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Developments In Corporate Takeover Techniques: Creeping Tender Offers, Lockup Arrangements, And Standstill Agreements

DEVELOPMENTS IN CORPORATE TAKEOVER TECHNIQUES: CREEPING TENDER OFFERS, LOCKUP ARRANGEMENTS, AND STANDSTILL AGREEMENTS

Recent corporate history has witnessed an increase in corporate takeover activity[1] and in the variety of techniques bidders employ to acquire holdings in target companies.[2] A wide array of federal and state laws attempts to safeguard the investing public by requiring bidders to disclose significant accumulations of target company stock and by imposing substantive restrictions on the forms of corporate takeovers.[3] Partly to evade disclosure laws, bidders have turned increasingly to open market and privately negotiated purchases to secure a foothold in a target's stock before launching a formal tender offer.[4] Some bidders

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[1] *See* Quade, *Merger Volume Up, but No Mania Seen*, 68 A.B.A.J. 31, 31 (1982). In 1981 the dollar volume of corporate takeovers reached a record high, with mergers totalling more than $60 billion. *See id.* Corporate takeover activity historically increases during periods when stock prices are undervalued. *See* Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 5 (1978) [hereinafter cited as Fischel]. Companies with low market prices for their securities often attract corporate bidders that anticipate higher profits under more efficient management. *See id.* A recent trend, however, has been for large, cash-rich companies to pursue takeover bids for small, well-managed firms in areas with the potential for continued profitability and growth. *See* E. HERMAN, CORPORATE CONTROL, CORPORATE POWER 100 (1981).

[2] *See* Fischel, *supra* note 1, at 5. The takeover device bidders use often depends on how receptive the target's management is to an acquisition attempt. *See id.* If the current management favors the takeover, a bidder may seek to approach the target directly with a merger proposal. *See id.* If the target management opposes the acquisition, a bidder may choose to wage a proxy contest for corporate control or engage in direct purchases of target shares. *See id.* at 6-7. A bidder may make direct purchases of target shares through private negotiations with individual shareholders, through transactions on the open market, or pursuant to a tender offer. *See id.* at 5-6. The current trend in corporate takeovers is to employ a combination of acquisition techniques in a multistep acquisition. *See* text accompanying notes 6-14 *infra.*

[3] *See* text accompanying notes 21-34, 71, 83-87 *infra.*

[4] *See* Nathan, *Developments in Strategies and Tactics for Offerors in Merger, Tender Offer and Similar Acquisitions Transactions*, in PLI, TENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 257, 266-67 (A. Fleischer, M. Lipton & R. Stevenson eds., 1979). A "tender offer" generally is a public offer to purchase for cash, stock, or other consideration some or all of the securities of a publicly held corporation during a fixed period of time at a particular price or upon specified terms. *See generally* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1973) [hereinafter cited as ARANOW & EINHORN]; Note, *What is a Tender Offer?*, 37 WASH. & LEE L. REV. 908 (1980) [hereinafter cited as *What is a Tender Offer?*]; Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 34 HARV. L. REV. 1250, 1251-52 (1973) [hereinafter cited as *Developing Meaning*]; note 36 *infra.* The tender offer is the best means for acquiring a company with widely held shares. *See* Fischel, *supra* note 1, at 6. In contrast to open market purchases in

have succeeded in rendering the takeover a virtual *fait accompli* before triggering disclosure requirements.[5]

Bidders now regularly include acquisition of a block of target shares as the first step in a series of transactions known as a multistep takeover.[6] The conventional multistep takeover consists of purchases of target shares in the open market or through private negotiations,[7] followed by a tender offer[8] and a merger.[9] By securing a large stake in

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which the bidder has no control over the number of shares available, tender offers may be conditioned upon obtaining sufficient shares for control. *See id.* Tender offerors typically reserve the right to purchase any and all shares tendered but refuse to become bound unless specified conditions are met. *See Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 211 (1967) (supplemental memorandum of Securities and Exchange Commission) [hereinafter cited as 1967 Senate Hearings]. Because the shareholder grants the offeror a conditional right to purchase the tendered shares, the shareholder obligates himself to sell while the offeror remains uncommitted. *See id.* In return for the tendered shares, the offeror usually pays cash but also may exchange the target stock for the offeror's shares or offer a combination of both. *See* Fischel, *supra* note 1, at 6. Target shareholders desiring to participate in a tender offer tender their shares to an agent specified by the bidder. *See Hearings on H.R. 14475 and S.510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 11 (1968) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) [hereinafter cited as 1968 House Hearings]. The bidder provides a time period within which target shareholders must tender their shares. *See id.* If the shareholders tender sufficient shares, the bidder must purchase the shares at the tender offer price. *See id.* 17 C.F.R. § 240.14e-1(c) (1981). If the number of shares tendered falls short, the bidder must either return the shares to the shareholders or extend the tender offer time period. *See* 1968 House Hearings, *supra* at 11; 17 C.F.R. § 240.14e-1(d) (1981); note 71 *infra*.

[5] *See* Freund & Easton, *The Three-Piece Suitor: An Alternative Approach to Negotiated Corporate Acquisitions*, 34 BUS. LAW. 1679, 1680 (1979) [hereinafter cited as Freund & Easton].

[6] *See* Freund, *The Multi-step Approach to Negotiated Corporate Acquisitions*, in PLI, TENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 503, 504 (A. Fleischer & M. Lipton eds., 1978) (PLI Corporate Law & Practice Course Handbook Series No. 285) [hereinafter cited as Freund]. *See generally* Freund & Easton, *supra* note 5; Freund & Volk, *Tender Offers: Developments on Offense*, in PLI, ELEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 1, 2-29 (A. Fleischer, M. Lipton & R. Stevenson eds. 1980) [hereinafter cited as Freund & Volk].

[7] *See* Freund, *supra* note 6, at 504-05. In seeking to obtain a block of target shares before a tender offer, the bidder usually attempts to negotiate stock purchase agreements with large individual or institutional investors of the target. *See id.* A bidder failing to obtain sufficient shares privately may turn to the open market to purchase the shares through a national security exchange or the over the counter market. *See id.* at 507.

[8] *See id.* at 506; note 4 *supra*. Because most target companies' shares are widely held, a tender offer is usually a necessary part of a multistep acquisition to secure sufficient shares to minimize the threat of competing bids. *See* Freund & Easton, *supra* note 5, at 1686. The second step of a multistep takeover is usually a "friendly" tender offer with the target board of directors recommending the acceptance of the offer to its shareholders. *See id.* at 1684.

[9] *See* Freund, *supra* note 6, at 506. The last step of a multistep takeover is ordinarily a

the target stock before a tender offer, a bidder seeks to attain a better position to approach the target management with its acquisition proposal.[10] If the target management is receptive to the acquisition, the target company may be willing to protect the bidder from competing bids by offering the bidder rights in the target's shares or assets or by assuring the bidder of management support for a tender offer.[11] The target, however, may choose to reject the tender offer outright or attempt to limit the bidder's acquisition of target shares.[12] To attract a more favorable bidder, the target may grant a preferred bidder rights in the target stock or assets to promote the favored acquisition.[13]

Three recent developments cast doubt on the continued viability of techniques bidders use in multistep acquisitions. Attempts to subject open market and privately negotiated purchases to the same disclosure and substantive requirements applied to conventional tender offers may restrict pre-tender offer acquisitions.[14] Additionally, courts holding that stock purchase and option agreements between bidders and targets are manipulative[15] may stall continued use of agreements intended to pro-

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merger of the target with a shell subsidiary of the bidder. *See id.* If the first two steps yield sufficient shares, a bidder may be able to take advantage of a short-form merger available in most states. *See id.* at 522-23. 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, *supra* note 5, at 1684. Short-form mergers, however, require the bidder to acquire a minimum number of shares before the merger can occur. *See, e.g.*, DEL. CODE ANN. tit. 8, § 253 (1974) (requiring 90% minimum for short-form merger); N.Y. BUS. CORP. LAW § 905 (McKinney 1963) (providing 95% minimum for short-form merger). *See* Freund & Easton, *supra* note 5, at 1684. If the bidder lacks the required minimum or if short-form mergers are unavailable in the state, the bidder usually must pursue a conventional merger. *See, e.g.*, N.Y. BUS. CORP. LAW § 903 (McKinney 1963); OHIO REV. CODE ANN. § 1701.78 (Baldwin 1978). *See* Freund, *supra* note 6, at 507.

[10] *See* Freund & Volk, *supra* note 6, at 5. By acquiring shares in a target company before initiating a formal tender offer, a bidder can obtain a bargaining position with the target's management, which may assure a more favorable reception for the bidder's acquisition proposals. *See* Law, Lipton & Flom, *Takeover Bids: Recent Developments*, PLI, SEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 181, 199-200 (R. Mundheim, A. Fleischer & B. Vandergrift, eds. 1976) [hereinafter cited as Law, Lipton & Flom]. In addition, pretakeover purchases allow a bidder to test the market in the target stock to determine the pricing formula to be used in a formal tender offer. *See id.* A pre-tender offer accumulation of target shares can help dissuade others from joining the bidding for the target company. *See* Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 826 n.25 (1981) [hereinafter cited as Gilson]. If another bidder vies for the target stock and tops the initial suitor's bid, the advance purchases may insure that the first bidder still profits from the venture through the increased price of the shares. *See* Law, Lipton & Flom, *supra*, at 199-200.

[11] *See* text accompanying notes 78-81 *infra*.

[12] *See* text accompanying notes 150-158 *infra*.

[13] *See* text accompanying notes 78-81 *infra*.

[14] *See* text accompanying notes 37-72 *infra*.

[15] *See* Mobil Corp. v. Marathon Oil Co., 14 SEC. REG. & L. REP. (BNA) 49, 53 (6th Cir.), *rev'g*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,262 (S.D. Ohio

tect favored acquisitions from competing bids.[16] Similarly, concern that limiting a bidder's rights in the target stock restricts shareholder choice[17] may curtail the practice of negotiating agreements containing such limitations.[18] Generally, tighter restrictions on pre-tender offer purchases and closer judicial scrutiny of tender offer negotiations may slow corporate takeover activity or at least restrict the acquisition techniques available to bidders.

As the first step in a multistep acquisition, corporations often preface their formal tender offers with open market or privately negotiated stock purchases.[19] The legal consequences of pretakeover transactions may differ under federal and state law.[20] State tender offer statutes usually require disclosure of substantial stock accumulations and impose substantive requirements on bidders attempting takeovers.[21] Many state takeover laws, however, exempt from regulation acquisitions

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1981); text accompanying notes 88-181 *infra*; Applied Digital Data Sys., Inc. v. Milgo Elec. Corp., 425 F. Supp. 1145, 1157-58 (S.D.N.Y. 1977).

[16] *See* text accompanying notes 78-140 *infra*.

[17] *See* Conoco Inc. v. Seagram Co., 517 F. Supp. 1299, 1303-04 (S.D.N.Y. 1981); text accompanying notes 159-92 *infra*.

[18] *See* text accompanying notes 150-98 *infra*.

[19] *See* Gilson, *supra* note 10, at 871; text accompanying notes 6-10 *supra*.

[20] *See* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510, 510-16 (1979) [hereinafter cited as *State Tender Offer Statutes*].

