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The Vitality of the Ohio Laws Designed to Encourage Negotiated Takeovers

Thomas E. Geyer
Capital University

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THE VITALITY OF THE OHIO LAWS DESIGNED TO ENCOURAGE NEGOTIATED TAKEOVERS

*Thomas E. Geyer**

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that . . . state law will govern the internal affairs of the corporation.[1]

> It is thus an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.[2]

I. INTRODUCTION

Nothing impacts the internal affairs of a corporation more than a change in control transaction, or takeover. And a view of the American business landscape reveals that state law sets out provisions governing takeover transactions. In other words, these provisions are contained in the bundle of rights that the investor acquires when the investor commits funds to a corporation. The investor becomes a shareholder and expects this bundle of rights to provide for the orderly conduct of corporate affairs.[3]

However, a takeover disrupts the orderly conduct of corporate affairs. Fortunately, when a takeover proceeds on a negotiated basis, disruptions are minimized because there is an organized plan for changing control. The parties to such a negotiated transaction typically view the pertinent state law provisions as mere formalities to the consummation of the deal. However, when a takeover proceeds on a non-negotiated, or hostile basis, the change in control is disruptive and contentious. The entity pursuing the takeover, the offeror, or bidder, typically assails certain pertinent state law

* Commissioner, Ohio Division of Securities. Adjunct Professor, Capital University Law School. B.B.A., University of Notre Dame, 1987; J.D., with honors, The Ohio State University College of Law, 1990. For their invaluable insights and comments, the author is grateful to: his wife, Catherine Geyer; Professor Howard Friedman; Professor Morgan Shipman; Leigh B. Trevor; John W. Edwards II; and Michael Miglets. For their able assistance, the author is grateful to Donna Miglets and Mary Keller. Some material in this article appeared in articles written by the author that were published in OHIO SECURITIES BULLETIN 96:3, OHIO SECURITIES BULLETIN 96:4, and OHIO SECURITIES BULLETIN 97:2.

1 Cort v. Ash, 422 U.S. 66, 84 (1975).

2 CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 91 (1987).

3 The United States Supreme Court has expressly recognized the "need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation." First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983).

provisions, designed to provide for the orderly change in control, as unconstitutional.

The state laws that come under attack during a hostile takeover are designed to encourage that which the offeror seeks to avoid: negotiating the change in control.[4] There are many reasons why an offeror may pursue a non-negotiated takeover: for example, the target company may not be amenable to a takeover; negotiations may have commenced but broken down; or the offeror's plans for the target company may not be palatable. In addition, much legal commentary has been devoted to the economic justifications of a hostile takeover,[5] and the theory of reallocation of "corporate assets into the hands of management who can use them most effectively."[6]

However, recent anecdotal evidence casts doubt on these purported economic synergies. For example, in December 1990, AT&T commenced a hostile takeover bid for Dayton-based NCR. AT&T eventually paid $7.5 billion to complete the takeover. Just over six years later, in January 1997, AT&T spun-off NCR. At the time of the spin-off, NCR had a market capitalization of $3.2 billion, representing a $4.3 billion, or 57%, decline in enterprise value.[7]

Further, the hostile takeover, normally pursued through a tender offer for the shares of the target company, subjects the shareholders of the target company to untoward pressures. In response to the increasing number of hostile tender offers in the 1960s, Congress passed the Williams Act[8] in 1968, which puts disclosure standards in place that attempt to put the

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4 It is important to keep in mind that the state laws which govern takeover transactions apply to "friendly" as well as "hostile" takeovers. *See, e.g.*, the Ohio Control Share Acquisition Act, which applies to "any control share acquisition." OHIO REV. CODE ANN. § 1701.831(A) (Baldwin 1993). *See also* the Ohio Control Bid Statute, which applies to every "control bid for any securities of a subject company . . . pursuant to a tender offer or request or invitation for tenders." OHIO REV. CODE ANN. § 1707.041(A)(1) (Baldwin 1993). In other words, the statutes are facially neutral. Typically, the statutes simply require that certain disclosures be made and that proposed transactions be approved by the shareholders or directors of the target company. *See, e.g.*, the Ohio Control Bid Statute, which requires disclosure of "the material terms of the proposed offer" and other specified information. OHIO REV. CODE ANN. § 1707.041(A)(1). *See also* the Ohio Control Acquisition Act, which requires specific shareholder approval. OHIO REV. CODE ANN. § 1701.831(E)(1). In a friendly, or negotiated takeover, compliance with these statutes is straightforward. However, in a hostile takeover, compliance is more challenging and therefore the statutes are alleged to be unconstitutional.

5 *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Michael Bradley et al., *Synergistic Gains from Corporate Acquisitions and their Division Between the Stockholders of Target and Acquiring Firms*, 21 J. FIN. ECON. 3 (1988).

6 *CTS Corp.*, 481 U.S. at 92.

7 Leigh B. Trevor. Remarks to the American Society of Corporate Secretaries (Sept. 20, 1997).

8 Securities and Exchange Act of 1934, §§ 13(d)-(e), 14(d)-(f), 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1997).

investor on equal footing with the takeover bidder, thereby protecting the investor.[9] While the Williams Act did put some disclosure standards in place,[10] the legislation nonetheless permits the tender offer to be completed in the relatively short time frame of twenty business days.[11]

The tender offer, through the acquisition of large blocks of voting shares, fundamentally impacts the internal affairs of a corporation. In addition, tender offers are "coercive in the sense that shareholders are normally concerned that a majority of their fellow shareholders will tender their shares, leaving them in a minority position with one controlling shareholder."[12] Further, the opportunity for reasoned decision-making is "hindered by the short time periods in which tender offers can be consummated. . . ."[13] Consequently, it is in the public interest for state law to provide shareholders the opportunity to express their views on changes in control effected by tender offers, just as shareholders have the franchise with respect to changes in control effected by other corporate transactions.[14] However, in the federal system, of course, the state laws must not conflict with the Constitution or the applicable federal laws.

Professor Morgan Shipman has pointed out that "Ohio has always led the way in reasonable state regulation of takeovers."[15] The point of this article is to explore the Ohio experience in navigating between the Scylla

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[9] Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 30 (1975).

[10] *See, e.g.*, Securities Exchange Act of 1934 § 14(d)(1), 15 U.S.C. § 78n(d)(1).

[11] 17 C.F.R. § 240.14e-(1)(a) (1997). *See infra* note 173 and accompanying text. One commentator has stated: "It is a profound source of national embarrassment for America to tolerate a legal system under which it takes a century to build, say, an NCR, but only . . . 20 business days to tear it apart." Trevor, *supra* note 7.

[12] OHIO REV. CODE ANN. § 1701.832(A)(3) (Baldwin 1993). Often, although shareholders may perceive an offer to be contrary to their long-term goals, they may nonetheless tender because of concern that they will be left in an unenviable minority shareholding position. *See infra* note 65 and accompanying text. Ohio law provides an important protection to shareholders faced with this dilemma. *Id.*

[13] *See infra* note 65 and accompanying text; *see also supra* note 11 and accompanying text.

[14] *See* OHIO REV. CODE ANN. § 1701.831(A)(4).

[15] Morgan Shipman, *The Case for Reasonable State Regulation of Corporate Takeovers: Some Observations Concerning the Ohio Experience*, 57 U. CIN. L. REV. 507, 507 (1988). In fact, in 1969 Ohio became the second state to enact a "first generation" takeover statute. *See infra* note 41 and text accompanying notes 154-55. In 1982, Ohio became the first state to enact a "second generation" takeover statute. *See infra* note 55 and accompanying text. Ohio enacted a "third generation" takeover statute in 1990. *See infra* notes 193-95 and accompanying text.

First generation statutes were characterized by prohibitions on acquisition of firms with substantial assets in a state unless a public official from that state approved the acquisition. *See generally* Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 497 (7th Cir. 1989). Second generation statutes are characterized by the elimination of governmental veto power and the establishment of disclosure standards. *Id.* Third generation statutes are characterized by the placing of conditions on certain post-acquisition transactions. *Id.*

of states' rights and the Charybdis of federal preemption in the sea of regulating corporate takeovers.[16] The former presents the safer course. Specifically, this article will describe the vitality of three remarkable Ohio statutory provisions that are designed to encourage negotiated changes in control. Included in the discussion is a review of the legal challenges, pertinent case law and recent statutory amendments that have bolstered the constitutionality of the provisions.

Before discussing the particular Ohio statutes, this article will first review the sovereignty of state corporate law and the authority of states to regulate takeover transactions.[17] It is the state's authority in creating the bundle of rights that accompany share ownership which underlies these Ohio laws. Next, this article will turn to a discussion of the Ohio laws: Ohio Revised Code ("R.C.") sections 1701.831 and 1701.832, the Ohio Control Share Acquisition Act ("Control Share Acquisition Act");[18] R.C. sections 1707.041 and 1707.042, the Ohio Control Bid Statute ("Control Bid Statute");[19] and R.C. Chapter 1704, the Ohio Business Combination Statute ("Business Combination Statute", also known as the merger moratorium statute.[20] Finally, this article will describe how these provisions work together to form a powerful incentive to negotiate the change in control of companies that are incorporated in or have significant ties to Ohio.[21]

II. THE SOVEREIGNTY OF STATE CORPORATE LAW

As the excerpts from *Cort v. Ash*[22] and *CTS Corp. v. Dynamics Corp. of America*[23] recited at the beginning of this article demonstrate, the United States Supreme Court's recognition of the sovereignty of state corporate

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[16] *See* EDITH HAMILTON, MYTHOLOGY (1942) (discussion of mythical analogies).

[17] *See infra* notes 22-47 and accompanying text.

[18] *See infra* notes 48-147 and accompanying text.

[19] *See infra* notes 148-92 and accompanying text.

[20] *See infra* notes 193-234 and accompanying text.

[21] *See infra* note 235 and accompanying text.

[22] *See supra* note 1 and accompanying text.

[23] *See supra* note 2 and accompanying text. The Supreme Court also noted: "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations." CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 61, 89 (1987). The sovereignty of state corporate law and the authority of states to create corporations, prescribe their powers, and define the rights that are acquired by purchasing their shares is known as the "internal affairs doctrine." One commentator has suggested that the *CTS Corp.* decision "virtually constitutionalized the internal affairs doctrine." Robert E. Suggs, *Business Combination Antitakeover Statutes: The Unintended Repudiation of the Internal Affairs Doctrine and Constitutional Constraints on Choice of Law*, 56 OHIO ST. L.J. 1097, 1118 (1995).

law has been explicit and specific. It has also been longstanding: in 1890, the high court stated:

> By the term "corporate franchise or business". . . we understand is meant . . . the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity . . . The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy.[24]

This principle was reaffirmed just after the turn of the century when the Supreme Court held:

> [T]he corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation.[25]

In addition, Professor Allen Boyer notes that the federal legislature has debated, and failed to adopt, the concept of federal incorporation on three separate occasions.[26]

First, at the Constitutional Convention in 1787, James Madison moved that the proposed federal government should have the power "to grant charters of incorporation in cases where the Public good may require them, and the authority of a single state may be incompetent."[27] The convention eventually rejected the motion.[28]

Second, between 1903 and 1914, twenty bills were introduced into Congress regarding federal incorporation.[29] Even a constitutional

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[24] Home Ins. Co. v. New York, 134 U.S. 594, 599-600 (1890). The principle that the corporation is a creature of, and derives all its power from, state law is even more longstanding. In 1804, Chief Justice Marshall stated:

> Without ascribing to this body, which in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.

Head & Amory v. Providence Ins. Co., 6 U.S. 127, 167 (1804). *See also* Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819); Bank of the United States v. Dandridge, 25 U.S. 64 (1827); Bank of Augusta v. Earle, 38 U.S. 519 (1839).

[25] Hale v. Henkel, 201 U.S. 43, 74-75 (1906).

[26] Allen D. Boyer, *Federalism and Corporate Law: Drawing the Line in State Takeover Regulation*, 47 OHIO ST. L.J. 1037 (1986).

[27] *Id.* at 1041.

[28] *Id.*

[29] *Id.* at 1049.

amendment on point was suggested.[30] During this Progressive Era, there appeared to be broad-based support for federal incorporation.[31] However, the federal incorporation bills seldom escaped the committees to which they were referred,[32] which left corporate law clearly under state authority.

Third, interest in federal chartering of corporations revived during the New Deal.[33] This time, arguments were advanced that federal corporate law was the necessary complement to the newly enacted federal securities legislation. During the Senate hearings on what would become the Securities Exchange Act of 1934 (the "1934 Act"), the President of the New York Stock Exchange testified:

> The apparent purpose of [the 1934 Act] is to correct the abuses in corporate procedure which exist today because of the inadequacy of state laws. The remedy for this situation is a national incorporation law applicable to all companies doing business in interstate commerce. This should be accomplished by direct Federal legislation.[34]

However, when the 1934 Act was completed, section 28(a) established protection for, rather than limitation of, state securities law.[35] Nonetheless, advocates of federal incorporation believed this left the door open to pursue the national corporate charter issue. Beginning in 1935, a series of bills were introduced, various reports were promulgated and even the Securities and Exchange Commission ("SEC") weighed in favor of federal chartering in 1938.[36]

Despite these initiatives, federal incorporation again failed to become law. There was neither an explicit decision not to federalize corporation law, nor a specific reason given for the failure to reach a decision.[37] The debate over federal corporate law ended simply with congressional silence.[38] This silence left the well-established and well-functioning state corporate law intact.

