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HOSTILE TENDER OFFERS AND INJUNCTIVE RELIEF FOR 14(e) MANIPULATION CLAIMS: DEVELOPMENTS AFTER *MOBIL CORP. v. MARATHON OIL CO.*

Section 14(e) of the Williams Act[1] amendments to the Securities Exchange Act of 1934[2] ('34 Act) prohibits false or misleading statements, material omissions, and fraudulent, deceptive, or manipulative activity in connection with a tender offer.[3] The prohibitions of section 14(e) extend to all bidders and to the management of the target company in responding to a tender offer.[4] Although the language of section 14(e) closely resembles the language of section 10(b)[5] of the '34 Act and rule 10b-5[6] of the Securities and Exchange Commission (SEC),[7] neither the '34 Act nor the Williams Act defines the term manipulation.[8] Federal courts, therefore, have defined

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[1] Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981). Congress enacted the Williams Act (the Act) to insure that target shareholders have access to material information concerning the tender offer on which to base informed investment decisions. *See* H.R. REP. No. 1711, 90th Cong., 2d Sess. 2 (1968), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2812 [hereinafter cited as H.R. REP. No. 1711].

[2] 15 U.S.C. §§ 78a-78kk (1976 & Supp. V 1981).

[3] *See* 15 U.S.C. § 78n(e) (1976) (antifraud provision for tender offers).

[4] *See* 17 C.F.R. § 240.14e-2 (1982). Under Rule 14(e)-2, promulgated by the Securities & Exchange Commission (SEC), target management must make one of three responses to a tender offer. *See id.* Management must recommend acceptance or rejection of the offer, express no opinion on the offer, or indicate an inability to take a position on the offer. *Id.* Management also must provide reasons for any position taken and is under a duty to update disclosures if a material change occurs. *Id.* Although the Williams Act originally did not require target management to respond to a tender offer, the legislative history of the Act indicates that if management did respond to the offer, the disclosure standards for the bidder would apply to management. *See* H.R. REP. No. 1711, *supra* note 1, at 2813, 2821 (§ 14(e) obligates anyone opposing tender offer to make full disclosure to shareholders).

[5] 15 U.S.C. § 78j(b) (1976) (§ 10(b) of Securities Exchange Act of 1934).

[6] 17 C.F.R. § 240.10b-5 (1982) (Securities and Exchange Commission rule 10b-5).

[7] *Compare* 15 U.S.C. § 78j(b) (1976) (§ 10(b) of '34 Act prohibits any manipulative or deceptive device or contrivance) *and* 17 C.F.R. § 240.10b-5 (1982) (rule 10b-5 prohibits manipulative and deceptive devices, untrue statements or omissions of material fact, and any fraudulent acts or practices in connection with purchase or sale of securities) *with* 15 U.S.C. § 78n(e) (1976) (§ 14(e) prohibits any material, false statements or omissions and any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer).

[8] *See* 15 U.S.C. § 78j(b) (1976) (§ 10(b) prohibits any manipulative or deceptive device or contrivance); 15 U.S.C. § 78n(e) (1976) (§ 14(e) prohibits any fraudulent, deceptive, or manipulative acts or practices). *See generally* 3 L. LOSS, SECURITIES REGULATION, 1531-70 (1961) (reviewing development of manipulation concept in securities markets); Note, *Tender Offer Defensive Tactics—Federal Regulation of Management's Prerogative*, 10 FORDHAM URB. L.J. 633, 638-40 (1981-82) [hereinafter cited as *Tender Offer Defensive Tactics*] ("manipulation" under '34 Act). The Securities Exchange Act of 1934 ('34 Act) explicitly lists prohibited manipulative practices under § 9 and § 10. *Id.* at 638; *see* 15 U.S.C. §§ 78i, 78j (1976). Courts

section 14(e) manipulation according to judicial interpretation of manipulation under section 10(b).[9]

In 1977, the Supreme Court stated in *Santa Fe Industries, Inc. v. Green*[10] that section 10(b) manipulation generally refers to practices that mislead investors by artificially affecting the market price of stock.[11] The Court explained that nondisclosure usually is necessary to insure successful manipulation of securities prices.[12] The *Santa Fe* Court also stated that breach of fiduciary duty, absent deception or nondisclosure, does not violate section 10(b) or rule 10b-5.[13] The Court held that Congress enacted the '34 Act primarily to insure full disclosure during securities transactions, and that state law provides adequate remedies for fiduciary violations absent fraud.[14]

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use the explicitly prohibited practices under § 9 and § 10 to infer a general definition of manipulation as acts occurring within the marketplace intended to distort the market's valuation of securities. *See Tender Offer Defensive Tactics, supra* at 638-39.

In a 1970 amendment to § 14(e) of the Williams Act, Congress granted the SEC the authority to promulgate rules concerning the definition of fraudulent, deceptive, and manipulative practices. *See* 15 U.S.C. § 78n(e) (1976). The SEC has not yet exercised this authority. *See* 17 C.F.R. §§ 240.14(e)(1)-(3) (1981).

[9] *See infra* notes 10-20 and accompanying text (manipulative scheme under § 10(b) generally requires nondisclosure of scheme).

[10] 430 U.S. 462 (1977).

[11] *Id.* at 476-77.

[12] *See id.* at 477. (*Santa Fe* Court quoted Loss, *supra* note 8 at 1565, to support position that manipulation traditionally requires nondisclosure). The term manipulation developed from an English common law criminal prosecution against a conspiracy to affect stock prices in the market by false rumors. *See id.* at 1531-33; Rex v. DeBerenger, 105 Eng. Rep. 536, 536-37 (K.B. 1814) (first English manipulation case).

[13] 430 U.S. at 476. In *Santa Fe Indus., Inc. v. Green*, the plaintiffs alleged that a majority shareholder violated his fiduciary duty to minority stockholders by entering into a short-form merger without any legitimate corporate purpose. *See id.* at 467-68. A short-form merger is a merger between a parent company and a subsidiary which does not require a vote of the subsidiary's shareholders. *See* Freund & Easton, *The Three-Piece Suitor: An Alternative Approach to Negotiated Corporate Acquisitions*, 34 Bus. Law. 1679, 1684 n.26 (1979). In *Santa Fe*, however, the Court stated that the short-form merger did not involve any deception on the part of the majority shareholder. 430 U.S. at 476-77.

[14] *See* 430 U.S. at 478 (state law provides adequate remedies for fiduciary violations). *But see infra* notes 103-107 and accompanying text (state law gives management wide discretion to act). The *Santa Fe* Court expressed disapproval over the potential increase in vexatious litigation and an expanded class of plaintiffs should federal courts use rule 10b-5 to apply a federal fiduciary principle. 430 U.S. at 479. The Court stated that except for explicit federal provisions regulating directors' duties to shareholders, the public invests in corporations on the understanding that state law controls the internal operation of the corporations. *Id.* (citing *Cort v. Ash*, 422 U.S. 66, 84 (1974)). The *Santa Fe* Court attempted to end decisions in the lower federal courts recognizing a cause of action under § 10(b) based solely on breach of fiduciary duty. *See id.* at 476-80. *See generally* Comment, Schoenbaum v. Firstbrook: *The "New Fraud" Expands Federal Corporation Law*, 55 Va. L. Rev. 1103 (1969) (discussion of initial cases recognizing cause of action under § 10(b) based solely on breach of fiduciary duty). In one pre-*Santa Fe* decision, the District Court for the Southern District of New York found that § 14(e) required target management to uphold a fiduciary duty to their shareholders. *See* Applied Digital Data Sys. v. Milgo Electronics, 425 F. Supp.

In addition to the nondisclosure or misrepresentation requirement of section 10(b), the Supreme Court has held that scienter, an actual intent to deceive, manipulate, or defraud, must exist to establish an action for damages under rule 10b-5.[15] In 1980, the Supreme Court extended the scienter requirement to SEC injunctive proceedings for 10b-5 violations.[16] Although the Supreme Court has not ruled on the necessary elements for proving a section 14(e) violation during a tender offer, a majority of federal courts continue to analogize section 14(e) claims to the established requirements for section 10(b).[17] Most bidders seeking permanent injunctive relief[18] against targets' defensive tactics[19] during a hostile tender offer

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1145, 1156, 1158 (S.D.N.Y. 1977). The *Milgo* court found that the target's sale of unissued shares to a friendly bidder did not constitute a valid business purpose and was intended solely to defeat the hostile tender offer. *Id.* at 1156-58.

[15] *See* Ernst and Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). In *Ernst and Ernst*, the Supreme Court held that negligence was not enough to establish a private cause of action for damages under rule 10b-5. *Id.*

[16] *See* Aaron v. SEC, 446 U.S. 680, 691 (1981). In *Aaron*, the Supreme Court held that Congress did not intend to create different scienter standards for private damage actions and SEC injunctive actions. *Id.*

[17] *See infra* notes 55-58 and accompanying text (courts refusing to find § 14(e) violations for reasons other than nondisclosure). *See generally* Note, *Private Litigation Under the Williams Act: Standing to Sue, Elements of a Claim and Remedies*, 7 J. CORP. L. 545 (1982) [hereinafter cited as *Private Litigation*] (discussion of necessary elements for implied right of action under § 14(e)].

[18] *See* Piper v. Chris-Craft Indus., 430 U.S. 1 (1977). In *Piper*, an unsuccessful bidder claimed damages and sought injunctive relief against the management of the target. *Id.* at 9-10. The Supreme Court held that a tender offeror who sued in his capacity as a takeover bidder, did not have standing to sue for damages under § 14(e). *Id.* The *Piper* Court determined that state law provided the bidder with an adequate remedy for an action based on the common-law principle of interference with a prospective commercial advantage. *Id.* at 40-41; *see* 1 W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 949-69 (4th ed. 1971) (common-law tort of interference with prospective commercial advantage primarily involves use of unfair or improper competitive practices). Although the *Piper* Court did not answer the question of a bidder's standing to sue for injunctive relief under § 14(e), the Court recognized that in the tender offer situation injunctive relief at an early stage of the trial is probably the best time for granting relief and the most effective type of remedy. *See* 430 U.S. at 40 n.26, 42, 47 n.33.

