MEMORANDUM

TO: Members of the General Assembly

FROM: A. Gilchrist Sparks, III, Chairman
Corporation Law Section
Delaware State Bar Association

RE: Proposed Section 203

DATE: January 18, 1988

Contrary to the impression which the opponents to proposed Section 203 have sought to create, the fact that some takeovers are coercive and not in the interests of shareholders is not just a view of the Council of the Corporation Law Section of the Bar Association. To the contrary, just this year the United States Supreme Court reaffirmed this very point in CTS Corp. v. Dynamics Corp. of America, wherein it stated:

> The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers are often at a disadvantage.... If, for example, shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares -- even if they doubt the tender offer is in the corporation's best interest -- to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." [Citations omitted.]

The same point has been made repeatedly by our Supreme Court. Enclosed are copies of our Supreme Court's recent decisions in Unocal Corp. v. Mesa Petroleum Co. and Ivanhoe Partners v. Newmont Mining Corp. I have marked with paper clips and noted in the margin those portions of those opinions which deal with the coercive tactics utilized by corporate raiders in seeking to force the small stockholder to sell stock at depressed prices and at a time selected by the buyer, rather than by the seller.

/lrg
Enclosures

ENCLOSURES

1. Opt-Out Position Paper

2. No Effect On Pension Benefits - Summary Based On Hearings.

3. No Effects On Stock Prices - Summary Based On Hearings

4. Protection Afforded Stockholders By §203 - Summary Based On Hearings

5. Executive Summary

6. Newspaper Memorandum

7. Response To Purported "Facts" Set Forth In Campaign Mounted By Out-of-State Opponents to Proposed §203

WHY THE "OPT-OUT" PROVISION OF HOUSE SUBSTITUTE NO. 1 TO HOUSE BILL 396 SHOULD NOT BE AMENDED

* It is unfair to require stockholders of Delaware companies -- and in particular less sophisticated, small stockholders -- to vote to obtain the protection they are entitled to, especially when the coercion applied to stockholders by raiders is the product of a feature of our own corporation law which permits a 51% stockholder to expropriate the stock of the 49% minority.

* It is also unfair to ask a company to call attention to itself as a target and potentially put itself "in play" by requiring that Section 203 be put to a vote of its stockholders. The fact that such a vote is sought will immediately be reported in the financial press and will constitute an invitation to every raider to check out the proponent's vulnerability to a takeover. Think about DuPont or Hercules becoming a target -- and the cost in local money and jobs that could result -- if this should happen to them. On the other hand, the bar proposal does permit a majority of stockholders (not 66 2/3% as erroneously assumed by Commissioner Grundfest in his testimony) to vote to have the statute not apply to their company, with such vote to take effect one year after it is obtained. Thus, the stockholders are free to require that a vote be taken to eliminate Section 203 if they desire to do so.

* An "opt-in" statute would not be competitive, since the other 27 states with takeover statutes all have "opt out" statutes, or no "out" at all. Further, most if not all of the provisions of Section 203 could be adopted now by stockholders without enabling legislation. By adopting a meaningless statute, Delaware would forfeit what may be its last opportunity to take the lead in fashioning a balanced approach to this problem to be followed by other states.

* Finally, any form of statute that required companies to put Section 203 to a vote would require every management to consider whether to reincorporate in another state as an alternative to putting Section 203 to a vote, since the vote required to adopt or retain Section 203 in all likelihood would be the same as that for a reincorporation merger. Since many other states have takeover laws which are more restrictive than Section 203 and it has historically been easy to obtain stockholder approval of reincorporation mergers, any stockholder vote requirement imposed by the legislature would pose a real risk that companies would decide to leave Delaware.

Will Pension Benefits Be Adversely Affected If This Legislation Is Passed?

