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Ii. Tender Offers: Injunctive Relief Under The Williams Act

quiring him to sell them prematurely for the benefit of the defrauding defendant. Indeed, there is no need for mitigation in light of the holding fixing damages on the date of public discovery of the fraud. Regardless of what happens to the stock's price after that date, the plaintiff's recovery will not be affected.[171]

The *Harris* court appeared to be guided by the policy of investor protection underlying the federal securities laws. The holding in *Harris* does not subject the defendants to a crushing financial burden,[172] yet makes them responsible for the consequences of their fraudulent conduct. In this sense, *Harris* is similar to the other damages cases. Together, these cases indicate a gradual expansion of the potential liability of securities law violators with an attendant awareness of the need to avoid punitive sanctions which could dramatically affect the professional securities and financial communities.

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II. TENDER OFFERS: INJUNCTIVE RELIEF UNDER THE WILLIAMS ACT

A number of methods have been employed to effect the takeover of a corporation. In the recent past, cash tender offers[1] have found increasing favor in the eyes of persons seeking to gain a controlling interest in a particular company.[2] Cash tender offers are regulated by

[171] *See* Cant v. Becker & Co., 379 F. Supp. 972, 975 (N.D. Ill. 1974). *See also* Beecher v. Able, CCH FED. SEC. L. REP. ¶ 95,016 at 97,561 (S.D.N.Y. Mar. 17, 1975) (no need for plaintiff to mitigate damages in action under § 11(a) of 1933 Act, 15 U.S.C. § 77k(a) (1970), by selling stock after statutory date for measurement of damages).

[172] In addition to the protection afforded by the time limitation, the court further required that Harris prove all the traditional elements for recovery under Rule 10b-5. 523 F.2d at 229 n.7. One of the most important of these elements is reliance by Harris upon the defendants' omissions and misrepresentations, more accurately characterized as causation in fact. *See, e.g.*, Clegg v. Conk, 507 F.2d 1351, 1361 n.14 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975). *See generally* Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV. L. REV. 584, 587-96 (1975).

[1] A tender offer consists of a public offer by a person or group, the offeror, to purchase some or all of the stock of a corporation, the target company. The offer is usually at a price slightly above the market price of the shares. *See generally* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL (1973); Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317 (1967).

[2] *See* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL xv, (1973); Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U. L. REV. 991 (1973).

the Williams Act,[3] which seeks to protect tendering shareholders by requiring that adequate information be provided on which to base a decision to tender shares.[4] Five percent beneficial owners[5] of any class of stock registered pursuant to §12 of the Exchange Act[6] must report information regarding their identity, the source of the funds used to make the purchases, and the purpose of the purchases.[7] When a tender offer is made, target company shareholders[8] must decide either to tender their shares for the price offered or maintain their ownership and participate in the new enterprise.[9] In either event, the information which must be reported pursuant to the Williams Act is provided to enable these shareholders to make a rational decision whether to participate in the outstanding cash tender offer.

The Williams Act fails to provide specific remedies for violations, thereby compelling the courts to determine the proper relief to be awarded.[10] The preliminary injunction has been the most frequently

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[3] Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 *adding* Securities Exchange Act of 1934 §§ 13(d)-(e), 14(d)-(f), 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1970) [hereinafter referred to as the Williams Act].

[4] H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968), *reprinted at* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813-14. *See also*, Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-59 (1975).

[5] Beneficial ownership of stock includes the ownership of securities in the name of a person's spouse and minor children. *See* Exchange Act Release No. 34-7793 (Jan. 19, 1966), *reprinted at* CCH FED. SEC. L. REP. ¶ 26,031. Concerted action by non-related persons may result in a finding of a group status which is subject to the Williams Act in the same manner as an individual. GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971); Twin Fair, Inc. v. Reger, 394 F. Supp. 156 (W.D.N.Y. 1975); Water & Wall Associates, Inc. v. American Consumer Indus., Inc. [1972-1973 Transfer Binder], CCH FED. SEC. L. REP. ¶ 93,943 (D.N.J. Apr. 19, 1973). Prior to 1970, ten percent ownership triggered the disclosure requirements under the Williams Act. Act of Dec. 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497, *amending* 15 U.S.C. §§ 78m(d)(1) & 78n(d)(1)(1970).

[6] Securities Exchange Act of 1934, 15 U.S.C. § 78*l* (1970).

[7] Securities Exchange Act of 1934 § 13(d)(1), 15 U.S.C. § 78m(d)(1) (1970). The same information must be provided to the Securities Exchange Commission and to the issuer of the stock if a person makes a tender offer which would result in that person owning five percent or more of the stock sought to be purchased. Securities Exchange Act of 1934 § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1970).

[8] *See* note 1 *supra*.

[9] Even if the shareholder tenders his stock, it may not all be purchased. Section 14(d)(6) provides that if more than the requested number of shares are tendered, the offeror must purchase those offered on a pro rata basis. 15 U.S.C. § 78n(d)(6) (1970).

