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Andrew Volk

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Introduction

On July 11, 1989, Hoylake Investments Limited ("Hoylake") announced a hostile tender offer for British American Industries (BAT). Because BAT is a British corporation whose shares are sold on the London Stock Exchange, British regulations governed the Hoylake bid. Nevertheless, because BAT ultimately controlled insurance companies doing business in nine American states, Hoylake could not tender a bid without the approval of the insurance commissioners in the nine states. Whereas British regulations required the completion of a tender offer within a rigid time frame, the state regulations called for much lengthier proceedings. Thus, compliance with both British and American regulations was impossible. Consequently, the application of United States law seriously threatened the Hoylake offer.

Hoylake attacked the conflict on both sides of the Atlantic, seeking injunctions in all nine states to bar application of the statutes and appealing to the British Panel on Takeovers and Mergers (the "Take-
over Panel”). Each of the nine states denied Hoylake’s motion for a preliminary injunction, but the British Takeover Panel granted Hoylake an unprecedented waiver of the timetable.

This Note argues that the analysis employed by the U.S. courts in denying Hoylake relief from state insurance laws was overly simplistic in failing to consider Britain’s interest in regulating takeover battles involving primarily British companies. Although the McCarran-Ferguson Act authorizes states to regulate “the business of insurance,” its use to authorize regulation of a predominantly foreign takeover battle was highly questionable. If, instead of waiving the strict time limits, the Takeover Panel had approved Hoylake’s offer, the states would have been hard-pressed to enforce a contrary ruling on Hoylake’s proposed acquisition.

Section I of this Note presents the facts of the Hoylake tender offer and describes the interaction between the British City Code and the state insurance holding company statutes. Section I also discusses the U.S. district court decisions denying Hoylake injunctive relief. Section II then considers as an analogue U.S. antitrust law and the balancing test courts have used in tempering the application of that law to transactions occurring outside the U.S. Section III first critiques the district courts’ failure to consider the international interests at stake. Next, section III explores the possible repercussion of the decisions on future cases involving acquisitions with even less impact on the U.S. than in the Hoylake scenario and concludes that the application of U.S. insurance law in such cases would be both unreasonable and unenforceable. Section III then applies to the Hoylake facts the balancing test borrowed from antitrust law, which is also found in the Restatement of U.S. Foreign Relations Law (“Restatement”). Finally, section III considers possible legislative responses to the Hoylake problem. This Note concludes that, although application of U.S. law arguably was reasonable in the Hoylake context, the strict application of state insurance regulations is an unworkably simplistic solution to a complex problem of international law.

I. Background

This section sets the background of Hoylake’s tender offer for BAT and contrasts the British regulatory scheme for mergers with the U.S. state scheme for regulating insurance companies. The British Takeover

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9. Takeover Panel, supra note 3. On September 29, 1989, the decision was affirmed by the Panel. See The Times (London), Sept. 30, 1984, at 17, col. 4.
Panel ultimately compromised important policy concerns to prevent U.S. laws from killing a bid within Britain's jurisdiction. The U.S. district courts made no concession to the British policy interests at stake and authorized the states to apply their insurance laws to Hoylake's bid.

A. The Offer and the Players

BAT is a multinational conglomerate incorporated in Britain and doing business in ninety countries. Its assets, totaling 9.9 billion pounds, are concentrated in tobacco, paper, retailing, and finance. In 1988 alone BAT's earnings exceeded $28 billion. BAT's subsidiary in the U.S., owns Farmers Group, Inc. ("Farmers"), which controls three insurance exchanges doing business in the U.S. The profits from Farmers comprise but a minuscule portion of BAT's total earnings.

Sir James Goldsmith, along with Jacob Rothschild and Kerry Packer, created Hoylake for the purpose of acquiring BAT. The hostile tender offer of 13.9 billion pounds ($21 billion) would have netted BAT's shareholders $4 billion above the pre-offer value of the stock. The proposal thus became the largest tender offer made to date in Europe. The deal was also novel in British annals for its heavy leveraging. Because Hoylake's offer was partially financed with "junk bonds," British financial commentators criticized the proposal.

The chances of Hoylake making a successful tender offer were significantly weakened because of the collapse of Drexel, Burnham & Lambert and a growing global wariness of junk bonds. Hoylake, not surprisingly, restructured its offer to include mostly cash. Soon after the first of the nine state insurance commissioners denied Hoylake's bid, Hoylake completely abandoned its tender offer.

B. British Takeover Regulation

Because all of BAT's stock is traded on the London Stock Exchange, Britain's City Code on Takeovers and Mergers ("City Code") governed
the Hoylake bid.\textsuperscript{23} The Takeover Panel promulgates and administers the City Code.\textsuperscript{24} Although the City Code is not statutary and "has not, and does not seek to have, the force of law,"\textsuperscript{25} the Takeover Panel may exclude a firm from the securities markets in the United Kingdom for failure to comply with the City Code.\textsuperscript{26} Thus, although the City Code depends on voluntary compliance, the practical sanction available virtually guarantees such compliance.

The Takeover Panel acts as a quasi-judicial board, and in appropriate circumstances an Appeal Committee reviews its decisions.\textsuperscript{27} Ultimately the British courts may review decisions of the Takeover Panel.\textsuperscript{28} At the behest of the Secretary of Trade, the Government Monopolies and Mergers Commission may intervene at any point.\textsuperscript{29} The City Code exists to protect the interests of target companies' shareholders.\textsuperscript{30} The City Code, therefore, makes every effort to give the relevant decision-making power to shareholders.\textsuperscript{31} Among the "General Principles" prefacing the City Code: an offeror must treat all shareholders of the same class of a target company similarly; both offeror and target must provide sufficient information and advice to enable shareholders to reach a proper decision; and, after an offer has been made, the board of the target company may not make defensive maneuvers which might frustrate the offer or deprive the shareholders of the opportunity to decide on the merits of the offer without the consent of the shareholders.\textsuperscript{32} Thus, the shareholders' right to make an informed decision on the merits of the tender offer is of paramount importance under the City Code.

The ban on "frustrating actions" is central to the British regulatory scheme and its promotion of shareholder control. Target boards are prohibited from unilaterally instituting takeover defenses, a strategy

\begin{enumerate}
\item[23.] City Code, supra note 2, at A3.
\item[24.] The Takeover Panel includes members of the London Stock Exchange and the British banking, investment, and insurance industries. \textit{Id.} at A1. The Panel was created by the London Stock Exchange, the Bank of England, and private financial institutions. \textit{Id.}
\item[25.] \textit{Id.} at A2.
\item[27.] City Code, \textit{supra} note 2, at A5.
\item[29.] The Mergers and Monopolies Commission (MMC) polices proposed mergers and acquisitions to prevent the creation of monopolies that lessen competition within British markets. The MMC intervenes to investigate proposed deals when the Trade Secretary so demands. Unlike the Takeover Panel which administers the City Code, the MMC is a statutory body. See \textit{The Times} (London), Sept. 22, 1989, at 21, col. 8 (Trade Secretary refused to initiate an inquiry of the Hoylake bid because the proposal did not affect competition).
\item[30.] See generally DeMott, \textit{supra} note 26, at 959-65.
\item[32.] City Code, \textit{supra} note 2, at C1-2.
\end{enumerate}
which is commonplace in the U.S.\textsuperscript{33} Indeed, shareholders must accept or reject the tender offer on its merits.

Another policy of the City Code is to avoid drawn-out takeover battles which are destructive to the target company and detrimental to its shareholders. Because companies should concern themselves with production rather than legal maneuvering, the City Code establishes a rigid time frame and keeps the involvement of lawyers to a minimum.\textsuperscript{34} The announcement of a “firm intention” to make an offer commences a takeover bid.\textsuperscript{35} The offeror must mail an offer to the shareholders within twenty-eight days of this announcement.\textsuperscript{36} If the offeror does not achieve a fifty-one percent acceptance rate from the shareholders of the target company within sixty days of the mailing, the offer expires.\textsuperscript{37} An expired offer may not be renewed for twelve months.\textsuperscript{38} This rigid time frame further limits the options available to the target board, thus enhancing the value of the offer to the shareholders. Prior to the Takeover Panel’s BAT ruling, the Panel only granted exceptions to the twelve month mandatory lapse period under very limited circumstances.\textsuperscript{39}