The Answer Based On The Record Before The Legislature Is No

* There is not one shread of evidence in the record before the legislature that this legislation will in any way injure the pension benefits of pensioners. Bruce Kallis and Ernst Dannemann, a member and the Chairman, respectively, of the State Board of Pension Trustees, both unequivocally stated that this legislation in no way effects or jeopardizes pension benefits. In fact, to make this clear to state employees, these two opponents of the legislation voted with their co-trustees to send a letter to this effect to all participants in the state pension fund. Nell Minow of Cardoza Law School, who also opposes this legislation, testified:

  > I don't know for an absolute fact that pension benefits will be effected . . . I am not sure about it . . . I don't have any evidence now . . .

  And James Heard of the United Shareholders Association -- the organization partly responsible for the postcards sent to Delaware residents trumpeting "reduced pension benefits" if this legislation is adopted -- was forced to say in response to questions posed by legislators that he did not know for a fact, and had no evidence to offer the legislature proving, that pension benefits would be at all impacted by this legislation.

* The testimony of opponents of this bill on this topic -- many of whom like Commissioner Grundfest and Nell Minow, among others, appeared to have never even read the legislation -- also must be compared to the testimony of knowledgeable proponents of the bill who addressed this issue. Many, including Irving Shapiro and Steven Golding (Delaware's Secretary of Finance) unequivocally stated that pension benefits are federally protected and guaranteed and are simply not affected by this legislation. Moreover, the testimony of virtually every proponent of the bill, including Professor Margotta of Northeastern University, made it clear that since the legislation would not have any adverse impact on the stock value of Delaware corporations, pension funds themselves (as distinguished from pensioners) which hold the stock of Delaware corporations would not be adversely effected, thus eliminating any conceivable rationale for arguing that this bill has anything whatsoever to do with pensions.

Will The Proposed Legislation Have A Negative Effect On The Market Price Of Stocks Of Delaware Corporations?

The Answer Based On The Record Before The Legislature Is No

* There is no evidence that this legislation will have an adverse effect on the stock prices of Delaware corporations. By the time the hearings were over, the most that opponents of the statute such as Professor Koford of the University of Delaware Economics Department could say was that the New York statute - a statute which both Chairman Dannemann of the Board of State Pension Trustees and Dr. Jarrell, former SEC Chief Economist, conceded was substantially more restrictive than the Delaware proposal - resulted in about a 1% drop in the price of New York stocks for a brief period days subsequent to the adoption of the New York statute. Not one opponent of the legislation could offer any evidence (rather than speculation) that adoption of the concededly more moderate Delaware proposal will have any short or long term effects on the stock prices of Delaware companies.

* In fact, Professor Margotta of Northeastern University who testified in support of the statute testified that alleged declines in stock prices subsequent to the adoption of takeover legislation in other states were statistically insignificant and that decreases did not exist if the stock prices were examined one to three weeks after the statute's adoption.

* Moreover, the testimony of the bill's opponents - Dr. Jarrell, Nell Minow of the Cardoza Law School, and Mr. Callis of the Board of Pension Trustees - was consistent in response to Representative George's question of each: An acquiror will, under this statute, have to pay more per share to acquire 85% of a company's stock than he would to acquire 51%. The math is simple - more stockholders get more money, and stocks become more, not less, valuable if this bill is passed.

Will This Legislation Protect The Average Stockholder Who Ends Up Among The Minority In The "Back-End" Of A Hostile Acquisition?

The Answer Based On The Record Before The Legislature Is Yes.

* Despite suggestions by Commissioner Grundfest and others to the contrary, "two tier" and partial tender offers remain a part of the corporate landscape and continue to be made regularly. For example, the recent offer by Ivanhoe Partners, controlled by T. Boone Pickens, for Newmont Mining was a partial offer.

* The record also establishes that this legislation will protect stockholders against the grossly inadequate any and all offer, in which the raider takes advantage of his right to cash out the minority to buy the company at a bargain price. As Dr. Jarrell, former Chief Economist for the S.E.C., Nell Minow of Cardoza Law School, and Bruce Callis, a Trustee of the Delaware Board of Pension Trustees, all testified, under this legislation an offeror will be forced to make its offer for all shares and at a higher price calculated to obtain 85% of the stock of the company and thus meet the 85% threshold defined in the statute. Opponents of the legislation uniformly conceded that more stock would be bought at higher prices if this legislation passed. This will protect minority stockholders from being forced out for lower value and being deprived of the real value of the assets of the company, a strategy Mr. Callis acknowledged was the premise of many hostile offers -- acquisition of a bare majority of the stock by individuals who do not care to run it but for whom the acquisition only "makes sense" if they can carve up and sell off the assets to finance their acquisition.

