10-1984

Schreiber v. Burlington Northern, Inc.

Lewis F. Powell Jr.

9/22

I think the Williams Act has been a disaster as it encourages giant corps. to "take over" smaller corps.

But the case is correctly decided.

PRELIMINARY MEMORANDUM

Sept. 24, 1984 Conference
Summer List 17, Sheet 2

No. 83-2129

SCHREIBER (shareholder)	Cert to CA3 (Adams, Sloviter, Teitelbaum)	
v.		
BURLINGTON NORTHERN INC., (tender offeror) et al. OK	Federal/Civil	Timely

1. SUMMARY: Petr contends that section 14(e) of the Williams Act prohibits "manipulative acts" in connection with a tender offer, notwithstanding the absence of deception.

Deny. The CA3's decision appears to be correct. Section 14(e) probably should require an element of misrepresentation. Moreover, even if

2. FACTS AND DECISIONS BELOW: Petr tendered her shares of El Paso Gas Co. to Burlington Northern Inc. in connection with its hostile takeover attempt of El Paso Gas Co. This tender offer was for 25.1 million shares at $24 a share. Before the purchase of the tendered shares but after it became apparent that the tender offer would be successful, Burlington Northern Inc. and El Paso Gas Co. entered into negotiations. Burlington agreed to provide the management of El Paso with golden parachutes, and El Paso consented to the takeover attempt. Burlington then rescinded the initial tender offer and instituted another offer seeking 21 million shares at $24 a share. In addition, Burlington agreed to purchase 4 million shares directly from El Paso at the same price. Forty million shares were tendered in response to the second tender offer. Shareholders who had tendered in response to the initial offer had to retender their shares, and were subject to proration. Burlington purchased 21 million shares on a prorated basis. Petr commenced this action alleging that Burlington violated section 14(e) of the Williams Act by improperly terminating the initial tender offer and by failing to inform the shareholders of the golden parachutes granted to El Paso management.[1]

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[1]Section 14(e) of the Williams Act 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 securities holders

Footnote continued on next page.

The D.Del. (Latchum, J.) held that Burlington's rescission and institution of the second tender offer did not violate section 14(e), because the alleged manipulation did not involve any deception. See Ernst & Ernst v. Hockfelder, 425 U.S. 185, 199 (1976) (manipulation [for purposes of section 10b and rule 10b-5] is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities"). Burlington fully disclosed its activities in withdrawing the initial offer and instituting a second offer to the shareholders and to the general public. The court reasoned that the fundamental purpose of the Williams Act is to promote disclosure. If disclosure has been complete, the fairness of the underlying transaction is of tangential concern to the statute. See Santa Fe Industries v. Green, 430 U.S. 462 (1977)(rule 10b-5).

The D.Del. also rejected petr's contention that Burlington's failure to disclose the grant of golden parachutes to El Paso management violated section 14(e). The court questioned whether this disclosure was material within the meaning of the Williams Act; tender offerors need only disclose material facts. The court held that, even if the information was material, it was unrelated to any damage suffered by the petr. Petr's damages, if any, arose from the withdrawal of the initial offer; disclosure of the golden parachutes would have had no effect on the with-

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in opposition to or in favor of any such offer, request, or invitation."

drawal of that offer.

The CA3 affirmed. It found that petr's argument of manipulation based on the cancellation of the initial tender offer sought to convert an arguable breach of contract claim into a violation of the Williams Act. The CA3 adopted the position of the CA2, which states that manipulation within the meaning of section 14(e) requires an element of misrepresentation. See, e.g., Data Probe Acquisition Corp. v. Datalab, Inc., 722 F.2d 1 (CA2 1983), cert. denied, ____ U.S. ____ (1984). The CA3 rejected the position taken by the CA6 in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (CA6 1981), in which the CA6 held that manipulative activities included defensive strategies expressly designed to artificially affect normal market activity notwithstanding the absence of deception. Id., at 376-77.

The CA3 agreed with the D.Del. that the nondisclosure of the golden parachutes involved deception, but that it was not causally related to petr's injuries.

3. CONTENTIONS: Petr contends that this Court should grant cert to resolve a split in the circuits. The CA6 in Mobil Corp. v. Marathon Oil Corp., supra, held that deception is not a requirement of section 14(e). The petr contends that the Ninth Circuit has also adopted this approach. See Pacific Realty Trust v. APC Investments, Inc., 685 F.2d 1083, 1086 (CA9 1982)("There are instances when violations of this antifraud provision [§14(e)] are unrelated to the information supplied to the shareholders.")(dictum). The CA2 has adopted the position that a sec-

tion 14(e) violation necessarily involves some element of deception. See Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (CA2 1983), cert. denied, ____ U.S. ____ (1983); Data Probe Acquisition Corp. v. Datatab, Inc., supra.

