Notes

Edgar v. MITE Corp.: The Death Knell for the Indiana Takeover Offers Act

I. Introduction

Since 1968 when the first state business takeover law was passed,[1] state regulation of tender offers, a weapon in the battle for corporate control, has gone forward under a constitutional cloud.

The federal law in this area is the Williams Act,[2] which was enacted by Congress in 1968 to bridge the regulatory gap in the Securities Exchange Act of 1934[3] as it affected tender offers[4] for the

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[1]Virginia passed the first state business takeover law in 1968. Va. Code §§ 13.1-528 to -541 (1978 & Supp. 1982).

[2]15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981). The Williams Act amended the Securities Exchange Act of 1934 by adding new sections 13(d), 13(e) and 14(d)-(f). The Williams Act required certain disclosures by investors who sought to gain control of a corporation through the use of a tender offer rather than the use of the more traditional takeover weapon, the proxy fight. Included in the scope of the law are attempted takeovers of companies traded on a national securities exchange or of companies having both one million dollars in assets and 500 shareholders. 15 U.S.C. § 78m(d)(1). The disclosure provisions of the Williams Act apply to any investor who, as a result of the tender offer, would own more than 5% of a class of stock subject to the acquisition. *Id.* The investor must file a disclosure statement with the Securities and Exchange Commission (SEC) within 10 days after the purchase that raises his holdings above the 5% threshold. *Id.* The disclosure statement must detail the background, identity, residence, and citizenship of the individuals making the purchase or on whose behalf the purchases were made, *id.* § 78m(d)(1) (Supp. V 1981); the source and amount of financing for the stock purchase, *id.* § 78m(d)(1)(B); the plans the investors have for the target company, including merger, liquidation, or sale of assets, if the purpose of the acquisition is to obtain control, *id.* § 78m(d)(1)(C); and information about any contracts, understandings, or arrangements with anyone relating to the target company's securities, *id.* § 78m(d)(1)(E).

The Williams Act further regulates the procedure of the tender offers and provides protections for shareholders who tender their stock. A shareholder in the target company may withdraw any of his shares tendered for sale, within the first seven days of the offer, *id.* § 78n(d)(5). If the offeror has not yet purchased the shares, the shareholder may withdraw his shares at any time after 60 days from the date of the original offer. *Id.* The seven-day redemption period has been extended by the SEC to 15 business days. 13 C.F.R. § 240.14d-7(a)(1) (1982). If more shares are tendered than the bidder sought to purchase, the Williams Act requires that those shares tendered within the first 10 days be purchased on a pro rata basis. 15 U.S.C. § 78n(d)(6).

[3]15 U.S.C. §§ 78a-78kk (1976).

[4]The Williams Act did not define the term "tender offer." However, one writer, cited with approval by the United States Supreme Court in Edgar v. MITE Corp., 102 S. Ct. 2629 (1982), has defined the term as "a publicly made invitation addressed

purchase of shares in a target corporation. Through the Williams Act, Congress sought to protect investors by requiring full disclosure;[5] yet, the disclosure process is intended to favor neither the target company nor the offeror.[6]

In enacting the Williams Act, Congress did not specifically bar the states from setting up their own regulatory schemes for tender offers. Congress left intact another section of the Securities Exchange Act of 1934 which stipulates that "[n]othing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."[7] In the years after the enactment of the Williams Act, thirty-seven states enacted their own laws regulating tender offers and takeover bids.[8] The stated pur-

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to all shareholders of a corporation to tender their shares for sale at a specified price." *Id.* at 2633 n.1 (quoting Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973)).

[5]As the United States Court of Appeals for the Fifth Circuit explained in Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), "[t]he function of federal regulation is to get information to the investor by allowing 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." *Id.* at 1276. Similarly, in MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), the court of appeals observed, "Congress contemplated only that investors be protected from acting in ignorance, not from their own well-informed choice." *Id.* at 494.

[6]As Senator Williams told his colleagues:

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

113 CONG. REC. 854, 854-55 (1967).

[7]15 U.S.C. § 78bb(a) (1976). While Congress was considering the Williams Act, the State of Virginia enacted its own takeover statute. VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1982). The Virginia statute took effect March 5, 1968. The effective date of the Williams Act was July 19, 1968. However, there is no indication that Congress was aware of the existence of the Virginia statute when it was considering the Williams Act. Edgar v. MITE Corp., 102 S. Ct. at 2635 n.6.

[8]ALASKA STAT. §§ 45.57.010 to .120 (1980); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101 to -108 (Supp. 1982); CONN. GEN. STAT. ANN. §§ 36-456 to -468 (West Supp. 1981); DEL. CODE ANN. tit. 8, § 203 (Supp. 1982); FLA. STAT. ANN. §§ 517.35 to .363 (West Supp. 1978) (repealed 1979); GA. CODE ANN. §§ 22-1901 to -1915 (1977 & Supp. 1982); HAWAII REV. STAT. §§ 417E-1 to -15 (1976); IDAHO CODE §§ 30-1501 to -1513 (1980 & Supp. 1981); ILL. REV. STAT. ch. 121½, §§ 137.51 to .70 (Supp. 1982); IND. CODE §§ 23-2-3.1-0.5 to -11 (1982); IOWA CODE ANN. §§ 502.211 to .215 (Supp. 1982-1983); KAN. STAT. ANN. §§ 17-1276 to -1285 (1974 & Supp. 1980);

pose of these supplemental state provisions was investor protection. Usually unstated, but nonetheless apparent from the thrust of the laws, was the desire to protect home-state companies against takeovers from outside corporations.[9]

Almost immediately questions arose as to whether the new state takeover laws could coexist with the federal regulatory approach under the Williams Act and the constitutional strictures of the commerce clause.[10] These questions focused primarily on the potential conflict

