Implied Repeal of the Sherman Act Via the Williams Act: Finnegan v. Campeau Corp.

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IMPLIED REPEAL OF THE SHERMAN ACT VIA THE WILLIAMS ACT:
FINNEGAN v. CAMPEAU CORP.

The Sherman Act was enacted in 1890 to prevent restraints of trade and to promote a competitive market environment. Due to their harmful effects on trade and the market, naked restraints of trade such as price fixing are per se violative of the Sherman Act.

1 15 U.S.C. § 1 (1988). The Sherman Act provides: “every contract, combination, . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.” Id.

2 See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 234 (1899) (“if private contracts when entered into do directly interfere with and regulate interstate commerce, Congress had power to condemn them”); Northern Sec. Co. v. United States, 193 U.S. 197, 331 (1904) (antitrust law embodied in Sherman Act “embraces all direct restraints imposed by any combination, conspiracy or monopoly”) (emphasis added); see also Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 61 (1985) (goal of antitrust law is “unfettered competition in the market place”); Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979) (antitrust laws designed to ensure competitive policy in all markets); United States v. Topco Assoc., 405 U.S. 596, 610 (1972) (Sherman Act basic to individual freedom); Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213, 218 (1966) (basic position found in cases is that “antitrust laws represent a fundamental national economic policy”); see generally Ratner, Using Currie’s Interest Analysis to Resolve Conflicts Between State Regulation and the Sherman Act, 30 WM. & MARY L. REV. 705, 751 (1989) (Sherman Act broadly construed).

3 See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (per se illegal price fixing exists when group of competitors band together for purpose of “depressing, fixing, pegging or stabilizing the price of a commodity”); see also United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 342 (1897) (price fixing agreement illegal regardless of reasonableness). See generally T. VAKERICS, ANTITRUST BASICS § 4.02 (1990) (price fixing in both vertical and horizontal context per se violative of Sherman Act).

Agreements to buy at a certain price are also per se illegal. See Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 242 (1948) (“agreement among the refiners to pay uniform prices for beets” fell “squarely within the Sherman Act’s prohibitions”). It therefore appears axiomatic that bid rigging through bidding arrangements among competitors is per se violative of antitrust law. See, e.g., National Soc’y of Profes-
The Williams Act was enacted in 1968 primarily to protect shareholders by empowering the Securities Exchange Commission ("SEC") to require certain disclosures in connection with tender offers. The Williams Act requires any shareholder who acquires more than 5% of certain equity securities to file a disclosure statement with the SEC. The items of information that must be disclosed include: the identity of the purchaser; the source and amount of funds used to acquire the shares; the extent of the purchaser's interest in the target entity; and the purchaser's plans with respect to the target. Prior to 1968, tender offers were not subject to federal disclosure requirements. See Piper v. Chris-Craft Indus., 430 U.S. 1, 22-23, 37 (1977). The Williams Act was enacted to close this loophole by "subject[ing] tender offerors to advance disclosure requirements." Id. at 22. Besides disclosure requirements, the Williams Act also confers benefits upon shareholders who elect to tender their stock, such as the right to withdraw their shares within a specified time period. Id. at 23. Additionally, the Williams Act includes an antifraud provision which makes it unlawful to falsify or omit any material fact in connection with a tender offer. Id. at 24; see generally Johnson & Millon, Misreading the Williams Act, 87 Mich. L. Rev. 1862, 1889-1903 (1989) (discussing purpose, history and status of Williams Act).

The thrust of the Williams Act is shareholder protection. See Chris-Craft, 430 U.S. at 26 (citing 113 Cong. Rec. 854 (1967) (statement of Sen. Williams)) (Williams Act designed to protect investor by requiring disclosure in area which securities law had not covered in past). The goal of the Williams Act is to provide investors with the information necessary to make an enlightened decision in responding to a tender offer. See Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). The Williams Act is designed "solely to require full and fair disclosure for the benefit of investors." Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 9 (1984) (citing 113 Cong. Rec. 24,644 (1967)). The Court in Schreiber noted that the Williams Act would simultaneously provide a neutral setting for management and bidders. Id. The Second Circuit, in Finnegan v. Campeau Corp., 915 F.2d 824 (2d Cir. 1990), cert. denied, 111 S. Ct. 1624 (1991), also found that the Williams Act is of limited scope when it recognized that "the SEC is only empowered to regulate in the area of disclosure." Id. at 831; see also Schreiber, 472 U.S. at 6 (rejecting "petitioner's interpretation [which] relies on the belief that section 14(e) [of Williams Act] is directed at purposes broader than providing full and true information to investors").

