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THE PENNSYLVANIA TAKEOVER DISCLOSURE LAW: A STATUTE WAITING TO BE INVALIDATED

Ira P. Tiger

I. INTRODUCTION

In the past fifteen years, the cash tender offer has become an increasingly utilized mechanism for gaining control of a corporation that resists acquisition.1 The individual, company, or group wishing to take over a corporation (tender offeror) simply makes an offer to purchase a quantity of securities of the target company from its shareholders.2 If and when the offeror obtains enough shares to give him effective voting power, he can take over control, and, if he desires, replace incumbent management with his own people.3 By dealing directly with shareholders of a publicly held corporation and circumventing incumbent management, the tender offeror is able to obtain control of the corporation quickly, without a bitter proxy contest and without making any commitments to incumbent management. It has been observed that "[c]ash tender offers, combining speed and secrecy, have proven very efficient: the rate of success is high, the cost and risk are low. From 1972 to 1975, 82% of all cash tender offers were either successful . . . or partially successful."4 This high rate of success was, however, shortlived. In 1976 and 1977 the success rate dropped to little better than one half.5 One explanation for declining victories among tender offerors was that

1. See Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 22 (1977); Kramer, Budnick & Hope, Tender Offers: Background and Definition, in Tender Offers: Making and Meeting Them 9 (C. Kanter ed. 1979). As early as 1966, "the increased use of cash tender offers to acquire control of corporations was evidenced by the fact that in [that year] there were over 100 such offers involving companies with securities listed on national securities exchanges as compared with eight in 1960." S. REP. No. 550, 90th Cong., 1st Sess. 2 (1967). A more recent study has indicated that this trend has continued, for during the 1973-1977 period, "89.5 percent of all tender offers (465) were cash tender offers." Austin, Study Reveals Trends in Tactics, Premiums, Success Rates in Offers, N.Y.L.J., June 12, 1978, at 34, col. 1.


3. See generally authorities cited note 2 supra.


5. Id.
"target management, through the use of improved defensive tactics and aided by state takeover statutes, [became] better able to resist unwanted takeovers."

Prior to 1968, cash tender offers were virtually unregulated. In that year, however, two very significant events occurred. In March, 1968, Virginia enacted the first state tender offer statute. In July of that same year, Congress enacted the Williams Act requiring tender offerors to file certain information with the Securities and Exchange Commission (SEC). A flurry of state activity followed, eventually resulting in the enactment of takeover statutes in some thirty-six states, including Pennsylvania. The avowed purpose of these statutes, which contain both procedural and substantive requirements, is to...
provide information and protection to shareholders of the target company.¹¹

State takeover statutes generally require one who intends to make a tender offer for the shares of a target company 1) to make an advance disclosure of his intention to a state administrative agency and to the target company itself, 2) to file a detailed report with the state administrator concerning his background, intentions, and other information, and 3) to delay making the tender offer until a specified period of time has elapsed.¹² In addition, the state administrator typically is given the power to postpone the effective date of the tender offer and (on his own initiative or at the behest of the target company’s management) to hold a hearing inquiring into the adequacy of the disclosure and other matters.¹³

The jurisdictional scope of a state takeover statute generally is based upon the relationships existing between the target corporation and the state, despite the fact that these statutes impose duties principally upon the offeror.¹⁴ The reach of these statutes is pervasive since the statutes rest jurisdiction on the existence of state-corporation relationships certain to encompass a multitude of corporate entities.¹⁵ For the most part, state takeover statutes cover corporations which are either incorporated under the laws of the state or have their principal place of business in the state, and the statutes emphasize the need for protection of shareholders of those target

¹¹ See Note, supra note 10, at 515; see, e.g., Va. Code § 13.1-528(B) (Michie 1978 & Supp. 1979). The Virginia Take-Over-Bid Disclosure Act states that “[t]he purpose of this chapter is to protect the interests of offerees, investors and the public by requiring that an offeror make fair, full and effective disclosure to offerees of all information material to a decision to accept or reject a take-over bid.” Id. But see H. Bloomenthal, supra note 7, at 141; Aranow & Einhorn, State Securities Regulation of Tender Offers, in The Tender Offer 41, 42 (C. Kanter ed. 1972). State takeover statutes were apparently inspired by the legislature’s concern for the issuer rather than the investor. A number of states apparently feared that established local concerns might, through the tender offer device, be taken over by outside interests who would then close down plants and leave local residents jobless. These legislatures considered bills which would have effectively precluded tender offers for companies located within their states.

Id. at 42 (footnote omitted).


¹³ See Berlstein, supra note 12, at 215-16.

¹⁴ See id. at 208-09; Note, supra note 4, at 881.

¹⁵ Berlstein, supra note 12, at 208. The factors employed, individually or in combination, to determine if the corporation is protected include: 1) incorporation in the state; 2) principal place of business in the state; 3) substantial assets located in the state; 4) percentage of the corporation’s total employees located within the state; 5) doing business within the state; 6) registration of the target company’s securities under federal securities laws; and 7) registration of the securities under state securities laws. Id.
companies. Thus, these laws are extraterritorial in effect; they apply to tender offers for the shares of a target company regardless of the locations of the offerors and the offerees.

Many state takeover disclosure laws do not define the term "tender offer," choosing instead to base their application upon the percentage of the target company's stock sought by the tender offeror. The Williams Act also lacks a precise definition, but the SEC has suggested to the courts eight elements which it considers to be characteristic of tender offers:

(1) active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only a limited period of time; (7) offeree subjected to pressure to sell his stock. . . [8] whether the public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company's securities.

While the tender offeror must own more than five percent of a class of stock to be subject to the requirements of the Williams Act, 18

16. See H. Bloomenthal, supra note 7, at 141. Note, supra note 4, at 889. For a table of state statutes indicating jurisdictional requirements, see Berlstein, supra note 12, at 234-36.
17. Berlstein, supra note 12, at 229. As one group of authors explained: "The vast majority of tender offers involve transactions between persons from a number of different states. The tender offeror may not be located in the same state as the target corporation, and shareholders of the target, to whom the offer is made, are often scattered in many states." Id. Regardless of these multistate relationships, all tender offers to all shareholders, including those domiciled outside of the state whose statute purports to control, must comply with the regulations imposed by that statute. See Note, supra note 4, at 881 n.60. One stated justification for this extraterritorial effect is that it prevents the offeror from circumventing the requirements of a particular state's takeover statute by not soliciting shareholders in that state. See Note, supra note 10, at 515. However, state takeover legislation creates serious impediments for the tender offeror who must comply with the pre-filing, disclosure, and hearing requirements of each state whose statute claims jurisdiction over the target company. See Wilner & Landy, supra note 12, at 21. The conflicting provisions of the various state statutes may make it difficult to arrange a tender offer and may create an adverse impact on interstate commerce. See Aranow & Einhorn, supra note 11, at 58-59. For an example of the problems that arise when two such statutes conflict, see notes 119-32 and accompanying text infra. For a discussion of the constitutional questions surrounding these extraterritorial effects, see Note, supra note 4, at 929-39.
19. See Berlstein, supra note 12, at 208; Katcher, supra note 10, at 145.
the requisite percentage in the state takeover statutes varies from five to twenty percent at the completion of the offer.\textsuperscript{22}

Recently, these state takeover statutes have come under heavy constitutional attack with the weight of authority concluding that they are unconstitutional.\textsuperscript{23} In its landmark decision in \textit{Great Western United Corp. v. Kidwell},\textsuperscript{24} the United States Court of Appeals for the Fifth Circuit invalidated the Idaho takeover statute as violative of both the supremacy clause and the commerce clause of the United States Constitution.\textsuperscript{25} Other courts have followed suit in attacking or invalidating several similar statutes.\textsuperscript{26} These decisions have rested on two bases: 1) the acts are preempted by the Williams Act and, therefore, violate the supremacy clause;\textsuperscript{27} and 2) the acts impose undue burdens on interstate commerce in violation of the commerce clause.\textsuperscript{28} As will be illustrated below, the Pennsylvania Takeover Disclosure Law should fare no better than have the others when tested in the courts.