* Despite the suggestions by Commissioner Grundfest and Dr. Jarrell that the S.E.C. has the power, as a matter of federal law, to protect minority stockholders from inadequate offers by insisting that they all be treated equally during the 20 days that a tender offer must remain open, the federal concept that an equal percentage of all the stock tendered by all stockholders will be purchased does not solve the problem which proposed Section 203 is designed to address. As A. Gilchrist Sparks testified, federal law does not solve the problem of the small stockholder who gets shut out of a partial offer because he does not understand the necessity of tendering within the 20-day period. And as he also testified, federal law does not solve the problem which Section 203 also addresses of the offeror who, taking advantage of the threat to all

stockholders arising from the power of the 51% majority to force out the 49% minority, makes an offer to all stockholders at a price so low that it would not achieve 51% of the stock but for the threat that all those who don't tender will be subject to the force out power of the 51% holder. <u>Obviously, under these circumstances, it is no consolation to the average stockholder that he has the right under federal law to be treated equally in a grossly underpriced tender offer.</u>

M E M O R A N D U M

TO: Members of the General Assembly

FROM: A. Gilchrist Sparks, III, Chairman of the Corporation Law Section of the Delaware State Bar Association

DATE: January 25, 1988

Enclosed for your information are two pieces which appeared in the January 24 Wilmington Sunday News Journal and address the issues that have been before you and which you have carefully studied over the past weeks -- the need to regulate hostile takeovers. The first, entitled "Takeovers Need Limits", discusses Substitute No. 1 to House Bill 396 pending before you and notes:

> In several hours of testimony last week the members of the House and Senate Judiciary Committees heard testimony on two bills designed to limit takeovers. Those offering evidence in support of such limitations were the more persuasive. Limiting hostile, inadequately financed takeovers will be good for Delaware and will, ultimately, protect not damage the interest of shareholders across the country.
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> Who objects to this proposal? Primarily, those who make substantial amounts of money from takeovers: corporate raiders and arbitrators.
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> The two bills under consideration H.S. 1 for H.B. 396 and S.B. 311, are nearly identical. The House version would require a Delaware-chartered corporation to be included under the takeover -- limiting provisions unless it chose to remove itself. The Senate Bill would make inclusion optional.

> The House version is the one developed and supported by the corporate bar. Delaware would be better served by the House version. Making these provisions optional would be tantamount to doing nothing at all.
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> The legislators have demonstrated an uncommon effort to try to understand and fully evaluate takeover-limiting proposals. The leadership has acted deliberately and responsibly. Now it is time to vote. A vote for H.S. 1 for H.B. 396 is a vote for Delaware and a vote for shareholders throughout the country.

The second piece is captioned "The Coming Invasion of Foreign Corporate Raiders". It discusses the unprecedented rash of takeovers by foreigners of companies which make products that are common American household names -- Mounds and Almond Joy, Vaseline, Ragu Spaghetti Sauce, Saks Fifth Avenue, Smith-Corona Typewriters, Alpo Dog Food, Alka-Seltzer -- the list goes on. As the article notes, foreign takeovers present problems to American industry and to all Americans.

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> It comes down to the fact that important decisions about your life are now being made thousands of miles away by people in other countries. They tend to do what is good for them -- and being based overseas, they are not exactly accountable to American public opinion.
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> [W]e can certainly look forward to more foreign takeovers of American companies in the coming year. Look for Germany's electronics giant, Siemens to bid for Advanced Micro Devices; Italy's Beretta to go after the Colt Fire Arms Company; Germany's Hoechst to stalk Up-john; France's Pernod Ricard to make a stab at Gallo; and Japan's

Yamaha to punch the keyboard of Baldwin Piano.

