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Iv. Tender Offers

succeed in suits under section 14(a), the ultimate result may be a more meaningful disclosure of the facts necessary to an informed corporate election.

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IV. TENDER OFFERS

Congress instituted federal regulation of tender offers[1] with the Williams Act,[2] which requires both the offeror and management of

tions by the trier of fact. See 3B, Securities Law Series, H. Bloomenthal, SECURITIES AND FEDERAL CORPORATE LAW § 13.17[b] at 13-63—13-64 (rev. ed. 1976); Anderson, in PLI EIGHTH ANNUAL INSTITUTE ON SECURITIES REGULATION (Mundheim, Fleischer & Vandegrift, 1977). Attempts have been made to classify the cases into factual categories that generally will require disclosure. *See, e.g.,* Goolrick, *Some Disclosure Problems in Acquisition Proxy Statements and Prospectuses,* 28 BUS. LAW. 111 (1972); Note, *Disclosure of Corporate Payments Abroad and the Concept of Materiality,* 4 HOFSTRA L. REV. 729 (1976). Nevertheless, generalizations are of little help where the fact is not patently significant. In close cases, litigation may well be the only sure way to determine whether a given fact should have been included in the proxy statement.

[1] Federal securities statutes make no attempt to define the term "tender offer." The classic tender offer is understood to be a public offer to purchase a fixed amount of securities of the target corporation at a specified price. E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1973) [hereinafter cited as ARANOW & EINHORN]; Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934,* 86 HARV. L. REV. 1250 (1973); Note, *The Scope of Section 14(d); What is a Tender Offer?,* 34 OHIO ST. L.J. 375 (1973). The consideration offered may be in cash, securities, or both. When consideration includes securities, the transaction is termed an "exchange offer." Bromberg, *Tender Offers: Safeguards and Restraints—An Interest Analysis,* 21 CASE W. RES. L. REV. 613, 613 (1970) [hereinafter cited as Bromberg].

[2] 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]. Under the Act, a person that acquires more than five percent of a certain class of equity securities of a corporation must disclose to that corporation and the SEC information concerning the funding and purpose of the purchases, as well as the background of the purchaser. Securities Exchange Act of 1934 § 13(d)(1), 15 U.S.C. § 78m(d)(1)(1970) [hereinafter referred to as the '34 Act]. Promulgated according to that provision, SEC Rule 13d-1, 17 C.F.R. § 240.13d-1 (1976), requires the 5% purchaser to file with the SEC a Schedule 13D report. In the report, the purchaser must disclose information concerning the funding and purpose of the purchases. 17 C.F.R. § 240.13d-101 (1976). The Williams Act also includes a broad antifraud provision that proscribes misleading statements or omissions of material facts made in connection with a tender offer. '34 Act § 14(e), 15 U.S.C. § 78n(e)(1970).

SEC rules also regulate the solicitation and recommendations pertaining to tender the target corporation to disclose facts material to an informed decision by shareholders concerning tender of their shares to the takeover bidder. Although the congressional purpose of shareholder protection through informed consideration of the merits of a tender offer is clear,[3] the Williams Act does not define the key components in the scheme of enforcement. The Act provides only for administrative supervision by the SEC.[4] Courts have implied private causes of action as a means of enforcing the Act,[5] but in doing so have created definitional problems related to the elements of those actions and the proper relief to be granted. In the past year, courts have dealt with issues concerning the point at which the duties of the Williams Act attach,[6] the standing of a tender offeror to assert violations,[7] and the propriety of preliminary relief to injured parties.[8]

A. *Exchange Offers: Pre-registration Activity*

A takeover bidder may offer consideration to target company shareholders in the form of cash, securities, or a combination of the two.[9] The principal attraction of the cash transaction to offerors is the

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offers. Any party making such statement must file a Schedule 14D with the SEC. 17 C.F.R. § 240.14d-14(a)(1970). Schedule 14D requires information concerning the identity and background of the party making the solicitation or recommendation, as well as copies of the statements. 17 C.F.R. § 240.14d-101 (1976).

[3] *See* Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926 (1977) (extensive discussion of purpose of Williams Act); Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975); H. R. REP. No. 1711, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811 [hereinafter cited as H.R. REP.]; S. REP. No. 550, 90th Cong., 1st Sess. (1967); ARANOW & EINHORN, *supra* note 1, at 67; Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973).

[4] *See* note 2 *supra*. The '34 Act, into which the Williams Act is incorporated, provides the SEC with power to conduct investigations of alleged violations of the statute. The Commission has the power of subpoena in connection with these investigations, and also is empowered to seek injunctive aid from federal district courts to enjoin violations of the statute. '34 Act § 21, 15 U.S.C. § 78u (1970).

[5] *See, e.g.*, GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972) (target corporation has standing under § 13(d)); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969) (target corporation and nontendering shareholders have standing to sue under § 14(e)); *cf.* J. I. Case Co. v. Borak, 377 U.S. 426 (1964) (private right of action exists under § 14(a)—proxy statements).

[6] Applied Digital Data Systems, Inc. v. Milgo Elec. Corp., [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824 (S.D.N.Y. Jan. 3, 1977); *see* section A *infra*.

[7] Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926 (1977); *see* section C *infra*.

[8] *See* section B *infra*.

[9] ARANOW & EINHORN, *supra* note 1, at 29.

element of surprise.[10] Properly executed, a cash tender offer becomes effective before target management is able to formulate a defensive strategy.[11] When the consideration offered is in the form of securities, however, the offeror must comply with SEC registration requirements.[12] The time lag between the offeror's initial application for registration and SEC approval enables target management to initiate defensive maneuvers.[13] Although the Williams Act prohibits dissemination of misleading information while both cash and exchange offers are in effect,[14] the Act does not indicate whether target management is subject to the provisions of the statute prior to SEC approval of an exchange offer registration statement.

In *Applied Digital Data Systems, Inc. v. Milgo Electronic Corp.*,[15] the plaintiff-offeror, Applied Digital Data Systems (ADDS), complained that conduct by Milgo management following an announcement by ADDS of an exchange offer for Milgo stock violated the Williams Act. Milgo responded that the activity in question was not subject to the Act since the exchange offer had not yet become effective.[16] The District Court for the Southern District of New York held that under the circumstances, the actions by Milgo management violated the Williams Act even though the registration statement still

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[10] *Id.*

[11] *Id.* The element of surprise may be diminished by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390 (1976), which requires that a cash tender offeror file 15-days' notice of an offer with the FTC before taking action. The purpose of the waiting period is to allow the FTC to examine the proposed transaction for possible antitrust implications. H.R. REP. No. 1373, 94th Cong., 2d Sess., (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2637, 2644-45. Congress recognized the special time considerations of cash tender offers by imposing a 15-day waiting period, rather than the 30-day period applied to mergers. *Id.*, [1976] U.S. CODE CONG. & AD. NEWS at 2644.

In addition, state statutes may impose a notice requirement on the cash offeror. *See, e.g.*, DEL. CODE ANN. tit. 8, § 203 (Michie Cum. Supp. 1976) (not less than 20 nor more than 60 days' notice); VA. CODE § 13.1-531 (1973) (20 days).

