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# Oklahoma's Corporate Take-Over Laws: A Struggle for Fair and Efficient Legislation

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# OKLAHOMA'S CORPORATE TAKE-OVER LAWS: A STRUGGLE FOR FAIR AND EFFICIENT LEGISLATION*

## I. INTRODUCTION

The preceding decade has been marked by substantial change in the methods exercised to gain control of publicly held corporations. While conventional acquisition devices such as mergers,[1] asset acquisitions,[2] and consolidations[3] are still utilized with some frequency, the tender offer[4] has become the predominant take-over device. "Corporate raiders,"[5] using tender offers, have been encouraged in their take-over attempts by several factors, including depressed stock market conditions[6] and the rel-

* Ed. note: The word "take-over" may be spelled as either "take-over" or "takeover" when used as a noun or an adjective. This Comment has adopted the "take-over" spelling. When quoting from a source that used the "takeover" spelling, this Comment will not insert "[sic]."

1. A "merger" is "the absorption of one corporation by another, which retains its name and corporate identity with the added capital, franchises, and powers of the merged corporation." 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7041 (rev. perm. ed. 1983).

2. In some instances, two or more corporations may effect a "combination," with neither corporation losing its separate existence and no new corporation formed. This would include situations whereby one corporation merely purchases or acquires another corporation's assets or property. "The importance of distinguishing between these transactions and a real consolidation or merger is apparent when . . . consider[ing] the powers and rights of the companies and also their duties and liabilities." *Id.* § 7043.

3. "Consolidation" is "a combination by agreement between two or more corporations . . . by which their rights, franchises, privileges and property are united, and become the rights, franchises, privileges and property of a single corporation . . . ." *Id.* § 7041.

4. "[T]ender offer" is defined as "a bid by an individual or group to buy shares of a company—usually at a price above the current market price. Those accepting the offer are said to tender their stock for purchase." H.R. REP. No. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2811. Tender offer has also been defined as "a publicly made invitation addressed to all [or a class] of the shareholders of a corporation [the "target"] to tender their shares for sale at a specific price." Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973). The offer requests a transfer of securities in return for cash or other securities generally valued at a higher market price than the sought-after shares. *Id.* Congress has not specifically defined the term "tender offer" in order to allow for flexibility in interpretation. *See* E. ARANOW, H. EINHORN & G. BERNSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL I (1977).

5. Individuals and corporations utilizing the tender offer in a corporate take-over have been labeled "corporate raiders." While many raiders oppose this label, their underlying objectives often have little to do with shareholder advocacy. For example, Sir James Goldsmith, who acquired St. Regis Corporation, has stated that corporate take-overs are "for the public good, but that's not why I do it. I do it to make money." Toy, Ehrlich, Berstein & Crock, *The Raiders—They Are Really Breaking the Vise of the Managing Class*, BUS. WK., Mar. 4, 1985, at 81.

6. The stock market generally undervalues corporate assets. Shares of the average company trade at two-thirds to three-fourths of the value of the shares' underlying assets. In a depressed

ative ease with which supportive financing has been available.[7]

The increase in hostile tender offers has resulted in the use of complex tactics by raiders and target companies, either to consummate or to avoid take-overs. For example, two tactics used recently by raiders are two-tiered offers[8] and greenmail.[9] Target companies, to oppose offers, have utilized tactics such as the repurchase of shares from a raider,[10]

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market, an offeror can still obtain a good return on his or her money even if he or she paid a premium above the market price for shares of a profitable company. *See* Robinson, *Tender Offers: Some Facts and Fancies*, 175 N.Y.L.J. 1 (1976).

7. For a discussion of financing techniques used in take-over attempts, see Bianco, *How Drexel's Wunderkind Bankrolls the Raiders*, BUS. WK., Mar. 4, 1985, at 90. Other possible factors contributing to the increased use of tender offers include:

> (1) Increased access to cash resulting from greater corporate liquidity and readily available credit;
> (2) Relatively low price-earnings and cash or quick assets ratios, as well as comparatively low book values;
> (3) Other means of obtaining control of the corporation, such as through proxy contests, require those seeking control to convince shareholders that they are better able to handle the affairs of the company than is the incumbent management, whereas tender offers appeal to shareholders on a strictly monetary basis;
> (4) The increasing respectability of tender offers as a takeover technique, along with greater sophistication and knowledge regarding the use of the tender offer.

E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 65-66 (1973), *cited in* Bunch, Edgar v. MITE Corporation: *A Proposed Analysis*, 17 TULSA L.J. 229, 233 n.37 (1981).

8. In a two-tiered offer, the raider first extends an offer, at a high cash premium, for a majority interest of the target, usually fifty-one percent. Once this front-end bid is completed, the target is merged into the raider. Remaining target shareholders are victims of "freezeout" and usually receive securities of the raider valued less than the first step premium. Dennis, *Two-tiered Tender Offers and Greenmail: Is New Legislation Needed?*, 19 GA. L. REV. 281, 281 (1985). For further discussion of two-tiered tender offers, see Note, *Second Step Transactions in Two-Tiered Takeovers: The Case for State Regulation*, 19 GA. L. REV. 343, 344 (1985). "Freezeouts, by definition, are coercive: minority stockholders are bound by majority rule to accept cash or debt in exchange for their common shares, even though the price they receive may be less than the value they assign to those shares." Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1357 (1978).

9. To prevent a take-over attempt, management for a target company may repurchase stock from a raider who has gained a substantial percentage of the target's common stock, at a "significant premium over the current market price. This practice is called greenmail." Dennis, *Two-tiered Tender Offers: Is New Legislation Needed?*, 19 GA. L. REV. 281, 282 (1985) [hereinafter cited as Dennis].

10. *See id.* at 306.

> In the leading case of *Cheff v. Mathes*, the Delaware Supreme Court stated that if the "sole or primary motive" for the share repurchase was to perpetuate the board in power, then the repurchase was improper. If, however, the repurchase occurred because there was a policy difference between the raider and current management, then using corporate funds to terminate the interest of the raider was legitimate and protected under the business judgment rule. The board must, however, show good faith and reasonable investigation.

Dennis, *supra* note 9, at 306 (citing Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964)). Greenmail transactions otherwise escape judicial review, absent a failure to adequately disclose pursuant to federal securities regulations, or a state enforced issue of fiduciary fraud. However, fiduciary fraud alone does not give rise to judicial relief under federal securities regulations. Dennis, *supra* note 9, at 306 n.125 (citing Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977)).

Both the 98th and 99th Congress considered antigreenmail legislation by means of amendments to the Securities and Exchange Act of 1934 and the Internal Revenue Code, but no legislation has issuance of additional shares,[11] lock-up options,[12] purchase of assets to create antitrust obstacles,[13] and sale of assets.[14] Each of these defense tactics has been judicially protected.[15] In this regard, courts have been lenient with target company management, allowing management great deference in exercising measures which in effect halt the take-over.

This Comment will focus upon state legislative attempts to regulate tender offers and the defects which have led to their lack of success. In particular, the development of Oklahoma's take-over legislation will be examined in light of recent take-over contests. In addition, recommendations for future attempts at regulating tender offers will be proposed and analyzed.

## II. STATE LAW AND CONSTITUTIONAL CHALLENGES

### A. *State Law*

With the advent of complex corporate acquisition tactics, state legislative measures to regulate tender offers have come to the forefront.[16] States advance various interests in justification of their take-over legisla-

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been enacted. *See, e.g.*, H.R. 5693, 98th Cong., 2d Sess. (1984); S. 2779, 98th Cong., 2d Sess. (1984); H.R. 1003, 99th Cong., 2d Sess. (1985); S. 632, 99th Cong., 2d Sess. (1985).

11. Dennis, *supra* note 9, at 308 (citing Marshall Field & Co. v. Icahn, 537 F. Supp. 413 (S.D.N.Y. 1982)).

12. Dennis, *supra* note 9, at 308 (citing Treadway Cos. v. Care Corp., 638 F.2d 357 (2d Cir. 1980); Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690 (2d Cir. 1980)).

13. Dennis, *supra* note 9, at 308 (citing Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981)).

14. Dennis, *supra* note 9, at 308 (citing Whittaker Corp. v. Edgar, 535 F. Supp. 933 (N.D. Ill. 1982)).

15. For further discussion of corporate defense tactics, see *infra* notes 186-205 and accompanying text.

The broad permissiveness granted to target management by the courts is arguably contrary to one of capitalism's oldest doctrines: A corporation exists to maximize the interests of its shareholders. In blocking a raider's efforts to buy out target shareholders, an otherwise stagnant or dying corporation may lose its only outlet for the replacement of inefficient managers, redistribution of assets to the shareholders' benefit, reallocation of underused resources, and the return to shareholders of the full value of their shares. These benefits are quickly countered by queries of (1) whether shareholders are in fact the "true owners" of corporations; and (2) what adverse impact do raiders have on United States competitiveness by enhancing an existing trend toward short-term corporate planning. For a full discussion of the economic arguments concerning tender offers, see Economic Report of the President, ch. 6, 187-216, Transmitted to the Congress (Feb. 5, 1985).

16. Securities regulation in the United States originated at the state level in the 1860's. *See* L. LOSS & E. GOWETT, BLUE SKY LAW 3-4 (1958). The creation of the federal regulatory scheme resulted from the inability of the individual states to deal with interstate securities transactions. *See* Travelers Health Ass'n v. Virginia, 339 U.S. 643, 653 (1950) (Douglas, J., concurring). Congress enacted securities acts in 1933 and 1934 to ensure that existing state regulations would remain intact. 15 U.S.C. § 78bb(a) states: "Nothing in this chapter shall affect the jurisdiction of . . . any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. § 78bb(a) (1982). The United States Supreme Court

tion. The most prominent express purpose has been the protection of persons, regardless of their state of domicile, who invest in corporations incorporated pursuant to the laws of the enacting state or in corporations "substantially related to" the enacting state.[17] This is largely the same purpose as that which is asserted by states in justifying blue sky laws.[18] Other purposes advanced in an attempt to assert a sufficient state interest to warrant state authority in the area of corporate take-overs include the perpetuation of the tenure of existing management,[19] the protection of employment opportunities of residents from potential loss resulting from a post-take-over shutdown of plant operations,[20] the adverse economic

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has stated that this provision "was plainly intended to protect, rather than to limit, state authority." Leroy v. Great W. United Corp., 443 U.S. 173, 182 & n.13 (1979).

