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V. Injunctions And Damages Under The' Williams Act-Defensive Mechanisms, Punitive Sanctions, Remedial Devices

V. INJUNCTIONS AND DAMAGES UNDER THE WILLIAMS ACT—DEFENSIVE MECHANISMS, PUNITIVE SANCTIONS, REMEDIAL DEVICES

A. *Purpose of Relief*

Faced with the rapidly expanding use of the tender offer to effect corporate takeovers, Congress passed the Williams Act amendment to the Securities Exchange Act of 1934.[1] The purpose of the Act, consistent with the federal securities laws generally, was the protection of the investing public.[2] In the tender offer situation the specific investors the Act seeks to protect are the small shareholders of target companies who are often caught between tendering their shares at a premium price, or retaining their shares with the hope of future profits.[3] The Act provides for the disclosure of information which will enable the investor to make an intelligent decision whether to sell to the offeror, or to retain his shares.[4]

Because Congress did not provide any remedial sanctions in the Williams Act, the courts have been forced to take the initiative in fashioning remedies. The administrative convenience and availability of the injunction[5] have made it the pro forma relief granted by the courts for any violation of the Act.[6] The temporary injunction is

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

[2] *See* S. REP. No. 550, 90th Cong., 1st Sess. 4 (1967). *See also* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 9-10 (1971).

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

[4] The Williams Act added to the Exchange Act certain provisions designed to protect the investor. These include: (1) a required filing by the offeror of certain information with the SEC, Exchange Act § 14(d), 15 U.S.C. § 78n(d)(1) (1970), as prescribed in Schedule 13D, 17 C.F.R. § 240.13d-101 (1973); (2) basic antifraud provisions, Exchange Act § 14(e), 15 U.S.C. § 78n(e) (1970); (3) a requirement of the disclosure of certain information to accompany the offer itself, Exchange Act § 13(d), 15 U.S.C. § 78m(d)(1) (1970); and (4) a restriction on repurchases of securities by the issuer, Exchange Act § 13(e), 15 U.S.C. § 78m(e) (1970).

[5] *See generally* Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462, 555-66 (1969).

[6] *Compare* Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969) (evidencing early hesitance to grant injunction because of fear of upsetting balance between target and offeror) *with* Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973) (illustrating position taken in more recent decisions that injunctive relief is the only method of insuring fairness). *See also* Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. REV. 991, 1007-11 (1973) [hereinafter cited as *The Courts and the Williams Act*].

granted ostensibly to maintain the status quo pending a decision on the merits,[7] while the permanent injunction is issued to prevent future violations[8] or irreparable harm.[9] Although many forms of equitable relief have been awarded[10] the remedy of damages has been largely ignored.[11]

The Williams Act was passed to protect investors, but it has been invoked most frequently by either the incumbent management or the offeror.[12] Unfortunately, the courts have often granted relief without considering what remedy would best serve the interest of the shareholders with the result that in many instances the stockholders have been injured more by the issuance of an injunction than they would have been by a takeover battle.[13] Several recent decisions, however, indicate a growing awareness of the purpose of the Williams Act and an attempt to fashion remedies which protect the investing public without favoring either target management or the offeror.[14]

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[7] *See, e.g.*, Checkers Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); Graphic Sciences, Inc. v. International Mogul Mines Ltd., CCH FED. SEC. L. REP. ¶ 94,834 (D.D.C. Oct. 21, 1974).

[8] *See, e.g.*, Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011 (7th Cir.), *cert. granted*, ___ U.S. ___, 43 U.S.L.W. 3348 (1974).

[9] *See, e.g.*, Bath Indus., Inc. v. Blot, 427 F.2d 97, 113 (7th Cir. 1970).

[10] *See, e.g.*, Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973) (rescission, tendering shareholders given opportunity to withdraw tendered shares); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 947 (2d Cir. 1969) (suggested alternative types of relief).

[11] In Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969), Judge Friendly cited the attributes of the preliminary injunction:

> [T]he application for a preliminary injunction is the time when relief can best be given. . . .[D]istrict judges would do well to ponder whether, if a violation has been sufficiently proved on an application for a temporary injunction, the opportunity for doing equity is not considerably better then than it will be later on. The court will have a variety of tools usable at that stage.

Id. at 947 (citation omitted).

[12] *See, e.g.*, GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

[13] An injunction that destroys a tender offer also destroys any opportunity for shareholders to tender their stock at a price substantially above market value. *See The Courts and the Williams Act, supra* note 6, at 1008-09 n.111.

