Comments

CREEPING FEDERALIZATION OF CORPORATE LAW: UNOCAL CORP. V. MESA PETROLEUM CO. AND THE ALL-HOLDERS RULE UNDER THE FEDERAL SECURITIES LAWS

I. Introduction

On July 17, 1986 the Securities and Exchange Commission (SEC) adopted amendments to the issuer and third-party tender offer rules\(^1\) which, if allowed to stand,\(^2\) significantly encroach upon areas traditionally relegated to state law. The promulgation of these rules not only strikes at the heart of the overall determination of the quality of tender offers but also at the proper exercise of business judgment.\(^3\) Not since the late Professor William Cary's passionate pleas for a federal corporation law\(^4\) has such a broad and radical extension of the federal law been advocated or adopted.\(^5\)

This paper will first examine the outline and scope of the All-holders rule as well as the impetus for its adoption. The discussion

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3. See infra notes 147-83 and accompanying text (use of business judgment rule in a hostile takeover context versus application of the All-holders rule).


5. Professor Cary's pleas for a federal corporation law while given much ado, have not been greeted with much success. In fact the concept of state regulation of fiduciary standards has become a bit more entrenched. See infra notes 269-77 and accompanying text. See also Fischel, The Race to the Bottom Revisited: Reflections on Recent Developments in Delaware Corporation Law, 76 Nw. U.L. Rev. 913 (1982).
then proceeds to an analysis of the decision in *Unocal Corp. v. Mesa Petroleum Co.* which, as will be seen, was the compelling force behind the SEC rulemaking action. A third section evaluates the legislative history, congressional intent and judicial interpretation of the federal securities law. This discussion necessarily explores the interaction between state corporation law and the federal securities laws. A final section will discuss the impact of the All-holders rule and the need to delineate between stock repurchases and selective self-tender offers. Because the promulgation of the All-holders rule was a reactionary measure elicited, at least in part, by a Delaware decision, state law analysis will focus primarily on the statutes and judicial decisions of that state.

II. Background

A. Substantive SEC Rules

The recently adopted rules and amendments to rules by the SEC embrace a number of concepts, most notably the All-holders requirement and the "Best Price provision." The All-holders rule requires that any tender offeror must hold open the tender offer to all holders of the particular class of equitable securities of the target corporation. This requirement is binding not only on third

9. Amendments to the Tender Offer Rules, supra note 1, at 25,873. Although not discussed here the SEC revised Minimum Offering Period requirements for tender offers by amending Rule 14e-1(b) and 13e-4(f)(1)(ii). Id. at 25,880 (codified at 17 C.F.R. § 240.14e-1(b) and 17 C.F.R. §§ 240.13e-4(f)(1)(ii)). The Commission also revised tender offer withdrawal rights by amending Rule 13e-4(f)(2) and 14d-7 (codified at 17 C.F.R. §§ 240.13e-4(f)(2), 14d-7).
10. Amendments to the Tender Offer Rules, supra note 1, at 25,874. The amendments to Rules 13e-4(f)(8) and 14d-10(a) as codified in 17 C.F.R. § 240.14d-10(a) provide in pertinent part:
   (a) No bidder shall make a tender offer unless:
      (1) The tender offer is open to all security holders of a class of securities subject to the tender offer; and
      (2) The consideration paid to any security holder pursuant to the tender
parties\textsuperscript{11} but also the issuers of securities.\textsuperscript{12} The "Best Price provision" requires that "the consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder."\textsuperscript{13} While there may in fact be persuasive arguments that the best price provision is also an impermissible encroachment upon state law because it, like the All-holders rule, goes to the quality of the tender offer;\textsuperscript{14} this discussion will be limited only to the application of the All-holders rule.\textsuperscript{15}

The All-holders requirement is an amendment to Rules 13e-4 and 14d-7\textsuperscript{16} providing that all security holders must be able to accept a tender if they so choose.\textsuperscript{17} Mechanically, this provision operates in a manner that precludes exclusive purchases by issuers or third parties of a company's stock if made pursuant to a tender offer.\textsuperscript{10} The term "security holder" denotes both record and beneficial holders of securities.\textsuperscript{19}

As the SEC readily admits, this substantive rulemaking was precipitated by the \textit{Unocal Corp. v. Pickens}\textsuperscript{20} decision rendered by the District Court for the Central District of California.\textsuperscript{21} The California decision was based in part upon the Delaware Chancery Court opinion in \textit{Mesa Petroleum Co. v. Unocal Corp.}\textsuperscript{22} and explicitly confirmed the "ability of state courts to deal with substantive issues of corporation law and corporate governance, including issues of the fair-

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\textit{Id.} at 25,882 (the identical language is used in both Rules).

\textsuperscript{11} Third party tender offers are tender offers made by any person not currently aligned with the target corporation. \textit{See Amendments to the Tender Offer Rules, supra} note 1, at 25,874, 25,877.

\textsuperscript{12} \textit{Id.} at 25,874 n.6, 25,882 (amendments codified at 17 C.F.R. \textsection 240.13e-4).

\textsuperscript{13} \textit{Id.} at 25,874 (operative language of the amended Rule 14d-10). \textit{See also supra} note 10 (pertinent part of amended Rule 14d-10).

\textsuperscript{14} \textit{See infra} notes 276-92 and accompanying text (discussion of the All-holders rule in relation to the quality of the tender offer).

\textsuperscript{15} \textit{Id.} The All-holders rule and Best Price provision may or may not be separated. Therefore, this analysis is not determined by such a treatment.

\textsuperscript{16} \textit{See supra} note 10 (text of amended Rules 13e-4(f)(8) and 14d-10(a)).

\textsuperscript{17} Amendments to the Tender Offer Rules, \textit{supra} note 1, at 25,874.

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.} at 25,877 n.35 (definition of "security holder").


\textsuperscript{22} No. 7997 (Del. Ch. Apr. 29, 1985).
ness in a corporation’s treatment of its shareholders.” 23 As will be seen the All-holders rule was a knee-jerk reaction to what the SEC considered inappropriate activity by the issuer of securities. Because Unocal dealt specifically with a self-tender offer that is now supposedly prohibited, an in-depth analysis of this device is warranted.

B. The Unocal Selective Self-Tender Offer

The struggle for Unocal Corporation began in mid-February 1985 when Mesa filed a Schedule 13D statement that it had acquired 7.3% of Unocal’s common stock. 24 The events which followed involved various defensive tactics employed by the Unocal board of directors to thwart what they believed to be a pillaging of the corporation by a notorious greenmailer.

1. Preliminary Overture

In late April 1985, Mesa and its affiliates, under their mentor T. Boone Pickens, initiated stock purchases resulting in their holding approximately 9.7% of Unocal’s outstanding stock at a cost in excess of $1 billion. 25 At the outset, Mesa declared in Schedule 13D statements that the shares were sought for investment purposes only. 26 The Unocal board of directors, however, was not convinced and called a meeting to discuss alternatives to what it perceived as a possible takeover. 27 The board adopted certain bylaw amendments designed to provide time for stockholder review of director nominations. Specifically, the bylaw amendments required that the nominee present his credentials thirty days prior to the meeting. 28

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24. See Mesa Petroleum, No. 7997, slip op. at 1.
29. Id.
Three days later Mesa disclosed in an amended Schedule 13D that it had acquired 13.6% of Unocal stock and was seeking to control the corporation.\(^{30}\) Mesa then contacted Unocal to notify it that Mesa was seeking to adjourn the stockholders meeting scheduled a little over a month from then, so that the stockholders would have adequate time to review a proposed recapitalization structure of Unocal.\(^{31}\)

On April 8, 1985, Mesa commenced a tender offer for 64 million shares of Unocal stock at $54 per share. If successful, this tender offer would have vested Mesa with slightly greater than 50% of Unocal’s outstanding common stock. The remaining publicly held shares were to be re-exchanged for debt securities worth $54 per share.\(^{32}\) Unocal stock prior to the tender offer had been trading between $29.87 and $43.75 per share.\(^{33}\)

On April 12, 1985 Unocal advised its shareholders that Mesa was too late in submitting its proposals because, even if the April 24 meeting were to be adjourned, the subsequent meeting would use the proposal deadline of the first meeting.\(^{34}\) The next day the Unocal board met to respond to Mesa’s tender offer. In a meeting that lasted more than nine hours, the directors were apprised of their fiduciary duties and given a slide presentation of valuation methodologies.\(^{35}\) Unocal’s financial advisors recommended a self-tender offer in exchange for debt securities valued in the $70-$75 dollars per share range.\(^{36}\) Under this proposal, the offering was conditioned upon Mesa purchasing 64 million shares (“Mesa Condition”) and prohibited Mesa from participating (“Mesa Exclusion”).\(^{37}\)

It was estimated that the tender offer would cause Unocal to incur between $6.1 and $6.5 billion additional debt, thus requiring asset revaluation in excess of $3 billion over book net worth\(^{38}\) and

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30. Id. at 4.
31. Id. Mesa was compelled by court order to supplement the original Schedule 13D filing to further disclose its recapitalization structure. See infra note 129 and accompanying text; Unocal, 493 A.2d at 951 n.3.
32. Unocal, 493 A.2d at 949.
33. Mesa Petroleum, No. 7997, slip op. at 3 (May 13, 1985).
34. Id. at 5.
35. Unocal, 493 A.2d at 950. The board, however, was not apprised of the inadequacy of the Mesa tender offer in terms of actual figures. The presentation was designed to apprise the directors of the scope of analysis rather than calculation of adequate figures. See infra note 106 and accompanying text (chancery court nonetheless found the board adequately informed).
36. Unocal, 493 A.2d at 950-51.
37. Id. at 951.
38. Id. at 950. See also Mesa Petroleum, No. 7997, slip op. at 6 (May 13, 1985).
a capital spending reduction between $549-$970 million over the following six years.\textsuperscript{39} The analysis of the proposal did note, however, that Unocal had a permissible debt ceiling of $7 billion and also included a hypothetical drop in the price of oil.\textsuperscript{40} The consideration for the tender offer was based upon the liquidation value of Unocal.\textsuperscript{41} After separate deliberation, the eight outside directors of Unocal\textsuperscript{42} agreed that the board should reject Mesa's tender offer as inadequate.\textsuperscript{43} The meeting adjourned without a final vote on the selective self-tender and was to reconvene two days later.

The meeting was reconvened on April 15, 1985 and the consideration for a selective self-tender was discussed. In order to support the debt securities to be exchanged for the outstanding stock an indenture would be set in place that would restrict payment of dividends and preclude the further incurrence of debt. It was determined, however, that this indenture would not present any fiscal problems for the corporation,\textsuperscript{44} and the selective self-tender was approved.\textsuperscript{45}

On April 18, 1985, Mesa brought an action to enjoin Unocal from enforcing the bylaw amendments contending that they would interfere with shareholder business to be conducted at the meeting,\textsuperscript{46} that they placed inequitable notice restrictions on the shareholders\textsuperscript{47} and that the bylaws were designed to entrench management.\textsuperscript{48}

\textsuperscript{39} \textit{Mesa Petroleum}, No. 7997, slip op. at 6 (May 13, 1985). \textit{See also} \textit{Unocal}, 493 A.2d at 950 (Unocal would remain a viable entity).
\textsuperscript{40} \textit{Mesa Petroleum}, No. 7997, slip op. at 6-7 (May 13, 1985) (analysis considered a drop in oil price of $2 or $4 per barrel).
\textsuperscript{41} \textit{Id.} at 7. There was, however, no material contained in the presentation as to the length of time needed to liquidate the company or the costs involved in such a liquidation. \textit{Id.} See \textit{Opening Brief for Appellant at 4}, \textit{Unocal Corp. v. Mesa Petroleum Co.}, 493 A.2d 946 (1985) (six week study by Unocal's investment bankers). \textit{See also infra} note 43.
\textsuperscript{42} \textit{Unocal}, 493 A.2d at 950 (Unocal had a total of 14 directors). \textit{See also infra} note 125 and accompanying text (role of outside directors).
\textsuperscript{43} \textit{Mesa Petroleum}, No. 7997, slip op. at 7 (May 13, 1985) (Unocal's investment banker, Peter G. Sachs, of Goldman, Sachs & Co. informed board that liquidation value of the stock was in excess of $60 per share).
\textsuperscript{44} \textit{See supra} note 39 and accompanying text.
\textsuperscript{45} \textit{Unocal}, 493 A.2d at 951.
\textsuperscript{46} \textit{Mesa Petroleum}, No. 7997, slip op. at 10 (Apr. 22, 1985) (Mesa alleged the bylaws violated \S\ 211(b) of the Delaware General Corporation Law because they would hinder the proper conductance of stockholder business at the annual meeting). \textit{See also DEL. CODE ANN.}, tit. 8, \S\ 211 (1974).
\textsuperscript{47} \textit{Mesa Petroleum}, No. 7997, slip op. at 10 (Apr. 22, 1985).
\textsuperscript{48} \textit{Id.}
chancery court found that the bylaws were not illegal because they did not interfere with Mesa’s section 211(b) rights.\textsuperscript{49} The court nonetheless issued a temporary restraining order (TRO) barring their enforcement. The Unocal board, in releasing its interpretation of the bylaws within thirty days of the meeting, effectively precluded Mesa from presenting any proposals at the meeting. Thus the bylaws were not found to be invalid on their face but only as applied.\textsuperscript{50} With this defensive measure stifled, the Unocal board regrouped.