\textsuperscript{24} 577 F.2d 1256 (5th Cir. 1978), rev’d on other grounds sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979) (venue in district court was improper).

\textsuperscript{25} 577 F.2d at 1274-87. For the text of the supremacy clause, see U.S. Const. art. VI, cl. 2; text accompanying note 46 infra. For the text of the commerce clause, see U.S. Const. art. I, § 8, cl. 3; text accompanying note 133 infra.

\textsuperscript{26} See cases cited note 23 supra.

\textsuperscript{27} See Great Western United Corp. v. Kidwell, 577 F.2d at 1274-81; Dart Indus., Inc. v. Conrad, 462 F. Supp. 1, 12-13 (S.D. Ind. 1978); notes 46-132 and accompanying text infra.

\textsuperscript{28} See Great Western United Corp. v. Kidwell, 577 F.2d at 1281-86; Dart Indus., Inc. v. Conrad, 462 F. Supp. 1, 13-14 (S.D. Ind. 1978); notes 133-88 and accompanying text infra.
II. THE PENNSYLVANIA TAKEOVER DISCLOSURE LAW

The Pennsylvania Takeover Disclosure Law (Act)\(^{29}\) purports to have been designed "to provide adequate protection for Pennsylvania corporations, shareholders, and employees and the public from the use of takeover offers without full and fair disclosure of information concerning them."\(^{30}\) Section 74(a) of the Act, the provision containing the registration requirements, makes it unlawful for an "offeror"\(^ {31}\) to make a "takeover offer"\(^{32}\) involving a "target company"\(^ {33}\) unless, at least twenty days prior thereto, the offeror 1) files with the Pennsylvania Securities Commission (Commission) a registration statement containing certain information specified in section 75; 2) sends copies of the registration statement to the target company and to the collective bargaining representative, if any, of the employees of the target company at its principal place of business; and 3) publicly discloses the offering price of the proposed offer and the fact that a registration statement has been filed with the Commission.\(^{34}\)

The Commission is empowered by section 74(c) to require the offeror to file any other documents that the Commission deems material to the takeover offer.\(^ {35}\) That section also empowers the Commission summarily to delay the effective date of the offer if it determines 1) that the registration statement does not contain all of the required information, or 2) that the solicitation materials do not provide full disclosure to offerees of all material information concerning the offer.\(^ {36}\)

Section 74(d) of the Act provides that the tender offer automatically becomes effective twenty days after the date of the filing of the required registration statement unless the Commission orders a delay


\(^{30}\) Id. § 72.

\(^{31}\) "Offeror" is defined in § 73 of the Act as "a person who makes or participates in any way in making a takeover offer." Id. § 73.

\(^{32}\) "Takeover offer" is defined in § 73 of the Act as the acquisition of or offer . . . to acquire any equity security of a target company, pursuant to a tender offer, if after the acquisition thereof, the offeror would, directly or indirectly, be a beneficial owner of more than 5% of any class of the outstanding equity securities of the target company.

\(^{33}\) Id. Section 73 goes on to provide for seven exceptions to the above definition. For the exempted transactions, see id.

\(^{34}\) Id. § 74(a).

\(^{35}\) Id. § 74(c).

\(^{36}\) Id.
or schedules a hearing. A hearing will be held if there is reason to believe that the offer does not provide the necessary “full and fair” disclosure to the offerees of all material information concerning the offer. It may be scheduled at the initiative of the Commission or upon the request of the target company. Once the hearing is scheduled, it must be held within thirty days of the original filing and any determination must be made within the thirty days following the hearing.

Civil and criminal sanctions are provided for in the Act. The Commission may issue an order requiring a violator to cease and desist from committing the impropriety and, additionally, the Commission may bring a court action “to enjoin the acts or practices and to force compliance with this act or any regulation or order thereunder.” The courts, “upon a proper showing” of illegal conduct, may grant a permanent or temporary injunction or restraining order without bond to enforce the provisions of the Act and may also order rescission of any sales or purchases of securities determined to be unlawful under the Act. Potential criminal penalties for each willful violation include a fine of not more than $1,000 or imprisonment of not more than one year, or both.

III. THE SUPREMACY CLAUSE CHALLENGE

The supremacy clause of the United States Constitution states in pertinent part: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” In Jones v. Rath Packing Co., the Supreme Court summarized the inquiries to be made when determining whether a statute is void under this clause. The Court stated:

37. Id. § 74(d).
38. Id.
39. Id.
40. Id. § 74(e). The 30-day period may be extended by order of the Commission for the convenience of the parties or for the protection of Pennsylvania offerees. Id.
41. Id. §§ 81(1)-(2), 82(a).
42. Id. § 81(1).
43. Id. § 81(2).
44. Id.
45. Id. § 82(a).
46. U.S. Const. art. VI, cl. 2.
The first inquiry is whether Congress, pursuant to its power to regulate commerce, . . . has prohibited state regulation of the particular aspects of commerce involved in this case. . . . [W]hen Congress has "unmistakably . . . ordained" . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. . . .

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. . . . The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." . . . This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.48

Section 28(a) of the Securities Exchange Act of 1934 (1934 Act)49 is the statutory counterpart to the supremacy clause, and is one of the few indications of congressional intent in this area. It provides:

Nothing in this chapter [which includes the 1934 Act and amendments thereto] 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.50

In 1917, the Supreme Court recognized a state's right under its police power to protect its citizens from abuse in securities transactions51 and upheld the constitutionality of the so-called "blue sky"

48. Id. at 525-26, quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 134 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (other citations omitted). There are three situations in which state statutes have been held to be preempted by federal legislation. See generally Note, supra note 10, at 517-25. First, state legislation is preempted when Congress clearly has manifested its intent to exclude states from a given area of regulation. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605, 611 (1926). Second, state regulation will be invalidated where congressional intent to preempt state regulation can be inferred. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 146-52. Finally, state regulation which conflicts with federal legislation or impedes the accomplishment of the congressional purposes in enacting the federal legislation will be preempted. See Hines v. Davidowitz, 312 U.S. at 67.
50. Id. § 78bb-(a) (1976) (emphasis added).
51. Hall v. Geiger-Jones Co., 242 U.S. 539 (1917). The Court observed that "[w]e have very lately decided a case upon the principle of the power of the State to prevent frauds and impo-
laws on the express ground that each operated only within the borders of the individual state. 52 When the 1934 Act was passed, 53 state securities statutes regulating the issuance and sale of securities had proliferated to the point where they existed in forty-seven states and Hawaii. 54 Enacted against this background, section 28(a) of the 1934 Act constituted both a recognition of the states' traditional role in the regulation of intrastate securities transactions and a prohibition against state regulation conflicting with the 1934 Act—all of this at a time when there was no federal or state regulation of cash tender offers. 55

