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XII. Securities Law

security to the same extent as threats of violence.[84] The Fourth Circuit's decision presumably will prompt the Virginia Assembly to amend the change-of-name statute to provide a "good cause" exception for both prisoners and probationers.[85]

The *Barrett* decision does not diminish the deference the Fourth Circuit will accord the interests of prison officials.[86] The *Barrett* court merely held that limitations on inmates' first amendment rights should be no greater than necessary to protect prison interests.[87] While *Barrett* indicates that courts in the fourth circuit will review restrictions on prisoners' basic freedoms,[88] *Barrett* also shows that courts will continue to defer to correctional officials when the officials take reasonable steps to forestall major breakdowns in discipline and order even though such actions also incidentally impinge upon a prisoner's religious expression.[89]

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XII. SECURITIES LAW

Tender Offer Defensive Tactics: Availability of Relief Under the '34 Act, Williams Act and RICO

In response to a hostile corporate takeover attempt, management may use a number of defensive tactics to defeat a hostile tender offer.[1] One com-

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"healthy sense of realism" and recognition that problems of prisons in America are intractable); *see also* C. STASTNY & G. TYRNAUER, WHO RULES THE JOINT 1, 1-7 (1982) (every prison in America is potentially another Attica). *See generally* Gettinger, *The Prison Population Boom: Still No End in Sight*, CORRECTIONS MAG., June 1983, at 6 (from 1972 to 1982, United States has more than doubled prison population due to post-war "baby boom," longer sentences, decreased paroles, mandatory sentences, increased police and court efficiency, and renewed public interest in punishment of criminals). Overcrowding combined with limited prison resources have made the search for prison order enormously difficult. *See* Procunier v. Martinez, 416 U.S. 396, 404-405 (1974) (problems of prisons nearly unmanageable). Seen in this context, the deference courts pay to prison authorities makes sense. *Id.* at 405.

84. *See* 689 F.2d at 502-503.

85. *See id.*; Brief for Appellee at 32, Barrett v. Virginia, 689 F.2d 498 (4th Cir. 1982) (central theme of district court's memorandum opinion was that change-of-name statute's rigidity was fatal to its constitutionality under first amendment).

86. *See supra* text accompanying notes 49-51 (explanation of why *Barrett* court refused to concern itself with how prison officials decide to keep their records).

87. 689 F.2d at 502; *see supra* text accompanying note 39 (least restrictive alternative language from *Jones*).

88. 689 F.2d at 502; *see supra* notes 2 & 6 (Constitution protects prisoners' civil rights).

89. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 132 (1977), *construed in* 689 F.2d at 502; *see supra* note 37 and accompanying text (explaining judiciary's wide-ranging deference for decisions of prison officials).

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1. *See* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1972)

mon defensive tactic is the institution of legal proceedings in the form of a request for preliminary injunctive relief to delay an offeror's takeover attempt.[2] In a request for a preliminary injunction, a target company's management may allege a variety of violations of state and federal securities laws including violation of the anti-fraud provisions of both the Securities Exchange Act of 1934 ('34 Act),[3] the Williams Act,[4] and violation of the Racketeering Influenced and Corrupt Organizations Act (RICO).[5] The anti-fraud provisions of the '34

(tender offer is public offer to purchase securities of publicly held corporation during fixed period of time at particular price or upon specified terms). Neither Congress nor the Securities and Exchange Commission (SEC) has defined the term tender offer. *Id.* Congress and the SEC did not define the term tender offer to preserve the flexibility of the SEC and the courts to make determinations on a case by case basis. *Id.*

Persons seeking corporate control often use a cash tender offer to acquire a controlling interest in a target company. *See* Note, *Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers*, 21 STAN. L. REV. 1104, 1105-06 (1969) (survey of preventive and remedial defensive tactics used by management to contest tender offers) [hereinafter cited as *Defensive Tactics*]; *see also* E. ARANOW & H. EINHORN, *supra* at 219-76 (discussion of defensive tactics to thwart tender offer); E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 193-206 (1977) (defensive tactics to thwart tender offer). The variety of defensive tactics that a target company's management may use to defend against a hostile tender offer include repurchase of own shares by target, open market purchases of target's shares by friendly third parties, concentrated selling of offeror's shares to friendly third parties, dividend increases, stock splits, issuance of additional shares, creation of incompatibility between target and offeror, defensive mergers, discriminatory voting provisions, triggering of state takeover statutes, legal action, publicity and restrictive loan agreements. *See* E. ARANOW & H. EINHORN, *supra*, at 234-76 (manner by which defensive tactics successfully used and limitations upon tactics' use).

2. *See Defensive Tactics, supra* note 1, at 1124 (institution of legal proceedings is effective weapon in contested tender offer); *see also* E. ARANOW & H. EINHORN, *supra* note 1, at 266 (target corporation considers legal action in most contested tender offers); E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra* note 1, at 199 (defensive tactics include litigation challenging tender offer as violative of variety of federal and state securities laws). A target company seeks to delay and thereby frustrate a takeover attempt by seeking temporary injunctive relief. *See* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 855 (2d Cir.) (target company filed suit for injuctive relief to delay tender offer), *cert. denied*, 419 U.S. 883 (1974). A temporary injunction may frustrate the acquisition of a target company since the offeror may decline the expense of a trial. *Id.* at 854. Additionally, even if the offeror persists, conditions may change so that the offer will fail during the long lapse of time before full trial and appeal. *Id. See* Note, *Tender Offer Regulation - Injunction Standards Under the Williams Act*, 45 FORDHAM L. REV. 51, 53 (1976) (preliminary injunction against tender offer effective defensive tactic) [hereinafter cited as *Injunction Standards*]; *see also* Electronic Speciality Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969) (relief best given at time of application for preliminary injunction). If a target company succeeds in obtaining a preliminary injunction against an attempted takeover, the contest for control ceases since it is practically impossible to renew a tender offer after a trial on the merits. *Injunction Standards, supra* at 55; *see* Note, *The Courts and The Williams Act: Try a Little Tenderness*, 48 N.Y.U. L. REV. 991, 994, 1007-10 (1973) (preliminary injunction may end battle for corporate control).

3. 15 U.S.C. §§ 78a-78kk (1982) ('34 Act).

4. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982) (Williams Act). Congress enacted the Williams Act to protect an investor faced with a decision to tender or retain shares. *See* 113 CONG. REC. 855-56 (1969) (remarks of Sen. Williams) (in contested tender offer, shareholders exposed to bewildering variety of conflicting statements designed to persuade them to accept or reject offer).

5. 18 U.S.C. § 1961-68 (1982); *see* Note, *Application of the Racketeer Influenced and*

Act and the Williams Act prohibit the use of manipulative and deceptive devices in connection with the purchase or sale of any security and in connection with any tender offer.[6] The RICO statute prohibits the acquisition of an interest in a business by funds derived from a pattern of racketeering activity.[7] In *Dan River, Inc. v. Icahn*,[8] the Fourth Circuit addressed the question of whether a preliminary injunction to delay a takeover attempt should stand based upon an incumbent management's allegations that an offeror violated federal securities laws and the RICO statute.[9]

During 1982, investor Carl C. Icahn and several of his companies (Icahn)[10]

Corrupt Organizations Act (RICO) to Securities Violations, 8 J. CORP. L. 411 (1983) (person who commits securities fraud is not only liable under federal securities laws but also may be liable under RICO) [hereinafter cited as *RICO-Securities Violations*].

6. *See* 15 U.S.C. § 78j(b) (1982) (prohibiting use of manipulative or deceptive device in connection with purchase or sale of any security); *id.* § 78n(e) (1982) (prohibiting fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer).

7. *See* 18 U.S.C. § 1962(a) (1982). To invoke RICO's statutory provisions, a plaintiff must prove that the defendant engaged in a pattern of racketeering activity. *Id.* Section 1961(5) of RICO defines a pattern of racketeering activity as the commission of two predicate offenses within ten years. 18 U.S.C. § 1961(5) (1982). Despite the definition given in § 1961(5), one court has concluded that the statutory definition of a pattern of racketeering activity is not an adequate definition. *See* United States v. Ladmer, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977) (§ 1961(5) does not define pattern of racketeering activity). Since the RICO statute may define "pattern" only in quantitative terms, courts have developed qualitative definitions. *See* United States v. Elliott, 571 F.2d 880, 899 & n.23 (5th Cir.) (to constitute pattern of racketeering activity, two predicate crimes need not be related to each other, but must be related to enterprise), *cert. denied* 439 U.S. 953 (1978); *see also* United States v. Weisman, 624 F.2d 1118, 1122 (2d Cir.) (enterprise supplies significant unifying link between predicate acts), *cert. denied*, 449 U.S. 571 (1980); Spencer Co. v. Agency Rent-A-Car, Inc., [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 at 92,215 n.4 (D. Mass. Nov. 17, 1981) (each act in pattern of racketeering must be related to enterprise); *RICO-Securities Violations, supra* note 5, at 432-33 (trend among courts to adopt *Elliott* interpretation of pattern).