Established by turn-of-the-century case law and justified by Congressional silence through the first half of the twentieth century, the sovereignty of state corporate law was reinforced by a series of United States Supreme Court decisions in the 1970s, including the previously

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[30] *Id.*

[31] *Id.* at 1050.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1051 n.69.

[35] Securities Exchange Act of 1934, § 28(a), 15 U.S.C. 78b(a) (1997).

[36] *See* Boyer, *supra* note 26, at 1051-52.

[37] *Id.* at 1053.

[38] *Id.*

quoted *Cort v. Ash.*[39] But, just as state law was being repeatedly affirmed judicially as the sole authority over internal corporate affairs, the hostile tender offer came into vogue as a method of gaining corporate control. As previously mentioned, the Williams Act was created in 1968 to protect investors in response to the increased use of cash tender offers in corporate acquisitions, devices that "removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws."[40]

Since tender offers have a significant impact on both the internal affairs of a corporation and the shareholders that reside in the state, the regulation thereof naturally fell under state law. When the Williams Act was enacted in 1968, only one state, Virginia, had a state takeover law in place.[41] By 1981, thirty-seven states had takeover laws on their books.[42] Existing as part of the bundle of rights acquired by a corporate shareholder, the goal of these state provisions is to encourage negotiated transactions that result in orderly changes in control, as opposed to the helter-skelter atmosphere of the hostile tender offer.

Nonetheless, state tender offer regulation has not gone without legal challenge. The tender offer is a hybrid transaction that uses the purchase of securities, typically nationally traded shares, as the method of initiating the change in corporate control. Thus, arguments are advanced which contend that state law must not stand in the way of transactions in the national securities markets. Further, state law must not stand in the way of the alleged economic efficiency of the hostile takeover. What these arguments fail to recognize, of course, is that but for state law, securities would not exist. A security, more specifically a share of stock, is a bundle of legal rights representing an ownership interest in the state law creation known as the corporation, and as such falls within the ambit of state regulation.

Notwithstanding the sovereignty of state corporate law, two federal considerations create tension surrounding state takeover regulation. First, Congress has spoken in the area of securities law.[43] While it is well-settled that the state has exclusive jurisdiction over the internal affairs of the

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[39] *See supra* note 1 and accompanying text.

[40] Piper v. Chris-Craft Indus., 430 U.S. 1, 22 (1975).

[41] In 1969, Ohio became the second state to enact a "first generation" takeover statute when the original Control Bid Statute was enacted. *See supra* note 15 and text accompanying notes 154-55.

[42] Mark A. Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 690 n.7 (1981).

[43] The Securities Act of 1933; Securities Exchange Act of 1934; Public Utility Holding Company Act of 1935; Trust Indenture Act of 1939; Investment Company Act of 1940; Investment Advisers Act of 1940; Securities Investor Protection Act of 1970; and National Securities Markets Improvement Act of 1996.

corporations that it charters, the state's jurisdiction is not exclusive over those securities that fall within the purview of the federal securities laws. As a result, the Supremacy Clause[44] may preempt certain state provisions. Second, the framers of the Constitution have spoken in the area of interstate commerce. The Commerce Clause,[45] including the notion of the "dormant" Commerce Clause,[46] prohibits state laws that discriminate against interstate commerce.[47] Consequently, in the area of tender offer regulation, state law must be tempered by both the federal aspects of securities law and Commerce Clause considerations. The remainder of this article describes the vitality of Ohio's efforts to strike this balance.

III. THE REDOUBTABLE OHIO CONTROL SHARE ACQUISITION ACT

The vitality of the Control Share Acquisition Act was recently confirmed. In July 1996, Judge James L. Graham of the District Court for the Southern District of Ohio recognized the constitutionality of the Control Share Acquisition Act. Judge Graham refused to grant an injunction against operation of the statute in litigation filed by United Dominion Industries Limited in connection with its tender offer for shares of Youngstown-based Commercial Intertech Corporation.[48] This decision came on the heels of Judge Graham's March 1995 ruling in *Luxottica Group S.p.A. v. U.S. Shoe Corp.*[49] that the Williams Act Control Share Acquisition Act and his suggestion in a July 1996 order issued in *Danaher Corp. v. Acme-Cleveland Corp.*[50] that the Ohio General Assembly (the "General Assembly") should consider amending the Control Share Acquisition Act to resolve "serious issues relating to the interpretation of certain provisions of the [Control Share Acquisition Act]."[51] Despite these prior rulings, Judge Graham refused to declare the Control Share Acquisition Act unconstitutional and further refused to grant an injunction against its operation in the *Commercial Intertech* case. Instead, Judge

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[44] U.S. CONST. art. VI, § 2.

[45] U.S. CONST. art. I, § 8, cl. 3.

[46] "[I]t has been settled for more than a century that the [Commerce] Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action." CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987). *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, ch. 6 (1987).

[47] "The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." *CTS Corp.*, 481 U.S. at 87.

[48] United Dominion Indus. v. Commercial Intertech Corp., 943 F. Supp. 857 (S.D. Ohio 1996).

[49] 919 F. Supp. 1085 (S.D. Ohio 1995).

[50] No. C2-96-0247 slip op. (S.D. Ohio July 1, 1996).

[51] *Id.* at 2.

Graham recognized the legitimacy of the procedures that the target company, Commercial Intertech, had put in place to comply with the Control Share Acquisition Act and noted from the bench the evidence in support of the proposed election procedures was sufficiently convincing.[52] Statutory amendments enacted in 1997 subsequent to the *Commercial Intertech* case codify the use of these procedures.[53] Additional statutory amendments contained in the 1997 package altered the provisions of the Control Share Acquisition Act over which Judge Graham had expressed concern.[54] It appears that these case law developments and statutory codifications have contributed significantly to the constitutionality of the Control Share Acquisition Act.

Enacted in 1982,[55] the Control Share Acquisition Act consists of substantive provisions set out in R.C. § 1707.831 and unique "legislative findings" set out in R.C. § 1701.832.[56] The general purpose of the Control Share Acquisition Act is to ensure that those who hold shares in a corporation before a takeover bid is announced have a sufficient opportunity to both consider and vote upon the proposal. R.C. § 1701.832 recognizes that takeovers impact the fundamental corporate control and corporate affairs issues upon which shareholders have the right to vote under Ohio corporate law.[57] The statute also notes the coercive nature and time constraints of takeovers effected through tender offers.[58] These factors compel special procedures to ensure that shareholders are afforded the rights Ohio corporate law provides to them. Consequently, in enacting the Control Share Acquisition Act, the Ohio General Assembly believed "that it is in the public interest for Ohio securities law to provide evenhanded protection of offerors and shareholders from fraudulent and manipulative transactions arising in connection with control acquisitions."[59]

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52 *Commercial Intertech*, 943 F. Supp. at 863.

53 *See* Am. Sub. H.B. 170, 122d General Assembly (Ohio 1998). *See infra* text accompanying note 146.

54 *See* Am. Sub. H.B. 170, 122d General Assembly (Ohio 1998). *See infra* text accompanying notes 141-45.

55 The Control Share Acquisition Act represented the first state "second generation" takeover statute.

56 OHIO REV. CODE ANN. § 1701.831-32 (Baldwin 1993).

57 OHIO REV. CODE ANN. § 1701.832(A)(3) (Baldwin 1993).

58 *Id.*

59 OHIO REV. CODE ANN. § 1701.832(A)(4) (Baldwin 1993). Note that despite the reference to "Ohio securities laws," the OCSAA is contained in the general corporation law, R.C. Chapter 1701. OHIO REV. CODE ANN. § 1701.832(A)(5) (Baldwin 1993) explains this by stating:

> Initial state efforts to deal with tender offer developments have been questioned by the federal courts. The general assembly observes that responsibility for general corporate laws

Unless an issuing public corporation has opted out of the Control Share Acquisition Act,[60] the statute provides that any "control share acquisition,"[61] of an "issuing public corporation"[62] shall be made only with

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> is the function of state legislation and that no federal law of corporations exists. The general assembly observes that securities law protection of state residents has long been recognized as an appropriate subject of state law regulation under the federal system. The general assembly acknowledges an in loco parentis responsibility to shareholders who invest in corporations created under the laws of Ohio and to shareholders generally who reside in Ohio.

[60] OHIO REV. CODE ANN. § 1701.831(A) states in pertinent part: "Unless the articles or the regulations of the issuing public corporation provide that this section does not apply to control share acquisition of shares of such corporation . . . ."

[61] OHIO REV. CODE ANN. § 1701.01(Z) (Baldwin 1993) provides that:

> (1) "Control share acquisition" means the acquisition, directly or indirectly, by any person of shares of an issuing public corporation that, when added to all other shares of the issuing public corporation in respect of which such person may exercise or direct the exercise of voting power as provided in this division, would entitle such person, immediately after such acquisition, directly or indirectly, alone or with others, to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of such voting power:
>
> (a) One-fifth or more but less than one-third of such voting power;
> (b) One-third or more but less than a majority of such voting power;
> (c) A majority or more of such voting power.
>
> A bank, broker, nominee, trustee, or other person who acquires shares in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code shall, however, be deemed to have voting power only of shares in respect of which such person would be able, without further instructions from others, to exercise or direct the exercise of votes on a proposed control share acquisition at a meeting of shareholders called under section 1701.831 of the Revised Code.
>
> (2) The acquisition by any person of any shares of an issuing public corporation does not constitute a control share acquisition for the purpose of section 1701.831 of the Revised Code if the acquisition was or is consummated in, results from, or is the consequence of any of the following circumstances:
>
> (a) Prior to November 19, 1982;
> (b) Pursuant to a contract existing prior to November 19, 1982;
> (c) By bequest or inheritance, by operation of law upon the death of an individual, or by any other transfer without valuable consideration, including a gift, that is made in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code;
> (d) Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code;
> (e) Pursuant to a merger or consolidation adopted, or a combination or majority share acquisition authorized, by shareholder vote in compliance with section 1701.78, 1701.781, or 1701.83 of the Revised Code provided the issuing public corporation is the surviving or new corporation in the merger or consolidation or is the acquiring corporation in the combination or majority share acquisition;
> (f) The person's being entitled, immediately thereafter, to exercise or direct the exercise of voting power of the issuing public corporation in the election of directors within the same range theretofore attained by that person either in compliance with the provisions of

the prior authorization of the shareholders of such issuing public corporation in accordance with R.C. § 1701.831.[63]

Functionally, the Control Share Acquisition Act sets out three requirements: (i) a potential acquiror must deliver to the issuing public corporation's principal executive offices an "acquiring person statement" that sets forth certain minimum information about the acquiror and the proposed acquisition;[64] (ii) within ten days after receipt of an acquiring person statement conforming to law, the issuing public corporation's directors must call a special meeting of shareholders for the purpose of voting on the proposed control share acquisition ("831 meeting");[65] and

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section 1701.831 of the Revised Code or as a result solely of the issuing public corporation's purchase of shares issued by it.

The acquisition by any person of shares of an issuing public corporation in a manner described under division (Z)(2) of this section shall be deemed a control share acquisition authorized pursuant to section 1701.831 of the Revised Code within the range of voting power under division (Z)(1)(a), (b), or (c) of this section that such person is entitled to exercise after such acquisition, provided, in the case of an acquisition in a manner described under division (Z)(2)(c) or (d) of this section, the transferor of shares to such person had previously obtained any authorization of shareholders required under section 1701.831 of the Revised Code in connection with such transferor's acquisition of shares of the issuing public corporation.

(3) The acquisition of shares of an issuing public corporation in good faith and not for the purpose of circumventing section 1701.831 of the Revised Code from any person whose control share acquisition previously had been authorized by shareholders in compliance with section 1701.831 of the Revised Code, or from any person whose previous acquisition of shares of an issuing public corporation would have constituted a control share acquisition but for division (Z)(2) or (3) of this section, does not constitute a control share acquisition for the purpose of section 1701.831 of the Revised Code unless such acquisition entitles the person making the acquisition, directly or indirectly, alone or with others, to exercise or direct the exercise of voting power of the corporation in the election of directors in excess of the range of such voting power authorized pursuant to section 1701.831 of the Revised Code, or deemed to be so authorized under division (Z)(2) of this section.

[62] "Issuing public corporation" means a domestic corporation with fifty or more shareholders that has its principal place of business, its principal executive offices, assets having substantial value, or a substantial percentage of its assets within this state, and as to which no valid close corporation agreement exists under division (H) of section 1701.591 of the Revised Code. OHIO REV. CODE ANN. § 1701.01(Y) (Baldwin 1993).

[63] OHIO REV. CODE ANN. § 1701.831(A) (Baldwin 1993).

[64] OHIO REV. CODE ANN. § 1701.831(B) (Baldwin 1993).

