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# STANDING UNDER SECTION 14(e) OF THE SECURITIES EXCHANGE ACT OF 1934: MAY A TENDER OFFEROR SUE FOR INJUNCTIVE RELIEF?

## I. Introduction

Within the last ten to fifteen years, the cash tender offer has become a common device for gaining control of a publicly held corporation.<sup>1</sup> Generally, a cash tender offer is recognized as a public offer made to shareholders of the company sought to be controlled to purchase stock at a set price over a period of time.<sup>2</sup> To induce shareholders to tender their stock, the price set by the offeror is

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1. Between 1972 and 1975, over 100 offers were registered each year with the Securities and Exchange Commission. Rattner, *States Acting to Put Curb on Takeovers*, N.Y. Times, July 6, 1976, at 41, col. 8. According to the SEC, the number of filings under the Williams Act (see note 8 *infra*) were: 111 in 1974; 93 in 1975; 126 in 1976. E. ARANOW, H. EINHORN & G. BERLSTEIN, *DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL* vi (1977). Contrast these figures with the fact that in 1960 only eight tender offers involved corporations with securities listed on the national securities exchanges. E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 65 n. 3 (1973) [hereinafter cited as ARANOW & EINHORN].

Some of the reasons suggested for the increased use of the tender offer device are:

- (1) increased corporate liquidity and readily available credit;
- (2) comparatively depressed price/earnings ratios, book values, and cash or quick assets ratios, making acquisition via the tender offer more attractive;
- (3) greater recognition, sophistication, and knowledge with respect to the takeover via the tender offer technique;
- (4) lack of extensive federal or state regulation of tender offers;
- (5) quicker and more successful results when compared with a full-dress proxy contest;
- (6) greater flexibility - the ability to hedge by reserving certain options against a final and irrevocable commitment;
- (7) psychology - the appeal to shareholders in straight dollars and cents language, eliminating the need, as in a proxy contest, to convince the shareholder that the insurgent can do a more efficient job;
- (8) notwithstanding the actual capital investment, the reduced costs of effecting a tender offer when compared with a proxy contest;
- (9) a new 'respectability' for cash tender offers.

*Id.* at 65-66.

2. See Fleisher & Mundheim, *Corporate Acquisitions By Tender Offers*, 115 U. PA. L. REV. 317 (1967); Note, *Standing To Sue Under 14(e)*, 26 KANSAS L. REV. 624 (1978). The term "tender offer" is not defined specifically in the Williams Act. Scholars believe that the failure of Congress and the SEC to define the term "tender offer" was not an oversight. Rather, they feel that the legislature did not define the term in order to allow the courts and the SEC to make case by case determinations. See ARANOW & EINHORN, *supra* note 1, at 69-70. The parameters of the term "tender offer" as it is used in the Williams Act have been the subject of much discussion. See, e.g., Note, *The Developing Meaning of "Tender Offer" under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973). This subject, however, is beyond the scope of this article.

higher than the current market price of the stock. In a tender offer, the offeror specifies the minimum total number of shares which must be tendered by a certain date.<sup>3</sup> If the minimum number of shares is tendered, the offeror will purchase the shares and thereby gain control of the corporation. If the minimum number of shares is not tendered, however, the offeror need not purchase any of the stock.

The cash tender offer is an attractive means of gaining control of a corporation because it costs less and consumes less time than other acquisition devices such as negotiated mergers, gradual market acquisition, and proxy contests.<sup>4</sup> In addition, the cash tender offeror, unlike the exchange tender offeror,<sup>5</sup> need not convince the shareholder that he would do a better job of managing the corporation than the incumbent.<sup>6</sup> Thus, the tender offer device, in contrast to the open market method of gaining control, substantially decreases the risk that an offeror will have its assets tied up in a corporation in which it cannot gain a controlling share of stock.

As the use of the cash tender offer device increased, so did the amount of abuse. In an effort to eliminate abuse,<sup>7</sup> Congress enacted the Williams Act<sup>8</sup> in 1968 as an amendment to the Securities Exchange Act of 1934.<sup>9</sup> The Williams Act regulates tender offers by mandating disclosure of the tender offeror's identity and intent,<sup>10</sup> regulating the offeror's acceptance of shares tendered,<sup>11</sup> and prohibiting any fraudulent activity in connection with a tender offer.<sup>12</sup> The

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3. The minimum number specified will be the number of shares of stock needed to gain control of the corporation.

4. Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976). For an example of the great expense involved in waging a proxy contest, see *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 128 N.E.2d 291, 51 A.L.R. 2d 860 (1955).

5. In an exchange tender offer, the offeror issues either its common or preferred stock, convertible or nonconvertible subordinated debentures, bonds, warrants, or some combination thereof. ARANOW & EINHORN, *supra* note 1, at 29.

6. *Id.* at 29-30.

7. See H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4 (1968); S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967).

8. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d)-78m(e), 78n(d)-78n(f) (1976)).

9. 15 U.S.C. § 78 (1976).

10. 15 U.S.C. §§ 78n(d)(1)-78n(d)(4) (1976).

11. *Id.* §§ 78n(d)(5)-78n(d)(8).

12. *Id.* § 78n(e).

prohibition against fraudulent activity is contained in section 14(e), which 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.<sup>13</sup>

It is not uncommon for the management of the corporation sought to be taken over (referred to hereinafter as the "target" corporation) to actively resist the takeover attempt.<sup>14</sup> To combat the takeover attempt, the target management can advise its shareholders not to tender their stock. Alternatively, target management may suggest to a third company, commonly referred to as the "white knight," to make a competing tender offer.<sup>15</sup>

The white knight, as a tender offeror, is likewise subject to the anti-fraud provisions of section 14(e).<sup>16</sup> Fraudulent assertions by the white knight could induce the shareholders of the target to tender their stock to the white knight rather than to the original tender offeror. The original tender offeror is thereby wrongly frustrated in his quest to gain control. Notwithstanding this injury, the United States Supreme Court in *Piper Aircraft, Inc. v. Chris-Craft Industries, Inc.*<sup>17</sup> held that a tender offeror does not have standing under section 14(e) to sue for damages. This Note will review *Piper* and address the issue of whether a tender offeror has standing to sue for injunctive relief under section 14(e). However, before the standing issue can be fully discussed, a brief review of the Williams Act and

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13. *Id.*

14. The target management may have some valid reasons for resisting the takeover. For instance, the target may believe in good faith that a takeover would not be in the best interests of its shareholders. However, the target management may have some improper reasons for resisting the takeover. In such cases where the management has purposely or negligently misled its shareholders, it appears that the shareholders can bring suit against management under section 14(e). See note 81 *infra* and the accompanying text.