Many states currently, by statute, regulate the corporate take-over process. The following is a list of those statutes:

> ALASKA STAT. §§ 45.57.010-.120 (1980); ARIZ. REV. STAT. ANN. § 6-144 (Supp. 1974-1985); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (1980); COLO. REV. STAT. §§ 11-51 -101 to -108 (Supp. 1984); CONN. GEN. STAT. ANN. §§ 36-456 to -468 (West 1981 & Supp. 1985); DEL. CODE ANN. tit. 8, § 203 (1983); GA. CODE ANN. §§ 22-1901 to -1915 (1977 & Supp. 1985); HAWAII REV. STAT. §§ 417-1 to -15 (1976 & Supp. 1984); IDAHO CODE §§ 30-1501 to -1513 (1980 & Supp. 1985); IND. CODE ANN. §§ 23-2-3.1-0.5 to .1-11 (Burns 1984); IOWA CODE ANN. §§ 502.101-.612 (West Supp. 1985); KAN. STAT. ANN. §§ 17-1276 to -1284 (1981 & Supp. 1984); LA. REV. STAT. ANN. §§ 51:1500-:1512 (West Supp. 1985); ME. REV. STAT. ANN. tit. 13, §§ 801-817 (1964 & Supp. 1985); MD. CORPS. & ASS'NS CODE ANN. §§ 3-601 to -603 (1985); MASS. GEN. LAWS ANN. ch. 110C, §§ 1-13 (West Supp. 1985); MICH. COMP. LAWS ANN. §§ 451.901-.917 (West Supp. 1985); MINN. STAT. ANN. chs. 80B, 302A (West Supp. 1985); MISS. CODE ANN. §§ 75-72-101 to -121 (Supp. 1984); MO. ANN. STAT. §§ 409.500-.565 (Vernon 1979); NEB. REV. STAT. §§ 21-2418 to -2430 (1983); NEV. REV. STAT. §§ 78.376-.3778 (1983); N.H. REV. STAT. ANN. §§ 421-A:1 to :16 (1983 & Supp. 1983); N.J. STAT. ANN. §§ 49:5-1 to -19 (West Supp. 1985); N.Y. BUS. CORP. LAW §§ 1600-1614 (McKinney Supp. 1984-1985); N.C. GEN. STAT. §§ 78B-1 to -11 (1981); OHIO REV. CODE ANN. §§ 1701.01, 1701.831 (Baldwin Supp. 1984); [for Oklahoma's statutory treatment of take-over attempts, see *infra* notes 78-185 and accompanying text]; 70 PA. CONS. STAT. ANN. §§ 71-85 (Purdon Supp. 1985); S.C. CODE ANN. §§ 35-2-10 to -130 (Law. Co-op. Supp. 1984); S.D. CODIFIED LAWS ANN. §§ 47-32-1 to -48 (1983); TENN. CODE ANN. §§ 48-5-101 to -114 (1984 & Supp. 1985); VA. CODE §§ 13.1-528 to -540 (1978); WIS. STAT. §§ 552-01 to -25 (Supp. 1985).

The following three states have repealed their take-over legislation:

> FLA. STAT. ANN. § 665.036 (West 1984). *repealed by* 1982 FLA. LAWS 214; ILL. ANN. STAT. ch. 121-1/2, ¶¶ 137.51-.70 (Smith-Hurd Supp. 1985), *repealed by* Act, No. 83-365, 1983 ILL. LAWS 365; UTAH CODE ANN. §§ 61-4-1 to -13 (Supp. 1985), *repealed by* 1983 Utah Laws 335.

Note: *Second Step Transactions in Two-tiered Takeovers: The Case for State Regulation*, 19 GA. L. REV. 343, 362 n.100 (1985) (list of statutes based upon this Note, then updated).

17. Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1, 16 (1976).

18. The term "blue sky laws" is defined as "[a] popular name for state statutes providing for the regulation . . . of securitites offerings and sales, for the protection of citizen-investors from investing in fraudulent companies." BLACK'S LAW DICTIONARY 157 (5th ed. 1979).

19. Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1, 18 (1976).

20. *Id.*

impact on local businesses,[21] and the loss of tax revenues upon the transfer of the target company's assets to another state.[22]

### B. *Constitutional Challenges*

#### 1. The Supremacy Clause

Despite the above asserted state interests, state take-over statutes have been met with a barrage of litigation challenging their constitutionality. In particular, they have been challenged as being in violation of the supremacy[23] and commerce[24] clauses of the United States Constitution. The supremacy clause and the related preemption doctrine have each been asserted in challenging overreaching state statutes.[25] Under the supremacy clause, a state statute which conflicts directly with federal law in a manner which renders compliance with both a "physical impossibility" is invalid.[26] The preemption doctrine, by contrast, is broader in scope than the supremacy clause. Under preemption, a state statute, although otherwise consistent with federal legislation, need not directly conflict with federal law, and in fact may be held invalid if it stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[27]

Adoption of the Williams Act,[28] an amendment to the Securities Exchange Act of 1934, marked the beginning of federal regulation of tender offers. Congress' primary purpose in the Williams Act was to assure "full and fair disclosure for the benefit of investors" in connection

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21. *Id.* at 19.

22. *Id.*

23. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

24. "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

25. *See, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971).

26. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

27. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977). In the decade following *Hines*, the United States Supreme Court, in Pennsylvania v. Nelson, elaborated upon the *Hines* rationale, developing a three part inquiry to identify the parameters of preemption: (1) Pervasiveness of the federal regulatory scheme; (2) federal occupation of a field in an area in which the federal interest is so predominal as to provide an assumption of preclusion of state action; and (3) danger of conflict between state laws and the administration of the federal program. Pennsylvania v. Nelson, 350 U.S. 497, 502-05 (1956).

28. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982).

with tender offers.[29] The purpose was to utilize the "market approach"[30] to tender offer regulation, an approach which emphasizes evenhanded neutrality between target companies and "offerors." Congress wanted neither to encourage tender offers nor to provide management with the means to obstruct or delay them.[31] Senator Harrison Williams, during his presentation of the legislation which bears his name, 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. [The Williams Act] is designed solely to require full and fair disclosure for the benefit of investors."[32]

Section 28a of the Securities Exchange Act[33] makes explicit as to tender offers the congressional intent to preserve *some* area for state regulation of securities transactions.[34] State regulation is prohibited, however, where: (1) Congress explicitly states its intention to preempt state regulation in a specific area;[35] (2) a dominant federal interest or national policy exists; or (3) a "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[36]

Absent express intention to preempt state regulation, preemption may still be implied from a review of the development and breadth of federal regulation. In this regard, any state's statutory take-over scheme which requires pre-commencement filings, administrative hearings, and extensive disclosures clearly interferes with Congress' regulatory objectives for securities regulation.

29. 113 CONG. REC. 24,664 (1967) (remarks of Senator Harrison Williams), *quoted in* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 31 (1977).

30. Kennecott Corp. v. Smith, 637 F.2d 181, 189 (3d Cir. 1980). The market approach "allow[s] both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself." Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978), *rev'd sub nom. on other grounds*, Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

31. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 30-31 (1977).

32. 113 CONG. REC. 24,664 (1967); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 31 (1977).

33. 15 U.S.C. § 78bb(a) (1982).

34. Leroy v. Great W. United Corp., 443 U.S. 173, 182 (1979). Furthermore, the legislative history of the 1934 Act indicates that it was not intended to override existing corporate law. Its focus was instead "to provide a legal regime governing transactions in securities markets, while preserving state autonomy in the area of law left to the states, i.e., corporate law." Kitch, *A Federal Vision of the Securities Laws*, 70 VA. L. REV. 857, 862 (1984).

35. *See* Jones v. Rath Packing Co., 430 U.S. 519 (1977). In making a judicial assessment as to the validity of state legislation under any challenge of preemption, courts must "start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 525 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

36. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The original draft of the Williams Act directed offerors to file a confidential disclosure statement with the Securities and Exchange Commission (SEC) at least five days prior to the commencement of the offer.[37] Despite SEC support of this pre-commencement filing[38] procedure, many Senate members were opposed to any pre-commencement filing or any scrutiny by the SEC.[39] The bill was later amended to delete the five-day notice period, and it then passed the Senate. One year later, the House proposed a similar bill,[40] but upon review the Senate did not find sufficient justification or support for any pre-commencement filing.[41] Thus, Congress' repeated failure to enact a pre-commencement filing provision, together with its express desire to promote evenhanded neutrality, suggests a clear national policy of avoiding arbitrary impediments to corporate acquisitions.[42]

While Congress expressly rejected any pre-commencement filing requirements, two other requirements found in some state statutes—pre-commencement administrative hearings and extensive disclosure similar to S-1 registration statements under the Securities Exchange Act of 1934[43]—were neither proposed nor scrutinized by Congress. Their pur-

37. S. 510, 90th Cong., 1st Sess. (1967).

38. Pre-commencement filing requirements were to follow proxy contest procedure. Manuel F. Cohen, then chairman of the SEC, testified before the Senate that pre-commencement filing was desired "since it would give the commission an opportunity to review the statement and point out any inaccuracies or inadequacies before any soliciting material was published or sent out to stockholders." *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 20 (1967) (statement of Manuel F. Cohen, Chairman, SEC) [hereinafter cited as *Hearings*].

39. Representatives of the New York Stock Exchange, *Hearings, supra* note 38, at 69-79, and representatives of the American Stock Exchange, *id.* at 106-08, testified that leaks may occur before the tender offer was made which would force its abandonment. Should the public gain knowledge of an impending offer, the price of stock would rise toward the anticipated tender price. Stockholders would then lose their primary incentive to realize a gain well above market price by selling to an offeror. The offeror would then resort to abandoning his or her offer, or raise the tender price even higher. An offer may quickly prove prohibitive should the tender price rise even a few dollars per share. *Id.* at 72.

40. H.R. 11,475, 90th Cong., 1st Sess. (1967).

41. 113 CONG. REC. 24,662 (1967).

42. The "market approach" policy was reaffirmed when Congress considered the Hart-Scott-Rodino Antitrust Improvements Act of 1976. *See* 15 U.S.C. § 18(a) (1982). The House report on this Act discussed the delay caused by requiring certain tender offerors to submit filings to the Federal Trade Commission and the Antitrust Division of the Justice Department. H.R. REP. No. 1373, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2572, 2644. The ten-day waiting period then proposed for such filings "was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy toward cash tender offers, by avoiding lengthly [sic] delays that might discourage their chances for success." *Id.*

43. 17 C.F.R. § 239.11 (1985).

pose and effect, however, are arguably sufficiently similar to pre-commencement filing requirements so as to violate the federal scheme of regulation.

The Williams Act *alone* is not so "pervasive" that preemption should be implied. Its regulation merely affects the time and content of disclosure. But, when the Securities Exchange Act of 1934 is analyzed with its expressly integrated counterpart, the Williams Act, virtually all aspects of tender offers are controlled. Thus, it is probable that this regulatory scheme, as a whole, satisfies the "pervasive regulation" standard[44] of the preemption doctrine and therefore precludes *every* state attempt at tender offer regulation.

### 2. The Commerce Clause

In addition to the supremacy clause/preemption challenge, the commerce clause has also been utilized to challenge overreaching state statutes. Generally, it serves as a limitation on the power of states to regulate or interfere with the stream of commerce[45] between the states.[46] It is not intended, however, to usurp the police power reserved to states under the tenth amendment.[47] Thus, a state may still legislate to protect legitimate state interests, even if it burdens interstate commerce, provided the need for the legislation justifies the burden on commerce.[48]

The standards for assessing the validity of state statutes affecting interstate commerce were set forth by the Supreme Court, by unanimous decision, in *Pike v. Bruce Church, Inc.*[49] The Court stated:

> [T]he criteria for determining the validity of state statutes affecting in-

44. If Congress intends to prescribe one uniform system of regulation, the test for preemption is "whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

45. "Commerce" may be defined as "[t]he exchange of goods, productions, or property of any kind . . . ." BLACK'S LAW DICTIONARY 244 (5th ed. 1979).

46. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35-37 (1980); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 370, 371 (1976).

47. Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443-44 (1960). The tenth amendment to the United States Constitution provides, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

48. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523 (1959). In addition, "[a]lthough Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 207 (1824). "The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body." White v. Massachusetts Council of Contr. Employers, 460 U.S. 204, 213 (1983); *see* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186 (1950).