The Unocal board met on April 22, 1985 and waived the Mesa Condition as to 50 million shares, leaving the remaining 37.2 million shares still subject to the Mesa tender offer.\textsuperscript{51} This waiver was effected because the board perceived that, under the original offer, if shares were tendered to Unocal there would be no shares purchased under either offer.\textsuperscript{52} During this meeting the board also discussed the rationale for the Mesa Exclusion, i.e., that if it were not effectuated then Unocal would finance Mesa’s own inadequate offer and it would hinder the stockholder protection sought by the plan.\textsuperscript{53}

On April 29, 1985, a TRO was granted to enjoin the Unocal selective self-tender offer absent any provision for Mesa participation.\textsuperscript{54} In applying for a TRO, Mesa argued that the self-tender was unlawful because it discriminated against one group of shareholders.\textsuperscript{55} Unocal acknowledged that while the self-tender was discriminatory, it was the product of a valid exercise of business judgment designed to fend off Mesa’s inadequate takeover bid.\textsuperscript{56} Both Mesa and Unocal agreed that the chancery court’s decision in \textit{Fisher v. Maltz}\textsuperscript{57} applied but differed as to its interpretation.\textsuperscript{58} \textit{Fisher} dealt with a situation in

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\item \textsuperscript{49} Id. at 10. The notice requirements set forth in the bylaws did not violate any § 211(b) right because no shareholder had been precluded from presenting any proper business. The court also found the threat of injury to be hypothetical rather than actual.
\item \textsuperscript{50} Id. at 12. The court found that by Unocal’s inequitable conduct there was no way that Mesa could comply with the 30 day notice requirements of the bylaws. If the injunction were not issued Mesa would be precluded from taking any action. Such conduct also perpetuated Unocal’s current management. See Lerman \textit{v. Diagnostic Data, Inc.}, 421 A.2d 907 (Del. Ch. 1980).
\item \textsuperscript{51} \textit{Mesa Petroleum}, No. 7997, slip op. at 9 (May 13, 1985).
\item \textsuperscript{52} Id. at 9-10.
\item \textsuperscript{53} Id. at 10. See infra notes 134-36 and accompanying text.
\item \textsuperscript{54} \textit{Mesa Petroleum}, No. 7997 (Apr. 29, 1985).
\item \textsuperscript{55} Id. at 3.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} No. 6068 (Del. Ch. Dec. 28, 1979), \textit{reprinted in} 5 Del. J. Corp. L. 530 (1980).
\item \textsuperscript{58} Mesa asserted that \textit{Fisher} required that the tender offer be fair to all shareholders regardless of their status as a hostile tender offeror. Unocal contended
which a corporation made a selective tender offer to some but not all of its employee shareholders. That not allowed to tender, the plaintiffs, were four former employees engaged in lawful competition with the corporation. The Fisher court held that there was no absolute prohibition on such offers under Delaware law. It found, however, that in order for a board to meet its fiduciary duties to shareholders “a burden is imposed upon the corporation to show that there is a valid corporate purpose for limiting the offer and that in so doing it has not unduly favored one group over another.”

Thus, the crucial issues involved in Mesa’s application for a TRO were whether there was a proper business purpose for excluding Mesa from the Unocal offer and whether there was an undue burden on those not afforded the tender offer opportunity. The appropriateness of the Fisher test was not embraced. Vice-Chancellor Berger did note that a board of directors may oppose and defeat a hostile takeover bid which, in the exercise of their business judgment, is not in the best interests of the corporation or its shareholders. This proper exercise of business judgment also permits the board to buy out dissident shareholders at a substantial premium. The vice-

that fairness was irrelevant under Fisher if it were found that the board was acting pursuant to a valid corporate purpose. Mesa Petroleum, No. 7997, slip op. at 6 (Apr. 29, 1985). See infra notes 149-83 and accompanying text (differentiating a shareholder’s status as a hostile tender offeror).

60. Id. at 2, reprinted in 5 Del. J. Corp. L. at 531.
63. Mesa Petroleum, No. 7997, slip op. at 6 (Apr. 28, 1985).
64. Since Fisher did not deal with a board of directors conduct in response to a hostile tender offer, the case factually was not parallel with the case at bar. Fisher can also be questioned under the Delaware Supreme Court’s recent pronouncement of the business judgment rule. See infra notes 65, 118 and accompanying text.
65. See Pogostin v. Rice, 480 A.2d 619 (Del. 1984); GM Sub Corp. v. Liggett Group, Inc., No. 6155 (Del. Ch. Apr. 24, 1980). This is true not only under Delaware law but also under New York law. See Treadway Cos. v. Care Corp., 638 F.2d 357 (2d Cir. 1980). See infra notes 194-95 and accompanying text (the business judgment rule is not applied in the same manner in Delaware and New York).
66. See supra note 61. The Cheff line of greenmail cases recognizes that the proper exercise of business judgment may allow for the use of corporate funds to rid the corporation of a dissident shareholder. See Cheff, 199 A.2d at 556.
chancellor found the opposition of an inadequate tender offer to be a valid corporate purpose, as required by Fisher, but also held that the tender offer must be fair to all shareholders.67

In distinguishing the Cheff v. Mathes68 line of "greenmail" cases, the vice-chancellor found that both the benefits of receiving a premium for tendered shares of Unocal stock and protection of Unocal from an inadequate tender offer flowed to shareholders other than Mesa.70 No matter which side of the deal it was on, Mesa lost under the selective self-tender and this was perceived to be inequitable.71 Having held that Unocal failed to meet the Fisher standard, thereby permitting Mesa to establish a likelihood of success on the merits,72 the court also found that Mesa would suffer irreparable harm if the TRO was not granted.73 Therefore, under Delaware law, Unocal was enjoined from proceeding with the selective tender offer.74

Even though Mesa had restrained Unocal in the Delaware action, it still sought a preliminary injunction pursuant to the federal securities laws in the U.S. District Court for the Central District of California two days later.75 The basis for Mesa's claims were vio-

68. 199 A.2d 548 (Del. 1964).
69. The term "greenmail" refers to the practice of buying out a takeover bidder's stock at a premium that is not available to other shareholders in order to prevent the takeover. See Unocal, 493 A.2d at 956 n.13. See also supra note 61 (cases referred to as the Cheff line of "greenmail" cases).
70. Mesa Petroleum, No. 7997, slip op. at 6 (Apr. 29, 1985). The vice-chancellor reasoned that the payment of greenmail was different from Unocal's selective self-tender. When greenmail is paid those not receiving a premium for their stock are protected from the hostile activities of the dissident shareholder. Whereas, in the selective self-tender context those receiving the premium for their shares and those not tendering (besides the dissident) are protected. The dissident receives neither the premium nor the protection; because management, after the tender, may thwart his moves at future control of the corporation. Id.
71. Id. The vice-chancellor, applying Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971), held that "legally or equitably impermissible conduct cannot be justified by the fact that it was motivated by a proper purpose." Id. at 72.
72. Id. at 7. The chancery court in Mesa required not only that a plaintiff demonstrate a threat of immediate irreparable harm, but also a likelihood of success on the merits and a favorable balance of the hardships. Thus, the application for TRO was considered equivalent to an application for a preliminary injunction. See Gimbels v. Signal Cos., 316 A.2d 599 (Del. Ch. 1974); Bayard v. Martin, 34 Del. Ch. 184, 101 A.2d 329 (Del. 1953), cert. denied, 347 U.S. 944 (1954).
73. Mesa Petroleum, No. 7997, slip op. at 8 (Apr. 29, 1985) (The court found that Mesa would be deprived of a unique opportunity, i.e., the inability to takeover Unocal, if the TRO were not issued).
74. Id. at 9 (loss could not be adequately compensated by award of monetary damages).
lations of sections 13(e) and 14(e) of the Securities Exchange Act of 1934 (Williams Act).\textsuperscript{76} Specifically, Mesa contended that the Williams Act prohibited discriminatory tender offers.\textsuperscript{77} Judge Tashima, however, found nothing in the text or legislation of the Williams Act to support this contention and also noted that the SEC had failed to adopt an All-holders rule.\textsuperscript{78} He further reasoned that, in the absence of such language, the Williams Act was not designed to regulate takeover law and as such the SEC lacked authorization to adopt a rule of that nature.\textsuperscript{79} The court held that "Congress never intended to substantively regulate tender offers"\textsuperscript{80} and those judicial decisions that allowed for such regulation were "universally criticized."\textsuperscript{81} Furthermore, the court determined that state courts were the proper forums to deal with substantive issues of corporation law and corporate governance, including issues of fairness in the treatment of shareholders.\textsuperscript{82}

The district court recognized the Delaware TRO proceeding as evidence of the appropriateness of law and forum.\textsuperscript{83} However, the court indicated in dicta that Mesa lacked any showing of irreparable harm, that money damages would be adequate to compensate Mesa\textsuperscript{84} and that Mesa had no legally protected right to acquire Unocal.\textsuperscript{85}

\textsuperscript{76} Id. ¶ 92,011. See also 15 U.S.C. §§ 78m(e), 78n(e).
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 92,011-012. The court noted that the SEC could have the authority but then went on to add that Congress never sought to substantively regulate tender offers under the Williams Act. Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id. The court cited the Sixth Circuit’s opinion in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982), which held that the term "manipulative" of § 14(e) (15 U.S.C. § 78n(e)) of the Williams Act did not include an element of misrepresentation or nondisclosure. This interpretation has been overruled by Schreiber v. Burlington N., Inc., 472 U.S. 1 (1985), which held that the Williams Act requires conduct designed to deceive and was not designed to substantively regulate the substantive fairness of tender offers, e.g., conduct beyond non-disclosure not covered.
\textsuperscript{83} Id.
\textsuperscript{84} Id. See also supra note 110 and accompanying text (chancery court’s analysis of requirements for TRO).
\textsuperscript{85} Unocal, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. ¶ 92,296, at 92,012 (citing Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975); Pacific Realty Trust v. APC Inv., Inc., 685 F.2d 1083, 1085 n.6 (9th Cir. 1982)).
It was this decision and the events that followed which prompted the SEC to adopt the All-holders rule.\textsuperscript{86} Immediately after the April 29 issuance of the TRO, Unocal sought certification of the issues to the Supreme Court of Delaware.\textsuperscript{87}

In an order dated May 2, 1985, the Delaware Supreme Court, per Justice Moore, held that the TRO was appealable because it determined the substantive rights of the parties.\textsuperscript{88} The court, however, held that the vice-chancellor should have a full opportunity to consider the articulated issues on a full record\textsuperscript{89} and deferred any action until completion of the preliminary injunction hearing.\textsuperscript{90}

Although the supreme court had framed the issues, the chancery court’s task of re-evaluating Unocal’s selective self-tender was far from simple. Specifically, the consideration of Mesa’s property interest in Unocal was pitted against the board’s exercise of business judgment.\textsuperscript{91} At the outset both Mesa and Unocal agreed that the directors’ duty of care does extend to protection of the corporation

\textsuperscript{86} See infra notes 228-39 and accompanying text (SEC rationale for adopting All-holders rule).