A majority of courts after *Piper* have given bidders standing to sue for injunctive relief. *See* Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 369-73 (6th Cir. 1981). In *Mobil*, the Sixth Circuit explained that providing the bidder standing to sue for injunctive relief was necessary to protect the interests of the target's shareholders. *Id.* at 371-72. The *Mobil* court stated that the bidder was in the best position to effectuate proper disclosure by management because the bidder normally will be the only party to have the knowledge and awareness to identify nondisclosure or manipulative practices in time to obtain preliminary relief. *Id.* at 371; *see also* Whittaker Corp. v. Edgar, 535 F. Supp. 933, 947, 949 (N.D. Ill. 1982); Crane Co. v. Harsco Corp., 511 F. Supp. 294, 300-01 (D. Del. 1981); Weeks Dredging & Contracting, Inc. v. American Dredging Co., 451 F. Supp. 468, 475-76 (E.D. Pa. 1978); Humana, Inc. v. American Medicorp., Inc., 445 F. Supp. 613 (S.D.N.Y. 1977).

[19] *See generally* Friedenberg, *Jaws III: The Impropriety of Shark-Repellent Amendments as a Takeover Defense*, 7 DEL. J. CORP. L. 32 (1982) (discussion of different defensive amendments to corporate charters); Gilson, *The Case Against Shark Repellent Amendments: Struc-*

will fail to establish section 14(e) violations if management fully discloses the tactics to the targets' shareholders, since the Supreme Court has stated that the primary purpose of the '34 Act is to insure full disclosure.[20] In 1981, however, the Sixth Circuit held in *Mobil Corp. v. Marathon Oil Co.*,[21] that a managerial defensive tactic constituted a manipulative act in violation of section 14(e), even though management had fully disclosed the action to the shareholders.[22]

In *Mobil*, Mobil Corporation (Mobil), alleged that two option agreements between the target, Marathon Oil Company (Marathon), and a rival bidder, United States Steel Corporation (U.S. Steel), constituted manipulation in violation of section 14(e).[23] The first agreement gave U.S. Steel an irrevocable option to purchase a significant percentage of Marathon's unissued shares.[24] The second agreement allowed U.S. Steel to exercise an option to purchase Marathon's most valuable asset if another bidder gained control of Marathon.[25] The Sixth Circuit found that the two

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tural Limitations on the Enabling Concept, 34 STAN. L. REV. 775 (1981-82) (same); Note, *Defensive Tactics and the Fiduciary Obligations of the Target Board of Directors*, 7 J. CORP. L. 579 (1982) [hereinafter cited as *Defensive Tactics*] (discussing common types of defensive tactics); *Tender Offer Defensive Tactics, supra* note 8 at 633 (same). Management may attempt to use any one of a variety of defensive measures to thwart a hostile tender offer that threatens takeover of the target company. *See id.* at 634 n.5 (extensive listing of defensive tactics commonly used by management).

[20] *See infra* notes 33-37 and accompanying text (§ 14(e) claims should parallel § 10(b) nondisclosure limitation for fraud); *see also* Dan River, Inc. v. Icahn [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,954, 94,961 (4th Cir. 1983) (citing Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 26-37 (1977)) (sole purpose of § 14(e) is to insure adequate disclosure to shareholders).

[21] 669 F.2d 366 (6th Cir. 1981).

[22] *See id.* at 373-78. In the district court opinion for *Mobil*, the District Court for the Southern District of Ohio held that *Santa Fe* precluded the bidder's § 14(e) manipulation claim because the target had fully disclosed the allegedly manipulative agreements. *See* Mobil Corp. v. Marathon Oil Co., [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,278-22 (S.D. Oh.), *rev'd*, 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

[23] 669 F.2d at 368. In *Mobil*, the district court had temporarily restrained the bidder, Mobil Corporation (Mobil) from proceeding with its tender offer because the target, Marathon Oil Co. (Marathon) had filed suit claiming that a proposed merger would violate the antitrust laws. *Id.* at 367. During the interim, Marathon sought a friendly bidder or "white knight" to make an alternative offer to Mobil's bid. *Id.* Subsequently, the Sixth Circuit held that a merger between Mobil and Marathon, two large oil corporations, would probably violate the Clayton Act's prohibition against acquisitions that reduce competition or tend to create a monopoly. On the basis of the Clayton Act, therefore, the Sixth Circuit sustained the district court's preliminary injunction against Mobil. *See* Marathon Oil Co. v. Mobil Corp., 669 F.2d 378, 378-84 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

[24] 669 F.2d at 367.

[25] *Id.* The valuable asset involved in *Mobil* was Marathon's 48% interest in the Yates oil field, one of the nation's most productive oil and gas fields. *Id.* at 367-68.

"lockup" options[26] created an artificial[27] ceiling for the value of Marathon's stock by discouraging competitive bidding for Mobil's stock.[28] The *Mobil* court determined that the purpose of the Williams Act, protection of the target's shareholders, required that all bidders have the opportunity to equally compete for the target's shares.[29] The court stated that Mobil, the original bidder, was willing to make a higher bid than U.S. Steel if the court invalidated the options.[30] The court held that the options, by locking up major assets of Marathon, were section 14(e) manipulative practices that had discouraged further competitive bidding.[31]

The *Mobil* court's interpretation of section 14(e) manipulation has been criticized for several reasons for not paralleling the requirements of section 10(b).[32] First, critics contend that by finding a fully disclosed agreement

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[26] *See* Fraidin & Franco, *Lock-up Arrangements*, REV. SEC. REG. Vol. 14 at 821 (Nov. 4, 1981). A lockup agreement gives the prospective acquirer of a target an advantage over other bidders or potential bidders by excluding valuable assets of the target from acquisition by a hostile bidder. *Id.*

[27] *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 463, 476 (1977). The *Santa Fe* Court used the term "artificial" in describing manipulative practices that interfere with the natural flow of supply and demand in the marketplace, or in other words, practices that affect a stock's price. *Id.* The Court referred to price rigging, a practice that raises the price of a stock through a series of pretended purchases to create the impression of an unusual demand for the stock, as one example of a manipulative practice that has an artificial effect on the stock's price. *Id.*; *see* LOSS, *supra* note 8, at 1541-69 (reviewing specifically prohibited manipulative practices under '34 Act).

[28] 669 F.2d at 374-77. The *Mobil* court explained that the definition of manipulation must remain flexible in order to include new techniques which artificially affect securities markets, and quoted *Santa Fe* in support of this position. *Id.* at 374 (quoting *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977)). The *Mobil* court observed that lockup options were a relatively new defensive tactic used to combat takeovers and represented the kind of manipulative device that Congress meant to prohibit under the securities laws. 669 F.2d at 374.

[29] 669 F.2d at 376. The *Mobil* court dismissed Marathon's argument that the *Santa Fe* requirements only demand full disclosure under § 14(e) and nothing more. *Id.* The *Mobil* court observed that the *Santa Fe* decision only concerned § 10(b). *Id.* The Sixth Circuit, furthermore, found that Marathon construed the *Santa Fe* holding too broadly because *Santa Fe* did not hold that nondisclosure was the only basis for bringing a § 10(b) claim. *Id.* Although the *Mobil* court recognized the *Santa Fe* statement that nondisclosure is usually necessary for a manipulative scheme to succeed, the *Mobil* court stated that cases will occur in which the manipulative act is not cured by disclosure. *Id.*

[30] *Id.* at 376-77. In the *Mobil* case, Mobil originally offered to buy 40 million shares of Marathon's outstanding common stock for $85 a share. *Id.* at 367. U.S. Steel then offered to purchase 30 million shares of Marathon common stock for $125 per share. *Id.* Mobil countered with an offer to buy at least 30 million shares of Marathon stock for $126 per share, conditioned on a finding that the two lockup options were invalid. *Id.* at 369.

[31] *Id.* at 377.

[32] *See infra* notes 33-37 and accompanying text (discussion of criticism of *Mobil* holding); Note, *Developments in Corporate Takeover Techniques: Creeping Tender Offers, Lockup Arrangements, and Standstill Agreements*, 39 WASH. & LEE L. REV. 1095, 1114 (1982) [hereinafter cited as *Corporate Takeover Techniques*] (denying management opportunity to negotiate lockup

manipulative, the *Mobil* court improperly expanded the definition of manipulation[33] and violated the *Santa Fe* Court's prohibition against examining the fairness of an agreement under federal securities law.[34] Second, critics argue that the *Mobil* holding improperly expanded the definition of manipulation under the '34 Act by including managerial conduct outside the market that influences the market.[35] Third, critics claim that the *Mobil* court ignored the scienter requirement for a cause of action under the '34 Act.[36] Finally, critics are concerned that federal courts might extend *Mobil*'s analysis to all defensive tactics initiated by management during a hostile tender offer, even though management may have legitimate reasons for opposing a particular bidder.[37]

Although the *Mobil* court's interpretation of section 14(e) manipulation expands the definition of manipulation under section 10(b),[38] limited

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may limit shareholder choice); *Tender Offer Defensive Tactics, supra* note 8 at 650-53 (*Mobil* court violated *Santa Fe* rule prohibiting federal fiduciary standard).

[33] *See Tender Offer Defensive Tactics, supra* note 8, at 650-51. The writer argues that the *Mobil* court ignored the *Santa Fe* ruling that manipulation traditionally does not include acts fully disclosed to investors. *Id.*; *see* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477 (1977) (nondisclosure usually necessary for manipulative scheme to succeed).

[34] *See Tender Offer Defensive Tactics, supra* note 8, at 647, 652-53 (*Santa Fe* Court rejected federal fiduciary standard). The writer contends that the congressional history of the Williams Act indicates only that Congress intended to eliminate pressured, uninformed decisions by target shareholders during a tender offer by a requirement of full and fair disclousure. *Id.* at 652. Further, the writer states that the legislative history does not give any indication that Congress intended to give bidders an absolute right to bid for another corporation or to insure that investors get the highest possible bid for their shares. *Id.* at 652, 653. *But see infra* note 41 and accompanying text (limited congressional evidence exists supporting competitive bidding).