[14] *See, e.g.*, Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); Tri-State Motor Transit Co. v. National City Lines, 505 F.2d 735 (8th Cir. 1974); Cambridge Fund, Inc. v. Tweedy, [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,380 (S.D.N.Y. Jan. 24, 1974); Graphic Sciences Inc. v. International Mogul Mines Ltd., CCH FED. SEC. L. REP. ¶ 94,834 (D.D.C. Oct. 21, 1974). *But see,* Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011 (7th Cir.), *cert. granted*, ___ U.S. ___, 43 U.S.L.W. 3348 (1974).

B. *The Preliminary Injunction: The Decline of the Defensive Injunction*

The tender offer is a sensitive mechanism to effect corporate takeovers, and much of its success depends on surprise and precise timing. As a defensive tactic, the incumbent management of a target company often seeks an injunction[15] on several alternative grounds in an attempt to thwart the success of the tender offer by suspending or delaying its consummation.[16] By providing for a preliminary injunction pending final adjudication of the case, which is usually a lengthy process, § 16 of the Clayton Act[17] provides an especially attractive device for target managements seeking to preserve their positions.[18] Further, courts have willingly granted preliminary injunctive

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[15] *See, e.g.*, Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 207 (2d Cir. 1973) (familiar tactic by the target company is to seek an injunction in an effort to kill tender offer).

[16] The allegations of target companies seeking defensive injunctions have not been limited to asserted violations of the securities laws, but have covered a multitude of potential violations resulting from the takeover. *See, e.g.*, Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973) (target alleged antitrust law violations); B.F. Goodrich Co. v. Northwest Indus., Inc., 424 F.2d 1349 (3d Cir. 1970) (target alleged Interstate Commerce Act violations); General Host Corp. v. Triumph Am., Inc., 359 F. Supp. 749 (S.D.N.Y. 1973) (target alleged potential violations of the securities laws, the Shipping Act, and the Communications Act); United Gas Corp. v. Pennzoil Co., 248 F. Supp. 449 (S.D.N.Y.), *aff'd per curiam*, 354 F.2d 1002 (2d Cir. 1965) (target alleged potential violation of Public Utility Holding Company Act). *See also*, E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 266-68 (1973) [hereinafter cited as ARANOW & EINHORN]; Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 HARV. BUS. REV. 135, 146 (Mar.-Apr. 1967); Schmults & Kelly, *Cash Takeover Bids — Defense Tactics*, 23 BUS. LAW. 115, 129 (1967); Comment, *Target Company Defensive Tactics Under Section 7 of the Clayton Act*, 4 CONN. L. REV. 352 (1971); *The Courts and the Williams Act, supra* note 6, at 1010 & n.118.

[17] Clayton Act § 16, 15 U.S.C. § 26 (1970).

[18] Judge Friendly in *Missouri Portland* stated:

> This appeal illustrates the growing practice of companies that have become the target of tender offers to seek shelter under § 7 of the Clayton Act . . . . Drawing Excalibur from a scabbard . . . the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if . . . it should be determined that no antitrust violation has been shown.

Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 854 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974) (citation omitted). In contrast, the district court judge in this case indicated that the only harm an injunction would work on the offeror was the cost of "processing a new tender offer." Missouri Portland Cement Co. v. Cargill, Inc., 375 F. Supp. 249, 258 (S.D.N.Y. 1974).

relief to target companies on showings which have not met the requisite equitable standards of probable success on the merits and irreparable injury to the moving party if the injunction were denied.[19] Because the success of its action often depends not on the merits of its claim at trial, but merely on obtaining the preliminary injunction, thus delaying the tender offer, the technique is decidedly favorable to the target management. Even if the offeror is vindicated at trial, the delay and expense will usually have destroyed the tender offer.[20]

The case of *Missouri Portland Cement Co. v. Cargill, Inc.*[21] presented such an attempted use of the preliminary injunction to defeat a tender offer. On December 19, 1973, Cargill, Inc. announced a cash tender offer to purchase all outstanding common stock of Missouri Portland Cement Co. at approximately twenty-five percent above market price. On December 21, Missouri Portland sought an injunction to halt the tender offer alleging that, if consummated, the takeover would result in a violation of § 7 of the Clayton Act,[22] and that the offer itself violated § 14(d) and § 14(e) of the Exchange Act.[23] The district court[24] enjoined the tender offer, citing "serious antitrust issues the resolution of which necessitates further investigation," and the "irreparable harm caused by the disruptive effect [of the tender offer] on Company morale."[25] While recognizing that the preliminary injunction may be the most expedient means of avoiding irreparable

[19] A plea for a preliminary injunction has traditionally required a showing of probability of success on the merits and potential irreparable injury. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959). In recent cases, however, courts have applied a lower standard requiring only a tipping of the balance of hardships in favor of the moving party and a serious question going to the merits. *See, e.g.*, Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 692-93 (2d Cir. 1973); Checkers Motor Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953); Kaufman v. Lawrence, CCH FED. SEC. L. REP. ¶ 94,908 (S.D.N.Y. Dec. 5, 1974).