In 1968, Congress adopted the Williams Act, 56 as an amendment to the 1934 Act, in response to the increased utilization of the interstate cash tender offer as a corporate acquisition technique. 57 The Williams Act was designed to enable investors confronted with a cash tender offer to make an informed decision about whether to tender their shares. 58 The Senate Report reflected concern about the then-existing "gap" in the disclosure requirements of the federal securities

52. Id. at 540; Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 559 (1917); Merrick v. Halsey & Co., 242 U.S. 568, 568 (1917). The Court in Geiger-Jones explained that [t]here is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of state legislation but it may imply permission of such legislation. In other words, the burden of the legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the national power. . . .

The provisions of the law, it will be observed, apply to dispositions of securities within the State and while information of those issued in other States and foreign countries is required to be filed . . . , they are only affected by the requirement of a license of one who deals in them within the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the State. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally.


54. See 1 L. LOSS, SECURITIES REGULATION 30 (2d ed. 1961).

55. See note 7 and accompanying text supra.

56. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976).


laws, but there is no mention in the Senate or House hearings on the Williams Act of the similar gap in state securities legislation. As previously noted, at the time the Williams Act was adopted, only Virginia had enacted a statute to regulate tender offers, and that law had become effective only a few months prior to the effective date of the Williams Act. It is not surprising, then, that the Williams Act contains no express preemption provision. However, since the Act was passed as an amendment to the 1934 Act, it falls within section 28(a) which makes clear that its integrity is protected against inconsistent state regulation.

In sum, both constitutional and statutory impediments exist to state tender offer regulations that are inconsistent with the federal policy for the regulation and administration of cash tender offers expressed in the Williams Act. As indicated below, the Pennsylvania Act appears to run afoul of the Federal Act and, thus, “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

A. The Pennsylvania Takeover Disclosure Law Upsets the Careful Balance Struck by Congress in the Williams Act Which Regulates Tender Offerors and Target Management Evenhandedly

The purpose of the Williams Act was to protect investors by requiring disclosure of information relevant to their decision to accept or decline a tender offer. Favoring a market approach, Congress intended that both the offeror and the incumbent management of a target company should have an opportunity to present their positions so that the investor can make an educated and independent judg-
Inherent in this scheme is the idea that there must be "neutrality among the contestants" in a tender offer situation. Recognizing that tender offers often benefit the investor, Congress rejected the original Senate bill introduced in 1965 which contained advance disclosure provisions, pre-effective filing requirements, and other requirements that served to arm target management against takeover bids. The "deliberate neutrality" of the later bill, from which such regulations had been excluded, was explained by Senator Harrison Williams:

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

The complete legislative history supports this analysis and presents a clear congressional commitment to fairness and neutrality.

Sections 13 and 14 of the 1934 Act, as amended by the Williams Act, include "disclosure requirements, substantive restrictions on tender offers, and a general antifraud provision. [These sections] also confer... broad rule-making authority upon the SEC." Section 14(d)(1) requires that anyone who makes a "tender offer" (a statutorily undefined term) which would result in his ownership of more than five percent of a class of equity securities registered under the 1934 Act must disclose specified information "at the time copies of the offer... are first published or sent or given to security holders." Other subsections of section 14(d), the principal provision of federal tender offer regulation, include: grace periods during which a shareholder may withdraw securities deposited pursuant to a tender...
offer;\textsuperscript{73} requirements that the tender offeror purchase shares tendered during the first ten days of the offer on a pro rata basis if more shares than the offeror specified have been tendered;\textsuperscript{74} and a requirement that any increase in the purchase price in a tender offer be paid to all tendering shareholders, including those who tendered in response to a lower price.\textsuperscript{75} As one commentator has remarked:

As a whole, . . . section 14(d) can be seen as responding to the situation prior to the passage of the Williams Act, when a conventional tender offer was capable of pressuring shareholders into tendering hastily, due to the combined effect of a premium price, a time limit, a specified number of shares to be bought, and a first-come-first-served purchase policy.\textsuperscript{76}

Significantly, the Williams Act does not require the offeror to make any filing or disclosure to either a government agency or the target company prior to the time the offeror makes the tender offer to the company's shareholders. Filing and disclosure must be carried out only at the time the tender offer is made.\textsuperscript{77} Thus, the Williams Act does not give incumbent management advance warning of an incipient tender offer.

In the Kidwell case, one of the grounds upon which the Fifth Circuit invalidated Idaho's Takeover Disclosure Statute was that, by requiring advance notice, the statute upset the neutral balance set by Congress in the Williams Act.\textsuperscript{78} The court explained:

There is no real dispute that the Idaho statute—like most of the state takeover laws—increases a target company's ability to defeat a tender offer. The Idaho law helps target companies primarily through provisions not found in the Williams Act that give them advance notice of a tender offer and the ability to delay the commencement of an offer, by means such as insisting on a hearing. Most observers of takeover battles agree that time is among the most effective weapons available to a company resisting a tender offer. The Idaho statute favors the target in other ways, as well.\textsuperscript{79}

Dismissing what was in "the minds of Idaho legislators" as irrelevant,\textsuperscript{80} the Fifth Circuit held that the dispositive factor was that

\textsuperscript{73} Id. § 78n(d)(5).

\textsuperscript{74} Id. § 78n(d)(6).

\textsuperscript{75} Id. § 78n(d)(7).


\textsuperscript{78} 577 F.2d at 1279-80.

\textsuperscript{79} Id. at 1278 (footnotes omitted).

\textsuperscript{80} Id. at 1279.
Idaho's legislature chose a "fiduciary approach" to protect investors rather than the "market approach" chosen by Congress. Observing that reliance upon the business judgment of corporate directors as a means of investor protection was an approach which Congress had considered and rejected, the court held that the Idaho statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Williams Act.

