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THE OHIO CONTROL SHARE ACQUISITION ACT: HAS ITS TIME FINALLY COME?

Takeover.¹ Over the past decade, this word has probably created more fear in the hearts of corporate management, local shareholders and employees than any other used in the business setting. For existing management and local shareholders, the word often triggers images of lost control; for employees, lost jobs. In spite of these concerns and others, tender offers have been portrayed both as an asset to the health of the national economy and a benefit to corporate shareholders.² In contrast, they have also been criticized as a tool of corporate raiders who are often interested only in stripping the target corporation of its valuable assets for personal gain.³

The objective of this article is to inform the reader of what Ohio has done over the past six years to address the perceived danger of hostile takeovers. This comment will focus almost exclusively on the Ohio Control Share Acquisition Act, since it is the author's belief that this Act represents the strongest legislative barrier to hostile takeovers. This article will commence by discussing the circumstances in which the Ohio Control Share Acquisition Act was created, continue by examining its most important provisions, and conclude by depicting the Act's constitutional battles in the federal courts.

BACKGROUND

Ohio's first attempt to regulate tender offers manifested itself in the enactment of the Ohio Takeover Act,⁴ adopted in 1969 as one of the first state takeover laws.⁵ Some of the Act's most controversial provisions included Section 1707.041(A)(1), which allowed the Act to apply to transactions having little or no connections to the state as long as the issuer was incorporated in Ohio or had its principal place of business and substantial assets within Ohio;⁶ and Section 1707.041(B)(1), which required a twenty-day prior announcement of any tender offer and also provided for a hearing on the sufficiency of the bidder's

¹ Since the tender offer is generally considered the most effective method in which to take control of a corporation from its present management, this author will use the words "takeover" and "tender offer" interchangeably. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1,2 (1978). Courts have generally defined the term "tender offer" as an offer made "to an anonymous or widespread group of sellers, involving pressures generated by both time limits and a fixed consideration offered by the buyer." Kreider, *Fortress Without Foundation? Ohio Takeover Act II*, 52 CIN. L. REV. 108, 110 (1983).

² Tender offers assist in maintaining incumbent corporate management's accountability to shareholders since this device allows them "to remove inefficient or sluggish management from office." Dart Indus., Inc. v. Conrad, 462 F. Supp. 1, 8 (S.D. Ind. 1978).

³ See *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1217 (D.N.J. 1981).

⁴ OHIO REV. CODE ANN. § 1707.041 (Baldwin 1986).

⁵ See Kreider, *supra* note 1.

⁶ OHIO REV. CODE ANN. § 1707.041(A)(1) (Baldwin 1986).

application made pursuant to the Ohio Takeover Act.⁷ The final decision on whether the tender offer could commence rested with the Division of Securities.⁸

In *Edgar v. Mite Corp.*, the United States Supreme Court held that the Illinois Business Takeover Act, which was similar in nature to the Ohio's Takeover Act, was invalid under the Commerce Clause of the United States Constitution since it purported "to regulate directly and to interdict interstate commerce, including commerce wholly outside the state."⁹ *Edgar v. Mite Corp.* has been credited with effectively invalidating all state takeover statutes which existed at the time of its decision.¹⁰

On November 18, 1982, Ohio became the first state to enact new legislation designed to regulate tender offers notwithstanding the *Mite* decision.¹¹ The Act¹² was established in the guise of traditional corporation law and emphasized the rights of shareholders.¹³ As the Ohio General Assembly stated in Section 1701.832(4) of the Ohio Revised Code: "It is in the public interest for shareholders to have a reasonable opportunity to express their views by voting on a proposed shift of control, an opportunity currently available under Ohio corporation law in transactions with similar effects."

The Ohio Control Share Acquisition Act is justified by legislative findings which generally state that tender offers, a device often used to acquire control of a public corporation, should be subjected to the same corporate approval mechanisms as mergers, consolidations, combinations and majority share acquisitions, since it also involves a change in corporate control which may affect internal corporate practices.¹⁴ Therefore, the General Assembly proposes that shareholders of a public corporation be permitted to vote on certain shifts of control attained through tender offers.¹⁵

⁷ OHIO REVISED CODE ANN. § 1707.041(B)(1) (Baldwin 1986).