[20] *See, e.g., The Courts and the Williams Act, supra* note 6, at 1007-08.

[21] Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

[22] Clayton Act § 7, 15 U.S.C. § 18 (1970).

[23] Securities Exchange Act of 1934 §§ 14(d)-(e), 15 U.S.C. §§ 78n(d)-(e) (1970).

Missouri Portland alleged *inter alia* that Cargill's acquisition of Missouri Portland would create a violation of the antitrust laws and that by failing to advise investors of this potential violation Cargill had not properly disclosed all necessary data required by the securities laws. 498 F.2d at 855, 871-73. *See* Gulf & Western Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973), for a case illustrative of the use of the antitrust laws as a defensive mechanism of target companies.

[24] Missouri Portland Cement Co. v. Cargill, Inc., 375 F. Supp. 249 (S.D.N.Y.), *rev'd in part*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

[25] 375 F. Supp. at 263.

injury in some instances, the Second Circuit rejected the finding of the district court that Missouri Portland made a showing of such harm[26] and held that granting the preliminary injunction under less than traditional equitable standards was improper.[27]

The Second Circuit first analyzed the antitrust claim, concluding that "the plaintiff here was a long way from demonstrating the probability of success ordinarily required to warrant preliminary injunctive relief."[28] Then Judge Friendly, speaking for the court, noted that the interests of Missouri Portland, as a corporate entity, and those of its shareholders, were distinguishable from those of the incumbent management of Missouri Portland.[29] The court concluded that the interests of the former group would likely be enhanced rather than harmed by the takeover.[30] Therefore, the injunction was not justified either on the basis of probably success on the merits or because irreparable injury would otherwise result.[31] Finally, in balancing the hardships between Cargill, Inc. and Missouri Portland, the district court has stated that the injunction would merely delay the tender offer.[32] The circuit court, however, noted that past experience demonstrated that a temporary injunction granted under the antitrust laws was almost always fatal to the success of a tender offer.[33]

The Second Circuit's opinion in *Missouri Portland* is promising evidence that courts may be more willing to examine the realities of a tender offer situation when determining the appropriateness of injunctive relief. Although *Missouri Portland* dealt with an antitrust injunction, recognition that the interests of the corporation and its stockholders are distinguishable from incumbent management's interest in preserving its position will likely subject the claims of target companies seeking defensive injunctions in the future to close scru-

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[26] 498 F.2d 851 (2d Cir.), *cert denied*, 419 U.S. 883 (1974).

[27] 498 F.2d at 870. *See* note 19 *supra* for a discussion of preliminary relief standards.

[28] 498 F.2d at 866.

[29] *Id.* at 867. Judge Friendly perceived the loss of position which would befall the incumbent management upon a successful takeover as not necessarily being harmful to the corporation.

[30] The court indicated that in all likelihood the competitive position of the corporation would be enhanced by the takeover. *Id.*

[31] *Id.* at 870.

[32] 375 F. Supp. at 258.

[33] 498 F.2d at 870 & n.38. *See also* Armour & Co. v. General Host Corp., 296 F. Supp. 470, 473-75 (S.D.N.Y. 1969); ARANOW & EINHORN, *supra* note 16, at 266; Comment, *Target Company Defensive Tactics Under Section 7 of the Clayton Act*, 4 CONN. L. REV. 352, 387-88 (1971); *The Courts and The Williams Act*, *supra* note 6, at 1016.

tiny.[34] The target will be required to show potential damage or violations in fact, rather than bald allegations, if future decisions follow Judge Friendly's example. Finally, although the court did not explicitly reject the relaxed standard for granting a preliminary injunction in all cases,[35] the fact that it held Missouri Portland to the traditional standard of probability of success on the merits and irreparable injury[36] may lead other courts to refuse injunctive relief as a matter of course.

C. *The Permanent Injunction: The Expansive Remedial Injunction*

Unlike the preliminary injunction, which is designed to maintain the status quo until litigation resolves the issues,[37] the permanent injunction is a remedial device granted after a full proceeding on the merits.[38] Permanent injunctions traditionally are granted only when there is no adequate remedy at law and irreparable injury to the party seeking the injunction would otherwise result.[39] In *Mosinee Paper Corp. v. Rondeau*[40] the Seventh Circuit seemingly ignored these requirements and instructed a district court to issue a permanent injunction against the defendant for a technical violation of § 13(d) of the Exchange Act.[41] Departing from accepted equitable standards the Seventh Circuit ordered an injunction without a showing of irreparable harm to the plaintiff or evidence of the likelihood of future violations by the defendant.[42]

In *Mosinee Paper* the defendant, Rondeau, failed to file a timely Schedule 13D after he acquired in excess of five percent of the out-

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[34] *See also The Courts and the Williams Act, supra* note 6, at 1011.