[12] The offeror must register the securities with the SEC under § 5 of the Securities Act of 1933, 15 U.S.C. § 77(e) (1970). *See* 3B Securities Law Series, H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 13.23 (Rev. ed. 1976); R. JENNINGS & H. MARSH, SECURITIES REGULATION 447-48 (4th ed. 1976) [hereinafter cited as JENNINGS & MARSH].

[13] In fiscal 1973, for example, this processing period averaged 41 days. SEC, ANNUAL REPORT 31 (1973).

[14] *See* H.R. REP., *supra* note 3, at 2812.

[15] [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824 (S.D.N.Y. Jan. 3, 1977).

[16] At the time of the court's decision, the registration still had not become effective. The statement was filed on December 13, 1976. *Id.* at 90,964.

was pending before the SEC.[17]

In early November of 1976, ADDS proposed a merger to the Milgo board of directors that could be accomplished by an exchange offer for publicly held Milgo stock. Milgo rejected the offer, announcing to the press that the plan was not in the best interests of Milgo shareholders. ADDS circumvented Milgo management by making the tender offer without Milgo's endorsement and announced publicly that as soon as it obtained the approval of its own shareholders and complied with SEC registration requirements, it would accept tenders of Milgo stock in exchange for a prescribed ratio of ADDS stock.[18]

In an attempt to block ADDS' takeover bid, Milgo arranged to sell 312,000 shares of authorized but unissued Milgo stock to Racal Electronics. As Racal and Milgo were partners in a joint venture that comprised Milgo's largest source of revenue,[19] the effect of the transaction would have been to place 15.5% of Milgo's outstanding stock in the hands of a shareholder sympathetic to Milgo management. Since Milgo management already controlled 6.5% of the shares, ADDS would not be able to obtain the 80% control necessary to achieve tax free status for the exchange.[20] ADDS brought suit to obtain a preliminary injunction, complaining that three press releases issued by Milgo management misstated material facts in violation of section 14(e).[21] ADDS also charged that one of the press releases constituted a recommendation to shareholders within the meaning of section 14(d)(4), and that Milgo had failed to file the Schedule 14D required in connection with such a recommendation.[22] Milgo, however, contended that since the conduct in question occurred before the effective date of the exchange offer, the actions could not come within the ambit of sections 14(d) and (e).

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[17] *Id.* at 90,976.

[18] *Id.* at 90,964.

[19] Racal, a British electronics manufacturer, was a partner of Milgo in Racal-Milgo Limited, the sole distributor of selected Milgo products in certain foreign markets. Racal-Milgo accounted for 23% of Milgo's annual revenue. *Id.*

[20] *See* I.R.C. §§ 354, 368.

[21] [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,966. 15 U.S.C. § 78n(e)(1970); *see* note 2 *supra.* The first press release announced the refusal of Milgo to accept ADDS' first offer. *See* text accompanying note 18 *supra.* The second and third press releases followed announcement of the exchange offer by ADDS. The second announcement described the public offer as "less favorable" than the private offer. *Id.* The third release did not mention the outstanding offer, but only announced the agreement with Racal. *Id.*

[22] *Id.* at 90,966. 15 U.S.C. § 78n(d)(4)(1970). *See* note 2 *supra.* The allegation pertained to the second press release, in which Milgo management commented upon the favorability of the exchange offer. *See* note 21 *supra.*

The court interpreted the language of the Act more broadly than Milgo. Analogizing to cases under Rule 10b-5, the court concluded that the Williams Act applies to conduct occurring while the exchange offer is pending registration.[23] The Rule 10b-5 cases cited had noted that the Rule applied to conduct prior to or contemporaneous with a purchase or sale of securities.[24] Since the language of Rule 10b-5 makes that regulation applicable to activity "in connection with" a purchase or sale of securities, and section 14(e) makes the Williams Act applicable to conduct "in connection with" a tender offer, the court reasoned that section 14(e) also encompassed conduct prior to the tender offer.[25]

The court thought that confinement of antifraud and disclosure requirements to the immediate period of the offer would frustrate the purpose of the Act.[26] The Act regulates tender offer conduct to provide shareholders with accurate information on which to base their decisions to tender. Defensive maneuvers that unfairly distort the facts of a particular offer will defeat this goal whether they take place before or after the official registration date of the offer.[27] Moreover, the court cited two instances in which courts apparently had considered the Act applicable to preregistration conduct.[28] Since activity

[23] [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,968-72.

[24] Kogan v. National Bank of North America, 402 F. Supp. 359 (E.D.N.Y. 1975); Fuller v. E. I. duPont, Glore, Forgan & Co., 54 F.R.D. 557 (W.D. Mo. 1971); Pepsico, Inc. v. W. R. Grace & Co., 307 F. Supp. 713 (S.D.N.Y. 1969). In each case, the courts dismissed the complaints for failure to state a claim upon which relief could be granted because the allegedly fraudulent conduct occurred *after* the date of the sale of securities. The courts, however, stated that fraudulent conduct preceding or occurring contemporaneously with the sale would be actionable under Rule 10b-5.

[25] [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,968. *See* note 52 *infra*.

[26] *Id.* at 90,969.

[27] *Id.*

[28] Anaconda Co. v. Crane Co., 411 F. Supp. 1210 (S.D.N.Y. 1975); ICM Realty v. Cabot, Cabot & Forbes Land Trust, [1973-1974 Transfer Binder] FED. SEC. L.. REP. (CCH) ¶ 94,585 (S.D.N.Y. June 6, 1974). Although both courts may have assumed that the Williams Act was applicable, neither court specifically considered the question.

In *Anaconda*, the court heard the offeror's charges that the target company's conduct violated the securities laws, even though the activities in question preceded the effective date of the exchange offer. As in *ADDS*, the offeror had announced publicly an intention to made an exchange offer. The court refused to grant the offeror's motion for preliminary relief, however, on the grounds that the conduct, although subject to the Williams Act, was not unlawful.

In *ICM Realty*, the court similarly refused to enjoin conduct occurring after the offeror had filed a 13D report. The report revealed that the offeror intended to make a tender offer in the near future. Although the court ruled that the conduct in question undertaken after public announcement of an exchange offer but before the offer became effective was subject to the Williams Act, ADDS had a cause of action for preliminary injunctive relief.

As a condition to injunctive relief, the court required ADDS to show that the challenged activities posed serious questions on the merits and that a balance of hardships existed in its favor.[29] First, ADDS contended that the sale of authorized but unissued common stock by Milgo to a corporate ally constituted fraud within the meaning of section 14(e).[30] The court defined fraud by reference to *Green v. Santa Fe Industries, Inc.*,[31] *Marshel v. AFW Fabric Corp.*,[32] and *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*,[33] three Second Circuit decisions which since have been reversed or vacated by the Supreme Court. According to the court, the *Chris-Craft* decision incorporated the common law tort doctrine of interference with a prospective economic advantage into the language of section 14(e).[34]

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complied with federal law, the court apparently assumed that the Williams Act applied to preregistration conduct.

[29] The court correctly noted that this standard also requires a showing of irreparable injury to the moving party. [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,970, *citing* Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356 (2d Cir. 1976). *See* part B *infra*.