In the Hoylake bid, the application of the U.S. insurance holding company statutes frustrated important British policies. Specifically, those statutes diluted the shareholders’ decision-making authority and precluded a quick resolution of the tender offer. Because the state insurance commissioners delayed ruling on Hoylake’s offer, BAT was able to engage in precisely the defensive maneuvering prohibited by the City Code. If any state commissioner denied Hoylake approval of its offer, the BAT shareholders would never have had the chance to decide upon the offer on its merits. Even if all nine states had eventually approved the offer, BAT’s frustrating actions may still have deprived its shareholders of the opportunity to review the offer on its merits. In order to maintain some control over its own regulatory system, the British Takeover Panel was forced to waive the twelve month lapse period,

\begin{itemize}
  \item \textsuperscript{33} For example, a target board in Britain may not implement a “poison pill,” recapitalize, or sell off the firm’s assets without the approval of its shareholders. Epstein, \textit{supra} note 31, at 46.
  \item \textsuperscript{34} See, e.g., \textit{Crv Code}, \textit{supra} note 2, at A6 (it is not the Panel’s normal practice to allow full representation by legal advocates); see also \textit{id}. at A3.
  \item \textsuperscript{35} \textit{Id}. at D6 (Rule 2.5).
  \item \textsuperscript{36} \textit{Id}. at M1 (Rule 30), F10 (Rule 9.3(a)).
  \item \textsuperscript{37} \textit{Id}. at M4 (Rule 31.6).
  \item \textsuperscript{38} \textit{Id}. at N1 (Rule 35.1).
  \item \textsuperscript{39} Dispensation of the 12-month freeze period will be granted when: (a) The new offer is recommended by the board of the offeree company . . .; or (b) the new offer follows the announcement of an offer by a third party for the offeree company; or (c) the previous offer lapsed on a reference to the Monopolies and Mergers Commission and the new offer follows the giving of clearance. Any such offer must normally be announced within 21 days after the announcement of such clearance.
\end{itemize}

\textit{Id}.
thus compromising the time frame so crucial to its regulatory regime.\textsuperscript{40} As a result, the application of U.S. insurance law completely frustrated British regulatory concerns.

C. The McCarran-Ferguson Act and the State Insurance Holding Company Statutes

In 1945, Congress passed the McCarran-Ferguson Act (the "Act")\textsuperscript{41} which declares that state regulation of insurance is in the public interest.\textsuperscript{42} Further, the Act provides in relevant part:

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.\textsuperscript{43}

In interpreting this Act, the Supreme Court set out a broad test for determining what qualifies as "the business of insurance" in \textit{S.E.C. v. National Securities}.\textsuperscript{44} The Act authorizes states to regulate "activities of insurance companies [that] relate so closely to their status as reliable insurers that they . . . must be placed in the same class [as the business of insurance]."\textsuperscript{45} Under this test, the Court has held the fixing of rates,\textsuperscript{46} the sale and advertising of policies,\textsuperscript{47} and the licensing of companies and their agents\textsuperscript{48} all to be the "business of insurance." In construing the Act broadly, the Court has authorized a wide range of state regulations.

\textsuperscript{40} See Epstein, \textit{supra} note 31, at 46. "As a result of the B.A.T. decision, foreign takeover battles will still be fought in U.S. courts and regulatory agencies, but they are less likely to be decided here." \textit{Id.}

\textsuperscript{41} 15 U.S.C. §§ 1011-15 (1988). The Act was passed in response to United States v. South-Eastern Underwriters Assoc., 322 U.S. 533 (1944), in which the court held that insurance transactions were commerce for purposes of the federal commerce clause, thus removing from the several states regulatory power over the insurance industry. \textit{See U.S. Const. art. I, § 8, cl. 3. South-Eastern Underwriters} reversed \textit{Paul v. Virginia}, 8 Wall. 168 (1868), in which the court had held that "[i]ssuing a policy of insurance is not a transaction of commerce." \textit{Id.} at 183.

\textsuperscript{42} The Act states:

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.


\textsuperscript{43} \textit{Id.} at § 1012.

\textsuperscript{44} \textit{SEC v. National Sec.}, 393 U.S. 453 (1969).

\textsuperscript{45} \textit{Id.} at 460.

\textsuperscript{46} \textit{Id.}


\textsuperscript{48} \textit{Robertson v. California}, 328 U.S. 440 (1946).
In *National Securities*, the Supreme Court also indicated that the McCarran-Ferguson Act authorized regulation of a merger involving insurance companies. Addressing an Arizona regulation, the Court noted that the statute "requires the State Director of Insurance to find that the proposed merger would not 'substantially reduce the security of and service to be rendered to policyholders' before he gives his approval. This section of the statute clearly relates to the business of insurance." The Court, therefore, implicitly recognized that mergers may result in the liquidation or underfinancing of the insurer. Either result would jeopardize the position of policyholders. Thus the McCarran-Ferguson Act, as a matter of federalism, authorizes state regulation of mergers involving insurance companies to protect the policyholders' interests.

1. *State Insurance Holding Company Statutes*

All fifty states promulgated insurance holding company statutes in the 1960s, when "insurance companies joined general business corporations in a move toward increased mergers and formation of holding companies." The nine states involved in the Hoylake bid, like most states, base their insurance holding company legislation upon the National Association of Insurance Commissioners' Model Laws, Regulations and Guidelines. The state statutes typically prohibit the formation or expansion of insurance holding companies unless authorized by the Commissioner after a hearing. They also list standards for the Commissioner to apply when considering a petition for the formation of an insurance holding company and grant the Commissioner authority to block mergers or consolidations of insurance holding companies. As interpreted by the Court in *National Securities*, the McCarran-Ferguson Act clearly shields this type of state legislation from attack under the federal commerce clause when the legislation is applied to protect the interests of policyholders.

49. *National Securities*, 393 U.S. at 46 (quoting ARIZ. REV. STAT. ANN. § 20-73183 (Supp. 1969)). The *National Securities* Court held the statute invalid, however, insofar as it purported to protect state shareholder interests: "[T]his is not insurance regulation, but securities regulation." Id at 460.

50. Amicus Brief for the National Association of Insurance Commissioners at 3, Hoylake Inv. Ltd. v. Washburn, 723 F. Supp. 42 (N.D. Ill. 1989) (No. 89-C-5822) [hereinafter N.A.I.C. Brief] (citing I NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (NAIC) PROCEEDINGS 176 (1969)). An "insurance holding company" is typically defined as consisting of "two or more affiliated [juridical] persons, one or more of which is an insurer." KAN. STAT. ANN. § 40-3302(d) (1985). "Person" is defined in the same statute as "an individual, corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert..." Id. at § 40-3302(l).


52. N.A.I.C. Brief, *supra* note 50, at 5.
The Illinois insurance holding company statute is substantially similar to the other statutes involved in the Hoylake bid.\textsuperscript{53} It requires that the Insurance Commissioner disapprove proposed acquisitions of Illinois insurance holding companies, whether direct or indirect, unless the Commissioner finds that:

(a) the proposed entity will satisfy state insurance licensing requirements;
(b) the acquisition will not tend to create a monopoly;
(c) the acquiring party is financially stable;
(d) the acquiring entity's plans for the local insurance company are "fair and reasonable" to the policyholders; or
(e) the competence of those who would control the state insurance company is such that the acquisition "would be in the best interests of the policyholders of such company. . . .\textsuperscript{54}

Persons who make a tender offer for an Illinois insurance holding company without prior approval by the Commissioner face both civil and criminal sanctions.\textsuperscript{55}

Under the Illinois Act, the offeror must file a "Form A" with the Commissioner, together with the tender offer materials, prior to sending any information to shareholders of the target company.\textsuperscript{56} "Form A" requires information detailing the proposed transaction and the resultant status of the insurance company.\textsuperscript{57} The Commissioner reviews the documents and may request additional information.\textsuperscript{58} The Commissioner can convene a hearing if the offer fails to comply with the statutory standards or will "adversely affect policyholders or the [insurance buying] public."\textsuperscript{59} Any party unsatisfied with the Commissioner's decision may petition for judicial review.\textsuperscript{60}

2. Administration of State Insurance Holding Company Statutes

The 1988 acquisition of Farmers by BAT reveals the cumbersome application of the insurance holding company statutes in Illinois and the other states involved in the Hoylake bid. In each state, Farmers opposed the acquisition.\textsuperscript{61} In some states, the Commissioners required lengthy additional filings. For example, the process was prolonged by 67 days in Idaho and 112 days in Texas.\textsuperscript{62} In three other states, hearings were delayed for at least four months.\textsuperscript{63} Once the hearings were

\textsuperscript{53} For simplicity, this section discusses the Illinois statute. Though each state statute has variations, their operation is substantially similar. See statutes cited \textit{supra} note 51.
\textsuperscript{54} \textsc{Ill. Ann. Stat.} ch.73, para. 743.8 (1988).
\textsuperscript{55} \textit{Id.} at para. 743.11.
\textsuperscript{56} \textit{Id.} at para. 743.4.
\textsuperscript{57} \textit{Id.} at para. 743.5.
\textsuperscript{58} \textsc{Ill. Ins. Reg.} § 851.40 (1988).
\textsuperscript{59} \textsc{Ill. Ann. Stat.} ch. 73, para. 743.8(2) (1988).
\textsuperscript{60} \textit{Id.} at para. 131.27.
\textsuperscript{61} Hoylake Brief, \textit{supra} note 12, at 14.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.}
under way, they varied in length from five to fifty days and generated thousands of transcript pages. Not surprisingly, by the time four of the nine states disapproved of the merger proposal, 106 to 152 days had elapsed since the “Form A” filings. Eventually, BAT and Farmers agreed to mutually favorable terms and refocused their efforts toward reversing the state disapprovals. Ultimately each of the disapproving states reversed its position, with the last approval coming some nine months after the initial “Form A” filings. Thus, the application of the insurance holding company statutes to the successful acquisition of Farmers was time-consuming, onerous, and inconsistent.