[35] The *Missouri Portland* court applied the traditional test. 498 F.2d at 870.

[36] *Id.*

[37] *See, e.g.*, Checkers Motor Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); Graphic Sciences, Inc. v. International Mogul Mines Ltd., CCH FED. SEC. L. REP. ¶ 94,834 (D.D.C. Oct. 21, 1974).

[38] D. DOBBS, THE LAW OF REMEDIES 106 (1973).

[39] *See* Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 506-07 (1959). The Securities and Exchange Commission may obtain an injunction when there is a threat that the wrong may be repeated. *See* Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 34 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972); SEC v. Culpepper, 270 F.2d 241 (2d Cir. 1959).

[40] 500 F.2d 1011 (7th Cir.), *cert. granted*, ___ U.S. ___, 43 U.S.L.W. 3348 (1974).

[41] Exchange Act § 13(d), 15 U.S.C. § 78m(d) (1970).

[42] 500 F.2d at 1017. An injunction places the violator under the shadow of contempt proceedings for any future violations. *See generally* Note, *Injunctive Relief in SEC Civil Actions: The Scope of Judicial Discretion*, 10 COLUM. J. LAW & SOC. PROB. 328, 339-42 (1974). Although the Commission did not bring the *Mosinee Paper* action, the same principles apply where private parties institute the action. *See* note 39 *supra*.

standing common stock of Mosinee.[43] Upon learning of the filing requirement, Rondeau promptly complied with the statute, but Mosinee nevertheless sought an injunction barring the defendant from voting his stock because of the violation. Rondeau asserted ignorance of the five percent filing requirement,[44] and claimed that he had no intention of seeking control of the company, arguing that his purchases were purely for investment purposes.[45]

The district court granted summary judgment denying the plaintiff's request for a permanent injunction,[46] holding that injunctive relief was inappropriate because the defendant had no intent to violate the Act and the plaintiff had failed to demonstrate harm.[47] On appeal, however, the Seventh Circuit reversed.[48] The court remanded the case to the district court ordering an injunction permanently enjoining Rondeau from future violations of § 13(d), and enjoining for five years voting of the shares acquired between the required and actual filing dates.

The court recognized that Mosinee failed to show irreparable harm,[49] but reasoned that as the issuer of the securities, Mosinee was the best enforcer of the filing requirements.[50] The court further reasoned that although no real harm occurred from Rondeau's tardy filing, to the extent that § 13(d) requires disclosure of large acquisitions of stock evidencing a potential tender offer,[51] Mosinee was de-

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[43] Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d)(1) (1970), requires any individual or group acquiring greater than a 5% equity interest in the total outstanding shares of any public corporation to file a Schedule 13D, 17 C.F.R. § 240.13d-101 (1974), with the Commission. For an analysis of the controversy surrounding "group" formulation under § 13(d) *see* Vandegrift, *Section 13(d) Disclosure: New Guidelines for Group Therapists*, 16 B.C. IND. & COMM. L. REV. 459 (1975).

[44] The original threshold filing requirements for Schedule 13D, 17 C.F.R. § 240.13d-101 (1973), was the acquisition of 10% of the outstanding shares. This was amended to 5% in December, 1970. Exchange Act § 13(d), 15 U.S.C. § 78m(d)(1) (1970), *amending* 15 U.S.C. § 78m(d)(1) (1968). The violation occurred in May, 1971, and Rondeau asserted he was unaware of the change. 500 F.2d at 1015.

[45] *Id.*

[46] Mosinee Paper Corp. v. Rondeau, 354 F. Supp. 686 (W.D. Wis. 1973), *rev'd*, 500 F.2d 1011 (7th Cir.), *cert. granted*, ___ U.S. ___, 43 U.S.L.W. 3348 (1974).

[47] 354 F. Supp. at 694-95. *See also* Tri-State Motor Transit Co. v. National City Lines, 505 F.2d 735 (8th Cir. 1974). The Eighth Circuit affirmed the district court's denial of injunctive relief because there was no attempt by the defendant to violate the act and no harm to the plaintiff or shareholders.

[48] 500 F.2d at 1011 (7th Cir.), *cert. granted*, ___ U.S. ___, 43 U.S.L.W. 3348 (1974).