[30] Issuance of additional shares is frequently employed as a defensive maneuver. *See, e.g.,* Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973)., *rev'd on other grounds,* 97 S. Ct. 926 (1977); *see also* ARANOW & ENHORN, *supra* note 1, at 247-49; Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics,* 23 BUS. LAW. 115, 119-21 (1967). This tactic makes control of the target's stock more difficult and expensive to obtain. Moreover, an increase in the number of shares necessary to obtain control raises the offeror's financial risk. The measure also may create in target company management a dynamic, growth oriented image that is more impressive to shareholders. ARANOW & EINHORN, *supra* note 1, at 224.

In *ADDS,* the sale would have left over 20% of Milgo's outstanding stock in the hands of two groups opposed to the tender offer, Racial and Milgo management. Consequently, the court found that the tax-free treatment that Milgo shareholders would receive if they tendered 80% of their shares would be almost impossible to attain. *See* text accompanying note 20 *supra.* Moreover, control of 20% of the voting stock could enable Racal and Milgo management to stagger the terms of the Milgo board, another common defensive technique. *See* Spielman v. General Host Corp., 402 F. Supp. 190 (S.D.N.Y. 1975), *aff'd,* 538 F.2d 39 (2d Cir. 1976) (per curiam); ARANOW & EINHORN, *supra* note 1, at 262.

[31] 533 F.2d 1283 (2d Cir. 1976), *rev'd,* 97 S. Ct. 1292 (1977).

[32] 533 F.2d 1277 (2d Cir.), *vacated and remanded for determination of mootness,* 97 S. Ct. 228 (1976).

[33] 97 S. Ct. 926 (1977); *see* section C *infra.*

[34] [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,971. *But see* text accompanying note 48 *infra.*

Such interference, however, could be justified under the Second Circuit's holdings in *Green* and *Marshel* by showing a valid corporate purpose for the proposed transaction with Racal.[35]

Milgo contended that the sale was designed to provide the corporation with necessary working capital. The court rejected this argument,[36] and found a serious possibility that the sole purpose of the sale was to deprive Milgo shareholders of the opportunity to tender their shares to ADDS.[37] Thus, the court concluded that ADDS's allegation pertaining to the stock transaction itself posed serious questions on the merits and met the first prerequisite for preliminary relief.[38]

ADDS also complained that each of the three press releases violated the Williams Act. The court ruled, however, that since the first release was issued prior to the public announcement by ADDS of the exchange offer, it was not within the purview of the "in connection with" language of the statute.[39] The two subsequent releases, however, were issued after public announcement of the offer.[40] The court found a serious possibility that the second release constituted a

[35] *Green* and *Marshel* involved going-private schemes. Defendants in *Marshel* offered no business justification for the plan. 533 F.2d at 1280. In *Green*, however, the defendant attempted to justify the short form merger as a legitimate move to squeeze out minority shareholders for the benefit of the majority. 533 F.2d at 1289. Rule 10b-5, 1976-1977 *Securities Law Developments*, 34 WASH. & LEE L. REV. 863, 927-37 (1977).

[36] The court doubted the corporation's need for working capital. Although Racal and Milgo had discussed merger possibilities less than a year earlier, the court found "no real activity" toward that end until after the exchange offer was announced. [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,973.

[37] *Id.* ADDS produced an incriminating quote from a report delivered to Racal's board of directors that described the stock transaction as the most effective method available to defeat the tender offer. *Id.* Additionally, ADDS showed that the transaction was structured deliberately to avoid the necessity of stockholder approval. Racal and Milgo had originally contemplated a sale of 450,000 shares of Milgo stock. This figure was scaled down to 312,000 to avoid a New York Stock Exchange requirement that the larger amount receive shareholder approval. *See* NYSE MANUAL A-284(c).

[38] [1976-1977 Transfer Binder] FED. SEC. L REP. (CCH) ¶ 95,824, at 90,975.

[39] The Supreme Court recently discussed the "in connection with" language of section 14(e) in *Piper v. Chris-Craft Industries, Inc.*, 97 S. Ct. 926 (1977). The Court held that the language did not provide a defeated offeror standing to sue for damages incurred pursuant to an exchange proposal because takeover bidders were not within the class Congress intended to protect. *Id.* at 946. *See* section C *infra*. A suit by the offeror for damages, however, must be distinguished from preliminary injunctive relief. Injunctive relief directly benefits the target shareholders, which the *Piper* Court identified as the class specifically protected by the statute. Accordingly, a tender offeror should retain standing to complain of disclosure violations that occur prior to registration because preliminary relief is of meaningful benefit to target shareholders.

[40] *See* note 21 *supra*.

"solicitation" within the meaning of section 14(d)(4).[41] If so, the failure of Milgo to file a Schedule 14D with the SEC would violate the Act.[42] Moreover, the second release may have contained material omissions in violation of section 14(e).[43] The third press release, which announced the agreement with Racal, but did not mention the exchange offer, was found nevertheless to pertain to the tender offer. Material omissions from this press release, therefore, violated section 14(e).[44] Thus, the court concluded that serious questions existed as to two of the three press releases.

ADDS met the second requirement for preliminary relief, a balance of hardships weighed in its favor, by showing that consummation of the Racal sale effectively would have thwarted the exchange offer.[45] An injunction blocking the sale to Racal, however, would have delayed acquisition of working capital by Milgo only for a limited time.[46] Accordingly, the court found that the balance of hardships tipped in favor of ADDS and concluded that ADDS had met both prerequisites to equitable relief. The court granted a preliminary injunction blocking the sale of stock to Racal and prohibiting Milgo from issuing further recommendations in connection with the exchange offer until the company filed a Schedule 14D.[47]

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[41] [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,975.

[42] 17 C.F.R. § 240.14d-4 (1976).

[43] *See* text accompanying note 18 *supra*. ADDS also complained that Milgo violated section 14(e) by falsely stating in the second press release that the public offer was less favorable to shareholders than the initial proposal to the Milgo board. The court stated that although the ADDS offer may have been financially more attractive than the sale price to Racal, other factors could justify the statement, such as the tendency of ADDS management to stress research and development. [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,973-74.

[44] ADDS alleged that Milgo should have revealed the existence of provisions in the Racal agreement that would have enabled Racal to withdraw should litigation arise and that required Milgo to support election of two Racal nominees to Milgo's board of directors. The court concluded that these omissons were material. [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,974.

[45] *Id.* at 90,975. The court concluded that denial of the opportunity to make the tender offer would have caused irreparable injury to Milgo shareholders and ADDS. *See* note 30 *supra*.

[46] Milgo's annual shareholder's meeting was scheduled for early February, slightly over a month from the date of the court's opinion. At that time Milgo management would have been able to recommend the Racal sale for shareholder approval as a means to acquire capital. *Id.*

[47] *Id.* at 90,976. ADDS ultimately acquired 823,805 shares of Milgo common stock, but failed to acquire the control it desired. On February 22 ADDS sold these holdings to Racal for $36 a share, a total of $29,656,980. This transaction gave Racal over 50% of Milgo's outstanding shares. STOCK REPORTS: NEW YORK STOCK EXCHANGE (STANDARD & POOR'S) 204W (Mar. 31, 1977).