8. 701 F.2d 278 (4th Cir. 1983).

9. *Id.* at 280. Dan River claimed that Icahn intended to loot Dan River in violation of Virginia's corporation law. *Id.* at 282; *see* VA. CODE §§ 13.1-71, 13.1-77, 13.1-81 (1950). Dan River alleged that upon acquiring control of Dan River, Icahn would liquidate Dan River's assets and then divert the cash to Icahn's use. *See* 701 F.2d at 278. The Fourth Circuit held that Dan River had to prove that Icahn intended to self deal with Dan River's assets to prove that Icahn violated state corporation or fiduciary duty laws. *Id.* at 291-92. The *Dan River* court noted that Dan River's allegation that Icahn would divert Dan River's liquidated assets to personal use required serious proof because allegations of future wrongdoing might not support equitable relief without additional proof. *Id.* at 292. The Fourth Circuit observed that the fact that Icahn may have engaged in self-dealing in Icahn's use of an unregistered investment company to finance previous takeover attempts did not entitle Dan River to assume that Icahn would self deal with Dan River in a similar manner. *Id.* The Fourth Circuit concluded that Dan River failed to show a strong likelihood of success on Dan River's state claim since Dan River failed to prove that Icahn's past wrongdoing would lead to future wrongdoing and because Dan River did not prove that Icahn's past activity was unlawful. *Id.*

10. 701 F.2d at 280. In *Dan River*, the Fourth Circuit referred to the entire takeover group as "Icahn". *Id.* The companies under Icahn's control included Icahn Holding Corporation, Icahn Capital Corporation, Icahn & Co., Inc., Wolf Investors Plan, Inc., Brett Investors Corporation, C.C.I. & Associates, Crane Associates, and Michelle Investors Corporation. *Id.* at 280 n.1.

purchased Dan River[11] common stock on the open market.[12] Upon acquisition of more than five percent[13] of Dan River's outstanding shares, Icahn filed with both the Securities and Exchange Commission (SEC) and Dan River a Schedule 13D disclosure statement.[14] Icahn's 13D disclosure statement indicated that Icahn intended to acquire control of Dan River.[15] Undeterred by Dan River's initial defensive tactics,[16] Icahn proceeded with a takeover strategy by offering to buy 3.1 million shares of Dan River common stock at eighteen dollars per share subject to a condition that Dan River's management not oppose Icahn's tender offer.[17] Icahn's offer stated that Icahn would purchase only seven hundred thousand shares at fifteen dollars per share if Dan River's management resisted Icahn's tender offer.[18] Icahn then revised its stock purchase offer for 3.1 million shares at eighteen dollars per share[19] to an offer to buy two million shares at $16.50 per share.[20] Dan River's management,

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11. *Id.* Dan River, Inc. is a major textile manufacturer. *Id.*

12. *Id.*

13. *Id.* Originally the Williams Act required that a purchaser file a Schedule 13D disclosure statement upon acquiring 10% of a company's equity security. *See* H.R. REP. No. 1655, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5025, 5026 (acquisition of 10% of company's securities triggers Williams Act's § 13(d) disclosure requirements). In 1970, Congress amended the Williams Act to reduce the percentage of shares necessary to activate the disclosure requirement from 10% to 5%. *See* Pub. L. 91-567, 84 Stat. 1497 § (a)(2) (codified as amended at 15 U.S.C. § 78m(d) (1976)) (beneficial owner of more than 5% of stock must file Schedule 13D with issuer and SEC).

14. *See* 15 U.S.C. § 78m(d)(1) (1982) (information required on Schedule 13D); 17 C.F.R. 240.13d-101 (1983) (information included in Schedule 13D). Schedule 13D requires disclosure of the background and identity of the beneficial owner of stock, the amount and source of the funds used in making stock purchases, the extent of the purchaser's holdings, and, if the purchaser intends to acquire control of the business, Schedule 13D requires disclosure of any plans or proposals for change to the SEC and the issuer. *Id.*

15. *See* 701 F.2d at 280-81. Icahn's Schedule 13D indicated that if Icahn acquired control of Dan River, Icahn would commit Dan River to an active course of transactions including a possible merger with one of Icahn's controlled companies. *Id.*

16. *Id.* at 281. As a defensive response to Icahn's expressed intention to acquire control of Dan River, Dan River issued 1.7 million shares of preferred stock to a new employee stock bonus plan. *Id.* Dan River's stock bonus plan awarded preferred stock to employees on the basis of an employee's salary. *Id.* Dan River's stock bonus plan gave the highest paid employees the greatest amount of the preferred stock. *Id.* Management, being the highest paid employees, received most of the preferred stock, thereby consolidating management's control over Dan River. *Id.* Establishment of employee stock ownership plans (ESOPs) constitute a significant defensive tactic for tender offer target corporations because a target may issue stock to an ESOP diluting the voting strength of the offeror and increasing the number of shares that the offeror must purchase to acquire control of the target. *See* E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra* note 1, at 197-99 (tender offeror may not be able to obtain stock from employees because of loyalty to employer or concern with job security).

17. *See* 701 F.2d at 282.

18. *Id.*

19. *Id.* On November 9, 1982, Icahn's first conditional offer of $18 per share lapsed by the offer's own terms. *Id.* Under the terms of Icahn's revised tender offer, Icahn reserved the right to purchase more than 2,000,000 shares if Dan River's shareholders tendered more than 2,000,000 shares. *Id.*

20. *Id.*

however, opposed Icahn's tender offer and filed suit in the District Court for the Western District of Virginia seeking a preliminary injunction to block Icahn's revised stock purchase offer.[21] The district court enjoined Icahn from exercising any rights in the shares Icahn had purchased and would purchase in the tender offer.[22] Icahn appealed the district court's order sterilizing Icahn's shares.[23] On appeal, the Fourth Circuit reversed the district court's preliminary injunction sterilizing Icahn's shares.[24]

In determining whether the district court should have granted Dan River's request for a preliminary injunction, the Fourth Circuit limited its decision to whether Dan River demonstrated a substantial likelihood of success on the merits that Icahn violated federal and state securities laws and the RICO statute.[25] The *Dan River* court first examined Dan River's claim that the court should enjoin Icahn from exercising any rights in the acquired Dan River stock because Icahn had violated the federal securities laws.[26] Dan River alleged that Icahn's ultimatum that Icahn would offer less for Dan River's shares if Dan River's management opposed the offer violated the '34 Act's prohibition against the use of manipulative and deceptive devices in connection with the purchase or sale of any security.[27] Dan River claimed that Icahn's ultimatum strategy amounted to an extortionate threat.[28] The Fourth Circuit noted that

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21. *Id.*

22. *Id.* In a portion of the district court's decision not appealed by either Icahn or Dan River, the district court allowed Icahn's tender offer to proceed subject to an extension of the offer's withdrawal date by one week. *Id.* The district court also ordered Icahn to correct inconsistencies in Icahn's disclosure statements. *Id.*

23. *Id.; see* 28 U.S.C. § 1292(a) (1976) (courts of appeals have jurisdiction to review interlocutory orders of district courts).

24. 701 F.2d at 292.

25. *Id.* at 284-92. The Fourth Circuit standard for granting preliminary injunctive relief is the balance of hardships test. *See* North Carolina State Ports Auth. v. Dart Containerline Co., 592 F.2d 749, 750 (4th Cir. 1979). In *Dart Containerline*, the Fourth Circuit held that four factors determine whether a court should grant or withhold preliminary injunctive relief. *Id.* In deciding whether to grant a preliminary injunction, the court must examine plaintiff's likelihood of success on the merits, plaintiff's possibility of suffering an irreparable harm, defendant's probable injury, and the public interest. *Id.* The *Dart Containerline* court held that a court must weigh the likelihood of plaintiff's success on the merits against plaintiff's probability of irreparable injury. *Id.* If the plaintiff demonstrates a substantial likelihood of success on the merits, plaintiff need not demonstrate the probability of irreparable harm. *Id.* Conversely, if plaintiff does not demonstrate a substantial likelihood of success on the merits, plaintiff must demonstrate the probability of irreparable injury. *Id.; see* Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1033 (4th Cir. 1980) (likelihood of success on merits increases in importance as harm to plaintiff decreases when balanced against harm to defendant). The *Dan River* court concluded that the balance of hardships between Dan River's probability of suffering irreparable harm and Icahn's probable injury did not weigh in Dan River's favor and therefore Dan River must show a strong likelihood of success on the merits to support a request for preliminary injunctive relief. 701 F.2d at 284.