\textsuperscript{87} See Unocal, 493 A.2d at 952. Upon certification under Delaware Supreme Court Rule 42(b), an order was issued shortly thereafter. See Unocal Corp. v. Mesa Petroleum Co., No. 152 (Del. May 2, 1985).

\textsuperscript{88} Unocal, No. 152, at slip op. at 3-4.

\textsuperscript{89} Id. at 4-5. Justice Moore articulated the issues to be determined at the preliminary injunction hearing as follows:

a) Does the directors’ duty of care to the corporation extend to protecting the corporate enterprise in good faith from perceived depredations of others, including persons who may own stock in the company?

b) Have one or more of the plaintiffs, their affiliates, or persons acting in concert with them, either in dealing with Unocal or others, demonstrated a pattern of conduct sufficient to justify a reasonable inference by defendants that a principle objective of the plaintiffs is to achieve selective treatment for themselves by the repurchase of their Unocal shares at a substantial premium?

c) If so, may the directors of Unocal in the proper exercise of business judgment employ the exchange offer to protect the corporation and its shareholders from such tactics? See Fogostin v. Rice, Del. Supr., 480 A.2d 619 (1984).

d) If it is determined that the purpose of the exchange offer was not illegal as a matter of law, have the directors of Unocal carried their burden of showing that they acted in good faith? See Martin v. American Potash & Chemical Corp., 92 A.2d at 302.

\textsuperscript{90} Id. at 5.

\textsuperscript{91} See infra notes 191-97 and accompanying text (analysis of the business judgment rule in a takeover context).
from shareholders as well as third parties.92 The court then found, based on magazine articles93 and a review of Mesa's past business practices,94 a reasonable inference that Mesa's principal objective was to be bought off at a substantial premium.95

As mentioned earlier, the crux of the chancery court's inquiry centered upon the fiduciary duties owed to shareholders and the proper exercise of business judgment by the Unocal board of directors. The court noted that the business judgment rule does apply in a takeover context and that a court's inquiry should be "focused on the directors' motivation rather than the transaction itself."96 Particularly, the court should be cognizant of any scheme designed to entrench management.97 In this case Vice-Chancellor Berger found that "the directors' decision was made in good faith [and] that the Mesa tender offer was inadequate."98 The court, however, considered


93. Mesa Petroleum, No. 7997, slip op. at 12-13 (May 13, 1985) (Mr. Pickens was featured in no less than ten business and financial magazines for his previous take-over attempts).

94. Id. at 13 (court looked to prior tender offers made by Mr. Pickens for Phillips Petroleum Co., Cities Service Co., and acquisition of Superior Oil Co stock).

95. Id. (in each prior deal by Mr. Pickens, Mesa sold its shares at a substantial premium in exchange for ceasing its acquisition objective).

96. Id. at 15. See also supra note 92 (authority for the use of the business judgment rule in a takeover context).


98. Mesa Petroleum, No. 7997, slip op. at 16 (May 13, 1985). The chancery court found that the board had acted reasonably and not to entrench themselves in office. The fact that the board had amended its bylaws before a tender offer was made could have supported a conclusion to the contrary. Perhaps the court's finding of a reasonable inference that Mr. Pickens was attempting to greenmail Unocal satisfied the court that the Unocal board was justified in their actions. The Delaware Supreme Court has upheld adoption of defensive mechanisms even though the maneuver employed was adopted by directors prior to an imminent threat of a tender offer. Cf. Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (directors adoption of poison pill based on a general market threat, rather than imminent threat, was entitled to protection of business judgment rule).
the concept of a fiduciary’s fairness within the ambit of the business judgment rule. The vice-chancellor disregarded Unocal’s contention that Mesa’s capacity as a shareholder and its capacity as a raider could be differentiated and found that corporate directors are fiduciaries to all shareholders regardless of how they are positioned in a particular transaction. The court, in addressing the Cheff line of selective stock repurchase cases, held that good faith beliefs of threat to corporate policy did not justify the abdication of Unocal’s fiduciary duties to Mesa, especially when Mesa was Unocal’s largest shareholder. The court, citing Fisher, specifically found that the business judgment rule does not apply to selective tender offers. Moreover, the chancery court also found that Unocal had failed to establish the requisite fairness as Fisher seemed to prescribe.

The court also found that the business judgment rule should not apply because the directors received a benefit not available to all shareholders. Although the court found a likelihood of success on the fairness issue, it found success improbable on the collateral issues raised. Specifically, it held the Unocal directors were adequately informed before acting on the exchange offer, that there was no tortious interference with Mesa’s prospective business advantage, no interference with Mesa’s proxy solicitation by the exchange offer.

100. See infra notes 136-40, and 149-73 and accompanying text (differentiating a raider from a shareholder—dual capacities).
101. See Martin, 92 A.2d at 302; Kors v. Carey, 158 A.2d 136, 141 (Del. Ch. 1960). See also infra notes 129-33 and accompanying text (Mesa’s proposed restructuring of Unocal).
102. See supra note 26 and accompanying text (Mesa had invested over $1 billion in the acquisition of Unocal stock).
104. Mesa Petroleum, No. 7997, slip op. at 19 (May 13, 1985) (court interpreted the fairness requirement of Fisher to mean that no shareholder could be treated any differently than any other shareholder). But see infra note 122 and accompanying text (reinterpretation of Fisher and undue fairness).
105. Mesa Petroleum, No. 7997, slip op. at 19 (May 13, 1985) (directors’ benefit in the exchange offer created a situation where they benefited when other shareholders did not). But see infra notes 143-45 and accompanying text (business judgment rule applied).
106. Mesa Petroleum, No. 7997, slip op. at 20-21 (May 13, 1985). The circumstances attendant the directors’ decisions were distinguishable from those present in Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
108. Id. at 21-22.
and no breach of fiduciary duty in the disclosures made in the circulation of the tender offer.\textsuperscript{109}

In finding that there was sufficient threat of irreparable harm, the court found, contrary to Judge Tashima, that Mesa would be sufficiently crippled by Unocal’s unlawful self-tender offer to successfully carry out the takeover.\textsuperscript{110} Because the exchange offer was completely within Unocal’s control, the balance of the hardships tipped in Mesa’s favor and the preliminary injunction was appropriate.\textsuperscript{111}

The issuance of the preliminary injunction set the stage for an expedited interlocutory appeal to the Delaware Supreme Court.\textsuperscript{112} The supreme court was called upon to decide whether the business judgment rule would apply to a selective self-tender offer utilized as a defensive\textsuperscript{113} maneuver against a hostile tender offeror. As will be discussed, this decision will solidify an important concern as to whether such maneuvers are to be relegated to federal regulation or whether they should remain in the bastions traditionally considered state corporation law.\textsuperscript{114}

2. \textit{Unocal’s} Business Judgment and the \textit{Mesa} Exclusion

In deciding the propriety of Unocal’s selective self-tender offer, the supreme court drew from one of the fundamental tenets of corporation law, i.e., the duty of a board of directors to manage the business and affairs of the corporation.\textsuperscript{115} In addition to the broad

\textsuperscript{109} \textit{Id.} at 22-23.
\textsuperscript{110} \textit{Id.} at 24.
\textsuperscript{111} \textit{Id.} at 24-25.
\textsuperscript{112} \textit{See Unocal,} 493 A.2d at 953 n.5.
\textsuperscript{113} \textit{See supra} note 103 and accompanying text (Vice-Chancellor Berger held that under \textit{Fisher} the business judgment rule does not apply to selective self-tender offers).
\textsuperscript{114} \textit{See infra} note 275 and accompanying text (internal relations between a corporation and its shareholders are to be governed by state law).
\textsuperscript{115} In Delaware, as in most states, the authority to manage corporate affairs is conferred to the board of directors by statute. \textit{Del. Code Ann. tit. 8, § 141(a)} states that:

\begin{quote}
[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.
\end{quote}
\textit{See Unocal,} 493 A.2d at 953 n.6.
powers conferred under section 141 of the Delaware General Corporation Law, section 160 of that statute specifically allows for a corporation to deal in its own stock.\textsuperscript{116} It has been long held under Delaware law that a corporation may deal selectively with its stockholders, provided the primary purpose is not to entrench management in office.\textsuperscript{117} The court found that the business judgment rule, as enumerated in \textit{Pogostin v. Rice},\textsuperscript{118} is applicable in a takeover situation.\textsuperscript{119} In such circumstances, the directors have a duty to protect the shareholders from any threats to the corporation irrespective of the source, including shareholders or third parties.\textsuperscript{120} This fundamental design for corporate governance regarding the duties of the board of directors was realized by the chancery court below, but the supreme court took a decidedly different tack. While the court realized that a board of directors in a takeover situation is entitled to the benefits of the business judgment rule, the court noted:

\begin{quote}
[t]here are, however, certain caveats to a proper exercise of this function. Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.\textsuperscript{121}
\end{quote}

\textsuperscript{116} See \textit{Del. Code Ann. tit. 8, § 160(a)} which provides in pertinent part: "Every corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares . . . ."

\textsuperscript{117} \textit{See supra} note 97. \textit{See also} \textit{Chaff v. Mathes}, 199 A.2d 548, 554 (Del. 1964) (board of directors decided to authorize share repurchase to thwart a threat by a shareholder to liquidate the company or materially change its sales policies); Bennett v. Propp, 187 A.2d 405, 408 (Del. 1962) (board member made market purchases of his corporation's stock on behalf of the corporation to preserve control of the corporation in himself and his fellow directors); Martin v. American Potash & Chem. Corp., 92 A.2d 295, 302 (Del. 1952) (corporation proposed to purchase for retirement shares of its own stock without pro rata offering to all holders of the class); Kaplan v. Goldsamt, 380 A.2d 556, 568-69 (Del. Ch. 1977) (corporation entered into an agreement to purchase shares of its own common stock from a former director); Kors v. Carey, 158 A.2d 136, 140-41 (Del. Ch. 1960) (directors of the corporation used corporate funds to purchase a block of the corporation's shares held by another corporation).

\textsuperscript{118} 480 A.2d 619 (Del. 1984).

\textsuperscript{119} \textit{Unocal}, 493 A.2d at 954.

\textsuperscript{120} \textit{Id. See Johnson v. Trueblood}, 629 F.2d 287 (3d Cir. 1980), \textit{cert. denied}, 450 U.S. 999 (1981). \textit{See also supra} note 92 (chancery court had also noted this extensive line of authority).

\textsuperscript{121} \textit{Unocal}, 493 A.2d at 954. This increased scrutiny has been apparent in previous stock repurchase cases, most notably Bennett v. Propp, 187 A.2d 405
This inherent conflict to which the directors are exposed does not, however, preclude the use of the business judgment rule in a selective stock repurchase. It does, however, require directors to make an initial showing that "they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person's stock ownership." The Unocal court found that this initial showing is met "by [a] showing [o]f good faith and reasonable investigation" and is further substantiated by approval of the outside independent directors present on the board. This "good faith and reasonable investigation" requirement, when satisfied, would seem to prevent a finding that the board's activities...

(Del. 1962). In Bennett the Delaware Supreme Court stated: "We must bear in mind the inherent danger in the purchase of shares with corporate funds to remove a threat to corporate policy when a threat to control is involved. The directors are of necessity confronted with a conflict of interest, and an objective decision is difficult." Id. at 409.