Like the Idaho statute invalidated in Kidwell, the Pennsylvania Takeover Disclosure Law is promanagement and requires disclosures not required by the Williams Act. The Pennsylvania Act assists incumbent management in resisting takeover attempts in several ways: 1) it requires the offeror to file a registration statement (and to send a copy to the target company) at least twenty days prior to making a takeover offer; 2) it permits the Commission summarily to delay the effective date of the offer if it determines that the registration statement is not complete; 3) it provides for an automatic delay in the effective date of a tender offer if the Commission schedules a hearing (either on its own initiative or at the request of the target company); 4) it enables incumbent management to make arrangements with friendly offerors which would be exempt from the requirements of the Act; and 5) it requires the "unfriendly" offeror to file a registration statement containing information concerning his own organization, operations, finances, properties, employee-relations history, litigation, business, and the like. All of these provisions serve to strengthen incumbent management's major strategy—delay. They have the clear effect of "tipping the balance of regulation...in favor of management." a situation that Congress was

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81. Id. The court characterized the fiduciary approach as one in which reliance is placed upon the business judgment of corporate directors who owe a fiduciary duty to their shareholders, rather than upon the business judgment of the shareholders themselves. Id. "Congress intended for the investor to evaluate a tender offer; Idaho asks the target company management to make that decision on behalf of the shareholders." Id. See Lynch & Steinberg, The Legitimacy of Defensive Tactics in Tender Offers, 64 CORNELL L.Q. 901, 911 (1979).
82. 577 F.2d at 1279.
83. Id.
84. Id. at 1280 (footnote omitted), quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
85. See PA. STAT. ANN. tit. 70, §§ 74-75 (Purdon Supp. 1979); text accompanying note 34 supra.
86. PA. STAT. ANN. tit. 70, § 74(a) (Purdon Supp. 1979).
87. Id. § 74(c).
88. Id. § 74(d).
89. Id. § 78(a).
90. Id. § 75(b).
specifically trying to avoid when it enacted the Williams Act. The Pennsylvania Takeover Disclosure Law "upsets the carefully balanced neutrality of the federal provisions by providing, contrary to the congressional scheme, substantial advantages to incumbent management's effort to defeat or delay a tender offer." 

The provisions requiring advance notice that permeate the Pennsylvania Takeover Disclosure Law, and the ability that those provisions give to target company management to delay the commencement of an offer by the mechanics of agency approval and pre-effective hearing procedures, confer overwhelming practical advantages on an unfriendly incumbent management. During the period of delay occasioned by the operation of the Pennsylvania Takeover Disclosure Law, target company management may choose to implement one or more of the following strategies: 1) repurchase its own securities; 2) induce friendly third parties to make open market purchases of the target company's securities; 3) announce dividend increases or stock splits; 4) issue additional shares of stock; 5) introduce possible antitrust considerations; 6) arrange a defensive merger; 7) enter into restrictive loan agreements; or 8) reincorporate in, or transfer assets to, a state having a restrictive takeover law for the protection of existing management. In addition, incumbent management of the target company can use the delay to further its own self-interest. It is not infrequently the case in negotiations between a target company and an offeror that incumbent management seeks job security or other emoluments in return for its recommendation of the offer. Such a recommendation creates a "friendly" tender offer and deprives the Pennsylvania Commission of jurisdiction.

Thus, it is evident that the Pennsylvania Act is biased against the tender offeror and in favor of target management in a manner that is inconsistent with the federal regulatory scheme. As such the Pennsylvania Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Williams Act and accordingly under the Supremacy Clause is unconstitutional.

93. See id.
95. See id. at 9; E. ARANOW & H. EINHORN, supra note 7, at 235, 242-68; BERLESTEIN, supra note 12, at 196-97; Lynch & Steinberg, supra note 81, at 902, 928-38.
96. See Pa. Stat. Ann. tit. 70, § 78(a) (Purdon Supp. 1979). If investor protection were really the primary concern of the Pennsylvania Takeover Disclosure Law, the Act would apply to all tender offers, not only to contested ones. As the accompanying text indicates, it may be more important to shareholders of a target company that full and fair disclosure be made in the case of a "friendly" tender offer than in the case of an "unfriendly" offer because in the former situation, deals may have been struck between management and the offeror of which the shareholders are unaware. See BERLESTEIN, supra note 12, at 224-27.
B. The Pervasive Federal Regulation of Interstate Cash Tender Offers Would Appear to Preempt the Pennsylvania Takeover Disclosure Law Even If It Were Not in Direct Conflict with the Williams Act

Federal law preempts a state statute whenever a scheme of federal regulation is so pervasive that no room has been left for state law to provide supplemental regulations. The 1934 Act, as amended by the Williams Act and as supplemented by the SEC's authority to promulgate rules and regulations, establishes a comprehensive legislative scheme for the regulation of virtually every aspect of securities transactions, including purchases and sales pursuant to cash tender offers. Pursuant to its delegated authority, the SEC has promulgated rules and regulations for the implementation of the Williams Act.

The Williams Act and the cases construing it, together with the rules and regulations promulgated by the SEC, constitute an extensive system of federal regulation of interstate cash tender offers. In view of the pervasive nature of this regulatory system, it would seem that any state law that goes beyond the federal regulatory scheme necessarily interferes with the federal regulation and is, therefore, invalid.


100. See notes 71-76 and accompanying text supra.

101. See, e.g., 17 C.F.R. § 240.13d-1 (1979) (describing the information to be furnished to the SEC by a tender offeror); 17 C.F.R. § 240.14d-1(a) (1979) (describing the information to be furnished to target company shareholders by the tender offeror); 17 C.F.R. § 240.14d-4 (1979) (describing the information to be filed with the SEC by a target company offering to buy its own shares or attempting to persuade its shareholders to either accept or reject a tender offer).


103. See note 101 and accompanying text supra.


105. Several commentators have concluded that the 1934 Act represents a sufficiently "pervasive" scheme of federal regulation so as to preempt state takeover acts. See, e.g., Langevoort, supra note 91, at 246-54; Moylan, State Regulation of Tender Offers, 58 MARQ. L. REV. 697, 699-700 (1975); Wilner & Landy, supra note 12, at 29-30; Note, Commerce Clause Limitations Upon State Regulation of Tender Offers, 47 S. CAL. L. REV. 1133, 1163-70 (1974) [hereinafter cited as Commerce Clause Limitations]. At least one commentator, however, has taken an opposite stance, maintaining that the Williams Act is a "fairly simple minimum disclosure statute" and is not a pervasive scheme of regulation of tender offers. Note, supra note 4, at 910-11. This
Analysis commences with Supreme Court decisions concerning
the preemption issue in regard to other federal regulatory schemes.
In City of Burbank v. Lockheed Air Terminal, Inc.,\textsuperscript{106} a municipal
airport curfew imposed to reduce local noise was held to be preem-
pted and, therefore, invalidated by a comprehensive system of federal
control of airport noise involving the Federal Aviation Administration
and the Environmental Protection Agency.\textsuperscript{107} The federal statute,
the Federal Aviation Act,\textsuperscript{108} did not by its terms preclude local en-
forcement of municipal ordinances against local airport noise;\textsuperscript{109}
evertheless, the Supreme Court found that "the pervasive nature of
the scheme of federal regulation of aircraft noise" compelled the con-
clusion that state and local actions were preempted.\textsuperscript{110}

Similarly, the supremacy clause has been held to forbid efforts
by a state to afford patent protection to that which Congress had
determined to maintain free from protection because the state efforts
"disturbed the careful balance" that Congress had drawn.\textsuperscript{111} Where
the federal government has reached a balance that satisfies "the needs
of the subject matter without disproportionate burden on the reg-
ulatees, the balance struck is not to be upset by the imposition of
higher local standards."\textsuperscript{112}

Since the pervasive nature of the federal regulatory system over
the national securities marketplace—including the regulation of
transactions involving interstate cash tender offers for securities al-

\textsuperscript{106} Id. at 633, 638.  
\textsuperscript{107} 411 U.S. 624 (1973).  
\textsuperscript{109} 411 U.S. at 633.  
\textsuperscript{110} Id. See Commerce Clause Limitations, supra note 105, at 1162-70. The author of Commerce
Clause Limitations relied upon the Burbank decision in concluding that the Williams Act
allows no room for supplemental state legislation. Id. But see Securities Law and the Constitu-
tion, supra note 10, at 519-20 n.65 (distinguishing the Federal Aviation Administration regulations
involved in Burbank from the Williams Act on the basis of both the comprehensiveness of
the statutory scheme and the lack of a public safety issue in the tender offer context).
\textsuperscript{111} Goldstein v. California, 412 U.S. 546, 569-70 (1973), quoting Sears, Roebuck & Co. v.
\textsuperscript{112} Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 171 (1963) (White, J.,
dissenting).
ready traded in the national securities markets—is the result of the balanced nature of its regulation\(^\text{113}\) rather than the sheer bulk of specific regulations, state takeover legislation must be deemed to be preempted.

