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Iv. The Tender Offer - A Developing Concept

imposition of extensive liability upon defendants but could lead to such liability without directly confronting the prospect of liquidating the corporate defendant to pay judgment creditors.[37]

IV. THE TENDER OFFER — A DEVELOPING CONCEPT

When Congress passed the Williams Act[1] amendments to the Securities Exchange Act the tender offer was for the first time subjected to federal regulation under the securities laws.[2] Although the term "tender offer" has a meaning based on generally understood custom and usage,[3] Congress did not define the term within the Act,[4] appar-

culpability requisite for liability under Rule 10b-5. *See* text accompanying notes 12-13 at 752-53.

[37] The recent Second Circuit decision in Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 516 F.2d 172 (2d Cir. 1975), indicates that one court has perhaps reached this point under the tender offer anti-fraud provisions of the Securities Exchange Act. Damages of $25,793,365 and prejudgement interest amounting to $10,000,000 were awarded Chris-Craft. Bangor-Punta Corporation, one of the defendants in the case with sufficient assets to pay the award, has claimed that the award and interest amount to 37% of shareholder equity and 52% of working capital. A rehearing en banc was denied by the Second Circuit, 516 F.2d at 172, and the Supreme Court will be petitioned to grant certiorari. Petitioner's Brief for Certiorari, Bangor Punta Corp. v. Chris-Craft Indus., Inc. (undocketed).

[1] Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454, *amending* 15 U.S.C. §§ 78m-n (1964) (codified at 15 U.S.C. §§ 78m(d)-(e), n(d)-(f) (Supp. V, 1965-69)), *as amended*, 15 U.S.C. §§ 78m(d)-(e), n(d)-(f) (1970).

[2] During the 1960's the cash tender offer became a popular means of acquiring control of a corporation. One of the prime advantages of the tender offer was the absence of federal controls which regulated other means of gaining corporate control such as proxy contests, Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970); SEC Reg. 14A, 17 C.F.R. §§ 240.14a-1 to 103 (1974), and exchange offers, Securities Act of 1933 §§ 5-8, 10, 15 U.S.C. §§ 77e-h, j (1970). *See generally* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 64-76 (1973) [hereinafter cited as ARANOW & EINHORN]; Fleisher & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 317-21 (1967); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1253-54 (1973) [hereinafter cited as *The Developing Meaning of "Tender Offer"*].

[3] Traditionally "tender offer" has meant a public offer by an individual or group to purchase a specified number of a class or classes of securities of a public corporation. *See, e.g.*, ARANOW & EINHORN, *supra* note 2, at 69-70; R. JENNINGS & H. MARSH, SECURITIES REGULATION 936-37 (3d ed. 1972); Note, *Cash Tender Offers*, 83 HARV. L. REV. 377, 377-78 (1969). The offer remains open for a stated period of time and the specified price remains constant, usually 10 - 20% above the current market price. *See, e.g.*, Hayes & Taussig, *Tactics of Cash Takeover Bids*, HARV. BUS. REV. Mar-Apr. 1967 at 135; Comment, *Tender Offers: An Analysis of the Early Development of Standing to Sue Under Section 14(e)*, 5 TEX. TECH L. REV. 779, 783 (1974). The obligation of the offeror to

ently to "prserve the flexibility of both the Commission and the courts in making a determination on a case-by-case basis."[5] While most decisions have adhered to the traditional meaning in applying the provisions of the Williams Act,[6] several cases decided in 1974 indicated a willingness to apply a more flexible definition of "tender offer."[7]

The open market purchase of shares of a corporation has not traditionally been considered a tender offer.[8] No public offer to purchase

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purchase is usually contingent upon a tendering of the requisite number of shares, and if more than enough shares are tendered the offeror must accept the tenders on a pro rata basis. Exchange Act § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1970). *See also* ARANOW & EINHORN, *supra* note 2, at 48-50.

The American Law Institute has proposed a narrow definition of "tender request" generally following the traditional definition:

> Sec. 299.9 [*Tender request*] (a) [*General*] "Tender request" means an offer to buy a security, or a solicitation of an offer to sell a security, that is directed to more than thirty-five persons, unless it (1) is incidental to the execution of a buy order by a broker or dealer in a trading transaction [or a transaction by or for the account or benefit of the issuer] and (2) satisfies any additional conditions that the Commission imposes by rule.

ALI FED. SEC. CODE § 299.9(a) (Apr. 1972 Draft). In Comment 2 to § 299.9(a) the Drafters point out that while the tender request and the traditional tender offer are the same device, "tender request" is a more appropriate term since the offeror is requesting the shareholders to tender their shares to him.