15. If the shareholders already have tendered the minimum number of shares requested by the offeror, the management, in a last effort to resist the takeover, may sell a block of authorized but unissued shares to a white knight for the purpose of diminishing the offeror's interest.

16. 15 U.S.C. § 78n(e) (1976).

17. 430 U.S. 1 (1977).

its niche in the overall plan of federal securities legislation is essential.

## II. History of the Williams Act

Congress enacted major securities legislation in 1933 and 1934 to restore the faith of Americans in the United States economy after the Great Depression. The Securities Act of 1933<sup>18</sup> regulates the offering of securities to the public.<sup>19</sup> The act is designed to provide investors with material information, financial and otherwise, regarding securities offered for public sale, and to prohibit all misrepresentation, deceit and fraud connected with the sale of securities.<sup>20</sup> The Securities Exchange Act of 1934,<sup>21</sup> enacted to expand investor protection, regulates trading in securities already issued and outstanding.<sup>22</sup> The 1934 Act, among other things, imposes disclosure requirements on publicly-held corporations,<sup>23</sup> prohibits "manipulative or deceptive devices or contrivances" associated with the sale or purchase of securities,<sup>24</sup> limits the amount of credit which may be extended for purchase of securities,<sup>25</sup> and provides for registration and supervision of national securities exchanges.<sup>26</sup>

Prior to the passage of the Williams Act, those seeking to gain control of a company by offering an exchange of stock or by proxy contest were required to disclose certain information.<sup>27</sup> Those at-

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18. 15 U.S.C. § 77 (1976).

19. The securities laws distinguish between the original issuance of shares and the subsequent trading of those shares. The Securities Act of 1933 regulates the issuance of shares; the Securities Exchange Act of 1934 applies to the subsequent transactions.

20. The first purpose is effectuated by requiring the issuer of securities offered for public sale to file a registration statement with the Securities and Exchange Commission. 15 U.S.C. § 77e (1976). The registration statement, including the prospectus, becomes public information immediately upon filing with the Commission. See 15 U.S.C. §§ 77g, j(1976).

21. *Id.* § 78.

22. See note 19 *supra*.

23. 15 U.S.C. §§ 78l(b), 78l(j), 78m(a), 78m(b) (1976).

24. *Id.* §§ 78i, 78j.

25. *Id.* §§ 78g, 78h.

26. *Id.* §§ 78k, 78kA, 78l(k), 78q.

27. Where one who seeks control of a corporation makes an exchange offer of stock to obtain control, the offer must be registered under the Securities Act of 1933. [§ 5]. The shareholder gets a prospectus explaining all material facts about the offer. He knows who the purchaser is, and what plans have been made for the company. He is in a position to make an informed decision either to hold his original security or to exchange it for another. Similarly, where control is sought through a proxy contest, information must be filed under the Securities Exchange Act [§ 14(a)] which tells

tempting a takeover by means of the cash tender offer device, however, were not required to reveal any information. The Williams Act attempts to rectify this anomaly by requiring all tender offerors, including cash tender offerors, to disclose information similar to that required of exchange tender offerors and proxy contestants.<sup>28</sup> The bill is not intended to favor the offeror or the target management;<sup>29</sup> rather, its purpose is to protect the investor.<sup>30</sup> Senator Harrison A. Williams, Jr., the sponsor of the bill introduced the legislation by stating: "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."<sup>31</sup> The Senate<sup>32</sup> and House<sup>33</sup> Reports on the Williams Act reflected similar sentiment.

In addition to imposing a duty on a tender offeror to disclose material information, the Williams Act expanded the class of shareholders protected under the securities laws. Prior to the passage of

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shareholders the identity of the participants and their associates, their stockholdings and when they acquired them, the extent to which the shares were purchased with borrowed funds and the identity of the lender if the funds were obtained otherwise than through a bank loan or margin account. Additionally, details as to any arrangements made regarding employment by, or other future transactions with, the issuer must be given. In both the exchange offer and the proxy fight the disclosures made are filed with the Commission and are subject to statutory requirements and sanctions.

113 CONG. REC. 854, 855 (1967).

28. Under § 14(d) of the 1934 Securities Exchange Act (enacted as part of the Williams Act), no person may make a tender offer which would result in his owning greater than 5% of a class of securities registered under § 12 of the 1934 Act unless he has filed with the SEC, and gives to each offeree, a statement containing certain of the information required under § 13(d) of the 1934 Act. Section 13(d) requires any person who becomes the owner of more than 5% of any class of securities registered under § 12 to file with the issuer of the securities and with the SEC a statement setting forth (1) the background of such person, (2) the source of the funds used for such acquisition, (3) the purpose of the acquisition, (4) the number of shares owned, and (5) any relevant contracts, arrangements or understandings.

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

30. "The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975).

31. 113 CONG. REC. 854 (1967) (emphasis added).

32. S. REP. NO. 550, 90th Cong., 1st Sess. (1967).

33. H.R. REP. NO. 1711, 90th Cong., 2d Sess. (1968).

the Williams Act, a party defrauded in connection with a tender offer had to seek relief under rule 10b-5.<sup>34</sup> Rule 10b-5 prohibits any fraudulent activity connected with the purchase or sale of securities.<sup>35</sup> Because rule 10b-5 contains a "purchaser-seller" requirement, shareholders who did not tender shares or whose shares were not purchased did not have causes of action under the federal securities statutes.<sup>36</sup> Section 14(e) is virtually identical to rule 10b-5, except that section 14(e) does not contain a purchaser-seller requirement.<sup>37</sup>

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34. Rule 10b-5, 17 C.F.R. § 240.10b-5 (1979), provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange:

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or,
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 10b-5 was promulgated under § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j (1976), which provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for protection of investors.

35. See note 34 *supra*.

36. In *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), the court limited causes of action under rule 10b-5 to purchasers or sellers of the security in question. The Supreme Court affirmed the *Birnbaum* rule in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), when it held that a private cause of action did not lie under rule 10b-5 in favor of potential purchasers who alleged that an overly pessimistic assessment by management discouraged them from exercising their options to purchase. Later, the Supreme Court denied standing under rule 10b-5 to customers of a brokerage firm who claimed that the brokerage firm's auditors issued misleading statements regarding an insolvent corporation in which the customer had invested. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The Court in *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462 (1977), held that shareholders "frozen out" under Delaware's "short form" merger statute did not have standing under rule 10b-5.