Although the court's holding that the Williams Act applies to preregistration conduct is correct, the grant of a preliminary injunction is questionable. The court's definition of fraud is untenable in light of the recent decision of the Supreme Court in *Santa Fe Industries, Inc. v. Green.*[48] In *Santa Fe,* the Court indicated that Congress did not intend to create a federal cause of action for breach of a fiduciary duty by corporate management.[49] Moreover, the *ADDS* court misinterpreted the decision of the court of appeals in *Chris-Craft.* The Second Circuit in that case expressly rejected a defensive merger by the target corporation as grounds for liability under section 14(e).[50] The Second Circuit did discuss common law fraud in *Chris-Craft,* but only as a means of interpreting congressional intent on the issue of standing.[51] In view of *Santa Fe* and *Chris-Craft,* the Racal transaction itself should have been allowed to proceed.

The holding in *ADDS,* that defensive actions undertaken following announcement of an exchange offer but before final registration are subject to the Act, stands on solid ground. Although the analogy

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[48] 97 S. Ct. 1292 (1977). *See* note 35 *supra.*

[49] The *Santa Fe* opinion proceeded upon alternative theories. The first approach was based upon the reasoning of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). The *Ernst & Ernst* Court made clear that Rule 10b-5 was limited by the scope of § 10(b), which proscribes use of any "manipulative or deceptive device" in connection with securities transactions. 15 U.S.C. § 78j (1970). Thus, breach of a fiduciary duty to shareholders would not be actionable under § 10(b) in the absence of a disclosure violation, even though rule 10b-5 purports to prohibit fraud. 97 S. Ct. at 1299-1300.

Section 14(e), however, specifically proscribes "fraudulent, deceptive, or manipulative acts or practices." 15 U.S.C. § 78n(e)(1970). Arguably, this language incorporates Rule 10b-5 cases pertaining to tender offers into statutory form. *See* Electronic Specialty Co. v. Internatonal Controls Corp., 409 F.2d 937, 940-41 (2d Cir. 1969). *But see* JENNINGS & MARSH, *supra* note 12, at 997.

The second basis of the Court's holding in *Santa Fe,* however, indicates that Congress did not intend to create a body of federal substantive corporate law. 97 S. Ct. at 1303. Thus, the Court was reluctant to override traditional state causes of action without clear congressional direction to the contrary. *Id.* at 1303-04. This portion of the decision seems equally applicable to § 14(e). The broad scope of the opinion indicates that the Supreme Court will not approve a cause of action under § 14(e) based solely upon common law fraud.

[50] 480 F.2d 341, 364 (2d Cir. 1973), *rev'd on other grounds,* 97 S. Ct. 926 (1977). The Second Circuit simply noted that mergers are commonly employed in defense by target corporations. *Id., citing* Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics,* 23 BUS. LAW. 115, 132-34 (1967).

[51] The court reasoned that since interference with a prospective economic advantage is an actionable tort in most state courts, Congress would have been more explicit had it intended to deny the injured party standing to assert violations of § 14(e) in federal court. 480 F.2d at 360-61.

to Rule 10b-5 cases seems somewhat strained,[52] the reasoning indicates that what is important about conduct occurring before the transaction is that it affected the interests of the party protected by the particular provision.[53] Deception undertaken prior to a purchase or sale is actionable under Rule 10b-5 because the conduct results in a sale tainted by unfairness. Thus, the crucial question in a tender offer case is not whether the registration has become effective, but whether the conduct has compromised the right of the shareholder to make an informed decision to tender. Because it ignores this basic question, limitation of shareholder protection to the immediate period of the exchange offer is inconsistent with the rationale of the Williams Act.

Pre-registration conduct can jeopardize a shareholder's rights. The period for completion of registration requirements typically is much greater than the life of the tender offer itself.[54] This additional time and the pressure upon target management to initiate defensive maneuvers as quickly as possible makes the pre-exchange offer period more susceptible to abuses. Injunctive relief provided at this stage in the takeover contest can remedy these abuses effectively, and yet preserve the tender offer intact.[55] Thus, application of the Williams Act to pre-registration activity serves the congressional purpose of shareholder protection through adequate disclosure of material information without unduly prejudicing the rights of the offeror or target management.

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[52] While both Rule 10b-5 and § 14(e) contain the words "in connection with," the provisions relate to different concepts. To say that a course of conduct preceding a securities sale is actionable does not compel the conclusion that the same is true for conduct preceding a tender offer. A purchase or sale is a single event that takes place at a given time. Conduct occurring before the transaction is, of necessity, subject to the statute, since simultaneous occurrence would be extremely rare. A tender offer, however, is an ongoing process that covers a span of time. Statutory regulation of tender offers conceivably could be limited to this period without rendering the provision entirely meaningless.

[53] [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,968.

[54] The SEC reported that in fiscal 1973, the average registration period lasted 41 days. SEC, ANNUAL REPORT 31 (1973). Although the New York Stock Exchange recommends that tender offers remain effective for thirty days, the median period for contested offers may be somewhat shorter. ARANOW & EINHORN, *supra* note 1, at 51. ADDS filed the registration statement with the SEC on December 13. [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,824, at 90,976. The NYSE listed the offering on February 15. STOCK REPORTS, NEW YORK STOCK EXCHANGE (STANDARD & POOR'S) 204W (Mar. 31, 1977).

[55] *See* Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 949 (1977); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969).

B. *Preliminary Relief*

The federal judiciary has evolved the concept of appropriate remedial measures under the Williams Act since the inception of the statute.[56] Ideally, relief should further the statutory policy of shareholder protection through full and fair disclosure of material corporate information[57] without favoring either the takeover bidder or target management.[58]

The first appellate court to interpret the Williams Act reasoned that preliminary relief is best suited to accomplish this policy, since equitable remedies can compel disclosure before continuation of the offer has become impractical.[59] That court, however, warned against the possibility that management would use the preliminary injunction solely as another corporate defensive tactic.[60] Subsequent courts adopted a cautious approach and were slow to grant preliminary

[56] *See generally* Porter & Hyland, *Rondeau v. Mosinee Company and the Williams Act Injunction,* 59 MARQ. L. REV. 743 (1976) [hereinafter cited as Porter & Hyland]; Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations,* 50 IND. L.J. 114 (1974); Note, *The Courts and the Williams Act: Try a Little Tenderness,* 48 N.Y.U. L. REV. 991 (1973) [hereinafter cited as *The Courts and the Williams Act]; Tender Offers: Injunctive Relief Under the Williams Act, 1975-1976 Securities Law Developments,* 33 WASH. & LEE L. REV. 935, 969-84 (1976); *Injunctions and Damages Under the Williams Act—Defense Mechanisms, Punitive Sanctions, Remedial Devices, Survey of 1974 Securities Law Developments,* 32 WASH. & LEE L. REV. 719, 777-85 (1975).

[57] *See* J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

[58] Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926 (1977); H.R. REP., *supra* note 3, at 2813.

[59] Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969).

