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Federal Decisional Law under the Williams Act

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FEDERAL DECISIONAL LAW UNDER THE WILLIAMS ACT

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PREFACE

PRIOR TO THE ENACTMENT OF THE WILLIAMS ACT, contests for control of public companies in the United States generally involved competing solicitations of proxies conducted within the limits of the requirements of the proxy provisions of the Securities Exchange Act of 1934 and the rules of the Securities and Exchange Commission (SEC). Tender offers became almost as prevalent in this country, with the conglomeration movement in the 1960's, as they had been in England immediately following World War II.

During this period, most bidders were perceived as corporate "raiders" intent on unfairly pressuring shareholders into selling their shares in "proud old companies" pursuant to short-fuse, "Saturday Night Specials" at unfair prices. The pre-Williams Act raider disclosed little about itself, its source of funds or its plans, including plans to fund its acquisition by draining liquid assets from the target company or liquidating various assets. Thus, initially proposed federal legislation was designed to close the gap between proxy and tender offer regulation and was clearly intended to protect target company management and to inhibit tender offers generally.[1] However, this one-sided approach was ultimately rejected in favor of a legislative scheme that did not "tip . . .

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[1] *See, e.g.*, S. 2731, 89th Cong., 2d Sess. (1966) (including, among other things, a 20-day pre-commencement filing requirement); S. 510, 90th Cong., 1st Sess. (1967) (including, among other things, a confidential 5-day pre-commencement filing requirement). *See generally* Sowards & Mofsky, *Corporate Take-Over Bids: Federal Securities Regulation*, 41 ST. JOHN'S L. REV. 499 (1967).

the balance of regulation either in favor of management or in favor of the person making a takeover bid" because of a congressional perception, fomented primarily by the professional investment community, that neither the bidder nor the target company needed additional weapons.[2] Thus, as the Supreme Court would later hold, the "sole purpose of the Williams Act was the protection of investors."[3]

In the vast majority of the contested tender offers after the Williams Act was enacted in 1968, target companies commenced defensive litigation, frequently alleging violations of that Act. However, the emerging body of federal decisional law was, in significant part, adverse to target company interests. It soon became clear, moreover, that the disclosure requirements and minimum substantive fairness provisions of the Williams Act had neither eliminated the "Saturday Night Special" (an "any and all" offer could be completed in a week under the Williams Act) nor dissuaded the true raider from entering the fray. Given the SEC's unwaivering commitment to abstract neutrality in the tender offer context (manifest at least until the promulgation of the rules which took effect in 1980 and in large part still evident today), potential target companies and their advisors turned to the legislatures of the various states, almost forty of which responded with legislation designed in part to string out the tender offer process.

Thereafter and until the avalanche of cases successfully challenging the state takeover laws,[4] tender offers evolved into a less impulsive, more sophisticated acquisition technique. The totally unforeseen "Saturday Night Special" was replaced by the "bear hug" and its variants as the preferred tactic of lawyers and investment bankers advising acquisi-

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[2] S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967).

[3] Piper v. Chris-Craft Indus., 430 U.S. 1, 35 (1977).

[4] The constitutional status of most state takeover laws was uncertain, *e.g.*, Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds*, 443 U.S. 1973 (1979), particularly since the SEC's promulgation of Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (creating a direct conflict with the pre-commencement waiting period requirements contained in many of the state takeover statutes), until the Supreme Court's decision in Edgar v. MITE Corp., 457 U.S. ____, 102 S. Ct. 2629 (1982). In *MITE*, a majority of the Supreme Court held that the Illinois takeover statute imposed an impermissible burden on interstate commerce. While there are certain features of the Illinois statute which distinguish it from other state takeover laws (*e.g.*, the Illinois statute provided for administrative regulation of substantive fairness), it appears likely that MITE sounds a death knell for virtually all state takeover legislation, at least as presently constituted. *See generally* Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982) (holding that the so-called "penalty box" provision of the Ohio Takeover Act, OHIO REV. CODE ANN. § 1707.041(B)(2) (Page Supp. 1981), imposed an unconstitutional burden on interstate commerce). However, in some part due to Justice Powell's concurrence in *MITE* (joining with the Commerce Clause ruling so as to permit the states some room to legislate in the area), efforts are underway in a number of states to enact legislation which will withstand constitutional scrutiny.

tion-minded clients. These tactical changes were in part a result of the adjustment to the state takeover statutes. They also reflected efforts to deal with the potentially more troublesome defensive techniques often employed by target companies; *e.g.*, litigation, protracted state administrative hearings and the placement of stock in friendly hands.

More importantly, the tender offer—once thought to be a tool solely of corporate raiders—came to be perceived by many persons in the business and financial communities as an acceptable and preferred acquisition device. At the same time, the category of typical target companies changed dramatically. While hard data are not available, it is commonly believed that typical target companies in the current environment are successful, often multi-billion dollar participants in their particular industries, and are managed by capable personnel; however, they are inadequately valued by the United States securities markets. Furthermore, with the apparent demise of state takeover legislation, at least as originally formulated, and the SEC's five-day "commence or withdraw" requirement in Rule 14d-2(b), lightning strikes without prior warning have again become the preferred approach of prospective bidders and their professional advisors.

The legal requirements relating to tender offers have thus become a subject of great interest to a broad spectrum of corporate America. Given the frequency of litigation in this context, and the fact that the Williams Act itself and the SEC's rules provide clear answers to only the most basic of questions, analysis and understanding of the federal decisional law relating to tender offers—the principal focus of this Article—is of obvious significance.

This Article does not purport to deal globally with the field of tender offer regulation; rather, it constitutes an effort to analyze generally the principal issues raised in the many tender offer cases decided since the enactment of the Williams Act as well as a few earlier cases which may be of continuing relevance. As such, reference must be made elsewhere for discussion of issues such as the operation and validity of state takeover legislation, the effect of state law fiduciary obligations and general offensive and defensive planning and similar matters.[5]

I. THE BASIC DISCLOSURE FRAMEWORK

A. *Introduction*

The Williams Act amendments to the Securities Exchange Act of

[5] A number of efforts have been undertaken to deal globally with the subject of tender offers, including, among other things, identification of potential target companies, general offensive and defensive planning, fiduciary obligations and state takeover legislation. *See, e.g.*, M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS (1978); E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL (1977); E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL (1973).

1934,[6] and rules thereunder,[7] primarily create a disclosure system applicable to purchases of, and certain offers to purchase, shares of public companies. The various substantive requirements and broad antifraud proscriptions under the Williams Act are, of course, important considerations in the structuring of any tender offer subject to the Act.[8] However, most of the litigation under the Williams Act has involved questions of whether particular filings were required in connection with the commencement or the consummation of certain transactions, the making of a particular communication or, if a prescribed filing or communication was made, whether the disclosures therein were adequate. These basic issues are the primary avenues for litigation, however, a number of subsidiary questions frequently arise in Williams Act cases; for example, questions as to standing, proper parties and remedies. Questions relating to whether a particular filing was required in connection with the commencement or consummation of a particular transaction or communication will be considered first.

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[6] 15 U.S.C. § 78a-kk, (1976) (the "Exchange Act"). The Williams Act amended sections 13 and 14 of the Exchange Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976) (the "Williams Act"). Hereinafter, references are generally to the Public Law section numbers of the Exchange Act rather than to the section numbers as codified in the United States Code.

[7] These rules are codified in 17 C.F.R. § 240.13d-.14f (1982). They are generally referred to throughout this Article by the SEC's rule number (e.g., Rule 14d-7) rather than to the rule numbers as codified in the Code of Federal Regulations.

[8] The substantive requirements under the Williams Act are as follows:

(i) Section 14(d)(5); Rule 14d-7 (providing withdrawal rights);
(ii) Rule 14d-5 (providing the bidder a right to a subject company's shareholder list and security position listings);
(iii) Section 14(d)(6) (providing for *pro rata* acceptance with respect to tender offers for less than all shares of an outstanding class);
(iv) Section 14(d)(7) (providing for increases in consideration to all tendering shareholders where terms of a tender offer are varied);
(v) Rule 14e-1 (providing for a 20 business day minimum offering period and certain other matters);
(vi) Rule 14e-2 (requiring the subject company to disclose its position with respect to a tender offer); and
(vii) Rule 14e-3 (prohibiting certain trading based upon inside information regarding a tender offer).

The SEC's substantive rules are discussed herein in their appropriate contexts. For an important recent development relating to the scope of the term "manipulation" under the Williams Act (which is not moored to questions of the adequacy of disclosure), *see, e.g.*, Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981); Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982); Profusek, *Tender Offer Manipulation: Tactics and Strategies After Marathon*, 36 Sw. L.J. 975 (1982). *See infra* text accompanying notes 140-68.

B. *Filing Requirements*

1. Section 13(d)

Section 13(d) of the Exchange Act requires any "person" who directly or indirectly acquires beneficial ownership[9] of more than 5% of any class of a registered equity security to file an information statement with the issuer, the SEC and the exchanges upon which the security is traded, within ten calendar days of such acquisition. The filing person must disclose, among other things: 1) the background and identity of all persons by whom or on whose behalf beneficial ownership was obtained; 2) the source and amount of funds for past and future purchases, including the identity of any lender unless such lender is a United States bank lending in the ordinary course of business; 3) any plans for major changes in the business or structure of the issuer; 4) the number of shares beneficially owned by the person and each associate of such person; and 5) any contracts, arrangements or understandings with respect to the disposition or acquisition of shares, the giving of proxies or the division of profits.[10] Section 13(d)(3) defines the term "person" for purposes of section 13(d) as follows: "When two or more persons act as a partnership, limited partnership, syndicate or other group for the purpose of acquiring, holding or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person.' "

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[9] Beneficial ownership is defined very broadly for purposes of the Williams Act. Rule 13d-3 provides that any person is deemed the beneficial owner of a security to the extent that (among other things) such person "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:

> 1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or
>
> 2) Investment power which includes the power to dispose, or to direct the disposition of, such security."

Because of the emphasis in Rule 13d-3 upon voting or investment *power* rather than traditional voting or investment *rights*, the determination of beneficial ownership is frequently very difficult.

[10] Section 13(d)(6) states, however, that the provisions of section 13 do not apply to any acquisition of or offer to acquire securities registered under the Securities Act; "any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class; any acquisition by the issuer of its own securities; or any acquisition which the SEC exempts by rules, regulations or order." The two-percent exclusion is effectively eliminated under the terms of the Domestic and Foreign Investment Improved Disclosure Act of 1977, 15 U.S.C. § 78m(g) (1977 Supp.). *See* S. 305, 95th Cong., 1st Sess., Tit. II (1977). Acquisitions or dispositions of 1% or more of a particular class of equity securities are now deemed "material" under Rule 13d-2(a), thus requiring an amendment to any prior Schedule 13D filing. Also, the SEC has promulgated rules designated to regulate issuer tender offers. *See* Rule 13d-4, 17 C.F.R. § 240.13d-4 (1982).

2. Section 14(d)

Section 14(d) of the Exchange Act makes it unlawful for any person to make a "tender offer" for any class of registered equity securities if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5% of such class, unless the person has filed an information statement with the SEC on Schedule 14D-1.[11] Section 14(d) contains a definition of the term "person" which parallels the language quoted above from section 13(d)(3).

The disclosure requirements of Schedule 14D-1 in significant part repeat those contained in Schedule 13D. In addition to those requirements, the bidder must disclose 1) past contacts, transactions or negotiations between the bidder and the subject company; 2) persons retained, employed or to be compensated by the bidder; 3) the financial statements of certain bidders;[12] and 4) other material information. The information required to be disclosed to subject company security holders is identified in Rule 14d-6(e).

Pursuant to Rule 14e-2 (which, like all the rules under Regulation 14E, applies to all tender offers in interstate commerce, not just those for securities of reporting companies), within 10 business days after a tender offer is first published, sent or given to security holders the subject company must issue a statement disclosing whether the subject company: 1) recommends acceptance or rejection of the tender offer; 2) expresses no opinion and is remaining neutral with respect to the tender offer; or 3) is unable to take a position with respect to the tender offer. This statement must also include disclosure of the reasons given for the position or inability to take a position, and the subject company must file a Schedule 14D-9 with the SEC on the date of publication of any solicitation or recommendation (including a statement required by Rule 14e-2).[13]

Schedule 14D-9 requires disclosure of 1) the security and subject company; 2) the tender offer at issue; 3) the identity and background of the filing person; 4) the nature of the solicitation or recommendation and the reasons therefor;[14] 5) persons retained, employed or to be compensated

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[11] The scope of the term "tender offer" for Williams Act purposes is discussed *infra* in Section I(B)(5).

[12] The requirement of financial statement disclosure by the bidder has been the subject of significant litigation. *See infra* Section III(C)(5).

[13] A subject company must also hand deliver a copy of its Schedule 14D-9 to the bidder on that date and at least telephonically notify each national securities exchange on which its stock is traded (or the NASDAQ if quoted over the counter) of the filing and certain of the terms thereof. Rule 14d-9(a)(2), 17 C.F.R. § 240.14d-9(a)(2)(1982).

[14] The Instruction to Item 4(b) of Schedule 14D-9 provides that "[c]onclusory statements such as 'The tender offer is in the best interest of shareholders' will not be considered sufficient disclosure in response to Item 4(b)." 17 C.F.R. § 240.14d-101 (1982). Since the effective date of this requirement, subject company

by the reporting person; 6) transactions effected by the reporting person in securities of the subject company within the preceding sixty days; and 7) certain negotiations and transactions (largely of a defensive nature) undertaken by the subject company in response to the tender offer. Most of the foregoing information (or a "fair and adequate summary thereof") is required to be furnished to security holders pursuant to Rule 14d-9(c).[15]

Contestants in unfriendly tender offers often allege violations of sections 13(d) and 14(d) in efforts to obtain injunctive relief. In view of the short time periods normally involved in this context, it is important to determine precisely when and to whom these requirements apply. However, the statutes provide little guidance, the SEC's rules provide less and the federal courts have not been consistent in their treatment of these important issues.

3. Williams Act "Groups"

As indicated above, the statutory definition of the term "person" in both section 13(d) and section 14(d) includes persons "act[ing] as a partnership, limited partnership, syndicate or other group for the purpose of acquiring, holding or disposing of securities of an issuer." Given that the Williams Act itself and many of the obligations under the SEC's rules speak in terms of particular "persons," the importance of a clear understanding of the statutory definition of that term is obvious. The most difficult issues arise with respect to the "group" concept under the Williams Act.

a. *Groups in General*

In *Bath Industries, Inc. v. Blot*,[16] the Seventh Circuit Court of Appeals considered the question of when a number of separate shareholders of an issuer became a "group" subject to the reporting requirements of section 13(d). On the basis of the legislative history of the Williams Act, the *Bath Industries* court held that section 13(d) becomes operative only when a configuration of shareholders owns more than 10% of the equity securities of a reporting company (changed by amendment in 1970 to 5%) and agrees to act in concert to acquire additional shares. The plaintiff's contention that section 13(d) becomes operative whenever any group of shareholders holding ten (five) or more percent of such

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disclosures of reasons for particular decisions (and actions) in response to a tender offer have generally become quite detailed.

[15] Due to the difficulty in determining what constitutes a "fair and adequate summary" of the information required to be furnished to subject company security holders pursuant to Rule 14d-9(c), many subject companies send a verbatim (except for some exhibits) printed copy of at least their initial Schedule 14D-9 filings to security holders.

[16] 427 F.2d 97 (7th Cir. 1970).

securities agrees to act in concert toward a specific goal, regardless of whether additional shares are to be purchased, was rejected on the ground that such a construction would enable the issuer's management to use section 13(d) for self-preservation, whereas the congressional purpose underlying the Williams Act was merely the protection of investors. Under *Bath Industries*, a group of shareholders that collectively holds the triggering percentage of equity securities can assert its determination to take control of the corporation, and act in concert toward that goal, without becoming subject to section 13(d), so long as the "group" does not *agree* to acquire additional shares.

The *Bath Industries* court recognized that requiring proof of an express agreement to acquire additional shares could easily frustrate private enforcement of section 13(d).[17] Therefore, that court held that if it can be shown that a group has agreed to pursue a common objective and that a member of the group thereafter purchased additional shares, a presumption would arise that the group had agreed to purchase additional stock. In such a case, compliance with section 13(d) would be required within ten days of the triggering purchase. However, even under this rationale a group member's purchases, made in the regular course of business without the knowledge of the other group members, will not trigger the presumption.[18]

Bath Industries appears to be unduly restrictive given the statutory language and apparent intent of section 13(d). In *GAF Corp. v. Milstein*,[19] the Second Circuit Court of Appeals rejected *Bath Industries* and held that the provisions of section 13(d) become operative merely upon the formation of a "group" which holds over 5% of any covered class of equity securities. The *Milstein* court viewed a "group" as an entity separate and distinct from its composite members, which entity "acquires" its shares within the meaning of the Williams Act upon its formation. A "group" is defined in section 13(d)(3) as any aggregation of individuals who have formed a common intent to *acquire, hold or dispose* of securities, and the statute appears to be primarily concerned with the disclosure of potential changes in control resulting from new aggregations of shareholders. Since a group holding over 5% could gain control of many public companies without additional purchases, it would appear that the requirement in *Bath Industries* frustrates one of the congressional purposes of the Williams Act.

Other courts have favored *Milstein* over *Bath Industries*.[20] For example, in *Water & Wall Assocs. v. American Consumer Industries, Inc.*,[21]

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[17] *See infra* Section II(A)(2)(a) (discussing standing requirements under Section 13(d)).

[18] *See, e.g.*, Calumet Indus. v. MacClure, [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,434 (N.D. Ill. 1978).

[19] 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

[20] *See, e.g.*, Twin Fair, Inc. v. Reger, 394 F. Supp. 156 (W.D.N.Y. 1975).

[21] [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 93,943 (D.N.J. 1973).

the District Court for New Jersey held that the combination of the requisite percentage of shares with the intention of gaining control was alone sufficient to trigger the filing requirements of section 13(d). The *Water & Wall* court further held that the "agreement" between the group members should not be construed in accordance with strict contract law principles.[22] Rather, any understanding, relationship, agreement or other arrangement should be, in normal circumstances, sufficient to trigger the reporting requirements.

Likewise, in *Texasgulf, Inc. v. Canada Development Corp.*,[23] the District Court for the Southern District of Texas followed *Milstein* without even mentioning *Bath Industries*:

> It takes more than the arithmetic of adding up shares to determine that a statutory group exists and that a filing must be made. Two criteria must be met: (1) The members must agree to act together for the purpose of acquiring, holding, or disposing of securities; and (2) once the members agree to act, they must own beneficially or acquire beneficially in excess of 5% of a class of equity security. Mere relationship, among persons or entities, whether family, personal, or business, is insufficient to create a group which is deemed to be a statutory person. There must be agreement to act in concert.[24]

Texasgulf was followed in *Universal Container Corp. v. Horwitz*,[25] and, together with *Milstein*, seems to constitute the prevailing view.[26]

The *Milstein/Texasgulf* test tracks the statutory language of "acquiring, holding or disposing of securities," whereas the *Bath Industries* court's analysis effectively eliminated the words "holding or disposing of" from the Williams Act "group" concept. Moreover, the manifest pur-

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[22] *Id.* at 93,756-57.

[23] 366 F. Supp. 374 (S.D. Tex. 1973).

[24] *Id.* at 403.

[25] [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,161 (S.D.N.Y. 1977).

[26] *See* General Aircraft Corp. v. Lampert, 556 F.2d 90 (1st Cir. 1977); Corenco Corp. v. Schiavone & Sons, 488 F.2d 207, 217-18 (2d Cir.), *aff'g in part and remanding in part*, 362 F. Supp. 939 (S.D.N.Y.), *modified*, [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,108 (S.D.N.Y. 1973); Lane Bryant, Inc. v. Hatleigh Corp., [1980 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,529 (S.D.N.Y. 1980); Wellman v. Dickinson, [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,918 (S.D.N.Y. 1979) (holding that a "group" was formed when defendants banded together to dispose of their stock on the ground that "[t]he critical ingredient is whether the agreement to dispose of the shares will effectuate a shift in corporate control"); Financial Gen. Bankshares, Inc. v. Lance, [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D.D.C. 1978). *But see* Calumet Indus. v. MacClure, [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,434, at 93,568 (N.D. Ill. 1978) (following *Bath*, but noting that a group could acquire stock through an agreement "to hold or dispose of shares in furtherance of a common goal of gaining control"); SEC v. Savoy Indus., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,497, at 93,869-70 (D.D.C. 1978) (holding that *Bath* encompasses "pooling arrangements . . . irrespective of whether they be formal or informal, written or unwritten").

pose of the Williams Act, particularly section 13(d), is to ensure adequate disclosure of potential changes in control. *Bath Industries*, however, by not requiring a filing by groups formed to hold or dispose of securities, removed two important circumstances which signal potential changes in control from the statutory coverage.

A third interpretation of section 13(d), differing from *Milstein/Texasgulf* and *Bath Industries*, was set forth in *Ozark Air Lines, Inc. v. Cox*.[27] The *Ozark Air Lines* court purported to follow *Bath Industries*, but actually added a third element to the test set forth therein. Not only must there be a group holding over 5% of the shares with an intent to acquire more shares for the section 13(d) filing requirement to be triggered, as in *Bath Industries*, but the group according to *Ozark Air Lines* must then *acquire* within one year more than 2% of the class over and above its original holdings. Not surprisingly, this restrictive reading of the statutory filing requirement has not been followed.[28] The 2% exemption in section 13(d)(6)(B) seems to have been aimed primarily at the open market purchaser who has no immediate plans to gain control of the issuer and not at new aggregations of shareholders who might affect control of a reporting company.

b. *Particular Individuals as Group Members*

Frequently, there will be some question as to whether a particular individual is a member of a Williams Act group. Usually, such a determination is a question of fact that must be answered in light of the individual's connection with the group and its activities. However, the cases have identified a number of principles which are relevant to these issues.

In *Transcon Lines v. A. G. Becker, Inc.*,[29] the District Court for the Southern District of New York held that, in light of the purpose of section 13(d) as evidenced by the legislative history and as interpreted by other courts in analogous cases, one who is not the beneficial owner of any shares of the subject company is not a member of a group within the meaning of section 13(d)(3).[30] The *Transcon Lines* court added that disclosure of the identity and relationship to the group of non-owners was sufficient, although it was unable to find authority for its holding other than the fact that Schedule 13D distinguishes between owners and non-owners. In *Cook United, Inc. v. Stockholders Protective Committee*,[31] the *Transcon Lines* holding was taken one step further. The *Cook United* court refused to include as a group member an advisor who

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[27] 326 F. Supp. 1113 (E.D. Mo. 1971).

[28] *See supra* note 26.

[29] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,806 (S.D.N.Y. 1979).

[30] *Id.* at 95,163.

[31] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,875 (S.D.N.Y. 1979).

also held a power of attorney over the group's stock, justifying its holding by noting that the advisor's duties were merely "ministerial."[32]

The result in both *Transcon Lines* and *Cook United* may, at least in some circumstances, be questioned. Section 13(d) is designed to inform shareholders of potential changes in control, and it could be generally argued that an important advisor or other participant might have a great impact in this respect even though he or she beneficially owns no stock in the issuer. The *Transcon Lines* court recognized this fact and attempted to distinguish between owners and non-owners notwithstanding, but its argument may not be persuasive in all instances, *e.g.*, where a director of the issuer who is not a substantial shareholder advises a shareholder group even where he or she declines to join the group. Since section 13(d) and, to a lesser extent, section 14(d) are designed to disclose potential changes in control, it arguably makes sense to require anyone connected with a group who might have a substantial impact upon it to provide the same information as is currently required of beneficial owners. However, the cases do not and perhaps should not support this argument.

c. *The Significance of Intent*

Apart from consideration of when a "group" is formed, for section 13(d) purposes the intent of the party who acquires 5% or more of the outstanding equity securities of an issuer is irrelevant to the question of whether a Schedule 13D filing must be made (although disclosure of certain plans and proposals must be made in Schedule 13D). Thus, in *Mosinee Paper Corp. v. Rondeau*,[33] the Seventh Circuit Court of Appeals rejected a contention by the defendant that his failure to file a timely Schedule 13D was irrelevant because he did not intend to seek control of the issuer at the time he purchased over 5% of the issuer's stock:

> [T]he reporting requirements of Section 13(d) apply regardless of the purchaser's purpose in acquiring the shares. The sweep of Section 13(d) goes beyond the circumstances where the purchaser has formulated an intent to control, but also reaches that point when because of the size of the purchaser's holdings (having attained five percent beneficial ownership of a class of stock) and the fact that he acquired such holdings in a short amount of time, the purchaser portends the *potential* to effectuate a change in control.[34]

The converse of the situation in *Rondeau* was considered by the Rhode Island District Court in *Nicholson File Co. v. H. K. Porter Co.*[35]

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[32] *Id.* at 95,579.

[33] 500 F.2d 1011 (7th Cir. 1974), *rev'd on other grounds*, 422 U.S. 49 (1975).

[34] *Id.* at 1016.

[35] 341 F. Supp. 508 (D.R.I. 1972).

The *Nicholson File* plaintiff contended that the filing requirements of section 13(d) were triggered by the formation of an intent to acquire control in a "group" which already controlled over 5% of the issuer's stock. However, the *Nicholson File* court rejected this contention and held that the statute applies only to new aggregations of shares, not to changes in intent. Therefore, the fact that one individual decides to acquire control and pools the interests, aggregating over 15% in *Nicholson File*, of several jurisdictional personalities (such as trusts, estates and foundations, all of which had acquired the shares before the Williams Act was passed) that he already controls is not enough under *Nicholson File* to invoke the filing requirements of section 13(d).[36]

In rejecting the plaintiff's argument that the formation of an intent to control by a 5% shareholder triggers section 13(d), the *Nicholson File* court examined the interrelationship of section 13(d) and section 14(d). Section 13(d) requires disclosure *after* the acquisition of more than 5% of a class of equity securities which suggests that Congress only intended to require disclosure of information bearing upon the potential effect on investment of major changes in holdings. In contrast, section 14(d) requires disclosure *before* any attempted tender offer. With respect to the latter provision, the *Nicholson File* court observed:

> Unless management is considered the sole beneficiary of this disclosure, a proposition vehemently denied after S. 510 was introduced, those reviewing the information have no effective means at their disposal to prevent the assertion of control. Rather, they are being supplied with information necessary to adjust for that possibility in their valuation of the corporation for investment purposes.[37]

The conclusion that Congress intended to benefit investors rather than incumbent management, bolsters the holding that section 13(d) applies only to persons who acquire substantial holdings in a short time period, but not to persons with long-standing (*i.e.*, pre-Williams Act) holdings who decide to seek control.

Another variation upon this theme was presented in *Texasgulf, Inc. v. Canada Development Corp.*[38] and *Corenco Corp. v. Schiavone & Sons.*[39] In those cases, the potential bidder had acquired a large number of shares in anticipation of a later takeover bid, but had scrupulously

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[36] Of course, a change in intent would, if material, require an amendment to a prior Williams Act filing. *See infra* Section I(C); Law, Weathers, Richardson & Dutcher (SEC Staff Reply Feb. 13, 1976). Schedule 13D filings are now required of pre-Williams Act beneficial owners of more than 5% of a reporting company. *See supra* note 10.

[37] 341 F. Supp. at 518 (quoting Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership*, 119 U. PA. L. REV. 853, 865-66 (1971)).

[38] 366 F. Supp. 374 (S.D. Tex. 1973).

[39] 488 F.2d 207 (2d Cir. 1973).

avoided going over the 5% benchmark of section 13(d). Both courts held that undisclosed purchases made in conscious avoidance of the filing requirements were perfectly permissible, even if the purchaser had formed a specific intent to seek control later. The result appears to be correct, or at least in accord with the SEC's current thinking.[40]

d. *Application of Section 13(d) to Management of the Issuer*

The filing requirements of section 13(d) are usually thought of in terms of bidder-outsiders. However, at least in some cases they may apply to management of the issuer. In *Tony Lama Co.*,[41] for example, a "group" of officer-directors of a corporation acquired over 2% of the issuer's shares in a twelve month period. The officer-director "group" requested a no-action letter from the SEC staff on the ground that it was exempt from the filing requirements of section 13(d) by virtue of the fact that the participants collectively owned 56% of the stock before the purchases and thus were already in substantial control of the corporation. Therefore, the group argued, there would be no purpose in requiring a Schedule 13D filing. The SEC staff rejected this contention, concluding that the management constituted a "group" within the meaning of section 13(d)(3), and:

> Once a person (defined to include a group such as the Lama group) has acquired more than 5% of the outstanding equity securities of a class within the scope of Section 13(d)(1), then such person must report every acquisition—even if only a single share—which together with all other acquisitions by the same person of the same class during the preceding twelve months exceeds . . . 2% of that class . . . . These provisions are applicable irrespective of how the acquisitions are made . . . . [N]or are these provisions affected in the situation . . . describe[d] where the Lama group already controls and will remain in control of the subject company following the acquisition in question.[42]

Tony Lama was followed in *Jewelcor Inc. v. Pearlman*.[43] There, Judge Stewart rejected the defendants' argument that existing management could not constitute a section 13(d)(3) "group" when it was formed to resist an outside attempt to gain control. However, the precedential value of *Jewelcor* may be limited since the plaintiff had alleged that

[40] *Cf.* Rule 14e-3, 17 C.F.R. § 240.14e-3 (imposing a "disclosure or abstain" rule relating to tender offers on persons *other than* "any person [who] has taken a substantial step or steps to commence, or has commenced, a tender offer"). *But see infra* Section V(C)(2).

[41] [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 79,901 (SEC Staff Reply May 14, 1974).

[42] *Id.* at 84,311.

[43] 397 F. Supp. 221 (S.D.N.Y. 1975).

various non-management persons had joined the group and the *Jewelcor* court seemed to indicate that *Tony Lama* would control only when there was no public tender offer. The latter limitation seems reasonable since, as is discussed below, where a tender offer is made, management of the subject company is subject to the filing requirements of section 14(d)(4) in any event. Still, *Jewelcor* used broader language than was necessary to reach this result,[44] and thus may ultimately be read more expansively.[45]

A management group which decides to pool its efforts and shares in an attempt to resist a hostile tender offer which has actually been commenced has been held not to be subject to section 13(d).[46] Moreover, if individual officers and directors cause an issuer to repurchase its stock, it has been held that no filing is required where the individuals are not personally acquiring any shares.[47] Of course, if management decides to communicate its opposition to the shareholders, it must make a separate Schedule 14D-9 filing. However, the cases have recognized that section 13(d) should not be deemed to require subject company management to make duplicate and arguably redundant filings.

Particularly in light of the requirement of Rule 14e-2 that the subject company disclose its position, and therefore make a Schedule 14D-9 filing, the judicial tendency to ignore section 13(d) arguments relating to the issuer's management where a tender offer has actually commenced seems sound and harmonizes the disclosure requirements of sections 13(d) and 14(d).[48] In this setting, a Schedule 13D filing would add nothing of significance to the filing and disclosure requirements of Rule 14d-9. The difficult questions in this context arise with respect to unconventional tender offers and situations in which only a threatening substantial investment has been made. In the latter context, unless the support of substantial shareholders outside management is solicited, it appears unlikely that any purpose would be served by requiring a Schedule 13D filing by the issuer's management.

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[44] "[W]e do not agree with Lafayette that § 13(d) does not apply to management groups." *Id.* at 243.

[45] *See* Podesta v. Calumet Indus., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,433, at 93,560 (N.D. Ill. 1978) (holding that a management group is subject to the requirements of 13(d) "at least where no outside tender offer is involved").

[46] *E.g.*, Corenco Corp. v. Schiavone & Sons, 488 F.2d 207 (2d Cir. 1973); Scott v. Multi-Amp Corp., 386 F. Supp. 44 (D.N.J. 1974) (alternative holding).

[47] *See* Wilfred P. Cohen Foundation v. Prevor, [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,057 (S.D.N.Y. 1975). However, Rule 13e-1 requires that certain disclosures be made in this context.

[48] *See, e.g.*, Applied Digital Data Sys. v. Milgo Elec. Corp., 425 F. Supp. 1145 (S.D.N.Y. 1977) ("[B]ecause [the subject company] and its management are subject to Section 14(d), the provisions of Section 13(d) are inapplicable to them." *Id.* at 1161).

4. "Bidders" Under Regulation 14D

The new definitions adopted in 1979 by the SEC under Regulation 14D discard the prior terms "offeror" and "target company," for the less inflammatory concepts "bidder" and "subject company."[49] Rule 14d-1(b)(1) defines the term "bidder" as including "any person who makes a tender offer or on whose behalf a tender offer is made." The person who "makes" a tender offer should be relatively easy to identify—that person presumably is the one who becomes contractually obligated to purchase tendered shares. However, the concept that the bidder includes any person on whose behalf a tender offer "is made" is not so clear.

General Instruction C to Schedule 14D-1 requires certain disclosures relating to "controlling persons" of the reporting person.[50] As such, it would appear that mere "control" of the person or entity making a contractually binding tender offer should not be enough to include the controlling person within the meaning of a "bidder" under Rule 14d-1(b)(1). The two cases decided thus far in this area have only implicitly recognized this analysis.[51] Instead, those cases have each stressed, in finding that particular entities or persons were not within the scope of the term "bidder," that the questioned entity or person either did not provide financing for the tender offer or would not likely receive stock in the subject company if the bid were successful.

It is not presently possible to determine what ultimate meaning will be given to the language "on whose behalf a tender offer is made" under Rule 14d-1(b)(1). However, several conclusions should be relatively obvious. First, as indicated above, mere control of the contractual offeror should not be enough, although disclosure of the existence of such control is separately required. Likewise, the mere provision of financing for a tender offer (*e.g.*, by a bank in the ordinary course of its business) clearly should not be enough to include the lender within the "bidder" concept. However, if the person in question either provides financing to an affiliate or might reasonably be expected to receive the economic benefits of stock ownership if the tender offer is successful, such a person may be included within Rule 14d-1(b)(1)'s concept of "bidder" for Williams Act purposes.

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[49] 17 C.F.R. § 240.14d-1(b)(1) & (2).

[50] Determining the precise meaning of the "controlling persons" concept under the federal securities laws is not always an easy task. *E.g.*, Sommer, *Who's "in Control"?—SEC*, 21 BUS. LAW. 559 (1966); Note, *The Burden of Control: Derivative Liability Under Section 20(a) of the Securities Exchange Act of 1934*, 48 N.Y.U.L. REV. 1019 (1973). *But see* Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982) (finding various defendants to be "controlling persons" under 15 U.S.C. § 78t(a) in a Williams Act context).

[51] Gray Drug Stores, Inc. v. Simmons, [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,305 (N.D. Ohio Aug. 31, 1981); Riggs Nat'l Bank v. Allbritton, [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,899 (D.D.C. 1981).

5. Definition of Williams Act "Tender Offers"

a. *Application of the Tender Offer Concept to Various Transactions*

Congress did not define the term "tender offer" in the Williams Act, and the SEC has in the past declined to adopt a rule defining the term on the ground that "a definition of the term 'tender offer' is neither appropriate nor necessary" given the dynamic nature of tender offers and the need for flexibility in the implementation of the Williams Act.[52] Accordingly, it has fallen upon the courts to establish guidelines for determining whether a transaction or series of transactions constitutes a tender offer. The effort has only been partially successful.