[49] 500 F.2d at 1016-17.

[50] *Id.*

[51] *See* Vandegrift, *Section 13(d) Disclosures: New Guidelines for Group*

layed in any attempt to defend against such a takeover.[52] The majority apparently believed that a distinction between stock acquisitions for investment purposes and acquisitions with a view towards control would be impossible.[53] Thus, the majority justified the issuance of the injunction on the basis of a technical violation of the law, rather than upon equitable principles.

In a vigorous and convincing dissent, Judge Pell pointed out that while allowing the issuer to act as the enforcer of the filing requirements was a justification of the issuer's standing to initiate the action,[54] granting an injunction was a remedial, not a standing, problem. Further, although Mosinee was not technically notified of Rondeau's purchases until after the required filing date, the purchases were "common knowledge, 'street talk' among brokers, bankers, and businessmen in the community."[55] The plaintiff had, in fact, been monitoring the acquisitions for some time,[56] and was thus in no way impaired in its ability to defend against a potential takeover attempt.[57] Judge Pell concluded that the majority was placing "form over substance" and ignoring the investors, while effectively "tipping the balance of regulation" in favor of imcumbent management.[58]

The issuance of a permanent injunction in *Mosinee Paper* evidences a dangerous use of the injunction as a punitive as well as a remedial device. Granting a permanent injunction for a technical violation with no showing of harm violates the purpose of relief under the securities law, which is to remedy the aggrieved party.[59] More

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Therapists, 16 B.C. IND. & COM. L. REV. 459 (1975).

[52] 500 F.2d at 1017.

[53] The court stated that the Act applied regardless of the intent of the purchaser. *Id.* at 1016.

[54] *Id.* at 1018-19. *See also* GAF Corp. v. Milstein, 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

[55] 500 F.2d at 1020.

[56] *Id.* at 1019. Judge Pell distinguished the situation in *Mosinee Paper* from that in Bath Indus., Inc. v. Blot, 427 F.2d 97 (7th Cir. 1970), where the defendant secretly acquired stock of the unsuspecting target company to strengthen its takeover bid.

[57] The question has been raised whether it is a breach of the fiduciary duty of the target management to defend against tender offers, especially where they would benefit the corporation. *See* ARANOW & EINHORN, *supra* note 16, at 220-22.

[58] 500 F.2d at 1020. In Scott v. Multi-Amp Corp., 386 F. Supp. 44 (D.N.J. 1974), the court cited Judge Pell's dissent in *Mosinee Paper* to support the denial of injunctive relief for a technical violation of § 13(d), when there was no harm to the plaintiff or the corporation. 386 F. Supp. at 58 & n.16.

[59] *See, e.g.*, Globus v. Law Research Serv., Inc., 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968); Note, *Measurement of Damages in Private Actions Under Rule 10b-5*, 1968 WASH. U.L.Q. 165.

disconcerting, however, is the advantage the court was willing to bestow upon the incumbent management. In dispensing relief under the Williams Act courts must be aware of two principles. First, the beneficiary of the Act is the investing public; and second, the court must not favor either party seeking corporate control.[60] By granting permanent injunctive relief to the issuer without requiring a showing of irreparable harm the Seventh Circuit clearly favored the incumbent management.

D. Damages: Something New

Various forms of equitable remedies[61] have been the mainstay of relief under the Williams Act. The damages award, although consistent with the intent of the Act,[62] has been ignored by the courts as a remedial device. The failure to award damages is the result of several factors. The first factor is the difficulty in ascertaining a precise amount of damages.[63] Perhaps more importantly, the liberal issuance of preliminary relief in many cases has generally foreclosed any opportunity for consideration of monetary relief. The Second Circuit,[64] however, in a decision which may initiate a trend, ordered the Southern District of New York to grant damages as well as supplemental injunctive relief for a violation of the Williams Act.[65]

In *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*[66] Chris-Craft attempted to gain control of Piper Aircraft through a cash tender offer for Piper shares. In an effort to defeat the takeover bid Piper management enlisted the aid of Bangor Punta Corporation, tendering its Piper stock to Bangor Punta in return for Bangor Punta

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[60] Senator Williams stated that the purpose of the Act was to protect investors during tender offer battles, while not favoring either the target management or the offeror. 113 CONG. REC. 854 (1967) (remarks of Senator Williams).

[61] *See, e.g.*, Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973) (offeror required to correct misstatement; tendering investors given opportunity to withdraw tendered shares); SEC v. OSEC Petroleum, S.A., CCH SEC. L. REP. ¶ 94,915 (D.D.C. Dec. 18, 1974) (late filing of Schedule 13D, fund established for benefit of persons selling shares after date of required filing; proxy designated to vote shares).