37. See *Dyer v. Eastern Trust & Banking Co.*, 336 F. Supp. 890 (D. Me. 1971). "The legislative history . . . and the similarity between the substantive provisions of Section 14(e) and Rule 10b-5 make clear that the intent of Congress in enacting Section 14(e) was to make available to those defrauded in connection with tender offers the full arsenal of remedies available under Section 10(b) and its implementing Rule 10b-5 to those defrauded in connection with purchases or sales of securities." *Id.* at 913-14 (citations omitted). Like section 14(e),

It has been argued therefore that section 14(e) provides defrauded shareholders, including non-sellers and non-purchasers, with a federal cause of action.<sup>38</sup> This argument is consistent with the express purpose of the Williams Act to protect the investors. Controversy develops where parties other than shareholders seek standing to sue under section 14(e).

### III. Standing to Sue for Damages: *Piper v. Chris-Craft*

In *Piper v. Chris-Craft Industries, Inc.*,<sup>39</sup> Chris-Craft, seeking to gain control of Piper Aircraft Corporation, began to make cash purchases of Piper stock on the open market in December 1968. In January 1969, Chris-Craft publicly announced a cash tender offer for up to 300,000 Piper shares.<sup>40</sup> Despite resistance from Piper management,<sup>41</sup> Chris-Craft acquired over 300,000 shares of Piper by the time its cash tender offer expired in early February. In an effort to obtain the balance of stock needed to gain control of Piper, Chris-Craft made an exchange offer to the Piper shareholders.<sup>42</sup> In March, Piper, attempting to avoid a takeover by Chris-Craft, began negotiating an exchange of stock agreement with Bangor Punta Corporation.<sup>43</sup> On May 8, the Piper family agreed to trade its thirty-one percent ownership in Piper Aircraft to Bangor. In exchange, Bangor agreed to trade a portion of its securities and promised to use its best efforts to acquire a controlling interest in Piper. Accompanying the

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section 10(b) does not provide for a private cause of action against those who violate section 10(b) and the rule promulgated under it. However, the United States Supreme Court has held that a private cause of action for damages may be implied under rule 10b-5 in *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971). The relationship between section 14(e) and rule 10b-5 has been well documented. See, e.g., Note, *A Proposal for Affirmative Disclosure by Target Management During Tender Offers*, 75 COLUM. L. REV. 190, 201 n. 71 (1975).

38. See, e.g., *Lowenschuss v. Kane*, 520 F.2d 255 (2d Cir. 1975); *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973). See note 102 *infra* and text accompanying notes 97-101 *infra*.

39. 430 U.S. 1 (1977).

40. *Id.* at 5. Chris-Craft made an offer to purchase Piper stock at a price \$12.00 above the current market value of the stock.

41. Management sent letters to the shareholders advising them not to tender their shares. In addition, Piper entered into an agreement with Grumman Aircraft Corp. in which Grumman was to purchase 300,000 authorized but unissued shares of Piper. This agreement, however, never was carried out. *Id.*

42. *Id.* at 6. For the definition of an exchange offer, see note 5 *supra*.

43. *Id.* at 6-7. According to Bangor's underwriter, First Boston Corporation, the value of the securities involved in the exchange offer was at least \$80 per share of Piper.



announcement of the agreement between Piper and Bangor was news that Bangor intended to make an exchange of stock offer to Piper shareholders. Bangor also announced that its underwriter assessed the value of the securities offered by Bangor at a price significantly higher than the value of shares offered by Chris-Craft.<sup>44</sup> After Bangor made three privately negotiated purchases from large institutional investors,<sup>45</sup> the takeover contest between Chris-Craft and Bangor focused on the competing exchange offers.<sup>46</sup> In September, Bangor finally acquired a controlling interest in Piper Aircraft.<sup>47</sup>

Litigation concerning the takeover began long before Bangor gained control of Piper Aircraft. On May 22, 1969, Chris-Craft filed suit in the United States District Court for the Southern District of New York alleging that Bangor had violated, *inter alia*, section 14(e) of the Securities Exchange Act of 1934, rule 10b-5, and rule 10b-6.<sup>48</sup> Chris-Craft sought to temporarily enjoin Bangor from voting the shares it acquired in the three negotiated purchases and from accepting any shares tendered by Piper shareholders pursuant to the exchange offer.<sup>49</sup> The district court denied Chris-Craft's prayer for a preliminary injunction.<sup>50</sup> This holding was affirmed by the Court of Appeals for the Second Circuit.<sup>51</sup> The court of appeals remanded the case to allow Bangor the opportunity to demonstrate that the negotiated purchases it made while awaiting the effective date of its exchange offer fell within an exception to rule 10b-6.<sup>52</sup>

On remand, Chris-Craft abandoned its request for a preliminary

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44. *Id.* at 7.

45. *Id.*

46. *Id.* at 8.

47. On September 5, 1969, Bangor held over 50% of Piper's outstanding stock and Chris-Craft held 42%. *Id.* at 9.

48. Section 14(e) is set forth in the text accompanying note 13 *supra*; rule 10b-5 is set forth in note 34 *supra*. Rule 10b-6, 17 C.F.R. 240.10b-6 (1979), in essence, makes it unlawful for any underwriter or other person participating in a "distribution" to bid for or purchase any units of the security being distributed, with certain specified exceptions. Chris-Craft alleged that Bangor violated rule 10b-6 when it purchased stock from three large institutional investors while awaiting the effective date of the exchange offer. 430 U.S. at 9.

49. *Id.*

50. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 303 F. Supp. 191 (S.D.N.Y. 1969). Judge Tenney denied injunctive relief because Chris-Craft failed to carry the burden of proving that it would suffer irreparable harm if the injunction were not granted. *Id.* at 199.

51. *Chris-Craft Indus., Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970).

52. *Id.* at 570.

injunction and sought only damages.<sup>53</sup> The district court held that Chris-Craft had standing to seek damages for Bangor's alleged violations of rule 10b-5, but ruled against Chris-Craft on the merits.<sup>54</sup> Therefore, the court found it unnecessary to decide whether a tender offeror had standing to sue under section 14(e).<sup>55</sup> The court felt that its decision as to Chris-Craft's rule 10b-5 claims would be dispositive on the merits of any claim brought under section 14(e) because of the similar language in section 14(e) and rule 10b-5.<sup>56</sup> On appeal, the court of appeals unanimously held that Chris-Craft had standing to sue for damages under section 14(e).<sup>57</sup> The court did not address any claims made by Chris-Craft under rule 10b-5 because it believed that section 14(e) was "the antifraud provision which more appropriately provides the basis for [Chris-Craft's] standing to sue. . . ."<sup>58</sup> The court based its decision on the language of the statute and prior case law.<sup>59</sup> In reaching its decision, the court said:

We can conceive of no more effective means of furthering the general objective of section 14(e) than to grant a victim of violations of the statute standing to sue for damages . . . . Particularly in light of the enforcement rationale of [J.I. Case v. Borak], we believe it is both necessary and appropriate that [Chris-Craft] should be granted standing to sue for damages.<sup>60</sup>

The court of appeals remanded the case for the purpose of determining damages.<sup>61</sup> The district court awarded Chris-Craft damages in the sum of \$1,673,988.<sup>62</sup> The court of appeals augmented this award

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53. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 337 F. Supp. 1128, 1136 n. 8 (S.D.N.Y. 1971).