49. 397 U.S. 137 (1970).

> terstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits .... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[50]

Accordingly, under *Pike*, the following three questions must be addressed: (1) Does the state statute promote a legitimate local purpose? (2) Is the statute's burden on interstate commerce incidental or significant? and (3) Is the burden on interstate commerce clearly excessive when balanced against the resulting local benefits?[51]

States have asserted numerous interests in an attempt to justify take-over legislation.[52] The police power asserted by states to protect the health and welfare of state residents stands as the basis for regulation of a wide variety of activities.[53] Difficulty arises in establishing state take-over legislation as "local," and thus within the scope of the state's police power, due to its impact beyond state boundaries.

Some states, in an attempt to satisfy police power limitations, have argued that their take-over legislation falls within the purview of state authority to regulate corporate "internal affairs." The internal affairs doctrine dictates that, because a state's law defines a corporation's attributes, powers, and functions when it charters a corporation, the corporation's internal procedural principles should also be governed by that state. Multistate tender offers, however, do not involve the corporation's internal procedures; thus, state regulation which is based upon the internal affairs doctrine does not reach these offers.[54] Consequently, state regulation of multistate tender offers made to domestic targets arguably contravenes the commerce clause, despite the statute's asserted local purpose. An equally insufficient local purpose generally exists with respect to regulation of foreign corporations which is based upon some nexus

50. *Id.* at 142.

51. Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1, 16 (1976).

52. *See supra* notes 17-22 and accompanying text.

53. For example, assertion of state police power to prevent fraud in the purchase and sale of securities has been consistently found valid. *See* Hall v. Geiger-Jones Co., 242 U.S. 539, 552 (1917); *see also* Edgar v. MITE Corp., 457 U.S. 624, 644 (1982) (noting that the protection of local investors is plainly a legitimate state objective).

54. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982).

with the state and the protection of *all* shareholders wherever domiciled. Proponents of this type of state legislation argue that *not only the chartering state,* but also any state with a significant relationship to a corporation, may regulate internal affairs. The conflict which results—several states attempting to separately assert jurisdiction over a particular corporation—causes, once again, the failure of the assertion of the internal affairs doctrine.

Although other bases have been asserted to establish a local purpose sufficient to justify state regulation,[55] courts continue to approach this issue on an ad hoc basis.[56]

Target corporations, although chartered under the laws of one state or associated, due to some nexus, with a state attempting to exercise controlling take-over legislation, generally have shareholders residing outside the state. The take-over legislation will generally affect these shareholders as well. In this respect, state take-over legislation is distinguishable from state blue sky legislation governing the sale of securities within one state.[57] The adverse influence of state take-over legislation on interstate commerce may result in: (1) An effect on a remote shareholder's ability to sell his or her shares, (2) disruption of trading and regulation in the national securities market, and (3) burdens which hinder and delay a potential offeror with pre-commencement requirements of each state attempting to control bids for the target company.

The mere existence of extraterritorial encroachment by take-over legislation strongly implies an excessive burden on interstate commerce when balanced with any putative local interest.[58] An argument, however, can be made that state take-over statutes regulate solely *before* interstate commerce begins, thus making the regulation permissible.[59]

Although the burden of a single take-over statute may be minimal, several states may in any one situation seek to concurrently impose separate regulation. The conflicts arising among the concurrent state statutes as well as between the state and federal regulation may reduce the attrac-

55. *See supra* notes 17-22 and accompanying text.

56. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 267 (2d ed. 1983).

57. *See supra* note 18. State blue sky laws have been found to be a valid exercise of state police power under the commerce clause. *See* Hall v. Geiger-Jones Co., 242 U.S. 539, 552 (1917); Underhill Assoc., Inc. v. Bradshaw, 674 F.2d 293 (4th Cir. 1982).

58. *See* Edgar v. MITE Corp., 457 U.S. 624, 644 (1982). Similar arguments concerning excessive burdens on commerce include, for example, prohibiting a state from imposing standards on carriers, if the rules substantially delayed the flow of goods through the stream of commerce. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

59. *See* Carter v. Carter Coal Co., 298 U.S. 238, 244 (1936).

tion to tender offers and disrupt national market trading—a result which clearly indicates an excessive impact on interstate commerce.

## C. Edgar v. MITE Corporation

Federal courts, using the *Pike* test, have rigorously reviewed state take-over statutes; most were found to have imposed excessive burdens on interstate commerce and thus were unconstitutional. One such state statute, the Illinois Business Takeover Act,[60] was found unconstitutional as an undue burden on interstate commerce in *Edgar v. MITE Corp.*[61] The United States Supreme Court's decision in *MITE* has had a substantial impact on the development of state securities regulation, particularly as to the role of the states in tender offers.[62]

On January 19, 1979, MITE Corporation, a Delaware corporation with its principal offices in Connecticut, instituted its tender offer for the outstanding shares of Chicago Rivet and Machine Company. Chicago Rivet was an Illinois corporation, with its principal offices and twenty-seven percent of its shareholders located in Illinois. In compliance with the Williams Act, MITE filed a schedule 14D-1[63] with the SEC. It did not, however, comply with the Illinois Business Takeover Act, which required any take-over offer[64] for the shares of a target company to be registered with the Illinois Secretary of State.[65] The statute additionally imposed a twenty-day pre-commencement waiting period,[66] during which time the Secretary of State could call a hearing to adjudicate the substantive fairness of the offer.[67] The Act applied to every tender offer for shares of a target company (1) of which Illinois shareholders owned ten percent of the class of securities subject to the offer, or (2) which met two of the three following conditions regarding the target corporation:

60. ILL. ANN. STAT. ch. 121-1/2, ¶¶ 137.51-.70 (Smith-Hurd Supp. 1985), *repealed by* Act, No. 83-365, 1983 Ill. LAWS 365.

61. 457 U.S. 624 (1982).

62. *MITE* has been the subject of numerous scholarly articles and, for this reason, is only briefly discussed. For a more in-depth analysis, see, e.g., *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 4, 62-71 (1982).

63. Schedule 14D-1 requires disclosure of the source of funds used to purchase the target shares, past transactions with the target company, and other material financial information about the offeror. Additionally, the offeror must disclose any anti-trust or other legal problems which might result from the success of the offer. 17 C.F.R. § 240.14d-100 (1981).

64. "Take-over offer" is defined under the Illinois Act as "the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer . . . ." ILL. ANN. STAT. ch. 121-1/2, ¶ 137.52-9 (Smith-Hurd Supp. 1985), *repealed by* Act, No. 83-365, 1983 ILL. LAWS 365.

65. *Id.* ¶ 137.54.A.

66. *Id.* ¶ 137.54.E.

67. *Id.*

(a) It has its principal executive offices in Illinois, (b) it is organized under the laws of the State of Illinois, or (c) it has at least ten percent of its stated capital and paid-in surplus in Illinois.[68]

MITE Corporation sought injunctive relief prohibiting the Secretary of State from enforcing the Illinois Act against MITE's tender offer for Chicago Rivet. MITE alleged that the Act was preempted by the Williams Act and imposed an unconstitutional burden on interstate commerce. The district court granted the preliminary injunction.[69] MITE Corporation subsequently withdrew its tender offer, but the Illinois Secretary of State appealed to the Seventh Circuit, which affirmed the district court's decision.[70] Embracing the Fifth Circuit's approach in *Great Western United Corp. v. Kidwell*,[71] the Seventh Circuit found Illinois' purported interests of shareholder protection and regulation of corporate internal affairs insufficient[72] and concluded that the possibility of intermittent delays outweighed the putative local benefits.[73]

The Supreme Court's decision in *MITE* was based on six separate opinions. The only ground on which a majority of the justices could agree was the statute's excessive burden on interstate commerce.[74] The Court reasoned that the state's asserted interests of protecting resident shareholders and regulating the internal affairs of domestic corporations did not palliate the extraterritorial impact on both non-resident shareholders and foreign corporations,[75] thus rendering the Illinois Act invalid under the commerce clause.[76] Although the Court's decision did not explicitly eliminate state regulation of tender offers, the decision did substantially limit such regulation. Further attenuation has been occasioned by subsequent judicial response to state take-over statutes.[77] Within

68. Edgar v. MITE Corp., 457 U.S. 624, 627 (1982).

69. *Id.* at 628.

70. *Id.* at 630. The Supreme Court first addressed whether the case was moot due to MITE Corporation's withdrawal of the tender offer. *Id.* The Court agreed with the Seventh Circuit's finding that the case was not moot due to the Secretary of State's intent to enforce the Act against MITE, exposing MITE to civil and criminal liability for violations of the Act. *Id.*

71. 577 F.2d 1256, 1256 (5th Cir. 1978), *rev'd sub nom. on other grounds*, Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

72. Edgar v. MITE Corp., 457 U.S. 624, 644-45 (1982).

73. *Id.* at 645-46.

74. *Id.* at 643.

75. *Id.* at 644-46.

76. Justices White, Burger, and Blackmun also expressed the view that certain provisions of the Illinois Act were invalid as preempted by the Williams Act under the supremacy clause. See *supra* notes 23-44 and accompanying text for discussion of the supremacy clause issues.

77. Mesa Petroleum Co. v. Cities Serv. Co., 715 F.2d 1425 (10th Cir. 1983) (Oklahoma statute violates commerce clause); Televest, Inc. v. Bradshaw, 697 F.2d 576 (4th Cir. 1983) (Virginia statute violates commerce clause); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982)

these narrow constitutional confines, states have attempted to develop take-over legislation. Oklahoma is no exception.

## III. The Development of Oklahoma's Take-over Legislation

### A. *Multinational Corporation Take-Over Bid Act*

Oklahoma has made four attempts toward the enactment of take-over legislation which would survive constitutional challenge. The initial three efforts were found unconstitutional. Oklahoma's take-over legislation originated with the Multinational Corporation Take-Over Bid Act (Multinational Act).[78] Enacted in 1980, the Multinational Act imposed several requirements upon offerors[79] attempting corporate take-overs. First, an offeror was required to file with both the Administrator of the Oklahoma Securities Commission and the target company notice of its intent to make a take-over bid and the material terms of the bid twenty days[80] before its commencement.[81] The Administrator could, within five days of such filings, either upon his own review of the offeror's proposal or at the request of the target company, order a hearing to adjudicate whether the offer contained "fair, full and effective disclosure to offerees of all information material to a decision to accept or reject the offer."[82]

Soon after its effective date, the Multinational Act was challenged in *Seagram v. Marley*.[83] In *Seagram*, the court found that although the provision for adjudication of the fairness of the disclosure required a final decision within forty days of the announcement of the offer, it in effect

(Michigan take-over statute violates commerce clause); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) (Missouri take-over statute violates commerce clause and supremacy clause).

78. Okla. Stat. tit. 71, §§ 414-421 (1981) (effective June 12, 1980) (held unconstitutional in Seagram v. Marley, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,246 (W.D. Okla. 1981)).

79. An "offeror," within the meaning of the Multinational Act, is defined as a person who makes or participates in making a multinational take-over bid. Okla. Stat. tit. 71, § 414(2). "Multinational take-over bid" is defined as an offer to acquire the equity securities of a multinational corporation (i) organized under the laws of this state, or (ii) with its principal place of business *and* substantial assets located within this state, if after such offer the offeror would own more than 10% of the equity securities of such corporations. *Id.* § 414(1).