⁸ OHIO REV. CODE ANN. § 1707.041(B)(4) (Baldwin 1986).

⁹ 457 U.S. 625, 643 (1982). The Court reasoned that the purported local benefits were insufficient to justify the excessive burden placed on interstate commerce. *Id.* at 643.

¹⁰ See Kreider, *supra* note 1; Comment, *Acquisition of Corporations: The Ramifications of Federal Regulation of State Tender Offer Statutes*, 24 DUQ. L. REV. 867, 887 (1986); Pozen, *Securities Regulation: The New Round Of State Tender Offer Statutes*, 53 BROOKLYN L. REV. 89, 90 (1987).

¹¹ Casenote, *The Constitutionality Of Second Generation Takeover Statutes*, 73 VA. L. REV. 203, 208 (1987).

¹² The Control Share Acquisition Act, OHIO REV. CODE ANN. § 1701.831 (Baldwin 1986).

¹³ Casenote, *supra* note II.

¹⁴ OHIO REV. CODE ANN. § 1701.832 (Baldwin 1986). The General Assembly noted that "although tender offers in theory offer shareholders the opportunity to consider such issues in deciding whether or not to tender their shares, in practice they do not. 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. Thus, shareholders often feel compelled to tender their shares, regardless of how they feel about the corporate control issues inherent in any tender offer." OHIO REV. CODE ANN. § 1701.832(3) (Baldwin 1986).

¹⁵ OHIO REV. CODE ANN. § 1701.832(4) (Baldwin 1986). "It is in the public interest for shareholders to have reasonable opportunity to express their views by voting on a proposed shift of control, an opportunity currently available under Ohio corporation law in transactions with similar effects." *Id.*

THE OHIO CONTROL SHARE ACQUISITION ACT

Under the Ohio Control Share Acquisition Act, no control share acquisition¹⁶ of an issuing public corporation¹⁷ can occur without prior authorization of the issuing public corporation's shareholders unless the articles or the regulations of the issuing public corporation state that the Act is inapplicable.¹⁸ Any person proposing to make a control share acquisition must first submit an "acquiring person statement" to the issuing public corporation which must include, among other facts, the number of shares owned by the acquiring person, the identity of the acquiring person and a description in detail of the terms of the control share acquisition.¹⁹

Within ten days of receiving the acquiring person statement, the directors of the issuing public corporation must call a special meeting of the shareholders to vote on the proposed control share acquisition.²⁰ Unless otherwise agreed to by the acquiring person, the special meeting must be held within fifty days after the acquiring person statement has been received by the issuing public corporation.²¹

At the special meeting of shareholders, two affirmative majority votes must be obtained before the acquiring person may initiate the proposed control share acquisition. The first must come from a majority of shareholders who possess voting rights in the election of directors and the second must be obtained from a majority of shareholders possessing disinterested shares.²² "Disinterested shares" include all shares except those held by an acquiring person; an elected

¹⁶ "Control share acquisition" is defined as "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 . . . 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."

OHIO REV. CODE ANN. § 1701.01(Z)(1) (Baldwin 1986). Some share acquisitions of an issuing public corporation are exempt from the above stated definition. OHIO REV. CODE ANN. § 1701.01(Z)(2) (Baldwin 1986). For example, a share acquisition made pursuant to a merger or consolidation is exempted under § 1701.01(Z)(2)(e).

¹⁷ "Issuing public corporation" is defined as "a domestic corporation with fifty or more shareholders that has its principal place of business, principal executive offices, or substantial 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 1986).

¹⁸ OHIO REV. CODE ANN. § 1701.831(A) (Baldwin 1986).

¹⁹ OHIO REV. CODE ANN. § 1701.831(B) (Baldwin 1986).

²⁰ OHIO REV. CODE ANN. § 1701.831(C) (Baldwin 1986).

