The Constitutionality of State Approval Requirements for the Acquisition or Transfer of Control of a Common Carrier or Public Utility

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This article addresses the question of whether, in light of the recent Supreme Court decision in *Edgar v. MITE Corp.*,[1] state approval requirements[2] for the acquisition of a public utility or common carrier are subject

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1. 457 U.S. 624 (1982).

2. The laws of fourteen states—*i.e.*, Arizona, Arkansas, California, Illinois, Kansas, Louisiana, Missouri, Nevada, New Mexico, Oklahoma, Oregon, Tennessee, Texas, and Utah—were surveyed with respect to the question of whether state approval was required for the acquisition

to challenge under the Supremacy[3] and Commerce[4] Clauses of the United States Constitution. Part I presents a brief background concerning questions surrounding the constitutionality of state takeover statutes, which were at issue in *Edgar*, and demonstrates how these questions relate to the state approvals here in issue. Part II presents a discussion of the holdings of *Edgar*, as well as a summary analysis of related federal circuit and district court case law. Part III discusses strategies for potential constitutional challenges to the state approval requirements, particularly in light of the recent decision in *National City Lines v. LLC Corp.*[5] Finally, Part IV concludes (1) that a strong challenge could be made to the state approval requirements under the Commerce Clause; and (2) that a less persuasive, but nevertheless legitimate, challenge to the state approval requirements could be made pursuant to the Supremacy Clause.

I. BACKGROUND

In 1968 the United States Congress passed the Williams Act, which amended the Securities Exchange Act of 1934 to provide for certain filing and disclosure requirements in connection with the making of cash tender offers.[6] Although the Williams Act did not preempt the entire field of securities regulation with respect to cash tender offers,[7] it nevertheless sought to establish a national system of regulation governing tender offers[8] which would strike a neutral balance between the incumbent man-

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or transfer of control of a common carrier or a public utility (using railroads and oil pipelines as the specific examples). Only two states, California and Nevada, required approval of such acquisitions. In California, every railroad corporation operated for compensation in California, including every corporation owning or controlling any railroad, is defined as a "common carrier." CAL. PUB. UTIL. CODE §§ 211, 229 (West Supp. 1985). Common carriers in turn are included within the definition of a "public utility," as are oil pipelines, CAL. PUB. UTIL. CODE § 216(a) and (c), and as such would be subject to the requirement that no corporation "whether or not organized under the laws of [California], shall . . . acquire or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the [public utilities] commission." CAL. PUB. UTIL. CODE § 854.

Similarly, in Nevada, a railroad corporation or any person, partnership, corporation, or company controlling any railroad or part of a railroad is declared to be a "public utility," subject to regulation by the Public Service Commission of Nevada. NEV. REV. STAT. §§ 703.150, 704.020 (1985). As such, they are subject to the provisions of § 704.410 which states:

> No transfer of stock of a public utility subject to the jurisdiction of the commission is valid without prior approval of the commission if the effect of such transfer would be to change corporate control of the public utility or if a transfer of 15 percent or more of the common stock of the public utility is proposed.

3. U.S. CONST. art. 6, § 2.
4. *Id.* at art. 1, § 8, cl. 3.
5. 524 F. Supp. 906 (W.D. Mo. 1981), *aff'd*, 687 F.2d 1122 (8th Cir. 1982).
6. 15 U.S.C. §§ 78m(d)-(e) and 15 U.S.C. §§ 78n(d)-(f) (1982 & Supp. II 1984).
7. Securities Exchange Act of 1934, § 28; 15 U.S.C. § 78bb (1982).
8. The basic provisions of the Williams Act have been repeatedly described at length in other articles. *See, e.g.* Comment, *The Constitutionality of the Maine Takeover Bid Disclosure*

agement of the target company and the offeror. Approximately four months before passage of the Act, certain states began adopting their own takeover bid disclosure statutes; ultimately, by 1981, 37 states had adopted such state takeover laws.[9]

Law, 30 ME. L. REV. 246, 251-52 (1979); so, too, *see id.* at 249 with respect to the general background behind the perceived need for statutory controls—federal or state—on tender offers.

The Williams Act, as suggested in the text, was predicated primarily on stringent reporting requirements and the full disclosure of pertinent information to investors. The requirements of, and rationale behind, SEC schedule 13D, 17 C.F.R. § 240.13d-101 (1985), are set forth in detail at Comment, *The Utah Take-Over Offer Disclosure Act: Constitutional and Practical Considerations*, 1979 UTAH L. REV. 583, at 601 n.98 (1979):

> Schedule 13D requires disclosure of: the purchaser's identity and background; the amount and source of funds used for the purchase; any plans for liquidation, merger, or other significant changes in business or corporate structure of the target company; the number of shares the purchaser owns; and the details of any agreements with other parties concerning shares in the target corporation.

The same information with respect to Schedule 14D-1, 17 C.F.R. § 240.14d-100 (1985), is set forth at *id.* at 587 n.22:

> Schedule 14D-1 requires the bidder to identify the terms of the offer as well as the bidder's own identity and background so that shareholders can assess the bidder's management abilities and prior treatment of acquired companies. The offeror's past contracts, transactions, and negotiations with the subject company, its interest in securities of the subject company, and its contracts regarding shares in the company must be revealed because they may indicate its willingness to pay a higher price. Disclosure of its source of funds is required so that shareholders will know if consideration exists for the offer. The financial entanglements of the offeror, if the assets of the target may be used to refinance the purchase, and plans for mergers, acquisitions, and major changes in corporate structure must be indicated so that shareholders may evaluate the company's prospects under new management. Persons retained, employed or compensated by the bidder in connection with the tender offer must be identified, and all other information that would be material to a target company shareholder must be disclosed.

9. Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510, 514 (1979); Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 690 n.7 (1981):

> ALASKA STAT. §§ 45.57.010 to .120 (1980); ARK. STAT. ANN. §§ 67-1264 to 1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101 to 108 (Supp. 1980) [*repealed by* 1984 Colo. Sess. Laws 398, § 8]; CONN. GEN. STAT. ANN. §§ 36-456 to 468 (West Supp. 1980) [current version at West Supp. 1985]; DEL. CODE ANN. tit. 8, § 203 (Supp. 1980); FLA. STAT. ANN. §§ 517.35 to .363 (West Supp. 1978) [*repealed by* 1979 Fla. Laws c. 79-38 § 13]; GA. CODE ANN. §§ 22-1901 to 1915 (1977) [current version at GA. CODE ANN. §§ 14-6-1 to 15 (1982 & Supp. 1985); HAWAII REV. STAT. §§ 417E-1 to 15 (1976) [& Supp. 1984; *repealed* effective July 1, 1986 *by* 1983 Hawaii Sess. Laws c. 167, § 19]; IDAHO CODE §§ 30-1501 to 1513 (1980 & Supp. [1985]); ILL. ANN. STAT. ch. 121-½, §§ 137.51 to .70 (Smith-Hurd Supp. 1981-1982) [*repealed* 1983]; IND. CODE ANN. §§23-3-3.1-1 to 11 (Burns [1984]); IOWA CODE ANN. §§ 502.211 to .215 (West Supp. [1985]); KAN. STAT. ANN. §§ 17-1276 to 1284 [1981 & Supp. 1985]; KY. REV. STAT. ANN. §§ 292.560 to .991 (Baldwin [1981 & Supp. 1984]); LA. REV. STAT. ANN. §§ 51:1500 to :1512 (West Supp. [1980]); ME. REV. STAT. ANN. tit. 13, §§ 801-817 ([1981 & Supp. 1985]); MD. CORPS & ASS'NS CODE ANN. §§ 11-901 to 908 ([1985 & Supp. 1985]); MASS. GEN. LAWS ANN. ch. 110C, §§ 1-13 (West Supp. [1985]); MICH. COMP. LAWS ANN. §§ 451.901 to .917 (West Supp. [1985]); MINN. STAT. ANN. §§ 80B.01 to .13 (West Supp. [1985]); MISS. CODE ANN. §§ 75-72-101 to 121 (Supp. [1985]); MO. ANN. STAT. §§ 409.500 to 565 (Vernon [Supp. 1986]); NEB. REV. STAT. §§ 21-2401 to 2417 (1977) [*repealed* 1983]; NEV. REV. STAT. §§ 78.376 to .3778