26. 701 F.2d at 284-85.

27. *Id.; see* 15 U.S.C. § 78j(b) (1982) (prohibiting use of manipulative device in connection with purchase or sale of securities).

28. 701 F.2d at 285. Dan River alleged that Icahn's takeover strategy constituted an extortionate threat because Icahn's strategy forced the company to buy Icahn out at a considerable profit to Icahn or face a takeover by Icahn. *Id.* at 284-85; *see infra* text accompanying notes

Dan River might have trouble establishing standing to sue under the market manipulation claims because under section 10(b)[29] and rule 10b-5[30] of the '34 Act only buyers and sellers of securities have standing to sue.[31] The court acknowledged that a question of fact existed as to whether or not Dan River sold securities during the allegedly manipulative period and therefore concluded that Dan River had not demonstrated sufficient likelihood of standing to sue.[32]

Furthermore, the Fourth Circuit stated that for Dan River to bring a claim under the '34 Act's prohibition against market manipulation, Dan River must prove that Icahn intended to deceive Dan River shareholders by artificially affecting the price of Dan River stock.[33] The *Dan River* court, however, held that Dan River's claim that Icahn's ultimatum strategy was similar to an extortion threat would probably fail in a trial on the merits because Dan River did not demonstrate that Icahn conducted the takeover strategy with the requisite intent to deceive Dan River stockholders.[34] Moreover, the court stated that Dan River's extortion threat claim would probably fail at trial because

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34-35 (*Dan River* court did not accept Dan River's claim that Icahn's takeover strategy could be likened to extortion).

29. 15 U.S.C. § 78j(b) (1982). Section 78j(b) prohibits the use of any manipulative or deceptive device in connection with the purchase or sale of any security. *Id.*

30. 17 C.F.R. § 240.10b-5 (1983). Section 240.10b-5 prohibits fraudulent practices in connection with the purchase or sale of any security. *Id.*

31. 701 F.2d at 285; *see* 15 U.S.C. § 78j(b) (1982) (prohibiting use of manipulative or deceptive devices in connection with purchase or sale of any security); 17 C.F.R. § 240.10b-5 (1983) (prohibiting fraudulent practices in connection with purchase or sale of any security); *see* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731-55 (1975) (only purchasers and sellers have standing to sue under § 10(b) and rule 10b-5); Birnbaum v. Newport Steel Corp. 193 F.2d 461, 464 (2d Cir.) (only purchaser or seller may sue under rule 10b-5), *cert. denied*, 343 U.S. 956 (1952). In *Blue Chip Stamps*, the Supreme Court adopted the *Birnbaum* rule that only purchasers and sellers may sue as a limitation on standing to sue for damages under the '34 Act's prohibition against manipulation in connection with the purchase or sale of any security. 421 U.S. at 755; *see* Birnbaum v. Newport Steel Corp., 193 F.2d 464 (rule 10b-5 protection extended only to defrauded purchaser or seller). The *Blue Chip Stamps* court limited standing to purchasers or sellers of securities to avoid the risk of strike suits by persons suffering no actual injury. 421 U.S. at 740-43. The *Blue Chip Stamps* purchaser-seller rule commands a wide acceptance by the courts. *See* Haber v. Kobrin, [1982-83 Transfer Binder] FED. SEC. L. REP (CCH) ¶ 99,259, at 96,162 (S.D.N.Y. June 3, 1983) (only purchasers and sellers have standing under § 10(b) and rule 10b-5); Erlbaum v. Erlbaum, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,772, at 93,920 (E.D. Pa. July 13, 1982) (language of § 10(b) and rule 10b-5 clearly requires purchase or sale as prerequisite to liability).

32. 701 F.2d at 285.

33. *Id.; see* 15 U.S.C. §§ 78a-78kk (1982) ('34 Act); *see also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195-99 (1976) (manipulative conduct under '34 Act defined as intent to deceive); *see also* Radol v. Thomas, 534 F. Supp. 1302, 1313 (S.D. Ohio 1982) (no substantial likelihood of success on merits where no intent to deceive in allegedly manipulative tender offer and merger).

34. *See* 701 F.2d at 285. In *Dan River* the Fourth Circuit concluded that Congress enacted § 10(b) of the '34 Act to ensure full disclosure to shareholders. *Id.* Since Icahn had made full disclosure of Icahn's takeover ultimatum, the court concluded that Dan River could not allege a violation of the '34 Act's prohibition against manipulation in the purchase or sale of any security. *Id.* The court held that to prohibit Icahn's "extraordinarily frank" disclosure would be contrary to congressional intent and against public policy. *Id.; see infra* text accompanying note 102 (prohibiting frank disclosure might encourage nondisclosure).

Dan River failed to demonstrate that Icahn's strategy constituted a form of blackmail.[35] The Fourth Circuit, therefore, held that Icahn's ultimatum was not necessarily unlawful because Icahn's strategy only placed Dan River on the defensive.[36]

In addition to alleging that Icahn's tender offer strategy was a manipulative and deceptive device, Dan River alleged that Icahn violated the '34 Act's disclosure requirements by failing to disclose a contingent obligation of five million dollars.[37] Icahn had omitted to disclose a five million dollar bank loan to an outside company guaranteed by Icahn Capital, one of Icahn's controlled companies.[38] The *Dan River* court examined whether Icahn's five million dollar omission violated the '34 Act's disclosure requirement under the standard of materiality.[39] Under the standard of materiality a court will hold that a failure to disclose a fact violates the '34 Act's disclosure requirements if the non-disclosed fact is a material fact that assumes actual significance to a reasonable shareholder.[40] The court concluded that a trial court would probably not find that Icahn's contingent liability of five million dollars was significant to a reasonable shareholder because the liability did not alter Icahn's ability to proceed with the tender offer.[41] The *Dan River* court, therefore, admonished

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35. *Id.*

36. *Id.*

37. *Id.* at 285-86. In *Dan River* the Fourth Circuit noted that even Dan River agreed that Icahn's ability to conduct the tender offer stood unimpaired by a $5 million contingent liability. *Id.* at 286. Dan River, however, claimed that Dan River stockholders would find Icahn's contingent liability material to the stockholders' decisions whether to tender. *Id.*

38. *Id.; see supra* note 10 (list of Icahn's controlled companies involved in takeover group).

39. 701 F.2d at 286. In *Dan River*, the court concluded that Icahn's $5 million contingent liability was probably not a material omission based on the Supreme Court's definition of materiality as applied in the context of Rule 14a-9, a violation of the proxy rules. *Id.; see* TSC Indus., v. Northway, Inc., 426 U.S. 438, 449 (1976) (standard of materiality is whether a fact would assume actual significance to a reasonable shareholder); *see also* 17 C.F.R. § 240.14a-9 (1983) (prohibiting omission of material fact in proxy statements). In *TSC Industries*, the Supreme Court resolved the controversy surrounding the definition of materiality. 426 U.S. at 449. The Supreme Court reversed the Seventh Circuit, holding that the court had adopted the wrong standard of materiality. *Id.* at 463-64. The Seventh Circuit had ruled that a material omission was defined as an omission that a reasonable shareholder might consider important. *See* Northway, Inc. v. TSC Indus., 512 F.2d 324, 330-33 (7th Cir. 1975), *rev'd*, 426 U.S. 438 (1976). The Supreme Court reversed the Seventh Circuit, holding that a material fact is a fact that a reasonable shareholder would consider important. *See* TSC Indus. v. Northway, Inc., 426 U.S. at 449. Most courts have held that the Supreme Court's definition of materiality as used in Rule 14a-9 applies equally in the tender offer context. *See* Panter v. Marshall Field & Co., 646 F.2d 271, 289 (7th Cir.) (*TSC Industries'* materiality standard applies to Schedule 13D nondisclosure), *cert. denied*, 454 U.S. 1092 (1981); *see also* E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra* note 1, at 57 (*TSC Industries'* materiality standard applies not only to Rule 14a-9 proxy violations but also to other securities laws); Whittaker Corp. v. Edgar, 535 F. Supp. 933, 945 (N.D. Ill. 1982) (omitted fact material if substantial likelihood that a reasonable shareholder would consider fact important in voting decision).

40. *See* TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) (material fact one that reasonable shareholder would consider important in voting decision).