D. Hoylake’s Actions in the Federal Courts and the Ruling of the British Takeover Panel

Prior to the British Takeover Panel’s ruling, Hoylake brought actions in each of the nine states to enjoin application of the insurance holding company statutes to its tender offer for BAT. The federal courts in those states each denied Hoylake’s motions. While those motions were pending, however, the Takeover Panel surprisingly waived the twelve month lapse period, which somewhat mitigated the conflict between the U.S. and British regulatory systems.

1. Hoylake’s Arguments in the District Courts

In support of its motions for preliminary injunction in the district courts, Hoylake argued that the state statutes at issue were unconstitutional under the federal and foreign commerce clauses insofar as they purported to regulate foreign tender offers and thus unduly burden foreign commerce. Hoylake contended that the McCarran-Ferguson Act did not authorize states to block tender offers made in foreign securities markets. Hoylake also argued that the states had adequate post-acquisition statutory powers to ensure the integrity of Farmers after Hoylake assumed control; it was therefore unnecessary to derail Hoylake’s bid by applying the state statutes.

64. Id.

65. Id.

66. Id.

67. Id. at 15. State Commissioners often aid the defense of a hostile takeover by withholding approval until an offer is accepted. Not surprisingly, this practice has been criticized. Ultimately, BAT acquired Farmers in a deal not governed by the City Code, because Farmers’ shares were sold on the U.S. Stock Exchange.

68. Only three of the opinions have been published. See supra note 8.

69. Hoylake Brief, supra note 12, at 22. The commerce clause provides that “Congress shall have Power...[t]o regulate Commerce with foreign Nations...” U.S. Const. art. I, § 8, cl. 3. See also Hoylake Brief, supra note 12, at 21-27.

70. Hoylake Brief, supra note 12, at 29-32. Hoylake also alleged that the state statutes violated the due process clause of the fifth amendment by attempting to prohibit contracts for the purchase of BAT securities entered entirely outside of the state borders. Id. at 32-24.

71. Id. at 25-26 (arguing that the Insurance Director of Illinois has statutory power—for example, the ability to issue cease-and-desist orders—adequate to police
2. The District Courts' Rulings

The federal district court in each of the nine states ruled against Hoylake. By applying the broad *National Securities* test, the courts found the merger to be so closely related to the integrity of the insurance companies as to be part of the "business of insurance." The courts thus held that the McCarran-Ferguson Act exempted the state insurance statutes from commerce clause attack.

The courts also rejected the argument that the McCarran-Ferguson Act does not authorize a state to regulate extraterritorial activities. The courts stated that concerns of extraterritoriality did not apply because the regulated insurance companies were within the territories of the respective states. The courts thereby skirted Hoylake's argument that the extraterritorial regulation of British takeover battles was unconstitutional, and avoided any real consideration of the international interests.

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post-acquisition changes in the insurance holding company without blocking the tender offer).

72. Because only three of the decisions are available, see supra notes 8 and 67, the discussion is necessarily restricted to these three decisions.

73. The Court in *National Securities* stated in dicta that statutes regulating mergers for the purpose of protecting policyholders' interests affected "the business of insurance" and were therefore authorized by the McCarran-Ferguson Act. The test of *National Securities* is whether the "[state-regulated] activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class . . . ." *National Securities*, 393 U.S. at 460. See also supra notes 44-45 and accompanying text.

74. The courts rejected Hoylake's contention that the *Pireno* test should apply. In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), the Court established a restrictive test for determining what constitutes the "business of insurance." Business practices encompassed by this definition were to be exempt from antitrust laws pursuant to 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The Court articulated three criteria: "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Id.* at 129.

Two of the district courts which considered Hoylake's motions held that the *Pireno* test only applied when the limited protection of § 2(b) is at issue and when federal antitrust statutes are involved. *Washburn*, 723 F. Supp. at 46; and *Bell*, 723 F. Supp. at 579. Although this holding seems plausible given the structure of the Act and the fact that the *Pireno* Court made no mention of overruling *National Securities*, the third district court held that even under *Pireno's* restrictive test, the insurance holding company statute "relates to the spreading and underwriting of risks, for the [insurance commissioner's] review assures that Farmers, or any domestic insurance company, remains a reliable insurer." *Gallinger*, 722 F. Supp. at 577.


76. "[T]he Illinois Act does not purport to regulate the extraterritorial activities of its insurance companies." *Washburn*, 723 F. Supp. at 47. "The Kansas Act regulates domestic insurers and entities that own Kansas insurance companies. Thus, the act cannot be characterized as one regulating commerce 'wholly outside its borders.'" *Bell*, 723 F. Supp. at 580 (citing Edgar v. Mite Corp., 457 U.S. 624, 642-43. "[W]hile it is true that the Act will have some extraterritorial effect outside of Arizona, that effect is indirect and collateral to the more limited purpose of protecting insurance policy holders in the State of Arizona." *Gallinger*, 722 F. Supp. at 578.
The district courts further held that even if the state statutes were not authorized by the McCarran-Ferguson Act, they fully comported with the Supreme Court's ruling in *CTS Corporation v. Dynamics Corporation of America*.

In *CTS*, the Court upheld an Indiana takeover regulation that "pose[d] no threat of inconsistent regulation" because it only applied to target corporations domiciled in Indiana. The courts considering Hoylake's motions found the *CTS* reasoning controlling because state regulation of a merger involving local corporations was involved. The district courts either refuted or ignored Hoylake's argument that the threat of inconsistent regulation was present due to inconsistencies between the British City Code and the state statutes. The courts likewise failed to differentiate between statutes regulating domestic mergers and those regulating a foreign securities transaction.

The district courts summarily dismissed Hoylake's contention that the state statutes unconstitutionally encroached on the federal government's control over foreign affairs pursuant to the "foreign commerce clause." The courts saw no British laws or policies which might be infringed by the state regulatory processes. Further, the courts failed to address Hoylake's argument that their rulings enhanced the risk of multiple regulation. Again, the courts considered the state statutes without regard to the conflicting British regulatory scheme. Because the courts found that no British policies were implicated, they considered it unnecessary to apply the second prong of the *Japan Line* holding requiring the regulation of foreign commerce to receive heightened scrutiny because the foreign commerce clause dictates that the U.S. speak "with

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77. In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), the Supreme Court upheld an Indiana statute prohibiting raiders from acquiring voting rights in target companies without the approval of the target's shareholders. The Court held that the Indiana statute was within the state's "authority to regulate domestic corporations" because the Indiana statute did not "prohibit any entity—resident or non-resident—from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporation's shareholders." *Id.* at 93. *See also Bell*, 723 F. Supp. at 579; *Washburn*, 723 F. Supp. at 47; *Gallinger*, 722 F. Supp. at 578.

78. *CTS Corp.*, 481 U.S. at 88.

79. *See Washburn*, 723 F. Supp. at 47 (no threat of inconsistent regulation). The other opinions make no mention of the argument.

80. *See Hoylake Brief, supra note 12.*

81. *See Bell*, 723 F. Supp. at 581 (Kansas not trying to express any foreign policy or to encroach on the laws of affairs with foreign governments); *Washburn*, 723 F. Supp. at 49 (policies of foreign governments not at issue in the Illinois regulatory process); *Gallinger*, 722 F. Supp. at 578.

82. This argument relied upon *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). In *Japan Line*, the Court voided the application of California's *ad valorem* property tax to foreign-owned cargo shipping containers used in foreign commerce as violative of the foreign commerce clause. The Court held that because the containers were already being taxed by Japan, "a state tax, even though 'fairly apportioned' to reflect an instrumentality's presence within the State, may subject foreign commerce to the risk of a double tax burden . . . which the [foreign] commerce clause forbids." *Id.* at 448.
one voice when regulating commercial relations with foreign governments. In ruling on Hoylake's motions, the courts did not consider whether this need to "speak with one voice" might be thwarted when nine different states effectively block a British bid that complies fully with British takeover regulations.

Thus the courts collectively failed to adequately consider the international implications involved in their decisions. Whatever the courts thought of the British interests in regulating takeovers occurring within the British securities market, or of the U.S. interests in the uniform regulation of foreign takeovers having domestic impact, such interests carried no weight in the courts' deliberations.