²¹ *Id.* Although similar time frames were attacked in *Edgar v. Mite Corp.*, 457 U.S. 624 (1982), one of the Act's principal drafters defended the longer time periods as reasonable and beneficial for shareholders. In his opinion, they result in higher yields to shareholders because (1) they promote a more thorough auction process (2) they give the target's board of directors greater opportunity for sound defensive tactics and (3) they allow time for private lawsuits to test the disclosures made pursuant to the statute. Shipman, *In Defense Of Reasonable State Regulation Of Tender Offers*, 53 BROOKLYN L. REV. 99, 99-100 (1987).

²² OHIO REV. CODE ANN. § 1701.831(E)(1) (Baldwin 1986). Under the powers granted in § 1701.11 of the Ohio Revised Code, this voting requirement may be supplemented by new enactments to an issuing public

or appointed officer of an issuing public corporation; or directors who are also employees of the corporation who may exercise or direct the exercise of the voting power of the corporation in the election of directors.²³

Having obtained the requisite shareholder approval, the acquiring person may commence the control share acquisition providing that the action is taken within three hundred sixty days of the date of prior shareholder authorization.²⁴

THE CONSTITUTIONALITY OF THE OHIO CONTROL SHARE ACQUISITION ACT

The Constitutional Issues

1. The Supremacy Clause and the Williams Act.

Two questions invariably arise when state takeover statutes are challenged on constitutional grounds: (1) whether the statute is preempted by the Williams Act and therefore violative of the Supremacy Clause of the United States Constitution and (2) whether the statute violates the Commerce Clause of the Constitution.²⁵ These same constitutional questions have been at issue when state Control Share Acquisition Acts have been addressed by the courts.²⁶

Under the Supremacy Clause,²⁷ a state statute will be considered void if it conflicts with a valid federal statute.²⁸ The Supreme Court has found that a conflict exists "where compliance with both federal and state regulation is a physical impossibility"²⁹ or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."³⁰ Generally, opponents of state takeover statutes do not argue that compliance with both the state statute and the Williams Act is physically impossible, but that the state statute in some substantial way frustrates the objectives of the Williams Act.³¹

The Williams Act was enacted in 1968 in response to the increased use

corporation's code of regulations. These emergency enactments may institute supermajority voting requirements or may even permit the directors alone to decide whether an acquisition may be conducted by the acquiring person (unless the shareholders first vote to deny the board of directors such power). Kreider, *supra* note 11, at 115.

²³ OHIO REV. CODE ANN. § 1701.01(CC) (Baldwin 1986).

²⁴ OHIO REV. CODE ANN. § 1701.831(E)(2) (Baldwin 1986).

²⁵ Williams Act, 17 C.F.R. § 240.14d-2 (1984); AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929, 930-31 (S.D. Ohio 1979); Canadian Pac. Enterprises (U.S.) Inc. v. Krouse, 506 F. Supp. 1192, 1196 (S.D. Ohio 1981); Edgar v. Mite Corp., 457 U.S. 624, 626 (1982).

²⁶ Fleet Aerospace Corp. v. Holderman, 796 F.2d 135 (6th Cir. 1986); Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986).

²⁷ "This Constitution and the Laws of the United States shall be the Supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

²⁸ Edgar v. Mite Corp., 457 U.S. at 631.

²⁹ Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

³⁰ Ray v. Atl. Richfield Co., 435 U.S. 151, 158 (1978).

³¹ Edgar v. Mite Corp., 457 U.S. at 632.

of tender offers in corporate acquisitions.³² It requires, among other things, that upon initiating a tender offer³³ the offeror file detailed information on the offer with the Securities Exchange Commission, the target company and the shareholders of the target company.³⁴ This information must include details on the offeror's background and identity, the source of funds which will be used to make the tender offer, the purpose of the purchase, including any liquidation or other major corporate structure changes, and the amount of holdings in the target corporation which the offeror possesses.³⁵

The purpose of the Williams Act was eloquently stated by Senator Williams when he reintroduced the bill in the Nineteenth Congress:

Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.³⁶

The general purpose must be kept in mind when considering whether the Ohio Control Share Acquisition Act is preempted by the Williams Act and therefore unconstitutional under the Supremacy Clause.