[35] *See Tender Offer Defensive Tactics, supra* note 8, at 640, 650-51. The writer argues that under the '34 Act, conduct outside the market that influences the market is not artificial within the meaning of manipulation. *Id.* at 639, 650. The argument is based on the holding in a 1979 federal district case that the definition of manipulation under § 10(b) does not including acts originating outside the marketplace. *Id.* at 640 nn..37 & 38; *see* Hundahl v. United Benefit Life Ins. Co., 465 F. Supp. 1349, 1360 (N.D. Tex. 1979) (manipulation consists of practices in marketplace that actually tamper with security's price or create false impression that market activity is occurring). *But see* Loss, *supra* note 8, at 1537-38 (New York penal law prohibits any person from knowingly circulating any false statement, rumor, or intelligence that may affect market price of a security).

[36] *See Tender Offer Defensive Tactics, supra* note 8, at 650. The writer argues that the *Mobil* court, by finding that Marathon had disclosed fully the option agreements to its shareholders, ignored the Supreme Court requirement that an actual intent to deceive or mislead exist for a cause of action under the '34 Act. *See id. But see infra* notes 49-50 and accompanying text (plaintiff can prove intent to manipulate under *Mobil* analysis).

[37] *See Tender Offer Defensive Tactic, supra* note 8, at 650 (*Mobil* analysis could extend to any defensive tactic that deters competitive bidding or creates artificial ceiling for share's value); *Corporate Takeover Techniques, supra* note 32, at 1114 (*Mobil* holding may have far reaching effects if extended to all lockup agreements). *But see infra* notes 55-58 and accompanying text (courts are reluctant to extend *Mobil* holding).

[38] *See supra* text accompanying notes 10-16 (requirements for cause of action under § 10(b)); 669 F.2d at 373-76 (*Mobil* court's interpretation of § 14(e) manipulation).

evidence exists that courts should draw a distinction.[39] Legislative history indicates that Congress intended the Williams Act to protect shareholders through disclosure, but did not intend the Act to provide the bidder or the target company with an advantage during a hostile tender offer.[40] Some members of Congress who supported the bill, however, considered competitive bidding for a block of target stock beneficial because competition increases the premium that shareholders receive for tendering their shares.[41] A managerial defensive tactic that frustrates competitive bid-

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[39] *See infra* notes 40-54 and accompanying text (discussion of arguments supporting *Mobil* distinction).

[40] *See* Piper v. Chris-Craft Indus., 430 U.S. 1, 30-31 (1977) (Williams Act is designed to avoid favoring bidder or target) (citing 113 CONG. REC. 24664 (1967) (remarks of Sen. Williams)). The *Piper* Court stated that the sole purpose of the Williams Act was the protection of investors confronted with a tender offer. 430 U.S. at 35. In the Senate debates on the bill, however, Senator Williams stated that "the purpose of the bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case." 113 CONG. REC. 854, 855 (1967) (remarks of Sen. Williams). At least two commentators argue that the *Piper* Court erroneously neglected the Williams Act's policy of evenhandedness and neutrality toward the bidder and management by placing undue emphasis on protection of investors as the sole purpose of the Act. *See* 430 U.S. at 29, 35; Pitt, *Standing to Sue Under the Williams Act after* Chris-Craft: *A Leaky Ship on Troubled Waters*, 34 BUS. LAW. 117, 166-67 (1978); *Private Litigation, supra* note 17, at 548 n.32. Justice Stevens, dissenting in *Piper*, stated that the legislative history indicated that the Act clearly was not meant to favor management. 430 U.S. at 63 n.16 (Stevens, J., dissenting). The bill originally introduced into Congress had been avowedly pro-management, but intense criticism forced the proponents to revise the bill to avoid favoring either side. *See id.* at 30.

[41] *See* 113 CONG. REC. 24665, 24666 (1967) (remarks of Senator Javits). Senator Javits stated that shareholders derive an obvious benefit from tender offers, particularly competing tender offers for a block of stock, namely the opportunity to sell shares for a premium over their market price. *See id. But see* H.R. REP. No. 1711, *supra* note 1, at 2821. The report states that § 14(e) affirms the fact that anyone seeking to influence the decision of investors or the outcome of a tender offer is under an obligation to make full disclosure of material information. *Id.* This statement may indicate that Congress only intended § 14(e) to perform the equivalent function of § 10(b), and therefore, did not contemplate the use of § 14(e) to prohibit fully disclosed acts that deter competitive bidding. *See id.*

See Edgar v. Mite Corp., 102 S. Ct. 2629, 2636 n.9 (1982). In *Mite*, the Supreme Court referred to Senator Javits' remarks in the legislative history while holding that an Illinois takeover statute was invalid under the commerce clause. *See id.* at 2636 n.9, 2640-41. The *Mite* decision represents a victory for bidders against state legislation that clearly intended to provide target management more time to defend against hostile bidders. *See id.* at 2635-43. The *Mite* decision, however, does not support the proposition that federal courts should take affirmative action under § 14(e) to prevent defensive efforts by target management during hostile tender offers. *See id.* at 2643, 2648.

Although six justices concurred in *Mite* that the Illinois Act was invalid under the commerce clause, only three of those justices agreed that the Williams Act preempted the state statute because the state statute violated the Williams Act's express policy of maintaining a balance between the combatants. *See id.* at 2635-40. The three justices concurring on the preemption ground agreed that the Act, by allowing the state to pass on the substantive fairness of a tender offer, interferred with congressional desire to provide shareholders complete freedom to make their own choice after full disclosure. *See id.* at 2639. Two justices, however, who concurred solely on the commerce clause ground, argued that the Williams

ding reduces the premium for tendering shareholders and arguably constitutes a manipulative act prohibited under the policy of the Williams Act.[42]

Another argument supporting a different interpretation of section 14(e) manipulation from section 10(b) manipulation is that the tender offer developed many years after the original congressional investigation into manipulative practices in the securities market.[43] In addition, the development of lockups and other agreements that frustrate competitive bidding has occurred since the passage of the Williams Act.[44] Thus, a requirement that section 14(e) manipulation apply only to conduct inside the market eliminates the effectiveness of a manipulative act prohibition in the tender

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Act's neutrality policy does not necessarily prohibit state legislation designed to insure greater protection to interests that include but often are broader than the interests of management. *See id.* at 2643 (Powell, J., concurring in part); *id.* at 2648 (Stevens, J., concurring in part).

[42] *See supra* text accompanying note 31 (Marathon's lockup options precluded higher bids). *But see Corporate Takeover Techniques, supra* note 32, at 1114. Several commentators argue that if courts' deny target management the opportunity to negotiate a stock or asset agreement with a white knight, courts may actually limit rather than expand shareholder choice. *See id.*; Bialkin, *Court Costs Cloud Over Option Tactic in Take-overs*, Legal Times of Wash., Jan. 11, 1982, at 19. The rationale for the argument is that if management is not allowed to negotiate lockup agreements or a bidder is not allowed to pressure a target into making concessions for a higher bid, then no higher bids will result, and shareholders can only tender at the original bidder's price. *See Corporate Takeover Techniques, supra* note 32, at 1114. Although the argument may have merit for some targets that have received no offers other than the original bid, the argument does not appear to apply under the facts in *Mobil*. *See* 669 F.2d at 367-68, 375-76.

In *Mobil*, the white knight, U.S. Steel, apparently pressured Marathon's management into accepting U.S. Steel's conditional bid. *See id.* at 367. The *Mobil* court observed that two other large companies had expressed an interest in bidding for Marathon, but only if the companies received options to purchase Marathon's interest in the Yates oil field. *See id.* at 367-68. Thus, Marathon's management apparently was unable to secure a higher bid than Mobil's bid unless Marathon gave the competing bidder a lockup option. *See id.* In *Mobil*, however, Marathon's management admitted in testimony that the 10 million share stock option granted to U.S. Steel would act as a deterrent against higher bids not only by Mobil, but by other third parties. *See id.* at 376. Marathon's admitted deterrence motive suggests that Marathon's directors were less concerned with finding alternative competitive bidders than with arranging an agreement that would deter Mobil's bid altogether. *See id.* By granting a lockup provision during a hostile tender offer, management advances one step beyond merely soliciting competitive bids to actually discouraging the hostile bidder from making a higher bid. *See id.* at 373-78. *But see* Buffalo Forge Co. v. Ogden Corp. [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,079, at 95,131, 95,140-41 (W.D.N.Y. 1983) (sale of treasury stock during bidding contest did not constitute § 14(e) manipulation because sales stimulated rather than foreclosed competitive bidding).

[43] *See* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 64-68 (1973) (discussion of rise and development of tender offers and subsequent proposals for regulation in 1960s). In 1960 there were only eight cash tender offers involving companies with securities listed on national securities exchanges as compared to 107 in 1966. *Id.* at 65 n.3.

[44] *See* 669 F.2d at 374; *Tender Offer Defensive Tactics, supra* note 8, at 648 n.91 (lockup agreement is relatively new type of defensive tactic).

offer context.[45] Section 14(e) manipulation should include any action that affects the price of a share in a tender offer transaction, regardless of where the action takes place, if that action frustrates competitive bidding.[46]

The *Mobil* court's approach to section 14(e) manipulation, if strictly applied to actions that frustrate competitive bidding, can satisfy a scienter requirement[47] and avoid an inquiry into managerial motives or the fairness of the transaction.[48] An agreement deterring a competitive bidding that management fully discloses to the shareholders evidences management's awareness of the agreement's anticompetitive effect.[49] A court should find an actual intent to manipulate, therefore, if manipulation covers agreements that foreclose competitive bidding.[50] In addition, under the *Mobil* court's application of section 14(e), management cannot justify manipulation by good faith performance of management's fiduciary obligations.[51] The *Mobil* court's approach, however, does not interfere with managerial discretion to oppose a bidder for control of the target company when legitimate business reasons exist.[52] Management also may enlist

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[45] *See* 669 F.2d at 374, 377 (term manipulative must remain flexible in face of new techniques which artificially affect securities market); Loss, *supra* note 8, at 1531-38 (manipulation concept developed from English criminal prosecution for false rumors outside marketplace concerning death of Napoleon intended to raise stock prices on London Stock Exchange).