The state statutes shared certain common characteristics. Generally, the statutes regulated tender offers for state corporations, frequently defined as including companies incorporated, headquartered, or having their principle place of business within the state, as well as corporations 10% of whose stock was held by state residents.[10] The statutes generally provided for disclosure of tender offers to the applicable state authority and to the target company's management a specified number of days—frequently twenty—prior to the effective date of the tender offer.[11] The state statutes generally subjected such filings to a decision by the requisite state authority as to the fairness to investors of the planned takeover. The state authority generally was empowered to conduct a formal investigation or to hold hearings on the issues at hand, and pursuant thereto could indefinitely suspend the effective date of a tender offer until such time as the investigation or hearing was concluded and a ruling promulgated.[12]

The constitutionality of the state takeover statutes was first chal-

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([1985]); N.H. REV. STAT. ANN. §§ 421-A:1 to :15 ([1985 & Supp. 1985½]); N.J. STAT. ANN. §§ 49:5-1 to 19 (West Supp. [1985-1986]); N.Y. BUS. CORP. LAW §§ 1600-1614 (McKinney Supp. [1984-1985]); N.C. GEN. STAT. §§ 78B-1 to 11 (1981); OHIO REV. CODE ANN. § 1707.041 (Page Supp. [1985]); PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. [1985]); S.C. CODE ANN. §§ 35-2-10 to 110 (Law. Co-op. Supp. [1985]); S.D. COMP. LAWS ANN. §§ 47-32-1 to 47 ([1983]); TENN. CODE ANN. §§ 48-2101 to 2114 (1979 & Supp. 1980 [current version at TENN. CODE ANN. §§ 48-5-101 to 114 (1984 & Supp. 1985), *repealed 1985];* UTAH CODE ANN. §§ 61-4-1 to 13 (1978 & Supp. 1979) [*repealed* 1983]; VA. CODE §§ 13.1-528 to 541 ([1985]); WIS. STAT. ANN. §§ 552.01 to .25 (West Special Pamphlet 1980) Tex. Administrative Guidelines For Minimum Standards in Tender Offers 065.15.00.100-.800.

With the passage of the Maine statute in 1978, more than two-thirds of the states had purported to regulate the making of corporate tender offers. Comment, *The Constitutionality of the Maine Takeover Bid Disclosure Law*, 30 ME. L. REV. 246, n.2 (1979).

10. *See, e.g.*, Missouri Takeover Bid Disclosure Act, MO. REV. STAT. §§ 409.500 to .565 (1979); ILL. REV. STAT. ch. 121-½, § 137.54.A (Supp. 1980) (*repealed* 1983); New Jersey Takeover Bid Disclosure Law, N.J. STAT. ANN. §§ 49:5-1 *et seq.* (West Supp. 1985).

11. In contrast to the five day requirement promulgated under authority of the Williams Act, *supra* at n.6. 17 C.F.R. § 240.14d-2(b) (1985).

The state statutes also classified, and strictly limited, acquisitions of more than ten percent of a target company's stock during a given time period, and thereby assumed that such acquisitions were in contemplation of a corporate takeover attempt. The state statutes generally also sought to regulate so-called "creeping tender offers," defined to include open market and privately negotiated acquisitions whereby an entity acquired a large percentage of a target's voting securities over time without use of a formal tender offer. Such "creeping tender offers" are not subject to the formal tender offer disclosure requirements of § 14D of the Williams Act, although they are subject to the filing requirements of § 13D once an entity has acquired five percent of the securities of that target company. *See* Telvest, Inc v. Bradshaw, 697 F.2d 576 (4th Cir. 1983) (discussing Virginia Take-over Bid Disclosure Act, VA. CODE § 13.1-529(b)(iii) (Supp. 1985), as amended in 1979 to reach "creeping tender offers"); and Agency Rent-A-Car, Inc. v. Connolly, 542 F. Supp. 231 (D. Mass.), *rev'd*, 686 F.2d 1029 (1st Cir. 1982) (discussing Massachusetts Takeover Statute, MASS. GEN. LAWS ANN. ch. 110C (Supp. 1985), as amended by 1981 Mass. Acts 508).

12. *See supra* n.10.

lenged in federal court in the late 1970s, in the leading case of *Great Western United Corp. v. Kidwell.*[13] In *Kidwell*, the Idaho state takeover statute[14] was challenged under the Supremacy Clause as being preempted by the Williams Act disclosure requirements;[15] its validity also was challenged under the Commerce Clause.[16] The Fifth Circuit agreed with plaintiff Great Western on both grounds. In reaching its conclusion concerning the Commerce Clause challenge, the court employed the balancing test set forth in *Pike v. Bruce Church, Inc.*[17] Between the time of *Kidwell* and the 1982 decision in *Edgar*, at least thirteen other state takeover statutes were declared unconstitutional.[18]

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13. 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom.*, Leroy v. Great Western United Corp., 443 U.S. 173 (1979) (improper venue).

14. IDAHO CODE §§ 30-1501-1513 (Supp. 1985).

15. Preemption is judged under the three-part test of Rice v. Santa Fe Elevator Corp., 331 U.S. 213, 230 (1947): (1) how pervasive is the scheme of federal regulation; (2) how dominant is the federal interest; and (3) what portions, if any, of the state's law conflict with or are otherwise inconsistent with federal law. The third inquiry is the toughest and most critical portion of the test. *See* McCauliff, *Federalism and the Constitutionality of State Takeover Statutes*, 67 VA. L. REV. 295, 300 (1981).

16. *Kidwell* clearly demonstrated one of the most difficult aspects of the existence of numerous state laws and the burdens such statutes create for interstate commerce: a single tender offer could be subject to regulation by the federal statute and by two or more state statutes. In *Kidwell*, four states—Idaho, Maryland, New York and Washington—all had an interest in the outcome of the tender offer. *See* Comment, *The Constitutionality of the Maine Takeover Bid Disclosure Law*, 30 ME. L. REV. 246, 253 n.56 (1979).

