

To Our Clients

Takeovers
The Return of the Saturday Night Special

The decision in the Sunshine Mining case, Great Western United Corp. v. Kidwell, CA-3-77-0405 (N.D. Tex. Sept. 2, 1977), if sustained on appeal, would revive the Saturday Night Special tender offer. The decision invalidates the Idaho takeover statute on both the preemption and burden on interstate commerce grounds. The rationale is such that there would appear to be no room to distinguish any of the other state statutes, except perhaps Delaware.

The essence of the preemption rationale is contained in the following excerpt from the opinion:

"Substantively, the Idaho statute differs significantly from the requirements of the Williams Act. First, while the Idaho statute requires the offeror to provide information required by the Williams Act it also requires other more detailed information. Some of the information, such as a description of business done by the offeror and material changes therein in the prior three years, seems only collaterally related to that information that a shareholder would require in deciding whether or not to tender his stock.

"Second, while the Williams Act has no waiting period after filing the applicable information before an offer may be made, the Idaho Act requires that a registration statement be declared effective by the Director of the Department of Finance before the offer can commence. Further, the management of the target company can demand a hearing which the State of Idaho is required to provide within twenty (20) days after the date of filing. A decision must be made within thirty (30) days after the hearing, but this time period may be extended. If a hearing is called the offer shall not become effective until registered by order of the Director of the Department of Finance. Idaho Code § 30-1504. Thus the management of the target company can unquestionably delay the institution of a tender offer for several weeks in which to marshal its resources.

"Third, while the Williams Act requires the offeror to file the required information with the SEC under all circumstances, the Idaho Act does not require compliance with Idaho law if the target company's board of directors recommends acceptance of the tender to its shareholders. Idaho Code § 30-1501(5) (e).

"It is clear that the Idaho statute conflicts with and frustrates the clear purposes of the Williams Act. The State of Idaho strongly maintains that a conflict exists rendering preemption applicable only if the state statute renders it impossible to comply with the federal standards. But a conflict may also exist when the state statute frustrates a Congressional purpose. Wilner and Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality, 45 Fordham L. Rev. 1, 23 (1976). The court is of the opinion that absolute impossibility of compliance with both laws is not necessary to a finding of preemption. Indeed, in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 145 (1963), the converse is indicated: If impossibility of compliance does not exist, then further inquiry is necessary.

"This court is of the opinion that the Idaho statute conflicts with the Williams Act by destroying the careful balance struck in the Williams Act between the offeror and the management of the target company designed to protect the interests of the shareholders. It is clear from examination of the legislative history and the Act itself that Congress' purpose in enacting the Williams Act was to let tender offers go forward for the benefit of shareholders. It is equally clear that the purpose of the Idaho takeover statute is to inhibit tender offers for the benefit of management. This purpose is evident from several provisions of the Idaho statute discussed above. By providing that a hearing must be held for the protection of the Idaho shareholders if 'requested by the target company acting through its Board of Directors', the Idaho statute gives management an absolute right to an administrative hearing prior to the time any tender may be made. If Idaho had the public interest in mind, any advance administrative review would be vested in a state agency which could hold hearings when necessary. The Idaho statute supplies management of the target company with a delay mechanism for use at its discretion. In contrast, the Williams Act provides for no administrative review prior to the time a tender is made.

"Further, the Idaho statute provides for an exemption from compliance with the terms of the Idaho statute if the Board of Directors of the target company recommends its acceptance to the stockholders. In contrast, the Williams Act requires compliance with its terms in the case of all tender offers, thus indicating its interest in protection of the shareholders rather than the management.

"The Idaho statute thus places the tools of delay -- anathema to an offeror -- within and only within the reach of management. And the statute blithly removes all impediments of an offer if management approves. There is a conflict of purpose between the Williams Act and the Idaho statute: the Williams Act regulates the making of tender offers for the benefit of shareholders, while the Idaho statute regulates the making of tender offers primarily for the benefit of the management of the target company. By weighing the scales so heavily in favor of management of target companies, the Idaho statute has destroyed the delicate balance reached by the Williams Act. Because of the conflict that exists, this court is of the opinion that the Idaho takeover statute is preempted by the Williams Act."

The burden on interstate commerce argument is:

"In any tender offer, there are at least three interested parties who have conflicting interests to some extent: the offeror, the shareholders and the management of the target company. The Williams Act seeks to protect the shareholders and to balance the competing interests of the other two parties. Despite the Idaho defendants' contention that the Idaho statute protects the interest of shareholders, this court finds that the immediate purpose of the statute is to protect incumbent management.

"The presence of the Idaho statute might work to the detriment of shareholders in several ways. First, the statute enables management of an unwilling target company to delay and frustrate the making of the offer by invoking the administrative procedure of the takeover statute. Second, the presence of the statute might dissuade a potential offeror from making an offer where it is faced with one or more onerous state takeover statutes.

"Third, there was evidence present that the presence of the statute might discourage an offeror from initially announcing its top offer. In some such cases the offeror holds the top offer back from shareholders and discloses it to target company management only in hopes of obtaining management's approval of the offer. By obtaining such approval the offeror negates the necessity of complying with the takeover statute. In those cases where a friendly arrangement cannot be consummated, the shareholders might never have an opportunity to consider and accept the higher offer made only to management. Fourth, the presence of the statute might induce the offeror to reduce its originally announced offer price where it

encounters resistance resulting from management's utilizing delays permitted by the takeover statute. In such case shareholders could also be deprived of the opportunity to consider and accept the original and higher offer.

"The ultimate purpose of the Idaho statute is to thwart tender offers and thereby prevent possible removal of the target company or its management, the closing of plants and related effects on the state's economy. But a state may not legitimate its regulation of interstate commerce by asserting this type of interest. As stated by the Supreme Court in Hood & Sons v. Dumond, 336 U.S. 525 (1949), a statute may not be enacted 'solely for protection of local economic interests'.

"Nor does the Idaho statute have only local application. The terms of the statute apply not only to the corporations incorporated under the statutes of Idaho, having their main office in Idaho or having 'substantial assets in Idaho', they also affect shareholders domiciled outside the state. The Idaho statute provides that tender offers may not be made to non-Idaho shareholders without being made to Idaho shareholders also. Idaho Code § 30-1506. The Idaho statute thus undertakes to regulate the offeror's affairs not only within Idaho, but within all states in which the offeror might make a tender offer. This intended extraterritorial effect distinguishes the takeover statute from state Blue Sky laws, which clearly do not intend to govern regulation of securities outside state boundaries.

"Idaho has shown no legitimate local interests in protection of shareholders in other states. In short, the Idaho defendants have not demonstrated that the state takeover statute regulates a legitimate local interest."

M. Lipton