[46] *See supra* notes 21-31 and accompanying text (*Mobil* court found that lockup provisions placed artificial cap on price of target's shares).

[47] *See supra* text accompanying notes 15-16 (Supreme Court requires actual intent to deceive or defraud for violations under rule 10b-5); *infra* text accompanying notes 49-50 (fully disclosed agreement indicates management's intent).

[48] *See infra* notes 51 & 99-100 and accompanying text (*Mobil* court did not dispute target management's good faith in finding violation of § 14(e)).

[49] *See* 669 F.2d at 376 (management testimony regarding impact of lockup option indicating management's knowledge of agreement's anticompetitive effect); *supra* note 42 (same). Under a usual manipulative scheme that requires nondisclosure for success, an intent to deceive may be difficult to prove. Under the *Mobil* analysis, however, a lockup agreement already disclosed to the shareholders in effect eliminates the need to prove scienter if the agreement is per se illegal. *See* Loss, *supra* note 8, at 1565 n.145. In a 1958 SEC proceeding against a traditional form of manipulation, the SEC found that although the defendants had disclosed their intention to manipulate the market to push the stock price up, the defendants had violated fraud provisions of the '34 Act in failing to disclose that the action would be illegal. *Id.*; *see* Shelley, Roberts & Co. of Cal., Sec. Ex. Act Rel. 5837 (1958) at 8; *see also* 669 F.2d at 377 (*Mobil* court's position that restricting manipulation to undisclosed acts would render manipulation prohibition useless in tender offer context). *But see* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976) (Supreme Court stated that manipulation under § 10(b) means willful conduct designed to deceive or defraud investor by controlling or artificially affecting stock's price).

[50] *See supra* note 49 (lockup agreement that is disclosed to shareholders and also forecloses bidding indicates management's knowledge of agreement's deterrent effect).

[51] 669 F.2d at 372; *see infra* notes 98-101 and accompanying text (*Mobil* court did not disturb lower court's finding of good faith and loyalty on part of Marathon's management).

[52] *See* 669 F.2d at 373-77. The *Mobil* analysis does not forbid management from taking defensive measures that will maintain the corporate entity as long as such tactics do not constitute manipulation in connection with the hostile tender offer. *See id.*; *see also* Buffalo

friendly bidders, known as "white knights," to raise the bid for the target's shares.[53] Management, however, should not take unilateral action that frustrates the shareholders' right to tender their shares to the highest bidder.[54]

Despite the fears of critics, federal courts have not applied the *Mobil* court's analysis to all defense tactics and effectively precluded managerial action against hostile tender offers.[55] In cases after *Mobil*, courts have either regarded section 14(e) manipulation claims with skepticism[56] or avoided making determinations on the claims because the plaintiffs fail to satisfy the requirements for equitable relief.[57] These decisions indicate

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Forge Co. v. Ogden Corp. [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,079, at 95,131, 95,140-41 (W.D.N.Y. 1983). In *Buffalo Forge*, a successful bidder who subsequently gained control of the target alleged that an agreement entered into between the target and a rival bidder during the bidding contest constituted a manipulative lockup device in violation of § 14(e). *See id.* at 95,132. The agreement allowed the rival bidder to purchase most of the target's unissued treasury stock with a promissory note payable over 10 years and also provided the rival with a one-year option to purchase the remaining treasury shares. *See id.* at 95,135-37. The District Court for the Western District of New York found that the agreement did not constitute manipulation under § 14(e) because unlike the situation in *Mobil*, neither the bidder nor the target in *Buffalo Forge* intended the sale of treasury stock or the option to foreclose higher bids. *Id.* at 95,141. The court observed that the agreement actually stimulated rather than foreclosed competitive bidding. *Id.* Although the successful bidder may have continued to raise the offer for the target's stock on the belief that a court would later invalidate the sale of treasury stock, the fact remains that the announcement of the sale did not deter competitive bidding but led to three successive, increased bids. *See id.* at 95,137-38. The agreement in *Buffalo Forge*, unlike the agreement in *Mobil*, did not include an irrevocable option to purchase the target's most valuable asset. *See id.*

[53] *See* 669 F.2d at 373-78. The *Mobil* court did not object to Marathon's efforts to enlist a white knight. *See id.* The *Mobil* court objected to Marathon's agreements with U.S. Steel that effectively stifled other competitive bids. *Id.*

[54] *See id.* at 376-77. An unstated but implicit reason for the Sixth Circuit's holding in *Mobil* was the complete absence of shareholder participation in the decision. *See id.*; *see also infra* text accompanying notes 85-86 (unilateral action by management more easily characterized as manipulative). *See generally* Bebchuk, *The Case For Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982). Bebchuk endorses regulations providing time for competing bids and supports a rule allowing management to solicit competing bids so long as management does not obstruct the initial, or any subsequent tender offer. *See id.*

[55] *See infra* notes 56-57 (review of holdings that did not extend *Mobil* § 14(e) analysis). A majority of cases after *Santa Fe Indus., Inc. v. Green* have held that when adequate disclosure is made, no action will lie under § 14(e) for the use of defensive tactics during a tender offer. *See* Panter v. Marshall Field & Co., 646 F.2d 271, 283 (7th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1982); Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir.), *cert. denied*, 449 U.S. 551 (1980); Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1318 (W.D. Mich. 1978). *But see* Joseph E. Seagram & Sons v. Abrams, 510 F. Supp. 860, 861-62 (S.D.N.Y. 1981) (court issued temporary restraining order until hearing could determine whether target management had used manipulative practices by opposing tender offer without business justification).

[56] *See* Dan River, Inc. v. Icahn [1982-83 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,962 n.10 (4th Cir. 1983); Marshall Field & Co. v. Icahn [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,616, at 93,057, 93,061 (S.D.N.Y. 1982).

[57] *See* FMC Corp. v. R.P. Scherer Corp., 545 F. Supp. 318, 319-23 (D. Del. 1982) (court

that the *Mobil* decision, if extended at all, may only limit the use of a small category of defensive tactics.[58] *Mobil*'s limited acceptance, however, has not deterred plaintiffs from attempting to extend the Mobil analysis to a variety of situations,[59] including claims by management that some hostile tender offers are manipulative under section 14(e).[60] Delays caused by litigation are one of the most effective weapons against a tender offer because of market changes, rising costs for the bidder, and the opportunity that management can initiate other defenses during the delay.[61] Courts, therefore, have struggled to assess the merits of the various claims for injunctive relief before delay forces a bidder to terminate an offer.[62]

In two recent decisions, bidders have attempted to extend *Mobil*'s section 14(e) manipulation analysis to defensive tactics other than lockup option agreements.[63] In *FMC Corp. v. R.P. Scherer Corp.*,[64] the bidder, FMC Corporation (FMC) sought a preliminary injunction to block a vote by the shareholders of R.P. Scherer Corporation (Scherer), the target company, on three amendments to Scherer's certification of incorporation.[65] The amendments included a supermajority[66] proposal that would require the

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found speculation on § 14(e) claim unnecessary because plaintiff failed to show likelihood of irreparable harm); San Francisco Real Estate Investors v. REIT of America [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,874, at 94,554-57 (D. Mass. 1982) (court found no § 14(e) violation by trustees who acted in good faith in opposing tender offer); Whittaker Corp. v. Edgar, 535 F. Supp. 933, 947-49 (N.D. Ill. 1982). Although the district court in *Edgar* agreed with the *Mobil* § 14(e) analysis regarding options, the court found that the outright sale of a subsidiary by the target during a hostile tender offer does not create an artificial price ceiling in the tender offer market for the target's shares. *See id.* at 949. The *Edgar* court stated that the sale of the subsidiary cannot be construed as expressly designed solely for the purpose of blocking competitive bidding, quoting this language from *Mobil. See id.*; 669 F.2d at 374; *see also supra* note 52 (discussion of recent court holding that sale of treasury stock and option agreed to during hostile tender offer were not manipulative practices under § 14(e)).

[58] *See infra* text accompanying notes 79-96 (discussion of recent decisions that did not extend Mobil § 14(e) analysis to other defensive tactics).

[59] *See infra* text accompanying notes 63-90 (discussion of cases in which plaintiffs alleged that bylaw and charter amendments were manipulative under § 14(e)).

[60] *See infra* text accompanying notes 117-49 (target management alleges tender offers are manipulative under § 14(e)).

[61] *Defensive Tactics, supra* note 19 at 588-89. *See* Edgar v. Mite, 102 S. Ct. 2639 n.12 (1983) (SEC listing of defenses target can pursue during delay). The Supreme Court in *Mite* recognized that delay can seriously impede a tender offer. *See id.* at 2629, 2638, 2638 n.12. *See generally* Wachtell, *Special Tender Offer Litigation Tactics*, 32 BUS. LAW. 1433 (1977) (discussion of advantages that management receives by litigating).

[62] *See supra* text accompanying note 61 (reasons why litigation is effective weapon against tender offer).

[63] *See infra* text accompanying notes 64-90 (bidders allege bylaw and charter amendments are manipulative under § 14(e)).

[64] 545 F. Supp. 318 (D. Del. 1982).

[65] *Id.* at 319.