41. *See* 701 F.2d at 286. Although conforming to the majority view, the *Dan River* court's materiality standard should not have caused the summary disposition of Icahn's alleged $5 million

the district court for ordering the sterilization of Icahn's Dan River shares, and held that full disclosure was the appropriate remedy for inadequate disclosure.[42] The *Dan River* court concluded that the district court's sterilization order was inappropriate and inequitable because the order needlessly burdened Icahn for the one allegedly material nondisclosure.[43]

In a third allegation, Dan River claimed that Icahn's two-tier tender offer represented an illegal "bait and switch" operation in violation of the Williams Act's prohibition against manipulative schemes in connection with any tender offer.[44] A bait and switch operation is a scheme whereby an offeror offers to buy stock at a higher price, inducing stockholders to tender on the offeror's alternative lower price.[45] Dan River alleged that Icahn's first offer to buy 3.1 million shares of Dan River at eighteen dollars per share represented bait designed to lure shareholders and that Icahn's second offer to purchase only seven hundred thousand Dan River shares at fifteen dollars per share represented a switch that shareholders would be forced to accept if management resisted the first offer.[46] Dan River claimed that Icahn's two-tier offer constituted manipulation because Icahn knew that Dan River's management would resist Icahn's offer and therefore Icahn's first offer would induce Dan River's shareholders to tender on Icahn's second offer.[47]

Addressing Dan River's bait and switch allegation, the Fourth Circuit first examined whether Dan River's claim that Icahn's two-tier offer was

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contingent liability as immaterial prior to a trial on the merits. *See* 701 F.2d at 292-93 (Butzner, J., dissenting). At a full scale trial on the merits, a juror could conclude that a reasonable shareholder would consider a $5 million contingent liability important in deciding how to vote. *See id.* at 292 (dissent noted than $5 million contingent liability represented 39% of Icahn Capital's net worth). The *Dan River* dissent stated that Icahn's contingent liability could be converted into an actual liability because Icahn controlled both the debtor and guarantor. *Id.* at 293. The debentures which Icahn would issue to Dan River's stockholders in the proposed merger could be subordinated to the contingent liability. *Id.*

42. *Id.* at 286. In *Dan River*, the Fourth Circuit concluded that Dan River's best remedy was an injunction against Icahn's tender offer until Icahn corrected the disclosure statement. *Id.* The court, however, noted that Dan River did not pursue a remedy requiring greater disclosure but instead requested sterilization of Icahn's Dan River shares. *Id.* at 286-87. The Fourth Circuit noted that the district court's order disenfranchising Icahn's shares did not provide greater disclosure but instead protected Dan River's management from a challenge by Icahn for control of the company. *Id.* at 287.

43. *Id.* The *Dan River* court balanced the harm caused to Dan River by the district court's order disenfranchising Icahn's shares against the harm to Dan River caused by Icahn's one allegedly material nondisclosure and concluded that the district court invoked the court's equitable powers to produce an inequitable result. *Id.; see also* note 25 (discussing balance of hardships test).

44. *Id.; see* 15 U.S.C. § 78n(e) (1982) (prohibiting untrue statement of material fact or omission of fact with respect to tender offer); Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981); *see also* Note, *Hostile Tender Offers and Injuctive Relief for 14(e) Manipulation Claims: Developments Since* Mobil Corp. v. Marathon Oil Co., 40 WASH. & LEE L. REV. 1175, 1197 (1983) (Dan River illustrates federal courts' reluctance to extend *Mobil* court's § 14(e) manipulation analysis to tender offers) [hereinafter cited as *Developments Since Mobil*].

45. *See Developments Since Mobil, supra* note 44, at 1195 (definition of "bait-and-switch" in tender offer context).

46. *See* 701 F.2d at 287-88.

47. *Id.*

manipulative in itself stated a claim for relief under the Williams Act's provisions prohibiting manipulative schemes.[48] Indicating that the sole purpose of the Williams Act's manipulative provisions was to ensure adequate disclosure to stockholders, the court expressed serious doubt that Dan River stated a claim under section 14(e)[49] of the Williams Act since Icahn had fully disclosed his takeover strategy.[50] Section 14(e) of the Williams Act prohibited fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer.[51] The court noted that even if section 14(e) allowed claims against the substance of a tender offer, Dan River still must overcome a considerable burden to demonstrate a likelihood of success on the merits that Icahn's strategy was a manipulative scheme.[52] The court stated that the mere fact that a tender offer affects the market price of a security does not mean that the tender offer impermissibly manipulates the market.[53] The *Dan River* court stated that a ruling that activity affecting the market price of a security constitutes manipulation would lead to a prohibition against all tender offers since all tender offers affect the market.[54]

In addition to Dan River's allegations that Icahn violated federal securities laws, Dan River alleged that Icahn acquired an interest in Dan River with funds derived through a pattern of racketeering activity in violation of RICO.[55] Dan River asserted that Icahn violated RICO by failing to comply with a provision of the Investment Company Act of 1940 (ICA),[56] which required all investment companies to register with the Securities and Exchange Commission.[57] Dan River argued that Icahn transformed Bayswater Realty and Capital Corporation (Bayswater) into an investment company and knowingly failed to register Bayswater with the SEC in violation of the ICA.[58] Dan River asserted that Icahn used Bayswater's assets to finance acquisitions of Dan River's securities, thereby triggering the RICO claim.[59]

To assert a claim under the RICO statute, a plaintiff must prove the com-

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48. *Id.*

49. 15 U.S.C. § 78n(e) (1982) (prohibiting untrue statement of material fact or omission of fact with respect to tender offer).

50. 701 F.2d at 288; *see Hearings on S. 50 Before the Subcomm. on Securities of the Senate Comm. on Banking & Currency*, 90th Cong., 1st Sess. 33 (1969) (statement of Manuel F. Cohen, Chairman, SEC) (primary purpose of Williams Act to provide shareholders with adequate information).

51. *See* 15 U.S.C. § 78n(e) (1982).

52. *See* 701 F.2d at 288.

53. *Id.; see* Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623, 627-33 (D. Md. 1982) (plaintiff must prove material nondisclosure to sustain claim of manipulation).

54. 701 F.2d at 288. In *Dan River*, the Fourth Circuit acknowledged that all tender offers inject an element of uncertainty into the marketplace. *Id.* The court noted that most tender offers include conditions which make acceptance of the offer uncertain. *Id.*

55. *Id.* at 289; *see* 18 U.S.C. §§ 1961-68 (1982) (RICO provision prohibiting acquisition of interest in business through funds derived from pattern of racketeering activity).

56. 15 U.S.C. § 80a-1, *et. seq.* (1982).

57. *See* 701 F.2d at 289.

58. *Id.*

59. *Id.*

mission of two predicate acts of racketeering.[60] Dan River alleged that Icahn committed the predicate offense of securities fraud by using Bayswater's assets in two previous takeover attempts.[61] Dan River argued that Bayswater could not give Icahn authority to use Bayswater's funds since Icahn did not register Bayswater with the SEC.[62] Dan River, therefore, contended that Icahn misrepresented the Icahn group's authority to use Bayswater's assets, thereby committing securities fraud.[63] Dan River also alleged that Icahn violated the federal mail fraud statute[64] because Carl C. Icahn, as an officer of Bayswater, violated his fiduciary duty to Bayswater's shareholders and concealed material information in the process.[65] The federal mail fraud statute prohibits use of the postal service to obtain money or property through fraudulent misrepresentations.[66] Dan River contended that Icahn's securities fraud and mail fraud offenses constituted a pattern of racketeering activity in violation of the RICO statute.[67]

Before addressing Dan River's probability of prevailing at trial on Icahn's alleged RICO violations, the Fourth Circuit considered whether the RICO statute granted private parties a cause of action for equitable relief.[68] The court noted that although RICO expressly granted a private plaintiff a right of action for treble damages[69] and that RICO expressly authorized the United States Attorney General to prosecute a case for equitable relief,[70] any private right of action for injunctive relief under RICO must arise by implication from the RICO statute since the language of the statute did not expressly provide

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60. *See* 18 U.S.C. § 1961(5) (1982). Section 1961(5) of the RICO statute defines a pattern of racketeering activity as requiring at least two criminal acts, one act occurring after the effective date of the RICO statute and one act occurring within ten years of the prior act of racketeering activity. *Id.* Section 1961(1) of the RICO statute defines racketeering activity by listing a large number of crimes commonly associated with organized crime. 15 U.S.C. § 1961(1) (1982). Section 1961(1) of the RICO statute, however, also includes a number of offenses committed by persons who are not members of organized crime. *Id.* The RICO statute's failure to limit the statute's list of predicate offenses commonly associated with members of organized crime has led the majority of courts to conclude that a link to organized crime is not a necessary prerequisite to alleging a RICO violation. *See infra* note 130 (courts holding that RICO does not require link to organized crime); *see also RICO-Securities Violations, supra* note 5, at 413-14 (courts not limiting application of RICO to members of organized crime due to § 1961(1) broad list of crimes).

61. *See* 701 F.2d at 290. Icahn used Bayswater's funds as part of a pool of assets used to finance acquisitions in the target companies. *Id.*

62. *Id.*

63. *Id.*

64. *Id.; see* 18 U.S.C. § 1341 (1982) (prohibiting use of postal service to defraud).

