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Symposium on State Corporate Anti-Takeover Legislation Articles: Introduction

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ARTICLES

Symposium on State Corporate Anti-Takeover Legislation

Introduction

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The momentous events of the past year involving state takeover-related laws — judicial decisions as well as legislative activity in both the state and congressional arenas — provide a timely and dramatic stage for the articles in this symposium.

The symposium articles outline the various types of so-called "second generation" state anti-takeover statutes and critique the impact of judicial decisions on those statutes, as well as provide an important overview of both the legislative choices and the legal issues involved. The symposium articles also present a discussion of the arguments for and against federal preemption of state takeover statutes, including their related policy underpinnings, economic and otherwise, and demonstrate how the battle lines on the preemption issue are being drawn.

In this author's view, a major result of the United States Supreme Court decision in *CTS Corp. v. Dynamics Corp. of America*,[1] in April 1987, upholding the constitutionality of the Indiana Control Share Acquisition Chapter,[2] has been the shifting of the "federal preemption of state takeover statutes" debate from the judicial forum to the congressional forum. This shift has occurred because of a critical aspect of the *CTS* decision that has yet received little attention, but which provides a valuable perspective from which to review and

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1. 107 S. Ct. 1637 (1987).

2. IND. CODE ANN. § 23-1-42 (West Supp. 1988).

consider the symposium articles. Namely, that the *CTS* Supreme Court majority decision rejected the so-called "market for corporate control" economic policy concept as a basis to invalidate state takeover statutes. The Court did so by concluding that "[t]he Constitution does not require the states to subscribe to any particular economic theory."[3] The Court later went on to state that "[w]e have rejected the 'notion that the commerce Clause protects the particular structure or methods of operation in a . . . market.' "[4] Following the 1982 Supreme Court decision in *Edgar v. MITE Corp.*,[5] the "market for corporate control" concept had been increasingly used in lower federal court decisions to invalidate state takeover statutes. This was especially true, and was particularly emphasized in the Seventh Circuit's decision in the *CTS* case which utilized such a policy as a basis for the Court of Appeals to invalidate the Indiana Chapter.[6]

The majority decision of the Supreme Court in *CTS* thus has determined that the federal judiciary may not invalidate a state takeover law based on one judge's view or one courts view of the "best" economic policy for the nation and whether the particular state takeover law in question conflicts with or frustrates such economic policy — in the absence of an unequivocal congressional mandate regarding the national policy on this issue. The *CTS* decision thereby implicitly recognized that the "market for corporate control" is as yet only an economic concept that is identified principally with economists from the so-called "Chicago School"; an economic concept that has not yet been recognized anywhere in express federal law or unambiguous federal mandate (in the Williams Act or elsewhere) as a basis for invalidating or preempting state takeover statutes. The Supreme Court has repeatedly has stated its interpretation of the federal policy underpinnings and purposes of the Williams Act. Namely, that the federal takeover regulatory scheme is intended to protect shareholders, while

3. *CTS*, 107 S. Ct. at 1649, 1652.

4. *CTS*, 107 S. Ct. at 1654, *citing* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978).

5. 457 U.S. 624 (1982).

6. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 264 (7th Cir. 1986), *rev'd*, 107 S. Ct. 1637 (1987) ("But whether or not an anti-takeover statute is vulnerable to challenge under the commerce clause if it impedes mobility of corporate assets, it is highly vulnerable if it impedes the important commerce in corporate control. Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control — an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute.").

neither favoring the bidder nor the target company in the process.[7]

The Supreme Court's decision in *CTS* thus puts both the debate and the determination regarding whether there should be a national policy to preempt state anti-takeover statutes squarely where most persons would say it should be, before Congress. In this author's view, the "bottom line" in this debate boils down to whether Congress will "buy" the economic concept of the "market for corporate control" as the basis for federal legislation preempting state anti-takeover statutes.

