MEMORANDUM

TO: Members of the General Assembly

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

RE: Proposed Section 203

DATE: January 18, 1988

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

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

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

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Enclosures