The thrust of the Williams Act is shareholder protection. See Chris-Craft, 430 U.S. at 27 (quoting testimony of SEC Chairman Manuel Cohen before Senate Subcommittee on Securities) ("principal point is that we are not concerned with assisting or hurting either management or bidders, but rather ">w we are concerned with the investor") (emphasis in original); cf. Rainey, State Regulation of Tender Offers Reexamined, 19 Tulsa L.J. 225, 230-31 (1983) (twofold purpose of Williams Act is shareholder protection and neutrality).
The objective of the Williams Act is to encourage "full disclosure without otherwise changing the balance in the market for corporate control." In implementing this objective, however, courts should balance it against the objective of unrestrained competition underlying antitrust law.

Occasionally, Congress expressly immunizes a regulatory scheme from antitrust laws such as the Sherman Act. To prevent the evisceration of regulatory power, such immunity has also been inferred under the doctrine of implied immunity. However, because of the strong policies underlying the antitrust laws, the implied immunity doctrine has traditionally been invoked solely in

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7 See Note, The Developing Meaning of "Tender Offer" Under the Security Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1251 (1973) (defining "tender offer"). The "tender offer" is a technique used to acquire securities of a corporation for either corporate control or investment. Id. at 1253. The tender offer consists of a public solicitation to the shareholders of the target corporation to sell their shares at a specified price. See id. at 1251; see also Note, Expanding the Horizon of the Williams Act: State Antitakeover Laws in the Aftermath of CTS Corp. v. Dynamics Corp. of America, 34 Wayne L. Rev. 1419, 1420-24 (1988) (discussing Williams Act and its application to tender offers).

8 Finnegan, 915 F.2d at 825.

9 Id. at 825-26.


11 See Silver v. New York Stock Exch., 373 U.S. 341, 360-61 (1963) (discussing problems created by evisceration of regulatory power). Silver was the first Supreme Court case to consider implied immunity in the securities field. See id. (discussing implied immunity in securities field). The Silver Court held that implied repeal could be found in instances where there was irreconcilable incompatibility between a regulatory objective and antitrust policy. Id. at 358. However, the preferred approach is to reconcile the operation of both statutory schemes with one another. Id. at 357.

12 See United States v. Radio Corp. of Am., 358 U.S. 334, 338, 346-52 (1959) (discussing whether regulatory scheme entrusted to FCC was impliedly immunized from Sherman Act). Radio Corp. was one of the first cases in which the United States Supreme Court addressed the implementation of implied immunity. See Comment, The Antitrust Immunity Doctrine and United States v. National Association of Securities Dealers: Stepping on Otter Tail, 28 Hastings L.J. 387, 398 (1976). In Radio Corp., the defendant asserted that due to the pervasive regulatory power vested in the FCC, the Sherman Act was impliedly repealed. 358 U.S. at 338. However, the Court found that the statute by which the FCC derived its power contemplated antitrust claims. See id. at 344-45. But see City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399 (1978) (strong presumption "against implied exclusions from coverage of the antitrust laws"); Abbott Laboratories v. Portland Retail Druggist Ass'n, 425 U.S. 1, 12 (1976) (antitrust immunity is strongly disfavored whether it be express or implied); Goldfarb v. Virginia State Bars, 421 U.S. 773, 787 (1975) ("cases have repeatedly established that there is a heavy presumption against implicit exemptions" from antitrust laws); Eskridge, Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1048 (1989) (strong presumption against finding exemption from antitrust laws).
cases involving “a pervasive regulatory scheme” or “plain repugnancy between antitrust and regulatory provisions.” Recently, however, in *Finnegan v. Campeau Corp.*, the Second Circuit invoked the implied immunity doctrine in concluding that the Williams Act impliedly repealed the Sherman Act with respect to conspiratorial bidding in takeover attempts.