122. Unocal, 493 A.2d at 954-55. The chancery court in interpreting Fisher held to the contrary. Mesa Petroleum, No. 7997, slip op. at 19 (May 13, 1985). The Delaware Supreme Court found the factual contexts between Fisher and the case at bar quite distinguishable. Since any evidence of a hostile takeover was absent, in Fisher, there was no threat to the corporate enterprise posed, and in that situation the selective repurchase of shares was unduly unfair. The Unocal court believed the Lawrence board in Fisher was "motivated by pique instead of rational business purpose." Unocal, 493 A.2d at 958 n.14.

The Unocal court also found, however, that a board's fiduciary powers to protect the corporation and its stockholders from perceived harm was not absolute. "A corporation does not have unbridled discretion to defeat any perceived threat by any Draconian means available." Id. at 955.

123. Id. See Cheff, 199 A.2d at 554 (board of directors motivated by a sincere belief that buy-out of dissenting stockholder necessary to maintain proper business practices will not be held liable). See also infra note 193 and accompanying text (discussion of stockholders activities which threaten corporate policy).

124. Unocal, 493 A.2d at 955 (quoting Cheff, 199 A.2d at 555). See also infra notes 129-33 (Mesa's threats to corporate policy).

were designed to perpetuate itself in office\textsuperscript{126} or the product of fraud or any other inequitable conduct.\textsuperscript{127} The court found that Unocal’s selective self-tender offer was reasonable to the threat posed.\textsuperscript{128} The threat was found to be a “grossly inadequate two-tiered coercive tender offer coupled with the threat of greenmail.”\textsuperscript{129} There was a perceived fear that the back-end consideration, e.g., the “junk bonds,”\textsuperscript{130} were worth considerably less than $54 per share\textsuperscript{131} and that Mr. Pickens was a nationally recognized corporate raider who, as “reasonably inferred by the court below,” was attempting to secure preferential benefits for himself.\textsuperscript{132} Thus, the selective self-tender offer, though discriminatory, was a valid mechanism by which an inadequate tender offer could be defeated, or in the alternative, the shareholders subjected to the back-end consideration could be protected.\textsuperscript{133}

In holding the Mesa Exclusion reasonable, the court noted that if Mesa were able to participate in Unocal’s self-tender offer, Unocal would be subsidizing Mesa’s own inadequate tender offer.\textsuperscript{134} Further, a tendering Mesa would proportionately displace the back-end shareholders Unocal sought to protect.\textsuperscript{135} Mesa simply could not fit into the “class of shareholders being protected from its own coercive and

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  \item[126.] See Cheff, 199 A.2d at 556; Kors, 158 A.2d at 137-44 (entrenchment potential of board).
  \item[127.] Unocal, 493 A.2d at 955.
  \item[128.] Id. Tender offer adequacy entails an analysis focusing on the nature of the takeover bid and its effect on the corporation which necessarily includes: “[I]nadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.” Id. (citing Lipton & Brownstein, Takeover Responses and Director Responsibilities: An Update, ABA Nat’l Inst. on Dynamics of Corporate Control 7 (Dec. 8, 1983)).
  \item[129.] Unocal, 493 A.2d at 956. See supra notes 93-94 and accompanying text (chancery court’s discussion of Mesa’s previous takeover activities).
  \item[130.] Unocal, 493 A.2d at 956 (highly subordinated debt securities are often termed “junk bonds”).
  \item[131.] Id. Mesa’s supplemental proxy statement contained an extensive recapitalization scheme which would have significantly altered the surviving company. Id. at 950 n.3.
  \item[132.] Id. at 956.
  \item[133.] Id. at 957 (court found that the selective self-tender was reasonable to the threat posed). See also infra note 174 and accompanying text (circumstances in which a selective self-tender offer may be inappropriate).
  \item[134.] Unocal, 493 A.2d at 956.
  \item[135.] Id.
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inadequate tender offer.'" Mesa had posited it contrary to the best interests of Unocal and its stockholders and the Unocal directors were not exacting any penalty upon Mesa in excluding them from the self-tender offer. The court held that "there is no support in Delaware law for the proposition that, when responding to a perceived harm, a corporation must guarantee a benefit to a stockholder who is deliberately provoking the danger being addressed." The court, citing the Cheff line of greenmail cases, found that selective stock repurchases are lawful in Delaware and the only difference between Unocal's selective tender offer and greenmail was that the selective treatment was afforded to those intended to be protected rather than the entity posing the threat. Given Mesa's past activities, its claims here were perceived to be a bit ironic. In addressing Mesa's contentions that the directors were interested and thus unable to benefit from the business judgment rule, the court found that the directors and the protected shareholders were all treated equally. The court held that the directors' participation in the exchange did not constitute a disqualifying "personal pecuniary interest" so as to defeat the operation of the business judgment rule. The directors' decision to oppose Mesa's tender offer was insufficient to constitute a breach of the fiduciary duty.

136. Id.
137. Under Delaware law nothing precludes a stockholder from acting in its own self-interest. See Tanzer v. International Gen. Indus., 379 A.2d 1121 (Del. 1977) (a merger made primarily to advance the business purpose of the majority does not breach a fiduciary duty). See also DuPont v. DuPont, 251 F. 937 (D. Del. 1918) (whether corporation will exercise right to take over purchase of its stock made by other shareholders is a question of policy to be determined by its directors or stockholders and not by the court); Ringling Bros. Barnum & Bailey Combined Shows, Inc. v. Ringling, 53 A.2d 441 (Del. 1947) (agreement between two stockholders that they should act jointly in exercising voting rights held valid).
138. See supra note 42 and accompanying text (transaction ratified by disinterested directors and decision held by the trial court to have been made in good faith).
139. Unocal, 493 A.2d at 958.
140. Id. Justice Moore, in attempting to summarize Unocal's position, stated: "'[I]f you're being threatened, you do not owe your attacker the duty to hand him a gun to finish you off." Record at 32, Mesa.
141. Unocal, 493 A.2d at 958 ("There is no obligation of self-sacrifice by a corporation and it's shareholders in the face of such a challenge").
142. Id. at 957.
143. Id. at 958-59.
144. Id. at 958. See Johnson, 629 F.2d at 292-93. At a minimum the plaintiff must show that the director's sole or primary purpose was to retain control. See also Cheff, 199 A.2d at 554.
likewise found to have been based on a good faith belief that Mesa's takeover attempt posed a danger to Unocal's corporate policy and effectiveness.\footnote{145}

Because the board was protected by the business judgment rule and the court could not substitute its judgment for that of the board, Unocal's selective self-tender offer was allowed to stand and the preliminary injunction was vacated.\footnote{146}

C. Operation of the Business Judgment Rule in the Context of Selective Self-Tender Offers

While the previous review of the Unocal scenario may seem a bit exhaustive, it is important to understand the proper circumstances which predicated the promulgation of the All-holders rule and the amount of scrutiny given the selective self-tender offer by the Delaware courts.\footnote{147} The business judgment rule, as will be discussed, allows for a flexible analysis to be used in evaluating takeover defenses. The All-holders rule, on the other hand, affords no such flexibility.\footnote{148} Equally important as the finding of the Delaware Supreme Court in Unocal that the business judgment rule applied to selective self-tender offers was (1) the court's analysis in severing Mesa's capacity as a shareholder from its capacity as a corporate raider, and (2) the lack of differentiation between a selective self-tender offer and a stock repurchase. This latter consideration is more pervasive than one might imagine.

1. Dual Capacity as a Raider and as a Shareholder

The concept that one may be a shareholder in one context and a hostile corporate raider in another is neither unheard of nor uncommon to the fields of corporation or securities law. In fact, the United States Supreme Court in Piper v. Chris-Craft Industries\footnote{149} held that a tender offeror suing in his capacity as a corporate raider has

\footnote{145. Unocal, 493 A.2d at 959 (review of chancery court's findings).}
\footnote{146. Id.}
\footnote{147. See infra notes 228-87 and accompanying text (discussion of the SEC rationale and authority in adopting the All-holders rule).}
\footnote{148. Because the All-holders rule is triggered by a plaintiff demonstrating that a selective self-tender offer is present, the concept of reasonable exercise of business judgment by the board is not considered. See infra notes 182-83 and accompanying text.}
\footnote{149. 430 U.S. 1 (1977).}
no standing to sue for damages under the Williams Act.\textsuperscript{150} Basing its decision upon a finding that the Williams Act was designed to provide a level playing field in terms of tender offer disclosure,\textsuperscript{151} the Court found that implying a cause of action under section 14(e) would unnecessarily tip the balance in favor of tender offerors.\textsuperscript{152} It is noteworthy that the Court found that a tender offeror was relegated to state law for the loss of an opportunity to control a corporation.\textsuperscript{153}

It seems likewise appropriate in this instance that the business judgment rule, properly applied,\textsuperscript{154} may be utilized in a context where a person’s capacities as a shareholder and a raider can be distinguished. There is no rational basis for the board of directors in the exercise of their business judgment to pay a premium for a dissident’s stock in one instance, i.e., greenmail, but in a similar instance be precluded from paying a premium to all shareholders except the dissident.\textsuperscript{155} In both situations, the dissident has taken a position adverse to the corporation and its shareholders. Furthermore, there seems to be no reason why directors, after properly exercising their business judgment, should hold the raider’s interests paramount to those of the corporation or the shareholders.\textsuperscript{156} In fact, the business judgment rule has been applied to circumstances where a board of directors adopted a policy adverse to those of a particular shareholder. In \textit{Panter v. Marshall Field \\& Co.},\textsuperscript{157} the Seventh Circuit, interpreting

\textsuperscript{150} Id. at 42. In \textit{Piper} a takeover bidder sought both damages and injunctive relief under \$ 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. \$ 78n(e) (1976) or under SEC Rule 10b-6, 17 C.F.R. \$ 240.10-b (1976) against the prevailing tender offeror, and the target corporation. The Supreme Court held that Congress in passing the Williams Act did not mean to grant a raider hostile to the interests of the corporation an implied cause of action under \$ 14(e). \textit{Id.} at 41.

\textsuperscript{151} See \textit{infra} notes 260-77 and accompanying text (disclosure objectives of the securities laws).

\textsuperscript{152} \textit{Piper}, 430 U.S. at 29.

\textsuperscript{153} \textit{Id.} at 41. See \textit{also infra} note 275 and accompanying text (delineation between federal and state law).

\textsuperscript{154} See \textit{supra} notes 121-27 and accompanying text. Of course, the Delaware Supreme Court did not hold that a selective self-tender offer could be employed every time a bidder made a tender offer. All takeover devices must be reasonable to the threat posed. See \textit{also infra} notes 174-81 and accompanying text.

\textsuperscript{155} Such legal inconsistencies should be avoided at all costs. When a board elects to cash out a hostile dissident pursuant to the proper exercise of its business judgment it should be able to preclude participation in a tender offer pursuant to the same valid exercise of its judgment. This is especially true when the action is ratified by the board’s outside directors. See \textit{supra} note 125 and accompanying text (importance of outside directors).

\textsuperscript{156} See \textit{Unocal}, 493 A.2d at 958.

