In the

ORIGINAL

Supreme Court of the United States

JAMES EDGAR,	)	
	)	
Appellant,	)	
v.	)	NO. 80-1188
	)	
MITE CORPORATION AND MITE HOLDINGS, INC.	)	
	)	

Washington, D. C.

November 30, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES EDGAR,
Appellant,
v. : No. 80-1188
MITE CORPORATION AND MITE HOLDINGS, INC.

Washington, D. C.
Monday, November 30, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:21 o'clock p.m.

APPEARANCES:

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear argument next in Edgar against the Mite Corporation.

Mr. Grimes, I think you may proceed whenever you are ready.

ORAL ARGUMENT BY RUSSELL C. GRIMES, JR. ESQ.,
ON BEHALF OF THE APPELLANT

MR. GRIMES: Mr. Justice, and may it please the Court, Mite Corporation initiated this action on January 19th, 1979, in the District Court for the Northern District of Illinois, seeking a declaratory judgment that the Illinois Business Takeover Act is void. Mite alleged that the Illinois Act is pre-empted by the Williams Act, and constitutes an impermissible burden on interstate commerce.

Mite also sought injunctive relief prohibiting the Illinois Secretary of State from applying the Illinois Act against Mite in connection with its takeover of Chicago Rivet and Machine Company --

QUESTION: Incidentally, Mr. Grimes, if it were pre-empted, I guess you don't get to the commerce clause issue.

MR. GRIMES: I think the --

QUESTION: If the Williams Act pre-empted your statute.

MR. GRIMES: I think that would preclude getting

to the commerce clause.

QUESTION: Yes.

QUESTION: Mr. Grimes, I would like to ask you a question along the lines that Justice Brennan just asked. There is a difference -- Do you think Judge Cudahy would have written the same opinion had the Congress not passed the Williams Act?

MR. GRIMES: Of course, within the Seventh Circuit or below, it is possible, I mean, to decide both decisions -- both grounds in case one would be reversed on appeal, I would imagine. If the Williams Act were not passed, there would -- you could still have, I suppose, a pre-emption ground even in the absence of Congressional action.

QUESTION: What would pre-empt?

MR. GRIMES: Well, there would be nothing to pre-empt here, because, I mean, with the Section 28(a) of the Securities Exchange Act of 1934.

QUESTION: I mean, supposing Congress simply had not gotten into this field at all, and left it to the states, the same way that it had attempted to preserve state blue sky laws in the 1934 or 1933 legislation. Do you think that the Seventh Circuit would have come out the same way as a burden on interstate commerce, a constitutional, straight constitutional holding, without any action of Congress?

MR. GRIMES: I am not sure, Justice Rehnquist. I

think in that situation, the Seventh Circuit could have gone to the commerce aspect, if there were no Congressional legislation in the field.

QUESTION: Well, it certainly could have. Do you think it would have been proper under the decisions of this Court for it to have done so?

MR. GRIMES: Well, I would recognize you avoid reaching -- you know, deciding on the constitutional issue if any other ground is possible, but of course, even when something is pre-empted you are still under -- it would be unconstitutional under the supremacy clause. I am not sure exactly --

QUESTION: But if there weren't any claim of statutory pre-emption, just a straight commerce clause argument, wouldn't the commerce clause argument be the same whether or not the Williams Act existed?

MR. GRIMES: I think the commerce clause issue would be the same regardless --

QUESTION: Well, if it was, if it were the same, wouldn't it have been decided the same, whether or not the Williams Act was in the picture?

MR. GRIMES: I think the commerce clause would -- the commerce --

QUESTION: That's what the Justice is asking you.

MR. GRIMES: Yes, the commerce clause issue stands

or falls regardless of the Williams Act. I mean, that is there even -- I mean, my first argument is that it is not pre-empted by the Williams Act, and then the commerce clause analysis will stand or fall on its own.

QUESTION: But there are two separate points.

MR. GRIMES: Definitely two separate points. The Seventh Circuit I feel correctly determined that Congress has not expressly barred states from coordinate regulation of tender offers, and even this Court has said in Section 28(a) that the 1934 Act was designed to preserve state authority as opposed to limit it.

Similarly, the Court of Appeals in its decision correctly determined that Congress -- the Williams Act is not a pervasive scheme of legislation from which the Illinois Act could be implicitly pre-empted.

QUESTION: Mr. Grimes, I guess if you consider the SEC's new rules on the subject, you would conclude that it was indeed pre-empted, would you not?

MR. GRIMES: Well, the new rules, which of course are not at issue here, create a direct conflict with a portion of the Illinois Act, in that under the SEC rule it has to commence or be withdrawn within five days, whereas the Illinois Act has a 20-day pre-commencement. But as far as -- although, as I still would submit, the new rule does not apply to this case, we do have examples of other very

current state amendments to their statutes, such as New York and Maryland, where you would not have that direct conflict in the sense that it would be impossible to comply with both. That would be -- that specific portion -- provision of the Illinois Act does conflict directly with the new SEC rule.

The Court of Appeals said that the Illinois Act stands as an obstacle to achieving the full Congressional purposes in enacting the Williams Act, in conflicts under the Hines versus Davidowitz test. The Court of Appeals had four main objections that it found with the Illinois Act.

It said that the Illinois Act would substitute regulatory control for investor autonomy; that a hearing could be instituted indirectly by incumbent management; and that the Illinois Act provides for delays grossly -- potentially grossly in excess of those contemplated under the Williams Act; and finally, the pre-commencement, 20-day pre-commencement notification period.

It is the State of Illinois' position that the Illinois Act ensures that an investor will have an adequate opportunity to make an informed decision, and it also ensures that there will be full compliance with the disclosure requirements in the Williams Act.

This Court has said that the sole purpose of Congress in enacting the Williams Act was to protect the

investor confronted with a tender offer. Now, there are expressions of Congressional neutrality in the legislative history of the Williams Act, but I think it is a -- I believe it is a mistake to believe that general neutrality as opposed to setting an unalterable balance -- I think those are two different things.

If in fact the Williams Act created a balance that could not be altered, then I think it is the situation now where the SEC has greatly increased the minimum time a tender offer must remain open to 20 business days. If it were an absolute balance in the Williams Act, that these terms were fixed, then I don't think the SEC could change them. Instead, I think it is more a feeling of general neutrality. They don't want to prevent tender offers from being made, but as long as the Illinois Act will not have the effect of precluding the making of tender offers, it can exist with the Williams Act by supplementing the protection afforded an investor.

With the question -- Certainly the Illinois Act is neutral. It applies to the activities of the target company as well as those of the offeror. Its specific purpose says it is to be interpreted so as to strike a balance that does not favor either management or the target company. It has no exemption for a friendly takeover.

Getting into the Seventh Circuit's problems that

there would be the delay under the Act that would conflict with the purpose of Congress, there is no question speed and surprise are to the benefit of an offeror, but that doesn't follow that that is to the benefit of the investor confronted with a tender offer.

The investor's right to make an informed decision, I believe this is furthered when you have reasonable delay because that investor then will have an opportunity to see what value the market places on the tender offer that has been made for his shares. To wit, if another company would come in with a competing bid, that would be an indication of what the true value of his shares are. There is certainly nothing in the record to show that the periods of delay in the Illinois Act would hinder the making of tender offers, and I think we certainly have seen that in the period of time since the SEC has increased virtually by 400 percent from the seven-day minimum period when it is a tender offer for all the shares under the Williams Act to now 20 business days, which would be approximately four weeks, there has certainly been no slackening in the making of tender offers.

QUESTION: What about the authority of the Illinois commissioner to hold a hearing?

MR. GRIMES: The hearing provisions of the Act which the seventh circuit found again to be delay, and there is -- I would have to agree that under the wording of the

Act, incumbent management perhaps indirectly could cause a hearing to be held as required by -- if it is 10 percent of the shareholders or a majority of the outside directors.

Now, the Securities Commissioner is there to protect the interests of the Illinois residents who are shareholders. He is not going to be a pawn of either the target company or the offeror. The Act does contain time limits, although it says that the Secretary would have the power to extend them if necessary like for the protection of Illinois offerees.

But the point is, if the Secretary conducts a hearing, if he sees -- the purpose of the Illinois Act, to ensure that there has been the full disclosure, and at that point the Secretary isn't going to be subject, and I don't think we could assume that the Secretary is going to be a pawn of the target company. The hearing at a very early time, much as if -- if the target company presently would go into the district court to seek a temporary restraining order or anything else. I think it is the same thing being achieved by having a hearing at an early stage to see that the Williams Act or the disclosure under the Illinois Act has been made, and in that event it is not going to be an obstacle to the tender offer going ahead.