54. *Id.* at 1133.

55. *Id.* at 1134, 1140.

56. *Id.* See note 37 *supra* and accompanying text.

57. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 358 (2d Cir. 1973).

58. *Id.* at 359.

59. *Id.* The court relied on the following cases: *Electronic Speciality Co. v. Int'l. Controls Corp.*, 409 F.2d 937 (2d Cir. 1969); *Butler Aviation Int'l, Inc. v. Comprehensive Designers Inc.*, 425 F.2d 842 (2d Cir. 1970); *Susquehanna Corp. v. Pan Am. Sulphur Co.*, 423 F.2d 1075 (5th Cir. 1970); *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970); *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973); *Iroquois Indus., Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970). See 480 F.2d at 360. See also notes 97-107 & 129-33 *infra* and accompanying text for a discussion of these cases.

60. 480 F.2d at 361.

61. *Id.* at 379-80.

62. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 384 F. Supp. 507, 523 (S.D.N.Y. 1974). The court determined that the reduction in appraisal value of Chris-Craft's holding in Piper

to over thirty-five million dollars.<sup>63</sup>

The United States Supreme Court granted certiorari to determine whether a defeated tender offeror has an implied cause of action for damages under section 14(e).<sup>64</sup> The Court held that a tender offeror, suing in its capacity as a takeover bidder, does not have standing to sue for damages under section 14(e).<sup>65</sup> In reaching its decision to deny standing under section 14(e) to a defeated tender offeror, the Court extensively discussed the legislative history of the Williams Act.<sup>66</sup> Relying on the statements of Senator Williams and others,<sup>67</sup> the Court concluded that the Williams Act was intended to protect the shareholders of the target corporation, not the defeated tender offeror.<sup>68</sup> The Court stated that its "conclusion as to the legislative history is confirmed by the analysis in *Cort v. Ash*."<sup>69</sup> In *Cort*,<sup>70</sup> Ash alleged that directors of Bethlehem Steel Corporation had violated the Federal Election Campaign Act of 1971,<sup>71</sup> a criminal statute prohibiting corporations from making contributions or expenditures in connection with specified federal elections. The district court denied Ash's request for a preliminary injunction.<sup>72</sup> The Court of Appeals for the Third Circuit affirmed the

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attributable to Bangor becoming the majority shareholder was \$2.40 per share. The court multiplied the \$2.40 by the number of shares held by Chris-Craft (697,495) to arrive at the damages award.

63. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 190 (2d Cir. 1975). The court held that "the correct formula for determining [Chris-Craft's] damages is the difference between the price [Chris-Craft] paid for its Piper stock (\$63.98) and the price it could have obtained for it through a public offering after [Bangor] unlawfully acquired control (\$27.00). This results in damages of \$36.98 per share, or a total of \$25,793,365 for [Chris-Craft's] block of 697,495 shares." Approximately 10 million dollars in interest was added to this figure, making the total award over 35 million dollars.

64. *Piper v. Chris-Craft Indus., Inc.*, 425 U.S. 910 (1976).

65. 430 U.S. at 42.

66. *Id.* at 22-37.

67. See text accompanying note 31 *supra* for a discussion of the remarks by Senator Williams. The Court also relied upon the comments of Manuel Cohen, the then chairman of the SEC. 430 U.S. at 27-28.

68. *Id.* at 35. It should be noted that the Court did not consider Chris-Craft an investor even though it held stock in Piper. The Court reasoned that because Chris-Craft was the tender offeror, it was not "in the posture of a target shareholder confronted with the decision of whether to tender or retain its stock." See note 118 *infra* and accompanying text.

69. 430 U.S. at 37.

70. 422 U.S. 66 (1975).

71. See 2 U.S.C. § 441 (b) (1976) (current version).

72. 350 F. Supp. 227, 231 (E.D. Pa. 1972).

denial of the preliminary injunction but reversed the decision to grant Ash summary judgment.<sup>73</sup> The Supreme Court refused to imply a cause of action for Ash's derivative suit and stated that his remedy, if any, must be under state law.<sup>74</sup> In its opinion the Supreme Court set out the following four factors as relevant in determining whether a cause of action may be implied from a statute which does not expressly provide for one:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? . . .

Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . .

Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . .

And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? . . .<sup>75</sup>

Addressing the first *Cort* factor, the *Piper* Court relied on statements made in the congressional debates and reports,<sup>76</sup> and determined that the tender offeror was not a member of the class "for whose *especial* benefit the statute was enacted."<sup>77</sup> Instead, the Court concluded that the tender offeror "was a member of the class whose activities Congress intended to regulate."<sup>78</sup> Regarding the second factor, the Court noted immediately that there was no evidence of legislative intent to create or deny a remedy in favor of tender offerors.<sup>79</sup> However, the Court interpreted the legislative documents as evincing "the narrow intent to curb the unregulated activities of tender offerors."<sup>80</sup> In addition, the Court rejected the argument that section 14(e) extended standing to tender offerors because it did not contain the "purchaser-seller" requirement.<sup>81</sup> With regard

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73. 496 F.2d 416, 421-22 (3d Cir. 1974).

74. 422 U.S. at 78.

75. *Id.* (citations omitted). It should be noted that the Court did not indicate whether these four factors should be construed conjunctively or disjunctively. See note 123 *infra* and accompanying text.

76. See text accompanying notes 19-23 *supra*.

77. 430 U.S. at 37.

78. *Id.*

79. *Id.* at 38.