3. The British Takeover Panel's Ruling

Concurrently with its actions in the U.S. courts, Hoylake sought two separate remedies from the British Takeover Panel. First, it sought to bar BAT from participating in the U.S. regulatory proceedings, alleging that participation without the consent of BAT shareholders violated the City Code's prohibition on "frustrating action." BAT's use of the state regulatory process in an effort to defeat Hoylake's offer appeared to be frustrating action in light of previous Takeover Panel decisions. Had the Takeover Panel proscribed BAT's involvement in the regulatory process, Hoylake might have hastened the state regulatory process and kept its offer alive.

The Takeover Panel, however, concluded that none of BAT's multifarious activities—lobbying, intervention in district court litigation, and participation in state regulatory proceedings—constituted frustrating action under the City Code. Because BAT did not institute the district court litigation and its actions were "designed to uphold the jurisdiction of the regulators," the Takeover Panel found no violation in BAT's involvement in the district court proceedings. Similarly, the Panel distinguished BAT's intervention in the state regulatory proceedings from intervention in litigation. The basis of this distinction was

83. Id. at 451 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).
84. BAT intervened in the state regulatory proceedings to persuade the Insurance Commissioners to rule against Hoylake. Takeover Panel, supra note 3, at 14-15.
85. See supra note 33 and accompanying text.
86. The Takeover Panel had recently proscribed a target company's involvement in antitrust litigation in the U.S. as frustrating action. Decision of the Panel on Takeovers and Mergers, Consolidated Gold Fields p.l.c. (May 9, 1989). See also Epstein, supra note 31, at 44.
87. BAT intervened as a defendant in the Hoylake actions in the U.S. courts. See Epstein, supra note 31, at 41.
88. See id. at 46 (arguing that it is impossible to reconcile this decision with the Takeover Panel's ruling in Consolidated Gold Fields that seeking an injunction in U.S. courts constituted frustrating action and was proscribed by the City Code).
89. Takeover Panel, supra note 3, at 15.
90. In an earlier ruling, the Panel had proscribed the institution of litigation as frustrating action. See Epstein, supra note 31, at 44.
that the regulatory agency, and not BAT, instituted the proceedings.91 The Panel dismissed Hoylake's argument that lobbying U.S. insurance commissioners and congressmen constituted frustrating action on the ground that such lobbying often takes place in Britain during takeover battles.92 The Panel thus somewhat apprehensively permitted BAT to continue its "wide ranging and thorough" efforts to block the offer in the U.S.93

Hoylake also sought relief from the twelve month lapse period dictated by the City Code.94 Surprisingly, the Takeover Panel granted this relief.95 The Takeover Panel accepted Hoylake's argument that unless the Panel relaxed the twelve month prohibition on renewal of lapsed offers, the "ability of the [City Code] to provide a sensible framework for offers . . . for multinational companies, could be called into question and certain companies rendered bid proof by the interaction of the Code and the foreign regulatory system."96 Thus, the Takeover Panel ruled that Hoylake would have twenty-one days from the end of the regulatory process in the U.S. in which to renew its bid.

The Takeover Panel was forced to relax the time frame of the City Code to prevent the U.S. regulatory proceedings from blocking the bid. The Panel emphasized that its main concern was to give the shareholders a chance to evaluate Hoylake's offer.97 The Takeover Panel regretted the "undesirable" uncertainty wreaked upon the management of

92. The Takeover Panel stated that lobbying is also common in Britain. It is not a very direct way of obstructing an offer, and since it is possible for the bidder to engage in counter lobbying, the effect of the process is simply to enable one of the public interest decision takers [sic] to have presented to them both sides of the argument.
Id. at 12.
93. Id. at 13. The Panel twice cautioned BAT against escalating its involvement in the U.S. It stated: "BAT should, however, . . . act in [the state regulatory] proceedings in such a way as to avoid a charge of frustration." Id. at 14. "[I]f this litigation continues, however, BAT should consider its future involvement very carefully with regard to [the] General Principle [prohibiting frustrating action]." Id. at 15.
94. Id.
95. See Epstein, supra note 31, at 46.
96. Takeover Panel, supra note 3, at 17. The Takeover Panel also compared the American state regulatory process with the British MMC, which investigates potential mergers if the government has concerns about the possible formation of monopolies. See supra note 30. Once an investigation commences, the offer lapses. The City Code provides, however, that the offer may be renewed within 21 days after the termination of the investigation. Takeover Panel, supra note 3, at 22. The same argument was made to no avail in the Consolidated Gold Fields hearing. Epstein, supra note 31, at 44.
97. The Panel states:
[T]he central consideration must be that the effect of the US regulatory process means that shareholders will not have an opportunity of considering an offer from Hoylake free from regulatory consents and within the [City] Code timescale . . . . [Thus] our principal function is to see that shareholders are dealt with fairly.
Takeover Panel, supra note 3, at 22.
BAT as a result of its ruling, but indicated that it was willing to compromise this concern to maintain some shareholder control over the takeover process.

The Takeover Panel’s ruling mitigated the conflict with the U.S. regulatory system, but it did so at the expense of policies central to the City Code. The City Code prohibits frustrating actions while an offer is pending, but after the Panel’s ruling, BAT was free to engage in such actions during the lapse period. The value of the deal to the shareholders could have diminished greatly because of the extra maneuvering time. For example, during this time the target company might have sold off valuable assets to render itself unattractive to the offeror. In such a scenario, the target shareholders would lose the chance to accept a potentially beneficial offer, as well as the long-term value of their investment. Such activity, although common in the U.S., is proscribed by the British regulatory system. Likewise, the uncertainty wrought by the Panel’s ruling forced BAT to focus more on defensive posturing than on production, again hurting its shareholders. In short, application of the U.S. regulations forced the Takeover Panel to proverbially bite off its hand to save its arm.

4. The Effect of The District Court Decisions on the Hoylake Bid

As a result of the district court rulings denying Hoylake relief from the application of the state insurance holding company statutes, nearly all of the state regulatory proceedings were still pending when the offer was finally withdrawn. Prior to the withdrawal, BAT actively restructured itself in an effort to fend off the bid. The opportunity for a successful takeover was substantially diminished, although Hoylake’s immense financial resources kept some hope of a tender offer alive. But as BAT restructured itself and strengthened management control over a shrinking corporation, the Hoylake offer became economically infeasible.

Moreover, the tenor of the district court rulings appears to foreshadow the strict application of state takeover laws regardless of their impact on U.S. policyholders. If eight states approved Hoylake’s proposal, but one disapproved it, according to the district courts’ reasoning, that one state could effectively block the entire deal. A decision by eight states that Hoylake’s plans for Farmers were generally sound would

98. Id.
99. See id. at 22-23.
100. See supra note 33 and accompanying text.
101. See id.
102. See supra notes 34-40 and accompanying text.
103. See Hoylake Abandons BAT Bid, supra note 22, at 1, col. 1 (the California insurance department ruled against Hoylake’s application approximately two weeks before Hoylake withdrew its bid).
104. See supra note 10.
106. See id.
indicate the security of policyholders' interests under Hoylake's stewardship. The ninth state's disapproval, therefore, could only appear arbitrary and would likely provoke an unfavorable response from the British government.

Regardless of whether the extraterritorial application of insurance holding company statutes can survive constitutional challenge,\(^1\) the international concerns, as a practical and diplomatic matter, cannot be overlooked. When two or more nations have conflicting policy concerns and regulatory systems, compromise is necessary to promote the smooth and orderly conduct of international affairs. The Takeover Panel's acquiescence made the task of the district courts easier.\(^1\) These courts further simplified their decisions by disregarding British policy concerns. But the issue of when and how the courts should consider foreign policy interests, which may be jeopardized by the extraterritorial effects of U.S. law, remains.


Because the extraterritorial application of U.S. state legislation to impede or block foreign mergers is an undeveloped area of law, this section looks at the extraterritorial application of U.S. antitrust law as an analogue to elucidate possible approaches to the merger problem. U.S. antitrust law has often been applied to block the formation of foreign cartels which sell goods in the U.S. when such arrangements would potentially lessen competition in domestic markets. Because firms often enter foreign cartels in full compliance with foreign regulations which may conflict with U.S. regulations,\(^2\) courts must determine which nation's rules should govern. As in the Hoylake scenario, sensitive issues involving the sovereign power of foreign nations accompany determinations of the applicability of U.S. antitrust law. In the antitrust area, U.S. courts have developed a body of case law that could address the concerns present in international takeovers. Therefore, the extraterritorial application of U.S. antitrust law provides a useful analogue for analysis of the Hoylake situation.\(^3\)

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107. See supra notes 81-83 and accompanying text. A more extensive analysis of the constitutionality of the state insurance company holding statutes is beyond the scope of this Note.

