Approved April 4, 1988
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch
Chairperson at

3:30 ~~a.m.~~/p.m. on March 23, 1988 in room 313-S of the Capitol.

All members were present except:

Representative Kennard, Peterson and Roy, who were excused

Committee staff present:
Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

M. Douglas Mays, Securities Commissioner
Gerhard Metz, Kansas Chamber of Commerce and Industry
Wayne Maichel, A.F.L. - C.I.O.

Hearing on S.B. 586 -- Corporation control share acquisition act

Commissioner Mays testified the Attorney General's opinion of June 1, 1987 declared the Kansas Takeovers Act unconstitutional. The issue of corporate takeover legislation was referred to the Special Committee on Judiciary for study during the interim. The committee encouraged the Securities Commissioner to meet and consult with various business leaders, as well as other interested parties, on the matter of hostile corporate takeovers in Kansas, and if possible, make specific proposals for consideration during the next session. S.B. 586 is the culmination of these meetingss. The bill closely follows the Indiana Control Share Acquisition Act which has been found to be constitutional. The Kansas Act is limited to public corporations organized under Kansas law that have 100 or more shareholders; either its principal place of business, its principal office or substantial assets in Kansas; and either more than 10% of its shareholders resident in Kansas, more than 10% of its shares owned by Kansas residents or 2,500 Kansas resident shareholders. He explained the major provisions of the bill, (see Attachment 1.

Gerhard Metz testified the Board of Directors of K.C.C.I.'s policy position supports the adoption of a statute that would result in more orderly procedures for the acquisition of controlling shares of domestic corporations; provide for equitable offers between shareholders; tightening disclosure provisions; and providing a longer period for informed choices. He expressed support for S.B. 586, (see Attachment II.

Wayne Maichel testified about the results of the attempted takeover of Goodyear Tire Company by Goldsmith. He stated S.B. 586 could help protect Kansas companies, and urged the Committee to recommend S.B. 586 favorable for passage.

The hearing was closed on S.B. 586.

The Committee meeting was adjourned at 5:00 p.m. The next meeting will be Thursday, March 24, 1988, at 3:30 p.m. in room 313-S.

GUEST REGISTER

DATE March 23, 1988

NAME	ORGANIZATION	ADDRESS
[illegible]	[illegible] Limited Partnership	Topeka
Terry Hurley	United Telecommunications, Inc.	2330 Shawnee Miss. Pky Westwood, KS 66205
[signature]	United Tel. Co. of KS.	TOPEKA
Gerhard Metz	KCCI	TOPEKA
Treva Potter	Peoples Natural Gas	"
Dan McGee	Centel Electric	Great Bend
Dawton B. Rice	305	Topeka
Wayne Maichel	KS AFL-CIO	Top
Harry Nelson	" " "	"
Jack G Graves	K N Energy	Wichita
Dick Isaacson	Coleman Co	Wichita
Joe A. Morris	Kansas League of Savings Inst.	Topeka

REMARKS REGARDING SB 586 -- CONTROL SHARE ACQUISITIONS

Kansas Securities Commissioner
M. Douglas Mays

Before the House Committee on Judiciary

March 23, 1988

HISTORY

Federal regulation of tender offers commenced with passage of the Williams Act in 1968, in response to the increasing presence of hostile tender offers. Prior to this, existing federal securities laws were thought to inadequately regulate this activity. Public shareholders were subjected to a variety of abuses.

The Williams Act comprises a series of amendments to the 1934 Securities Exchange Act. Except for the anti-fraud provisions the Act applies only to '34 Act reporting companies, i.e., companies which have securities registered on a national exchange, or "over-the-counter" companies which have assets greater than $5 million and more than 500 shareholders.

The Williams Act requires any party who acquires more than 5 percent of the securities of a reporting company to file disclosure documents. The Act also imposes procedural ground rules to govern tender offers. For example, stockholders who tender their shares pursuant to the tender offer may withdraw them during the first 15 days. The offer itself must remain open for at least 20 days. If more shares are tendered than the offeror sought to purchase, purchases must be made from all tendering shareholders on a pro rata basis. The offeror must also pay the same price for all purchases. If the offering price is increased before the end of the offer, all tendering shareholders must receive the benefit of the increased price.

After the federal government moved to substantively regulate tender offers, most states followed suit and enacted some form of regulation. Kansas enacted a take-over bid act which was fairly representative of what was done in other states, K.S.A. 17-1276 Generally these state acts followed a pattern of requiring that a pre-commencement notification and disclosure be filed with a state official, usually the securities administrator. They also typically provided the target company the opportunity for an administrative hearing on either the fairness of the tender offer or the adequacy of the disclosure. Enforcement of the various state acts afforded a target company a procedural mechanism to halt or delay a hostile take-over bid.