The dispute in *Finnegan* arose in March of 1988, when Federated Department Stores, Inc. (“Federated”) became a takeover target in a tender offer battle between two rival bidders, Campeau Corp. (“Campeau”) and R.H. Macy & Co., Inc. (“Macy’s”). In April, after numerous escalating bids, Macy’s offered $75.51 per share for the Federated stock under the mistaken belief that Campeau had previously bid $75.50. However, in an attempt to avoid the economic disadvantages of a bidding war, the bidders entered into an agreement whereby Macy’s withdrew its latest bid allowing Campeau to acquire control of Federated at Campeau’s earlier bid of $73.50 per share. In return, Campeau paid Macy’s $60 million to cover investment banking and legal expenses and allowed Macy’s to purchase two divisions of Federated. By acquiring the Federated stock at its earlier bid, Campeau paid $172 million less than Macy’s bid would have totalled. Alleging that the agreement was a conspiracy in restraint of trade, and therefore a violation of section 1 of the Sherman Act, a group of Federated shareholders brought suit against Campeau and Macy’s in the

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14 *Id.* at 832.
15 *Id.* at 826.
16 See *id.* at 826.
17 See *N.Y. Times*, Apr. 1, 1988, at D3, col. 4. The bid consisted of $75.14 in addition to an upcoming dividend of $.37. *Id.*
18 See *id.*
19 *Finnegan*, 915 F.2d at 826.
20 *Id.*
21 See *N.Y. Times*, Apr. 2, 1988, at 33, col. 5. The $172 million figure was calculated by multiplying the two dollar difference ($75.51 less $73.50) against the number of outstanding shares (approximately 86 million). See *id.*
United States District Court for the Southern District of New York.\(^{23}\)

Macy's moved to dismiss the complaint for failure to state a claim upon which relief could be granted.\(^{24}\) The Southern District granted the motion reasoning that: (1) plaintiffs, as shareholders of a target company in a tender offer contest, did not have standing under the antitrust laws;\(^{25}\) (2) antitrust law did not apply to the market for corporate control because a tender offer does not involve "trade or commerce" as required under the Sherman Act;\(^{26}\) and (3) due to inconsistent provisions, the Williams Act impliedly immunized tender offer transactions from the antitrust laws.\(^{27}\)

On appeal, the United States Court of Appeals for the Second Circuit affirmed the dismissal, but did not adopt the reasoning of the Southern District.\(^{28}\) Writing for the court, Judge Cardamone first recognized that the plaintiffs, as shareholders of Federated, had standing under the antitrust laws.\(^{29}\) Second, he rejected the


\(^{24}\) Id.; see also Bucher v. Shumway, 452 F. Supp. 1288, 1291 (S.D.N.Y. 1978) (agreement to fix price for shares tendered not actionable under Sherman Act), aff'd, 622 F.2d 572, 572 (2d Cir.), cert. denied, 449 U.S. 841 (1980). In Bucher, the Southern District of New York adopted a constricted reading of "trade or commerce" by relying on dicta from Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1930), where the Supreme Court concluded that the Sherman Act applied to "commercial competition in the marketing for goods or services." Bucher, 452 F. Supp. at 1290; see also Kalmanovitz v. G. Heileman Brewing Co., 769 F.2d 152, 158 (3d Cir. 1985) (agreement to fix price of stock by bidders under tender offer not actionable under Sherman Act). But see Rothberg v. National Banner Corp., 259 F. Supp. 414, 416 (E.D. Pa. 1966) (attempt to corner market of single stock actionable under antitrust laws).

\(^{25}\) Id. at 827. Section 4 of the Clayton Act grants standing to "any person who [is] injured in his business or property by reason of anything forbidden in the antitrust laws."
Southern District’s argument that the Sherman Act was limited to “trade and commerce” in tangible “goods” and concluded that, absent immunity, the market for corporate control was ordinarily within the ambit of the antitrust laws. Finally, although he agreed that the tender offer transaction was impliedly immune from the antitrust laws, Judge Cardamone’s basis for this conclusion differed from that of the Southern District. Judge Cardamone noted the power of the SEC to require disclosure of bidding arrangements and inferred that bidding arrangements, such as the agreement between Macy’s and Campeau, were contemplated by the SEC. He further reasoned that section 14(e) of the Williams Act, which provides the SEC with authority to “prescribe means reasonably designed to prevent such acts and practices as are fraudulent, deceptive, or manipulative,” vested the SEC with the exclusive power to protect shareholders. Lastly, Judge Cardamone emphasized that if the Sherman Act could be used to thwart the efforts of prospective suitors, the precarious balance of power in corporate auctions would tip in favor of incumbent management.