[66] *See* Friedenberg, *supra* note 19, at 42-44. A supermajority proposal is a preventive defensive tactic that requires a certain percentage of the shareholders beyond a mere majority to approve business mergers that have not been agreed to by the board of directors. *See Defensive Tactics, supra* note 19, at 586. The tactic is preventive in nature because a

approval of eighty percent of the stockholders before Scherer could merge with another company.[67] Another amendment proposed the creation of a group of continuing directors[68] who would have discretion to waive the eighty percent requirement and permit a proposed merger by a majority of the shareholders.[69] FMC alleged that the proposed amendments constituted deceptive and manipulative acts in violation of section 14(e) because the amendments would deter competitive bidding for Scherer's stock by preventing a takeover by a hostile bidder.[70]

The United States District Court for the District of Delaware denied FMC's claim for equitable relief because of FMC's failure to satisfy the necessary requirements for obtaining a preliminary injunction.[71] Although FMC asserted that adoption of the corporate charter amendments would leave FMC with a large and costly[72] block of *Scherer* stock and no damage remedy for frustration of FMC's merger plans, the *Scherer* court rejected

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supermajority requirement to approve business mergers may discourage a bid from ever being made. *Id.* Between 1972 and 1978, 199 companies listed on the New York Stock Exchange adopted supermajority provisions of one type or another. *See* Black & Smith, *Anti-takeover Charter Provisions: Defeating Self-Help for Takeover Targets*, 36 WASH. & LEE L. REV. 699, 713 n.51 (1979).

[67] 545 F. Supp. at 319.

[68] *See* Friedenberg, *supra* note 19, at 39-42. Continuing directors are directors who would remain in office indefinitely, or under a staggered system, directors who would remain on the board longer than the original term of office provided for in the corporate charter. *See id.*

[69] 545 F. Supp. at 319. In *FMC Corp. v. R.P. Scherer Corp.*, the bidder, FMC, alleged that the shareholders behind Scherer's management controlled almost 48% of Scherer's common stock and that approval of the amendments would allow Scherer's management to preclude FMC's offer. *Id.* at 320. FMC also alleged that an option agreement entered into by Scherer and Deutsche Gelatine Fabriken Stoess & Co. (DGF) for a valuable West German subsidiary of Scherer, constituted a manipulative device in conjunction with the supermajority proposal by absolutely deterring any hostile tender offer. *Id.* at 319 n.2. Although FMC used the *Mobil* argument that the DGF option and the amendments imposed an artificial ceiling on the market price for Scherer stock by deterring competitive bidding, the *Scherer* court never addressed the issue. *Id.* at 321-23; *see infra* text accompanying notes 71-73 (*Scherer* court based decision on FMC's failure to show irreparable harm). Scherer had entered into the DGF option in 1979, three years before the initiation of FMC's tender offer. 545 F. Supp. at 321. A court, therefore, probably would not find the DGF option a manipulative act under § 14(e) because the agreement clearly had not taken place "in connection with" a tender offer. *See infra* text accompanying notes 92-94 (§ 14(e) requires manipulation occur in connection with tender offer).

[70] 545 F. Supp. at 319. In addition to the § 14(e) manipulation claim FMC asserted in *Scherer*, FMC also asserted that the proxy materials on the proposed amendments contained materially false and misleading statements in violation of § 14(a) of the '34 Act. *Id.*

[71] *Id.* at 321-23. To obtain a preliminary injunction under federal law, a plaintiff must demonstrate a probability of irreparable injury, and a reasonable probability of success on the merits. *Id.* at 321. A court, in making a determination on the request, must consider the possibility of harm to the other party if relief is granted, and the public interest to be served by providing or denying relief. *Id.*

[72] *See id.* at 322. In *Scherer*, FMC stated that the price FMC was willing to pay for the stock was 90% over the market value. *Id.*

the likelihood of irreparable harm should FMC continue with the offer after approval of the amendments.[73] The court stated that an adequate remedy at law would exist for FMC if the court later found that Scherer's defensive amendments illegally obstructed FMC's merger plans.[74] The district court explained that the court had the power to vacate the shareholders' vote and order a second vote if the court later held the amendments invalid.[75]

The *Scherer* court observed that FMC had conditioned its tender offer with a right to terminate the offer should Sherer's stockholders adopt the amendments.[76] The court stated that FMC's primary reason for seeking a preliminary injunction was to obtain an initial indication of the legality of the supermajority amendment and the prospect of ultimately merging with Scherer before financially committing itself to the tender offer.[77] The court determined that FMC's position clearly did not warrant the court disclosing any preliminary indication as to FMC's ultimate success on the merits.[78]

Although the *Scherer* court refused to speculate on the validity of FMC's amendments, the prospect appears unlikely that federal courts will ever find supermajority or similar defensive amendments manipulative under section 14(e).[79] Under the *Mobil* analysis, a manipulation claim assumes that a managerial defensive tactic not only frustrates competitive bidding but also prevents a majority of shareholders from tendering their

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[73] *Id.* at 321-22. In *Scherer*, several shareholders of Scherer intervened in the case against Scherer's management under an allegation of irreparable harm should Scherer adopt the supermajority proposal. *Id.* at 322-23. The shareholders argued that if the amendments were adopted the shareholders would suffer in the short run because FMC would abandon its offer, and in the long run because the supermajority amendment would depress the market value of their stock and discourage other potential bidders. *Id.* at 322. The *Scherer* court found that the intervenors would have an adequate remedy at law, a post-transaction suit for damages against Scherer if the court later declared the amendments invalid and FMC abandoned its offer. *Id.* The court disregarded the intervenors contention regarding loss of possible future bids as too speculative to constitute immediate irreparable harm. *Id.* at 323.

[74] *Id.* at 322.

[75] *Id.* The *Scherer* court distinguished the situation in which a court erroneously refused to preliminarily enjoin a merger from the situation in *Scherer*. *See id.* at 323. The court stated that the reason courts grant preliminary relief more willingly to prevent a merger rather than to prevent tactics obstructing a merger is the difficulty of "unscrambling the eggs" after an erroneous refusal to enjoin a merger. *Id.*

[76] *Id.* Most tender offers include conditions making acceptance of the tender offer uncertain. *See* 1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS, § 1.7.11 (1978) [hereinafter cited as LIPTON & STEINBERGER].

[77] 545 F. Supp. at 323.

[78] *Id.*

[79] *See infra* text accompanying notes 80-84 (corporate charter amendments require shareholder participation). *But see generally* Gilson, *supra* note 19 (antitakeover amendments are in direct conflict with allocation of authority between shareholders and management under modern corporate structure).

shares of a premium.[80] Corporate charter amendments, by preventing a bidder from gaining control of the target after a successful offer, may force the removal of the bid altogether.[81] By requiring a majority vote of the shareholders, however, a supermajority amendment does not constitute unilateral action by management.[82] If management fully discloses the purpose and effects of the amendment to the shareholders,[83] the amendment should not violate any provisions of the Williams Act.[84]

In contrast to corporate charter amendments, limitations in corporate bylaws usually do not require a shareholder vote in order to become effective.[85] Thus, for purposes of a section 14(e) claim, unilateral action by management to amend a bylaw is more easily characterized as manipulative if the bylaw's effect is to thwart a tender offer.[86] In *San Francisco Real Estate Investors v. REIT of America*,[87] however, the United States District Court for the District of Massachusetts denied a bidder a preliminary injunction because the bidder ultimately could not prove that a bylaw limitation, restricting the concentration of stock in the target company, constituted a manipulative device under section 14(e).[88] The *REIT*

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[80] *See* Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 373-77 (6th Cir. 1981); *supra* text accompanying notes 39-54 (discussion of support for *Mobil* position that § 14(e) should protect shareholders' right to tender to highest bidder).

[81] *See supra* note 66 (some corporate charter amendments designed as preventive defensive tactic).

[82] *See supra* text accompanying notes 64-75 (amendments to corporate charter require shareholder participation).

[83] *See supra* text accompanying note 14-15 (federal securities law primarily requires full disclosure).

[84] *See supra* note 66 (supermajority amendment usually requires majority shareholder vote in order to take effect).

[85] *See* Friedenberg, *supra* note 19, at 34 n.15, 49, 49 n.96 (bylaw amendments are less common and less safe than charter amendments). Depending on the substantive requirements under each state's corporation laws and under each corporation's charter, directors will have some power to amend the corporation's bylaws without the necessity of a shareholder vote. *See id.* at 34, 49.

[86] *See id.* at 49, 49 n.96. Some antitakeover actions may be illegal under state corporation law. *See id.* at 50-51; *see also* Telvest v. Olson, No. 5798 (Del. Ch. filed March 8, 1979). In *Telvest*, a Delaware court held that directors who attempted to unilaterally reduce the voting rights for common stock by issuing an unusual class of preferred stock to prevent a takeover violated the shareholders' right to vote under state law. *See* Friedenberg, *supra* note 19, at 50-51; *see also* Crane Co. v. Harsco Corp., 511 F. Supp. 294 (D. Del. 1981) (substantial likelihood of fiduciary breach by directors repurchasing company stock during tender offer). *But see infra* notes 103-07 and accompanying text (majority of courts favor defensive tactics by management under business judgment rule).

[87] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,874, at 94,551 (D. Mass. 1982).

[88] *See* San Francisco Real Estate Investors v. REIT of America [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,874, at 94,555. The bylaw limitation in *REIT* restricted any shareholder from purchasing more than 9.8% of the trust's stock. *See id.* at 94,554. The bylaw at issue in *REIT* was very similar to the bylaw adopted in Pacific Realty Trust v. APC Investments, Inc., 685 F.2d 1083, 1085 (9th Cir. 1982). *See infra* text accompanying notes 118-34 (discussion of *Pacific Realty*). The *REIT* district court, however, distinguished the two cases because the bylaw in *Pacific Realty* had been enacted after a tender offer

court stated that in order to establish a claim of manipulation under section 14(e), a bidder must show that management enacted the bylaw solely to prevent the tender offer.[89] The court found that the trustees, the managers of the target company, acted in good faith by enacting the stock ownership bylaw because a concentration in stock might result in the target company losing a special tax advantage under the Internal Revenue Code.[90]

The *REIT* court's holding raises several questions when a bidder attempts to classify a target bylaw limitation as manipulative under section 14(e).[91] Because section 14(e) requires that the manipulation occur in connection with a tender offer,[92] if a company passes a bylaw before receiving a tender offer, the company refutes a connection between the two actions and the bylaw should not violate section 14(e).[93] Management with foresight to anticipate a tender offer can take defensive measures with little fear that such measures will later constitute manipulative acts, despite the fact that management's sole concern in enacting the restrictive bylaw limitations is to prevent future hostile tender offers.[94] A court

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had commenced. [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,874, at 94,555. The district court indicated that the bylaw in *REIT* had been enacted before the commencement of the tender offer. *See id.* at 94,554, 94,556 (bylaw enacted 7 days before filing for tender offer). *But see infra* note 90 (court opinion confusing regarding liability of target under § 14(e) "in connection with" tender offer language).