The courts have had little difficulty fashioning a definition of a so-called "conventional" tender offer:

> The offer normally consists of a bid by an individual or group to buy shares of a company—usually at a price above the current market price. Those accepting the offer are said to tender their shares for purchase. The person making the offer obligates himself to purchase all or a portion of the tendered shares if certain specified conditions are met.[53]

Most courts agree, however, that a "tender offer" need not follow the conventional pattern.[54] "Several courts . . . have taken the position . . . that other unique methods of stock acquisition which exert pressure on stockholders to make uninformed, ill-considered decisions to sell, as is possible in the case of tender offers, should be treated as tender offers for purposes of the [Williams Act]."[55]

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[52] SEC Rel. No. 34-15548 (Feb. 5, 1979), [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 81,935, at 81,213.

[53] Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978) (*quoting* H.R. REP. NO. 1171, 90th Congress, 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2811). *See also* Water & Wall Assocs. v. American Consumer Indus., [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶93,943 (D.N.J. 1973). *See generally* S. REP. NO. 550, 90th Cong., 1st Sess. 8 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 8-9 (1968); Smallwood v. Pearl Brewing Co., 489 F.2d 579, 597 n.22 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974).

[54] Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974), specifically rejected the contention that a "tender offer" must be a hostile bid opposed by incumbent management.

[55] Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978). *See also* Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); Wellman v. Dickinson, [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,918 (S.D.N.Y. 1979); S-G Sec. Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114 (D. Mass. 1978); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973). *But see generally* Freedom Nat'l Bank v. Daniels & Nell, Inc., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,439 (S.D.N.Y. Jan. 28, 1982) (purchase program including solicitations by mail had some characteristics of a tender offer but irreparable harm not

This issue will most likely arise when an entity or group accumulates a large number of shares through ordinary market transactions conducted over an exchange or in the over-the-counter market, or through privately negotiated purchases. Since each situation raises slightly different questions, each will be discussed separately below.[56]

(i) Open Market Purchases

There have been a number of cases in which open market purchases have been challenged on the ground that they constituted tender offers. The most significant cases in this regard are discussed below *seriatim*:

1. In *Nachman Corp. v. Halfred, Inc.*,[57] the District Court for the Northern District of Illinois found that a 30% shareholder had not made a tender offer when he purchased an additional block of shares from a broker who had put the block together by buying shares on the Midwest Stock Exchange as they became available:

> The market transactions of [the broker] on behalf of [the buyer] do not constitute a tender offer. The sellers of those shares decided to sell on their own without any pressure from [the buyer]; there is no evidence that the market purchases were preceded by any public announcement which might have caused them to be a tender offer. . . . Although [the broker] presumably offered the shareholders . . . a premium over the market price, the Court does not deem this alone, especially in light of the small number of shareholders apparently so solicited, . . . sufficient to make these dealings a tender offer.[58]

The *Nachman* court also held that the buyer's partially successful attempt to purchase the stock of several directors and large shareholders did not constitute a tender offer either by itself or in connection with the open market purchases, primarily because individuals were thought

shown); Crane Co. v. Harsco Corp., 511 F. Supp. 294 (D. Del. 1981) (target's purchase of its own shares at a premium from arbitrageurs was not a tender offer); E.H.I. of Fla., Inc. v. Insurance Co. of N. Am. [1980 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,686 (E.D. Pa. 1980) (letter to bondholder-trustees requesting approval of sale of assets serving as part of the bonds' collateral was not a tender offer, as bonds are not equity securities); Gilbert v. Bagley, 492 F. Supp. 714 (M.D.N.C. 1980) (offer to purchase shares at fixed price pursuant to a court-supervised settlement agreement not a tender offer).

[56] A proxy solicitation will not be converted into a tender offer by a state statute that gives dissenting shareholders (in a merger or other transaction of similar consequence) the right to surrender their shares and receive an amount equal to fair market value as determined by a court. In situations of this type, the corporation is *required* to purchase the shares once the statutory prerequisites are satisfied; it is not *offering* to purchase the shares. *E.g.*, Leighton v. AT&T, 397 F. Supp. 133 (S.D.N.Y. 1975).

[57] [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,455 (N.D. Ill. 1974).

[58] *Id.* at 95,592.

to be "powerful enough not to be pressured by [the buyer] into making uninformed, ill-considered decisions to sell."[59] Accordingly, the *Nachman* court concluded that no tender offer had been made since "[t]o characterize . . . negotiations with a relatively small and powerful group of shareholders as a tender offer or tender offers would not serve the purposes of §§ 14(d) and (e)."[60]

2. In *Water & Wall Assocs. v. American Consumer Industries, Inc.*,[61] the plaintiff contended that the defendant had made a tender offer by contacting a market maker for the purpose of acquiring an interest in the subject company and later purchasing shares through the market maker pursuant to an open purchase order. The *Water & Wall* court rejected this argument, concluding that "the action taken by [the defendant] may have had some effect on the price of the stock, but it does not amount to a tender offer."[62]

3. In *D-Z Investment Co. v. Holloway*,[63] the District Court for the Southern District of New York rejected the issuer's argument that the defendant had made a tender offer when it purchased 5.37% of the stock of NJB Prime Investors in open market transactions on the American Stock Exchange and another 7.59% in four privately negotiated transactions with four highly sophisticated financial institutions. The *Holloway* court flatly rejected the plaintiff's contention that the open market purchases amounted to a tender offer, stating that "[i]t seems clear . . . that open market purchases cannot be a tender offer,"[64] and that the purchaser's "telephone calls to 'sophisticated persons,' . . . some 'two dozen' in all, and the four actual purchases from financial institutions" did not constitute a tender offer.[65]

4. In *Calumet Industries, Inc. v. MacClure*,[66] the District Court for the Northern District of Illinois concluded that a series of open market transactions did not constitute a so-called creeping tender offer within the meaning of section 14(d): "[C]ourts have repeatedly held that the requirements of that section are not triggered by regular purchases in the open market."[67]

5. In *Kennecott Copper Corp. v. Curtiss-Wright Corp.*,[68] the Second Circuit Court of Appeals held that Curtiss-Wright's open market purchases of Kennecott stock over various national securities exchanges

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

[60] *Id.* at 95,592.

[61] [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 93,943 (D.N.J. 1973).

[62] *Id.* at 93,759.

[63] [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,771 (S.D.N.Y. 1974).

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

[65] *Id.* at 56,563.

[66] [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,434 (N.D. Ill. 1978).

[67] *Id.* at 93,567.

[68] 584 F.2d 1195 (2d Cir. 1978).

did not constitute a tender offer,[69] reasoning that Congress could not have intended such purchases to be included in the definition of "tender offers" since such a definition would be inconsistent with other provisions of the Williams Act:

> Although broad and remedial interpretations of the [Williams] Act may create no problems insofar as the antifraud provisions of subsection (e) of section 14 are concerned, this may not be true with regard to subsections (d)(5)-(d)(7). Subsection (d)(5) provides that securities deposited pursuant to a tender offer may be withdrawn within seven days of the publication or delivery to shareholders of the tender offer or at any time after sixty days from the date of the original tender offer. Subsection (d)(6) requires offerors to purchase securities on a pro rata basis where more are tendered than the offeror is bound or willing to take. Subsection (d)(7) provides that where the offeror increases the offering price before the expiration of his tender offer, those tenderers whose stock has already been taken up are entitled to be paid the higher price. It seems unlikely that Congress intended "tender offer" to be so broadly interpreted as to make these provisions unworkable. . . .
>
> Kennecott's interpretation would . . . require courts to apply the withdrawal, pro rata and increased price provisions of section [14](d)(5)-(7) to ordinary stock purchases, a difficult if not impossible task. . . .
>
> If this court is to opt for an interpretation of "tender offer" that differs from its conventional meaning, this is not the case in which to do it.[70]

The final comment is at least somewhat unsettling. Although the *Kennecott* court found that Curtiss-Wright's purchases had not amounted to a tender offer, its suggestion that it might extend the definition of "tender offer" indicates that the decision could have gone the other way if the facts had been slightly different. At the same time, however, it must be recognized that *Kennecott* was the first case in which the Second Circuit Court of Appeals had been asked to plumb the meaning of the tender offer concept. Accordingly, the *Kennecott* court's comment

[69] White, Weld & Co. solicited approximately 50 Kennecott stockholders on behalf of Curtiss-Wright and later purchased the shares held by those individuals in transactions consummated on an exchange. In addition, another Curtiss-Wright broker purchased an undetermined number of Kennecott shares from a dozen institutional stockholders in transactions that did not cross an exchange. The Court of Appeals for the Second Circuit did not consider these purchases to be significant, however. In reaching its decision the court ignored White, Weld's actions, and held that "[t]he fact that several of Curtiss-Wright's purchases were negotiated directly with financial institutions lends no force to Kennecott's contentions." *Id.* at 1207.

[70] *Id.* (citations omitted).

should probably be taken to mean that the court did not intend to limit itself to the conventional definition of "tender offers" in the future. It does not necessarily mean, however, that that court will go so far as expanding the definition of "tender offers" to include open market purchases.[71]

In sum, there appears to be a consensus among the courts that open market purchases do not, by themselves, constitute tender offers. This position seems sound. First, as the Court of Appeals for the Second Circuit pointed out in *Kennecott*, a definition of "tender offer" that includes open market purchases would be inconsistent with other provisions of the Williams Act. Sections 14(d)(5)-(7), are particularly troublesome, but section 14(d)(1), which requires an offeror to file a Schedule 14D-1 before it publishes a tender offer, and Rule 10b-13, which prohibits an offeror from purchasing the target's stock other than pursuant to the tender offer while the offer is open, are also problematic. The application of these provisions to open market purchases would make such purchases a practical impossibility—a result which Congress clearly did not intend when it enacted the Williams Act.[72]

The second reason open market purchases should not be included in the definition of "tender offer" is that such an expansive definition of the term is neither warranted nor necessary given the purpose of the Williams Act. Sections 14(d) and 14(e), the principal statutory provisions applicable to tender offers, were designed to protect investors from pressured solicitations in which they might be forced to choose whether to sell their stock without the information necessary for a reasoned decision as a result of fear that if they failed to act quickly their shares would not be taken up at all.[73] Open market purchases hardly fit within this framework since, in those situations, the sellers will have entered the market on their own, content to take the then prevailing price. Moreover, there is no need to extend the protections of the Williams Act to situations where the purchaser does not publicize his intentions.[74]

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[71] *See also* Chromalloy Am. Corp. v. Sun Chem. Corp., 474 F. Supp. 1341 (E.D. Mo. 1979) (a series of open-market purchases plus one block purchase was not a tender offer); Financial General Bankshares, Inc. v. Lance, [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D.D.C. 1978) (discussed *infra* in connection with privately negotiated purchases).

[72] Wellman v. Dickinson, [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,918, at 95,840 (S.D.N.Y. 1979), *citing*, S. REP. NO. 550, 90th Cong. 1st Sess. 2 (1967).

[73] *See* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1275-76 (1973) (concluding that the term "tender offer" should not include open-market purchases since such transactions are not "capable of exerting the same sort of pressure on shareholders to make uninformed, ill-considered decisions to sell which Congress found the conventional tender offer was capable of exerting").

[74] In SEC Rel. No. 34-8392 (1968), [1969-70 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 77,715, the SEC took the position that a special bid constitutes a tender offer. The special bid does have many of the attributes of a tender offer (*e.g.*, public

It should be noted, however, that certain segments of the SEC have not formally conceded this point. In the past, at least some members of the SEC staff advocated a definition of the term "tender offer" that would include open market purchases.[75] These arguments seem to be based upon the assumption that the tender offer provisions of the Williams Act should extend to all transactions that "may have as great an effect on the market for an issuer's shares and may readily affect a change in the control of the issuer, as does a conventional tender offer."[76] However, Senator Williams specifically rejected this interpretation of the Williams Act:

> Substantial open market or privately negotiated purchases of shares may . . . relate to shifts in control of which investors should be aware. While some people might say that this information should be filed before the securities are acquired, disclosure after the transactions avoids upsetting the free and open auction market where buyer and seller normally do not disclose the extent of their interest and avoid prematurely disclosing the terms of privately negotiated transactions.[77]

Accordingly, there is little support for the expansive definition proposed by some members of the SEC staff.

(ii) Privately Negotiated Purchases

The courts have not reached a clear resolution of the question whether privately negotiated purchases can constitute a "tender offer." Clearly, a single negotiated purchase of stock should not amount to a tender offer regardless of the number of shares that are traded. As the following cases indicate, however, at some point the private solicitation of stockholders may become a statutory tender offer. The cases are again presented *seriatim*.

1. In *Cattlemen's Investment Co. v. Fears*,[78] the District Court for the Western District of Oklahoma held that the defendant had made a tender offer in the following circumstances:

> [T]he activities of the defendant in making contact with

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solicitation, fixed price, fixed number of shares and a premium over market price) and seems distinguishable from a normal market purchase. As a result of the SEC's position, the special bid has been used sparingly.

[75] *See, e.g.*, Griffin & Tucker, *The Williams Act, Public Law 90-439-Growing Pains? Some Interpretations With Respect to the Williams Act*, 16 HOW. L.J. 626 (1971).

[76] *Id.* at 634. The SEC proposed a largely mechanical definition of the tender offer concept in 1979. SEC Rel. No. 34-16385, [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 82,374 (1979). It is highly unlikely that this proposal will be adopted.

[77] 113 CONG. REC. 856 (1967).

[78] 343 F. Supp. 1248 (W.D. Okla. 1972).

> plaintiff's shareholders by the use of the mails, telephone calls, and personal visits, for the purpose of purchasing their shares, constitute "tender offers for, or a request or invitation for tender offers of" their stock within the meaning of the statute.[79]

The *Fears* court noted that it had no hesitancy in reaching this conclusion since "the contacts utilized by the defendant seem even more designed than a general newspaper advertisement, the more conventional type of 'tender offer,' to force a shareholder into making a hurried investment decision without access to information, in circumvention of the statutory purpose."[80]

2. In *Financial General Bankshares, Inc. v. Lance*,[81] the District Court for the District of Columbia identified five characteristics that it believed to be indicative of a Williams Act tender offer:

> (i) [S]olicitation made to a substantial number of shareholders and for a substantial percentage of the target corporation's stock;
> (ii) [O]ffer at a premium over current market price;
> (iii) [P]ressure exerted on the shareholders of the target corporation by the purchasing program; . . .
> (iv) [L]imited information available to shareholders . . . [of the target;] and
> (v) [L]imited time for deciding whether to sell.[82]

Based on these criteria, the *Lance* court found that the defendants had not made a tender offer:

> Plaintiff has . . . failed to show the widespread solicitation that is characteristic of a tender offer. The evidence indicates that at most ten FG shareholders were solicited by defendants. While these shareholders held a substantial percentage of FG stock, they were sophisticated investors who had decided to sell because they were dissatisfied with FG management. Yet, because these shareholders received above-market prices for their stock, plaintiff argues that the series of private transactions in which they sold their stock amounted to a tender offer. Plaintiff offers no support for this contention, and it is clear that privately negotiated transactions at premium prices, without more, are not a tender offer.[83]

The *Lance* court also found that the defendants' purchases of stock on

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[79] *Id.* at 1252.

[80] *Id.*

[81] [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D.D.C. 1978).

[82] *Id.* at 93,429.

[83] *Id.*

the open market, approximately one-fourth of the total acquired, did not constitute a tender offer since "there [was] no evidence that these transactions were in any way out of the ordinary."[84]

3. In *S-G Securities, Inc. v. Fuqua Investment Co.*,[85] the Massachusetts District Court undertook a thorough analysis of privately negotiated purchases. The *Fuqua* court said that it was "persuaded . . . that methods of stock acquisition other than the conventional tender offer fall within the purview of the tender offer provisions of the Williams Act,"[86] and that "[t]he question in [determining whether a given transaction should be included] is whether [the] method of acquisition . . . creates the same pressures and dangers . . . that the Williams Act was designed to prevent."[87] The *Fuqua* court noted that open market and privately negotiated purchases ordinarily do not constitute tender offers, but that this rule does not necessarily hold true when the purchases are preceded by extensive publicity:

> Defendant's purchases, in the case at bar, were preceded by two and, in part, by three widely publicized press releases issued by defendants that outlined with some specificity the details of the proposed buying program. . . .
>
> This publicity created a risk of the pressure on sellers that the disclosure and remedial tender offer provisions of the Williams Act were designed to prevent . . . . The conditional language in which defendants' proposals were couched does not obviate the public shareholders' need for the protection of the tender offer provisions of the Williams Act once such proposals have been made public with the specificity and apparent genuineness evident in this case.[88]

Accordingly, the *Fuqua* court "conclude[d] that where there is:

> (1) a publicly announced intention by the purchaser to acquire a substantial block of the stock of the target company for purposes of acquiring control thereof; and
>
> (2) a subsequent rapid acquisition by the purchaser of large blocks of stock through open market and privately negotiated purchases;

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[84] *Id. See also* Stromfeld v. Great Atl. & P. Tea Co., [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,287 (S.D.N.Y. 1980) (privately and secretly negotiated purchase of stock involving only seven stockholders was not a tender offer even though the price was at a premium and the purchase was contingent on the acquisition of a large number of shares because the terms were negotiated and the offer remained open for a long time).

[85] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,750 (D. Mass. 1978).

[86] *Id.* at 94,935.

[87] *Id.*

[88] *Id.* at 94,936.

such actions constitute a tender offer for purposes of § 14(d) of the statute."[89]

4. In *Kennecott Copper Corp. v. Curtiss-Wright Corp.*,[90] the District Court for the Southern District of New York held that Curtiss-Wright's acquisition of over three million shares of Kennecott stock did not constitute a tender offer. Curtiss-Wright had accumulated most of the shares through open market purchases, but at least fifty Kennecott stockholders were solicited off the floor of the exchange, and Salomon Brothers, a Curtiss-Wright broker, purchased an undetermined number of shares from four sophisticated institutional stockholders in privately negotiated transactions.

As indicated above, the *Kennecott* court dismissed Curtiss-Wright's open market purchases, noting that it is "well settled that market purchases of stock, however aggressive, do not constitute a tender offer."[91] The court then discussed the privately negotiated purchases (in which it apparently included the purchases from individual shareholders who were solicited off the floor but involved transactions completed on an exchange):

> Nor do the off-market solicitations and purchases . . . constitute a tender offer in the circumstances of this case. The most liberal definition of a tender offer is:
>
> > "any offer to purchase securities likely to pressure shareholders into making uninformed, ill-considered decisions to sell." Note, *The Developing Meaning of "Tender Offer"*, 86 Harv. L. Rev. 1250, 1281 (1973).
>
> In this case, the potential sellers of Kennecott stock were merely asked whether they wanted to sell their shares. They were offered no premium over market price. They were never given a deadline by which to decide whether to sell or not sell. . . .
>
> These sellers, moreover, were largely institutions who were unlikely to be forced into uninformed, ill-considered decisions. . . . These sophisticated investors have at hand large reservoirs of financial knowledge and capable staffs able to evaluate the pros and cons of a particular sale. In short, they are hardly the uninformed security holder unable to fend for himself, who needs the protection of the Williams Act. *Given the lack of pressure and the absence of any likelihood of hasty, uninformed selling, we*

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[89] *Id. citing* H. ARANOW, E. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 7-8, 14-17 (1977).

[90] 449 F. Supp. 951 (S.D.N.Y.), *aff'd in part, rev'd in part*, 584 F.2d 1195 (2d Cir. 1978).

[91] *Id.* at 961.

> *refuse to extend the concept of tender offer to reach the purchasing activities challenged here.*[92]

The *Kennecott* court did not indicate whether it considered the absence of pressure or the sophistication of the sellers to be more significant. It is reasonable to conclude, however, that both these factors played a substantial part in the *Kennecott* court's decision, and that the absence of either might have led to a different result.

5. In *Brascan Ltd. v. Edper Equities Ltd.*,[93] Brascan Ltd. brought suit against Edper Equities Ltd. after Edper purchased 3.2 million Brascan shares in a series of open market and privately negotiated transactions. The purchases followed weeks of heavily publicized negotiations between the two companies concerning Edper's future relationship with Brascan. Of the total number of shares acquired, approximately one-half were purchased from Gordon Securities Ltd., Edper's regular broker, which had accumulated the shares by soliciting large stockholders. The remaining shares were purchased in ordinary market transactions. All of the transactions, including the purchases from Gordon Securities, were made on Edper's behalf by Balfour Securities Co., a broker-dealer that Edper had retained specifically for the purpose.

The District Court for the Southern District of New York held that Edper's purchases did not amount to a tender offer as Brascan had contended. This finding was based on a two-pronged analysis of the transactions. First, Edper's open market purchases were held to have very little similarity to a conventional tender offer: "What Edper did was to acquire a large amount of stock in open market purchases, bidding cautiously so as to avoid bidding up the price of the stock to excessive levels unless there was large volume available at such price. *This is not a tender offer* . . . ."[94] The *Brascan* court also concluded that an expansive definition of the term "tender offer"—at least a definition that was broad enough to include Edper's purchases of Brascan shares—was inconsistent with the Williams Act. The *Brascan* court specifically rejected the argument that the tender offer provisions of the Williams Act should apply to all major acquisitions, reasoning that "the provisions of the Williams Act itself acknowledge . . . distinctions since it provides for different consequences where an initial accumulation is acquired by tender offer as opposed to where it is acquired by other methods."[95] Moreover, the *Brascan* court concluded that Congress could not have intended the concept "tender offer" to include privately negotiated purchases since the application of sections 14(d)(5)-(7) and Rule 10b-13 to

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[92] *Id.* (citations omitted) (emphasis added).

[93] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,882 (S.D.N.Y. 1979).

[94] *Id.* at 96,631 (emphasis added).

[95] *Id.* at 95,632.

such provisions would, as a practical matter, limit large scale acquisition programs to conventional tender offers.[96]

The *Brascan* court then turned to the transactions in which Gordon Securities had participated, and concluded that Gordon had not acted as Edper's agent. The *Brascan* court was not influenced by the fact that Gordon Securities was Edper's regular broker, or by the fact that the firm had helped Edper plan the purchases and accordingly had received advance knowledge that Edper would purchase a substantial number of shares. Instead, the *Brascan* court concluded that Gordon Securities was acting as an agent of the *sellers*, and that its solicitation was not made on behalf of Edper. More importantly, the *Brascan* court went on to say:

> Even if [Gordon Securities] were deemed to have been Edper's agent in the solicitation of shares for sale, still the transaction would not constitute a tender offer within the meaning of the Williams Act. All that [the] firm did was to scout between 30 and 50 large institutional holders of Brascan stock, plus about a dozen large individual investors, to collect a large block for Edper to purchase at a price agreeable to both sides of the transaction. . . . Such privately negotiated block trading is done on a daily basis in the U.S. securities markets without anyone's [sic] ever suspecting that what is being practiced might be a tender offer.[97]

This language might be taken to mean that shareholder solicitations will not constitute a tender offer if the solicitation is carried on by a broker, even a broker who is acting as an agent for the purchaser, rather than the sellers. A more reasonable interpretation, however, is that the solicitation of shares will not amount to a tender offer if the solicitor—either the purchaser or his broker—limits his efforts to sophisticated investors. Of the two, the latter interpretation is clearly more consistent with the Williams Act's goal of protecting shareholders from being forced to make uninformed, ill-considered decisions to sell or not to sell their shares.

6. In *Macke Co. v. Allegheny Beverage Corp.*,[98] the District Court for the District of Columbia entered a three-day temporary restraining order against the acquirer on preliminary findings that its substantial purchases, in open market and block transactions, managed by a large investment firm, at premium prices and with attendant pressure on target shareholders to sell, constituted a tender offer. At the expiration of the temporary restraining order, the *Macke* court denied the plaintiffs' motion for a preliminary injunction based upon its finding that no

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[96] *Id.*

[97] *Id.* at 95,631.

[98] [1980 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,576 (D.D.C. 1980).

purchases were made above the market price, no offer was contingent upon the purchase of a fixed number of shares, no time limit was placed on any offer and no pressure to sell was placed on any shareholder.

7. *SEC Position*: The SEC has filed *amicus curiae* briefs that typically list eight criteria which it apparently considers to be indicative of a "tender offer":

(i) An active and widespread solicitation of public shareholders;
(ii) The solicitation is made for a substantial percentage of the issuer's stock;
(iii) A premium over the prevailing market price;
(iv) The terms of the offer are firm rather than negotiable;
(v) The offer is contingent upon a fixed number of shares;
(vi) The offer is open only for a limited period of time;
(vii) The offerees are subject to pressure to sell their shares; and
(viii) Public announcement of the purchase program precedes or accompanies a rapid accumulation of shares.

This position has received a mixed response from the courts.[99] However, in *Hoover Co. v. Fuqua Industries, Inc.*,[100] the District Court for the Northern District of Ohio held that an offer to purchase from more than one hundred family members holding more than 41% of the subject company's stock was a tender offer, making explicit reference to the SEC's eight-point test.

8. *Wellman v. Dickinson*[101] is perhaps the most significant recent case in this context. In *Wellman*, the District Court for the Southern District of New York broke new ground by holding that a purchaser's privately negotiated purchases from a select group of financially sophisticated individuals and institutions constituted a tender offer within the meaning of the Williams Act. The *Wellman* court's holding is not surprising given the facts of the case. The purchaser's solicitation

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[99] *Compare* Brascan Ltd. v. Edper Equities Ltd., [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,882 (S.D.N.Y. 1979) ("I have doubts as to whether the Commission's view constitutes either a permissible or a desirable interpretation of the statute." *Id.* at 95,632), *with* Wellman v. Dickinson, [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,918 (S.D.N.Y. 1979) ("[I]t seems to me that the list of characteristics stressed by the Commission are the qualities that set a tender offer apart from open market purchases, privately negotiated transactions or other kinds of public solicitations." *Id.* at 95,842). The eighth criterion was omitted by the SEC in a brief filed in *Wellman*. As the *Wellman* court pointed out: "The reason this last characteristic was left out undoubtedly was because publicity was not a feature of [the] transaction [at issue there]." *Id.* *Compare* Wellman v. Dickinson *with* Hoover Co. v. Fuqua Indus., [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,107 (N.D. Ohio 1979).

[100] [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,107 (N.D. Ohio 1979).

[101] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,918 (S.D.N.Y. 1979).

was a systematic, well-planned effort designed to secure over one-third of the outstanding stock of the target company with great speed and a minimum of legal maneuvering. It was accomplished through a series of simultaneous phone calls made by the purchaser's brokers, the substance of which the *Wellman* court described as follows:

> There were slight variations, but each solicitee was told that a non-disclosed purchaser . . . was looking for 20% of [the subject company's] stock; that no transaction would be final unless 20% of the shares were acquired; that $45 option was a top final price and $40 option could be accepted with protection in the event shares were later bought at a higher figure; and that the desired 20% goal was within reach or that the order was filling up fast and a hurried response was essential. Each solicitee was asked to respond within one hour or less, although some were given until the next day.[102]

The *Wellman* proposal therefore included many characteristics that are indicative of a conventional tender offer.

Since the *Wellman* court concluded that "[T]here can be no disagreement that a purely private transaction is not subject to the pre-filing strictures under Section 14," it began its analysis by examining "whether this was a privately negotiated transaction or a series of transactions or a public offering."[103] The *Wellman* court approached this question in a novel, and seemingly questionable, fashion, using the private offering exemption provided by section 4(2) of the Securities Act as a guideline.[104] Reasoning by analogy to *SEC v. Ralston Purina Co.*,[105] the *Wellman* court concluded that the principal basis for distinguishing private from "public" transactions was "whether the particular class of persons affected needed the protection of the Act," regardless of the business or legal sophistication possessed by those individuals.[106] It added that "[t]he number and relationship of the offers and the size and manner of the offering" were additional factors to be considered,[107] and that the purchaser had the burden of proving that the transactions were private. The *Wellman* court then concluded that the offerees were in need of the protection of the Williams Act since they had not been given enough information (even as sophisticated investors) to enable them to make intelligent decisions, and the purchaser had applied pressure to force quick decisions. These factors, combined with the lack of "common

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[102] *Id.* at 95,830.

[103] *Id.* at 95,836.

[104] The actual reference in the *Wellman* court's opinion is to § 4(1) of the Securities Act. It seems clear that the *Wellman* court meant to refer to § 4(2).

[105] 346 U.S. 119 (1953).

[106] [1979 Decs.] Fed. Sec. Rep. (CCH) ¶ 96, 918, at 95,837.

[107] *Id.* at 95,837.

characteristic[s] binding upon the solicitees together," led the *Wellman* court to hold that the purchaser had "failed to carry [the] burden of showing that [its] acquisition was 'privately negotiated.' "[108]

The *Wellman* court concluded, however, that a solicitation will not be turned into a tender offer merely because it is "public." Accordingly, the *Wellman* court proceeded to consider whether the purchaser's acquisitions had constituted a Williams Act tender offer. In this regard, the *Wellman* court observed that many of the elements of a conventional tender offer—for example, a firm bid at a premium price and an obligation to purchase all or a specified portion of the tendered shares if certain conditions were met—were present in the case before it. The court specifically rejected defendant's contention that publicity, widespread solicitation of the general body of stockholders and the placement of shares in a depository were essential elements of a tender offer, holding instead that a transaction need not have "*all* the definitional features that courts have traditionally used to describe a tender offer" in order to fall within the purview of the Williams Act.[109] The *Wellman* court placed a great deal of emphasis on the fact that the transaction had been "a swift, masked maneuver," a characteristic which it considered to be the "basic evil which Congress sought to cure by enacting the [Williams Act]."[110] It summed up by noting that "[s]ophistication serves no purpose" in such transactions, and concluded that the purchaser's actions had clearly amounted to a tender offer.[111]

Overall, this conclusion seems sound; given the facts of the case it would appear that the *Wellman* purchaser had made a "tender offer." There are, however, certain aspects of the *Wellman* court's opinion that are troublesome. First, the *Wellman* court's short shrift to the sophistication of the parties constitutes a fundamental departure from prior authority. Equally disturbing is the *Wellman* court's reliance on *SEC v. Ralston Purina Co.*,[112] as a guideline for distinguishing public from private transactions. The application of *Ralston Purina* would more than likely stifle the use of privately negotiated stock acquisitions—a result obviously not intended by Congress[113]—just as it threatened to stifle the use of section 4(2) exemptions prior to, and at least in several contexts even after, the SEC's promulgation of Rule 146 (now Regulation D).[114] Finally, the *Wellman* court all but ignored the legislative history of the Williams Act, except to the extent that it could be relied upon to bolster its decision. At several points throughout its

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[108] *Id.* at 95,838-39.

[109] *Id.* at 95,844 (emphasis in original).

[110] *Id.* at 95,841.

[111] *Id.* at 95,841-44.

[112] 346 U.S. 119 (1953).

[113] *See* 113 CONG. REC. 856 (1967) (remarks of Sen. Williams).

[114] *See generally* SEC Rel. No. 33-5487, 39 Fed. Reg. 15,261 (1974).

opinion the *Wellman* court reasoned that the purchaser's actions must have been a tender offer because they were a "swift, masked maneuver" designed to achieve a shift in corporate control—according to the *Wellman* court, transactions of the type that Congress intended to regulate by enacting the Williams Act. Congress, however, specifically divided its regulatory effort into two parts: One to cover transactions in which post-acquisition disclosure was deemed necessary (section 13), and one to cover tender offers (section 14). The fact that a transaction presents a potential for a shift in corporate control, therefore, should not necessarily constitute it a "tender offer."

(iii) Integration

There are only a few cases in which the courts have been asked to decide whether open market or privately negotiated purchases, that do not themselves constitute a tender offer, must be integrated with a subsequent conventional tender offer. In *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*,[115] the District Court for the Southern District of New York flatly rejected the argument that open market purchases should be integrated with a subsequent tender offer. The *Gulf Western* decision is somewhat confusing, however, since the court therein made its comment in response to the plaintiff's contention that the bidder should have filed a Schedule 13D (formerly required for both section 13 and section 14 purposes) at the time it began acquiring shares with the intention of ultimately making a tender offer. Another significant case is *ICM Realty v. Cabot, Cabot & Forbes Land Trust*,[116] in which the District Court for the Southern District of New York held that allegedly misleading statements made in connection with pre-tender offer purchases were made "in connection with" a tender offer, but implied that the purchases were not part of the tender offer itself. Finally, in *Heine v. Signal Cos.*,[117] the same court flatly stated that there was no justification for integrating the purchaser's privately negotiated purchases with a subsequent tender offer.

It is significant to note that in all of these cases the courts also refused to hold (or were not asked to hold) that the private purchases alone constituted a tender offer. Consequently, it is not possible to say that open market or privately negotiated purchases could never be integrated with a subsequent tender offer. On the basis of the cases discussed above, however, it would seem that private transactions will not be integrated with a subsequent tender offer in most cases.

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[115] [1972-73 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 93,765 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973).

[116] 378 F. Supp. 918 (S.D.N.Y. 1974).

[117] [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,898, at 91,320 (S.D.N.Y. 1977).

[118] SEC Rel. No. 34-16623, 3 FED. SEC. L. REP. (CCH) ¶ 24,284I (Mar. 5, 1980).

b. *The "Commencement" Concept*

Rule 14d-2 described the various bases under which tender offers may be deemed to "commence" as, among others, 1) a long-form publication of the tender offer pursuant to Rule 14d-4(a)(1); 2) a summary advertisement pursuant to Rule 14d-4(a)(2); and 3) a public announcement of (A) the identity of the bidder, (B) the identity of the target company, (C) the amount and class of securities sought, and (D) the price or range of prices being offered thereof.

The most difficult interpretive issues under Rule 14d-2 have arisen with respect to public announcements. For example, the SEC has taken the position that only public announcements by the bidder (not a public statement by the subject company or an unaffiliated person unless confirmed by the bidder) trigger the five day "commence or withdraw" requirement of Rule 14d-2(b) notwithstanding the fact that the identity of the person making the announcement is irrelevant for shareholder-protection purposes.[118] The SEC also takes the position that, while a bidder may condition acceptance of tendered shares upon external events (such as regulatory approvals), it may not delay the dissemination of its offer once it has made public disclosure of the information specified in Rule 14d-2(b).[119] Finally, as discussed below,[120] it appears to be the SEC's view that any tender offer must remain open continuously for the twenty business day period of Rule 14e-1 and the bidder must be willing to accept for deposit any shares tendered during that time.

C. *Amendments*

1. The Timing Requirement

Section 13(d)(2) requires that an amendment to a Schedule 13D filing be made promptly whenever any material change occurs in the facts previously disclosed therein.[121] A similar requirement exists pursuant to Rule 14d-9(b), and Rule 14d-1(b) requires an amendment to any Schedule 14D-1 filing "promptly but not later than the date . . . additional tender offer material is first published, sent or given to security holders."

In *D-Z Investment Co. v. Holloway*,[122] a subject company sought to enjoin a tender offer on the ground that the bidder had not amended his Schedule 13D "promptly." The bidder had crossed the 5% line on April

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[119] *Id.*

[120] *See infra* note 128 and accompanying text.