80. *Id.*

81. *Id.* at 38-39. The Court conceded that shareholder offerees who did not tender their

to the third factor, the Court concluded that the granting of remedial relief would be inconsistent with the underlying purpose of the Williams Act.<sup>82</sup> The Court reasoned that a judgment in favor of the tender offeror would work a hardship on the shareholders who exchanged their stock for shares in the white knight by forcing them to bear part of the burden of paying the damages award to the defeated tender offeror.<sup>83</sup> The Court, applying the fourth factor, determined that the matter was better relegated to state law, "at least to the extent that the offeror seeks damages for having been wrongfully denied a 'fair opportunity' to compete for control of another corporation."<sup>84</sup>

The Court distinguished *J.I. Case Co. v. Borak*<sup>85</sup> from the case at bar.<sup>86</sup> In *Borak*, a shareholder of J.I. Case brought suit alleging deprivation of the pre-emptive rights of all shareholders by reason of a merger between Case and American Tractor Company. The shareholder claimed that Case Company had violated section 14(a)<sup>87</sup> of the Securities Exchange Act of 1934 by issuing false and misleading proxy material. The trial court held that it could not grant remedial relief in a private suit based on violations of section 14(a). The court of appeals reversed.<sup>88</sup> The Supreme Court affirmed and

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stock due to fraudulent misrepresentation by a party might have standing under section 14(e) because it does not contain the purchaser-seller requirement. But, the Court clearly stated that the increased protection, if any, bestowed on shareholder offerees could not be interpreted as giving protection to tender offerors. *Id.* See notes 34-38 *supra* and accompanying text.

82. 430 U.S. at 39.

83. *Id.*

84. *Id.* at 41. The Court offered little reasoning and authority to support its conclusion that the damages cause of action was traditionally relegated to state law. In fact, the Court acknowledged the "pervasiveness" of the federal securities law. It is possible that the court reached the conclusion it did in order to avoid deciding whether the *Cort* factors should be construed conjunctively or disjunctively. See notes 122-23 *infra* and accompanying text.

85. 377 U.S. 426 (1964).

86. 430 U.S. at 41.

87. 15 U.S.C. § 78n(a) (1976), which provides:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

88. 317 F.2d 838 (7th Cir. 1963).

implied a damages remedy under section 14(a) of the Securities Exchange Act of 1934 because it believed that such a remedy was necessary to effectuate the legislative purpose of protecting investors.<sup>89</sup>

The *Piper* Court distinguished *Borak* by explaining that "creating a damages action in favor of [the defeated tender offeror would be] unnecessary to ensure the fulfillment of Congress' purposes in adopting the Williams Act."<sup>90</sup>

In his dissenting opinion, Justice Stevens stated that *Borak*, not *Cort*, should have been the controlling authority.<sup>91</sup> He believed that the same factors which made *Borak* distinguishable from *Cort* were present in *Piper*.<sup>92</sup>

In this case, as in *Borak*, there is "at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone;" . . . there is a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard;" . . . the private remedy is necessary to effectuate the congressional goal; . . . and that goal will accordingly be hindered if the plaintiff is relegated to an inadequate state remedy.<sup>93</sup>

Justice Stevens explained that the presence of these factors excused the tender offeror from meeting the "especial class" test of *Cort*.<sup>94</sup>

Justice Stevens also advanced a policy argument for finding an implied cause of action for damages in favor of the tender offeror. He reasoned that the high cost of complex litigation precludes most individual investors from bringing suit; therefore, granting the tender offeror standing to sue would provide the most effective deterrent to the perpetration of fraud on shareholders. Justice Stevens also pointed out that granting standing to a tender offeror would

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89. 377 U.S. at 432.

90. 430 U.S. at 41.

91. *Id.* at 66 (Stevens, J., dissenting). Justice Stevens noted that *Borak* was distinguished, not overruled, by *Cort*. *Id.*

92. *Id.*

93. *Id.* (citing *Cort v. Ash*, 422 U.S. at 79, 82, 85). It has been argued that Justice Stevens' reasoning was sounder than that of the majority. The author concluded that because courts recognized causes of action under sections 14(a) and 10(b), the sections after which section 14(e) is patterned (See 113 CONG. REC. 24665 (1967) (Remarks of Senator Williams)), Congress probably intended to extend the same protection to tender offerors under the Williams Act. Note, *Chris-Craft: Changing Perspectives on Contests for Corporate Control*, 6 HOFSTRA L. REV. 203, 225 (1977).

94. 430 U.S. at 66-67 (Stevens, J., dissenting).

protect those shareholders of the target who accepted the exchange offer and became shareholders of the tender offeror.<sup>95</sup>

#### IV. Law Prior To *Piper*

Prior to *Piper*, the federal courts liberally granted standing under section 14(e). Indeed, courts seemed to follow the opinion of the *Borak* Court that in controversies involving securities laws, courts should not hesitate to imply a private right of action when to do so would effectuate the purpose of the statute involved.<sup>96</sup> This position is reflected in *H.K. Porter, Inc. v. Nicholson Tile Co.*<sup>97</sup> In *Porter*, plaintiff made a tender offer to the stockholders of Nicholson to buy 437,000 shares. By the closing date of the offer, only 132,292 shares were tendered. Plaintiff then brought an action for damages in district court contending that Nicholson, in response to plaintiff's tender offer, issued false, fraudulent and misleading statements in order to persuade its shareholders not to tender their stock, in violation of rule 10b-5, section 10(b) and section 14(e) of the 1934 Securities Exchange Act. The district court dismissed the section 10(b) and rule 10b-5 claims,<sup>98</sup> but let stand the section 14(e) claim.<sup>99</sup> The Court of Appeals for the First Circuit affirmed.<sup>100</sup> The court based its decision to grant standing on the history of the Williams Act, the reasoning expressed in *Borak*, and the argument that section 14(e) was intended to expand the standing allowed under section 10(b) and rule 10b-5.<sup>101</sup> The second<sup>102</sup> and fifth<sup>103</sup> circuits also have granted standing to sue for damages under section 14(e).

The federal courts were even more liberal in granting standing to sue for injunctive relief under section 14(e). In *Butler Aviation In-*

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95. *Id.* at 68.

96. 377 U.S. at 432-34.

97. 482 F.2d 421 (1st Cir. 1973).

98. 341 F. Supp. 508 (D.R.I. 1972).

99. 353 F. Supp. 153 (D.R.I. 1973) (supplemental opinion).

100. 482 F.2d 421 (1st Cir. 1973).

101. *Id.* at 423-25.

102. *Lowenschuss v. Kane*, 520 F.2d 255 (2d Cir. 1975). (shareholder of target permitted to sue tender offeror for damages resulting from the alleged breach of the tender offer contract).

103. *Smallwood v. Pearl Brewing*, 489 F.2d 579 (5th Cir. 1974), (court held that plaintiff may have cause of action under § 14(e) if injured by fraudulent activities connected with tender offer).