2. The Commerce Clause.

The Commerce Clause³⁷ has generally been accepted as a limitation upon the power of the states to institute regulations even where Congress has implemented no legislation of its own.³⁸ The Commerce Clause prohibits direct regulation of interstate commerce by the states but will permit incidental regulation.³⁹ The state statute will be held valid if it "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce

³² *Id.*; Williams Act, 17 C.F.R. § 240.14d-2 (1984).

³³ A tender offer begins at 12:01 A.M. on the earliest date of the following occurrences, (1) first publication of the form designated under Rule 14d-4(a)(1); (2) first publication of a summary advertisement pursuant to Rule 14d-4(a)(2); or (3) first public announcement of the tender offer unless withdrawn within five days or the bidder complies with the filing and disclosure requirements of Rules 14d-3(a), 14d-6 and 14d-4 which require public dissemination. 17 C.F.R. § 240.14d-2 (1984).

³⁴ 15 U.S.C. § 78n(d)(1) (1986 ed., Supp. IV).

³⁵ 15 U.S.C. § 78m(d)(1) (1976 ed., Supp. IV). The purpose of requiring the offeror to send to the issuer and to file with the Securities Exchange Commission certain information is not to protect incumbent management or to discourage takeover bids, but to assure a fair fight between target management and offerors, *Indiana Nat'l Corp. v. Rich*, 712 F.2d 1180, 1185 (7th Cir. 1983); to alert the marketplace to rapid accumulations of securities, *Feldman v. Simkins Indus., Inc.*, 679 F.2d 1299, 1306 (9th Cir. 1982); and to protect the individual investor from making uninformed decisions, *Securities Exch. Comm'n v. World Wide Corn Inv. Ltd.*, 567 F. Supp. 724, 754 (N.D. Ga. 1983).

³⁶ 113 Cong. Rec. 854-55 (1967).

³⁷ "Congress shall have Power . . . to regulate Commerce . . . among the states." U.S. CONST., art I, § 8, cl. 3.

³⁸ *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980); *Edgar v. Mite Corp.*, 457 U.S. at 640.

are only incidental . . . unless the burden imposed on such interstate commerce is clearly excessive in relation to the putative local benefits."⁴⁰ The constitutionality of the Ohio Control Share Acquisition Act has been questioned severely under the Commerce Clause of the Constitution.⁴¹

Recent Cases

In spite of the above stated constitutional questions, the proponents of the Ohio Control Share Acquisition Act were confident that they had created legislation that would withstand constitutional attack under the *Edgar v. Mite Corp.* decision.⁴² Nevertheless, in *Fleet Aerospace Corp. v. Holderman*, the first case directly challenging the constitutionality of the new Ohio Act, the district court held that the Ohio Control Share Acquisition Act violated both the Supremacy Clause and the Commerce Clause of the United States Constitution and therefore, was unenforceable.⁴³

The district court gave three reasons for concluding that the Ohio Act substantially frustrated the objectives of the Williams Act⁴⁴ and consequently, was invalid under the Supremacy Clause. First, the court found that the Act permitted delay in the take down of tendered shares beyond the time frame required under the Williams Act.⁴⁵ The court stated that this lengthy delay undermined the basic policy of the Williams Act to maintain a neutral policy toward tender offers and tilted the carefully balanced scales in the incumbent management's favor.⁴⁶

Second, the court determined that the Ohio Act impermissibly tipped "the scales in favor of incumbent management by requiring a shareholder vote . . ." since the process usually forces the offeror to engage in a proxy contest which creates additional expense and delay not experienced under the Williams Act.⁴⁷ Last, the court found that the Ohio Control Share Acquisition Act prevented individual shareholders from deciding whether to sell his or her stock

⁴⁰Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

⁴¹"The Ohio Control Act clearly imposes substantial burdens on interstate commerce." Pozen, *Security Regulation: The New Round Of State Tender Offer Statutes*, 53 BROOKLYN L. REV. 89, 93 (1987); "The most serious constitutional question raised by Takeover II lies in its extraterritorial application." Kreider, Comment, *supra* note 1, at 121; see *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986).