17. 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it would be promoted as well with a lesser impact on interstate activities.

(Citation omitted.)

18. Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980) (New Jersey statute); MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980) (Illinois statute); National City Lines v. LLC Corp., 524 F. Supp. 906 (W.D. Mo. 1981) (Missouri statute); Empire, Inc. v. Ashcroft, 524 F. Supp. 898 (W.D. Mo. 1981) (Missouri statute); Natomas Co. v. Bryan, 512 F. Supp. 191 (D. Nev. 1981) (Nevada statute); Crane Co. v. Lam, 509 F. Supp. 782 (E.D. Pa. 1981) (Pennsylvania statute); Kennecott Corp. v. Smith, 507 F. Supp. 1217 (D.N.J. 1981) (New Jersey statute); Canadian Pac. Enter. (U.S.) v. Krouse, 506 F. Supp. 1197 (S.D. Ohio 1981) (Ohio statute); Dart Industries v. Conrad, 462 F. Supp. 1 (S.D. Ind. 1978) (Delaware statute); Seagram & Sons v. Marley, 1981-1982 FED. SEC. L. REP. (CCH) ¶ 98,246 (W.D. Okla. 1981) (Oklahoma statute); Hi-Shear Industries v. Campbell, 1982 FED. SEC. L. REP. (CCH) ¶ 97,804 (D. S.C. 1980), *stay pending app. denied*, No. 80-18125 (4th Cir. Dec. 8, 1980) (South Carolina statute); Hi-Shear Industries v. Neiditz, 1981 FED. SEC. L. REP. (CCH) ¶ 97,805 (D. Conn. 1980) (Connecticut statute; antifraud provisions excepted); Brascon, Ltd. v. Lassiter, 1981-1982 FED. SEC. L. REP. (CCH) ¶ 98,247 (E.D. La. 1979) (Louisiana statute); Kelly *ex rel.* McLaughlin v. Beta-X Corp., 302 N.W.2d 596 (1981) (Michigan statute); and Eure v. Grand Metropolitan Ltd., 1979-1980 FED. SEC. L. REP. (CCH) ¶ 97,383 (N.C. Super. Ct. 1980) (North Carolina Statute).

In particular, it is important to note that the court in Natomas invalidated the Nevada takeover

Each of the state statutes discussed above and in n.18 *supra* were *general* state takeover bid statutes. Various states, however, also adopted statutes governing the acquisition of, or control over, corporations or entities in a given industry, such as insurance and, as in the present case, common carriers including railroads. Certain of these industry-specific statutes have been the subject of challenges patterned after the more general takeover statutes; in particular, state insurance holding company statutes have been the subject of constitutional challenges in Missouri, Kansas, Indiana, and Florida[19] with varying results.[20] It is these cases, when set against the background of the decisional law concerning general state takeover statutes, which provide the closest analogy to the current question, for the local and state benefits discussed in the insurance cases provide a rubric of parallel values which may offset corresponding burdens on interstate commerce under any Commerce Clause challenge. The district court decision in *National City Lines* provides a particularly good blueprint of the type of constitutional challenge which might be brought successfully against the state approval requirements governing the acquisition of common carriers and public utilities, such as railroads and oil pipelines.

II. THE DECISION IN *EDGAR V. MITE CORP.*[21]

Edgar addressed the constitutionality of the Illinois takeover statute[22] which provided that a tender offer for the shares of a target company must be registered with the Illinois Secretary of State and communicated to the target company twenty business days before the offer became effective. During that twenty day period, the Secretary of State was empowered to hold a hearing to adjudicate the substantive fairness of the

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statute, as Nevada is one of the two jurisdictions with state approval requirements for the acquisition of railroads.

19. Professional Investors Life Ins. Co. v. Roussel, 528 F. Supp. 391 (D. Kan. 1981) (upholding Kansas statute); National City Lines v. LLC Corp., 524 F. Supp. 906 (W.D. Mo. 1981) (striking Missouri statute); Gunter v. AGO Int'l. B.V., 533 F. Supp. 86 (N.D. Fla. 1981) (striking Florida statute); Sun Life Group, Inc. v. Standard Life Ins. Co., 1979-1980 FED. SEC. L. REP. (CCH) ¶ 97,314 (S.D. Ind. 1980) (upholding Indiana statute).

20. The conflicting outcomes in the insurance holding company cases apparently have resulted in large part from problems caused by the complicating factor of the MaCarran-Ferguson Act, 15 U.S.C. § 1012 *et seq.*, which permits states to regulate the "business of insurance." It also should be noted that *Roussel*, *National City Lines*, *Sun Life*, and *Gunter* all were decided prior to *Edgar*.

21. *Edgar*, *supra* note 1. The court in Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522 (D. Md. 1982) (striking down Maryland's takeover statute pursuant to both Supremacy and Commerce Clause challenges) provides an excellent breakdown and analysis of the six different opinions written by the U.S. Supreme Court justices in Edgar.

22. Illinois Business Takeover Act, ILL. REV. STAT., ch. 121-½, § 137.54.A (Supp. 1980) (repealed 1983).

offer if he or she believed a hearing was necessary to protect the interests of the shareholders of the target corporation. The law was applicable if the target corporation was organized under the laws of Illinois, had its principal place of business in Illinois, or had at least 10 percent of its stated capital and paid-in surplus represented within Illinois.

Plaintiff MITE Corporation, which had made its tender offer for the Chicago Rivet and Machine Company in compliance with the disclosure provisions of the Williams Act, sought to avoid the state act and challenged it in federal court on three separate grounds: (1) as preempted by the Williams Act under the Supremacy Clause; (2) as a direct burden on interstate commerce; and (3) alternately, as an indirect burden on interstate commerce. Although Justice White, in his opinion, addressed all three arguments *in seriatim*, only his analysis of the Illinois act as being an unconstitutional *indirect* burden on interstate commerce[23] garnered the five votes necessary to become the opinion of the Court.[24] A plurality of four supported Justice White's opinion that the Illinois Act also represented an unconstitutional *direct* burden on interstate commerce, while there were only three votes for his conclusion that the statute was preempted by the Williams Act under the Supremacy Clause.

A. *Preemption Under the Supremacy Clause*

Justice White's Supremacy Clause preemption analysis was predicated on two factors. First, in passing the Williams Act, the Congress adopted a uniform national regulatory scheme of strict neutrality as between the incumbent management of the target company and the offeror.[25] Congress adopted such a position in light of its finding that

23. Part V-B of the Opinion of Justice White. 457 U.S. 624, 643 (1981).

24. Chief Justice Burger and Justices Powell, O'Connor, and Stevens joined in Part V-B.

25. 457 U.S. 624, 633-34; S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); 113 Cong. Rec. 24,664 (1967) (remarks of Senator Williams).

Prior to *Edgar*, there was some dispute as to whether the Williams Act specifically manifested a policy or purpose of strict neutrality.