[121] Rule 13d-2(a), 17 C.F.R. § 240.13d-2(a) (1981), provides further elucidation of this requirement:

> An acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed "material" . . .; acquisitions or dispositions of less than such amounts may be material, depending upon the facts and circumstances.

[122] [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,771 (S.D.N.Y. 1974).

23, 1974 and filed three days later. Its later purchases through May 16 were reported on May 21; purchases through May 28 were reported on June 3; and purchases through July 3 were reported by July 9. While refusing to define the outer limits of the term "promptly," the *Holloway* court held that the bidder's amendments fit easily within the definition and rejected the subject company's claims.

Moreover, in *Scott v. Multi-Amp Corp.*,[123] it was held that even though the amendment-triggering event seemingly had occurred by July 10, 1974, a filing on September 5, 1974 met the requirements of section 13(d)(2). In reaching this conclusion, the *Scott* court emphasized the following factors: 1) the proposed purchaser (of assets of the issuer) was not even incorporated as of September 5; 2) there was a lingering uncertainty as to whether there was any need to file at all; and 3) the price for the acquisition had not been set until July 29.[124]

A similar result obtained in *Cook United, Inc., v. Stockholders Protective Committee*.[125] In *Cook United*, the defendants held a meeting on March 21, 1979 at which they decided to wage a proxy fight for control of the plaintiff corporation. The actual agreements which committed the defendants to this course of action were not signed until early in the next month. The plaintiff contended that a Schedule 13D should have been filed after the March 12 meeting, but the *Cook United* court rejected this contention, holding that the defendants had made a timely filing on April 12, 1979.[126]

Although neither the courts nor the SEC have analyzed the issue in precisely these terms, the question of whether a Schedule 13D amendment is sufficiently "prompt" should depend upon the relative degree of importance of the fact or facts giving rise to the amendment. For example, an amendment disclosing that a filing person had changed his intention in tolding securities of the issuer from "investment" to a purpose to obtain actual control pursuant to a tender offer should be filed almost immediately after the latter decision has been made since such information is of obvious significance to the issuer's shareholders and the investing public. On the other hand, the fact that a filing person which had previously purchased slightly more than 5% of an issuer's securities in open market purchases over an extended period had acquired an additional 1% over several months and had not changed its intent would be of less significance. Most practitioners in the area would counsel for an almost immediate amendment in the first case (although pinpointing a change in intent is admittedly difficult), but would not be uncomfortable with some delay (as long as it was not unreasonable) in the second.[127]

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[123] 386 F. Supp. 44 (D.N.J. 1974).

[124] *Id.* at 61.

[125] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,875 (S.D.N.Y. 1979).

[126] *Id.* at 95,578.

[127] The SEC has provided virtually no guidance in this area. *But see generally*

2. Amendment Versus New Offer

The point of time at which changes in or modifications of an existing tender offer become so significant as to constitute a "new offer" triggering the fifteen business day withdrawal rights period provided in Rule 14d-7 and the twenty business day minimum offering period provided in Rule 14e-1 has not yet been clearly identified by the SEC's rules or judicial authority.

In *Pullman, Inc. v. McDermott, Inc.*,[128] the District Court for the Northern District of Illinois held that an announcement by a bidder of 1) a change in the tender offer price, 2) the number of shares sought, 3) the statement of intention to effect a clean-up merger, 4) the minimum number of shares sought, and 5) the conditions to the offer constituted a new tender offer, thus triggering the twenty business-day minimum offering period. However, the announcement of only an increase in the number of shares sought was held not to constitute a new offer by the Seventh Circuit Court of Appeals in *McDermott, Inc. v. Wheelabrator-Frye, Inc.*[129] The result obtaining when changes in magnitude are between these two extremes is not predictable. In general, the courts should proceed cautiously in expanding the holding in *Pullman* since an overly broad approach to this issue might inhibit the competitive bidding process.[130]

3. The Effect of Injunctions Against Bidders

A related issue (and one which might properly be dealt with under the "commencement" rubric) involves the effect of an injunction against the bidder upon the various minimum periods prescribed by the Williams Act rules. The cases decided thus far have held that the twenty business-day minimum offering period and fifteen business-day withdrawal period are not tolled or retriggered because of injunctions or temporary restraining orders entered against the bidder.[131] However, particularly in a situation like Mobil Corporation's October 30, 1981 in-

In re United States Filter Corp., SEC Rel. No. 34-17425, [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 82,803 (1981) (amendment one day after signing of an acquisition agreement but some three weeks after a change in intent deemed not "prompt"); Law, Weathers, Richardson & Dutcher (SEC Staff Reply Feb. 13, 1976).

[128] No. 3555 (N.D. Ill. Sept. 3, 1980).

[129] [1980 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,687 (7th Cir. 1980).

[130] Application of the SEC's new minimum periods arguably should not be used to the advantage of any competitive bidder in light of Congress' overall neutral stance.

[131] Crouse Hinds Co. v. InterNorth, Inc., [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,840 (N.D.N.Y. 1980); Raybestos-Manhatten, Inc. v. Hi-Shear Indus., [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,806 (E.D.N.Y. 1980); Curtiss-Wright Corp. v. Kennecott Corp., [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,803 (S.D.N.Y. 1980).

itial offer for shares of Marathon Oil Company (where the bidder had not complied fully with the dissemination requirements of Rule 14d-3 when injunctive relief was entered),[132] it could be that the offer has not actually "commenced" or, alternatively, that the minimum periods should be tolled because of the dissemination requirements of Rule 14d-3 when an injunction is entered.[133]

D. *Section 14(e)*

Section 14(e) of the Williams Act[134] proscribes fraudulent, deceptive or manipulative acts or practices in connection with any tender offer. Section 14(e) and Rule 10b-5[135] are substantively identical, except with regard to their respective "in connection with" clauses.[136] As the Rule

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[132] Wall St. J., Nov. 5, 1981, at 14, col. 1.

[133] If the bidder does not publish a long-form offer or mail its offer to all shareholders, the only alternative left to it under Rule 14d-4(a) is the publication of a summary advertisement relating to the offer and furnishing "with reasonable promptness . . . tender offer materials to any security holder who requests such tender offer materials pursuant to the summary advertisement or otherwise." Since "the date of commencement and the date of first publication, sending or giving are synonymous" under the SEC's tender offer rules, SEC Rel. No. 34-16623, 3 FED. SEC. L. REP. (CCH) ¶ 24,284I, at 17,759 (Mar. 5, 1980), it could be argued that an injunction which precludes adequate dissemination by one of the prescribed means precludes actual "commencement". The tolling argument is based solely upon equitable considerations since, at last in a partial tender offer, all shareholders may not be equally treated (due to proration) where only particular classes of shareholders have actually received the bidder's tender offer materials (arbitrageurs and professional investors frequently receive those materials in advance of other classes of security holders). The issue was rendered moot in the *Mobil-Marathon* decision by an order of the trial court in pending antitrust litigation resetting the initial proration, withdrawal and expiration dates of Mobil's tender offer. Marathon Oil Co. v. Mobil Corp., No. 2193 (N.D. Ohio Nov. 10, 1981) (interim order).

[134] Section 14(e) of the Williams Act provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purpose of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative.

[135] 17 C.F.R. § 240.10b-5 (1981).

[136] *E.g.*, Bucher v. Shumway, [1979-80] Fed. Sec. L. Rep. (CCH) ¶ 97,142, at 96,299 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *In re* Sunshine Mining Co. Sec. Litig. [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,217, at 96,635-36 (S.D.N.Y. 1979).

10b-5 of tender offer regulation,[137] it is not surprising that the vast majority of tender offer cases have been brought and decided under section 14(e).

The various disclosure issues which have arisen under section 14(e) are discussed elsewhere in this Article.[138] However, the proper scope of section 14(e), a topic of much recent tender offer litigation,[139] warrants comment here.

1. The "In Connection With" Requirement

The requirements of section 14(e) extend not only to the statutory filing and tender offer materials and recommendations, but to all conduct "in connection with" a tender offer. It has been held that alleged fraudulent conduct made for the purpose of warding off a possible tender offer does not satisfy the "in connection with" and causation requirements of section 14(e), at least where no tender offer is ever actually commenced.[140] However, in *ICM Realty v. Cabot, Cabot & Forbes Land Trust*[141] a potential target company was successful in obtaining an injunction against a proposed tender offer on the ground that the potential bidder had made material misstatements to five banks with which the bidder had contracted for the purchase of blocks of the target's shares. The *ICM Realty* court held that the acquisition of these blocks was part of the potential bidder's overall plan to make a tender offer and that section 14(e) therefore applied to all representations which the potential bidder had made to the banks. The potential bidder had made no representations to the public or even to the subject company, but only to the five banks, which did not join as plaintiffs to the action. The defendant argued that later statements to the public in its forthcoming offer to purchase would cure any alleged misrepresentation to the banks, but the *ICM Realty* court rejected that contention.[142]

The approach adopted in *ICM Realty*, utilized by other courts in Williams Act litigation,[143] was at the heart of the District Court for the

[137] *See, e.g.*, Smallwood v. Pearl Brewing Co., 489 F.2d 579, 605 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974).

[138] *See infra* Section III.

[139] *E.g.*, Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981). *See generally* Profusek, *Tender Offer Manipulation: Tactics and Strategies After Marathon*, 36 Sw. L.J. 975 (1982).

[140] Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981).

[141] 378 F. Supp. 918 (S.D.N.Y. 1974).

[142] *Id.* at 926-27.

[143] *See, e.g.*, Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982); Lewis v. McGraw, [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,195 (S.D.N.Y. 1979); Applied Digital Data Sys. v. Milgo Elec. Corp., 425 F. Supp. 1163 (S.D.N.Y. 1977). "It is well settled that statements made by either the offeror or the target company prior to the actual effective date of a tender offer but after the announcement of the offer and preliminary filings fall

Southern District of New York's reasoning in *O'Connor & Assocs. v. Dean Witter Reynolds*.[144] There, the restrictive argument that the scope of section 14(e) could not apply until after the public announcement of a tender offer was explicitly rejected under the SEC's Rule 14e-3:

> It is true that here the allegedly fraudulent conduct occurred prior to the announcement of the tender offer proposal. However, this circumstance does not change the fact that the alleged failure to disclose the impending announcement of the tender offer proposal worked to deny the target invest[or] the relevant information on which to decide whether to sell his shares in the same manner as fraudulent conduct operates when an offer has already been publicly announced.[145]

The *O'Connor* court concluded that any other reading would present "the risk of defeating in substantial part the very purpose of the Act."[146] Cases such as *ICM Realty* and *O'Connor* seem correct—false or misleading statements made in advance of public announcement of a tender offer have an obvious potential to undercut stockholder protections, at least as significant as those made following the public announcement of the offer. Yet, some factual nexus to the offer does seem to be necessary. Thus, if no tender offer was distinctly on the horizon, it would appear that no section 14(e) claim could be made out.

2. Whether Section 14(e) Proscribes Unfair Conduct Absent Fraud or Deception

A number of early cases found conduct violative of section 14(e) without respect to whether such conduct involved a misstatement or failure to state material facts or traditional manipulation.[147] In *Applied*

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within the purview of § 14(e)." Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1318 (W.D. Mich. 1978). *See, e.g.*, Applied Digital Data Sys. v. Milgo Elec. Corp., 425 F. Supp. 1145, 1152, 1154-55 (S.D.N.Y. 1977). False and misleading statements made "on the eve of a tender offer" have been held to be subject to the Williams Act as being made "in connection with a tender offer." Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980).

It has, however, also been said to be "questionable" whether § 14(e) has any application to the *mechanics* of a tender offer during the period after the shareholders' investment decisions have been made. Indiana Nat'l Bank v. Mobil Oil Corp., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,483, at 93,783 n.10 (7th Cir. 1978).

[144] 529 F. Supp. 1179 (S.D.N.Y. 1981).

[145] *Id.* at 1191.

[146] *Id.* (quoting Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir. 1980), *cert. denied*, 449 U.S. 951 (1981)).

[147] *E.g.*, Royal Indus. v. Monogram Indus., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,863 (C.D. Cal. 1976) (refusal of subject company to provide stockholders list to bidder).

Digital Data Systems, Inc. v. Milgo Electronic Corp.,[148] for example, an issuance of stock designed to thwart a tender offer was deemed violative of section 14(e). The same court subsequently determined that an offeror had a right to the target company's shareholder list, without respect to whether the latter utilized such list to communicate with its shareholders in a manner which violated sections 14(d) or 14(e).[149]

More recently, in *Mobil Corp. v. Marathon Oil Co.*,[150] the Court of Appeals for the Sixth Circuit held that a stock option and an asset option obtained by a competing bidder (USS Inc., a subsidiary of United States Steel Corporation) as a condition to its making a competing tender offer constituted a "manipulative" act or practice under section 14(e) notwithstanding the trial court's express holding, left undisturbed by the appellate court, that the subject company's directors had acted for a good faith corporate purpose and that the terms of both options were fair and reasonable and had been fully disclosed:

> The [asset] option and the stock option, both individually and in combination, have the effect of circumventing the natural forces of market demand in this tender offer contest. Were this contest a straight price-per-share auction, tender offers well in excess of the USS offer of $125 per share may have been forthcoming. Of course, Mobil itself has offered $126 per share, conditional on the judicial removal of the options. Our task under the Williams Act is not to speculate about what price the Marathon shareholders might have been offered if the natural market forces existed in this tender offer contest, but rather to enforce the mandate of section 14(e) against manipulation of the market. The purpose of the Williams Act, protection of the target shareholders, requires that Mobil and any other interested bidder be permitted an equal opportunity to compete in the marketplace and persuade the Marathon shareholders to sell their shares to them.[151]

In so holding, the *Marathon* court explicitly rejected the argument that nondisclosure was a *sine qua non* of "manipulation" under the federal securities laws: "In short, to find compliance with Section 14(e) solely by the full disclosure of a manipulative device as a *fait accompli* would be to read the 'manipulative acts and practices' language completely out of

[148] 425 F. Supp. 1163 (S.D.N.Y. 1977).

[149] Applied Digital Data Sys. v. Milgo Elec. Corp., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,824 (S.D.N.Y. 1977).

[150] 669 F.2d 366 (6th Cir. 1981). In the interest of full disclosure, it should be noted that Jones, Day, Reavis & Pogue acted as attorneys for the subject company in this action.

[151] *Id.* at 376.

the Williams Act."[152] Instead, under *Marathon*, the critical inquiry is whether the challenged act or transaction prohibits others from "competing on a par" for control.[153]

Arguably decisions such as *Marathon* and *Applied Digital Data Systems* represent an impermissible extension of the Williams Act. In introducing such legislation, the sponsor stated: "This legislation will close a significant gap in investor protection under the Federal Securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities."[154] That is, the Williams Act is primarily a disclosure statute enacted for the benefit of the holders of equity securities in a subject company, and was not intended to provide new rights to either the takeover bidder or management of the subject company: "The two major protagonists—the bidder and defending management—do not need any additional protection. . . . [T]hey have the resources and the arsenal [and the] moves and countermoves which can adequately protect their interests."[155]

It was principally this factor which led to the Supreme Court's conclusion in *Piper v. Chris-Craft Industries, Inc.*,[156] that a defeated bidder lacked standing to sue for damages under section 14(e): "[T]ender offerors were not the intended beneficiaries" of the Williams Act.[157] While the *Piper* Court was acutely aware that Congress did not intend to tip the balance in favor of the subject company or the bidder,[158] it reasoned that "[t]his express policy of neutrality scarcely suggests an intent to confer highly important, new rights upon the class of participants whose activities prompted the legislation in the first instance."[159]

The *Piper* Court utilized the four-pronged test articulated in *Cort v. Ash*,[160] to analyze whether the inference of a private damage remedy under section 14(e) was appropriate. While not literally applicable to questions whether, for example, a "lock-up" option or a defensive merger violates section 14(e), this analysis is nonetheless relevant. The *Piper* Court readily concluded that the first two *Cort* factors—whether the plaintiff was a member of the "especial class" that the legislation was designed to protect and whether congressional intent to confer a

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[152] *Id.* at 377.

[153] *Id.* at 376.

[154] 133 CONG. REC. 854 (Jan. 18, 1967).

[155] *Hearings Before S. Subcomm. on Secs. of S. Comm. on Banking & Currency*, 90th Cong., 1st Sess. 57 (1967).

[156] 430 U.S. 1 (1977).

[157] *Id.* at 28.

[158] *Id.* at 29.

[159] *Id.* at 30.

[160] 422 U.S. 66 (1975).

right existed—militated against the inference of an action for damages since, as discussed above, bidders were not the intended beneficiaries of the Williams Act.[161] This reasoning would, of course, equally apply to a lock-up option, a defensive merger or a request for the subject company's shareholder list. The third *Cort* factor is whether the inference of such a right would be consistent with the federal statutory scheme. Here the *Piper* Court concluded that "the Williams Act cannot consistently be interpreted as conferring a monetary remedy upon regulated parties, particularly where the reward would not redound to the direct benefit of the protected class."[162] However, it could be argued that any defensive tactic (other than disclosure) undertaken solely to block an offer (which was not the case in *Marathon* since the options were a condition to obtaining a higher bid) is inconsistent with the purposes of the Williams Act since, if effective, it might perforce prevent the consummation of a tender offer.

The fourth factor under *Cort* is whether the cause of action is one traditionally relegated to state law. Both in the *Piper* situation and the context at issue in *Marathon*, state law has traditionally controlled. Accordingly, deference to state law was the principal policy consideration underlying the Supreme Court's refusal in *Santa Fe Industries, Inc. v. Green*,[163] to extend Rule 10b-5 to cover corporate conduct touching upon securities transactions which did not involve deception or manipulation: "Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden."[164] Instead, in *Green* the Supreme Court held that the word "manipulation" in Rule 10b-5 is a term of art which "refers generally to practices such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity."[165]

Of course, a target company may have to disclose accurately the objective facts relating to a defensive act, such as a merger.[166] However, given that section 14(e) merely makes Rule 10b-5 applicable to tender offers, it would appear the former should have no application in the

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[161] 430 U.S. at 32.

[162] *Id.* at 39.

[163] 430 U.S. 462 (1977).

[164] *Id.* at 479.

[165] *Id.* at 476. In Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976), the Supreme Court held:

> Use of the word "manipulative" is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.

[166] *See, e.g.*, SEC v. Thermal Power Co., [1975-76 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,265 (D.D.C. 1975).

absence of misrepresentation or failure to disclose material facts, or "manipulation" within the meaning of *Green*. Judge Moore's dissent to the Second Circuit Court of Appeal's decision in *Green*[167] seems equally applicable in the tender offer context:

> The [Second Circuit] majority's insistence on extending federal securities anti-fraud provision beyond the bounds of fraud and into the realms of fiduciary duty is disturbing enough. Accompanied, as it is, by their erroneous finding of a breach of such duty, and by the astonishing and impermissible establishment of a federal common law of corporations—as ill-founded as it is improper—disconcertion must give way to alarm.[168]
>
> First and foremost, however, the point must be made that, in taking cognizance of plaintiff's claim, the majority has not provided a remedy to correct a fraud; rather it has extended to these plaintiffs an independent, substantive right totally unrelated to the anti-fraud scheme of the federal securities laws and in complete derogation of a valid state rule regulating corporate activity. Indeed, the majority appears to have ignored the Supreme Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1939), which put an end to federal common law and forbade the federal courts from formulating their own "better rule."[169]

As is discussed below, in contrast to *Marathon* and *Applied Digital Data Systems*, most other courts have held that nothing in the Williams Act precludes a subject company from, for example, seeking a "friendly merger" to counter a hostile tender offer, granting "lock-up" options or taking other similar defensive actions.[170] Given *Green* and the fact that such "defensive" activity usually redounds to the shareholders' benefit, the result reached in these cases seems correct.

Presumably, these perceptions led to *Marathon's* lukewarm reception

[167] Green v. Santa Fe Indus., Inc., 533 F.2d 1283, 1304-07 (2d Cir. 1976) (Moore, J., dissenting), *rev'd*, 430 U.S. 462 (1977).

[168] *Id.* at 1304.

[169] *Id.* at 1307.

[170] *E.g.*, Panter v. Marshall Field & Co., 646 F.2d 271, 285 (7th Cir. 1981); *In re* Sunshine Mining Co. Sec. Litig., 496 F. Supp. 9, 11 (S.D.N.Y. 1979); Altman v. Knight, 431 F. Supp. 309 (S.D.N.Y. 1977). *See also* Seaboard World Airlines v. Tiger Int'l Inc., 600 F.2d 355, 358 (2d Cir. 1979); Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1318, 1321 (W.D. Mich. 1978); Bucher v. Schumway, [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,142, at 96,229 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); Golub v. PPD Corp., 576 F.2d 759, 764 (8th Cir. 1978); Marsh v. Armada Corp., 533 F.2d 978 (6th Cir. 1976) (a pre-*Santa Fe* Rule 10b-5 decision); E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 205, nn.41 & 46 (1979); McIntyre, *Shareholders' Recourse Under Federal Securities Law Against Management for Opposing Advantageous Tender Offers*, 34 BUS. LAW. 1283, 1293-94 (1978).

by other courts. For example, in the Whittaker/Brunswick tender offer, the bidder, Whittaker, sought to enjoin an asset sales agreement entered into by the subject company, Brunswick, with American Home Products which provided for the swap of shares of Brunswick acquired pursuant to American Home Products' negotiated tender offer for Brunswick's Sherwood Division, its "crown jewel." However, in *Whittaker Corp. v. Edgar*,[171] Judge Flaum distinguished *Marathon* because *Whittaker* did not, in his view, involve an option (even with broad "outs" in controlling documents, some of which arguably had already been triggered) and because the proposed sale of the "crown jewel" had not created an artificial ceiling in the tender offer market for Brunswick. Finally, Judge Flaum held that "a sale of the substantial asset by a corporation in the face of a tender offer standing alone is not a violation of Section 14(e)."[172]

The *Icahn*[173] decision was more directly inconsistent with *Marathon*. There, Icahn, an approximately 30% holder (together with a section 13(d)(3) "group") of the subject company, Marshall Field, sued to enjoin a stock option exercisable at the cash tender offer price (which was increased one day later) of a two-step White Knight agreement with BATUS and a first-refusal right relating to Marshall Field's Chicago retail stores (its crown jewel). However, in *Marshall Field & Co. v. Icahn*,[174] Judge Leval refused the 30% holder's application for injunctive relief against the alleged "lock-up" options. While making a pass at distinguishing the Sixth Circuit's *Marathon* decision (based principally upon a failure to prove irreparable harm—*viz.*, that any potential bidder had been deterred by the options), Judge Leval's decision was grounded in a fundamental disagreement with the Sixth Circuit's *Marathon* analysis:

> I doubt that [*Marathon*] represents the law in this circuit. In my view the reasoning of that decision could unduly interfere with the right of company management to combat a takeover attempt that it believes in good faith to be harmful to its shareholders. In my view the securities laws do not bar management from taking action in the best interest of its shareholders even if this will make more difficult the success of a disfavored offeror. The rule might be otherwise on a showing that management is acting for its own interests in violation of its fiduciary duty to its shareholders. No such showing has been made here.[175]

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[171] [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,483 (N.D. Ill. Jan. 25, 1982), *aff'd*, No. 82-1305 (7th Cir. Mar. 5, 1982).

[172] *Id.* at 92,832.

[173] Marshall Field & Co. v. Icahn, [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,616 (S.D.N.Y. Mar. 26, 1982).

[174] *Id.*

[175] *Id.* at 93,061.

Marathon nonetheless remains the law of the Sixth Circuit and it therefore provides a basis for challenging both offensive and defensive actions given the almost limitless jurisdiction and venue provisions applicable to most nationwide tender offers. The question therefore is one of plumbing *Marathon's* outer limits.

Taken to its extreme, virtually any preemptive offensive or defensive reaction could be said to be "manipulative" under the Sixth Circuit's *Marthon* reasoning. However, *Brunswick* and *Icahn* suggest thst defensive "lock-ups" can possibly be structured to avoid *Marathon*, even within the Sixth Circuit. More particularly,

1. Stock options can be granted at the best price then being offered (or, better yet, with price escalators); and
2. Asset agreements can be structured as binding contracts (*Brunswick*) or first-refusal rights (*Icahn*) since it appears that a critical factor in *Marathon* (presumably inserted only to protect Marathon's "crown jewel" if the company remained independent) was that the asset option was exercisable by U.S. Steel only if a third party gained control.

To be sure, *Marathon* has been criticized as a result of the short shrift given therein to the question of whether non-disclosure or deception are necessary elements of "manipulation" under the federal securities laws and the trial court's express holding that the subject company's directors had satisfied their state law fiduciary obligations in granting the challenged options.[176] The most far-reaching implications of *Marathon* may, however, relate not to its analysis of substantive proscriptions, but to the questions of what remedies are available for conduct determined to be manipulative. Based upon the *Marathon* court's express holding, disclosure is irrelevant to whether the illegal conduct has been practiced.[177] Accordingly, as discussed below,[178] curative disclosure may no longer be sufficient to remedy a Williams Act violation; instead, injunctive relief which removes the manipulative device and dissipates its effect, as was ordered in *Marathon* itself, will in many instances now be required.

E. *Section 14(f)*

Section 14(f) requires the subject company to transmit to the SEC and to the holders of record of its securities, who would be entitled to vote for the election of directors, information "substantially equivalent" to that required by the proxy rules for the election of directors in the following circumstances:

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[176] *E.g.*, Nathan, *Novel Legal Questions Explored*, Nat'l L.J. Mar. 29, 1982, 25, col. 4, at 30, col. 2-4.

[177] *See, e.g.*, Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982).

[178] *See infra* Section II(C).

> If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to [sections 13(d) or 14(d)], any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the person so elected or designated will constitute a majority of the directors of the issuer.

In *Gruss v. Uris Building Corp.*,[179] National Kinney Corporation purchased 54% of the shares of Uris Building Corporation from six shareholder-directors. Pursuant to the stock purchase agreement, the sellers agreed to use their best efforts to increase the number of Uris directors from thirteen to fourteen and to cause six nominees of Kinney to be elected, both of which events were accomplished. The selling shareholders also agreed to resign from the board upon demand from Kinney. Thereafter, three former directors resigned, one of whom was a seller. Thus, the board was composed of eleven directors, six of whom were Kinney nominees, and the remaining five of whom were sellers who had agreed to resign at Kinney's request. Minority shareholders brought an action alleging that Uris had violated section 14(f) by not filing the information required thereunder. The plaintiffs argued that, since Kinney could demand the resignation of five directors, it should be presumed that they were under Kinney's direct control and, therefore, that Kinney could be said to have designated eleven of the fourteen seats on the Uris board. Judge Waytt rejected the claim, holding that the five seller-directors had not been "elected or designated" by Kinney and that section 14(f) therefore did not apply. Whether the five directors were "controlled by" Kinney was held to be irrelevant for purposes of the statute.[180]

In *Monheit v. Carter*,[181] however, three of thirteen members of the issuer's board were elected without a shareholders meeting. The three directors allegedly represented a controlling group of shareholders. In addition, the plaintiff, a minority shareholder, alleged that four of the remaining directors who were not up for election had agreed to become the designees of the control group. Judge Tyler held that the plaintiff had stated a claim under section 14(f) since an actual change in control would have taken place. In so holding, Judge Tyler specifically rejected the formalistic requirement of *Gruss* that the directors be actually "elected or designated" in favor of an approach that focused upon the actual balance of control.

While the terms of section 14(f) require that a director be "elected or designated" otherwise than at a shareholders meeting, the triggering "election or designation" is one pursuant to any "arrangement or understanding." It would seem that the approach in *Monheit* is more

179 [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,154 (S.D.N.Y. 1973).

180 *Id.* at 94,632-33.

181 376 F. Supp. 334 (S.D.N.Y. 1974).

consistent with the apparent intent of section 14(f) than *Gruss*, since *Monheit* takes a substantive and realistic approach to the problem. On the other hand, the *Gruss* rule has the virtue of providing a sure guideline as to when the statutory provisions become applicable and avoids an inquiry into each director's primary allegiance.

II. CERTAIN BASIC LITIGATION ISSUES

As indicated at the outset, the principal avenues for Williams Act litigation involve questions of whether a particular filing was required in a given setting and, if made, whether the filing was timely and the disclosures therein were adequate. However, a number of other basic litigation questions, the resolution of which may be crucial in a particular takeover contest, must also be considered. The most significant of these are considered in this Section.

A. *Standing*

Prior to the enactment of the Williams Act, a party seeking to attack a tender offer was forced to attempt to assert standing under section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Although the subject company and tendering shareholders were generally given standing to seek relief against a non-disclosing bidder,[182] questions of standing and proper parties were often dependent upon such subtle distinctions as the type of relief sought.[183] Since the enactment of the Williams Act, however, questions of standing have generally been framed only in the terms of the role played by the party in a particular tender offer.[184]

1. Bidder Standing

Except in competitive bidding situations, the instances in which bidders commence Williams Act litigation are, on a relative basis, few because the bidder's principal object in most tender offers is the prompt consummation of the bid, so as to preclude competing bids, defensive actions and similar events. Nonetheless, any examination of standing to sue under the Williams Act should begin with bidder standing since the developments in this context form the foundation for analysis in other contexts.

In *Piper v. Chris-Craft Industries, Inc.*,[185] the Supreme Court held that

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[182] *See, e.g.*, Moore v. Greatamerica Corp., 274 F. Supp. 490 (N.D. Ohio 1967).

[183] *See, e.g.*, Mutual Shares Corp. v. Genesco, Inc., 266 F. Supp. 130 (S.D.N.Y.), *rev'd in part*, 384 F.2d 540 (2d Cir. 1967).

[184] *E.g.*, GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U. S. 910 (1972); Nicholson File Co. v. H. K. Porter Co., 341 F. Supp. 508 (D.R.I. 1972). *See generally* Butler Aviation Int'l Inc. v. Comprehensive Designers, Inc. 425 F.2d 842 (2d Cir. 1970).

[185] 430 U.S. 1 (1977).

a defeated bidder lacks standing to sue for damages under section 14(e). Although cognizant of Congress express refusal to enact tender offer legislation which would tip the balance toward one side or another in takeover contests, the Court, as discussed in the preceeding Section, concluded that this policy "scarcely suggests an intent to confer highly important, new rights upon the class of participants whose activities prompted the legislation in the first instance."[186] Instead, bidders were deemed to be "outside the scope of the concerns articulated in the evolution of the legislation."[187]

As briefly discussed in the preceding Section, in reaching this decision the Supreme Court applied the four-pronged test articulated in *Cort v. Ash*,[188] to determine whether the inference of a damage remedy would be appropriate. First, bidders were found not to be of the class of persons for whose special benefit the Williams Act was passed. "To the contrary, [the bidder] is a member of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class, shareholder-offerees."[189] Second, the *Piper* Court determined there was no explicit or implicit indication that Congress intended to create a remedy in favor of the loser in a contest for control.[190] Third, the Court noted that it would be inconsistent with the underlying scheme of the Williams Act to infer a damage remedy, "particularly [because] the award would not redound to the direct benefit of the protected class."[191] Finally, the cause of action at issue was deemed to be one which has been traditionally relegated to state law:

> Although Congress is, of course, free to create a remedial scheme in favor of contestants in tender offers, we conclude, as we did in *Cort v. Ash*, that "it is entirely appropriate in this instance to relegate the [offeror-bidder] and others in [that] situation to whatever remedy is created by state law."[192]

Not suprisingly, the significance of *Piper* extends well beyond the narrow question at issue. For example, the reasoning of *Piper* has been applied to bar actions for damages by defeated contestants for control

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[186] *Id.* at 30.

[187] *Id.* at 33.

[188] 422 U.S. 66 (1975). *Cort* involved, narrowly speaking, the question of whether an implied civil remedy existed for alleged violations of federal election laws. Since *Piper*, whether the question is phrased as one of standing or the inference of a private remedy is only semantical. (An implied right of action for damages presumably exists in favor of a subject company shareholder under Section 14(e); however, a defeated bidder can not assert that right.)

[189] 430 U.S. at 37.

[190] *Id.* at 38.

[191] *Id.* at 39.

[192] *Id.* at 41.

purportedly brought under sections 9 and 10 of the Exchange Act.[193] However, the *Piper* Court was not faced with the task of determining whether an offeree has standing to sue a competing bidder or the subject company for injunctive relief or damages under section 14(e), yet its analysis suggests that such standing would be recognized in appropriate circumstances.[194] More importantly, in the context of contested or competitive takeover bids, the *Piper* Court expressly declined to consider whether a bidder would have standing to seek injunctive relief under section 14(e).[195]

Piper has not been read as justifying the denial of bidder standing to sue for injunctive relief under the Williams Act. Unlike the situation in *Piper*, in many situations the granting of such relief would not injure the very class of participants sought to be protected by Congress in enacting the Williams Act.[196] Instead, allowing bidders to bring actions for injunctive relief arguably furthers the congressional purpose of ensuring that both sides are fairly presented in tender offer battles. Accordingly, several courts, based upon similar analyses, have held since *Piper* that a bidder does have standing to sue for injunctive relief.[197]

The most recent of these cases is the decision of the Court of Appeals for the Sixth Circuit in *Mobil Corp. v. Marathon Oil Co.*[198] *Marathon* involved an action alleging violations of section 14(e) and state law fiduciary duties brought by Mobil Corporation against Marathon Oil Company, certain of Marathon's directors and a subsidiary of United States Steel Corporation, a competing bidder. The action challenged a stock option and an asset option granted by Marathon to U.S. Steel to induce U.S. Steel to make a bid which was about 50% higher than Mobil's bid.[199] Like most courts in this context, the *Marathon* court

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[193] *E.g.*, Crane Co. v. American Standard, Inc., 439 F. Supp. 945 (S.D.N.Y. 1977).

[194] *See* 430 U.S. at 36-37.

[195] 430 U.S. at 42 n.28, 48.

[196] Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 369 (6th Cir. 1981). In *Piper*, the damage award approved by the Second Circuit Court of Appeals would have significantly diminished the value of the target shareholders' investments.

[197] *E.g.*, Crane Co. v. Harsco Corp., 511 F. Supp. 294 (D. Del. 1981); Weeks Dredging & Contracting, Inc. v. American Dredging Co., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,414 (E.D. Pa. 1978); Humana, Inc. v. American Medicorp., Inc., 445 F. Supp. 613 (S.D.N.Y. 1977).

[198] 669 F.2d 366 (6th Cir. 1981). The Sixth Circuit Court of Appeals' analysis of this question is *dictum* since the parties did not raise this issue on appeal. The issue was raised in the trial court, which held that a competing bidder had standing, both as a shareholder of the subject company and a competing bidder, to sue for alleged violations of Section 14(e) and state law fiduciary duties. [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,375 (S.D. Ohio Dec. 7), *aff'd in part, rev'd in part*, 669 F.2d 366 (6th Cir. 1981).

[199] At the time that it commenced this action, Mobil was restrained from con-

sought to distinguish *Piper* by contrasting actions for damages with actions for injunctive relief (the latter normally will not injure the one class of participants which Congress sought to protect in enacting the Williams Act).[200] The *Marathon* court also observed:

> In a tender offer battle, events occur with explosive speed and require immediate response by a party seeking to enjoin the unlawful conduct. Issues such as incomplete disclosure and manipulative practices can only be effectively spotted and argued by the parties with complete knowledge of the target, its business, and others in the industry.[201]

That reasoning equally justifies subject company standing under the Williams Act.