[89] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,874, at 94,555. *See infra* text accompanying notes 98-101 (*REIT* court's consideration of management's good faith for determining § 14(e) violation is contrary to *Mobil* analysis and reduces inquiry to breach of fiduciary obligation).

[90] *See* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,874, at 94,555. Although the *REIT* court refused the bidder's preliminary injunction request, the court denied the target trustee's motion to dismiss. *See id.* at 94,557. The district court referred to the phrase, "in connection with a tender offer," under § 14(d), in determining that on the basis of the preliminary evidence the bidder had demonstrated that the trustees' action was taken to meet a perceived tender offer. *See id.* The court stated that the phrase "in connection with a tender offer" should not be read so narrowly if the purposes of the Williams Act are to be achieved. *Id.* Although the *REIT* court mentioned § 14(d) as containing the "in connection with" phrase, the court presumably meant § 14(e) because § 14(d) does not contain the phrase "in connection with." *See id.*; 15 U.S.C. § 78n(d) (1976). Considering the district court's earlier finding that § 14(e) probably had not been violated because of the trustees' legitimate purpose for passing the bylaw, the *REIT* court's rationale for refusing to dismiss the case is difficult to understand. *See* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,874, at 94,555, 94,557.

[91] *See infra* text accompanyng notes 92-101 (court must determine that manipulation occurred in connection with tender offer under § 14(e) and should not consider management's good faith).

[92] *See* 15 U.S.C. § 78(e) (1976) (§ 14(e) applies to actions taken in connection with any tender offer).

[93] *See* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,874, at 94,555 (bylaw passed before initiation of tender offer not unauthorized). *But see id.* at 94,557 (bylaw passed 7 days before filing for tender offer may violate "in connection with tender offer" prohibition).

[94] *See supra* note 66 (significant number of public corporations have passed supermajority provisions). *But see* Gilson, *supra* note 19, at 792-804 (author contends that direct deterrent effect of antitakeover amendments against tender offers has been exaggerated).

is more likely to find manipulation in restrictive bylaws passed by management during the course of a tender offer, even if management passed the bylaws for a legitimate corporate purpose.[95] Additionally, most target management groups will not have as persuasive an argument as the trustees that opposed the tender offer in *REIT*.[96]

The *REIT* court raised a more difficult question by deciding the section 14(e) claim on the basis of the trustees' good faith.[97] By considering management's purpose for enacting the bylaw limitation, the *REIT* court ignored the prohibition in *Sante Fe Industries, Inc. v. Green* against a federal court's inquiry into management's fiduciary obligations under federal securities laws.[98] Furthermore, the *REIT* court, by considering the trustees' good faith, neglected an important statement by the *Mobil* court, that manipulation cannot be justified by good faith performance of fiduciary duties.[99] In *Mobil*, the Sixth Circuit stated that the decision to find section 14(e) manipulation did not disturb the district court's finding of good faith on the part of the target's management.[100] The *Mobil* court focused on the lockup options' effect on competitive bidding, not on the purpose of the options and, therefore, the court's ruling did not contradict the *Santa Fe* prohibition.[101]

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[95] *See supra* notes 88 & 90 (*REIT* court's position on legitimate bylaw passed in connection with tender offer). *But see supra* note 55 (majority of federal courts do not find manipulation under § 14(e) if action is fully disclosed to shareholders).

[96] *See* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,874, at 94,555 (trustees had obligation to act to preserve tax status of target).

[97] *See id.* (trustees acted in good faith).

[98] *See supra* text accompanying notes 13-14 & 34 (*Santa Fe* holding forbids inquiry under federal securities law into management's good faith).

[99] *See* Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 372 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

[100] *See id.* at 377.

[101] *See id.* at 373-77 (lockup options effectively deter other competitive bids). In *Mobil*, the Sixth Circuit referred to language in § 14(e) prohibiting manipulation by "any person" in connection with a tender offer. *Id.* Although the Sixth Circuit implied that U.S. Steel was responsible for the manipulative conduct by demanding and obtaining the options, the *Mobil* court stated that the Williams Act prohibited the options regardless of which party did the manipulating. *Id.* The *Mobil* court's analysis focused on the effect of the options, and the court would prohibit any similar agreement enacted in connection with a tender offer. *See id.*

Although the Sixth Circuit stated that by blocking competitive bidding the options could be interpreted as designed solely for that purpose, the court's analysis carefully avoided an inquiry into management's reasons for entering into the agreements. *See id.* at 374, 375-77. At least one commentator has suggested an approach that would consider management's purpose. *See* LOSS, *supra* note 8, at 1552-53. Under an approach considering management's purpose, the existence of a motive to manipulate establishes the manipulative purpose and the burden of going forward with the evidence will then shift to management. *See id.* Under a management purpose approach, however, a motive to manipulate will exist in every hostile tender offer situation because of the potential conflict of interest facing target management. *See Defensive Tactics, supra* note 19, at 582-83. The management purpose approach would not be as effective as an absolute prohibition against agreements that preclude competitive bidding, because target management will still risk making anticompetitive

Although the *Santa Fe* ruling required that the *Mobil* court carefully avoid an inquiry into management's reasons for opposing the tender offer, the *Santa Fe* ruling relied on the existence of adequate state law remedies for fiduciary violations.[102] The current trend under state law fiduciary standards, however, favors management's use of defensive tactics to thwart hostile tender offers.[103] A shareholder, denied an opportunity to tender his shares to the highest bidder, has little chance of recovery under present state fiduciary standards[104] because management only must meet the minimal fiduciary standards under the business judgment rule,[105] or a standard of an equivalent nature,[106] all of which create a presumption in favor of defensive action by management.[107] Allowing frustrated bid-

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agreements so long as management is confident that the agreement can stand legally. Additionally, the management purpose approach will require courts to make a more extensive investigation, perhaps even requiring trial, whereas a per se prohibition would enable courts to provide swift injunctive relief against management.

[102] *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (1977) (state law provides adequate remedies for breach of fiduciary obligation absent fraud).

[103] *See Defensive Tactics, supra* note 19, at 594-601 (1982). Recent federal court decisions on state fiduciary claims indicate that a plaintiff, frustrated from tendering his shares by management's action, carries a heavy burden in proving improper motive because the plaintiff must show that management's opposition to the bidder was motivated solely by a desire to retain control of the target. *See id.* at 600; *see also* Panter v. Marshall Field & Co., 646 F.2d 271, 295 (7th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1982) (burden on plaintiffs to demonstrate directors' bad faith in defeating bid); Treadway Co. v. Care Corp., 638 F.2d 357, 381-82 (2d Cir. 1980) (same); Johnson v. Trueblood, 629 F.2d 287, 293 (3rd Cir. 1980) (plaintiff must show primary or sole motive of defendant was to retain control); Crouse-Hinds Co., v. InterNorth, Inc., 634 F.2d 690, 702-03 (2d Cir. 1980) (same); Whittaker Corp. v. Edgar, 535 F. Supp. 933, 951 (N.D. Ill. 1982) (failure to show primary motive was to retain control). The federal courts' current approach is not consistent with earlier state court decisions that placed the burden of proof upon target management when management acted to retain control. *See Defensive Tactics, supra* note 19, at 589-92, 596, 600.

[104] *See infra* note 107 and *supra* note 103 (presumption favoring management under state fiduciary law). *But see* Crane Co. v. Harsco Corp., 511 F. Supp. 294, 305-06 (D. Del. 1981) (target directors repurchasing corporate stock in context of tender offer have burden to justify purchase as primarily in corporate interest).

[105] *See* Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 822-24 (1981) (business judgment rule is inadequate standard for judging managerial action in tender offer context). The business judgment rule is defined as the position that absent bad faith or some other corrupt motive, directors normally are not liable to the corporation for mistakes of judgment, whether of law or fact, if the directors have acted within the corporation's powers and the directors' authority. *Id.* at 822 (citing *Crammer v. General Tel. & Elecs. Corp.*, 582 F.2d 259, 274 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979).

[106] *See* Gilson, *supra* note 105, at 824-25. Several state courts apply the fairness standard, a test that developed under common law to review corporate contracts. *Id.* at 824. If the court finds that the contract is unfair to the corporation, the court will invalidate the contract. *See id.* at 824-25 (fairness test is inadequate measure of management's discharge of duty to corporation in context of change of control).

[107] *See* Gilson, *supra* note 105, at 822-24. The business judgment rule is premised on the theory that corporate management, not courts, are in the best position to make business decisions that enhance shareholder interests. *See id.* The rule's premise extends to target

ders to bring section 14(e) manipulation claims for injunctive relief that focus on the effects of a defensive tactic on competitive bidding would deter such action by target management in the context of competing tender offers.[108] In addition, a grant of relief at the preliminary injunction stage is a more direct and less drastic method for protecting shareholders' and competing bidders' interests than a shareholder damage action for breach of fiduciary duty after the fact.[109]

Although the *REIT* and *Scherer* courts did not extend the section 14(e) *Mobil* analysis to defensive tactics used by management in situations involving a single bidder,[110] a section 14(e) manipulation claim can serve a useful purpose when at least two bidders are competing for the same block of stock.[111] One critic who opposes almost all defensive tender offer tactics has expressed approval for managerial efforts to enlist "white knights" because shareholders clearly benefit from competitive bidding.[112] Management, by seeking a "white knight," evidences dislike for the original bidder or the bidder's price, but management in effect has admitted resignation to the idea of a tender offer or an inability to use other defensive tactics.[113] In a bidding contest, at least one tender offer has taken place, and, therefore, a court should closely scrutinize any action that might restrict competitive bids.[114] By limiting the focus of section 14(e) manipula-

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management's defensive actions against a tender offer because management is in the best position to evaluate the merits of a proposed offer. *Defensive Tactics, supra* note 19, at 581. Several commentators, however, have argued that an inherent conflict of interest arises whenever target management is faced with a hostile tender offer because an offer provides shareholders the opportunity to sell their shares for a premium over market price and at the same time is the best method for forcibly unseating target management. *See* Gilson, *supra* note 105, at 819; *Defensive Tactics, supra* note 19, at 580 n.7, 594 n.136 (listing of different proposals by commentators concerning proper role of management in tender offer situation).