QUESTION: But, Mr. Grimes, supposing the Illinois Secretary concludes that although there has been complete

and thorough disclosure, everything has been disclosed that could possibly be disclosed, nevertheless, in his judgment the offer was inequitable, what happens then?

MR. GRIMES: Okay. This provision is the one that the Second Circuit said that it found most objectionable. First, I would point out, the Secretary has contended, our position has been throughout this litigation, that he doesn't have the power to pass on the substantive fairness or the amount of the offer. I did include a case in my brief, an Illinois Supreme Court case, which said -- well, first of all, to give you the language, the Secretary has the power to deny registration if he finds that a takeover offer is "inequitable or would work or tend to work a fraud or deceit." I did argue that this should be construed in the conjunctive as opposed -- the "or" to be construed "and", that it is -- fraud or deceit.

Now, I recognize that certainly in more traditional state blue sky law, where they do pass on substantive fairness and "inequitable" is used in that, that it -- I mean, that this could be reasonably construed as passing on substantive fairness. I -- we contend, though, that that is counter to the purpose of the Act.

QUESTION: No, but is it not clear that Judge Cudahy so construed it?

MR. GRIMES: Oh, absolutely.

QUESTION: And are we not bound to accept the Court of Appeals construction of the Illinois statute? Do we go behind them and take a second look at what the Illinois statute means?

MR. GRIMES: Well, Judge Cudahy in his opinion didn't even point out that we argued that it didn't entitle the Secretary. I cite in my brief in response, in my reply brief here, I cited the portion of our brief in the Seventh Circuit where we argued that it did not possess -- we do not possess this power. The Seventh Circuit didn't comment on that. He quoted a different portion.

QUESTION: It is very clear he disagreed with you, and the fact that you raised the point seems to me kind of cuts against you in a way. If it was argued and he construed it differently, that seems to me all the more of a hurdle for you to overcome.

MR. GRIMES: Well, the point being that we don't feel we have the power to pass on the substantive fairness. The Illinois Act does have a severability provision. We don't contend -- we think that is counter to the purpose of the Williams Act to pass on the substantive fairness. That is the investor's decision, adequate time, full disclosure, and ensure that at an early stage.

But in getting back to what I was saying about more like a traditional state blue sky law, I mean, that is

a different situation. If a new issuing is being made in Illinois, and an investor is putting up dollars for a stock certificate, you have an inherent risk that you could lose everything, whereas I think a cash tender offer is a different situation. The Illinois investor is giving up his share of stock for -- well, if it is a cash tender offer for all the shares -- for some certain -- I would say that the purpose of the Illinois Act, unless it could -- you know, the Illinois Supreme Court decision is authority that "or" can be construed as "and", and in this situation I feel that it would be counter to the purpose of the Act to have the power of substantive review, of the fairness, substantive fairness review.

If that power is there, it is one that the Secretary, in the position of the Attorney General's office, is that the legislature didn't intend that. If it did, I don't see that that could withstand scrutiny.

QUESTION: General Grimes, did the Secretary seek a stay of the injunction issue by the district court?

MR. GRIMES: No, it did not seek a stay.

QUESTION: Why?

MR. GRIMES: There had -- I filed the notice of appeal in this case. Some time after we filed the notice of appeal, that -- of course, then when Mite withdrew its tender offer -- I know in prior litigation that happened a

couple months before this there had been -- a stay was sought there in Daylin -- or UARCO versus Daylin. Stay was sought and denied in the Seventh Circuit, and also, I believe, denied by this Court.

QUESTION: Are you going to address somewhere along the line the suggestion that the case is moot?

MR. GRIMES: Yes, I will be glad to address it. The main reason why I feel that this case is not moot -- this was raised for the first time by Mite in the response to the jurisdictional statement -- is this. At present, the Secretary of State is still permanently enjoined --

QUESTION: Are you criticizing that it was raised then for the first time?

MR. GRIMES: No. No, no, but I am just pointing out that the Seventh Circuit, although it addressed it, it was not argued there, but -- because, I mean, I realize it makes no difference when it is raised, as to something like mootness. But at present the Illinois Secretary of State is enjoined from applying the Illinois Business Takeover Act against Mite Corporation.

QUESTION: Or to any --

MR. GRIMES: Well, the specific -- the specific injunction was --

QUESTION: Where there is a declaration of unconstitutionality anyway.

MR. GRIMES: Right. It would not have been enforced in the actions, but back to that question. If the Illinois Secretary of State would, for example, bring an action seeking civil penalty against Mite for publishing its tender offer in the Wall Street Journal on February 5th, 1979, after it obtained the injunctive relief, the Secretary of State would be in contempt of that permanent injunction.

QUESTION: Well, how can Mite be held when everything it did was under the protection of an injunction?

MR. GRIMES: Well, I would still -- I am arguing, at least I argued in my reply brief that the Act provides for both criminal and civil penalties. Since it provides for civil, I don't think it is necessary obviously to reach any consideration of criminal. Most of the cases Mite cited in its reply brief for all of them we are dealing in a situation of criminal penalties.

In one case cited by them, Kratz versus Kratz, though, the court in that held that the fact that it does not follow that in a civil case reliance upon judicial opinion instructing that the conduct is legal must be available as a defense in a civil case, and we have -- and I don't think --

QUESTION: It isn't an opinion. It's a flat injunction here that protects them.

MR. GRIMES: Well, but in Leroy versus Great

Western United Corporation, they had completed their tender offer after obtaining injunctive relief, but this Court said, that acquisition did not moot the case, however, because the question whether Great Western has violated Idaho statute will remain open unless and until the district court's judgment is finally affirmed. Well, they --

QUESTION: I take it you are arguing that you want to retaint the right to collect civil penalties for violation of the statute, and that the judgment below was just plain wrong, and you want it set aside so you can collect civil penalties.

MR. GRIMES: We are currently enjoined from bringing an action for civil penalties. Only if we prevail in this Court can we then bring that action. We currently are enjoined from doing so. I feel that if --

QUESTION: I want to be sure about one fact. Mite never acquired any shares of Chicago Rivet?

MR. GRIMES: Mite withdrew its tender offer on March 5th on its own.

QUESTION: It never acquired any shares of Chicago Rivet?

MR. GRIMES: Correct.

QUESTION: It also agreed not to acquire any in the future.

MR. GRIMES: With their -- their agreement, yes,

with Chicago Rivet.

QUESTION: So there is no likelihood that Mite will make any effort to take over Chicago Rivet again?

QUESTION: They have agreed not to.

MR. GRIMES: They made an agreement with Chicago Rivet that when they -- they had a proposed, I guess, amendment to their tender offer for $31 a share, and that if for any reason they didn't go ahead with that they agreed not to make a future attempt.

QUESTION: Mr. Grimes, doesn't that distinguish this case from Leroy? There the acquisition had actually been completed, had it not?

MR. GRIMES: The acquisition had been completed.

QUESTION: And here it was not.

MR. GRIMES: But the fact --

QUESTION: And there is a promise that it will never come to pass.

MR. GRIMES: I agree that --

QUESTION: What I am really trying to get at, what is the basis of any liability under the Illinois statute in these circumstances?

MR. GRIMES: The basis for the liability would have been making the tender offer without getting it registered under the Illinois Act.

QUESTION: Even though they have now withdrawn it?

MR. GRIMES: Even though they have now withdrawn it, they made it without getting it registered under the Illinois Act. They were able to do so on the basis of their injunctive relief, but we are still dealing with the civil sort of penalty, and I don't see how that is much different, because in Leroy they acquired --

QUESTION: Well, there wasn't any question, the acquisition had gone through and it was claimed in defiance of the prohibitions of the state statute.

MR. GRIMES: But the fact that they acted under an injunction in Leroy wouldn't have insulated them if -- let's assume there had been a decision on the merits in this Court, you know, then it would have been proper, and that there had been a decision in the lower court to reverse. Then I think that there would definitely be effects of whether they might even have to rescind the sales they purchased, or possibly. There are provisions for such civil things.

QUESTION: Well, I gather what you are saying, even if you win here, even if you win, you could still go after --

MR. GRIMES: We can bring an action against Mite.

QUESTION: Even though they have withdrawn the tender offer.

MR. GRIMES: But they -- on the basis of that, it

was their own decision to withdraw it.

QUESTION: What is the civil penalty for doing what they did, since they have now withdrawn it and promised they will not go forward with it?