\section*{C. The Dominant Federal Interest in the Uniform Regulation of Interstate Cash Tender Offers Preempts the Pennsylvania Takeover Disclosure Law}

Whenever federal law regulates a field in which the federal interest is clearly dominant over the interests of the states, the federal system necessarily precludes enforcement of state laws on the same subject.\(^\text{114}\) Over 100 years ago, the Supreme Court established that the federal commerce power embraces subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation, [and that] may justly be said to be of such a nature as to require exclusive legislation by Congress."\(^\text{115}\) More recently, this proposition provided a basis for the Court's decision in \textit{Burbank} which invalidated municipal regulation of air travel.\(^\text{116}\) The Court determined that a uniform system of federal regulation is required in order to fulfill the congressional objectives underlying the \textit{Federal Aviation Act}.\(^\text{117}\) Similarly, control of interstate tender offers would seem to require a uniform system of national regulation because nonuniform protection of incumbent management precludes the effective functioning of the national securities markets.\(^\text{118}\)

The need for a uniform system of regulation of tender offers under federal control is exemplified by a situation encountered last year by this author.\(^\text{119}\) The author represented a Massachusetts corporation having few, if any, contacts with Pennsylvania, which had

\begin{itemize}
  \item \textbf{113.} See notes 65-70 and accompanying text \textit{supra}.
  \item \textbf{116.} See 441 U.S. at 633; notes 106-10 and accompanying text \textit{supra}.
  \item \textbf{117.} 411 U.S. at 639.
  \item \textbf{118.} \textit{See Corporate Takeovers: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs, 94th Cong., 2d Sess.} 101-04 (1976) (statement of Richard A. Debs, first vice-president and chief administrative officer of the Federal Reserve Bank of New York). \textit{See also id.} at 91-94 (statement of Phillip A. Loomis, Jr., SEC Commissioner). Commissioner Loomis stated that "tender offers are frequently a matter of national concern and the issues they present call for resolution on a national basis."
  \item \textbf{119.} Litigation incident to the facts discussed in the text was settled prior to the filing of pleadings responsive to the target company's complaints. The settlement consisted of a repurchase by the target company of its shares from the offeror (the author's client). Accordingly, none of the issues about to be discussed was ever presented for adjudication.
\end{itemize}
acquired a large number of shares of the common stock of a Pennsylvania corporation whose principal place of business was in Florida. Standing as obstacles to a takeover attempt by the author’s client were the Pennsylvania Takeover Disclosure Law, which purports to apply to all corporations incorporated in Pennsylvania,\textsuperscript{120} and the now-repealed Florida Investor Protection Act, which purported to encompass, \textit{inter alia}, all corporations having their principal place of business in Florida.\textsuperscript{121} Since the target company was incorporated in Pennsylvania and had its principal place of business in Florida, the target company’s management claimed, in suits to enjoin the takeover, that the purported tender offer was subject to regulation under \textit{both} takeover statutes.\textsuperscript{122}


\textsuperscript{122} It should be noted that neither the Pennsylvania Takeover Disclosure Law nor the now-repealed Florida Investor Protection Act contained any provision authorizing the target company to bring an action to enjoin takeover attempts allegedly in violation of the state statute. Cf. UV Indus., Inc. v. Posner, 466 F. Supp. 1251, 1256 (D. Me. 1979) (Maine Takeover Bid Disclosure Law expressly grants a target company the right to bring an action to enjoin violations of that Act).

The Pennsylvania Act spells out various causes of action and specifically delineates the persons who may bring those suits. See Pa. Stat. Ann. tit. 70, §§ 81-83 (Purdon Supp. 1979). Thus, § 82 of the Pennsylvania Act empowers “the Attorney General . . . [to] institute the appropriate criminal proceedings.” \textit{Id.} § 82. Section 83 grants a cause of action (for rescission or damages) to any person who sells a security to an offeror who purchases the security in connection with a takeover offer in violation of the Act. \textit{Id.} § 83. In addition, § 81 empowers the Pennsylvania Securities Commission to bring an action to enjoin acts or practices in violation of the statute. \textit{Id.} § 82.

Significantly, however, there is nothing in the Pennsylvania Act which purports to grant a cause of action (either for damages or for injunctive relief) to the target company itself. It is well-settled that a statute does not grant a private cause of action to every individual who claims to have been damaged by a violation thereof; a private cause of action arises only when the statute provides for it, either expressly or by necessary implication. See, e.g., Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 18 (1979); Touche Ross & Co. v. Redington, 442 U.S. 460 (1979); Cort v. Ash, 422 U.S. 66, 78 (1975). In \textit{Touche Ross}, for example, the Supreme Court held that there is no implied right of action for damages under § 17(a) of the 1934 Act. 442 U.S. at 576. The Court based its decision on “the plain language” of § 17(a) and on the silence of the legislative history with regard to the existence of a private cause of action. \textit{Id.} at 571-72. As additional justification for its holding, the Court noted that “§ 17(a) is flanked by provisions of the 1934 Act that explicitly grant private causes of action. . . . [indicating that] when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly.” \textit{Id.} (citations omitted).

As stated above, the Pennsylvania Takeover Disclosure Law grants a cause of action for injunctive relief to the state regulatory commission, and a private cause of action to aggrieved shareholders. Pa. Stat. Ann. tit. 70, §§ 81, 83 (Purdon Supp. 1979). Applying the reasoning of \textit{Touche Ross}, these two provisions indicate that when the Pennsylvania Legislature desired to grant a remedy, it did so expressly. Thus, considering the silence of the Act, it would seem that the Pennsylvania legislature did not intend to grant a private cause of action to a target com-
Although similar in many ways, the Pennsylvania and Florida takeover disclosure laws differed in several significant respects. Under section 77(a) of the Pennsylvania Act, an offeree may withdraw securities deposited or tendered pursuant to a takeover offer at any time within seven days from the date the offer becomes effective. However, under section 3(3) of the Florida Investor Protection Act, the offeree could withdraw securities at any time within fifteen days after the date of the first invitation to deposit securities. Thus, since both statutes had extraterritorial effect, the careful offeree was required to accept the larger withdrawal period provided by the Florida statute.

