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## TENDER OFFERORS: ENTER THE CONTROL BATTLE AT YOUR OWN RISK

*To analyze effectively the evolution of the cash tender offer as a mechanism for acquiring corporate control, this Comment first examines the historical need for recognition of cash tender offer. The author then discusses regulation of cash tender offers through section 14(e) of the Securities Exchange Act of 1934 and traces judicial attempts to delineate the scope of section 14(e). Finally, the Comment examines the Supreme Court's latest pronouncement concerning the scope and proper judicial interpretation of section 14(e).*

The tender offer is an established mechanism utilized by aggressor corporations to expand through the acquisition of other corporations. Cash tender offers were not subject to regulation under the federal securities laws prior to 1968. In an effort to preserve the integrity of the cash tender offer as a means of corporate acquisition, Congress enacted section 14(e) of the Securities Exchange Act of 1934 (1934 Act).<sup>1</sup> Section 14(e) is an antifraud provision specifically directed toward regulating cash tender offers by ensuring fair and adequate disclosure. Section 14(e) provides in pertinent part:

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 were 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 solicitations of security holders in opposition to or in favor of any such offer, request or invitation.<sup>2</sup>

In 1977, the Supreme Court rendered its definitive interpretation of section 14(e) in *Piper v. Chris-Craft Industries, Inc.*<sup>3</sup> by holding that a tender offeror when suing in its capacity as a takeover bidder does not have standing to sue for damages under the Williams Act. The Supreme Court's interpretation differed dramatically from the lower federal court's interpretation of section 14(e). After exploring the history and the regulation of cash tender offers, the meaning of these decisions is examined.

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1. 15 U.S.C. § 78n(e) (1976).

2. *Id.*

3. 430 U.S. 1 (1977).

*The Need for Regulation of Tender Offers*

As a means of acquiring control of a corporation, the cash tender offer<sup>4</sup> became popular in the 1960's when it was one of three major avenues to corporate acquisition available to an outside corporation. The other two avenues are the public exchange offer and the proxy fight.<sup>5</sup> In deciding which avenue to pursue, tactical considerations are paramount because these avenues are occasionally used against each other.<sup>6</sup> At the time cash tender offers and public exchange offers were employed most often, proxy fights were rarely utilized.

Although cash tender offers were free from regulation before 1968, proxy contests and public exchange offers were—and still are—subject to extensive federal regulation.<sup>7</sup> Individuals choosing the proxy contest are required to file advance copies of the proxy statement, which includes disclosure of substantial information on the corporation soliciting proxy votes. A private cause of action is available to maintain the integrity of takeover attempts through fair and adequate disclosure. The tender offeror is liable to the target company's shareholders for use of deceptive or false information in a proxy solicitation for securities.<sup>8</sup> Use of the public exchange offer requires

4. A cash tender offer is defined as

[a] public offer or solicitation by a company, an individual or a group of persons to purchase during a fixed period of time all or a portion of a class or classes of securities of a publicly held corporation at a specified price or upon specified terms for cash and/or securities.

Aranow & Einhorn, *Essential Ingredients of the Cash Tender Invitation*, 27 BUS. LAW. 415, 415 (1972).

5. SEC rule 10b-13, 17 C.F.R. § 240.10b-13 (1977), defines "exchange offer" to "include a tender offer for, or request or invitation for tenders of, any security in exchange for any consideration other than for cash." The terms "proxy fight" and "proxy" are not defined in the 1934 Act. The meaning of these terms is implied from the terms of § 14(a) of the 1934 Act, which regulates "proxies."

6. For example, in a contest between General Host Corp. and Greyhound Lines, Inc. for control of Armour & Co., General Host made an exchange offer of a package of securities consisting of a \$60 subordinated debenture and one and one-half warrants to purchase General Host common stock at \$45 per share. Wall St. J., Jan. 9, 1969, at 21, col. 1. Greyhound countered by making a cash tender offer of \$65 per Armour share, increased it to \$70, and then to \$72. *Id.*, Feb. 11, 1969, at 3, col. 2. The control contest culminated in Armour suing for an injunction of the exchange of securities offered by General Host. *Armour & Co. v. General Host Corp.*, 296 F. Supp. 470 (S.D.N.Y. 1969). Armour was denied its request for an injunction because there was no evidence that General Host had violated any securities laws.

7. Proxy fights are regulated by § 14(a) of the 1934 Act, 15 U.S.C. § 78n (1976), and by SEC rules promulgated pursuant thereto, 17 C.F.R. § 240.14a-1 to -103 (1977). Public exchange offers are regulated by the registration requirements of the Securities Act of 1933, 15 U.S.C. § 77aa (1976).

8. 17 C.F.R. § 240.14a-11 (1977). *See, e.g.*, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

registration of the security offered and advance filing of a prospectus with the Securities and Exchange Commission (SEC) which must also be presented to every target shareholder receiving the exchange offer. False or misleading information in the prospectus also engenders a private cause of action.<sup>9</sup>

Aggressive corporations increasingly turned to the unregulated cash tender offer, which allowed the corporation to set self-serving terms for its offer.<sup>10</sup> The absence of regulation of cash tender offers forced courts reviewing the challenged takeovers to rely on the general antifraud provisions<sup>11</sup> and the disparate rules and practices of the stock exchanges.<sup>12</sup> Another factor that encouraged proliferation of cash tender offers by aggressive corporations was the slight expenditure involved in conducting the cash tender offer.<sup>13</sup>

In 1968, Congress became alarmed at the dramatic growth of cash tender offers<sup>14</sup> due to the gap in federal regulations between cash tender offers and extensively regulated proxy fights and public exchange offers. This gap was closed by passage of the Williams Act,<sup>15</sup> which imposed disclosure requirements upon parties making cash tender offers.<sup>16</sup> The Williams Act was intended to put cash tender offers on equal footing with other methods of corporate acquisition<sup>17</sup> and covered private as well as on-the-market acquisitions.

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9. 15 U.S.C. § 77l (1976).

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

11. Reliance upon general antifraud provisions occurred most notably through implication or extrapolation of rule 10b-5. 17 C.F.R. § 240.10b-5 (1977).

12. S. REP. NO. 550, 90th Cong., 1st Sess. 4-5 (1967).

13. 113 CONG. REC. 24,664 (1967). The primary cost of a cash tender offer is the premium paid over the market price of the securities sought to be acquired. *See, e.g.,* Cohen, *Tender Offers and Takeover Bids*, 23 BUS. LAW. 611 (1968); Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317 (1967); Hayes & Taussig, *Tactics of Cash Takeover Bids*, HARV. BUS. REV., March-April, 1967, at 135.

14. This congressional alarm was compounded by the uncertain evolution of rule 10b-5 as applied by the courts to cash tender offer litigation. The leading articles on cash tender offers and rule 10b-5 illustrating this point are: Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149 (1966); Cohen, *Tender Offers and Takeover Bids*, 23 BUS. LAW. 611 (1968); Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317 (1967); Hayes & Taussig, *Tactics of Cash Takeover Bids*, HARV. BUS. REV., March-April, 1967, at 135.

15. 15 U.S.C. § 78n (1976).

16. *Id.* § 78n(d)(e).

17. S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967). *See, e.g.,* Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 318-22 (1967).