The implied revocation of the Sherman Act by the Williams Act in Finnegan substantially expands immunity from the Sherman Act. This Comment will assert that any expansion of immu-


See id. at 829. Additionally, the Second Circuit concluded that Congress contemplated bidding agreements in section 14(d)(2) of the Williams Act, which states that “[w]hen two or more persons act as a partnership . . . or other group . . . [they] shall be deemed a ‘person’ ” within the Act. Id. at 829-30 (quoting 15 U.S.C. § 78n(d)(2) (1988)).

See id. at 832.
nity is unwarranted primarily for three reasons: (1) implied contemplation of bidding arrangements alone is insufficient to confer immunity; (2) any supposed conflict or inconsistency between the antitrust laws and the Williams Act is misperceived because the SEC's power is limited to disclosure; and (3) shareholder protection, the sole purpose of the Williams Act, is compromised due to excessive concern with neutrality among bidders and incumbent management. In addition, by establishing that the Williams Act does not preempt most state antitakeover legislation, this Comment will conclude, by analogy, that the Act does not immunize tender offer bidding arrangements from the antitrust laws.

I. CONGRESSIONAL CONTEMPLATION OF BIDDING AGREEMENTS

In Silver v. New York Stock Exchange, the United States Supreme Court determined that the antitrust and securities laws could coexist provided that the imposition of the former did not render the workings of the latter ineffectual. In Finnegan, the Second Circuit inferred that the Williams Act "contemplate[s] agreements between bidders" because under section 14(d)(2) "partnership[s] . . . [and] other group[s]" are persons within the Act and therefore found the antitrust laws inapplicable to bidding agreements in the takeover context. However, the mere contemplation of bidding arrangements does not justify preclusion of antitrust law. Moreover, even when regulatory bodies have been

37 Id. at 357. The Court in Silver noted that without an express grant of immunity, implied repeal would be found "only if necessary to make the . . . Act work, and even then only to the minimum extent necessary." Id. See generally Note, The Application of Antitrust Laws to the Securities Industry, 30 WM. & MARY L. REV. 136, 152-68 (1968) (discussing impact of Silver on implied revocation in securities context).
38 15 U.S.C. § 78n(d)(2) (1988); see also Finnegan, 915 F.2d at 829-30. The Finnegan court added that the language of the Williams Act indicates an intent to allow such bidding arrangements. Id. But see Gordon v. New York Stock Exch., 422 U.S. 659, 691-92 (1975) (Douglas, J., concurring) ("mere existence of a statutory power of review by the SEC . . . cannot justify immunity"); id. at 692 (Stewart, J., concurring) ("Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities [in question]!").
39 See Finnegan, 915 F.2d at 832.
40 See id. at 829. The court in Finnegan found that since bidding arrangements were required to be disclosed under Item 7 of Schedule 14D-1, the SEC had contemplated the existence of collusive bidding. Id.
41 See California v. Federal Power Comm'n, 369 U.S. 482, 489 (1962) (acquisition with FPC approval no bar to antitrust attack); see also United States v. National Ass'n of Sec.
empowered to approve a particular activity, such a grant of authority does not create a license to immunize such activity from the antitrust laws.\textsuperscript{43} Immunity from the antitrust laws should be implied only when Congress has granted power to a regulatory agency to consider antitrust implications.\textsuperscript{44} In finding implied immunity, the \textit{Finnegan} court noted that once the existence of a bidding arrangement has been \textit{disclosed}, the sole purpose of the Williams Act (to protect investors) has been fulfilled.\textsuperscript{46} However, since the SEC does not examine whether a bidding arrangement comports with antitrust prohibitions, it is apparent that the SEC's authority does not rise to the level required for implied immunity.\textsuperscript{46}

Dealers, 422 U.S. 694, 719 (1975) (immunity from antitrust is "strongly disfavored"); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561 (1944) ("if exceptions are to be written into the [Sherman] Act, they must come from the Congress, not this Court").


\textsuperscript{44} See \textit{National Ass'n of Sec. Dealers}, 422 U.S. at 744 (White, J., dissenting).