MR. GRIMES: Well, the --

QUESTION: You can get an injunction, can't you. Under your statute it provides for injunctions, so if you prove a past violation, at least theoretically an Illinois court can enter an injunction against Mite ever doing it again, couldn't it? It's like a cease and desist order.

MR. GRIMES: Well, but the Act has been declared unconstitutional.

QUESTION: I understand, but if you win, if you win, and have the Act held valid, you could then go in and say, we would like an injunction against Mite making another tender offer.

QUESTION: But wouldn't you have to show under Illinois law some likelihood that Mite was about to make a tender offer?

MR. GRIMES: Well, I mean, here they have agreed never to make -- or they have agreed not to acquire. I think on that there would be problems, but I am still saying that we have a right to bring an action for civil penalties. We are enjoined from doing so presently, and if and only if this Court would reverse the Seventh Circuit on

the merits could we bring that action. I am suggesting that what Mite is arguing by way that it is moot is that they ultimately might have a defense when we would bring that action, and I think that would be an advisory opinion, to say that they would have a defense on the merits, or that they would ultimately prevail.

QUESTION: You are saying that it is moot only if the state is deprived of its right to collect a civil penalty. And you don't think that is -- you think that saves it from mootness.

MR. GRIMES: I think that saves it from mootness that we are presently enjoined. The Act has been -- you know, we can't apply the Act against Mite, although they were able to go ahead with their publishing of the tender offer without getting it registered.

QUESTION: Do you think you would be in violation of the injunction if you applied the Act to some other company?

MR. GRIMES: The injunction itself only applied to the Secretary of State, Mite, and Chicago Rivet. There is a declaratory relief that it is unconstitutional, affirmed. The Secretary of State has not been enforcing the Illinois Act pending -- because of the decision of the Seventh Circuit.

QUESTION: Mr. Attorney General, in the ordinary

case, if you get an injunction and the person against whom you get the injunction comes into court and said, look, I was wrong and I am not going to do this any more, would you just mind lifting the injunction, doesn't the court usually do it?

MR. GRIMES: Well, it depends, I suppose --

QUESTION: Doesn't the court usually do it?

MR. GRIMES: The court would lift the injunction, but a person can be damaged in a private case; if an injunction is improperly issued, there would be presumed damages.

QUESTION: But the court would usually lift the injunction, don't they? I mean, what are we talking about here? Justice Brennan asked how much money would you get. A dollar and seventy-five cents?

MR. GRIMES: No, it's --

QUESTION: I am asking you what is involved here. They are not going to do it. They have stopped it. They are not going to do it.

MR. GRIMES: $10,000 per violation for the commission of any act herein deemed to be illegal.

QUESTION: Is that what you want? Is that what you want?

MR. GRIMES: I imagine that is what it would be brought for. I don't know if we would recover it.

QUESTION: And the state of Illinois needs $10,000? And that is all that is in this case, right? Do you agree?

MR. GRIMES: I agree at this point, but if we can't --

QUESTION: Would you agree to send it back to see, and let the Seventh Circuit decide whether it is moot or not?

MR. GRIMES: The Seventh Circuit decided it is not moot.

QUESTION: That's right. I am trying to find out --

MR. GRIMES: They said that the fact that we could bring criminal and civil -- an action for criminal and civil --

QUESTION: I don't understand what is involved here. Suppose this company goes out of business right now. Would it be moot then?

MR. GRIMES: If Mite went out of business?

QUESTION: Yes. Or dropped dead. I mean, I don't see where the harm is out there. I don't see what we are blowing at, except $10,000.

MR. GRIMES: The fact is that we could not bring that action today. We are enjoined from doing so. If we were --

QUESTION: You are enjoined from doing so against

Mite.

MR. GRIMES: Against Mite.

QUESTION: And I would suppose if you tried to bring it against anybody else there would be pretty fast relief granted against it.

MR. GRIMES: Well, I mean, they haven't enforced the Act because -- I mean, they have had calls, I mean, when there have been other tender offers, but with the Seventh Circuit opinion, the Act has been obviously -- it cannot be enforced in light of that.

QUESTION: Of course, if this Court thought it was moot, it would not only dismiss but vacate the judgment below and order the case dismissed in the district court, which would leave no judgments or opinions in force, in which event --

MR. GRIMES: Yes. Well, if this Court found it to be moot, it --

QUESTION: In which event, you would be free. I don't know what some district judge, federal district judge would do if some other company sued to enjoin you, if he knew that he was just going to get reversed in the Seventh Circuit.

QUESTION: It is too bad John Barnes isn't still chief judge of the Northern District of Illinois.

(General laughter.)

MR. GRIMES: I will let Mr. Berman --

CHIEF JUSTICE BURGER: Mr. Berman.

ORAL ARGUMENT OF EUGENE D. BERMAN, ESQ.,

AMICUS CURIAE

MR. BERMAN: Mr. Chief Justice, and may it please the Court, New York believes that Illinois through its tender offer statute serves, if it is allowed to, with the reversal of the decision below, a vital function in shareholder protection. That shareholder protection is similar to protections now accorded shareholders under some 36 other state laws. Those states have decided that this protection is necessary.

If I may, I would like to discuss briefly the experience of New York under its takeover statute. New York has had a tender offer statute since 1976. After the new SEC regulations took effect in 1980, New York determined not to be in a conflict situation with Rule 14(d)(2), and therefore made extensive amendments to its Act, so that under the New York Act there is no longer a pre-offer waiting period.

New York believes that the state has a legitimate interest in regulating tender offers to protect shareholders. Since New York's Act became effective, there have been 44 filings. Twenty-three filings were made since the 1980 amendments, and of those, 16 have been made so far

this year. New York has never ultimately prevented a tender offer from being commenced or consummated through administrative action.

The function of the New York Attorney General is to determine whether or not there has been full disclosure, and once that determination is made, either that there is full disclosure, and the offer is allowed to proceed on its own course, or is not, and an amendment is required, the offer then continues in the same manner as it would under the Williams Act.

New York has had four public hearings, two before and two after the 1980 amendments. Of those public hearings, none lasted for more than two days. It is New York's experience that state legislation in this area does not frustrate Congressional objectives in the Williams Act.

QUESTION: What, Mr. Berman, was the subject of the public hearings?

MR. BERMAN: There were four public hearings. The subject in all of them was whether under the specific tender offer in question the offeror had made full and fair disclosure of all material terms.

QUESTION: Before whom were those hearings?

MR. BERMAN: Those were held before the New York State Attorney General.

New York believes that the state has a legitimate

state interest in regulating tender offers. A tender offer is, after all, a bid to acquire control of a corporation. In the case before this Court, Mite sought 100 percent of the Chicago Rivet shares. It sought, in essence, to buy Chicago Rivet. The state has a traditional interest in regulating affairs of corporations with respect to purchases of that corporation, analogous to merger transactions or major asset sales.

As this Court has noted in Cort against Ash, the corporation is a creature of state statute. Shareholders invest in a corporation knowing that the very existence of the corporation and their relationship with that corporation will be governed by state law.

QUESTION: Mr. Berman, as I read the last paragraph of the Seventh Circuit's opinion, it doesn't say that there can be no state legislation in this field. It simply says that the Illinois statute does not conform to either the pre-emption or interstate commerce burden requirements. Isn't it conceivable that whereas perhaps they are correct about the Illinois statute, perhaps the New York or other statute might pass muster, even under the Seventh Circuit's opinion?

MR. BERMAN: That is absolutely correct, and as Your Honor notes, that area seems to have been reserved by the Seventh Circuit in its opinion. However, there are

certain aspects of the Seventh Circuit opinion, namely, what it refers to as the potential for delay under the Illinois statute, which must be addressed.

The state tender offer statutes have one thing in common for the most part, all save Delaware's, and that is a period of time during which the neutral state administrator will look at the offer to determine whether or not it complies with the statute. That is, whether there is full and fair disclosure in the case of New York and Illinois.

Although the Seventh Circuit leaves the possibility of some state statute remaining in effect, it does not define what that might be. For example, we could speculate a state statute which merely parrots the language of the Williams Act, not being a burden on interstate commerce, but in that context there would be no independent regulatory review of the disclosures in the specific tender offers as exist now under the state takeover statutes.

Therefore, a key element which New York believes must be addressed is whether there is a legitimate interest in the states to have an independent regulatory review of the disclosures at some point either prior to or during the existence of a tender offer.

QUESTION: Are you saying that if Congress had said in the Williams Act there shall be no review in the states of the terms of an offer, of the fairness of the

terms, that that would be unconstitutional?