These two articles only reiterate what I hope the testimony of the past week has made clear -- the threat to American industry and American citizens posed by takeovers is real. Delaware's answer is pending before you -- House Substitute No. 1 to House Bill 396 is a fair and meaningful response to unreasonable takeover threats and deserves your support.

Takeovers need limits

THE GENERAL ASSEMBLY has it in its power to limit hostile corporate takeovers in which raiders use a company's assets to finance their takeover bids. It should do so.

In several hours of testimony last week the members of the House and Senate Judiciary Committees heard testimony on two bills designed to limit takeovers. Those offering evidence in support of such limitations were the more persuasive. Limiting hostile, inadequately financed takeovers will be good for Delaware and will, ultimately, protect not damage the interests of shareholders across the country.

The concept of limiting hostile takeovers isn't new. There are 27 states with such legislation — many, if not all, of them pose more severe restrictions than Delaware's proposed law.

Nor did Delaware's corporate legal community, perhaps the most respected in the country, rush into the matter. The final, compromise draft was submitted last month after several months of study and development. The corporate bar solicited opinions and advice from throughout the country. As a result, the proposal submitted is a moderate one — designed to limit, not outlaw, takeovers.

Who objects to this proposal? Primarily, those who make substantial amounts of money from takeovers: corporate raiders and arbitragers. Wilmington attorney William Prickett put it well during the second day of hearings: "It (the current situation) plays into the hands of the financial manipulators, the raiders and arbitragers. These people are not interested in running the company. They're not interested in the employees and they're not interested in the stockholders." Indeed, not. They're interested in making a quick buck.

Some opponents used unseemly scare tactics to try to stop passage of takeover limitations — suggesting that such passage would slash stock values and erode pension fund values. Several legislators were justifiably offended by such charges which lack substantiation.

It seemed certain last week that the General Assembly has answered the threshold question, "Should anything be done?" affirmatively. It now must decide what. The two bills under consideration, H.S.1 for H.B. 396 and S.B. 311, are nearly identical. The House version would require a Delaware-chartered corporation to be included under the takeover-limiting provisions unless it chose to remove itself. The Senate bill would make inclusion optional.

The House version is the one developed and supported by the corporate bar. Delaware would be better served by the House version. Making these provisions optional would be tantamount to doing nothing at all.

Since Delaware is the corporate home to about 180,000 corporations — 56 percent of the Fortune 500 companies, nearly half of the firms listed on the New York Stock Exchange — and since about 17 percent of the state's revenues depend on these corporations, the legislature must weigh both the local and national impact of any major change in corporate law. Those who drafted the bill were painstakingly careful in considering these interests.

The legislators have demonstrated an uncommon effort to try to understand and fully evaluate takeover-limiting proposals. The leadership has acted deliberately and responsibly. Now it's time to vote. A vote for H.S.1 for H.B. 396 is a vote for Delaware and a vote for shareholders throughout the country.

The coming invasion of foreign corporate raiders

Ivan Boesky may be going off to jail but the arbitragers are cheering once again

By MILTON MOSKOWITZ

WATCH out, Boone Pickens, Carl Icahn, David Murdoch, Irving Jacobs, Robert Haft, Paul Bilzerian and other corporate raiders — the British are coming. And the Japanese, the Germans, the Swedes, the French and even the Swiss.

After the stock market collapse in the last quarter of 1987, there was a lull in takeover activity. But as 1988 opened, the big, secretive Swiss pharmaceutical house, F. Hoffmann-La Roche & Co., of Valium and Librium fame, made a bid of more than $4 billion for Sterling Drug, maker of Bayer aspirin, Phillip's Milk of Magnesia ("Mom knows best"), Lysol and d-Con insecticides.

Ivan Boesky may be going off to serve time in jail, but the arbitragers were cheering again on Wall Street. They were on their feet again, as BAT Industries, a big British company that ranks as the world's largest privately owned seller of cigarettes, came through with a $4 billion-plus bid of its own, this one for Los Angeles-based Farmers Group, the nation's third-largest writer of auto and homeowners insurance. The "arbs" were back in business, thanks to the foreign influx.