80. Only by special order obtained from the Administrator could the twenty-day pre-commencement filing requirement be shortened. *Id.* § 415(A).

81. *Id.*

82. *Id.* § 415(A)(3). Among the information to be disclosed by offerors were the identities and backgrounds of all parties seeking to acquire equity securities in the bid, the sources and amounts of monies to be used in the attempted acquisition, and a statement by the offeror setting forth any proposed major change in the business, corporate structure, management personnel, or employment policies, should the offeror succeed in gaining control of the target company. *Id.* § 415(C).

83. [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,246 (W.D. Okla. 1981) [hereinafter cited as *Seagram*].

delayed the completion of an offering by nine to eleven days beyond the provisions of the Williams Act.[84] The court concluded that the statute was inconsistent with the Williams Act, "stand[ing] as an obstacle to the accomplishment and execution of [its] full purposes and objectives," and was thus invalid under the supremacy clause.[85] In addition, the provision for a hearing if exercised, had the potential of precluding the consummation of a nationwide tender offer in violation of the commerce clause.[86]

### B. *The Oklahoma Take-over Bid Act*

Only four days after the *Seagram* decision, Oklahoma adopted its second statute which attempted to regulate take-overs—the Oklahoma Take-over Bid Act (Oklahoma Act).[87] Unlike the Multinational Act, the Oklahoma Act expressly set forth the legislature's intent and purpose, which was: " [T]o provide for full, fair and effective disclosure of all material information concerning take-over bids to shareholders of target companies so that the opportunity of each shareholder to make an informed investment decision may be secured."[88] The disclosure requirements of the Oklahoma Act, however, were identical to the Multinational Act's disclosure provisions,[89] with one salient addition: In

84. *Id.* at 91,619. Under the Williams Act, a tender offer is considered commenced once it is "first published or sent or given to security holders." 15 U.S.C. § 78n(d)(1) (1982). The offer then remains open for a minimum period of twenty days, during which time interested security holders may tender their shares to the offeror. Under the federal regulatory scheme, time is of the essence and any delay in this process may be fatal to a tender offer. Kennecott Corp. v. Smith, 637 F.2d 181, 188-90 (3d Cir. 1980); Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1277 (5th Cir. 1978), *rev'd sub nom. on other grounds*, Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

85. *Seagram, supra* note 83, at 91,622.

86. *Id.*

87. OKLA. STAT. tit. 71, §§ 431-450 (1981) (effective July 21, 1981), *repealed by* Oklahoma Take-over Disclosure Act of 1985, ch. 285, 1985 Okla. Sess. Laws 1224 (to be codified at OKLA. STAT. tit. 71, §§ 451-462).

88. OKLA. STAT. tit. 71, § 432 (1981). "Take-over bid," within the meaning of the Oklahoma Act, is defined as an acquisition or offer to acquire any equity security of a target company (1) organized under the laws of Oklahoma; or (2) with substantial assets *and* its principal place of business located within Oklahoma; or (3) with substantial assets *and* significant operations located within Oklahoma; or (4) which has equity security holders resident in Oklahoma who own an aggregate of at least 10% of any class of such entity's equity securities. *Id.* § 433(1)-433(4). Additionally, a take-over bid, in order to fall within the scope of the Oklahoma Act, *must result in* the offeror owning 10% of the equity securities of such entity. *Id.* § 433(1).

89. OKLA. STAT. tit. 71, § 415(C) (1981). The Multinational Act required offerors to file a disclosure statement containing the following information and accompanying documents: (1) Copies of all documents offerors proposed to utilize in disclosing to offerees all information material to a decision to accept or reject the offer; (2) the identity and background of each acquiring party; (3) the source and amounts of all funds utilized in the acquisition process; (4) a statement as to any plan for major change in business operations, corporate structure, management personnel, or employment policies; (5) the number of shares each offeror has a right to acquire and the names and addresses of

the event the take-over bid was subject to section 14(d) of the Securities Exchange Act of 1934,[90] unless otherwise requested by the Administrator, all state disclosure requirements were waived and the offeror was merely required to file the 14(d) information statement with the Administrator and the target company.[91]

The scope of offers governed by the Oklahoma Act was even broader than that of the Multinational Act because the Oklahoma legislature broadened the definition of a target company.[92] In light of the supremacy clause defects of the Multinational Act, the Oklahoma Legislature, in the Oklahoma Act, adopted the same express purpose as that of the Williams Act.[93] The legislature also shortened the time within which the Administrator was required to render a final determination as to the fairness of the disclosure to within twenty days of the filing of the information statement.[94] If the Administrator found the disclosure insufficient, the offeror was given an opportunity to remedy the defects in the disclosure,[95] and could even file a petition for rehearing.[96]

Despite the legislature's attempts to remedy constitutional defects in the state's take-over legislation, the Oklahoma Act likewise fell to constitutional challenge in *Mesa Petroleum Co. v. Cities Service Co.*[97] In *Mesa*, the Tenth Circuit observed several similarities between the Oklahoma Act and the Illinois Business Takeover Act (Illinois Act)[98] which was found unconstitutional in *Edgar v. MITE Corp.*[99] The substantial adverse effects of the Illinois Act, which likewise made the Oklahoma Take-over Bid Act objectionable on commerce clause grounds, were enumerated in *MITE* as follows: (1) The Illinois Act purported to regulate tender offers involving target companies which may have had no Illinois resident shareholders; (2) the Act applied to tender offers where some or all of the

offerors; (6) specifics as to any contracts, agreements, or other understandings, to which an offeror is a party with respect to any equity security of the target company, including the names of persons with whom such contracts, agreements, or understandings have been entered; (7) complete information concerning the organization and operations of the offeror; and (8) any and all additional information as the Administrator may require in preserving the purposes of the Act. *Id.*

90. 15 U.S.C. § 78a (1982).

91. OKLA. STAT. tit. 71, § 436(A) (1981).

92. For a statement of the scope of the Multinational and Oklahoma Acts, see *supra* notes 79 and 88, respectively.

93. *See supra* notes 28-36 and accompanying text.

94. OKLA. STAT. tit. 71, § 437(B) (1981).

95. *Id.* § 437(A)(2)(c).

96. *Id.* § 437(C).

97. 715 F.2d 1425 (10th Cir. 1983).

98. ILL. ANN. STAT. ch. 121-½, ¶¶137.51-.70 (Smith-Hurd Supp. 1985), *repealed by* Act, No. 83-365, 1983 ILL. LAWS 365.

99. 457 U.S. 624 (1982); *see supra* notes 60-77 and accompanying text.

offerees resided in states other than Illinois; (3) the Act regulated or prevented the consummation of interstate stock sale transactions; and (4) the Act regulated tender offers involving target corporations incorporated under the laws of other states and/or corporations which had their principal offices and operations in other states.[100] The Tenth Circuit in *Mesa* declared a similar extraterritorial reach by the Oklahoma Act to have been a substantial burden on interstate securities trading and thus was unconstitutional.[101]

### C. *The Energy Resources Conservation Act*

After *Mesa*, the Oklahoma legislature made very little progress toward enacting state take-over legislation which would overcome the constitutional impasses encountered in its first two legislative attempts. In 1983, during the 1st session of the 39th legislature, a new bill was drafted by Senator Bill Dawson, D-Seminole, in response to hostile take-over attempts on Cities Service Company.[102] Based upon the tenet that the state has an interest in protecting the development of oil and gas,[103] the

100. Mesa Petroleum Co. v. Cities Serv. Co., 715 F.2d 1425, 1429-31 (10th Cir. 1983) (citing Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982)).

101. *Mesa*, 715 F.2d at 1429.

102. The first version is rumored to have been modeled after LA. REV. STAT. ANN. §§ 51:1500-1512 (West. Cum. Supp. 1985) (effective June 28, 1976). This is somewhat misleading, however, in that the Louisiana statute is a general take-over act. The provision relating to natural resource companies is merely one section of an entire state take-over act, as opposed to the Oklahoma draft which was limited in scope to energy companies and was codified under the state's oil and gas statutes. Title 51, section 1501 of the Louisiana statute provided:

> G. A take-over offer relating to a natural resource company shall not become effective until there shall be a written determination duly adopted by the State Mineral Board and filed with the commissioner that the offeror has made an affirmative showing, by clear and convincing evidence, that the take-over offer will provide a positive benefit to this state, its citizens and its resources, particularly with respect to the discovery, development, preservation and utilization of the mineral and other natural resources of this state. Factors which are to be considered in the making of the foregoing determinations include but are not limited to the experience of the offeror in mineral and other natural resource industries; any proposed or potential change in the number of plants and other establishments within this state or in the number of employees herein; and the probable investment in the exploration and development of the natural resources resulting from the take-over offer.

LA. REV. STAT. ANN. § 51:1501(G). This sub-section had been repealed by 1981 La. Acts, No. 155, § 1, at the time of Senator Dawson's first draft. Clearly, the Oklahoma legislation was not modeled after the Louisiana statute. It is conceivable, however, that this could have been the fundamental idea upon which Oklahoma expanded.

103. The United States Supreme Court has stated, in upholding an Oklahoma Corporation Commission order fixing a minimum wellhead price for natural gas: "That a legitimate local interest is at stake in this case is clear. A state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources." Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 187 (1950) (comparing Thompson v. Consolidated Gas Corp., 300 U.S. 55, 76-77 (1937)).

The state has the power, with respect to its regulatory scheme for oil and gas production, to regulate the production of oil and gas so as to prevent waste and secure the correlative rights of landowners overlying a common source of supply. Osborn v. Texas Oil & Gas Corp., 661 P.2d 71, new proposal was drafted and was then circulated through various parties, including Frank Marley, then Administrator of the Oklahoma Security Commission, for comment, but was never officially introduced.[104] It was not again reconsidered until February 6, 1985, when Senator Dawson revived his original draft and introduced it in the Oklahoma State Senate as Senate Bill No. 143, the Energy Resources Conservation Act (ERCA).[105] Without passing through ordinary committee scrutiny,[106] ERCA passed the Senate on February 11, 1985, by a 35-11 vote,[107] passed the House of Representatives on February 13, 1985,[108] and was signed by the Governor on the same date.[109]

Although this was certainly not the first effort by the legislature to prevent hostile business take-over attempts, ERCA did represent a new focus—the first state statute of its kind, with the following stated purposes:

> [ (1) ] [T]o protect [the state's] energy resource assets from transfers that may retard the timely and efficient development of such assets, or

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73 (Okla. Ct. App. 1982) (construing Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 233 (1932)).

104. Interview with Senator Dawson, D-Seminole, Oklahoma State Senate, in Oklahoma City (May 23, 1985).

105. Energy Resources Conservation Act, ch. 2, 1985 Okla. Sess. Laws 2 (to be codified at OKLA. STAT. tit. 52, §§ 601-614 (Supp. 1985) (found unconstitutional in Mesa Partners II v. Unocal Corp., No. CIV-85-398-W (W.D. Okla. Apr. 26, 1985)) [hereinafter cited as ERCA].