[10] *Compare* Chris-Craft Indus. v. Piper Aircraft Corp., 516 F.2d 172 (2d Cir. 1975), *cert. granted*, 96 S. Ct. 1505 (1976) (damages awarded to tender offeror for misrepresentations by competing tender offeror and target company) *with* Otis Elevator Co. v. United Technologies Corp., 405 F. Supp. 960 (S.D.N.Y. 1975) (preliminary injunction

employed device because it prevents violations of the disclosure provisions of the Act, while providing an opportunity to correct errors in the statements made by the parties.[11] The tender offer is a sensitive mechanism, however, and a preliminary injunction which delays the development of the offer frequently impairs the chances of success.[12] Permanent injunctive relief has also been recognized by the courts as an appropriate remedy for effectuating the purposes of the Williams Act.[13] A failure to distinguish sufficiently the distinct character of permanent injunctive relief as opposed to the preliminary injunction has led to some confusion concerning the propriety of granting either type of relief, as well as the standards to be applied in making those determinations.[14] Moreover, in granting injunctions the courts have occasionally lost sight of the investor-protection purpose of the Williams Act.

A. Permanent Injunctions

In *Rondeau v. Mosinee Paper Corp.*,[15] the target corporation sought a permanent injunction against Rondeau, a private investor, who had failed to file a timely Schedule 13D.[16] Rondeau began purchasing large amounts of Mosinee's common stock in April 1971. Slightly more than a month later, he had acquired more than five

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granted to enjoin any actions in furtherance of the tender offer when there is alleged a violation of §§ 14(d) and (e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(d)&(e) (1970).

[11] Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973). *See also* Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969).

[12] *See* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 266-68 (1973). *See generally* Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW. 115 (1967); Hayes & Taussig, *Tactics of Cash Take-Over Bids*, 45 HARV. BUS. REV. 135 (Mar.-Apr. 1967).

[13] *See, e.g.*, Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975).

[14] *See* text accompanying notes 63-75 *infra*.

[15] 422 U.S. 49 (1975).

[16] *Id.* at 53. Section 13(d)(1) of the Exchange Act provides in pertinent part:

> Any person who . . . is directly or indirectly the beneficial owner of more than 5 per centum [of any equity security of a class which is registered pursuant to section 78*l* of this title] shall, within ten days after such acquisition, send to the issuer . . . and file with the Commission, a statement containing such . . . information . . . as the Commission may by rules and regulations prescribe . . . .

15 U.S.C. § 78m(d)(1) (1970). The Securities Exchange Commission has promulgated Rule 13d-101 which sets forth the information required to be filed by five percent owners of a class of stock. 17 C.F.R. § 240.13d-101 (1976).

percent of the outstanding common stock of Mosinee, but had failed to make the required filing.[17] Mosinee brought suit seeking to enjoin Rondeau from voting or pledging the stock he owned and from acquiring additional stock. Mosinee further sought divestiture of the stock Rondeau already owned and damages.[18] The district court denied the injunction holding that Mosinee had not shown irreparable harm.[19] The Seventh Circuit held, however, that Rondeau's failure to make a timely filing of a Schedule 13D was sufficient to cause an injunction to issue, even absent irreparable harm.[20]

The Supreme Court reversed and ordered the Seventh Circuit to "reinstate the judgment of the District Court."[21] The Court examined Rondeau's activities against the investor-protection purpose of the Williams Act[22] and found that Rondeau had not engaged or threatened to engage in any activity which the Act was directed to prevent.[23] Chief Justice Burger, writing for the majority, noted that the Williams Act principally seeks to protect shareholders when a tender offer is made for their shares. Section 13(d),[24] however, requires filing whenever five percent or more of a class of securities is acquired,

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[17] Rondeau continued to purchase Mosinee's common stock until June 30, 1971, by which time he had acquired over 60,000 of the 800,000 outstanding shares. Upon receipt of a letter dated July 30, 1971, from Mosinee informing him that his purchase might be in violation of the securities laws, Rondeau discontinued his purchases. He filed a Schedule 13D on August 25, 1971, in compliance with Rule 13d-1. *See* note 16 *supra*. Thereafter, Mosinee informed its shareholders by letter and a simultaneously released newsletter that Rondeau had violated federal law and that their stock was undervalued in the over-the-counter market. 422 U.S. at 53-54. Mosinee commenced this action after Rondeau filed a Schedule 13D.

[18] 422 U.S. at 55. Mosinee also sought a preliminary injunction; however this motion, made with the complaint, was subsequently withdrawn. *Id.*

[19] 354 F. Supp. 686, 693-94 (W.D. Wisc. 1973), *rev'd* 500 F.2d 1011 (7th Cir. 1974), *rev'd* 422 U.S. 49 (1975).

[20] 500 F.2d 1011, 1017 (7th Cir. 1974), *rev'd* 422 U.S. 49 (1975). The Seventh Circuit determined that Mosinee, in its position as issuer of the shares, was best able to enforce the Williams Act. Therefore, since there was a violation of the Act, albeit a technical one, Mosinee was allowed to enforce it, here by means of a permanent injunction. 500 F.2d at 1016-17.

[21] 422 U.S. 49, 65 (1975).

[22] *Id.* at 58. The Court stated that:

> [t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party.