That money is coming in from abroad to buy American companies should not be surprising. The double whammy effect of lower stock prices and a plunge in the value of the dollar has made U.S. properties dirt cheap to foreigners. They're buying because the price is right. And their purchases are likely to hit record levels in 1988.

How will consumers be affected by this shopping spree by overseas buyers? Well, it won't be a new experience. American consumers have been buying made-in-Ohio Hondas, made-in-San-Diego Sonys and made-in-Wisconsin Kikkoman soy sauce in huge quantities. And for years now they have been spreading French's mustard on their hot dogs without knowing — or caring — that it was made in Rochester, N.Y., by a British-owned company. Indeed, those people who have been decrying imports will no doubt welcome foreign takeovers since they keep companies alive and save jobs.

From a long-range point of view, however, it does pose problems, similar to the ones that have confronted European, Asian and Latin American countries when they faced a rising tide of investment by U.S. companies. It comes down to the fact that important decisions about your life are now being made thousands of miles away by people in other countries. They tend to do what's good for them — and being based overseas, they are not exactly accountable to American public opinion.

A foreign takeover also removes a company from public view. If it was a publicly traded firm, its shares are delisted. It no longer has to issue an annual report. And if the local symphony or hospital or museum comes around looking for support, the decision may have to be bucked over oceans to London, Tokyo, Basel or Dusseldorf.

The flow used to be decidedly one way, with U.S. investments abroad dwarfing foreign investments here to the point where it gave rise 20 years ago to "The American Challenge," a book by the French writer and editor, Jean-Jacques Servan-Schreiber, who sounded a call to arms. Servan-Schreiber warned that if the Europeans didn't get their act together, they would be taken over by American multinationals.

That scenario has not been enacted. Not only have American companies failed to become the dominant economic force in Europe, but a number of U.S. companies cited by Servan-Schreiber as embodying that threat (Union Carbide, Chrysler, Celanese, Remington Rand) have beat a retreat from Europe. Meanwhile, European companies have mounted an unprecedented invasion of the United States. And Japanese companies, which were barely mentioned by Servan-Schreiber, have moved massively into the U.S. and European marketplaces.

The pace of foreign investment in the U.S. accelerated sharply in 1986 and 1987. Sweden's Electrolux became the world's largest home appliance maker by acquiring Cleveland's White Consolidated Industries (Frigidaire, Westinghouse, Kelvinator, Gibson). Switzerland's Nestle became the world's largest food company by absorbing Carnation. Grand Metropolitan of Britain became the world's largest spirits company by scooping up Heublein. British Petroleum became the world's largest producer of animal feeds by acquiring Purina Mills from Ralston Purina. Germany's Bertelsmann became the world's largest publishing company by taking over Doubleday. London's Saatchi & Saatchi became the world's largest advertising agency complex by acquiring a clutch of American shops: Compton, Ted Bates, Backer & Spielvogel.

As a result, a lot of brands that you may think of as American are not. Here are some of these brand names and their foreign owners: Mounds and Almond Joy (Cadbury-Schweppes), Vaseline Intensive Care and Ragu spaghetti sauce (Unilever), Travelodge (Trust House Forte), Saks Fifth Avenue and Marshall Field (B.A.T. Industries), Ball Park Franks and Smith-Corona typewriters (Hanson Trust), Hills Brothers coffee and Lean Cuisine (Nestle), the Chateau St. Jean and Firestone vineyards (Suntory), the Mark Hopkins Hotel, Alpo dog food and Beaulieu vineyards (Grand Metropolitan), Alka-Seltzer (Bayer) and Calistoga mineral water (Perrier).

Japanese money was coming into the United States at the rate of $4 billion a month in 1987. Much of it went into real estate. Among the properties Japanese interests own are ARCO Plaza in downtown Los Angeles, the Exxon Building in New York's Rockefeller Center and Citicorp Center in downtown San Francisco. The Japanese have also bought 12.5 percent of investment banker Goldman Sachs (Sumitomo Bank), 13 percent of Shearson Lehman Bros. (Nippon Life Insurance) and 100 percent of preppy clothesmaker J. Press (Kashiyama).