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Ky. Rev. Stat. Ann. §§ 292.560 to .991 (Bobbs-Merrill 1981); La. Rev. Stat. Ann. §§ 51:1500 to :1512 (West Supp. 1982); Me. Rev. Stat. Ann. tit. 13, §§ 801-817 (Supp. 1980-1981); Md. Corps. & Ass'ns Code Ann. §§ 11-901 to -908 (Supp. 1982); Mass. Gen. Laws Ann. ch. 110C, §§ 1-13 (West 1982-1983); Mich. Comp. Laws Ann. §§ 451.901 to .917 (Supp. 1982-1983); Minn. Stat. Ann. §§ 80B.01 to .13 (West Supp. 1982); Miss. Code Ann. §§ 75-72-101 to -121 (Supp. 1982); Mo. Ann. Stat. §§ 409.50 to .565 (Vernon 1979); Neb. Rev. Stat. §§ 21-2401 to -2417 (1977); Nev. Rev. Stat. §§ 78.376 to .3778 (1979) (amended 1981); N.H. Rev. Stat. Ann. §§ 421-A:1 to :15 (Supp. 1979) (repealed 1981); N.J. Stat. Ann. §§ 49:5-1 to -19 (West Supp. 1982-1983); N.Y. Bus. Corp. Law §§ 1600-1614 (McKinney Supp. 1982-1983); N.C. Gen. Stat. §§ 78B-1 to -11 (1981); Ohio Rev. Code Ann. § 1707.041 (Page Supp. 1980); Pa. Stat. Ann. tit. 70, §§ 71-85 (Purdon Supp. 1982-1983); S.C. Code Ann. §§ 35-2-10 to -110 (Law. Co-op. Supp. 1982); S.D. Comp. Laws Ann. §§ 47-32-1 to -47 (Supp. 1982); Tenn. Code Ann. §§ 48-2101 to -2114 (1979 & Supp. 1982); Texas Administrative Guidelines for Minimum Standards in Tender Offers §§ 065.15.00.100 to .800, *reprinted in* 3 Blue Sky L. Rep. (CCH) ¶¶ 55,671-55,682; Utah Code Ann. §§ 61-4-1 to -13 (1978 & Supp. 1981); Va. Code §§ 13.1-528 to -541 (1978 & Supp. 1982); Wis. Stat. Ann. §§ 552.01-.25 (West Supp. 1982).

In general, the state takeover laws have sought to supplement the Williams Act by requiring more disclosure. *See, e.g.*, Alaska Stat. § 45.57.020(c); Ga. Code Ann. § 22-1902(b); Idaho Code § 30-1503(2); Ill. Rev. Stat. ch. 121½, § 137.54C; Ky. Rev. Stat. Ann. § 292.570; Me. Rev. Stat. Ann. tit. 13, § 803(2); Mass. Gen. Laws Ann. ch. 110C, § 4; Nev. Rev. Stat. § 78.3771(1); N.Y. Bus. Corp. Law § 1603(a); Pa. Stat. Ann. tit. 70, § 75; Tenn. Code Ann. § 48-2104.

Other provisions varied the terms for redemption. *See, e.g.*, Alaska Stat. § 45.57.010; Colo. Rev. Stat. § 11-51.5-103(c); Hawaii Rev. Stat. § 417E-2(2); La. Rev. Stat. Ann. § 51:1504A; Me. Rev. Stat. Ann. tit. 13, § 809(1); Mass. Gen. Laws Ann. ch. 110C, § 7; Nev. Rev. Stat. § 78.3772(2); N.C. Gen. Stat. § 78B-3(1).

Usually, state laws added obstacles to the tender offer, such as requiring hearings before the state securities commissioner or a similar officer. *See, e.g.*, Alaska Stat. § 45.57.020(a); Conn. Gen. Stat. Ann. §§ 36-460, -461; Ga. Code Ann. § 22-1902(e), (f); Idaho Code § 30-1503(4), (5); Kan. Stat. Ann. § 17-1277(a); Me. Rev. Stat. Ann. tit. 13, § 804; Minn. Stat. Ann. § 80B.03(4)-(5); N.J. Stat. Ann. § 49:5-4(b); Pa. Stat. Ann. tit. 70, § 74(d), (e); Tenn. Code Ann. § 48-2104(4), (5); Wis. Stat. Ann. § 552.05(4), (5).

Other laws imposed waiting periods before the offer could commence. *See, e.g.*, Ark. Stat. Ann. § 67-1264.2(5); Ga. Code Ann. § 22-1902(e); Hawaii Rev. Stat. § 417E-3(f); Idaho Code § 30-1503(1); Kan. Stat. Ann. § 17-1277(a); La. Rev. Stat. Ann. § 51:1501(E); Mich. Comp. Laws Ann. § 451.905(2); N.Y. Bus. Corp. Law § 1605; S.D. Comp. Laws Ann. §§ 47-32-21, -22; Va. Code § 13.1-531(a).

[9]*See* Galanti, *Business Associations, 1981 Survey of Recent Developments in Indiana Law*, 15 Ind. L. Rev. 31, 65-66 (1982).

[10]U.S. Const. art. I, § 8, cl. 3.

between the state laws and the federal act and on the purported authority of state laws to regulate securities transactions outside of their boundaries.

The first test case to reach the United States Supreme Court was disposed of on procedural grounds,[11] and the question of the constitutionality of state takeover statutes was not raised before the Court for another three years. In the summer of 1982, the Supreme Court made its first analysis of the constitutionality of a state tender offer statute in *Edgar v. MITE Corp.*[12] The Illinois Business Take-Over Act[13] was challenged because it empowered the secretary of state to block a nationwide tender offer for control of a company with Illinois ties, if the bidding company failed to comply with its requirements. The Court found that the Illinois Act placed an undue burden on interstate commerce and, thus, was unconstitutional.[14]

The invalidation of the Illinois Act raised questions about the constitutionality of the other state tender offer statutes, including Indiana's Takeover Offers Act,[15] on which the Illinois law appeared to have been modeled.[16] Although Indiana's Act was modified in 1981 to meet constitutional concerns raised in connection with the Illinois law,[17] the Indiana Act still contains provisions that are troublesome under the commerce clause. Specifically, the Indiana Act allows the state securities commissioner to prevent the consummation of a tender offer for shares in a company with strong Indiana ties.[18] The Act gives state regulators the power to sidetrack a tender offer for as many as twenty business days.[19] In addition, to the extent that the Act allows the tender offer to be delayed, giving the target company time

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[11]Great Western United Corp. v. Kidwell, 439 F. Supp. 420 (N.D. Tex. 1977), *aff'd*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom.* Leroy v. Great Western United Corp., 443 U.S. 173 (1979). Great Western, delayed in its attempt to make a tender offer by the enforcement of the Idaho business takeover law, filed suit seeking a declaration that the Idaho statute was unconstitutional as applied to interstate tender offers to purchase securities traded on a national exchange. *See* 439 F. Supp. at 421.

[12]102 S. Ct. 2629 (1982).

[13]Pub. L. No. 80-1421 (1978) (codified at ILL. REV. STAT. ch. 121½, §§ 137.51 to .70 (Supp. 1980)).

[14]102 S. Ct. 2629 (1982).

[15]IND. CODE §§ 23-2-3.1-0.5 to -11 (1982).