2. Subject Company Standing

a. *Section 13(d)*

Under early Williams Act cases, the subject company was uniformly held to have standing to enforce the filing requirements of section 13(d).[202] In *Corenco Corp. v. Schiavone & Sons, Inc.*,[203] however, the Second Circuit Court of Appeals expressed doubt as to whether a subject company has standing to assert violations of section 13(d) by the bidder. The issue was, at best, "unclear" to the *Corenco* court,[204] but it did not resolve it since it found no violations of the statute.

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summating its own offer pursuant to antitrust litigation brought against it by Marathon under § 7 of the Clayton Act. Marathon Oil Co. v. Mobil Corp., No. 2193 (N.D. Ohio Dec. 8), *aff'd*, No. 3704 (6th Cir. Dec. 23, 1981), *cert. denied*, No. 81-1213 (Feb. 22, 1982). While the pendancy of the antitrust appeal was perhaps not legally relevant to the securities and state law issues before the Sixth Circuit, the former presumably had some practical effect on the disposition of the latter in light of the fact that, after initiating the latter case, Mobil increased its tender offer price to $1 per share above that offered by U.S. Steel. The appellate court's desire to foster additional cometitive bidding was manifest in its mandate to the trial court to fashion a remedy which would require U.S. Steel's offer to remain open for a period of time resonably sufficient to allow other companies to enter the auction. U.S. Steel purchased a majority of Marathon's equity securities on January 7, 1982. Wall St. J., Jan. 7, 1982, at 3, col. 1.

[200] Ironically, on the very facts at issue, Marathon's shareholders were in fact injured by the temporary restraining order obtained by Mobil (losing more than $1 million per day in interest opportunities). *See, e.g.*, Memorandum of Marathon Oil Company in Opposition to Mobil's Emergency Application at 18, Mobil Corp. v. Marathon Oil Co. (U.S. Jan 5, 1982) (No. 1213).

[201] 669 F.2d at 371.

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

[203] 488 F.2d 207 (2d Cir. 1973).

[204] *Id.* at 218.

Most recent Williams Act cases have continued to recognize subject company standing to sue under section 13(d).[205] However, given *Piper* and a number of other securities law developments,[206] several courts have recently held against subject company standing under section 13(d). For example, in *Gateway Industries, Inc. v. Agency Rent-A-Car, Inc.*,[207] the District Court for the Northern District of Illinois found that the decisions recognizing an implied private right of action were based on *J.I. Case Co. v. Borak*,[208] from which the Supreme Court has turned in recent cases involving alleged violations of implied rights of action.[209] Upon considering the governing principles of implied rights of action and the language and legislative history of the Williams Act, the *Gateway* court decided that an issuer had no right of action under section 13(d) either in its own right or on behalf of its shareholders.

The trend of cases like *Gateway* is perhaps best evidenced by the decision of the District Court for the Northern District of Alabama in *First Alabama Bancshares, Inc. v. Lowder*.[210] In *First Alabama*, the trial court held that a subject company has no standing to sue for either damages *or* injunctive relief under section 13(d) *or* section 14(d).[211]

To be sure, the Supreme Court has recently given strong indications of an intent to cut back significantly with respect to the inference of private rights of action under federal securities laws.[212] However, until *Piper* is overturned by the Supreme Court, it would appear that an issuer should be considered to have the right to sue at least for injunctive relief under section 13(d) based upon the same analysis that the

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[205] *See, e.g.*, Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982); Camelot Indus. v. Vista Resources, Inc., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,611 (S.D.N.Y. Mar. 29, 1982); Spencer Cos. v. Agency Rent-A-Car, Inc., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,301 (D.Mass. Sept. 21, 1981); Standard Metals Corp. v. Tomlin, [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,894 (S.D.N.Y. 1981); Kaufman & Broad, Inc. v. Belzberg, [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,893 (S.D.N.Y. 1981); Saunders Leasing Sys. v. Societe Holding Gray D'Albion, 507 F. Supp. 627 (N.D. Ala. 1981); Kirsch v. Bliss & Laughlin Indus., 495 F. Supp. 488 (W.D. Mich. 1980). *See also* Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216 (4th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981); Treadway Cos. v. Care Corp., 638 F.2d 357 (2d Cir. 1980).

[206] In Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979), the Supreme Court held that there is no implied right of action for damages under section 17(a) of the Exchange Act. In Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), the Supreme Court held that there is no implied right of action for damages under section 206 of the Investment Advisors Act of 1940.

[207] 495 F. Supp. 92 (N.D. Ill. 1980).

[208] 377 U.S. 426 (1964).

[209] *See supra* note 25 and text accompanying notes 24-27.

[210] 495 F. Supp. 96 (N.D. Ala. 1980).

[211] *Id.* at 101. *Accord* American Bakeries Co. v. Pro-Met Trading Co., [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,925 (N.D. Ill. 1981); Sta-Rite Indus. v. Nortek, Inc., 494 F. Supp. 358 (E.D. Wis. 1980).

[212] *See supra* note 25 and text accompanying notes 26-28.

courts have used to allow bidders to sue for injunctive relief under section 14(e).

b. *Sections 14(d) and 14(e)*

A subject company should have standing under both section 14(d) and section 14(e) to obtain injunctive relief against an unlawful tender offer. Likewise, it would appear that an issuer which is a potential target of a future tender offer should be held to have standing to assert violations of section 14(e) committed by the potential offeror in the course of preparing for its offer.

A compelling justification for allowing injunctive actions by subject companies under sections 14(d) and 14(e) is that the period prior to consummation of a tender offer is the time when relief can best be given. After that point, the eggs may be difficult to unscramble. The District Court for the Southen District of New York held in *Wellman v. Dickinson*,[213] that a subject company should also be able to obtain equitable relief after the fact. The *Wellman* court pointed out that "[w]hile the Court's reasoning [in *Piper*] forecloses a damage suit by [a subject company], and supports an equitable remedy before the takeover or partial takeover has been effectuated, [*Piper*] does not deny standing to the [subject] corporation to seek equitable relief after the transaction has been consummated."[214] Accordingly, the *Wellman* court concluded that the subject company had standing to maintain the action, pointing out that the bidder had specifically designed its acquisition to avoid a pre-offer legal battle. However, there is nothing in the opinion that suggests that the *Wellman* court meant to limit its holding to situations in which the target had no opportunity to bring an action prior to consummation of the tender offer.[215]

c. *The Margin Rules*

A division of authority exists as to whether a subject company has

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[213] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,918 (S.D.N.Y. 1979).

[214] *Id.* at 95,835.

[215] Counsel for target companies have sometimes sought to head off defenses based upon standing in litigation brought under section 13(d) or other provisions of the Williams Act by having officers or shareholders of the issuer join as named plaintiffs. Provided that a willing person in one of these categories can be identified, this tactic probably does solve any technical standing problem. *See, e.g.*, Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982). It should be noted, however, that in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981), the Court of Appeals for the Sixth Circuit said in *dictum* that a bidder which was also a shareholder of the subject company lacked standing to sue in its capacity as a shareholder because it could not realistically claim to be advancing the interests of typical subject company shareholders. Similar arguments could conceivably be used to attack the standing of an officer or shareholder affiliated with the issuer.

standing to enforce the margin and credit requirements of sections 8, 7(c), and 7(f) of the Exchange Act and the Federal Reserve Board's implementing regulations.[216] While the later decisions tend to allow such standing, the court in *D-Z Investment Co. v. Holloway*,[217] emphatically denied it, stating: "Management [of the subject company] is simply trying to protect its entrenched position and, while its attackers must obey the securities laws, enforcement of those laws is, with rare exceptions, best left to the SEC or to the stockholders [of the target]."[218] The *D-Z Investment* court did, however, grudgingly concede that the target had standing under sections 14(d) and 14(e).

3. Shareholder Standing

Former shareholders of a subject company acquired in an exchange offer have been held to have standing to sue for damages and/or rescission under section 10(b) and section 14(e).[219] For example, in *Electronic Specialty Co. v. International Controls Corp.*,[220] the Second Circuit Court of Appeals considered the question whether the shareholders involved in a tender offer have standing to seek relief from illegal acts by the contestants. The *Electronic Specialty* court held that shareholders who do not tender their shares still have independent standing. That is, their claim need not be derivative and, therefore, they need not comply with Rule 23 of the Federal Rules of Civil Procedure.

The rationale for granting standing to nontendering shareholders is that the inadequacy of a tender offer is likely to depress the market for the shares they retain. Further, if the bidder had evil designs with regard to the subject company, the nontendering shareholders could suffer additional injury.[221]

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[216] *E.g.*, H.K. Porter Co. v. Nicholson File Co., 353 F. Supp. 153 (D.R.I. 1972), *aff'd*, 482 F.2d 421 (1st Cir. 1973); Gulf & W. Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973); Butler Aviation Int'l v. Comprehensive Designers, Inc., 425 F.2d 842 (2d Cir. 1970); Texasgulf, Inc. v. Canada Dev. Corp., 366 F. Supp. 374 (S.D. Tex. 1973); Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248 (W.D. Okla. 1972).

[217] [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,771 (S.D.N.Y. 1974).

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

[219] *Compare* Nachman Corp. v. Halfred, Inc., [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,455 (N.D. Ill. 1973), and D-Z Inv. Co. v. Holloway, [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,771 (S.D.N.Y. 1974), *with* Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199 (D. Md.), *aff'd*, 546 F.2d 25 (4th Cir. 1976); Alaska Interstate Co. v. McMillian, 402 F. Supp. 532 (D. Del. 1975).

[220] 409 F.2d 937 (2d Cir. 1969).

[221] *E.g.*, Petersen v. Federated Dev. Corp., 387 F. Supp. 355 (S.D.N.Y. 1974). *But see* Hundahl v. United Benefit Life Ins. Co., 465 F. Supp. 1349 (N.D. Tex. 1979) (tendering stockholders have standing, but a non-tendering stockholder could not maintain an action for the decrease in value of his stock that resulted when other shareholders were fraudulently induced to tender their shares).

One case which denied standing under section 14(e) to shareholders is *Sargent v. Genesco, Inc.*[222] In *Sargent*, the defendants mailed a letter describing a refinancing plan to both common shareholders and debenture holders. The letter allegedly contained material misstatements regarding the plan. Under the plan, the debentures could be tendered to a group of underwriters and would then be converted into common stock. A shareholder brought a class action on behalf of all other shareholders alleging that the defendants had violated section 14(e). The Fifth Circuit Court of Appeals held that the shareholders had no standing since they were not asked to tender their securities under the plan.[223] In contrast, in *GAF Corp. v. Milstein*,[224] the Second Circuit Court of Appeals stated that any shareholder has standing to enforce section 13(d). While the narrow holding of the case was limited to the issuer's standing, the *GAF* court stated in a footnote that the shareholders "clearly" had standing as well.[225] However, if section 14(e) is extended to cover conduct which does not involve nondisclosure, as in *Marathon*, it may be that particular categories of shareholders (*e.g.*, nontendering shareholders) will be held to lack standing to attack such conduct as alleged "lock-up" devices.

B. *Proper Parties*

Two Williams Act cases have dealt at length with the question of proper parties in an action for alleged violations of the federal securities laws relating to tender offers. In *Chris-Craft Industries, Inc. v. Piper Aircraft*

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[222] 492 F.2d 750 (5th Cir. 1974).

[223] *Accord* Hundahl v. United Benefit Life Ins. Co., 465 F. Supp. 1349 (N.D. Tex. 1979) (non-tendering shareholder could not maintain action for decrease in value of his stock that resulted when other shareholders were fraudulently induced to tender their shares).

[224] 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

[225] *Id.* at 719 n.21. The *Milstein* court cited Grow Chem. Corp. v. Uran, 316 F. Supp. 891 (S.D.N.Y. 1970), as support for its conclusion. *See also* General Aircraft Corp. v. Lampert, 556 F.2d 90 (1st Cir. 1977); Spencer Cos. v. Agency Rent-A-Car, Inc., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Sept. 17, 1982); Standard Metals Corp. v. Tomlin, [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,894 (S.D.N.Y. 1981); Kaufman & Broad, Inc. v. Belzberg, 522 F. Supp. 35 (S.D.N.Y. 1981). *Compare id., with* Myers v. American Leisure Time Enter., Inc., 402 F. Supp. 213 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 312 (2d Cir. 1976) (shareholders who neither buy or sell have no implied right of action for section 13(d) violations).

In Wellman v. Dickinson, 497 F. Supp. 824 (S.D.N.Y. 1980), the District Court for the Southern District of New York held that the class action plaintiffs, non-tendering shareholders, had no cause of action under § 13(d) against shareholders who had tendered at a profit. The *Wellman* court stated that the only cause of action for damages under § 13(d) which the shareholders could bring is one that is actionable under § 18, which provides an explicit damages remedy, and that the plaintiffs could not qualify under that section.

Corp.,[226] the Second Circuit Court of Appeals held that the dealer-manager for a contestant in a tender offer could be joined as a party and held liable as an "aider and abettor" if such dealer-manager failed to estabilish a "due diligence" defense. In *Ronson Corp. v. Liquifin Aktiengesellschaft*,[227] the Third Circuit Court of Appeals held that a depositary national bank, which was a subsidiary of a corporation controlled by the principal financier-defendant, could be joined as a party to a section 14(e) action. The *Ronson* court then ruled that the venue provisions of the securities acts took precedence over those controlling national bank venue. Further, the national bank's parent company, which had "participated in the conspiracy to violate the antitrust laws and the securities acts and performed ministerial functions in furtherance of the overall conspiracy" also was held to be a proper party to the litigation.[228] The bank was later dismissed because the plaintiff failed to prove a violation of the securities laws.

C. *Remedial Issues*

1. Standards for a Preliminary Injunction

a. *General*

Because of the timing problems inherent in the tender offer context, a contestant is frequently forced to invoke or resist swift judicial aid. In the federal courts, the most frequently used weapons are the temporary restraining order and the preliminary injunction.

Under the traditional and more stringent test, an applicant for a preliminary injunction must show a strong or substantial probability of success at trial on the merits, a possibility of irreparable harm if the injunction were denied, lack of substantial harm to others and that the public interest favors the injunction.[229] Particularly in antitrust and other actions affected with a public interest, the applicant must show that the balance of the equities in terms of injury to the public versus injury to the defendants weighs in his favor.[230]

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[226] 480 F.2d 341 (2d Cir. 1973).

[227] 483 F.2d 846, 852 (3d Cir. 1973).

[228] Ronson Corp. v. Liquifin A. G., 370 F. Supp. 597 (D.N.J.), *aff'd*, [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,536 (3d Cir. 1974)

[229] *See, e.g.*, Bath Indus. v. Blot, 427 F.2d 97 (7th Cir. 1970); Graphic Sciences, Inc. v. International Mogul Mines Ltd., 397 F. Supp. 112 (D.D.C. 1974) (specifically rejecting the less stringent standard); Nachman Corp. v. Halfred, Inc., [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,455 (N.D. Ill. 1973); Ozark Air Lines, Inc. v. Cox, 326 F. Supp. 1113 (E.D. Mo. 1971).

[230] *See, e.g.*, Buffalo Forge Co. v. Amoco-Pittsburgh Corp., 638 F.2d 568 (2d Cir. 1981) (securities and antitrust claims); Gulf & W. Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973) (antitrust and securities claims); Harnischfeger Corp. v. Paccar, Inc., [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,119 (E.D. Wis. 1979) (antitrust claims); Calumet Indus. v. MacClure, [1978 Decs.] Fed.

The courts which have applied the more stringent test for the granting of preliminary injunctive relief have recognized that, by enjoining allegedly fraudulent and deceptive tender offers ordinarily at the request of the subject company's management, they could easily become "tools" of "entrenched management" and thereby upset the "balance" struck by Congress in the Williams Act, as well as frustrate the desires of shareholders who wish to tender their shares.[231]

Counterbalancing these fears was the perception of many federal courts that it was far easier to enjoin a proposed tender offer than to unscramble the eggs after the transaction had been consummated.[232] The courts therefore began to relax the requirements for preliminary injunctions. Thus, in many recent tender offer cases, a disjunctive test for the issuance of a preliminary injunction has been utilized. Under this standard, the applicant for an injunction must show *either* probable success on the merits and possible irreparable injury *or* sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in his favor.[233] However, a few courts have recently adhered to the traditional formulation of the standard for preliminary injunctive relief.[234]

Sec. L. Rep. (CCH) ¶ 96,434 (N.D. Ill. 1978) (securities law claims); Weeks Dredging & Contracting, Inc. v. American Dredging Co., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,414 (E.D. Pa. 1978) (mixture of antitrust and securities claims); Elco Corp. v. Microdot, Inc., 360 F. Supp. 741 (D. Del. 1973) (antitrust and securities violations).

[231] *See, e.g.*, Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied*, 418 U.S. 919 (1974); Butler Aviation Int'l Inc. v. Comprehensive Designers, Inc., 425 F.2d 842 (2d Cir. 1970); Scott v. Multi-Amp. Corp., 386 F. Supp. 44 (D.N.J. 1974). *Cf.* Jewel Cos. v. Pay Less Drug Stores Northwest, Inc., 510 F. Supp. 1006 (N.D. Cal. 1981) (contrary to policy of allowing shareholders freedom of choice).

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

[233] Representative cases are: Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied*, 418 U.S. 919 (1974); Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247 (2d Cir. 1973); Gulf & W. Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973); Stark v. New York Stock Exchange, 466 F.2d 743 (2d Cir. 1972); Marks v. Lainoff, 466 F. Supp. 301 (S.D.N.Y 1979); MLZ, Inc. v. Fourco Glass Co., 470 F. Supp. 273 (E.D. Tenn. 1978); Berkman v. Rust Craft Greeting Cards, Inc., 454 F. Supp. 787 (S.D.N.Y. 1978); Applied Digital Data Sys. v. Milgo Elec. Corp., 425 F. Supp. 1163 (S.D.N.Y. 1977); Alaska Interstate Co. v. McMillian, 402 F. Supp. 532 (D. Del. 1975); Jewelcor Inc. v. Pearlman, 397 F. Supp. 221 (S.D.N.Y. 1975); Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267 (S.D.N.Y. 1975); Kaufmann v. Lawrence, 386 F. Supp. 12 (S.D.N.Y. 1974); Broder v. Dane, 384 F. Supp. 1312 (S.D.N.Y. 1974); Ronson Corp. v. Liquifin A.G., No. 785-73 (D.N.J. 1973), *aff'd*, 483 F.2d 846 & 853 (3d Cir. 1973); D-Z Inv. Co. v. Holloway, [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,771 (S.D.N.Y. 1974); Texasgulf, Inc. v. Canada Dev. Corp., 366 F. Supp. 374 (S.D. Tex. 1973); General Host Corp. v. Triumph Am., Inc., 359 F. Supp. 749 (S.D.N.Y. 1973).

[234] *E.g.*, Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981).

The disjunctive test for the issuance of a preliminary injunction has been deemed to be consistent with the Supreme Court's decision in *Rondeau v. Mosinee Paper Corp.*[235] While analysis of the phrasing of the disjunctive test suggests that preliminary injunctive relief will be easier to obtain in the courts that follow it than in courts which follow the more traditional test, it is doubtful that the outcome of any particular case has been affected by its application.

b. *Rondeau*

In *Mosinee Paper Corp. v. Rondeau*,[236] the Court of Appeals for the Seventh Circuit reversed a trial court's denial of permanent injunctive relief against an offeror who had failed to file a timely Schedule 13D. The purchaser admitted his violation, but alleged that his failure to file was the result of ignorance of the law. Moreover, he contended that his original purchases were for investment and that he had formed an intent to seek control only after learning of the filing requirements from his attorney. Once informed of the statutory provisions, he did make a filing which, he argued, cured any ill effects that the target company might have suffered from his violation. In reversing the district court, the Seventh Circuit held that a subject company need not show that it suffered any irreparable harm in order to obtain permanent injunctive relief from a violation of the filing requirements of section 13(d) because it is in the best position to protect investors by insuring that the Williams Act is enforced.[237]

The Supreme Court in turn reversed the Seventh Circuit.[238] The Court first rejected the intermediate appellate court's alternative holding that sufficient injury had been shown in the case at bar to justify injunctive relief:

> The short of the matter is that none of the evils to which the Williams Act was directed has occurred or is threatened in this case. Petitioner has not attempted to obtain control of respondent, either by a cash tender offer or any other device. Moreover, he has now filed a proper Schedule 13D, and there has been no suggestion that he will fail to comply with the Act's requirements of reporting any material changes in the information contained therein. . . . On this record there is no likelihood that respondent's shareholders will be disadvantaged should

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[235] 422 U.S. 49 (1975). *See, e.g.*, Sea World, Inc. v. MCA, Inc., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,803, at 90,912 (S.D. Cal. 1976) ("Indeed, the balance of the equities would never tip decidedly in favor of the moving party unless irreparable harm is demonstrated."). *See also* Royal Indus. v. Monogram Indus., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,863, at 91,138 (C.D. Cal. 1976).

[236] 500 F.2d 1011 (7th Cir. 1974), *rev'd*, 422 U.S. 49 (1975).

[237] 500 F.2d at 1016-17.

[238] Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975).

> petitioner make a tender offer, or that respondent will be unable to adequately place [*sic*] its case before them should a contest for control develop. Thus, the usual basis for injunctive relief "that there exists some cognizable danger of recurrent violation," is not present here.[239]

Turning to the intermediate appellate courts principal holding that no showing of irreparable injury was required under section 13(d) of the Williams Act, the *Rondeau* Court concluded:

> Respondent urges, however, that the "public interest" must be taken into account in considering its claim for relief and relies upon the Court of Appeals' conclusion that it is entitled to an injunction because "it is in the best position" to insure that the Williams Act is complied with by purchasers of its stock. This argument misconceives, we think, the nature of the litigation. Although neither the availability of a private suit under the Williams Act nor respondent's standing to bring it has been questioned here, this cause of action is not expressly authorized by the statute or its legislative history. Rather, respondent is asserting a so-called implied private right of action established by cases such as *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). Of course, we have not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to enforcement by the Securities and Exchange Commission. . . . However, it by no means follows that the plaintiff in such an action is relieved of the burden of establishing the traditional prerequisites of relief. Indeed, our cases hold that quite the contrary is true.[240]

Rondeau should have equal applicability under all provisions of the Williams Act. However, its application has given rise to one ambiguity, which has not been confronted directly in the cases, with respect to actions commenced by issuers and subject companies—*i.e.*, whether the relevant inquiry as to the likelihood of "irreparable injury" relates to the issuer or subject company, its shareholders or both. Some courts have focused exclusively upon the potential for injury to the subject company,[241] while others have looked exclusively to the potential for in-

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[239] *Id.* at 59.

[240] *Id.* at 62-63 (citations omitted).

[241] *E.g.*, Universal Container Corp. v. Horwitz, [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,161 (S.D.N.Y. 1977) (applying *Rondeau*). It should be noted, however, that even after *Rondeau* no showing of irreparable injury has been required in SEC enforcement actions. *E.g.*, SEC v. General Refractories Co., 400 F. Supp. 1248 (D.D.C. 1975).

jury to the shareholders of the subject company.[242] However, the latter approach seems unduly restrictive since, as in *Rondeau*, it will usually be possible to argue that monetary damages would be sufficient, and in fact the Supreme Court's focus in *Rondeau* was upon the likelihood of irreparable injury to either the subject company or its shareholders. Such an approach seems preferable.[243]

2. Equitable Defenses, Reversal and Modification

A preliminary injunction is, of course, equitable in nature and, as such, the moving party is subject to the traditional defenses recognized by courts of equity. Thus, in *Cauble v. White*,[244] for example, the trial court refused to grant preliminary injunctive relief in a case where both the offeror and the subject company had violated the Exchange Act and thus were *in pari delicto*.

To be sure, a trial court's application of erroneous legal principles is cause for reversal. However, as to the application of such principles to the facts *sub judice* the federal appellate courts have held, consistent with general principles, that a trial court should not be reversed unless the appellant can show a clear abuse of discretion or findings of fact which are clearly erroneous. In *Sargent v. Genesco Inc.*,[245] for example, the Fifth Circuit Court of Appeals articulated the reasons for this rule:

> Our review of the exercise of discretion by the trial court in refusing preliminary injunctive relief must be closely circumscribed. It comes to us on an abbreviated development of facts. It requires a balancing of the probabilities of ultimate success on the merits with the consequences of court intervention at a preliminary stage. The prerogative to weigh the nice distinctions involved belongs to the district court, not this court.[246]

Once a preliminary injunction has been granted, it is also difficult for the party enjoined to have it modified or reversed. The applicable standards for modifying an injunction were stated in *Elco Corp. v. Microdot, Inc.*[247] as follows:

> [*United States v. Swift & Co.*, 286 U.S. 106 (1932),] clearly holds, however, that an injunction "may *not* be changed in the in-

[242] *E.g.*, Stecher-Traung-Schmidt Corp. v. Self, Bee Chem. Co., 529 F.2d 567 (2d Cir. 1976).

[243] *E.g.*, S-G Sec., Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114 (D. Mass. 1978); Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975).

[244] 360 F. Supp. 1021 (E.D. La. 1973).

[245] 492 F.2d 750 (5th Cir. 1974).

[246] *Id.* at 770.

[247] 360 F. Supp. 741 (D. Del. 1973).

> terests of the defendants if the purposes of the litigation as incorporated in the decrees . . . have not been fully achieved." . . . By this standard, a modification which will not give complete assurance that the objectives of the original injunction will be achieved should not be permitted.[248]

This requirement will rarely be met given the normally rapid pace of Williams Act litigation.

3. Remedies for Violations

a. *Section 13(d)*

Section 13(d) can be violated either by failing to file a Schedule 13D, or amendments thereto, within the applicable time periods or by a false or misleading filing. Either violation is grounds for injunctive relief against the offending person, but the nature of the relief granted depends upon which of the two violations is committed.

Most of the decided cases involving a failure to file under section 13(d) arose out of requests for preliminary injunctive relief. *Financial General Bankshares, Inc. v. Lance,*[249] and *Bath Industries, Inc. v. Blot,*[250] involved "groups" under section 13(d)(3) which had failed to file a required Schedule 13D. In each case, the members of the groups were preliminarily enjoined from voting their shares or attempting to acquire control over the issuer by other means, such as a tender offer or proxy contest. In addition, the defendants in *Financial General Bankshares* and *Bath Industries* were prohibited from acquiring any additional shares. However, the injunction in *Bath Industries* was to continue only until the defendants complied with the Williams Act by filing a Schedule 13D, and the defendants in *Financial General Bankshares* were enjoined only until they offered rescission to stockholders from whom they had purchased stock while no Schedule 13D was on file. A similar result obtained, with respect to a management "group," in *Jewelcor, Inc. v. Pearlman,*[251] and this type of limited relief was approved in *dicta* by the District Court for the Southern District of Texas in *Texasgulf, Inc. v. Canada Development Corp.*[252]

A case decided by the First Circuit Court of Appeals, *General Aircraft Corp. v. Lampert,*[253] suggests that *Rondeau* may have even a

[248] *Id.* at 757.

[249] [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D.D.C. 1978).

[250] 427 F.2d 97 (7th Cir. 1970).

[251] 397 F. Supp. 221 (S.D.N.Y. 1975).

[252] 366 F. Supp. 374, 405 n.45 (S.D. Tex. 1973). *But see* Wellman v. Dickinson, 497 F. Supp. 824 (S.D.N.Y. 1980) (settlement agreement requiring stock divestiture).

[253] 556 F.2d 90 (1st Cir. 1977).

greater impact than simply ensuring that traditional equitable principles are applied to requests for permanent injunctive relief under the Williams Act. On October 30, 1974, the three individual defendants in *Lampert* purchased an aggregate of 12% of the outstanding shares of common stock of General Aircraft Corporation (GAC). They did not, however, file a Schedule 13D. On December 31, 1974, two of the defendants purchased additional shares (less than 1%). However, it was not until January 31, 1975 that a Schedule 13D was filed on behalf of the group. The defendants clashed with existing GAC management during the next year and a half by demanding seats on GAC's board, threatening a proxy fight and proposing drastic changes in GAC's business and corporate structure. GAC commenced an action alleging, among other things, that the defendants had violated section 13(d) by failing to file a timely Schedule 13D and thereafter filing a false one as to the purpose of the acquisition. The district court entered a preliminary injunction, enjoining defendants from 1) further violations of section 13(d); 2) failing to amend the inaccurate Schedule 13D filed on January 1, 1975; 3) acquiring additional GAC shares or soliciting proxies until the Schedule 13D was amended; and 4) voting any GAC stock or proxies at the 1976 annual meeting of shareholders.

The *Lampert* court, after affirming the findings that the individual defendants were a "group" under section 13(d)(3) and that their Schedule 13D was misleading with respect to their purpose in acquiring GAC shares, held that they were properly required to amend the Schedule 13D prior to obtaining more shares:

> As the very *raison d'etre* of Section 13(d) was thwarted by appellants' continued failure to disclose the statutorily required information, we discover no error in the decision that irreparable injury would occur to shareholders and the investing public if appellants were allowed to continue their activities without correcting and amplifying their Schedule 13D. We therefore affirm the order granting the preliminary injunction insofar as it enjoined appellants from further violations of Section 13(d), from failing to amend their inaccurate Schedule 13D, and from acquiring further shares of GAC common stock or soliciting proxies or consents from GAC stockholders until the Schedule 13D is amended to reflect accurately their intentions.[254]

However, the *Lampert* court held that the defendants should not have been enjoined from voting at, or soliciting proxies for, the upcoming annual meeting of shareholders:

> Flexibility rather than rigidity has distinguished equity practice over the years, and "[t]he historic injunctive process was

[254] *Id.* at 96-97.

> designed to deter, not to punish." . . . Appellants' stock was acquired legally more than a year prior to the filing of the present action. Investors are entitled to the legitimate fruits of their investment. . . . In the circumstances disclosed by this record, sterilization of appellant's legally acquired shares would be punishment, not deterrence, since it would deprive appellants of previously acquired voting rights without sound reason. While it may be appropriate for the courts to enjoin the voting of shares rapidly acquired just before a contest for control following a Section 13(d) violation . . . absent a clear showing of irreparable injury, disenfranchisement should not extend to prior holdings legally acquired.[255]

Under *Lampert*, sterilization may not be available even if the person or group violating the Williams Act utilizes (presumably effectively) the shares obtained to take steps toward effecting a change in corporate control.

A number of cases after *Lampert* have disallowed sterilization and similar remedies in the absence of extraordinary, ongoing harm to the target company or its shareholders such as a pending election or an immediate takeover bid. In *Saunders Leasing System, Inc. v. Societe Holding Gray d'Albion*,[256] for example, the District Court for the Northern District of Alabama granted an injunction prohibiting the defendants from making further purchases of stock until they had cured their section 13(d) violations by amending their Schedule 13D to state their intent to acquire control of the target company. The *Saunders Leasing* court, however, did not find any harm to the target or its shareholders that would not be remedied by the amended filing and so refused to order a subsequent "cooling-off" period during which the defendants would have to forgo further acquisitions. In addition, the *Saunders Leasing* court refused to order rescission or divestiture of previously acquired shares, reasoning that there was no *per se* illegality in the acquisition of those shares, in contrast with illegal tender offers or

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[255] *Id.* at 97 (citations omitted).

[256] 507 F. Supp. 627 (N.D. Ala. 1981). *See also* Schnall v. Schnall, [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,927 (S.D.N.Y. 1981) (denying disgorgement of profits in shareholders action); Kirsch Co. v. Bliss & Laughlin Indus., 495 F. Supp. 488 (W.D. Mich. 1980) (additional purchases enjoined until filing of accurate Schedule 13D; no prohibition against voting or order to divest); Lane Bryant, Inc. v. Hatleigh Corp., [1980 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,529 (S.D.N.Y. 1980) (purchases enjoined until disclosure sufficient to make potential sellers aware of the antifraud allegations is made, voting not enjoined). *But see generally* Treadway Cos. v. Care Corp., [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,188 (S.D.N.Y. 1979) (target enjoined from selling new stock to "white knight" merger candidate which would have given it extra votes in upcoming proxy battle), *rev'd*, 638 F.2d 357 (2d Cir. 1980) (holding that the sale of stock to preserve the possibility of a merger was done in the exercise of good faith judgment).

fraudulent acquisitions effected through violations of Rule 10b-5, for which rescission and divestiture are not unusual remedies.

In *Scott v. Multi-Amp. Corp.*,[257] an attempt to enjoin a sale of an issuer's assets to another corporation (MUL) was denied even though it had been established that the owners of MUL had violated section 13(d) in the acquisition of shares some four and one-half years earlier. However, *Scott* appears to be more limited than *Lampert*. In refusing to grant the relief requested, the *Scott* court emphasized the following four factors: 1) the defendants had not stealthily crept up and dethroned the issuer's management (the purchases were publicly disclosed); 2) the failure to file a Schedule 13D was inadvertent; 3) there was little evidence of injury to anyone; and 4) the plaintiffs had been lax in seeking relief.[258] Adumbrating the Supreme Court's decision in *Rondeau*, the *Scott* court viewed the technical failure under section 13(d) as not rising to a level where it could be said that the "irreparable injury requisite to the drastic remedy of . . . injunctive relief" had been shown.[259]

A similar result was reached in *Financial General Bankshares, Inc. v. Lance*,[260] a case in which the District Court for the District of Columbia refused to sterilize the defendants' stock after it was established that the defendants did not plan to acquire additional shares. The *Lance* court reasoned that plaintiff would not suffer irreparable harm since the defendants had already agreed not to acquire any additional stock. In *SEC v. Savoy Industries, Inc.*,[261] however, the same court sterilized the defendant's stock in an SEC enforcement action on the ground that the defendant's past conduct indicated a reasonable likelihood of future violations of the securities laws. In support of its decision, the *Savoy Industries* court cited the defendant's knowledge that his conduct had been wrongful and his repeated prior violations of the law.

Perhaps surprisingly, the penalties imposed upon a defendant who does not make adequate disclosures in his Schedule 13D have generally been less severe than those imposed upon persons who fail to file at all. In *Matter of Susquehanna Corp.*,[262] for example, the SEC found that the respondent had failed to disclose its intent to use assets of the target for future acquisitions, thereby violating section 13(d). The SEC ordered it to make a curative amendment. This relatively mild penalty was probably influenced by two factors. First, section 15(c)(4) of the Exchange Act only empowers the SEC to order respondents to comply with sections 12, 13 and 15(d) upon such terms and conditions as the SEC may specify. Thus, the SEC's remedial powers under statute are probably

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[257] 386 F. Supp. 44 (D.N.J. 1974).

[258] *Id.* at 55.

[259] *Id.* at 57.

[260] [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,511 (D.D.C. 1978).

[261] [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,497 (D.D.C. 1978).

[262] SEC Rel. No. 34-8933 (SEC Admin. Proc. July 17, 1970).

not as broad as those of a federal court. Second, the Fifth Circuit had already held that the respondent had not violated the disclosure provisions of section 13(d).[263] The SEC was undoubtedly reluctant to impose a more severe penalty.