A similar conflict between the statutes existed with respect to the manner in which they dealt with the tender of more shares than the offeree sought. Under section 77(b) of the Pennsylvania Takeover Disclosure Law, if an offeree makes a takeover offer for less than all of the outstanding securities of a class and the number of shares deposited or tendered within ten days after the offer has become effective is greater than the number the offeree has offered to accept, the securities tendered within the ten-day period must be accepted pro rata. While section 3(4) of the former Florida Act contained a similar provision, the Florida statute did not include a ten-day limitation. Thus, under Florida law, the offeree had to accept pro rata all securities tendered (regardless of when they were tendered), whereas under the Pennsylvania Act the offeree need accept pro rata only those securities tendered within the ten-day period.

An example should highlight the problems inherent in this statutory divergence. Suppose an offeree made a tender offer for 1000...
shares of stock of a Pennsylvania corporation with its principal place of business in Florida and received tenders within the ten-day period from twenty shareholders, each of whom tendered 100 shares (for a total of 2000), and received tenders after the ten-day period from another ten shareholders, each of whom also tendered 100 shares (for an additional total of 1000 or a grand total of 3000 tendered shares). Under the Pennsylvania statute, the offeror would be required to accept 50 of the shares tendered by each of the twenty shareholders who tendered within the ten-day period, to return 50 shares to each such shareholder, and to return all 100 shares tendered by each of the ten shareholders who tendered after the ten-day period had expired. Under the Florida statute, however, the offeror would have been required to accept 33½ of the shares tendered by each of the thirty shareholders (regardless of when the shares were tendered), and to return 66⅔ shares to each of the thirty shareholders. If the offeror had complied with the Pennsylvania statute, he would have violated the Florida statute, and if he had complied with the Florida statute he would have violated the Pennsylvania statute.\textsuperscript{131} No offeror should be faced with the Hobson's choice of having to violate one statute in order to comply with another. Such an imposition of inconsistent duties by overlapping state laws clearly indicates why this area of law is one which is so national in character that the federal government has a strong interest in regulating it pursuant to a uniform, exclusively federal, scheme.\textsuperscript{132} The Williams Act is this uniform, federal scheme and, as such, it preempts state takeover statutes like the Pennsylvania Act. In light of the foregoing, it would appear very likely that the Pennsylvania Takeover Disclosure Law will be held invalid under the supremacy clause when the issue is presented for adjudication in an appropriate forum.

\section*{IV. The Commerce Clause Challenge}

The United States Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States."\textsuperscript{133} As the Fifth Circuit noted in \textit{Kidwell}, this affirmative grant of power also "imposes

\textsuperscript{131} Cf. Wilner & Landy, \textit{supra} note 12, at 31. Wilner and Landy note that the practical effect of the variations between the proration provisions of state statutes and that of the Williams Act "is to pose such burdens and uncertainties as to threaten the validity of any offer." \textit{Id.} This analysis is equally applicable to the effect of the conflicting state provisions discussed here.

\textsuperscript{132} See note 48 \textit{supra}.

\textsuperscript{133} U.S. CONST. art. I, § 8, cl. 3.
limits upon state power to regulate commerce over which Congress has primary responsibility." 134

Thus, states are prohibited from enacting legislation that unduly burdens interstate commerce. The proper test to determine the validity of a state statute affecting interstate commerce was set forth by the Supreme Court in Pike v. Bruce Church, Inc. 135 The Pike Court stated that "[w]here 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." 136 The test, therefore, requires a legitimate local purpose and no more than incidental burdens on interstate commerce. Only when both of these requirements are met are we allowed to engage in a balancing of the nature and importance of the local interests involved against the correlative burdens on interstate commerce. 137

A. The Pennsylvania Takeover Disclosure Law

Does Not Effectuate a Legitimate Local Public Interest

The Supreme Court has observed that the commerce clause is more than a grant of congressional power; 138 it also provides constitutional support for the creation and maintenance of interstate markets where goods and services can be exchanged freely, unimpeded by state borders or other restraints which might be imposed by parochial state or local interests. 139 Thus, the commerce clause by its own

134. 577 F.2d at 1281.
137. 397 U.S. at 142. The Court stated:
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.
Id.
force has created a federal common market—an area of free trade among the several states.\textsuperscript{140}

The area of free trade created by the commerce clause is, by definition, “free from interference by the States.”\textsuperscript{141} The commerce clause erects a constitutional barrier to state regulation of phases of commerce that are in their nature intensely national—at least where that regulation substantially impedes the “free flow of commerce from state to state.”\textsuperscript{142} In addition, a state’s regulation is of doubtful validity under the commerce clause where it necessarily extends far beyond the state’s boundaries.\textsuperscript{143} Since interstate markets for securities are within the area of free trade created by the commerce clause,\textsuperscript{144} state regulation thereof is violative of this constitutional prohibition.

Despite the Supreme Court’s admonition that no state may “place itself in a position of economic isolation,”\textsuperscript{145} the Pennsylvania Takeover Disclosure Law erects a protective economic barrier around local target corporations by requiring advance notice of proposed tender offers and by providing incumbent management with the means to delay tender offers.\textsuperscript{146} Under section 77(e) of the Pennsylvania Takeover Disclosure Law,\textsuperscript{147} the offeror is prohibited from exercising any control, directly or indirectly, over any assets of the target company unless the takeover is made in compliance with the Act.\textsuperscript{148} These tactical advantages given to incumbent management, together with a prohibition against relocation of target company assets, clearly constitute an attempt to regulate interstate commerce in order to protect local industry and the local economy. Such a burden “has been declared to be virtually per se illegal.”\textsuperscript{149}


\textsuperscript{141} Freeman v. Hewit, 329 U.S. 249, 252 (1946).


\textsuperscript{143} See id. at 767 n.2. The Southern Pacific Court noted its fear that “to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.” Id.

\textsuperscript{144} See, e.g., Boston Stock Exch. v. State Tax Comm’n, 429 U.S. 318 (1977) (New York statute, imposing higher transfer tax on transfers of securities resulting from out-of-state sales than on transfers resulting from intrastate sales, held unconstitutional as an undue burden on interstate commerce);


\textsuperscript{146} See PA. STAT. ANN. tit. 70, § 74 (Purdon Supp. 1979); notes 31-40 and accompanying text supra.

\textsuperscript{147} Id. at 767 n.2.

\textsuperscript{148} Id.

\textsuperscript{149} See Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970). In Pike, the Court stated: [T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed
Whether a state statute effectuates a legitimate local public interest is a question based upon the substantive and practical effects of the statute, rather than upon the legislature’s declaration of purpose or the motive that compelled the statute’s enactment.\textsuperscript{150} Notwithstanding the legislative pronouncement that the primary purpose of the Pennsylvania Takeover Disclosure Law is the protection of Pennsylvania corporations, shareholders, and employees,\textsuperscript{151} the statute in fact promotes economic protectionism without any corresponding benefit to target company shareholders residing in Pennsylvania. This is evident from the provision of the Act exempting any offer that is recommended to the shareholders by target company management, despite the fact that disclosure under these circumstances might still benefit the shareholders.\textsuperscript{152} Moreover, the Act’s provisions apply regardless of the presence or absence of any Pennsylvania shareholder and regardless of the presence or absence of a target company’s place of business in Pennsylvania, since mere incorporation in the state is sufficient to bring the Act into play.\textsuperscript{153} Consequently, the Pennsylvania Securities Commission might be in the position of having to judge whether or not a tender offer should proceed even though no stockholder is a resident of the Commonwealth of Pennsylvania and

\textsuperscript{150} See also Toomer v. Witsell, 334 U.S. 385, 403-06 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 13 (1928); Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1282 (5th Cir. 1978), rev’d on other grounds sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979). In Kidwell, the Fifth Circuit offered the following analysis regarding the statutory purpose of protecting local business:

It is true that the Idaho law helps incumbent management. One purpose of this favoritism may be to prevent the removal of local business to other states. This purpose would be unacceptable. Indeed, statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere impose a burden on commerce that is per se illegal. . . . Idaho’s law does not require any business to remain in Idaho; at worst, it hinders relocation. Nevertheless, the purpose of preserving local industry cannot support the legislation. Nor can that effect be ignored.