106. Although ERCA escaped committee review, two days prior to ERCA's introduction the Oklahoma Department of Securities, at the request of Senator Dawson, issued its memorandum analyzing ERCA in light of *MITE* and a more recent Eighth Circuit decision, Cardiff Acquisitions, Inc. v. Hatch, FED. SEC. L. REP. (CCH) ¶ 91,854 (8th Cir. 1984). The memorandum concluded that a logical nexus did not exist between the law in question (ERCA) and the state interest sought to be protected by that law (the protection of natural resources); the state's compelling interest was not enhanced by ERCA since such protection was already provided by existing law; and, accordingly, ERCA effected a burden on interstate commerce. The Securities Department went further to recommend that the Oklahoma Take-over Bid Act be amended in line with the Minnesota Corporate Take-overs Act in sections 80B and 302A of the Minnesota Statutes. This change created legislation that would not then be limited to oil and gas entities, but would instead protect Oklahoma shareholders of all companies with substantial assets in this state. Memorandum from Oklahoma Department of Securities, Melanie Hall and Faye Morton, to Senator Bill Dawson, Oklahoma State Senate (Feb. 4, 1985). For a discussion of the Oklahoma Take-over Bid Act, see *supra* notes 87-101 and accompanying text.

107. Computer Printout of the Senate Vote on Senate Bill No. 143 (Feb. 11, 1985) (available through the Oklahoma State Legislature). Senators in opposition to ERCA argued the impropriety of government involvement in the free enterprise system. Proponents, however, contended free enterprise was safeguarded by the legislation. More particularly, Senator Jerry Pierce, R-Bartlesville, asserted that the bill warded off "economic predators" such as Carl Icahn and T. Boone Pickens. To the contrary, Senator Bernest Cain, D-Oklahoma City, attempted to delay the bill's passage and send it to a committee for review, stating, "It's absurd. It's against free enterprise. The only lawyers I know who have approved it were Phillips lawyers." *Icahn Raises Offer to $60 a Share*, Tulsa Tribune, Feb. 12, 1985, at A1, cols. 4, 7.

108. S. 143, 40th Leg., 1st Sess. (1985).

109. *Id.*

> transfers that may interfere with . . . existing contracts [regarding energy resource assets] within this state. . . . [and] [ (2) ] To encourage orderly future . . . development [and] production . . . of hydrocarbons and hydrocarbon products . . . within the state, to conserve and prevent waste of energy resource assets, to protect correlative rights in underground mineral resources, and to protect and preserve sources of tax revenue derived from the orderly and efficient development, management and production of the state's energy resource assets.[110]

Highlighting ERCA was the provision requiring any person proposing to acquire ownership of energy resource assets in excess of $75 million to apply to the Oklahoma Corporation Commission for approval of such transfer of ownership. ERCA did not apply, however, to acquisitions occurring in the ordinary course of business in the hydrocarbon industry.[111]

Once application was made to the Corporation Commission, the Commission had to determine whether the transfer of energy resource assets would adversely affect any one of a multitude of aspects of energy resource development.[112] If there were an adverse effect the application could be denied. The Corporation Commission could then enforce its orders by issuing orders of restraint, by appointing receivers to rescind unlawful transfers, and instituting contempt proceedings against violators.[113] Application and hearing requirements could be waived if so requested by affidavits of the parties to the transfers and if the Corporation Commission determined that no substantial legal issues were present requiring an application and hearing. The Corporation Commission, however, had to act within seven days.[114]

The primary distinction between ERCA and the prior acts is the

110. ERCA, *supra* note 105, § 2. "Energy resource assets" is defined in section 3(2) of ERCA, and covers such energy resources as oil, gas and coal in solid, liquid or gaseous form, or any combination thereof. It also includes "any rights for the exploration, development or production" thereof, and "any tangible assets used in the exploration, development or production, refining, processing, transportation or transmission by pipeline or other common carrier of any of the foregoing." *Id.* § 3(2). "Transfer" is defined in section 3(4) of ERCA as a disposition for value of any energy resources assets or any ownership interest in any person, other than a natural person, directly or indirectly owning or controlling such assets. *See id.* § 3(4).

111. *See id.* § 5.

112. Tangential to energy resource development, and therefore considerations of the Corporation Commission, are: (1) The timely, efficient and orderly exploration, development, production, refining, processing, transportation, or transmission of hydrocarbons or hydrocarbon products within the state; (2) any interference with contractual obligations regarding hydrocarbons; (3) any impediment to conservation, or waste of energy resource assets; (4) any disruption in the collection or realization of state tax revenues; and (5) a determination of whether or not the transferee is able to manage such energy resource assets in a lawful manner. *See id.* § 6(D).

113. *Id.* § 10.

114. *Id.* § 6(E)(1).

grant of authority in prior acts to the state Securities Commission to prohibit or delay interstate tender offers, with the focus being to protect shareholders through adequate disclosure. With ERCA's scope limited to energy resources, Oklahoma sought to assert a sufficient state interest so as to protect ERCA from any challenge as to its constitutionality.

1. Constitutional Challenges

Constitutional challenges to ERCA were readily forthcoming. The first of these challenges was asserted by New York financier Carl Icahn and arose in the midst of a month-long struggle by Icahn for the control of Phillips Petroleum Company (Phillips).[115]

Phillips had just ended a battle in December of 1984 with T. Boone Pickens and his investor group, Mesa Partners, in which Mesa had proposed a tender offer for Phillips stock.[116] As part of the settlement agreement with Mesa, Phillips was to structure a plan for recapitalization, which Mesa was contractually obligated to support. On February 1, 1985, Phillips commenced the distribution of its proxy material to shareholders for approval of the plan, with the meeting of shareholders scheduled for February 22nd.[117]

Less than one week later, on February 4, 1985, financier Carl Icahn entered the picture. In a letter to Phillips Chairman, William C. Douce, Icahn expressed the view that management's offer to Phillips shareholders was "grossly inadequate."[118] With the purported purpose of giving Phillips shareholders "an opportunity to choose an alternative transaction,"[119] Icahn proceeded to set forth the terms of his take-over bid.[120]

115. Phillips, a Delaware corporation, maintains its corporate headquarters in Bartlesville, Oklahoma.

116. By December 4, 1984, Mesa Partners had acquired 5.8% of Phillips' outstanding common shares. In a schedule 13D, filed with the Securities and Exchange Commission, Mesa Partners disclosed its intent to gain control of Phillips, but had not yet formed the offer by which this would be accomplished.

From December 4, 1984, to December 23, 1984, Phillips and Mesa Partners commenced numerous legal proceedings in connection with Mesa's proposal. On December 23, 1984, after three days of negotiations, the parties entered into a settlement agreement which ended Mesa's efforts to acquire control of Phillips. PHILLIPS PETROLEUM COMPANY, 1984 PROXY STATEMENT 4 (Jan. 31, 1985).

117. In its original form, the recapitalization plan provided that Phillips would redeem 38% of its common stock in exchange for bonds and notes having face values of $60 per share. Additionally, Phillips was to sell up to 32 million shares to its employee stock ownership plan. To off-set its debts, Phillips would sell approximately $2 billion in company assets. PHILLIPS PETROLEUM COMPANY, 1984 PROXY STATEMENT (Jan. 31, 1985).

118. Letter from Carl C. Icahn to William C. Douce (Feb. 4, 1985).

119. *Id.*

120. In this, the first of three bids ultimately presented to Phillips, Icahn proposed the acquisi-

In response, Phillips, through counsel, first requested additional information from Icahn concerning his bid,[121] but rejected Icahn's proposal at a special meeting of its board of directors held the evening of February 6th.[122] Phillips there introduced a "poison pill",[123] declaring "Note Purchase Rights" to chill the attempts of the would-be acquirer.[124]

Icahn responded aggressively by proposing to activate these declared Note Purchase Rights and informed Phillips of his intent to initiate a tender offer to acquire enough additional stock to give him 30% at $2.2 billion.[125] Phillips responded by informing Icahn that he was not eligible to purchase notes, and encouraged him to reconsider Phillips' newly revised recapitalization plan.[126]

On February 11th, with the shareholder's meeting scheduled for February 22nd, Phillips mailed revised proxy statements setting forth the provisions of its revised recapitalization plan.[127] After rejection of Icahn's $55 per share offer, Phillips stated it would only consider offers

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tion of 100% of Phillips common stock at $55 per share, payable one-half in cash and one-half in subordinated notes. *Id.*

121. Letter from William G. Paul, Esq., and Andrew R. Brown, Esq., to Carl C. Icahn (Feb. 5, 1985).

As part of his response to Phillips, Icahn stated: (1) Under his proposed merger, Phillips' management would be invited to continue in place; (2) Icahn would not liquidate Phillips, but over a period of one year, would sell approximately $3.7 billion assets before taxes; (3) consistent capital expenditure would be maintained; and (4) Icahn would continue major Phillips headquarters operations in Bartlesville, Oklahoma. Letter from Carl C. Icahn to Phillips Petroleum Company, c/o its representative Wachtells, Lipton, Rosen & Katz (Feb. 6, 1985).

122. Phillips Petroleum Company, Press Release No. 4 (Feb. 6, 1985).

123. *See infra* note 192.

124. The Phillips Board declared a "dividend distribution of one Note Purchase Right on each outstanding share of Phillips common stock." Phillips Petroleum Company, Press Release No. 4 (Feb. 6, 1985). Phillips explained this "poison pill" Note Purchase Right as:

> entitl[ing] its holder to exchange one share of Phillips common stock for $62 principal amount of 15% Phillips One Year Senior Notes. The Rights dividend will be distributed on February 18, 1985 to shareholders of record on that date. The Rights will not be exercisable and separate Rights Certificates will not be issued until a person or group acquires beneficial ownership of 30% or more of Phillips Common stock . . . . The Rights will be redeemable by the Board for $25 per Right at any time prior to a 30% acquisition. In addition, the Rights will expire if Phillips' recapitalization is approved by shareholders.

*Id.* The "poison pill" would burden Icahn, or any similar acquirer, with an additional cost of 15% interest due to the shareholders within one year if the acquirer succeeded in an attempt to take-over Phillips. For a further discussion of poison pills, see *infra* note 192.

125. Icahn proposed to offer $57 per share tendered. The offer also stated that if the Rights were withdrawn, extinguished, or found invalid, he would accept enough tendered shares to give him at least 50% of Phillips outstanding shares at $55 per share. All remaining shares would then be acquired for securities valued at $55 per share. Letter from Carl C. Icahn to William C. Douce (Feb. 7, 1985).

126. Letter from William C. Douce to Carl C. Icahn (Feb. 8, 1985).

127. Under the revised plan, Phillips proposed to add an issue of preferred stock and repurchase some 20 million of its outstanding shares at $50 cash per share, a $1 billion purchase. Doenges, *Phillips' Revised Proxy Sent to Stockholders*, Tulsa World, Feb. 12, 1985, at B7, col. 1.

of $62, or better, per share in cash.[128]

Amid the take-over contest, Phillips and Icahn, as well as third parties, instituted a multitude of legal proceedings. One of the most significant of these proceedings took place in the United States District Court for the Northern District of Oklahoma.[129] Contemporaneous with the passage of ERCA,[130] a temporary restraining order and preliminary injunction were sought against the enforcement and application of ERCA in connection with Icahn's tender offer.[131] In support of this motion, Icahn set forth the following arguments:

1. *ERCA did not apply to a tender offer for common stock.*[132] ERCA purportedly governed transfers of energy resource assets in an attempt to protect and conserve Oklahoma minerals. Icahn's offer, however, was to acquire stock in Phillips, not to receive energy resource assets. Therefore, Icahn argued that ERCA did not govern tender offers and was not intended to do so.[133]

2. *ERCA violated the supremacy clause.*[134] Icahn further argued that the provision for substantive review of the terms of a tender offer by the Corporation Commission was in direct conflict with the purposes of the Williams Act's "market approach."[135] Additionally, Icahn maintained that significant delays required by ERCA favored incumbent management since delay is "the most potent weapon in a tender offer fight."[136]

3. *ERCA violated the commerce clause.*[137] Icahn alleged that ERCA placed a substantial and adverse burden on corporate securities transactions by allowing delay and frustration of nationwide tender of-

128. *Id.*

Icahn submitted his third (and final) offer within twenty-four hours: the cash sum of $60 per share for 70 million (nearly 50%) of Phillips common shares, on two conditions. First, Phillips would have to remove the poison pills. Second, the shareholders would have to reject the proposed plan of recapitalization. The remaining shares would then be exchanged for $50 per share in securities to complete a merger or other combination of Phillips. Crawley & Mathis, *Icahn Raises Offer to $60 a Share*, Tulsa Tribune, Feb. 12, 1985, at A1, col. 1.