More stringent preliminary injunctive relief was imposed by the district court in *Graphic Sciences, Inc. v. International Mogul Mines Ltd.*,[264] where the defendant was found to have failed to disclose its intent to acquire control of the target. Pending trial on the merits, the defendant was enjoined from soliciting proxies from or making a tender offer to other shareholders in the corporation. The *Graphic Sciences* court did, however, permit the defendant to vote its shares or dispose of them in an appropriate manner, stating that the objective of its preliminary injunction was not to punish but to preserve the status quo by protecting the target from any takeover bid based upon inadequate disclosure.

Thus, in most garden variety section 13(d) cases, injunctive relief will normally be limited to an order prohibiting future purchases or a tender offer pending the filing of an accurate Schedule 13D.[265] There are, however, exceptions to the normal rule, particularly where the defendant's conduct was intentional or gave it a significant advantage over the target or competing bidders. For example, in *General Steel Industries, Inc. v. Walco National Corp.*,[266] a case which involved the accumulation of a large block of shares for the purpose of obtaining control notwithstanding a Schedule 13D which reported a passive "investment" intent, the bidder was enjoined from continuing with its tender offer until it divested itself of target stock previously purchased in market transactions:

> Unless an injunction is issued, GSI [the subject company] and its shareholders, both those who presently own shares and those who sold during Walco's [the bidder] non-compliance with the requirements of Section 13(d) of the 1934 Act, will be irreparably harmed in that:
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>> (i) Walco's illegally obtained blocking position has placed it in a position to inhibit competing offers and has made it extremely difficult for GSI to arrange for a merger, business combination or to pursue other possible business opportunities which would be favorable to all GSI shareholders (as opposed to the 19 percent which Walco seeks). Once Walco controls GSI, it will have lit-

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[263] *See* Susquehanna Corp. v. Pan Am. Sulphur Co., 423 F.2d 1075 (5th Cir. 1970).

[264] 397 F. Supp. 112 (D.D.C. 1974).

[265] *See, e.g.*, Treadway Cos. v. Care Corp., 638 F.2d 357, 380 (2d Cir. 1980); Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240, 249 (8th Cir. 1979).

[266] [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,402 (E.D. Mo. Nov. 24, 1981).

tle, if any, incentive to pay a premium to the remaining GSI shareholders in a subsequent merger of GSI and Walco. In addition, Walco's acquisition of over 51% of GSI will reduce the liquidity of GSI stock held by the remaining GSI shareholders.

(ii) The knowledge that Walco's ultimate purpose was to seek control of GSI may have led many shareholders who sold in the open market to hold onto such shares in anticipation of a higher price or to stay with the new entity. The stockholders that sold could not be compensated for the irretrievable loss of the opportunity to consider whether they wished to sell their shares at a time when a takeover was intended or whether they wished to facilitate, directly or indirectly, the acquisition by Walco of GSI.

(iii) Shareholders who sold to Walco irretrievably lost their ability to obtain a control premium for their shares—a loss not compensable by a monetary award—and unwittingly sacrificed their right to knowingly determine who should be in a position to control GSI.[267]

Walco appealed the trial court's ruling to the Eighth Circuit, but the case was settled prior to decision by the appellate court. While the appeal was pending, the SEC filed a brief as *amicus curiae*, the contents of which were described as follows:

> The district court found that the true purpose of the defendant's purchases was to obtain control of the plaintiff and that the defendant misrepresented its purpose for purchasing the shares as part of a scheme to obtain a sufficiently large position in the plaintiff's stock to block any competing offer or merger. To remedy this violation of the statute, the court enjoined the tender offer pending rescission of all the purchases made by the defendant after May 1, 1981, and divestiture of any of those shares still held by the defendant after completion of the recission offer. The defendant appealed to the Court of Appeals for the Eighth Circuit arguing that the lower court had no authority to enjoin the tender offer or to order rescission or divestiture after the defendant had disclosed its true intentions.
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> The Commission urged in its brief that the district court's equitable jurisdiction to remedy Section 13(d) violations includes the authority to order any relief appropriate under the circumstances. *The Commission expressed the view that equitable remedies* in addition to corrective disclosure, *such as rescission*

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[267] *Id.* at 92,418.

and divestiture, may be necessary or appropriate to remedy violations of the Williams Act, particularly in cases where the defendant deliberately violated Section 13(d) and the illegal conduct had permitted the defendant to obtain a sufficient number of shares to inhibit competing tender offers or merger proposals. In such cases, absent rescission or divestiture or other remedy removing the wrongfully obtained blocking position, shareholders could be irreparably harmed and the defendant would be permitted to benefit from its wrongful conduct.[268]

Thus, if the acquiring person's section 13(d) violation was intentional or gave it a competitive advantage over other bidders or the subject company, divestiture of shares, even shares purchased before the filing of an inaccurate Schedule 13D, may be ordered.[269]

b. *Section 14(d)*

Section 14(d)(1) and the rules promulgated thereunder require a bidder to file a Schedule 14D-1 with the SEC and the target as soon as practicable on the day that copies of the offer to purchase are first published, sent or given to stockholders. In *Cattlemen's Investment Co. v. Fears*,[270] the subject company brought an action against an offeror who had violated this provision of the Williams Act. After finding that the defendant had engaged in activity that constituted a "tender offer" under the Williams Act, the *Fears* court issued a preliminary injunction which restrained him from voting any of the shares acquired during the period of violation. Further relief was postponed until trial on the merits.

A more stringent injunction was entered in *S-G Securities, Inc. v. Fuqua Investment Co.*,[271] a case which arose out of facts similar to those at issue in *Fears*. In *Fuqua* the Massachusetts District Court found that the defendant's open market and privately negotiated purchases constituted a tender offer and therefore, since no Schedule 14D-1 had been filed, a violation of section 14(d). However, the *Fuqua* court refused to enter an injunction prohibiting the defendant from permanently acquiring additional shares or voting the shares already held. Instead, the *Fuqua* court ordered the defendant to cease its open market and private

[268] General Steel Indus. v. Walco Nat'l Corp., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,387, at 92,344 (8th Cir. Dec. 21, 1982) (emphasis added). The SEC took the same position as *amicus curiae* in Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 3386 (6th Cir. June 28, 1982), which appeal was dismissed on July 8, 1982.

[269] Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982). *But compare id., with* Liberty Nat'l Ins. Co. v. Charter Co., [Jan.-June 1982] Sec. Reg. & L. Rep. (BNA) 796 (N.D. Ala. 1982).

[270] 343 F. Supp. 1248 (W.D. Okla. 1972).

[271] 466 F. Supp. 1114 (D. Mass. 1978).

purchase activities until further notice, and to offer rescission to certain shareholders who would not otherwise have a remedy for the section 14(d) violation. The defendant was prohibited from acquiring or voting any shares until such time as it offered to rescind the specified transactions. This remedy would protect the shareholders of the target company from suffering irreparable harm without unnecessarily punishing the defendant.

Finally, in *SEC v. Texas International Co.*,[272] the SEC brought an enforcement action against Texas International Company (TI) for alleged section 14(d) violations. TI had offered to buy the "reorganization claims" held by creditors and shareholders of a bankrupt corporation. The *Texas International* court found this conduct to be a "tender offer" since the reorganization claims were soon to be exchanged for stock in the reorganized company and thus constituted, in substance if not in form, registered equity securities. However, the *Texas International* court excused TI's failure to file under section 14(d) due to the novel circumstances and the court's finding that TI's illegal conduct was neither willful nor in bad faith. Therefore, the *Texas International* court refused to order rescission, holding that rescission for noncompliance with statutory filing requirements, in the absence of fraudulent misrepresentations or omissions, is a disproportionately severe remedy which does not effectuate the statutory purposes.

c. *Section 14(e)*

In certain cases where the bidder had been found to have violated section 14(e), the courts should be willing to grant unconditional preliminary injunctions against consummation of the tender offer itself. However, absent complicating factors beyond mere nondisclosure, such as serious antitrust problems, inadequate time to make curative disclosures before expiration of the offer, possible adverse effects of foreign law on the target or a finding that the challenged conduct was manipulative, such relief may not be justified. Still, even where the takeover is a *fait accompli*, a trial court seemingly has the power to enjoin tender offerors who have obtained control via an unlawful tender offer from enjoying the fruits of their wrongs.

Violations of the disclosure provisions of section 14(e) can be cured in the usual case by further disclosure. Thus, a typical remedy in this context is to enjoin further tender offer activity until such time as the offeror makes an adequate disclosure.[273] Some courts have added the qualification that shareholders be given a reasonable time in which to

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[272] 498 F. Supp. 1231 (N.D. Ill. 1980).

[273] *E.g.*, Life Investors, Inc. v. AGO Holding, N.V., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,356 (8th Cir. Oct. 21, 1981); Pacific Realty Trust v. APC Inv., Inc., No. 1046 (D. Ore. Nov. 28, 1981).

withdraw their stock if they so wish.[274] Upon finding a violation of the disclosure requirements of the Williams Act, it also appears that federal courts have the equitable power to order the extension of a tender offer.[275] The periods of any such provision of withdrawal rights or extension presumably depend upon the perceived gravity of the nondisclosure or other violation, and in recent cases have run twenty,[276] fifteen[277] and ten[278] days. In *Corenco Corp. v. Schiavone & Sons*,[279] the Second Circuit added the *caveat* that, where material information was intentionally misstated or omitted, it might require a "cooling-off" period before permitting the offer to resume in order to allow the effects of the violation to dissipate. While it seems likely that a scienter standard would be deemed implicit in section 14(e),[280] the ruling in *Corenco* is questionable since the state of mind of the bidder or subject company is irrelevant to the question whether full disclosure to offerees has been or will be made—the ultimate purpose of the Williams Act.[281]

Where the challenged conduct is held to be "manipulative" under section 14(e), curative disclosure will be irrelevant, and a proper remedy will have to be fashioned to remove the manipulative device and restore integrity to the market.[282] Under these circumstances divestiture of previously acquired shares may be required,[283] as well as the extension of withdrawal rights,[284] and other relief.

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[274] *E.g.*, General Steel Indus. v. Walco Nat'l Corp., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,402 (E.D. Mo. Nov. 24, 1981).

[275] *See id.*

[276] *Id.*

[277] Life Investors, Inc. v. AGO Holding, N.V., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,356 (8th Cir. Oct. 21, 1981).

[278] Pacific Realty Trust v. APC Inv., Inc., No. 1046 (D. Ore. Nov. 28, 1981).

[279] 488 F.2d 207 (2d Cir. 1973).

[280] *E.g.*, *In re* Commonwealth Oil Co./Tesoro Petroleum Corp. Sec. Litig., 467 F. Supp. 227 (W.D. Tex. 1979).

[281] *See* Weeks Dredging & Contracting, Inc. v. American Dredging Co., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,414 (E.D. Pa. 1978) (refusing to enjoin tender offer but requiring defendant to file curative amendment to its state securities filings). It should be noted in passing that an offeror may be liable for breach of contract to those who tender their shares, under the theory that a unilateral contract was thereby created, even when the tender offer was suspended or withdrawn because of an injunction. Lowenschuss v. Kane, [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,104 (2d Cir. 1975). At least this is so where, as in *Lowenschuss*, the injunction was obtained because of the offeror's violations of the Williams Act and the offer itself is unqualified. *Id.* at 97,921-22. However, the doctrine of impossibility of performance may ultimately excuse the offeror, at least if it is determined not to have been legally responsible for the injunction (*i.e.*, if no permanent injunction could be granted). *Id.* at 97,922-23.

[282] Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981).

[283] Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982).

[284] Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 377-78 (6th Cir. 1981).

Where violations of section 14(e) have caused injury that cannot be remedied by injunctive relief, a number of courts have held that the injured party may seek damages from the violator.[285] While the requirements of standing to bring actions for damages under sections 14(e) and 10(b) may differ (in that the former has no purchaser-seller requirement), the materiality and scienter standards thereunder appear to be parallel.[286] The Court of Appeals for the First Circuit in *H.K. Porter Co.*[287] did caution that damages received from either the subject company or the bidder should be limited: "The statute, in other words, may not be diverted from one designed to assist the investor to one operated principally to benefit one or another of the rival management or control groups jockeying for power."[288] This limitation will not, however, apply to actions brought by the subject company's shareholders.

III. Disclosure Considerations (Primarily for the Defense)

A. *Disclosure as a Show-Stopper*

Litigation challenging a bidder's tender offer disclosures does not normally present the possibility of blocking the offer because disclosure deficiencies normally can be cured by subsequent disclosures.[289] Thus in the usual situation the only defensive benefit of litigation based upon alleged disclosure deficiencies is the possibility of delay.[290]

There is, however, one area of disclosure litigation which sometimes has show-stopping potential, *i.e.*, cases in which legitimate questions are raised about sensitive disclosure issues which, because they bear upon the integrity of the bidder's management or financial condition, the bidder simply refuses to disclose. Areas which are frequently cited for consideration in this regard include, among others, questionable

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[285] *E.g.*, Herbst v. ITT, 495 F.2d 1308 (2d Cir. 1974); H.K. Porter Co. v. Nicholson File Co., 353 F. Supp. 153 (D.R.I. 1972), *aff'd*, 482 F.2d 421 (1st Cir. 1973).

[286] *E.g.*, Heine v. The Signal Cos., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,898, at 91,318 (S.D.N.Y. 1977). *But see generally* Vernon J. Rockler & Co. v. Minneapolis Shareholders Comm., 425 F. Supp. 145 (D. Minn. 1977) (leaving open the question whether the standards for the imposition of liability are substantially identical under sections 10(b) and 14(e)).

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

[288] *Id.* at 424-25.

[289] *See, e.g.*, Chromalloy Am. Corp. v. Sun Chem. Corp., 474 F. Supp. 1341 (E.D. Mo. 1979).

[290] Of course, delay can be important, particularly where White Knight or other discussions are ongoing. *See generally* AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1979) (60-day review period under the Ohio takeover statute provided subject company opportunity not only successfully to challenge proposed disclosures in tender offer materials but also to find a White Knight offering almost $100 million more than initial bid).

payments,[291] corporate prerequisites[292] and environmental problems.[293]

An example of this avenue for defensive attack is Anderson, Clayton & Co.'s 1977 tender offer for Gerber Products Company. In May, 1976 Anderson, Clayton publicly disclosed questionable payments to foreign governmental officials aggregating approximately $2,100,000 and an off-record account utilized to pay a state lobbyist's lawful expenses.[294] In February, 1977, Anderson, Clayton disclosed that its completed investigation of these matters had revealed an additional $1,000,000 in overbillings in connection with export sales transactions. The sales related to the overbillings aggregated approximately $35,000,000, and, as a result of terminating its overbilling practices, most of the customers for whom overbillings had been effected apparently expressed the intention to cease doing business with Anderson, Clayton.

In April, 1977, Anderson, Clayton announced its intention to make a tender offer for all of the equity securities of Gerber. The company did not include a description of the questionable payments in the proposed offer to purchase. Gerber sued to block the proposed offer, alleging, among other things, that the failure to disclose the questionable payments violated section 14(e):

> The omission to disclose [*sic*] Anderson, Clayton's practice of making illegal or questionable payments and improper overbillings and the knowledge of its directors and officers of such practices is material in that, *inter alia*, it failed to disclose conduct

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[291] *See, e.g.*, Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1322-23 (W.D. Mich. 1978); Babcock & Wilcox Co. v. United Technologies Corp., No. 124A (N.D. Ohio. Apr. 25, 1977). *See generally* S. BANK., HOUSING & URBAN AFFAIRS COMM. REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL PAYMENTS AND PRACTICES, 94th Cong., 2d Sess. at 74 (1976) [hereinafter cited as SEC REPORT].

[292] *E.g.*, General Steel Indus. v. Walco Nat'l Corp., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,402 (E.D. Mo. Nov. 24, 1981). *See generally* Profusek, *Nonmonetary Forms of Remuneration Under the Federal Securities Laws*, 30 CASE W. RES. L. REV. 3 (1979).

[293] *E.g.*, Matter of Occidental Petroleum Corp., No. 041-15 (O. Div. of Secs. Oct. 9, 1978). *But see* Chromalloy Am. Corp. v. Sun Chem. Corp., 483 F. Supp. 116 (E.D. Mo. 1980).

[294] Anderson, Clayton also disclosed:

> It appears that one director who is a member of management was aware of these transactions, that certain directors and officers were generally aware of the practice of making small payments and that officers and directors were aware of one payment . . . which in effect was extorted by threats against certain employees.
>
> . . .
>
> The foreign sales and operations involved are material in the aggregate to the business of the Company in that their contribution to the consolidated net income of the Company has been material—averaging approximately 10% per year for the years under review.

Anderson, Clayton & Co. Form 8-K, at 2 (Mar., 1976).

> that would obviously affect Anderson, Clayton's ability to obtain the approval of the Superintendent of Insurance of New York, necessary to its purchase of shares on the tender offer contemplated by the Proposed Offer. Under the New York Insurance Law, for example, the Superintendent is specifically required to consider, in determining whether or not to approve the transaction, "the trustworthiness of the acquiring person or any of its officers or directors."
>
> Such omission is also material in that a fundamental purpose of Congress in enacting the "Williams Act" . . . was to ensure that the shareholder whose shares were being sought would receive all pertinent information relating to the competence and integrity of the management of a company seeking their shares.[295]

Like the bidder in *Babcock & Wilcox Co. v. United Technologies Corp.*,[296] Anderson, Clayton initially resisted the subject company's discovery requests relating to its questionable payments. However, unlike the situation in *United Technologies*, Judge Fox effectively[297] refused the request for a protective order in *Anderson, Clayton*:

> With reference to when the information [relating to Anderson, Clayton's questionable payments] should be disclosed, if it is to be disclosed, after trial or presently, if the information goes to anything that would be relevant to or have an effect upon the decision of the stockholders of Gerber, it should be disclosed now and not at the time of trial. This is discovery, and the Gerber stockholders are entitled to the information, which may affect their judgment.
>
> Anyone who reads the *Wall Street Journal* or any of the trade financial papers knows there is an upsurge in vital concern for corporate conduct . . . . There is sensitivity in stockholders as to what kind of companies they have, and that sensitivity could affect the judgment of a stockholder.
>
> The kind of information which was in the confidential document which you submitted to me shouldn't be withheld from the

[295] Complaint ¶¶ 39-40, Gerber Prods. Co. v. Anderson, Clayton & Co., No. 188 (W.D. Mich. 1977).

[296] No. 124A (N.D. Ohio Apr. 25, 1977) (Contie, J.) (defensive litigation based upon, among other things, alleged failure to disclose adequate information regarding voluntarily disclosed questionable payments).

[297] The district court in *Anderson, Clayton* did make allowance for the protection of information where public disclosure thereof "may affect the life of a human being," and included protective provisions in its order requiring Gerber to submit to the court information which it proposed to disclose which might endanger foreign nationals forty-eight hours prior to disclosure (so that Anderson, Clayton would have the opportunity to object thereto). *Id.*; *see* Order of June 2, 1977, Gerber Prods. Co. v. Anderson, Clayton & Co., Civ. No. 188 (W.D. Mich. 1977).

> Gerber stockholders. It goes to what the characteristics of the officers of the pursuing corporation is, or has been [*sic*]; and that is vital to the judgment of a stockholder in making a decision in this kind of case. It should be disclosed now.
>
> If Anderson, Clayton wants to venture to take over Gerber, it has to suffer the consequences, if there are any, of public disclosure.[298]

Anderson, Clayton may be of limited precedential weight, since the net income related to the questionable payments was apparently material under traditional principles and the bidder failed to make any reference to questionable payments in its tender offer materials (when this general topic was in vogue, relatively detailed descriptions of ostensively immaterial payments were frequently included in tender offer materials). However, the *Anderson, Clayton* court obviously was more concerned with information that allegedly bore upon the integrity of the bidder's management than the amounts at issue. More importantly, by effectively inviting the public dissemination of the details underlying Anderson, Clayton's questionable payments, the court seemingly took a step beyond what had normally been required in this area by the SEC.[299]

Gerber sought discovery of the facts underlying Anderson, Clayton's questionable payments for the *express* purpose of utilizing such facts in its tender offer defense. Anderson, Clayton argued before Judge Fox that a "decision cannot be made until discovery is complete and until this case is before the Court on its full merits," and asserted that premature disclosure of the underlying facts could result in physical injury to its employees in certain foreign countries.[300] However, Gerber expressly stated that it wished access to the information to utilize it (if relevant and after giving Anderson, Clayton notice thereof) in proceedings

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[298] *Id.* (bench ruling) (emphasis added).

[299] The SEC has stated that, as a general matter, the following items ought to be included in a disclosure statement relating to questionable payments:

> 1. The existence, amount of, duration and purpose for the questionable payments;
> 2. The role of senior management in such payments;
> 3. The tax consequences, if any, of the payments;
> 4. Information about the line of business, or class of products or services in connection with which the payments have been made;
> 5. The company's intention with respect to the continuation or termination of the payments;
> 6. The impact that cessation of the payments referred to in Items 1 through 4 above may have on the company's consolidated revenues, net income or assets; and
> 7. The method of effecting the payments, including possible falsifications or inadequate corporate books and records. SEC REPORT, *supra* note 291, at 32-33.

[300] Transcript, at 8-9, Gerber Prods. Co. v. Anderson, Clayton & Co., No. 188 (W.D. Mich. May 31, 1977).

before the Michigan Securities Bureau and the New York Insurance Bureau arising out of state administrative review of the proposed tender offer and, possibly, to communicate with its shareholders: "Again, if stockholders have an interest in being fully informed, and if the information is information which stockholders should have, it simply does not make sense to delay the availability of that information to them until this entire lawsuit is tried on the merits."[301] Judge Fox's order, effectively provided protection for the underlying information only upon a concrete showing of potential physical harm to Anderson, Clayton's employees, and as such presented Gerber with a potent weapon in its struggle with Anderson, Clayton.

On June 7, 1977, Anderson, Clayton sought expedited review in the Sixth Circuit of Judge Fox's ruling pertaining to questionable payments. However, Anderson, Clayton and Gerber then entered into a stipulation pursuant to which Anderson, Clayton agreed to full discovery with respect to questionable payments and agreed not to commence its tender offer until ten days after the conclusion of the trial on the merits. In return, Gerber pledged to maintain in confidence information so obtained, pending the outcome of the trial. A few months later, citing the delay caused by the litigation in the federal district court, Anderson, Clayton withdrew its proposed tender offer.

Cases such as *Anderson, Clayton* are rare. In most instances, disclosure litigation revolves around somewhat more technical issues as to which some bidders are willing to make disclosure even if they disagree that disclosure is required. The touchstones for disclosure in this regard are, of course, the materiality concept generally and the SEC's specific disclosure requirements relating to tender offers.

B. *Materiality*

In order for the plaintiff to obtain relief, any alleged misstatement or omission must be found to have been in derrogation of the SEC's explicit disclosure requirements or otherwise "material." Section 14(e) generally incorporates the disclosure standards applicable in Rule 10b-5 cases. Although the Rule 10b-5 cases contain numerous and sometimes conflicting definitions of "material" information, a Second Circuit decision involving the Williams Act delineates a test for materiality which seems to distill most of the prior Rule 10b-5 law on the subject:

> The concept of materiality focuses on the weightiness of the misstated or omitted fact in a reasonable investor's decision to buy or sell. We articulated the materiality standard in *List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965), to be "whether 'a reasonable man would attach importance [to the fact misrepresented] in determining his

[301] *Id.* at 11.

> choice of action in the transaction in question.' " [footnote omitted.] The materiality test is concerned only with whether a prototype reasonable investor would have relied. *See Heit v. Weitzen*, 402 F.2d 909, 912-14 (2d Cir. 1968), *cert. denied*, 395 U.S 903 (1969). Account must be taken of all the surrounding circumstances to determine whether the fact under consideration is of such significance that a reasonable investor would weigh it in his decision whether or not to invest.[302]

Although the following cases may have been undercut by the Supreme Court's decision under section 14(a) in *TSC Industries, Inc. v. Northway, Inc.*,[303] a number of cases decided after the Second Circuit's decision in *Chris-Craft* used very expansive definitions of the concept of "materiality." However, the ostensive willingness of even these courts to expand greatly the concept of materiality may be merely a result of the requirements of the particular cases.[304] For example, in *Corenco Corp. v. Schiavone & Sons, Inc.*,[305] the District Court for the Southern District of New York held that a bidder must disclose at least two year's financial statements about its operations but only because: 1) no financial information was otherwise publicly available; 2) the bidder sought control; 3) a merger was contemplated; and 4) less than all shares were sought. The bidder was enjoined from further activity in connection with the offer until such time as it had made the required disclosures, despite the fact that financial information concerning the bidder was not then a mandatory disclosure item on any of the SEC forms and had not previously been held to be required. However, absent any of the factors enumerated above, it seems likely that a contrary result would have obtained.

Similarly, *Cauble v. White*,[306] indicates that misrepresentations and omissions may be more critical when made to the shareholders of a small bank who are primarily local people.[307] The *Cauble* court also held

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[302] Chris-Craft Indus. v. Piper Aircraft Corp., 480 F.2d 341, 362-64 (2d Cir. 1973).

[303] 426 U.S. 438 (1976) (discussed *infra*).

[304] *See, e.g.*, Texasgulf, Inc. v. Canada Dev. Corp., 366 F. Supp. 374, 421 (S.D. Tex. 1973) ("whether a reasonable 'prototype' investor might have considered such information important in the making of his decision to tender or not"); Elco Corp. v. Microdot, Inc., 360 F. Supp. 741, 752 (D. Del. 1973), *quoting*, Butler Aviation Int'l., Inc. v. Comprehensive Designers, Inc., 425 F.2d 842, 845 (2d Cir. 1970) ("inaccurate statements [or omissions] . . . which may have had some tendency to affect the decision of the [target company's] stockholders with respect to the . . . offer").

[305] 362 F. Supp. 939, *modified*, [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,108 (S.D.N.Y.), *aff'd in part and remanded in part*, 488 F.2d 207 (2d Cir. 1973). *See infra* Section III(C)(5) with respect to disclosure of financial information regarding the bidder.

[306] 360 F. Supp. 1021 (E.D. La. 1973).

[307] *See also* Indiana Nat'l Bank v. Mobil Oil Corp., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,483 (7th Cir. 1978).

that "[t]he culpability of officers or directors of a corporation for misstatements is greater than that of other persons" due to the fiduciary duties which they owe to the shareholders.[308] Moreover, where the bidder has intentionally impeded the ability of the subject company to respond by limiting the duration of its offer, at least one court has held that a more relaxed standard of materiality should be applied to alleged misstatements and omissions.[309] Interestingly, the SEC has indicated that it may apply an even broader standard of materiality in its own administrative proceedings. For example, in *Matter of Susquehanna Corp.*,[310] the SEC held that the bidder-respondent had violated section 13(d) by failing to disclose its intent to make future acquisitions with the liquid assets of the subject company. In so holding, the SEC rejected a prior determination by the Fifth Circuit that the offeror had not violated the Williams Act.[311]

Described in the abstract, materiality is a concept that can bear virtually any burden. However, the concept has two overlapping but distinguishable components—the qualitative and quantitative components—which, when properly analyzed, provide bounds beyond which the federal disclosure system should not be pushed.

1. The Qualitative Component

The first element is qualitative, *i.e.*, attention must be directed to the nature of a particular fact vis-a-vis the interests of the investing public or shareholder. As a general proposition, the courts and the SEC require disclosure of a particular item of information "not because it is of interest to the general public but because it might affect *profitability* and hence be of concern to investors."[312] That is, the concept of materiality is premised upon an economic model—emphasis is to be placed upon the effect of an item of information "on the [corporation's] profit and loss account and on the earnings trends which determine modern ratios."[313] Indeed, this limiting aspect of the concept of materiality is seemingly mandated by the general legislative history of

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[308] 360 F. Supp. at 1029.

[309] Commonwealth Oil Ref. Co. v. Tesoro Petroleum Co., 394 F. Supp. 267 (S.D.N.Y. 1975).

[310] SEC Rel. No. 34-8933 (SEC Admin. Proc. July 17, 1970).

[311] Susquehanna Corp. v. Pan Am. Sulphur Co., 423 F.2d 1075 (5th Cir. 1970).

[312] Stevenson, *Corporations and Social Responsibility in Search of the Corporate Soul*, 42 GEO. WASH. L. REV. 709, 726 n.30 (1974) (emphasis added). *But see generally* Ferrara, Starr & Steinberg, *Disclosure of Information Bearing on Management Integrity and Competancy*, 76 NW. U.L. REV. 555 (1981).

[313] Kripke, *Rule 10b-5 Liability and Material Facts*, 46 N.Y.U.L. REV. 1061, 1071 (1971). *See, e.g., Matter of Investors Management Co.*, SEC Rel. No. 34-9267 (1971) (A fact is material "where it is of such significance that it could be expected to affect [the] judgment of investors as to a security's merit and, if generally known, to affect its market price.").

the Exchange Act.[314] However, as indicated above, other topics not moored to traditional economic concepts, *e.g.*, so-called questionable payments, may sometimes be required to be disclosed, particularly if they bear significantly upon the integrity of the bidder's management.

2. The Quantitative Component

In addition to its qualitative aspect, the concept of materiality also has a quantitative component, *i.e.*, the relative importance of a particular fact or group of facts must be assessed to determine if it is significant enough to be disclosed publicly. Were this not the case, stockholders and the investing public would be repeatedly bombarded with information which would be of little benefit to them and could be produced only at an unnecessary public and private expense.[315] It was principally this perception that led the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.* to reject the previously prevailing "might" standard of materiality under the federal securities laws, as "too suggestive of mere possibility, however unlikely."[316]

Instead, the *TSC Industries* Court defined a "material" fact, for purposes of the proxy rules, as follows:

> An omitted fact is material if there is a *substantial likelihood* that a reasonable shareholder *would* consider it important in deciding how to vote. . . . [This standard] does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote, but contemplates a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the reasonable shareholder's deliberations.[317]

In short, for a fact to be material under the federal securities laws there must be a substantial likelihood that the "disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[318]

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[314] *See, e.g.*, S. REP. NO. 792, 73d Cong., 2d Sess. 10 (1934) ("The bill provides that . . . a condition of . . . registration shall be the furnishing of complete information relative to the financial condition of the issuer.").

[315] *E.g.*, Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963).

[316] 426 U.S. 438, 446 (1976), *citing*, Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1302 (2d Cir. 1973).

[317] 426 U.S. at 449 (emphasis added).

[318] *Id.* The materiality standard enunciated in *TSC Industries* had been expressly applied to alleged § 14(e) violations. *See, e.g.*, Staffin v. Greenberg, 509 F. Supp. 825 (E.D. Pa. 1981); SEC v. Texas Int'l Co., 498 F. Supp. 1231 (N.D. Ill. 1980); Weeks Dredging & Contracting, Inc. v. American Dredging Co., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,414 (E.D. Pa. 1978); Berman v. Gerber Prods. Co., 454 F. Supp. 1310 (W.D. Mich. 1978). The *TSC Industries* standard was also

It is the quantitative aspect of materiality which has led to the conclusion in a few cases that even when it is determined that certain facts relevant to a particular transaction or series of transactions might be deemed material, it is not necessarily a foregone conclusion that the same must be disclosed.[319] The decision as to what information must be disclosed necessarily involves a balancing of the costs involved, such as the direct expense of disclosure and the possibility that the disclosure itself might be misleading or unduly damaging, against the benefits sought to be obtained. Thus, in a particular case it may be that the direct and indirect costs of disclosure could be deemed to outweigh the putative benefits therefrom.

In *Berman v. Gerber Products Co.*,[320] the trial court distinguished relevance from materiality: "[A] target company's duty under Section 14(e) is not one of absolute disclosure of all potentially relevant facts about its management, finances, and operations. Rather, the duty is one of disclosure of material facts that are necessary to prevent an investor from being misled."[321] The *Berman* court suggested that voluntary disclosure of certain relevant facts might make other facts material and thereby trigger further disclosure.[322] Thus, the *Berman* court held that a subject company ordinarily had no obligation to disclose its past earnings in responding to a tender offer. If the subject company characterized the offer as "inadequate," however, the company's past earnings might become material to an investor's decision, and disclosure might therefore be required.

A number of other decisions indicate that more stringent limitations may be imposed upon the "materiality" concept in the tender offer context. In *Missouri Portland Cement Co. v. Cargill, Inc.*,[323] for example, the bidder alleged that the subject company had violated section 14(e) by informing its shareholders that they would lose a 25% stock dividend if

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applied to alleged § 13(d) violations in SEC v. Savoy Indus., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,497 (D.C. Cir. 1978); Blanchette v. Provident & Worcester Co., 428 F. Supp. 347 (D. Del. 1977). *See also* Chromalloy Am. Corp. v. Sun Chem. Corp., 483 F. Supp. 116 (E.D. Mo. 1980) (holding that matters involving compliance with environmental and occupational health and safety laws are immaterial, as they are not mentioned by the SEC rules and regulations regarding required disclosure, and need not be disclosed on an acquirer's Schedule 13D); Crouse-Hinds Co. v. InterNorth, Inc., [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,840 (N.D.N.Y. 1980) (bidder not required to disclose the possibility of it being subject to environmental proceedings due to the operation of its facility, as they were not yet pending).

[319] SEC Rel. No. 34-11733 (1975), [1975-76 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 80,310, at 85,712. *See, e.g.*, Ash v. Baker, 392 F. Supp. 368, 372 (E.D. Pa. 1975) (expense of resolicitation of proxies held to outweigh potential benefits).

[320] 454 F. Supp. 1310 (W.D. Mich. 1978).

[321] *Id.* at 1327.

[322] *Id.*

[323] 498 F.2d 851 (2d Cir.), *cert. denied*, 418 U.S. 919 (1974).

they tendered their shares. The subject company did not disclose that the true value of the stock dividend lay in the payment of the usual dividend on an increased number of shares or that the market price would reflect this increase. However, no violation of section 14(e) was found: "[The subject company's] statement was literally true and here again we are not disposed to require parties to a tender fight to conform to standards of sterilization that might be appropriate in other contexts."[324] It should be noted that, as discussed below,[325] the court that decided *Missouri Portland Cement* reached questionable results on at least some of the other issues presented, and the precedential value which other courts will attach to the case remains to be seen.

A few courts have manifested an unwillingness to give full girth to the "total mix" concept suggested by the Supreme Court in *TSC Industries, e.g.*, they have refused to allow the availability of curative information to be utilized as a defense to allegedly material misstatements or omissions.[326] However, most courts have been eager to point to the "total mix" of information available to offerees, even if it is presented by third parties.[327] For example, in *Spielman v. General Host Corp.*,[328] the Second Circuit affirmed a judgment denying liability for allegedly material omissions in an offeror's prospectus in an exchange offer concerning the method of election of directors of the subject company, *i.e.*, that the target had a staggered board and cumulative voting. Noting that the shareholders presumably were aware of the organic structure of their own corporation and had been reminded thereof during the course of the offer and a recent proxy solicitation, the *Spielman* court held that this was a "situation where the 'total mix' of communications to, and knowledge of, shareholders of the target company renders harmless a potentially misleading omission in the prospectus circulated by the tender offeror."[329] In short, given the realization that one cannot expect the type of purity in takeover battles that might exist in other contexts,[330] the threshold for materiality under the Williams Act may, as

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[324] *Id.* at 874.