Originally, Senator Williams, the sponsor of the Williams Act, was primarily concerned with protecting incumbent corporate management from corporate raiders.<sup>18</sup> However, the Senator was subsequently persuaded that tender offers could in fact serve a very useful purpose by eliminating inefficient and inept management.<sup>19</sup> Therefore, references to corporate raiders were omitted from his bill, making it neutral by neither encouraging nor discouraging cash tender offers.<sup>20</sup> The main purpose of the bill was to protect investors by ensuring the conveyance of extensive and accurate information about the takeover attempt to public shareholders<sup>21</sup> rather than to “penalize . . . the legitimate businessman with legitimate methods and legitimate goals.”<sup>22</sup> The pervasive theme of the bill was disclosure,<sup>23</sup> requiring the dissemination of “material facts concerning the identity, background and plans of the person or group making a tender offer.”<sup>24</sup> The section of the bill specifically directed at regulating cash tender offers was section 14(e).

### *The Evolution of Section 14(e) in the Courts*

The Williams Act created new questions concerning civil liability under the securities laws. Section 14(e)—the antifraud provision of the Williams Act—provides a new basis of recovery for those involved in a tender offer battle. The courts have been quite liberal in delineating the intended beneficiaries of section 14(e) while remaining cognizant of the strict standing requirements of related antifraud provisions such as rule 10b-5.<sup>25</sup> It has been urged that to have stand-

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18. 111 CONG. REC. 28,258 (1965) (statement of Sen. Williams). Senator Williams introduced this version by sympathetically referring to “proud old companies rendered to corporate shells after white-collar pirates have seized control.” *Id.* at 28,257.

19. 113 CONG. REC. 24,664 (1967) (statement of Sen. Williams).

20. *Id.* See generally Griffin & Tucker, *The Williams Act, Public Law 90-439—Growing Pains? Some Interpretations with Respect to the Williams Act*, 16 HOW. L.J. 654 (1971); Note, *Cash Tender Offers*, 83 HARV. L. REV. 377, 381-89 (1969).

22. 111 CONG. REC. 28,260 (1965) (statement of Sen. Williams).

23. *Id.* This need for disclosure was also evidenced in the title of the bill: *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids*. Reinforcement is found in the ban of misleading information relating to proxy solicitations. See note 7 *supra*. In a sense, these provisions, designed to protect specific evils Congress thought existed in tender offer practices, constituted a code of “fair play.” Thus, the integrity of the tender offer as a mechanism of corporation acquisition was insured and preserved.

24. S. REP. NO. 550, 90th Cong., 1st Sess. 4 (1967).

25. 17 C.F.R. § 240.10b-5 (1977). There are a number of cases denying standing under rule 10b-5. *E.g.*, *Allied Artists Pictures Corp. v. D. Kaltman & Co.*, 283 F. Supp. 763 (S.D.N.Y. 1967); *Pacific Ins. Co. v. Blot*, 267 F. Supp. 956 (S.D.N.Y. 1967). *Cf.* *Moore v. Greatamerica Corp.*, 274 F. Supp. 490 (N.D. Ohio 1967) (granting standing under rule 10b-5). The requirements for a competing tender offeror to gain standing were not clear prior to the Williams Act. See, *e.g.*, *Iroquois Indus., Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert.*

ing in the federal courts there must be "a substantial claim founded 'directly' upon federal law."<sup>26</sup> Under section 14(e), the federally protected interest is in preserving the integrity of the tender offer as a mechanism of corporate acquisition by ensuring fair and adequate disclosure through the regulation of takeover attempts.

*Electronic Specialty Co. v. International Controls Corp.*<sup>27</sup> was the threshold case presenting the issue of standing under section 14(e). In this case, the plaintiff target company was given standing to sue the defendant tender offeror. The defendant had allegedly made misleading statements about its future plans for the target corporation. The Second Circuit determined that the purpose of section 14(e) is to ensure that full and accurate disclosures are made by the tender offeror and the target company management to the target company shareholders.<sup>28</sup> The court reasoned that liberal standing requirements were mandated by the express legislative intent.<sup>29</sup> The court declared that section 14(e) could properly be invoked as a means of protecting their separate interests by both the target company and the non-tendering shareholder in a suit for injunctive relief. The court urged district courts to be prompt in issuing injunctive relief in these circumstances but cautioned them to be wary of sham suits instituted for the purposes of harassing, delaying, or even defeating legitimate tender offers.<sup>30</sup> This case set an important precedent for according standing under section 14(e) but left open the question of who is entitled to damages and on what grounds.

This question was at issue in *Neuman v. Electronic Specialty Co.*<sup>31</sup>

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*denied*, 399 U.S. 909 (1970) (no standing for action against the target company). Standing under rule 10b-5 is addressed in Comment, *10b-5 Standing Under Birnbaum: The Case of the Missing Remedy*, 24 HASTINGS L.J. 1007 (1973).

26. Mishkin, *The Federal Question in the District Courts*, 53 COLUM. L. REV. 157, 168 (1953). The decisive cases on standing rendered by the United States Supreme Court ask the question whether plaintiff had "a personal stake in the outcome" of the controversy. See, e.g., *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968).

27. 409 F.2d 937 (2d Cir. 1969).

28. *Id.* at 945.

29. *Id.* at 946.

30. *Id.* The very nature of tender offers demands that immediate relief be available. The Second Circuit adhered to the *Electronic Specialty* precedent in *Butler Aviation Int'l v. Comprehensive Designers, Inc.*, 425 F.2d 842 (2d Cir. 1970). In *Butler*, the court granted standing to the target company to sue the tender offeror for misleading information in the tender offeror's annual report. The annual report was required to be submitted to the target company under § 14(e)'s disclosure requirements.

31. [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,591 (N.D. Ill. 1969).

The target company had presented misleading statements to its shareholders regarding the tender offer. The court granted these shareholders standing to sue the target company for damages because they had relied on the target company's misleading statements in their decision not to tender their shares to the tender offeror.<sup>32</sup>

In *Dyer v. Eastern Trust & Banking Co.*,<sup>33</sup> standing to sue for damages under section 14(e) was granted to a shareholder of the tender offeror on the ground that the plaintiff's shares in the defendant corporation had been devalued by approximately 33.27% because of the defendant's acquisition of three banks through an exchange tender offer.<sup>34</sup> The court noted that although section 14(e) did not expressly provide for a private cause of action, such a cause of action could reasonably be implied from section 14(e) by analogy to the private cause of action implied from rule 10b-5.<sup>35</sup> The defendant tender offeror urged that the plaintiff lacked standing because she was not a "purchaser or seller" at the time of the bank merger.<sup>36</sup> The court disposed of the defendant's contention by surveying cases granting standing under section 14(e)<sup>37</sup> and by noting that the congressional purpose behind the section was protection of the public investor from deceptive tactics in a tender offer. Using these cases

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32. *Id.* at 98,705-06.

33. 336 F. Supp. 890 (D. Me. 1971).

34. The court held exchange tender offers to be within § 14(e)'s antifraud provisions. *Id.* at 907.

35. *Id.* at 913-14.

36. *Id.* at 912. Rule 10b-5 provides, in pertinent part:

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,

.....

(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.

17 C.F.R. § 240.10b-5 (1977). In construing this rule, the courts have uniformly held that any plaintiff suing thereunder has no standing unless he expressly meets the "purchaser-seller" limitation imposed by rule 10b-5. *See, e.g.*, *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952) (the so-called *Birnbaum* doctrine established the purchaser-seller requirements for standing under rule 10b-5). This requirement has come under attack in the courts and by the commentators. *E.g.*, *Herpich v. Wallace*, 430 F.2d 792, 800 (5th Cir. 1970); Comment, *The Purchaser-Seller Requirement of Rule 10b-5 Reevaluated*, 44 U. COLO. L. REV. 151 (1972).