[60] *Id.* Litigation is frequently recommended to target management as one of many defense tactics available. *See* ARANOW & EINHORN, *supra* note 1, at 266-68; Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics,* 23 BUS. LAW. 115 (1967). Even though litigation may serve only to delay the offer, the additional time may allow target management to initiate other defensive maneuvers. ARANOW & EINHORN, *supra* note 1, at 266. This technique was utilized in Texasgulf Inc. v. Canada Development Corp., 366 F. Supp. 374 (S.D. Tex. 1973). Canada Development Corp. made an offer to Texasgulf shareholders. Texasgulf obtained a temporary restraining order that remained in effect through extensions for two months. During that time Texasgulf announced a $46,000,000 expansion program, increased earnings, and a new ore strike. These announcements drove the price of Texasgulf stock above the price offered by Canada Development. Porter & Hyland, *supra* note 56, at 746-47. A recent study of 119 cash tender offers found that 42.2% of the resisted bids involved use of legal action as a defense tactic. Target companies successfully defeated the takeover attempts in 68.4% of these instances. Where no legal action was used, however, target management prevailed in 76.9% of the contested bids. Ebeid, *Tender Offers: Characteristics Affecting Their Success,* 11 MERGERS & ACQUISITIONS 21, 25 (1976).

relief that would thwart a tender offer.[61] These courts accomplished this result through close scrutiny of the moving party's case[62] or adherence to the traditional equitable requirements of probable success on the merits and irreparable harm.[63]

Later courts, however, appeared more willing to grant injunctive relief. These courts reasoned that the public interest in enforcement of securities statutes required that injunctive relief be made more readily available.[64] This result was accomplished by requiring the moving party to show merely that the balance of hardships rested in its favor, and that there were serious questions on the merits of the case,[65] rather than a strict showing of irreparable injury.

The Supreme Court initiated a reaction to this trend in *Rondeau v. Mosinee Paper Corp.*,[66] in which it emphasized the importance of a showing of irreparable harm as a prerequisite to injunctive relief.[67] Although *Rondeau* involved permanent injunctive relief, the empha-

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[61] *See, e.g.*, Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842, 844-45 (2d Cir. 1970); *see also The Courts and the Williams Act, supra* note 56, at 1000-05.

[62] *See, e.g.*, Susquehanna Corp. v. Pan Am. Sulphur Co., 423 F.2d 1075 (5th Cir. 1970); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969); *see also The Courts and the Williams Act, supra* note 56, at 1000-01.

[63] *See, e.g.*, Columbia Ribbon & Carbon Mfg. Co. v. Kapralos, 374 F. Supp. 500 (E.D.N.Y. 1974); Ozark Air Lines, Inc. v. Cox, 326 F. Supp. 1113 (E.D. Mo. 1971).

[64] *See* Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011, 1017 (7th Cir. 1974), *rev'd*, 422 U.S. 49 (1976); Sonesta Int'l Hotels Corp. v. Wellington Assoc., 483 F.2d 247, 250-51 (2d Cir. 1973); Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 692-93 (2d Cir. 1973).

[65] Development of this standard in the securities cases represents an evolution from Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973), a case involving both antitrusts and securities allegations. The Second Circuit reasoned that where the public interest is as vitally involved as in an antitrust case, irreparable harm should not be required, but, rather, a balance of equities in favor of the moving party. *Id.* at 693. The same analysis was applied in Sonesta Int'l Hotels v. Wellington Assoc., 483 F.2d 247 (2d Cir. 1973), where the court phrased the question in terms of a "balance of hardships" in the plaintiff's favor. *Id.* at 250. *Sonesta*, however, did not involve antitrust issues. Instead, the court justified use of a standard less stringent than irreparable harm by invoking the public interest in enforcement of securities statutes, *Id.* at 250-52, a step that made the balance of hardships test applicable to any Williams Act case. *See* Porter & Hyland, *supra* note 56, at 759-60.

[66] 422 U.S. 49 (1975), *rev'g* 500 F.2d 1011 (7th Cir. 1974).

[67] *Id.* The Seventh Circuit had issued a permanent injunction without requiring management to show irreparable injury from the defendant's failure to file a Schedule 13D. Rather, the court of appeals held that mere violation of the statute satisfied the requirement and directed entry of permanent injunctive relief. 500 F.2d at 1016-17. The Supreme Court, however, held that a showing of irreparable harm was necessary to obtain injunctive relief. 422 U.S. at 60-61.

sis of the Court on traditional equitable principles has led many lower courts to reexamine use of the balance of hardships standard in deciding whether to grant a preliminary injunction.[68]

In *Missouri Portland Cement Co. v. H. K. Porter Co.*,[69] the Eighth Circuit considered target management's motion for preliminary relief under the traditional standard of probable success and irreparable harm. Missouri Portland Cement (MPC) brought suit to enjoin alleged disclosure violations in connection with a tender offer by Porter for MPC stock but was denied relief. On appeal, the circuit court required that MPC show a substantial probability of success on the merits and irreparable harm in the absence of the requested relief. MPC was able to meet the first element of this standard by alleging that Porter had failed to disclose an intent to control the target corporation.[70] The plaintiff, however, was unable to show the second element, irreparable harm, and the court denied injunctive relief.

MPC argued that irreparable harm in the absence of an injunction would result from the possibility that Porter could seize control of the corporation and halt the litigation. MPC also contended that nontendering shareholders would be harmed permanently if Porter liquidated the corporation before a trial on the merits.[71] The Eighth Circuit rejected both of these arguments. The court considered the possibility that Porter could exercise sufficient control over MPC to stop the lawsuit in such a short period of time unlikely, especially in view of the staggered terms of MPC's board.[72] This staggered board also

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[68] *See, e.g.*, Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975); Applied Digital Data Systems, Inc. v. Milgo, Inc., [1976-1977 Transfer Binder] FED. SEC. L. REP.(CCH) ¶ 95,824, at 90,970 (S.D.N.Y. Jan. 3, 1977); *see also* text accompanying note 29 *supra; Tender Offers; Injunctive Relief Under the Williams Act, 1975-1976 Securities Law Developments*, 33 WASH. & LEE L. REV. 969 (1976); *cf.*, Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1359 (2d Cir. 1976) (antitrust).

[69] 535 F.2d 388 (8th Cir. 1976).

[70] Porter's first tender offer was enjoined when the district court determined that Porter had failed to disclose an intent to control MPC. Porter amended the offer to disclose this intent, and proceeded. MPC contended, however, that a Schedule 13D filed by Porter several months before the initial tender offer was false and misleading. Porter had filed the 13D, but did not report an intent to control MPC. The court found at least a possibility that MPC could show that Porter intended to control MPC at the time it filed the 13D. The court did not determine the issue conclusively, however, since it could not find the requisite harm to MPC. *Id.* at 394.

In addition to the control allegation, MPC charged Porter with several other violations of the Williams Act. The court could not find a possibility that MPC would prevail on these issues at trial, however, and did not discuss irreparable harm with regard to them.

[71] *Id.* at 399.

[72] *Id.* Staggered terms for board members are used frequently as a means to deter

would prevent Porter from accomplishing a liquidation before trial. Moreover, the trial court had found specifically that Porter did not intend to liquidate MPC. Thus, the court of appeals found that the possibility of irreparable harm was slim and did not warrant preliminary injunctive relief under the traditional standard.