Id. (footnote omitted).

[23] *Id.* at 59.

[24] Securities Exchange Act of 1934 § 13(d), 15 U.S.C. § 78m(d) (1970). *See* note 16 *supra*.

whether or not a tender offer is made. Indeed, an acquisition of that magnitude could "lead to important changes in the management or business of the company . . . ."[25] Nevertheless, the Court did not consider Rondeau's activities to be of the sort from which Congress sought to protect investors.[26] Rondeau had not made a tender offer for Mosinee stock, and therefore, the shareholders of Mosinee were not under pressure to sell their stock without the benefit of essential information. Thus, the tardy filing of the Schedule 13D was sufficient to protect Mosinee shareholders.[27] Since the shareholders were adequately protected, irreparable harm would not result from a denial of injunctive relief.

The Court then reviewed the Seventh Circuit's determination that irreparable harm need not be shown. The majority concluded that simply because Mosinee was attempting to protect investors by enforcing the Williams Act, "it [was not] relieved of showing irreparable harm and other usual prerequisites for injunctive relief."[28] The Court made no distinction between preliminary and permanent injunctive relief. Rather, "the traditional standards for extraordinary equitable relief" were held to apply to the case[29] and irreparable harm was thus recognized as a prerequisite to injunctive relief generally.[30]

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[25] H.R. REP. No. 1655, 91st Cong., 2d Sess. (1970), *reprinted at* 1970 U.S. CODE CONG. & AD. NEWS 5025, 5028.

[26] *See* text accompanying note 35 *infra*. Senator Williams, the sponsor of the Act, has stated that the Act was intended to protect investors during tender offers. 113 CONG. REC. 854 (1967) (remarks of Senator Williams). *See generally* S. REP. No. 550, 90th Cong., 2d Sess. (1967); H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968), *reprinted at* 1968 U.S. CODE CONG. & AD. NEWS 2811. In this case, Rondeau had not made a tender offer. However, he did indicate in his Schedule 13D that he was contemplating such action. Furthermore, the district court found that there was no concrete evidence that Rondeau intended to obtain control of Mosinee prior to his receipt of the July 30th letter from Mosinee. 354 F. Supp. 686, 690 (W.D. Wisc. 1973). *See* note 17 *supra*. The Seventh Circuit did not dispute this finding and noted that they were "giving effect" to the district court's determination "that [Rondeau's conduct] was unaccompanied by a tender offer or proxy solicitation." 500 F.2d 1011, 1017 (7th Cir. 1974).

[27] 422 U.S. 49, 59 (1975).

[28] *Id.* at 65.

[29] *Id.* at 57. The Court relied on Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959). In *Beacon Theaters*, the Court held that injunctive relief is not proper absent a showing of irreparable harm and inadequacy of legal remedies. 359 U.S. at 506-07. This standard had been continually upheld for both permanent and temporary injunctive relief. *See, e.g.*, Sampson v. Murray, 415 U.S. 61, 88 (1974).

[30] The same standards were considered despite the difference between permanent and preliminary injunctions. A preliminary injunction is generally issued to preserve the status quo which exists immediately prior to the contested circumstances presented in the litigation. American Radiator Ass'n v. Mobile S.S. Ass'n, 483 F.2d 1, 4

The Court's examination of the factual setting in *Rondeau* resulted in a finding that irreparable harm was not present and therefore that a permanent injunction should not have been granted.[31] Given the investor-protection purpose of the Act,[32] Rondeau's failure to file a timely Schedule 13D absent a tender offer for the shares could not have irreparably harmed the shareholders. The shareholders had not been presented with a tender offer which compelled them to make an investment decision based on insufficient information. Indeed, Rondeau complied with the Williams Act by filing a Schedule 13D as soon as practicable after learning of his duty to file.[33]

The Court further noted that since the shareholders were not harmed by Rondeau's dilatory filing, the permanent injunction would serve only a punitive purpose. The investors did not need protection from Rondeau's activities; therefore, the relief granted served merely as a penalty for the technical violation. Moreover, the Court also considered that, as Rondeau alleged, the violation of the Williams Act was unintentional resulting from a lack of familiarity with the requirements of the Act.[34]

In *Rondeau*, the Court was confronted with determining the propriety of permanent injunctive relief under the circumstances presented. No distinction was made between permanent and preliminary injunctions; rather, the Court spoke only in terms of "injunctive

(5th Cir. 1973); District 50, U.M.W. v. Union of U.M.W., 412 F.2d 165, 168 (D.C. Cir. 1969); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969). Permanent injunctions are generally issued to prevent recurring interference with another party's legal rights. *See* Western Union Tel. Co. v. International Bhd. of Electrical Workers, 133 F.2d 955, 957 (7th Cir. 1943). Thus, permanent injunctive relief is intended to provide a final solution to the problem presented. D. DOBBS, THE LAW OF REMEDIES 106 (1973). Since the effect of the issuance of such relief is continuous, a more detailed review of the facts by the court is essential. This is the approach adopted by the Supreme Court in *Rondeau*. The transitory nature of preliminary injunctions should, therefore, demand a less complete analysis by the issuing court. The differences in the nature of the remedies and in the standards to be applied in granting the two types of injunctive relief have not always been recognized. *See* Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975) and text accompanying notes 63-75 *infra*. *See also Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965).