[65] OHIO REV. CODE ANN. § 1701.831(C) (Baldwin 1993). Unless the acquiror agrees in writing to another date, the 831 meeting must be held within fifty days of receipt of the acquiring person statement. *Id.* The acquiring person statement may request that the 831 meeting be held no sooner than thirty days after receipt. *Id.* The vote at the 831 meeting establishes an important protection for shareholders who feel compelled to tender their shares. Often, although shareholders may perceive an offer to be contrary to their long term goals, they may nonetheless tender because of concern that they will be left in an unenviable minority shareholding position. The 831 meeting process allows a shareholder who has tendered in order to protect their financial interests to nevertheless vote against the proposed acquisition. If the proposed acquisition is not approved at the 831 meeting, it cannot

(iii) special quorum and voting standards are imposed at the 831 meeting.[66] The concept of "interested shares," is used to set the special quorum and voting standards. The purpose of the "interested shares" notion is to disqualify from the special quorum and voting standards shares acquired after the announcement of a control share acquisition. While the "interested shares" definition had in recent cases been attacked as the Achilles Heel of the Control Share Acquisition Act, the 1997 amendments to the Control Share Acquisition Act appear to have covered this vulnerability with water from the River Styx.[67]

In reviewing the judicial treatment of the Control Share Acquisition Act, Professor Howard Friedman has noted that "[i]nitial tests of the constitutionality of [the Control Share Acquisition Act] in the lower courts suggested that it would not survive constitutional scrutiny."[68] Indeed, in the 1986 challenge to the Control Share Acquisition Act, *Fleet Aerospace Corp. v. Holderman*,[69] Judge John D. Holschuh of the District Court for the Southern District of Ohio held that the Control Share Acquisition Act was unconstitutional on both Supremacy Clause (preemption) and Commerce Clause grounds.[70] Specifically, Judge Holschuh found three flaws with the Control Share Acquisition Act: (i) it delayed the purchase of tendered shares beyond the time frame permitted under the Williams Act;[71] (ii) it undermined the Williams Act's supposed policy of evenhandedness between acquiring companies and target companies by creating a period of

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move forward and tendered shares must be returned. OHIO REV. CODE ANN. §§ 1701.831(A), (E) (Baldwin 1993).

66 OHIO REV. CODE ANN. § 1701.831(E).

67 *See infra* text accompanying notes 142-45.

68 HOWARD M. FRIEDMAN, OHIO SECURITIES LAW AND PRACTICE 740 (2d ed. 1996).

69 637 F. Supp. 742 (S.D. Ohio 1986), *aff'd*, 796 F.2d 135 (6th Cir. 1986), *vacated sub nom.*, 481 U.S. 1026 (1987).

70 *Id.* at 743.

71 When enacted in 1968, the Williams Act provided that a shareholder who tendered shares could withdraw shares so tendered either (i) up to seven days after tender, or (ii) if the tendered shares were not purchased within sixty days after tender. *See* 15 U.S.C. § 78n(d)(5) (1997). As a result, contemporary conventional wisdom held that the purchase of tendered shares for purposes of completing the takeover had to take place within sixty days so as not to allow tendered shares to be subject to reinstated withdrawal rights. Consequently, some of the early cases construing the interplay between state takeover statutes and the Williams Act established that sixty days was the "Williams Act time frame," meaning that the procedures established by state law had to be resolved within sixty days. *See, e.g., Fleet Aerospace Corp.*, 637 F. Supp. at 756-57. Procedures that extended beyond sixty days were preempted. In 1986, however, the sixty-day time frame became moot when the SEC enacted Rule 14d-7. 17 C.F.R. § 240.14d-7(a) (1997). This rule provides that tendered shares may be withdrawn at any time while the tender offer or request or invitation for tenders remains open. *Id.* Nonetheless, counsel for offerors continued to argue that sixty days was the determinative time frame for state procedures, and that any state law which could cause the takeover process to extend beyond sixty days constituted an "unreasonable delay" and should be preempted. *See, e.g.*, Luxottica Group v. United States Shoe Corp., 919 F. Supp. 1085, 1089-90 (S.D. Ohio 1995).

delay during which incumbent management could strengthen its defense; and (iii) it altered the Williams Act's claimed focus on informed individual decision-making to a collective decision-making process.[72]

Judge Holschuh rendered his decision on June 6, 1986, and less than three weeks later the *Fleet Aerospace* decision was affirmed by the Sixth Circuit Court of Appeals.[73] However, on April 27, 1987, the United States Supreme Court vacated the Sixth Circuit's judgment and remanded the case[74] for further consideration in light of the Supreme Court's decision in *CTS Corp. v. Dynamics Corp. of America*,[75] which the Court had rendered six days earlier. In *CTS Corp.*, the Supreme Court upheld the Indiana control share acquisition statute, rejecting both Supremacy Clause and Commerce Clause arguments.[76]

In *CTS Corp.*, the Supreme Court first noted that the Indiana statute in question differed in major respects from the Illinois control share acquisition statute that a Supreme Court plurality had struck down in *Edgar v. MITE Corp.*,[77] the 1982 case limiting state regulation of interstate takeovers.[78] Specifically, the *CTS Corp.* court rejected the Supremacy Clause argument, finding that the maximum delay period of fifty days imposed by the Indiana statute (the same maximum delay period imposed by the Control Share Acquisition Act) was reasonable.[79] The Court also rejected the Commerce Clause claim. Noting that the statute applied only to corporations incorporated under Indiana law, the Court relied on the internal affairs doctrine to recognize the state's strong and legitimate interest in outlining the rights of shareholders of its domestic corporations.[80]

Upon remand of the *Fleet Aerospace* case to the Sixth Circuit, in June 1988 the appellate court in turn remanded the case to the district court.[81] During the litigation, the tender offer had been completed and the target company had been merged into a subsidiary of Fleet Aerospace. On October 31, 1988, the District Court issued a consent order dismissing the case with prejudice. The order reflected the parties' agreement to dissolve

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72 *Fleet Aerospace Corp.*, 637 F. Supp. at 756-59.

73 Fleet Aerospace Corp. v. Holderman, 796 F.2d 135 (6th Cir. 1986).

74 Ohio v. Fleet Aerospace Corp., 481 U.S. 1026 (1987).

75 481 U.S. 69 (1987).

76 *Id.* at 70-71.

77 457 U.S. 624 (1982).

78 *CTS Corp.*, 481 U.S. at 80.

79 *Id.* at 84-85. Recall that "Williams Act timeframe" in this context is 60 days. *See supra* note 71 and accompanying text.

80 *CTS Corp.*, 481 U.S. at 87-93.

81 Fleet Aerospace Corp. v. Holderman, 848 F.2d 720 (6th Cir. 1988).

both the injunction and the declaratory judgment holding the Control Share Acquisition Act unconstitutional.[82]

Thus, although the Control Share Acquisition Act was struck down at the outset of the *Fleet Aerospace* litigation, the ruling of unconstitutionality was effectively withdrawn at the conclusion of the litigation. It appears, however, that had the district court considered the Control Share Acquisition Act under the *CTS Corp.* analysis, the Control Share Acquisition Act would have passed constitutional muster. This proposition is supported by two other federal court decisions from that era that upheld the statute against constitutional challenges.

In *CEIC Holding Co. v. Cincinnati Equitable Insurance Co.*,[83] Judge Arthur Spiegel of the District Court for the Southern District of Ohio considered a motion by CEIC to enjoin the operation of the Control Share Acquisition Act in connection with CEIC's tender offer for the shares of Cincinnati Equitable. Analyzing the motion under the then controlling precedent of *MITE*, the *Cincinnati Equitable* court first undertook a Commerce Clause analysis and considered whether the Control Share Acquisition Act imposed an undue burden on interstate commerce. After recognizing that ninety percent of Cincinnati Equitable's shareholders were Ohio residents, the court found that the state's interest in protecting local shareholders outweighed the minimal burden on interstate commerce.[84] The *Cincinnati Equitable* court then turned to the Supremacy Clause analysis and rejected that contention as well, stating that it did not "perceive a serious conflict [between the Control Share Acquisition Act and] federal statutes or regulations."[85]

In *Veere Inc. v. Firestone Tire & Rubber Co.*,[86] Judge Alice Batchelder of the District Court for the Northern District of Ohio considered Supremacy Clause and Commerce Clause attacks on the Control Share Acquisition Act made by the Pirelli Group in connection with its tender offer for shares of Akron-based Firestone. The *Firestone* court conducted its analysis under the *CTS Corp.* holding, noting that it was the task of the court to "determine whether the differences between the Ohio and Indiana statutes . . . are substantively significant for purposes of . . . analysis pursuant to *CTS*."[87] The *Firestone* court rejected the Supremacy Clause attack, finding it was physically possible for the offeror to comply with

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[82] Fleet Aerospace Corp. v. Holderman, No. C2-86-556, slip op. (S.D. Ohio Oct. 31, 1988).

[83] No. C-1-84-1587, slip op. (N.D. Ohio Nov. 15, 1985).

[84] *Id.* at 14-15.

[85] *Id.* at 15.

[86] 685 F. Supp. 1027 (N.D. Ohio 1988).

[87] *Id.* at 1028.

both the Williams Act and the Control Share Acquisition Act[88] and that the time frame established by the Control Share Acquisition Act did not constitute an "unreasonable delay."[89] The *Firestone* court also rejected the Commerce Clause attack, finding any burden that the Control Share Acquisition Act created on interstate commerce was permissible since the Control Share Acquisition Act "neither discriminates against interstate commerce nor subjects activities to inconsistent state regulation."[90] Rather, it simply "regulates voting rights of shareholders and the rights of shareholders to participate in the administration of the affairs of the corporation."[91]

Consequently, the constitutionality of the Control Share Acquisition Act seemed well-settled. However, as the Control Share Acquisition Act was applied to control share acquisitions in the late 1980s, some practitioners believed that the Control Share Acquisition Act operated as a "Trojan Horse" in that although the proposed control share acquisition went before a vote of the shareholders, the shareholders typically included market arbitrageurs who would most likely always vote in favor of the proposed transaction.[92]

To remedy this unintended result, the Ohio General Assembly amended the Control Share Acquisition Act in 1990 to add a new section, R.C. § 1701.01(CC)(2),[93] which created a new additional class of interested

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[88] *Id.* at 1029.

[89] *Id.* at 1030-32.

[90] *Id.* at 1032.

[91] *Id.*

[92] *See Ohio Strengthens, Simplifies Control Share Acquisition Act*, JONES DAY COMMENTARIES, Oct. 1997 [hereinafter *Ohio Strengthens*].

[93] OHIO REV. CODE ANN. § 1701.01(CC)(1)(2)(a)(b) provides:

> "Interested shares" also means any shares of an issuing public corporation acquired, directly or indirectly, by any person from the holder or holders thereof for a valuable consideration during the period beginning with the date of the first public disclosure of a proposed control share acquisition of the issuing public corporation or any proposed merger, consolidation, or other transaction which would result in a change in control of the corporation or all or substantially all of its assets, and ending on the date of any special meeting of the corporation's shareholders held thereafter pursuant to section 1701.831 of the Revised Code, for the purpose of voting on a control share acquisition proposed by any acquiring person if either of the following apply:
>
> (a) The aggregate consideration paid or given by the person who acquired the shares, and any other persons acting in concert with him, for all such shares exceeds two hundred fifty thousand dollars;
>
> (b) The number of shares acquired by the person who acquired the shares, and any other persons acting in concert with him, exceeds one-half of one per cent of the outstanding shares of the corporation entitled to vote in the election of directors.

shares. The new section disqualified (from the statute's special quorum and voting provisions) any shares acquired during a specified period. The period begins on the date of the first public disclosure of the proposed acquisition and ending on the date of the 831 meeting, provided the aggregate consideration paid for such shares exceeded $250,000 or the number of shares acquired exceeded one-half of one percent of the corporation's outstanding shares entitled to vote in the election of directors. While the 1990 amendment succeeded in eliminating the "Trojan Horse" effect, it created a new provision that could be subjected to constitutional attack.

The first challenge arose in March 1995 when Luxottica Group commenced a tender offer for shares of Cincinnati-based U.S. Shoe. In connection with the takeover, Luxottica filed suit in the District Court for the Southern District of Ohio seeking a preliminary and permanent injunction against the application of R.C. § 1701.01(CC)(2) at the 831 meeting.[94] Luxottica claimed that R.C. § 1701.01(CC)(2) was preempted by the Williams Act and also violated the Commerce Clause.[95]

In examining the challenges, the District Court first reviewed the touchstone United States Supreme Court cases addressing state regulation of takeovers, *MITE* and *CTS Corp.* Like the *Firestone* court, the *U.S. Shoe* court explored the issue of unreasonable delay (and noted that the Illinois statute struck down in *MITE* imposed an unreasonable delay in the consummation of tender offers, in conflict with the Williams Act) while also recognizing that in *CTS Corp.*, the Supreme Court stated "[n]othing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should 'be free to go forward without *unreasonable* delay.'"[96]

Considering the parameters set out in *MITE* and *CTS Corp.*, the *U.S. Shoe* court held:

> This court concludes that unlike the Indiana statute under consideration in *CTS Corp.*, § 1701.01(CC)(2) of the [Control Share Acquisition] Act imposes an unreasonable delay beyond the sixty day period established for the reinstitution of withdrawal rights under the William Act and that

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Note that this provision was amended by Am. Sub. H.B. 170, 122d General Assembly (Ohio 1997). *See infra* notes 131-34 and accompanying text.