37. The cases surveyed were *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969) (standing granted to the tender offeror); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969) (standing granted to the target company and to a non-tendering shareholder); *Fabrikant v. Jacobellis*, [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,686 (E.D.N.Y. 1970) (standing granted to the target company and to a non-tendering shareholder); *Neuman v. Electronic Specialty Co.*, [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,591 (N.D. Ill. 1969) (standing granted to a non-tendering shareholder).

and the congressional purpose behind section 14(e) as a foundation, the court concluded that the plaintiff should have standing as a party obviously within the class designated for protection by Congress.<sup>38</sup>

In granting standing to the plaintiff shareholder, the *Dyer* court clearly adhered to the theory that in the context of tender offers, section 14(e) was essentially rule 10b-5 without the purchaser-seller limitation. This theory is in accord with the congressional intent to close the gap in tender offer regulations by passing the Williams Act.<sup>39</sup>

The case of *H.K. Porter Co. v. Nicholson File Co.*<sup>40</sup> expanded standing under section 14(e) to include specifically the tender offeror itself. The plaintiff tender offeror sued the target company over allegedly misleading statements concerning the plaintiff made by the target company to its own shareholders. These misleading statements caused the shareholders to refrain from tendering to the plaintiff, thereby effectively defeating its tender offer. The court concluded that an award of damages was warranted under section 14(e) in light of the legislative intent to protect shareholders.<sup>41</sup> Additionally, the court determined that Congress intended the courts to take a neutral stance in construing and enforcing the Williams Act, and therefore the target was not to be favored over the contestants.<sup>42</sup> Although the plaintiff failed to sue immediately after discovering the acts sought to be enjoined, the court stated that offenses in a tender offer battle do not usually come to light until the conclusion of the contest and that the suit thus was timely. Of paramount importance in this case is the court's rejection of the argument that the shareholders of the target company would be injured by an award of damages against the

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38. 336 F. Supp. at 914.

39. Statutory symmetry appears to be a basis for the liberalization of standing under § 14(e). Section 14(e) is deemed to be a "gap-filler" because it is sometimes interpreted to protect a class of plaintiffs (both corporate and individual) which is so involved in the tender offer contest that its right to make an investment decision based upon full disclosure by all participants in the contest must be safeguarded.

40. 353 F. Supp. 153 (D.R.I. 1972). This case was predicated specifically upon § 14(e). In *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), a claim was predicated upon rule 10b-5. The court granted standing to the tender offeror in *Crane* upon the tender offeror's 10b-5 basis for the suit. The *Crane* court, in dicta, opined that the tender offeror would have had standing under the newly enacted § 14(e) had the tender offeror asserted his claim upon § 14(e).

41. The court noted that defeat of a tender offer by false and misleading information "is of obvious concern to the [tender] offeror's shareholders" whose interest the plaintiff is protecting in this suit. 353 F. Supp. at 164.

42. *Id.*



target.<sup>43</sup> The *Porter* case keenly illustrates the desire of the courts to preserve the integrity of the cash tender offer by ensuring that the information required to be disclosed by both parties in a tender offer battle be fair and adequate.

The Second Circuit followed its *Porter* decision in *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*<sup>44</sup> by granting standing to appellant, the defeated tender offeror. The decision resulted in monumental litigation which eventually culminated in a United States Supreme Court decision.

#### THE CHRIS-CRAFT LITIGATION

##### *Statement of the Facts*<sup>45</sup>

Soon after the enactment of section 14(e), Chris-Craft Industries, Inc. (Chris-Craft), became embroiled in a tender offer takeover contest with Bangor Punta Corporation (BPC) for control of Piper Aircraft Corporation (Piper). The resulting litigation<sup>46</sup> provided further opportunity for judicial interpretation of section 14(e). The Second Circuit's analysis of the causation issue is especially important.<sup>47</sup>

In early 1969, Chris-Craft made a cash tender offer<sup>48</sup> to Piper and its shareholders. This tender offer bound Chris-Craft to purchase the

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43. Here the court noted that the shareholders of the tender offeror would be injured if damages were *not* assessed against the offending target company. It is the shareholders who must ultimately suffer if *any* damages are awarded. In this context, the court referred to the encouragement in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), for utilizing the damages remedy as "yet another enforcement mechanism of the securities laws." 353 F. Supp. at 165.

44. 480 F.2d 341 (2d Cir. 1973).

45. The facts summarized here are set forth in *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 349-55 (2d Cir. 1973).

46. The reported decisions, in chronological order, are *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 303 F. Supp. 191 (S.D.N.Y. 1969), *aff'd*, 426 F.2d 569 (2d Cir. 1970) (preliminary injunction denied); *SEC v. Bangor Punta Corp.*, 331 F. Supp. 1154 (S.D.N.Y. 1971), *modified*, 480 F.2d 341 (2d Cir. 1973) (BPC ordered to offer rescission to shareholders who had accepted its tender offer), *cert. denied*, 414 U.S. 924 (1973); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 337 F. Supp. 1128 (S.D.N.Y. 1971), *rev'd*, 480 F.2d 341 (2d Cir.) (Piper held liable in damages), *cert. denied*, 414 U.S. 910 (1973); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 384 F. Supp. 507 (S.D.N.Y. 1974), *modified*, 516 F.2d 172 (2d Cir. 1975) (damages award modified), *cert. granted*, 425 U.S. 910 (1976), *rev'd*, *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977); *Bangor Punta Corp. v. Chris-Craft Indus., Inc.*, 337 F. Supp. 1147 (S.D.N.Y. 1971), *aff'd*, 480 F.2d 341 (2d Cir.) (cross action against Chris-Craft by BPC dismissed), *cert. denied*, 414 U.S. 910 (1973).

47. The causation issue confronted by the Second Circuit in *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973), can be simply stated: Was Chris-Craft able to prove that the securities laws violations by the defendants caused Chris-Craft the injury for which it sought damages?

48. The offer was for \$65 per Piper share and ran from January 23 to February 3, 1969. *Id.* at 351.

first 300,000 Piper shares tendered, with an option to purchase any amount tendered over 300,000.<sup>49</sup> Piper management opposed Chris-Craft's takeover attempt by sending a letter to Piper shareholders. The letter labeled the offer as inadequate and against the best interests of Piper shareholders.<sup>50</sup> Piper management then attempted to merge with Grumman Aircraft Corporation (Grumman) by offering to sell Piper stock to Grumman while giving Grumman an option to return any Piper shares purchased within six months under a "put" agreement.<sup>51</sup> However, the attempted merger was unsuccessful because the New York Stock Exchange refused to list the new shares.<sup>52</sup>

Chris-Craft purchased 304,606 Piper shares in its cash tender offer<sup>53</sup> and then made an exchange offer<sup>54</sup> to Piper and its shareholders. In another effort to oppose acquisition by Chris-Craft, Piper management reached a merger agreement with BPC by which BPC was bound to exchange BPC stock for all the Piper shares controlled by Piper management (30.5% of Piper's outstanding stock). BPC then publicly announced its intention to make an exchange offer for Piper stock.<sup>55</sup> In its registration statement filed with the SEC for this exchange offer, BPC reported the Bangor and Aroostook Railroad (BAR) as an asset worth \$18,400,000. However, BPC failed to disclose its involvement in negotiations to sell the BAR for \$5,000,000.<sup>56</sup>

Shortly after the conclusion of these exchange offers, Chris-Craft withdrew from the control contest, having acquired 40.4% of outstanding Piper stock.<sup>57</sup> BPC later withdrew after acquiring 50.6% of

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49. To make this cash tender offer, Chris-Craft had accumulated a cash fund which consisted of \$15,000,000 received on credit and \$25,000,000 raised via an offering of convertible debentures. Before the cash tender offer, Chris-Craft had purchased 203,700 of 1,644,790 outstanding Piper shares on the market. *Id.* at 350-51.