[31] 422 U.S. at 59.

[32] *See* text accompanying notes 22-23 *supra*.

[33] *See* Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011, 1020 (7th Cir. 1974) (Pell, J., dissenting). Rondeau also updated his filing approximately one month after the initial filing in order to "reflect more accurately the allocation of shares between himself and his companies." 422 U.S. 49, 54 (1975).

[34] 422 U.S. at 55. Rondeau had contended that he was unaware of the 1970 amendments to the Act which reduced the amount of stock ownership filing requirement from ten to five percent.

relief."[35] Moreover, *Beacon Theaters, Inc. v. Westover*,[36] a preliminary injunction case, was relied on by the Court in its discussion of the standards applicable to the granting of injunctive relief. This analysis indicated that the Court, in *Rondeau*, may have been seeking to affect the treatment accorded by the courts to preliminary as well as permanent injunctions. The continued reference to injunctive relief, without specifying the permanent injunction granted by the Seventh Circuit in *Rondeau*, allows the Court's opinion to be read to permit the granting of preliminary injunctive relief only when traditional equitable principles for preliminary relief are met. This result, however, has not uniformly followed from the Court's decision.[37]

B. Preliminary Injunctions

The preliminary injunction is the most frequently requested relief under the Williams Act.[38] Target companies, whose management perceive the tender offer as a threat to their position or as detrimental to the corporation generally, often seek an injunction to thwart a potential takeover.[39] The request for a preliminary injunction to enjoin the consummation of a tender offer is commonly based on alleged violations of the antitrust and securities laws.[40] Recently the courts have more closely scrutinized the allegations of target companies seeking to defend against tender offers. This trend may be a function

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[35] Chief Justice Burger stated that the question before the court was "whether a showing of irreparable harm is necessary for a private litigant to obtain injunctive relief in a suit under § 13(d) of the Securities Exchange Act of 1934 . . . ." 422 U.S. 49, 50-51 (1975). No discussion regarding the differences in the nature of permanent and preliminary injunctive relief was undertaken. *See* note 30 *supra*.

[36] 359 U.S. 500 (1959).

[37] *See* text accompanying notes 52-59 and note 77 *infra*.

[38] *See* note 11 *supra*.

[39] *See* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 219-22 (1973); Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U. L. REV. 991, 995 (1973). *See also* Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW. 115 (1967).

[40] The target management most often includes allegations of both securities and antitrust laws violations. *See* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2nd Cir. 1973); Otis Elevator Co. v. United States Technologies Corp., 405 F. Supp. 960 (S.D.N.Y. 1975); Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975). Less frequently an allegation of violations of the securities laws will be made without any allegation of antitrust law violations. *See, e.g.*, Universal Container Corp. v. Horowitz, [1974-1975 Transfer Binder], CCH FED. SEC. L. REP. ¶ 95,382 (S.D.N.Y. Dec. 5, 1975); Twin Fair, Inc. v. Reger, 394 F. Supp. 156 (W.D.N.Y. 1975).

of both the Supreme Court's decision in *Rondeau*[41] and the particular facts of the cases before the courts.

In *Copperweld Corp. v. Imetal*,[42] the target company, Copperweld, sought to enjoin Imetal's tender offer by alleging violations of the securities laws,[43] and that completion of the tender offer would violate the Clayton Act.[44] The court reviewed the standards currently being employed to determine if a preliminary injunction should issue. Forsaking the test previously utilized by the court of appeals in its circuit, the district court adopted the "less stringent" test employed by the Second Circuit.[45] Following that standard, the court analyzed the plaintiff's allegations to determine if Copperweld had shown serious questions regarding the merits and a balance of hardships tipped decidedly in its favor.[46] The district court found that only one of the ten counts alleged in the complaint presented serious questions going to the merits, thus meeting the first part of the less stringent test.[47]

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[41] 422 U.S. 49 (1975).

[42] 403 F. Supp. 579 (W.D. Pa. 1975).

[43] Copperweld alleged violations of §§ 10(b), 13(d), 14(d) and 14(e) of the Exchange Act, 15 U.S.C. §§ 78j(b), 78m(d), 78n(d) and 78n(e) (1970), and rules promulgated thereunder. 403 F. Supp. at 586.

[44] Copperweld alleged *inter alia* that Imetal was a "potential competitor" under the theory of United States v. Falstaff, 410 U.S. 526 (1973) and § 7 of the Clayton Act, 15 U.S.C. § 17 (1970). 403 F. Supp. at 586-87.