MR. BERMAN: Excuse me, if Congress had said --

QUESTION: And said expressly that the states may not do what Illinois attempted to do here.

MR. BERMAN: Well, let me answer that this way, if I may. The states may not do what Illinois is alleged to have felt it could do, that is, regulate the fairness.

QUESTION: Well, what the Seventh Circuit thought it was doing.

MR. BERMAN: Yes.

QUESTION: Well, would Congress have that authority? To say that expressly? And make it stick? Is that your argument or not?

MR. BERMAN: Well, Congress certainly has not made that argument. I frankly am not certain whether the interstate commerce authority extends to such a point where Congress --

QUESTION: Well, what if it did?

MR. BERMAN: Well, if it did, then yes.

QUESTION: Well, then, yes, but then what about -- would that have any implications for your present argument?

MR. BERMAN: But that would be a pre-emption question and not a commerce clause question.

QUESTION: Yes. Yes.

QUESTION: Certainly the Shreveport rate cases

said that Congress in exercising its power over interstate railroad transportation could regulate to a certain extent railroad transportation simply within a state, did it not?

MR. BERMAN: We do not question the fact that Congress does have the authority to regulate commerce and to regulate commerce within a state, within the commerce clause direction of regulating commerce among the states. However, in the case of the state tender offer statutes, we are given a different situation entirely.

The role of state regulation of securities transactions and the role of the state regulation of internal affairs of corporations is one which has been traditional, and traditionally upheld by this Court. It is very different from the instance of transportation, such as railroads or interstate commerce on highways going through the states, and we contend that the slight delay which may be imposed by the Illinois statute is indeed not a burden on interstate commerce. It does not prevent the tender offer's ultimate consummation. It merely delays the tender offer until such point as there can be a determination of fair disclosure, and that fair disclosure is the same disclosure which is required by the Williams Act.

In essence, the states have felt in this area that the Williams Act is a minimum disclosure statute akin to the various other federal securities laws. In fact, the

legislative history of the Williams Act indicates that its purpose or the purpose of the drafters was to fill the gap in federal regulation of securities in this area. At that time, the tender offer was unregulated by federal law.

QUESTION: What do you make of the colloquy between Senator Javits and Senator Williams on the floor where Senator Javits asked Senator Williams, the purpose of this Act is not to discourage tender offers, is it? And Senator Williams said, no, not indeed. Some of them may be -- I am just paraphrasing -- beneficial.

MR. BERMAN: Yes. That is true. There are several benefits which may be said. I believe in then SEC Chairman Emanuel Cohn's testimony before Congress, he mentioned that there are indeed some instances where tender offers would be beneficial because the incumbent management is inefficient, but Chairman Cohn realized that a tender offer is in essence a corporate opportunity due to a depressed stock market price. An offeror is able to buy a bargain.

For example, a stock trading at $25 may have an actual value of $100. The mere delay in a tender offer statute is not going to impede an offeror from buying something for $25 that is worth $100. It has been our experience in New York, with our statute in existence for some several years, that tender offers are not frustrated by

our statute. Indeed, they seem to be flourishing, and are dependent more on outside economic market factors than on any regulation, be it federal or state.

A question had been raised while Mr. Grimes was addressing the Court concerning the Seventh Circuit's finding that the Illinois statute regulated fairness. New York respectfully suggests that the Seventh Circuit misread a statement in the Illinois brief before it. The statement by the court that Illinois defends the fairness review by referring to impartial review by a state administrator is not what was stated in the brief as is cited in both the Illinois reply brief and New York's brief as amicus.

Indeed, in those briefs, it was -- in that brief, it was specifically stated that the Illinois Secretary of State does not interpret the statute so as to regulate for fairness, and the brief specifically mentions the word "price" there. Illinois would not say whether or not it is a good price, and I believe there was a misreading of that statement by the Seventh Circuit which led to its conclusion.

QUESTION: Well, but the statute on its face is consistent with the Seventh Circuit's reading. It does say, the Secretary does not find that the offer is inequitable, and how does one read the word "inequitable" except to indicate some interest in the fairness of the bargain? I don't care what the -- I mean, I don't know, I don't have

the briefs before the Court; we just have the opinion and the language of the statute, and the Court of Appeals' reading of the statutory language is certainly not manifestly untenable.

MR. BERMAN: It is not manifestly untenable in and of itself.

QUESTION: Right.

MR. BERMAN: However, the Illinois officials, the State Attorney General, representing the State Secretary of State, has stated that this is not how Illinois will interpret this language. Illinois will interpret this language only as meaning that we will regulate for disclosure, not for fairness, and I think this Court should give credence to Illinois' statement of how it will interpret its own statutes, there being no decision by Illinois --

QUESTION: It isn't very often that we disagree with a Court of Appeals on what a state law is.

MR. BERMAN: Well --

QUESTION: Unless a state court has said it is otherwise.

MR. BERMAN: Yes, and there is no such decision in Illinois court.

QUESTION: Did you ask for an extension?

MR. BERMAN: New York was not involved.

QUESTION: Oh, that's right. Was there any request for extension in this case?

MR. BERMAN: No, I don't believe so, but there was no -- there was no state court action at that time. This was merely an administrative review.

Well, I see that my time is up. In the absence of any questions, I thank the Court.

CHIEF JUSTICE BURGER: Mr. Hulbert?

ORAL ARGUMENT OF RICHARD W. HULBERT, ESQ.,
ON BEHALF OF THE APPELLEES

MR. HULBERT: Mr. Chief Justice, and may it please the Court, there are two issues on the merits here, the constitutionality of the Illinois Business Takeover Act on commerce clause grounds, and the constitutionality of it on supremacy clause grounds.

The Court of Appeals held it invalid on both counts, and in that respect aligned itself with substantially every decision by a federal court on the merits of those questions as they have arisen with respect to state laws such as Illinois'. We submit that decision should be affirmed.

The merits of these questions have been rather elaborately briefed to this Court two years ago in the Leroy case. They have been the subject of three very lengthy and thoughtful decisions of Courts of Appeals of the Third, the

Fifth, and the Seventh Circuits, and they have been the subject of a mountain of commentary in the legal literature and in the financial and more practical press, if one may put it that way.

One would certainly be rather temeritous in supposing that one could add any great deal of enlightenment to this question in the half an hour allowed for oral argument. I do think that there are elements in the facts of this case which will illustrate in a specific way exactly how these laws, this law, Illinois' law does in truth burden interstate commerce and create a good deal of confusion and delay, subject a tender offeror to the prospects of the conflicting commands of different sovereigns, and in general act in a way which, so far as I am aware, no state assertion of legislative jurisdiction in the history of the country has ever purported to act.

QUESTION: Mr. Hulbert, let me ask you, supposing that Congress had never legislated in this field at all. Would you feel that the Seventh Circuit opinion is sustainable solely because the Illinois statute is an unconstitutional burden on interstate commerce?

MR. HULBERT: Justice Rehnquist, I think the answer to that question is yes, and for the reason that unlike Illinois and other state regulation in the blue sky area, the Illinois statute is a global regulation of any

tender offer to which it applies. It governs situations in which there may be not a soul in Illinois who owns shares of the stock in question. It governs companies not organized under Illinois law. It purports to tell a tender offeror in Manchester, New Hampshire, whether or not he can buy stock from a shareholder living in Montreal, Canada, and it is insisted that by --

QUESTION: What would the Illinois connection be in that last example that you gave? Because there are limits. I mean, Illinois doesn't say every tender --

MR. HULBERT: There must be -- the statute prescribes a variety of alternate tests. If the corporation is an Illinois corporation and either its principal place of business is in Illinois or 10 percent of its capital and surplus are represented in Illinois -- I am not quite sure what that means -- the statute applies. The statute applies without regard to anything else if more than 10 percent of the stockholders are residents of Illinois.

QUESTION: And it might, with respect to Chicago Rivets, those --

MR. HULBERT: Those tests are met. No question about it.

QUESTION: -- at least two of them were met more than adequately.

MR. HULBERT: Three of them are met. Rivet is an

Illinois corporation, its principal executive office is in Illinois, and somewhat under a quarter of its stockholders are Illinois residents. So there is no question that the statutory tests were satisfied on several alternative grounds.

What distinguishes these statutes, and what I think raises the constitutional question is the insistence that regulation to be effective must be national, indeed, must be international, that there is no such thing as effective local regulation of a tender offer. I don't know whether that is right or wrong, but it is insisted in the briefs amicus filed on behalf of the appeal here that Illinois is justified in regulating worldwide, because unless it regulates worldwide, it can't effectively regulate at all, and that seems to me, one really has to go back to the nineteenth century, I think, to find judicial discussion of the characteristics of subjects appropriate for the national power and subjects appropriate for the state power.