*ternational, Inc. v. Comprehensive Designers, Inc.*,<sup>104</sup> the target alleged that the tender offeror had violated section 14(e) by misstating earnings in the annual report. The Court of Appeals for the Second Circuit expressly held that the target had standing to seek preliminary injunctive relief under section 14(e).<sup>105</sup> In *Mesa Petroleum Co. v. Aztec Oil & Gas Co.*,<sup>106</sup> the district court implied a cause of action under section 14(e) in favor of a tender offeror seeking to enjoin target's management from interfering with the offeror's communication with target shareholders. Several other cases have noted, in dicta, that preliminary injunctive relief may be granted to a party suing under section 14(e).<sup>107</sup> Furthermore, in *Electronic Specialty Co. v. International Controls Corp.*,<sup>107.1</sup> the Second Circuit granted target management and non-tendering shareholders standing to seek permanent injunctive relief.<sup>107.2</sup>

The Supreme Court, by holding in *Piper* that a tender offeror does not have standing to sue for damages under section 14(e), did not follow the trend in the lower federal courts to grant standing liberally. The *Piper* decision settles the standing issue with respect to the tender offeror's right to sue for damages. The tender offeror's right to seek injunctive relief under section 14(e) will next be discussed.

## V. Injunctive Relief

Whereas the Supreme Court of the United States directly ad-

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104. 425 F.2d 842 (2d Cir. 1970).

105. *Id.* at 843 n.1.

106. 406 F. Supp. 910 (N.D. Tex. 1976).

107. After holding that the tender offeror had standing under rule 10b-5 to sue target for injunctive relief under the "forced seller" principle, the court, in *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 798-99 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), said that the enactment of section 14(e) would allow tender offeror to sue even if he did not have status of a "forced seller." In *Iroquois Indus., Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970), a tender offeror brought an action under rule 10b-5 against target management for management's alleged fraudulent activity in resisting the offer. The court, relying on the *Birnbaum* rule, dismissed the rule 10b-5 claims, but hinted that standing might be afforded a tender offeror under section 14(e). *Id.* at 969-70. In *Electronic Specialty Co. v. Int'l Controls Corp.*, 409 F.2d 937 (2d Cir. 1969), target and non-tendering shareholders brought an action against the tender offeror for alleged violations of sections 14(d) and (e) and rule 10b-5. Though the court could have avoided the standing issue, *id.* at 945, it stated, in dicta, that the target and non-tendering shareholders could bring an action for a preliminary injunction under section 14(e).

107.1. 409 F.2d 937 (2d Cir. 1969).

107.2. See notes 130-40 *infra* and accompanying text for further discussion of this case.



dressed in *Piper v. Chris-Craft* the issue of a tender offeror's right to sue for damages under section 14(e) of the Securities Exchange Act, the nation's highest court has never decided whether a tender offeror has standing to seek *injunctive relief* under that section. In fact, the *Piper* Court expressly noted that it was not ruling on the standing question with respect to injunctive relief.<sup>108</sup> Because the effects of preliminary and permanent injunctions differ significantly, each remedy will be analyzed separately.

### A. Preliminary Injunction

If, during a tender offer contest, the tender offeror believes that the white knight and/or target management have acted fraudulently, the tender offeror should be granted standing under section 14(e) to seek an injunction ordering the white knight and/or target management to disclose further information or to correct their misrepresentations.<sup>109</sup> Language from *Piper* supports this position. The *Piper* Court stated that "injunctive relief at an earlier stage of the contest is apt to be the most efficacious form of remedy" in cases involving violations of section 14(e).<sup>110</sup> In addition, the *Piper* Court quoted with approval Judge Friendly's observation that "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, 'is the time when relief can best be given.'"<sup>111</sup>

Some of the Court's reasoning in *Piper* is irrelevant to the injunctive relief question. The Court noted that if it granted standing to the tender offeror, investors who exchanged their shares in the target corporation for stock in the competing tender offeror would be forced to bear a part of the damages award.<sup>112</sup> The Court believed that such a result would contravene the intended purpose of the

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108. 430 U.S. at 47 n.33. Specifically, the Court said: "We intimate no view upon whether as a general proposition a suit in equity for injunctive relief, as distinguished from an action for damages, would lie in favor of a tender offeror under . . . § 14(e) . . . ."

109. The tender offeror conceivably could seek injunctions designed to suspend the voting rights of the shares acquired by the white knight or to prevent the white knight from acquiring any more shares. See text accompanying note 129 *infra* for a discussion of these types of injunctions.

110. 430 U.S. at 40 n.26.

111. *Id.* at 42 (citing *Electronic Speciality Co. v. Int'l Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969)).

112. See text accompanying note 83 *supra*.

Williams Act to protect the investor.<sup>113</sup> This concern is irrelevant to cases where injunctive relief is sought because the granting of such remedy does not impose a similar financial burden on the shareholders of the competing tender offeror.<sup>114</sup>

Applying the relevant factors test established in *Cort v. Ash*<sup>115</sup> to a case in which injunctive relief is sought produces an inconclusive answer. The result of applying the first two *Cort* factors<sup>116</sup> suggests that the tender offeror should be denied standing to seek injunctive relief under section 14(e). In *Piper*, the Supreme Court concluded that investors, not tender offerors, made up the class for whose especial benefit the statute was enacted.<sup>117</sup> In addition, the *Piper* Court indicated, in dicta, that even if the tender offeror asserted standing as a shareholder of the target, he would not be considered a member of the especial class.<sup>118</sup> The fact that the tender offeror seeks injunctive relief, rather than damages, in no way impeaches the validity of the *Piper* Court's conclusions in this area. Similarly, the *Piper* Court's determination that there was no indication of legislative intent to create a remedy in favor of the tender offeror<sup>119</sup> is equally valid in cases where injunctive relief is sought.

However, when the third *Cort* factor<sup>120</sup> is applied to a case where injunctive relief is sought the result suggests that standing should

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113. 430 U.S. at 39.

114. See *Weeks Dredging & Contracting, Inc. v. American Dredging Co.*, 451 F. Supp. 468, 475-76 (E.D. Pa. 1978). See note 127 *infra* and accompanying text for a discussion of this case. The court also believed that granting a tender offeror standing to sue for damages under section 14(e) would deter some corporations from making competing tender offers for fear of incurring great expense in defending suits brought by defeated tender offerors or target management. 430 U.S. at 40. Though this concern arguably is applicable to the standing question with respect to injunctive relief, on balance, it is insufficient to compel denial of standing to a tender offeror.

115. 422 U.S. 66 (1975). For a detailed discussion of *Cort*, see notes 70-75 *supra* and accompanying text.

116. See text accompanying note 75 *supra*.

117. 430 U.S. at 37. See text accompanying notes 76-78 *supra*.