[4] 15 U.S.C. § 78n(d) (1970).

[5] ARANOW & EINHORN, *supra* note 2, at 70.

[6] *See, e.g.*, Gulf & Western Indus. v. Great Atl. & Pac. Tea Co., 356 F. Supp. 1066, 1074 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973) (market purchases, even though made in anticipation of a tender offer do not constitute part of the tender offer); D-Z Inv. Co. v. Holloway, CCH FED. SEC. L. REP. ¶ 94,771 (S.D.N.Y. Aug. 23, 1974) (activities involved do not constitute a conventional tender offer and there is no authority for extending traditional definition).

[7] Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974) (tender offer is to apply to cases where there is a danger the investor might be misled); Loews Corp. v. Accident & Cas. Ins. Co., Civ. No. 74 C 1396 (N.D. Ill. July 11, 1974) (certain activities may constitute a tender offer to the extent they go beyond "anything other than open market purchases"); ICM Realty v. Cabot, Cabot & Forbes Land Trust, [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,585 (S.D.N.Y. June 6, 1974) (statements made in anticipation of tender offer constitute part of the tender offer); Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,455 (N.D. Ill. July 13, 1973) (meaning of tender offer should extend to all purchases pressuring the investor into a hasty, uninformed decision to sell).

[8] *See, e.g.*, Water & Wall Associates, Inc. v. American Consumer Indus., Inc., [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,943 (D.N.J. Apr. 19, 1973); Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F. Supp. 1066 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973). *See* ALI FED. SEC. CODE § 299.9 (Apr. 1972 Draft) (Comment).

is made, no deadline for tender is required, and the offeror retains no option to abrogate the purchase once made. This threefold aspect of the traditional tender offer was reaffirmed by the Southern District of New York in *D-Z Investment Co. v. Holloway*.[9] In April 1974, D-Z Investment Co. began buying shares of NJB Prime Investors on the open market in an attempt to gain control of NJB, and subsequently purchased a large number of NJB shares by means of four privately negotiated transactions. D-Z sought an injunction against certain defensive activities of NJB and NJB counterclaimed, alleging *inter alia* that the activities of D-Z constituted a tender offer under the Williams Act and that the failure of D-Z to file the statements required by Rules 14d-1 and 14d-4[10] constituted violations of § 14(d) and § 14(e) of the Exchange Act. While the court recognized the expanding scope of the term "tender offer,"[11] it stated unequivocally that the challenged purchases contained none of the characteristics of a conventional tender offer and that no judicial authority existed in the Second Circuit to extend the term beyond its normal meaning.[12]

In contrast to the court's orthodox definition of tender offer in *D-Z Investment*, language in other cases evidences a willingness to expand the traditional definition under appropriate circumstances.[13] Some courts have become increasingly cognizant of the impact on the individual shareholder of major stock acquisitions and large block purchases and have endeavored to protect the shareholder from pressures which might precipitate a hurried and ill-advised disposition of his holdings.[14] The court in *Nachman Corp. v. Halfred, Inc.*[15] stated

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[9] CCH FED. SEC. L. REP. ¶ 94,771 (S.D.N.Y. Aug. 23, 1974).

[10] Rule 14d-1, 17 C.F.R. § 240.14d-1 (1974), requires the filing by the offeror of Schedule 13D, 17 C.F.R. § 240.13d-101 (1974), if after consummation of the tender offer the offeror would be the beneficial owner of more than 5% of the class of security solicited. Rule 14d-4, 17 C.F.R. § 240.14d-4 (1974). This schedule requires information including the class of security solicited and the identity and background of the offeror.

[11] CCH FED. SEC. L. REP. ¶ 94,771, at 96,562-63.

[12] *Id.* at 96,562.

[13] *See, e.g.*, Smallwood v. Pearl Brewing Co., 489 F.2d 579, 598 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248, *vacated per stipulation*, Civ. No. 72-152 (W.D. Okla. May 8, 1972).

[14] *See, e.g.*, Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248, *vacated per stipulation*, Civ. No. 72-152 (W.D. Okla. May 8, 1972). The court in *Cattlemen's Investment* held that a coordinated series of purchases from several large shareholders was a tender offer under § 14(d). Although recognizing that such a series of transactions would not be considered a tender offer within the conventional definition, the court reasoned that they created the same type of pressures on the investor that Congress attempted to alleviate by § 14(d) of the Williams Act. *Id.* at 1251-52. *See also*

that the definition of tender offer "should extend beyond its conventional meaning to offers likely to pressure shareholders into making uninformed, ill-considered decisions to sell."[16] In the *Nachman* case, Halfred purchased a thirty percent block of Nachman stock from Tech Tape, Inc.[17] In an attempt to gain a voice in management, Halfred made both open market purchases, and privately negotiated purchases from holders of large blocks of Nachman stock. Nachman sought a preliminary injunction alleging that Halfred's actions constituted a tender offer and that he failed to comply with the requirements of the Williams Act. While recognizing the need for a flexible definition of the term tender offer, the court reasoned that the shareholders contacted by Halfred were "presumed to be powerful enough not to be pressured . . . into making uninformed, ill-considered decisions to sell."[18]