[16]Indiana's business takeover law was first enacted in April 1975, and took effect on May 1, 1975. Act of May 1, 1975, Pub. L. No. 263, 1975 Ind. Acts 1469, 1469 (1975). Illinois' statute was adopted in September 1978. The fact that the Illinois statute contained similar language to provisions of the 1975 Indiana Act raises the inference that the Indiana law was used as a model.

[17]*See infra* notes 67-74 and accompanying text. The amendments to the Indiana Act were in response to the Seventh Circuit's holding in MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980).

[18]IND. CODE § 23-2-3.1-1(j) (1982).

[19]*Id.* §§ 23-2-3.1-7, -8.

to mount a defense, the statute will interfere with interstate commerce by depriving shareholders who live outside Indiana of a lucrative market for their stock in the target company.

The Indiana Act, as amended in 1981, has not yet been tested in the courts. This Note examines the Indiana Takeover Offers Act in light of the Supreme Court's analysis in *MITE* of the Illinois Act. This Note also will measure the Indiana Act against the Williams Act. This Note will argue for federal preemption of state takeover laws and will recommend changes to be made by the Indiana legislature.

II. *Edgar v. MITE Corp.*

The focus of the Supreme Court's first substantive analysis of the constitutionality of state takeover laws was *Edgar v. MITE Corp.*,[20] which challenged the Illinois Business Take-Over Act[21] on commerce clause and supremacy clause grounds.[22] In that case, MITE made a

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[20]102 S. Ct. 2629 (1982).

[21]ILL. REV. STAT. ch. 121½, §§ 137.51 to .70 (Supp. 1980).

[22]The Illinois Act differed from the Williams Act in several significant respects. First, the Illinois Act gave shareholders 17 calendar days from the date of the original offer to withdraw their shares, ILL. REV. STAT. ch. 121½, § 137.59(C), compared with seven days under the Williams Act and 15 business days under a subsequent SEC regulation. *See supra* note 2. However, like the Williams Act, the Illinois Act permitted shareholders to withdraw their shares any time after 60 days from the time the tender offer was first made. ILL. REV. STAT. ch. 121½, § 137.59(C). Second, the Illinois Act specified that a tender offer would not become effective until 20 business days after it was filed with the secretary of state. *Id.* § 137.54(E). Under the Williams Act, a tender offer is effective when it is first published or sent to shareholders. 15 U.S.C. § 78n(d)(1) (1977). Third, the Illinois Act permits the secretary of state to hold hearings on a tender offer. ILL. REV. STAT. ch. 121½, § 137.57. The secretary of state could initiate a hearing if he considered it necessary for protection of the Illinois shareholders of the target company. *Id.* § 137.57(A). In addition, the Illinois Act required the secretary of state to hold a hearing if one was requested by a majority of the outside directors of the target company, who are neither officers nor employees of the target company, or by Illinois residents who owned at least 10% of the stock in the class that was subject to the tender offer. *Id.* The law required the hearing to start within 10 days after the date the request for the hearing was received. *Id.* § 137.57(C). The secretary of state could extend the date of the hearing for the convenience of the parties or for the protection of the target company's Illinois shareholders. *Id.* There apparently was no deadline by which the hearing must begin in cases where the secretary of state ordered a hearing without receiving a request for one.

Under the Illinois Act, the secretary of state was required to rule on the tender offer within 15 business days of the conclusion of the hearing, unless the interests of Illinois shareholders warranted an extension. *Id.* § 137.57(D). However, there was no statutory limitation on the length of those hearings.

The secretary of state was empowered to deny registration of the tender offer if, among other things, he found that it was inequitable. *Id.* § 137.57(E). Until the offer was registered, the tender offeror could not contact shareholders of the target company. *Id.* § 137.54(A).

cash tender offer for all outstanding shares of Chicago Rivet and Machine Company, an Illinois corporation, by filing with the Securities Exchange Commission (SEC) the information required by the Williams Act. MITE made no effort to comply with the Illinois law. Instead, MITE filed suit in the United States District Court for the Northern District of Illinois seeking a declaratory judgment that the Illinois Business Take-Over Act was preempted by the Williams Act and violated the commerce clause of the United States Constitution.[23] MITE also requested a temporary restraining order and preliminary and permanent injunctions to prevent the Illinois secretary of state from enforcing the state statute.[24] After a series of legal maneuvers by Chicago Rivet and the Illinois secretary of state, the district court issued an order barring the secretary of state from enforcing the Illinois Act against MITE. Three days later, MITE published its tender offer in the February 5th issue of the Wall Street Journal. The same day, Chicago Rivet issued an offer for forty percent of its own shares. The district court, in its final judgment, permanently enjoined enforcement of the Illinois Act on the grounds that it conflicted with the Williams Act and violated the commerce clause. The court of appeals affirmed the district court's findings.[25]

The Supreme Court, in a decision which produced six separate opinions,[26] went on to hold that the Illinois Act was unconstitutional under the commerce clause.[27] The Court concluded that the Illinois

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[23]Edgar v. MITE Corp., 102 S. Ct. 2629, 2634 (1982) (the district court opinion is unreported).

[24]*Id.*

[25]MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980). The Seventh Circuit specifically found that the case was not moot because of the Illinois secretary of state's stated intention to enforce the Illinois law against MITE. *Id.* at 490. The Illinois secretary of state had raised the mootness question because, after the district court judgment was entered, MITE and Chicago Rivet entered into an agreement through which both tender offers were withdrawn and which allowed MITE to take steps preparatory to another tender offer for Chicago Rivet's shares. Ultimately, MITE announced it would not make a second tender offer. *Id.*

[26]The majority of the Court found that the case was not moot and that the Illinois Act violated the commerce clause. Justice White, joined by Chief Justice Burger, delivered the Court's opinion. Justice White, Chief Justice Burger, and Justices Blackmun, Stevens and O'Connor joined in the part of the opinion finding the case was not moot. Justice White, Chief Justice Burger and Justices Powell, Stevens and O'Connor joined in the part of the opinion finding that the Illinois Act violated the commerce clause.

Justices Stevens and O'Connor each wrote separate concurring opinions in which they found that the case was not moot. Justice Powell wrote a concurring opinion in which he found that the Illinois Act violated the commerce clause. Justice Marshall filed a dissenting opinion in which Justice Brennan joined. Justice Rehnquist filed a separate dissenting opinion.

[27]102 S. Ct. at 2641-43.

law failed the test enunciated in *Pike v. Bruce Church, Inc.*[28] for determining whether a state statute unduly burdened interstate commerce.