[45] The Third Circuit, where the *Copperweld* court was located, required that for a preliminary injunction to issue the moving party must show (1) a reasonable probability of success on the merits, and (2) that irreparable harm will be suffered if the injunction is denied. Delaware River Port Authority v. Transamerican Trailer Transp., Inc., 501 F.2d 917, 919-20 (3d Cir. 1974); Scooper Dooper, Inc. v. Kraftco Corp., 460 F.2d 1204 (3d Cir. 1972) (per curiam); A.L.K. Corp. v. Columbia Pictures Indus., Inc., 440 F.2d 761 (3d Cir. 1971). This test is generally recognized as the traditional test for preliminary injunctions. Therefore, the test comports with the Supreme Court's intent expressed in *Rondeau* that "traditional prerequisites of extraordinary equitable relief" be met before injunctive relief should issue. 422 U.S. at 61.

The Second Circuit, however, has developed a "less stringent test" for preliminary injunctions. 403 F. Supp. 579, 586 (W.D. Pa. 1975). Under that test, the moving party is required to show only that (1) he has raised serious questions going to the merits and that (2) the balance of hardships is tipped decidedly in his favor. Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953).

[46] 403 F. Supp. 579, 587 (W.D. Pa. 1975). *See* note 45 *supra*. The court chose the Second Circuit test because the Third Circuit had favorably cited Second Circuit cases employing the "less stringent test," and because Copperweld "had not shown a likelihood of success [on the merits]" and would therefore be dismissed pursuant to the traditional test. *Id.* The court's generous attitude in choosing the less stringent test was not maintained throughout the opinion. *See* text accompanying notes 57-64 *infra*.

[47] 403 F. Supp. at 592, 608.

Despite having met the requirement of presenting serious questions going to the merits, that count was also dismissed. The court held that the second portion of the test, that the moving party must have the balance of hardships tipping decidedly in his favor, could not be utilized in light of *Rondeau*.[48] Thus, absent a showing of irreparable harm, a preliminary injunction could not be granted.[49]

The district court indicated that *Rondeau* required a finding of irreparable harm for an injunction to issue. The court likely considered *Rondeau* to call for a return to traditional equitable principles, rather than as a mandate for a finding of irreparable harm as a requisite for the issuance of a preliminary injunction. *Copperweld*, therefore, is consistent with the spirit of *Rondeau* and the legislative purpose of the Williams Act. The court, noting that the Act is not meant to provide incumbent management with an additional weapon to defeat tender offers, reviewed Imetal's Schedule 13D disclosures and determined that Copperweld shareholders had adequate information on which to make the decision to tender or refrain from tendering their shares. Copperweld's complaint was scrutinized carefully by the court.[50] This scrutiny evinces a policy of requiring target company management to do more than merely allege antitrust and securities laws violations in order to obtain preliminary injunctive relief. The primary concern of the court in *Copperweld* was the protection of the target shareholders, and the strict factual analysis was consonant with that concern.[51]

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[48] *Id.* at 607.

[49] *Id.*

[50] *Id.* at 608. The court referred to Copperweld's case as "weak" and based on speculation.

[51] *Id.* The district court, in its discussions of the numerous counts alleged by Copperweld, variously noted that "plaintiff's factual footing is at best tenuous," *id.* at 596, and that ultimately "Copperweld's case [is] weak." *Id.* at 608.

The fundamental purpose of the Williams Act, providing tendering shareholders with adequate information regarding the offer and the offeror, S. REP. No. 550, 90th Cong., 1st Sess. 2 (1967), was also considered of paramount importance in Mesa Petroleum Co. v. Aztec Oil & Gas Co., 406 F. Supp. 910 (N.D. Tex. 1976). Mesa Petroleum initiated a tender offer for Aztec's stock. Aztec's management decided to oppose the offer and sent letters to Aztec shareholders informing them of their decision. Aztec's management also refused to honor Mesa Petroleum's request to supply shareholder lists for the purpose of mailing the offering materials to Aztec shareholders. Mesa Petroleum brought suit to obtain the lists, and Aztec counterclaimed for preliminary injunctive relief alleging that a successful tender offer by Mesa Petroleum would violate the antitrust laws. The court, noting *Rondeau*, denied Aztec's request, and held that since Aztec could not show a sufficient probability of success on the merits, a preliminary injunction could not be granted. Moreover, the court granted the request for production of the shareholder lists in order to insure that Aztec shareholders would

This close examination of target company pleadings has also been employed by the Southern District of New York. In *Otis Elevator Co. v. United Technologies Corp.*,[52] Otis Elevator, the target company, sought to enjoin United Technologies from completing its tender offer due to United's failure to disclose its intent to merge with Otis upon successful completion of the tender offer. The court found that United's failure to disclose the merger plans made its purchase offer "not only materially misleading but. . . false."[53] Thus, the court held that Otis had shown probable success on the merits and therefore had overcome the first of two obstacles in its efforts to obtain preliminary injunctive relief.[54] The second test which the court applied related to the balance of hardships which would result from the consummation of the tender offer. Utilization of this test in conjunction with the probable success on the merits requirement produced a unique standard for preliminary injunctive relief.[55]

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be adequately informed about the tender offer. In this way, the shareholders are provided with the information they need to make their tender decision and the purpose of the Williams Act is effectuated. The court was vigilant in the protection of the Aztec *shareholders* without acquiescing to the allegations of Aztec's management.