[94] *Id.*

[95] Luxottica Group v. U.S. Shoe Corp., 919 F. Supp. 1085 (S.D. Ohio 1995).

[96] *Id.* at 1087-88, 1090.

accordingly this provision of the Ohio law is preempted by the Williams Act.[97]

The *U.S. Shoe* court continued:

> The Court reaches this conclusion because it believes there are two significant flaws in § 1701.01(CC)(2) which result in unreasonable delay. The first flaw is the definition of disqualification in terms of shares as opposed to persons. The second flaw is the provision ending the period for determining disqualification on the date of the 831 meeting instead of the record date for that meeting.[98]

The court explained the first flaw by noting that since the disqualification is determined in terms of shares and not persons, the information needed to make this determination would not be available to the inspector of election because over half of the U.S. Shoe shareholders held their shares in "street name."[99] Consequently, neither U.S. Shoe nor the inspector of election could gather information regarding the beneficial owners and the shares held thereby, including purchase price and date, necessary to determine disqualification.[100]

The court described the second flaw, continuing the disqualification period until the date of the 831 meeting, as rendering meaningless the record date for the 831 meeting since share transactions occurring after the record date would be considered for disqualification purposes.[101] The court noted that the undisputed testimony in the case indicated that it would take at least four weeks after the date of the 831 meeting to solicit the shareholders who appeared at the 831 meeting (in person or by proxy) to obtain the information necessary to determine disqualification under R.C. § 1701.01(CC)(2). And, even once obtained, such information in many instances would be incapable of verification by the inspector of election. Consequently, the *U.S. Shoe* court found:

> that it would be impossible to comply with § 1701.01(CC)(2) within the sixty day period for reinstituting withdrawal rights under the Williams Act and that compliance with this particular provision of the [Control Share Acquisition] Act would frustrate the Congressional purpose of preventing undue delay in the consummation of a tender offer.[102]

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[97] *Id.* at 1088.

[98] *Id.*

[99] *Id.* at 1089.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 1090.

In its conclusion, the *U.S. Shoe* court offered remarks that appeared to be dicta at the time, but in fact take on significance when the *U.S. Shoe* decision is reviewed in light of the *Commercial Intertech* decision. The remarks centered around U.S. Shoe's contention that the challenge to R.C. § 1701.01(CC)(2) was not ripe for judicial review because it could have been possible for U.S. Shoe to comply with the provision without incurring undue delay. The court rejected this argument, noting that: "[u]ncertainty about the ground rules for the 831 meeting . . . in itself is likely to cause irreparable injury to [Luxottica] in [its] attempts to consummate [the] tender offer."[103]

But before analyzing the *Commercial Intertech* opinion, a discussion of *Danaher Corp. v. Acme-Cleveland Corp.*[104] is in order. The *Acme-Cleveland* case arose in March 1996 in connection with Danaher Corporation's tender offer for shares of Cleveland-based Acme-Cleveland Corporation. Like Luxottica, Danaher sought an injunction against the application of R.C. § 1707.01(CC)(2).[105] In fact, Danaher argued that the issue was controlled by the *U.S. Shoe* decision.[106]

However, the *Acme-Cleveland* litigation became moot on June 3, 1996, when Danaher and Acme-Cleveland reached an agreement on Danaher's acquisition.[107] Upon reaching the agreement, Danaher and Acme-Cleveland moved the court to dismiss the lawsuit. The state of Ohio, which had also been named as a defendant, filed a motion to impose appropriate terms and conditions on the dismissal, specifically asking the court to rule on the constitutionality of the Control Share Acquisition Act, seeking to avoid a Sysiphus-like fate.[108]

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[103] *Id.* at 1091.

[104] No. C2-96-0247, slip op. (S.D. Ohio July 1, 1996).

[105] *Id.* at 1.

[106] *Id.* at 2.

[107] *Id.* at 1.

[108] The state argued:

> If this Court permits voluntary dismissal of the action without finality as to the State's interests, the State will suffer defeat even while winning the legal battle, and will be left to defend the [Control Share Acquisition Act] from scratch yet again on another day. Such a result would be inequitable and a poor use of both executive and scarce judicial resources. Moreover, like Sisyphus, the State Defendants can anticipate being compelled to go through this same futile exercise over and over again, without ever obtaining a final decision on the critical issues. The very nature of tender offer litigation makes this case a textbook example of one capable of repetition, yet evading review. This inequitable result could easily be circumvented by a final decision from this court putting to rest the constitutional issues raised by Danaher.

State Defendants' Memorandum in Support of its Motion to Impose Appropriate Terms and Conditions Upon Dismissal and In Opposition to Joint Motion of Plaintiffs and Co-Defendants for

Judge Graham granted the motion to dismiss, but declined to rule on the constitutionality of the Control Share Acquisition Act. In a written order dated July 1, 1996, he noted that the parties sought dismissal of the proceeding before the hearing on the constitutionality of the Control Share Acquisition Act was completed, leading him to state that "[i]t would not be appropriate for the court to make a final determination of that issue on an incomplete record."[109]

However, Judge Graham concluded his order with the following commentary:

> This court's decision in Luxottica Group S.P.A. v. The United States Shoe Corporation, 919 F. Supp. 1085 (S.D. Ohio 1995), as well as the arguments raised in this case and the court's rulings during the aborted preliminary injunction hearing show that there are serious issues relating to the interpretation of certain provisions of Ohio Revised Code § 1701.01(CC)(2). The state should consider amending the statute to resolve the resulting confusion.[110]

Before the General Assembly had the opportunity to consider amending the statute pursuant to Judge Graham's admonition, United Dominion filed its complaint on July 12, 1996, in connection with its tender offer for shares of Youngstown-based Commercial Intertech. Like Luxottica and Danaher, United Dominion sought an injunction against the operation of R.C. § 1701.01(CC)(2).[111]

A two-day hearing was held before Judge Graham on July 29 and 30, 1996. United Dominion argued that the case was controlled by the *U.S. Shoe* decision, that R.C. § 1701.01(CC)(2) was unconstitutional and that the operation of the statute should be enjoined.[112] Commercial Intertech argued that it had developed unique procedures that would allow it to comply with R.C. § 1701.01(CC)(2) within the time frame permitted under the Williams Act.[113] Specifically, Commercial Intertech proposed to use self-certifying proxies, presented evidence regarding certain presumptions to be used in connection with the voting at the 831 meeting and claimed that quorum and voting totals could be determined within ten days of the

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Voluntary Dismissal at 7, Danaher Corp. v. Acme-Cleveland Corp., No. C2-96-0247 (S.D. Ohio July 1, 1996).

[109] *Acme-Cleveland*, slip op. at 2.

[110] *Id.*

[111] United Dominion Indus. v. Commercial Intertech Corp., 943 F. Supp. 857, 860 (S.D. Ohio 1996).

[112] Id.

[113] Id.

831 meeting. Thus, unlike U.S. Shoe, Commercial Intertech had already laid certain ground rules for the 831 meeting.

At the conclusion of the hearing, Judge Graham delivered an opinion from the bench denying the motion for injunction. The subsequently written opinion describes the conclusion of the hearing as follows:

> At the hearing on [United Dominion's] motion for preliminary injunction, [Commercial Intertech] presented evidence in support of its proposed election procedures which was sufficiently convincing to persuade the Court to deny the relief requested. Noting that "the court's power to declare a state statute unconstitutional is one which should be resorted to sparingly, and the party who asserts that a state statute is unconstitutional under the Supremacy Clause bears a heavy burden," the Court denied plaintiff's motion.[114]

On August 5, 1996, perhaps because of this ruling and perhaps because of certain defensive tactics employed by Commercial Intertech, United Dominion withdrew the tender offer.[115] Accordingly, counsel for United Dominion announced its desire to terminate the litigation challenging the Control Share Acquisition Act.[116] Commercial Intertech and the state urged the court nonetheless to issue a decision on the constitutionality of R.C. § 1701.01(CC)(2). The court chose to "take the occasion to express its current conviction on the interpretation and constitutionality of 1701.01(CC)(2) and the election procedures proposed by [Commercial Intertech]."[117] Those convictions are set out in a published opinion dated September 13, 1996.[118]

In the written opinion, Judge Graham reexamined the alleged constitutional infirmities of R.C. § 1701.01(CC)(2). First he addressed the "once tainted, always tainted" problem.[119] Counsel for United Dominion claimed that phrase described the literal interpretation of the statute that once a share becomes "interested," it remains interested regardless of who owned the shares.[120] This interpretation had been adopted by the *U.S. Shoe* court, but in *Commercial Intertech*, Judge Graham noted that "[t]he court in [*U.S. Shoe*] did not pursue whether other permissible interpretations of the statute might resolve the once tainted, always tainted problem."[121] Thus, in *Commercial Intertech*, Judge Graham recognized that in *Acme-*

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[114] *Id.* at 863.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 857.
[119] *Id.* at 863.
[120] *Id.*
[121] *Id.* at 864.

Cleveland the court did reconsider the "once tainted, always tainted" interpretation. Specifically, at the *Acme-Cleveland* hearing, Judge Graham commented:

> I believe that a fair reading of the statute leads to the conclusion that any shares, and again it's my belief that the General Assembly was focusing on shares, not individuals, but they're measuring the disqualification of the shares in terms of the attributes of an individual who holds them at the time of the 831 meeting; and if that individual acquired more than $250,000 worth of shares from the time of the public announcement until the time of the 831 meeting, those shares are disqualified.[122]

The *Commercial Intertech* opinion states that "the court continues to believe that [the above quote from *Acme-Cleveland*] is the correct interpretation of the statute."[123] When combined with the fact that the period of disqualification runs through the date of the 831 meeting (not the record date for such meeting), the *Acme-Cleveland* interpretation requires an evaluation of the status of the shares on the date of the 831 meeting: first for the purpose of voting, and second for determining the existence of a quorum. Additionally, shares which were disinterested on the record date for the 831 meeting may be rendered interested if the holder acquires additional shares after the record date. In summary, the *Commercial Intertech* court commented:

> in order to determine whether shares are interested or not in the hands of some owner, one must look back from the time of the 831 meeting and determine whether that owner has purchased, in the defining period, shares in excess of either of the defining maximums. If the owner sells his shares, then § 1701.01(CC)(2) must be separately applied to the new owner or owners.[124]

As a practical matter, the *Commercial Intertech* court noted that in order to determine whether shares purchased during the defining period were "interested," an inspector of election need simply determine whether a shareholder's total ownership of shares at any time in the defining period exceeded: 1) $250,000 in purchase price; or 2) one-half of one percent of the outstanding shares entitled to vote in the election of directors.[125] Thus, the court concluded, with respect to the self-certifying proxies proposed by Commercial Intertech,[126] "that what shareholders are being asked to certify

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] The self-certifying proxy was an information-seeking proxy where beneficial owners were asked to certify the status of their shares as "interested" or "disinterested." The beneficial owners were

on information seeking proxies can be specified in a relatively straightforward way."[127]

Having reiterated the constitutionality of R.C. § 1701.01(CC)(2) to avoid the "once tainted, always tainted" problem, the *Commercial Intertech* opinion next explored the second problem identified in *U.S. Shoe*, the problem of obtaining the information necessary to determine the interested status of shares for 831 meeting purposes. In the *U.S. Shoe* case, evidence indicated that it would take at least four weeks after the 831 meeting to compile the information. This delay pushed the Luxottica tender offer outside the sixty day timeframe permitted under the Williams Act and caused R.C. § 1701.01(CC)(2) to be preempted. However, in the *Commercial Intertech* case, Commercial Intertech proposed certain procedures such that the pertinent information could be finalized within ten days of the 831 meeting. Undoubtedly aware of the dicta of the *U.S. Shoe* opinion discussed earlier, Commercial Intertech sought to set the ground rules for the 831 meeting with the necessary certainty and sought to insure that those ground rules would operate within the "Williams Act timeframe."[128]

First, Commercial Intertech proposed to use information seeking proxies where beneficial owners were asked to certify their shares' status as "interested" or "disinterested" by indicating whether they purchased more than $250,000 of shares after the tender offer's announcement.[129] The beneficial owners were also asked to agree to update their certification should they purchase or sell shares after they complete and return their proxy forms. The court, while recognizing that no information-seeking proxies of this precise sort had ever been employed, upheld the validity of such proxies, specifically rejecting challenges under the Ohio general corporation law governing voting by proxy, R.C. § 1701.48.[130]

Second, Commercial Intertech proposed to use certain presumptions in connection with the 831 meeting.[131] For example, Commercial Intertech established a presumption that all of the interested shares would be present at the 831 meeting.[132] United Dominion claimed that having the presumptions originate with Commercial Intertech, rather than the

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also asked to agree to update their certification should they purchase or sell shares after they complete and return their proxy form. *Id.* at 867. *See also infra* text accompanying notes 129-30.

[127] *Commercial Intertech*, 943 F. Supp. at 865.

[128] *See id.* at 867-71; *see also supra* note 71.

