

May 26, 1989

To Our Clients:

Seventh Circuit Upholds Constitutionality
of Wisconsin Business Combination Act

In the first appellate decision to review the constitutionality of a state business combination statute that applies only to domestic corporations, the Seventh Circuit Court of Appeals has held that the Wisconsin Business Combination Act is constitutional. Amanda Acquisition Corp. v. Universal Foods Corp., et al., Nos. 89-1581, 89-1712 (7th Cir. May 24, 1989). (With respect to the district court's opinion, see our client memo of March 20, 1989.) The Wisconsin Act bans second step mergers with a 10% or greater shareholder for three years after the 10% position is acquired unless, prior to the 10% stock acquisition, the Board of Directors of the target gives its approval. The Wisconsin Act does not contain an exception for acquisitions of a specified percentage of shares pursuant to a tender offer, as, for example, the Delaware statute does.

The Seventh Circuit, through Circuit Judge Frank Easterbrook, rejected preemption and commerce clause challenges to the Wisconsin law. With respect to the preemption challenge, the Seventh Circuit held that only if the Williams Act "gives investors the right to be the beneficiary of [tender] offers could Wisconsin's law run afoul of the federal rule". But, said the Court, because "[i]nvestors have no right to receive tender offers" and the Williams Act "does not create a right to profit from the business of making tender offers", the Wisconsin law is not preempted. Slip op. at 15.

In his commerce clause discussion, significantly, Judge Easterbrook, like the court below, rejected the "meaningful opportunity" test developed by the federal district Court in Delaware in the Koppers case and followed in several other cases involving business combination statutes like the Delaware statute. The Seventh Circuit thus held that "[t]he Commerce Clause does not demand that states leave bidders a 'meaningful opportunity for success'". Slip op. at 21.

The Seventh Circuit decision is a strong affirmation of the right of states to adopt business combination laws without offending the Constitution. It should end constitutional doubts which have led to diluted business combination laws like Delaware's.

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