108. See supra text accompanying notes 94-100.

109. Unlike the situation in Hoylake, conflicts in antitrust cases are often "false" in that compliance with both schemes, given the broad scope of the U.S. interest and the negligible foreign interest, is both possible and not unduly burdensome to the foreign entity. See, e.g., Note, The Use of Interest Analysis in the Extraterritorial Application of United States Antitrust Law, 16 CORNELL INT'L L.J. 147, 180-82 (1983) (presenting an example of a false conflict in the antitrust area).

110. As a preliminary matter, the U.S. antitrust statutes, unlike the McCarran-Ferguson Act or state statutes created in its wake, exhibit a specific intent to regulate foreign commerce. The Sherman Act, the foundational antitrust statute, states in section one that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . with foreign nations, is declared to
The same concerns which underlie cases in the international antitrust context are present when state courts apply their laws to predominately foreign mergers and acquisitions. When compliance with both foreign and domestic law proves impossible, U.S. courts must decide which law shall govern. With an eye toward international relations, courts must decide whether protecting a recognized interest is worth engendering friction with a foreign state by applying U.S. law. Whether the U.S. can effectively enforce its law against the foreign persons or entities involved presents a further, practical question. The foreign country is unlikely to aid enforcement if it believes the U.S. is infringing upon its sovereignty. Such are the concerns domestic courts typically address when determining whether U.S. antitrust law should block transactions occurring beyond U.S. borders.

In United States v. ALCOA, a landmark antitrust case involving U.S. jurisdiction over foreign transactions, Learned Hand, writing for a special appellate panel of last resort, introduced as a broad basis of jurisdiction the “effects doctrine.” Aluminum Limited, a Canadian company, allegedly conspired with several European companies to limit their production of aluminum and to fix prices. Hand considered what role international law might play in his decision—“as a Court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers . . . .” Hand nevertheless went beyond the customary bases of jurisdiction when he proposed that “it is

be illegal.” 15 U.S.C. § 1 (1976). As a conscious use by Congress of its powers under the foreign commerce clause, the Sherman Act is immune from constitutional attack as a matter of U.S. law. By negative implication, and application of the reasoning of Japan Line, the state insurance statutes are on shaky ground when used to impede or block a British tender offer that complies with the laws of Britain.

111. See infra notes 162-64 and accompanying text.
112. United States v. ALCOA, 148 F.2d 416 (2d Cir. 1945).
113. This panel was set up because the Supreme Court could not achieve a quorum with judges who did not have a conflict of interest in the case. ALCOA thus has the force of a Supreme Court decision. See 15 U.S.C. § 29 (1976); see also United States v. Aluminum Co. of America, 322 U.S. 716 (1944).
114. ALCOA, 148 F.2d at 416. Prior to ALCOA, the standard derived from American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), was far more restrictive. In American Banana, Justice Holmes for the Court declined jurisdiction over a dispute involving an alleged conspiracy between United Fruit and the Costa Rican Government to monopolize the trade of bananas in the U.S. Holmes stated:

For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned might resent.

Id. at 356. Holmes also rested the Court’s holding on the independent ground that “[a]ll legislation is prima facie territorial,” and therefore, the Sherman Act could not apply to the activities of foreign entities. Id. at 357 (quoting Ex parte Blain, In re Sawers, 12 Ch. D. 522, 528 (1879)).
115. ALCOA, 148 F.2d at 442.
116. Id. at 443.
settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."117 The effects doctrine thus stands for the proposition that U.S. courts have jurisdiction over anticompetitive agreements entered into by foreigners abroad, provided that substantial effects on U.S. commerce are foreseeable from the nature of the agreement.118 Despite the weak precedential basis for the effects doctrine, and despite the fact that the doctrine contravened international law, the effects doctrine quickly became established law in the U.S.119

Because international cartels frequently involve American companies, pure application of the effects doctrine—to cartels involving solely foreign entities—proved quite rare.120 Courts in the U.S. have, however, used the effects doctrine to apply U.S. antitrust law in contravention of important policies of foreign nations. Indeed, the effects doctrine has led to virtually uniform application of U.S. antitrust law.121 Not surprisingly, the effects doctrine produced widespread international criticism of the growing reach of U.S. law.122

Commentators have criticized the broad application of U.S. antitrust law under the effects doctrine because "[i]t conflicts with the regu-

119. Id.
120. Id. at 63.
121. The application of U.S. law under the effects doctrine is quite rigorous in that any case which raises a colorable claim will have some effect on U.S. markets.
122. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). Zenith's complaint alleged, inter alia, that its sales of electronic equipment in Canada were hindered by the refusal of Hazeltine to grant licenses from a Canadian patent pool. The Canadian Government had encouraged the creation of the pool for the purpose of granting licenses to those who agreed to manufacture equipment for the Canadian market and refusing licenses to companies, like Zenith, who refused to do so. The Supreme Court's decision, awarding Zenith treble damages, was criticized by international commentators along the following lines:

In neither litigation [Hazeltine and a similar action] did the court seriously consider the possibility that Canadian policy interests in not having US Antitrust law enforced so as to undercut Canadian policy in Canadian markets, should at least be weighed against US interests in promoting export opportunities for US businesses selling to Canada.

W. Knighton & D. Rosenthal, National Laws and International Commerce 31 (1982). See also United States v. Watchmakers of Switz. Information Center Inc., 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962). In Watchmakers, the court employed the effects doctrine to exercise jurisdiction over an alleged Swiss and American conspiracy to create a monopoly in the U.S. watch market. The court's decree—purporting to require changes in the Swiss industry's arrangement in Switzerland—was later substantially modified in the wake of diplomatic protests by the Swiss Government. See A.D. Neale & M.L. Stephens, supra note 119, at 67.
lation by other nations of their domestic economies" and blocks foreign firms from entering U.S. markets. In a global economy where transactions necessarily cross national boundaries, a measure of compromise by the U.S. is necessary to ensure stable relationships with its many transnational trading partners. Conflicts with foreign economic regulations, exclusion of foreign firms from U.S. markets, and threats to foreign relationships are similarly present when states apply insurance legislation to block predominately foreign takeovers conducted in compliance with foreign regulatory schemes.

Extraterritorial application of U.S. antitrust law through the effects doctrine has also prompted some countries to institute blocking legislation. Such legislation, also termed "clawback" legislation, attempts to block U.S. jurisdiction over foreign corporations by preventing discovery and denying foreign enforcement of U.S. judgments. In short, the long reach of U.S. antitrust legislation has provoked considerable foreign resentment and damaged U.S. international trading relationships. Application of state insurance company holding laws to predominately foreign mergers could provoke similar resentment and further damage U.S. international trading relationships.

In response to these developments, the Ninth Circuit articulated a new approach in Timberlane Lumber Co. v. Bank of America. Timberlane involved two American companies and an action for damages under the Sherman Act. Judge Choy set out a three-part test for determining the reasonableness of asserting U.S. jurisdiction, stating that "[a]n effect on United States commerce, although necessary to the exercise of jurisdiction, . . . is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness." Preliminarily, there must be some "effect" on American commerce. Next, the effect must be "sufficiently large" to cause a cognizable violation under the antitrust law. Finally, the court must decide whether the alleged violation's effect on American interests is great enough in comparison to the foreign nation's interests.

123. Note, supra note 111, at 148.
125. Among the nations to impose blocking legislation are Britain, France, Germany, Italy, Belgium, Canada, Australia, and South Africa. See Pettit & Styles, supra note 126; see also Note, Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law, 81 Colum. L. Rev. 1097 (1981).
126. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1977).
127. Timberlane, 549 F.2d at 613. "Comity" has been defined by the Supreme Court as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience . . . ." Hilton v. Guyot, 159 U.S. 113, 164 (1895).
to warrant the application of U.S. law.\textsuperscript{128}

Judge Choy then presented a non-exclusive list of factors for consideration under the third prong:

1) The degree of conflict with foreign law or policy,
2) the nationality or allegiance of the parties and the location or principal places of business of corporations,
3) the extent to which enforcement by either state can be expected to achieve compliance,
4) the relative significance of effects in the U.S. as compared with those elsewhere,
5) the extent to which there is explicit purpose to harm or affect U.S. commerce,
6) the foreseeability of such effect, and
7) the relative importance to the violation charged of conduct within the U.S. as compared with conduct abroad.\textsuperscript{129}

Judge Choy enumerated the factors in this third prong to force courts to look at the conflicts with foreign regulatory schemes that might be created by the application of U.S. law. Only after such consideration can courts responsibly determine whether the U.S. interests are great enough to justify extraterritorial application of U.S. law.\textsuperscript{130}

Critics of \textit{Timberlane} contend that the balancing test is impossible to apply. For example Judge Wilkey of the D.C. Circuit, a prominent U.S. critic, wrote that because of the difficulty of assessing foreign interests, "[w]hen there is any doubt, [domestic] interests will tend to be favored over foreign interests."\textsuperscript{131} Such criticism, echoed by British commentators,\textsuperscript{132} essentially views the balancing test as outcome determinative in that domestic courts will always be able to apply U.S. law. If the balance in fact led to the consistent application of U.S. law, then the \textit{Timberlane} test would be a mere exercise in form, devoid of substantive purpose

\footnotesize
\textsuperscript{128} \textit{Timberlane}, 549 F.2d at 613.
\textsuperscript{129} \textit{Id.} at 614.