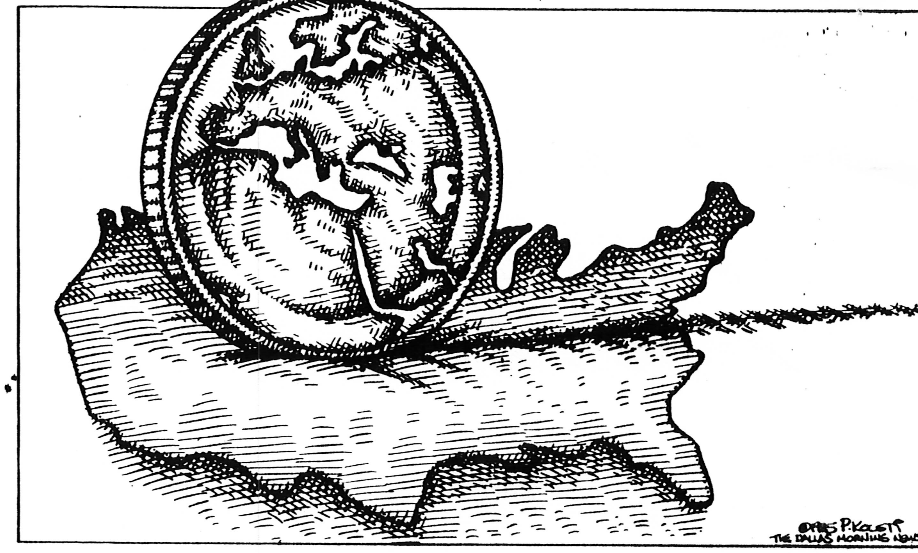
As yet, Japanese companies have not made many acquisitions of U.S. manufacturing companies, but that is expected to change. With the yen in such a powerful position versus the dollar, the Japanese will be buying companies. American investment bankers are already knocking on doors, explaining to Japanese corporate leaders that it's not disgraceful to take over another company.

Foreign investors can count on support from the American banking community. When F. Hoffmann-La Roche made its hostile bid for Sterling Drug, it had at its side Morgan Guaranty Trust. The fact that it had a longtime banking relationship with Sterling did not dissuade Morgan from coming to the aid of the Swiss.

So, we can certainly look forward to more foreign takeovers of American companies in the coming year. Look for Germany's electronics giant, Siemens, to bid for Advanced Micro Devices; Italy's Beretta to go after the Colt firearms company; Germany's Hoechst to stalk Upjohn; France's Pernod Ricard to make a stab at Gallo; and Japan's Yamaha to punch the keyboard of Baldwin Piano.

Los Angeles Times

Milton Moskowitz is the author of the recently published book, "The Global Marketplace: 102 of the Most Influential Companies Outside America."



Vice President

• Continued from F9

to fill in his own prejudices.

The job of vice president means you are not homeless and you do draw a regular paycheck. Beyond that, you are what the president allows you to be, but you have no real authority, no real responsibility and no independent clout. And almost everyone inside knows that.

A vice president goes as a messenger wherever he goes, trappings of derivative power substituting for the real thing. The secretaries of state and defense have more authority on foreign affairs and defense policy. And, on domestic issues, each Cabinet officer, no matter how lowly or mediocre, has more authority in his or her field than the vice president.

Bush's claims? Not much, I'm afraid. He is in the time-honored tradition of those who have preceded him. Service as vice president probably should not disqualify him, or anyone, from running for president or serving if elected. But Eisenhower wanted a week to think of something Nixon had done; I've had 10 years to think of what Humphrey, whom I idolized, did as VP. It all adds up to zero.