118. The Court specifically stated:

As a tender offeror actively engaged in competing for [the target's] stock, [the tender offeror] was not in the position of a target shareholder confronted with the decision of whether to tender or retain its stock . . . [T]he fact that [the tender offeror] necessarily acquired [the target's] stock as a means of taking over [the target] adds nothing to its § 14(e) standing arguments.

430 U.S. at 35-36.

119. *Id.* at 38-39. See text accompanying notes 75, 79 & 80 *supra*.

120. See text accompanying note 75 *supra*.

be granted to the tender offeror. The issuance of a preliminary injunction is consistent with the underlying aim of the statute because such a judgment does not affect adversely any investor and ensures that investors will receive complete and accurate information upon which to base their investment decisions.<sup>121</sup> Similarly, the result of applying the fourth *Cort* factor to an action where injunctive relief is requested demands that a cause of action be implied in favor of the tender offeror. In light of the pervasiveness of the federal securities law, this cause of action cannot be found to be one traditionally relegated to state law.<sup>122</sup>

Because the application of the *Cort* factors to a case where injunctive relief is sought yields an equivocal answer, the ultimate decision of whether to imply a cause of action rests on a determination of whether the factors should be construed conjunctively or disjunctively. The *Cort* Court did not specify how the factors should be construed.<sup>123</sup> In *Piper*, the Court was not forced to give its opinion as to how the factors should be construed because the *Cort* test produced an unequivocal answer. It appears that the district courts have reduced the determination of whether a cause of action should be implied in favor of a tender offeror seeking injunctive relief to a function of one factor: whether implying a cause of action would be inconsistent with the underlying legislative purpose. In *Humana, Inc. v. American Medicorp, Inc.*,<sup>124</sup> the court granted a tender offeror standing to sue a competing tender offeror for injunctive relief under section 14(e). Plaintiff sought increased information about the competitor's offer and the nature of its stock to enable the offerees to

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121. See note 114 *supra* and accompanying text.

122. The fact that the *Piper* Court offered little reasoning and case law to support its conclusion that the damages cause of action was traditionally relegated to state law and the fact that it acknowledged the pervasiveness of the federal securities law casts doubt on the propriety of its conclusion. See note 84 *supra* and the accompanying text.

123. The *Cort* Court listed the factors in four sentences. The Court did not use the conjunctions "and" or "or" in laying out the factors. See text accompanying note 75 *supra*.

124. 445 F. Supp. 613 (S.D.N.Y. 1977). In *Humana*, the plaintiff sought to acquire 75% of American Medicorp stock. Medicorp's board of directors decided that the offer was not advantageous for its shareholders and advised them not to tender their stock. Two months later Trans World Airlines and its wholly-owned subsidiary, Hilton International Company, made a competing tender offer for Medicorp stock. While both offers were still open, the plaintiff amended its complaint to include TWA and Hilton and to request injunctive relief against both. The court, admitting that because of urgency the issue was not thoroughly analyzed, held that the plaintiff-tender offeror had standing under section 14(e) to sue for injunctive relief and granted the amendment of the second complaint.

make an informed judgment.<sup>125</sup> In reaching its decision, the court stated that "the critical factor is not whether Humana may be benefited by the suit but whether the stockholders of the target company would be benefited if the allegations of the complaint are proven to be true and the relief requested is granted."<sup>126</sup> The reasoning employed in *Humana* was accepted by the court in *Weeks Dredging and Contracting, Inc. v. American Dredging Co.*,<sup>127</sup> a case in which a tender offeror was permitted to sue the target corporation for injunctive relief under section 14(e).

Notably, the *Cort* test was not applied in *Humana* or *Weeks*. The only case which discusses the *Cort* relevant factor test is *Foremost—McKesson, Inc. v. Posner*.<sup>128</sup> In *Foremost—McKesson*, the court held that the target management had the right to seek a preliminary injunction against a tender offeror under section 14(e) even though it found that the target management was not a member of the especial class and despite the Supreme Court's conclusion in *Piper* that the statute was designed to protect only investors.

The conclusions of the lower courts are sound, even though their opinions fail to apply strictly the *Piper* analysis. It is immaterial that the party bringing the suit is not of the especial class or that there is no indication of legislative intent to create a remedy in favor of the tender offeror as long as members of the especial class are benefited by the action. Therefore, a tender offeror should be afforded standing under section 14(e) to seek an injunction which would require the adversary to reveal further information or correct

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125. *Id.* at 616.

126. *Id.* In moving toward the ultimate articulation of this test, the court relied heavily on Judge Friendly's observation in *Electronic Specialty* (see note 111 *supra* and accompanying text) and Chief Justice Warren Burger's statement in *Piper* (see note 110 *supra* and accompanying text). The court distinguished *Piper* and *Crane Co. v. American Standard, Inc.*, 439 F. Supp. 945 (S.D.N.Y. 1977), which was relied upon by the defendant, on the fact that these cases involved actions for damages.

127. 451 F. Supp. 468, 476 (E.D. Pa. 1978). In this case *Weeks Dredging and Contracting* (*Weeks*) attempted to take over *American Dredging Company* (*American*) by directing a tender offer to the *American* shareholders. *American*, in an effort to resist the takeover, made statements concerning the offer to the press and to the shareholders. *Weeks* then brought an action for preliminary injunctive relief against *American* in which *Weeks* alleged that *American's* statements to the press and shareholders were false and misleading and thereby violated section 14(e). The court found that the tender offeror had standing to seek preliminary injunctive relief under section 14(e) and granted the relief requested.

128. No. 76-338 (N.D. Cal., filed April 20, 1977).

previous disclosures because the investors are the direct beneficiaries of the action.

The tender offeror, however, may seek other types of preliminary injunctions.<sup>129</sup> For example, the tender offeror may want to enjoin the white knight from soliciting or acquiring any more shares during the pendency of the suit, or from exercising voting rights attached to those shares. Tender offerors should be granted standing to sue for such injunctions because such injunctions ultimately protect the investors, a result desired by the Williams Act. The effect of such injunctions is to maintain the status quo while the court determines whether the white knight or the target management indeed has violated section 14(e). The investor is not harmed by the imposition of such injunction; he need only postpone the tendering of his stock until the court makes its decision. These injunctions protect the investor by giving him the benefit of the court's ruling before he is forced to decide whether or not to tender his shares.

## B. Permanent Injunction

A tender offeror injured by the fraudulent activity of the white knight may attempt to permanently enjoin the white knight from acquiring any more stock in the target. Alternatively, the tender offeror may attempt to enjoin the white knight from voting any of the shares it acquired or to have the white knight divest itself from the stock it already acquired. To date no court has addressed the issue of whether a tender offeror may sue for permanent injunctive relief. Target management's standing to seek permanent injunctions, however, has been discussed in several cases.