\textsuperscript{157} 646 F.2d 271 (7th Cir.), \textit{cert. denied}, 454 U.S. 271 (1981).
Delaware law, held that defensive acquisitions designed to create federal antitrust obstacles for a hostile tender offeror were protected by the business judgment rule.\textsuperscript{153} There was no “evidence of bad faith, overreaching, self-dealing or any other fraud necessary to shift the burden of justifying the transactions to the defendants.”\textsuperscript{153} As such, the court would not substitute its judgment for that of the directors in protecting the corporation against the perceived damage the merger would cause.\textsuperscript{160} Furthermore, it seems that every defensive tactic employed by a board in fending off a hostile take-over made by a raider/shareholder conflicts directly with that shareholder’s self-interest.\textsuperscript{161} In fact, discrimination based upon the size of an individual stockholder’s holding, via charter amendment, has been upheld under Delaware law.\textsuperscript{162}

In \textit{Providence & Worcester Co. v. Baker},\textsuperscript{163} the Delaware Supreme Court upheld voting restrictions adopted pursuant to Delaware General Corporation Law section 212(a) and contained in a corporate charter which varied from the traditional “one share-one vote” standard.\textsuperscript{164} Thus it seems that if voting restrictions are allowed under Delaware law based on a stockholder’s holdings, then selective treatment should be allowed pursuant to the lawful exercise of a director’s business judgment.\textsuperscript{165} Some jurisdictions have held that where a discriminatory device unreasonably restrains the alienability of the stock or wrests voting power from the shareholders it will be in-
validated under state law.\textsuperscript{166} Although every defense to a hostile takeover may be contrary to the raider/shareholder’s best interest, this by no means triggers the use of a selective self-tender offer in every situation.\textsuperscript{167}

The \textit{Unocal} court reaffirmed the requirement that director action must be reasonable to the threat posed.\textsuperscript{168} The court found compelling the fact that there would be significant changes in the capital structure of Unocal due to the highly subordinated debt securities\textsuperscript{169} and that Mr. Pickens was a nationally recognized greenmailer.\textsuperscript{170} Also compelling in a takeover context is the fact that the raider/shareholder would still be able to secure a fair price for his shares on the open market.\textsuperscript{171} In \textit{Unocal}, Mesa’s interest was not eliminated\textsuperscript{172} and the transferability rights attendant to the stock were not restricted.\textsuperscript{173}

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\item \textsuperscript{166} See Minstar Acquiring Corp. v. AMF, Inc., 621 F. Supp. 1252 (S.D.N.Y. 1985) (Rights plan discriminated between holders of a class of securities). The court specifically rejected the \textit{Unocal} rationale and held that any discrimination between security holders in a given class was illegal. This ruling would certainly be in line with the All-holders rule. See infra notes 228-59 and accompanying text. See also Asarco, Inc. v. MRH Holmes A Court, 611 F. Supp. 468 (D.N.J. 1985) (New Jersey corporation law forbids the issuance of shares with different voting rights). But see Unilever Acquisition Corp. v. Richardson-Vicks Inc., 618 F. Supp. 407 (S.D.N.Y 1985). \textit{Unilever} court agreed with the \textit{Unocal} rationale but found it inapplicable where the discrimination restricted a stockholder’s voting rights without prior warming, compensation or stockholder authorization. In essence what was created was a subclass within a class which did not restrict a particular shareholder, but all who had recently acquired shares; this conflicted with the corporation’s certificate of incorporation.
\item \textsuperscript{167} See infra note 174 and accompanying text.
\item \textsuperscript{168} \textit{Unocal}, 493 A.2d at 956.
\item \textsuperscript{169} Id. at 956-57 (noting highly subordinated nature of the bonds).
\item \textsuperscript{170} Id. at 956 n.13. Although there was a finding of a “reasonable inference” that Mesa’s primary objective was greenmail, the author hopes that the subjective perceptions of the directors do not have a high priority on the list of factors used to determine the adequacy of a tender offer. One’s past successes or failures should not be a major consideration as to his ability to use corporate assets better than current management. But see Cheff, 199 A.2d at 556 (considering a raider’s past liquidation activities).
\item \textsuperscript{171} \textit{Unocal}, 493 A.2d at 956. The court specifically found that the selective self-tender offer allowed the minority stockholder to receive the substantial equivalent in value of his previous holdings. See Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985); Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952). Although restrictions on Mesa’s transferees were discussed at trial, it is highly unlikely that they would be precluded from tendering to the \textit{Unocal} self-tender offer if they were not found to be colluding with Mesa. Record at 11-16. See generally supra notes 134 (financing of Mesa’s own inadequate tender offer), 151 (restrictions on transferability of shares).
\item \textsuperscript{172} \textit{Unocal}, 493 A.2d at 958. Since there would be no elimination of Mesa’s minority interest there would be presumably no breach of fiduciary duty owed by \textit{Unocal} to Mesa. See Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977).
\item \textsuperscript{173} \textit{Unocal}, 493 A.2d at 958. It is apparent that Mesa’s ability to participate
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In *AC Acquisition Corp. v. Anderson, Clayton & Co.*,\(^{174}\) the Delaware Chancery Court, in determining the validity of a partial self-tender offer for 65% of a company's shares,\(^{175}\) relied upon the test set forth in *Unocal*: (1) whether there was a proper corporate purpose for the defensive measure, and (2) whether the measure was reasonable in relation to the threat posed.\(^{176}\) Although the chancery court found that there was a valid corporate purpose not personal to the board of directors,\(^{177}\) the measure was unreasonable in relation to the threat posed.\(^{178}\) Specifically, the court found that "a defensive step that includes a coercive self-tender timed to effectively preclude a rational shareholder from accepting the any-and-all offer cannot . . . be deemed to be reasonable in relation to any minimal threat posed to stockholders by such offer."\(^{179}\) The practical effect of the self-offer was that the shareholders were precluded from accepting the competing tender offer.\(^{180}\) Those who did not participate in the self-tender were relegated to incurring substantial losses in the market value of their holdings.\(^{181}\)

In contrast to the reasonable exercise of business judgment, the recently promulgated All-holders rule tends to hinder appropriate defensive measures designed to protect the interests of the corporation or its shareholders.\(^{182}\) The rule fails to recognize the differing capacity of shareholders and raiders. Under this rule, once a tender offer is

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\(^{174}\) 519 A.2d 103 (Del. 1986).

\(^{175}\) The self-tender offer came on the heels of a preliminary injunction against the effectuation of a recapitalization, and was designed to thwart a competitor's adequate takeover bid.


\(^{177}\) *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 112 (Del. 1986). The board in making its self-tender offer "preserved the ability of the stockholders to choose between the two options." The creation of this alternative in and of itself was considered a valid corporate purpose, thus satisfying the first prong of the *Unocal* test. *Id.*

\(^{178}\) *Id.*

\(^{179}\) *Id.* at 114:

\(^{180}\) *Id.* (effect was feared to be illegal by the Unocal board of directors when they partially waived the "Mesa condition").

\(^{181}\) *Id.* at 116.

\(^{182}\) *See infra* notes 228-59 and accompanying text. The circumstances of a particular transaction do not mediate the application of the rule, all that is required is the presence of a selective self-tender offer.
made the interests of the parties merge and the board of directors' business judgment is restricted.183

2. Tender Offers Versus Stock Repurchases: The Continuing Enigma

No matter how comfortable one is with the outcome of Unocal, the Delaware Supreme Court's opinion memorializes the continuing search for the definition of the term "tender offer." Federal securities laws continue to regulate its disclosure but are unable to define it; the courts have likewise struggled to pin down the concept.184 Although Unocal had technically characterized its plan as an "Exchange Offer,"185 the court decided the validity of the maneuver according to standards enumerated in a long line of selective repurchase, i.e., greenmail, cases.186 If it were not for the All-holders rule, which applies solely to tender offers and not repurchases, the distinction

183. Id. This tends to tip the scales in favor of the tender offeror. See also supra note 150 (design of the Williams Act).
184. Nowhere in the federal securities laws is the term "tender offer" defined. In 1979, the SEC proposed a definition which was never formally adopted:
   (1) The term "tender offer" includes a "request or invitation for tenders" and means one or more offers to purchase or solicitations of offers to sell securities of a single class, whether or not all or any portion of the securities sought are purchased, which
   (i) during any 45-day period are directed to more than 10 persons and seek the acquisition of more than 5% of the class of securities, except that offers by a broker (and its customer) or by a dealer made on a national securities exchange at the then current market or made in the over-the-counter market at the then current market shall be excluded if in connection with such offers neither the person making the offers nor such broker or dealer solicits or arranges for the solicitation of any order to sell such securities and such broker or dealer performs only the customary functions of a broker or dealer and receives no more than the broker's usual and customary commission or the dealer's usual and customary mark-up; or
   (ii) are not otherwise a tender offer under paragraph (b)(1)(i) of this section, but which (A) are disseminated in a widespread manner, (B) provide for a price which represents a premium in excess of the greater of 5% of or $2 above the current market price and (C) do not provide for a meaningful opportunity to negotiate the price and terms.
4 Fed. Sec. L. Rep. (CCH) ¶ 24,281A (May 12, 1982). See Hanson Trust PLC v. SCM Corp., 774 F.2d 47 (2d Cir. 1985) ("Absent any express definition of 'tender offer' in the Act, the answer requires a brief review of the background and purposes of § 14(d).")
186. See supra note 129 and accompanying text.
would be specious because the net effect on the corporate entity and the shareholders is the same.\textsuperscript{187}

The use of selective stock repurchases or "greenmail" to eliminate the interests of a dissident\textsuperscript{188} has continually been permitted by state courts.\textsuperscript{189} Like the usual tender offer, the repurchase of shares are made at a premium to the stockholder.\textsuperscript{189} The litmus test for validity of such repurchases is set forth in the seminal case of Cheff v. Mathes.\textsuperscript{191} The Cheff court found that selective stock repurchases or greenmail were proper unless the directors had "acted solely or mainly because of their desire to perpetuate themselves in office."\textsuperscript{192} To meet this purpose the directors had to show that there were reasonable grounds to believe that corporate policy was in danger.\textsuperscript{193} This motivational inquiry into potential entrenchment has evolved from a long line of Delaware cases.\textsuperscript{194} In Cheff the court found that the directors had acted in good faith and upon reasonable investigation in using corporate funds to buy out a dissident.\textsuperscript{195} It is noteworthy that the Unocal court in relying on Cheff found the circumstances in each case to be parallel,\textsuperscript{196} noting that the Cheff dissident had a reputation as a corporate raider and had threatened to liquidate the company or materially change its sales policies.\textsuperscript{197}

In Kaplan v. Goldsamt\textsuperscript{198} a board of directors' exercise of business

\begin{footnotesize}
\footnotesize{187. Regardless of the rationale, Mesa was still precluded from participating in Unocal's selective self-tender offer.  
188. See Unocal, 493 A.2d 956 n. 13.  
190. See generally id.  
191. 199 A.2d 548 (Del. 1964).  
192. Id. at 554. See supra note 126 and accompanying text.  
193. Cheff, 199 A.2d at 554. Such a threat to corporate policy would include the making of an inadequate tender offer as a bootstrap device to control a company's assets, followed by a restructuring and recapitalization to pay off one's debts. See supra notes 129-33 and accompanying text.  
194. This evolution can be seen in: Cheff v. Mathes, 199 A.2d 548 (Del. 1964); Bennett v. Propp, 187 A.2d 405 (Del. 1962); Martin v. American Potash & Chem. Corp., 92 A.2d 295 (Del. 1952); Kaplan v. Goldsamt, 380 A.2d 556 (Del. Ch. 1977); Kors v. Carey, 158 A.2d 136 (Del. Ch. 1960); Hall v. Trans-Lux Daylight Picture Screen Corp., 171 A. 226 (Del. Ch. 1934). See also Hanson Trust PLC v. SCM Corp., 774 F.2d 47 (2d Cir. 1985) (noting the Delaware caselaw); Norlin Corp. v. Rooney Face, 744 F.2d 255 (2d Cir. 1984) (same).  
195. Cheff, 199 A.2d at 556.  
196. Unocal, 493 A.2d at 957.  
197. Id.  
198. 380 A.2d 556 (Del. Ch. 1977).}
\end{footnotesize}
judgment in effectuating a stock repurchase was presumed valid and as such would not be interfered with by the courts, absent evidence of bad faith, dishonesty or an abuse of discretion. Kaplan involved the stock repurchase from the founder and director (Goldsamt) of a corporation who had become increasingly disinterested and hostile to the other board members. In fact, Goldsamt was seriously contemplating a proxy fight. The derivative plaintiff sought to set aside various agreements entered into by the board of directors and Goldsamt.