[21] *See id.* at 514-16. Thirty-seven states have enacted takeover statutes that regulate various aspects of corporate acquisitions. *See* Veasy, *State Takeover Statutes*, in PLI, THIRTEENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 179, 181-82 (A. Fleischer, M. Lipton & R. Mundheim eds. 1981) (PLI Corporate Law & Practice Course Handbook Series No. 373) [hereinafter cited as Veasy]. Virtually all state takeover laws govern attempts to acquire companies incorporated within the state, and the majority extend to acquisitions of corporations with the principal place of business or significant assets within the state. *See* E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 234-36 (1977) (table listing jurisdictional requirements of state takeover statutes) [hereinafter cited as ARANOW, EINHORN & BERLSTEIN]; *State Tender Offer Statutes, supra* note 20, at 514-19, 514 n.29. Some state statutes require disclosure of essentially the same information required to be disclosed under federal securities laws. *See, e.g.*, COLO. REV. STAT. § 11-51.5-104 (Supp. 1981) (required disclosure same as Williams Act); MD. CORP. & ASS'NS CODE ANN. § 11-902 (Supp. 1981) (requiring same disclosures as Williams Act); *State Tender Offer Statutes, supra* note 20, at 515; note 29 *infra*. Other state statutes demand more complete disclosure. *See, e.g.*, N.Y. BUS. CORP. LAW § 1603 (McKinney Supp. 1981) (requiring offeror to disclose capital structure, pending legal or administrative proceedings, and financial statements); OHIO REV. CODE ANN. § 1707.041(G)(3) (Baldwin 1978) (calling for offeror to disclose capital structure, significant legal proceedings, and financial statements); 70 PA. STAT. ANN. § 75 (Purdon Supp. 1981) (providing for offeror to disclose capital structure, material legal or administrative proceedings, and financial statements); *see Tender Offer Statutes, supra* note 20, at 56 n.36. Most states require filing of disclosures 20 days before a tender offer. *See* OHIO REV. CODE ANN. § 1707.041(B) (Baldwin 1978). At least one state, however, requires disclosure as early as 60 days before a tender offer. *See* HAWAII REV. STAT. § 417E-3(f) (1976). Given the early warning required under state law, target management usually has the opportunity to prepare defensive tactics in response to acquisition attempts. *See* ARANOW, EINHORN & BERLSTEIN, *supra*, at 217. Hence, takeover statutes

which the target board of directors approves.[22] Because multistep transactions involve negotiating a "friendly" takeover with the target management, multistep acquisitions ordinarily would not be subject to regulation under state takeover laws.[23]

Under federal law significant stock accumulations are likely to trigger the disclosure provisions of the Williams Act[24] amendments to the

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are subject to attack as protective of local business. *See* Gould & Jacobs, *The Practical Effects of State Tender Offer Legislation*, 23 N.Y.L. SCH. L. REV. 399, 402 (1978) [hereinafter cited as Gould & Jacobs].

Most state takeover statutes also provide for the state securities agency to review the adequacy of the disclosure or the substantive fairness of any takeover bid should the agency or target request a hearing. *See, e.g.*, CONN. GEN. STAT. ANN. § 36-460 (1981) (hearing available at request of securities commissioner, target company, or shareholder owning 10% of target shares); 70 PA. CONST. STAT. ANN. § 74(d) (Purdon Supp. 1981) (hearing limited to fairness of disclosure); N.J. STAT. ANN. § 49:5-4 (Supp. 1981) (allowing state securities agency to review substantive fairness of offer). In addition to disclosure, some states impose specific substantive requirements on the offeror. The acts often require minimum and maximum tender offer periods. *See, e.g.*, DEL. CODE ANN. tit. 8, § 203(a)(2) (Supp. 1980) (20-day minimum but no maximum period for tender offers); MICH. COMP. LAWS ANN. § 451.905(2) (Supp. 1980) (60-day minimum tender offer period but no maximum period); *see* ARANOW, EINHORN & BERLSTEIN, *supra*, at 214-15. The statutes also guarantee tendering shareholders the right to withdraw their shares. *See* COLO. REV. STAT. § 11-51.5-103(1)(c) (Supp. 1981) (allowing withdrawal of tendered shares during first 15 days and after 35 days of commencement of tender offer); DEL. CODE ANN. tit. 8, § 203(a)(3) (Supp. 1980) (permitting withdrawal of tendered shares during first 20 days of tender offer); *see* ARANOW, EINHORN & BERLSTEIN, *supra*, at 214-15.

Because courts and commentators often perceive state takeover laws merely as intended to protect local business and incumbent management from outside takeover, state takeover laws are vulnerable to attack as pre-empted both by the federal securities laws and the commerce clause of the United States Constitution. *See* Kennecott Corp. v. Smith, 637 F.2d 181, 191 (3rd Cir. 1980) (New Jersey disclosure law pre-empted by federal law); Great West. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on grounds of venue sub nom.*, Leroy v. Great West. United Corp., 443 U.S. 173 (1979) (invalidating Idaho tender offer statute on Williams Act and commerce clause grounds). *See generally State Tender Offer Statutes*, *supra* note 20; Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213 (1977); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976).

[22] *See, e.g.*, GA. CODE § 22-1901(f)(2)(B) (1977); MICH. COMP. LAWS ANN. § 451.904(2)(d) (Supp. 1980); OHIO REV. CODE ANN. § 1707.041(A)(1)(d) (Baldwin 1978); *see* ARANOW, EINHORN & BERLSTEIN, *supra* note 21, at 405-07.

[23] *See* Freund & Volk, *Developments on Offense*, in PLI, ELEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 13, 21-22 (A. Fleischer & M. Lipton eds. 1979) (PLI Corporate Law & Practice Course Handbook Series No. 319) [hereinafter cited as *Developments on Offense*]. Although multistep transactions may be exempt from state takeover laws in some states, fiduciary standards apply in judging target management decisions in response to a takeover. *See* note 195 *infra*.

[24] 15 U.S.C. § 78m(d)-(e), 78n(d)-(f) (1976 & Supp. II 1978) (adding §§ 13(d)-(e), 14(d)-(f) to the Securities Exchange Act of 1934 ('34 Act)). Congress enacted the Williams Act amendments to the '34 Act in response to the increasing popularity of tender offers as a takeover device. *See* H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2811-15 [hereinafter cited as 1968 House Rep. and paginated to [1968] U.S. CODE CONG. & AD. NEWS 2811]. One reason for the upsurge in tender offers was

Securities Exchange Act of 1934[25] ('34 Act). Section 13(d) of the '34 Act[26] requires bidders acquiring beneficial ownership of five percent or more[27] of any class of equity securities registered under the '34 Act[28] to file with the Securities and Exchange Commission (SEC) within ten days of the acquisition a schedule 13D,[29] disclosing certain ownership informa-

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that federal law allowed bidders to engage in corporate acquisitions without requiring bidders to disclosure the takeover attempts. *See id.* at 2812. Congress enacted the Williams Act to insure that target shareholders have access to material information concerning the tender offer on which to base their investment decisions. *See id.* at 2813. Consistent with the general scheme of federal securities laws, Congress deemed adequate and accurate disclosure essential for shareholders to evaluate intelligently takeover proposals. *See id.* *See generally* Brown, *The Scope of the Williams Act and Its 1970 Amendments*, 26 BUS. LAW. 1637 (1971); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 VAND. L. REV. 700 (1970).

[25] *See* 15 U.S.C. §§ 78a-78kk (1976). In addition to disclosure requirements, other provisions of the '34 Act are likely to affect open market and privately negotiated purchases in connection with multistep acquisitions. Section 16(b) of the '34 Act provides that a corporation may recover profits from transactions in its securities within a six month period by insiders or beneficial owners of 10% or more the company's stock. *See id.* § 78p(b) (1976). A bidder failing to acquire enough securities to complete a takeover attempt may risk § 16(b) liability if he resells the securities within six months. *See id.*; ARANOW & EINHORN, *supra* note 4, at 257 n.120; Nathan, *Lock-Ups and Leg-Ups: The Search for Security in the Acquisitions Market Place*, in PLI, THIRTEENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 13, 37-38 (A. Fleischer, M. Lipton & R. Mundheim eds. 1981) (PLI Corporate Law & Practice Course Handbook Series No. 373) [hereinafter cited as Nathan]. Once a tender offer commences, rule 10b-13 prohibits bidders from purchasing or entering into agreements to purchase securities outside the tender offer. *See* 17 C.F.R. § 240.10b-13 (1981); Securities Exchange Act Release No. 8712 (Oct. 8, 1969). Most bidders execute stock purchase agreements before commencing the tender offer to avoid the rule 10b-13 limitation. *See* Nathan, *supra*, at 30-31.

Accumulations of 15% or more of a company's voting securities or an aggregate amount exceeding $15 million also may trigger the disclosure provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. *See* 15 U.S.C. § 18(a)(3) (1976). *See generally* S. AXINN, B. FOGG & N. STOLL, ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT (1980); Nathan, *supra* at 22-25. The Hart-Scott-Rodino Act requires advance notice of significant stock accumulations to allow the opportunity for private enforcement of the federal antitrust laws. *See* 1 M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS 333 (1978). The practical effect of the statute is to delay corporate acquisitions regardless of the likelihood of substantive antitrust problems. *See id.*

[26] *See* 15 U.S.C. § 78m(d) (1976 & Supp. II 1978).

[27] *Id.* Originally, the Williams Act required disclosure of beneficial ownership upon accumulation of 10% of any class of equity security. *See id.* §§ 78m(d) & 78n(d) (1972). In 1970, however, Congress reduced the amount of shares needed to trigger the disclosure requirement from 10% to 5% to provide broader disclosure. *See* H.R. REP. No. 91-1655, 91st Cong., 2d Sess. 3 (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5025, 5026.

[28] *See* 15 U.S.C. §§ 78a-78kk (1976). Section 12 of the '34 Act requires corporations with assets of at least $1 million and over 500 shareholders or any corporation with securities traded on a national exchange to register with the Securities and Exchange Commission (SEC). *See id.* § 78*l* (1976) ('34 Act, § 12).

[29] *See* 17 C.F.R. § 240.13d-101 (1981) (rule 13d-101). Schedule 13D requires disclosure of the identity and background of the beneficial owner of stock, the source and amount of financing for the transaction, the extent of the purchaser's holdings, and, if the purchaser in-

tion.[30] In contrast to section 13(d), which applies to all accumulations of registered securities and allows disclosure after the acquisition,[31] section 14(d) of the '34 Act only governs acquisitions in the form of tender offers and requires disclosure of information about the bidder before the offer.[32] Before making a tender offer, a bidder must file a schedule 14D-1[33] with the SEC and publish or transmit the information the schedule 14D-1 contains to the target shareholders.[34] Consequently, whether a bidder must disclose before or after a transaction depends on whether the acquisition is characterized as a tender offer.[35]

Because the Williams Act does not define the term "tender offer," courts have had to determine when a bidder's acquisitions constitute a tender offer.[36] Companies that have been the target of gradual accumula-

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tends to acquire control, any plans the buyer has for the company. *Id.*

Section 13(d) of the '34 Act does not expressly provide a private cause of action for failure to comply with the provisions. *See* 15 U.S.C. § 78m(d) (1976 & Supp. II 1978) ('34 Act, § 13(d)). Numerous courts, however, have been willing to imply a private right to action under the section. *See, e.g.*, General Aircraft Corp. v. Lampert, 556 F.2d 90, 94 n.5 (1st Cir. 1977); W. A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc., 466 F. Supp. 800, 803 (D. Neb. 1979); Myers v. American Leisure Time Enterpr., 402 F. Supp. 213, 214 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 312 (2d Cir. 1976). *But see* Gateway Indus., Inc. v. Agency Rent A Car, Inc., 495 F. Supp. 92, 100 (N.D. Ill. 1980); Sta-Rite Industries, Inc. v. Nortek, Inc., 494 F. Supp. 358, 362 (E.D. Wis. 1980). *See generally* Comment, *Private Right of Action for Damages Under Section 13(d)*, 32 STAN. L. REV. 581 (1980); Note, *Section 13(d) of the '34 Act: The Inference of a Private Cause of Action for a Stock Issuer*, 38 WASH. & LEE L. REV. 971 (1981).