\textsuperscript{151} PA. STAT. ANN. tit. 70, § 72 (Purdon Supp. 1979).

\textsuperscript{152} PA. STAT. ANN. tit. 70, § 78(a) (Purdon Supp. 1979). This section exempts from the requirements of § 74 “[a]n offer as to which the target company, acting through its board of directors, recommends acceptance to its shareholders . . . .” \textit{Id.}

\textsuperscript{153} See notes 17 & 120 and accompanying text \textit{supra}; note 33 \textit{supra}.
even though the target company conducts little, if any, activities in Pennsylvania.

Furthermore, the promanagement features of the Pennsylvania Act actually may have a negative effect on the interests of resident shareholders of the target company by delaying, and perhaps eventually defeating, a tender offer made at a premium over the existing market price. Certainly, a primary interest of an investor is to sell shares of the target company at the best possible price.154

In short, as the court in Dart Industries, Inc. v. Conrad155 concluded with respect to the Delaware Act, the Pennsylvania statute "fails . . . to serve any local interest that would justify its impact on interstate commerce."156

B. The Pennsylvania Takeover Disclosure Law
Burdens Interstate Commerce

One direct effect of the Pennsylvania Takeover Disclosure Law is that it deters the making of tender offers. As the Fifth Circuit noted in Kidwell, "state statutes such as [these] have a general effect of discouraging tender offers."157

The Pennsylvania Takeover Disclosure Law has an inherent extraterritorial effect since it applies to all takeover offers to acquire shares of Pennsylvania corporations, regardless of where the corporation’s business, assets, employees, and shareholders are located, and regardless of where the tender offer itself is actually made.158 This extraterritorial reach of the Pennsylvania Takeover Disclosure Law necessarily has an impact on interstate commerce159 for it will regu-

154. See Langevoort, supra note 91, at 239. Federal courts have been mindful of the congressional intent to protect the rights of shareholders. See Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842, 845 (2d Cir. 1970). The Butler court stated that "[w]hile courts should rigorously enforce the policy of honesty and fair dealing prescribed by federal securities legislation, they must guard against the risk that, at the instance of incumbent management, they may be frustrating informed stockholders from doing what the latter want."

156. Id. at 13-14.
157. 577 F.2d at 1283. See also Dart Indus., Inc. v. Conrad, 462 F. Supp. at 10. Langevoort, supra note 91, at 238. Langevoort points out that [p]otential offerors facing restrictive laws are discouraged from proceeding with a takeover bid since losing can be extremely costly in terms of time, effort, and money. Furthermore, the statutes also invite burdensome suits against the offeror. Thus, one can reasonably predict that state regulation will discourage offerors from engaging in takeover attempts.

158. See notes 17 & 120 and accompanying text supra; note 33 supra. See also Wilner & Landy, supra note 12, at 20-21.
159. See Wilner & Landy, supra note 12, at 20-21.
late disclosures that the offeror makes in other states and will delay
the consummation of those securities transactions until the require-
mements of the Pennsylvania Act are met. Through the extraterritorial
application of the Pennsylvania Act, the Pennsylvania legislature has,
in practical effect, legislated for the entire nation.160

Still another effect on interstate commerce is created by the in-
consistency among state takeover statutes. Neither the time periods
for administrative clearance nor the definitions of the jurisdictional
bases are consistent. For instance, a tender offer for shares of a Dela-
ware corporation, having its principal place of business in Ohio and
substantial assets in Indiana, might be subject to the takeover statutes
of all three states.161 The hearing requirements of the Ohio162 and
Indiana163 statutes might collide with the Delaware requirement that
the offer be made not less than twenty nor more than sixty days after
delivery of a statement of intent to make the offer.164 The direct
conflict between the Pennsylvania Act and the now-repealed Florida
takeover disclosure act in connection with the requirement of pro rata
acceptance of shares tendered in excess of the amount sought has
already been noted.165

Conflicts like these among the state statutes cannot be cured by
deference or cooperation among the various state administrative
agencies.166 The lack of uniformity among the statutes puts the
prospective offeror at continual risk regardless of his course of action.
A potential player who can never be sure whether he is complying
with the rules may decide that the game is not worth playing at all.
The burden on interstate commerce is clear.

mud guards for trucks and trailers which restricted a vehicle's movement from one state to
another placed unconstitutional burden on interstate commerce); Southern Pac. Co. v. Arizona,
325 U.S. 761, 773-75 (1945) (state regulation of train lengths which had the practical effect of
regulating length of out-of-state trains imposed unconstitutional burden on interstate com-
merce).

161. ABA Section of Corporation, Banking and Business Law, Subcomm. on Proxy Solicita-
tions and Tender Offers, Federal Regulation of Securities Committee, Report: State Takeover
and the Williams Act, 32 BUS. LAW. 187, 193 (1976). For the takeover or tender offer statutes
of the states mentioned in the text, see DEL. CODE ANN. tit. 8, § 203 (Supp. 1979); IND. CODE
1979).


165. See notes 119-32 and accompanying text supra.

166. See, e.g., State Dental Council and Examining Bd. v. Pollock, 457 Pa. 264, 269-71, 318
with multiple statutes will not be an impossibility because it can be assumed that state admin-
istrators will cooperate with each other and with the offeror. The short answer to this contention
is that one's constitutional rights should not be dependent on the whims of public officials.
C. The Burdens Imposed on Interstate Commerce By the Pennsylvania Takeover Disclosure Law Are Excessive in Relation to Any Local Benefits

Even if a state statute advances a legitimate state interest, it nevertheless violates the commerce clause if it burdens interstate commerce excessively in relation to the local benefit. The balancing of the national interest in the free flow of commerce against a legitimate state interest requires an analysis of the nature and extent of the burdens imposed on interstate commerce by the state statute. As the Fifth Circuit stated in Kidwell: "[T]he final step under Pike is to determine whether the legitimate local purposes served by [the] takeover statute justify the law's substantial impact on interstate commerce.”