The Eastern District of Pennsylvania applied a similar standard in *Boyertown Burial Casket Co. v. Amedco Inc.*,[73] a case that grew out of an Amedco offer for publicly held shares of Boyertown. Boyertown managment responded to the tender offer with a suit for preliminary injunctive relief. Unlike the plaintiff in *Missouri Portland*, however, Boyertown alleged in its complaint not only that Amedco's tender offer had violated disclosure regulations, but also that the takeover of Boyertown by Amedco would violate antitrust statutes.[74]

Boyertown charged that Amedco's offer and a letter subsequently mailed to shareholders distorted or failed to state material facts relating to appraisal remedies,[75] previous market prices of Amedco shares,[76] planned management personnel changes,[77] and the results of a court ruling on a previous takeover attempt by another casket corporation.[78] The complaint also alleged that because of the degree of

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tender offers. *See* ARANOW & EINHORN, *supra* note 1, at 262; Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW. 115 (1967).

[73] 407 F. Supp. 811 (E.D. Pa. 1976).

[74] Clayton Act § 7, 15 U.S.C. § 18 (1970) (amended 1976). Section 7 prohibits corporate acquisitions where the effect may be to lessen competition substantially or tend to create a monopoly in any line of commerce in any section of the country. Section 16 gives persons or corporations standing to seek injunctive relief to enforce § 7, 15 U.S.C. § 26 (1970).

Boyertown is the nation's fourth largest manufacturer of caskets, while Amedco ranks ninth or tenth. Boyertown produced evidence to show that the two companies competed on a nationwide basis. Finding that a combination of the corporations would control 6% of the national market for burial caskets, the court concluded that the acquisition of Boyertown by Amedco would accelerate a national trend toward concentration in the burial casket industry. 407 F. Supp. at 816.

[75] The offer did not reveal that Pennsylvania law gave dissenting shareholders the right to appraisal and payment of fair value for their shares. *Id.* at 820. *See* PA. STAT. ANN. tit. 15, § 805 (Purdon 1967).

[76] The letter reported that Boyertown stock had not sold for over $16 per share in the previous three years. The court found that the market price exceeded $16 during the week before the letter was mailed. 407 F. Supp. at 820.

[77] Amedco had told Boyertown management that present personnel would be retained if the offer succeeded. The letter, however, suggested that Amedco would replace members of management. *Id.*.

[78] In Boyertown Burial Casket Co. v. Walco, Inc., 344 F. Supp. 1357 (E.D. Pa. 1972), the district court denied Boyertown's request for preliminary injunctive relief on the grounds that since Walco had not yet made a tender offer, Boyertown could not

competition between Boyertown and Amedco, a takeover would lessen substantially competition within the casket industry.[79] The court found a reasonable likelihood that Boyertown would prevail on these issues at a later trial on the merits.

Boyertown also satisfied the second prerequisite to preliminary relief, the possibility of irreparable injury to the moving party. Boyertown showed that the tender offer, if allowed to proceed, would injure the morale of Boyertown employees and confidence of Boyertown customers in the future of the company's operation. The court found further injury to the corporation in the time allocated by management to resist the offer, in the effect of the offer upon salesmen's performance, and in the loss of confidential corporate information.[80] Thus, Boyertown, having met both criteria for preliminary relief, obtained an injunction against the Amedco offer.

The factors that supported a finding of irreparable harm in *Boyertown,* although common in antitrust suits,[81] are not related to Williams Act disclosure violations. The elements of irreparable injury in *Boyertown* will be present in any tender offer.[82] Application of these factors to a Williams Act suit such as *Missouri Portland,* based solely upon disclousre violations, would result in a pro forma determination of irreparable harm, a result clearly inconsistent with the policy considerations of *Rondeau.* Where a colorable antitrust claim is present, therefore, courts should examine carefully the likelihood of success before enjoining the offer.[83]

In addition to irreparable harm and probability of success, courts should consider the relative equities of the interests involved.[84] Share-

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show immediate irreparable harm. *Id.* at 1364. The court did conclude, however, that a merger between the two casket manufacturers would violate the Clayton Act. *Id.* at 1363. Amedco's letter had stated that Walco had failed to obtain an injunction. A permanent injunction, however, was entered in the Walco litigation shortly after the denial of the preliminary injunction. 407 F. Supp. at 820.

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

[80] 407 F. Supp. at 821.

[81] *See, e.g.,* Metro-Goldwyn-Mayer Inc. v. Transamerica Corp., 303 F. Supp. 1344 (S.D.N.Y. 1969) (disruption of management, employee relations, loss of confidential information); United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa. 1963) (loss of confidential information, public interest in free economy); *see also* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 673 (1977); Note, *"Preliminary Preliminary" Relief Against Anticompetitive Mergers,* 82 YALE L.J. 155, 162 (1972).

[82] Metro-Goldwyn Mayer, Inc. v. Transamerica Corp., 303 F. Supp. 1344, 1352 (S.D.N.Y. 1969).

[83] L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 671 (1976).

[84] Porter & Hyland, *supra* note 56, at 758-59. *See also* Graphic Sciences, Inc. v. International Mogul Mines, Ltd., 397 F. Supp. 112 (D.D.C. 1974).

holders have an interest in disposing of their property as they choose,[85] and the public has an interest in corporate efficiency promoted by the tender offer device.[86] Target management should not be allowed to use the Clayton Act merely as another defensive tactic in a takeover struggle.[87] Nonetheless, these interests must be weighed against the public interest in economic competition promoted by the antitrust laws. Careful scrutiny of tender offer litigation involving antitrust implications should produce a result consistent with the antitrust statutes and the Williams Act.

C. *Standing*

In 1972, the Second Circuit ruled that defeated tender offerors had standing to sue for damages incurred in an unsuccessful takeover attempt.[88] In *Piper v. Chris-Craft Industries, Inc.*,[89] the Supreme Court reversed that ruling, and held that a tender offeror has no implied federal right of action for damages.

The decision, which represents the culmination of eight years of litigation,[90] grew out of an unsuccessful tender offer by Chris-Craft Industries, Inc. for the common stock of Piper Aircraft Corp. Piper management responded to the takeover attempt with a barrage of

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[85] Mesa Petroleum Co. v. Aztec Oil & Gas Co., 406 F. Supp. 910, 916 (N.D. Tex. 1976); Copperweld Corp. v. Imetal, 403 F. Supp. 579, 608 (W.D. Pa. 1975).

[86] Congress has recognized that the policy of free competition promoted by the antitrust statutes must be balanced against the economy's interest in preserving the tender offer as a means of promoting corporate efficiency. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383 (1976), establishes a thirty-day notification and waiting period requirement on parties contemplating a merger. The purpose of the requirement is to allow the FTC to review the proposed transaction for antitrust implications. Where the merger is to be effected by a cash tender offer, however, the waiting period is only fifteen days. The report of the House Judiciary Committee explained that the longer notification period would favor target management, and thereby conflict with the neutral approach of the Williams Act. H.R. REP. No. 1373, 94th Cong., 2d Sess. 12 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2637, 2643-44.

[87] L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 671 (1976).

[88] Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973), *rev'd*, 97 S. Ct. 926 (1977).

[89] 97 S. Ct. 926 (1977).