[30] 15 U.S.C. § 78m(d) (1976 & Supp. II 1978); note 29 *supra*. In addition to filing a schedule 13D with the SEC, the purchaser must send the information required in schedule 13D within 10 days of the purchase to each stock exchange listing the security and to the issuer. *See* 15 U.S.C. § 78m(d); 17 C.F.R. § 240.13d-1 (1981) (rule 13d-1).

[31] *See* 15 U.S.C. § 78m(d) (1976 & Supp. II 1978).

[32] *Id.* § 78n(d). Although § 14 contains no express private right of action, courts have implied a private right to sue for injunctive relief under the section. *See, e.g.*, 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, 614 (S.D.N.Y. 1977).

[33] *See* 17 C.F.R. § 240.14d-100 (1981) (rule 14d-100). A schedule 14D-1 contains essentially the same information as a schedule 13D. *See* note 29 *supra*. The schedule 14D-1, however, requires more complete information about the offeror's source of funds and the bidder's plans for the target company under its control. *See* 17 C.F.R. § 240.14d-100 (1981) (rule 14d-100). In addition, the schedule 14D-1 provides for disclosure of any previous negotiations between the offeror and the target and any financial information about the offeror that may be material to the tender offer. *See id.*

[34] *See* 15 U.S.C. § 78n(d) (1976 & Supp. II 1978).

[35] *See* text accompanying note 7 *supra*.

[36] *See* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 790 (S.D.N.Y. 1979); Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248, 1251 (W.D. Okla. 1972), *vacated per stipulation*, Civil No. 72-152 (W.D. Okla. May 8, 1972). For many years the SEC remained reluctant to define the term "tender offer" to avoid restricting the flexibility necessary to respond to new forms of corporate acquisition. *See* SEC Securities Exchange Act Release No. 34-12676 (Aug. 2, 1976), *reprinted in* [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,659, at 86,895-96; *What is a Tender Offer?*, *supra* note 4, at 908 n.5. The SEC since has proposed a definition of the term tender offer. *See* 44 Fed. Reg. 70,349, 70,349-52 (1979) (proposed rule

tions of shares by hostile bidders have sought to impose section 14(d) requirements on bidders by characterizing the acquisitions as "creeping" tender offers.[37] According to the creeping tender offer analysis, the purpose of the Williams Act is to regulate the problems associated with tender offers, regardless of whether a takeover actually takes the form of a conventional tender offer.[38] Thus, Williams Act requirements should apply whenever the problems arise in a takeover in a form other than a conventional tender offer.[39] One justification for extending section 14(d) protections is that open market and privately negotiated acquisitions deprive shareholders of the premium they would otherwise receive if they were aware of the impending takeover.[40] Proponents of the creeping tender offer analysis justify subjecting preacquisition purchases to tender offer requirements with the remedial nature of the Williams Act and language in some court opinions calling for liberal construction of the Act.[41]

Although several federal district courts have held that open market

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14d-1(b)(1)). According to the proposed rule, an offer to purchase securities must satisfy either of two tests to constitute a tender offer. *See id.* To qualify under the first test, the offer must propose to purchase more than 5% of the shares of one class of securities from more than 10 persons within a 45 day period. *See id.* Under the second test, the offer must be made in a widespread manner, exceed the market price of the stock by either 5% or $2 per share, and not be subject to negotiation. *See id.* at 70,351. Appearing to abandon the proposed rule, the SEC later recommended to Congress legislative changes designed to clarify the tender offer definition. *See* Letter from SEC Chairman Harold Williams to Senator Harrison Williams (February 15, 1980); *SEC Seeks Takeover Rule Change to End Controversy, Could Increase Firms' Costs*, Wall St. J., Feb. 20, 1980, at 2, col. 2. More recently, however, the SEC seems to have dropped its pursuit of either a rule change or a legislative revision, preferring instead to return to its previous position that defining "tender offer" would limit the SEC's ability to respond to new acquisition techniques. *See SEC Reconsiders Rules on Tender Offers*, Wall St. J., July 17, 1980, at 4, col. 1.

[37] *See* Atkins, *Defense Against Creeping Acquisitions*, in PLI, THIRTEENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 129, 140 (A. Fleischer, M. Lipton & R. Mundheim eds. 1981) (PLI Corporate Law & Practice Course Handbook Series No. 373) [hereinafter cited as Atkins]. Proponents of the creeping tender offer theory have argued that certain open market and privately negotiated purchases should be integrated with any subsequent tender offer to determine whether to require disclosure before or after the tender offer. *See* ARANOW, EINHORN & BERLSTEIN, *supra* note 21, at 17. Litigants also have advanced creeping tender offer claims, however, where no formal tender offer has followed the purchases, arguing that the takeover problems were sufficiently similar to tender offer problems to demand tender offer regulation. *See* Wellman v. Dickinson, 475 F. Supp. 783, 820-21 (S.D.N.Y. 1979); Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248, 1251 (W.D. Okla. 1972), *vacated per stipulation*, Civil No. 72-152 (W.D. Okla. May 8, 1972); note 42 *infra*.

[38] *See* note 37 *supra*.

[39] *See id.*

[40] *See* ARANOW & EINHORN, *supra* note 4, at 17.

[41] *See* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1973) (tender offer definition should extend beyond conventional meaning); Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248, 1251 (W.D. Okla. 1972), *vacated per stipulation*, Civil No. 72-152 (W.D. Okla. May 8, 1972) (Williams Act is remedial and should be construed liberally).

and privately negotiated purchases accompanied by aggressive publicity or widespread solicitation of target shareholders qualify as a tender offer,[42] most federal courts have rejected extension of the section 14(d) disclosure requirements.[43] In *Ludlow Corp. v. Tyco Laboratories, Inc.*,[44] the United States District Court for the District of Massachusetts addressed the issue whether open market and privately negotiated purchases constitute a tender offer when accompanied by electronically transmitted solicitations.[45] The plaintiff, Ludlow Corporation (Ludlow), sought relief from alleged tender offer violations involved in the acquisition of 28 percent of Ludlow's outstanding shares by Tyco Laboratories, Inc. (Tyco).[46] Ludlow claimed that Tyco's acquisitions constituted an il-

[42] *See, e.g.*, Wellman v. Dickinson, 475 F. Supp. 783, 826 (S.D.N.Y. 1979); S-G Securities, Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1126-27 (D. Mass. 1978); Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248, 1252 (W.D. Okla. 1972), *vacated per stipulation*, Civil No. 72-152 (W.D. Okla. May 8, 1972). In *Wellman*, a bidder solicited offerees by telephone in its purchase of 34% of the shares of Becton, Dickinson & Company from individual and institutional investors. *See* 475 F. Supp. at 809-10. The *Wellman* court held that the limited time the bidder allowed for response, the inflexibility of the price, and other aspects of the solicitation were sufficiently similar to a tender offer to be subject to tender offer regulation. *See id.* at 820-21. In finding shareholder pressures equivalent to a tender offer, the court in *S-G Industries* relied on the bidder's prior rejected proposal to acquire the target, a recently announced intent to obtain control of the target, a recently announced intent to obtain control of the target, and subsequent open market and privately negotiated purchases of a large block of target shares. *See* 466 F. Supp. at 1126-27. The court in *Cattlemen's* found that the bidder engaged in a widespread solicitation of shareholders through telephone calls, direct mail, and personal visits. *See* 343 F. Supp. at 1251-52. The court held that the solicitations pressured shareholders into making hurried investment decisions without access to adequate information. *See id.* at 1252.

[43] *See, e.g.*, Stromfeld v. Great Atl. & Pac. Tea Co., 484 F. Supp. 1264, 1272-73 (S.D.N.Y. 1980) (privately negotiated purchases); Chromalloy Am. Corp. v. Sun Chem. Corp., 474 F. Supp. 1341, 1346-47 (E.D. Mo.), *aff'd on other grounds* 611 F.2d 240 (8th Cir. 1979) (open market transaction); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 790 (S.D.N.Y. 1979) (open market); Copperweld Corp. v. Imetal, 403 F. Supp. 579, 597-98 (W.D. Pa. 1975) (privately negotiated); Gulf & W. Indus. v. Great Atl. & Pac. Tea Co., 356 F. Supp. 1066, 1074 (S.D.N.Y.), *aff'd on other grounds*, 476 F. 2d 687 (2d Cir. 1973) (open market); *see* Einhorn, *What is a "Tender Offer?"* in PLI, TENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 245, 249 (A. Fleischer, M. Lipton & R. Stevenson eds. 1979).

[44] [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98, 383, at 92,303 (D. Mass. 1981). At the state level, the Massachusetts Securities Division in *In re Ludlow Corp.* was more receptive than the federal court to the claim that a suitor's purchases before a takeover bid constitute a tender offer. *See In re* Ludlow Corp., [1978-1981 Transfer Binder] BLUE SKY L. REP. (CCH) ¶ 71,646, at 69,288 (Mass. Securities Div. 1981).

[45] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383, at 92,306.

[46] *See id.* at 92,304. In the action against Tyco Laboratories, Ludlow Corporation sought injunctive and declaratory relief, damages, and an order requiring defendants to divest themselves of the Ludlow stock acquired. *See id.* at 92,304. Ludlow had succeeded earlier in obtaining a temporary restraining order against Tyco based on alleged inaccuracies in Tyco's schedule 13D disclosures. *See* Ludlow Corp. v. Tyco Laboratories, Inc. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,382, at 98,301 (D. Mass. 1981). Tyco purchased Ludlow shares in its own name and in the name of AMBG, a wholly owned subsidiary of Tyco. *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383, at 92,304.

legal creeping tender offer in violation of section 14 of the Williams Act.[47] Ludlow charged that Tyco's purchases were sufficiently public to be characterized as a tender offer because the solicitations occurred through the use of Autex, an electronic communications system providing market information to subscribers.[48]

In assessing whether Tyco's acquisitions shared enough common characteristics with tender offers to merit tender offer status, the court reviewed several tests which have evolved to define tender offers.[49] Without applying the tests specifically, the court rejected per se that open market purchases, however aggressive, constitute a tender offer.[50] The court relied on the distinction in the Williams Act between tender offers under section 14(d) and open market and privately negotiated acquisitions under section 13(d).[51] Under the specific facts in *Ludlow*, the court failed to find the public or widespread solicitation of shareholders that ordinarily typifies a tender offer.[52] Ludlow never linked the Autex

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[47] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383, at 92,305; 15 U.S.C. § 78n(d) (1976 & Supp. II 1978) ('34 Act, § 14(d)).