65. *See* 701 F.2d at 290.

66. *See* 18 U.S.C. § 1341 (1982).

67. *See* 701 F.2d at 290.

68. *Id.*

69. *Id.; see* 18 U.S.C. § 1964(c) (1982) (any person injured by violation of § 1962 of RICO may sue for treble damages, court costs and attorney's fees); *see also* 18 U.S.C. § 1962 (1982) (prohibiting acquisition of interest in a business through funds derived from a pattern of racketeering activity).

70. *See* 18 U.S.C. § 1964(b) (1982) (Attorney General may prosecute RICO claim and court may grant injunction).

private individuals with a right to equitable relief.[71] The court, however, concluded that recent Supreme Court cases holding that legislative intent determined whether a private right of action arose by implication from a statute,

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71. *See* 701 F.2d at 290; *see also* S. 30, 91st Cong., 1st Sess. (1969). The Senate version of the RICO bill sent to the House for approval did not include a private right of action for damages. *Id.* The final House version of the RICO bill, however, included a private right of action to sue and to recover treble damages plus court costs and reasonable attorney's fees. *See* H.R. REP. No. 1549, 91st Cong., 2d Sess. 1-2, 15-21, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4007, 4010 (RICO statute including private right of action for damages). *But see* 116 CONG. REC. 35346 (1970) (statement of Rep. Steiger) (proposing amendment to RICO statute). In the floor debate, Representative Sam Steiger offered an amendment to the RICO statute to clarify the procedure to be followed in a private action. *Id.* Although Congressman Steiger withdrew the amendment, Steiger clearly expressed the belief that the RICO statute, without the Steiger amendment, provided a private right to injunctive relief. *See id.* at 35346-47 (RICO statute provides private right of action for injunctive relief); *see also* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014, 1047 n.197 (1980) (RICO authorizes private parties to seek injunctive relief, treble damages plus costs, and reasonable attorney's fees).

Holding that RICO did not expressly grant private plaintiffs a right to injunctive relief, the *Dan River* court concluded that to state a claim for equitable relief, a plaintiff must prove that a private right of action for injunctive relief arose by implication from the RICO statute. 701 F.2d at 290. The Supreme Court has ruled that in the absence of legislative intent to provide an additional remedy, if a statute provides a particular remedy, courts should not imply an additional remedy. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 15 (1981) (courts compelled to conclude that Congress provided appropriate remedy in absence of contrary congressional intent); Touche Ross v. Redington, 442 U.S. 560, 575 (1979) (central inquiry in deciding whether statute provides private right of action is whether Congress intended to create private right of action). While the RICO statute provides particular remedies for violations of its provisions, the *Dan River* court failed to examine RICO's legislative history to decide whether Congress intended to provide any additional remedies to the remedies provided in the RICO statute. *See* 701 F.2d at 290. Following the Fourth Circuit's decision in *Dan River* that the RICO statute did not grant private parties an express right of action for injunctive relief, the Southern District of New York, in *Trane Co. v. O'Connor Securities*, examined the RICO statute's grant of relief in the securities context. *See* Trane Co. v. O'Connor Securities, 561 F. Supp. 301, 306-07 (S.D.N.Y. 1983) (examining claim for injunctive relief under RICO).

In *Trane*, plaintiff air conditioning equipment manufacturer brought an action against a risk arbitrage group alleging market manipulation, unfair and inadequate disclosures, and violation of the RICO statute. *See id.* at 303-04. The *Trane* court expressed serious doubt whether the RICO statute provided plaintiffs a private right of action for injunctive relief. *Id.* at 307, *see* 18 U.S.C. §§ 1961-68 (1982) (RICO). The *Trane* court found only one case granting a private party injunctive relief under RICO. *See* 561 F. Supp. at 306. The *Trane* court cited *Aetna Casualty and Surety Co. v. Liebowitz*, 570 F. Supp. 908 (E.D.N.Y. 1983) an opinion read into the record from the bench, as the only case granting a private plaintiff injunctive relief under the RICO statute. 561 F. Supp. at 306. According to the *Trane* court, however, *Aetna* granted a preliminary injunction without addressing the issue regarding the suitability of injunctive relief for private plaintiffs under RICO. *Id.* The *Trane* court concluded that the *Aetna* court implicitly assumed the availability of a private right of action for equitable availability of a private right of action for equitable relief under RICO, and therefore the *Trane* court declined to follow the *Aetna* decision. *Id.* at 307. Instead, the *Trane* court approvingly noted the Fourth Circuit's reservations as to whether RICO granted injunctive relief to private plaintiffs alleging a RICO violation. *Id.* The *Trane* court, however, did not decide whether RICO provided a private right of action for injunctive relief, concluding that since the defendants did not engage in market manipulation, the defendants could not violate RICO. *Id.*

undermined Dan River's claim that a private right of action for equitable relief arose by implication from the RICO statute.[72] The Fourth Circuit, therefore, considered Dan River's probability of success unlikely on a claim that private injunctive relief might arise by implication from RICO.[73]

The *Dan River* court next held that even if RICO provided plaintiffs a private right of action for injunctive relief, Dan River must prove that Icahn had a criminal intent in failing to register Bayswater with the SEC to prove either the mail fraud or the securities fraud charges.[74] The court found that Icahn rebutted any inference of criminal intent by establishing that Icahn constantly monitored Bayswater and that Icahn relied upon counsel's advice that registration was unnecessary.[75]

Finally, the Fourth Circuit expressed serious reservations as to whether Congress intended RICO to provide injured parties an additional remedy against securities fraud.[76] The *Dan River* court noted that Congress enacted RICO to combat organized crime, not to regulate corporate takeovers.[77] The court stated that since Congress may not have intended RICO to provide relief for securities fraud, Dan River could not demonstrate a substantial likelihood of success on the merits to support equitable relief.[78] The Fourth Circuit concluded that Dan River failed to demonstrate a substantial likelihood of prevailing on the merits on any of Dan River's federal and state securities claims

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72. *Id.; see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 15 (1981) (in absence of contrary congressional intent, where statute provides particular remedy court should avoid reading other remedies into statute); Touche Ross & Co. v. Redington, 442 U.S. 560, 573-75 (1979) (congressional intent essential to whether private right of action implied from statute). In *Touche Ross*, the Supreme Court examined whether a private right of action was available under § 17(a) of the '34 Act. *Id.; see* 15 U.S.C. § 78g(a) (1982). The Court observed that Congress enacted § 18(a) of the '34 Act to provide the exclusive remedy for misstatements in any reports filed with the SEC, including reports filed pursuant to § 17(a) of the '34 Act. 442 U.S. at 573-75. *See* 15 U.S.C. § 78r(a) (1982); 15 U.S.C. § 78g(a) (1982). The Court held that the central inquiry as to whether a private right of action arises by implication from a statute focuses on congressional intent to create a private right of action. 442 U.S. at 573-75. The *Touche Ross* Court concluded that since Congress did not intend to create a private right of action under § 17(a), no private right of action could arise by implication from the statute. *Id.* The Fourth Circuit acknowledged the Supreme Court's current reluctance to imply a private right of action from a statute. 701 F.2d at 290 (current Supreme Court authority supports conclusion that Dan River may fail to state a claim for injunctive relief under RICO); *see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 15 (1981) (Congress must intend to provide remedy); Touche Ross v. Redington, 422 U.S. 560, 575 (1979) (congressional intent key to whether remedy available).

73. *See* 701 F.2d at 290.

74. *See id.* at 291.

75. *Id.; see* Bisno v. United States, 299 F.2d 711, 719-20 (9th Cir. 1961) (reliance on attorney's advice rebuts inference of criminal intent), *cert. denied*, 370 U.S. 952 (1962).

76. *See* 701 F.2d at 291.

77. *Id.* In *Dan River*, the Fourth Circuit stated that Congress did not enact RICO to attack the problems of corporate control and risk arbitrage. *Id.*

78. *Id.* The *Dan River* court did not examine the legislative history of the RICO statute before concluding that RICO does not apply to securities violations. *Id.; see also supra* note 71 (legislative history of RICO).

or on Dan River's RICO allegation.[79] The Fourth Circuit, therefore, reversed the district court's injunction against Icahn.[80]

Although the *Dan River* court held that only purchasers or sellers of securities have standing to sue under section 10(b) of the '34 Act, several courts have allowed exceptions to the purchaser-seller rule.[81] For example, in *Hanna Mining Co. v. Norcen Energy Resources Ltd.*,[82] the United States District Court for the Northern District of Ohio recently granted standing to a target company to sue an offeror under section 10(b).[83] In *Hanna Mining*, an issuer filed for preliminary relief to enjoin a tender offer claiming that the offeror's misleading Schedule 13D Disclosure Statement constituted a fraudulent and manipulative device.[84] While several courts have granted a target company standing to sue a tender offeror for violating the disclosure provisions of sec-

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79. 701 F.2d at 284.