Certain commentators suggested that the federal circuit courts, in elevating neutrality in tender offers to be a central purpose of the Williams Act, had ignored the Supreme Court's finding in Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 29 (1977) that such neutrality was but one characteristic of legislation designed specifically and primarily to protect investors. McCauliff, *Federalism and the Constitutionality of State Takeover Statutes*, 67 Va. L. Rev. 295, 302-303 (1981); *accord* AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1979). Other commentators, in contrast, criticized McCauliff's reliance on the language in *Piper* regarding neutrality. *See* Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 Ohio State L.J. 689, 714 (1981); *accord*, Crane Co. v. Lam, *supra* note 18. In *Crane Co.* the court stated:

> The question before the Court in *Piper*—whether the Williams Act confers a private right of action upon defeated offerors—was altogether different. The *Piper* court's objective was to determine *who* the Williams Act was designed to protect, and the Court concluded that the Williams Act was intended only to protect shareholders, not offerors.

takeovers and tender offers often provided economic benefits, such as serving as a necessary check on entrenched but inefficient managers.[26] Any state provisions which tipped the balance in favor of one party, therefore, were contrary to the intent and purpose of the Williams Act and subject to preemption. In particular, the Illinois statute provided for registration of a tender offer with the Illinois Secretary of State and with the target company twenty days before the effective date of the tender offer, as compared with the maximum five day waiting period provided for by the Williams Act, and thereby tipped the balance towards the incumbent management.[27] So, too, did hearing provisions which allowed the Secretary of State to suspend a tender offer indefinitely pending state approval.[28]

Second, Justice White found that the Williams Act had incorporated the Congressional finding that investors, when provided with all necessary information by means of the Williams Act's disclosure requirements, were to be the final arbiters of the fairness of a tender offer.[29] The provision of the Illinois Act requiring a determination by the Secretary of State as to the fairness of a tender offer ran contrary to the plan of the Williams Act and was preempted.[30]

Justice White's analysis was addressed by only five members of the Court. Chief Justice Burger and Justice Blackmun supported White's position, while Justices Stevens and Powell refused to join the opinion, stating that they were unconvinced that Congress' decision to follow a policy of neutrality manifested an intention to preclude states from providing special protection for certain interests including, but not limited to, incumbent management.[31]

The *Piper* Court thus had no occasion to consider whether the neutral approach to tender offers adopted by Congress in the Williams Act was intended to establish a federal policy of neutrality with which the states cannot interfere.

509 F. Supp. 782, 788.

Accordingly, some commentators previously had concluded that the Williams Act had a twofold purpose: to inform the investor, *Piper*, 430 U.S. 1 at 30; and to favor neither the offeror nor the target, Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). Comment, *Challenges to State Takeover Laws: Preemption and the Commerce Clause*, 64 MARQUETTE L. REV. 657, 663 and note 27 (1981).

26. 457 U.S. 633; S. REP. NO. 550, 90th Cong., 2d Sess. 3; H.R. REP. NO. 1711, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813.

27. 457 U.S. 624, 626-27, 634-36.

28. *Id.* at 636-39.

29. *Id.* at 639-40.

30. *Id.*

31. 457 U.S. 624, 646-47 (opinion of Justice Powell); 457 U.S. 624, 655 (opinion of Justice Stevens).

B. THE DIRECT BURDEN ON INTERSTATE COMMERCE

Justice White was joined by Chief Justice Burger and Justices Stevens and O'Connor[32] in his conclusion that the Illinois act was an unconstitutional direct burden on interstate commerce.[33] Justice White's analysis was predicated on the fact that the Illinois Act, by its terms, directly regulated transactions which took place across state lines, even if wholly outside the state of Illinois, *i.e.*, it impacted directly on tenders for, and transactions involving, securities made across state lines conducted by means of the mails, telephone, and other similar methods.[34] Such transactions, which are themselves interstate commerce,[35] would be prohibited unless the Illinois Act was complied with and the state approval given for a tender offer.[36] This would be so even if none of the target's shareholders was a resident of Illinois.[37] Accordingly, Justice White found the Illinois Act to be an unconstitutional direct burden on interstate commerce, relying on *Southern Pacific Company v. Arizona*,[38] *Shafer v. Farmers Grain Company*,[39] and *Shaffer v. Heitner*.[40]

C. THE INDIRECT BURDEN ON INTERSTATE COMMERCE

As previously noted, a majority of the Court supported Justice White's final conclusion that the Illinois act was a prohibited indirect burden on interstate commerce, under the balancing test of *Pike v. Bruce Church, Inc.*[41]

The Court stated that the most obvious burden the Illinois Act imposed on interstate commerce arose from the statute's nationwide reach which purported to give Illinois the power to determine if a tender offer could proceed anywhere in the country.[42] Against this "substantial"[43] burden, the state raised two offsetting legitimate local interests: (1) that the Illinois Act served to protect resident security holders; and (2) that the

32. Justices Blackmun and Powell did not address this point.
33. Part V-A of Justice White's Opinion, 457 U.S. 624, 641-43.
34. 457 U.S. 624, 641-42.
35. *Id.* at 642.
36. *Id.*
37. *Id.*
38. 325 U.S. 761, 775 (1945). The "practical effect of such [state] regulation is to control . . . [conduct] . . . beyond the boundaries of the state. . ." and therefore was prohibited.
39. 268 U.S. 189, 199 (1925). "[A] state statute which by its necessary operation directly interferes with or burdens . . . [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted."
40. 433 U.S. 186, 197 (1977). "[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."
41. *See supra* note 17.
42. 457 U.S. 624, 643.
43. *Id.*

Act served to regulate the internal affairs of companies incorporated under Illinois law.[44]

With respect to the first point, the Court noted that Illinois had no legitimate interest in protecting non-resident shareholders and that insofar as the act burdened out-of-state transactions, there were no offsetting legitimate local interests to be weighed.[45] Furthermore, the Act exempted a target company's acquisition of its own shares from regulation, thereby potentially undermining the Act's asserted legislative purpose of protecting investors.[46]

With respect to the second point, the Court cited *Kidwell* for the proposition that tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company.[47] Furthermore, the proffered justification was incredible as the Act would apply in some instances even to wholly non-Illinois corporations, *i.e.*, in situations where 10 percent of the outstanding shares of the target were held by Illinois residents but where the corporation was neither incorporated in, nor had its principal place of business in Illinois.[48]

Accordingly, the Court found that the Illinois Act imposed a substantial burden on interstate commerce which outweighed the putative local benefits and therefore was invalid under the Commerce Clause.[49]

D. Results in the Federal Courts

Since *Edgar* was decided in 1982, the federal circuit and district courts have applied the decision to *general* state takeover statutes on at least four different occasions.[50] In three of those instances, involving the state takeover statutes of Missouri,[51] Maryland,[52] and Virginia,[53] the implicated statute was found to be unconstitutional under both the Supremacy and Commerce Clauses. In an anomalous decision, how-