129. Icahn Group, Inc. v. Baker, No. 85-C-144-C (N.D. Okla. filed Feb. 13, 1985).

130. *See supra* notes 102-14 and accompanying text.

131. Memorandum of Points and Authorities in Support of Plaintiff's Application for Temporary Restraining Order and Motion for Preliminary Injunction at 1, Icahn Group, Inc. v. Baker, No. 85-C-144-C (N.D. Okla. filed Feb. 13, 1985) [hereinafter cited as Plaintiff's Brief].

132. Plaintiff's Brief, *supra* note 131, at 5-7.

133. *Id.* at 6.

134. *Id.* at 7; *see also supra* notes 23-44 and accompanying text.

135. Plaintiff's Brief, *supra* note 131, at 13; *see also supra* notes 28-32 and accompanying text.

136. Plaintiff's Brief, *supra* note 131, at 14 (quoting Edgar v. MITE Corp., 457 U.S. 624, 637 (1982)).

137. Plaintiff's Brief, *supra* note 131, at 14; *see also supra* notes 45-59 and accompanying text.

fers.[138] Icahn proposed that the state's interest in protecting minerals did not extend to securities regulation. Therefore, the state had no valid interest at issue, and accordingly, was acting in violation of the commerce clause.[139]

4. *ERCA violated the equal protection clause of the fourteenth amendment.*[140] ERCA exempted from its provisions the transfer of an ownership interest by a natural person,[141] thereby treating similarly situated individuals (e.g., two shareholders owning an identical number of shares where one is a natural person and one is a corporation) differently.[142] Icahn argued that ERCA deprived a non-natural person of equal protection of the law, thus violating the equal protection clause of the fourteenth amendment.[143]

5. *ERCA violated the due process clause of the fourteenth amendment.*[144] Icahn alleged that ERCA was unconstitutionally vague, created an *ex post facto* law, and violated the jurisdictional prerequisites to summon non-residents to Oklahoma.[145] This argument emphasized that fundamental fairness is at the very essence of due process.

A hearing on these issues was held February 22, 1985[146] before the Honorable H. Dale Cook. At this hearing, attorneys for the Oklahoma Corporation Commission argued that the state's energy resource production could be adversely affected by those not expert in oil and gas production.[147] In response, Icahn argued that the Corporation Commission already had the power to regulate the production of oil and gas.[148] Con-

138. Plaintiff's Brief, *supra* note 131, at 16.
139. *Id.* at 14-17.
140. *Id.* at 17.
141. ERCA, *supra* note 105, § 3(4)(b).
142. Plaintiff's Brief, *supra* note 131, at 20.
143. *Id.* at 17-20.
144. *Id.* at 21.
145. *Id.* at 21-26.
146. The hearing was conducted the same date as the Phillips shareholder's meeting in Bartlesville, Oklahoma. Interview with Susie Prichett and Sharon J. Howard, of Linn & Helms, attorneys for Carl C. Icahn, in Oklahoma City, Oklahoma (May 24, 1985).
147. *Id.* Dr. Alexander B. Holmes, Associate Professor of Economics, University of Oklahoma, was a witness for the Corporation Commission. He testified that given the magnitude of short term borrowings which corporate raiders amass in a take-over process, they are left with an overhanging debt which they must pay off rapidly. Short term borrowings imply a short term horizon and therefore short term goals in management activities. The extraction of hydrocarbons under short term management incentives by a non-expert in the production of hydrocarbons would cause them to be depleted at a rate faster than the maximum efficient rate. This results in oil actually remaining in the ground which could have been extracted had the operation proceeded in an orderly fashion. These ground reserves can never be recovered under current technology. *Id.*
148. *Id. See generally* OKLA. STAT. tit. 52, §§ 271-279 (1981) (provisions regarding control of production).

sequently, an avenue for controlling production already existed without ERCA. However, no judicial determination of Icahn's assertions was made since the Phillips-Icahn battle was resolved.[149]

In a similar tender offer dispute, T. Boone Pickens, Jr.[150] through Mesa Partners II[151] (Mesa) sought to acquire a controlling interest in Unocal Corporation.[152] Similar to Icahn, Mesa sought preliminary injunctive relief on February 14, 1985 against the enforcement of ERCA.[153]

In support of this request for relief, Mesa alleged that ERCA was preempted by the Williams Act and was accordingly unconstitutional

149. The proxy vote concerning Phillips' recapitalization plan resulted in 57 million shares, out of the 120 million shares which voted, favoring the plan. However, 154.6 million of all outstanding shares were needed in order for the plan to be approved. At this point, Icahn withdrew his tender offer and entered into a settlement with Phillips, as follows: Icahn agreed not to make a take-over attempt against Phillips for a period of eight years; Drexel, Burnham, Lambert, Inc., the investment banking firm used by Icahn, agreed not to finance any take-over attempts against Phillips for a period of three years; Icahn additionally agreed not to attempt to unseat the Phillips Board of Directors. Phillips, in turn, was to reimburse Icahn's attorney fees and financing expenses, up to $25 million; and, both parties agreed to dismiss all pending lawsuits. Phillips' new exchange offer was to exchange 72.5 million of its shares for securities valued at $62 per share. Taken at face value, the exchange offer would give Icahn $16 per share more than the average price he paid for 7.5 million shares, or $120 million.

Additional terms of the settlement provided for Phillips to increase its annual common stock dividend to $3 per share, from $2.40 per share, and to issue $300 million in preferred stock to holders of the remaining 73.1 million shares of Phillips common stock. Phillips also dropped its plan to sell a controlling interest to its employees.

Icahn is believed to have received a pre-tax profit of between $50 million and $60 million, leaving Phillips to sell off some $2 billion in assets to offset its debt. *Icahn-Phillips Pact Ends Take-over Bid*, Tulsa Tribune, Mar. 4, 1985, at A1, col. 1.

150. T. Boone Pickens, Jr., President and Chairman of Mesa Petroleum Co., an Amarillo-based oil concern, has received a great deal of public attention in the past three years for forays against other companies, amassing great fortunes by selling back those companies' stock at a premium price. These targets were Cities Service Co., General American Co., Superior Oil Co., Gulf Corp., and Phillips Petroleum Co. *See supra* notes 116-18 and accompanying text. Following take-over bids by Pickens, Cities Service Co. was later acquired by Occidental Petroleum Corp., General American was purchased by Phillips, Superior was purchased by Mobil Corp., Gulf was acquired by Chevron, and Phillips agreed to a costly restructuring. *Icahn-Phillips Pact Ends Take-over Bid*, Tulsa Tribune, Mar. 4, 1985, at A1, col. 1.

151. Mesa Partners II was composed of affiliates of Mesa Petroleum Co. and Wagner & Brown, an independent oil company based in Midland, Texas. *Pickens Group Buys 7.9 Percent of Unocal*, Tulsa Tribune, Feb. 15, 1985, at D2, col. 5.

152. Unocal Corporation is the nation's 13th-largest oil company and parent company of Union Oil Company of California. By tender offer of April 8, 1985, Mesa Partners II and its wholly-owned subsidiary, Mesa Eastern, Inc., offered $54 per share in debt securities for 64 million of Unocal's common stock. Through this acquisition, Pickens would have 50.1% control of Unocal's outstanding shares. Gillott, *Pickens' Group Eyes Unocal Takeover*, Tulsa World, Apr. 9, 1985, at B9, col. 1. On February 14, 1985, at a special meeting of its Board of Directors, Unocal rejected Mesa's offer. *Pickens Group Buys 7.9 Percent of Unocal*, Tulsa Tribune, Feb. 15, 1985, at D2, col. 5.

153. Mesa Partners II v. Unocal Corp., No. CIV-85-398-W (W.D. Okla. filed Feb. 14, 1985).

under the supremacy clause of the United States Constitution.[154] Secondly, Mesa argued that ERCA imposed an impermissible burden on interstate commerce.[155] Unocal, the State of Oklahoma, and the Oklahoma Corporation Commission responded that ERCA was presumptively constitutional, that its effects on interstate commerce were merely incidental, and that it promoted a legitimate local interest.[156] Therefore they argued that ERCA was not an unconstitutional burden on interstate commerce.[157]

On April 11, 1985, this matter was set for evidentiary hearing on Mesa's motion for preliminary injunction.[158] At this hearing, the court applied the *Pike v. Bruce Church* test for valid state regulation affecting interstate commerce.[159] The court concluded that the exemption provisions in ERCA[160] so narrowed the range of transactions subject to scrutiny that it did not constitute an "evenhanded conservation regulation."[161] Additionally, the court balanced the burden on interstate commerce with the conservation purposes of ERCA. The court concluded that there was a contravention of the principles recognized in *MITE*.[162] ERCA was accordingly found unconstitutional.[163]

154. Order of Apr. 26, 1985 at 3-4, Mesa Partners II v. Unocal Corp., No. CIV-85-398-W (W.D. Okla. filed Feb. 14, 1985).

155. *Id.*

156. *Id.* at 4.

157. *Id.*

158. Mr. Michael D. Brown, Managing Director of Drexel, Burnham, Lambert's West coast merger and acquisition activities, appeared as a witness for Mesa. Brown acted as senior merger and acquisition partner in charge of advising Mesa with respect to its Unocal offer. In his testimony, Brown emphasized the harm which delay imposed on tender offerors, as well as the advantages to be gained by a target company through utilization of delay tactics. Transcript of Proceedings at 24-25, Mesa Partners II v. Unocal Corp., No. CIV-85-398-W (W.D. Okla. filed Feb. 14, 1985).

Dr. Alexander B. Holmes, Associate Professor of Economics, The University of Oklahoma, testified on behalf of defendants. Holmes previously testified as a witness on behalf of the Corporation Commission during Icahn's challenge to the constitutionality of ERCA. Holmes emphasized the harm which could result from imprudent extraction of hydrocarbons, and the state's need to regulate its energy resource assets. *Id.* at 50-59. *See supra* notes 147-48 and accompanying text.

159. *See supra* notes 49-50 and accompanying text.

160. ERCA, *supra* note 105, § 5.

161. Order of Apr. 26, 1985 at 10, Mesa Partners II v. Unocal Corp., No. CIV-85-398-W (W.D. Okla. filed Feb. 14, 1985).

162. *Id.* at 14.