[90] The principal litigation, involving several district court decisions and three circuit court opinions, proceeded as follows; 303 F. Supp. 191 (S.D.N.Y. 1969) (preliminary injunction denied), *aff'd in part, rev'd in part*, 426 F.2d 569 (2d Cir. 1970) (en banc), *on remand*, 337 F. Supp. 1128 (S.D.N.Y. 1971), *aff'd in part, rev'd in part*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973), *on remand from 2d Cir.*, 384 F. Supp. 507 (S.D.N.Y. 1974), *aff'd in part, rev'd in part*, 516 F.2d 172 (2d Cir. 1975) (damages), *rev'd*, 97 S. Ct. 926 (1977).

defensive maneuvers, including acquiescence in a competing tender offer from Bangor Punta Corp. Eight months after announcement of its initial tender offer, Chris-Craft conceded control of Piper to Bangor Punta. Nevertheless, Chris-Craft retained a 42% minority interest in Piper with a total value of $44 million.

In the middle of this takeover struggle, Chris-Craft filed suit for damages and injunctive relief. Failing to obtain a preliminary injunction, Chris-Craft continued the suit for damages following withdrawal from the takeover contest, but abandoned its plea for injunctive relief.[91] Chris-Craft charged that disclosure and other securities laws violations by members of the Piper family, Bangor Punta, and Bangor Punta's underwriter had caused monetary damage to Chris-Craft.

In an extensive opinion, the Second Circuit reversed the district court's holding that Chris-Craft did not have standing to sue for damages, and held the defendants liable.[92] The court of appeals awarded Chris-Craft standing to sue based upon its interpretation of *J. I. Case Co. v. Borak.*[93] In *Borak,* the Supreme Court emphasized

[91] Presumably, Chris-Craft no longer desired to control a corporation that would remain in the hands of Bangor Punta until a final decision by the courts. *See* 97 S. Ct. at 964 n.22.

[92] The Second Circuit found that certain shareholder letters and press releases by the Piper family violated § 14(e) by omitting or misstating material facts. The Piper family failed to reveal details of an agreement with Bangor Punta that gave the family a pecuniary interest in the success of the Bangor Punta offer. Moreover, a press release announcing an agreement to sell 300,000 shares of authorized but unissued Piper stock to Grumman Aircraft Corp. did not disclose that Grumman retained a right to "put," or return, the shares to Piper. Finally, letters from the Piper family to shareholders described the Chris-Craft offer as inadequate, even though Piper was then negotiating with Grumman at the same price. 480 F.2d at 364-66.

The Second Circuit concluded that Bangor Punta's exchange offer should have revealed that the Bangor and Aroostook Railroad was overvalued in the registration statement. The statement listed the value of the railroad at $18.4 million, but the company was negotiating to sell the line for approximately $5 million. Failure to reveal this potential loss constituted a violation of § 14(e). 480 F.2d at 367-69. This material defect in the registration statement rendered First Boston Corp., which had underwritten the Bangor Punta exhange offer, liable as well. The court concluded that First Boston had failed in its duty to discover the misrepresentation. 480 F.2d at 369-73.

The court of appeals' opinion has been discussed in more detail by a number of commentators. *See generally* Dugan & Fairfield, *Chris-Craft Corp. v. Piper Aircraft Corp.: Liability in the Context of a Tender Offer,* 35 OHIO ST. L..J. 412 (1974); Note, *Chris-Craft: The Uncertain Evolution of Section 14(e),* 76 COLUM. L. REV. 634 (1976); Note, Chris-Craft *and Section 14(e): The Expansion of Lead Underwriters'* Liability, 42 FORDHAM L. REV. 820 (1974); 51 TEX. L. REV. 1444 (1973).

[93] 377 U.S. 426 (1964).

the importance of private enforcement of federal securities statutes.[94] The Second Circuit reasoned that a cause of action for damages in the hands of the offeror would provide effective enforcement of the Williams Act,[95] and would conform to congressional intent.[96] The court found that the defendants' violations had caused Chris-Craft to lose the opportunity to control Piper, thereby reducing the value of Chris-Craft's holdings in Piper. The court remanded the cases for a determination of damages[97] and, on its own motion, issued an injunction barring Bangor Punta from voting the Piper shares it had obtained through unlawful transactions for a least five years.[98]

The Supreme Court reversed, and ruled that Chris-Craft did not have a federal cause of action for damages.[99] The Court based this holding on an analysis of the legislative history of the William Act, and the prior holding by the Court in *Cort v. Ash.*[100]

The legislative history of the Williams Act revealed that Congress intended the statute to protect shareholders by compelling the offeror and target management to disclose facts material to an informed decision to tender shares.[101] Neither the offeror nor target manage-

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[94] *Borak* involved the question of a private right of action under proxy regulations. Securities Exchange Act § 14(a), 15 U.S.C. § 78n (1970). The Court held that federal courts should provide "such remedies as are necessary to make effective the congressional purpose." 377 U.S. at 433. A private right of action to enforce proxy regulations would provide a "necessary supplement" to SEC review and thereby serve the statutory policy of investor protection. *Id.* at 432. *See generally* Note, *Private Rights from Federal Statutes: Toward a Rational Use of* Borak, 63 Nw. U.L. Rev. 454 (1968); Comment, *Private Rights and Federal Remedies: Herein of* J. I. Case v. Borak, 12 U.C.L.A. L. Rev. 1150 (1965).

[95] 480 F.2d at 361.

[96] The court concluded that the failure of Congress specifically to prohibit a private cause of action indicated an intent to provide such a remedy. According to the court, Congress realized that a defeated offeror would have a right of action in state court, and that there was therefore a presumption that takeover bidders would be able to sue in federal court under the statute as well. *Id.* at 360-62. *But see* text accompanying note 121 *infra.*

[97] *Id.* at 379-80. On remand, the district court awarded damages of $1,673,988, or $2.40 per share of Piper stock held by Chris-Craft. 384 F. Supp. at 523. All parties appealed, and the Second Circuit held that the district court incorrectly had ignored the reduction in value of Chris-Craft's Piper holdings occasioned by assumption of control by Bangor Punta. Accordingly, the court of appeals computed damages at $36.98 per share, for a total of $25,793,365 plus pre-judgment interest. 516 F.2d at 190.

[98] 480 F.2d at 380.

[99] 97 S. Ct. 926 (1977).

[100] 422 U.S. 66 (1975).

[101] At this point in the *Piper* opinion, the Court quoted extensively from remarks on the Senate floor by Senator Williams, testimony before the Senate Committee on Banking and Currency, and the Senate Report. 97 S. Ct. at 942-47. At each opportun-

ment was an intended beneficiary of the Act. Rather, the antifraud and disclosure regulations were for the sole benefit of the shareholders.[102]

The Court applied the test adopted in *Cort v. Ash* to support this conclusion.[103] This test consisted of four essentials: (1) the plaintiff must be a member "of the class for whose *especial* benefit the statute was enacted;" (2) there must have been a legislative intent to create the requested remedy; (3) the remedy must be consistent with the "underlying purposes of the legislative scheme;" (4) the cause of action should not be one "traditionally relegated to state law."[104]

Application of this test to the facts of *Piper* compelled a finding that a tender offeror had no implied cause of action.[105] The Court's review of the legislative history had indicated that the statute was not directed to the "especial" benefit of offerors and that Congress had not intended to provide the requested remedy. Moreover, such a damage remedy would be inconsistent with the legislative scheme of protection for all shareholders.[106] Finally, the availability to Chris-Craft of an action in state court supported the inference that Congress did not intend to provide a similar remedy under federal law.[107]

The Court did not believe that the damage remedy sought by Chris-Craft was consistent with the language of *J. I. Case Co. v. Borak.*[108] In *Borak,* the Court authorized a private cause of action for proxy violations because the remedy was "necessary" to accomplish the statutory purpose.[109] In *Piper,* the Court placed special emphasis on the word "necessary."[110] A cause of action not essential to the

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ity, the Court supplied emphasis to words that indicated that the Williams Act was designed to protect shareholders through a policy of even-handed regulation of offerors and target management. The Court noted, however, that such an analysis should be approached cautiously. *Id.* at 941, 944 n.20.