The chancery court, citing Cheff and Kors v. Carey, held:

that the use of corporate funds to acquire shares of a dissident is a proper exercise of business judgment where it is done to eliminate what appears to be a clear threat to future business or the existing, successful business policy of a company and is not accomplished for the sole or primary purpose of perpetuating the control of management.

In retrospect, regardless of whether the device was a stock repurchase or tender offer, Unocal’s reliance upon Cheff and Kaplan appears to be well founded. In each case the directors had exercised their business judgment in response to what they reasonably believed to be a legitimate threat to corporate policy. Such a situation lies in contrast to the circumstances apparent in Fisher and relied upon in the chancery court’s opinion in Unocal, where there was no threat posed to corporate policy. In line with this analysis, does it make any difference whether the mechanism adopted by the board is labeled a “selective tender offer” or a “stock repurchase”? 

199. Id. at 568.

200. Id. at 560.

201. Id. (business judgment of the American Medicorp board should be analyzed as if exercised in a takeover context, because it was not known until the suit was filed whether Goldsamt would pursue his threat of inciting a proxy contest). See also supra note 121 and accompanying text (the business judgment rule in a takeover context).

202. Kaplan, 380 A.2d at 558. Goldsamt was cashed out and entered into consultation and non-competition agreements for a five-year period under the terms of which Goldsamt was partially paid in advance. Id.

203. 158 A.2d 156 (Del. Ch. 1960).

204. Kaplan, 380 A.2d at 569.

205. Unocal, 493 A.2d at 956 (threat viewed by the Unocal board was a grossly inadequate two-tier coercive tender offer coupled with the threat of greenmail). See also supra note 193 and accompanying text.

206. See supra note 122 and accompanying text (discussion of Fisher analysis by the Delaware Supreme Court).
Although this distinction is arguably one of semantics, under federal securities laws the distinction is made. While the courts have struggled with this elusive distinction, the SEC by necessity relied upon it in the adoption of the All-holders rule.

Regardless of the material differences between tender offers and stock repurchases, under federal caselaw Unocal's selective repurchase was technically a tender offer. In Brascan Ltd. v. Edper Equities, Ltd. the district court used characteristics such as the lack of widespread solicitation, absence of a fixed amount of shares bought, and presence of negotiation as to price as conduct indicative of an open market purchase and not a tender offer. These

207. Because the Securities Exchange Act of 1934 addresses the subject of tender offer disclosure, the SEC has been given the authority to adopt regulations dealing with tender offers. See infra note 242 and accompanying text.

208. See infra notes 210-17 and accompanying text. For an interesting review, see M. STEINBERG, TENDER OFFERS: DEVELOPMENTS AND COMMENTARIES (1985).

209. See infra notes 228-59 and accompanying text (authority for the All-holders rule).

210. The premium offered in the Unocal self-tender would have been the same if the transaction had been labeled a selective stock repurchase as opposed to a selective self-tender offer.

211. See supra notes 212-17 and accompanying text. See also S. REP. NO. 550, 90th Cong. 1st Sess. 10 (1967); H.R. REP. NO. 1711, 90th Cong. 2d Sess. 5 (1968), reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2814-15. A cash tender offer "normally consists of a bid by an individual or group to buy shares of a company—usually at a price above the current market price." Id.


213. Widespread solicitation most commonly refers to the dissemination and negotiation of the offers to buy stock. If the purchaser approaches only a few individuals he will more often be found to be making a private purchase. But if he uses the media to attract sellers of securities he may be found to be making a tender offer. Id. at 789-90. See also Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206 (2d Cir. 1978) (no tender offer where substantially all stock was purchased on national exchanges and the off-market purchases were offered no premium).


215. Id.

216. Id. See also Hanson, 774 F.2d at 56 (these factors are relevant in determining whether the Williams Act applies); Kennecott, 584 F.2d at 1206 (no tender offer found where no pressure other than normal pressure of the market place was exerted on sellers); Energy Ventures, Inc. v. Appalachian Co., 587 F. Supp. 724 (D. Del. 1984) (privately negotiated transaction in a series of stock purchases executed in open market was not a tender offer); Astronics Corp. v. Protective Closures Co., 561 F. Supp. 329 (W.D.N.Y. 1982) (offer contingent on fixed number of shares is not determinative); LTV Corp. v. Grumman Corp., 526 F. Supp. 106 (E.D.N.Y. 1981) (corporation's own acts to defeat a tender offer did not itself constitute a tender offer); Stromfeld v. Great Atlantic & Pac. Tea Co., Inc., 484 F. Supp. 1084 (S.D.N.Y.), aff'd, 646 F.2d 563 (2d Cir. 1980) (secretly negotiated sale was not a tender offer).
characteristics have been adopted in the Ninth\textsuperscript{217} and the Second Circuits.\textsuperscript{218} In fact, in \textit{SEC v. Carter Hawley Hale Stores}\textsuperscript{219} the Ninth Circuit set forth eight relevant factors to be used in determining the presence of a tender offer.\textsuperscript{220} As one might expect, however, later courts have found such all-encompassing lists not to be exclusive, thus lending to the overall lack of confidence in deciding whether or not a tender offer in fact exists.\textsuperscript{221} It is evident, however, that the private negotiation aspect (or lack thereof) and the overall coerciveness of an offering to buy securities are the primary indicia that a tender offer has been made.\textsuperscript{222} If the outcome of this analysis leads to the conclusion that Unocal's offering was, in fact, a selective self-tender offer, one might query as to the impact this has upon Mesa's allegations of unfairness and whether the adoption of the All-holders rule is facilitated.

The author is of the conviction and will concede that, indeed, the Delaware Supreme Court decided \textit{Unocal} under case law more appropriately aligned with privately negotiated selective repurchases rather than tender offers,\textsuperscript{223} and it is true that if the issue were decided under federal securities laws\textsuperscript{224} Unocal would have been found

\begin{footnotesize}
\begin{enumerate}
\item active and widespread solicitation of public shareholders for the shares of an issuer;
\item solicitation made for a substantial percentage of the issuer's stock;
\item offer to purchase made at a premium over the prevailing market price;
\item terms of the offer are firm rather than negotiable;
\item offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;
\item offer open only a limited period of time;
\item offeree subjected to pressure to sell his stock;
\item public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company's securities.
\end{enumerate}
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\begin{footnotesize}
\textsuperscript{217} \textit{See SEC v. Carter Hawley Hale Stores}, 760 F.2d 945, 950-53 (9th Cir. 1985).
\textsuperscript{218} \textit{Hanson}, 774 F.2d at 56-57.
\textsuperscript{219} 760 F.2d 945 (9th Cir. 1980).
\textsuperscript{220} \textit{Id.} at 950. The Ninth Circuit set forth eight factors. Such factors were applied by the district court in \textit{Wellman v. Dickinson}, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979), \textit{aff'd on other grounds}, 682 F.2d 355 (2d Cir. 1982), \textit{cert. denied}, 460 U.S. 355 (1983). These factors are as follows:
\item active and widespread solicitation of public shareholders for the shares of an issuer;
\item solicitation made for a substantial percentage of the issuer's stock;
\item offer to purchase made at a premium over the prevailing market price;
\item terms of the offer are firm rather than negotiable;
\item offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;
\item offer open only a limited period of time;
\item offeree subjected to pressure to sell his stock;
\item public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company's securities.
\textsuperscript{221} \textit{See Hanson}, 774 F.2d at 57 (not all factors needed to establish a tender offer nor is the list not exclusive).
\textsuperscript{222} \textit{See Kennecott}, 584 F.2d at 1206-07; \textit{Wellman}, 475 F. Supp. at 824.
\textsuperscript{223} \textit{See supra} note 211.
\textsuperscript{224} \textit{See supra} notes 75-85 and accompanying text (federal court in California found Mesa's claims not to be federal in nature and specifically relegated Mesa to the ongoing state court action.)
\end{footnotesize}
to have made a tender offer.225 Such a finding, however, does not render the Unocal court's reasoning faulty or outcome erroneous. Perhaps the crucial aspect of the analysis was addressed by Judge Tashima in the federal district court action in Unocal.226 Nevertheless, the court's findings in that action were specifically rebuffed by the SEC in its adoption of the All-holders rule.227

III. Analysis

A. Legal Basis for the All-Holders Rule

The discussion thus far has explored the facts and issues preceding the adoption of the All-holders rule by the SEC. As previously discussed, the SEC was not at all pleased by the Delaware Supreme Court's ultimate finding that Unocal's self-tender offer, while discriminatory, was lawful under Delaware law.228 Because the device involved appeared to be tender offer, the SEC was able to seize upon the opportunity to check what it believed to be the resurrection of "Saturday Night Specials"229 and other detrimental activities.230 This discussion now turns to the appropriateness of the SEC's rule-making. Because of divergent views within the SEC itself231 and the controversy which arose after announcement of the proposed rule,232 the SEC made a special effort to validate its authority in the final rule.233

Under section 23(a) of the Securities Exchange Act of 1934,234 the SEC has the authority to adopt such rules "as may be necessary

225. Applying the Carter Hawley Hale factors, Unocal seems to have made a selective self-tender offer. See supra note 220.
227. Divided SEC, supra note 7, at 997.
228. In fact the policy considerations behind the adoption of the All-holders rule by the SEC was the fear of "Saturday Night Specials" and "First-Come First Served Offers." Devices in which controlling ownership of a corporation or offers made without any proration were sought to be prohibited by the Williams Act. For a brief review of the history behind the Williams Act, see M. Steinberg, TENDER OFFERS: DEVELOPMENTS AND COMMENTARIES (1985).
229. Amendments to the Tender Offer Rules, supra note 1, at 25,875. See also supra note 228.
230. Amendments to the Tender Offer Rules, supra note 1, at 25,875.
231. Divided SEC, supra note 7, at 997.
232. Amendments to the Tender Offer Rules, supra note 1, at 25,874 (substantial majority of the 76 comment letters received by the SEC regarding the All-holders rule regarding issuer tender offers were opposed to its adoption).
233. Id. at 25,875-877 (Final Rules contained a section specifically setting forth its authority to adopt the rules).
or appropriate to implement the provisions of [the Exchange Act]."235 Like all other federal agencies, the rulemaking must be reasonably related to the enabling legislation for it to be upheld.236 It is at this juncture that the author believes the authoritative support for the All-holders rule fails.237

The SEC, in its basis for authority, correctly pointed out that the Williams Act was designed to promote investor protection by requiring full disclosure of cash tender offers.238 The SEC also contended that the Williams Act amendments were designed “to eliminate discriminatory treatment among security holders who may desire to tender their shares.”239 Because the SEC perceived a resurgence of “Saturday Night Specials” and “First-Come First-Served Offers,”240 the All-holders rule was adopted “expressly [to] preclude bidders from discriminating among holders of the class of securities that is the subject of the offer . . . .”241 The SEC relied upon Congress’ broad grant of rulemaking authority under section 14(d)(4),242 which allows it to specify information to be included in a board’s tender offer recommendation,243 as support for such substantive tender offer regulation.244 Specifically, the SEC found by implication that Congress never meant for discriminatory self-tenders to exist.245

The SEC further noted that section 14(d) is “designed to make relevant facts known so that shareholders have a fair opportunity to make their decision”246 to tender, sell or hold their securities.247 In adopting the rule, the SEC read the pro rata provisions of section 14(d)(6) to prescribe that the tender offer be made to all holders of