The Supreme Court found that the extraterritorial effect of the Illinois Act could be characterized as "[t]he most obvious burden" imposed on interstate commerce.[29] The law's nationwide reach "purports to give Illinois the power to determine whether a tender offer may proceed anywhere."[30] The Court enumerated the substantial effects of allowing the Illinois secretary of state to block a nationwide tender offer. First, shareholders could lose their chance to sell their stock at a premium.[31] Second, the law could hinder the reallocation of economic resources to their highest-valued use.[32] Third, the Illinois Act could reduce the incentive that tender offers give target company management to perform well so that stock prices remain high.[33]

The Court rejected Illinois' claim that its business takeover law furthered legitimate local interests by protecting resident shareholders and by merely regulating the internal affairs of state-chartered corporations.[34]

The Court observed, with some irony, that the Illinois Act did not apply to Chicago Rivet's competing tender offer for its own shares. A company's purchase of its own shares was specifically exempted from the requirements of the Illinois Act.[35] The Court said that exemption "[left] Chicago Rivet's shareholders to depend only on the protections afforded them by federal securities law, protections which Illinois views as inadequate to protect investors in other contexts."[36]

The Court was not convinced that the Illinois Act enhanced the position of resident shareholders because the Williams Act offered the same substantive protections.[37] Even though the Illinois Act required more disclosure than the Williams Act, the Court found that the additional information "may not substantially enhance the shareholders' ability to make informed decisions."[38] The Court said

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[28]397 U.S. 137 (1970). That test requires a state law to be upheld if it "regulated even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

[29]102 S. Ct. at 2641-42.

[30]*Id.* at 2642.

[31]*Id.*

[32]*Id.*

[33]*Id.*

[34]*Id.* The Court stated that, "[w]hile protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." *Id.*

[35]ILL. REV. STAT. ch. 121½, § 137.52-.9(4).

[36]102 S. Ct. at 2642.

[37]*Id.*

[38]*Id. Compare* ILL. REV. STAT. ch. 121½, § 137.54 *with* 15 U.S.C. § 78*l*(a)-(c).

that the additional delays embodied in the Illinois statute could outweigh any benefits of added disclosure by allowing target company management more time to initiate defensive maneuvers.[39]

III. Analysis of *Mite*

The Supreme Court properly found that the Illinois Business Take-Over Act was void as an undue burden on interstate commerce.[40] No other conclusion could be justified in view of the impact on the national securities markets resulting from the law's ability to block nationwide tender offers.

Given that the Illinois Act was vulnerable on both commerce clause and supremacy clause grounds, it is inexplicable why the preemption analysis in the Court fell short of a majority. Certainly a law with one constitutional flaw is just as void as a law with several. As pinpointed and analyzed by Justice White's opinion, three basic aspects of the Illinois Act posed an obstacle to the accomplishment of the goals of the Williams Act. The Illinois provisions for a precommencement notification, for hearings, and for a regulatory veto by the secretary of state frustrated the "market approach" of the Williams Act by taking away from the shareholder the decision whether to accept a tender offer.[41] With the delays caused by the precommencement notification process and by the hearings, the Act increased the chances that the tender offer would fail or be defeated through the defensive actions of the target company.[42] By giving the

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[39]102 S. Ct. at 2642.

[40]*Id.* at 2643.

[41]*Id.* at 2637.

[42]*Id.*

As further evidence of the conflict between the state and the federal regulatory schemes, the Justices looked to the legislative history of the Williams Act. They found that Congress specifically rejected precommencement notification. Justice White's opinion quoted the Senate report on the Williams Act:

> "At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public."

Id. at 2638 (quoting S. Rep. No. 550, 90th Cong., 1st Sess. 1, 4 (1967)).

Using the same analysis, the Justices concluded that the hearings provision of the Illinois Act conflicted with the Williams Act by adding undue delay to the tender offer process. 102 S. Ct. at 2638. The Court found that "Congress anticipated investors and the takeover offeror be free to go forward without unreasonable delay. The potential for delay provided by the hearing provisions upset the balance struck by Congress by favoring management at the expense of stockholders." 102 S. Ct. at 2639.

secretary of state an opportunity to block the tender offer on grounds of unfairness, the law again deprived the shareholders of an opportunity to decide for themselves.[43]

Thus, Justice White, with Justices Burger and Blackmun, concluded that the Illinois statute also was void under the supremacy clause, and their analysis on this point is persuasive.[44] Of the justices who concurred with White and Burger in the commerce clause holding, only Justice O'Connor chose not to discuss supremacy "because it was not necessary to reach the preemption issue."[45]

Justice Powell, putting his own gloss on federal legislative history, concluded that "the Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include but often are broader than those of incumbent management."[46] On that basis, he declined to rule that the Illinois statute was void under the supremacy clause. It is, indeed, an odd interpretation of the meaning of neutrality to conclude that it sanctions giving greater protection to one side over another.

Justice Stevens, taking an unorthodox view of the supremacy clause, declined to join in the preemption holding because he was not persuaded "that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management."[47]

Given the obvious conflicts between the Illinois Act and the Williams Act, the Court should have nullified the Illinois Act on supremacy clause grounds as well as on the commerce clause grounds. However, the Court did not flatly declare that there could be no state regulation of interstate tender offers.[48] At first blush, the Court's reluctance to void the Illinois Act on preemption grounds may appear to be disingenuous. The Court held out the possibility that states could legislate in this area but gave no hints how they may do so within the confines of the commerce clause. The answer might be found in the test of *Pike v. Bruce Church, Inc.*, cited by the Court,[49] which requires a state law to be upheld if "its effects on interstate commerce

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[43]102 S. Ct. at 2639. The Justices commented: "[t]he Court of Appeals understood the Williams Act and its legislative history to indicate that Congress intended for investors to be free to make their own decisions. We agree." *Id.*

[44]*Id.* at 2635-37. *See supra* notes 40-43.

[45]102 S. Ct. at 2643. *See supra* note 26.

[46]*Id.*

[47]*Id.* at 2648.

[48]*Id.* at 2642-43.