[325] *See infra* Section III(C)(1)(a).

[326] *See, e.g.*, Blanchette v. Providence & Worchester Co., 428 F. Supp. 347 (D. Del. 1977) (exchange offeror could not cure material misstatements as to offerees' voting rights by a supplemental letter).

[327] *See, e.g.*, Davis v. Emerson Ins. Agency, Inc., 423 F. Supp. 561 (D. Neb. 1976) (offerees told by the target company that deregistration may occur as a result of tender offer). *See also* Vernon J. Rockler & Co. v. Minneapolis Shareholders Comm., 425 F. Supp. 145 (D. Minn. 1977) (where offer is not likely to be consummated quickly, the information made available through the give and take of a tender offer battle deemed superior to that which could be judicially mandated).

[328] 538 F.2d 39 (2d Cir. 1976).

[329] *Id.* at 39-40.

[330] *See, e.g.*, Flynn v. Bass Bros. Enter., 456 F. Supp. 484 (E.D. Pa. 1978).

a practical matter, be relatively high so long as the offer is contested and there is an adequate opportunity for both sides to respond.

Another limitation on the amount of disclosure required under section 14(e) was imposed in *Texasgulf, Inc. v. Canada Development Corp.*[331] There, the subject company alleged that the bidder had violated section 14(e) by failing to disclose that a takeover could result in the loss of the subject company's right to manage certain Australian mining joint ventures. This information could only have been obtained by going to Australia and examining the relevant contracts. Thus, although it held that the omitted information was "material,"[332] the *Texasgulf* court refused to impose liability on the bidder:

> However, [the bidder] could not reasonably have been expected, to disclose this information because it was not available to them and could not have been discovered with reasonable effort since there was nothing in any of the public filings to inform [the bidder] of the possible problem. [The subject company] suggests [the bidder] should have inquired of [it] about the projects, but this suggestion is unrealistic as it would have encouraged speculation that [the bidder] was contemplating an offer.[333]

The *Texasgulf* "reasonable effort" rule seems sensible.[334] Under a more stringent rule, section 14(e) arguably could become an unintended obstacle to any tender offer.

One additional limitation on the scope of the materiality concept should be noted at the outset—*i.e.*, the concept "must accommodate a concern that information containing conclusions which on their face would, if disclosed, risk misleading the shareholder because the basis for the conclusions are speculative and unreliable."[335] Thus, in *Radol v. Thomas*,[336] the District Court for the Southern District of Ohio held that asset valuations prepared by a target company and its investment ad-

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[331] 366 F. Supp. 374 (S.D. Tex. 1973).

[332] *Id.* at 426. Even though the *Texasgulf* court found no violation by the bidder in failing to disclose the information, it did require that the amended offer to purchase, which the bidder had volunteered to publish, contain a description of the Australian mining venture.

[333] *Id.*

[334] *Cf.* Escott v. Barchris Constr. Corp., 283 F. Supp. 643, 685-89 (S.D.N.Y. 1968) (The extent of an individual director's duty to investigate under § 11 of the Securities Act is contingent upon his or her relative access to information in a particular setting and the nature of the duties which he or she is performing.).

[335] Radol v. Thomas, No. 13, Slip op. at 7 (S.D. Ohio Apr. 12, 1982). *See also* Staffin v. Greenberg, [1981-82] FED. SEC. L. REP. (CCH) ¶ 98,465 (3d Cir. Feb. 19, 1982); James v. Gerber Prods. Co., 587 F.2d 324, 327 (6th Cir. 1978); Arber v. Essex Wire Corp., 490 F.2d 414, 421 (6th Cir. 1974); Kohn v. American Metal Climax, Inc., 458 F.2d 255, 265 (3d Cir. 1972).

[336] No. 82-13 (S.D. Ohio Apr. 12, 1982).

visors were not required to be disclosed because they "contained facts and conclusions that were based on speculations, assumptions and calculations that were imprecise and inaccurate."[337]

A novel attempt to restrict the duty to disclose material information was made in *Sonesta International Hotels Corp. v. Wellington Assocs.*[338] There, the defendant-bidder contended that the subject company had distributed communications to its shareholders in which it could have, but failed to disclose any material facts which the bidder had omitted. Moreover, the bidder argued that its offer was so generous that it mitigated the effects of any misrepresentations or omissions that had been made. In rejecting both contentions, the Second Circuit stated:

> While the failure of a target company to seize an opportunity to rectify claimed omissions may have some bearing on their materiality, *General Time Corp. v. Talley Industries, Inc.*, 403 F.2d 159, 162 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969), and while it would have been in the interests of disclosure for Sonesta itself to have drawn its stockholders' attention to the possible consequences of their tendering Sonesta shares, which Wellington had omitted, it would emasculate the purposes of the Williams Act to allow the offeror to look to the target company to remedy the offeror's own material deficiencies in disclosure. The obligation is placed squarely on those making the offer in the first instance to disclose all material factors necessary to make *their offer* not misleading. That duty cannot be shifted to the shoulders of others. As for the suggestion that the generosity of the offer should reduce Wellington's obligation to inform the shareholders of all relevant circumstances, we must reject any such nullification of the disclosure requirements of the Act, as did the Supreme Court in a similar situation with respect to proxy violations in *Mills v. Electric Auto-Lite*, [396 U.S. 375, 381-85 (1970)].[339]

That is, a party upon whom a disclosure obligation is imposed may not shift that obligation to a contestant simply because of the contestant's resistance.[340]

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[337] *Id.* at 8.

[338] 483 F.2d 247 (2d Cir. 1973).

[339] *Id.* at 255. *See also* Memorandum of Mobil Corp. in Opposition to Request for a Hearing at 10-12, No. 041-22 (Ohio Div. of Secs. Nov. 17, 1981).

[340] In Elkind v. Liggett & Myers, Inc., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,602 (S.D.N.Y. 1978), the District Court for the Southern District of New York held that Liggett & Myers' failure to correct a financial analyst's projected earnings reports did not constitute a violation of Rule 10b-5 even though the analyst

However, as suggested in *Sonesta*, in *Seaboard World Airlines, Inc. v. Tiger International, Inc.*,[341] the Second Circuit held that a failure to correct another's error may be some evidence that the error is not material. In that case, the subject company sued to enjoin a tender offer, alleging that the bidder had misrepresented the true value of the subject company's stock. The *Seaboard World Airlines* court found that there had been no section 14(e) violation:

> As we have indicated, as early as March, [the subject company] stated that its $20 asking price was based on the liquidation value of its aircraft. . . . [The subject company] had ample opportunity to make its position clear to the stockholders whom it now alleges were misled by [the bidder's] statement. But the record does not reveal, and [the subject company] does not claim to have made, any effort to rebut [the bidder's] characterization of its $20 asking price by apprising its stockholders of the value of its aircraft if the corporation were liquidated and these assets sold. *Cum tacent claimant.*
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> . . .
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> Under these circumstances we believe our comments in *General Time Corp. v. Talley Industries, Inc.*, *supra*, 403 F.2d at 162 to be particularly appropriate. "*Failure of the other side to correct alleged misstatements or rectify omissions is some evidence that it did not regard them as material.*"[342]

Thus, tender offer contestants have legal as well as business reasons for challenging statements made by the other side in a takeover battle.

C. *Particular Disclosure Issues*

1. Compliance with Law

Item 10 of Schedule 14D-1 requires that, if material, a bidder make disclosure of, among other things, 1) applicable regulatory requirements and approvals, 2) the applicability of antitrust laws, 3) the applicability of margin requirements, and 4) pending legal proceedings relating to the tender offer. Subject companies frequently assert in defensive litigation that the bidder's disclosures regarding legal obstacles to and consequences of a tender offer were inadequate. Such claims are especially predictable where a colorable antitrust argument can be made.

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had submitted the reports to Liggett & Myers for review before their release. The *Elkind* court concluded that there was simply no duty under the federal securities laws to correct another's erroneous statements, even if, as was the situation in *Elkind*, it would have been customary so to do.

[341] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,877 (2d Cir. 1979).

[342] *Id.* at 95,590-91 (emphasis added; citations omitted).

a. *Antitrust Laws*

Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.,[343] involved a tender offer for MGM by Tracy Investment Company. The financing for Tracy's offer was to be provided by a subsidiary of Transamerica. Transamerica owned 99.6% of United Artists, which, of course, is a major competitor of MGM. MGM sought a preliminary injunction against the tender offer on the grounds that Tracy had violated sections 14(d) and 14(e) by failing to disclose the potential antitrust problems in either its Schedule 13D (then required for tender offers) or the offer to purchase itself. The trial court used the following test for "materiality": Whether or not any of the stockholders who tendered their shares would not have done so if they had known of the disclosed facts.[344] Under this overly stringent test, the trial court was not persuaded that the information was material.[345] At any rate, the trial court's order delineating the conditions under which the offer was to proceed required disclosure of these facts to the shareholders. Thus, any harm would be remedied. A further factor in *MGM* may well have been that the trial court was not firmly convinced that any real substantive antitrust problems existed, especially given the provisions of its order requiring amendment of the loan agreement so as to preclude the lender from exercising control over MGM.[346]

In *Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*,[347] the substantive antitrust problems were clearer than those in *MGM*. Bluhdorn, the chief executive officer of the offeror, Gulf & Western, was also the largest shareholder and a director of Bohack, the chief competitor of the subject company, A&P, in the New York City area. Gulf & Western also controlled a number of A&P suppliers, raising problems, at least at that time, of vertical foreclosure and reciprocity. A&P sought injunctive relief against the tender offer on the ground that Gulf & Western had violated sections 14(d) and 14(e) by not disclosing Bluhdorn's relationship with Bohack, or Gulf & Western's control of certain A&P suppliers.

Using the test for a preliminary injunction discussed above,[348] the Second Circuit held that A&P had demonstrated a probability of success on the merits with respect to its section 14(e) claim. The *Gulf & Western* court stated that A&P was only required to show that the omitted information was material, and that any of the shareholders who tendered their shares would probably not have done so if they had known all of

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[343] 303 F. Supp. 1344 (S.D.N.Y. 1969).

[344] *Id.* at 1353.

[345] *Id.*

[346] *Id.* at 1354.

[347] 476 F.2d 687 (2d Cir. 1973).

[348] *See supra* Section II(C)(1).

the facts. Gulf & Western argued that, at the time of its offer, no antitrust action had been commenced against it and, therefore, that its liability was uncertain. However, the *Gulf & Western* court rejected this defense, holding that the potential antitrust problems were "basic facts" of "obvious concern" to all A&P shareholders.[349]

Gulf & Western was followed in *Elco Corp. v. Microdot, Inc.*,[350] wherein the Delaware District Court found that consummation of the tender offer would probably violate section 7 of the Clayton Act. The *Elco* court rejected the offeror's denials that the antitrust laws would have been violated by the acquisition and asserted that it would have been false and misleading for it to so state:

> At a minimum, the present record makes it appear that the facts regarding the . . . market [at issue] raised serious and substantial questions about the legality of the transaction. If so, they held the potential of effecting [*sic*] the judgment of . . . shareholders on whether and how much to tender. These basic facts could have been stated without speculation on future events. They were not stated.[351]

The thrust of the opinions in *Gulf & Western* and *Elco* would appear to have seriously weakened the earlier *MGM* decision. *MGM* can be distinguished from both *Gulf & Western* and *Elco* on the basis of the relative certainty of the substantive antitrust violations in each case.

However, in *Missouri Portland Cement Co. v. Cargill, Inc.*,[352] the Second Circuit rejected the contention that the bidder had violated section 14(e) by failing to disclose that potential antitrust problems were involved in its offer. The *Cargill* court found no likely antitrust obstacles in the transaction and approved the district court's holding that antitrust obstacles need not be disclosed unless the probability of violation is clearly apparent at the time of the offer. The *Cargill* court went further than was necessary to decide the issues before it, stating:

> Courts should tread lightly in imposing a duty of self-flagellation on offerors with respect to matters that are known as well, or almost as well, to the target company; [footnote omitted] some issues concerning a contested tender offer can safely be left for the latter's riposte. Of course, if the FTC should issue a complaint with respect to Cargill's acquisition of MP, as we are told its staff has recommended, a renewed tender offer should disclose that fact, with whatever reasonable comments Cargill may choose to make about it.[353]

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[349] 476 F.2d at 697.

[350] 360 F. Supp. 741 (D. Del. 1973).

[351] *Id.* at 752-53 (footnote omitted).

[352] 498 F.2d 851 (2d Cir.), *cert. denied*, 418 U.S. 919 (1974).

[353] *Id.* at 873.

The FTC did, in fact, issue a complaint against the bidder after it had acquired 18% of the target's stock. This development indicates that the approach taken in *Cargill* may not have much lasting vitality, particularly the comment that:

> It is also worth noting that here Cargill's offer was for all of MP's stock whereas Gulf & Western's was for only 15% of A&P's. It is hard to see the materiality of a possible antitrust violation to an MP stockholder who had tendered and been paid for all his stock.[354]

It would seem that the fact of a forthcoming FTC complaint would be most relevant to the holders of 82% of the target's stock who did not tender their shares. *Cargill* can perhaps best be explained as a somewhat aberrational development resulting from the particular panel's (Judges Waterman, Mulligan and Friendly) thinly disguised annoyance with suits by target companies.

The basis of the *Cargill* holding, that disclosure of antitrust problems will be necessary only when the circumstances are such as to make the probability of antitrust violations apparent at the time of the offer, does have continuing viability, however.[355] This approach appears to be sensible. If no antitrust problem conceivably could be presented by consummation of a tender offer, no disclosure should be required. The nature and extent of the disclosures required in other situations will be dependent upon the seriousness of the antitrust problems posed in a particular situation.

Under *Gulf & Western*[356] and *Cargill*,[357] the bidder is obliged only to disclose the "basic facts" giving rise to the alleged illegality so that shareholders are able to reach their own conclusions. The bidder is not required to characterize the facts at issue with "pejorative nouns or adjectives or . . . to draw adverse inferences from the facts disclosed."[358] A contrary rule would enable subject company management to use the disclosure requirements of the Williams Act in derogation of Congress apparent intent in enacting that Act.

b. *Regulatory Approvals*

Depending upon the nature of the business of the subject company, regulatory approval of a tender offer for control of a subject company

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[354] *Id.* at 873 n.45.

[355] *Accord* Crane Co. v. Harsco Corp., 509 F. Supp. 115 (D. Del. 1981). *See also* Grumman Corp. v. LTV Corp., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,319 (E.D.N.Y. Oct. 14, 1981).

[356] 476 F.2d at 697-98.

[357] 498 F.2d at 873.

[358] Issen v. GSC Enter., 508 F. Supp. 1278, 1290 (N.D. Ill. 1981). *See also* Golub v. PPD Corp., 576 F.2d 759 (8th Cir. 1978); Selk v. St. Paul Ammonia Prods., Inc.,

may be required.[359] The cases involving potential antitrust violations do not necessarily justify an injunction against a bidder seeking to obtain control of a corporation which is subject to regulatory approvals. In the former cases the illegality of the tender offer inheres in the possible ownership of the subject company by the bidder—*i.e.*, without respect to the means employed, the end itself would be illegal as a matter of substantive law. Contrarily, where the illegality of the offer is divorced from the end sought to be obtained (*viz.*, control of a subject company which, for example, holds a broadcasting license), but only results from a requirement of administrative approval prior to the transfer of control, the courts have refused to enjoin tender offers until such approval is obtained.

In *Ronson Corp. v. Liquifin Aktiengesellschaft*,[360] for example, the Third Circuit adopted the conclusion of the trial court that the defendants were not required to secure administrative approvals prior to consummation of a tender offer.[361] Moreover, in *Texasgulf, Inc. v. Canada Development Corp.*,[362] a case involving a tender offer for shares of a corporation which controlled several subsidiaries that were licensed to operate radio broadcasting stations, the District Court for the Southern District of Texas expressly stated that "[c]learances from administrative agencies need not be secured prior to a final tender offer provided disclosure is made of the potential loss and its value."[363]

Strong policy arguments support the conclusion of the *Ronson* and *Texasgulf* courts. A contrary result would, in effect, institute a form of pre-offer registration. Pre-offer filing was rejected when the Williams Act was enacted because of the adamant opposition thereto by the securities industry,[364] based upon the argument that pre-offer filing would eliminate the critical tactical element of surprise from the

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597 F.2d 635, 639 (8th Cir. 1979); Rodman v. Grant Found., 608 F.2d 64, 72-73 (2d Cir. 1979); Biesenbach v. Guenther, 588 F.2d 400, 402 (3d Cir. 1978); Bucher v. Shumway, [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,142, at 96,303 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir.) (mem.), *cert. denied*, 449 U.S. 841 (1980).

[359] *E.g.*, 42 U.S.C. § 2234 (Atomic Energy Act); 46 U.S.C. §§ 808, 835, 883 (Shipping Act of 1916); 47 U.S.C. § 310 (Federal Communications Act); 49 U.S.C. §§ 1378, 1381 (Federal Aviation Act).

[360] Civ. No. 785 (D.N.J. July 3, 1973), *aff'd*, 483 F.2d 846 (3d Cir. 1973) (per curiam), *cert. denied*, 419 U.S. 870 (1974).

[361] At issue in *Ronson* was 49 U.S.C. § 1378(a)(5), which prohibits any person from acquiring control of an air carrier without prior approval by the Civil Aeronautics Board.

[362] 366 F. Supp. 374 (S.D. Tex. 1973).

[363] *Id.* at 429, *citing*, Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 846 (3d Cir. 1973) (per curiam), *cert. denied*, 419 U.S. 870 (1974). *See also* Orbanco, Inc. v. Security Bk., [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,559, at 95,956 (D. Ore. 1974) (FDIC filing).

[364] *See, e.g.*, *Hearings on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking & Currency*, 90th Cong., 1st Sess. 87-89 (1967).

bidder's arsenal. A similar concept underlies commencement and dissemination provisions of the SEC's new tender offer rules.[365] Finally, section 14(a)(5) of the Williams Act makes all tenders revocable after sixty days in order to preserve the shareholder's freedom to deal in his stock. As such, a requirement of prior administrative approval would be inconsistent with the SEC's, and arguably Congress, apparent desire to stimulate quick consummation of tender offers. In sum, it is not likely that any hostile tender offer would be enjoined on the ground that the requested administrative approval had not been obtained prior to the offer absent truly extraordinary facts.[366]

c. *Litigation*

In *SEC v. Texas International Co.*,[367] the District Court for the Northern District of Illinois held that the bidder should have disclosed the existence of pending litigation which might affect the tender offer and the issues involved but that the bidder did not have to speculate on the potential outcome of the litigation itself. In contrast, in *Crouse-Hinds Co. v. InterNorth, Inc.*,[368] the District Court for the Northern District of New York held that the bidder was not required to disclose the possibility of its being subject to environmental proceedings due to the operation of its petrochemical facility, as no such action was then pending. The differing results can be explained by the fact that the litigation in *Texas International* affected the offer itself whereas that in *Crouse-Hinds* did not.

d. *Adverse Tax Implications*

Herbst v. International Telephone & Telegraph Co.,[369] is probably the first case to consider the problem of non-disclosure of possible adverse tax implications. ITT made an exchange offer for the shares of Hartford Insurance Company and, in connection therewith, issued a prospectus which represented that the transaction would be tax-free. ITT did not disclose, however, that it had obtained a tax ruling from IRS on the basis of inaccurate information. When the IRS later withdrew its ruling, the Second Circuit held that former Hartford shareholders could main-

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[365] *See* SEC Rel. No. 34-16623, 3 Fed. Sec. L. Rep. (CCH) ¶ 24,284I (Mar. 5, 1980).

[366] In a particular case, it could be said that the consequences of a failure to obtain a particular administrative approval (*e.g.*, pursuant to Canada's Foreign Investment Review Act) might be so significant that they could not be adequately disclosed in the bidder's tender offer materials. However, these circumstances are likely to be rare.

[367] 498 F. Supp. 1231 (N.D. Ill. 1980).

[368] [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,840 (N.D.N.Y. 1980).

[369] 495 F.2d 1308 (2d Cir. 1974).

tain a class action for damages or rescission under sections 10(b) and 14(e).

An analogous case, but involving disclosure of the effect of a takeover on the issuer, is *Commonwealth Oil Refining Co. v. Tesoro Petroleum Corp.*,[370] wherein the District Court for the Southern District of New York indicated that a (later-cured) failure to disclose the *precise dollar amounts* resulting from a possible loss of the issuer's tax exemption under Puerto Rican law and various benefits under the Federal Energy Administration's crude oil cost equalization program constituted a violation of section 14(e).[371]

2. Conflicts of Interests

Disclosure of possible conflicts of interests between the bidder and the subject company is not specifically required by either the statute or the SEC's implementing regulations. However, the decided cases have generally held such information to be material within the meaning of section 14(e) on the ground that this type of information is patently relevant to the investor's decision whether to tender his shares since, if he does not tender, he may be injured by future actions by the bidder.

In *Sonesta International Hotels Corp. v. Wellington Assocs.*,[372] the Second Circuit reversed the trial court's denial of a preliminary injunction against consummation of a tender offer. Wellington, the bidder, was involved in litigation with the subject company, Sonesta, over the terms of a lease. Sonesta had obtained a $1.8 million judgment against Wellington in a New York court, from which Wellington had appealed. In addition, there was an undisputed debt of $500,000 owed to Sonesta by Wellington. The bidder had disclosed the existence of the dispute and stated that a successful takeover might mean that Sonesta would receive less than the amount due. However, the amount of the judgment was not revealed, so the *Sonesta* court held this violated sections 14(d) and 14(e). Since the exact figure was "material," its omission entitled the plaintiff to injunctive relief.[373]

During the period of Wellington's tender offer, there were two pending shareholder resolutions regarding liquidation of certain Sonesta assets. Subject to IRS approval and the vote of two-thirds of all shares at the annual meeting, the liquidation of these assets could have resulted in a two dollar per share cash distribution to stockholders. In its offer to purchase, Wellington stated its intention to abstain from

[370] 394 F. Supp. 267 (S.D.N.Y. 1975).

[371] *But cf.* Texasgulf, Inc. v. Canada Dev. Corp., 366 F. Supp. 374 (S.D. Tex. 1973).

[372] 483 F.2d 247 (2d Cir. 1973).

[373] *See also* Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267 (S.D.N.Y. 1975).

voting on these proposals. Wellington failed to disclose that, if its tender offer were successful, it would acquire enough shares to defeat the resolutions by its abstention. The trial court held that such a disclosure would have been "purely hypothetical" since it was impossible to predict the ultimate success of the offer. Therefore, it denied injunctive relief. The appellate court reversed, stating:

> The test of materiality is not whether a possible consequence of the offer was contingent or hypothetical . . . but whether it was a factor that might be considered of some importance by a Sonesta stockholder in making his decision. We believe that it was. It is true that Wellington's offer has not been as successful as it had hoped . . . and that the two proposals have since been approved by a small margin at Sonesta's Annual Meeting. But this post-offer occurrence does not render the offer any the less misleading . . . "in light of the circumstances under which they are made."[374]

Another potential conflict of interest situation was considered in *Texasgulf, Inc. v. Canada Development Corp.*[375] The offeror in *Texasgulf* was a corporation established by the Canadian government for the purpose of fostering Canadian development. Its corporate charter also provided that the corporation should make a profit, if possible. The subject company alleged that there was an inherent conflict between the objectives of the bidder and the interests of the subject company's non-Canadian shareholders. The trial court held, however, that the potential conflicts of interest were no greater than those faced by the directors of many multinational corporations, especially in view of the provision requiring the directors to make a profit. Thus, the problem was not serious enough to require disclosure. In view of the extensive publicity which the case had received, however, the bidder volunteered to amend its purchase offer to disclose the problem, and the trial court agreed that it should so do.

Finally, in *Crane Co. v. Harsco Corp.*,[376] the Delaware District Court ruled that a bidder's failure to disclose its receipt of certain "inside" information of contested but doubtful confidentiality and its hiring an attorney who was formerly counsel to the subject company was not in violation of sections 14(d) or 14(e). The court stated that "[t]he use to which a reasonable stockholder is to put this information remains entirely unclear to the Court. Thus, this . . . cannot be regarded as material."[377]

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[374] 483 F.2d 247, 253 (2d Cir. 1973) (citation omitted).

[375] 366 F. Supp. 374 (S.D. Tex. 1973).

[376] 509 F. Supp. 115 (D. Del. 1981).

[377] *Id.* at 122. *See infra* Section III(C)(7)(d) (discussing disclosure of "inside" information).

3. Plans and Purpose Disclosure

Item 5 of Schedule 14D-1 requires the bidder to state the purpose for the purchase of securities and plans or proposals to make any material changes in the business, management or structure of the subject company. Item 4 of Schedule 13D has similar requirements applicable to beneficial owners of more than 5% of a class of equity securities of a reporting company. Thereunder, the bidder or holder must disclose not only his intent to acquire control, if any, but also what it plans to do once control is acquired.

a. *Intent to Control*

Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.,[378] is perhaps the leading case on the question of when a bidder must declare its intent to control the subject company. Gulf & Western, the bidder, claimed that it was acquiring A&P shares for investment purposes only and, therefore, that its failure to declare an intent to dominate the subject company was proper. However, the Second Circuit disagreed, holding that A&P had demonstrated a substantial likelihood that it would prove a violation of section 14(e) at trial and was therefore entitled to preliminary injunctive relief against the offer.

The *Gulf & Western* court recognized that proof of corporate "intent" is extremely difficult, especially in the context of a preliminary injunction where the opportunity for discovery is limited. The decision that A&P had shown a likelihood of proving that Gulf & Western intended to obtain control by its tender offer was based upon three factors. The *Gulf & Western* court first noted that the bidder had a well established history of eventually dominating firms in which it initially acquired a small interest. Second, the bidder's president had characterized A&P as "overpriced" and "run down" in his deposition.[379] Further, he remarked that his "Bohack management team" had the skill necessary to turn A&P around.[380] These elements, together with the fact that this tender offer represented the largest single monetary commitment ever made by the bidder, a conglomerate, indicated a likelihood that it had violated sections 14(d) and 14(e) by not declaring its intent to dominate A&P.[381]

The district court in *Graphic Sciences, Inc. v. International Mogul Mines, Ltd.*,[382] was also willing to infer that the defendant had an undis-

[378] 476 F.2d 687 (2d Cir. 1973).

[379] *Id.* at 697.

[380] *Id.*

[381] *Id. See also* Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216 (4th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) (opinion states in *dicta* that disclosure of possible intent to control is required whenever the purchaser has a perceptible desire to influence substantially the issuer's operations); Hanna Mining Co. v. Norcen Energy Resources Ltd., No. 959 (N.D. Ohio June 11, 1982).

[382] 397 F. Supp. 112 (D.D.C. 1974).

closed intent to control the target at the time it filed a Schedule 13D. The defendants were a Canadian group of related corporations which had made major purchases of the plaintiff corporation's stock. The two key executives of the principal defendant had openly expressed their disagreement with the policies of the plaintiff's management in several meetings and had requested significant changes in the composition of the plaintiff's board and in the business policies of the corporation. The District Court for the District of Columbia refused to accept the defendant's characterization of its meetings with several of plaintiff's large shareholders and non-management directors as mere gripe sessions. Accordingly, the plaintiff was deemed to have at least raised serious questions regarding the defendant's failure to disclose its intent to control and was entitled to a preliminary injunction restraining the defendant from acquiring any more shares or soliciting proxies.[383]

In contrast, in *Jewelcor, Inc. v. Pearlman*,[384] the District Court for the Southern District of New York distinguished cases such as *Gulf & Western* on the grounds that 1) Jewelcor had no established history of swallowing up other enterprises (this was its first overture toward a publicly held corporation); 2) there was evidence that the purchaser considered the issuer to be a good investment; and 3) Jewelcor *had* disclosed that it was considering various types of business combinations with the issuer.[385]

The willingness of the courts in both *Gulf & Western* and *Graphic Sciences* to infer an intent to control the target companies and, consequently, violations of the securities laws through non-disclosure, may have been prompted in large measure by the fact that the plaintiffs had little opportunity to undertake discovery before requesting preliminary injunctive relief. Nonetheless, these decisions suggest that a potential bidder which is required to file a Schedule 13D would be well advised to disclose at least the possibility of an intent to seek control of the proposed target. If such a bidder really does not intend to acquire control, but nonetheless anticipates resistance by the target company, it should be prepared to document very carefully (pursuant to an identified document generation and retention program) and to present substantial evidence of its actual intent in order to resist the target's motion for a preliminary injunction.

Notably, the general approach, *i.e.*, willingness to infer intent from prior behavior, taken in *Gulf & Western* and *Graphic Sciences* was seemingly rejected by the District Court for the Southern District of California in *Sea World, Inc. v. MCA, Inc.*[386] Sea World, the subject company, alleged that MCA failed to disclose its intention to merge Sea World with it or another entity:

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[383] *See supra* Section II(c)(3) (discussing remedial issues).

[384] 397 F. Supp. 221 (S.D.N.Y. 1975).

[385] *Id.* at 238.

[386] [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,803 (S.D. Cal. 1976).

> The "facts" urged as support Sea World's position take the following general form: (1) that MCA has a "track record" of acquiring a 100% interest in its subsidiaries, 37 of 38 of which are wholly owned; (2) that MCA has for the last few years had an interest in acquiring Sea World; (3) that informal offers have been made to Sea World's management; (4) that MCA has conducted various financial investigations of Sea World; and (5) that MCA has explored the effect of its acquisition of Sea World on the latter's permits held under the Marine Mammal Protection Act.[387]

However, the *Sea World* court rejected the subject company's claim on the ground that it had "not demonstrated any *specific* merger plans, or even any *possible proposed* terms, or that a decision to pursue a merger [had] *actually* been made."[388] It may be difficult indeed for a subject company to make such a showing with respect to a well-advised bidder.

In *Susquehanna Corp. v. Pan American Sulphur Co.*,[389] the Fifth Circuit also considered the sufficiency of a bidder's declaration of intent to control. The trial court had granted a preliminary injunction which prevented Susquehanna from voting the Pan American stock it had acquired through a tender offer. The grounds for granting the injunction were that Susquehanna had not complied with section 14(e), in that the following paragraphs from its Schedule 13D failed adequately to disclose its intent to acquire control of the target:

> Pan American had 4,751,342 shares of common stock issued and outstanding as of October 31, 1968. Susquehanna through its offer intends to purchase 1,800,000 shares at $40 per share, which, if acquired, should in the opinion of Susquehanna's Management, give Susquehanna *working control* of Pan American. If control is achieved, it is contemplated that the business of Pan American will be conducted *as a subsidiary* of Susquehanna serving as its natural resources arm.
>
> Neither Susquehanna, nor its officers or directors, or any of their associates has any contracts, arrangements or understandings with respect to the securities of Pan American. However, Pan American's Certificate of Incorporation does not provide for cumulative voting, and accordingly ownership of 1,800,000 shares will not insure any representation on the Board of Directors of Pan American. *If, however, Susquehanna acquires 1,800,000 shares pursuant to this Offer, it expects to request Pan American's Board of Directors to fill the two vacancies now existing on its Board of Directors with persons designated by Susquehanna.* The designees of Susquehanna will be selected

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[387] *Id.* at 90,912.

[388] *Id.* (emphasis added).

[389] 423 F.2d 1075 (5th Cir. 1970).

> from its directors and officers listed herein. It is possible that representatives of Pan American will be invited to occupy any vacant seats on Susquehanna's Board.[390]

The Fifth Circuit reversed the granting of a preliminary injunction, holding that Susquehanna's disclosures with respect to its intent to control were entirely adequate.[391] Nonetheless, the case does illustrate the difficulties that a bidder can experience. Had the district court in *Susquehanna* enjoined the consummation of a *proposed* tender offer, the results might have been problematic, given the legitimate timing considerations involved in most tender offers from the bidder's perspective. Thus, it is important that the language in a Schedule 13D or 14D-1 and tender offer materials be as clear as possible, although it is indeed difficult to envision what more Susquehanna could have done to forestall the district court's improvident granting of an injunction.

Cauble v. White[392] involved a clearer case of inadequate disclosure. In his newspaper advertisements for the tender offer, the bidder stated: "The purpose of the transaction is to acquire 150,000 of the 315,000 outstanding shares of the bank. *This is less than control.*"[393] In a revised tender offer, which also appeared in the press, the bidder stated: "If Mr. Cauble purchases 150,000 shares of the Bank's stock pursuant to this Offer, he will not have acquired pursuant hereto a majority of the outstanding shares of the Bank's stock, but such acquisition *may* result in Mr. Cauble being able to effectively control the Bank."[394] The *Cauble* court held that the disclosures in both advertisements were inadequate:

> It was clear from the testimony of Mr. Cauble that, while he knew at the time of both newspaper notices that 150,000 shares was not numerical control, he was virtually certain that a successful purchase of that number of shares would allow him effective control, and he intended that result. Neither notice made it clear that plaintiff's intention was to assume control of the bank.[395]

Moreover, the *Cauble* court rejected the defendant's contention that

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[390] *Id.* at 1082 (emphasis added).

[391] *See also* Vaughn v. Teledyne Corp., 628 F.2d 1214 (9th Cir. 1980) (corporate officials have no duty to disclose the precise motive for a series of acquisitions and an issuer tender offer because the reasons, increasing percentage of control and earnings, are obvious); Purolator, Inc. v. Tiger Int'l Corp., 510 F. Supp. 554 (D.D.C. 1981) (acquirer's statement that its present purpose was to acquire a significant minority interest, and separate statement that it was prepared to explore the possibility of acquisition, was sufficient disclosure to satisfy section 13(d)).

[392] 360 F. Supp. 1021 (E.D. La. 1973).

[393] *Id.* at 1025.

[394] *Id.*

[395] *Id.*

his use of the word "may" was proper because achievement of control was not absolutely certain at the time of the offer. What is required is disclosure of the bidder's own *intent*. The *Cauble* court may have been especially stringent in its disclosure requirements because of its concern for the shareholders of the target bank, who were primarily "local" people to whom a change in control of the bank would have been especially relevant.[396]

b. *Changes in the Target's Business*

The bidder's intention to make large-scale changes in the business of the target is closely related to the intent to control and must be disclosed. However, the courts have, in general, been somewhat circumspect in application of this requirement of Schedule 14D-1. The management of almost every acquiring company engages in tentative planning for the post-acquisition operation of the target. Since this planning is often reflected in computer printouts or other written materials, the subject company has a ready source of non-disclosed information with which to block tender offers if the disclosure requirements as to this issue were expansively construed. The courts have, therefore, repeatedly held that tentative plans for the target need not be disclosed.[397] Indeed, as the Second Circuit has noted, it "would be as serious an infringement of these regulations to overstate the definiteness of the plans as to understate them."[398]

However, in *Otis Elevator Co. v. United Technologies Corp.*,[399] the bidder, United, disclosed that it "has not formulated any plan or pro-

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[396] Of course, if substantial obstacles to the exercise of control exist (*e.g.*, exchange restrictions or joint venture agreements) such matters are required to be disclosed if the stated purpose of the offer is to gain control. *E.g.*, Alaska Interstate Co. v. McMillian, 402 F. Supp. 532 (D. Del. 1975).