235. Id. See infra note 277 and accompanying text.
236. See supra note 2 and accompanying text (analysis of an agency’s authorized rulemaking activity); infra note 242 and accompanying text (legislative basis for tender offer regulation).
237. The author does not believe he is alone in adopting this viewpoint. See supra note 232.
238. Amendments to the Tender Offer Rules, supra note 1, at 25,875.
239. Id. But see infra note 279 (House and Senate reports are contrary).
240. See supra note 228 and accompanying text.
241. Amendments to the Tender Offer Rules, supra note 1, at 25,875.
243. Id.
244. See Amendments to the Tender Offer Rules, supra note 1, at 25,875.
245. Id. The Commission contends that Rule 14d-2, 17 C.F.R. § 240.14d-2, does not contemplate that notification of the tender offer will only be made to certain stockholders but to stockholders as a class. It quotes the “class of equity security” language from § 14(d)(1) to support this contention. See 15 U.S.C. § 78m(d).
247. See Amendments to the Tender Offer Rules, supra note 1, at 25,875.
a class of securities rather than proration offered to those who were
given the opportunity to tender their shares.243 Further, the "equality
of treatment among all shareholders who tender shares" language
was lifted from the legislative history and used to support the con-
tention that no shareholders could be discriminated against, regardless
of whether they were able to tender their shares.249 The SEC, in
noting that the Williams Act was designed to protect all tendering
and non-tendering shareholders, concluded that the best protection
was to open the offer to all.250

As to issuer tender offers, the SEC found federal preemption
of state law to be dead letter.251 Pursuant to section 13(e) of the
Securities Exchange Act,252 the SEC is given authority to promulgate
rules to serve the public interest and protect investors.253 Such rules
were intended by Congress to define unlawful acts and prescribe
means to prevent such acts. To validate the All-holders rule, the

249. See Amendments to the Tender Offer Rules, supra note 1, at 25,876. See
Cong., 2d Sess. 4 (1968), reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2811,
2813-14.
250. See Amendments to the Tender Offer Rules, supra note 1, at 25,876.
251. See id. The SEC stated:
When it adopted section 13(e), Congress determined that, notwithstanding
that share repurchases by an issuer were regulated by state corporation
law, there was a need for federal regulation. Those who argue that adoption
of the all-holders rule would preempt state corporation law fail to recognize
that Congress made that decision when it enacted section 13(e).
Regulation of issuer tender offers in the same manner as third-party tender
offers is entirely consistent with Congressional intent.

Id.
252. 15 U.S.C. § 78m(e). Section 13(e)(1) provides:
It shall be unlawful for an issuer which has a class of equity securities
registered pursuant to section 12 of this title, or which is a closed-end
investment company registered under the Investment Company Act of
1940, to purchase any equity security issued by it if such purchase is in
contravention of such rules and regulations as the Commission, in the
public interest or for the protection of investors, may adopt (A) to define
acts and practices which are fraudulent, deceptive, or manipulative, and
(B) to prescribe means reasonably designed to prevent such acts and
practices. Such rules and regulations may require such issuer to provide
holders of equity securities of such class with such information relating to
the reasons for such purchase, the source of funds, the number of shares
to be purchased, the price to be paid for such securities, the method of
purchase, and such additional information, as the Commission deems
necessary or appropriate in the public interest or for the protection of
investors, or which the Commission deems to be material to a determination
whether such security should be sold.

Id.
253. See infra note 277 and accompanying text.
SEC cited Schreiber v. Burlington Northern, Inc. as authority to permit the promulgation of substantive rather than disclosure-oriented rule-making. To verify its authority the SEC also noted the disclosure, withdrawal, proration and equal price rules.

As a means of allowing for consistency of policy, the SEC mandates that the All-holders rule should apply to both third-party and issuer tender offers. While discriminatory self-tender offers may be considered "manipulative" under the other portions of the Exchange Act, the author firmly believes that issuer self-tender offers should be permitted when they conform to the traditional principles applicable to fiduciaries under state law. Given the recent rash of coercive two-tiered tender offers it is clear that the SEC means well, but is perhaps a bit misguided.

B. Disclosure Under the Federal Securities Laws and the Proper Domain of State Corporation Law

Since the late nineteen twenties and early thirties, at the effective inception of the federal securities laws, the fundamental concept of

255. See Amendments to the Tender Offer Rules, supra note 1, at 25,876.
256. See 17 C.F.R. §§ 240.13e-4(d) (disclosure); 240.13e-4(f)(2) (withdrawal); 240.13e-4(f)(3) (proration); and 240.13e-4(f)(4) (equal price).
257. See Amendments to the Tender Offer Rules, supra note 1, at 25,876.
258. See Schreiber v. Burlington N., Inc., 472 U.S. 1 (1985). "The term [manipulative] refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." Sante Fe Indus., Inc. v. Green, 430 U.S. 462, 476 (1977). If there is misrepresentation or nondisclosure as to the material facts attending the tender offer which distorts the market then the self-tender offer could be considered manipulative. Manipulative practices are prohibited under § 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e). This section provides:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative.

Id.

259. See Sante Fe, 430 U.S. at 477; Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939) (director's fiduciary duties). See also Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971) (parent's fiduciary duties owed to subsidiary).
disclosure has provided the foundation for the lawmaking (and regulation) in this area. \footnote{The Securities Act of 1933\footnote{The 1933 Securities Act provides the enabling legislation from which the SEC derives its authority and the disclosure of information involving securities remains paramount. Until recently this concept of disclosure had continued to be the rule. The promulgation of the All-holders rule is an exception, because, by definition, it does not regulate disclosure but instead directly impacts upon the substance and quality of tender offers. Current securities laws and the rules promulgated thereunder are designed to disclose relevant facts; the All-holders rule, however, \textit{creates} those relevant facts by dictating to whom the tender offer applies. The regulation of self-tender offers relates to the intimate relations between a corporation and its shareholders, the substance of which have been traditionally relegated to the states. Federal law has been preemptory only as to disclosure requirements necessary to protect investors or when state regulation is so widespread so as to violate the United States Constitution.} and the Securities Exchange Act of 1934\footnote{Involves the SEC.} provide the enabling legislation from which the SEC derives its authority and the disclosure of information involving securities remains paramount. Until recently this concept of disclosure had continued to be the rule. The promulgation of the All-holders rule is an exception, because, by definition, it does not regulate disclosure but instead directly impacts upon the substance and quality of tender offers.\footnote{Current securities laws and the rules promulgated thereunder are designed to disclose relevant facts; the All-holders rule, however, \textit{creates} those relevant facts by dictating to whom the tender offer applies. The regulation of self-tender offers relates to the intimate relations between a corporation and its shareholders, the substance of which have been traditionally relegated to the states.\footnote{Federal law has been preemptory only as to disclosure requirements necessary to protect investors or when state regulation is so widespread so as to violate the United States Constitution.}} provide the enabling legislation from which the SEC derives its authority and the disclosure of information involving securities remains paramount. Until recently this concept of disclosure had continued to be the rule. The promulgation of the All-holders rule is an exception, because, by definition, it does not regulate disclosure but instead directly impacts upon the substance and quality of tender offers.\footnote{Current securities laws and the rules promulgated thereunder are designed to disclose relevant facts; the All-holders rule, however, \textit{creates} those relevant facts by dictating to whom the tender offer applies. The regulation of self-tender offers relates to the intimate relations between a corporation and its shareholders, the substance of which have been traditionally relegated to the states.\footnote{Federal law has been preemptory only as to disclosure requirements necessary to protect investors or when state regulation is so widespread so as to violate the United States Constitution.} Federal law has been preemptory only as to disclosure requirements necessary to protect investors or when state regulation is so widespread so as to violate the United States Constitution.}}
Consistent with this disclosure scheme, the Williams Act was “designed solely to get needed information to the investors” subject to tender offers.266 Contrary to the SEC’s authoritative contentions, the Williams Act was not designed to encroach on state regulation of tender offers.267 All the Williams Act requires is that the bidder furnish the investor with adequate information. There was no congressional intent “to do . . . more than give incumbent management an opportunity to express and explain its position.”268 The Supreme Court, in interpreting this legislative intent, has consistently held that “[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”269

The United States Supreme Court’s analysis in Sante Fe Industries, Inc. v. Green,270 which held that Rule 10b-5 does not override the Delaware law with respect to mergers, is appropriate here.271 If the All-holders rule were allowed to outlaw selective self-tender offers which were developed to entrench management, federal law would “bring within the rule a wide variety of corporate conduct tradi-

[footnotes]

266. Piper v. Chris-Craft Indus., 430 U.S. 1, 30-31 (1976). See Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) (“The purpose of the Williams Act is to ensure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information”). See also Schreiber, 472 U.S. at 12 (adhering to the Rondeau rationale).

267. See Edgar, 457 U.S. at 631. The Supreme Court noted that § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) was not amended. Section 28(a) provides: “Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.” Id.

268. Rondeau, 422 U.S. at 58. See Edgar, 457 U.S. at 634.

269. Sante Fe, 430 U.S. at 479 (quoting Cort v. Ash, 422 U.S. 66, 84 (1975)). This rationale has also been acknowledged by the Delaware Supreme Court. See Singer v. Magnavox Co., 380 A.2d 969, 976 n.6 (Del. 1977).


271. Id.
tionally left to state regulation," including a director's fiduciary
duties.\textsuperscript{272}

The \textit{Sante Fe} Court, in noting that the Securities Exchange Act
of 1934 was designed "to substitute a philosophy of full disclosure
for the philosophy of \textit{caveat emptor},"\textsuperscript{274} found that Congress had not
meant "to bring within the scope of 10(b) instances of corporate
mismatch ... in which the essence of the complaint is that
shareholders were treated unfairly by a fiduciary."\textsuperscript{275} The impetus
for the adoption of the All-holders rule was the \textit{Mesa} decision which,
by coincidence, also dealt with allegations that a shareholder was
being "treated unfairly by a fiduciary."\textsuperscript{276} Only last term in \textit{Schreiber},
the Supreme Court noted: "Nowhere in the legislative history is
there any suggestion that [section] 14(e) serves any purpose other
than disclosure ... [t]he quality of any [tender] offer is a matter
for the marketplace."\textsuperscript{277}

\textsuperscript{272} \textit{Id}. The Court further stated: "[A]bsent a clear indication of congressional
intent, we are reluctant to federalize the substantial portion of the law of corporation
that deals with transactions in securities, particularly where established state policies
of corporate regulation would be overridden." \textit{Id}. \textit{See also} Golub v. PPD, 576 F.2d
759 (8th Cir. 1978) (federal legislation in the field of securities regulation is not
designed to draw controversies involving the affairs of a corporation into federal
court).

\textsuperscript{273} \textit{See Guth} v. Loft, 5 A.2d 503 (1939). \textit{See also} Panter v. Marshall Field
federal securities claim can lie for breach of fiduciary duty). \textit{See generally} Bucher v.
Shumway, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) \textsection 97,142, \textit{cert. denied}, 449 U.S. 841 (1980) (an alleged breach of fiduciary duty cannot be transformed into a federal securities claim by alleging the breach was not disclosed);
does not present a claim within the federal securities laws). In Hundahl v. United
Benefit Life Ins. Co., 465 F. Supp. 1349 (N.D. Tex. 1979), the court stated
(interpreting \textit{Sante Fe}): "[T]he central thrust of a claim or series of claims arises
from acts of corporate mismanagement, the claims are not cognizable under federal
law. To hold otherwise would be to eviscerate the obvious purpose of the Sante
Fe decision, and to permit evasion of that decision by artful legal draftsmanship." \textit{Id}. at 1365-66.

\textsuperscript{274} \textit{Sante Fe}, 430 U.S. at 477 (quoting Affiliated Ute Citizens of Utah v.
United States, 406 U.S. 128, 151 (1972), and SEC v. Capital Gains Research
Bureau, 375 U.S. 180, 186 (1963)).

\textsuperscript{275} \textit{Id}. Once disclosure has occurred, the fairness of the transaction is at best

\textsuperscript{276} \textit{See supra} note 104 and accompanying text.