[49]*Id.* at 2641.

are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[50]

IV. The Indiana Takeover Offers Act

A. *An Historical Look*

Against this backdrop stands the Indiana Takeover Offers Act.[51] The Indiana General Assembly first addressed the issue of state regulation of tender offers in a statute enacted in 1975.[52] That law was repealed and another enacted in 1979.[53] The 1979 law applied to offers to acquire stock in a target company if, after the purchase, the offeror would be the owner of more than ten percent of any class of stock,[54] a higher threshold than that provided in the Williams Act. The law did not apply unless the target company was an Indiana corporation with its principal place of business and substantial assets in the state.[55] In addition, the law did not apply to Indiana target companies which had less than fifty shareholders.[56] For companies subject to federal securities laws, the disclosure requirements of the Indiana Act were identical to the Williams Act.[57] In fact, these companies had only to file a copy of each document that was required by the SEC to comply with the Indiana Act.[58] Companies not subject to federal laws were required to disclose information in the same broad categories required by the Williams Act, but in more detailed form.[59]

Many of the provisions of the 1979 Takeover Offers Act were similar to those in the Illinois Act. In particular, the Indiana statute

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[50]397 U.S. 137, 142 (1970).

[51]Ind. Code §§ 23-2-3.1-0.5 to -11 (1982).

[52]Act of Apr. 29, 1975, Pub. L. No. 263, 1975 Ind. Acts 1469 (repealed 1979).

Indiana maintains no formal legislative histories on bills passed by the legislature, but an article written shortly after the 1975 statute became law sheds light on the legislators' intent in enacting the statute. The writers of the article observed that the statute passed without any dissenting votes in either house. The authors commented:

> This support undoubtedly reflected the concern of many legislators that, with the current depressed stock prices and the availability of substantial capital in foreign money-markets, many Indiana-based businesses were fair prey to the corporate raider. The recent takeovers of two Indiana corporations were commonly cited as examples by supporters of the need for the legislation.

Leagre & Frick, *The New Indiana Business Take-Over Act: A New Weapon in the Arsenal to Fight the Unwanted Acquisition*, 19 Res Gestae 154, 154 (1975).

[53]Act of Apr. 6, 1979, Pub. L. No. 235, 1979 Ind. Acts 1122 (codified at Ind. Code §§ 23-2-3.1-0.5 to -5, -7 to -11 (1982)).

[54]Ind. Code § 23-2-3.1-1(i) (1982).

[55]*Id.* § 23-2-3.1-1(j).

[56]*Id.* § 23-2-3.1-1(j)(5) (Supp. 1980). This provision has since been amended to raise the threshold to 75 shareholders. *Id.* § 23-2-3.1-8.6(a)(3) (1982).

[57]*Id.* § 23-2-3.1-5 (1982).

[58]*Id.*

[59]*Id.* § 23-2-3.1-5.

required tender offerors to file with the securities commissioner and with the target company a disclosure statement fifteen business days prior to the commencement of the offer.[60] The precommencement notification period required by the Illinois statute was twenty business days.[61] The 1979 version of the Indiana law mandated in all cases that hearings be held within fifteen business days of the filing of the registration statement.[62] In any case, the decision of the securities commissioner had to be made within that same fifteen-business-day period from the date of filing.[63] Indiana, like Illinois, permitted the regulatory officer to block the offer if he found it unfair.[64] Besides the precommencement notification period, the Indiana statute imposed yet another delay. The 1979 Act prevented the offeror from purchasing any shares within the first fifteen business days from the date the offer was made to the shareholders of the target company.[65]

B. The 1981 Amendments

After the Seventh Circuit found the Illinois Act to be unconstitutional in *MITE*,[66] the Indiana General Assembly acted in an attempt to cure the common defects of the Indiana Act.[67] One of the features of the 1981 amendments was a statement outlining the legislature's reasons for enacting a business takeover law.[68] Heeding the court of appeals' decision in *MITE*, the Indiana legislature repealed the precommencement notification provision.[69] However, the legislature did not repeal the post-offer waiting period for the purchase of tendered shares. Instead, the legislature extended the prohibition on the pur-

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[60]*Id.* § 23-2-3.1-6 (Supp. 1980) (repealed 1981).

[61]ILL. REV. STAT. ch. 121½, § 137.54(E) (1979).

[62]IND. CODE § 23-2-3.1-7 (Supp. 1980), *amended by* Act of Apr. 24, 1981, Pub. L. No. 215, 1981 IND. ACTS 1700.

[63]*Id.*

[64]*Id.*; ILL. REV. STAT. ch. 121½, § 137.62(A) (Supp. 1980).

[65]IND. CODE § 23-2-3.1-8.

[66]MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980).

[67]Act of Apr. 24, 1981, Pub. L. No. 215, 1981 IND. ACTS 1700 (codified at IND. CODE §§ 23-2-3.1-0.5 to -5, -7 to -11 (1982)).

[68]IND. CODE § 23-2-3.1-0.5 (1982). In this new section, the legislature found that it is often difficult for shareholders to get enough pertinent information to evaluate tender offers. The legislature stated:

> By enacting this chapter, it is the intent and purpose of the general assembly to provide for full and fair disclosure of all material information concerning takeover offers to shareholders of Indiana corporations, so that the opportunity of each shareholder to make an informed and well-reasoned investment decision may be secured. It is the purpose of the general assembly to provide for adequate disclosure in a manner consistent with the Constitutions of the United States and of Indiana.

Id.

[69]Pub. L. No. 215 § 11, 1981 IND. ACTS 1700.

chase of shares to twenty business days after the offer is first made.[70]

The 1981 amendments maintained the mandatory hearing provision and extended the period in which the hearing must be held from fifteen business days to twenty business days from the date the disclosure statement was filed.[71] In light of the Seventh Circuit's objection to the substitution of a regulatory official's decision for that of a supposedly informed investor, the legislature stripped the securities commissioner of his power to block "unfair" tender offers.[72] Instead, the securities commissioner may prohibit the purchase of tendered shares only if he finds, by a preponderance of the evidence, that the registration statement fails to fully disclose all material information about the offer or that the offer is not made on substantially the same terms to all shareholders in the target company.[73]

The 1981 amendments broadened the antifraud provision of the Indiana Act. As a result, incumbent management of the target company, as well as the tender offeror, can be held liable for any untrue statement or omission of a material fact or for any fraudulent, deceptive, or manipulative acts or practices committed in connection with a tender offer.[74]

C. *The Indiana Act and* MITE

The Supreme Court found the Illinois Act to be unconstitutional because of its power to block a tender offer outside of its own boundaries.[75] The same criticism can be made of the current Indiana Act. It is true that with the amendments, the Indiana Act cannot block a tender offer from being made to shareholders. It can, however, prevent the tender offer from being consummated by allowing the securities commissioner to prohibit the offeror from purchasing the tendered shares.[76]

The Indiana law is more narrowly drawn than the Illinois statute in that it applies only to target companies chartered in Indiana with their principal place of business and substantial assets in Indiana.[77] The Illinois statute applied to companies in which ten percent of the stock that was subject to the tender offer was owned by Illinois residents[78] or which met two of the following conditions: had its prin-

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[70]IND. CODE § 23-2-3.1-8 (1982).