44. 457 U.S. 624, 644.
45. *Id.*
46. *Id.*
47. 457 U.S. 624, 645.
48. *Id.* at 645-46.
49. *Id.* at 646.
50. In a separate instance, the Supreme Court of New Hampshire considered and rejected Supremacy and Commerce Clause challenges to the New Hampshire Security Takeover Disclosure Act, N.H. Rev. Stat. Ann. ch. 421-A:1 *et seq.* (1983 & Supp. 1983), in 1981, prior to the *Edgar* decision. Sharon Steel Corp. v. Whaland, 433 A.2d 1250 (N.H. 1981). On appeal, the United States Supreme Court vacated the judgment and remanded it to the state supreme court for further consideration in light of *Edgar*. Sharon Steel Corp v. Ins. Comm'r, 458 U.S. 1101 (1982).
51. National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) (affirming the district court decision reported at 524 F. Supp. 906 (W.D. Mo. 1981) discussed *supra* note 15).
52. Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522 (D. Md. 1982).
53. Televest, Inc. v. Bradshaw, 697 F.2d 576 (4th Cir. 1983).

ever, the Massachusetts takeover statute was upheld against like constitutional challenges.[54]

National City Lines concerned a challenge under the Supremacy and Commerce Clauses to both the Missouri Takeover Bid Disclosure Act[55] and the Missouri Insurance Holding Companies Act.[56] The Missouri Takeover Statute was virtually identical to the Illinois act at issue in *Edgar*.[57] The court, as a result, found that the issues raised under the Commerce Clause were controlled by *Edgar*.[58] At the same time, since only a plurality of the Supreme Court had reached the Supremacy Clause issues in *Edgar*, the circuit court engaged in a lengthy, detailed analysis applying the preemption test summarized in *Jones v. Rath Packing Company*.[59]

The court's analysis carefully paralleled that of Justice White in *Edgar* and relied heavily on the decisions of the various circuit courts in *Kidwell*, *Kennecott Corp.*, and *MITE Corp. v. Dixon*.[60] The court concluded

54. Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029 (1st Cir. 1982) (vacating the preliminary injunction granted by the district court as reported at 542 F. Supp. 231 (D. Mass. 1982), discussed *supra* note 15, and remanding to the district court).

55. MO. REV. STAT. § 409.500 (Supp. 1986) *et seq.*

56. MO. REV. STAT. § 382.010 (Supp. 1986) *et seq.* The insurance act was allegedly applicable because the target company, LLC Corp., had as one of its subsidiaries a Missouri insurance company, the Personal Life Insurance Company. Although the district court concluded that the McCarron-Ferguson Act did not preclude federal preemption of the insurance act, the circuit court found that LLC did not meet the definition of a "domestic insurer" under the state act; accordingly, the insurance act was held to be inapplicable.

57. 687 F.2d 1122, 1128.

58. *Id.*

59. 430 U.S. 519, 525-26 (1977):

> The first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. CONST. art. I, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. . . . [W]hen Congress had "unmistakably . . . ordained," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973); [citation omitted]. Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. CONST., art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *Accord*, De Canas v. Bica, 424 U.S. 351, 363 (1976); Perez v. Campbell, 402 U.S. 637, 649 (1971); [citation omitted]. This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

As explicated in *Kennecott Corp.*, 637 F.2d at 188, *Jones* stands for the proposition that: "Preemption analysis focuses on whether the state law serves as an obstacle to the operation of federal law 'in the circumstances of the particular case,' rather than in all cases or in a hypothetical case." (*Citing Jones*, 430 U.S. 519 at 525-26).

60. All cited *supra* at note 18.

(1) that, as with the Illinois act, the twenty-day waiting period of the Missouri act conflicted with the short time table of the Williams Act by creating undue delay in the commencement of the tender offers, which upset the neutral balance between incumbent management and the offeror mandated by Congress;[61] (2) that the far more extensive disclosure requirements of the Missouri act provided a mass of irrelevant data which only served to confuse investors, in conflict with the policy of the Williams Act that informed investors should be able to make an unfettered choice about the merits of a tender offer;[62] and (3) that the substantive requirements of the Missouri act, including specific withdrawal rights and *pro rata* rights, were in direct conflict with the parallel provisions of the Williams Act.[63]

Bendix Corp. v. Martin Marietta Corp. involved the Maryland Takeover Statute, which closely paralleled the Missouri and Illinois acts.[64] The court began by engaging in a careful analysis of the six different opinions written by members of the *Edgar* Court[65] and reciting a lengthy list of cases in which state takeover statutes had been challenged.[66] The court then went on to hold (1) that the Maryland Act imposed an unconstitutional *indirect* burden on interstate commerce because by its terms Maryland assumed the power to block a nationwide tender offer and to decide if a tender could proceed anywhere;[67] (2) that the Maryland Act was an unconstitutional *direct* burden on interstate commerce because it regulated transactions in securities which took place across state lines;[68] and (3) that its lengthy waiting period, with the possibility of indefinite delay while a hearing or investigation was in progress, and its exemption of offers approved by the target company, conflicted with the goals and purposes of the Williams Act and was therefore preempted.[69]

Telvest, Inc. v. Bradshaw presented a somewhat different analytical pattern than *National City Lines* and *Bendix. Telvest* concerned Virginia's

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61. 687 F.2d 1122, 1130.
62. *Id.* at 1131.
63. *Id.* at 1132-33.
64. The Maryland act provided that, for the act to be applicable, the target company had to be a Maryland corporation, doing business in Maryland, with at least 35 shareholders residing in Maryland. A tender offer was exempted from the act if it was approved by the target's board of directors. There was a twenty-day waiting period following registration, during which time the Maryland state commissioner could commence a hearing and institute an investigation to determine if the tender offer complied with Maryland law; the tender offer could not go forward while the hearing was pending. MD. CORP. & ASS'NS CODE ANN. §§ 11-901 to 908 (1985 & Supp. 1985).
65. 547 F. Supp. 522, 525-29.
66. *Id.* at 529.
67. 547 F. Supp. 522, 532 (relying on *Edgar* and *Pike v. Bruce Church, Inc.*).
68. 547 F. Supp. 522, 533.
69. *Id.* (*citing Kennecott Corp.*, *Kidwell*, and *National City Lines*).

Take-over Bid Disclosure Act[70] which had been amended[71] to require a declaration of intent in connection with so-called "creeping tender offers"[72] where the target was a Virginia corporation. The court, confronted with a two-prong challenge under the Commerce Clause, found that the principles announced in *Edgar* with respect to impermissible indirect burdens on interstate commerce were controlling.[73]

The court found the sole local interest supporting the statute to be the protection of Virginia shareholders. By contrast, Virginia could have no legitimate interest in protecting non-resident shareholders. Furthermore, the disclosure requirements of the Williams Act better served investors, as disclosure became mandatory once an investor or offeror had acquired 5 percent of a company's stock, as opposed to the 10 percent trigger set by the Virginia act. So too, the state's purpose was called into question by virtue of the exemption for purchases by a Virginia corporation of its own shares.

At the same time, the identifiable economic burdens resulting from the act were numerous, including the fact that the act would discourage investment in Virginia corporations; that it would impact on the ability of the free market to effectively price securities and allocate resources; and that it would reduce the incentives to incumbent management to perform well and thereby maintain a high market price for the target's securities.[74]

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70. VA. CODE §§ 13.1-528 to 541 (1985).