It would be incredible even to suggest that Congress intended to give participants in the mutual-fund industry, individually or collectively, \textit{carte blanche} authority to impose whatever restrictions were thought desirable and \textit{without regard to the policies of the antitrust laws}. The majority does not contend otherwise and rests its case \[solely\] on the power which it finds in the Commission to approve, \textit{or fail to disapprove}, the practices challenged here and to immunize them from antitrust scrutiny.

\textit{Id.} (White, J., dissenting) (emphasis added).

\textsuperscript{45} See \textit{Finnegan}, 915 F.2d at 830.

\textsuperscript{46} See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350 (1963). The Supreme Court has noted that even in instances where a regulatory agency has authorized behavior with regard to "public interest, convenience and necessity," antitrust law is not superseded. \textit{See id.; Radio Corp.}, 358 U.S. at 351; \textit{see also Comment, supra note 12, at 423} (regulatory concern with competitive conduct not preclusive of antitrust law). Even in instances of express statutory exemption from antitrust law, \textit{see Group Life & Health Ins., Co. v. Royal Drug Co.}, 440 U.S. 205, 231 (1979), courts narrowly construe such immunity in order to limit regulatory independence. \textit{See FMC v. Seatrain Lines, Inc.}, 411 U.S. 726, 733 (1973). The Court in \textit{Seatrain} found that the Federal Maritime Commission's express immunity with respect to agreements "controlling, regulating and preventing" or destroying competition did not extend to FMC-approved mergers. \textit{Id.} at 734. As evidenced in the transportation industry, however, the Court has deferred to express grants of immunity. \textit{See, e.g., Hughes Tool Co. v. Trans World Airlines}, 409 U.S. 363, 389 (1973) (Civil Aeronautics Board authorized transfer of air carrier exempt from antitrust law pursuant to statutory power); \textit{Pan Am. World Airways v. United States}, 371 U.S. 296, 312 (1963) (express immu-
Furthermore, the Finnegan court did not attempt to distinguish between collusive bidding arrangements formulated prior to the tender offer and those entered into among bidders during the auction.47 Groups formed prior to a tender offer are analyzed under the "rule of reason," which inquires "whether the challenged agreement is one that promotes competition or one that suppresses competition."48 Under the rule of reason, antitrust law will apply only where the anticompetitive effects of the bidding arrangement outweigh its procompetitive effects.49 However, agreements that are so "plainly anticompetitive" that their illegality may be presumed are deemed per se illegal.50 Therefore, arrangements among competing bidders made with the purpose of ending the auction process are distinguishable because they are presumptively an-

47 See Finnegan, 915 F.2d at 830. Finnegan contended that the word "group" in section 14(d)(2) applied only to agreements formulated "prior to engaging in a contest for control of a target company, not agreements made by rival bidders during the bidding process such as was the case here." Id. The Second Circuit rejected this argument "because neither the Williams Act nor the SEC regulations make [this] distinction" and "joint bids are not that uncommon." Id.


49 See United States v. Morgan, 118 F. Supp. 621, 699 (S.D.N.Y. 1953). The mere forming of bidding groups prior to the auction is not per se violative of antitrust law, but such arrangements may violate antitrust law if they amount to unlawful suppression of competition. See id.

50 Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8 (1979).
ticompetitive under the per se rule.51

II. THE ANTIFRAUD POWER OF THE SEC

Drawing further from the language of the Williams Act, the Finnegan court commented that section 14(e), which provides the SEC with authority to promote regulations “designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative,”52 conflicted with the Sherman Act.53 However, this perceived incompatibility between section 14(e) and the Sherman Act is undermined by recognizing that disclosure is the only means by which Congress sought to protect target shareholders under the Williams Act.54 Since the SEC’s authority extends solely to issues related to disclosure, and it is not empowered to protect competition affirmatively, the Sherman Act can function without impeding the SEC’s authority.55 Nevertheless, the Second Circuit in Finnegan held that the Sherman Act would interfere with the SEC’s ability to passively accept bidding agreements by failing to invoke the section 14(e) antifraud provision.56 This position is flawed because, as the Finnegan court conceded, the SEC may not intercede in substantive matters.57 Therefore, since the SEC lacks the requisite authority to prescribe means beyond disclosure, the supervi-

