>9</sup> The information required to be filed includes, in general, all materials that the offeror intends to use to disclose to offerees all information material to a decision to accept or reject the offer.<sup>10</sup> The information filed must also include comprehensive background and current information with respect to the persons making the acquisition, as well as comprehensive statements regarding any future plans that the offeror may have to liquidate, merge, consolidate, or effect any other major change in the target corporation.<sup>11</sup>

After the offeror has filed with the Secretary, the Secretary may order a hearing within twenty days if he determines that it is necessary or appropriate for the protection of offerees in the Commonwealth.<sup>12</sup> The Secretary may also order a hearing if requested to do so by the target company within fifteen days after the filing.<sup>13</sup> If a hearing is ordered, it must be held within sixty days of the filing and any decision must be made within ninety days after such filing.<sup>14</sup> If the Secretary determines at the hearing that "effective provision is made for fair and full disclosure to offerees of all information material to a decision to accept or reject the offer,"<sup>15</sup> then the take-over bid may be made.<sup>16</sup> If, however, the Secretary finds that the take-over bid violates the Act or that fair disclosure was not made, the take-over bid may not be made.<sup>17</sup>

The Act also sets forth a number of substantive provisions. It prohibits an offeror from making a take-over bid if the offeror and any associates and affiliates are the beneficial owners of five percent or more of any class of securities of the target company, *any* of which were purchased within one year of the proposed take-over bid and

<sup>8</sup> The Act also exempts a bid made by a dealer for his own account in the ordinary course of business and an offer that would not result in the offeror acquiring "more than two per cent of the same class of equity securities of the issuer within the preceding twelve month period." *Id.*

<sup>9</sup> *Id.* §2.

<sup>10</sup> *Id.* §4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* §2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* §6. Furthermore, the adjudication must be made pursuant to G. L. c. 110A, §412.

<sup>15</sup> Acts of 1976, c. 121, §2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* §6.

the offeror, at the time of such purchase, failed to publicly announce its intention to gain control of the target company.<sup>18</sup> Take-over bids must be made to all holders of the securities who reside in the Commonwealth.<sup>19</sup> Security holders residing in the Commonwealth must be offered the same terms as those available to any security holder not residing in the Commonwealth.<sup>20</sup> The Act also seems to require that if an offer is made for less than all the outstanding securities of the class sought to be purchased, then the offeror is bound to pay for all securities deposited by all offerees.<sup>21</sup> The Act requires that any take-over bid be open for a period of at least sixty days.<sup>22</sup> Furthermore, it is unlawful for an offeror to engage in any "fraudulent, evasive, deceptive, manipulative or grossly unfair practices in connection with a take-over bid."<sup>23</sup>

The offeror of any take-over bid made in violation of chapter 110C of the General Laws is liable to a person who sells a security for either rescission or damages.<sup>24</sup> In addition, every associate and affiliate of the offeror,<sup>25</sup> every principal officer or director, and every employee, broker-dealer, or agent, "who materially aids in the act or transaction constituting the violation,"<sup>26</sup> is liable jointly or severally with the offeror to the sellers.<sup>27</sup> All persons potentially liable, with the exception of the offeror, may avoid liability if they prove that they did not know, and in the exercise of reasonable care, could not have known of the existence of the facts by reason of which the liability is alleged to exist.<sup>28</sup> Moreover, certain violations of chapter 110C are also made criminal offenses.<sup>29</sup>

In enacting chapter 121 of the Acts of 1976, Massachusetts joined nearly half of the states in adopting a comprehensive statute regulating tender offers.<sup>30</sup> The trend towards such legislation is accelerating. At least twelve states adopted some form of tender offer legislation in

<sup>18</sup> *Id.* §3.

<sup>19</sup> *Id.* §7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Furthermore, if the terms of a take-over bid are changed to increase the consideration offered, all offerees must receive the increase. *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at §9(a). "Damages are the excess of either the value of the security on the date of purchase or its present value, whichever is greater, over the present value of the consideration received for the security." *Id.*

<sup>25</sup> See note 3 *supra*.

<sup>26</sup> Acts of 1976, c. 121, § 9(b).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* §9(f), which provides for fines of not more than five thousand dollars and/or imprisonment for not more than three years for any violation of the disclosure provisions of §2 or any willful violation of the other substantive provisions, which are contained in §7.