[397] *E.g.*, Raybestos-Manhattan, Inc. v. Hi-Shear Indus., 503 F. Supp. 1122 (E.D.N.Y. 1980) (acquirer not required to state how it would vote on an upcoming merger proposal, nor that it would have the determinative votes if the tender offer succeeded); Treadway Cos. v. Care Corp., [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,255 (S.D.N.Y. 1980) (bidder's failure to disclose intent to replace subject company's current management and liquidate certain properties was merely a "technical" violation), *aff'd*, 638 F.2d 357 (2d Cir. 1980); Susquehanna Corp. v. Pan Am. Sulphur Co., 423 F.2d 1075 (5th Cir. 1970) (tentative negotiations for the merger of subject company into third corporation); Alaska Interstate Co. v. McMillian, 402 F. Supp. 532 (D. Del. 1975) (merger proposals submitted to lenders); Texasgulf, Inc. v. Canada Dev. Corp., 366 F. Supp. 374 (S.D. Tex. 1973) (tentative discussions as to disposition of certain assets and dismissal of certain officers of the subject company).

[398] Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 948 (2d Cir. 1969). *See also* Kirsch Co. v. Bliss & Laughlin Indus., [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,993 (W.D. Mich. 1981); Riggs Nat'l Bank v. Allbritton, [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,899 (D.D.C. 1981).

[399] 405 F. Supp. 960 (S.D.N.Y. 1975).

posal to merge the [subject company, Otis] with United."[400] In September, 1975 United had approached management of Otis to propose a friendly merger. Otis rebuffed this overture, but the trial court found that this did not result in the cancellation of United's ultimate merger plans. The initial plan contemplated a cash tender offer for approximately 40% of Otis' common stock (the offer was for up to 55%) to be followed by an exchange offer. Finding that "a merger plan, if present, is *per se* material under the Williams Act," the *Otis Elevator* court held:

> There can be no doubt that the plan at issue here is the type of plan which, though prospective, is material under *Sonesta* and thus must be disclosed. The documents discussed by the Court above clearly indicate that the [initial merger] plan was highly developed and was ready for execution. While evidence which negates is so often difficult to produce, the Court must nevertheless note that there is little or no documentary evidence that United intended to pursue solely the cash tender offer.[401]

Since there existed an intent on the part of the senior executive officers of United to go forward with the initial merger plan, such intent could be imputed to United, even though its board of directors, while put on notice of such plan, had not formally approved it.[402] Therefore, the district court granted Otis' motion for a preliminary injunction.[403]

By comparison, in *Weeks Dredging & Contracting, Inc. v. American Dredging Co.*,[404] the District Court for the Eastern District of Pennsylvania held that the bidder had not violated section 14(e) when it stated that it "may propose a possible merger or combination."[405] The bidder was able to refute the subject company's contentions to the contrary by proving that it, somewhat surprisingly, did not know the subject company's corporate requirements for a merger and that any consolidation was contingent on future economic developments.

Although no court has so stated expressly, the decided cases indicate that, when the bidder's plans are likely to have an adverse impact on the target, more extensive disclosure of less definite plans seems to be required. Thus, for example, in *General Host Corp. v. Triumph American, Inc.*,[406] the bidder was alleged to have failed to disclose its plans to liquidate certain assets of the subject company upon successful completion of the tender offer. The plaintiff introduced memoranda which had been circulated among Triumph American executives. These

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[400] *Id.* at 963.
[401] *Id.* at 970.
[402] *Id.*
[403] *Id.* at 974.
[404] [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,414 (E.D. Pa. 1978).
[405] *Id.* at 93,494.
[406] 359 F. Supp. 749 (S.D.N.Y. 1973).

memoranda discussed various alternative plans involving the liquidation of assets. The *General Host* court stated that, without more, there would have been no duty on the bidder to divulge the contingent planning which had occurred.[407]

The *General Host* court held, however, that the past history of Triumph American acquisitions dictated a different result. In a prior transaction, Triumph had purchased Resolute Insurance Company and immediately declared a large cash dividend. The *General Host* court agreed with the target's contention that the combination of the memoranda and the bidder's history made it likely that the bidder would liquidate certain assets of the target to pay for the cost of the acquisition.[408] The contents of the memoranda and the history of the Resolute acquisition were held to be material facts which should have been disclosed to the target's shareholders under section 14(e).[409]

An even more stringent standard of disclosure was applied in *Nachman Corp. v. Halfred, Inc.*[410] In a meeting with the target's management, the president of the prospective bidder stated that he would pay "anything" for the shares held by the subject company's directors and threatened to institute proceedings to dissolve the subject company if he failed to get control. The subject company later obtained a preliminary injunction against acquisition of shares by the bidder on the ground that the bidder should have filed an amended Schedule 13D in which its plans to dissolve the target were disclosed. The result in the case can perhaps be explained as an over-reaction by the court to the defendant's heavy-handed tactics. The bidder's plans for dissolution appear to have been a contingent threat designed to bluff the target's management into capitulating.[411]

As indicated above, limitations on the scope of disclosures required in the "change in business" requirements do, of course, exist. In *Coreno Corp. v. Schiavone & Sons*,[412] for example, the Second Circuit disagreed with the subject company's contention that the bidder was likely to convert the subject company's assets into cash in order to repay bank loans and should have disclosed that possibility. The combined income of the

[407] *But see* Otis Elevator Co. v. United Technologies Corp., 405 F. Supp. 960 (S.D.N.Y. 1975).

[408] 359 F. Supp. 749, 755 (S.D.N.Y. 1973).

[409] *See also* Matter of Susquehanna Corp., SEC Rel. No. 34-8933 (1971) (plans to use cash assets of the target to finance the tender offer inferred from the conduct of the bidders' president). *But see* Humana, Inc. v. American Medicorp., Inc., [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,286 (S.D.N.Y. 1978).

[410] [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,455 (N.D. Ill. 1973).

[411] Counsel for major beneficial owners with possible desires to effect an entire acquisition now carefully coach representatives of such beneficial owners as to communications with issuers based upon the likelihood that even casual remarks will be used against the owner in defensive litigation.

[412] 488 F.2d 207 (2d Cir. 1973).

two firms would have more than sufficed to repay the loans. The *Coreno* court did state, however: "[E]ven if such a conversion were likely, we would only require a disclosure of the circumstances rather than a specific statement that a conversion was likely to occur. . . . This the district court had already done by requiring [the offeror] to disclose financial information about itself . . . ."[413]

In *Missouri Portland Cement Co. v. Cargill, Inc.*,[414] the Second Circuit held that plans to expand the existing business of the subject company need not be disclosed, no matter how definite those plans might be, since an expansion does not constitute a "change" in the business. However, this result is questionable because a decision significantly to expand the subject company's business would appear to be quite relevant to a decision whether to tender.

A pre-Williams Act case involving Rule 10b-5 might further serve to limit the scope of the duty to disclose possible "change" in the subject company's business. *Mutual Shares Corp. v. Genesco, Inc.*[415] was an action brought by a purchaser of securities against a bidder. The plaintiff purchased shares of S.H. Kress during the pendency of a tender offer made by Genesco, the defendant-bidder. The complaint alleged that the defendant had failed to disclose in the tender offer that Kress's real estate was undervalued in its financial statements and that Genesco intended to sell these undervalued assets to the Genesco pension fund in order to finance the acquisition. The plaintiff further alleged that, had the true facts been known, it would not have purchased the Kress shares. The Second Circuit ruled against the claim for several reasons. First, the implication of the plaintiff's case was that, merely by making a tender offer, the defendants *impliedly* represented to the world at large that they would not change the business of the target through mismanagement (*i.e.*, "looting"). Second, Rule 10b-5 as imposing an affirmative duty of disclosure to outsiders was, to the *Genesco* court, much too expansive.

In sum, the trend in the cases seems to be at least toward requiring a bidder to reveal any planned changes in the subject company's business which would adversely affect the existing shareholders. *General Host* and *Susquehanna* even suggest, at least from a planning perspective, that a bidder must disclose its history of dealing with acquired firms where *any* meaningful thought has been given to similar treatment of the subject company.

4. Source of Funds

A 5% beneficial owner or bidder is required to disclose the source of

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[413] *Id.* at 217.

[414] 498 F.2d 851 (2d Cir.), *cert. denied*, 418 U.S. 919 (1974).

[415] 384 F.2d 540 (2d Cir. 1967).

funds used or to be used for its purchase or offer unless the lender is a United States bank acting in the ordinary course of its business, in which case confidential treatment of the identity of the lender may be requested pursuant to Item 3 of Schedule 13D or Item 4 of Schedule 14D-1. In *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.*,[416] the subject company claimed that the bidder had violated section 14(e) by failing to disclose that its principal lender, Transamerica, owned virtually all of the outstanding shares of one of the subject company's competitors. The *Transamerica* court ordered the bidder to implement certain prophylactic measures and held that, unless its order was violated, there was no possibility that the lender would exercise control over either the bidder or the subject company. Therefore, no disclosure of the relationship between the lender and the competitor was found to be necessary. The *Transamerica* court also ruled that, where the bidder discloses that it may accept more shares than stated in the offer, it need not disclose the potential source of funding for the additional purchases where the source of such funds had not yet been determined.

The second analysis of the source-of-funding disclosure requirement is contained in *Ronson Corp. v. Liquifin Aktiengesellschaft*.[417] In *Ronson* the offeror, Liquifin, stated in its original SEC filing that the source of funding for the cash tender offer would be out of the general working capital of its parent, Liquigas. In an amended filing, Liquigas disclosed that the funds would not be Liquigas' working capital, but would come in part from the proceeds of the sale of an affiliated subsidiary. At an unspecified date, Liquifin began investing in a Brazilian holding company, Liquipar. By 1973, Liquifin owned almost 83% of Liquipar. In March and April 1973, Liquifin sold its Liquipar holdings to another of Liquigas' wholly owned subsidiaries, Liquimportex Aktiengesellschaft. Thereafter Liquimportex sold 49% of Liquipar shares to Capitalfin International Limited. The proceeds from the sale, twenty million dollars, were deposited for the tender offer, to the account of Liquifin to pay part of the Ronson shares. The trial court held that the steps taken in obtaining the twenty million dollars should have been disclosed on the ground that the Ronson shareholders had the "right to know" the manner in which such funds were acquired.

The *Ronson* court subsequently found that curative amendments had adequately disclosed the sources of funding. Permanent injunctive relief was therefore denied.[418] In so ruling, the *Ronson* court rejected several theories advanced by the plaintiff as alleged reasons for Liquifin's complicated financings and held that a bidder must disclose only the *facts*

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[416] 303 F. Supp. 1344 (S.D.N.Y. 1969).

[417] No. 785 (D.N.J.), *aff'd*, 483 F.2d 846, 852 (3d Cir. 1973).

[418] Ronson Corp. v. Liquifin Aktiengesellschaft, 370 F. Supp. 597 (D.N.J.), *aff'd*, [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,536 (3d Cir. 1974).

regarding those transactions *directly* related to the funding of its tender offer.[419]

The subject company in *Humana, Inc. v. American Medicorp, Inc.*[420] sought to enjoin an offer on the grounds that the dealer-manager and lender had supplied the bidder with confidential information regarding the target's business. With respect to the dealer-manager, the *Humana* court was satisfied with the offeror's disclosure that the dealer-manager possessed certain confidential information regarding the target but had never revealed it. Although the offeror made no comparable disclosure regarding the lender, the *Humana* court was convinced by the testimony of bank officials that they had not considered information supplied by the target in a prior loan application in approving the tender offer loan. The *Humana* court generally observed, however, that "a special relationship which may be designated fiduciary or confidential, does exist between a prospective borrower and its bank which should preclude the bank from disseminating or using [confidential] information for improper purposes."[421]

In *Jewelcor, Inc. v. Pearlman*,[422] the trial court refused to dismiss a claim that Jewelcor's statement that its purchases were to be internally financed was misleading. The issuer alleged that the purchaser was already heavily in debt and that business reverses had completely depleted its operating profits for the relevant fiscal year. Thus, it was impossible to say that at least some of the purchaser's borrowings may not have been for the purpose of financing the acquisition. Still, the *Jewelcor* court declined to enjoin further purchases since the issuer had not shown "that it will be unduly harmed by a denial of injunctive relief."[423] Any additional purchases would require an amendment to the purchaser's Williams Act filing.[424]

In *Kaufman & Broad, Inc. v. Belzberg*,[425] the District Court for the Southern District of New York strictly construed Item 7 of Schedule 13D, which requires the filing of copies of all written agreements and contracts relating to the borrowing of funds used to finance acquisitions, holding that the purchasers failure to file actual copies of its loan agreement violated section 13(d). On another point, the *Belzberg* court held that the purchaser did not have to disclose the possible effect that a sale

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[419] 370 F. Supp. at 602-04.

[420] [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,286 (S.D.N.Y. 1978).

[421] *Id.* at 92,829. *See infra* Section III(C)(7)(d) regarding disclosure of "inside" information generally.

[422] 397 F. Supp. 221 (S.D.N.Y. 1975).

[423] *Id.* at 241.

[424] *See also* Raybestos-Manhattan, Inc. v. Hi-Shear Indus., 503 F. Supp. 1122 (E.D.N.Y. 1980) (failure to disclose the *possibility* of financing purchase via new loan rather than the disclosed revolving credit line was immaterial).

[425] 522 F. Supp. 35 (S.D.N.Y. 1981).

of the acquired stock might have on the stock's price, stating: "There is no allegation that such sales are contemplated, and . . . [m]oreover, conjecture by defendants as to the market consequences of remotely possible sales would appear to be precisely the type of speculation not properly included in a factual disclosure document such as Schedule 13D."[426]

Two decisions to the effect that an acquirer's Schedule 13D filing need not disclose every creditor but only the borrowings undertaken for the purpose of acquiring stock are *Purolator, Inc. v. Tiger International, Inc.*,[427] and *Standard Metals Corp. v. Tomling*.[428] In *Riggs National Bank v. Allbritton*,[429] however, the District Court for the District of Columbia held that a natural person making a tender offer for a national bank's stock had to disclose considerably more financial information.[430] In addition to the "usual" financial information concerning indebtedness incurred in financing the acquisition, specifically including the default provision in the loan agreement, the *Allbritton* court held that the bidder was required to disclose his estimated net worth, the value of his major assets, the schedule of interest payments and the anticipated source of their payments and other alternatives for repayment of the principal amount of the loan.[431]

5. The Bidder's Financial Condition

One of the most interesting developments in the area of tender offer disclosure occurred in *Corenco Corp. v. Schiavone & Sons*.[432] In *Corenco*, the trial court and the Second Circuit each held that section 14(e) re-

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[426] *Id.* at 43.

[427] 510 F. Supp. 554 (D.D.C. 1981).

[428] [1980 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,606 (S.D.N.Y. 1980).

[429] [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,899 (D.D.C. 1981).

[430] *Id.* at 90,557.

[431] Item 4(b)(2) of Schedule 14D-1 now requires the offeror to:

> Briefly describe any plans or arrangement to finance or repay [any tender offer borrowings], or if no such plans or arrangements have been made, make a statement to that effect.

It has been held that a bidder's statement of intent to repay borrowings from future financings, together with the disclosure that it had made no arrangements or understandings with respect to any refinancing, was sufficient disclosure under Item 4(b)(2), at least where the subject company had not shown any undisclosed facts indicating an inability to refinance the debt. Dymo Indus. v. Esselte AB, No. 2276 (S.D.N.Y. May 22, 1978). In Raybestos-Manhattan, Inc. v. Hi-Shear Indus., 503 F. Supp. 1122 (E.D.N.Y. 1980), the offeror's disclosure pursuant to Item 4 concerning the loan agreements into which it had entered in order to finance its tender offer, and its statement that it intended to finance the offer from a revolving line of credit when it may actually have intended to float a different loan for this purpose, were held not materially misleading.

[432] 362 F. Supp. 939 (S.D.N.Y.), *modified*, [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,220 (S.D.N.Y.), *aff'd in part and remanded in part*, 488 F.2d 207 (2d Cir.), *on remand*, [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,220 (S.D.N.Y. 1973).

quired a bidder to disclose its own financial statements, notwithstanding that the SEC's rules were silent on the topic at the time, because 1) the bidder was not subject to the periodic reporting requirements of the Exchange Act and its financial reports were not otherwise available to the public; 2) the bidder sought to control the subject company; 3) a merger of the two firms was contemplated; and 4) the bidder sought less than all of the subject company's outstanding shares. The bidder did subsequently disclose financial statements for two years which was held to be sufficient.

Perhaps taking its cue from *Corenco*, the SEC modified its requirements to require the inclusion of financial statements "if material" in Schedule 14D-1 filings.[433] If the bidder is a reporting company it can satisfy these requirements by cross reference; and it will, of course, be rare that a bidder in a contested tender offer will be exempt from the reporting requirements of the Exchange Act. However, it appears that a mere cross reference would not be deemed to constitute adequate disclosure in tender offer materials actually disseminated to stockholders of the subject company.[434]

The SEC has provided no meaningful guidance as to when a failure to include financial statements would be a "material" omission. However, *Alaska Interstate Co. v. McMillian*[435] may be helpful in this regard. In *Alaska Interstate* the subject company claimed that the bidder should have specifically disclosed its financial condition because 1) the offer was made for less than all of the subject company's outstanding equity securities, 2) the offer contemplated a "second step" acquisition, and 3) the bidder was in a precarious financial position. The trial court found, however, that the subject company had failed to adduce sufficient evidence to support the latter claim:

> Accordingly, this is not a situation where the general statement of the offeror's business operations is misleading because it impliedly represents, contrary to the fact, that the offeror is a viable business organization and is not beset by any problem which casts in doubt its ability to consummate its offer. Accordingly, so far as the present record discloses, Apco and Energy have no substantial prospect of success on this issue unless it can be said that the Williams Act is violated whenever one who tenders for less than all of the stock and proposes an acquisition of the tar-

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[433] *See* Item 9 of Schedule 14D-1.

[434] The SEC's rules are somewhat unclear as to whether a cross-reference would suffice. Instruction 2 to Item 9 of Schedule 14D-1 permits incorporation by reference "solely for the purposes of this Schedule." Rule 14d-6(e)(1)(viii) expressly permits the use of summary financial statements in tender offer materials furnished to security holders. It is seemingly implicit therein that incorporation by reference is not adequate by itself.

[435] 402 F. Supp. 532 (D. Del. 1975).

> get corporation for its own securities fails to provide its financials in the tender materials.[436]

With respect to this question, the *Alaska Interstate* court held:

> Given (1) the judgment of the [SEC] and the apparent rationale for its distinction between cash and exchange offers, (2) the fact that financial information about Alaska sufficient for the purpose of general evaluation is readily available to Apco stockholders, (3) the fact that nothing has been shown about Alaska's recent history which would make the publicly available financials materially misleading, and (4) the fact that no affirmative representations were made with respect to Alaska's financial history or prospects (other than an opinion with respect to debt service), I find no legal basis for implying a duty to include financials in Alaska's tender materials.[437]

However, subsequent decisions have not viewed the bidder's disclosure obligations so narrowly. In *Prudent Real Estate Trust v. Johncamp Realty, Inc.*,[438] the Second Circuit preliminarily enjoined a tender offer pending corrected and supplemented disclosure, including disclosure of financial statements of all controlling persons of the offeror. The *Johncamp* court reasoned:

> [I]t is necessary to appreciate the problem faced by a stockholder of the target company in deciding whether to tender, to sell or to hold part or all of his securities. It is true that, in the case of an "any and all" offer such as that here at issue, a stockholder who has firmly decided to tender has no interest in the financial position of the offeror other than its ability to pay—a point not here at issue—since he will have severed all financial connections with the target. It is also true that in the case of such an offer, there is less reason for him to seek to eliminate the risk of being partly in and partly out by selling to arbitrageurs, usually at a price somewhere between the previous market and the offered price, than where the offer is for a stated number or percentage of the shares (with or without the right to accept additional shares) or is conditioned on a minimum number being obtained. Still, the shareholder of the target company faces a hard problem in determining the most advantageous course of action, a problem whose difficulty is enhanced by his usual ignorance of the course other shareholders are adopting. If the bidder is in a flourishing financial condition, the stockholder might decide to hold his shares in the hope that, if the offer was only partially successful, the bidder might raise its

[436] *Id.* at 547-48.

[437] *Id.* at 548.

[438] 599 F.2d 1140 (2d Cir. 1979).

> bid after termination of the offer or infuse new capital into the enterprise. *Per contra*, a poor financial condition of the bidder might cause the shareholder to accept for fear that control of the company would pass into irresponsible hands.[439]

A similar result obtained in *Life Investors, Inc. v. AGO Holding, N.V.*[440] In *Life Investors*, the Eighth Circuit Court of Appeals noted that, contrary to *Johncamp*, if the bidder "was purchasing all the stock, a stockholder would have relatively little concern for the bidder's financial condition."[441] However, the *Life Investors* court held that financial statement disclosures were required because the bid at issue was only partial and would, if successful, give the bidder operating control over the subject company.[442] After *Life Investors* and *Johncamp*, a plausible argument can be made in almost any situation that financial statements must be disclosed.

6. Control Persons

Ronson Corp. v. Liquifin Aktiengesellschaft,[443] is the only decision that has discussed in detail the requirement of disclosing persons in control of the bidder. The bidder and its alleged controlling shareholder, Ursini, were enmeshed in a complex tangle of stock and credit relationships with a variety of persons and entities. The subject company's contention that these relationships should have been disclosed was accepted by the district court and provided one basis for its granting of a preliminary injunction against the offeror. The *Ronson* court accepted the plaintiff's argument that numerous persons or groups can be deemed to be in control of an entity and that all such persons or groups should be disclosed. The *Ronson* court went further, concluding that the identity of large lenders and others closely related to the controlling persons should be disclosed, even if they could not be deemed to be strictly in "control." Such disclosures were, in the *Ronson* court's opinion, necessary for the shareholders' understanding of the degree of control exercised by Ursini. Liquifin's amended offer to purchase was later found to have adequately disclosed its controlling person's interrelationships, and the *Ronson* court ultimately held that Ronson had failed to prove that anyone but Ursini was in actual control of Liquifin.[444]

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[439] *Id.* at 1147.

[440] [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,356 (8th Cir. Oct. 21, 1981).

[441] *Id.* at 92,195.

[442] *Id.* at 92,195-96.

[443] No. 785 (D.N.J.), *aff'd per curiam*, 483 F.2d 846 & 852 (3d Cir. 1973).

[444] Ronson Corp. v. Liquifin, A.G., 370 F. Supp. 597 (D.N.J.), *aff'd*, [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,536 (3d Cir. 1974). *See also* Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951 (S.D.N.Y. 1978) (control was open question despite ownership of 30% of offeror's stock because the offeror and

Bidders have not been required to disclose the degree of control possessed by controlling persons in absolute terms. For example, in *Gray Drug Stores, Inc. v. Simmons*,[445] the District Court for the Northern District of Ohio held adequate a disclosure that a particular individual "may be deemed to control" the nominal bidder notwithstanding that the true controlling person's own prior public statements had flatly stated that that individual was in actual control as a result of stock ownership, positions as the principal executive officer in each of the controlled entities and family relationships among officers and directors in the control group. The result in *Gray Drug* may be questionable in view of those prior statements.

7. Miscellaneous Disclosure Issues

a. *Misleading Publicity*

The *Wall Street Journal's* "Heard On the Street" column published a report in 1969 of a possible tender offer for Electronic Specialty Company by International Controls Corporation. The column exaggerated both International Controls' holdings in Electronic Specialty and the proposed offering price. International Controls believed that the information in the column had been planted by Electronic Specialty in an effort to force a curative disclosure and thereby obtain advance disclosure. In *Electronic Specialty Co. v. International Controls Corp.*,[446] the Second Circuit held that there is no obligation on a company to correct misstatements in the press which were not attributable to it, particularly when the information relates to its plans for another company.[447]

In *Sonesta International Hotels Corp. v. Wellington Assocs.*,[448] the Second Circuit held that the offeror, Wellington, was not required to disclose that it had been named by the *New York Post* and other papers as the owner of properties which were used by pornographers and prostitutes. Sonesta claimed that Wellington's "bad reputation" could adversely reflect upon its own reputation and thereby damage its business. However, Wellington denied the allegations and had instituted a libel action against the newspaper. Under the circumstances, the Second Circuit held that there was no duty to repeat statements which Wellington considered false.[449]

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target had no common directors); SEC v. Zimmerman, 407 F. Supp. 623 (D.D.C. 1976) (failure to disclose prime actor in Section 13(d)(3) group held an omission of a material fact).

[445] [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,305 (N.D. Ohio Aug. 31, 1981).

[446] 409 F.2d 937 (2d Cir. 1969).

[447] *See also* Elkind v. Liggett & Myers, Inc., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,602 (S.D.N.Y. 1978).

[448] 483 F.2d 247 (2d Cir. 1973).

[449] The sensational, but seemingly immaterial nature of the allegations in *Sonesta* very likely affected the outcome.

b. *Foreign Offerors*

In *Ronson Corp. v. Liquifin Aktiengesellschaft*,[450] a preliminary injunction was granted against a proposed tender offer because of alleged violations of sections 14(d) and 14(e). The alleged violations consisted in part of non-disclosures by the bidder of adverse legal ramifications which could result from the success of the proposed offer. The plaintiff subject company alleged that foreign tax laws applicable to the bidder would adversely affect the subject company's operations. The trial court reserved a detailed exploration of that issue for trial, but held that the plaintiff had made a sufficient showing to justify granting a preliminary injunction. The possible presence of foreign control over the subject company was perceived as raising "substantial questions of administrative law" which could result in the loss of licenses from the FCC and CAB, as well as several important defense contracts.[451] The *Ronson* court held that it was unnecessary to decide whether the defendants had made arrangements through voting trusts and the like, which were adequate to forestall the adverse consequences. Rather, the defendants' characterization of these problems as "routine" in their offer to purchase was found sufficiently misleading to justify the entire tender offer. In affirming the trial court on this issue, the Third Circuit stated:

> Although the district court was justified in commenting that the tender offer presented to federal authorities "very substantial questions of administrative law", which the tender offer, as modified prior to the July 5 injunction, misleadingly treated as if probably subject to resolution without divestiture of the helicopter and defense business, we agree with defendants that clearance from the several administrative agencies involved need not be secured prior to a final tender offer, *provided that the approximate gross amounts, type, profits, etc., of Ronson's business affected*, which may be permissibly revealed in the light of the security needs of the defense business as determined by the district court, are disclosed.[452]

Thus, the *Ronson* court established a rather specific list of requirements for disclosure of possible adverse effect upon the target's business. In fact, the list was sufficiently precise that the injunction was later dissolved upon a finding that Liquifin's amended tender offer had brought it into compliance with the statutory requirements.

General Host Corp. v. Triumph American, Inc.[453] is another case involv-

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[450] No. 785 (D.N.J.), *aff'd per curiam*, 483 F.2d 846 & 852 (3d Cir. 1973).

[451] *See supra* Section III(C)(2) (discussing the effect of regulatory approval requirements).

[452] Ronson Corp. v. Liquifin A.G., 370 F. Supp. 597 (D.N.J.), *aff'd*, [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,536 (3d Cir. 1974).

[453] 359 F. Supp. 749 (S.D.N.Y. 1973).

ing non-disclosure of the possible adverse impact of foreign investment. Triumph American, the bidder, was a British holding company subject to British statutes which conferred power on the United Kingdom Treasury to compel parent corporations to declare or withhold dividends from their subsidiaries. The existence of these statutes was not revealed in the tender offer. Triumph American asserted that the laws were, in effect, "dead letters" and, therefore, that it was highly unlikely that they would have an adverse impact on the target. However, the District Court for the Southern District of New York held that the shareholders are entitled to know that these laws exist and *could* be enforced in a manner which *might* adversely affect General Host. Since the "reasonable investor" is unlikely to be familiar with foreign law, a tender offer by a foreign corporation should call such laws to the investor's attention.[454]

Finally, in *Texasgulf, Inc. v. Canada Development Corp.*,[455] the District Court for the Southern District of Texas rejected the subject company's contention that the federal courts should protect American business from the threat of foreign takeovers by holding them "illegal *per se*" because of the allegedly inherent conflicts between the bidder's interests and those of the American shareholders and the nation as a whole. In the trial court's opinion, such policy questions were incapable of judicial resolution. The trial court also held that a Texas statute requiring "international trading companies" to be controlled by United States citizens did not apply to the target. The court noted that such statutes are of dubious constitutional validity.

c. *Delisting from a Stock Exchange*

In *Sonesta International Hotels Corp. v. Wellington Assocs.*,[456] the Second Circuit held that the defendant bidder's failure to disclose the possibility that a successful tender offer could result in the subject company's common stock being delisted from the NYSE was a material

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[454] The facts that the financial statements of a foreign bidder are prepared using foreign accounting concepts and amounts are stated in foreign currency have been used as the basis for an argument that such statements are required to be disclosed. *E.g.*, Life Investors, Inc. v. AGO Holding, N.V., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,356 (8th Cir. Oct. 21, 1981). However, these facts should have nothing to do with the question of whether disclosure is required in the first instance. Moreover, it is not likely that a foreign bidder would be required to restate its financial statements in United States dollars or under United States accounting principles provided that adequate information on exchange rates and the differences between United States and foreign accounting principles is provided. *Id.*

[455] 366 F. Supp. 374 (S.D. Tex. 1973).

[456] 483 F.2d 247 (2d Cir. 1973). Since *Sonesta*, rather detailed disclosures relating to the possibility of delisting and, in any event, the effect of a tender offer on the market for the subject company's shares have become customary.

omission. If Wellington, the bidder, had achieved the stated goal of its tender offer, the publicly held Sonesta stock would be reduced below NYSE standards in both number of shareholders and aggregate value. The trial court had ruled that the possibility of delisting was too speculative, relying on the fact that the ultimate success of the offer was uncertain. The appellate court, however, held that the possibility should have been disclosed in view of the importance which Sonesta shareholders would attach to the listing privilege. The fact that Wellington's offer was not as successful as anticipated did not render an injunction meaningless, inasmuch as future offers would again subject Sonesta to possible delisting.[457] Conversely, where delisting might reasonably be said to be a possible result of a successful tender offer, a statement to that effect should not be deemed to be misleading. Still, the argument could be made to the effect that such a statement, where the likelihood of delisting is remote, unfairly coerces shareholders into tendering.

d. *Inside Information*

Since the decision of the Second Circuit in *Crane Co. v. Westinghouse Air Brake Co.*,[458] target companies have frequently brought litigation alleging that a bidder could not proceed without disclosing nonpublic information in its possession.[459] While "specifically quantifiable information relating to contingent events" may require disclosure, forecasts or projections involving "subjective judgments" have been held not to be required disclosures where the information appears to be soft and unreliable.[460] Thus, it may be that valuations and other information based upon estimates and judgments should not be required to be disclosed in most cases for the same reasons that companies are not required to publish projections and other "soft" information in registration statements and reports. However, the courts have been inconsistent in this area. In *Flynn v. Bass Bros. Enterprises, Inc.*,[461] for example, mo-

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[457] In addition, Wellington certainly did not expect its offer to be unsuccessful at the time that the offer was initiated.

[458] 419 F.2d 787, 796 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970) (Rule 10b-5).

[459] Indeed, one defensive tactic has been for potential target companies deliberately to provide inside information to potential suitors in order to create disclosure problems for them in the event that they were to initiate hostile bids. Confidentiality agreements have also been used in this regard. *E.g.*, General Portland, Inc. v. LaFarge Coppee S.A., No. 1060 (N.D. Tex. Aug. 28, 1981). *But see* Conoco, Inc. v. Seagrams Co., [Current] FED. SEC. L. REP. (CCH) ¶ 98,234 (S.D.N.Y. July 16, 1981). Persons obtaining information with respect to a planned but unannounced takeover bid are now prohibited from trading on the basis of that information under Rule 14e-3.

[460] *E.g.*, Alaska Interstate Co. v. McMillian, 402 F. Supp. 532 (D. Del. 1975).

[461] 456 F. Supp. 484, 491-92 (E.D. Pa. 1978). *See also* Radol v. Thomas, No. 13 (S.D. Ohio Apr. 12, 1982); General Portland, Inc. v. LaFarge Coppee S.A., No. 1060 (N.D. Tex. Aug. 28, 1981).

tions for summary judgment by both sides were denied on claims that a bidder which was also the majority shareholder of the subject company failed to disclose a third party's estimates of the target company's worth. Yet in *Life Investors, Inc. v. AGO Holding, N.V.*,[462] the Iowa District Court held that a bidder which had access to nonpublic information via representation but not control of the subject company's board of directors was only required to disclose the nature of its relationship to the subject company, not the fact of such access.[463] Thus, the requirements in this context are as yet unclear.[464]

IV. DEFENSIVE TACTICS UNDER THE WILLIAMS ACT

A. *Public Statements*

Prior to the promulgation of Rule 14e-2, the Williams Act had been construed not to impose any obligation on the subject company to respond to a tender offer.[465] Subject companies did, of course, frequently issue advertisements and press releases in resisting unsolicited takeover bids and thus were subject to the filing requirements of Rule 14d-9 (except with respect to so-called stop-look-and-listen communications)[466]

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[462] [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,343 (N.D. Iowa Oct. 9, 1981), *rev'd on other grounds*, [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,356 (8th Cir. Oct. 21, 1981).

[463] The use of confidential information obtained by banks from subject companies in loan applications has also not been deemed to preclude a bank from also financing a tender offer for a client company's stock provided that such information is not disclosed to the bidder. *See, e.g.*, Washington Steel Corp. v. TW Corp., 602 F.2d 594 (3d Cir. 1979); Humana, Inc. v. American Medicorp., Inc., [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,286 (S.D.N.Y. 1978); American Medicorp, Inc. v. Continental Ill. Nat'l Bank & Trust Co., 475 F. Supp. 5 (N.D. Ill. 1977).

[464] *See generally* Hi-Shear Corp. v. Klaus, No. 434 (C.D. Cal. Aug. 20, 1974) (purchase of shares pursuant to a tender offer enjoined on ground that offer to purchase contained confidential material about the target in hands of a defendant-director of target company), *vacated per order*, No. 74-2665 (9th Cir. Oct. 1, 1974) (target had not proven money damages were insufficient). *Cf.* Sunshine Mining Co. v. Great W. United Corp., [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,049, at 91,721 (D. Idaho 1977).

[465] *E.g.*, A & K R.R. Materials, Inc. v. Green Bay & W. R.R., 437 F. Supp. 636, 644 (E.D. Wis. 1977); E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 79-80 (1977). Rule 13e-2 does not actually require that the target company take a position either for or against a tender offer (neutrality is explicitly permitted).