There is language, for example, in the decision in Cooley against the Board of Wardens a century and a quarter ago saying, "Whatever subjects of this power are in their nature national or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

What Illinois has, on the contrary, proposed to do

in this case by enacting this statute, and what every other state, I think, that has done so likewise proposes it has the right to do, is to impose an absolute veto on a tender offer occurring anywhere in the world provided the jurisdictional contacts, and they vary from state to state, and one of the issues that arose in this case was exactly what the Pennsylvania statute meant when it said principal place of business in Pennsylvania.

QUESTION: Mr. Hulbert, don't your arguments, though, about extraterritoriality really condemn a number of state laws, like state antitrust laws or statutes requiring corporations to use cumulative voting, and things like that, that apply certainly beyond the borders of the state?

MR. HULBERT: I am not sure about antitrust laws. I don't know that a state has really ever attempted to regulate on an antitrust basis apart from a concern that the impact of the transaction is local, and as far as cumulative voting and other incidents of the relations between stockholders and a corporation, I agree.

QUESTION: Or how about merger requirements?

MR. HULBERT: I agree that where one is dealing with something that can fairly be classified as a matter of internal affairs of a corporation, it has as a matter of tradition and necessity been referred to state law, there having been at no time in our history a federal law of

incorporation, and in the interest of fairness and predictability and certainty there has to be a law to which questions can be referred, and our practice historically has been to refer those questions to the law of the state of incorporation.

QUESTION: Don't many of those in effect have extraterritorial application?

MR. HULBERT: Sure. They do. The problem here is that you can have four or five states, at least in concept, and in this case two states argued by Mite, there were two states here, each of which --

QUESTION: Well, your last reply to Justice O'Connor intimates that you are arguing the case to all the judges of England sitting in Westminster, where under a written constitution which gives some powers to Congress, leaves others to the states, gives other powers to the individuals. I mean, it isn't a question just of what the nine members of this Court happen to think should be the proper mode of regulation.

MR. HULBERT: That is certainly accurate, but it seems to me that under the Constitution of the United States, the assertion by the state of Illinois of the power to regulate on a global basis, as it does in this Act, is impermissible, just as -- answering your original question as to whether taking the commerce clause issue quite apart

from the issue of pre-emption one would come out where the Seventh Circuit came out.

QUESTION: That doesn't --

MR. HULBERT: That obviously does not answer the full issues presented by the case, because there is also the pre-emption argument, but it does seem to me that these statutes are sharply distinguishable from the blue sky laws.

QUESTION: And would you agree that that doesn't involve federal judges deciding whether the Williams Act or the Illinois Act is the better of the two for the protection of investors?

MR. HULBERT: Certainly if one goes off on the commerce clause issue, the Williams Act never need be determined. It seems to me on that issue, to answer your question, the unconstitutionality of the Illinois Act is quite clear, and it has attempted to be defended on the grounds that, well, a tender offer is really like a merger or like a proxy fight, and is therefore subject to rules that can safely be analogized to those that apply to the internal affairs of a corporation.

I think there are three or four answers to that. One of them is that the statute, which contains a legislative statement of purpose, says not a word on that subject, and while that is obviously not necessarily dispositive, it is surely somewhat indicative. The location

of the statute in the consolidated statutes of Illinois is not where you would find it if it were a regulation of corporations. Along with the Illinois corporation law, it is tacked right onto the Illinois blue sky law.

It applies to corporations as to which Illinois has never -- no state has ever, to my knowledge, asserted the right to regulate the internal affairs. It applies to corporations that are not incorporated under the laws of Illinois as to which Illinois has not heretofore asserted any right to control internal affairs, and lastly, I think it really is not accurate, acceptable to characterize a tender offer which is a purchase of stock as a matter of the internal affairs of a corporation.

It may give rise to subsequent relations that do involve the question of internal affairs of a corporation, and there are aspects of conduct associated with the tender offer that presumably are covered by state law. For example, the fiduciary obligations of directors faced with a tender offer. What may they do? May they spend corporate money to oppose it? Is their obligation simply to make sure that the facts are on the table for the stockholders' decision? There is plenty of scope for state law, and it does no disservice to the solid notions of state responsibility in the sphere of economic regulation properly assigned to states to hold that in this case Illinois has

gone much too far simply on commerce clause grounds alone.

If one turns to the second branch of the argument, which is the issue as to pre-emption, I think the facts of this case will cast in some higher light some of the assertions that have been made with respect to the relations between the Illinois law and the Williams Act. It is said that Illinois imposes a slight delay. Well, the fact of the matter is that at the time this tender offer was proposed to be made in January, 1979, as a matter of Federal law, it could have been made in seven days, and as a matter of Illinois law it could not possibly have been made in less than eight weeks, the 20-day pre-commencement period of uncetainty mandated by the law and the 20 business days that the offer at a minimum had to be kept open.

In addition, there are the hearing provisions which have been referred to, and given the usually combative nature of these transactions, it can safely be assured that where a hearing can be requested it will be. The hearing itself adds a minimum of another additional five weeks. The ten days within which the Secretary is to commence the hearing after he has been asked to do so, and that date he is allowed to extend without any stated limit of time. Then there is a 15 business day period after the conclusion of the hearing in which the Secretary is to render a decision, although that period likewise can be extended without any

stated limit of time, and then of course there is the time required for the hearing itself.

If these procedures were strung out with any ingenuity at all, with half the ingenuity that was displayed in the various maneuvers that in truth went on, you would be confronting something 16, 18 weeks, half a year, seven months, and if one contrasts that on the one hand with one week, which was the period under which an offer -- within which an offer could be made under the Williams Act, it seems to me one cannot refer to this in terms of slight delay. It is a gross alteration of the whole terms of the transaction. It ceases to be something recognizable to any draftsman of the Williams Act and becomes something -- a horse of an absolutely different color, and indeed probably not a horse at all.

QUESTION: Do you suggest that it represents a different approach to the whole problem as between the federal and the state?

MR. HULBERT: Mr. Chief Justice, it represents a view by the state of Illinois that on a matter on which Congress has reached one judgment, the state of Illinois is entitled to reach a very different one, and I don't see how it is easily possible to come to the conclusion that that state judgment may stand in the face of --

QUESTION: You would have to include some other

states in that, then, too, would you not?

MR. HULBERT: There are -- the limitations of time are not the same under various state statutes. The New York statute which Mr. Berman spoke of is a very different statute from that which was -- the Illinois statute in issue in this case, and one might, I think, come to all sorts of different conclusions about a number of features of the New York statute that would have no bearing on the conclusion to which one ought to come in this case.

The question of the hearing obviously raises the substitution of some administrative judgment in some degree, whether a true review of the literal adequacy of the price in somebody's mind, but certainly those words must mean something, and they impose a procedure which Congress did not have in mind. There is a --

QUESTION: Mr. Hulbert, certainly Congress said it wanted to avoid upsetting the balance between the tender offerors and the target companies, but does that necessarily mean that Congress objected to letting the states take a different approach, and allowing them to alter the balance? I mean, I don't know that I see anything in the Congressional scheme that necessarily says to me that although Congress perceived that it wanted to approach it a certain way, that it was hoping to preclude the states from taking a different --

MR. HULBERT: There is nothing explicit in the Congressional -- in the legislative history that really bears -- that exposes any overt understanding by any Congressman on how to deal with these state statutes. The truth of the matter is that there was only one of them in existence when the Williams Act was first adopted, and that had been enacted in Virginia two or three months earlier, and I am not sure that Congress was even aware of it, and the spate of state legislation on this subject has really occurred only in the last four or five years, and it may be that Congress is quite satisfied with the fact that these statutes almost invariably are knocked down on constitutional grounds when litigation reaches them. Congress has conferred authority on the Securities and Exchange Commission explicitly in the Williams Act to introduce regulatory modifications in the interests of investors, and to a degree in recent regulations the Commission has sought to do so.

I am not -- it seems to me that what Congressional exchanges there are do bear on the question, and very clearly bear on the question as to whether Congress thought that it would be permissible state practice or anybody's practice to proceed in such a way as to make a tender offer an immensely long, drawn out thing fraught with peril and therefore much less likely to be made at all, and if made,

less likely to be something that a stockholder in the end is ever given a chance to accept.