\textsuperscript{131} Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) (Wilkey, J.). Wilkey later wrote:

It is unrealistic to expect courts of the United States, or for that matter, of any country to carry out an evaluation of the interest which a country has in a particular law or policy or of the relative importance of its application to any particular matter. Such a matter is essentially nonjusticiable.


\textsuperscript{132} \textit{See}, e.g., A.D. Neale & M.L. Stephens, \textit{supra} note 119, at 76.
and functionally equivalent to the effects doctrine.\textsuperscript{133} Others have attacked the \textit{Timberlane} test because it considers non-justiciable factors which are normally the province of the legislature or the executive.\textsuperscript{134} Such criticism is unproductive, as it ignores the central problem: courts, forced to decide whether to apply U.S. law, must do so on \textit{some} principled basis.\textsuperscript{135}

Despite its flaws the balancing approach of \textit{Timberlane} and its progeny\textsuperscript{136} at least forces courts to consider the foreign interests involved. Coupled with the Foreign Trade Antitrust Improvements Act of 1982,\textsuperscript{137} the U.S. clearly has curtailed its broad exercise of jurisdiction in the international antitrust arena.\textsuperscript{138} Moreover, the balancing test articulated in \textit{Timberland} should \textit{at least} prevent the application of U.S. antitrust law in particularly outrageous circumstances—for example where the U.S. interest is minimal and the foreign interests are great. As a means of alleviating international conflict, the \textit{Timberlane} approach is certainly preferable to the virtually uniform application of U.S. law under the effects doctrine. The practical difficulty of ascertaining the appropriate interests does not justify ignoring important international concerns.

The Tentative Draft of the Restatement of Foreign Relations Law endorses a balancing approach, stating that even when a recognized basis for jurisdiction is present, a state should not exercise jurisdiction “with respect to the activities . . . or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.”\textsuperscript{139} “Reasonableness” is defined in terms of a balancing test which is culled from \textit{Timberlane} and its progeny.\textsuperscript{140} This is

\textsuperscript{133} Fortunately, such is not the case. See, e.g., \textit{supra} note 113 and cases cited therein.


\textsuperscript{135} The strict application of U.S. law under the effects doctrine is every bit as “political” as weighing the factors in the balancing test—to apply the U.S. laws in extreme situations is a statement of foreign policy. Likewise, completely declining to apply U.S. laws in questionable situations would be viewed by some as an impermissible arrogation of the legislative power by the judiciary.

\textsuperscript{136} See \textit{supra} note 127-31 and accompanying text.

\textsuperscript{137} The Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 7 (1982), removes foreign conduct from antitrust liability unless it has “direct, substantial and reasonably foreseeable” effects on domestic or import commerce. \textit{Id.} at § 6(a). The heightened threshold effect on the U.S. required to trigger antitrust liability is more deferential to foreign interests than the “effects doctrine” because fewer foreign acts are sanctionable.


\textsuperscript{139} \textit{Restatement (Second) of the Foreign Relations Law of the United States} § 403(1) (Tent. Draft No. 7, 1986).

\textsuperscript{140} \textit{Id.} at § 403(2).
a significant departure from an earlier Restatement which adopted Learned Hand's effects doctrine. The current Draft Restatement is of increasing importance in district court litigation.

The excessive reach of U.S. jurisdiction under the effects doctrine provoked international criticism and retaliation. Courts have used the Draft Restatement balancing approach culled from Timberlane (the "Timberlane/Restatement" approach) to quell criticism and alleviate the danger of foreign retaliation. Like any balancing test, the Timberlane/Restatement test is imperfect. The test is, however, a step in the right direction because it forces courts to assess the extranational consequences of applying U.S. antitrust law.

III. Analysis

The concerns present in the extraterritorial application of U.S. antitrust law also arise when two or more nations claim jurisdiction to regulate the same merger. When any one of nine—or fifty—states can block a securities transaction occurring predominately outside U.S. borders, international concerns are implicated. In the Hoylake matter, the British Takeover Panel backed down. In future cases, however, Britain or another sovereign state might not. If U.S. courts continue to apply state merger laws as if only internal federalism concerns were present, jurisdictional conflicts of the sort that have arisen in antitrust cases will surely follow.

The solution might be for Congress to exercise its powers under the foreign commerce clause to provide a federal mechanism for dealing with international mergers and acquisitions that affect the U.S. The possibility of inconsistent action by states, the desire to promote the smooth transaction of international commerce, and the fear of provoking foreign resentment and retaliation provide strong incentives for the federal government to "speak with one voice." Absent such legislation, the U.S. courts individually must decide whether to apply state merger laws to foreign transactions subject to foreign regulatory schemes and whether to apply those laws in a manner that recognizes foreign interests and possible international repercussions.

Part A of this section argues that the courts reviewing the Hoylake bid should have considered Britain's interests in regulating the merger.

141. See id. at §§ 18, 39 (1965), stating that a state with jurisdiction to prescribe rules of conduct may properly require foreign persons to act in contravention of their own state's laws! This view was "contrary to most authorities on international law outside the United States." A.D. NEALE & M.L. STEPHENS, supra note 119, at 67.


143. See supra note 123-26 and accompanying text.

144. U.S. CONST. art. I, § 8, cl. 3.

145. See supra text accompanying notes 108-10.

Part B illustrates hypothetically the necessity of weighing foreign interests even in transactions involving far less contact with the U.S. than did the Hoylake bid. Part C applies the Timberlane/Restatement analysis to the facts of Hoylake and assesses the efficacy of the test in light of those facts and the hypothetical described in part B. Part D briefly explores a possible legislative response to the Hoylake conflict.

A. The Flaw in the District Courts' Analyses

The central flaw in the district courts' reasoning in denying Hoylake's motions was that they acted as if only questions of federalism were involved. In so doing, the courts ignored the British interest in regulating a tender offer for a British target company. The precedent the courts relied on concerned the application of state insurance holding company legislation to wholly domestic mergers and the McCarran-Ferguson Act's shielding of such legislation from commerce clause attack. Such precedent is of highly questionable value in the Hoylake setting where important British policies of the protection of shareholders and the orderly conduct of transactions occurring within Britain's borders were at stake. Because the courts relied on cases involving only American entities and U.S. constitutional concerns, their reasoning cannot withstand scrutiny.

In fairness to the district courts, they were acting without guidance from Congress. The only direction from Congress regarding the protection of American insurance policyholders is the McCarran-Ferguson Act, which vests states with the power to protect policyholders. Therefore, a holding that the state insurance holding company statutes were unconstitutional as applied, and thus impotent to block foreign securities transactions, would have left Hoylake free to dismantle the insurance companies. Absent the state regulations, under current law there would be no protection of the state policyholders' interests.

Understandably, if not admirably, the courts responded to this dilemma by treating the cases as if there were no conflicting British interests, thereby eliminating the need to examine the extraterritorial effect of the U.S. laws. By focusing only upon the effects of the Hoylake bid in the U.S., the courts made this a very easy case. Under such an analysis, the strict application of U.S. law was a foregone conclusion.

147. See supra text accompanying notes 33-45.
148. See supra notes 77-82 and accompanying text.
149. See supra notes 24-41 and accompanying text.
150. See supra notes 42-45 and accompanying text.
151. In fact, Hoylake proposed to sell Farmers to Axa-Midi, a French Insurance Company, in the belief that such a transaction would promote faster regulatory approval, and in the hope that the money thereby raised would help finance the tender offer. See The Times (London), Aug. 25, 1989, at 10, col. 1. This gambit proved to be of no avail to Hoylake in its battle with Insurance Commissioners in the U.S. Id.
152. See supra note 81.
153. See supra notes 82-83 and accompanying text.
All of the criticism of the effects doctrine,\textsuperscript{154} therefore, is equally applicable to the courts' reasoning in the Hoylake decisions, because both lead to the strict application of U.S. law in contravention of foreign interests.

For the same reasons that the rigid application of antitrust law is undesirable,\textsuperscript{155} the strict application of the insurance statutes as exemplified by the district courts is equally unacceptable. The infringement upon the sovereign interests of foreign states and the possibility of negative repercussions counsel restraint in the application of state merger laws to block foreign securities transactions solely on the basis of effects within domestic markets. At a minimum, courts should consider the magnitude of the effects on the U.S. and the importance of the foreign interests involved.