[48] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383, at 92,305. In *Ludlow*, Tyco's broker, Kidder, Peabody & Co., Inc. issued a one-day interest message to institutional investors requesting indications of interest in Ludlow shares. *See id.* Although broadcast only on one day, subscribers could recall the announcement at any time within the following three months. *See id.* The message did not specify that Tyco was the party interested in purchasing Ludlow's shares. *See id.*

[49] *See id.* at 92,307-09. Although the *Ludlow* court refused to endorse any specific criteria, the court reviewed the leading tests for defining tender offers. *See id.* at 92,307. Initially, the court considered a test suggested in the *Harvard Law Review* which concentrates on the harms inherent in improper attempts to pressure shareholders to tender their shares. *See id.*; *Developing Meaning*, *supra* note 4, at 1251-52. The focus of the test is whether the impact of a purchaser's activities is to force shareholders into entering transactions without sufficient information or time to consider the decision. *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383, at 92,307. The *Ludlow* court listed as an alternative test the factors advanced by the SEC for defining whether stock accumulations result in a tender offer. *See id.* at 92,307-08. The SEC has advocated examining how widespread the solicitation is, the percentage of target shares acquired, the premium over the market price, the terms of the offer, the minimum shares necessary to consummate the transfer, and the publicity surrounding the offer. *See id.*; Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,382, at 92,308; 466 F. Supp. 1114, 1126-27 (D. Mass. 1978). The court in *S-G Industries* held that a publicly announced intent to purchase a significant block of target shares to gain control coupled with a subsequent rapid accumulation of target shares through open market and privately negotiated transactions constituted a tender offer. *See* 466 F. Supp. at 1126-27; note 42 *supra*.

[50] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383, at 92,308. *See also* Brascan Ltd. v. Edper Equities, Ltd., 477 F. Supp. 773, 790 (S.D.N.Y. 1979); Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951, 961 (S.D.N.Y.), *aff'd in part, rev'd in part*, 584 F.2d 1195 (2d Cir. 1978).

[51] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383, at 92,308. *Compare* 15 U.S.C. § 78m(d) (1976 & Supp. 1978) ('34 Act, § 13(d)) *with id.* § 78n(d) ('34 Act, § 14(d)). *See* note 68 *infra*.

[52] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383, at 92,308; text accompanying note 42 *supra*.

message to any request by Tyco or its agents to transmit the communication.[53] Moreover, the court noted that shareholders who did enter into negotiations with Tyco initiated the transactions.[54]

The court examined Tyco's transactions to determine if certain pressure tactics existed which are common in tender offers.[55] Tyco did not require a minimum number of shares to consummate its purchases and offered no premium price, but bought all available shares on the market at current prices.[56] The privately negotiated transactions involved large blocks of shares owned by institutional investors with sufficient financial knowledge and investment data to make informed decisions.[57] The court emphasized that institutional investors and other sophisticated offerees do not require the same safeguards as uninformed shareholders whom Congress intended the Williams Act to protect.[58] Hence, the *Ludlow* court joined most other federal courts in denying attempts to characterize open market and privately negotiated purchases as tender offers.[59]

In contrast to the *Ludlow* court's review of the various tests for defining tender offers, the United States District Court for the Eastern District of Michigan reached the same result in *Luptak v. Central Cartage Co.*[60] by emphasizing the legislative history of the Williams Act and the practical effect of including open market and privately negotiated purchases within the tender offer definition.[61] The plaintiff, Luptak, filed the action on behalf of himself and other shareholders[62] of the Detroit International Bridge Company (DIBC), which was the subject of an acquisition attempt by Central Cartage Co. (Cartage).[63] Cartage made its pur-

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[53] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,383, at 92,305. Because Ludlow never established that Tyco authorized the electronic solicitation message, the court rejected on a factual basis Ludlow's assertion that Tyco's activities were public. *See id.*

[54] *See id.*

[55] *See id.* at 92,308-09.

[56] *See id.*

[57] *See id.* at 92,309. In *Ludlow*, Tyco privately negotiated purchases of Ludlow shares from such large institutional investors as Morgan Guaranty Trust. *See id.* at 92,309. The institutional investors were not only sophisticated investors but also had access to financial information generally unavailable to ordinary traders. *See id.*

[58] *See id. See also* Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951, 961 (S.D.N.Y. 1978) (Williams Act primarily intended to protect uninformed investors, not sophisticated offerees).

[59] *See* note 43 *supra.*

[60] *See* [Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,034, at 91,349 (E.D. Mich. 1979).

[61] *See id.* at 91,353.

[62] In *Luptak*, the court rejected plaintiff's standing to bring the action derivatively or through a class action on behalf of the other shareholders. *See id.* at 91,347. The court, however, allowed plaintiff to continue the lawsuit in his individual capacity as a shareholder. *See id.*

[63] *See id.* at 91,350-01. In addition to stock accumulations by Central Cartage Co. (Cartage), several other potential tender offerors, including the plaintiff, vied for shares in the Detroit International Bridge Co. (DIBC). *See id.*

chases in the over the counter market[64] while another bidder was engaged in a tender offer for DIBC.[65] Luptak relied on the novel argument that the court should treat Cartage's acquisitions as a tender offer because Cartage purchased DIBC's shares under the "umbrella" of the other bidder's tender offer.[66] The court, stressing the open market source of Cartage's shares, disregarded plaintiff's argument that Cartage's independent acquisitions amounted to an illegal tender offer.[67]

The court in *Luptak* noted that both the Williams Act and its legislative history distinguish between tender offers and aggressive market acquisitions.[68] The court also recognized the impracticalities of extending the substantive tender offer provisions of the Williams Act to pre-tender offer purchases.[69] The court found that characterizing pre-tender offer acquisitions as a conventional tender offer would subject open market and privately negotiated purchases to the withdrawal, proration, and equality of treatment provisions of section 14(d).[70] Section 14(d) requires offerors to allow shareholders to withdraw tendered shares within a certain period, to purchase on a pro rata basis the shares exceeding the requested number, and to extend any subsequent price increase to all tendering shareholders.[71] To avoid rendering the substan-

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[64] *See id.* at 91,350.

[65] *See id.* In *Luptak*, Cartage began its buying program in the midst of a tender offer by Wesco Financial Corp. *See id.* Cartage's purchases, however, extended beyond Wesco's expiration date for accepting tendered DIBC shares. *See id.*

[66] *See id.* at 91, 353.

[67] *See id.*

[68] *See id. See also* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 790 (S.D.N.Y. 1979) (reviewing legislative history of Williams Act). Comments by Senator Harrison Williams, author and principal proponent of the Williams Act, and by SEC Chairman Manuel Cohen specifically refer to the distinction between tender offers and other forms of large scale purchases. *See* 1967 Senate Hearings, *supra* note 4, at 16-17, 24-25, 36 (1967).

[69] *See* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,034, at 91,353.

[70] *See id.*

[71] *See* 15 U.S.C. § 78n(d)(5)-(7) (1976 & Supp. II 1978) ('34 Act, § 14(d)(5)-(7)). To relieve the pressures on shareholders faced with a tender offer, Congress imposed substantive requirements on offerors engaging in a tender offer. *See* House Rep., *supra* note 24, at 2820. Once an offeror commences a tender offer, the tender offer must remain open for a minimum of 20 business days. *See* 17 C.F.R. § 240.14e-1 (1981) (rule 14e-1). A tendering shareholder has the right to withdraw tendered shares within 15 business days and after 60 days from the announcement of the tender offer. *See* 17 C.F.R. § 240.14d-7 (1981) (rule 14d-7). The offeror must purchase pro rata all of the shares tendered during the first ten days of the offer if the total shares tendered exceeds the number of shares sought. *See* 15 U.S.C. § 78n(d)(6) (1976) ('34 Act, § 14(d)(6)). A bidder increasing the price offered for the shares before expiration of the tender offer must pay the increased price to every shareholder participating in the tender offer. *See* 15 U.S.C. § 78n(d)(7) (1981) ('34 Act, § 14(d)(7)). Given the volume and frequency of open market and privately negotiated transactions, the § 14(d) substantive provisions are incompatible with pre-tender offer acquisitions. *See* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 789 (S.D.N.Y. 1979); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978); Law, Lipton & Flom, *supra* note 10, at 201.

tive provisions of section 14 unworkable in the context of pre-tender offer acquisitions, the court rejected plaintiff's attempt to construe Cartage's purchases as a tender offer.[72]

The trend in the federal courts to reject creeping tender offer theories reflects the realization that pre-tender offer accumulations do not contain the same problems inherent in formal tender offers.[73] A target shareholder confronted with a cash tender offer must decide whether to sell his shares or retain his interest in the target company under new management.[74] Thus, information about the background and future plans of the bidder available through the schedule 14D-1 is valuable to the offeree in evaluating his decision whether to tender his shares.[75] By contrast, the only evaluation required of a shareholder in an open market or privately negotiated transaction is his decision to sell, and information as to the value of the shares owned is already available in the market.[76] Although a shareholder may later regret selling his shares when he learns of a subsequent tender offer, the initiative to sell the stock is nevertheless the shareholder's own and involves no more pressure than other ordinary market transactions.[77]

The second recent development likely to plague multistep acquisitions is the greater scrutiny courts have applied to provisions included in takeover agreements designed to "lock up" the transaction.[78] The lockup is a relatively new technique by which parties to a friendly takeover seek to improve the chances that the acquisition will succeed.[79]

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[72] *See* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,034, at 91,353.

[73] *See* note 43 *supra*.

[74] *See* Fischel, *supra* note 1, at 10-11.

[75] *See* 1967 Senate Hearings, *supra* note 4, at 18 (statement of SEC Chairman Manuel F. Cohen).

[76] *See id.* at 17.

[77] *See* Cohen, *Open Market and Privately Negotiated Purchases of Stock*, in PLI, ELEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 87, 87-88 (A. Fleischer, M. Lipton & R. Stevenson eds. 1980).

[78] *See* Mobil Corp. v. Marathon Oil Co., 14 SEC. REG. & L. REP. (BNA) 49, 53 (6th Cir.), *rev'g* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,262 (S.D. Ohio 1981); Applied Digital Data Sys., Inc. v. Milgo Elec. Corp., 425 F. Supp. 1145 (S.D.N.Y. 1977); text accompanying notes 88-131 *infra*. One commentator has suggested that the term "lockup" may be a misnomer, because the agreements more accurately serve to provide only a "leg-up" or an advantage for a favorable bidder. *See* Nathan, *supra* note 25, at 16. The parties to lockup agreements may prefer the term lockup because the implication that the deal is certain to occur may deter rival bidders. *See id.*

[79] *See* Bialkin, *Court Costs Cloud Over Option Tactic in Take-overs*, Legal Times of Wash., Jan. 11, 1982, at 19 [hereinafter cited as Bialkin]. The lockup technique offers several distinct advantages as a means of acquiring shares in a target company. By engaging in private negotiations rather than public bidding, a bidder employing the lockup technique may avoid engendering management hostility to an open takeover attempt. *See* *Developments on Offense*, *supra* note 23, at 28. By keeping the negotiations private, the two parties may avoid disclosure requirements until they have entered into a binding agreement. *See id.* at 30. The bidder, thus, may escape public embarassment should the target rebuff the bidder's overtures. *See* Freund, *supra* note 6, at 511. Once the parties agree upon

The lockup generally takes the form of a stock purchase or option agreement between the bidder and the target's management or its principal shareholders.[80] The lockup also may consist of an agreement by the target to sell or grant an option to sell to the bidder a key asset of the target company.[81] Another variation is a negative lockup which consists of an agreement by the target management or shareholders not to tender or sell their shares to a rival bidder.[82]

Under federal law the provision most likely to affect lockup agreements is section 14(e) of the '34 Act.[83] Section 14(e) prohibits

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the lockup provisions, however, the parties often choose to disclose the existence of the agreement to discourage unfriendly bidders. *See* Nathan, *supra* note 25, at 19. Because a bidder can lock up the price at a fixed level, the suitor may avoid a bidding war that could otherwise escalate the price of the target stock. *See Developments on Offense, supra* note 23, at 28. Hence, a bidder may deter potential competitors by acquiring a substantial block of a target's shares before initiating a formal tender offer. *See id.* at 27. Conversely, a target company may attract friendly bidders to rescue the company from an unwanted offer by promising generous stock or asset options to would-be "white knights," friendly suitors to whom a target turns when confronted with a hostile tender offer. *See* Bialkin, *supra*, at 19.