[129] *Commercial Intertech*, 943 F. Supp. at 867. The opinion notes that OHIO REV. CODE ANN. § 1701.01(CC)(2)(b) (Baldwin 1993) had no practical application. *See id.* at 867 n.2.

[130] *Id.* at 867-69.

[131] *Id.* at 871-73.

[132] *Id.*

inspector of election, violated standard election and voting practice and was not authorized by Ohio corporation law.[133] The court rejected this claim, finding that R.C. § 1701.50, the Ohio general corporation law governing inspectors of election, does not prohibit this procedure.[134]

Within the general structure of certain proxies and presumptions, United Dominion raised a number of additional objections. United Dominion claimed that the self-certifying proxy procedures violated SEC rules because beneficial owners were required to disclose information that the SEC rules entitle them to keep confidential. The court rejected this claim noting that no confidential information would make its way back to Commercial Intertech or the inspector of election.[135] United Dominion also objected to Commercial Intertech's proposed method to verify the voting results, which involved a private service using a sophisticated "nominee identification" system.[136] United Dominion argued that the system was unreliable and that the system went so far beyond traditional election methods as to render it illegal. The court rejected both claims on the grounds that United Dominion had not presented sufficient evidence to demonstrate unreliability or illegality.[137]

Finally, United Dominion objected to the presumption that all interested shares would be present at the 831 meeting, which essentially set the required size of the second quorum. The court did find merit with this contention. However, the court ultimately rejected the argument, stating:

> . . . in order to prevail, it is not enough that [United Dominion] show that the specific presumption that [Commercial Intertech] proposes would violate the requirement of fairness imposed by § 1701.50(C) and, because of this, frustrate the purposes of the Williams Act. It must also be shown that no presumptions or procedures concerning the interested status of nonvoting shares are possible in the instant case that will not subject shareholders to the unreasonable and uncertain risk of disenfranchisement and quorum manipulation.[138]

In conclusion, the *Commercial Intertech* court found:

> . . . that [United Dominion had] not shown that [it is] likely to succeed in [its] preemption claim. Unlike [*U. S. Shoe*], the Court in the instant case is unable

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[133] *Id.*

[134] *See id.*

[135] *Id.* at 869.

[136] The private service was New York-based Morrow & Co. *Id.* at 870. Joseph Morrow testified as an expert witness during the hearing. *Id.* at 870-71. Mr. Morrow also testified as an expert witness during the *Acme-Cleveland* hearing.

[137] *Id.* at 871.

[138] *Id.* at 873.

> to find that the procedures necessary to determine the existence of the second quorum and the results of the second vote would require delay in the consummation of a tender offer well beyond the parameters set by the Williams Act.[139]

The simple analysis of the *Commercial Intertech* case is that R.C. § 1701.01(CC)(2)'s operations was not enjoined because the target corporation demonstrated the existence of procedures that permitted the statute to operate within the "Williams Act timeframe."[140] Commercial Intertech established a template for such procedures. Viewed in the bigger picture, the *Commercial Intertech* decision rejected the challenge to the last constitutionally vulnerable provision of the Control Share Acquisition Act.

Further bolstering the vitality of the Control Share Acquisition Act are the 1997 statutory amendments[141] enacted in light of the *Commercial Intertech* holding. The amendments have three main aspects.

First, R.C. § 1701.01(CC)(2) was redesignated as R.C. § 1701.01(CC)(1)(d) and amended to provide that, with respect to shares acquired after the proposed control share acquistion's first public disclosure, the period for the determination of interested shares must end on the record date of the 831 meeting.[142] This will permit the interested shares tabulation to proceed more easily within the "Williams Act timeframe."[143] This amendment resolves Judge Graham's concern regarding knowing the interested or disinterested status of shares on the date of the 831 meeting. The concern stemmed from difficulties in tracking post record-date transfers in a timely manner. This tracking is made unnecessary by the amendment, which codifies the "voting rights" approach to the determination of interested shares. Since, under Ohio law, voting rights become fixed and determinable as of the record date,[144] the voting rights of shareholders can be determined on that date. Additionally, this provision's purpose is to protect against post-record date transfers of voting power to market arbitrageurs, the amendment provides that interested shares include shares as to which a person can exercise or direct the voting power at the 831 meeting, as long as such person transfers the shares after the record date for the meeting and such transfer is

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[139] *Id. See also supra* note 71.

[140] *See supra* note 71.

[141] Am. Sub. H.B. 170, 122d General Assembly (Ohio 1997).

[142] OHIO REV. CODE ANN. § 1701.01(CC)(1)(d) (Baldwin 1993 & Supp. 1998).

[143] *See supra* note 71.

[144] Wick v. Youngstown Sheet & Tube Co., 46 Ohio App. 253 (1932).

"accompanied by the voting power in the form of a blank proxy, and agreement to vote as instructed by the transferee, or otherwise."[145]

Second, the additional quorum requirement for the 831 meeting, set out in R.C. § 1701.831(E)(1), was eliminated.[146] In their constitutional attacks, offerors would allege that it was difficult, if not impossible, to determine the number of interested shares absent from the 831 meeting that were held by market arbitrageurs. In *Commercial Intertech*, the target company, developed a system of presumptions to be used by the inspector of election to overcome this difficulty. These were among the presumptions found by Judge Graham to pass constitutional muster. Nonetheless, the second quorum added a certain level of complexity to the 831 meeting process. The amendments simply eliminate it, thus removing a potential constitutional infirmity from the statute.

Third, legislative findings regarding the use of information-gathering proxies and the use of presumptions were codified.[147]

These amendments, along with the *Commercial Intertech* holding, eliminate the sole remaining constitutional uncertainty surrounding the Control Share Acquisition Act. As a result, the Control Share Acquisition Act constitutionally exists in the bundle of rights that constitutes a share of an Ohio corporation, and provides for certainty in transactions that fall within its jurisdiction.

IV. THE UBIQUITOUS OHIO CONTROL BID STATUTE

The Control Bid Statute exists at the intersection of state corporate law and state securities law. The Control Bid Statute is not a part of the Ohio corporate code, but rather is part of the Ohio Securities Act. It is a part of the bundle the rights that are acquired by purchasing shares of companies under its jurisdiction.

The Control Bid Statute derives its primary support from the longstanding constitutionality of state securities laws. In *Hall v. Geiger-Jones*,[148] decided in 1917, the United States Supreme Court recognized "the power of the state to prevent frauds and impositions" and upheld the original Ohio Securities Act, which was enacted in 1913.[149] In confirming

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[145] OHIO REV. CODE ANN. § 1701.831(CC)(1)(d). *See also Ohio Strengthens*, *supra* note 92, at 4.

[146] OHIO REV. CODE ANN. § 1701.831(E)(1) (Baldwin 1993).

[147] OHIO REV. CODE ANN. § 1701.832(D) (Baldwin 1993 & Supp. 1998).

[148] 242 U.S. 539 (1917).

[149] *Id.* at 551 (citations omitted). In two companion cases, the Court upheld the constitutionality of the South Dakota blue sky law, Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917) and

the constitutionality of blue sky law, the Supreme Court explicitly rejected the contentions that state securities regulation violated federal due process and equal protection,[150] and placed an impermissible burden on interstate commerce.[151]

Thus, the Control Bid Statute eminates from the state's constitutional authority to protect its citizens from fraud in securities transactions. It is also supported by the holdings of *MITE*[152] and *CTS Corp.*, which expressly leave room for state oversight of takeovers, and the decision of the Eighth Circuit Court of Appeals in *Cardiff Acquisitions, Inc. v. Hatch.*[153]

The Control Bid Statute's original version was enacted in 1969, as a part of the post-Williams Act movement by the states,[154] and represented Ohio's first venture into the oversight of tender offers.[155] Provisions of the original statute included the requirement that the offeror make a filing with the Ohio Division of Securities (the "Division") twenty days prior to the commencement of the offer, a provision allowing the target company to request a hearing that could delay a tender offer up to sixty days and disclosure requirements regarding the accumulation of shares in anticipation of a tender offer.

Not surprisingly, the original Control Bid Statute ran into some constitutional problems. Specifically, in two reported decisions from the District Court for the Southern District of Ohio, the twenty-day pre-commencement filing requirement was declared unconstitutional.[156] Specifically, the pre-commencement filing requirement was preempted by SEC Rule 14(d)-2 promulgated under the Williams Act, which Rule requires a tender offeror to either distribute the offering materials or discontinue the offer within five days of a public announcement of a tender offer.[157] Subsequent to these cases, the Division announced that it would reconcile the original Control Bid Statute with federal law. The reconciliation would be accomplished by requiring that the filing be made with the Division upon the making or announcement of the tender offer,

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the Michigan blue sky law, Merrick v. Halsey & Co., 242 U.S. 568 (1917). The three cases are collectively referred to as the "Blue Sky Cases."

150 *Hall*, 242 U.S. at 552-57.

151 *Id.* at 557-59.

152 *See infra* note 159 and accompanying text.

153 751 F.2d 906 (8th Cir. 1984).

154 *See supra* notes 41-42 and accompanying text.

155 The 1969 version of the Control Bid Statute was a "first-generation" takeover statute. *See supra* notes 15 and 41; *see also* FRIEDMAN, *supra* note 68, at 713.

156 AMCA Int'l v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1979); Canadian Pacific Enter. v. Krouse, 506 F. Supp. 1192 (S.D. Ohio 1981).

157 17 C.F.R. § 240.14d-2 (1997). Since the tender offer filing became a "public record" upon filing with the Division, the filing commenced the five-day period.

provided that the offeror complied with the original Control Bid Statute's open offer, withdrawal rights and payment provisions.[158]

However, the death knell tolled clearly for the original Control Bid Statute when the United States Supreme Court held that the Illinois Business Takeover Act, which contained pre-commencement filing and hearing provisions similar to the original Control Bid Statute, was unconstitutional in *Edgar v. MITE Corp.*[159] Subsequent to *MITE*, the Division continued to apply the original Control Bid Statute *sans* the pre-commencement filing requirement. Constitutional scrutiny was avoided in a number of cases as the Division failed to find cause for a hearing or suspension.[160]

In 1990, the Control Bid Statute was amended in an effort to remedy its constitutional deficiencies. Among other changes, the pre-commencement filing requirement was replaced with a contemporaneous filing requirement,[161] the hearing process was replaced with a three-day review period to be undertaken by the Division,[162] and the disclosure obligations regarding the accumulation of shares in anticipation of a tender offer were deleted. The revisions were based on the Minnesota Corporate Take-Over Act which the Eighth Circuit Court of Appeals upheld as constitutional in *Cardiff Acquisitions, Inc. v. Hatch.*[163] Some of the specific provisions that were validated by the *Cardiff* court which found their way into the Control Bid Statute include: (i) a contemporaneous filing requirement;[164] (ii) a three-calendar day state securities agency review period and suspension authority;[165] (iii) the agency's inability to stop a tender offer based on the equities of the transaction;[166] and (iv) disclosure obligations in addition to those imposed by the Williams Act regarding sources of financing[167] and pending legal proceedings.[168]

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[158] FRIEDMAN, *supra* note 68, at 716, (quoting OHIO SECURITIES BULLETIN 1981:2 at 3).

[159] 457 U.S. 624, 654 (1982).

[160] FRIEDMAN, *supra* note 68, at 718. *See, e.g.*, CRTF Corp. v. Federated Dept. Stores, 679 F. Supp. 731 (S.D. Ohio 1988).

[161] OHIO REV. CODE ANN. § 1707.041(A)(1) (Baldwin 1993).

[162] OHIO REV. CODE ANN. § 1707.041(A)(3) (Baldwin 1993). The review period was extended to five. *See infra* notes 171-74 and accompanying text.

[163] 751 F.2d 906 (8th Cir. 1984).

[164] *Id.* at 910; OHIO REV. CODE ANN. § 1707.041(A)(1).

[165] *Cardiff*, 751 F.2d at 910; OHIO REV. CODE ANN. § 1707.041(A)(3). The three calendar day review period in the Ohio statute was extended to five calendar days by H.B. 215. *See infra* notes 171-74 and accompanying text.

[166] *Cardiff*, 751 F.2d at 91; OHIO REV. CODE ANN. § 1707.041(A)(3).

[167] *Cardiff*, 751 F.2d at 914-15; OHIO REV. CODE ANN. § 1707.041(A)(2)(c) (Baldwin 1993).

[168] *Cardiff*, 751 F.2d at 915-16; OHIO REV. CODE ANN. § 1707.041(A)(2)(g) (Baldwin 1993).

Despite the 1990 legislative antidote for the Control Bid Statute, offerors continued to attack the constitutionality of the law in connection with hostile tender offers. In practice, however, the constitutional attack is stayed while the Division completes its review of the control bid filing. Typically the offeror and the Division enter into a stipulation which permits the Division to conduct its review, provided that the Division gives notice to the court and the offeror if it intends to suspend the offer.[169] If the Division intends to suspend, the court would entertain the constitutional attack on the Control Bid Statute in a hearing on a motion for preliminary injunction against the operation of the statute. However, since the Division has not, up to now, sought to use the revised Control Bid Statute to suspend a control bid that is accompanied by a lawsuit in federal court,[170] the constitutionality of the statute has not yet been ruled upon.