B. The Danger of the District Courts' Reasoning: Cases on the Horizon

That the Takeover Panel backed down in the Hoylake case bears repeating, but it did so at the expense of important regulatory policies.\textsuperscript{156} The next foreign nation faced with the choice of applying its own regulatory scheme or acquiescing to the quirks of the multi-state system in the U.S. might not be so obliging. Given that "recent cases have demonstrated that a connection to the United States can be an exceedingly useful takeover deterrent,"\textsuperscript{157} it is quite plausible that entirely foreign entities might seek such connections as the ultimate takeover deterrent. The following scenario, therefore, is highly plausible.

Posit a foreign corporation ("Raider") seeking to take over another foreign corporation ("Spuds") engaged primarily in the cultivation of potatoes. Spuds, fearful of the takeover, acquires a twenty-five percent share of a U.S. insurance holding company ("Lifeline"). This acquisition is Spuds' only connection with the U.S. Raider fully complies with the laws of both Spuds' and its own state of domicile and wishes to tender its offer. Pursuant to statutory authority, the insurance commissioner of the state involved denies approval of Raider's indirect acquisition of the twenty-five percent interest in Lifeline, which controls an insurance company doing business in the state. The insurance commissioner's denial blocks Raider's bid.

In such a situation, the effects on U.S. insurance policyholders due to Raider's acquisition would virtually be nonexistent. The twenty-five percent ownership change in Lifeline would likely not give Raider a controlling interest in the company, and Lifeline's organization and financial structure would thus be unchanged. But, the conflict with the foreign law would be substantial, because Raider fully complied with the foreign law and would have been free to carry out its takeover bid. Like-

\textsuperscript{154} See supra notes 124-25 and accompanying text.
\textsuperscript{155} Id.
\textsuperscript{156} See supra notes 100-02 and accompanying text.
\textsuperscript{157} Epstein, supra note 31, at 46.
wise, the connections with the U.S. would arguably be weaker than in
the Hoylake case because Lifeline does business in only one state. The
lack of impact in the U.S. and the high degree of conflict with the foreign
country law compel the non-application of the state insurance holding
company legislation.

According to the reasoning of the district courts in the Hoylake
decisions, U.S. law would apply and the state insurance commissioner
could block the transaction by disapproving Raider's indirect acquisition
of a twenty-five percent interest in Lifeline. The logic would be the
same as in Hoylake—Congress authorized the states to regulate "the
business of insurance." By posing a threat to policyholders, mergers
affect the business of insurance. States may, therefore, block mergers
which pose a threat to policyholders.

Such a response to the above hypothetical would be manifestly
unreasonable. Any interest the U.S. might have in blocking the acquisi-
tion of stock in Lifeline is outweighed by the foreign country's interest in
regulating its own securities market, Raider's interest in a profitable
takeover, and the interest of Spuds' shareholders in a potentially profit-
able stock sale. Moreover, assuming that Raider tendered its offer for
Spuds in violation of the state's insurance holding company statute, the
U.S. would look foolish should the state try to enforce its law. Presuma-
bly the aggrieved foreign nation would not enforce a judgment against
assets located in its jurisdiction. Thus, the insurance commissioner's
only conceivable means of enforcement would be to attach Lifeline's
assets. The state presumably could not attach or levy upon the seventy-
five percent of Lifeline owned by entities not connected with Raider.
The state might be able to attach Raider's stock, but not if doing so
would harm the policyholders. Assuming that the aggrieved Raider
would feel the sting of such a sanction, it is hard to imagine Raider's
home country not vigorously protesting the state's action. The U.S.,
and not just the state involved, might pay the price for the state's actions
in the form of foreign retaliation. Thus, the exercise of jurisdiction in
the Spuds' takeover would be unworkable and risky, as well as
unreasonable.

Given the above hypothetical and the interests involved in the Hoy-
lake tender offer, courts must somehow account for the ramifications
of applying state insurance legislation to block foreign mergers. The les-
sons from antitrust law form a useful starting point.

158. See supra note 77 and accompanying text.
159. The McCarran-Ferguson Act only authorizes the states to protect policyhold-
ers' interests. See supra note 51. Any actions which would harm the insurance
company, and therefore its policyholders, are without federal authorization and are
constitutionally infirm under the commerce clause.
C. Application of the Timberlane/Restatement Balancing Test to the Hoylake Facts

This section will apply the Draft Restatement\textsuperscript{160} balancing test culled from Timberlane\textsuperscript{161} to the Hoylake facts and assess the efficacy of the test in the context of state insurance statutes used to regulate foreign takeover battles.

1. The Degree of Conflict with Foreign Law or Policy

When Hoylake initiated its bid to take over BAT, U.S. state laws designed to protect insurance policyholders conflicted with the City Code of Britain, a delicate, governmentally sanctioned means of regulating tender offers.\textsuperscript{162} The City Code requires that takeovers be conducted within sixty days,\textsuperscript{163} whereas the state takeover statutes extend the time frame. The lengthy proceedings required by U.S. state law jeopardized Britain's prohibition against "frustrating activity."\textsuperscript{164} Ultimately, application of U.S. law may have eclipsed the heart of the British scheme, which is intended to enable the target shareholders to weigh the offer on its merits. The high degree of conflict with British policy should have weighed heavily against the application of the state insurance holding company statutes.

2. The Nationality or Allegiance of the Parties and the Location or Principal Places of Business of Corporations

The parties to the underlying transaction were British, Hoylake and the huge conglomerate, BAT, suggesting that Britain has a paramount interest in regulation. Other non-parties were affected by the transaction as well, of course, chiefly insurance policyholders residing in the U.S. The state insurance commissioners seek to protect their interests by preventing Hoylake from liquidating the insurance companies. Because the Hoylake transaction impacts upon both British and American interests, the nationality of the parties did not clearly weigh in favor of the application of either British or U.S. law.

3. The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance

Apparently, the British Takeover Panel believed the U.S. had the power to enforce its regulatory scheme or it likely would not have backed down. But, consider what would have happened had the Takeover Panel not bowed to U.S. state insurance law. By statute, state insurance commissioners must protect the interests of state policyholders.\textsuperscript{165} Thus, they presumably could not impose sanctions that would harm the

\begin{itemize}
  \item \textsuperscript{160} See supra note 140.
  \item \textsuperscript{161} See supra notes 129-31 and accompanying text.
  \item \textsuperscript{162} See supra text accompanying notes 23-39.
  \item \textsuperscript{163} See City Code, supra note 2, at M4.
  \item \textsuperscript{164} See supra note 33 and accompanying text.
  \item \textsuperscript{165} See supra note 51.
\end{itemize}
company and thereby necessarily jeopardize policyholders' interests. Therefore, although courts could arguably grant the state commissioners authority to place the company in receivership pending sale to an approved outside party, for example, use of such an extraordinary remedy is both unlikely and, undoubtedly, extra-statutory. Weaker remedies would not have prevented Hoylake from going ahead with its plans. Thus, had the Takeover Panel not backed down, the state insurance commissioners would have been hard-pressed to enforce their statutes against Hoylake. The lack of pre-acquisition remedies suggests that the courts should have considered Hoylake's contention that the state commissioners could more effectively police changes in the structure of Farmers after Hoylake took control.6

4. The Relative Significance of Effects in the U.S. to Those Abroad

The Hoylake bid required balancing disparate interests in the U.S. and abroad. States have a strong interest in protecting insurance policyholders who depend on the stability of their insurance company for both psychological and financial security. Should Hoylake somehow have destroyed Farmers, British interests would not suffer.

In Britain, however, the Hoylake bid would have had significant impact on the economy. In the aggregate, Farmers Group Insurance Company comprises less than one-fourth of the value of BAT's shares. Thus, the financial effects in the U.S., although significant, were relatively small compared to those in Britain. The difficulties posed by the balancing of unlike interests render this factor inconclusive.

5. The Extent to Which the Activity i) Takes Place within the Regulating State or ii) Has Substantial, Direct, and Foreseeable Effects upon or in the Regulating State

This factor begs the question. The tender offer, made in Britain, substantially affected the British economy. On the other hand, Farmers runs insurance companies in the nine states involved; therefore, the potential effect in each state was both foreseeable and direct. This factor suggests both that the nine states should regulate the insurance companies to ensure their integrity and that Britain should regulate the merger to protect British interests. Although Hoylake mentioned this

166. The sanctions imposed under the statutes for making a tender offer without prior approval of the Insurance Commissioners typically are minor. See, e.g., Ariz. Rev. Stat. Ann. § 20-3311 (1990) (maximum fine for violation is $20,000; other sanctions include revocation of license to practice insurance in that state).
167. See supra note 75 and accompanying text.
168. Axa-Midi offered 2.8 billion pounds ($4.5 billion) for Farmers Insurance Group. Hoylake's total bid for BAT was 13.4 billion pounds. Even assuming that Hoylake grossly undervalued Farmers in its effort to cement a deal, Farmers constitutes but a minor portion of BAT's worldwide holdings. See The Times (London), Aug. 25, 1989, at 19, col. 1.
possibility in its briefs, the district courts failed to consider it.\textsuperscript{169}

6. Connections, Such as Nationality, Residence, or Economic Activity, between the Regulating State and the Persons Principally Responsible for the Regulated Activity

The persons principally responsible for the potential takeover of BAT, and thus indirectly of Farmers, were the tender-offerors. As Hoylake and BAT were both British entities,\textsuperscript{170} their strongest connections were with Britain. Additionally, Hoylake and the bulk of BAT shareholders were subject to British law. The connection with the U.S., derived from the shareholders' interest in Farmers, was relatively incidental. Thus, this factor favored British control.