In *Electronic Specialty Company v. International Controls Corporation*,<sup>130</sup> a case decided prior to *Piper*, target management and a non-tendering shareholder, alleging that the tender offeror violated, *inter alia*, section 14(e) by misstating material information concerning the tender offer, sought to force the tender offeror to divest itself of the stock it acquired in the target and to refrain from voting the stock. The Second Circuit ruled that the plaintiffs had standing to seek the permanent injunction on the grounds that granting standing would best effectuate the legislative purpose of

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129. See *Electronic Specialty Co. v. Int'l Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969).

130. 409 F.2d 937 (2d Cir. 1969).

the Williams Act.<sup>131</sup> The court, however, denied plaintiff's request for relief on the merits.<sup>132</sup> The court reasoned that if the tender offeror were forced to divest the shares it acquired the price of the target's stock would be driven down, thereby injuring the non-tendering shareholders. Similarly, the court refused to order the tender offeror to relinquish its voting rights because it felt that such a disposition would have the same effect as a divestiture order. The court also noted that requiring the tender offeror to refrain from voting the shares would leave the direction of the company to less than fifty per cent of the stock, an "unhealthy" situation.<sup>133</sup> The relevance today of *Electronic Specialty* may be limited. First, because *Electronic Specialty* was decided prior to *Piper*, the methodology formulated therein was not applied. Second, and more important, the reason espoused in *Electronic Specialty* for denying the requested relief was cited later in *Piper* as a factor relevant to the determination of whether to grant standing.

In *Becton Dickinson and Company v. Sun Company, Inc.*,<sup>134</sup> a case consolidating SEC and private actions, the defendants purchased, over several days, thirty-four percent of the target company's outstanding stock. Defendants, in response to allegations that they had violated, *inter alia*, section 14(e), argued that the target lacked standing because it was not an intended beneficiary of the Williams Act. The district court held that under these circumstances target management has the right to sue for post-acquisition equitable relief.<sup>135</sup> In reaching its decision to grant standing the court emphasized that the effect of a preliminary injunction was negated by the defendants' secret and rapid takeover. The court explained that denying the target standing would, in effect, allow a tender offeror implementing "quick strike" tactics to deprive the target a meaningful remedy.<sup>136</sup>

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131. *Id.* at 946. The district court granted standing by analogizing section 14(e) to the proxy rule established under section 14(a). Section 14(a) makes it unlawful to solicit proxies in contravention of the rules and regulations promulgated by the SEC. Section 14(a) is set forth in note 87 *supra*. See *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2d Cir. 1966). The circuit court noted that the analogy to section 14(a) was not perfect, and therefore refused to rest its decision solely on that basis.

132. 409 F.2d at 947.

133. *Id.* at 947-48.

134. 475 F. Supp. 783 (S.D.N.Y. 1979).

135. *Id.* at 816.

136. *Id.* at 817.

The precise effect of *Becton Dickinson* on the question of whether target management may sue for permanent injunctive relief under section 14(e) is unclear. Though *Becton Dickinson* was decided after *Piper*, the case did not discuss the methodology set forth therein. Furthermore, there is language in *Becton Dickinson* which suggests that target management may be granted standing only when the tender offeror's tactics render meaningless the imposition of a preliminary injunction.<sup>137</sup> For these reasons, it appears that *Becton Dickinson* does not stand for the broad proposition that target management has standing under section 14(e) to sue for permanent injunctive relief.

In both *Electronic Specialty* and *Becton Dickinson*, target management initiated the suit for permanent injunctive relief. Whether these cases may be used to support a finding that the tender offeror has standing to sue for permanent injunctive relief is subject to speculation. The intent of the drafters of the Williams Act was to benefit only investors.<sup>138</sup> Although target management has been granted standing in several cases, it does not necessarily follow that a tender offeror should be granted standing because the relationship between the tender offeror and the investors is significantly different from the relationship between target management and the investors.<sup>139</sup> As noted in *Electronic Specialty*, target management, ostensibly at least, is in the position of representing the shareholders' interest whereas the tender offeror is not.<sup>140</sup>

The case of *Humana, Inc. v. American Medicorp, Inc.*,<sup>141</sup> in which a tender offeror was granted standing to sue for a preliminary injunction, provides no compelling reasons for ruling that a tender offeror may seek permanent injunctive relief under section 14(e). The effect of granting tender offerors standing to sue for permanent injunctive relief is more similar to allowing the tender

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137. *Id.*

138. See notes 29-33 *supra* and accompanying text.

139. As noted in the text accompanying note 29 *supra*, the drafters of the Williams Act did not intend to favor target management over the tender offeror. Strictly construed, this intention implies that the target management and the tender offeror should be treated equally, *i.e.*, if the target management is granted standing, so should the tender offeror. For reasons discussed later, this conclusion should not be drawn.

140. Shareholders are afforded state causes of action in order to protect them against management's abuse of its representative position. See, *e.g.*, *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 128 N.E.2d 291, 51 A.L.R.2d 860 (1955).

141. See notes 124-26 *supra* and accompanying text for a discussion of this case.

offeror to sue for damages than for preliminary injunctive relief because the imposition of a permanent injunction will inflict a financial burden on shareholders.<sup>142</sup> Therefore, if protection of the investor is the paramount consideration, the rationale of *Piper* should be followed and the tender offeror should not be granted standing under section 14(e) to sue for permanent injunctive relief.

## VI. Conclusion

In *Piper v. Chris-Craft*, the United States Supreme Court refused to imply a cause of action under section 14(e) in favor of a tender offeror suing for damages. The Court, however, expressly left open the question of whether a tender offeror has standing to sue for injunctive relief under section 14(e). In *Piper*, the Court established the methodology for determining whether a cause of action should be implied under a certain statute. As part of its analysis, the *Piper* Court applied the facts of its case to the "relevant factors" test established in *Cort v. Ash*. The district courts which have addressed the standing question with respect to injunctive relief have based their decisions, in effect, on one factor: whether implying a cause of action would be inconsistent with the underlying legislative purpose.

A tender offeror should have standing to seek preliminary injunctive relief because investors are the ultimate beneficiaries of the action; they will be assured of complete and accurate information as a result of the suit. In contrast, implying a cause of action in favor of a tender offeror seeking permanent injunctive relief does not serve the investors' best interests, and therefore should be denied.

James A. Scaduto

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142. See text accompanying note 133 *supra*.