Like the Control Share Acquisition Act, the Control Bid Statute was amended in 1997. Unlike the Control Share Acquisition Act amendments, which were largely designed to enhance its constitutionality, the Control Bid Statute amendments were designed to adhere to the careful constitutional balance struck in *Cardiff.* Specifically, the review period set out in R.C. § 1707.041(A)(3) was extended from three calendar days to five calendar days.[171] In accomplishing this amendment, the Division was faithful to the intent of both the revised Control Bid Statute's drafters and

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[169] *See, e.g.*, Stipulation filed in United Dominion Indus. Ltd. v. Commercial Intertech Corp., No. C2-96-672, slip op. (S.D. Ohio July 12, 1996).

[170] Since the Control Bid Statute was amended in 1990, the Division has not (as of the date of this article) sought to suspend a control bid that is accompanied by a lawsuit in federal court. However, in 1996, the Division began the practice of issuing comment letters to offerors during the statutory review period. During 1996 and 1997, seventeen control bid filings were made with the Division, and the Division issued comment letters in fifteen of those cases. The comment letters request additional information or clarification of disclosures made. To date, the comment letters have fallen into three general categories: letters regarding issues of a relatively ministerial nature, such as the failure to file a required exhibit; letters seeking the confirmation of information that is not disclosed, such as no change to employee benefit plans; and letters with significant comments such as questions regarding the source of funds for the acquisition, issues pertaining to the 831 meeting or the applicability of the Business Combination Statute, or other litigation or disclosure issues. For example, in the United Dominion/Commercial Intertech control bid, the Division sent a relatively extensive comment letter regarding disclosures pertaining to agent designation and proxy solicitation, and disclosures pertaining to the applicability of the Business Combination Statute. Suspension has been avoided where the issues raised in the comment letter have been resolved such that the disclosures meet the standards of the Control Bid Statute. However, the Division has suspended control bids where the comments were not resolved. *See, e.g.*, *Briarwood Golf Course, Inc./BGC Acquisition and Golf Acquisition Corp.*, OHIO SEC. BULL. (Ohio Dep't of Commerce), 96:3, 1996 at 18. In one recent case, the Division comment letter caused a control bid to be withdrawn. *See TR Sport, Inc./Sportco, L.L.C.*, OHIO SEC. BULL. (Ohio Dep't of Commerce), 97:2, 1997 at 9. The Division has also written letters to target companies to confirm that they are in fact "subject companies" under the Control Bid Statute.

[171] OHIO REV. CODE ANN. § 1707.041(A)(3). *See* Thomas E. Geyer, *Amendments to Ohio Securities Act Contained in Budget Bill*, OHIO SEC. BULL. (Ohio Dep't of Commerce), 97:2, 1997 at 1.

the *Cardiff* holding. In particular, the Ohio State Bar Association Corporation Law Committee notes accompanying the 1990 revisions of the Control Bid Statute state:

> [The Control Bid Statute] requires the Division to act within three days of filing to suspend the continuation of the control bid . . .. The Division must complete its hearing process on any such suspension within nineteen (19) calendar days of the original filing, in order to conform to the time frames allowed for control bids under the Williams Act, as interpreted by [*Cardiff*].[172]

In this context, the time frame allowed for state action under the Williams Act is twenty business days.[173] As a result, while the review period set out in R.C. § 1707.041(A)(3) has been extended to five calendar days, the post-suspension period set out in R.C. § 1707.041(A)(4) has been correspondingly reduced from sixteen calendar days to fourteen calendar days. Thus, the entire Division involvement in the control bid will still be resolved in nineteen calendar days, which is the timeframe upheld in *Cardiff* and is well within the Williams Act's twenty business day boundary.

The striking feature of the Control Bid Statute is its broad applicability. Generally speaking, the Control Bid Statute applies to cash acquisitions, through a tender offer, of a corporation's securities that have significant ties to Ohio if, after such acquisition, the acquiror would beneficially own more than ten percent of any equity securities of such corporation. Although viewed by many as a provision triggered only by hostile takeover attempts, it is important to note that the Control Bid Statute has no express exception for friendly acquisitions, negotiated acquisitions, acquisitions approved by the board of directors, acquisitions which are subject to a fairness opinion or acquisitions pursuant to a merger agreement. In the constitutional sense, the statute is neutral on its face: whether the context is

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[172] Ohio State Bar Association Corporation Law Committee Comments accompanying the 1990 Amendments to the Ohio Securities Act, *reprinted in* HOWARD M. FRIEDMAN, OHIO SECURITIES LAW AND PRACTICE HANDBOOK 49 (1998).

[173] SEC rule 14e-(1)(a), 17 C.F.R. 240.14e-(1)(a) (1997), states in pertinent part: "[n]o person who makes a tender offer shall . . . [h]old such tender offer open for less than 20 business days from the date such tender offer is first published." The *Cardiff* court held that since federal law required the tender offer to be held open for at least twenty business days, state intervention that would be resolved within that time frame was not preempted. Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 910 (8th Cir. 1984). Therefore, twenty business days sets the outer limit on state involvement. This twenty business day time period is distinct from the sixty day period discussed earlier. *See supra* note 71 and accompanying text. While twenty business days is the boundary for state involvement, courts have held that sixty days is the boundary on corporate procedures authorized by state law, which are typically carried out by officers, directors, or shareholders, but not state actors. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 85 (1987).

friendly or hostile and without regard to the state of incorporation of the offeror, R.C. § 1707.041(A)(1) provides that the Control Bid Statute applies if the transaction is a "control bid"[174] for securities of a "subject company"[175] pursuant to a "tender offer"[176] unless the companies involved fit into the narrow exception to the application of the Control Bid Statute set out in R.C. § 1707.041(G).[177]

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[174] OHIO REV.CODE ANN. § 1707.01(V) (Baldwin 1993) provides:

(1) "Control bid" means the purchase of or offer to purchase any equity security of a subject company from a resident of this state if either of the following applies:

(a) After the purchase of that security, the offeror would be directly or indirectly the beneficial owner of more than ten per cent of any class of the issued and outstanding equity securities of the issuer.

(b) The offeror is the subject company, there is a pending control bid by a person other than the issuer, and the number of the issued and outstanding shares of the subject company would be reduced by more than ten per cent.

(2) For purposes of division (V)(1) of this section, "control bid" does not include any of the following:

(a) A bid made by a dealer for his own account in the ordinary course of his business of buying and selling securities;

(b) An offer to acquire any equity security solely in exchange for any other security, or the acquisition of any equity security pursuant to an offer, for the sole account of the offeror, in good faith and not for the purpose of avoiding the provisions of this chapter, and not involving any public offering of the other security within the meaning of Section 4 of Title I of the "Securities Act of 1933," 48 Stat. 77, 15 U.S.C.A. 77d(2), as amended;

(c) Any other offer to acquire any equity security, or the acquisition of any equity security pursuant to an offer, for the sole account of the offeror, from not more than fifty persons, in good faith and not for the purpose of avoiding the provisions of this chapter.

[175] OHIO REV. CODE ANN. § 1707.01(Z) (Baldwin 1993) provides:

(1) "Subject company" means an issuer that satisfies both of the following:

(a) Its principal place of business or its principal executive office is located in this state, or it owns or controls assets located within this state that have a fair market value of at least one million dollars.

(b) More than ten per cent of its beneficial or record equity security holders are resident in this state, more than ten per cent of its equity securities are owned beneficially or of record by residents in this state, or more than one thousand of its beneficial or record equity security holders are resident in this state.

(2) The division of securities may adopt rules to establish more specific application of the provisions set forth in division (Z)(1) of this section. Notwithstanding the provisions set forth in division (Z)(1) of this section and any rules adopted under this division, the division, by rule or in an adjudicatory proceeding, may make a determination that an issuer does not constitute a "subject company" under division (Z)(1) of this section if appropriate review of control bids involving the issuer is to be made by any regulatory authority of another jurisdiction.

[176] "Tender offer" is not defined in the Ohio Securities Act. *See infra* notes 184-92 and accompanying text.

The first statutory predicate to the applicability of the Control Bid Statute is the definition of "control bid" set out in R.C. § 1707.01(V). A control bid is the purchase, or offer to purchase, of any equity securities of a subject company from an Ohio resident if: (i) after the purchase the offeror[178] would be directly or indirectly the beneficial owner[179] of more than ten percent of any class of the issued and outstanding shares of the issuer; or (ii) the offeror is the subject company, there is a pending control bid by a person other than the issuer, and the number of the issued and outstanding shares of the subject company would be reduced by more than ten percent. However, a control bid does not include: (i) a bid made by a dealer for his own account in the ordinary course of his business of buying and selling securities; (ii) an offer to acquire, or the acquisition of, equity

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[177] OHIO REV. CODE ANN. § 1707.041(G) (Baldwin 1993) provides that this section [1707.041] does not apply when:

> (1)The offeror or the subject company is a public utility or a public utility holding company as defined in section 2 of the "Public Utility Holding Company Act of 1935," 49 Stat. 803, 15 U.S.C. 79, as amended, and the control bid is subject to approval by the appropriate federal agency as provided in such act;
>
> (2)The offeror or the subject company is a bank or a bank holding company as subject to the "Bank Holding Company Act of 1956, 70 Stat. 133, 12 U.S.C. 1841, and subsequent amendments thereto, and the control bid is subject to approval by the appropriate federal agency as provided in such act;
>
> (3)The offeror or the subject company is a savings and loan holding company as defined in section 2 of the "Savings and Loan Holding Company Amendments of 1967, 82 Stat. 5, 12 U.S.C. 1730a, as amended, and the control bid is subject to approval by the appropriate federal agency as provided in such act;
>
> (4)The offeror and the subject company are banks and the offer is part of a merger transaction subject to approval by appropriate federal supervisory authorities.

[178] "Offeror" means a person who makes, or in any way participates or aids in making, a control bid and includes persons acting jointly or in concert, or who intend to exercise jointly or in concert any voting rights attached to the securities for which the control bid is made and also includes any subject company making a control bid for its own securities. OHIO REV. CODE ANN. § 1707.01(W) (Baldwin 1993).

[179] "Beneficial owner" includes any person who directly or indirectly through any contract, arrangement, understanding, or relationship has or shares, or otherwise has or shares, the power to vote or direct the voting of a security or the power to dispose of, or direct the disposition of, the security. "Beneficial ownership" includes the right, exercisable within sixty days, to acquire any security through the exercise of any option, warrant, or right, the conversion of any convertible security, or otherwise. Any security subject to any such option, warrant, right, or conversion privilege held by any person shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by that person, but shall not be deemed to be outstanding for the purpose of computing the percentage of the class owned by any other person. A person shall be deemed the beneficial owner of any security beneficially owned by any relative or spouse or relative of the spouse residing in the home of that person, any trust or estate in which that person owns ten per cent or more of the total beneficial interest or serves as trustee or executor, any corporation or entity in which that person owns ten per cent or more of the equity, and any affiliate or associate of that person. OHIO REV. CODE ANN. § 1707.01(AA) (Baldwin 1993).

securities solely in exchange for other securities, where such exchange qualifies as a private offering under section 4(2) of the Securities Act of 1933; or (iii) an offer to acquire, or any acquisition of, any equity securities, for the sole account of the offeror from less than fifty persons, in good faith and not for the purpose of avoiding the Ohio Securities Act.

The ten percent threshold in the definition of control bid is greater than the five percent threshold that triggers the Williams Act and therefore presents no conflict with federal law. However, the ten percent threshold is less than the twenty percent threshold that triggers the Control Share Acquisition Act.[180] It is noteworthy that a transaction consisting of an offer of securities of the offeror for the securities of the subject company is not excepted from the definition of control bid unless the exchange qualifies as a private offering under federal law. In other words, a transaction need not have a cash component to constitute a control bid. It is also worth noting that there is no exception to the definition of control bid for a pre-acquisition shareholder or an acquisition by a majority or even super-majority shareholder.

The second statutory predicate to the application of the Control Bid Statute is the definition of "subject company" set out in R.C. § 1707.01(Y). That term is the Ohio General Assembly's definition for a company that has significant ties to Ohio. Specifically, a subject company is an issuer[181] that meets both an operations test and a shareholder test. First, the operations test is met if the company has either its principal place of business or principal executive office in Ohio, or it owns or controls assets located in Ohio that have a fair market value of at least one million dollars. Second, the shareholder test is met if more than ten percent of the company's beneficial or record equity security holders are resident in Ohio, more than ten percent of the company's equity securities are owned beneficially or of record by residents of Ohio, or more than one thousand of the company's beneficial or record equity security holders are resident in Ohio.

This Ohio nexus requirement is much narrower than the Williams Act's application to equity securities registered under the 1934 Act.[182] But like the Minnesota statute held constitutional in *Cardiff*, the definition of subject company is broad enough to include companies that are not incorporated in Ohio provided they have a substantial nexus to the state by meeting the operations test and the shareholder test. In this regard, the

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[180] See the definition of "control share acquisition" set out in note 61.

[181] "Issuer" means every person who has issued, proposes to issue, or issues any security. OHIO REV. CODE ANN. § 1707.01(G) (Baldwin 1993).