Eugene McCarthy once derisively described Walter Mondale as having the "soul of a vice president." I think that is unfair. It is only a temporary condition that lasts from election to defeat or some other rehabilitation. Mondale has recovered. Humphrey did too. Since only one person in the country can suffer from the condition at one time, we know that George Bush, with luck, will also soon be

**Response to Purported "Facts"
Set Forth in the Campaign Mounted
by Out-of-State Opponents
to Proposed Section 203**

Who Wins if proposed Section 203 is adopted?

* All stockholders of Delaware corporations, who will realize greater short term values in acquisitions or will benefit from retaining the long term value of their investment, rather than having it siphoned off by a raider.

* The small, less sophisticated stockholder, who will be less likely to be trapped in the back-end of a two step acquisition.

* All Delaware taxpayers, who will benefit from the continued payment of franchise taxes by Delaware corporations, which accounts for 16% of state revenues.

* Employees of Delaware corporations, who will be less likely to face the threat that their company will be broken up or that employee cut backs will be made to finance the acquisition debt of under capitalized raiders or to make greenmail payments.

* Suppliers to Delaware corporations, whose corporate customers are less likely to be saddled with debt resulting from acquisition attempts by underfinanced raiders, and thus will be better credit risks.

Who Loses?

* T. Boone Pickens and those who follow his methods, since this legislation will encourage them to pay to stockholders of Delaware corporations a greater percentage of the gap between market values and asset values.

* Wall Street professionals, such as brokers and advisors to pension funds, who profit from the artificial stock market activity generated by corporate raiders who make offers for companies with no intention to actually purchase and operate the business.

What other groups can be expected to oppose the legislation?

* Unelected officials of federal agencies who would prefer that takeover methods be solely a matter of federal concern, a concept rejected by the U.S. Supreme Court in its April, 1987 decision in CTS Corp. v. Dynamics Corp. of America.

* Various academics who have traditionally advocated federal chartering of major corporations.

Are there any studies which show that proposed Section 203 will result in a decrease in stock prices? <u>No</u>.

* The proposed Delaware statute is unique, in that rather than seeking to broadly prohibit takeovers as some other states have done, it offers a series of incentives to acquirors to pay full value to stockholders and to treat them equally. Thus, no economic study of other statutes has precedential value.

* The reported references by the opponents of Section 203 to economic studies of the effects of passage of the New York, Ohio and New Jersey statutes are misleading. Those statutes are much more restrictive than proposed Section 203. Furthermore, studies conducted by Professor Margotta of Northeastern University conclude that, even in the case of those statutes, small drops in stock prices around the date of passage are statistically insignificant and are followed by rebounding stock prices.

Can assurance be given that corporations will not leave Delaware if the General Assembly fails to pass the balanced proposal advocated by the Bar Association? <u>No</u>.

* Twenty-seven other states now have takeover legislation and more can be expected to act.

* Reincorporation from Delawsare to another state is easy, requiring only director approval plus a majority vote of stockholders.

* Contrary to the assertions made by opponents to Section 203, there is generally no significant stockholder opposition to such moves. In September, 1985 Pepsi, one of the largest Delaware corporations, reincorporated in North Carolina without even holding a meeting of stockholders, obtaining stockholder approval instead by written consent.

* At least six major corporations have threatened to leave and, if they did, others could be expected to follow.

Is this bill constitutional? Almost certainly <u>yes</u>.

* The U.S. Supreme Court's 1987 decision in <u>CTS v. Dynamics Corporation of America</u> broadly affirmed the right of the states, and particularly the state of incorporation, to act in this area.

* The Council of the Corporation Law Section drafted proposed Section 203 with reference to <u>CTS</u> to maximize the prospects that the legislation will, if challenged, be found to be constitutional.

Will the adoption of Section 203 result in pre-emption of all state takeover laws? Probably not.

* A committee of the U.S. Senate has recently rejected a proposal to overrule the CTS case and pre-empt state takeover laws.

* Proposed Section 203 is more balanced and moderate than the legislation on the books in other states.

* Even if a future congress were to pre-empt state takeover legislation and substitute for it meaningful federal legislation, Delaware's status as the corporate domicile of choice would be unaffected since we would retain all those features which presently distinguish our corporation law from those of other states.