80. *Id.* at 280. The *Dan River* opinion contained a lengthy dissent. *Id.* at 292-95. The *Dan River* dissent concluded that Dan River demonstrated a substantial likelihood of success on the merits to support a preliminary injunction. *Id.* at 294. Since Icahn failed to disclose a loan guarantee obligation that represented approximately thirty-nine percent of Icahn Capital's net worth in accordance with proper accounting procedures, the dissent concluded that Icahn's disclosure statement was presumably misleading or inaccurate. *Id.* at 292-93. The dissent argued that because Icahn proposed a merger between Dan River and Icahn by the issuance of debentures, the debentures might be subordinated to the contingent debt liability. *Id.* at 293. Thus, the dissent found Icahn's nondisclosure a material omission in violation of § 14(e) of the Williams Act. *Id.; see* 15 U.S.C. § 78n(e) (1982) (prohibiting untrue statements of material fact or omissions of fact with respect to tender offer). The dissent also concluded that Icahn violated § 14(e) of the Williams Act because Icahn's two-tier tender offer constituted an illegal bait and switch operation. 701 F.2d at 293. The *Dan River* dissent observed that Dan River presented evidence that Icahn knew that Dan River would oppose Icahn's $18 per share conditional tender offer. *Id.* Dan River proved that Icahn knew that the first offer, being an illusion, would induce Dan River's shareholders to tender on the second, lower offer of $15 per share. *Id.* The dissent contended that Icahn must rebut Dan River's evidence to prove that Icahn's two-tier offer did not constitute an illegal bait and switch operation. *Id.*

Furthermore, the dissenting opinion asserted that since Carl C. Icahn stated that he would dismiss the action on the merits upon assuming control of Dan River, Dan River demonstrated a probability of irreparable harm in support of Dan River's application for injunctive relief. *Id.; see supra* note 25 (balance of hardships test). The dissenting opinion emphasized that a consideration of the public interest required an inquiry into the means Icahn used to advance its takeover goals. *See* 701 F.2d at 294-95. The dissent contended that the court would best serve the public interest by maintaining the status quo until a resolution on the merits. *Id.* at 295. Finally, the dissent concluded that the district court's order disenfranchising Icahn's shares provided an appropriate remedy by preventing future harm to Dan River. *Id.*

81. *See* Kirshner v. United States, 603 F.2d 234 (2d Cir. 1978) (pension trust fund beneficiaries have standing under rule 10b-5), *cert. denied*, 442 U.S. 909 (1979); Heyman v. Heyman, 356 F. Supp. 958, 964 (S.D.N.Y. 1973) (trust beneficiaries have standing under rule 10b-5); *see also* 17 C.F.R. § 240.10b-5 (1983) (prohibiting use of manipulative and deceptive devices in connection with any securities transactions).

82. [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,878 (N.D. Ohio June 11, 1982).

83. *See id.* at 94,592 (target company has standing under rule 10b-5); 17 C.F.R. § 240.10b-5 (1983) (prohibiting use of manipulative and deceptive devices in connection with purchase or sale of any security).

84. *See* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,878 at 94,592.

tion 13(d) of the Williams Act,[85] only the *Hanna Mining* court has granted a target company standing to sue a tender offeror for violating section 10(b).[86] The *Hanna Mining* court held that a target company had standing to seek injunctive relief even though the company was not a purchaser or seller of securities.[87] The court held that the target company was the most appropriate party to assert a violation of the '34 Act's antifraud provisions on behalf of the company's shareholders because the target company was the only party possessing the offeror's misleading statements.[88] The *Hanna Mining* court, therefore, granted standing to Hanna Mining under section 10(b) of the '34 Act's antifraud provisions and under SEC rule 10b-5.[89]

In addition to the purchaser-seller rule exception that the party best situated to seek relief has standing to sue, some courts have allowed an injunction exception to the purchaser-seller rule.[90] In *Cowin v. Bressler*,[91] the United States District Court for the District of Columbia ruled that the purchaser-seller rule of section 10(b) did not apply in a suit for injunctive relief because the purchaser-seller rule applied only in private damages actions.[92] In *Cowan*, a

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85. *See* Dan River, Inc. v. Unitex Ltd., 624 F. 2d 1216, 1224 (4th Cir. 1980) (target corporation has standing to seek relief enjoining violation of § 13(d)), *cert. denied*, 449 U.S. 1101 (1981); Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240, 248 (8th Cir. 1979) (issuer has standing to require full disclosure under § 13(d)); General Aircraft Corp. v. Lampert, 556 F.2d 90, 97 (1st Cir. 1977) (target corporation has standing to maintain private right of action for injunctive relief under § 13(d)); GAF Corp. v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971) (issuer has standing under § 13(d) to seek relief if false filing), *cert. denied*, 406 U.S. 910 (1972); *see also* 15 U.S.C. § 78m(d)(1) (1976) (Schedule 13D filing requirement).

86. *See* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,878 at 94,592 (N.D. Ohio June 11, 1982). Relying on a narrow exception to the purchaser-seller rule, the *Hanna Mining* court stated that an issuer may have standing because an issuer is often the most appropriate party to assert a rule 10b-5 violation. *See id.* at 94,592 (*GAF Corp.'s* reasoning for purchaser-seller exception under § 13(d) supports issuer standing under § 10(b) and rule 10b-5); *see also* GAF Corp. v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971) (issuer might have standing if issuer most appropriate party to seek relief on behalf of issuer's shareholders).

87. *See* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,878, at 94,592.

88. *Id.*

89. *Id.*

90. *See* Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 194-95 (3d Cir. 1976) (narrow injunction exception to purchaser-seller rule where preventive relief appropriate); Davis v. Davis, 526 F.2d 1286, 1289-90 (5th Cir. 1976) (injunction exception to purchaser seller rule because strict insistence on purchase or sale not as critical in suit for injunctive relief as in suit for damages).

91. [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383 (D.C.D.C. Dec. 23, 1981).

92. *Id.* at 92,376-77 (injunction exception to purchaser-seller rule entitled minority shareholders to standing under rule 10b-5); *see* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 725, 730-31 (1975) (only purchasers or sellers of securities have standing to sue under § 10(b) and rule 10b-5; *supra* notes 29-30 and accompanying text (definition of § 10b and rule 10b-5). The *Cowin* court noted that the Supreme Court's holding in *Blue Chip Stamps* that only purchasers or sellers of securities could assert standing under § 10(b) and rule 10b-5 applied only to private damage actions. *See* [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,393, at 92,376-77 (*Blue Chip Stamps's* purchaser-seller rule not applied to actions for injunctive relief); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. at 725, 730-31 (purchaser seller rule applied in private damages action).

minority shareholder sought injunctive relief against a company to require disclosure of allegedly material information.[93] Defendants objected to plaintiff's claim, arguing that plaintiff lacked standing to sue because plaintiff neither purchased nor sold securities in connection with the alleged fraudulent acts.[94] The *Cowan* court held that judicial endorsement of the injunction exception to the purchaser-seller rule coupled with a policy of encouraging private litigants to supplement SEC enforcement actions supported the court's grant of standing to a minority shareholder seeking an injunction to require disclosure.[95]

The *Dan River* court should have applied the *Hanna Mining* court's holding that the party best situated to assert a violation of the antifraud provisions of the '34 Act has standing to sue.[96] The *Dan River* court, therefore, should have granted standing to the plaintiff target company. Dan River was in the best position to prosecute a claim for injunctive relief on behalf of Dan River's shareholders because Dan River had better knowledge of Icahn's alleged violations and greater resources to maintain a suit for equitable relief. The *Dan River* court, however, should not have granted standing to Dan River under a general injunction exception to the purchaser-seller rule.[97] The injunctive exception is designed to provide preventive relief in cases where no actual purchase or sale transaction has been completed.[98] In *Dan River*, the plaintiff did not seek to enjoin Icahn's tender offer but instead sought to disenfranchise Icahn's shares of Dan River common stock.[99]

The Fourth Circuit also noted that Dan River must prove that Icahn actually intended to deceive Dan River's investors, because the Supreme Court has held that a private cause of action will lie under the section 10(b) antifraud provision of the '34 Act and SEC rule 10b-5 only in the presence of scienter, an intent to deceive, manipulate or defraud.[100] The Supreme Court

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93. *See* [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,393, at 92,375-76 (requesting injunctive relief to require disclosure of allegedly material information).

94. *Id.* at 92, 376.

95. *See id.* at 92,376-77 (policy of encouraging private enforcement actions supports injunction exception to purchaser-seller rule).