51 See, e.g., United States v. Young Bros., 728 F.2d 682, 689 (5th Cir.) (rigged bids among competitors per se illegal), cert. denied, 469 U.S. 881 (1984).
53 See Finnegan, 915 F.2d at 830; see also Gordon v. New York Stock Exch., 422 U.S. 659, 689 (1975) (“[i]f antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC”). In Gordon, the Court held that implied repeal was warranted because the antitrust laws would excessively hinder the SEC’s statutory authority to set commission rates. See id. at 690-91.
54 See Finnegan, 915 F.2d at 830.
56 See Finnegan, 915 F.2d at 831.
57 See id. at 830. The Court in Finnegan noted that section 14(e) of the Williams Act empowers the SEC only to the extent that such exercise is rooted in disclosure. See id. (citing Schreiber v. Burlington N., Inc., 472 U.S. 1, 11-12 (1985) (“[n]owhere in the legislative history is there the slightest suggestion that § 14(e) serves any purpose other than disclosure”)). The remedy provision in section 14(e) has not been read to include intervention into the “substantive fairness of tender offers.” Id. (quoting Schreiber, 472 U.S. at 11-12). Therefore, the intervention of antitrust law into issues of substantive fairness exists wholly apart from the power vested in the SEC to define and prohibit fraudulent, deceptive or manipulative practices. 15 U.S.C. § 78n(e) (1988); cf. Georgia v. Pennsylvania R.R., 324 U.S. 439, 455 (1945) (conspiracy to fix rates not exempt from antitrust law because federal agency had no power to grant relief).
sory role it plays does not in conflict with antitrust laws.58

Pursuant to section 14(e) of the Williams Act, the SEC has promulgated a series of related rules,59 the most recent being the "all holders rule."60 In Unocal Corp. v. Mesa Petroleum Co.,61 the Delaware Supreme Court permitted the board of directors of a takeover target to institute a "selective tender offer" by which the company extended a tender offer for its own shares to all its shareholders except the hostile bidder.62 In response to Unocal, which threatened shareholders' rights to the benefits of a tender offer, the SEC promulgated the "all holders rule," which requires that all tender offers be nonexclusive.63 This unprecedented step by the SEC was criticized on the ground that it extended beyond the scope of section 14(e) because of its attenuated ties to disclosure.64 Despite the criticism, the "all holders rule" has been endorsed as a valid exercise of the SEC's power under section 14(e).65 However, due to vigorous opposition to the "all holders rule," it now appears to demarcate the outer reach of the SEC's power under section 14(e).66 Accordingly, the SEC has no power to regulate anticompetitive activity under the Williams Act beyond the antifraud provision of section 14(e).67 Since SEC intervention into conspiratorial

58 See Gordon v. New York Stock Exch., 422 U.S. 659, 692 (1975) (Douglas, J., concurring) (implied immunity is warranted only "if the SEC is actively and aggressively exercising its powers of review and approval").

59 These include: the "hold open period," see Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (1990) (requiring tender offers to remain open for minimum of 20 days in order to prevent coercion of investors); withdrawal rights, see 15 U.S.C. § 78n(d)(5) (1988); 17 C.F.R. § 240.14d-7 (1989) (enabling shareholder to withdraw within 15 days of tender offer or in event shares not purchased within 60 days); pro-rata requirements, see 15 U.S.C. § 78n(d)(6) (1988); 17 C.F.R. § 240.14d-8 (1989) (requiring total number of shares tendered to be prorated in event of oversubscription); and best price protection, see 15 U.S.C. § 78n(d)(7) (1988); 17 C.F.R. § 240.14d-8 (1988) (providing for all shareholders to receive highest price offered by the tendering party).

60 17 C.F.R. § 240d-10(a)(1) (1989). The "all holders rule" provides that tender offers must be extended to all holders of the class of securities to be tendered. Id.

61 493 A.2d 946 (Del. 1985).

62 Id. at 958-59. The court noted that the offer was made "in good faith and upon a reasonable investigation pursuant to a clear duty to protect the corporate enterprise." Id. at 958.