[466] Rule 14d-9(e) provides:

> This section shall not apply to the subject company with respect to a communication by the subject company to its security holders which only:
> (1) Identifies the tender offer by the bidder;
> (2) States that such tender offer is under consideration by the subject company's board of directors and/or management;

and the general antifraud prohibitions of section 14(e).[467] In fact, subject company management has been held to a stricter standard of disclosure than the bidder because of state law fiduciary obligations and, at least with respect to some issues, greater access to information than the bidder.[468]

Accordingly, if the subject company makes material misstatements or omits material information in its SEC filings or shareholder communications, the bidder can seek injunctive relief.[469] In this regard it has been held that the filing requirements of section 14(d)(4) may apply even if a tender offer has not formally been published; all that is necessary is the announcement of an intent to commence a tender offer.[470]

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(3) States that on or before a specified date (which shall be no later than 10 business days from the date of commencement of such tender offer) the subject company will advise such security holders of (i) whether the subject company recommends acceptance or rejection of such tender offer; expresses no opinion and remains neutral toward such tender offer; or is unable to take a position with respect to such tender offer and (ii) the reason(s) for the position taken by the subject company with respect to the tender offer (including the inability to take a position); and

(4) Requests such security holders to defer making a determination whether to accept or reject such tender offer until they have been advised of the subject company's position with respect thereto pursuant to paragraph (e)(3) of this section.

[467] *See, e.g.*, Humana, Inc. v. American Medicorp, Inc., [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,286 (S.D.N.Y. 1978); Alaska Interstate Co. v. McMillian, 402 F. Supp. 532 (D. Del. 1975); Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 874-75 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); SEC v. Royal Indus., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,773 (D.D.C. 1976) (consent decree).

[468] *E.g.*, Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1328-29 (W.D. Mich. 1978). *See* Flynn v. Bass Bros. Enter., 456 F. Supp. 484, 491-92 (E.D. Pa. 1978). *See generally* Chris-Craft Indus., Inc., v. Piper Aircraft Corp., 480 F.2d 341, 364-65 (2d Cir.) ("Corporate insiders . . . have a special responsibility to be meticulous and precise in their representations to shareholders."), *cert. denied*, 414 U.S. 910 (1973).

[469] *See supra* Section I(B)(5)(b) (discussing the "commencement" concept under Rule 14d-2). *See also* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir)., *cert. denied*, 418 U.S. 919 (1974) (injunction granted on grounds of the subject company's failure to disclose that all shareholders would benefit from any increase in the offering price under section 14(d)(7)); Petersen v. Federated Dev. Co., 387 F. Supp. 355 (S.D.N.Y. 1974); Orbanco, Inc. v. Security Bank, 371 F. Supp. 125 (D. Ore. 1974) (injunctive relief granted against officer who falsely represented that he had received an offer for his shares at a price which was double that of the offeror); Cauble v. White, 360 F. Supp. 1021 (E.D. La. 1973) (officer who asserted that target's shares were worth $100 without any factual basis required to make a curative disclosure). *See generally* Jewelcor, Inc. v. Pearlman, 397 F. Supp. 221, 245 (S.D.N.Y. 1975) (Rule 10b-5); Lipton, *Takeover Bids in the Target's Boardroom; an Update After One Year*, 36 BUS. LAW. 1017 (1981); Lynch & Steinberg, *The Legitimacy of Defensive Tactics In Tender Offers*, 64 CORNELL L. REV. 901 (1979).

[470] Applied Digital Data Sys. v. Milgo Elec. Corp., 425 F. Supp. 1163 (S.D.N.Y. 1977). *But see* Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981) (no

The subject company's management may, of course, make critical comments about the terms of the offer or the bidder, so long as some reasonable factual basis exists therefor. Thus, in *Graphic Sciences, Inc. v. International Mogul Mines Ltd.*,[471] the subject company's annual report characterized the statements in the bidder's Schedule 13D as misleading and inaccurate. The trial court, in an action brought by the issuer as to which the purchaser asserted the equitable defense of "unclean hands," found such statements to be proper under the circumstances:

> The Court has reviewed these statements carefully. It finds that these statements constitute no more than the views of Graphic management as expressed in this case. Those views are not expressed in an inflammatory or misleading way. Management certainly may express its views and do so in a restrained manner, as here. Such conduct does not constitute "unclean hands."[472]

In this regard, it should be noted that the opinion of an outside investment banker who evaluates the merits of a particular offer will not be considered a misrepresentation unless the subject company intentionally caused a false statement to be issued, or unless the information on which the opinion was based either was false or was omitted from the materials distributed to shareholders.[473]

However, a subject company, or a competing bidder, may not state

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section 14(e) liability where tender offer not actually commenced). Of course, certain public announcements now constitute the "commencement" of a tender offer under Rule 14d-2(b). *See supra* Section I(B)(5)(b).

[471] 397 F. Supp. 112 (D.D.C. 1974).

[472] *Id.* at 127. *See also* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied*, 418 U.S. 919 (1974) (where the terms of the offer were confusing as to withdrawal rights, the bidder cannot complain of the subject company's warning that the shareholders would be "locked in" by the offer); Berman v. Gerber Prods. Co., 454 F. Supp. 1310 (W.D. Mich. 1978) (alleged antitrust and securities problems were held to justify the subject company's statement that the tender offer was not in the shareholders' best interests); Humana, Inc. v. American Medicorp, Inc., [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,286 (S.D.N.Y. 1978) (statement that offer raised antitrust problems held not false and misleading). *But see generally* Royal Indus. v. Monogram Indus., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,863, at 91,139-43 (C.D. Cal. 1976) (finding statements by the subject company on the following topics violative of sections 14(d) and 14(e): 1) the possibility that bidder would utilize the target's earnings to finance its "tremendously heavy debt structure"; 2) the size of the bidder—*i.e.*, that it was "smaller"—because only one factor, net sales, was used; 3) the action of the board upon the advice of an investment banker—because there was not sufficient time for careful analysis; 4) the subject company's unwarranted projections as to earnings; 5) the subject company's failure to disclose the personal interests of its officers and directors in resisting the bid; 6) the subject company's statement that soliciting brokers will receive "double commissions"; and 7) the subject company's statement as to the purpose of a proposed defensive acquisition).

[473] *E.g.*, Helfant v. Louisiana & S. Life Ins. Co., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,606, at 94,591 (E.D.N.Y. 1978).

mere opinions in absolute terms.[474] Several cases have considered the question whether the subject company may lawfully term the offeror's price "inadequate." A negative answer was given by the Second Circuit in *Chris-Craft*.[475] The management of the subject company, Piper Aircraft, opposed Chris-Craft's tender offer and characterized its offering price as "inadequate." At the time this communication was sent to the shareholders, Piper shares were trading a price substantially below that offered by Chris-Craft. Piper's own expert advisors had opined that the price was "fair and equitable," and Piper management was seriously considering selling its own shares for the same price to another company. The latter facts serve to distinguish *Chris-Craft* from most other cases in which target companies term an offer "inadequate."

For example, in *Corenco Corp. v. Schiavone & Sons Inc.*,[476] the District Court for the Southern District of New York held that the subject company's characterization of the offer as "inadequate" was permissible since the bidder's dealer-manager had recommended a higher price and the price was below book value. The *Corenco* court characterized the term "inadequate" as "highly subjective" and, hence, permissible to use so long as some supporting grounds existed therefor.[477]

B. *Other Defensive Tactics*

Many of the classic defensive tactics have been considered in Williams Act litigation.[478] The *Cargill* court, for example, held that a subject company could permissibly enter into long-term employment contracts with its officers and directors within a few hours after learning of a forthcoming tender offer.[479] Moreover, that court held that infor-

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[474] *E.g.*, Alaska Interstate Co. v. McMillian, 402 F. Supp. 532 (D. Del. 1975).

[475] Piper v. Chris-Craft Indus., Inc., 516 F.2d 172 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1 (1977).

[476] 362 F. Supp. 939, 951 (S.D.N.Y.), *modified*, [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,108 (S.D.N.Y.), *aff'd in part and remanded in part*, 488 F.2d 207 (2d Cir. 1973).

[477] *Id.* at 951. *See also* Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981) (subject company's press release describing the offer price as inadequate was not deceptive in light of evidence that a higher price could have been obtained). *But see* Royal Indus. v. Monogram Indus., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,863, at 91,144 (C.D. Cal. 1976) ("Where management and directors of a target company, in fighting a tender offer, describe an item such as the price of the offer as 'inadequate' or 'not in the best interests of shareholders' without disclosing that they have no reasonable basis for such a statement, a violation of the 1934 Act occurs."); Humana, Inc. v. American Medicorp, Inc., [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,286 (S.D.N.Y. 1978) (subject company must at least furnish shareholders with information it has received if it terms an offer "inadequate").

[478] *See, e.g.*, Weeks Dredging & Contracting, Inc. v. American Dredging Co., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,414 (E.D. Pa. 1978).

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

mation regarding such contracts is not "material" to an offeree's decision and, therefore, need not be disclosed.[480] Similar results obtained in *Altman v. Knight*[481] and *Graphic Sciences, Inc. v. International Mogul Mines Ltd.*[482] In the latter case, the subject company entered into long-term contracts with its key executives, replaced a nonaffiliated director with an officer, and entered into finder's fee arrangements whereby its remaining nonaffiliated directors would be compensated for arranging a friendly merger. These facts were disclosed in the annual report. The *Graphic Sciences* court held that none of the target's activities amounted to the type of "unclean hands" activity that would preclude it from obtaining injunctive relief.[483]

A subject company may also increase dividends in the face of a tender offer, even though the increase may represent a departure from prior policies, provided that a reasonable business reason exists for the action.[484] Finally, the facts that a bidder engaged in industrial espionage or had "cornered the market" in proxy-solicitation firms so as allegedly to deprive a subject company of an effective opportunity to respond were held not to be actionable in *Commonwealth Oil Refining Co. v. Tesoro Petroleum Corp.*[485] Presumably, the same result would obtain as to similar conduct by subject companies.

Stock repurchases have also generally been upheld, absent fraud or manipulation.[486] However, such transactions are now subject to section 13(e) and Rule 13e-1.[487] Given that the rule only prescribes certain disclosures relating to such transactions, it would appear that nothing in the Williams Act should be said to prohibit them provided that such disclosures are made.

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[480] If "material," Item 3(b) of Schedule 14D-9 requires disclosure of contracts between the subject company and, among others, executive officers of the company. Rule 14d-9(c) requires that such disclosure (or a "fair and adequate summary") be furnished to shareholders (although a cross-reference to a disclosure in a proxy statement furnished to shareholders within the prior year will suffice). Most subject companies decide to disclose executive employment contracts in Schedule 14D-9 filings notwithstanding the *Cargill* court's analysis.

[481] [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,040, *amended*, 431 F. Supp. 309 (S.D.N.Y. 1977).

[482] 397 F. Supp. 112 (D.D.C. 1974).

[483] *Id.* at 127.

[484] *See, e.g.*, Humana, Inc. v. American Medicorp, Inc., [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,286 (S.D.N.Y. 1978).

[485] 394 F. Supp. 267 (S.D.N.Y. 1975). *But see* Orbanco, Inc. v. Security Bank, 371 F. Supp. 125 (D. Ore. 1974).

[486] *See, e.g.*, Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972). *But see* Orbanco, Inc. v. Security Bank, 371 F. Supp. 125 (D. Ore. 1974).

[487] Rule 13e-1 literally applies only to the "issuer" (defined in section 3(a)(8) of the Exchange Act as the person issuing subject securities). Accordingly, it would appear that entities other than the statutorily defined "issuer" could engage in repurchase transactions without respect to the requirements of the Rule. *But see* SEC v. Grumman Corp., No. 1486 (E.D.N.Y. Nov. 9, 1981) (complaint alleging

As was discussed in Section I above,[488] prior to the decision of the Circuit Court in *Mobil Corp. v. Marathon Oil Co.*,[489] the prevailing view had been that, absent fraud or deception or "manipulation" within the meaning of *Santa Fe Industries, Inc. v. Green*,[490] charges of corporate unfairness were actionable only under state law[491] and that federal law was not implicated so long as all material facts were disclosed and subject company shareholders were not deceived.[492] While the discussion of the scope of section 14(e) and cases such as *Marathon* need not be repeated in this Section, a few issues of particular relevance to defensive actions will be analyzed here.

Before *Marathon*, a number of federal courts had begun to borrow certain state fiduciary principles in analyzing claims brought against de-

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violations of sections 13(e), 14(d) and 14(e), and Rules 13e-1 and 14d-9 arising out of, among other things, repurchases of subject company common stock by its principal pension plan, the trustees for which were all executive officers of such company, after commencement of a hostile tender offer).

[488] *See supra* Section I(D)(2).

[489] 669 F.2d 366 (6th Cir. 1981).

[490] 430 U.S. 462, 476 (1977).

[491] From early beginnings, *e.g.*, Northwest Indus. v. B.F. Goodrich Co., 301 F. Supp. 706 (N.D. Ill. 1969), the law has evolved to the point that it is now clear that subject company directors not only have the right but the duty to oppose a takeover bid which would harm the corporate enterprise or is inadequate from a financial point of view. *E.g.*, Heit v. Baird, 567 F.2d 1157, 1161 (1st Cir. 1977).

A necessary corollary of this duty is that actions taken in response to a takeover bid will be presumed to be valid, even if it can be shown that *one* of the motives therefore was retention in office. *E.g.*, Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 701 (2d Cir. 1980); Kaplan v. Goldsamt, 380 A.2d 556, 568 (Del. Ch. 1977). *But see* Mobil Corp. v. Marathon Oil Co., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,375 (S.D. Ohio Dec. 7), *rev'd on other grounds*, 669 F.2d 366 (6th Cir. 1981). *But see generally* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

Based upon this legal formulation, defensive manuevers, including tactics that could be referred to as "lock-ups," have survived judicial scrutiny under state law. *E.g.*, Conoco, Inc. v. Mobil Oil Corp., No. 4787 (S.D.N.Y. Aug. 4, 1981); GM Sub Corp. v. Liggett Group, Inc., No. 6155 (Del. Ch. Apr. 25, 1981). A similar analysis was recently adopted by Judge Kinneary (although he imposed the burden of proof upon the defendant directors) in the highly publicized battle for control of Marathon Oil Company. Mobil Corp. v. Marathon Oil Co., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,375 (S.D. Ohio Dec. 7), *rev'd on other grounds*, 669 F.2d 366 (6th Cir. 1981).

[492] *E.g.*, Panter v. Marshall Field & Co., 646 F.2d 271, 282-83 (7th Cir. 1981); Seaboard World Airlines, Inc. v. Tiger Int'l, Inc., 600 F.2d 355, 358 (2d Cir. 1979); Altman v. Knight, 431 F. Supp. 309 (S.D.N.Y. 1977); *In re* Sunshine Mining Co. Sec. Litig., 496 F. Supp. 9, 11 (S.D.N.Y. 1979); Berman v. Gerber Prods., 454 F. Supp. 1310, 1318, 1321 (W.D. Mich. 1978); Bucher v. Shumway, [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,142, at 96,299 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980). *See* Golub v. PPD Corp., 576 F.2d 759, 764 (8th Cir. 1978); Marsh v. Armada Corp., 533 F.2d 978 (6th Cir.), *cert. denied*, 430 U.S. 954 (1976) (a pre-*Santa Fe* Rule 10b-5 decision). *See also* E. ARANOW, H.

fensive actions under section 14(e). In *Crane Co. v. Anaconda Co.*,[493] for example, the District Court for the Southern District of New York held that defensive maneuvers would violate section 14(e) if their "sole reason" was to defeat a tender offer.[494] In a subsequent opinion the *Crane* court refused to decide whether the same result would obtain if the "primary" purpose was tender offer defense, since the claim failed under either test.[495] In *Crouse-Hinds Co. v. InterNorth, Inc.*,[496] a proposed exchange offer between a subject company and a White Knight was upheld where it was undertaken to facilitate a prior merger proposal and to thwart a hostile tender offer conditioned upon the abandonment of the merger.

The question of whether a breach of state law fiduciary duties can be turned into a disclosure violation, based upon a failure to disclose the alleged breach, has yet to be resolved under the federal securities laws.[497] The overall relationship between state and federal concepts is

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EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 205, nn.41 & 46 (1977); McIntyre, *Shareholders' Recourse Under Federal Securities Law Against Management for Opposing Advantageous Tender Offers*, 34 BUS. LAW. 1283, 1293-94 (1979). *But see, e.g.*, Applied Digital Data Sys. v. Milgo Elec. Corp., 425 F. Supp. 1163 (S.D.N.Y. 1977) (issuance of stock designed to thwart a tender offer was deemed violative of § 14(e)); Royal Indus. v. Monogram Indus., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,863 (C.D. Cal. 1976).

[493] 411 F. Supp. 1208 (S.D.N.Y. 1975).

[494] *Id.* at 1210.

[495] Anaconda Co. v. Crane Co., 411 F. Supp. 1210, 1219-20 (S.D.N.Y. 1975).

[496] 634 F.2d 690 (2d Cir. 1980).

[497] In Bucher v. Shumway, [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,142 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 572 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), the District Court for the Southern District of New York held that a breach of fiduciary duty by the subject company (in this case, an acquisition undertaken solely to block a tender offer) without any deception, misrepresentation or nondisclosure did not violate § 10(b), Rule 10b-5 or § 14(e). Additionally, the *Bucher* court stated that common law breaches of fiduciary duty cannot be transformed into § 10(b) or 14(e) violations merely by alleging the failure to disclose them. *See also In re* Sunshine Mining Co. Sec. Litig. [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,217 (S.D.N.Y. 1979). *But see* Goldberg v. Meridor, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978). Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), adds another element. In addition to holding that the subject company is under no federally imposed duty to disclose its motive for opposing a tender offer, and that, absent manipulation or deception, the failure to disclose a policy of resistance to acquisition is not actionable under Rule 10b-5, the *Panter* court held the subject company shareholder's claim that fraudulent acts by the subject company's management caused withdrawal of a tender offer was not actionable under § 14(e) due to the lack of reliance (the threatened tender offer was not actually commenced).

Other courts have attempted to determine when and under what circumstances a state law breach of fiduciary duty becomes a violation of sections 10(b) or 14(e) as well. *See, e.g.*, Merrit v. Libby, McNeill & Libby, 510 F. Supp. 366 (S.D.N.Y. 1981) (minority subject company shareholder stated a Rule 10b-5 cause of action also evolving; for example, in *State Teachers Retirement Board v. Fluor Corp.*,[498] the District Court for the Southern District of New York expressly held that the business judgment rule that developed under general corporation law governs decisions as to the timing of disclosures of material facts to the investment community generally. Other courts have reached similar results in actions purportedly brought under Rule 10b-5.[499]

In the context of section 14(e) litigation, if it is determined that an action by a subject company (*e.g.*, granting of lock-up options to ensure a competing tender offer at a fair price) was in furtherance of state-imposed fiduciary obligations (*i.e.*, the duty to resist an inadequate offer), it could well be argued that, absent a failure to disclose all material facts, any claim based upon an alleged "manipulation" of the market should fail. If target directors satisfy their state law fiduciary obligations in authorizing such transactions, the only valid federal interest is satisfied provided that disclosure of all material facts has been made. However, similar reasoning was ignored by the Sixth Circuit Court of Appeals in *Marathon*,[500] and it remains unclear as to whether other courts will follow that decision.

V. MISCELLANEOUS ISSUES

A. *Proxy Rules*

In any situation involving a struggle for corporate control and solicitations of support from shareholders, the proxy rules promulgated under section 14(a) of the Exchange Act may become applicable. A discussion of the substantive provisions of those rules, however, is beyond the scope of this Article. It may be useful, nonetheless, to note those situations in tender offer cases where the proxy rules were at issue.

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by alleging that the subject company's management and acquirers acted together to eliminate cash and stock dividends in an effort to depress its price). *Cf.* Credit & Fin. Corp. v. Warner & Swasey Co., [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,826 (2d Cir. 1981) (claim that target's press release failed to disclose predetermination to reject a tender offer coupled with factual allegations of extensive prior dealings between the parties does state a claim under Rule 10b-5); Merritt v. Colonial Foods, Inc., [1980 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,689 (D.C. Del. 1980) (failure to disclose alleged self-serving purpose of a tender offer).

[498] [1979-80 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,340 (S.D.N.Y. 1980), *aff'd in part, rev'd in part on other grounds*, [1981 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 98,005 (2d Cir. 1981).

[499] *See, e.g.*, Financial Indus. Fund v. McDonnell Douglas Corp., 474 F.2d 514, 518 (10th Cir.) (en banc), *cert. denied*, 414 U.S. 874 (1973).

[500] Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981). The trial court had explicitly held in that case that the subject company directors had satisfied their fiduciary duties in approving the grant of the challenged "lock-up" options. [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,375 (S.D. Ohio Dec. 7, 1981). That holding was not disturbed by the appellate court.

In *Sargent v. Genesco, Inc.*,[501] the defendant officers agreed upon a "refinancing plan" for their corporation. One of the alleged purposes of this plan was to protect the defendants from exposure to liability from earlier securities law violations. A letter describing this plan was sent to stockholders. The letter did not, however, solicit any proxies from these shareholders, since no vote on the matter was required. The trial court dismissed a shareholders' class action that alleged, in part, that the letter was a "proxy solicitation" that was subject to, but had not complied with the proxy rules. The Fifth Circuit reversed, holding that the letter could be, but was not necessarily, a "proxy solicitation" within the meaning of section 14(a) since it was sent at a time when management was engaged in self-dealing and could have been intended to mollify the shareholders and thereby prevent them from taking any action against the plan.[502] The case was remanded for trial on this issue.

In another case decided at about the same time, the Fifth Circuit found that a letter describing a proposed merger did not constitute a "proxy solicitation" since the letter was not reasonably calculated to result in either the procurement of proxies or any other action by the shareholders. The letter in question did not request proxies, and the time for soliciting them was not near.[503]

Target management may violate section 14(a) if it forms a section 13(d)(3) group in an effort to resist a takeover attempt but fails adequately to disclose this fact in its annual proxy solicitation.[504] On the other hand, an issuer need not disclose its entire battle plan under section 14(a), *e.g.*, planned organic changes in the corporate structure or a possible effort to go private.[505]

Rule 14a-2 exempts solicitations of the proxies of ten or fewer "persons" from the filing requirements of section 14(a) of the Exchange Act.[506] In *Water & Wall Assocs. v. American Consumer Industries,*

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[501] 492 F.2d 750 (5th Cir. 1974).

[502] *Id.* at 766-68.

[503] Smallwood v. Pearl Brewing Co., 489 F.2d 579, 601 (5th Cir.), *cert. denied,* 419 U.S. 873 (1974).

[504] *See* Jewelcor, Inc. v. Pearlman, 397 F. Supp. 221 (S.D.N.Y. 1975).

[505] *Id.*

[506] The rule provides, in relevant part:

> [The rules contained in the regulation] apply to every solicitation of a proxy with respect to securities registered pursuant to section 12 of the Act, whether or not trading in such securities has been suspended, except that:
>
> . . .
>
> (b) Sections 240.14a-3 to 240.14a-8 and 240.14a-10 to 240.14a-12 do not apply to the following:
>
> (1) Any solicitation made otherwise than on behalf of the issuer where the total number of persons solicited is not more than 10 . . . .

Inc.,[507] the plaintiff contended that where one person who controls several blocks of stock in various capacities is solicited, each interest or block he represents should be counted as one "person" toward the limit of ten. However, the *Water & Wall* court held that this construction would be predicated on the contention that the SEC was extremely "inarticulate" in its draftsmanship of Rule 14a-2 and, therefore, refused to follow the plaintiff's overly technical reading of the rule.[508]

B. *Rule 10b-4*

Rule 10b-4 prohibits the practice of "short tendering," *i.e.*, promising to deliver securities to an offeror which one does not own at the time the promise is made. The rule contains a rather explicit and lengthy list of prohibited activities. The first known enforcement action under this rule was *SEC v. Weisberger*,[509] in which the defendants were found to have violated Rule 10b-4(a)(1) by offering to tender 5,000 shares of Marcor, Inc. to Mobil Corporation in connection with the latter's tender offer. Only a few other cases have arisen under this rule,[510] presumably because the prohibitions thereunder are relatively clear.

C. *Rule 10b-5*

1. General

The utility of the antifraud provisions of Rule 10b-5 as a basis for relief in the tender offer area is limited by *Birnbaum v. Newport Steel Corp.*,[511] the validity of which was confirmed by the Supreme Court in *Blue Chip Stamps v. Manor Drug Stores*.[512] *Birnbaum* requires that plaintiffs bringing private actions under Rule 10b-5 be either purchasers or sellers of the securities in connection with which the alleged fraud was practiced. The *Birnbaum* doctrine precludes actions for fraud in connection with tender offers from being brought under Rule 10b-5 by the bidder, the subject company, the issuer or nontendering shareholders, unless those parties happen to have purchased or sold the securities in question.[513]

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[507] [1973 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 93,943 (D.N.J. 1973).

[508] *Id.* at 93,758.

[509] [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,108 (S.D.N.Y. 1975).

[510] *E.g.*, SEC v. Roven, Civ. No. 3413 (C.D. Cal. 1976). The SEC has proposed an amendment to Rule 14d-4 which would proscribe so-called "hedged tendering." SEC Release No. 34-18050, [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 83,019 (Aug. 21, 1981).

[511] 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

[512] 421 U.S. 723 (1975).

[513] *See, e.g.*, Sargent v. Genesco, Inc., 492 F.2d 750 (5th Cir. 1974) (common stockholders whose equity interests are diluted have no standing under Rule 10b-5); Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), *cert. denied*, 489

The rule is, however, subject to exceptions in some cases, notably, a plaintiff only seeking injunctive relief is not required to be a purchaser or seller.[514] A plaintiff must, however, have some connection to the defendant's conduct. In *Brascan Ltd. v. Edper Equities Ltd.*,[515] for example, the District Court for the Southern District of New York held that a subject company had standing to seek an injunction for a bidder's alleged violation of Rule 10b-5 since the target was in the best position to protect the interests of its shareholders. Most courts would also agree that a stockholder has standing to sue for an injunction under Rule 10b-5.[516]

Of course, if the plaintiff is required to satisfy the purchaser-seller rule, any purchase or sale must be made in connection with the tender offer. This point is amply illustrated by *Crane Co. v. American Standard, Inc.*[517] In *Crane*, a bidder brought suit against a rival bidder, alleging that the rival's violations of the federal securities laws had caused the tender offer made by the initial bidder to fail. Although the plaintiff had acquired a large block of shares as part of these transactions, the trial court dismissed the section 10(b) and Rule 10b-5 claims holding that it could not satisfy the purchaser-seller requirement. The trial court pointed out that the plaintiff had made a profit of nearly ten million dollars when it later sold the shares that it had acquired and that the plaintiff's only grievance was that the rival bidder had prevented it from gaining control of the target. "In that role, [the initial bidder did] not present itself . . . as a member of the class intended to be protected by § 10(b) and Rule 10b-5."[518]

The *Crane* court's analysis seems sound. The original purpose of the purchaser-seller requirement was to prevent the recovery of speculative damages under Rule 10b-5, and the only damage suffered by the initial bidder in *Crane* was the failure of its tender offer, an undertaking

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U.S. 873 (1974) (nontendering shareholders); GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972) (issuer); Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842 (2d Cir. 1970) (subject company); Financial Gen. Bankshares, Inc. v. Lance, [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D.D.C. 1978) (subject company); ICM Realty v. Cabot, Cabot & Forbes Land Trust, 378 F. Supp. 918 (S.D.N.Y. 1974) (issuer); H. K. Porter Co. v. Nicholson File Co., 353 F. Supp. 153 (D.R.I. 1972), *aff'd*, 482 F.2d 421 (1st Cir. 1973) (bidder and subject company).

[514] *See, e.g.*, Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967); Monheit v. Carter, 376 F. Supp. 334 (S.D.N.Y. 1974). *But see* Camelot Indus. v. Vista Resources, Inc., [1981-82 Decs.] FED. SEC. L. REP. ¶ 98,611 (S.D.N.Y. March 29, 1982); Liberty Nat'l Ins. Holding Co. v. Charter Co., [1981-82 Decs.] FED. SEC. L. REP. (CCH) ¶ 98,671 (N.D. Ala. April 27, 1982).

[515] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,882, at 95,633 (S.D.N.Y. 1979).

[516] *See, e.g.*, Reserve Mgmt. Corp. v. Anchor Daily Income Fund, Inc., [1978 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,566 (S.D.N.Y. 1978).

[517] [1979 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,823 (2d Cir. 1979).

[518] *Id.* at 95,289.

that may or may not have succeeded in any event. Since a bidder has no standing to bring an action under Rule 10b-5 for interference with a tender offer, the *Crane* court correctly dismissed the Rule 10b-5 claims. Still, while the problem of standing under Rule 10b-5 is one that must be considered by litigants in tender offer cases, it can be circumvented in most tender offer cases by bringing the action under section 14(e), which contains no "purchaser-seller" requirement but provides substantially the same protection.[519]

In *Sargent v. Genesco, Inc.*,[520] the Fifth Circuit discussed the elements that must be pleaded and proved in order to recover monetary and injunctive relief under Rule 10b-5:

> As recognized by the district court, there are three basic elements to be pled and proved in 10b-5 actions: (1) conduct by the defendants proscribed by the rule; (2) a purchase or sale of securities by the plaintiffs "in connection with" such proscribed conduct; and (3) resultant damages to the plaintiffs.[521]

By implication these elements would also constitute a claim under section 14(e), except for the "in connection with" requirement.[522]

2. Disclosure of a Forthcoming Tender Offer

If a prospective bidder purchases shares of the target over an exchange in preparation for its forthcoming offer, it could perhaps be argued that Rule 10b-5 obligates it to insure that its plans with respect to the forthcoming tender offer are publicly disclosed in advance of the purchases. However, under the traditional concept of Rule 10b-5 as a prohibition of trading on the basis of inside information, the bidder should be under no obligation to make such disclosure, since its own in-

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[519] *See generally supra* Section I(D)(1).

[520] 492 F.2d 750 (5th Cir. 1974).

[521] *Id.* at 759.

[522] The Fifth Circuit also discussed the statute of limitations applicable to claims under Rule 10b-5 in *Genesco*. The Exchange Act contains no statute of limitations applicable to claims under Section 10(b) (since such claims are implied remedies), nor does federal law prescribe any statute of limitations generally applicable to civil actions. Therefore, the *Genesco* court held that "the limitation period which the forum state applies to the state remedy which bears the closest substantive resemblance to Rule 10b-5 and which best effectuates its purpose is to be applied." *Id.* at 758. The date on which the claim accrues and the statute of limitations begins to run was, however, held in *Genesco* to be a matter of federal, rather than state law. *Compare id. with* Stull v. Bayard, 424 F. Supp. 937 (S.D.N.Y.), *aff'd*, 561 F.2d 429 (2d Cir. 1977). Under *Genesco*, a Rule 10b-5 claim does not accrue until the plaintiff actually discovers the fraud. The rule may, however, be different in other circuits. *But see* SEC v. Glick, [1980 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 97,535 (D.C. Nev. 1980) (holding that an SEC action under Rule 10b-5 seeking equitable relief accrues on behalf of the public interest and is not bound by federal or state statutes of limitations).

tentions are not "inside information" with respect to the prospective target company.[523]

However, the SEC in the past has attempted to alter the traditional concepts in this area. These efforts[524] suffered a major setback in the Supreme Court's decision in *Chiarella v. United States*.[525] After *Chiarella*, the SEC promulgated Rule 14e-3 pursuant to section 14(e), which prohibits tipping or trading where any person has taken a substantial step or steps to commence a tender offer.[526] However, the rule does not require pre-offer disclosure by such person and therefore could not be used successfully to attack, for example, pre-offer market purchases.

D. *Rule 10b-6*

Rule 10b-6 prohibits bids for or purchases of a security by or on behalf of the issuer of a security if the security is "the subject of . . . . [a] distribution."[527] In *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*,[528] an exchange offeror purchased shares of the exchange offeree. The latter company was the target of a pending tender offer at the time. The Second Circuit held that the proscriptions of Rule 10b-6 apply to the acquisition of "any right to purchase" a security. Since the target-offeree's shareholders were to have exchanged their shares in the target for shares in the exchange offeror, acquisition of shares in the target by the exchange offeror constituted the purchase of a "right to purchase" its own shares. In other words, if Corporation A offers to exchange its shares for shares in Corporation B by means of a distribution, and if A buys shares of B in the meantime, it has violated Rule 10b-6. In *Chris-Craft*, the Second Circuit found the exchange offeror's purchases to be manipulative in that they artificially stimulated interest in the target-offeree's securities immediately after the proposed exchange offer was announced.[529] The competing tender offeror was also held to have stand-

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[523] E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 23-24 (1973). *See also* Nachman Corp. v. Halfred, Inc., [1973-74 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 94,455 (N.D. Ill. 1973) (approving of market purchases without any public announcement of a forthcoming tender offer).

[524] *E.g.*, SEC v. Primar Typographers, Inc., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,734 (S.D.N.Y. 1976). *See generally* Heller, *Chiarella, SEC Rule 14e-3, and Dirks: Fairness versus Economic Theory*, 37 BUS. LAW. 517 (1982).

[525] 445 U.S. 222 (1980).

[526] Rule 14e-3 was upheld in O'Conner & Assocs. v. Dean Witter Reynolds, Inc., 529 F. Supp. 1179 (S.D.N.Y. 1981).

[527] 17 C.F.R. § 240.10b-6 (1982).

[528] 516 F.2d 172 (2d Cir. 1975), *rev'd*, 430 U.S. 1 (1977).

[529] *See generally* Jewelcor, Inc. [1974-75 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 80,014 (SEC Staff Reply, Sept. 11, 1974) (disclosure in a Schedule 13D that future acquisition of shares by public tender offer as one of several alternatives being considered was not a "public announcement" under rule 10b-13).

ing to enforce Rule 10b-6 and to recover damages for the violations which the Second Circuit found denied the target offeror a fair chance to compete for control. However, the Supreme Court reversed the Second Circuit's determination in *Chris-Craft* on the ground that "at no time has [the defeated offeror] complained of or even suggested that the price which it paid for [the target's] shares was influenced by [the victorious offeror's] Rule 10b-6 violations."[530]

E. *Rule 10b-13*

A rule which is really an outgrowth of Rule 10b-6 is Rule 10b-13, which the SEC adopted in 1969. Rule 10b-13 prohibits any "person who makes a cash tender offer or exchange offer for any equity security" from purchasing such security other than pursuant to his offer during the period in which the offer is effective.[531] However, Rule 10b-13 applies only after a tender offer is publicly announced or commenced and has been held inapplicable to privately negotiated purchases prior to the commencement of the offer.[532] While the SEC's new "commencement" concept in Rule 14d-2(b) serves further to limit a bidder's flexibility in the marketplace,[533] Rule 10b-13 remains but a trap for the unwary.

CONCLUSION

Tender offers have become an important and permanent part of the corporate landscape in the United States. An understanding of the decisional law under the Williams Act is therefore important to any corporate law practitioner since defensive litigation almost inevitably accompanies unfriendly tender offers. Such an understanding is equally important with respect to friendly tender offers since the applicable federal statutes and rules provide guidance only with respect to the most basic questions. Hopefully, this Article will aid in such understanding.

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[530] 430 U.S. at 45.

[531] 17 C.F.R. § 240.10b-13 (1982).

[532] *E.g.*, Sunshine Mining Co. v. Great W. United Corp., [1977-78 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 96,049 (D. Idaho 1977); Heine v. Signal Cos., [1976-77 Decs.] Fed. Sec. L. Rep. (CCH) ¶ 95,898 (S.D.N.Y. 1977).

[533] *See supra* Section I(B)(5)(b).