⁴²Shipman, *supra* note 21, at 101.

⁴³637 F. Supp. 742, 764 (S.D. Ohio 1986).

⁴⁴See *supra* note 36.

⁴⁵" . . . the Williams Act . . . permits plaintiff to begin purchasing shares on the sixteenth business day following the commencement of the tender offer. Under the OCSAA . . . the right of the offeror to purchase and the right of the stockholder to sell to the offeror . . . can be delayed by the management of the target company as long as fifty days following the commencement of the tender offer." *Fleet Aerospace Corp. v. Holderman*, 637 F. Supp. at 756.

⁴⁶*Id.* at 757. The state defendants had argued "that the fifty day time period in which to call a meeting was reasonable because it allows sufficient time to prepare the necessary proxy solicitation materials; receive SEC clearance of these materials . . . ; distribute the proxy materials to the shareholders; and allow the shareholders sufficient time to read the materials and return their proxies." *Id.*

to the offerer and placed the decision in the hands of other shareholders collectively.⁴⁸

The *Fleet Aerospace Corp. v. Holderman* decision gave two reasons for holding that the Ohio Control Share Acquisition Act violated the Commerce Clause.⁴⁹ The first reason given was that the Act regulated transactions occurring beyond Ohio's state borders and attempted "to assert extraterritorial jurisdiction over persons and property in other states," thus invalidating the Act because of its direct regulation of interstate commerce.⁵⁰ The second reason given was that the Ohio Act failed to pass the test stated in *Pike v. Bruce Church, Inc.*, which required that any state statute regulating interstate commerce indirectly not be excessive in relation to the local interests served by the statute.⁵¹ Instead, the court found that the Ohio Control Share Acquisition Act placed a substantial burden on interstate commerce and that the local interests did not outweigh that burden.⁵²

In *Holderman*, the district court had relied heavily on *Dynamics Corp. of America v. CTS Corp.*, a 7th Circuit Court of Appeals case decided less than two months earlier which held that the Indiana Control Share Acquisition Act, which is very similar to the Ohio Act, violated the Supremacy Clause and the Commerce Clause.⁵³ The Ohio Control Share Acquisition Act took another devastating, and what appeared to be a final blow when the 6th Circuit Court of Appeals followed the reasoning of the district court and affirmed the court's decision.⁵⁴ However, almost five years after the *Edgar v. Mite Corp.* decision, the constitutionality of a state takeover act was again at issue in the United States Supreme Court.⁵⁵

In *CTS Corp. v. Dynamics Corp. of America*, the issues were whether the Indiana Control Share Acquisition Act was unconstitutional under the Supremacy Clause and the Commerce Clause.⁵⁶ The Supreme Court began its analysis by asking whether the Williams Act preempted the Indiana Act.⁵⁷ The Court concluded that it did not, since the Act furthered "a basic purpose of the Williams

⁴⁸ *Id.* at 756. "The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself." *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1276 (5th Cir. 1978).

⁴⁹ *Fleet Aerospace Corp. v. Holderman*, 637 F. Supp. at 761.

⁵⁰ *Id.*

⁵¹ 397 U.S. 137, 142 (1970).

⁵² *Holderman*, 637 F. Supp. at 764. The state had advanced three state interests which it felt were legitimate; (1) the state interest in regulating the internal affairs of its corporations in the area of policing changes in corporate control, including any caused by tender offers; (2) the power to regulate shareholders of an Ohio corporation regardless of where they live, and (3) promoting its business climate by protecting Ohio corporations from wholesale raids by foreign companies. *Id.* at 762.

⁵³ 794 F.2d 250 (7th Cir. 1986).

⁵⁴ *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986).

⁵⁵ *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987).

⁵⁶ *Id.* at 1640-41.

⁵⁷ *Id.* at 1644.