63 See Rock, supra note 55, at 1398 (discussing "all holders rule").

64 See id. at 1397-98 (citing Unocal Corp. v. Pickens, 608 F. Supp. 1081, 1082-83 (C.D. Cal. 1985)).

65 See Polaroid Corp. v. Disney, 862 F.2d 987, 995 (3d Cir. 1988).

66 See Rock, supra note 55, at 1398 (noting tenuous ground on which "all holders rule" rests).

67 See supra notes 46-52 and accompanying text (discussing misperceived conflict between antifraud provision of Williams Act and antitrust laws).
bidding arrangements is beyond any procedural powers vested in the SEC by section 14(e), the Sherman Act can coexist with the Williams Act.88

III. INVESTOR PROTECTION AND NEUTRALITY

Finally, the Finnegan court reasoned that applying antitrust laws to tender offers would upset the equilibrium of neutrality among bidders, shareholders and management that the Williams Act seeks to achieve.69 Congress drafted the Williams Act as a neutral bill70 because it recognized that a statute which favored management would discourage desired takeover activity to the detriment of shareholders.71 Unfortunately, the Finnegan court's concern over neutrality is misplaced because it overlooks what is perhaps the heart of the Williams Act—protection of the investor.72 Thus, the supremacy of shareholder protection over neutral-

68 See Rock, supra note 55, at 1399.

69 See Finnegan, 915 F.2d at 831. The Second Circuit found that the allowance of antitrust suits would discourage takeover activity. See id. at 831. The Finnegan court concluded that diminishing the amount of takeover activity would benefit management by solidifying their entrenchment, therefore tipping the balance unfavorably against prospective bidders. See id. But see infra note 72 (noting concern for shareholder well-being superior to concern for neutrality).

70 See Finnegan, 915 F.2d at 831-32. In the legislative history of the Williams Act, Senator Williams noted:

I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interest of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal time to present their case.


71 See Polaroid Corp. v. Disney, 862 F.2d 987, 1006 (3d Cir. 1988) (discussing congressional recognition of benefits of takeovers); see also Manne, Mergers and the Market for Corporate Control, 73 J. POL. ECON. 110 passim (1965) (discussing benefits of takeovers). Professor Manne advocated takeover activity as a means to achieve efficiency; he reasoned that management complacency would be diminished if checked by impending takeovers. Id. The theory behind allowing unhindered takeover activity rests on the proposition that the capital markets will tend to value a corporation based on its management's performance. Id. Therefore, in the event of inefficient management, the value of the stock declines, making the corporation attractive to those who can put it in the hands of efficient management and thereby realize a gain. Id.; see also Johnson & Millon, supra note 5, at 1892 (discussing Manne's theory and benefits of takeovers); Manne, Tender Offers and the Free Market, in 2 MERGERS & ACQUISITIONS 91 passim (1966) (discussing utility of takeovers).

72 See Piper v. Chris-Craft Indus., 430 U.S. 1, 27-28 (1977). In response to the sugges-
ity as a policy objective of the Williams Act suggests that antitrust relief should be used to combat anticompetitive conduct that might negatively affect investor return.

IV. PREEMPTION AS A GUIDE TO IMMUNITY

In *Ray v. Atlantic Richfield Co.*, the Supreme Court held that federal preemption of a state law would occur only where the federal and state regulations were inherently inconsistent or where the state law would frustrate the objectives of Congress in enacting the federal law. Similarly, courts have been reluctant in finding that a law or regulatory scheme impliedly preempts federal laws in a way that immunizes activities from the protection of those laws. An examination of the relationship of the Williams...
Act with state antitakeover legislation reveals that it has limited preemptive ability and can coexist with other legislation.\textsuperscript{77} In \textit{CTS v. Dynamics Co.},\textsuperscript{78} the United States Supreme Court upheld the constitutionality of an Indiana antitakeover statute that conditioned the right to vote for certain acquired blocks of shares upon majority approval of the disinterested shareholders.\textsuperscript{79} The Court in \textit{CTS} found that the Williams Act did not preempt Indiana's antitakeover statute because the statute was compatible with the Act and did not frustrate the Act's purpose, that is, investor protection.\textsuperscript{80}

In \textit{Amanda Acquisition Corp. v. Universal Foods Corp.},\textsuperscript{81} the Seventh Circuit reviewed a Wisconsin antitakeover statute\textsuperscript{82} that effectively enabled the directors, rather than the shareholders, of a target corporation to delay an undesired merger or business combi-

\textsuperscript{77} See Rock, supra note 55, at 1396. Professor Rock found that the Williams Act poses a greater barrier to state legislation than antitrust law because state antitakeover laws "have a much more substantial effect on the market for control," and thus concluded that antitrust law is more amenable to coexistence with the Williams Act. Id. But cf. Cary, \textit{Federalism and Corporate Law: Reflections upon Delaware}, 83 YALE L.J. 663 passim (1974) (discussing traditional principles of corporate law-state governance); Note, \textit{CTS: Returning Limited Regulation of State Tender Offers to the State}, 19 TEX. TECH. L. REV. 1453, 1453-54 (1988) (dominant factor against preemption of state antitakeover legislation is tradition of state governance in corporate law).