Target management was also unsuccessful in its judicial attempts to defeat a tender offer in Missouri Portland Cement Co. v. H.K. Porter & Co., 406 F. Supp. 984 (E.D. Mo. 1975). Porter offered to purchase Missouri Portland stock and was initially defeated by a preliminary injunction due to material misstatements and omissions in their offer. The offer was quickly amended only to be challenged again several days later. The district judge scrutinized the second offer made by Porter and determined that Missouri Portland's allegations, and the evidence offered to sustain the allegations, were insufficient to show a "substantial probability of success at a subsequent trial." *Id.* at 991. The court stated throughout the opinion that the shareholders were being provided with sufficient information on which to base their investment decision. Thus, the purpose of the Williams Act was once more effectuated.

The Supreme Court's instruction on the purpose of the Williams Act in *Rondeau* thus seems to have guided the lower courts to consider the cases with the target company shareholders in particular when determining whether to grant injunctive relief. Moreover, the lower courts are also maintaining a balance between the offeror and target management, a result specifically called for in the legislative history of the Williams Act, S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967), and *Rondeau*, 422 U.S. at 58-59.

[52] 405 F. Supp. 960 (S.D.N.Y. 1975).

[53] *Id.* at 969. The court noted further that the merger plans were sufficiently prepared and were attributable to United Technologies as an entity so as to be subject to the disclosure requirements of § 14(d)(1) of the Exchange Act, 15 U.S.C. § 77n(d)(1) (1970). 405 F. Supp. at 973.

[54] 405 F. Supp. at 973. The test employed by the court at this point was identical to that utilized in the Third Circuit. *See* note 45 *supra*.

[55] *See* notes 45-46 *supra*. The test employed by the court in *Otis* combined the first portion of the Third Circuit standard and the second part of the Second Circuit stan-

In applying this standard, the court scrutinized the pleadings and the evidence and found that a preliminary injunction could not properly be granted for injury to Otis.[56] Nevertheless, the court found that a preliminary injunction would be necessary to protect the interest of Otis shareholders.[57] The court realistically viewed the situation presented and effectuated the purpose of the Williams Act without "tipping the balance either in favor of management or in favor of the person making the takeover bid."[58] Furthermore, by specifically providing for the protection of those shareholders presented with the tender offer, the court ensured that the shareholders would not be forced to act without adequate information. Although the *Otis* court made no reference to *Rondeau*, the analysis employed and the careful examination by the court of the violations alleged is consistent with the approach utilized by the *Copperweld* court which relied on *Rondeau*. In *Otis*, the court did not require a showing of irreparable harm.[59] However, the result reached was in line with the *Rondeau* theme. The target company was not provided with a "weapon" to defeat the tender offer and the tendering shareholders were adequately protected.

The Southern District of New York did rely on *Rondeau* in another preliminary injunction case under the Williams Act. In *Myers v. American Leisure Time Enterprises, Inc.*,[60] the district court denied a motion for a preliminary injunction because the plaintiff could not show irreparable harm.[61] Indeed, the plaintiff had omitted any

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dard. The *Otis* standard is the reciprocal of the test used in *Copperweld*. *See* text accompanying notes 45-49 *supra*.

[56] 405 F. Supp. at 973.

[57] *Id.* at 973-74. Otis claimed that it was harmed in its corporate capacity by United's failure to disclose its plan to merge with Otis. The court found, however, that Otis was not harmed by this violation of § 14(d) of the Exchange Act. Although the corporation was not harmed, the failure to disclose the plans was peculiarly vital to the Otis shareholders in the tender offer context. They would be compelled to make the decision to remain in the company or tender their shares without the knowledge that a merger, which could increase the value of the shares, was impending. The court found that this was the interest being harmed by the inadequate disclosure by United. *Id.*

[58] S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967). The Court also noted that "it should take with a grain of salt the claim of 'jitters in executive suites.' " 405 F. Supp. at 973, *quoting* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 869 n.36, (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

[59] 405 F. Supp. at 973-74. The balance of hardships test was employed by the court in its determination of the issues presented. The court apparently recognized *Rondeau* as dealing solely with permanent injunctions and having no direct bearing on this case.

[60] 402 F. Supp. 213 (S.D.N.Y. 1975).

[61] *Id.* at 215.

reference to irreparable harm in his complaint. Thus, in the court's view, *Rondeau* was dispositive of the preliminary injunction issue.[62] The court, ignoring the balance of hardships test, impliedly cast it aside as improper in light of *Rondeau*. While the analysis of the courts in *Myers* and *Otis* conflicts, both courts sought to pierce the pleadings and confront the problems alleged to be present. This brought about compatible results despite the courts' difference of opinion on the precedential value of *Rondeau*.[63]

The effect of *Rondeau* on standards for granting preliminary injunctions has been reviewed only once in the courts of appeals. In *Klaus v. Hi-Shear Corp.*,[64] the Ninth Circuit was presented with the issue of whether a preliminary injunction should issue for an alleged violation of §14(e) of the Exchange Act.[65] Klaus had been attempting to gain control of Hi-Shear for several years. Hi-Shear had retaliated by increasing the amount of its outstanding stock to prevent Klaus from achieving a controlling position. Klaus sought preliminary injunctions against the allegedly improper defensive tactics employed by Hi-Shear.[66] The district court awarded Klaus preliminary injunc-