[80] *See* Nathan, *supra* note 25, at 60. The lockup technique developed as a stock purchase agreement by principal target shareholders to support a bidder's proposed takeover by transferring their shares to the bidder. *See id.* at 59. The option agreement provided bidders an alternative to committing themselves to the purchase of the shares until the bidders assured their success. *See id.* at 44. Increasingly, bidders have approached target management directly with proposed lockups as part of an acquisition package. *See id.* at 59-60. A lockup agreement with target management can occur only if management favors the takeover, unlike lockups with target shareholders which are available even if the target management opposes the acquisition. *See id.* at 60. One way target management can support a takeover is by making available to the bidder authorized yet unissued shares under a stock purchase or option agreement. *See id. See also* ARANOW & EINHORN, *supra* note 4, at 247; Mobil Corp. v. Marathon Oil Co., [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,268 (6th Cir. 1981); text accompanying notes 88-131 *infra*. Issuance of additional target shares to a friendly bidder increases the total shares which rival bidders must acquire to achieve a takeover. *See* ARANOW & EINHORN, *supra* note 4, at 247.

[81] *See* Nathan, *supra* note 25, at 75. In addition to entering a stock purchase or option agreement with the bidder, target management may agree to sell to the bidder or grant an option on a principal asset of the target company. *See id.*; Mobil Corp. v. Marathon Oil Co., [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,268 (6th Cir. 1981); text accompanying notes 88-131 *infra*. By committing to sell a key asset to a friendly bidder, the target may dissuade unfriendly suitors that might lose interest in the target if the asset is likely to be sold before they have the chance to acquire the target company. *See* Nathan, *supra* note 25, at 75. Because most target companies consist of several key operations, few targets can boast of any single asset sufficiently important to dissuade hostile bidders fearing its sale. *See id.* at 77. Moreover, to provide an effective deterrent, the target must convince unfriendly bidders that the target would complete the sale even if the unwanted suitor succeeded in outbidding the favored acquiror. *See id.*

[82] *See* Nathan, *supra* note 25, at 75.

[83] *See* 15 U.S.C. § 78n(e) (1976 & Supp. II 1978). In addition to the § 14(e) antifraud provisions of the '34 Act, lockup agreements in the form of stock purchase or option agreements involving substantial holdings of target shares may be subject to § 13(d) disclosure provisions. *See* text accompanying notes 26-30 *supra*. A friendly bidder agreeing

fraudulent, deceptive, or manipulative activity associated with a tender offer.[84] Litigation under section 14(e) ordinarily arises in two contexts.[85] Litigants may use section 14(e) as a basis for alleging that a party failed to file promptly with the SEC or adequately disclose the details of a lockup agreement.[86] A more serious threat is the contention that lockup agreements constitute a manipulative device under section 14(e).[87]

Mobil Corp. v. Marathon Oil Co.[88] was the first federal appellate case to consider whether lockup agreements are manipulative under section

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to a stock purchase or option agreement with a target company for over 5% of the target shares must file within 10 days of its execution a schedule 13D if the right to acquire ownership is exercisable within 60 days. *See* 15 U.S.C. § 78m(d) (1976); 17 C.F.R. § 240.13d-3 (1981) (rule 13d-3); note 29 *supra*. A company which becomes the target of a tender offer must file and disseminate within 10 days a schedule 14D-9, disclosing any lockup arrangements. 17 C.F.R. § 240.14e-2 (1981) (rule 14e-2). *See* Nathan, *supra* note 25, at 74. A schedule 14D-9 requires disclosure of any stock purchase or option agreements that may affect the tender offer. *See* 17 C.F.R. § 240.14d-1 (1981) (rule 14d-1); Nathan, *supra* note 25, at 74. In negotiating lockup agreements, the parties also should be aware that their agreement may run afoul of the § 14(d) tender offer provisions. *See* 15 U.S.C. § 78n(d) (1976); Nathan, *supra* note 25, at 25-26. Lockup agreements may be subject to contest as an unconventional tender offer requiring disclosure before consummation. *See* Wellman v. Dickinson, 475 F. Supp. 783, 820-21 (S.D.N.Y. 1979) (finding widespread solicitation of state purchase agreements to be tender offer); note 42 *supra*. *See also* Nathan, *supra* note 25, at 26.

At the state level, stock purchase and option agreements would be exempt from regulation in many states which do not regulate acquisitions which target management approves. *See* text accompanying note 22 *supra*. In addition to specific statutes, lockup agreements are subject to common law principles of fiduciary duty. *See* note 195 *infra*. The question may arise whether a controlling shareholder entering into a lockup agreement for transfer of his shares owes a fiduciary duty to insure that his fellow shareholders share any premium he receives. *See* Nathan, *supra* note 25, at 38. Most courts now reject that a principal shareholder is obligated to guarantee that fellow shareholders receive the same price for their shares. *See, e.g.*, Treadway Companies, Inc. v. Cane Corp., 638 F.2d 357, 376 (2d Cir. 1980); Wellman v. Dickinson, 475 F. Supp. 783, 835 (S.D.N.Y. 1979); Yerke v. Batman, 63 Ind. App. 99, ____, 376 N.E.2d 1211, 1215 (Ct. App. 1978). *See* Nathan, *supra* note 25, at 78; Freund & Volk, *supra* note 6, at 9. Moreover, because most lockup agreements provide for the bidder to extend the same price offer to all shareholders, few lockups would face a control premium contest. *See* Nathan, *supra* note 25, at 38.

[84] *See* 15 U.S.C. § 78n(e) (1976 & Supp. II 1978). Congress added the § 14(e) antifraud provision to the '34 Act to insure that parties engaged in a tender offer fully and accurately disclose any material information relating to the tender offer. *See* 1968 House Rep., *supra* note 24, at 2821. In drafting § 14(e), Congress employed language similar to that found in § 10(b) of the '34 Act and rule 10b-5. *Compare* 15 U.S.C. § 78j(b) (1976) ('34 Act, § 10(b)) *and* 17 C.F.R. § 240.10b-5 (1981) (rule 10b-5) *with* 15 U.S.C. § 78n(e) (1976) ('34 Act, § 14(e)). *See generally* Note, *The Scope of the Disclosure Duty Under SEC Rule 14e-3*, 38 WASH. & LEE L. REV. 1055, 1062-64 (1981).

[85] *See* Nathan, *supra* note 25, at 36.

[86] *See* Mobil Corp. v. Marathon Oil Co., [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) § 98,375, at 92,270 (S.D. Ohio 1981); Applied Digital Data Systems, Inc. v. Milgo Elec. Corp., 425 F. Supp. 1145, 1150-51 (S.D.N.Y. 1977); text accompanying notes 88-131 *infra*.

[87] *See* note 86 *supra*.

[88] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,262 (S.D. Ohio), *rev'd*, 14 SEC. REG. & L. REP. (BNA) 49 (6th Cir. 1981).

14(e).[89] In *Mobil*, Mobil Corporation (Mobil) brought an action to preliminarily enjoin United States Steel Corporation's (U.S. Steel) attempt to take over the Marathon Oil Company (Marathon).[90] The dispute arose after a Mobil tender offer for Marathon[91] prompted Marathon's management to search for a more favorable bidder.[92] When U.S. Steel emerged as a suitable white knight,[93] Marathon and U.S. Steel entered into negotiations resulting in a proposal by U.S. Steel to acquire Marathon.[94] The agreement proposed a cash tender offer[95] and a merger upon successful completion of the tender offer.[96] The agreement included a lockup provision granting an option for U.S. Steel to purchase authorized but unissued Marathon stock[97] and an option to buy Marathon's mineral interests in the Yates oil field in case a third party preempted U.S. Steel from completing the takeover.[98] Before announcing the tender offer, U.S. Steel filed the required schedule 14D-1 with the SEC.[99] In an attempt to block the transaction, Mobil challenged whether U.S. Steel and Marathon complied with the disclosure requirements of the Williams Act.[100] Mobil also charged Marathon and U.S. Steel with manipulative practices in violation of section 14(e).[101]

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[89] *See* 14 SEC. REG. & L. REP. (BNA) at 53-54.

[90] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,263. The U.S. District Court hearing in *Mobil* involved an application by Mobil Corporation (Mobil) for a preliminary injunction against the Marathon Oil Company (Marathon), not a trial on the merits of the case. *See id.*

[91] *See id.* at 92,264-65. Mobil began its takeover attempt of Marathon by offering to purchase up to 40 million shares of Marathon common for $85 per share, provided that at least 30 million were tendered. *See id.*

[92] *See id.* at 92,265-66.

[93] *See id.* at 92,267. One reason Marathon considered the United States Steel Corporation (U.S. Steel) a more favorable bidder than Mobil was that U.S. Steel proposed to maintain Marathon's corporate headquarters in Findlay, Ohio, rather than move the headquarters to New York City as Mobil proposed. *See id.* at 92,265-66. Additionally, U.S. Steel's takeover was less likely to pose serious antitrust problems. *See id.* at 92,263 n.1.

[94] *See id.* at 92,267-68. U.S. Steel entered into agreements with Marathon both in its own name and in the name of its wholly owned subsidiary, USS, Inc. *See id.* at 92,263 n.1.

[95] *See id.* at 92,268. U.S. Steel offered to purchase up to 30 million shares, or 51%, of Marathon's stock at $125 per share. *See id.*

[96] *See id.* The merger agreement between Marathon and U.S. Steel provided that Marathon would merge with USS, Inc., a subsidiary of U.S. Steel, upon successful consummation of the tender offer. *See id.*

[97] *See id.* The stock option between Marathon and U.S. Steel gave U.S. Steel the option to purchase up to 10 million shares of authorized but unissued Marathon common stock for $90 per share in either cash or securities. *See id.*

[98] *See id.* The Yates oil field, located in western Texas, is one of the nation's most productive oil and gas fields and constitutes a substantial part of the Marathon stock's value. *See id.* at 92,273-74.

[99] *See id.*; note 33 *supra*.

[100] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,268.

[101] *See id.* at 92,263. In its complaint, Mobil contended that the schedule 14D-1 filing and communications with Marathon shareholders lacked material facts necessary for understanding U.S. Steel's tender offer and merger proposals. *See id.*; 15 U.S.C. § 78n(e) (1976 & Supp. II 1978) ('34 Act, § 14(e)).

In addressing both the disclosure and manipulation claims, the United States District Court for the Southern District of Ohio focused on the parties' adherence to the Williams Act disclosure requirements.[102] The court held that the defendants not only fully complied with the mandated Williams Act disclosures,[103] but that the adequacy of the disclosures also fulfilled the defendants' antifraud obligations under section 14(e).[104] The court characterized Mobil's charge that the defendants violated section 14(e) as simply a claim that the Marathon directors acted unfairly and in conflict with the fiduciary duty owed to Marathon and its shareholders.[105] The district court relied on the United States Supreme Court's decision in *Sante Fe Industries, Inc. v. Green*[106] to conclude that complete disclosure fulfills the antifraud requirements of the Williams Act.[107] Because the trial court doubted Mobil's probability of success on the merits of its claims, the court denied Mobil's request for a preliminary injunction.[108]

On appeal, the Sixth Circuit singled out the section 14(e) manipulation issue as the sole basis for reversing the district court's denial of Mobil's request for a preliminary injunction.[109] The Sixth Circuit held that the lockup agreement granting U.S. Steel the irrevocable option to purchase the Marathon shares and the contingent option to obtain

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[102] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,278-82.