Attachment I

CONSTITUTIONALLY

These state acts potentially raised two constitutional questions. The first was a question of a violation of the "supremacy clause." If Congress exercises legitimate authority to regulate conduct and manifest an intention to do so to the exclusion of state regulation, it is said to pre-empt the field of regulation. In such circumstances any state regulation is constitutionally impermissible as a violation of the supremacy clause. However, even in the absence of an express intention to pre-empt, attempted state regulation will violate the supremacy clause if compliance with both state and federal regulation is impossible or if the state act frustrates the purpose of a federal act.

The second constitutional issue concerned a question of whether the state acts violated the Commerce Clause of the U.S. Constitution. The Commerce Clause is nothing more than a grant to Congress the power to "regulate commerce. . .among the several states." If a state act directly burdens interstate commerce it is unconstitutional. However, if a state act indirectly burdens interstate commerce, the courts have engaged in a balancing test weighing the local interests promoted by state regulation versus the burden it imposes. In such circumstances, a state act is unconstitutional if the court decides the burdens outweigh local benefits and is therefore excessive. State acts have also been held to be an impermissible burden if they subjected interstate commercial activities to the risk of multiple, inconsistent state regulation.

The U.S. Supreme Court first addressed these questions in the context of the Illinois Take-Over Bid Act in Edgar v. Mite, 457 U.S. 624 (1982). The Mite court could reach no consensus on the supremacy clause issue, although a plurality of 3 justices found the act violated the supremacy clause. Since this portion of the opinion had less than a majority (5 out of 9), it is not binding precedent. Also there was less than a majority on the question of a direct burden on interstate commerce. However, a majority of the justices in Mite held that the Illinois Act was an impermissible indirect burden on interstate commerce.

Mite was followed by a rash of U.S. Circuit Court of Appeals decision declaring other state acts unconstitutional. Most notable of these for our purposes is Mesa Petroleum Co. v. Cities Service Co. Mesa declared the Oklahoma statute unconstitutional. It was virtually identical to the Kansas Act.

In the wake of Mite, many states attempted to amend or adopt new take-over legislation which would pass constitutional muster. This generation of legislation is referred to as post-Mite. Because of the variety of concurring and dissenting opinions in Mite much confusion existed over the import of the decision. These endeavors generally met with little success at the circuit court level. Most considered were found unconstitutional.

The Indiana "Control Share Acquisition Act"

In early March of 1987, my office received an inquiry concerning the Kansas Act. After examining the statute and applicable case law, we concluded that K.S.A. 17-1276 was probably unconstitutional for the above stated reasons. On March 30, 1987, my office requested an opinion from the Attorney General. That opinion, rendered on June 1, 1987, confirmed our ascertations. At the time of our opinion request, there remained a serious question as to what, if any, legislation could replace the existing statute and be constitutionally permissible. This speculation came to an end when the U.S. Supreme Court considered the Indiana Control Share Acquisitions Act in CTS v. Dynamics Corp. of America, 55 U.S.L.W. 4478 (1987).

Among post-Mite approaches the Control Share Acquisition Act is unique. It regulates tender-offers indirectly through the substantive law of corporate governance. The acquisition of a certain level of shares automatically severs the voting rights from the shares until and unless approved by a majority of disinterested shareholders. There is no external state administrative review of the tender offer process. Rather it becomes a matter of internal governance of the corporation by its shareholders.

Essentially, the majority decision on CTS held that such an act is not a violation of the supremacy clause, not a direct burden on interstate commerce, nor is it an impermissible indirect burden. The local interest served (regulation of domestic corporations, the definition of powers, and definition of rights acquired by purchasing shares) outweighes any effect on interstate commercial transactions. It is important to note, however, the Act applies only to domestic corporations, corporations organized under the enacting state's law. The decision notes that any risk of inconsistent state regulation (often a grounds for a finding of an unconstitutional indirect burden) is eliminated if each state regulates only corporations it has created. Since the CTS decision, several states have passed new statutes patterned after the Indiana Act. Many, including Missouri, Massachusetts, Oklahoma and Arizona follow that act closely.

Senate Bill No. 586

The bill before you is the culmination of nearly a years efforts. After the Attorney General's opinion of June 1, 1987 declared the existing Takeovers Act unconstitutional, I, with the Governor's blessing, approached the Legislative Coordinating Council to ask that an interim study be conducted. The issue of corporate takeover legislation was referred to the Special Committee on the Judiciary. For various reasons the committee, while not opposing efforts designed to deal with hostile takeovers, made no specific recommendation.