163. *Id.* Absent the court's adjudication of ERCA, and given the potential for delay in the takeover process by ERCA's provisions, the effectiveness of ERCA in the prevention or deterrence of hostile corporate take-overs is questionable. Brown's testimony indicated that a delay of 45 days in Mesa's take-over attempt could cost up to $10 million, due to the high cost of short term financing. Transcript of Proceedings at 24, Mesa Partners II v. Unocal Corp., No. CIV-85-398-W (W.D. Okla. filed Feb. 14, 1985).

Assuming, *arguendo*, that ERCA had caused such a delay in Mesa's attempt, its financial impact and injury to Mesa and the resulting deterrence would be relatively minute when compared to defenses available to and exercised by Unocal, and like corporate targets. It was not ERCA which

D. *Oklahoma Take-over Disclosure Act of 1985*

Concurrent with the introduction of Senate Bill 143 (passed as ERCA) before the Oklahoma Senate, a "twin bill," Senate Bill 142 (S.B. 142),[164] was introduced. S.B. 142, however, was not placed on the "fast-track." Instead S.B. 142 was submitted to the Senate Committee on Finance for further review.[165]

On February 27, 1985, S.B. 142 passed the Senate. Thereafter, it was submitted to the House Committee on Bank and Finance where, upon consideration, it was recommended for passage.[166] Upon introduction in the House on May 23, 1985, S.B. 142 passed by a unanimous vote with only a modification to its title. However, the House amendment did not pass the Senate in this amended form. At the request of the Senate, a conference committee was formed to further consider S.B. 142.[167] The committee was composed of three Senate and House conferees. On July 11, 1985, the conference committee recommended that the House recede from the amendment to the title and that a committee substitute to S.B. 142 be adopted.[168] This substitute consisted of combining S.B. 142, as first presented, with then-pending House Bill 1399. Following the committee's recommendations, the substitute passed both the House and Senate on July 17, 1985.[169] Entitled "Oklahoma Take-over Disclosure Act of 1985" (the Act), the legislation was modeled after the Minnesota Cor-

posed a genuine threat to Mesa's take-over scheme, but instead a "poison pill" defense tactic imposed by Unocal. By introducing a proposal to buy back 49.9% of its stock at $72 per share, Unocal so heavily burdened the company with debt that Mesa would have had difficulty financing its proposed take-over and would have been saddled with the tremendous expense of an unsuccessful endeavor, with no avenue to mitigate losses.

Consequently, on May 20, 1985, Mesa agreed to cease its take-over efforts in exchange for Unocal's commitment to repurchase Mesa's stock in its buyback proposal. *Pickens to Take Loss in Agreement with Unocal*, Tulsa Tribune, May 21, 1985, at B1, col. 1.

164. Oklahoma Take-over Disclosure Act of 1985, ch. 285, 1985 Okla. Sess. Laws 1224 (to be codified at OKLA. STAT. tit. 71, §§ 451-462).

165. As introduced, Senate Bill 142 was composed merely of a title provision and declaration of emergency. Following submission to the Senate Committee on Finance, and by Committee Report of February 19, 1985, Senate Bill 142 was amended by a committee substitute, and returned to the Senate for approval. S. COMM. ON FIN., REP. ON S. 142 (Feb. 19, 1985).

166. H. COMM. ON BANK. AND FIN., REP. ON ENGROSSED S. 142 (May 6, 1985).

167. Although Senate Bill 142 first passed the Senate seemingly without incident, certain state senators, given an opportunity to reflect upon the legislation, were reluctant to approve its passage thus causing considerable delay. Their hesitance was prompted by their belief that corporations and "free enterprise" were better left to a laissez-faire environment. Telephone interview with Senator Bill Dawson, D-Seminole, Oklahoma State Senate (July 22, 1985).

168. S. CONF. COMM. OF OKLA., REP. ON S. 142 (June 11, 1985).

169. H.R. 1399 had the affect of amending existing securities laws to make smaller securities offerings (i.e., those submitted to 25 or fewer people) easier to complete and exempt from full-scale filing requirements.

porate Take-overs Act.[170] The Minnesota Corporate Take-overs Act presented an attractive guide for take-over legislation since it had been upheld as constitutional in most respects.[171]

The disclosure requirements specified in section 3F of the Act closely follow those required by the Williams Act.[172] The advantage of the simultaneous enforcement of the Williams Act and the Act is the protection of affected resident shareholders while imposing little burden on offerors. The Act additionally provides shareholders with information relating to the impact of a take-over on the local community involved and the State of Oklahoma as a whole.[173]

The scope of the Act is limited to "take-over offers" directed toward Oklahoma residents (as opposed to individuals from any location). Further, the take-over must be designed to acquire the equity securities of a company when 20% of the shareholders *and* substantial assets are within the state.[174] Offers must be registered with the Administrator of the Oklahoma Department of Securities and must disclose the identity and background of the offeror. The report must also include information concerning organization and operations if the offeror is not a natural person. Additionally, financial statements are required, along with a description of pending litigation to which the offeror is a party.[175]

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170. MINN. STAT. ANN. chs. 80B, 302A (West Supp. 1985). The Oklahoma Department of Securities had earlier recommended the Minnesota statute as a model for Oklahoma legislation.

171. *See infra* notes 178-85 and accompanying text.

172. See 15 U.S.C. § 78m(d)(1) (1982) for the Williams Act disclosure requirements.

173. A letter endorsing the Act stated in part:

> The importance of Senate Bill 142 is enhanced in view of the fact that the United States Securities and Exchange Commission lacks the resources to carefully examine the Williams Act disclosures made in connection with a take-over. The Oklahoma Take-over Disclosure Act of 1985 will enable the state to step in to more satisfactorily protect local investors through adequate disclosure.

Letter from C. Raymond Patton, Jr., Administrator, Okla. Dept. of Sec. to Senator Bill Dawson (Feb. 20, 1985); *see also* Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 912 n.6 (8th Cir. 1984):

> During the 1983 fiscal year, approximately 1,700 schedule 13(d) reports and 3,700 amendments to those reports were filed pursuant to section 13(d) by persons or groups acquiring more than five percent of a class of securities. More importantly, these filings are only a small part of the many thousands of disclosure documents filed with the Commissioner each year under the federal securities laws. The Commission does not have the resources to police the truthfulness of the myriad 13(d) filings made each year.

(citing Brief of Amicus SEC at 3 n.2, Gearhart Indus., Inc. v. Smith Intern, Inc., 741 F.2d 707 (5th Cir. 1984)).

A recent deregulatory trend has emerged at the federal level which is certain to have some impact on states' efforts to regulate tender offers. For a discussion of its effect on securities regulation, see Warren, *Reflections on Dual Regulation of Securities: A Case Against Preemption*, 25 B.C.L. REV. 495, 525-27 (1984).

174. *See* Oklahoma Take-over Disclosure Act of 1985, ch. 285, § 2, 1985 Okla. Sess. Laws 1224, 1225 (to be codified at OKLA. STAT. tit. 71, §§ 451-462).

175. *Id.* § 3(A)-(C).

The Administrator may suspend a tender offer within three days if the registration materials fail to apprise local investors fairly of the information required. A hearing to lift the suspension must be held within ten days and a decision rendered within three days once an offeror discloses the requested information.[176] Thus, there is no significant delay under the Act. The Administrator must complete the review process within nineteen calendar days. Therefore, the review process must be completed prior to the expiration of the twenty business-day minimum offering period or the fifteen business-day period for withdrawal rights specified by federal law.[177]

The Oklahoma Take-over Disclosure Act of 1985 has not been challenged constitutionally. However, its sister statute, the Minnesota Take-over Act[178] survived a constitutional challenge in most respects in *Cardiff Acquisitions, Inc. v. Hatch.*[179] The Eighth Circuit Court of Appeals found the disclosure requirements of Minnesota's general takeover statute more finely tuned to protect local investors than the comparable provisions of the Illinois take-over law in *MITE.*[180] More importantly, the court found that the Minnesota takeover statute, unlike the Illinois statute, did not require filing disclosure statements before commencing the tender offer.[181] The court held that this provision in the Illinois statute directly conflicted with the Williams Act, thus violating the supremacy clause of the United States Constitution. The Minnesota regulatory timetable had to be completed within nineteen calendar days. This timetable avoided conflict with the Williams Act requirement of the twenty business-day minimum offering period.[182] Further, the application of the Minnesota statute "was limited to the filing of factual disclosure statements to aid shareholders." The court contrasted this type of disclosure with evaluative statements which are not permitted.[183] The Eighth Circuit thus upheld the constitutionality of the Minnesota Act under both the commerce clause and the supremacy clause.

Only two segments of the Minnesota statute were found unconstitutionally vague in *Cardiff.*[184] The court held that these segments "may

176. *Id.* § 3(D)-(E).
177. 17 C.F.R. § 240.14d-7, .14e-1 (1984 & Supp. 1985).
178. MINN. STAT. ANN. chs. 80B, 302A (West Supp. 1985).
179. 751 F.2d 906 (8th Cir. 1984).
180. *Id.* at 911.
181. *Id.* at 910.
182. *Id.*
183. *Id.* at 914.
184. *Id.* Sections 80B.03(2) and 80B.03(6) required the offeror to disclose such "additional information the commissioner may by rule prescribe." *Id.*

require the disclosure of irrelevant or confusing data and may require judgmental data that the Commissioner has no authority to require."[185] In adopting the Minnesota Act, the Oklahoma Legislature omitted those segments held unconstitutional. Accordingly, should the Act meet with challenges under the commerce and supremacy clauses, it has the advantage of this supporting authority.

## IV. The Future Previsited

Despite the likelihood of survival under supremacy and commerce clause challenges, the Act is fraught with inadequacies as an anti-takeover measure. Its approach as a disclosure statute is primitive compared to the level of sophistication which the take-over process has risen. In fact, it is nothing more than the existing federal disclosure legislation resurfacing under state review—legislation which to date has done nothing either to prevent or thwart hostile corporate take-overs.

On the state level, one possible alternative would be the passage of a uniform statute across the 50 states modeled after Oklahoma's Act. Uniform legislation could enhance the degree of review given to the terms and conditions of a proposed tender offer if disclosure requirements were enacted by a majority of the states. The result would still be limited to disclosure legislation with no take-over regulation per se.

A second alternative would be to revive ERCA. The legislature could endeavor to amend it to cure its constitutional defects. Alternatively, the legislature could revive its stated purpose and develop new legislation founded upon a state's interest in protecting its oil, gas, and other minerals.[186] However, one disadvantage to this approach is the possible jeopardy in which it could place all existing state oil and gas statutes. Hypothetically, upon constitutional challenge to a statute embodied within the state's oil and gas title, a reviewing court could find both the statute as well as the entire title unconstitutional. The inherent risk of this alternative is thereby sacrificing state protection and regulation of oil and gas.

Some states, namely Ohio, Maryland, Wisconsin, and Pennsylvania, have adopted a very different form of take-over regulation. The distinction between these "second-generation" take-over statutes and the "first-

185. *Id.*

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

The State of Texas is presently considering this approach, and has in fact requested information concerning ERCA from the Oklahoma legislature. Telephone interview with Senator Bill Dawson, D-Seminole, Oklahoma State Senate (July 22, 1985).

generation" statutes found unconstitutional under *MITE* is a shift in focus from securities regulation to corporate law.[187] These states have treated the tender offer as falling within the purview of their business corporation laws.[188] These states are thus developing anti-take-over tactics statutorily. These statutes provide protection against attempted take-overs which corporations have otherwise accomplished through bylaw revisions and other defenses.