Act, 'placing investors on an equal footing with the takeover bidder.'"⁵⁸ The Court distinguished *Mite*, finding that the Illinois statute involved in that case wrongly "operated in favor of management against offerors to the detriment of shareholders," whereas the Indiana Act protected the independent shareholder against both competing parties.⁵⁹

The Supreme Court also took issue with the lower court's preemption finding.⁶⁰ The Court concluded that the Act did not impose an absolute fifty day delay on tender offers and that even if it did, the delay was reasonable, and therefore the Act was not preempted by the Williams Act.⁶¹

The Supreme Court then addressed the constitutionality of the Indiana Act under the Commerce Clause. The Court first held that the Act did not discriminate against interstate commerce since it imposed no greater burden on out-of-state offerors than it did on Indiana offerors.⁶² Secondly, the Court concluded that the Indiana Act did not "create an impermissible risk of inconsistent regulation by different states," thus disagreeing with the respondent's contention.⁶³

Finally, the Supreme Court challenged the Court of Appeals' basis for finding that the Act violated the Commerce Clause, i.e., that the Indiana Act hindered tender offers and by doing so indirectly affected interstate commerce in a substantial way.⁶⁴ After identifying several legitimate state interests,⁶⁵ the Court concluded that these interests outweighed any effect the Act may have on interstate commerce and that subsequently, the Indiana Control Share Acquisition Act was valid under the Commerce Clause of the Constitution.⁶⁶

⁵⁸ *Id.* at 1645-46. This conclusion is derived from the assumption that independent shareholders are often at a disadvantage when dealing with tender offers since they are susceptible to the coercive aspects of some tender offers. *Id.* at 1646; Ohio Rev. Code Ann. § 1701.832(A)(3) (Baldwin 1986).

⁵⁹ *Id.* at 1645.

⁶⁰ *Id.* at 1646. The Court of Appeals had reasoned that since it was possible that voting rights may not be conferred until after the shareholders meeting which could take as long as fifty days, the Act imposed a fifty day delay on tender offers. *Id.* at 1647.

⁶¹ *Id.* ". . . nothing 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.'" *Id.*

⁶² *Id.* at 1649.

⁶³ *Id.* "So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State." *Id.* (Section 23-1-49-9 of the Indiana Control Share Acquisition Act removed voting power from control shares acquired through a tender offer until a majority of disinterested shareholders approved the tender offer.)

⁶⁴ *See Id.* at 1649-52.

⁶⁵ *Id.* at 1649-51. "A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have a effective voice in corporate affairs." *Id.* at 1651.

⁶⁶ *Id.* at 1652. Justice White, joined by Justice Blackmun and Stevens expressed a strong dissenting opinion: "A state law which permits a majority of an Indiana corporation's stockholders to prevent individual investors including out-of-state stockholders, from selling their stock to an out-of-state tender offeror and thereby frustrate any transfer of corporate control, is the archetype of the kind of state law that the Commerce Clause forbids." *Id.* at 1656.

CONCLUSION

The two Supreme Court decisions, *CTS Corp. v. Dynamics Corp. Of America* and *Ohio v. Fleet Aerospace Corp.*,⁶⁷ can easily be interpreted as supporting the constitutionality of the Ohio Control Share Acquisition Act. These decisions represent a major victory for state takeover statutes which, beginning with *Edgar v. Mite Corp.*, had undergone devastating constitutional attacks in the federal courts.

Whether the Ohio Act will become an effective tool which will be used by Ohio corporations to ward off and defend against hostile tender offers is not yet certain. The answer will depend to a large extent on the incumbent management's ability to coordinate effective takeover defenses within the additional time frames granted under the Ohio Act and the management's ability to retain the confidence and loyalty of those disinterested shareholders which may ultimately have the final word in whether a tender offer may commence. It is more certain, however, that the Ohio Control Share Acquisition Act has finally found acceptance in the courts and should serve to benefit and protect those individuals who previously were the most helpless in the deadly arena of hostile corporate takeovers . . . the shareholders.

BRYAN J. GREEN

⁶⁷The Supreme Court vacated and remanded the 6th Circuit Court of Appeals case which had held that the Ohio Control Share Acquisition Act violated the Supremacy and Commerce Clauses of the Constitution, 407 S.Ct. 1949 (1987).