96. *See supra* notes 87-88 and accompanying text (issuer in best position to assert violation of anti-fraud provisions of '34 Act and SEC rules promulgated thereunder).

97. *See* Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 194-95 (3d Cir. 1976) (denying injunction exception to purchaser-seller rule where actual purchase or sale completed). In *Tully*, the Third Circuit qualified the injunction exception to the purchaser-seller rule by limiting application of the injunction exception to situations where the exception's preventive purpose could be achieved. *Id.* The plaintiffs in *Tully* sought not to enjoin a purchase or sale of securities but instead requested disenfranchisement of defendant's shares to undo the effects of a completed transaction. *Id.* The *Tully* court concluded that the injunction exception to the purchaser-seller rule could not grant plaintiffs standing to allege a violation of the '34 Act's antifraud prohibitions. *Id.* The situation presented in *Tully* is analogous to the situation in *Dan River*. Dan River could not rely on an injunction exception to the purchaser-seller rule since Dan River did not seek to enjoin Icahn's tender offer but instead sought sterilization of Icahn's shares. *Id.; see also* 701 F.2d at 282.

98. *See* 540 F.2d at 194-95.

99. *See* 701 F.2d at 287.

100. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193-215 (1976) (private cause of action for damages under § 10(b) and rule 10b-5 will not lie in absence of scienter, defined as intent to deceive, manipulate or defraud).

has extended the scienter requirement to SEC injunctive proceedings.[101] The Fourth Circuit, therefore, in compliance with the scienter requirement found no evidence of an intent to deceive investors.[102] In fact, the court observed the "potential irony" in finding Icahn's "extraordinarily frank" disclosure a violation of rule 10b-5 because such a finding might only encourage less, rather than full disclosure of an offeror's intentions.[103]

The Fourth Circuit cited *Radol v. Thomas*[104] in support of the proposition that a two tier tender offer would not violate section 14(e) of the Williams Act.[105] The *Dan River* court, however, failed to analogize *Radol* to *Dan River*.[106] In *Radol*, plaintiff Marathon Oil shareholders sought to enjoin a proposed merger between Marathon and U. S. Steel, alleging that the "front-end loaded" price structure of U. S. Steel's tender offer and merger created artificial market influences in violation of section 14(e) of the Williams Act.[107] Front-end loaded offers propose one price for the actual tender offer and a second price for a subsequent merger.[108] The *Radol* plaintiffs claimed that U. S. Steel's front-end loaded offer manipulated the price of Marathon's securities by coercing Marathon shareholders into tendering their shares to avoid the risk of being forced to accept a lower price in the form of cash or a stock trade in the subsequent merger.[109] Although the *Radol* court defined manipulation as intent to deceive investors by artificially affecting the price of securities,[110] the *Radol* court concluded that the plaintiffs failed to demonstrate a substantial likelihood of proving at trial that U. S. Steel's two-price offer manipulated the price of Marathon stock by coercing Marathon shareholders into tendering.[111] The court held that it was unlikely that the two-tier structure interfered with the market of other potential offerors for Marathon stock.[112] Although failing to analogize *Radol* to *Dan River*, the Fourth Circuit might have relied on *Mobil Corp. v. Marathon Oil Co.*[113] to demonstrate that Icahn's two-tier offer was manipulative.[114]

In *Mobil*, the target corporation, Marathon, granted U. S. Steel, a white knight,[115] an option to purchase up to ten million shares of Marathon for

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101. *See* Aaron v. SEC, 446 U.S. 680, 691 (1980) (scienter requirement necessary in SEC injunctive proceedings for violation of rule 10b-5).

102. *See* 701 F.2d at 285.

103. *Id.*

104. 534 F. Supp. 1302 (S.D. Ohio 1982).

105. *See Dan River*, 701 F.2d at 289 n.11.

106. *Id.*

107. *See Radol*, 534 F. Supp. at 1311.

108. *See id.*

109. *Id.*

110. *Id.; see* Santa Fe Indus. v. Green, 430 U.S. 462, 476 (1977) ("manipulation" virtually a term of art in securities context).

111. *See Radol*, 534 F. Supp. at 1312-13.

112. *Id.*

113. 669 F.2d 366 (6th Cir. 1981).

114. *See Dan River*, 701 F.2d at 288 n.10.

115. *See* Polinsky v. MCA Inc., 680 F.2d 1286, 1290 n.4 (9th Cir. 1982) (white knight defined as friendly corporation engaged by target company to make a tender offer at a higher price than original unfriendly tender offeror's bid). A target company locates a white knight to protect the

ninety dollars per share, and an option to purchase Marathon's interest in the Yates Oil field for $2.8 billion, if U. S. Steel's tender offer failed and another corporation succeeded in acquiring a majority interest in Marathon.[116] The Sixth Circuit held that the "lock-up" agreement violated section 14(e) of the Williams Act.[117] A lock up arrangement is an offer of an exclusive right to one contestant which would discourage higher bids from other contestants.[118] The *Mobil* court concluded that the lock-up options imposed an artificial price ceiling on the tender offer market for Marathon shares and therefore constituted a manipulative act under the Williams Act.[119]

The Fourth Circuit distinguished the *Mobil* decision on the grounds that the *Mobil* lock-up agreement was an artificial manipulation outside the securities marketplace while the situation in *Dan River* was an offer in the securities marketplace.[120] The Fourth Circuit instead examined the analogous situation presented in *Cities Service Co. v. Mesa Petroleum Co.*[121] in which an offeror made a friendly offer which management rejected, followed by a hostile offer at a lower price.[122] In *Cities Service Co.*, the acquirer offered to buy forty-six percent of the target's shares at fifty dollars per share.[123] When target management rejected the friendly offer, the acquirer offered to purchase fifteen percent of the target's shares at forty-five dollars per share with an option to purchase more than fifteen percent.[124] The target sought preliminary injunctive relief in the United States District Court for the District of Delaware, alleging that the acquirer's first offer induced shareholders into believing that the acquirer could afford to purchase at least forty-six percent at fifty dollars per share and that consequently, shareholders would tender on the lower offer believing that the acquirer would purchase more than fifteen percent.[125] The *Cities Service Co.* court held that the tender offer probably did not violate the Williams Act because the offeror made full disclosure.[126]

Applying the *Radol* court's analysis, the *Dan River* court correctly concluded that Icahn's two-tier tender offer did not violate the Williams Act's

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company by encouraging shareholders to tender to the white knight instead of to the unfriendly tender offeror. *Id.*

116. *See* Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 375 (6th Cir. 1981) (lock-up option manipulative practice violating § 14(e) of the Williams Act).

117. *See id.*

118. *Id.*

119. *Id.*

120. *See* 701 F.2d at 288 n.10 (*Dan River* court noted criticism of *Mobil* decision); *see also* Santa Fe Indus. v. Green, 430 U.S. 462, 476-77 (1977) (deception necessary predicate to § 14(e) allegation); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623, 629-30 (D. Md. 1982) (*Mobil* fails to interpret *Santa Fe's* definition of manipulation as requiring deception to allege § 14(e) violation).

121. 541 F. Supp. 1220 (D. Del. 1982).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

prohibition against manipulation in connection with any tender offer.[127] Like the front-end loaded offer in *Radol*, Icahn's two-tier tender offer did not coerce Dan River stockholders into tendering, nor did Icahn's two-tier offer deter other offers for Dan River's stock.[128] Although all tender offers are manipulative, Congress decided that regulation of tender offers through the disclosure provisions of the Williams Act, rather than a blanket prohibition, would provide adequate protection for the investor.[129] Like the two-tier offers in *Radol* and *Cities Service* but unlike the lock-up agreement in *Mobil*, Icahn's two-tier tender offer was not manipulative and therefore did not violate section 14(e) of the Williams Act.[130]

In addition to concluding that Icahn's activities did not constitute securities fraud, the Fourth Circuit examined whether Icahn violated RICO.[131] A minority of courts have required that a defendant be associated with organized crime to support a RICO charge.[132] The first case to require that a plaintiff demonstrate that defendant had ties to organized crime arose in a federal mail fraud case, *Barr v. WUI/TAS, Inc.*[133] In *Barr*, the plaintiff alleged that the defendant, the nation's largest telephone answering service had overcharged the plaintiff.[134] The district court denied plaintiff's motion to amend the

127. *See* 701 F.2d at 287-89 (Icahn's two-tier tender offer probably not manipulative); *see also Radol*, 534 F. Supp. at 1312-13 (two-tier pricing structure neither coercive nor manipulative).

128. *See* 701 F.2d at 287-89 (two-tier offer not coercive because district court's order gave shareholders additional time to reconsider decision to tender); *see id.* (two-tier offer not manipulative because Icahn made full disclosure of terms and conditions of offer and management's resistance to offer).