D. The Efficacy of the Timberlane/Restatement Test in the Hoylake Setting

Although the preceding analysis suggests restraint in the application of state insurance laws, this result is by no means obvious. Factors suggesting restraint are 1) the strong conflict with British policy; 2) the potential enforcement problems had Hoylake violated the state statutes; and 3) the greater connections of the principal actors with Britain. The district courts should thus have conceded the difficulty of the cases before them and examined Hoylake's suggestion that existing statutes afforded a narrowly tailored remedy for the states.\textsuperscript{171} By refusing to consider these factors, the courts glossed over the conflict between the state laws and important British regulatory objectives.\textsuperscript{172}

The other three factors considered were inconclusive.\textsuperscript{173} This result is not surprising, however, because these factors attempt to compare foreign economic interests with the qualitatively distinct domestic interest in protecting resident policyholders. In light of the McCarran-Ferguson Act, a U.S. judge is likely to apply state law by weighing the security of the state insurance policyholders heavily. When no real impact on U.S. policyholders occurs, however, the balance will favor the application of foreign law. Conversely, when the application of U.S. law does not threaten foreign interests, the balancing factors will support application of state laws.

The Timberlane/Restatement balance yields clear results in a variety of situations. For example, the Spuds hypothetical presents a scenario

\textsuperscript{169} See supra note 75. The feasibility of such an arrangement under current state law is beyond the scope of this Note. Use of the balancing test, however, might encourage courts to construct non-confrontational remedies.

\textsuperscript{170} Hoylake, as a Bermudan company, is subject to British regulation.

\textsuperscript{171} See Hoylake Brief, supra note 12.

\textsuperscript{172} See supra note 80 and accompanying text.

\textsuperscript{173} The three factors are 1) the nationality or allegiance of the parties and the location or principal places of business of corporations; 2) the relative significance of effects in the U.S. as compared with those elsewhere; and 3) the extent to which the activity i) takes place within the regulating state or ii) has substantial, direct, and foreseeable effect upon or in the regulating state.
in which the state interest is virtually non-existent while the conflict with foreign law is substantial. Further, the state would likely be unable to enforce its statute against Raider corporation. The balancing test, therefore, clearly proscribes the application of the state insurance statute.

Alternatively, the balancing test would dictate the application of state law in some cases. Consider the facts of Hoylake, except assume that the foreign country does not regulate mergers. The state's interest in protecting insurance policyholders would remain, but would not conflict with any foreign policies or laws. In such a scenario, the test clearly dictates application of state law.

The Timberlane/Restatement analysis better addresses competing policy concerns than does the rigid application of state laws evinced by the district courts' rulings on Hoylake's motions. The balancing test, although no panacea, forces U.S. courts to consider foreign interests and provides a mechanism for analyzing those concerns.

E. Possible Legislative Responses to the Hoylake Problem

While the Timberlane/Restatement test may produce clear answers in some situations, its application will be uncertain in difficult cases like Hoylake, where a strong state interest conflicts with a strong foreign regulatory policy. In such close cases, a legislative response would undoubtedly be more effective.

At least two different types of legislation are possible. As mentioned previously, states could effectively protect resident policyholders' interests after the merger has been effectuated through statutes granting state insurance commissioners broad monitoring powers and sanctions. For example, such a statute could require state approval of any change in the capitalization of insurance companies or any other change that might adversely affect the policyholder. The state could also impose stiff criminal and civil sanctions, and in the case of particularly egregious violations, the state could assume control of the insurance company and sell it to a suitable party. When the offending foreign company owned a controlling interest in an insurance company, sanctions would likely work because that company would have both substantial assets within the state subject to attachment and managers

174. A third legislative approach—the creation of a federal body with exclusive authority to regulate foreign mergers indirectly affecting the U.S.—is beyond the scope of this Note.

175. See Hoylake Brief, supra note 12 and accompanying text.

176. For the purpose of this Note it makes no difference whether the Commissioners would always have these powers or have them only when a foreign firm acquired a domestic U.S. insurance company.

177. Fines typically levied under state law are too small to adequately sting a multinational corporation. See, e.g., ARIZ. REV. STAT. ANN. § 20-3311 (1990) (maximum fine of $20,000).
located within the state subject to criminal sanctions. Indeed, the mere spectre of such sanctions would probably ensure compliance. By regulating only those acts that directly impact policyholders, states could protect local interests without impinging upon foreign regulatory schemes and impeding international trade. However, this approach would only be effective if a substantial number of states passed such regulatory legislation. Absent a holding that the current approach is unconstitutional or a federal law requiring states to avail themselves solely of post-acquisition means of protecting policyholders' interests, states are highly unlikely to alter current laws.

As an alternative to individual state action, Congress could create a federal body to rule on proposed mergers of foreign corporations when such mergers affect insurance companies doing business in the U.S. Congress could begin by declaring that the McCarran-Ferguson Act does not authorize states to block mergers of foreign corporations merely because the target company controls insurance companies doing business in the U.S. Congress could then grant exclusive authority to regulate such mergers to a federal body with powers similar to those currently held by the state commissioners. This body could govern the merger's effects on U.S. insurance en toto. Moreover, Congress could require that the body issue decisions quickly so as to accommodate foreign commercial transactions.

The congressional approach has two distinct advantages. It requires no court action, and it eliminates the repetitious regulatory proceedings characteristic of a multi-state system. States that have traditionally regulated the insurance industry may oppose national legislation, but Congress could meet such opposition by appointing the National Association of Insurance Commissioners, comprised of state insurance commissioners, as the body empowered to decide on pro-

178. Under current law, the sanctions kick in when the tender offer is made without the Insurance Commissioner's approval. The Commissioner could, therefore, theoretically attempt to enforce against a foreign entity that has yet to do any business in the U.S. In such a situation, there would be nothing and no one to enforce against.
179. If only a few states passed such legislation, the Hoylake scenario would not be prevented. Moreover, foreign corporations could acquire control of a U.S. insurance holding company to deter takeovers.
180. Such a law might read: "The McCarran-Ferguson Act does not authorize states to regulate mergers involving foreign target corporations simply because they are indirectly engaged in the U.S. insurance business. States may regulate the post-acquisition of such insurance companies to the fullest extent possible under current or future state legislation." It seems bizarre that Congress would recognize the problem, yet so blatantly pass the buck to the states.
182. See supra notes 52-60 and accompanying text.
183. Given the foreign concerns at issue, it might be advisable that Congress require such approval only when a threshold 51% ownership of the insurance company is effectuated. Current state statutes typically are triggered when a 25% interest is acquired.
184. The foreign commerce clause clearly gives Congress power to legislate in this area. See U.S. Const. art I, § 8, cl 3.
posed mergers implicating U.S. insurance companies. Because this body already exists, its use at the federal level would be relatively inexpensive and would assure states that their interests would be protected.

Both the multi-state and the federal approach would alleviate friction with foreign regulatory schemes and promote international commerce. No such legislation, however, is currently pending.

Conclusion
By focusing upon domestic concerns, U.S. courts neglected important international interests and allowed U.S. state insurance law to derail a British tender offer for a British company which was in full compliance with British regulations. These courts failed to respect both Britain's sovereignty and its interest in regulating transactions occurring within its borders. Moreover, the infeasibility of individual American states enforcing a judgment against Hoylake was completely ignored. The district courts adopted a myopic view, as if the issues presented were merely a matter of federalism and only involved the power of states qua states to regulate insurance companies within their borders.

Congress, in the exercise of its power under the foreign commerce clause, could by statute best address the problem of multi-state takeover regulation in the transnational economic setting. Alternatively, by granting tougher post-acquisition powers to state insurance commissioners, states could provide a smoother multi-state system that would not impinge upon foreign regulatory interests. Absent national or multi-state action, U.S. courts must consider foreign economic and diplomatic interests when deciding whether U.S. jurisdiction is appropriate. In the antitrust area, courts have used a balancing approach to address analogous concerns. A form of that test could be applied to the Hoylake facts. Although the results of the test are not completely conclusive on the Hoylake facts, they certainly counsel restraint in the exercise of U.S. jurisdiction.

Strict application of state insurance holding company legislation can lead to absurd and dangerous results. While the balancing test is far from perfect, it should at least prevent application of U.S. law when its application would be outrageous and unworkable. Consideration of all of the interests involved is far preferable to the superficial and potentially dangerous approach adopted by the district courts.

Andrew Volk