[71]*Id.* § 23-2-3.1-7(a).

[72]*Id.*

[73]*Id.*

[74]*Id.* § 23-2-3.1-8.5.

[75]Edgar v. MITE Corp., 102 S. Ct. at 2641-42.

[76]IND. CODE § 23-2-3.1-8; *see supra* text accompanying note 73.

[77]IND. CODE § 23-2-3.1-1(j).

[78]ILL. REV. STAT. ch. 121½, § 137.52-10.

cipal executive office in Illinois; was organized under Illinois law; or had at least ten percent of its stated capital and paid-in surplus represented in Illinois.[79]

Even with the 1981 amendments, the Indiana Act still would affect persons who live outside the state but who own stock in corporations that are organized in Indiana with their principal place of business and substantial assets here. To the extent that the law permits the Indiana securities commissioner to forbid the purchase of shares tendered by any shareholder—those living within Indiana as well as those from other states—it imposes an impermissible burden on interstate commerce under the Supreme Court's analysis in *MITE*.[80] It was the Illinois statute's "nationwide reach which purport[ed] to give Illinois the power to determine whether a tender offer may proceed anywhere"[81] that the Supreme Court characterized as "[t]he most obvious burden the Illinois Act impose[d] on interstate commerce."[82]

Besides the possibility of an outright prohibition, the Indiana law, without exception, will delay the purchase of tendered shares for twenty business days; that is, four weeks from the date the offer is made. During this period, the securities commissioner must hold hearings to determine the adequacy of the offeror's disclosures.[83] That this mandatory prepurchase waiting period is an advantage for incumbent management is unmistakable. During these twenty business days, the target company is free to buy up its own stock and to induce shareholders to withdraw any shares they might have already tendered to the offeror. The target company can engage in these defensive maneuvers without triggering any of the disclosure requirements imposed on the offeror.

In its amicus curiae brief in *MITE*, the SEC outlined other defensive maneuvers which can be taken by the target company while a tender offer is delayed. They include: announcement of dividend increases and stock splits; issuance of additional shares of stock; acquisition of other companies, resulting in an antitrust violation if the tender offer is successful; arrangement of a defensive merger; entering into restrictive loan agreements; and commencement of litigation to block the tender offer.[84] Other tactics include abolishing cumulative

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[79]*Id.*

[80]*See* Edgar v. MITE Corp., 102 S. Ct. at 2641-42.

[81]*Id.* at 2642.

[82]*Id.* at 2641.

[83]*See supra* note 71 and accompanying text.

[84]Brief for the Securities and Exchange Commission as amicus curiae at 10 n.8, Edgar v. MITE Corp., 102 S. Ct. at 2639 n.13. These defensive maneuvers may be very successful. With dividend increases and stock splits, incumbent management can drive up the market price of the target's stock, making the tender offer a more expensive proposition for the offeror. By issuing additional shares of stock, the target

voting and negotiating expensive lifetime contracts for incumbent management.[85] Congressman Peter Rodino of New Jersey warned that "the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful."[86] Rodino concluded that if a tender offer is defeated by delay, the shareholders "will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer."[87]

The Indiana Act's hearing provision and prepurchase waiting period make extended delay, with all the attendant pitfalls for the offeror, inescapable. There are some who argue that regulatory delays of this sort serve the beneficial purpose of investor protection. One writer opined that "delays created by prepurchase waiting periods or the hearings are needed for timely administrative review and effective use of administrative remedies. . . . [T]heir purpose is consistent with that of the [Williams] Act; any adverse effect they may have on the offeror is an acceptable cost of effecting that purpose."[88] Implicit in such an argument is the premise that the market approach, deliberately chosen by the drafters of the Williams Act, is not sufficient protection for investors. However, the market approach is based on the philosophy that any investor, whether sophisticated or neophyte, is better suited than a government regulator in managing his own financial affairs. Given the information required to be disclosed by the Williams Act, an investor can decide whether it is in his financial best interests to sell out. It is the investor who knows his financial

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company effectively forces the offeror to buy more shares in order to obtain the required margin for control. For example, if a target company had 10 million shares outstanding and if ownership of 10 percent, or one million shares, would give an investor working control, the issuance of two million additional shares of stock would force the tender offeror to purchase another 200,000 shares to obtain 10 percent ownership. By entering into restrictive loan agreements which provide that the loans could be called in, in the event of a change in control of the target company, the target can make itself financially unattractive to the bidder. With litigation challenging the tender offer based on alleged violations of state takeover laws, the target company can force the bidder into a potentially protracted and expensive lawsuit to defend the tender offer and, in the process, wear the bidder down.

[85]122 CONG. REC. 30,877 (1976) (debate on premerger notification and waiting period). By abolishing cumulative voting—a practice which gives shareholders who own less than 50 percent of the stock the mathematical possibility of electing one or more directors—the target company can make it difficult for the bidder, assuming the tender offer is successful, to have a voice on the board of directors. Faced with expensive lifetime contracts for incumbent management, the successful tender offeror may find it financially impractical to throw them out.

[86]122 CONG. REC. at 30,877.

[87]*Id.*

[88]Sargent, *On the Validity of State Takeover Regulation: State Responses to* MITE *and* Kidwell, 42 OHIO ST. L.J. 689, 717 (1981).

goals in owning the stock, such as long-term investment or short-term speculation, and who will evaluate the tender offer according to those goals. The Willams Act gives the investor the tools to make those decisions.

It has also been suggested that if delay permits defensive maneuvering by the target company which defeats the tender offer, a disappointed shareholder who loses an opportunity to tender his stock for a premium price has a remedy by suing incumbent management for breach of fiduciary duty.[89] Yet realistically speaking, only a rare shareholder would choose the uncertain rewards of a stockholder derivative suit over an opportunity to profit from the sale of his stock to a ready and willing offeror. Other suggested benefits of delay are a higher price for the stock from a "white knight"[90] brought in by the target company to compete with the tender offeror, and the unconventional financial reorganizations by incumbent management.[91] But these benefits are by no means guaranteed. The prospects of extended delay in completing the tender offer could discourage some offerors from initiating one in the first place. In addition, target companies may forego attempts to drive up the cost of the tender offer by delaring dividends or stock splits, which would benefit the shareholder, and instead intitiate a lawsuit to block the tender offer. The attendant delays and expense for the offeror raise the possibility that the tender offer will not be completed. Thus, the shareholder loses a potentially lucrative market for his stock.[92]

The delays imposed by the Indiana Act could be greeted with the same skepticism that the Supreme Court in *MITE* reserved for the delays caused by the Illinois Act when it said that "the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer might fail due to defensive tactics employed by incumbent management."[93]

One of the goals of the Williams Act is to maintain a regulatory policy of neutrality toward tender offerors and the target company.[94] To the extent that a state law favors one side, it upsets that balance. Another aspect of the hearing provision of the Indiana Act has that effect. Under this section, all expenses related to the hearings, including the cost of transcripts, must be paid by the offeror.[95] The hear-

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[89]*Id.* at 718-19.