[62] *See* H. K. Porter Co. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1973) (damages are consistent with Congress' intent to protect investors).

[63] *See, e.g.*, Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 251 (2d Cir. 1973).

[64] Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973).

[65] Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 384 F. Supp. 507 (S.D.N.Y. 1974), *rev'd in part*, Civil No. 74-2542, 75-7003 (2d Cir. April 11, 1975).

[66] 480 F.2d 341 (2d Cir. 1973).

stock.[67] Bangor Punta then engaged in a tender offer battle with Chris-Craft for control of Piper. Prior to Bangor Punta's gaining fifty-one percent of Piper, Chris-Craft unsuccessfully sought a preliminary injunction, asserting misrepresentations by Piper and Bangor Punta in violation of the Williams Act disclosure requirements.[68] After Bangor Punta gained control, thus defeating Chris-Craft's takeover bid, the latter sought damages. The district court dismissed the claim, finding no evidence that the alleged misrepresentations had been relied upon by Chris-Craft, or would have caused any exchanging shareholder to change his course of action.[69] The Second Circuit, however, held that Chris-Craft did sustain harm as a result of Bangor Punta's and Piper's violation and therefore remanded with guidelines for determining the precise amount of damages.[70]

The Second Circuit instructed the district court to award Chris-Craft damages measured by "the reduction . . . in the appraisal value of its shares of [Piper] when its opponent's position as a majority owner became established."[71] The district court recognized the abstract nature of this calculation,[72] and therefore relied upon expert witnesses to determine the value of Chris-Craft's stock before and after Bangor Punta gained the majority position.[73] The essential determination was the premium—the amount per share in excess of market value—Chris-Craft had when it held a plurality position and was still capable of acquiring majority control of Piper, compared to the value of its holding once that potential was foreclosed by Bangor

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[67] Bangor Punta also agreed to give members of the Piper family an additional bonus if it was successful in attaining majority status. *Id.* at 353.

[68] Chris-Craft alleged violations of Securities Act § 5(c), 15 U.S.C. § 77e(c) (1970); Rule 135, 17 C.F.R. § 230.135 (1974); Exchange Act §§ 9, 10(b) & 14(e), 15 U.S.C. §§78i, 78j(b) & 78n(e); Rule 10b-5, 17 C.F.R. § 240.10b-5 (1974); Rule 10b-6, 17 C.F.R. § 240.10b-6 (1974). Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 303 F. Supp. 191 (S.D.N.Y. 1969).

[69] Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 337 F. Supp. 1128 (S.D.N.Y. 1971), *rev'd in part*, 480 F.2d 341 (2d Cir. 1973).

[70] Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973). For a discussion of the court's treatment of causation see Duggan & Fairchild, *Chris-Craft Corp. v. Piper Aircraft Corp.: Liability in the Context of a Tender Offer*, 35 OHIO ST. L.J. 312 (1974).

[71] Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 384 F. Supp. 507, 511 (S.D.N.Y. 1974), *rev'd in part*, Civil No. 74-2542, 75-7003 (2d Cir. April 11, 1975), *citing* 480 F.2d 341, 380 (2d Cir. 1973).

[72] 384 F. Supp. 507, 511. *See generally* A. DEWING, THE FINANCIAL POLICY OF CORPORATIONS 275-308 (5th ed. 1941); Comment, *Remedies for Defrauded Tender Offerors Under § 14(e) of the Securities Exchange Act of 1934*, 62 GEO. L.J. 1693, 1705-06 (1974).

[73] 384 F. Supp. at 512.

Punta's acquiring the majority position.[74]

In making this calculation the district court first assessed the fair market value of Piper stock "uninfluenced by the fight for control."[75] From the expert opinions presented by each side, the court discarded the highest and lowest estimates, rounding the average of the remaining opinions to the nearest dollar per share.[76] The court then determined the value of control of Piper discounted by Chris-Craft's probability of obtaining such control. While the court recognized that control places a definite premium on the value of a block of stock,[77] it also recognized that Chris-Craft had no assurance of gaining control. Further, because of the fight for control with Bangor Punta, Chris-Craft's large plurality position would have had a reduced premium value on the market.[78] Therefore, although the control premium of Piper would be twenty percent per share above the market value of each share had there been no opposition, the countervailing factors in this case reduced Chris-Craft's premium to five percent per share. The five percent per share premium over the market value on the date Bangor Punta gained control was the court's assessment of the monetary loss suffered by Chris-Craft as a result of Bangor Punta's majority acquisition.[79]

On appeal, however, the Second Circuit found the district court's damage calculation in error. In reversing, the circuit court noted that the lower court was correct in attempting to compare the value of Chris-Craft's holdings of Piper stock before and after Bangor Punta gained a majority position.[80] However, unlike the Southern District, the circuit court held that the "before value" of Chris-Craft's holdings was the price actually paid for the Piper stock.[81] Thus, Chris-

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[74] *Id.*

[75] *Id.* at 515. The court refused to accept as a guide the prices paid for the stock by the parties, because as "contestants" in a "battle" they were inclined to act irrationally, therefore paying "artificially inflated" prices. *Id.* at n.8.