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[62] *Id.*

[63] In Anaconda Co. v. Crane Co., [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 95,364, (S.D.N.Y. Nov. 17, 1975), the district court employed the same practical viewpoint in a similar type of case. Crane offered debentures to Anaconda shareholders in order to obtain approximately 22% of Anaconda's shares. In the battle that ensued, both parties alleged wrongdoings on the part of the other. Since this was an exchange offer, the Williams Act did not apply. Nevertheless, the protection of tendering shareholders remained the primary goal. The court once again carefully scrutinized the pleadings, and held that Anaconda's shareholders would be best protected by permitting the exchange offer to continue. Just as in *Otis*, *see* text accompanying notes 52-59 *supra*, the balance of hardships test was used to determine the propriety of issuing injunctive relief. Finally, the shareholders and not the target company management were at the center of the court's attention. This focus thus implements the directive in *Rondeau* to protect investors in tender offer situations.

[64] 528 F.2d 225 (9th Cir. 1975).

[65] 15 U.S.C. § 78n(e) (1970).

[66] Hi-Shear responded to Klaus' first tender offer by purchasing over 600,000 of its outstanding shares and sold 130,000 of these to a wholly owned subsidiary, Caribe. Klaus made a second tender offer in which he obtained approximately 45% of the outstanding shares of Hi-Shear. Klaus believed that the 130,000 shares held by Caribe were non-votable, which would have given him over 50% of the voting stock. Klaus demanded a stockholders meeting which took place nearly three months later. In the interim, Hi-Shear issued another 180,000 shares which were to be voted in favor of Hi-Shear management. Moreover, Klaus also learned during this period that the Caribe-held shares were outstanding and would be voted by Hi-Shear management. Klaus thus sought a preliminary injunction to prevent these shares from being voted at the impending meeting of Hi-Shear stockholders. 528 F.2d at 228-29.

tions on some, but not all, of the claims.[67] Both parties appealed from that determination, and the Ninth Circuit reversed the lower court's granting of preliminary injunctions because "the court applied an improper test for the availability of injunctive relief."[68]

The district court had concluded that the management of Hi-Shear should not be allowed to vote the improperly issued stock pending the outcome of the trial on the merits.[69] The lower court considered Klaus' claims and found that the balance of equities was such that Klaus should prevail on several counts.[70] The balance of equities standard employed by the district court was improper, according to the Ninth Circuit, in light of *Rondeau*.[71] The court of appeals stated that "[t]he Supreme Court . . . restricted the availability of injunctive relief to either of the parties contesting a takeover bid for an alleged violation of the federal securities laws."[72] The circuit court further concluded that *Rondeau* required that irreparable harm be shown before a preliminary injunction could be granted. Thus, the case was remanded to the district court for consideration of Klaus' claims, subject to the requirement of a finding of irreparable harm before a preliminary injunction could be granted.

The Ninth Circuit construed *Rondeau* in the same manner as the *Copperweld* and *Myer* courts. The irreparable harm standard for permanent injunctive relief, as set forth in *Rondeau*, was transposed to a preliminary injunction context without change. This mechanical use of *Rondeau* fails to recognize the inherent differences between permanent and preliminary injunctive relief.[73] Therefore, the opinion

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[67] Klaus was denied a preliminary injunction to prevent the voting of shares held by two companies which Hi-Shear acquired, during the interim, by a transfer of Hi-Shear stock for the outstanding shares of the acquired companies. All other preliminary injunctive relief sought by Klaus was granted. 528 F.2d at 229-30.

[68] *Id.* at 231. The court of appeals noted that while the granting of equitable relief lies within the sound discretion of the court, the holding of the lower court would properly be vacated since it was based on an "erroneous legal premise." *Id.*

[69] *Id.*

[70] *See* note 66 *supra*.

[71] 422 U.S. 49 (1975).

[72] 528 F.2d at 231.

[73] *See* note 30 *supra*. Failure to distinguish between permanent and preliminary injunctions has characterized those opinions which have considered preliminary injunctions in light of *Rondeau*. *See* Mesa Petroleum Co. v. Aztec Oil & Gas Co., 406 F. Supp. 910 (N.D. Tex. 1976); Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975); Myers v. American Leisure Time Enterprises, Inc., 402 F. Supp. 213 (S.D.N.Y. 1975). Other courts have not considered *Rondeau* in their discussion of preliminary injunctions. *See, e.g.*, Anaconda Co. v. Crane Co., [1974-1975 Transfer Binder], CCH FED. SEC. L. REP. ¶ 95,364 (S.D.N.Y. Nov. 17, 1975); Otis Elevator Co. v. United Technologies Corp., 405 F. Supp. 960 (S.D.N.Y. 1975).

in *Klaus* may lead to further confusion regarding the effect of *Rondeau*. Moreover, the instructions given to the district court by the Ninth Circuit in *Klaus* were unclear and did not relate specifically to the standards which must be applied on remand.[74] The court of appeals apparently indicated that the lower court's attention should be directed toward the tendering shareholders to the exclusion of the other parties. This narrow approach to the issues does not comport with *Rondeau*.[75] Perhaps the ambivalent character of the Ninth Circuit's instructions will allow the circumvention of that court's insistance on irreparable harm to the target company shareholders. Furthermore, the lower court was ultimately ordered to "enter any interlocutory orders it deems desirable, compatible with the guidelines set forth herein."[76] While this may allow the lower court further leeway on remand, no decision has yet been rendered in the case or in other similar cases by district courts located in the Ninth Circuit. As such, no conclusions may yet be drawn regarding the circuit court's interpretation of *Rondeau*.