50. *Id.* at 364.

51. The "put" agreement gave Grumman the option to sell the shares back to Piper after six months at Grumman's cost plus three and one-half percent interest per annum running from the closing date. *Id.* at 351.

52. *Id.* at 352.

53. This purchase gave Chris-Craft ownership of approximately 33.8% of outstanding Piper stock. *Id.* at 352.

54. The exchange offer ran from July 24 to August 4, 1969. *Id.* at 354.

55. While preparing this exchange offer (to run from July 18 to July 29, 1969), BPC privately purchased Piper stock despite an earlier announcement by the SEC that such purchases would violate SEC rule 10b-6, 17 C.F.R. § 240.10b-6 (1977). 480 F.2d at 354.

56. These negotiations were later consummated for a sale price of \$5,000,000, which resulted in a \$13,800,000 book loss to BPC. 480 F.2d at 368.

57. Chris-Craft withdrew because it felt that BPC's lead was too great. However, BPC later urged that lack of funds was the unstated reason for Chris-Craft's withdrawal. *Id.* at 376.

outstanding Piper shares. Subsequently, BPC, Piper, and First Boston (BPC's stock underwriter) were held jointly and severally liable to Chris-Craft for damages resulting from various violations of the securities laws, especially section 14(e).<sup>58</sup>

By implying a private cause of action into the terms of section 14(e),<sup>59</sup> courts determine whether violations of section 14(e) are compensable to particular plaintiffs within the confines of the common law action for deceit. In order to establish this action, the plaintiff must prove both reliance upon the defendant's misrepresentations and causation between the defendant's misrepresentations and the alleged injury.<sup>60</sup> However, these common law requirements can be impractical or difficult to apply in the context of securities regulation. These problems have resulted in the development of presumptions which tend to ease plaintiffs' burden of proof. For example, under several antifraud provisions of the securities laws, it has become established that reliance may be presumed when the plaintiff is able to show all other elements necessary to recover damages.<sup>61</sup> The United States Supreme Court approved use of a presumption in

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58. The Piper management was found liable under § 14(e) on two grounds: its letter to Piper shareholders describing Chris-Craft's cash tender offer as "inadequate" (here the Second Circuit rejected Piper's contention that by using the term "inadequate" it meant something other than price), *id.*, and Piper's failure to disclose the "put" agreement with Grumman in its press release and letter to Piper's shareholders, *id.* at 352.

BPC was also found liable under § 14(e) on two grounds: its failure to disclose the BAR negotiations which made BPC's registration statement misleading and its private purchases of Piper stock after publicly announcing the intent to tender an exchange offer for Piper stock, which violated SEC rule 10b-6, 17 C.F.R. § 240.10b-6 (1977). *Id.* at 369. BPC's liability under rule 10b-6 will not be discussed except to the extent that the subsequent enactment of SEC rule 10b-13, 17 C.F.R. § 240.10b-13 (1975), directly proscribed these private purchases by BPC, thus apparently mooted the dispute over rule 10b-6 liability.

Although First Boston's liability under § 14(e) will not be discussed, a lucid analysis of the liability of underwriters under § 14(e) can be found in Note, *Chris-Craft and Section 14(e): The Expansion of Lead Underwriters' Liability*, 42 *FORDHAM L. REV.* 820, 830-37 (1974).

59. See, 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); *Dyer v. Eastern Trust & Banking Co.*, 336 F. Supp. 890 (D. Me. 1971). Implying a cause of action into § 14(e) is a continuation of the readiness of the courts to imply a private cause of action to suits arising under rule 10b-5 (which was most often utilized by the courts in litigation resulting from tender offer contests before the enactment of section 14(e)). See generally Comment, *10b-5 Standing Under Birnbaum: The Case of the Missing Remedy*, 24 *HASTINGS L.J.* 1007 (1973).

60. W. PROSSER, *THE LAW OF TORTS* § 105, at 685-86, 714-20 (4th ed. 1971).

61. Proof of reliance came to be presumed in class actions, which were usually employed by plaintiffs in disputes arising from stock distributions, proxy contests, or tender offers. To require a showing of each individual's reliance upon defendant's misrepresentations would effectively emasculate the class action in an area where it is most useful. The reliance presumption was first utilized by a court in a § 14(e) suit in *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969).

section 14(e) cases involving misrepresentations due to a failure of tender offer contestants to disclose information,<sup>62</sup> ostensibly upon the theory that it would be an unreasonable burden to require the plaintiff to show that it relied upon information which, to the plaintiff, was nonexistent.

*The Mills-Affiliated Ute Presumption as Applied to Chris-Craft*

The Second Circuit found that every alleged violation by BPC caused injury to Chris-Craft.<sup>63</sup> The court held that any proof which tended to establish that the violation caused a change in the outcome of the contest would suffice to establish causation of recoverable injury.<sup>64</sup>

In viewing the letter to Piper shareholders and the nondisclosure of the "put" arrangement, the court employed the *Mills-Affiliated Ute* presumption to establish reliance by Chris-Craft.<sup>65</sup> However, the court further presumed that more Piper shares would have been available to Chris-Craft in its cash tender offer had these violations not occurred. This second presumption led the court to conclude that Chris-Craft would indeed have purchased these hypothetically available shares.<sup>66</sup> The court then found that causation had been established due to the mathematical impact of these shares.<sup>67</sup> The court,

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62. The reliance presumption was recognized and approved by the Supreme Court for use in cases arising under the securities laws antifraud provisions in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 382 n.5 (1970), and in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972). The presumption of reliance will be referred to as the *Mills-Affiliated Ute* presumption.

63. The court rejected the district court's requirement that to prove causation, the plaintiff had to show that the defendant's misrepresentations caused the defendant's control bid to succeed and that they caused the plaintiff's control bid to fail. 480 F.2d at 373. See *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 337 F. Supp. 1128, 1139 (S.D.N.Y. 1971).

64. Thus, the Second Circuit found causation of injury as to the BAR nondisclosure after concluding that it had been crucial to the ultimate success of BPC's control bid. 480 F.2d at 375. The court also found causation as to the Piper management's misrepresentations after deciding that they had been a factor in the failure of Chris-Craft's control bid. *Id.* at 376-77.

65. It is urged that the Second Circuit's use of the *Mills-Affiliated Ute* presumption to establish reliance upon the Piper letter that described Chris-Craft's cash tender offer as "inadequate" was incorrect. It must be kept in mind that the Supreme Court in *Mills* and *Affiliated Ute* distinguished an affirmative misrepresentation from a failure to disclose by presuming reliance only for the latter. See note 59 *supra*.

66. 480 F.2d at 376. It is implicit in the court's reasoning that Chris-Craft's cash tender offer would have *had* to be *more* successful had these shares been tendered.