[90]The terms "white knight" and "angel" often are used to describe a friendly company sought out by a target company to take over the target company saving it from the "dragon," the tender offeror.

[91]Sargent, *supra* note 88, at 718-19.

[92]*See supra* notes 84 and 85.

[93]102 S. Ct. at 2642.

[94]*See supra* note 6.

[95]IND. CODE § 23-2-3.1-7(c) (1982).

ing provision also allows any person whose interests may be affected, including but not limited to any offeree and any representatives of the target company or of the offeror, to present evidence, to call witnesses and to offer oral agruments.[96] There is no limit on how many witnesses may be called. Conceivably, the target company could enlist any number of people whose interests would be affected by the tender offer, and call them as witnesses or join them as parties to the hearing. The potential for abuse and the added expense it will impose on the offeror is apparent. The law permits imaginative target companies to run up the expense of the hearing, already expensive to the offeror in terms of delay, and the offeror is powerless to protest the cost.

V. A Case for Preemption

In *MITE*, the Supreme Court did not find that the Illinois Act was unconstitutional under the supremacy clause by virtue of having been preempted by the Williams Act, although three Justices advanced that view.[97] Even those Justices conceded that Congress had not prohibited the states from regulating tender offers and that the question whether a particular state law conflicted with the Williams Act would have to be resolved on a case-by-case basis.[98]

However, a strong argument can be made for preemption of state regulation of tender offers.[99] The Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee of the American Bar Association's Section on Corporation, Banking and Business Law concluded that "federal preemption is indicated because there is a particular need for uniformity in the area of tender offer legislation and because state laws are too pro-management."[100] The subcommittee's principal criticism of state takeover laws was that they were "designed and applied to protect incumbent management by forestalling takeovers. This protectionist tilt is inconsistent with the purposes of the Williams Act . . . ."[101] The subcommittee also found that the state takeover laws contained provisions which delay the progress of tender offers, a factor that favors the target company. In addition, the subcommittee observed that "the jurisdictional base announced in some of the statutes is broad, extending not only to target

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[96]*Id.* § 23-2-3.1-7(d).

[97]102 S. Ct. at 2635-37. Justices White, Burger and Blackmun found that three provisions of the Illinois Act "upset the careful balance struck by Congress" in the Williams Act's regulation of tender offers and thus ran afoul of the Supremacy Clause. 102 S. Ct. at 2637. *See supra* note 26.

[98]102 S. Ct. at 2635.

[99]*See* E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers for Corporate Control 225-29 (1977).

[100]*State Takeover Statutes and the Williams Act*, 32 Bus. Law. 187, 193 (1976).

[101]*Id.* at 188.

companies incorporated in the state but also to those whose principal place of business is there."[102]

Because the Supreme Court has not found that state takeover laws are preempted by the Williams Act, Congress should do so. It may be that the Supreme Court's commerce clause objections in *MITE* to the Illinois Act will cause the remaining state takeover laws to fall one by one. But such an invalidation is not automatic. Inevitably, some state securities regulators will be unwilling to heed the judicial analysis of other states' laws that dooms their statutes as well.[103]

Rather than wait for case-by-case reversals of state takeover statutes, Congress should act to preempt this area of the law and, thus, provide a uniform approach to regulate nationwide tender offers. Presently, the multiplicity of state takeover laws can create anomolous situations for those offerors who are bidding for shares in a target company which is covered by the regulatory scheme of more than one state.[104] If Congress wished to leave the states some authority over tender offers, it could permit the states to create private causes of action for parties who allege they have been the victims of Williams Act violations. These remedies would supplement those available under the Williams Act.

IV. The Indiana Alternative

There is little doubt that the Supreme Court's objections to the Illinois Business Take-Over Act also will prove fatal to the Indiana Act, largely because of the common flaws in the two statutes. But it remains to be seen whether all state regulation of tender offers will offend the commerce clause. In fact, Justice Powell, in his concurring opinion in *MITE*, explained that he joined in the section of the Court's opinion which nullified Illinois' law "because its Commerce Clause reasoning leaves some room for state regulation of tender offers."[105]

The Indiana legislature would be wise to repeal the mandatory hearings and prepurchase waiting period provisions of the business takeover law as they apply to corporations subject to federal securities laws. Once that is done, the legislature should consider expanding the antifraud provision contained in the present law and consider providing an express private right of action for shareholders as well as

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[102] *Id.* at 188-89.

[103] When the Supreme Court's decision in *MITE* was announced, Stephen Coons (then Indiana Securities Commissioner) was of the belief that the Indiana Act was safe. Indianapolis Star, June 25, 1982, at 29, col. 2.

[104] *See* Note, *The Validity of State Tender Offer Statutes: SEC Rule 14d-2(b) and Post-*Kidwell *Federal Decisions*, 38 Wash. & Lee L. Rev. 1025 (1981).

[105] 102 S. Ct. at 2643.

disappointed tender offerors. This would enable both groups to sue incumbent management for misleading statements or fraud in connection with a failed tender offer. Currently, the Indiana Act only makes such conduct "unlawful"[106] and does not specify whether there is a private right to sue or whether the remedy rests only with the securities commissioner in his prosecutorial capacity.

In view of *MITE*, a private right of action should withstand the constitutional challenges that brought down the Illinois Act. The state-level private civil remedies for recission of the stock transaction or for damages for proven violations of the Williams Act would not impede the progress of a nationwide tender offer. Rather than operate prospectively to prevent a tender offer from proceeding, the private remedies would give target companies, their shareholders, and even disappointed offerors a means to pursue their own claims without interfering with the interests of shareholders in other states who may wish to take advantage of the tender offer. The focus of the Supreme Court's commerce clause objection to the Illinois law was that the statute purportedly gave the Illinois secretary of state the power to freeze a tender offer, not only in Illinois but also in the other forty-nine states.[107] The effect on interstate commerce is apparent. By contrast, a private cause of action would not have the injunctive effects of present state regulations. The bidding company would be free to make the tender offer and face any private civil consequences later. The same rationale applies to the option of giving a state regulatory agency the power to bring actions for civil penalties for violations of the Williams Act. So long as the administrative remedies do not affect the opportunities of shareholders in other states to evaluate the tender offer, they would come within the permissable area of regulation circumscribed by *MITE*.