<sup>30</sup> See Practising Law Institute, EIGHTH ANNUAL INSTITUTE ON SECURITIES REGULATION 169 (1976).

1976.<sup>31</sup> This trend has caused increasing confusion in the tender offer area and may create growing pressure for federal regulation specifically designed to preempt the field.<sup>32</sup>

The Massachusetts statute, like other state statutes,<sup>33</sup> clearly seems intended to inhibit tender offers for the securities of Massachusetts corporations and other corporations with their principal place of business in the Commonwealth.<sup>34</sup> Although on its face the statute is even-handed, the effect of the Act is to inhibit substantially the ability of insurgents to make tender offers. The inhibition on tender offers derives from two characteristics of the Act. One is the requirement that a tender offer be publicly announced well in advance of its effectiveness.<sup>35</sup> This notification requirement obviously eliminates the secrecy which is thought to be a necessary ingredient of an effective tender offer.<sup>36</sup> The other provision that inhibits tender offers is the requirement that the offer be held open for at least sixty days.<sup>37</sup> Thus, the advance notice and the period for which the offer must be held open combine to assure that an offer cannot be completed in less than ninety days. Furthermore, if a hearing is held, the period could be extended to 150 days.<sup>38</sup> Therefore, the amount of time required to complete an offer takes away from the offeror the element of speed which is regarded as critical to success.<sup>39</sup>

Although the Massachusetts statute closely resembles statutes enacted in other states,<sup>40</sup> in one respect the Massachusetts statute seems unique. Section 7 of chapter 121 of the Acts of 1976 provides in part that "no offeror shall make a take-over bid . . . which, if it is for less than all the outstanding equity securities of a class does not

<sup>31</sup> See *id.*, where the effective date of each state statute is provided.

<sup>32</sup> See American Bar Association Subcommittee on Proxy Solicitations and Tender Offers, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 198-99 (1976).

<sup>33</sup> For discussion and comparison of some state statutes, see generally Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687 (1975); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722 (1970); Sommer, *The Ohio Takeover Act: What Is It?*, 21 CASE W. RES. L. REV. 681 (1970); Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133 (1974).

<sup>34</sup> See Sommer, *The Ohio Takeover Act: What Is It?*, 21 CASE W. RES. L. REV. 681, 682 (1970).

<sup>35</sup> Acts of 1976, c. 121, § 2. See text at note 9 *supra*.

<sup>36</sup> See Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1150-51 (1974).

<sup>37</sup> Acts of 1976, c. 121, § 7. See text at note 22 *supra*.

<sup>38</sup> Acts of 1976, c. 121, § 6. See text at note 14 *supra*.

<sup>39</sup> See Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1150-51 (1974). The long delay between the announcement of the offer and its completion also increases the period during which the trading market for the target company's stock is disrupted. See Sommer, *The Ohio Takeover Act, What Is It?*, 21 CASE W. RES. L. REV. 681, 700 (1970).

<sup>4</sup> Compare, e.g., Acts of 1976, c. 121, with OHIO REV. CODE ANN. §1707.041 (Baldwin) (1971). See generally Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 690-98 (1975).

bind such offeror to take up and pay for all securities deposited by all offerees, if a greater number of securities is deposited pursuant thereto."<sup>41</sup> This language seems to require the offeror to purchase all tendered securities, even if the offer was to purchase less than all of the shares outstanding. This provision contrasts with federal legislation<sup>42</sup> and other state statutes,<sup>43</sup> which require the offeror to take up shares tendered on a pro rata basis. The effect of section 7 seems to be to eliminate offers to purchase less than all of the outstanding securities of the class for which the tender is made. The rationale for such a requirement is presumably that the change in the corporation is so fundamental that a stockholder should have the opportunity to withdraw his entire investment.<sup>44</sup> Such a rationale makes a certain amount of sense since a shift of control can have a dramatic impact on the nature of the stockholder's investment. From the point of view of a prospective offeror, however, the requirement is another impediment to his ability to gain control.

Although the issue has been raised by commentators,<sup>45</sup> to date the validity of state tender offer statutes has not been the subject of judicial scrutiny in any reported decision.<sup>46</sup> If the Massachusetts statute were to be so scrutinized, it is not clear whether or not it would be found valid. There are two principal grounds upon which a challenge to state statutes regulating tender offers could be based: (1) federal preemption; and (2) unconstitutionality.