I don't know whether that gets to the -- I am afraid Congress has not been as explicit as one might like in expressing its views about the state statutes.

QUESTION: This obviously is outside the record, but are the economic facts of life, so to speak, which a couple of you have referred to, that the longer a merger offer is outstanding and uncompleted, the less likely it is to be completed?

MR. HULBERT: Well, it certainly --

QUESTION: Or can you just not say?

MR. HULBERT: I think one can certainly generalize. The longer the time it is outstanding, the greater the risk of failure, for whatever reason, and certainly the greater the expense. It is conventional in these issues, as it was here -- it is set forth in the SEC disclosure document that Mite filed, was obliged to file, that certain lines of credit had been established in order to finance the purchase. Those lines of credit carry commitment fees. Those fees are a percentage of the principal measured over time, and the longer the period of time, the greater the expense.

QUESTION: May I ask a question? Is there any empiric evidence that shows that tender offers necessarily

are good and should be accepted?

MR. HULBERT: I don't know how -- what one would define as evidence that satisfied that standard.

QUESTION: Well, is a tender offer necessarily to be favored? That seems to be the philosophy behind the Williams Act.

MR. HULBERT: I think there is a fundamental philosophy that the existence of a capital market unrivaled in the world has been of enormous benefit to this country, reflected not only in the stock exchange but in the fact that securities can be sold in great numbers, bought and traded freely, that mechanisms to increase economic efficiency are of social value, that the possibility that stock can be bought in a way that may exert some impetus on management to exert a more active and effective role in the management of the corporation it seems to me in concept, it would be consistent to conclude that that was of social value, and that tender offer, it seems to me, promotes these several circumstances. It makes stock more salable.

QUESTION: Is there evidence that conglomerates promote the social good?

MR. HULBERT: I have no evidence that is conclusive about conglomerates.

QUESTION: Is there evidence that tender offers for the most part --

MR. HULBERT: Excuse me?

QUESTION: -- encourage conglomerates?

MR. HULBERT: I think the question there is probably more a matter of what they do than how they do it. I suppose if one were going to be speculating about control of conglomerates, one would be dealing with an aspect of social judgment that is perhaps more accurately reflected in the general area of the antitrust laws than in the question of the mechanics by which stock is bought and sold.

QUESTION: So there really isn't any evidence, I take it, any empiric evidence that suggests that the Williams Act, which appears to favor the offeror or the state legislation, which appears to provide more time for the target company to present its views, which of the two approaches is in the public interest.

MR. HULBERT: Well, Congress has made a judgment, it seems to me.

QUESTION: Yes.

MR. HULBERT: And if you accept what the Seventh Circuit and other courts have inferred to be the judgment implicit in the Williams Act.

QUESTION: Well, I suppose, however unwise the Williams Act may be, if it is constitutional, then it does displace any state law, and that is the end of it for us, however wise or unwise it may be.

MR. HULBERT: I would have thought that was certainly conventional analysis.

QUESTION: Does not this legislative history reflect some attitude on the part of Congress that there is some utility and value to the public in --

MR. HULBERT: It seems to me clearly so. The exchange between Senators Javits and Williams goes directly to that point.

QUESTION: Of course, to me, that standing alone is ambiguous. It could mean that Congress just wanted to remain neutral as to tender offers rather than encourage them, and Senator Javits wanted to assure himself that the Williams Act was not going to discourage them.

MR. HULBERT: Yes, but I think there is another point that I haven't yet managed to get to, which I think bears on this question of how free the states ought to be regarded as having been left by Congress to intervene in this area, and that is the problem of conflicting assertions of state jurisdiction over the same tender offer, which arose in this case.

The tender offer which was made by Mite, a Delaware corporation doing business in Connecticut and Indiana, for stock of Rivet, was the subject of a 75-page in typed form disclosure statement filed with the SEC pursuant to the Williams Act, and in all the claims and charges that

were subsequently raised in the several litigations that were brought, it was never contended by anybody, by Rivet or by the Secretary of State of Illinois, that there was anything missing or unfairly stated in this disclosure document, or that any further disclosure of any kind would have been of any use to anybody.

The only ground of objection Illinois ever did assert was simply the technical one that an application for registration had not been made.

On the basis of publicly available information, it appeared that Rivet, since it was an Illinois corporation and had its principal place of business in Chicago, would be subject to the Illinois Act. The Illinois Act had been held unconstitutional not two months before by Judge Collins in the Northern District, and it seemed really a relatively foregone conclusion that if the same case were presented to the Northern District of Illinois on facts that these tender offers are very much like one another, there would be almost no prospect that the result would be different.

The period of delay occasioned by complying with the Illinois Act and the expense that would undoubtedly be incurred in doing so, 16, 18 weeks or what have you, made it obviously sensible to initiate the litigation that was initiated. Unbeknownst to us, circumstances with respect to Rivet gave rise to the possibility in the minds of its

counsel that an argument could be made that the Pennsylvania Act applied, on the view that the largest single plant of Chicago Rivet was located in Tyrone, Pennsylvania, employing somewhat more than half of the work force, and producing somewhat more than half of the total production, and if that could be fitted within the Pennsylvania statutory phrase, principal place of business, that in conjunction with what seemed obviously enough to satisfy the substantial assets test, which was the other part of the Pennsylvania definition, a useful second front might be established against the tender offer by making use of the Pennsylvania statute and the various techniques that could flow from that, so that instead of fighting the Illinois battle on its merits, Rivet and the Secretary of State showed up in court on Monday, the 22nd, and said -- indeed, they moved to dismiss on the grounds there was no case or controversy because they were only relying on the Pennsylvania statute at that point.

So, off we all trooped to the snowy hills of western Pennsylvania.

QUESTION: Kind of like a galepoly.

MR. HULBERT: Yes, exactly. The state court action was removed, and other action was brought. Rivet applied to the Pennsylvania Securities Commission to take jurisdiction, and all in all, about ten days of time was

consumed in what might probably have been predicted at the outset and certainly proved in the event to be a fruitless caper, and on February 1, the United States District Court for the Western District of Pennsylvania refused to extend any further the injunctive relief that had been obtained in the Pennyslvania state court, and so then the scene moved back to Illinois, where the final determination with respect to the Illinois statute was made, as it could have been predicted at the outset it would have been.

One point of interest on this conflict is that in the early posture of the case, the Secretary of State, who may not have been a pawn, but certainly appeared to take no action that was inconsistent with the tactical necessities of Rivet's position from time to time, asserted in court that he was unclear whether he was going to enforce the Illinois Act because of the comity provision which would have permitted him in appropriate circumstances to defer to another state administrator if he felt like it, but a day later or so decided that he would not defer to the Pennsylvania Act for reasons which I think show exactly the problem of conflicting state jurisdiction.

At Page H-2 of the record, Mr. Shapiro -- another Mr. Shapiro -- appearing as counsel for the Secretary of State, explained that the Secretary of State had decided that he was not going to defer to Pennsylvania.

QUESTION: Give me that page again, counsel.

MR. HULBERT: H-2.

QUESTION: H-2.

MR. HULBERT: Because of certain differences between those two statutes. The length of time the offer must remain open was different; in Pennsylvania it was 17 days, and in Illinois it was 20 business days. That the provisions for pro-ration were not the same, and that the rights of withdrawal were measured by different periods of time, so that from that point on it was Rivet's position, in effect, that we were to be subjected to two laws, the Pennsylvania Act and the Illinois Act, which at least the Illinois Secretary of State was himself confident could not be readily reconciled, so that he was determined to enforce his, and presumably Pennsylvania was being urged to enforce its, and what were we to do? Whose law governs the duration of withdrawal rights? Do you apply Pennsylvania law only in Pennsylvania? Do you apply Illinois law only in Illinois, even though both laws purport to apply everywhere?

It seems to me that whatever Congress may have intended, it did not intend that, and the possibilities -- it also seems to me as a matter of the commerce clause you cannot readily imagine a situation in which several states are each free to assert an exclusive legislative jurisdiction over the same transaction. I don't know of a

comparable case.

The nearest situation that occurs off -- quickly is the case where an issue before this Court concerned truck mud guards, and the state of Illinois had required one kind of mud guard and the state of Arkansas prohibited the use of that mud guard, so you were confronted with a situation in which there was no truck that could run on the highways of both Arkansas and Illinois without violating one law or the other, and this is the case of Bibb against Navajo Freight Lines, and reading the opinion, one draws the seemingly clear conclusion that the Court attributed considerable significance to the kind of obstructive value which that sort of regulation has.