[103] *See id.* at 92,278-80.

[104] *See id.* at 92,281-82.

[105] *See id.* at 92,281. By construing Mobil's manipulation argument merely to be a breach of fiduciary duty claim, the district court in *Mobil* held that Mobil failed to state a recognizable claim under the federal securities laws. *See id.*; *In re* Sunshine Mining Co. Sec. Litigation, 496 F. Supp. 9, 11 (S.D.N.Y. 1979) (breach of fiduciary duty not cause of action under § 14(e)).

[106] 430 U.S. 462 (1977). *Sante Fe Industries, Inc. v. Green* involved an allegation that a majority stockholder breached his fiduciary duty to the minority shareholders by engaging without any legitimate business purpose in a short-form merger that eliminated the minority interests. *See id.* at 467-68. The Court determined that a breach of fiduciary duty, absent any deception or nondisclosure, does not constitute a "manipulative" practice under § 10(b) of the '34 Act, a provision with language similar to § 14(e). *Id.* at 476. *Compare* 15 U.S.C. § 78j(b) (1976) ('34 Act, § 10(b)) *with* 15 U.S.C. § 78n(e) (1976 & Supp. II 1978) ('34 Act, § 14(e)). To establish a federal securities violation, a plaintiff must demonstrate that the defendant artificially affected market activity to deceive investors. *See* 430 U.S. at 476-77. Otherwise, the plaintiff's only recourse is to pursue his breach of fiduciary duty claim under state law. *See id. See generally* Jacobs, *How* Sante Fe *Affects 10b-5's Proscriptions Against Corporate Mismanagement*, 6 SEC. REG. L.J. 3 (1978); Sherard, *Federal Judicial and Regulatory Response to* Sante Fe Industries, Inc. v. Green, 35 WASH. & LEE L. REV. 695 (1978); Note, *Suits for Breach of Fiduciary Duty Under Rule 10b-5 After* Sante Fe Industries, Inc. v. Green, 91 HARV. L. REV. 1874 (1978).

[107] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,281-82.

[108] *See id.* at 92,281.

[109] *See* 14 SEC. REG. & L. REP. (BNA) 49, 50 (6th Cir. 1981). Because the Sixth Circuit in *Mobil* relied exclusively on the manipulation claim in reversing the district court, the appellate panel avoided considering whether Marathon violated the Williams Act disclosure requirements or Ohio law. *See id.* at 50 n.2; 15 U.S.C. § 78n(e) (1976 & Supp. II 1978) ('34 Act, § 14(e)); OHIO REV. CODE ANN. § 1701.96 (Baldwin 1978).

Marathon's interests in the Yates oil field constituted a manipulative act in violation of section 14(e).[110] Because the '34 Act does not define the term "manipulative" in the context of tender offers,[111] the Sixth Circuit looked to the Supreme Court decision in *Sante Fe*[112] to determine whether defendants' activities were among those proscribed by the Williams Act.[113] In *Sante Fe* the Supreme Court described "manipulative" as a term of art in the financial community, referring to practices intended to deceive investors by "artificially affecting" the market price of stock.[114] The Supreme Court listed wash sales,[115] matched orders,[116] and rigged prices[117] as examples of manipulative practices.[118] The Sixth Circuit concluded that the lockup agreement between U.S. Steel and Marathon was as manipulative as any conceivable device in artificially affecting the market for Marathon's shares.[119] The Sixth Circuit held that the lockup device not only manipulated the price but also obstructed the usual market activity of the stock.[120]

In ruling that the lockup agreement between U.S. Steel and Marathon was manipulative, the Sixth Circuit concluded that granting U.S. Steel the contingent option of severing the Yates oil field from Marathon's holdings in the event U.S. Steel lost its bid had the effect of discouraging rival bidders.[121] Because acquisition of Marathon shorn of the Yates oil field could make Marathon a much less attractive target, the court deemed the lockup an artificial ceiling on the value of Marathon's shares.[122] Moreover, U.S. Steel's irrevocable option to pur-

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[110] *See* 14 SEC. REG. & L. REP. (BNA) at 55.

[111] *See id.* at 53.

[112] 430 U.S. 462 (1977). *See* note 106 *supra*.

[113] *See* 14 SEC. REG. & L. REP. (BNA) at 55.

[114] *See* 430 U.S. at 476.

[115] A "wash sale" is a fictitious transaction involving no change in the beneficial ownership of stock, in which the seller does not expect to make nor the buyer to receive delivery of the securities. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 205 n.27 (1979).

[116] "Matched orders" are orders for the transfer of a security that are entered by a party trading with himself or with someone acting in concert with him, knowing that substantially similar orders will be entered by the same or different persons at substantially the same time or price. *See id.*

[117] "Price rigging" denotes the practice of escalating the price of stock or enhancing its quoted value through a series of pretended purchases, intending to create the impression of an unusual demand for the stock. *See* BLACK'S LAW DICTIONARY 1189 (5th ed. 1979).

[118] *See* 430 U.S. at 476.

[119] *See* 14 SEC. REG. & L. REP. (BNA) at 53.

[120] *See id.*

[121] *See id.* at 54. Because the lockup agreement in *Mobil* provided that U.S. Steel could exercise its option on the Yates oil field in the event U.S. Steel lost its takeover bid, the lockup agreement effectively precluded rival bidders from obtaining Marathon intact. *See id.*

[122] *See id.* The Sixth Circuit in *Mobil* reasoned that absent competition over the price of the stock, Marathon shareholders would lose the advantage of a bidding war between rival suitors for the stock. *See id.*

chase a significant block of Marathon shares similarly could deter potential bidders.[123] Hence, the court reasoned that the effect of the management negotiations between U.S. Steel and Marathon was to circumvent the normal market for Marathon shares.[124] The court concluded that by entering into an agreement governing the disposition of Marathon's shares and assets, Marathon's directors deprived the company's shareholders of the choice whether or not to tender their shares to a third party.[125]

The Sixth Circuit rejected the defendants' argument and the district court's conclusion that assuring proper disclosure fulfills the obligations of the Williams Act prohibitions against manipulative tactics.[126] The Sixth Circuit disputed the trial court's reading of *Sante Fe*[127] to mean that once a court determines that proper disclosure has been made the court need not inquire into the fairness of the transaction.[128] The Sixth Circuit cautioned against construing *Sante Fe* to hold that manipulative practices are legal so long as fully disclosed.[129] Given the court's opinion that the lockup agreement foreclosed the possibility of other tender offers, the Sixth Circuit concluded that the lockup provision denied shareholders any choice but to accept the directors' accord whether or not the agreement was disclosed.[130] In reversing the district court, the Sixth Circuit ordered that the U.S. Steel tender offer, without the two

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[123] *See id.* Because U.S. Steel obtained an option on a substantial block of authorized but unissued Marathon Shares which U.S. Steel could exercise at any time in a bidding contest, the Sixth Circuit concluded that the option could deter competing bidders. *See id.* at 114.

[124] *See id.* While not objecting to the district court's finding that the $2.8 billion Marathon would receive for the Yates oil field was a fair price, the Sixth Circuit in *Mobil* noted that evidence was available that the Yates oil field might be worth as much as $3.6 billion. *See id.* Regardless of the actual market value, the Sixth Circuit deemed the open market the only means to determine the value of the Yates oil field. *See id.*

[125] *See id.* at 54-55. The Sixth Circuit in *Mobil* considered mere compliance with the disclosure requirements of the Williams Act an inadequate safeguard for Marathon shareholders. *See id.* at 55. Under the court's analysis, full disclosure of the accomplished fact of the lockup agreement would offer little protection for Marathon shareholders who would have no choice but to accept the completed deal. *See id.* The court's interpretation of § 14(e) favored a broader construction of the provision to preclude target management agreements which have the effect of foreclosing shareholder participation in bidding contests for stock. *See id.*

[126] *See id.* at 55.

[127] 430 U.S. 462 (1977); *see* note 106 *supra.*

[128] *See* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,281-82; note 105 *supra.*

[129] *See* 14 SEC. REG. & L. REP. (BNA) at 55.

[130] *See id.* The Sixth Circuit refused to hold either the Marathon directors or U.S. Steel's management responsible for the alleged manipulation. *Id.* Rather, the court pointed to language in § 14(e) prohibiting manipulation by "any person" in connection with a tender offer to hold that the agreement was illegal regardless of which party was at fault. *See id.*; 15 U.S.C. § 78n(e) (1976 & Supp. II 1978).

option provisions, remain open for a reasonable time and that Marathon allow its shareholders to withdraw any tendered shares.[131]

Although the Sixth Circuit purported to limit its decision to the lockup device employed in *Mobil*,[132] the court's holding could have far reaching effect if extended to lockup agreements generally. Lockup agreements resulting from a genuine bargain between a bidder and a target are not inherently manipulative and should not trigger automatically the antifraud provisions of the Williams Act.[133] The Sixth Circuit's opinion, however, suggests that in bidding contests a bidder may not use a promise of an increased price for target stock to pressure a target into yielding concessions that might make the target stock undesirable to rival bidders.[134] Denying corporate management the opportunity to negotiate the granting of a stock or asset package may have the effect of limiting rather than expanding shareholder choice.[135] By offering assurances as to the disposition of corporate shares or assets, a target may attract more generous bids for target stock.[136]

As the United States District Court for the Southern District of New York noted recently, bargaining to obtain a higher offer coincides with the shareholders' best interest by advancing rather than obstructing the market for the company's stock.[137] The effect of confining bidders to unconditional bids, as the Sixth Circuit in *Mobil* did, may be more likely to discourage than to generate higher bids.[138] Provided negotiations are at arm's length and the price is the product of a genuine bargain, management bartering to obtain a higher price for a company's shares differs little from other commercial transactions.[139] If directors uphold their

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[131] *See* 14 SEC. REG. & L. REP. (BNA) at 55. One member of the Sixth Circuit in *Mobil* dissented on the grounds that Marathon's success in its antitrust case enjoining Mobil's tender offer rendered the lawsuit under the Williams Act moot. *See id.* at 55-56 (Merritt, J., dissenting).

[132] *See id.* at 55.

[133] *See id.* Labelling lockup agreements as inherently manipulative would ignore the United States Supreme Court's restriction of the term manipulative to devices which artificially affect the price of the stock. *See* Sante Fe Indus., Inc. v. Green, 430 U.S. 462, 476 (1977); text accompanying notes 114-18 *supra*. Lockup agreements achieved through substantive negotiations between bidders and targets may represent a genuine measure of the value of the target shares. *See* Bialkin, *supra* note 79, at 19.

[134] *See id.*

[135] *See id.*

[136] *See* Marshall Field & Co. v. Icahn, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,616, at 93,095, 93,061 (S.D.N.Y. 1982); text accompanying notes 146-49 *infra*; Gilson, *supra* note 10, at 869. Generally, an attempt by target management to engage in a defensive merger with a white knight is likely to generate a higher bid by the unfriendly bidder. *See* Fischel, *supra* note 1, at 59. Proposing a stock or asset package may stimulate a bidding war between the rival bidders, with the target shareholders the ultimate beneficiaries. *See id.* at 39.

[138] *See* Bialkin, *supra* note 79, at 19.