[102] *Id.* at 946.

[103] 422 U.S. 66 (1975). The plaintiff, a shareholder, brought suit on behalf of the corporation against corporate officials who had made allegedly illegal campaign contributions from corporate funds. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 18 U.S.C. § 610 (Supp. IV 1974).

[104] 422 U.S. at 78.

[105] 97 S. Ct. at 947-49.

[106] The court noted that damages conceivably could be detrimental to the interests of shareholders in general. Fear of large damage awards for disclosure violations could discourage future tender offers. *Id.* at 948-49. *But see* text accompanying notes 113-14 *infra.*

[107] 97 S. Ct. at 949. *See* text accompanying notes 120-21 *infra.*

[108] 377 U.S. 426 (1964).

[109] *Id.* at 432.

[110] 97 S. Ct. at 941.

statutory goal would not be sustained. Since preliminary injunctive relief, long considered by the courts to be the form of relief best adapted to shareholder protection, is available to offerors, a damage remedy is unnecessary.[111] Moreover, damages would not be awarded to shareholders, but to the offeror corporation. Although Piper shareholders who had tendered their shares in exchange for Chris-Craft stock would benefit from the award, damages would be detrimental to those Piper shareholders who had tendered to Bangor Punta and who now had an interest in that corporation.[112] Thus, the damage remedy was not the most effective tool available to the courts, and bore little relationship to the congressional purpose of shareholder protection.

Justice Stevens dissented, contending that damages were the most effective means available to accomplish the congressional purpose.[113] He reasoned that a tender offeror has a great deal at stake once it initiates a takeover attempt, and that to protect itself, the offeror will use its resources to detect and challenge Williams Act violations. Since most shareholders would not have similar capabilities, a cause of action for damages by the offeror would provide a valuable deterrent which would be entirely consistent with *Borak* as a remedy *necessary* to effective enforcement of the statute.[114]

Justice Stevens distinguished *Cort v. Ash* on the grounds that *Cort,* unlike *Borak,* did not involve a statute which provided for a civil remedy on the part of *someone.*[115] The statute at issue in *Cort*

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[111] *See* Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969). This was the first appellate court to interpret the newly adopted Williams Act. Judge Friendly pointed out that the flexibility of pre-offer injunctive relief would allow courts to rectify disclosure defects, and yet allow the offer to proceed without undue delay. *Id.*

[112] 97 S. Ct. at 949-50. The Court also used this reasoning to support its finding that a damage remedy was not consistent with the underlying purpose of the statute, the third element of the *Cort* test. *See* text accompanying note 106 *supra.*

[113] 97 S. Ct. at 958-61. Justice Stevens was joined by Justice Brennan. Justice Blackmun concurred with the result of the case, but agreed with the dissent that Chris-Craft should have standing to sue for damages. He could not conclude, however, that violations by the defendants had injured Chris-Craft. *Id.* at 954-55.

[114] Justice Stevens also argued that Chris-Craft was a shareholder of Piper and therefore entitled to sue in that role. By the time Bangor Punta announced the allegedly unlawful tender offer Chris-Craft had acquired over 500,000 shares of Piper stock. *Id.* at 956-58. The majority rejected this argument, contending that Chris-Craft was not of the class that the Williams Act was designed to protect. The beneficiary of the Act is the shareholder faced with the decision to tender or retain possession of his shares. Although Chris-Craft held Piper shares, it was not realistically faced with a decision to tender those shares. *Id.* at 946 and n.23.

[115] *Id.* at 961-62. The '34 Act provides the SEC with authority to seek injunctive

was a criminal statute and did not mention civil actions.[116] Since *Piper*, like *Borak*, involved a statute that did provide a civil remedy, Justice Stevens did not believe *Cort* could be applied to deny Chris-Craft standing.

Interpretation of *Borak* is where the dissent and majority reveal their differing theories of judicial interpretation. The emphasis of the majority upon the word "necessary" implied that no private right of action would be provided unless absolutely essential to realization of the statutory purpose. Justice Stevens, however, employed a broader interpretation. He construed "necessary" to include remedies which would further the congressional goal of shareholder protection.[117] Justice Stevens thought the damage remedy should be sustained because the risk of damages would deter violations, a result consistent with congressional intent. The majority, on the other hand, reasoned that since injunctive relief was available and well suited to shareholder protection, a damage remedy would not be necessary.[118]

The majority's approach reaffirms the recent Supreme Court trend toward strict construction of congressional directives.[119] This trend is evidenced by the Court's treatment of the traditional com-

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remedies against violation of the statute. '34 Act § 21, 15 U.S.C. § 78u (1970).

[116] *See* note 103 *supra*.

[117] The *Borak* Court did not define "necessary." The opinion did indicate, however, that private right of action was necessary under § 14(a) because of the inability of the SEC to scrutinize carefully every proxy statement filed. 377 U.S. at 432. *See* Note, *Private Rights from Federal Statutes: Toward a Rational Use of* Borak, 63 Nw. U.L. REV. 454, 464-69 (1968). In *Piper*, the majority questioned whether a damage remedy in the offeror would supplement SEC enforcement in view of what the Court saw as the ineffective nature of the damage remedy. 97 S. Ct. at 949. The SEC, however, filed an amicus brief in which it claimed that a private action of this nature was indeed a necessary supplement to agency action. Brief for SEC as Amicus Curiae at 95-102. The Commission noted that the professional staff of the Office of Tender Offers, Acquisitions and Small Issues consisted of five lawyers. *Id.* at 97 n.265. The majority responded that implication of private rights of action is peculiarly one for judicial decision, not administrative expertise. 97 S. Ct. at 949 n.27.

[118] *See* text accompanying note 111 *supra*.

[119] *See, e.g.*, Santa Fe Indus., Inc. v. Green, 97 S. Ct. 1292 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Foremost-McKesson, Inc. v. Provident Securities Co., 423 U.S. 232 (1976); *see also* Deutsch & LaRue, *Federalism and the Law of Securities Regulation: The Legacy of Brown v. Board of Education, 34* WASH. & LEE L. REV. 799 (1977); Pitt, *An SEC Insider's View of the Utility of Private Litigation Under the Federal Securities Laws*, 5 SEC. REG. L.J. 3, 9 (1977); Note, *Judicial Retrenchment Under Rule 10b-5: An End to the Rule as Law?*. 1976 DUKE L.J. 789; *cf.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (courts may not award attorneys' fees under private attorney general theory without statutory authority).