67. *Id.* at 377.

however, failed to appreciate that Chris-Craft's cash tender offer had been a success.<sup>68</sup> Even though it appeared that Chris-Craft desired additional shares from its tender offer,<sup>69</sup> Chris-Craft had not attempted to secure additional funds with which it could acquire any shares tendered over 304,606. In fact, there was some evidence that Chris-Craft was unable to borrow these additional funds.<sup>70</sup> Nevertheless, once the court arrived at these two conclusions—that under the *Mills-Affiliated Ute* presumption, more Piper shares would have been tendered absent the defendant's misrepresentation, and that Chris-Craft could have acquired the capital it lacked to purchase these shares—it then had to address the extent to which these additional shares would have affected the outcome of the control contest. Unfortunately, the court never did so. Instead, it concluded that due to BPC's narrow victory margin, the non-acquisition of these shares caused the demise of Chris-Craft's control bid.<sup>71</sup>

Implicit in this conclusion is the assumption that every other event in the control contest still would have occurred, thus enabling Chris-Craft to emerge victorious through the acquisition of these hypothetical shares. The court failed to consider that had Chris-Craft acquired these shares, BPC might have altered its strategy by committing additional funds to the contest.<sup>72</sup>

To recover for the BAR nondisclosure violation by BPC, Chris-Craft again had to prove that Piper shareholders had, in reliance upon the nondisclosure, tendered enough shares to BPC to change the contest's outcome. The court used the *Mills-Affiliated Ute* presumption to establish reliance by the Piper shareholders.<sup>73</sup> The court then presumed that absolutely no Piper shareholders would have tendered their shares to BPC had they known of the nondisclosed information. These shares were labelled as "critical" to BPC's success because they composed a seven percent block acquired late in the contest.<sup>74</sup> Again the court assumed that all other events in the contest would have occurred exactly as before and neglected to consider whether

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68. It must be remembered that under the cash tender offer, Chris-Craft was only bound to purchase the first 300,000 Piper shares tendered to it. Chris-Craft in fact purchased a total of 304,606 Piper shares by the conclusion of the offer. *Id.* at 352.

69. *Id.* at 376.

70. The court rejected this evidence because it believed that Chris-Craft could have acquired additional funds had more shares been tendered. *Id.*

71. *Id.* at 377.

72. BPC was clearly in a better financial position to acquire these shares and to continue the contest than was Chris-Craft. If Chris-Craft had used borrowed funds for its tender offer, the use of these funds would have constituted "a default under certain of Chris-Craft's arrangements with its creditors." 337 F. Supp. at 1150.

73. 480 F.2d at 375.

74. This seven percent was critical because BPC emerged with a scant 50.6% interest. The court ruled that reliance and causation were shown. *Id.*

this seven percent block of shares would have actually altered the contest's outcome. The court could just as easily have concluded that had BPC not acquired these shares, they would have remained on the market for acquisition absent the BAR nondisclosure.<sup>75</sup> Again the court failed to require that Chris-Craft show some causal link between defendant's violations and Chris-Craft's asserted injury. It could be argued that BPC ceased to purchase Piper shares because it then had control of Piper. Had it not, BPC would have continued to purchase Piper stock for cash until it did gain control.

Thus, in discussing each violation, the court failed to limit its use of the reliance presumption to establishing reliance in the causal chain. By extending the reliance presumption to presume causation,<sup>76</sup> the court set a most unfortunate precedent.<sup>77</sup>

#### CHRIS-CRAFT IN THE SUPREME COURT

*Piper v. Chris-Craft Industries, Inc.*<sup>78</sup> was decided by the Supreme Court on February 23, 1977. The Supreme Court ostensibly put to rest what had become an extremely protracted litigation. After exam-

75. This alternate conclusion is perfectly reasonable, especially when viewed in light of Chris-Craft's financial difficulties and its failure even to assert its readiness and capability to purchase these shares. It must be remembered that evidence was presented that BPC was able to pay for these shares with cash reserves.

76. The Supreme Court never addressed the causation segment of the Second Circuit's opinion. See text accompanying note 94 *infra*. Instead, the Court reversed on other grounds. Mr. Justice Blackmun, in his concurring opinion, was the only member of the Court to recognize the gravity of the Second Circuit's causation analysis, stating that he would prefer to reverse the Second Circuit on the causation issue rather than on the narrow ground of standing preferred by the majority. 430 U.S. 1, 50-53 (1977) (Blackmun, J., concurring).

77. The damages holding by the Second Circuit is as controversial as its causation analysis. The Second Circuit held the defendants jointly and severally liable to Chris-Craft in damages amounting to \$25,793,365 in *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 516 F.2d 172 (2d Cir. 1975). However, this Comment takes the position that due to Chris-Craft's failure to establish a causal nexus between defendant's violations and Chris-Craft's asserted injuries, Chris-Craft should have been foreclosed from recovering any damages by the "actual damages" limitation in § 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) (1970).

In construing § 28, the courts have formulated several principles. First, the damages recoverable under § 28 are specifically limited to proof that actual damages were sustained due to the alleged securities violation. *Wolf v. Frank*, 477 F.2d 467 (5th Cir. 1973), *reh. denied*, 478 F.2d 1403, *cert. denied*, 414 U.S. 975 (1974). Second, any recovery in the nature of punitive damages is prohibited. *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). Third, no speculative damages are allowed. *Gould v. American-Hawaiian*, 535 F.2d 761 (3d Cir. 1976).

78. 430 U.S. 1 (1977).

ining the progress of the case through the courts, Chief Justice Burger phrased the issue rather narrowly by asking

[w]hether tender offerors such as Chris-Craft, whose activities are regulated by the Williams Act, have a cause of action for damages against other regulated parties under the statute on a claim that anti-fraud violations by other parties have frustrated the bidder's efforts to obtain control of the target corporation.<sup>79</sup>

The Court employed a two-pronged approach in an effort to decide the issue on the strict grounds of statutory interpretation. First, the Court turned to the legislative history underlying section 14(e) to discover the congressional purpose in enacting the section. Second, the Court used the analysis of *Cort v. Ash*,<sup>80</sup> which delineated four factors as being "relevant" in determining whether a private remedy is implicit in a statute not expressly providing such a remedy.

In analyzing the legislative history of section 14(e), the Court determined that the *sole* purpose of the Williams Act is the protection of investors who are confronted by a tender offer.<sup>81</sup> The Court found no hint of a legislative intent to provide a private cause of action for a losing contender against either the target corporation or a successful offeror.<sup>82</sup> The Court then cited its decision in *Cort* as support for its construction of the legislative history underlying section 14(e).

Under *Cort*, the first factor in the implication of a private cause of action is whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted."<sup>83</sup> The Chris-Craft Court determined that the special class under section 14(e) is exclusively made up of the shareholders of the target corporation. Additionally, the Court interpreted the statute as a regulation of tender offerors. For both these reasons, the Court decided the first factor against Chris-Craft.<sup>84</sup>

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79. *Id.* at 24.

80. 422 U.S. 66 (1975).

81. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 35 (1977). As the Court stated in *Rondeau v. Mosinee Paper Co.*, 422 U.S. 49 (1975), "the purpose of the Williams Act is to ensure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information." *Id.* at 58. The issue in *Rondeau*, also very narrow, was whether the record supported the grant of injunctive relief, a remedy the basis of which "in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Id.* at 57. In *Rondeau*, the issuing corporation had sued one of its shareholders who had purchased more than five percent of the outstanding corporate stock but who failed (due to ignorance of the filing requirement) to file schedule 13D, see 17 C.F.R. § 240.13d-101 (1977), with the SEC, pursuant to § 13(d) of the 1934 Act, 15 U.S.C. § 78m(d) (1976). The issuing corporation sought to enjoin the shareholder from voting or pledging his stock, from acquiring additional shares, and from divesting himself of the stock already owned. The Court denied the issuing corporation's requests, noting that shareholders were adequately protected. 422 U.S. at 58-60.