Even there, of course, each statute purported to apply only within its own borders. That is not true of these tender offer statutes along the Illinois model. They are not confined to the control of transactions within Illinois or concerning Illinois residents, and I think it is in that regard that the Seventh Circuit reserved the question whether a valid state tender offer statute is conceivable.

QUESTION: Of course, cumulative voting statutes aren't necessarily confined to residents of the state which enacts them, either.

MR. HULBERT: I agree. If you accept what I think

is the very forced assertion that tender offers are to be treated as regulation of internal corporate affairs, then the extraterritorial feature ceases to be a significant factor in constitutional analysis, but even there, it seems to me you have got to deal with the fact that these statutes are not stated in jurisdictional terms so as to be mutually exclusive. The Illinois statute does not apply only to Illinois corporations, and the Pennsylvania statute, indeed Rivet insisted, Rivet, an Illinois corporation, insisted that it was entitled to the protection of the Pennslyvania statute, and they both can't apply if they are to be regarded as nothing more than the regulation of the internal affairs of the corporation. Which one applies?

If the states, I suppose, all got together and each agreed to have a series of state laws enacted no two of which would apply to the same circumstance, you would at least have the possibility of knowledge of what law was to apply, and you might be able to comply with it. The ALI Federal Securities Code, not enacted, but at one time, I believe, had the support of the Securities and Exchange Commission, would acknowledge the right of a state to regulate tender offers in the circumstance in which more than 50 percent of the stock was owned by local residents and they owned more than -- and they constituted more than 50 percent of the shareholders and the corporation was

organized under the laws of that state, and furthermore, the corporation noted somewhere so that you could find it as a matter of public record that it was a corporation that met those tests, and therefore was subject to that state's law. That would certainly solve many of the problems of -- it would solve the problems of overlapping and conflicting claims to jurisdiction that now exist.

QUESTION: Mr. Hulbert, did you bring up the matter of mootness? You filed a suggestion of mootness in your --

MR. HULBERT: I have raised it because I felt an obligation to raise it. I haven't argued it -- I haven't argued it.

QUESTION: I know. I just wanted to --

MR. HULBERT: I did raise it. We felt -- as I understand it, counsel are obliged to bring to the attention of the Court --

QUESTION: Yes.

MR. HULBERT: -- matters that seem to suggest the case may be moot. We did that.

QUESTION: Where would you be with respect to your position vis-a-vis the authorities in Illinois if we held the case to be moot and had the judgment below vacated and the case dismissed in the district court?

MR. HULBERT: Where would we be? I am not sure

how much of life would have been retrospectively wiped away. The question is, could they now --

QUESTION: Well, you would just put aside the --

MR. HULBERT: -- proceed as if there had been no litigation, and therefore proceed against us as if we had never gotten an injunction because, so to speak, retrospectively the injunction never existed. Well, as a practical matter, I find it very hard that the state of Illinois has to resort --

QUESTION: Well, if we reversed -- if you lost this case and we reversed it, we reversed the judgment of pre-emption, where would you be with respect to --

MR. HULBERT: I think we would, and this is the mootness point, I suppose, although the state argues that it has been decided --

QUESTION: I don't know whether it is -- mootness or not.

MR. HULBERT: We would argue that you can't fine us or put us in jail or exact penalties even if you called them civil.

QUESTION: You mean, you don't think you should pay because you --

MR. HULBERT: If we had done nothing except for the --

QUESTION: -- you didn't understand the law?

MR. HULBERT: Well, not only we didn't understand it, Judge Crowley didn't understand it either, and he issued an injunction.

QUESTION: Well, you need to convince the Court of Appeals to misunderstand it.

MR. HULBERT: And further, we induced the Court of Appeals to misunderstand it. It seems to me -- well, there are very few cases, and it is not surprising that there are very few, in which people have been prosecuted for doing what they did under the protection of a federal injunction, because there are very few prosecutors that believe that a case for prosecution can remotely be made in such circumstances.

The very few cases that do exist suggest you can't do that, and the implications for constitutional rights in all sorts of areas if an injunction really meant no more than sort of a chip on a wager as to whether the law was eventually going to be sustained in the direction of the judicial pronouncements that underlay the injunction.

It seems to me irreparable injury would continue to be irreparable injury, and an injunction in some sense would have no meaning, and I can't believe that would be the result or that indeed in truth an Illinois prosecutor could be found who would think that that state, which I suppose has as much demand on its prosecutorial resources as any

other, is in fact likely to take somebody to court to collect a $10,000 fine for having not bought any stock.

Thank you.

CHIEF JUSTICE BURGER: Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,
AMICUS CURIAE

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court, the federal government contends that the Court of Appeals correctly concluded that the Illinois takeover statute violates both the commerce clause and the supremacy clause of the Constitution.

I would like first to explain why this statute infringes the commerce clause, and then describe how the statute defeats Congress's objectives under the Williams Act.

Ever since this Court's ruling in Cooley against Board of Wardens, it has been settled law that the commerce clause places limitations on the power of state authorities to regulate commercial activity. The federal government is empowered to regulate interstate commerce, the flow of commerce among the states, while the states are empowered to regulate commerce in its local aspects, and when state regulation has the side effect of burdening interstate commerce, that effect is permissible only if it can fairly be described as incidental in nature.

QUESTION: What if Congress passed a statute

saying that we are going to leave the subject of tender offers entirely up to the states, and each of them can do what they want?

MR. SHAPIRO: It could pass such a statute under the commerce clause if it chose to do so.

QUESTION: And that would be constitutional?

MR. SHAPIRO: It would indeed, Your Honor. Rather than regulating locally and imposing only an incidental effect on interstate commerce, the Illinois statute directly governs interstate commerce across the nation in pursuit of its local objective, and this, we submit, is a complete reversal of the state's proper role under the commerce clause.

Nationwide tender offers for the shares of publicly traded companies are quintessentially interstate commerce. The Illinois statute dictates the circumstances under which that commerce may proceed. It governs offers by bidders to stockholders throughout the country, so long as the target company has certain connections with the state of Illinois.

In the present case, this statute would directly regulate the actions of a bidder in Delaware that wished to offer $23 million to stockholders across the entire nation. The Illinois statute requires the bidder to notify the target company of its confidential tender offer plan, and

then wait a minimum of four weeks before commencing the offer. The bidder must also await the result of a hearing, if a hearing is demanded by the target company's outside directors, and the Act imposes no time limit for completion of the hearing.

Throughout this entire period, stockholders and arbitraguers that wish to sell at the tender offer price are forced to wait and to speculate whether state officials ultimately will grant their consent. Trading on national securities exchanges also was affected by the announcement of an offer which may never take place, or which may be delayed for an indefinite period of time, and at the end of the entire process, a nationwide offer can be blocked altogether if state officials deem it to be in violation of local law.

Under this regime, the commercial freedom of buyers and sellers throughout the country is burdened. The state of Illinois, far from using its own jurisdiction as a laboratory for economic experimentation, is attempting to use the entire nation as its laboratory.

QUESTION: What if Illinois passed a statute saying, it's a crime to deal in stolen goods. Could somebody come in and argue and say this prevents people in all 50 states from dealing in stolen goods?

MR. SHAPIRO: The analogy would be if Illinois

passed a law that attempted to regulate the conduct of buyers and sellers in other states and impose penalties based on what is done in Delaware, New York, Kansas, and in places beyond its own borders, and that is precisely what this statute does.

QUESTION: Could Illinois prohibit a Delaware potential seller of a stolen good to someone in Chicago, from selling it to someone in Chicago?

MR. SHAPIRO: Indeed it could. It could regulate a local transaction, but it can't regulate transactions beyond its boundaries, and that is what this statute does. The decisions of this Court leave little room to doubt that this is in excess of the requirements of the commerce clause.

As the Court stated in Shafer against Farmers Grain Company, and I quote, "The right to buy in interstate commerce is not a privilege derived from state laws which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause." And ever since Shafer, this Court has adhered to the view that individual states may not interfere with the natural functioning of the interstate market either through prohibition or through burdensome regulation.

In a case such as this, we submit, which involves

an attempt by a state to issue commands to buyers and sellers far beyond its borders, there is no need to engage in a weighing of local benefits against interstate burdens, but even if this kind of a weighing test were appropriate, the Illinois statute would not, we submit, survive constitutional scrutiny. The legislature's stated purpose for this statute is to protect the interests of Illinois security holders through a disclosure, prohibition of fraud, guarantee of withdrawal and pro-ration rights, and provision of time to make a decision.