[76] *Id.* at 517.

[77] *Cf.* Perlman v. Feldman, 219 F.2d 173 (2d Cir. 1955). *See also* Berle, *"Control" In Corporate Law*, 58 COLUM. L. REV. 1212 (1958); Bayne, *A Philosophy of Corporate Control*, 112 U. PA. L. REV. 22 (1963).

[78] 384 F. Supp. at 520-21.

[79] *Id.* at 523. Supplementing the monetary award was an injunction barring Bangor Punta from voting its ill-gotten shares for 5 years. An injunction was also granted barring extraordinary corporate activity for five years to prevent Chris-Craft from abusing its plurality position. Prejudgment credit was awarded under the court's equity powers; however, recognizing the self-interest in Chris-Craft's prosecution of the suit, attorney's fees were denied. *Id.* at 523-28.

[80] Civil No. 74-2542, 75-7003, at 2849 (2d Cir. Apr. 11, 1975).

[81] *Id.* at 2853. *See* note 73 *supra*.

Craft's average cost of $64 per share was used as the value of the Piper shares before Bangor Punta gained control.[82] Similarly, the district court had determined the "after value" of Chris-Craft's block as the price at which the Piper shares could have been sold on the day Bangor Punta gained control. The Second Circuit, however, noted that the only feasible method by which Chris-Craft could have sold its large holding was through a public offering. Such an offering could not realistically have taken place within less than four months after Chris-Craft's opportunity to gain control was foreclosed by Bangor Punta's victory.[83] Therefore, the court valued the Piper shares four months after Bangor Punta's victory, arriving at a figure of $27 per share. Consequently, the Second Circuit's calculation resulted in damages of $37 per share, or almost $26 million,[84] as compared to the district court's calculation of $2.40 per share, or $1.7 million.[85] Although the Second Circuit noted various uncertainties in determining damages, it indicated that any risk created by such uncertainties must be borne by the wrongdoer.[86]

The *Chris-Craft* case represents a most significant development in the formulation of relief under the Williams Act, and more generally under § 13 and § 14 of the Exchange Act. Although the case indicates an awareness that the injunction is not the sole means of remedying violations of the securities laws in takeover situations,[87] it also demonstrates the difficulty courts will encounter in dealing with

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[82] Civil No. 74-2542, 75-7003, at 2854.

[83] Judge Timbers, speaking for the court, reiterated the opinions of the experts in the district court which stated that sale of Piper stock on the exchanges where it was being traded would have been virtually impossible after Bangor Punta gained majority status. Chris-Craft's two alternatives for disposing of its Piper shares were a private placement or a public offering. Because a private placement would have required an additional discount of 25-30% below what could be obtained through a public offering, Judge Timbers rejected that alternative. *Id.* at 2856-57.

[84] *Id.* at 2859.

[85] 384 F. Supp. at 523.

[86] Civil No. 74-2542, 75-7003, at 2858-59, the Second Circuit stated that it was resolving the uncertainties in favor of those the statute was designed to protect. Applying the Second Circuit's reasoning to this case conflicts with the notion that the courts are to remain neutral as between the contestants to the tender offer. *See, e.g.*, Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011 (7th Cir.) (Pell, J., dissenting), *cert. granted*, 43 U.S.L.W. 3348 (U.S. Dec. 16, 1974).

[87] *See* H. K. Porter Co. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1973). After the Second Circuit remanded *Chris-Craft* with a direction to award damages, the First Circuit in *Nicholson* followed the lead and ordered damages consistent with common law notions of tortious interference with "prospective advantage." *Id.* at 424. *See also* Comment, *Remedies for Defrauded Tender Offerors Under § 14(e) of the Securities Exchange Act of 1934*, 62 GEO. L.J. 1693, 1705-07 (1974).

valuation of securities. The gross disparity in damage calculations illustrates the potential for error which may cause other courts to shy away from monetary relief. On the other hand, the enormous recovery given Chris-Craft may motivate other contestants in tender offer battles to seek damages rather than injunctive relief.