82. 430 U.S. at 35.

83. 422 U.S. at 78 (emphasis original).

84. 430 U.S. at 36.

The second factor under *Cort* is whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one."<sup>85</sup> The *Chris-Craft* Court failed to find either type of legislative intent but concluded that because tender offerors constituted the class the conduct of which was to be regulated by the statute, there was no reason to believe that Congress intended to grant them the weapon of a private cause of action for damages.<sup>86</sup>

Under *Cort*, the third factor in the implication of a private cause of action is whether "it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff."<sup>87</sup> In *Chris-Craft*, the Court concluded that it was not, stating that "as a disclosure mechanism aimed especially at protecting the shareholders of target corporations, the Williams Act cannot consistently be interpreted as conferring a monetary remedy upon regulated parties, particularly where the award would not redound to the direct benefit of the protected class."<sup>88</sup> The Court stressed that *Chris-Craft* had not sued in its capacity as an injured Piper shareholder but had sued as a defeated tender offeror.<sup>89</sup>

The fourth factor under *Cort* is whether "the cause of action is one traditionally relegated to state law."<sup>90</sup> In this regard, the *Chris-Craft* Court emphasized dicta by the Second Circuit that the plaintiff had a possible cause of action under the common law principles of interference with a prospective commercial advantage.<sup>91</sup> The Court reasoned, therefore, that it would be entirely appropriate to limit the plaintiff, when suing in its capacity as a defeated tender offeror, to its remedy provided by state law.<sup>92</sup>

*Piper v. Chris-Craft Industries, Inc.* was limited to a narrow holding: A tender offeror, when suing in its capacity as a takeover bidder, does not have standing to sue for damages under the Williams Act.<sup>93</sup> By disposing of the case in this manner, the Court effectively avoided addressing the other issues presented and argued by the parties.<sup>94</sup>

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85. 422 U.S. at 78.

86. 430 U.S. at 36-37.

87. 422 U.S. at 78.

88. 430 U.S. at 39.

89. *Id.* This statement implies that had *Chris-Craft* asserted injury to itself in another capacity, it might have altered the Court's conclusion.

90. 422 U.S. at 78.

91. 430 U.S. at 40-41.

92. *Id.*

93. *Id.* at 42 n.28.

94. Among the other issues presented in *Piper v. Chris-Craft Indus., Inc.* were



*The Supreme Court's Statutory Construction*

After a cursory analysis of the Williams Act, the Court concluded that no private right of action under section 14(e) exists for defeated tender offerors.<sup>95</sup> Having reached this decision, the Court then analyzed the legislative history of the Williams Act in an attempt to find some substantiation for its holding. The Court was guided in this search by Mr. Justice Frankfurter, who had stated that the Court "must be wary against interpolating our notions of justice in the interstices of legislative provisions."<sup>96</sup> In addition, the Court noted that it was not bound to accept statements made by those who were not directly responsible for the sponsorship of the statute in question.<sup>97</sup> With these two principles in mind, the Court embarked upon a selective analysis of the legislative history behind the Williams Act.

Remarks made by Senator Williams, the sponsor of the Act, were stressed by the Court in its search for the congressional purpose underlying the Act.<sup>98</sup> Senator Williams was sensitive to the plight of the shareholder who needs the protection of accurate and truthful information.<sup>99</sup> The Court quoted<sup>100</sup> Senator Williams to the effect that "S.510 is designed solely to require full and fair disclosure for the benefit of investors."<sup>101</sup> However, Senator Williams had in fact stated that the purpose of the bill was "to require full and fair disclosure for the benefit of shareholders *while at the same time providing the offeror and management equal opportunity to fairly present their case.*"<sup>102</sup> From this statement, it is evident that Senator Williams intended to maintain the integrity of the tender offer by requiring honest and accurate disclosure of information. Furthermore, Senator Williams expressed his hope that the disclosure requirements of the federal securities laws would aid, not hinder, legitimate business ventures. Senator Williams stated:

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scienter, causation, calculation of damages, imposition of joint and several liability, liability of underwriters in § 14(e) damages actions, and award of pre-judgment interest. Unfortunately, by so deciding the case, the Court allowed the rather dubious Second Circuit holdings on causation and damages to stand, thus giving them some value as precedent.

95. 430 U.S. at 47.

96. *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942).

97. During its previous term, the Court had stated that "[r]emarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976).

98. 430 U.S. at 26-27, 31.

99. 113 CONG. REC. 24,664 (1967) (statement of Sen. Williams).

100. 430 U.S. at 31.

101. 113 CONG. REC. 24,664 (1967) (statement of Sen. Williams).

102. *Id.* (emphasis added).

While the bill may discourage tender offers or other attempts to acquire control by those who are unwilling to expose themselves to the light of disclosure, this is but a small price to pay for adequate investor protection. Experience under the Securities Act of 1933 and the Securities Exchange Act of 1934 has amply demonstrated that the disclosure requirements of the Federal Securities Acts are an aid to legitimate business transactions, not a hindrance.<sup>103</sup>

These remarks by the sponsor hardly support the Court's assertion that the *sole* purpose of the Act is protection of the shareholder who is confronted by a tender offer.<sup>104</sup>

Remarks by Senator Kuchel,<sup>105</sup> who voiced a concern for "corporate raiders" and "takeover pirates," were used by the Court as evidence that tender offerors were to be regulated by the Act, not to become beneficiaries of its disclosure provisions.<sup>106</sup> The Court's reliance upon these statements by Senator Kuchel is a questionable exercise in statutory interpretation<sup>107</sup> because these remarks were made in 1965—before Senate hearings on the initial proposal by Senator Williams took place. These statements do not accurately reflect the congressional purpose underlying the Williams Act as finally enacted in 1968.

The Court rejected Chris-Craft's attempt to use statements by expert witnesses Professors Israels and Painter to show that Congress was aware that private actions were implicit in section 14(e).<sup>108</sup> However, in virtually the same paragraph, the Court relied upon remarks presented by other expert witnesses during congressional hearings on the bill.<sup>109</sup> These remarks were cited as confirming the Court's belief that what Congress had in mind was the protection of investors, the "pawns in a form of industrial warfare."<sup>110</sup> As further confirmation of its belief that tender offerors did not have

103. *Id.*

104. 430 U.S. at 35. These statements also would appear to cloud the perceptiveness of the dicta in *Rondeau v. Mosinee Paper Co.*, 422 U.S. 49 (1975), used by the Court to the same effect.

105. Senator Kuchel was co-sponsor of the Williams Act.

106. 430 U.S. at 28.

107. Considering the genesis of the Williams Act, as presented in the beginning of this Comment, it is apparent that Senator Williams was *originally* concerned with corporate pirates in his initial presentation of the Act in 1965. See notes 18-24 and accompanying text *supra*. However, he was also persuaded that tender offers may serve some very useful functions. This belief is found in his subsequent presentation of the Act which, as enacted, omitted *all* reference to and concern for corporate raiders and takeover pirates.

108. The Court dismissed these statements and similar materials as being of limited value. 430 U.S. at 31 n.20.

109. *Id.* at 29, 33-34.