[139] *See id.* The nature of target management decisionmaking in response to a takeover differs little from such other important corporate decisions as voting for a major capital ex-

fiduciary duty to the shareholders, good faith negotiations by directors should advance rather than hinder shareholder interests.[140]

In the wake of the *Mobil* decision, two district courts have distinguished the lockup options in *Mobil* from lockup agreements containing binding commitments for transfer of target assets or shares to a friendly third party in the face of a hostile tender offer.[141] The United States District Court for the Northern District of Illinois tacitly approved of *Mobil* but resisted extension of the decision to target agreements to sell a corporate asset outright to a third party.[142] The court agreed with *Mobil* that granting an option to a friendly bidder which is exercisable only if a hostile bidder gains control of the target may affect the market price of the stock.[143] The court, however, held that a sale of a target asset

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penditure or hiring a new chief executive officer. *See* Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 109-18 (1979) [hereinafter cited as Lipton]; Perlmutter, *Shareholders vs. the Corporation*, N.Y. Times, March 9, 1980, § 3, at 18, col. 3. *But see* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1198 n.106 (1981) (distinguishing between target's takeover responses and other management decisions).

[140] *See* Bialkin, *supra* note 79, at 19. State fiduciary law traditionally has been the source of shareholder protections from abuses by corporate management. *See* Nathan, *supra* note 25, at 66; note 195 *infra*. The United States Supreme Court in *Sante Fe Indus., Inc. v. Green* stated that disgruntled shareholders should look for remedies for corporate mismanagement in state fiduciary laws rather than in the federal securities statutes. 430 U.S. 462, 477-78 (1977). *See* note 195 *infra*.

[141] *See* Whittaker Corp. v. Edgar, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,482, at 92,821, 92,832 (N.D. Ill. 1982), *aff'd without opinion*, ____ F.2d ____ (7th Cir. 1982); Marshall Field & Co. v. Icahn [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,616, at 93,059, 93,061 (S.D.N.Y. 1982).

[142] *See* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,482, at 92,832. The lockup agreement which prompted the litigation in *Whittaker Corp. v. Edgar* arose out of attempts by Brunswick Corp. (Brunswick) to fend off a tender offer by Whittaker Corp. (Whittaker). *See id.* at 92,822. On January 6, 1982, Whittaker launched a tender offer for up to 10,400,000 shares of Brunswick common stock and up to $30,000,000 of Brunswick debentures. *See id.* at 92,822-23. Whittaker increased its tender offer on February 10, 1982. *See id.* at 92,825. To undercut the Whittaker tender offer, Brunswick entered into an agreement with American Home Products Corp. (American Home) for American Home to acquire all of the outstanding shares of Brunswick's subsidiary, Sherwood Medical Industries, Inc. (Sherwood). *See id.* at 92,826. American Home agreed to make a tender offer for up to 14,166,666 shares of Brunswick common stock. *See id.* American Home then would redeem 13,772,000 shares of the Brunswick stock for the Sherwood shares. *See id.* American Home commenced its tender offer for Brunswick on February 16, 1982. *See id.*

On February 23, 1982, Whittaker added a request for a preliminary injunction to block the lockup agreement to other litigation already in progress between Whittaker and Brunswick. *See id.* at 92,828. Relying on *Mobil*, Whittaker charged that Brunswick violated § 14(e) of the '34 Act by entering into an illegal lockup agreement with American Home for the disposition of the Sherwood subsidiary. *See id.*; 15 U.S.C. § 78n(e) (1976 & Supp. II 1978) ('34 Act, § 14(e)).

[143] *See id.* at 92,832. In ruling on Whittaker's motion for a preliminary injunction, the district court emphasized that under *Mobil* violation of § 14(e) of the '34 Act through a manipulative lockup device is an appropriate basis for injunctive relief. *See id.* at 92,829.

to a third party does not interfere with the normal market for the stock.[144] Hence, the court denied that an outright sale of a corporate asset by a target confronted with an unfriendly tender offer violates section 14(e) of the '34 Act.[145]

The United States District Court for the Southern District of New York also rejected application of *Mobil* to binding sales of target shares or assets to a third party in the face of a takeover.[146] Because the court considered *Mobil* as deviating from controlling Second Circuit law, however, the court regarded *Mobil* as questionable authority.[147] The court deemed *Mobil* as encroaching on the right of target management to defend target companies against takeover attempts which target management finds detrimental to target shareholders.[148] The court favored granting target management wide discretion, subject to fiduciary standards, to act on behalf of shareholders to resist takeover attempts.[149]

The practice of negotiating multistep acquisitions also has been subject to contest when the resulting takeover agreements have included "standstill" provisions.[150] In a standstill agreement the bidder agrees to

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The court also relied on *Mobil* to hold that Whittaker as a tender offeror had standing to bring the action. *See id.* at 92,832.

[144] *See id.* The *Whittaker* court noted that in *Mobil* Marathon granted U.S. Steel an option on the Yates oil field which could be exercised only if a third party defeated U.S. Steel's takeover bid. *See id.* In *Whittaker*, however, Brunswick proposed the outright sale of its Sherwood subsidiary to American Home. *See id.* Thus, the court concluded that the agreement would not artificially affect the market price for the Whittaker stock. *See id.*

[145] *See id.*; 15 U.S.C. § 78n(e) (1976 & Supp. II 1978) ('34 Act, § 14(e)).

[146] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,616, at 93,061. *Marshall Field & Co. v. Icahn* involved an attempt by Marshall Field & Co. (Marshall Field) to block a group of investors (Icahn) from taking over the company. *See id.* at 93,059-60. Following Icahn's acquisition of substantial shares of Marshall Field, the company entered into a series of agreements with BATUS, Inc. (BATUS) and other potential investors. *See id.* Under a stock purchase agreement with BATUS, Marshall Field proposed to sell BATUS two million shares at the tender offer price of $25.50 per share. *See id.* at 93,060. BATUS later increased its tender price to $30 per share. *See id.* Under another agreement BATUS obtained a right of first refusal for Marshall Field's Chicago Division should the division be sold within one year of termination of a BATUS-Marshall Field merger agreement. *See id.* A third set of agreements committed potential purchasers to acquire Marshall Field shares only with the company's approval. *See id.* In exchange for the commitments, Marshall Field disclosed confidential information to the potential investors on which to base their bids. *See id.*

Icahn charged that the agreements with BATUS and the other potential bidders improperly interfered with the market for Marshall Field shares. *See* [1982 Transfer Binder] FED. SEC. L. REP. ¶ 98,616, at 93,060. Icahn alleged that Marshall Field's activities constituted a manipulative practice in violation of § 14(e) of the '34 Act. *See id.*; 15 U.S.C. § 78n(e) (1976 & Supp. II 1978).

[147] *See* [1982 Transfer Binder] FED. SEC. L. REP. ¶ 98,616, at 93,061.

[148] *See id.* The court in *Marshall Field* indicated that target management is entrusted with authority to oppose acquisitions which it believes in good faith to be contrary to the interests of the shareholders. *See id.*; text accompanying notes 132-40.

[149] *See id.*; note 195 *infra.*

[150] *See* Nathan, *Corporate Stock Repurchases and Stock Issuance in the Context of Un-*

limit its rights in the target stock.[151] The agreements typically restrict the bidder's ability to purchase additional shares in the target company.[152] The purchase limitation may take the form of a compact by a bidder to confine its bid to a friendly tender offer.[153] The target management thus may protect the company from a hostile takeover should the target's directors reject the bidder's proposed tender offer.[154] The standstill agreement also may restrict the bidder's right to buy additional shares following completion of a tender offer.[155] Thus, the standstill may serve to allow the target's directors the opportunity to decide whether additional purchases are in the remaining shareholders' best interest.[156] In addition to the purchase limitation, the standstill agreement also may govern the acquired stock's voting rights[157] or condition the bidder's

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solicited Takeover Bids, in PLI, ELEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 289, 342-43 (A. Fleischer & M. Lipton eds. 1979) (PLI Corporate Law & Practice Course Handbook Series No. 319) [hereinafter cited as *Stock Issuance*]. *See generally* Bialkin, *The Use of Standstill Agreements in Corporate Transactions*, in PLI, THIRTEENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 91 (A. Fleischer, M. Lipton & R. Mundheim eds. 1981) (PLI Corporate Law & Practice Course Handbook Series No. 373) [hereinafter cited as *Standstill Agreements*]; A. FLEISCHER, TENDER OFFERS: DEFENSES, RESPONSES & PLANNING 64-65 (1981 ed.); Freund & Volk, *supra* note 6, at 22-23.

151 *See Standstill Agreements*, *supra* note 150, at 93; *Stock Issuance*, *supra* note 150, at 354-58. Standstill agreements may arise in the context of multistep acquisitions in several circumstances. Before commencing serious takeover discussions, negotiating parties often execute a confidentiality agreement to promote the flow of information about each company to aid in the evaluation process. *See Standstill Agreements*, *supra* note 150, at 94. Confidentiality agreements frequently contain standstill provisions to prevent the bidder from purchasing target shares without target approval. *See id.* at 95. During the first step of negotiating acquisition of a block of target shares, the target company or selling shareholder may convince the bidder to stall its takeover efforts or forego the acquisition attempt and adopt a more passive status as a minority investor. *See Stock Issuance*, *supra* note 150, at 342-43. The standstill agreement also may serve as a means of defeating an unsolicited takeover bid by placing target shares with a more suitable investor under the restriction that the friendly bidder remain a minority shareholder. *See Standstill Agreements*, *supra* note 150, at 96; *Stock Issuance*, *supra* note 150, at 342. In addition to multistep acquisitions, standstill agreements may appear in other contexts. Standstill agreements may restrict a corporation launching a minority investment program of direct investment in other companies to the passive role of minority shareholder. *See Stock Issuance*, *supra* note 150, at 342. Additionally, courts may impose standstill agreements on parties in resolving litigation between a bidder and a target. *See Standstill Agreements*, *supra* note 150, at 102-06.

152 *See Standstill Agreements*, *supra* note 150, at 93; *Stock Issuance*, *supra* note 150, at 354. Standstill agreements usually take the form of a provision included in a stock purchase agreement to restrict the bidder's purchases to a specified percentage of the target's shares unless the target management approves of additional purchases. *See Stock Issuance*, *supra* note 150, at 354.

153 *See* Conoco, Inc. v. Seagram Co. Ltd., 517 F. Supp. 1299, 1301 (S.D.N.Y. 1981) (description of Seagram's agreement to limit itself to friendly bid); text accompanying notes 160-92 *infra*.

154 *See* Freund & Volk, *supra* note 6, at 23.

155 *See id.*

156 *See id.*

157 *See id.*

disposal of any shares on a right of the remaining shareholder's first refusal.[158]

In a case stemming from the largest corporate takeover in United States history,[159] the United States District Court for the Southern District of New York considered the enforceability of a standstill agreement in *Conoco Inc. v. Seagram Co.*[160] Under the agreement, the Seagram Company Ltd. (Seagram) promised to limit its bid for shares of Conoco Inc. (Conoco) to a friendly tender offer.[161] The dispute arose because of Conoco's efforts to resist a takeover bid by Dome Petroleum Ltd. (Dome).[162] In seeking to rebuff Dome's takeover attempt, Conoco turned to other potential bidders in search of a white knight.[163] In the course of negotiations, Seagram proposed what it termed a "friendly" tender offer.[164] Seagram agreed to subject its proposed acquisition of 35 percent of Conoco stock to a standstill agreement that would require Seagram to drop its takeover bid should the negotiations fail.[165] The agreement obligated Seagram to vote the acquired shares only in accord with Conoco's management, to limit its holdings to the 35 percent, and to transfer its shares only with Conoco's approval.[166] Meanwhile, Conoco engaged in negotiations with Cities Service Company (Cities Service) concerning the possibility of a merger.[167] Allegedly relying on the standstill provision limiting Seagram to a friendly takeover offer, Conoco's board of directors decided to reject Seagram's proposal.[168] On the same day that Conoco and Cities Service agreed in principle to merge, Seagram launched a hostile tender offer for up to 40 percent of Conoco's stock.[169] As a result, Cities Service withdrew from negotiations concerning the proposed merger with Conoco.[170]

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[158] *See id.* Providing a right of first refusal on shares purchased under a standstill agreement allows the target to assure itself that the shares will not fall into the hands of an unfriendly purchaser or one that may present antitrust or other difficulties for the target. *See id.* at 21. A bidder that fears losing a bidding contest has a strong incentive to limit the standstill restrictions placed on the shares. *See id.* at 23-24. A bidder failing to complete a takeover may face the unwanted prospect of being unable to sell the shares while remaining confined in the shareholder rights exercisable under the standstill agreement. *See id.*

[159] *See Deals of the Year*, FORTUNE, Jan. 25, 1982, at 36.