71. *Id.*, as amended in 1979. The Virginia act applied when an offeror acquired more than 10 percent of the stock of a Virginia corporation through open-market purchases or otherwise, if the offeror had purchased more than 2 percent of the corporation's stock in the last twelve months. At that point, the offeror had to refrain from further open-market purchases until it filed a statement with the Virginia State Corporation Commission setting forth its intent, the purpose of its (assumed) desire to change control of the company, the manner in which such change was to be carried out, and other pertinent information. The offeror was presumed to intend to change control of the target company and could only obtain an exemption after proving its benign purpose to the State Commission. 697 F.2d 576, 578.

72. The rationale for regulating "creeping tender offers" was that would-be offerors found that, pursuant to § 14 of the 1934 Act, they could strengthen their position before making a tender offer by continuing to buy shares after reaching 5% of the shares of the target and then filing on the tenth day. *See* Strode v. Esmark, Inc., 1980 FED. SEC. L. REP. (CCH) ¶ 97,538 at 97,805-06 (Ky. Cir. Ct. May 13, 1980); *McCauliff*, *supra* note 15 at 307.

New proposed SEC rules on takeovers, coming in reaction to the massive wave of huge mergers in the oil industry in the first three months of 1984, have in part focused on precisely this situation:

> One target of the proposals is the "sneak attack," which would be curbed by closing the ten-day period that allows investors to buy secretly as much stock as possible in a target company before filing disclosure of a 5 percent holding with the commission. The SEC rejected a recommendation to require registration 48 hours in advance, however, due to fluctuations in the stock price once the announcement is made. The precise filing time has yet to be determined.

Ross, *New Rules Proposed on Takeovers*, Washington Post, March 14, 1984, at D7, col. 5.

73. 697 F.2d 576, 579.

74. *Id.* at 580-81.

Furthermore, the indeterminate delay which might result from a hearing concerning the offeror's intent posed a heavy burden on interstate commerce.[75]

The court concluded, under *Edgar* and *Pike v. Bruce Church, Inc.*, that although the burdens imposed by the Virginia act were less than those imposed on interstate commerce by the Illinois act at issue in *Edgar*, the purported protections for resident investors in Virginia nevertheless were too speculative to sustain the statute's validity under the Commerce Clause.[76]

By contrast to *Telvest*, *Bendix*, and *National City Lines*, the court in *Agency Rent-A-Car, Inc. v. Connolly*[77] upheld the Massachusetts takeover statute[78] there in issue. The Massachusetts act sought to regulate "creeping tender offers" in much the same manner as had the Virginia act. With respect to the Commerce Clause challenges, the court simply remanded to the district court for determination of the issues in light of *Edgar*, as the district court previously had not addressed those issues.[79]

At the same time, the court reversed the district court's finding of preemption under the Supremacy Clause. The court first analyzed the split among the five *Edgar* justices who had discussed the preemption issue, and then went on to distinguish the Illinois act and other similar laws as being in far greater conflict with the Williams Act than was the Massachusetts statute. The court found one critical distinction: in *Agency Rent-A-Car*, the plaintiff had completely failed to challenge the disclosure, filing and hearing requirements of the Massachusetts law, but rather only had challenged the sanctions provision of the act. Given this procedural posture, the court held that all delay (and sanctions) which might result from application of the act could be avoided simply by full compliance with the statutory requirements.[80] Such was not the case with other similar statutes which contained hearing and timetable provisions and which had certain delays built in to the regulatory framework.

In sum, with rare exception, the vast body of law both prior to and following *Edgar* almost uniformly has held general state takeover statutes invalid on each of the three bases discussed in Justice White's opinion. The rare exceptions, such as *Agency Rent-A-Car*, appear to be anomalous.

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75. *Id.* at 580.
76. *Id.* at 582.
77. 686 F.2d 1029 (1st Cir. 1982), *rev'g* 542 F. Supp. 231 (D. Mass.)
78. MASS. GEN. LAWS ch. 110C (Supp. 1985) (as amended by 1981 Mass. Acts ch. 508).
79. 686 F.2d 1029, 1040.
80. 686 F.2d 1029, 1038-39.

III. Strategies for Attacking State Approval Requirements for the Acquisition of Public Utilities and Common Carriers

Any constitutional challenge to state approval requirements for the acquisition of public utilities and common carriers ("approval requirements" or "state approvals") must therefore be considered against the imposing background of case law concerning general state takeover statutes. As we have seen in the specific cases of the Nevada and California approval requirements, such requirements are worded in a far more general, non-specific manner than are the various general takeover statutes previously discussed. With respect to Nevada, the applicable law only states that a transfer of stock of a public utility which would result in a change of corporate control of the public utility or in the transfer of 15 percent or more of the common stock of the utility will be invalid without prior state approval.[81] No specific provision is made within the public utility laws with respect to timetables, disclosures, or the conduct of hearings or investigations.[82]

Similarly, California's public utility code simply provides that no corporation shall acquire or control a public utility organized and doing business within California, either directly or indirectly, without first securing state authorization to do so.[83] No other specific provisions with respect to approval requirements are made. The initial question then becomes whether such industry-specific approval requirements necessarily engender the same constitutional problems as the general state takeover statutes, and whether such flaws are over-balanced by sufficient legitimate local interests.

Surely, although the state approval requirements may be said to reflect legitimate local interests in protecting resident investors and in regulating the internal affairs of resident corporations (as was the case with the general state takeover laws), their primary purpose is to ensure the continued proper functioning of public service-type corporations and the concomitant availability of critical public services. At the same time, however, the industry-specific approval statutes impose substantial burdens on interstate commerce, and also present the potential for serious conflict with the purposes and plan of the Williams Act.

By necessitating state approval for a sale of stock which would result either in the transfer of 15 percent of the common stock of, or in a change of control in, a public utility, Nevada law impacts directly on securities

81. Nev. Rev. Stat. § 704.410(8) (1985) (public utility is defined to include a railroad or a holding company which controls a railroad).

82. As previously discussed, Nevada had a separate general takeover statute which was held unconstitutional in Natomas v. Bryan, 512 F. Supp. 191 (D. Nev. 1981).

83. Cal. Pub. Util. Code § 854 (West Supp. 1985) (a railroad is considered to be a common carrier which in turn comes within the definition of a public utility under California law).

transactions across state lines. The same is true of California's change-of-control approval requirements. Such transactions, executed by instrumentalities of interstate commerce including the mails and the telephone, normally will implicate situations where both parties are non-residents. States, however, have no legitimate interest in regulating transactions between non-residents.

Secondly, by their own terms, the state approval statutes do not merely regulate the implicated corporate body, but rather regulate the entire tender offer transaction which might, as one of its components, impact on an in-state utility or carrier. Accordingly, both the Nevada and California acts have assumed the state's power to block a tender offer anywhere in the nation, not just in the home state.

So, too, the requirements of state approval in both California and Nevada before a change in control or transfer of stock takes place may result in the indefinite delay of a tender offer, occasioned by hearings or investigations at the state level. The potential for such delays, according to Congress, will necessarily tip the balance in a tender offer situation in the direction of the incumbent management, in contravention of the purposes of the Williams Act.