\textsuperscript{277} \textit{Schreiber}, 472 U.S. at 7. The SEC's administrative discretion is limited
"to require only such information as 'necessary or appropriate in the public interest
or for the protection of investors.'" \textit{See} Corporate Disclosure, \textit{supra} note 264, at
The authority cited to support the All-holders rule flies in the face of the legislative history of the Williams Act and the precedent interpreting the securities laws. The SEC contends that section 13(e) somehow preempts state law regarding share repurchases, goes beyond mere disclosure and provides authority for substantive regulation.\textsuperscript{278} The legislative history is contrary. Congress specifically noted that repurchase programs initiated by corporations could facilitate entrenchment but, falling short of dictating fiduciary standards, stated only that shareholders "should have full information regarding the company’s activities and intentions in purchasing its own stock,"\textsuperscript{279} and that disclosure in connection with certain corporation repurchases was considered appropriate.\textsuperscript{280} The language of section 13(e), as enacted, is demonstrative of the congressional intent to set forth an adequate disclosure policy.\textsuperscript{281} Congress granted broad rulemaking authority to promulgate rules to provide information to the holders of equity securities.\textsuperscript{282}

The Supreme Court is also inapposite to the view that section 14(e) preempts state corporation law or goes beyond the disclosure of relevant information.\textsuperscript{283} In Schreiber the Court noted that section 14(e) imposes specific disclosure duties on corporations purchasing


\textsuperscript{278} See supra note 252 and accompanying text.


Today, the public shareholder in deciding whether to accept or reject a tender offer possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma which our securities laws are designed to prevent.

\ldots

We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. S.510 is designed only to require full and fair disclosure for the benefit of investors. The bill will at the same time provide the offeror and management equal opportunity to present their case.

\textsuperscript{113} Cong. Rec. 24,664 (1967) (emphasis added). See also Schreiber, 472 U.S. at 8-9 (quoting the same language).


\textsuperscript{281} See supra note 252 (text of § 13(e) of the Security Exchange Act).

\textsuperscript{282} See 15 U.S.C. § 78m(e).

\textsuperscript{283} See supra notes 265-76 and accompanying text.
stock but that Congress stopped short of imposing specific substantive requirements. The Court found that the Williams Act relies on disclosure as the preferred method of market regulation rather than court-imposed principles of fairness or artificiality. The SEC nonetheless cites this language as a means to grant authority for the All-holders rule. From the foregoing discussion this reliance seems to be misplaced. Peculiarly, the SEC realizes possible interference between the All-holders rule and state takeover regulation, yet refuses to interfere with constitutionally valid state takeover statutes.

The contention that section 14(d) somehow allows for such a substantive regulation as the All-holders rule is specious. Section 14(d) deals with third-party cash tender offers for greater than five percent of a corporation's equity securities. The SEC notes that under section 14(d)(4) it has the authority to specify "the information to be included in any recommendation" made and thus may allow for substantive regulation. The legislative history is clear that the purpose of the section was again aimed at disclosure and was designed to ensure that both "the offeror and management have an equal opportunity to present their case . . . ." Thus even if the SEC is allowed to carry this authority to the regulation of issuer tender offers, such authority allows for the modification or requirement of additional disclosures, not alteration of the terms of the tender offer.

Finally, there seems to be no firm basis to find that Congress sought to preclude by implication those tender offers made to only

284. Schreiber, 472 U.S. at 11-12.
285. Id.
286. Amendments to the Tender Offer Rules, supra note 1, at 25,876.
287. Id. at 25,877. See also CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637 (1987).
289. See id.
290. Amendments to the Tender Offer Rules, supra note 1, at 25,875.
292. H.R. Rep. No. 1711, 90th Cong. 2d Sess. 10 (1968), reprinted in 1968 U.S. Code Cong. & Admin. News 2811, 2820 (§ 14(d)(4) intended to allow SEC to specify the information to be included in any recommendations and to regulate the activities of parties involved in making the tender offer or seeking to influence an investor's decision on a tender offer; Congress made no mention concerning the terms of the tender offer itself). See also supra note 277 and accompanying text (Supreme Court interpretation that federal securities laws do not regulate quality of tender offers).
certain members of a class of equity securities\textsuperscript{293} once the appropriate disclosures were made.\textsuperscript{294} Once again the definition of what constitutes a "tender offer" rears its ugly head.\textsuperscript{295} The language of section 14(d)(1) does pertain to "any equity security"\textsuperscript{296} while the language of Section 13(e) refers to "any equity security issued."\textsuperscript{297} The legislative history of the act is equally ambiguous; it only deals with what portion of the tendered shares are to be taken,\textsuperscript{298} not the situation in which the corporation seeks to exclude a hostile tender offer pursuant to a valid exercise of business judgment.\textsuperscript{299} The equal price,\textsuperscript{300} withdrawal,\textsuperscript{301} and proration\textsuperscript{302} provisions are again aimed at adequate disclosure and are designed to provide adequate time and reduce the coercion present to those stockholders subject to the offer. There is no evidence that Congress sought to regulate or provide the means to regulate the initial class of tender offerees.

It therefore appears that the congressional intent in passing the securities laws and the case law interpreting this intent do not provide an adequate basis for the adoption of the All-holders rule—especially since the main thrust of the federal securities laws is to protect shareholders from coercion and uninformed decisionmaking by a process of full and fair disclosure.\textsuperscript{303}

C. Ramifications of the All-Holders Rule and the Ability of the States to Regulate the Corporate Family

Absent any new enunciation of congressional intent, the substantive rulemaking embraced by the All-holders rule is inappro-

\textsuperscript{293} See supra note 241 and accompanying text (SEC's contention that tender offers should extend to entire class of equity holders).

\textsuperscript{294} Sections 13(e), 14(d), and 14(e) of the Securities Exchange Act contain the tender offer disclosure requirements. See 15 U.S.C. §§ 78n(e), 78n(d), 78n(e).

\textsuperscript{295} See supra notes 184-222 and accompanying text.

\textsuperscript{296} 15 U.S.C. § 78n(d)(1).

\textsuperscript{297} Id. § 78n(e). See supra note 252 (text of § 13(e)(1) of the Security Exchange Act).


\textsuperscript{299} See id. at 2814. The legislative history noted that stock repurchases may be used to reduce the outstanding capital stock following a partial sale of assets, to have shares available for options, acquisitions or employee stock option plans or to boost the market price of the stock.

\textsuperscript{300} See 15 U.S.C. § 78n(d)(7) (Securities Exchange Act § 14(d)(7)).

\textsuperscript{301} See id. § 78n(d)(5) (Securities Exchange Act § 14(d)(5)).

\textsuperscript{302} See id. § 78n(d)(6) (Securities Exchange Act § 14(d)(6)).

\textsuperscript{303} See supra notes 266-77 and accompanying text.
The issue of whether the state or the federal government should govern the internal affairs of corporations seems to be well settled. The directors are the managers and final arbiters of the business affairs of the corporation, and this responsibility and duty is to be regulated by the state corporation laws.\textsuperscript{304} While the late Professor Cary's desire for a federal fiduciary law may seem attractive to some, the best interests of the national economy and the public at large are served by state standards dictating proper corporate governance.\textsuperscript{306} The states provide a unique atmosphere for the development of innovative concepts concerned not only with business planning but also corporate governance. The federal government has no monopoly on innovative thinking and has in fact been generally quite slow in adopting new principles concerning taxation, bank regulation and foreign trade policy. The states also are more attuned to the particular needs of the local business community they serve and regulate.\textsuperscript{307} A substantial number of United States corporations are small but aggressive firms that require capitalization from the national financial markets. Federal securities laws mandate disclosure of business practices as a way to minimize fraud and this is a reasonable tribute to be paid for access to such markets. The state laws, however, provide the bases for control and regulation of the internal affairs of the corporation itself.

The business judgment rule and state fiduciary concepts provide an adequate means by which shareholder interests are protected.\textsuperscript{308} This is especially true in situations where there is a threat posed to the corporate entity which requires a swift and decisive strategy to protect these interests. Because shareholders are the equitable owners

\textsuperscript{304} It is certainly possible that the \textit{Unocal} decision is so blatantly inequitable so as to prompt Congress into enacting some sort of federal corporation law. The author does not believe this to be the case. In any event, such a radical extension to the regulation of fiduciary duties is unwarranted absent the proper enactment of enabling legislation. See Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (when the will of the Congress is so clear there is no room to extend the scope of the statute).

\textsuperscript{305} See supra note 276 and accompanying text.

\textsuperscript{306} See supra notes 4-5 and accompanying text.

\textsuperscript{307} The states in adopting their own general corporation law may adopt a statute that is specifically designed to meet the particular needs of local industry. The Delaware statute, for instance, contains a special subsection regarding close corporations. See Del. Code Ann., tit. 8, §§ 341-56. See also Seidel, \textit{Close Corporation Law: Michigan, Delaware and the Model Act}, 11 Del. J. Corp. L. 383 (1985).

\textsuperscript{308} See supra note 275 and accompanying text (analysis of specific statutory provisions addressing points of law particular to close corporations).
of the corporation, their interests are paramount. Therefore, it is only where a shareholder takes a position hostile to the corporation that his interests are restricted. When a corporation is incorporated in a certain state, a presumption is created that the basis for relations between shareholders and prospective management is the product of bargained-for consideration.

Because the states have legitimate interests in attracting and providing for the businesses they seek, they have an interest in providing for those businesses in a manner most conducive for that business, provided there are no constitutional impediments. In fact, in the months that followed the promulgation of the All-holders rule, the SEC issued a Concept Release relating to tender offers which allows corporations, via shareholder vote, to opt out of the rule. This release recognizes that self-governance exemptions founded upon state law may yield "benefits that may not be as readily attainable under rules of general applicability," such as the federal securities laws. The operation of this exemption is to permit shareholders to authorize exclusionary self-tender offers by amending the corporate charter. It is too soon to tell of the impact, if any, of this generous exemption. The concept appears, however, to be an attempt by the SEC to vest discretion in the board of directors that was mandated by state law and was one which the board should have never lost.

309. See Medical Committee for Human Rights v. SEC, 432 F.2d 659, 681 (D.C. Cir. 1970); Saxon Indus., Inc. v. NKFW Partners, 488 A.2d 1298 (Del. 1984). See also In re J.P. Linahan, 111 F.2d 590 (2d Cir. 1940) (stockholders' right to hold an annual meeting during a bankruptcy proceeding for the election of directors will not be disturbed); In re Bush Terminal, 78 F.2d 662 (2d Cir. 1935) (stockholders are true owners of corporations and their rights must be maintained even in Chapter 11 reorganization).

310. Since each state statute is different in some respect, it is presumed when the corporation is incorporated that it undertakes to abide by the laws of that jurisdiction. New York, for example, has a codified "duty of care," see N.Y. Bus. Corp. L. § 717 (McKinney 1977); Norlin Corp. v. Rooney Pace, Inc., 744 F.2d 255 (2d Cir. 1984); Delaware, however, has no codified duty of care.

311. See CTS Corp., 107 S. Ct. at 1649. The supreme court in evaluating what is commonly referred to as the "Internal Affairs Doctrine" noted:

[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. . . . [T]he beneficial free market system depends at its core upon the fact that a corporation . . . is organized under, and governed by, the law of a single jurisdiction.

See also Edgar v. MITE, 457 U.S. 624 (1982).


314. Id. at 1192.
The All-holders rule and the substantive regulation it provides is an unnecessary burden and encroachment upon state corporation law which necessarily upsets the balance between the federal desire for full and adequate disclosure and the state desire for providing a favorable business climate for the corporations incorporated there.

IV. Conclusion

This review of the interaction between federal securities laws and state corporate law has shown that substantive regulation of tender offers is inappropriate where the basis of the regulation is an area traditionally relegated to state law. The situation in *Mesa Petroleum Co. v. Unocal Corp.*\(^{315}\) was an example of an instance where a board of directors acting in good faith and in a fully informed manner decided that the interests of the corporation would be best served by a selective self-tender offer. There seems to be no support within the federal securities laws to substitute the views of the SEC for the business judgment of a board of directors. Such a misguided application of the intent and the letter of the federal securities laws tends to retard rather than further the desires for an efficient and healthy business climate within the states and the nation as a whole.

*Mark A. Cleaves*

\(^{315}\) *315. 493 A.2d 946 (Del. 1985).*