110. *Id.* at 27.

standing to sue under section 14(e), the Court quoted another expert witness who believed that “the two major protagonists—the bidder and the defending management—do not need additional protection.”<sup>111</sup> Chief Justice Burger apparently did not feel constrained by the same principles of statutory interpretation which he so forcefully thrust upon the plaintiffs. The Court’s approach effectively emasculates the very principles enunciated by the Court as controlling its disposition of the case.

### *Analysis of Cort v. Ash*

The Court utilized the analysis in *Cort v. Ash*<sup>112</sup> to confirm that its interpretation of section 14(e)’s legislative history was correct. As noted previously, *Cort* identified four factors as “relevant” in determining whether a private remedy is implicit in a statute not expressly providing one.<sup>113</sup> The Court concluded that these criteria militated against implying a private cause of action in favor of Chris-Craft when suing in its capacity as a defeated tender offeror.<sup>114</sup>

However, the *Cort* test can just as effectively show that Congress intended an implied private cause of action in favor of defeated tender offerors under section 14(e). The first factor under *Cort* is whether plaintiff is “one of the class for whose *especial* benefit the statute was enacted.”<sup>115</sup> As previously shown, those statements in the legislative record which were so carefully severed from the statements quoted by the Court afford ample evidence that defeated tender offerors are within this class.<sup>116</sup>

The second factor is whether there is “any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one.”<sup>117</sup> Again, in omitted portions of statements in the legislative record, this intention is explicitly voiced by the sponsor of the Williams Act.<sup>118</sup> Implicitly, there is a “pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard.”<sup>119</sup>

The third factor in the implication of a private cause of action under *Cort* is whether it is “consistent with the underlying purposes

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111. *Id.* at 29. Mr. Hayes continued by noting that “the investor—who is the subject of these entreaties of both major protagonists—is the one who needs a more effective champion.” *Id.*

112. 422 U.S. 66 (1975).

113. *Id.* at 80-85.

114. See notes 83-92 and accompanying text *supra*.

115. See text accompanying note 83 *supra*.

116. See text accompanying notes 100-103 *supra*.

117. 422 U.S. at 78.

118. See text accompanying notes 100-103 *supra*.

119. 422 U.S. at 82.

of the legislative scheme to imply such a remedy for the plaintiff."<sup>120</sup> Senator Williams was particularly concerned that the Act might be used to favor one side or the other in control contests.<sup>121</sup> By determining the third factor against Chris-Craft, the Court effectively negated the Senator's desire for neutrality. When blatant violations of the securities laws are perpetrated by the target company's management and by the competing tender offeror, the Court's refusal to allow an action by an innocent tender offeror is indeed "tipping the scales . . . in favor of management or in favor of the persons making the takeover bid."<sup>122</sup> Such an approach undermines the integrity of the tender offer as a mechanism of corporate acquisition.

The fourth factor in *Cort* is whether "the cause of action is one traditionally relegated to state law."<sup>123</sup> When the violations in *Chris-Craft* occurred (1969), scant state law regulating tender offers existed.<sup>124</sup> It can hardly be concluded that this particular cause of action was one *traditionally* relegated to state law. The Court neatly side-stepped this conclusion by determining that the common law provides an adequate cause of action for the injury asserted by Chris-Craft.<sup>125</sup>

In refusing to imply a cause of action in favor of Chris-Craft, the Court ignored judicial precedent that had expressly implied a private cause of action under section 14(e) in favor of several parties<sup>126</sup>

120. *Id.* at 78.

121. "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the persons making the takeover bid." 113 CONG. REC. 24,664 (1967) (statement of Sen. Williams).

122. *Id.* In this context, the "management" is Piper management and the "persons making the takeover bid" are BPC.

123. 422 U.S. at 78.

124. Prior to 1969, no statutory regulation of cash tender offers existed at the state level. Even the common law responsibilities of the directors of the offeror and offeree corporations were unsettled. Kennedy, *Tender Moment*, 23 BUS. LAW. 1091, 1094 (1968). State concern for preserving the integrity of the takeover mechanism through fair and adequate disclosure first developed in 1968. *See, e.g.*, VA. CODE §§ 13.113.540 (Supp. 1968); 3 BLUE SKY L. REP. (CCH) §§ 49,228-49,241 (1968). Another state considering similar legislation was Pennsylvania (legislation eventually codified in PA. STAT. ANN. tit. 40, § 459.6 (Purdon Supp. 1970)). British Commonwealth legislation was cited by Congress as illustrating the need for federal action. 111 CONG. REC. 28259 (1965) (statement of Sen. Williams). Foreign tender offer legislation is discussed in Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 323, 326-27 (1967).

125. Pennsylvania, Piper's state of incorporation, evidently did not share the Court's conclusion as to the adequacy of the common law cause of action, as it subsequently enacted tender offer legislation in 1970. *See* note 124 *supra*.

126. *See* notes 25-40 and accompanying text *supra*.

concerned with the tender offer battle. The Court also ignored the analogous precedent it had set in implying a private cause of action under rule 10b-5. For example, in *Blue Chip Stamps v. Manor Drug Stores*,<sup>127</sup> the defendant contended that it was improper to imply a private cause of action under rule 10b-5.<sup>128</sup> Admitting the lack of an express grant of standing in rule 10b-5, the Court rejected the contention that it was improper to imply a private cause of action: "We are dealing with a private cause of action which has judicially been found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question."<sup>129</sup> Unfortunately the Court in *Chris-Craft* never distinguishes its willingness to imply a private cause of action under rule 10b-5 from its reluctance to imply a private cause of action under the provisions of section 14(e). Section 14(e) and rule 10b-5 are both antifraud provisions in the law of securities regulation, and both have judicial precedent implying a private cause of action from their express statutory provisions.

It should now be clear that the test enunciated in *Cort* is hardly the talisman of statutory construction the Court determined it to be. The Court's use of *Cort* as precedent in *Chris-Craft* is inappropriate for several reasons. Primarily, *Cort* was factually different from *Chris-Craft*: *Cort* involved a suit by a shareholder against corporate management for the recovery of corporate funds expended by management for political advertisements in the 1972 presidential campaign. These expenditures violated a *criminal* statute that proscribed any contribution or expenditure in connection with any vice-presidential or presidential election.<sup>130</sup> The congressional policy underlying the criminal statute was to free vice-presidential and presidential elections from corporate influence. This policy is hardly the same as the congressional policy underlying section 14(e). Second, the issue in *Cort* was *whether* the statute created an implied private remedy which could be invoked by a shareholder when suing corporate management in derivative cause of action. To the contrary, the issue presented in *Chris-Craft* was *who* may invoke a remedy that has already been implied by the courts. Third, *Cort* involved interpretation of a criminal statute which provided for criminal penalties such as imprisonment and fines. *Chris-Craft*, however, involved interpretation of a statute under which only a civil cause of action had been implied. Civil damages were the only remedy available to the plaintiff suing under section 14(e). Finally, the statute in *Cort* did not

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127. 421 U.S. 723 (1975).

128. *Id.* at 749.

129. *Id.*

130. 18 U.S.C. § 610 (1970).

allow for civil enforcement of its provisions, whereas the threat of civil enforcement is a primary method of preventing violations under section 14(e).