[108] *See* Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 371-73 (6th Cir. 1981) (allowing bidders to bring § 14(e) claims will protect shareholders' interests), *cert. denied*, 455 U.S. 982 (1982).

[109] *See id.* at 373 (citing *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 42 (1977) (under injunctive relief court may structure remedy on case-by-case basis)); *see also supra* note 18 (bidder is in best position to quickly challenge Williams Act violation because of amassed information bidder possesses on target).

[110] *See supra* text accompanying notes 64-78 (*Scherer* court found unlikelihood of irreparable harm to bidder) and 87-90 (*REIT* court found that trustees of target acted in good faith).

[111] *See supra* notes 41-42 and accompanying text (competitive bidding for block of stock raises the premium for tendering shareholders).

[112] *See* Gilson, *supra* note 105, at 867-75 (advocating managerial bargaining to secure higher premium for target's stock).

[113] *See* Gilson, *supra* note 19, at 776 n.3 (whether defensive tactic of seeking white knight should be regarded more properly as negotiated surrender); *see also* Buffalo Forge Co. v. Ogden Corp. [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,079, at 95,133-34 (W.D.N.Y. 1983) (target faced suddenly with hostile tender offer considered various defensive tactics but only acted to secure a rival bidder).

[114] *See* Mobil Corp. v. Marathon Oil Corp., 669 F.2d 366, 373-77 (6th Cir. 1981) (court

tion claims to the competitive bidding situation, courts will insure the expressed congressional desire to maintain competitive bidding[115] and will protect shareholders' right to tender to the highest bidder.[116]

In addition to the section 14(e) manipulation claims brought by bidders, the management of some target companies have attempted to convert the *Mobil* section 14(e) manipulation analysis into a weapon to oppose tender offers.[117] In *Pacific Realty Trust v. APC Investments, Inc.*,[118] the Ninth Circuit considered whether to permanently enjoin a hostile bidder confronted with a valid bylaw limitation when the target company alleges that the bid constitutes a manipulative act under section 14(e).[119] Under the bylaw amendment involved in *Pacific Realty*, no stockholder could own more than 9.8% of the shares of Pacific Realty Trust (PacTrust).[120] After passing the bylaw amendment, PacTrust's trustees initiated proceedings in federal and state court to enjoin the prior tender offer of APC Investments, Inc. (APC).[121] In the state action, an Oregon trial court upheld the validity of the bylaw, although the trustees of PacTrust had passed the bylaw in response to the tender offer by APC.[122] The United States District Court for the District of Oregon, after hearing of the state court decision, held that to proceed with the tender offer in the face of a valid bylaw limitation would constitute a violation of section 14(e).[123] The district court permanently enjoined APC's tender offer because full disclosure would not remove the obstacle created by the bylaw.[124]

On appeal, the Ninth Circuit held that the tender offer could proceed lawfully as long as APC adequately disclosed how the bylaw might affect tendering shareholders.[125] The Ninth Circuit explained, however, that

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found that lockup agreement for valuable asset precluded competitive bidding) *cert. denied*, 455 U.S. 982 (1982). *See generally* Bebchuk, *supra* note 54 (advocates rule enabling management to solicit competitive bids so long as management does not obstruct any tender offers).

[115] *See supra* note 41 (congressional history supports competitive bidding).

[116] *See supra* notes 38-54 and accompanying text (arguments supporting application of § 14(e) to protect shareholders' right to tender for highest possible bid).

[117] *See infra* text accompanying notes 118-49 (target management claiming tender offer is manipulative under § 14(e)).

[118] 685 F.2d 1083 (9th Cir. 1982).

[119] *Id.* at 1085-88.

[120] *Id.* at 1085; *see supra* note 88 (*REIT* court distinguished bylaw in *REIT* from bylaw in *Pacific Realty*).

[121] 685 F.2d at 1085.

[122] *Id.* The court in *Pacific Realty Trust v. APC Inv., Inc.* stated that although the state trial court had upheld the validity of the bylaw, the state court refused to enjoin APC from proceeding with the tender offer because a possible future violation of the valid bylaw did not warrant an injunction. *Id.* at 1085 & n.3.

[123] *Id.* at 1085 & n.3.

[124] *Id.* at 1085. The district court in *Pacific Realty* stated that full disclosure would not protect shareholders from the illegality of proceeding with the tender offer in the face of the valid bylaw that restricted stock ownership. *Id.*

[125] *Id.* at 1087-88.

although disclosure is the preferred remedy for defects in a tender offer under the Williams Act, other courts have found at least two situations in which a court might impose a permanent injunction for violations of the Williams Act.[126] Under the first situation, a court might use a permanent injunction to punish a bidder who intentionally withheld information from the target company's shareholders.[127] The Ninth Circuit stated, however, that the deterrent situation did not apply in *Pacific Realty* because the district court found no willful misconduct by APC.[128] Under the second situation, the Ninth Circuit explained that companies commit violations of section 14(e) that cannot be cured by disclosure to the shareholders.[129] Although the Ninth Circuit relied solely on *Mobil* as an example of the second situation, the court distinguished *Mobil* from the facts in *Pacific Realty* because unlike the agreements in *Mobil*, a continuance of APC's tender offer would not artificially affect the price of PacTrust's shares.[130]

The *Pacific Realty* court rejected PacTrust's contention that continuation of the offer constituted a manipulative act under section 14(e) and explained that full disclosure would more than adequately protect the interests of PacTrust's shareholders for several reasons.[131] The court stated that APC might lawfully complete the tender offer in spite of the bylaw limitation.[132] The court also stated that an appeal was pending in the Oregon courts on the state trial court's decision upholding the validity

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[126] *Id.* at 1086; *see infra* text accompanying notes 127-30 (courts could permanently enjoin tender offer for willful violations of disclosure rules or for practices that are manipulative under § 14(e)).

[127] *See* 685 F.2d at 1086. Although the *Pacific Realty* court suggested that a court might permanently enjoin a bidder who willfully violated the Williams Act's disclosure provisions, to this date no court has ever permanently enjoined the completion of a tender offer solely for violation of the disclosure provisions of § 14(d) and § 14(e). *See* E. ARANOW, H. EINHORN, & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 134 (1977); *see also* Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1316 (W.D. Mich. 1978). The *Berman* district court stated that the court would permanently enjoin the bidder's tender offer if the bidder refused to obey a court order to disclose the nature and scope of questionable foreign payment transactions. *See id.* The *Berman* court, however, never reached the issue because the bidder subsequently withdrew the tender offer. *See id.*

[128] 685 F.2d at 1086.

[129] *Id.*

[130] *Id.* The *Pacific Realty* court did not explain its reasoning in determining that continuance of the tender offer in spite of the valid bylaw would not artificially affect the value of the target's stock. *Id.*

[131] *Id.* at 1087; *see infra* notes 132-33 and accompanying text (*Pacific Realty* court's reasons for continuing tender offer in spite of bylaw).

[132] 685 F.2d at 1087. The *Pacific Realty* court explained that the possibility remained that PacTrust could lose its tax status without APC taking over. *Id.* Assuming that PacTrust lost the tax status, the court believed that the trustees would rescind the bylaw because no legitimate reason would remain to support the bylaw. *Id.* The court stated that the shareholders might decide to call a special shareholder meeting to rescind the bylaw if APC's bid offers the shareholders a substantial premium. *Id.*

of the bylaw limitation.[133] The *Pacific Realty* court sustained a preliminary injunction against APC's tender offer until the district court determined whether APC had adequately disclosed all the possible effects of continuing with the offer under the bylaw limitation.[134]

Although the *Pacific Realty* court did not express disapproval of the target company's right to raise a manipulation claim against a bidder, the Fourth Circuit in *Dan River, Inc. v. Icahn*,[135] challenged a target company's right to claim that a tender offer constituted a manipulative scheme under section 14(e).[136] In *Dan River*, management of Dan River, Inc. (Dan River) claimed that a two-level tender offer[137] by the Icahn Investment Group (Icahn)[138] constituted a "bait and switch" scheme in violation of section 14(e).[139] The first of Icahn's bids represented the alleged "bait," an offer to buy 3.1 million shares of Dan River at eighteen dollars a share.[140] The second bid represented the "switch," an offer to buy only seven hundred thousand shares at fifteen dollars a share if management resisted Icahn's

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[133] *Id.* The *Pacific Realty* court observed that the state trial court judge had admitted his limited knowledge of securities law and the possibility of reversal on appeal. *Id.*

[134] *Id.* at 1088. The *Pacific Realty* court stated that if a later determination required that APC divest itself of the stock tender, state law would not necessarily require recission as the remedy. *Id.* at 1087. The court stated that the shareholders probably would retain the premium gained from tendering their stock and that APC would have to incur the loss by selling off the stock tendered in the offer. *Id.* Regardless of the possible outcome, the court believed that full disclosure would apprise the shareholders of all possible risks and benefits and allow the shareholders to choose from themselves. *Id.*

[135] [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,954 (4th Cir. 1983).

[136] *Id.* at 94,961.