Corporations continue to employ defensive measures with relative success. Of common usage among target corporations are golden parachutes,[189] pac-man defenses,[190] white knights,[191] poison pills,[192] shark repellents,[193] and scorched earth defenses.[194] The decision to implement any one of these tactics, as well as the decision to accept or reject a greenmail tactic[195] by a bidder, is left in the hands of the corporation's management. The extent of management's authority to exercise these various tactics continues to be met with controversy.

Corporate management is entrusted and endowed with great deci-

187. *See* Profusek & Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky, or Corporation Law Concepts?*, 7 CORP. L. REV. 3, 24-29 (1984).

188. For a discussion of second-generation legislation, see Sargent, *Do The Second-Generation State Takeover Statutes Violate the Commerce Clause?*, 8 CORP. L. REV. 3 (1985).

189. "Golden parachutes" are generous severence agreements for the benefit of key executives which take effect in the event of a change in corporate control. Economic Report of the President, ch. 6, 211, Transmitted to the Congress (Feb. 5, 1985).

The implementation of golden parachutes is a topic of great controversy. Advocates claim that these agreements supply management with job security, thus enabling them to proceed with negotiations for the best price of the corporation's shares without being hampered by conflicting self-interests. Opponents, however, view the agreements as self-help provisions for management at the shareholders' expense. Evidence on the true impact of these severence agreements is inconclusive. *Id.*

190. "Pac-man defenses" are not only found in video arcades. They are also tender offers made by target companies for the securities of the original bidder. Goldberg, *Regulation of Hostile Tender Offers: A Dissenting View and Recommended Reforms*, 43 MD. L. REV. 225, 237 (1984).

191. "White knights" are parties friendly to a target company's management, whom management seeks to make a competing offer. *Id.* at 239. The target often uses "lock-ups" to give the white knights an advantage over other potential acquirors. Lock-ups take many forms, including "stock purchase agreements for treasury or unissued shares, options to purchase treasury or unissued shares, options to buy certain [of the most prized] assets . . . , merger agreements . . . and similar arrangements." *Id.* at 237.

192. "Poison pills" are "any provision[s] in an agreement or charter which will mature upon a change of control to cause immediate problems for the acquirer, such as issuance of a class of securities of the target company convertible upon a change in control into the common stock of the acquiring company. *Id* at 238.

193. Target company directors often amend the target's charter or by-laws to discourage unsolicited bids. This tactic is known as a "shark repellent." *Id.* at 238.

194. "Scorched earth defenses" have as their primary purpose the loss of interest by a bidder in a target or the deprivation to the bidder of the benefits of a successful tender offer. This is obtained by selling off primary assets (otherwise known as "crown jewels") or by destroying the company's character. *Id.*

195. *See supra* notes 9-10 and accompanying text.

sion-making power on behalf of and in the best interests of shareholders. This fiduciary responsibility is regulated by state fiduciary law. The management are empowered with broad discretion in the control of the corporation. Thus management deserves protection from personal liability for decisions made in good faith, on an informed basis, and in the honest belief that the decision is in the best interests of the corporation and for a rational business purpose. The business judgment rule affords such protection.

Management's exercise of defensive measures against tender offers has raised the question of how far the business judgment rule may extend to protect management. It is important to recognize that some defensive measures are abusive in nature. These types of measures are used solely to promote management's interests over those of the shareholder. Once management acts to so promote their own interests, they can no longer claim the protection of the business judgment rule. In many situations, however, it is difficult to determine whether management is acting strictly for their own benefit since many tactics are not always abusive in effect.

Various courts have attempted to define the extent of managerial responsibility and the scope of the business judgment rule in protecting managerial judgment. It is difficult to define which tactics must be uniformly protected. Consequently each situation must be considered on its own facts. Some of the defensive measures which have been judicially protected as falling within the ambit of the business judgment rule include the sale and option of treasury stock by target management to one of its bidders in a take-over contest;[196] target's issuance of a "warrant dividend plan;"[197] recapitalization efforts by a target;[198] and, a target company's exchange offer to its shareholders that excluded the bidder from participation.[199]

196. Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 759 (2d Cir.), *cert. denied*, 104 S. Ct. 550 (1983).

197. Moran v. Household Int'l, Inc., 490 A.2d 1059 (Del. Ch. 1985), appeal docketed. This plan consists of a declaration of rights designed to deter two-tier and partial tender offers. The strength of Household's plan was a "flip-over" provision which entitled any holder, in the event of a merger in which Household did not survive, to receive $200.00 in common stock of the acquiring corporation upon the mere payment of $100.00, the exercise price of the right. *See id.* at 1065-69.

198. Edelman v. Phillips Petroleum Co., C.A. No. 7899 (Del. Ch. Feb. 12, 1985).

199. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985), wherein the court stated: "If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed."

"A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be . . . 'attributed to any rational business purpose.' " *Id.* at 954 (citing Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)).

In addition to the judicial response to the operation of the business judgment rule in a hostile corporate take-over environment, the Williams Act prohibits defensive measures which may be construed as "manipulative acts or practices."[200] The Supreme Court has recently interpreted the term "manipulation" to require "misrepresentation or nondisclosure.[201] It connotes 'conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.' Without misrepresentation or nondisclosure, § 14(e) has not been violated."[202] This interpretation is broader than that of previous lower court decisions.[203] The targets' exercise of defensive measures will clearly be affected by this broader definition of "manipulation."

Given the relative success of defensive measures, *should* states attempt to legislatively prevent hostile corporate take-overs? In developing anti-take-over legislation, whose interests are to be protected thereby? And, is it possible to protect these interests with the "even-handed neutrality" consistent with federal legislation?

First and foremost, federal and state anti-take-over legislation should have the effect of protecting the rights and interests of all persons (whether individuals or corporations) impacted by the take-over. Identifying these "players" is a major step in that direction.

Beginning with the central figure, the target company, it is necessary to keep in mind that a corporation per se is nothing more than a *legal fiction*, an entity separate and distinct from the members who compose it. As defined by Chief Justice Marshall, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."[204] Thus, any rights asserted by a corporation are rights indirectly owing to those persons (whether individuals or corporations) lying behind the corporate veil. Included in this bundle of separate and distinct rights might be the rights of management group employees, investing shareholders, rank and file employees, "privy" businesses, and secondary and tertiary businesses.

Separate and apart from any endowed rights, corporate management by custom is allowed a financial "free rein" during hostile take-over

200. 15 U.S.C. § 78n(e) (1982).

201. Schreiber v. Burlington Northern, Inc., 105 S. Ct. 2458 (1985).

202. *Id.* at 2465 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976)).

203. *See, e.g.*, Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 374 (6th Cir. 1981) (defining "manipulation" as any transaction which "affect[s] the market for, or price of, securities by artificial means, i.e., means unrelated to the natural forces of supply and demand").

204. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

attempts. The end result is a benefit to the raider, a comparable loss to the shareholder, and a maintenance of the status quo for the management. Does management have this right, and should it be protected through anti-take-over legislation? Perhaps consideration should be given to the scope of the business judgment rule in fashioning such legislation. This legislation should clearly identify those actions which may be taken by management absent the voting approval of shareholders.

Do shareholders, the vested owners of the corporation, possess certain rights which deserve protection? Management has the duty to act as public advocate for non-management shareholders, but this often does not occur in a take-over climate. Presently, shareholders have two choices: either adopt the proposals of the raider or suffer the financial loss incurred through management's exercise of costly tactics, such as opting to pay greenmail to the raider. If the state police power is to be exercised, should stockholders' choices be increased? Should the legislature fashion other options for shareholders? The law should become the shareholder's advocate, thus create and protect the "property right" vested in shareholders.

Further, legislators should determine what rights, if any, belong to rank and file employees. Rank and file employees are those non-management individuals who are employed by the corporation and depend upon its continued strength and existence for their very livelihood.

Similarly affected are privy businesses. Privy businesses are those persons actually doing business with and through the target corporation by furnishing services, labor, materials, or by purchasing the fruits of the target company's operations. They too are dependent upon the target's continued strength and existence for their livelihood. Any legislative measure should consider whether any degree of protection should be given to the rights of privy businesses.

Analogous to John Maynard Keynes' economic theory, the "multiplier effect,"[205] is the impact of take-overs on persons secondary and tertiary to the target. These persons do business with and through the privy businesses and one another. There is less interaction with these privy businesses when a corporation reduces spending in order to retire debt obligations accrued in defending a take-over attempt or when a raider

205. The "multiplier effect" described by John Maynard Keynes asserts that the impact of the government's injecting funds into the money supply is actually multiplied to several times its original value. As the money is passed from bank to spender to merchant and ultimately back to bank again for relending, economic activity grows, and the money supply grows at some proportional (multiplied) rate. *See* M. SPENCER, CONTEMPORARY ECONOMICS 140-44 (4th ed. 1980).

liquidates assets to pay accrued debts after a successful take-over. These privy businesses may be forced to reduce their interactions with secondary persons, the secondary with the tertiary, and so forth. The legislature should consider giving protection to these secondary and tertiary businesses.

Thus, shareholders, rank and file employees, privy businesses, and secondary and tertiary businesses are all seeking separate legislative protection of their rights. This legislation should define with particularity the scope of management's authority absent the voting approval of shareholders. The extent of the rights of the tender offeror to proceed with a take-over attempt are separate and apart from the other "players" rights. With free enterprise at the heart of American business, consideration should be given to the offeror's right to engage in business propositions for profit through take-overs.

Lastly, what of the rights of the public-at-large? Should only local interests be protected? What about the impact upon the United States? The world? What are the economic repercussions? Legislators must determine at which level a significant public interest exists with respect to corporate take-overs, and then endeavor to protect those interests.

Once all of the potential rights are identified, it is in balancing the interests of *all* parties affected by a corporate take-over that difficulty arises. Further, uniformity in regulation is imperative in developing legislation to balance these interests. If states continue in their efforts to regulate hostile take-over attempts, they should adopt a uniform act in the interest of equity. That failing, the federal government should enact more pervasive legislation. It is otherwise grossly inequitable for individual states to independently dictate the outcome of business transactions which impact the rights of persons removed from the boundaries of a regulating state.

## V. CONCLUSION

The Oklahoma Take-over Disclosure Act of 1985 is clearly not the final resting place for legislators in developing state regulation of hostile corporate take-overs. An alternate approach would be the adoption of a uniform disclosure statute modeled after the Act. This legislation would be enforced by the states, thereby avoiding the federal government's inability to adequately police filings. Further, at least two other options presently exist to deter take-overs. Legislation could be founded on a state's interest in protecting its oil, gas, and other minerals. Another alternative is the development of tender offer regulations under the auspices of state business corporations statutes.

Given the relative success of defensive measures exercised by corporations, the question arises as to whether states should even attempt to legislatively prevent hostile corporate take-overs. Further, state and federal legislators must labor under standards of constitutionality. Any subsequent legislation must seek to effectively deter take-over tactics and defenses which unduly violate the rights of all parties impacted by the take-over.

It is virtually impossible to impose regulatory measures without infringing upon the rights of some parties involved. However, future legislative efforts need to identify the interests of all parties impacted by corporate take-overs. Equity and fair dealing require a balancing of these interests. Further, the ultimate goal of any legislation should be uniformity in regulation.

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