The committee did, however, encourage the Securities Commissioner to "...meet and consult with various business leaders as well as other interested parties on the matter of hostile corporate takeovers in Kansas." The report concluded with the hope that such meeting would result in "...specific proposals for consideration during the next session."

With this charge in mind, I convened a meeting at the Capitol on November 19, 1987. Invited to attend were the representatives of many of the publicly held corporations in Kansas, the KCCI, the Department of Commerce, Kansas, Inc.; the State House and Senate, my office, and virtually anyone that had expressed an interest. The meeting was attended by thirteen individuals with additional comment received later by many of those not in attendance.

Resulting from this meeting were the following conclusions:

1. Corporate Takeover Legislation is necessary to protect Kansas businesses and shareholder interests.

2. That legislation should closely follow the Indiana Control Share Acquisition Act.

3. That differences concerning the various detailed provisions of the Act did not appear to be insurmountable.

4. That the Securities Commissioner was to work with the various interested parties to attempt to form a consensus around a specific bill.

5. That the bill should be introduced in the next session of the Kansas Legislature.

A mini-committee of five was formed to draft specific legislation. The preliminary version was mailed to interested parties for comment in December, 1987, and was received throughout January. A final draft was submitted on February 1 and, with minor changes by the revisor, is the bill before you.

CONCLUSION

I believe that SB 586 fulfills the charge of the report of the Special Committee on Judiciary. While there may be some who are not, due to their own particular situation, enthusiastic about some specific provisions of this bill, overall as solid a consensus as can be expected concerning legislation as complex as this, currently exists.

While this act is not perfect,it is constitutional and it deals with the difficulties and abuses that arise many times during hostile takeover attempts. It can be argued that not all takeovers are necessarily bad. In some cases, the management of a corporation may be so inept, that the shareholders may welcome a complete change in the boardroom. The key lies in the motives

of those initiating the takeover attempt. In some instances, this amounts to little more than outright extortion, popularly known as "greenmail."

SB 586 provides a level playing field upon which the battle for control can take place. It forces the two opposing parties to set forth their plans for the future of the target corporation. It allows the shareholders, who have not as yet sold out, time to consider these proposals and to rationally decide who will manage and direct the corporation.

This bill is, in my opinion, a fair, moderate, effective and constitutional act. As Securities Commissioner, I urge its adoption.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

SB 586 March 23, 1988

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Judiciary Committee

by

Gerhard Metz
Director of Taxation

Mr. Chairman and members of the Committee, on behalf of KCCI I should like to thank you for this opportunity to express our support for SB 586.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

During its Fall, 1987 meeting, the Board of Directors of KCCI adopted a policy position supporting the adoption of a statute that would result in more orderly procedures for the acquisition of controlling shares of domestic corporations. Such a

Attachment II

statute "should provide for equitable offers as between shareholders, tightening disclosure provisions, and providing a longer period for informed choice."

Later last Fall, in meetings with legislators, concerned businesses, and the Securities Commissioner, it was decided that KCCI would coordinate an effort to develop a consensus of the business community which would result in a bill acceptable to most concerned Kansas businesses. After a meeting with Commissioner Mays, Prof. Fred Lovitch of the University of Kansas law faculty, and Sen. Wint Winter, a draft proposal was worked out, and a copy was forwarded to our offices to be circulated for comments by KCCI members. The bill before you now is the outcome of these consultations and careful review of the issues of constitutionality, fairness, and creation of a stable business environment, where informed choices can be made by shareholders and management in a hostile takeover situation.

It should be stressed at the outset that the objective of this legislation is <u>not</u> to prevent all hostile takeovers, nor is it intended to protect inefficient, entrenched management. We readily acknowledge that in some instances a change in ownership, and subsequent management changes may be required for a corporation's economic health. This, however, is not the case in all instances. When acquisition techniques are so manipulated as to coerce shareholders into making hasty decisions for fear of losing their investments, the only beneficiary is the "raider;" the fiscal situation of the acquiring company may even be adversely affected by ill-advised acquisitions. What SB 586 does is to give the requisite time for an informed choice by all shareholders. There is built-in protection in the form of a bifurcated vote, whereby the interests of both the acquiring party and the opponents of acquisition are balanced with those of purely disinterested shareholders. In order to prevent any corporation's being included in the protections of this law, during the initial six months of this law's application, companies would have to "opt in" by an affirmative act. Those corporations for which the provisions of the law appear to be undesirable need not be included.

We believe that adoption of SB 586 would restore the balance in merger and acquisition procedures, and provide the kind of predictability that businesses need in order to move forward for a more productive economy.

Thank you once again for the opportunity to speak. I will be happy to stand for questions.