[182] *See* Securities Exchange Act of 1934, § 14(d)(1), 15 U.S.C. § 78n(d).

Control Bid Statute has broader application than the Control Share Acquisition Act.[183]

The third statutory predicate is that the control bid for the subject company be made pursuant to a "tender offer or request or invitation for tenders."[184] Unlike "control bid" and "subject company," "tender offer" is not defined in the Ohio Securities Act. Additionally, "tender offer" is not defined in any federal statute. However, the phrase "tender offer or request or invitation for tenders" used in the Control Bid Statute is identical to the language used in the Williams Act.[185] Consequently, it is instructive to look to the federal case law construction of tender offer.[186]

Unfortunately, federal courts have not developed a uniform test. The Second Circuit Court of Appeals has stated that the "traditional characterization" of a tender offer is:

> a bid by an individual or group to buy shares of a company usually at a price above the current market price. Those accepting the offer are said to tender their stock for purchase. The person making the offer obligates himself to purchase all or a specific portion of the tendered shares if certain specified conditions are met.[187]

Beyond this, two general standards have developed, one broad and one narrow. The broad view is exemplified by the two part test enunciated in *S-G Sec., Inc. v. Fuqua Investment Co.*,[188] which holds that a tender offer exists where there is: (i) a publicly announced intention by the purchaser to acquire a substantial block of the stock of a target company for purposes of acquiring control thereof, and (ii) a subsequent rapid acquisition by the purchaser of large amounts of stock through open market and privately negotiated transactions.[189] The narrow standard consists of an eight part

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[183] The Control Share Acquisition Act applies only to "issuing public corporations" which, by definition, includes only corporations incorporated under the laws of Ohio. *See* OHIO REV. CODE ANN. § 1701.01(Z) (Baldwin 1993). The broader reach of the Control Bid Statute is directly supported by the *Cardiff* decision, which upheld the extra-territorial reach of the Minnesota Corporate Take-Over Act. *See* Cardiff Acquisition Inc. v. Hatch, 751 F.2d 906, 911-12 (8th Cir. 1984). Further, it is well-settled that blue sky laws may constitutionally have an extra-territorial impact. *See* Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 506-07 (1989).

[184] For convenience, as used in the rest of this article, "tender offer" will refer to the entire statutory phrase "tender offer or request or invitation for tenders."

[185] *See* Securities Exchange Act of 1934 §§ 14(d) and (e), 15 U.S.C. §§ 78n(d) and (c) (1997).

[186] Since there is no Ohio case law on point, it is likely that a court called upon to interpret the Control Bid Statute would apply the federal case law construction of tender offer.

[187] Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206 (2d Cir. 1978) (citation omitted).

[188] 466 F. Supp. 1114 (D. Mass. 1978).

[189] *Id.* at 1126-27. An even broader view was expressed in Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1973) where the

test most notably applied by the Ninth Circuit in *Securities and Exchange Commision v. Carter Hawley Hale Stores, Inc.*:[190]

> (1) [a]ctive 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 for a limited period of time;..................................
> (7) offeree subjected to pressure to sell his stock; [and ....
> (8)] public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of a large amount of target company's securities.[191]

Accordingly, one must look to these not-so-bright case law lines to determine whether a proposed acquisition constitutes a tender offer. Because of the federal case law on point, and the corresponding lack of Ohio case law, a transaction constituting a tender offer for federal purposes will almost certainly be considered by the courts to be a tender offer for Ohio purposes. Thus, the tender offer predicate should be identical for both Control Bid Statute and Williams Act purposes. It should be noted, however, that there is no tender offer predicate to the anti-fraud provisions of the Control Bid Statute set out in R.C. § 1707.042. Nor is there a tender offer predicate to the Control Share Acquisition Act.[192]

With its sweeping applicability, the Control Bid Statute places in the bundle of shareholder rights the right to receive full and fair disclosure of a takeover bid. The statutory provisions flow from the state's power to prevent fraud in securities transactions. Given this background, its statutory predicates, and of course the *Cardiff* decision, the Control Bid Statute exists as the type of constitutional state level oversight of tender offers permitted under the *CTS Corp.* holding and by blue sky law standards.

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court held that the definition of tender "should extend beyond its conventional meaning to offers likely to pressure shareholders into making uninformed, ill-considered decisions to sell."

[190] 760 F.2d 945 (9th Cir. 1985).

[191] *Id.* at 950 (citation omitted). This standard was first articulated in Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979), and is sometimes referred to as the "Wellman test."

[192] *See* OHIO REV. CODE ANN. § 1701.831(A); OHIO REV. CODE ANN. § 1701.01(Z).

V. THE FORMIDABLE OHIO BUSINESS COMBINATION STATUTE

The Business Combination Statute is what is known as a "third generation" takeover statute.[193] Enacted in 1990,[194] the Ohio State Bar Association Corporation Law Committee comments accompanying the statute indicate that it is intended to "prevent some of the abusive and self-dealing activities which often accompany or follow highly-leveraged acquisitions" and to "encourage those persons proposing to acquire control . . . to negotiate with the board of directors so that all of the corporation's shareholders receive full and fair consideration for their shares."[195]

The Business Combination Statute generally prohibits an "issuing public corporation"[196] from engaging in certain business combinations, defined by the General Assembly as "Chapter 1704 transactions,"[197] with an

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[193] *See generally* Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 497-98 (7th Cir. 1989). Third generation statutes are characterized by the placing of conditions on certain post-acquisition transactions. *Id.*

[194] AM. SUB. S.B. 321 (Ohio 1990).

[195] Ohio State Bar Association Corporation Law Committee Comments accompanying R.C. Chapter 1704, *reprinted in* HOWARD M. FRIEDMAN, OHIO SECURITIES LAW AND PRACTICE HANDBOOK 17 (1998).

[196] OHIO REV. CODE ANN. § 1701.01(Y) (Baldwin 1993). *See supra* note 62. Note that this is the same predicate as is used in the Control Share Acquisition Act.

[197] "Chapter 1704. Transaction" means any of the following:

> (1)A merger, consolidation, combination, or majority share acquisition between or involving an issuing public corporation or any subsidiary of an issuing public corporation and any of the following:
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> (a) An interested shareholder;
> (b)A person, partnership, corporation, or other entity, however organized, whether or not it is an interested shareholder, that is, or after the merger, consolidation, combination, or majority share acquisition would be, an affiliate or associate of an interested shareholder.
>
> (2)(a) Subject to the exception in division (B)(2)(b) of this section, a purchase, lease, sale, distribution, dividend, exchange, mortgage, pledge, transfer, or other disposition of assets, directly or indirectly owned or controlled by the issuing public corporation, by, to, with, or for the benefit of an interested shareholder or an affiliate or associate of an interested shareholder in one or more transactions, if, in any of those transactions, the assets meet any of the following conditions:
>
> (i) The assets have an aggregate fair market value equal to at least five per cent of the aggregate fair market value of all the assets, determined on a consolidated basis, of the issuing public corporation;
> (ii)The assets have an aggregate fair market value equal to at least five per cent of the aggregate fair market value of all the outstanding shares of the issuing public corporation;
> (iii) The assets represent at least ten per cent of the earning power or income of the issuing public corporation, determined on a consolidated after-tax basis and after excluding any transaction other than in the ordinary course of business.

(b)One or more transactions in the ordinary course of business of an issuing public corporation on terms no more favorable to the interested shareholder than those acceptable to third parties, as shown by contemporaneous transactions, is not a Chapter 1704. transaction under division (B)(2)(a) of this section.

(3)(a) Subject to the exception in division (B)(3)(b) of this section, a purchase, lease, sale, exchange, transfer, or other disposition of assets directly or indirectly owned or controlled by the interested shareholder or an affiliate or associate of the interested shareholder, by, to, with, or for the benefit of the issuing public corporation in one or more transactions, if, in any of those transactions, the assets meet any of the conditions set forth in division (B)(2)(a)(i), (ii), or (iii) of this section.

(b)One or more transactions in the ordinary course of business of an issuing public corporation on terms no more favorable to the interested shareholder than those acceptable to third parties, as shown by contemporaneous transactions, is not a Chapter 1704. transaction under division (B)(3)(a) of this section.

(4)The issuance or transfer to an interested shareholder or an associate or affiliate of an interested shareholder of any shares, or of any rights to acquire shares, of the issuing public corporation or a subsidiary of the issuing public corporation by the issuing public corporation or a subsidiary of the issuing public corporation, in one or more transactions, if the shares, or the rights, have an aggregate fair market value equal to at least five per cent of the aggregate fair market value of all the outstanding shares of the issuing public corporation and if the shares, or the rights, are not issued or transferred pursuant to the exercise of warrants, rights, or options to purchase that have been issued, or pursuant to a dividend paid or a distribution made, proportionately to all shareholders of the issuing public corporation.

(5)The adoption of a plan or proposal for the dissolution, winding up of the affairs, or liquidation of the issuing public corporation that is proposed by, on behalf of, or pursuant to a written or unwritten agreement, arrangement, or understanding with an interested shareholder or an affiliate or associate of an interested shareholder.

(6)Any of the following, if the direct or indirect effect is to increase the proportionate share of the outstanding shares of the issuing public corporation or a subsidiary of the issuing public corporation beneficially owned by an interested shareholder or an affiliate or associate of an interested shareholder, unless the increase is the result of immaterial changes due to fractional share adjustments:

(a)A reclassification of securities, including a share split, a share dividend or other distribution of shares, or a reverse share split;
(b)A recapitalization of the issuing public corporation;
(c)A merger, consolidation, combination, or majority share acquisition between or involving the issuing public corporation and a subsidiary of the issuing public corporation;
(d)Any other transaction, whether or not with, into, or involving the interested shareholder, that is proposed by, on behalf of, or pursuant to a written or unwritten agreement, arrangement, or understanding with the interested shareholder or an affiliate or associate of the interested shareholder.

(7)Receipt by an interested shareholder or an affiliate or associate of an interested shareholder of the direct or indirect benefit of a loan, advance, pension or any other employee benefit plan termination, guarantee, pledge, mortgage, security agreement, financing statement, deed of trust, or other financial assistance, or a tax credit or other tax advantage, provided by or through the issuing public corporation or any subsidiary of the issuing public corporation unless the interested shareholder receives the benefit proportionately as a holder of shares of the issuing public corporation.

"interested shareholder"[198] for a period of three years after the "share acquisition date."[199] In the takeover context, the issuing public corporation is the target and the interested shareholder is the offeror. Thus, the offeror may be prohibited for three years from completing a takeover transaction initiated by a tender offer. And even after the three year moratorium, a "Chapter 1704 transaction" may be carried only upon receiving shareholder approval[200] or upon compliance with "fair price" requirements.[201]

Commentary suggests that the General Assembly enacted this "merger moratorium statute" to deter hostile takeovers by limiting the bidder's ability to carry out a second stage clean-up merger after the initial tender offer,[202] and to encourage those persons proposing to acquire control of an issuing public corporation to negotiate with the target corporation's board of directors.[203] R.C. Chapter 1704 encourages such negotiation by providing that the moratorium does not apply if, prior to the interested shareholder's share acquisition date, the directors of the issuing public corporation have approved either (i) the Chapter 1704 transaction, or (ii) the purchase of shares by the interested shareholder.[204]

OHIO REV. CODE ANN. § 1704.01(B) (Baldwin 1993).

198 When used in connection with a Chapter 1704 transaction:

> "Interested shareholder," with respect to an issuing public corporation, means a person other than the issuing public corporation, a subsidiary of that issuing public corporation, any employee stock ownership or benefit plan of the issuing public corporation or a subsidiary of that issuing public corporation, or any trustee or fiduciary with respect to any such plan acting in such capacity who is the beneficial owner of a sufficient number of shares of the issuing public corporation that, when added to all other shares of the issuing public corporation in respect of which that person may exercise or direct the exercise of voting power, would entitle that person, directly or indirectly, alone or with others, including affiliates and associates of that person, to exercise or direct the exercise of ten per cent of the voting power of the issuing public corporation in the election of directors after taking into account all of that person's beneficially owned shares that are not currently outstanding.

OHIO REV. CODE ANN. § 1704.01(C)(8) (Baldwin 1993).

199 "'Share acquisition date,' with respect to any person, means the date on which that person first becomes an interested shareholder of an issuing public corporation." OHIO REV. CODE ANN. § 1704.01(C)(10) (Baldwin 1993).

200 OHIO REV. CODE ANN. § 1704.03(A)(3) (Baldwin 1993).

201 OHIO REV. CODE ANN. § 1704.03(A)(4) (Baldwin 1993). *See also* FRIEDMAN, *supra* note 68, at 750-52.

202 This is subject to the offeror's compliance with statutory tests aimed at providing fairness for minority shareholders. *See* OHIO REV. CODE ANN. § 1704.03. *See also* FRIEDMAN, *supra* note 68, at 750-52.

203 *See* FRIEDMAN, *supra* note 68, at 744-45.