[160] 517 F. Supp. 1299, 1303 (S.D.N.Y. 1981).

[161] *See id.*

[162] *See id.* at 1301. On May 6, 1981, Dome Petroleum Ltd. (Dome) began a tender offer for 20% of the common stock of Conoco Inc. (Conoco) with the intent of exchanging the shares for Conoco's majority holdings in Hudson's Bay Oil & Gas Company Ltd. *See id.*

[163] *See id.*

[164] *See id.*

[165] *See id.*

[166] *See* Brill, *Conoco: Great Plays & Errors in the Bar's World Series*, Am. Law., Nov. 1981, at 39, 43.

[167] *See* 517 F. Supp. at 1301.

[168] *See id.*

[169] *See id.* In its initial public tender offer, Seagram proposed to purchase up to 40% of the Conoco common stock for $73 per share. *See id.*

[170] *See id.*

Contending that the standstill agreement should estop Seagram's bid, Conoco requested a preliminary injunction against Seagram's tender offer.[171] Conoco maintained that the directors entered into merger negotiations with Cities Service in reliance on Seagram's agreement not to make an unfriendly offer for Conoco's stock.[172] Conoco contended Seagram's announcement of a hostile tender offer deprived Conoco's shareholders of the benefit of a merger with Cities Service.[173] Conoco also sought to enforce the restrictive provisions of the standstill agreement to limit Seagram's acquisitions of Conoco stock.[174]

Disputing Conoco's charges, Seagram asserted that the standstill provisions applied only during the period of merger negotiations with Conoco.[175] When Conoco broke off the negotiations, Seagram argued it no longer was obligated to abide by the friendly takeover limitation.[176] Moreover, Seagram submitted that in agreeing to the standstill provisions, Seagram relied on Conoco's good faith in the negotiations.[177] Seagram claimed that Conoco acted in bad faith by concealing the simultaneous negotiations with Cities Service, and hence, Conoco lacked the clean hands necessary to merit equitable relief.[178] Conoco responded that Seagram was aware Conoco was engaged in other takeover negotiations, although Seagram did not know with whom.[179]

An essential element of any claim for injunctive relief is proof that the party seeking the injunction will be injured irreparably if the relief is denied.[180] In its *Conoco* opinion, the district court focused its attention on Conoco's failure to establish irreparable harm.[181] Although Seagram's hostile bid arguably deprived Conoco shareholders of the Cities Service deal, Conoco quickly became the subject of a more generous tender offer by E. I. du Pont de Nemours & Co. (Du Pont)[182] and an escalated offer by

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[171] *See id.* at 1300.
[172] *See id.* at 1301.
[173] *See id.*
[174] *See id.*
[175] *See id.*
[176] *See id.* at 1302.
[177] *See id.*
[178] *See id.*
[179] *See id.*
[180] *See id. See also* Union Carbide Agric. Prods. Co. v. Costle, 632 F.2d 1014, 1017 (2d Cir.), *cert. denied*, 450 U.S. 996 (1981); Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979); Seaboard World Airlines, Inc. v. Tiger Int'l Inc., 600 F.2d 355, 359 (2d Cir. 1979).
[181] *See* 517 F. Supp. at 1302-04. Because the district court in *Conoco* based its decision on the irreparable injury component of its preliminary injunction claim, the court avoided addressing Conoco's probability of success on the merits. *See id.* at 1302-03.
[182] *See id.* On July 5, 1981, E. I. du Pont de Nemours & Co. (Du Pont) made a tender offer to purchase up to 100% of Conoco's stock. *See id.* at 1300. Under the offer, Du Pont offered to buy 40% of Conoco's shares at $87.50 per share and exchange 1.6 Du Pont shares for each share of the balance of Conoco stock. *See id.* Du Pont later increased its offer to $95 per Conoco share and proposed an exchange of 1.7 Du Pont shares for each of the remaining Conoco shares. *See id.* at 1303 n.3.

Seagram.[183] The court rejected Conoco's contention that Seagram's hostile bid endangered Du Pont's tender offer,[184] stating that the argument amounted to a claim that Conoco's directors simply preferred Du Pont's offer.[185]

In discussing the Conoco directors' right to enter into the standstill agreement with Seagram, the court subtly shifted focus from the irreparable injury issue to the broader policy question whether directors or shareholders should determine which tender offer to accept.[186] The court reasoned that although directors are obligated to apply their best business judgment in responding to a takeover attempt, their opinion is not binding on the shareholders.[187] The court stated that the ultimate decision whether to accept Seagram's or Du Pont's tender offer rested with the shareholders, not management.[188] Even without relying on Seagram's charge that Conoco dealt in bad faith, the court disregarded Conoco's estoppel claim because enforcing the standstill agreement would have deprived Conoco shareholders of an alternative to Du Pont's bid.[189] Furthermore, after rejecting Conoco's irreparable injury claim, the court denied Conoco's likelihood of success on the merits.[190] The court believed that the factual controversy over Conoco's good faith prevented Conoco from succeeding in its proof that the Seagram tender offer precluded its proposed merger with Cities Service.[191] The court held that the balance of equities tipped in favor of the Conoco shareholders, whom the court determined should not be denied the option of accepting alternatives to Du Pont's tender offer.[192]

In its broadest terms, *Conoco* represents the policy determination that corporate directors should not be allowed to contract away the right of shareholders to consider takeover bids that target management opposes.[193] *Conoco* implies that target management may never exercise

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[183] *See id.* at 1303. In a second tender offer in *Conoco*, Seagram upgraded its initial offer of $73 per Conoco share to $85 per share of Conoco common. *See id.*

[184] *See id.* at 1302-03. In *Conoco*, Conoco based its argument that Seagram's hostile tender offer threatened the Du Pont deal on the fear that Seagram's bid might preclude the availability of the minimum 51% of Conoco stock upon which Du Pont conditioned its offer. *See id.*

[185] *See id.*

[186] *See id.*

[187] *See id.*; note 195 *infra.*

[188] *See* 517 F. Supp. at 1302-03. *See also* American Crystal Sugar Co. v. Cuban-American Sugar Co., 276 F. Supp. 45, 50 (S.D.N.Y. 1967).

[189] *See* 517 F. Supp. at 1303. *See also* Armour & Co. v. General Host Corp., 296 F. Supp. 470, 475 (S.D.N.Y. 1969).

[190] *See* 517 F. Supp. at 1304.

[191] *See id.*

[192] *See id.*

[193] Most forms of corporate acquisitions, including statutory mergers and sales of corporate assets, involve an initial decision by the board of directors whether to proceed with the deal. *See* Perlmutter, *supra* note 139, at 18. To the extent that responses to a takeover

its business judgment to secure a standstill agreement committing a potential bidder not to launch a tender offer, even when the board of directors has concluded that a hostile tender offer would adversely affect the shareholder's best interests.[194] The court's opinion, however, offers little to support placing tighter restrictions on the directors' ability to enter into contracts on behalf of the company than are already embodied in management's fiduciary obligations under state law.[195] Anyone entering the securities market entrusts corporate leadership with the duty to make decisions that in its best business judgment[196] will enhance the profitability of the company's stock.[197] So long as the directors' fidelity to the shareholders remains steadfast, management should remain free to represent investors in corporate negotiations.[198]

The greater scrutiny courts have applied in examining multistep acquisition techniques ultimately focuses on whether protection of shareholders confronted with a takeover attempt should derive from federal or state law, and more fundamentally, whether shareholders or directors should determine the proper response to a bidder's acquisition efforts. The Williams Act provisions should continue to provide shareholder protection in the form of full and fair disclosure.[199] Because

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attempt differ only in form rather than substance from other corporate decisions, target directors should be free to enter into standstill agreements. *See id.*; note 139 *supra.* Moreover, the decision to enter into a standstill agreement differs little from other target defensive tactics in which the shareholder is entitled to little or no voice. *See* Fischel, *supra* note 1, at 42.

[194] Letter from Russell H. Beatie, Jr., of Dewey, Ballantine, Bushby, Palmer & Wood, counsel for Conoco, to Judge Edward Weinfeld (July 15, 1981) at 4 (on file with the United States District Court for the Southern District of New York).

[195] A target's decision whether to engage in a particular defensive tactic to thwart a hostile bidder is subject to the same state fiduciary standards imposed on corporate directors in other management decisions. *See* Bialkin, *supra* note 79, at 27. While directors are obligated to uphold strict fiduciary standards, management decisions are entitled to deference under the business judgment rule. *See* Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholder's Welfare,* 36 BUS. LAW. 1733, 1745 (1981). The basic theory supporting the business judgment rule is that corporate directors, not courts, are in the best position to make business decisions that enhance shareholder interests. *See id.* To avoid second-guessing management, courts apply a presumption in favor of management's business decisions. *See id.* A party challenging management's choice of a defensive tactic has the burden of proving that the target directors acted in bad faith or served their own interests in the transaction. *See* Treadway Cos., Inc. v. Care Corp., 638 F.2d 357, 381 (2d Cir. 1980). *See generally* Lipton, *supra* note 139; Lipton, *Takeover Bids in the Target's Boardroom: An Update After One Year,* 36 BUS. LAW. 1017 (1981); Note, *Tender Offers: Standing to Sue, Prohibited Practices, Reliance on Non-Tenderer,* 37 WASH. & LEE L. REV. 930, 939 n.73 (1980).

[196] *See* note 195 *supra.*

[197] Given their access to corporate information and generally superior business experience, target directors are usually in a much better position to assess the merits of an acquisition attempt than are ordinary shareholders. *See* Perlmutter, *supra* note 139, at 18.

[198] *See* note 193 *supra.*

[199] *See* text accompanying notes 23-35 *supra.*

the current bifurcated disclosure provisions adequately protect investors, federal courts should resist attempts by creeping tender offer proponents to extend tender offer requirements to open market and privately negotiated transactions.[200] While federal securities laws assure proper disclosure of acquisition attempts, state fiduciary standards should constitute the primary source of substantive takeover safeguards.[201] When confronted with a hostile tender offer, target management should be free to attract more favorable bids by negotiating agreements designed to lock up the target's acquisition by a preferred bidder.[202] Similarly, federal securities laws should not restrict target management's ability to enter into standstill agreements limiting a bidder's rights in the target stock if management concludes the takeover attempt would be detrimental to the target shareholders.[203] Provided target management upholds its fiduciary obligations, shareholders should entrust target directors with the authority to act on their behalf in furthering the best interests of the company.[204]

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[200] *See* notes 37-72 *supra*.
[201] *See* note 195 *supra*.
[202] *See* notes 83-140 *supra*.
[203] *See* notes 159-92 *supra*.
[204] *See* text accompanying notes 196-98 *supra*.