129. *See* 701 F.2d at 288; *Radol*, 534 F. Supp. 1312 (Congress regulates not outlaws tender offers); *see also* SEC Advisory Committee on Tender Offers - Report of Recommendations, [Current Binder] FED. SEC. L. REP. (CCH) No. 1028 (July 15, 1983). The SEC Advisory Committee considered whether two-tier offers should be prohibited. *Id.* The Committee acknowledged the coercive elements inherent in two-tier tender offers and the potential for abuse in partial bids. *Id.* at 25. Partial bids unlike a full bid for all of a company's securities are offers for only a portion of a company's stock. *Id.* Two-tier offers are partial bids since such offers propose an initial offer to purchase a specified number of securities at a specified price and propose an alternative offer if the initial offer fails. *Id.* As a result of the Committee's examination, the Committee recommended a regulatory disincentive to two-tier tender offers. *Id.* at 26. The Committee adopted recommendation 16 which would require a longer minimum offering period for partial bids than that required for full bids. *Id.* Recommendation 16 states that the minimum offering period for a partial tender offer should be approximately two weeks longer than that prescribed for full tender offers. *Id.*

130. *See* 701 F.2d at 284-89; *Radol*, 534 F. Supp. at 1312-13 (front end loaded offer not manipulative); *Cities Service*, 541 F. Supp. at 1220 (two-tier offer not manipulative); *but see Mobil*, 669 F.2d at 375 (lock up option manipulative).

131. *See* 701 F.2d at 289-91.

132. *See* Noonan v. Granville-Smith, 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (defendant must be member of organized crime because purpose of RICO statute is to curb organized crime); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 746-48 (N.D. Ill. 1981) (RICO act limited to entities involved with organized crime or activities within the penumbra of organized crime); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 112-13 (S.D.N.Y. 1975) (plaintiff must demonstrate affirmatively that defendant connected with organized crime to support RICO charge).

133. 66 F.R.D. 109 (S.D.N.Y. 1975).

134. *Id.* at 112-13.

pleadings to include a RICO charge because the plaintiff failed to indicate that the defendant had a connection with organized crime.[135]

In contrast to *Barr*, the majority of courts have rejected a requirement that a plaintiff demonstrate that a defendant had ties to organized crime.[136] For example, in *United States v. Bledsoe*[137] the Eighth Circuit held that no statute could require nor did Congress intend the RICO statute to require direct proof of involvement in something as ill defined as organized crime.[138] In *Bledsoe*, the government alleged that defendants associated with an enterprise which fraudulently sold securities of agricultural cooperatives and that defendants participated in the affairs of the enterprise through a pattern of racketeering activity in violation of RICO.[139] The *Bledsoe* court concluded that RICO did not require a nexus with organized crime.[140]

In addition to judicial authority, the RICO statute's legislative history demonstrates that defendants need not be connected to organized crime to allege a RICO violation.[141] Congress refused to limit application of RICO's

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135. *Id.*

136. *See* Cenco, Inc. v. Seidman & Seidman, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,615, at 93,057 (7th Cir. Mar. 26, 1982) (no requirement that defendant be involved with organized crime); Mauriber v. Shearson/American Express, 546 F. Supp. 391, 396 (S.D.N.Y. 1982) (no organized crime requirement in RICO), Maryville Academy v. Loeb Rhoades & Co., 530 F. Supp. 1061, 1069 (N.D. Ill. 1981) (plaintiff need not demonstrate that defendant member of organized crime); Engl v. Berg, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981) (not necessary that defendant connected to organized crime).

137. 674 F.2d 647 (8th Cir.), *cert. denied*, 103 S. Ct. 456 (1982).

138. *Id.* at 663.

139. *Id.*

140. *Id.; see* United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1976) (no link with organized crime necessary to invoke RICO). In *Mandel*, the Maryland district court squarely addressed the issue whether the RICO statute applied only to members of organized crime. *Id.* In *Mandel*, the court recognized that Congress' primary purpose in enacting the RICO statute was to combat organized crime. *Id.; see* Congressional Statement of Findings and Purpose of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 92 *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 1073 (purpose of RICO to eradicate organized crime). The *Mandel* court, however, noted that Congress rejected a number of proposals to define organized crime. 415 F. Supp. at 1018. The court concluded that Congress did not intend to require a link with organized crime to invoke RICO. *Id.* at 1018-19.

The *Mandel* case, however, was a criminal RICO case. *Id.* The *Mandel* court distinguished *Barr* as an action brought by a private litigant under RICO's civil provisions to conclude that an organized crime requirement should not apply in a criminal prosecution. *Id.; cf.* Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 112-13 (S.D.N.Y. 1975) (connection with organized crime required to invoke civil RICO). The *Mandel* court noted that *Barr* did not consider the legislative history indicating that Congress did not intend RICO to apply exclusively to members of organized crime. 415 F. Supp. at 1019. The *Mandel* analysis of a criminal RICO case, however, should apply to private actions brought under RICO's civil provisions. The legislative history for both the criminal and civil provisions of the RICO statute indicates that Congress did not intend to limit RICO to individuals connected with organized crime. *See* 116 CONG. REC. 35,344 (1970) (remarks of Rep. Poff) (amendment limiting RICO to members of organized crime, specifically limited to persons of Italian ancestry would be unconstitutional).

141. *See* 116 CONG. REC. 35,302 (1970) (remarks of Rep. Celler) (RICO statute does not contain definition of organized crime to maintain flexibility in application of statute); *see also* United States v. Uni Oil, 646 F.2d 946, 953 (5th Cir. 1981) (in criminal RICO case court held

statutory provisions to members of organized crime.[142] Moreover, in *United States v. Turkette*,[143] the United States Supreme Court examined the legislative history of the RICO statute and concluded that Congress was aware of the scope of the statute.[144] The Court held that since Congress intended RICO to have a broad scope, courts should not restrict application of the RICO statute to persons connected with organized crime.[145]

The Fourth Circuit should not join the minority of courts requiring that defendants be connected to organized crime to assert a RICO claim.[146] The majority of courts hold that RICO's legislative history and statutory language do not support a restriction of the RICO statute to members of organized crime.[147] The Fourth Circuit should follow the Eighth Circuit's holding in *Bledsoe* that Congress did not require a nexus with organized crime.[148]

In *Dan River*, the Fourth Circuit held that a target company had not demonstrated a substantial likelihood of success on the merits regarding a number of alleged securities laws violations and an alleged violation of the RICO statute to justify injunctive relief.[149] The court's conclusion that Dan River as a target company probably lacked standing to assert a claim under the antifraud provisions of the '34 Act demonstrates the Fourth Circuit's reluc-

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that nothing in history or language of RICO statute expressly limits application to members of organized crime), *cert. denied*, 455 U.S. 908 (1982).

142. *See* Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983) (nexus with organized crime not necessary to invoke RICO). In *Schacht*, the Illinois State Director of Insurance alleged that defendants continued an insurer in business past the insurer's point of insolvency and looted the insurer of the insurer's most profitable and least risky business, thereby aggravating the insurer's insolvency. *Id.* at 1344-45. Examining RICO's legislative history, the *Schacht* court held that Congress did not intend to limit RICO's statutory reach to persons involved with organized crime. *Id.* at 1353-56.

143. 452 U.S. 576 (1981).

144. *Id.* at 586-87. In *Turkette*, a criminal case, the Supreme Court held that neither the language nor structure of RICO limited RICO's application to defendants that have infiltrated legitimate enterprises. *Id.* The Court examined RICO's language and legislative history to conclude that Congress knew that the legislature was entering a new domain of federal involvement by enacting RICO. *Id.* As a result of Congress' knowledge of the scope of RICO, the Supreme Court concluded that courts have no authority to restrict RICO's application. *Id.*

145. *Id.*

146. *See RICO-Securities Violations, supra* note 5, at 437 (restricting RICO to only persons associated with organized crime necessarily restricts statute's utility as weapon against organized crime); *see also* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1106-09 (1982) (courts should not restrict RICO to persons affiliated with organized crime).

147. *See* Schacht v. Brown, 711 F.2d 1343, 1353-54 (7th Cir. 1983) (enumerating decisions of courts not restricting RICO to members of organized crime).

148. *See* United States v. Bledsoe, 674 F.2d 647, 663 (8th Cir. 1982) (Congress did not require link to organized crime to invoke RICO); *see also RICO - Securities Violations, supra* note 5, at 437 (restricting RICO to members of organized crime contrary to judicial authority and legislative history); *Civil RICO, supra* note 139, at 1120-21 (courts should not limit RICO liability based on determination of which defendants connected with organized crime).

149. *See supra* text accompanying notes 25-79 (Fourth Circuit's analysis of Dan River's likelihood of success on merits).