[137] *See infra* text accompanying notes 140-41 (describing terms of Icahn's two-level tender offer).

[138] *See* Marshall Field & Co. v. Icahn [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,616 at 93,059 (S.D.N.Y. 1982). The Icahn Investment Group has been involved in several tender offer controversies. *See id.* As the *Dan River* court explained in reviewing the target's complaint, Icahn on several occasions has purchased a significant interest in a company. [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,956. Icahn then pressures management to buy Icahn's interest out or find a white knight, either of which alternatives will realize a substantial profit for Icahn. *Id.* Icahn rarely has to actually contest control because management usually is frightened enough by Icahn's mere presence that management will buy out Icahn's interest at an inflated price. *Id.*

[139] [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,957. In addition to the § 14(e) violation in *Dan River*, the target company, Dan River, alleged that the bidder, Icahn, violated § 10(b) of the '34 Act by proposing that Dan River management buy out Icahn's interest in Dan River or face a takeover attempt. *Id.* Dan River also alleged that Icahn's disclosures under the Williams Act were insufficient and misleading, and that Icahn violated the Racketeer Influenced and Corrupt Organizations Act by financing its interest in Dan River with money derived from "racketeering" or extortionate activity. *See id.* at 94,956-57; 18 U.S.C. §§ 1961-68 (1976) (provisions of the Racketeer Influenced and Corrupt Organizations Act). Additionally, Dan River alleged that Icahn intended to "loot" the target in violation of state corporation law. *See* [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,956.

[140] [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,961.

first offer.[141] Dan River claimed that Icahn's two-level offer manipulated the shareholders because Icahn, believing that management would defend against the bid, had made the first offer only to lure the shareholders into tendering on the second offer.[142]

The Fourth Circuit denied Dan River preliminary injunctive relief because Dan River failed to show irreparable harm or a likelihood of success on the merits.[143] The court seriously questioned Dan River's substantive claim under section 14(e) because legislative history and judicial precedent indicated that section 14(e) only required full disclosure.[144] Although the Fourth Circuit referred to *Mobil* as the sole authority for Dan River's manipulative claim, the court distinguished *Mobil* from the situation facing Dan River.[145] The Fourth Circuit described the option agreement in *Mobil* as an artificial manipulation outside the market that affected supply and demand forces within the market.[146] In *Dan River*, however, the Fourth Circuit explained that the allegedly manipulative tender offer represented an offer actually in the securities marketplace.[147] The *Dan River* court stated that all tender offers affect the market place, and to prohibit tender offers on that basis alone would preclude all tender offers.[148] Although the Fourth Circuit recognized that the two-level offer created some uncertainty regarding the offer, the court stated that most tender offers include conditions that introduce some uncertainty as to whether shareholders should accept the offer.[149]

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[141] *Id.*

[142] *Id.* The *Dan River* court only found one case in which target management made a claim similar to Dan River's bait and switch claim. *Id.* at 94,962; *see* Cities Serv. Co. v. Mesa Petroleum Co., 541 F. Supp. 1220 (D. Del. 1982). In *Cities Service*, the bidder made a "friendly" tender offer for 46% of the target's shares at $50 per share. *Id.* at 1221. Target management rejected the bid, whereupon the bidder responded with a hostile tender offer for 15% of the target's shares at $45 per share. *Id.* at 1221-22. The target claimed that the bidder never had the financing to support the original bid, but made misleading statements to that effect in order to convince the target's shareholders of the bidder's ability to consummate the original tender offer. *Id.* The target alleged that the bidder intended to manipulate the market by its misrepresentations. *Id.* at 1222. The target also alleged that the bidder's scheme aimed for the tender of 46% of the target's stock at the second, lower offer to enable the bidder to obtain the financing afterwards to purchase control of the target. *Id.* The *Cities Service* court denied the target's motion for preliminary injunction, holding that full disclosure apparently had been made and, therefore, the target was unlikely to prevail on the claim. *See id.* at 1224-25.

[143] [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,958.

[144] *Id.* at 94,961-62; *see supra* text accompanying notes 13-14 ('34 Act primarily requires full disclosure). *But see* [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,966 (Butzner, J., dissenting) (although two-level tender offer is case of first impression, likelihood exists that Icahn violated § 14(e)).

[145] [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,962 n.10.

[146] *Id.*; *see supra* notes 35 & 45 (discussion of definition of "manipulation").

[147] [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,962 n.10.

[148] *Id.* at 94,962.

[149] *Id.* The *Dan River* court stated that other tender offers have been allowed contain-

The *Dan River* court's reasons for not characterizing tender offers as manipulative under section 14(e) indicate the likelihood of failure for similar claims by management.[150] Allowing management to characterize an offer as manipulative under section 14(e) that has in all other respects complied with the Williams Act provisions would result in upsetting the balance between bidder and target management that Congress intended to provide under the Act.[151] Although certain bidders appear quite predatory in their motives and behavior,[152] diligent and fair disclosure of a bidder's background and past tactics will enable management to present target management's position to the shareholders.[153] Ultimately, the decision to tender rests with fully informed shareholders who, as owners of the corporation, should have complete freedom to exercise their right.[154]

Dan River and other recent decisions illustrate federal courts' reluctance to extend the *Mobil* section 14(e) manipulation analysis to tender offers[155] or to defensive tactics intended by management to maintain the target's corporate entity.[156] Nevertheless, the current inadequacy of state law remedies for frustrated bidders and shareholders has led to bidders' equitable relief requests under section 14(e) that require federal courts to make quick and efficient decisions.[157] Although a majority of courts ad-

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ing clauses that permitted withdrawal of the offer in the event of litigation. *Id.*; *see* Lipton & Steinberger, *supra* note 76, at § 1.7.11.

[150] *See supra* text accompanying notes 143-49 (*Dan River* court's reasons for unlikelihood of § 14(e) violation).

[151] *See* 113 CONG. REC. 24664 (1967) (remarks of Sen. Williams) (Act designed to avoid "tipping the scales" in favor of either side).

[152] *See supra* note 138 (description of Icahn's tactics that compel management to buy out Icahn's interest for a premium).

[153] *See* [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,043, at 94,961-62; Cities Serv. Co. v. Mesa Petroleum Co., 541 F. Supp. 1220, 1224-25 (D. Del. 1982) (full disclosure will adequately protect management's interest to shareholders).

[154] *See generally* Gilson, *supra* note 19; Friedenberg, *supra* note 19; Bebchuk, *supra* note 54 (commentators advocating greater freedom for target shareholders in tender offer context).

[155] *See supra* text accompanying notes 117-49 (discussion of recent decisions that have not extended *Mobil*'s § 14(e) analysis to tender offers).

[156] *See supra* text accompanying notes 63-101 (discussion of cases that did not extend Mobil's § 14(e) analysis to defensive tactics initiated in context of single tender offer).

[157] *See supra* notes 102-09 and accompanying text (discussion of inadequacy of state law remedies for frustrated bidders and shareholders). *But see Tender Offer Defensive Tactics, supra* note 8, at 655-58 (recognizing general problem in tender offer context but argues against patchwork federal approach and suggests congressional reassessment to update Williams Act to changing environment); *see also* Wall St. J., Jan. 13, 1982, at 3, col. 5. A study published by W.T. Grimm & Co. indicated that the number of hostile tender offers in 1981 rose 42% from 1980 to 75, and that 28 target companies opposed the bids, up from 12 in 1980. *Id.* The consultant company's report states that only 15 of the 28 were successful in warding off the hostile bidder. *Id.* The W.T. Grimm & Co. report suggests that the balance has not tipped in favor of target management, and thus raises the question whether a hostile bidder and shareholders need greater protection under an expanded definition of § 14(e) manipulation. *See id.*

vise against the use of a section 14(e) manipulation claim for reasons other than nondisclosure, some manipulative practices cannot be cured by disclosure in the tender offer context.[158] A strict application of the *Mobil* analysis to managerial actions that clearly restrict competitive bidding would provide legitimate protection for the shareholders.[159] By limiting the courts' focus to the effects of a unilateral defensive action when at least two bidders are involved, federal courts will avoid the Supreme Court's prohibition against establishing a federal fiduciary standard.[160] An extension of *Mobil*'s section 14(e) manipulation analysis to claims against tender offers, however, would not provide shareholders with additional protection.[161] Congress has declared disclosure as the proper means by which the bidder and hostile management can present the facts to the shareholders.[162] Allowing management to characterize a tender offer as manipulative that has in all other respects complied with the Williams Act would contravene Congress' intention of maintaining a balance between the bidder and management and would deprive the shareholders of their right to tender their stock as owners of the company.[163]

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[158] *See supra* text accompanying notes 22-31 (discussion of *Mobil* holding that fully disclosed option agreement constituted manipulative act in violation of § 14(e)).

[159] *See supra* text accompanying notes 110-16 (reasons why courts should scrutinize managerial tactics in context of competing tender offers); *see also* Lynch & Steinberg, *The Legitimacy of Defensive Tactics in Tender Offers*, 64 CORNELL L. REV. 901, 911-12 (1979) (shareholder right to discover material facts of transaction is worthless if not given opportunity to tender shares). *But see* Piper v. Chris-Craft Indus., 430 U.S. 1, 28 (1977) (Williams Act's express policy of neutrality scarcely suggests intent to confer new rights upon bidders whose activities prompted Act in first place).

[160] *See* Santa Fe Indus., v. Green, 430 U.S. 462, 478 (1977) (*Santa Fe* Court prohibited inquiry into fairness of transaction).

[161] *See supra* text accompanying notes 117-49 (*Pacific Realty* and *Dan River* court's rejection of claims characterizing tender offer manipulative under § 14(e)).

[162] *See* 113 CONG. REC. 854, 855 (1967) (remarks of Sen. Williams) (Act's purpose is to provide shareholders full and fair disclosure while presenting bidder and management equal opportunity to present their case).

[163] *See* 113 CONG. REC. 24664 (1967) (remarks of Sen. Williams) (Act designed to avoid "tipping the scales" in favor of management or bidders).