The inroads which the Supreme Court's ruling in *Rondeau*[77] have made into the availability of preliminary injunctions have left the

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Otis and *Anaconda* are consistent in their results with *Myers*; however, the analyses in the cases are vastly different. *Myers* directly relies on the Supreme Court's holding in *Rondeau* to deny a motion for a preliminary injunction, while the courts in *Otis Elevator* and *Anaconda* do not refer to *Rondeau* although all these cases were decided in the Southern District of New York. Thus, confusion as to the effect of *Rondeau* on preliminary injunction requests exists not only among the districts, but also within one.

[74] The Ninth Circuit was clear in its requirement of a showing of irreparable harm; however, the court did not specify the parties to be protected or whether the party seeking the injunction must show probable success on the merits. Rather, the court intimated that the tendering shareholders must be faced with irreparable harm before an injunction will issue, and that there must exist a probability of success on the merits. 528 F.2d at 232. While this analysis follows the lead of *Rondeau* in seeking to fulfill the policy of protecting target company shareholders, it overlooks that portion of the legislative history of the Williams Act which explicitly warns against "tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." *See* note 58 *supra*. This one-dimensional analysis by the Ninth Circuit may allow incumbent management to employ whatever defensive techniques they wish to defeat the tender offer as long as irreparable harm to the shareholders will not ensue.

[75] Chief Justice Burger noted in *Rondeau* that the Williams Act was not meant to provide target company management with an additional weapon to combat tender offers. 422 U.S. at 58-59. *See also* H.R. REP. No. 1711, 90th Cong., 2d Sess. 4 (1968), *reprinted at* 1968 U.S. CODE CONG. & AD. NEWS 2813-14.

[76] 528 F.2d at 236.

[77] 422 U.S. 49 (1975).

lower courts divided as to the proper standards which must be applied to motions for preliminary injunctive relief.[78] Although the district courts have not been uniform in their reliance on *Rondeau*, they have reached ultimately consistent and reasonable results. The utilization of the balancing of hardships test, as opposed to the irreparable harm standard evoked by the Supreme Court in *Rondeau*, is of less significance than the manner in which the courts have approached the cases brought before them. The former practice of liberally granting preliminary injunctive relief in tender offer cases,[79] apparently has been curtailed. Rather, the problems have been approached by the courts in a practical manner, with close examination of the circumstances confronting the parties controlling the implementation of particular rules or standards. The Ninth Circuit, however, apparently has not approached the problem in this manner, instead applying a rule with little concern for the factual situation presented.[80] This automatic application of *Rondeau* to tender offer situations is not in keeping with the Supreme Court's analysis. The Supreme Court criticized this strict rule-application analysis in *Rondeau*. The Ninth Circuit's decision is *Klaus v. Hi-Shear*[81] is in that sense similar to the opinion of the Seventh Circuit in *Rondeau*.[82]

A reflex-type reaction, such as that taken by the Ninth Circuit in *Klaus*, also does not effectuate the purposes of the Williams Act. Action taken on motions for preliminary injunctive relief often determines the success or failure of the tender offer.[83] Moreover, relief under the Williams Act is not intended to provide incumbent man-

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[78] *Compare* Mesa Petroleum Co. v. Aztec Oil & Gas Co., 406 F. Supp. 910 (N.D. Tex. 1976); Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975), *and* Myers v. American Leisure Time Enterprises, Inc., 402 F. Supp. 213 (S.D.N.Y. 1975) *with* Otis Elevator Co. v. United Technologies Corp., 405 F. Supp. 960 (S.D.N.Y. 1975) *and* Anaconda Co. v. Crane Co., [1974-1975 Transfer Binder], CCH FED. SEC. L. REP. ¶ 95,364 (S.D.N.Y. Nov. 17, 1975).

[79] E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 219-22 (1973); *Injunctions and Damages Under the Williams Act—Defensive Mechanisms, Punitive Sanctions, Remedial Devices, Survey of 1974 Securities Law Developments*, 32 WASH. & LEE L. REV. 719, 777 (1975); Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U. L. REV. 991, 995 (1973).

[80] *See* note 74 *supra*.

[81] 528 F.2d 225 (9th Cir. 1975).

[82] 500 F.2d 1011 (7th Cir. 1974).

[83] *See, e.g.*, Lowenschuss v. Kane, 520 F.2d 255, 258-61 (2d Cir. 1975); Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 207 (2d Cir. 1973); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969); Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975). *See also* Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U. L. REV. 991, 1007-11 (1973).