Petr argues that the CA6's interpretation is the correct one. Petr purports to base her analysis on the language of the statute which uses the word "or," rather than "and," when referring to "fraudulent, deceptive, or manipulative" practices. She maintains that two types of actions are prohibited by section 14(e): deceptive practices and manipulative acts and practices.

Petr contends that the legislative history of the Security Exchange Act of 1934 also supports her position. She maintains that the purpose of the Act is the protection of the public investor, and that this protection is not limited to practices involving deception or nondisclosure.

Petr asserts that the CA2 and the CA3 reached the opposite conclusion, because they erroneously relied upon cases interpreting section 10b. She contends that section 10b is addressed to the problem of insuring informed investment decisions, but that section 14(e) is addressed to the more specific problem of protecting investors in the context of a cash tender offer. Petr maintains that complete disclosure will not assist an investor faced with a cash tender offer if the tender offeror is free to affect the market through the use of manipulative practices, because the investor has nowhere to go with the information possessed.

Resp contends that the decision of the CA3 is consistent with the decisions of this Court. See Edgar v. MITE Corp., 456 U.S. 624, 639 (1982) ("the [Williams] Act was designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision"); Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 31 (1977) (Williams Act designed "solely to get needed information to the investor"). Because disclosure is the goal of section 14(e), resp argues that omission or misstatement is an essential element of a violation of section 14(e).

Resp maintains that the decision of the CA6 in Mobil Corp v. Marathon Oil Corp, supra, is an abberation and has been recognized as such by other courts. See, e.g., Buffalo Forge Co. v. Ogden Corp, supra; Data Probe Acquisition Corp v. Datatab, Inc., supra; Dan River, Inc. v. Icahn, 701 F.2d 278 (CA4 1983); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623 (D. Md. 1982). Alternatively, resp contends that the case at bar can be distinguished from Mobil Corp. v. Marathon Oil Corp., supra. Resp characterizes Mobil Corp. as involving the use of an allegedly manipulative device whcih discouraged competitive bidding in Marathon stock, but contends that the case at bar encouraged competitive bidding by adding fifteen business days to the takeover process when it withdrew the initial offer and instituted a second offer. Thus, resp contends that, even if the CA3 had adopted the approach of the CA6, this case would have been decided in the same way. The thrust of resp's argument is that there is no conflict in the circuits.

4. DISCUSSION: This case is a possible grant. Neither the CA2 nor the CA3 made any attempt to distinguish Mobil Corp. v. Marathon Oil Corp., supra, when it reached a contrary result. Nor do I find resp's distinction persuasive. I would have to agree with the petr, therefore, that there is a split in the circuits on the question whether violations of section 14(e) must involve an element of deception based on nondisclosure or on disclosure of incorrect information.

Despite the conflict, however, this question may not be certworthy, because it appears that the CA6's approach has been largely discredited. The Court may want to wait to reach this issue when and if another circuit adopts the approach taken by the CA6. Although petr contends that the CA9 has done so, the relevant language, quoted supra, was dictum. See Pacific Realty Trust v. APC Investments, Inc., supra. Nor was the decision in that case consistent with the dictum; the CA9 enjoined a tender offer until it could be determined whether adequate disclosure had been made.

There is a response.

August 10, 1984 Agrawal opn in petn

Court ..... Voted on ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 83-2129

Submitted ....., 19... *Announced* ....., 19...

SCHREIBER

vs.

BURINGTON

5 years explicit

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.			✓		Join 3								
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.			✓										
O'Connor, J.						Dist							

83-2129 SCHREIBER v. BURLINGTON NORTHERN Argued 1/9/85

No. 83-2129, Schreiber v. Burlington Northern Conf. 1/11/85

The Chief Justice

Justice Brennan

Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 21, 1985

No. 83-2129 Schreiber v. Burlington Northern

Dear Chief,

Please add at the end of the next draft of your opinion that I took no part in the consideration or decision of the above case.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 22, 1985

Re: 83-2129 - Schreiber v. Burlington Northern, Inc.

Dear Chief:

Please join me.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 22, 1985

Re: 83-2129 - Schreiber v. Burlington Northern

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 22, 1985

No. 83-2129

Schreiber v. Burlington Northern, Inc., et al.

Dear Chief,

I agree.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

May 22, 1985

83-2129 Schreiber v. Burlington Northern

Dear Chief:

Please add the end of the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 22, 1985

83-2129 -

Schreiber v. Burlington Northern, Inc.

Dear Chief,

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 28, 1985

Re: No. 83-2129, Schreiber v. Burlington Northern, Inc.

Dear Chief:

Please join me.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 29, 1985

Re: No. 83-2129-Schreiber v. Burlington Northern

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

83-2129 Schreiber v. Burlington Northern (Annmarie)

LFP out - letter 5/22/85
CJ for the Court 1/18/85
1st draft 5/21/85
Joined by JPS 5/22/85
WJB 5/22/85
CJ 5/22/85
BRW 5/23/85
HAB 5/28/85
TM 5/29/85
SOC out - 5/21/85