Similarly, the state statutes do not specify the criteria to be used by the states in rendering their decisions to approve or disapprove a transfer of control. An application for such approval may entail the offeror disclosing far more information than is called for by the Williams Act, thereby threatening to deluge investors with a mass of irrelevant data. Furthermore, the state decisions may encompass factors about the fairness of the proposed transaction, which would also contravene the plan of the Williams Act.

Finally, to the extent time delays, hearings, and investigations impinge on the potential for success of a tender offer[84] the ability of the national free market to price securities and allocate resources effectively would be damaged.

In sum, each of the critical factors used to support the conclusion in *Edgar* and in the various federal circuit and district court opinions that general state takeover statutes are unconstitutional, exist in the context of the state approval requirements. This conclusion is best illustrated in the parallel context of the state insurance holding companies act cases. As previously mentioned, in at least four states—Missouri, Florida, Indiana, and Kansas—Supremacy and Commerce Clause challenges have been made to the insurance acts along the same analytical lines as the challenges to the general takeover statutes.

84. Or, in the case of Nevada, on the intent to purchase at least 15 percent of a target's common stock.

Perhaps the best example of this is presented by the district court's opinion in *National City Lines*[85] where the court concluded that:

> To uphold the challenged sections of the Insurance Act would permit the state to gain jurisdiction over a tender offer and to halt all purchases of stock merely on account of the fortuitous circumstance that the target company controls a domestic insurer. Since the Division of Insurance's interest in protecting policyholders does not extend to the regulation of securities, the challenged sections of the Insurance Act pose significant burdens on interstate commerce.[86]

The court found that the Missouri insurance director could still engage in the regulation of the "business of insurance" pursuant to the McCarran-Ferguson Act and could ensure the protection of policyholders by a whole series of protective measures. Valid protective measures might include, but would not be limited to, specifying the content and form of insurance policies; setting rates; revoking licenses; and protecting against questionable management practices.[87] To allow more than this, however, was to grant the insurance director the power to engage in "the regulation of securities" rather than the regulation of the "business of insurance," and would conflict with the "pervasive requirements" of the Williams Act.[88] The court found that the Williams Act had preempted the authority of the insurance director "to regulate the relationship between a stockholder and the company in which he owns stock. . . ."[89] The court's finding was fully consonant with the statement in *Edgar* that "[t]ender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company."[90]

In a similar case, *Gunter v. AGO International B.V.*, the Florida Insurance Holding Company Act[91] was held invalid by a federal district court pursuant to a Supremacy Clause attack. The court reasoned that the Act contravened the purposes of the Williams Act because it required the disclosure of additional information not mandated by the Williams Act, and because it imposed serious problems of delay.[92]

In contrast to *National City Lines* and *Gunter*, the district court in *Professional Investors Life Insurance Company v. Roussel*,[93] rejected Supremacy and Commerce Clause challenges to the Kansas Insurance

85. 524 F. Supp. 906, 909-12 (W.D. Mo. 1981).
86. *Id.* at 912.
87. *Id.* at 911.
88. *Id.* at 910.
89. *Id.*
90. 457 U.S. 624, 645 (*citing Kidwell*).
91. FLA. STAT. § 628.461.
92. Gunter v. AGO Int'l B.V., 533 F. Supp. 86 (N.D. Fla. 1981).
93. 528 F. Supp. 391 (D. Kan. 1981). *Roussel* concerned a damage action for tortious acts allegedly committed during a takeover attempt.

Holding Company Act[94] in a pre-*Edgar* decision. The Kansas Statute required persons or related entities wishing to purchase more than 10 percent of a Kansas insurance company's stock to file an application with the Commissioner of Insurance.[95] The complicating factor, in the opinion of the *Roussel* court, was the extent of the exemption provided by the McCarran-Ferguson Act,[96] which allows states to regulate the "business of insurance."[97] The court found that to the extent the Kansas act operated to protect security holders, it did not receive McCarran-Ferguson protection.[98] The court, however, stated:

> Nevertheless, the KIHCA is safe from constitutional attack relative to the Supremacy and Commerce Clauses as long as the KIHCA does not significantly impede the purpose of federal securities regulation and does not place an excessive burden upon interstate commerce.[99]

The court then went on to find that the Kansas act merited McCarran-Ferguson Act protection because it also served to protect the security of policyholders.[100] As such, state authority in the area of insurance regulation should enjoy a presumption of validity.[101] In specifically disagreeing with the district court's reasoning in *National City Lines*, the Kansas district court stated:

> We recognize that [*MITE Corp. v. Dixon*, *Kidwell*, and *Empire, Inc. v. Ashcroft*] provide some support for defendants' position. These cases, however, are distinguishable on the grounds that they consider the constitutionality of *general* takeover statutes. Such statutes must have a greater impact upon commerce and be a greater impediment to federal securities regulation than a law concentrating on insurance company transactions. In addition, the statutes are not protected by McCarran-Ferguson.[102]

The court in *Sun Life Group, Inc. v. Standard Life Insurance Co. of Indiana*[103] disagreed with the *Roussell* court's application of the McCarran-Ferguson Act, yet upheld the constitutionality of the Indiana Insurance Company Holding Act[104] there in issue. In addressing McCarran-Ferguson, the court stated:

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94. KAN. STAT. ANN. § 40-3301 (1981 & Supp. 1985).

95. 528 F. Supp. 391, 394.

96. 15 U.S.C. § 1012 (1982).

97. Obviously, such a complicating factor does not exist in the context of state approvals for acquisitions of common carriers and public utilities.

98. 528 F. Supp. 391, 402.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* A detailed analysis of the impact of the *Edgar* decision on the state insurance holding company acts is presented in Webster, *State Regulation of Tender Offers for Insurance Companies After Edgar v. MITE*, 51 FORDHAM L. REV. 943 (1983).

103. 1979-1980 FED. SEC. L. REP. (CCH) ¶ 97,314 (S.D. Ind. 1980).

104. IND. CODE ANN. § 27-1-23 (Burns Supp. 1980) (current version at § 27-1-23 (Burns Supp. 1985)).

> Section 14d of the Securities Exchange Act, which is the federal statute under which the tender offer rules are promulgated, refers expressly by its terms to insurance companies. As a result the McCarran-Ferguson Act, 15 U.S.C. § 1012, is inapplicable by its terms. Moreover, under *Securities and Exchange Comm'n v. National Securities Corp.*, 393 U.S. 453, 89 S. Ct. 564 (1969), the dissemination to shareholders is in the center of the area of insurance company affairs that is subject to federal regulation under the McCarran-Ferguson Act, 15 U.S.C. § 1012, and is not "the business of insurance" subject to exclusive state regulation.[105]

The court, however, went on to find that the Indiana Act did not conflict with SEC Rule 14d-2(b)[106] insofar as the state insurance administrator construed the Act—a state takeover statute applicable only to insurance corporations—as permitting a tender offer to commence prior to the expiration of the Act's 30-day waiting period; Indiana could require that the offer be expressly conditioned upon later approval by the administrator.[107]

IV. CONCLUSION

In conclusion, with the exception of the Kansas insurance act decision in *Roussel*, there is essentially uniform authority on which to base Supremacy and Commerce Clause challenges to state approval requirements for the acquisition or transfer of control of a public utility or common carrier. With respect to *Roussel*, it should be remembered that that decision appeared before the Supreme Court's opinion in *Edgar* and that the district court judge did not have the benefit of the Court's pronounce-

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105. *Sun Life*, *supra* note 100, at 97, 117-18.