\textsuperscript{78} 481 U.S. 69 (1987).

\textsuperscript{79} See id. at 73-74, 94. Indiana's antitakeover statute conditioned the potential acquiror's voting rights upon the approval of the preacquisition shareholders. \textsc{ind. code ann.} § 23-1-42 (9)(b) (West 1989). Since the Indiana statute gave the target company's management 50 days to consider the acquiror's voting rights, instead of the minimum 20-day hold-open period required under the Williams Act, the state statute effectively delayed tender offers by a month, relative to the Williams Act. See \textit{CTS v. Dynamics Corp.}, 794 F.2d 250, 263 (7th Cir. 1986), rev'd, 481 U.S. 69, 94 (1987).

\textsuperscript{80} See \textit{CTS}, 481 U.S. at 86-87.

\textsuperscript{81} 877 F.2d 496 (7th Cir.), cert. denied, 110 S. Ct. 367 (1989).

\textsuperscript{82} Wisconsin's statute has been called a "third generation" statute. See Comment, \textit{CTS Corp. and the Internal Affairs Veil of State Takeover Regulations}, 60 COLUM. L. REV. 189, 190 (1989). The author used the term "first generation" to apply to those state statutes enacted up until the Supreme Court's decision in \textit{Edgar v. Mite}, 457 U.S. 624 (1982), and the corresponding demise of the Illinois antitakeover statute. Comment, supra, at 190. The "second generation" label was used for those statutes enacted post-\textit{Mite}, yet pre-\textit{CTS}. \textit{Id.} Since the Wisconsin statute examined in \textit{Amanda} was enacted post-\textit{CTS}, it was labeled a "third generation statute." See id.
nation for three years.\textsuperscript{83} Despite this severely restrictive effect on the substantive ability to acquire a Wisconsin corporation by way of a hostile bid, the Seventh Circuit determined that the Wisconsin statute was not preempted under the Williams Act.\textsuperscript{84} Since the Williams Act does not preempt severe state antitakeover measures like those of Indiana and Wisconsin, it would appear by analogy that it also should not preempt antitrust law under the doctrine of implied immunity.

\textbf{Conclusion}

The Sherman Act stands as the cornerstone of American economic policy. Implied immunity from the Sherman Act's prohibitions against anticompetitive practices is therefore rarely permitted. By drafting the Williams Act to require certain disclosures in connection with tender offers, Congress did not intend to immunize the tender offer process from antitrust laws. In addition, Congress's apparent contemplation of collusive bidding arrangements in the text of the Williams Act does not warrant implied immunization. Moreover, the SEC's disclosure-oriented powers do not conflict with the more substantive competitive policy embodied in the Sherman Act. Most importantly, however, implied immunity from the antitrust laws would conflict with the sole purpose of the Williams Act—investor protection.

The Second Circuit in \textit{Finnegan} permitted the Williams Act to shield from the antitrust laws collusive bidding practices that lowered the price a shareholder would receive in a tender offer. A more logical and sound approach would have been to recognize that collusive bidding arrangements should not be impliedly immunized from antitrust law. If the Second Circuit had rejected implied immunity in the tender offer context, its decision would have been consistent with the historically narrow interpretation of the implied immunity doctrine and maximized investor protection. If the result that the Second Circuit sought was denial of relief, it

\textsuperscript{83} See Amanda, 877 F.2d at 504-05. The Amanda court permitted state antitakeover measures to go further than Indiana in so far as the delay mechanism on ultimate control was placed in the hands of the directors rather than the shareholders. \textit{See id. at 497-98}. In the absence of advance board approval, the bidder had to wait three years after buying the shares in order to effect a merger. \textit{See id. at 498}. The practical effect of the Amanda decision was to tip the scales of neutrality in favor of management in connection with their ability to prevent hostile takeovers. \textit{Id. at 499}.

\textsuperscript{84} See \textit{id. at 496}.
should have followed precedent and concluded antitrust law does not apply to the market for corporate control.

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