As was previously indicated, there can be no doubt that trading in securities involves interstate commerce. While it is true that traditional state blue sky laws have been upheld in the face of commerce clause challenges, the Pennsylvania Takeover Disclosure Law differs from those laws in that the Pennsylvania Act is not limited to intrastate transactions and, therefore, is extraterritorial in effect. In Baldwin v. G.A.F. Seelig, the United States Supreme Court invalidated a New York statute with a similar extraterritorial reach. The statute in that case prohibited the sale of imported milk in New York unless the price paid to the producer in the state of origin was at least equal to the minimum price prescribed in New

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168. See note 144 and accompanying text supra.
170. See notes 17 & 120 and accompanying text supra; note 33 supra.
171. 294 U.S. 511 (1935).
172. 294 U.S. at 527. For examples of recent cases holding state statutes or regulations having extraterritorial reach invalid under the commerce clause because the burdens they imposed on interstate commerce were excessive in relation to the local benefits derived, see Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (striking an Oklahoma statute which did not limit the number of minnows that could be brought into the state or the disposition of minnows within the state but prohibited transporting any significant number of minnows out of the state for sale); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (striking a New Jersey statute which forbade the importation and dumping of most waste originating outside the state); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441-42 (1978) (striking Wisconsin regulations which limited the length of trucks permitted on the state's highways); Hunt v. Washington State Apple Ad. Comm'n, 432 U.S. 333, 350 (1977) (striking a North Carolina statute which prohibited Washington apple growers and dealers from displaying Washington apple grades on closed containers shipped into the state).
York.\textsuperscript{174} Noting that New York could not “project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there,”\textsuperscript{175} the Court held that indirect regulation by one state of the price to be paid in another state violated the commerce clause.\textsuperscript{176}

The Pennsylvania Takeover Disclosure Law asserts even greater control over conduct outside of Pennsylvania than did the statute in \textit{Baldwin} because the Pennsylvania Act can be used to prohibit an interstate cash tender offer in another state, even though the other state may have an equal or greater contact with the target company but may have chosen not to enact any takeover legislation or to enact takeover legislation of a less restrictive nature.\textsuperscript{177} Thus, Pennsylvania seeks to impose its legislative judgment upon other states and upon shareholders residing in those states. This direct burden on interstate commerce is hardly outweighed by the minimal protection that the Pennsylvania Act gives to any existing Pennsylvania shareholders. As previously noted, any advantage to Pennsylvania shareholders afforded by the Act may be illusory.\textsuperscript{178}

The Fifth Circuit’s analysis of the Idaho takeover statute in \textit{Kidwell} is equally applicable to the Pennsylvania Act. While recognizing the state’s interest in protecting investors, the \textit{Kidwell} court found that “the strength of this interest is substantially diluted because [the state] has little reason to protect the large majority of the shareholders affected by the takeover act.”\textsuperscript{179} In addition, the \textit{Kidwell} court maintained that the alleged benefits to investors were uncertain,\textsuperscript{180} and that the shareholders may, in fact, be harmed by the delay that the statute imposes if, during the delay, the offeror reduces or abandons the offer.\textsuperscript{181}

The \textit{Kidwell} court also recognized a state’s interest in “encouraging civic responsibility by the management of local corporations.”\textsuperscript{182} but expressed doubt as to whether such a purpose actually was advanced by the Idaho takeover statute in light of the law’s uniform

\begin{footnotesize}
\begin{enumerate}
\item[174.] 294 U.S. at 519.
\item[175.] Id. at 521.
\item[176.] Id. at 524. The Court stated that “[o]ne state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy.” \textit{Id.}
\item[177.] \textit{See} note 153 and accompanying text \textit{supra}.
\item[178.] \textit{See} 577 F.2d at 1285-86; notes 152 & 154 and accompanying text \textit{supra}.
\item[179.] 577 F.2d at 1285.
\item[180.] Id.
\item[181.] Id.
\item[182.] Id. at 1286.
\end{enumerate}
\end{footnotesize}
applicability to all offerors and all incumbent managers.\textsuperscript{183} Even assuming \textit{arguendo} that the additional disclosure would be helpful to shareholders in determining whether a tender offeror is a responsible citizen, the Fifth Circuit noted that this "information would be of no help if it is never disclosed because the burdensome state requirements discourage a responsible offeror from ever making an offer for an Idaho corporation."\textsuperscript{184} The \textit{Kidwell} court suggested that the state's interest in responsible corporate management could be better advanced by legislation more appropriate for that purpose.\textsuperscript{185}

Finally, the \textit{Kidwell} court balanced the state's interest against the extensive impact of the statute on interstate commerce.\textsuperscript{186} Concluding that the "burdens [imposed on interstate commerce] are disproportionate to the legitimate benefits the Idaho takeover law provides," the court held that the Idaho takeover law was invalid under the commerce clause.\textsuperscript{187}

The entire \textit{Kidwell} analysis is applicable to the Pennsylvania Takeover Disclosure Law. Like the Idaho statute, the Pennsylvania Act unduly burdens interstate commerce without providing corresponding legitimate benefits to the shareholders domiciled in the Commonwealth. To borrow the language of the \textit{Dart Industries} court: "In view of the minimal legitimate interests of [the state] here and the substantial burden imposed on interstate commerce, [the takeover disclosure act] cannot be sustained under the Commerce Clause. It is, accordingly, invalid and unenforceable . . . ."\textsuperscript{188}

\textsuperscript{183} Id. The \textit{Kidwell} court remarked:
Surely it cannot be true that all incumbent managers are model corporate citizens or that all tender offerors are vandals. The record certainly contains no support for such a conclusion. Yet, the Idaho takeover statute imposes the same handicaps on all offerors and the same advantages on all incumbent managers.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} Id. at 1286. See notes 135-37 and accompanying text supra.

\textsuperscript{187} 577 F.2d at 1286. Under the balancing test announced in \textit{Pike v. Bruce Church, Inc.}, see notes 135-37 and accompanying text supra, the Idaho statute would have been upheld had it promoted a legitimate local interest and only "incidentally" burdened interstate commerce. See 397 U.S. at 142. However, in view of the fact that the Idaho statute "halted over 31 million dollars of interstate commerce," 577 F.2d at 1286, it would appear that the statute was invalid without having to balance the local interest against the burden on interstate commerce.

\textsuperscript{188} 462 F. Supp. at 14. The view that state takeover disclosure statutes are invalid under the commerce clause has been generally supported in scholarly commentary. See, e.g., Langevoort, supra note 91, at 242-46; Maylan, supra note 106, at 700-02; Wilner & Landy, supra note 12, at 15-23; \textit{Commerce Clause Limitations}, supra note 105, at 1152-62.
V. Conclusion

In adopting the Williams Act, Congress struck a careful balance in order to regulate tender offerors and target management evenhandedly. This balance is upset by the Pennsylvania Takeover Disclosure Law which, in effect if not in actual purpose, gives target management significant advantages over the offeror. The supremacy clause of the Constitution and section 28(a) of the Securities Exchange Act of 1934 prohibit this kind of interference with the congressionally declared mandate.

Moreover, the Pennsylvania Takeover Disclosure Law imposes an undue burden on interstate commerce that cannot stand in light of the principles that have evolved under the commerce clause. The Pennsylvania Takeover Disclosure Law does not effectuate a legitimate local public interest and, even if it did, the burdens on interstate commerce that the Act imposes are simply too great for the statute to be upheld.

189. See notes 64-84 and accompanying text supra.
190. See notes 85-97 and accompanying text supra.
191. See generally notes 46-132 and accompanying text supra.
192. See generally notes 133-88 and accompanying text supra.
193. See notes 138-88 and accompanying text supra.