204 OHIO REV. CODE ANN. § 1704.02(A) (Baldwin 1993).

The Business Combination Statute is also designed to prevent an acquiror from selling assets to pay off acquisition debt. This is accomplished by including dispositions of assets in the class of transactions that are delayed for three years.[205]

Although the constitutionality of the Business Combination Statute has not been litigated, the statute is largely based upon a Wisconsin statute[206] that the Seventh Circuit Court of Appeals upheld as constitutional in *Amanda Acquisition Corp. v. Universal Foods Corp.*.[207] In that case, the offeror, Amanda Acquisition, sought injunctive relief claiming that the Wisconsin law was unconstitutional. The court described the pertinent provisions of the statute as follows:

> No firm incorporated in Wisconsin and having its headquarters, substantial operations, or 10% of its shares or shareholders there may engage in a business combination with an interested stockholder . . . for three years after the interested stockholder's stock acquisition date unless the board of directors of the [Wisconsin] corporation has approved, before the interested stockholder's stock acquisition date, that business combination or the purchase of stock.[208]

The court also commented that the Wisconsin law "provides for almost hermetic separation of bidder and target for three years."[209]

The *Amanda Acquisition* court began its review by commenting: "If our views of the wisdom of state law mattered, Wisconsin's takeover statute would not survive."[210] But, when commencing its constitutional analysis, the court recognized that: "[s]kepticism about the wisdom of a state's law does not lead to the conclusion that the law is beyond the state's power."[211] The court then rejected Amanda Acquisition's Supremacy Clause and Commerce Clause challenges.

First, the court addressed Amanda Acquisition's argument that since the Wisconsin law makes tender offers unattractive to many potential bidders, it is preempted. The court observed that the 1934 Act, to which the Williams Act was added in 1968, also contains a savings clause in favor of state law.[212] Further, the Seventh Circuit noted "the traditional reluctance of federal courts to infer preemption of state law in areas traditionally

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[205] OHIO REV. CODE ANN. § 1704.01(B)(2)(a) (Baldwin 1993).

[206] WIS. STAT. § 180.0726 (1996).

[207] 877 F.2d 469 (7th Cir. 1989).

[208] *Amanda Acquisition Corp.*, 877 F.2d at 498 (citation omitted).

[209] *Id.*

[210] *Id.* at 500.

[211] *Id.* at 502.

[212] Securities Exchange Act of 1934 § 28(a), 15 U.S.C. § 78bb(a) (1997).

regulated by the states."[213] The court then examined the Williams Act and stated:

> To say that Congress wanted to be neutral between bidder and target - a conclusion reached in many of the Court's opinions . . . - is not to say that it also forbade the states to favor one of these sides . . . Nothing in the Williams Act says that the federal compromise among bidder, target's managers, and investors is the only permissible one.[214]

Upon careful review, the *Amanda Acquisition* court recognized that the Williams Act regulated the *process* of tender offers, leaving the *substance* to the states. The court commented that "*CTS* observed that laws affecting the voting power of acquired shares do not differ in principle from many other rules governing the internal affairs of corporations."[215] The Seventh Circuit therefore concluded that the Wisconsin law at issue was not different than other internal affairs provisions (*e.g.*, staggered or classified boards of directors, supermajority voting requirements and multiple classes of stock) and therefore was not preempted. The court added "[o]nly if the Williams Act gives investors a right to be the beneficiary of offers could Wisconsin's law run afoul of the federal rule. No such entitlement can be mined out of the Williams Act, however."[216]

Second, the court addressed the Commerce Clause challenge. The court again recognized the long standing and unimpaired vitality of the internal affairs doctrine supplemented by the philosophy that courts "are not inclined to second guess the empirical judgments of lawmakers concerning the utility of legislation."[217] The court recognized that the statute at issue depressed a bid price, or even discouraged a bid altogether. The Seventh Circuit stated, however, that "this is equally true of . . . other rules of corporate law - supermajority voting requirements, staggered and classified boards, and so on - have similar or greater effects on some persons' willingness to purchase stock."[218] The court then responded to the discrimination argument by stating "[e]very rule of corporate law affects investors who live outside the state of incorporation, yet this has never

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[213] *Amanda Acquisition Corp.*, 877 F.2d at 502 (citation omitted).

[214] *Id.* at 503.

[215] *Id.*

[216] *Id.* at 504.

[217] *Id.* at 505 (citation omitted).

[218] *Id.* at 506. The court also noted that "States could ban mergers outright, with even more powerful consequences." *Id.* In fact, Wisconsin did not allow mergers among firms chartered there until 1947. *Id.*

been thought sufficient to authorize a form of cost benefit inquiry through the medium of the Commerce Clause."[219]

Moreover, the court found that "[b]ecause nothing in the [Wisconsin] Act imposes a greater burden on out-of-state offerors than it does on similarly situated [Wisconsin] offerors, we reject the contention that the Act discriminates against interstate commerce."[220]

Finally, the court dismissed the claim that the Wisconsin law hindered interstate commerce "too much," in holding that:

> *CTS* dispatched this concern by declaring it inapplicable to laws that apply only to the internal affairs of firms incorporated in the regulating state. States may regulate corporate transactions as they choose without having to demonstrate under an unfocused balancing test that the benefits are "enough" to justify the consequences.[221]

The *Amanda Acquisition* decision is a remarkable recognition of state law in the tender offer context.[222] One commentator has suggested that the case "announces three absolutely correct propositions of Constitutional Law."[223] First, that an offeror has no constitutional right to profit from the making of a tender offer.[224] Second, that shareholders have no constitutional right to receive a tender offer.[225] And, third, states have no constitutional duty to permit tender offers to succeed.[226]

The Fourth Circuit Court of Appeals followed the *Amanda Acquisition* decision in upholding the Virginia business combination statute in *WLR Foods, Inc. v. Tyson Foods, Inc.*[227] In responding to the constitutional challenge, the *WLR Foods* court first noted that "the sole purpose of the Williams Act [is] the protection of investors who are confronted with a

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[219] *Id.*

[220] *Id.* The court continued: "For the same reason, the court long ago held that state blue sky laws comport with the Commerce Clause." *Id.*

[221] *Id.* at 507 (citation omitted).

[222] The decision is all the more remarkable because it was authored by the Honorable Frank Easterbrook, whose pre-judicial philosophies clearly disfavored the types of statutes like the one upheld in this case. *See supra* note 5.

[223] Leigh B. Trevor, *The American Hostile Tender Offer " dreadful degradation of standards,"* 97 Exchanges (1992).

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] 65 F.3d 1172 (4th Cir. 1995), *cert. denied*, 516 U.S. 1117 (1996). The whole of the decision upheld a package of four Virginia statutes designed to deter hostile takeovers: the "Control Share Acquisition Act," VA. CODE ANN. §§ 13.1-728.1 to 728.9 (Michie 1993); the "Affiliated Transaction Act" (business combination statute), VA. CODE ANN. §§ 13.1-725 to 727.1 (Michie 1993); the "Poison Pill Statute," VA. CODE ANN. § 13.1-646 (Michie 1993); and the "Business Judgment Statute," VA. CODE ANN. § 13.1-690 (Michie 1993).

tender offer."[228] The court then recognized that the Virginia statute could have a pro-incumbent management impact, but stated:

> Congress did not forbid the result that Virginia has achieved with the statutory scheme in the instant case. The fact that Congress, when it enacted the Williams Act, did not intend to create an advantage for target management in the takeover situation, does not necessarily mean that Congress meant to prevent the states from allowing management an advantage that is not unfair to investors.[229]

The court then rejected the constitutional challenge.

Consequently, in light of the *Amanda Acquisition* and *WLR Foods* decisions, the Business Combination Statute is on very firm constitutional ground. While the statute may favor incumbent management, this aspect is by no means constitutionally fatal. Rather, a review of the cases upholding business combination statutes returns to where this article began: the judicially-sanctioned sovereignty of state corporate law and the authority of a state to create the bundle of rights obtained by purchasers of corporate shares.

While it may appear that the Business Combination Statute, and similar laws in other states, are constitutionally invulnerable, there is certainly no assurance against constitutional attack. For example, it has been suggested that the Delaware business combination statute, section 203 of the Delaware Corporation Law,[230] is unconstitutional in its application.[231]

Professor Robert Suggs suggests the following hypothetical: following the acquisition of a majority of shares in a Delaware target corporation through a hostile tender offer, the acquiror replaces the incumbent directors of the target and then causes a transfer of the target's assets to a foreign (non-Delaware) wholly-owned subsidiary of the target (the "foreign asset subsidiary").[232] Next, the acquiror creates a second foreign subsidiary and transfers the stock of the first foreign subsidiary to it (the "foreign parent subsidiary").[233] Third, the acquiror effects one of three transactions: (i) a sale of substantially all of the assets of the foreign asset subsidiary to the acquiror's wholly-owned subsidiary; (ii) a statutory merger between the foreign asset subsidiary and a wholly-owned subsidiary of the acquiror; or (iii) a partial sale of assets by the foreign asset subsidiary to the acquiror's

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[228] *WLR Foods*, 65 F.3d, at 1179-1180 (quoting Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 35 (1977)). *See also supra* notes 8-9 and accompanying text.

[229] *WLR Foods*, 65 F.3d. at 1180.

[230] DEL. CODE ANN. tit. 8, § 203 (1995).

[231] See Suggs, *supra* note 23.

[232] *Id.* at 1112.

[233] *Id.* at 1113.

wholly-owned subsidiary. Professor Suggs notes that section 203 would not prohibit the first two steps, but that each of the alternative transactions in step three would fall within section 203's moratorium. The prohibitions on the transactions in step three are unconstitutional, suggests Professor Suggs, because the Delaware law purports to apply to the affairs of corporations not incorporated under Delaware law.[234]

While this may in fact be a constitutional infirmity of the Delaware law, the Business Combination Statute does not contain the same flaw. Instead, the first step in the series, the transfer of assets from the Ohio target to a foreign subsidiary would subject to the Business Combination Statute's moratorium. The applicability to the Ohio target is both appropriate and constitutional. Thus, the Ohio law is triggered at the time assets are sought to be moved from the Ohio target, so that the possible constitutional infirmities of the Delaware law do not arise.

VI. CONCLUSION

The investor who acquires the bundle of legal rights known as a "share" expects that bundle of state laws to provide for the orderly conduct of corporate affairs, including a change in the corporation's control. The current state of the law is quite favorable toward maintaining the integrity of those laws in the bundle that provide for reasonable state oversight of takeover transactions.

In *CTS Corp.*, the United States Supreme Court upheld the Indiana control share acquisition statute, which established a template for state legislation that would neither be preempted by the Williams Act nor run afoul of the Commerce Clause. *CTS Corp.'s* progeny includes the *WLR Foods* decision, which upheld the Virginia control share acquisition act, and more importantly, the *Commercial Intertech* decision, which upheld the Control Share Acquisition Act. In addition, the 1997 amendments to the Control Share Acquisition Act bolster its constitutionality.

Further, the *Cardiff* decision upheld the constitutionality of blue sky oversight of tender offers. The Control Bid Statute, as amended in 1990 and 1997, fits squarely within the parameters of that case.

Finally, the *Amanda Acquisition* and *WLR Foods* cases upheld the constitutionality of business combination statutes enacted by Wisconsin and Virginia, respectively. The Business Combination Statute falls within the purlieu of those decisions.

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[234] *Id.*

As with all situations implicating the Commerce Clause, there is a tension between state action and constitutional considerations. Case law recognizes this tension, and has established the constitutional boundaries. Many state legislatures also recognize this tension, and have drafted statutes accordingly. Additionally, the Division recognizes this tension, and administers takeover oversight within constitutional reasonableness.

This article has described the three vibrant provisions of Ohio law that encourage negotiated changes in control. Although they appear in different chapters of the Revised Code, they work together as an integrated part of the bundle of rights acquired by purchasers of shares of corporations incorporated in, or with significant ties to, Ohio. First, the Control Share Acquisition Act operates to insure that (i) information regarding a proposed acquisition is timely delivered to the target and (ii) those who hold shares before the proposed acquisition is publicly announced have a sufficient opportunity both to consider the information and to vote upon the proposal. Second, the Control Bid Statute mandates the full and fair disclosure of certain information regarding a proposed acquisition, and charges the Division with the responsibility of ensuring that this standard is met. Third, the Business Combination Statute prevents certain transactions that might be attractive to a successful acquiror but detrimental to shareholders. These bulwarks form a powerful incentive in favor of negotiating changes in control of companies. In fact, recent empirical evidence from the Division indicates that the statutes are accomplishing their goal of negotiated takeovers.[235]

The constitutionality of this acropolis is supported by a legion consisting of the internal affairs doctrine, the constitutionality of blue sky law, appropriate legislative amendments and federal case law such as *CTS Corp.*, *Commercial Intertech*, *Cardiff* and *Amanda Acquisition*. Consequently, the investor who commits funds to a corporation incorporated in, or with significant ties to, Ohio receives a bundle of rights that includes settled expectations regarding change in control transactions.

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[235] During the three year period of 1995 to 1997, a total of 18 control bid filings were made with the Division. Only four of those filings, *Luxottica/U.S. Shoe*, *Danaher/Acme-Cleveland*, *BGC Acquisition Corporation/Briarwood Golf Course*, and *United Dominion/Commercial Intertech*, represented hostile takeovers. The other 14 transactions represented takeovers pursuant to negotiations with the target company's board of directors and/or merger agreements.