QUESTION: Mr. Shapiro, under your argument, would the statute be valid if it said no offer may be made to an Illinois resident who owns stock in the target company without complying with the statute?

MR. SHAPIRO: It would be valid under the commerce clause, but it still would have to pass supremacy clause analysis, which I will discuss later, and it would not survive if it had the terms that the present statute does, because it conflicts with Congress's purpose under the Williams Act. Even Illinois investors, just like investors everywhere, are entitled to the protections of the Williams Act.

QUESTION: Is there any federal requirement that if a tender offer is made, it be made to all stockholders? In other words, say you had a statute such as I propose.

Could an offeror make its offer to everyone except Illinois residents?

MR. SHAPIRO: I believe that that would be possible. There are similarities under the blue sky laws, for example. The seller of securities may attempt to --

QUESTION: Leave out certain states?

MR. SHAPIRO: -- go around the state that has an unhospitable local regime, regulatory regime.

QUESTION: Here this wouldn't escape the Illinois statute, because this applies even to transactions between a New York resident and --

MR. SHAPIRO: Precisely. Illinois says that if its connection test is satisfied, that regulations across the country are governed. We submit that Illinois shareholders already are protected in these very same areas covered by the state statute under the Williams Act, under Congress's chosen standards. The Williams Act requires disclosure of material facts, forbids fraud, prescribes withdrawal and pro-ration rights for all tendering stockholders, and it effectively requires that the tender offer remain open for between seven and ten days, and the SEC has rulemaking authority to flesh out all of these requirements.

Since Congress and the SEC have been vigilant in protecting investors, including Illinois investors, the

additional protection afforded by this statute is entirely speculative, as the Court of Appeals correctly concluded. While counsel has also suggested that Illinois has an interest in regulating control of local companies, this statute does not address any aspect of corporate control that is within the state's jurisdiction.

The provisions at issue in this case do not prescribe fiduciary duty for management or controlling persons, but instead focus on sale transactions between stockholders and outsiders in national securities markets. This is not an aspect of the internal affairs of the domestic target company that traditionally is subject to local regulation.

In reality, this statute regulates the business of bidders throughout the entire country, not the internal affairs of local target companies.

On the other side of the scale, if one were to attempt to apply a weighing test in this case, the Illinois statute severely burdens both buyers and sellers in interstate commerce. As the Senate report which accompanied the Williams Act stated, pre-commencement waiting periods can delay the offer when time is of the essence, and when Congress passed the Hart-Scott-Rodino Act, which was intended to dovetail with the Williams Act, it made the point in the House report that cash tender offers depend on

speed and surprise to be successful.

Congress and the courts have recognized, in short, that pre-commencement delay is a potent weapon to defeat tender offers and deprive shareholders of the opportunity to sell their shares at a premium, and as the facts of this case show, bidders under the state regulatory regime that we are focusing on today must attempt to comply with potentially overlapping state statutes, all of which have extraterritorial coverage. The number of states that ultimately will assert jurisdiction will not be known at the outset of the offer.

This increases confusion, delay, expense, and opportunities for injunctive orders, all of which can severely encumber the planning and the execution of a nationwide tender offer, and if more than one state does ultimately assert jurisdiction, that permits the state with the strictest standards to set the rules for buyers and sellers throughout the entire country. Illinois has not cited a single local objective that justifies these major burdens on interstate commerce.

In addition to exceeding the bounds of its authority over local commercial affairs, Illinois has enacted a statute which conflicts with the purposes of Congress under the Williams Act. In the Williams Act, Congress exercised its plenary power over commerce to

protect investors across the country. When it enacted this statute, Congress recognized that tender offers often extend a valuable opportunity to stockholders, and that they frequently serve a useful purpose by providing a check on entrenched but inefficient management.

In order to assure full disclosure to stockholders without discouraging or hindering the making of tender offers, Congress adopted a carefully selected strategy. To achieve its goal, Congress struck a balance between the interests of incumbent management and the bidder, and it permitted each side to fairly present its proposals to public investors.

An essential aspect of this regulatory balance is the timetable which Congress prescribed for tender offers. Under Section 14(d) of the statute, a bidder may disclose its plan and begin to solicit shares simultaneously. Congress deliberately rejected the idea that there should be a compulsory delay between announcement and commencement of tender offers. It concluded that this would frustrate tender offers and disrupt the operation of the national securities markets, results harmful to the best interests of the investing public.

This Illinois statute clashes with Congress's timetable and upsets its carefully prescribed balance. Illinois requires bidders to announce their confidential

plans in advance of the offer, and then wait a minimum of four weeks, and indeed, even longer, if state officials so decree, and while the bidder waits, with its hands tied by state statute, unable to make a soliciation or to present its views about the offer, incumbent management may engage in defensive maneuvers to defeat the offer, including the making of a competing tender offer free of any registration or waiting obligations under Illinois law, and that is precisely what occurred in the present case.

Although economic arguments can be fashioned to show that delay sometimes has beneficial side effects, those arguments are quite beside the point in this litigation. In order to protect investors in the manner that it thought best, Congress adopted a schedule for tender offers and it prescribed a balance for tender offers. It is not the province of the states to dislodge that balance or to impose a schedule which conflicts with the schedule mandated by Congress.

For these reasons and the reasons that we have stated in our brief amicus curiae, we request that the decision of the Court of Appeals be affirmed. Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Grimes?

ORAL ARGUMENT OF RUSSELL C. GRIMES, JR., ESQ.,
ON BEHALF OF THE APPELLLANT - REBUTTAL

MR. GRIMES: A couple of remarks, Your Honor.

Mr. Shapiro said on a couple of occasions that Congress struck a balance, that the Williams Act already protects shareholders. Again we are going back to this absolute balance, and we come back to the fact that the SEC even has seen fit to quadruple this balance. I would point out that under the Williams Act we are focusing on the investor. I think that the fact Congress at times has amended the Williams Act, has not seen fit to change that. The Illinois Act covers the activities of the target company on a soliciation for or against. A tender offer must be submitted to the Secretary of State.

It is clear that the Illinois Act has incidental extraterritorial effect, but in order to protect the Illinois residents who are shareholders, that all shareholders will receive the same protections.

Now, in this case here there is not a situation where there were two states who were invoking their tender offers. The Pennsylvania Securities Commission declined to take jurisdiction with the Pennsylvania Act over this offer. The Secretary of State, as well as having the comity provision, any burden on interstate commerce, they can accept the federal filing of the 14(d) as compliance with the state Act.

And certainly here we have a situation with

Chicago Rivet, an Illinois corporation, its principal executive offices in Illinois, 27 percent of the shareholders, 43 percent of the outstanding shares held by Illinois residents.

QUESTION: Mr. Grimes, may I interrupt you? I understood Mr. Shapiro to say that there were no regulations imposed on a counter offer proposed by the target company. Is that correct under the Illinois statute?

MR. GRIMES: The way this came up, the Illinois Act initially as it defines a tender offer does not cover when an issuer is purchasing its own shares, but I am arguing that the Illinois Act covers all soliciations, and I cited that in the reply brief, requires that any soliciation of the target company management either favoring or for the rejection of a tender offer must be filed with the Secretary of State.

So, with the Chicago Rivet's counteroffer here where they recommend -- if they are recommending that Mite's not be accepted, that was required to be filed with the Secretary of State under the Illinois Act. It applies to solicitation material by both sides.d

My point with Chicago Rivet, that certainly as an Illinois corporation the tender offer is for takeover of control. It is like a merger, a proxy solicitation.

QUESTION: May I ask again about the -- it applies

to soliciation materials that relate to the --

MR. GRIMES: Tender offer.

QUESTION: -- initial tender offer, but then supposing they file an entirely separate group of documents making a brand new offer. Would you say it also applied there? If management made the second --

MR. GRIMES: Well, I believe when a tender offer is -- my -- the Secretary's interpretation, I believe, would apply there, because in the first instance, if there is a solicitation by an issuer to purchase its own shares, you are not having a transfer of control or all the other elements.

QUESTION: Right.

MR. GRIMES: But if you have the -- you have a tender offer, you have a target company, if the target company then -- and if they solicit their own shares without commenting on the tender offer, I would still think that would be within the gamut or within the scope of the Act there, because it is not that situation where they are initially just purchasing their own shares. It is in reaction to a tender offer.

If there are no further questions.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:51 o'clock p.m., the case in the

above-entitled matter was submitted.)

CERTIFICATION

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JAMES EDGAR, vs. MITE CORPORATION AND MITE HOLDINGS, INC.

NO. 80-1188

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BY Suzanne Young