Although the courts in neither of these cases concluded that the challenged activities constituted a tender offer, the decisions illustrate the current judicial inclination, in defining tender offer, to supplement the traditional analysis of the offeror's activity[19] with an analysis of the coercive effect the activity has on the individual investor.[20] In both *Nachman* and *D-Z Investment* the court focused on the

The Development Meaning of "Tender Offer," supra note 2. The author suggests extension of the term tender offer to encompass all situations which create investor pressure to make a hurried decision to buy or sell similar to that found in the conventional tender offer.

[15] [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,455 (N.D. Ill. July 13, 1973).

[16] *Id.* at 95,590.

[17] *Id.*

[18] *Id.* at 95,592. *See also* ALI FED. SEC. CODE § 299.9 (Apr. 1972 Draft) (Comment). The drafters suggest that the Williams Act was not designed to cover transactions involving a few controlling shareholders.

[19] *See* note 3 *supra.*

[20] *See* Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974). That case involved a merger of two corporations. The plaintiff, a shareholder of the acquired corporation, alleged that a letter from the surviving corporation to the merging corporation's shareholders constituted a tender offer. However, the defendant contended that a tender offer required hostility between the offeror and the target company. Judge Wisdom, speaking for the court, stated that although the primary practice Congress sought to regulate was the corporate takeover, the aim of the Williams Act was to protect the investor. Judge Wisdom reasoned that investors would require greater protection when management of the target company and management of the offeror company "are on the same side of the fence," as in this case. *Id.* at 598. In conclusion, Judge Wisdom indicated that the term tender offer should be developed on a case-by-case basis with the basic investor protection purposes of the securities laws in mind. *Id.*

specific facts and the sophistication of the investors involved. In *Nachman* the investors were large shareholders or directors of the target corporation. Although the tactics used by Halfred may have intimidated some investors, the court reasoned that because of their power and position the investors involved in *Nachman* were not susceptible to such pressures.[21] In *D-Z Investment* the court declined to extend the conventional definition of tender offer, but emphasized that even under the expanded definition the private transactions involved "financial institutions" and "sophisticated persons" who were able to fend for themselves.[22]

While no court has held an open market purchase to be subject to the tender offer provisions of the Exchange Act, the "investor pressure" theory used by the court in *Nachman* may, if widely adopted, subject open market purchases as well as privately negotiated purchases to the filing requirements of § 14(d) and the antifraud provisions of § 14(e).[23] The ordinary market purchase does not involve the pressure of the traditional tender offer. However, if a purchase is preceded by publicity, or investors are notified in advance of a large purchase, the pressure on the shareholder to make a hurried decision may be sufficient to regard such a transaction as a tender offer under the "investor pressure" formula.[24] Similarly, when large private purchases are accompanied by publicity, the coercive impact on the individual shareholder may be strong enough to bring the activity within the "investor pressure" definition. Although not universally accepted, the growing tendency of the courts to apply the "investor pressure" formula could extend the tender offer filing requirements to many activities not heretofore considered tender offers.[25]

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[21] [1973-1974 Transfer Binder] CCH. FED. SEC. L. REP. ¶ 94,455, at 95,592 (N.D. Ill. July 13, 1973).

[22] CCH FED. SEC. L. REP. ¶ 94,771, at 96,563 (S.D.N.Y. Aug. 23, 1974).

[23] In LSL Corp., [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,715 (SEC Staff Reply Jan. 8, 1974), the Division of Corporate Finance refused to express an opinion about whether LSL's intent to increase its holding of Progressive National Corp. from 30% to 51% through open market purchases and private negotiations would constitute a tender offer. The staff was apparently leaving open the possibility that open market purchases might be considered a tender offer if combined with other systematic acquisitions of stock.

[24] *See The Developing Meaning of "Tender Offer," supra* note 2, at 1279.

[25] The Commission has recently undertaken a study to determine whether it should define tender offer; and, if so, whether the definition should include: (a) open market purchases; (b) offers or invitations to a limited number of persons; (c) privately negotiated transactions. SEC Securities Exchange Act Release No. 11003 (Sept. 9, 1974).