The private remedies and retrospective administrative sanctions could also survive a challenge on supremacy clause grounds. Although the Supreme Court has previously ruled that the Williams Act provides no private right of action for disappointed tender offerors,[108]

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[106]*See* IND. CODE § 23-2-3.1-8.5 (1982).

[107]*See MITE*, 102 S. Ct. 2629.

[108]Piper v. Chris-Craft Indus., 430 U.S. 1 (1977). Chris-Craft attempted to obtain control of Piper Aircraft Corporation by means of a tender offer. Chris-Craft's takeover attempt failed, and Bangor Punta Corporation, with the approval of the Piper family, obtained control of Piper. Chris-Craft filed suit under Section 14(e) of the Securities Exchange Act of 1934 and SEC Rule 10b-6. Chris-Craft alleged that Bangor Punta obtained control of Piper as a result of securities law violations by the Piper family, Bangor Punta and Bangor Punta's underwriter, First Boston Corp. The Supreme Court, with two justices dissenting, concluded that there was no private right of action under the Williams Act for a disappointed offeror who wishes to sue a successful bidder or the target company. *Id.* at 42. The Court also found that Chris-Craft did not have standing to assert the 10b-6 claim. *Id.* at 45.

the Williams Act itself does not forbid private causes of action; rather, the act is silent as to this remedy. Allowing private remedies would not frustrate the purpose of the Williams Act—investor protection—but rather would enhance that goal.[109] The remedies would be supplemental, not contradictory. Similarly, the Williams Act does not forbid all state regulatory activity. The only state regulation that would be forbidden by federal law is that which conflicts with the Williams Act or with other federal securities laws and regulations. State sanctions that promote the goals of the Williams Act and that do not favor either the target company or the offeror would be legitimate, even under a supremacy clause analysis.[110]

As it presently exists, there is little justification for Indiana's business takeover law, short of erecting impermissable barriers around home-state corporations. It gives no further protection to Indiana investors than that offered by the Williams Act because its only disclosure requirement is that the offeror file a copy of any statement required under federal law. The Indiana Act does not even speak to withdrawal or proration rights.[111] Therefore, the Williams Act provides the only protection afforded Indiana shareholders. While offering Indiana shareholders nothing more, the Indiana Act has the potential of actually harming the financial interests of resident shareholders, not to mention the fortunes of those who live outside the state, by delaying the tender offer until the opportunity to sell their stock at a premium is lost.

The analysis of the United States District Court for the District

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[109]*See supra* note 6 and accompanying text.

[110]*See* Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029 (1st Cir. 1982). In *Connolly*, the First Circuit Court of Appeals, in one of the first cases decided after *MITE*, upheld a state sanction in the face of a supremacy clause challenge. *Connolly* dealt with a Massachussetts statute which prohibited 10% shareholders from making a tender offer in Massachussetts for one year if the offeror failed to comply with state disclosure provisions. In remanding the case for consideration of commerce clause issues, the First Circuit reviewed the supremacy clause objections to the sanction provision and concluded that the penalty was not necessarily preempted by the Williams Act. *Id.* at 1038.

The court stated:

> It is true that the one-year delay may often be a more serious penalty than is necessary to protect investors from the consequences of improper disclosure in a particular situation. To that extent it may be said to conflict with federal policy. On the other hand, the deterrent effect of the sanction is obviously beneficial to investors and is therefore in keeping with federal goals. Indeed, it may be that the deterrent effect is so powerful that violations can be expected only very rarely further reducing the degree of conflict.

Id. at 1039.

[111]The Indiana Act does not include provisions that would allow shareholders to withdraw or redeem their tendered shares. For the withdrawal and proration provisions of the Williams Act, *see supra* note 2.

of New Jersey in invalidating the New Jersey business takeover law[112] is particularly appropriate to Indiana. In commenting on the added burdens of the New Jersey law, the court observed:

> Even as to New Jersey residents, the statute's benefits are uncertain at best. New Jersey residents are already protected by the disclosure and antifraud provisions of the Williams Act. Thus any additional benefit bestowed by the New Jersey statutes is at most marginal. Moreover, the delay caused by the statute can actually harm New Jersey residents by giving incumbent management of the target an opportunity to frustrate the tender offer entirely.[113]

It is clear that a state's interest in protecting the local business climate is not sufficient to justify the burdens a state takeover law imposes on interstate commerce.[114] Given the narrow strictures within which it can act, the Indiana legislature would serve its constituents well by abandoning the pretext of protecting Indiana residents through the hearings and prepurchase waiting periods in the Indiana Act and instead bow to the federal scheme for protecting investors' interests. In addition to avoiding the constitutional problems inherent in state tender offer legislation, the legislature could save shrinking fiscal resources by deferring to the Williams Act, supplemented by expanded state antifraud provisions. The money spent on hearing officers, investigators, clerks and the myriad technical and support services that go into Indiana's tender offer regulation could be better used elsewhere.

VII. Conclusion

The Supreme Court's objections to the Illinois Business Take-Over Act also apply to Indiana's Takeover Offers Act and thus it is invalid under the commerce clause. Although some state regulation of tender offers may be constitutionally possible, the confines of such a law are not spelled out in *MITE*. Indiana shareholders would be better served if the legislature deferred to the federal government in the regulation of nationwide tender offers while adding supplemental state remedies. There are persuasive arguments for federal preemption of this area. Since the Supreme Court in *MITE* fell short of the necessary

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[112]N.J. Stat. Ann. §§ 49.5-1 to -19 (West Supp. 1982-1983).

[113]Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1224 (D.N.J. 1981).

[114]The district court in *Great Western* concluded that the ultimate goal of the Idaho business takeover law was to "thwart tender offers and thereby prevent possible removal of the target company or its management, the closing of plants and related effects on the state's economy. But a state may not legitimate its regulation of interstate commerce by asserting this type of interest." 439 F. Supp. at 438.

majority to rule that Illinois' law (and by analogy, any similar state takeover law) was preempted by the Williams Act, Congress should preempt the regulation of interstate tender offers. Only then will there be a uniform national approach to govern this increasingly popular method of corporate takeovers.

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