The preemption argument is that the Williams Act,<sup>47</sup> which regulates tender offers at the federal level, preempts the field.<sup>48</sup> The difficulty with the preemption argument is that the federal securities laws have consistently been construed as not occupying the field.<sup>49</sup> The preemption argument also founders on the fact that most of the provisions of the state laws go beyond the Williams Act, but do not make compliance with that Act impossible.<sup>50</sup>

The constitutional argument is based on both commerce clause and

<sup>41</sup> Acts of 1976, c. 121, §7.

<sup>42</sup> 15 U.S.C. §78n(d)(6) (1970).

<sup>43</sup> See, e.g., OHIO REV. CODE ANN. §1707.041(c) (Baldwin) (1971).

<sup>44</sup> This rationale is drawn from statutes giving a stockholder the right to seek appraisal in corporate mergers and asset sales.

<sup>45</sup> See Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 700 (1975); Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1159-62 (1974).

<sup>46</sup> See American Bar Association Subcommittee on Proxy Solicitations and Tender Offers, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 190 (1976).

<sup>47</sup> 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1970).

<sup>48</sup> See American Bar Association Subcommittee on Proxy Solicitations and Tender Offers, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 190-91 (1976); Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 699-700 (1975).

<sup>49</sup> See Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722, 740, 756 (1970).

<sup>50</sup> See American Bar Association Subcommittee on Proxy Solicitations and Tender Offers, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 191 (1976).



due process grounds. The commerce clause argument is that state tender offer statutes impose a burden on interstate commerce while advancing no legitimate state interest.<sup>51</sup> The due process argument is directed to the extraterritorial application of the statutes.<sup>52</sup> Statutes like chapter 121 purport to regulate not only transactions in Massachusetts, but offers made to residents of other states by residents of other states.<sup>53</sup> Therefore, the question is whether the enacting state as the place of incorporation or the site of the principal place of business has a sufficient relationship to all the stockholders of the target corporation to justify the application of its laws outside its borders.<sup>54</sup>

The combination of the growing number of state statutes<sup>55</sup> and the possible increase in SEC regulation<sup>56</sup> may add up to some decisive federal legislation in this area. The impact of most of the state laws has been to block or inhibit tender offers.<sup>57</sup> Such an impact contrasts with the federal policy of not taking a side in the battle of tender offers,<sup>58</sup> while at the same time encouraging the dissemination to stockholders of the information necessary to make intelligent decisions.<sup>59</sup> The SEC has proposed additional regulations that would further the scope of federal intervention, but in light of the federal policy, such regulations proceed from a relatively neutral point of view.<sup>60</sup> It seems likely, therefore, that Congress will be asked to resolve the growing conflict between the state interest in protecting local business and the federal interest in allowing the free flow of capital.<sup>61</sup>

<sup>51</sup> See Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 700-02 (1975); Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1152-53, 1159-60 (1974).

<sup>52</sup> See American Bar Association Subcommittee on Proxy Solicitations and Tender Offers, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 190-91 (1976);

<sup>53</sup> Acts of 1976, c. 121, §1.

<sup>54</sup> See Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722, 740-41 (1970).

<sup>55</sup> See text at notes 30 & 31 *supra*.

<sup>56</sup> See, e.g., Exchange Act Release 34-12676, [1976] Fed. Sec. L. Rep. (CCH) ¶ 80, 659 (proposing tender offer rules and schedules).

<sup>57</sup> See American Bar Association Subcommittee on Proxy Solicitations and Tender Offers, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 188 (1976).

<sup>58</sup> In discussing the proposed federal legislation, Senator Williams stated: "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids." 113 Cong. Rec. 24664 (1967) (remarks of Senator Williams). See also American Bar Association Subcommittee on Proxy Solicitations and Tender Offers, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 188 (1976).

<sup>59</sup> See 15 U.S.C. § 78n(d)-(f) (1970).

<sup>60</sup> See note 56 *supra*.

<sup>61</sup> See, e.g., American Bar Association Subcommittee on Proxy Solicitations and Tender Offers, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 187 (1976), where a majority of the Subcommittee favors federal legislation which would preempt the state takeover laws.