In listing key factors which may impact on how Congress will act on the preemption issue, the first point to be noted is that, like most other areas of economic concept and theory, there has not developed a consensus among economists as to whether takeovers, in general, and hostile takeovers, in particular, are economically beneficial. Rather, economists have conducted studies and issued papers that have reached conclusions on opposite sides of the issue, as was pointed out in several of the symposium articles. Perhaps the most telling conclusion on this point was contained in the July 1983 Report of the Securities and Exchange Commission's Advisory Committee on Tender Offers which stated that "after considerable study, discussion and consideration of comments and views, the Committee finds that there is insufficient basis for concluding that takeovers are either *per se* beneficial or detrimental to the economy or the securities markets in general, or to issuers or their shareholders specifically."[8]

A second aspect to be factored in the analytical equation of whether and how Congress might act on the preemption issue is that Congress acts on the basis of the collective vote of the individual members of Congress; such that a majority of the members of each house of Congress would have to vote to preempt the states in the takeover area. Such a majority vote action by members of each house of Congress may prove to be difficult inasmuch as virtually every state can demonstrate the "bloody shirt" effects of the waves of hostile takeovers ("bust-up" takeovers and otherwise) over the last several years. These effects include closed plants, employee layoffs and other economic or community negatives in various respects—all of which have created substantial local constituencies in virtually every state who have been adversely impacted by hostile takeovers. Those con-

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7. *CTS*, 107 S. Ct. at 1644; Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8-9 (1985); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 29 (1977).

8. Executive Summary, Securities and Exchange Commission Advisory Committee on Tender Offers, Report of Recommendations, p. xvii (July 15, 1983).

stituencies are major factors in the voting process when members of Congress from those affected jurisdictions face reelection. It is to be noted that in the prior session of Congress there were reported to be some 3-score separate pieces of federal legislation introduced by Senators and Representatives that would restrict takeovers in various respects. Such is an indication of what federal legislation preempting the states would have to overcome in terms of congressional sentiment regarding takeovers.

Another factor confronting Congress in the preemption analysis is the evidence that the existence of the various types of "second generation" takeover statutes—29 states currently have one or more such statutes, with 12 states having enacted statutes since the April 1987 *CTS* decision—has not deterred hostile takeovers. This is evidenced by the fact that on just one day, February 29, 1988, no less than 6 hostile takeovers involving in excess of $5.4 billion were commenced.[9] Further, numerous recent examples exist[10] of hostile offers succeeding in the face of even the "New York-type" version of the "business combination freeze" statutes, considered by authors of symposium articles to be the most potent of the state takeover statutes in terms of deterring hostile offers. The principal consequences from operation of the state takeover laws in those situations were that target company shareholders received a higher price for their shares and/or that target company management extracted an agreement from the bidder to retain local headquarter operations in the state and limiting plant closings. These results can hardly be deemed "negative," whether from a shareholder or community standpoint, or from a microeconomic or macroeconomic standpoint. The only remaining economic argument against state takeover statutes—the acknowledged fact that such state laws may result in deterring some hostile offers from being commenced (principally "low ball" offers seeking to acquire a target company at a relatively inexpensive price before competing bids can develop)—does not appear to be a compelling basis for Congress to preempt state takeover regulation. After all, nowhere is it written that the first takeover bidder should "win", just as nowhere is it written, under corporate merger and acquisition law, that the first party to propose a merger should "win".

All of the above factors as well as others not discussed in this Introduction will be considered by Congress as part of the legislative

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9. Wall St. J., Mar. 1, 1988, § 1, at 3, col. 1.

10. Amber Acquisition Corp. (Bond Corporations Holdings Ltd.)/Heileman Brewing Co.; Bilzerian Partners, Ltd./The Singer Corporation; Salant Acquisition Corp./Manhattan Industries Inc.

process dealing with the preemption issue. If the result is that Congress refuses to accept the "market for corporate control" concept as a basis for federal preemption of state takeover laws, the judicial battles over the various types of second generation state laws analyzed in certain of the symposium articles can be expected to continue. In addition, more legislative experimentation with state takeover regulation in the state "laboratories" will take place—both in terms of developing different types of legislative approaches as well as considering more refined versions of existing statutory approaches such as the Model Control Share Acquisition Act recently developed by an ABA/NASAA Joint Committee that I was privileged to Co-chair and be a part of.[11]

The national debate regarding the proper scope of state involvement and impact on takeovers can be expected to continue. The articles in this symposium provide an important sharpening of the focus of that debate.

11. MODEL CONTROL SHARE ACT (Final Draft, Mar. 29, 1988) (ABA/NASAA Joint Committee).