106. Rule 14d-2, 17 C.F.R. § 240.14d-2 (1985), defines the circumstances under which a tender offer is deemed to have commenced. In particular, Rule 14d-2(b) triggers a tender offer if specific information is made public.

107. *See* Sargent, *supra* note 9 at 692 n.18 and 710 note 145.

Compliance with both state precommencement notification and waiting periods, and with the SEC requirement under Rule 14d-2(b) that an offer proceed immediately, generally will be impossible. *See* Ryndak, *State Takeover Statutes Under Attack—Casualties in the Battle for Corporate Control—MITE Corp. v. Dixon*, 30 DEPAUL L. REV. 989, 991 note 14 (1981). The court's analysis in *Sun Life*, discussed in the text *supra*, was one of the few isolated attempts to reconcile the apparently conflicting demands of antipathetic state and federal requirements, and thereby preserve the state statute.

The court's line of reasoning was the subject of later attack from commentators. So, for example, in Comment, *Challenges to State Takeover Laws: Preemption and the Commerce Clause*, 64 MARQUETTE L. REV. 657, 685 (1981), the writer in no uncertain terms concluded that "the administrative rules promulgated by the SEC [*i.e.*, Rule 14d-2] made clear that state takeover laws are preempted by the Williams Act." However, prior to the Court's decision in *Edgar*, other commentators suggested that while existing state takeover acts would be found infirm under preemption and Commerce Clause attacks, modifications limiting the applicability of the various acts might be made so that they would comport with the Williams Act and with Rule 14d-2. *See* Comment, *The Utah Takeover Offer Disclosure Act: Constitutional and Practical Considerations*, 1979 UTAH L. REV. 583.

ment on the non-relationship of a transfer of stock *vis-a-vis* regulation of the internal affairs of a corporation.[108] In light of the Court's comment in *Edgar*, the argument is strong that *Edgar* and the analysis set forth in *National City Lines* would prevail over that in *Roussel*. Furthermore, it also should not be forgotten that all of the insurance act cases are complicated by the presence of the McCarran-Ferguson Act, a factor not present in the public utility/common carrier context.

It has been suggested that both Commerce and Supremacy Clause challenges could be made to industry-specific state takeover statutes, such as those of Nevada and California. In light of the fact that only three of the five justices who addressed the Supremacy Clause challenge in *Edgar* supported that challenge, it is problematic as to whether such an attack would continue to have persuasive effect in the future.[109] The fact

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108. 457 U.S. 624.

109. The preemption question is further muddled by the presence of § 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) (1982) which provides:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

State regulation of securities, specifically by means of so-called "blue sky" laws, antedated federal securities regulation and § 28(a) specifically was designed to preserve such blue sky laws. Comment, *The Utah Take-Over Offer Disclosure Act: Constitutional and Practical Considerations*, 1979 UTAH L. REV. 583, 593. Thirty-four years later the Williams Act was passed as an amendment to the 1934 Act without change being made in § 28(a) with respect to its application to the *entire* 1934 Act; in particular, no change was made and the legislative history does not address the need for clarification concerning the impact of § 28(a) on the continuing validity of state takeover laws. Accordingly, some confusion has arisen as to the applicability of § 28(a) to the Williams Act and its various state counterparts. The Supreme Court stated in dictum in Leroy v. Great Western United Corp., 443 U.S. 173, 182 (1979) that "[t]he section was plainly intended to protect, rather than to limit, state authority." This language and the basic provisions of § 28(a) were cited by a number of commentators, in the years before *MITE* and before *Edgar*, as support for the propositions (1) that § 28(a) provided for dual federal and state regulatory authority over takeover offers; and (2) that *Kidwell* was incorrectly decided and that the preemption and Commerce Clause challenges to the state laws were invalid. *See e.g.*, Comment, *The Constitutionality of the Maine Takeover Bid Disclosure Law*, 30 MAINE L. REV. 246, 257, 272-73 (1979).

Similarly, other commentators argued for the validity of such laws, at least where they were limited in application to domestic corporations with a substantial presence in the jurisdiction, or to "pseudo-foreign" corporations, with such presence, under the rationale that such laws are part "of the traditional sphere of state corporate law and not a form of state securities regulation designed to protect non-resident investors." Sargent, *supra* n.9 at 729; *see also* Ryndak, *supra* note 104 at 997 note 46, 1004, 1019 note 199. Sargent, in particular, argued that a legitimate local purpose of the state statutes was to protect investors through the regulation of fundamental changes in corporate ownership and organization. This line of reasoning, obviously, has not been borne out by subsequent judicial decisions.

Furthermore, the Court of Appeals in *MITE v. Dixon* reasoned that § 28(a) was aimed primarily at preserving, and generally limited to, state blue sky laws. 633 F.2d at 491 n.5. *See* Ryndak, *supra* note 104 at 1001 note 77 (1981).

Recently, however, the SEC has again come to scrutinize the state/federal dichotomy in

that the First Circuit rejected a Supremacy Clause attack in *Agency Rent-A-Car*, although distinguishable on its facts, lends at least a small amount of credence to the suggestion that a preemption argument would prove to be a weaker line of attack than a Commerce Clause challenge.

Both on the facts and on the law, a strong Commerce Clause challenge could be mounted against the industry-specific state approval requirements. As suggested, the Nevada and California statutes present precisely the same substantial burdens on interstate commerce as did the general state takeover statutes, *i.e.*, by virtue of the state's assumed power to regulate interstate securities transactions between non-residents and to block nationwide tender offers. The state interest in ensuring the availability of adequate public services can be served through a variety of means other than the state's engaging in the "regulation of securities," as was argued persuasively by the district court in *National City Lines*. Finally, unlike a preemption argument, a Commerce Clause analysis would be controlled by the principles set forth by a majority of the Supreme Court in *Edgar*.

In sum, even if state authority has not otherwise been preempted by federal statute,[110] such state approval authority is subject to strong challenge under the Commerce Clause pursuant to *Edgar* and to a lesser extent under the Supremacy Clause as having been preempted by the Williams Act.

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considering new proposed federal takeover rules against the backdrop of the surge of massive mergers announced in the oil industry. The *Washington Post* reported in part:

> The SEC agreed with the vast majority of the experts' ideas. The few areas of disagreement involved the question of federal preemption of state laws. While the activities of bidders are largely regulated by federal law because tender offers take place in national securities markets, the actions of target companies are generally governed by state law.
>
> The SEC refrained from adopting preemption on charters and bylaws provisions to restrict takeovers, but may preempt state laws as to issues of self tenders and crown jewels.

Ross, *New Rules Proposed in Takeovers*, Washington Post, March 14, 1984, at D7, col.5 and D10, col.1.

110. It is possible that such an argument might exist with respect to railroads and other common carriers under such federal statutes as the Staggers Railway Act of 1980, particularly as codified at 49 U.S.C. §§ 10501, 11343, and 11501 (1982). This article, however, does not address this issue.