Although the Williams Act was passed with the intention of protecting private investors without favoring either side in the tender offer,[88] the sheer size of the Second Circuit's damage award appears frighteningly punitive toward the tender offer victor, especially considering that the defeated party had no assurance of success. The district court's refusal to grant Chris-Craft's attorney's fees and fashioning of injunctive relief to protect Bangor Punta's interest emphasized that court's recognition that although the parties may be enforcing the securities laws to the benefit of the public, they are primarily motivated by self-interest. The Second Circuit, however, apparently ignored Chris-Craft's motives for entering the tender offer battle initially, and awarded it damages as if it were a "protected party."[89]

E. A Look at Future Relief Under the Williams Act

The recent decisions under the Williams Act demonstrate both the need and the willingness of courts to reassess the value of the injunction as the exclusive remedial device. While the preliminary injunction has the benefit of maintaining the status quo and preventing potential harm, too often the incumbent management of the target company seeks an injunction to ward off a proper tender offer,[90] many times at the expense of shareholders who wish to sell their shares at a price substantially above market.[91] Judge Friendly's opinion in *Missouri Portland Cement Co. v. Cargill, Inc.*[92] will hopefully initiate a realistic appraisal by the courts of the nature of the tender offer. Unlike the Seventh Circuit's decision in *Mosinee Paper Corp. v. Rondeau*,[93] which favored the incumbent management, Judge

[88] 113 CONG. REC. 854 (1967). *See generally* Comment, *Tender Offers: An Analysis of the Earl Development of Standing to Sue Under § 14(e)*, 5 TEX. TECH L. REV. 779 (1974).

[89] Civil No. 74-2542, 75-7003, at 2858-59, *citing* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 385 (1970). The Second Circuit indicated that the Williams Act was passed to protect the contestants in the tender offer as well as investors.

[90] *See* note 18 *supra*.

[91] *See generally The Courts and the Williams Act, supra* note 6, at 995-96, 1012.

[92] 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

[93] 500 F.2d 1011 (7th Cir.), *cert. granted*, ___ U.S. ___, 43 U.S.L.W. 3348 (1974).

Friendly, in rejecting the target's plea for an injunction, recognized the self-preserving motives of the incumbent management of the target company and urged the courts to maintain strict neutrality amidst the legal maneuvering.[94]

The damage remedy fashioned in *Chris-Craft Industries Corp. v. Piper Aircraft Corp.*[95] is also evidence that the Second Circuit and the Southern District are attempting to formulate the most appropriate relief, not the most expedient.[96] Although other methods of calculation may be developed, the damage remedy promotes the policy of the Act by allowing a tender offer to reach fruition unhampered by premature imposition of an injunction, yet provides adequate relief to an aggrieved party.[97] Also, the threat of a damages judgment arguably deters potential violations as successfully as the threat of an injunction.[98]

In granting relief under the Williams Act courts should follow the Second Circuit's example and formulate remedies which take into account the nature and circumstances of the particular violation.[99] Most importantly, relief must be granted that will protect the investing public without unduly favoring either the target companies or offerors. Judge Pell, in his dissent in *Mosinee Paper*, noted the lack of sensitivity of the courts to the problems of relief and the aims of the Act:

> To grant an injunction on the sole basis of a belated filing appears to me to be exalting form over substance, to be bringing an artificial and unduly restrictive sanction into the law of securities, and to be ignoring the real purpose of the Williams Act, which "was designed for the benefit of the investors and not to tip the balance of regulation either in favor of manage-

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[94] 498 F.2d at 850.

[95] 384 F. Supp. 507 (S.D.N.Y. 1974).

[96] The court was aware of the inequalities that would result from granting Chris-Craft both damages and injunctive relief. Therefore, it issued an order preventing Chris-Craft from abusing its plurality position. 384 F. Supp. at 524-25.

[97] In Kaufman v. Lawrence, CCH FED. SEC. L. REP., ¶ 94,908 (S.D.N.Y. Dec. 5, 1974), the plaintiff alleged material misstatements in an exchange offer prospectus in violation of § 10(b) and § 14(e) of the 1934 Act. The court denied the requested preliminary injunction, stating that if there was a violation damages would adequately compensate the plaintiff's injury. *Cf.* Tanzer Economic Associates, Inc. v. Haynie, CCH FED. SEC. L. REP., ¶ 94,873 (S.D.N.Y. Nov. 20, 1974) (aggrieved plaintiff has adequate remedy at law for proxy disclosure omission).

[98] *See* H. K. Porter Co. v. Nicholson File Co., 482 F.2d 421, 424 (1st Cir. 1973).

[99] *See generally The Courts and the Williams Act, supra* note 6, at 1011-18.