*Cort*, therefore, was not an appropriate precedent for *Chris-Craft*. The controversies presented in the *Chris-Craft* litigation could have been more properly determined under the principles set forth in the landmark decision of *J.I. Case Co. v. Borak*.<sup>131</sup> *Borak*, however, is factually similar to *Chris-Craft*. *Borak* involved a derivative action brought by a shareholder who had received and then acted upon misleading proxy statements. The Court in *Chris-Craft* intimated on several occasions that had *Chris-Craft* sued derivatively as a Piper shareholder, the Court might have granted standing.<sup>132</sup> In addition, the issue in *Borak* was the same as that presented in *Chris-Craft*: *who* may sue under an antifraud provision of the 1934 Act which makes no specific reference to a private right of action. Finally, *Borak* involved statutory construction of section 14(a)—another antifraud provision of the 1934 Act primarily enforced by civil actions.

In *Borak*, the Court was confronted with an antifraud provision which, like section 14(e), was devoid of any provisions creating a private cause of action. The Court determined that where congressional purposes are likely to be undermined in the absence of private enforcement, private remedies may be implied in favor of the class intended to benefit from the statute.<sup>133</sup> Indeed, the Court carefully noted in *Borak* that because of practical limitations upon the SEC's enforcement capabilities, "private enforcement of the proxy rules provides necessary supplement to Commission action."<sup>134</sup>

In *Borak*, the Court concluded that a derivative suit on behalf of the corporation could be brought under section 14(a)<sup>135</sup> even though

131. 377 U.S. 426 (1964).

132. See note 89 and accompanying text *supra*.

133. 377 U.S. at 432.

134. *Id.* It is noteworthy that the Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), specifically alluded to this language in *Borak* concerning the necessity for supplemental private remedies without which congressional protection of shareholders would be defeated. *Id.* at 730. This rationale is also applicable to *Chris-Craft*. The United States implied as much when it stated that "the SEC has limited resources and may not be able to monitor every corporate takeover bid. Accordingly, lawsuits by injured tender offerors provide a . . . supplement to commission action . . . necessary to make effective the Congressional purpose." Brief for the United States as Amicus Curiae at 15, *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977).

135. 430 U.S. at 66.

it seemed clear that the primary beneficiaries of this section were individual shareholders rather than corporations.<sup>136</sup> Therefore, *Borak* itself does not meet the “especial” class test of *Cort*. Chief Justice Burger stated that *Borak* did meet this test because the damages did not arise from deceiving the individual shareholders but rather from deception practiced on the shareholders as a group in their capacity as owners of the corporation. Therefore, shareholders as a class composed the “especial” class for which section 14(a) was enacted.<sup>137</sup> Even under this rationale, it is difficult to understand the distinction drawn by the *Chris-Craft* Court that only ordinary shareholders, as opposed to holders of larger blocks, are protected by section 14(e).

Perhaps the most cogent argument favoring *Borak* as precedent for *Chris-Craft* can be found in *Cort* itself when the Court distinguished *Borak* on grounds that apply to *Chris-Craft*. In *Chris-Craft*, as in *Borak*, there is “at least a statutory basis for inferring that a cause of action lay in favor of someone.”<sup>138</sup> There is a “pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard.”<sup>139</sup> The private remedy is necessary to effectuate the Congressional goal.<sup>140</sup> This goal would accordingly be hindered if the plaintiff were relegated to an inadequate state remedy.<sup>141</sup> In the circumstances peculiar to *Chris-Craft* and to *Borak*, *Cort* does not require that the plaintiff belong to an “especial” class. At no time does *Cort* state that this factor is essential. In addition, *Cort* further distinguishes *Borak* by suggesting the presence of a “pervasive legislative scheme” as an alternative to an “articulated federal right in the plaintiff.”<sup>142</sup>

In denying standing to *Chris-Craft* under section 14(e), the Court rather summarily rejected several important arguments that were presented in favor of according *Chris-Craft* standing. The most important argument was that by granting a tender offeror standing to sue, the shareholders in general would have received significant

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136. 377 U.S. at 432.

137. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 32 n.21 (1977).

138. *Cort v. Ash*, 422 U.S. 66, 79 (1975).

139. *Id.* at 82.

140. *Id.* at 84.

141. *Id.* at 85.

142. Mr. Justice Stevens, in his *Chris-Craft* dissent (joined by Mr. Justice Brennan), believed that this was a vital argument favoring *Borak* over *Cort* as precedent. To this argument, the Court stated that the shareholders would not benefit because any judgment rendered against the competing tender offeror would invariably injure its stockholders. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. at 39. Thus, in effect, the Court preferred that shareholders of the defeated tender offeror, which was innocent of any violation of the securities laws, should suffer devaluation of their stock instead of the shareholders of the victorious offeror which *was* in violation of federal securities laws.

additional protection,<sup>143</sup> primarily because the participants in the tender offer contest have an interest in preserving the integrity of the process.<sup>144</sup> It has been noted that an offeror's economic stake in the outcome of the control battle, the offeror's resources, and the possibility of an extraordinarily large recovery provide the offeror with the incentive and the capacity to detect violations and to pursue remedies vigorously.<sup>145</sup> In addition, private rights of action under the federal securities laws stimulate compliance with these laws and serve as a necessary supplement to SEC enforcement action.<sup>146</sup> As one of the draftsmen of the 1934 Act stated in advocating liberal standing requirements under the Act, "there is no policeman so effective as the one whose pocketbook is affected by the degree to which he enforced the law."<sup>147</sup>

The Court in *Chris-Craft* attempted to respond to the theory pervading these statements by urging that if indeed there were violations encountered in a tender offer battle for control, the individual shareholder could best fend for himself using private damages actions.<sup>148</sup> This belief is theoretically attractive but, from a practical

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143. The Court dismissed this argument by stating that it would instead injure shareholders in two ways: first, by discouraging their corporations from competing in tender offer battles for fear of being subjected to suits by defeated tender offerors "for what courts subsequently hold to be an actionable violation of § 14(e)"; and second, by causing the victor to bear expenses of litigation by defeated tender offerors in a later and successful defense of its victory. *Id.* at 40. The second argument was presented by Mr. Justice Stevens, who urged that he was "unpersuaded that the federal courts are incapable of structuring the remedy to avoid this problem." *Id.* See, e.g., *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421, 425 (1st Cir. 1973). Indeed, the Court has previously rejected the very argument which it now asserts: that expanding standing of an anti-fraud securities law provision would result in vexatious suits. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the Court stated:

Congress itself recognized the potential for nuisance or "strike" suits in this type of litigation, and in Title II of the 1934 Act amended § 11 of the 1933 Act to provide that "In any suit under this or any other section of this title the Court may, within its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees . . ." Sen. Fletcher, Chairman of the Senate Banking and Finance Committee, in introducing Title II of the 1934 Act on the Senate floor, stated in explaining the amendment to § 11(e): "This amendment is the most important of all." Among its purposes is to provide "a defense against blackmail suits."

*Id.* at 740-41 (citations omitted).

144. Such a concern was expressed by Senator Williams. See text accompanying note 102 *supra*.

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

146. *Id.* See also *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

147. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 62 n.14 (1977).

148. *Id.* at 40.



view, most unrealistic. To conclude that the threat of a private suit by an individual shareholder provides any incentive to a tender offeror to conduct his battle within legal bounds is being overly optimistic. Indeed, few shareholders have the capacity to pursue such violations effectively.<sup>149</sup> Therefore, the most realistic deterrent to antifraud violations is a suit properly brought by the competing tender offeror which has the resources available and the financial investment at stake<sup>150</sup> to police diligently violations by its competitor. A potential consequence of the *Chris-Craft* Court's reasoning in this regard is the encouragement of violations of the Williams Act in the context of a tender offer battle. Suit by individual shareholders is not an effective deterrent, and as previously noted, the SEC lacks the means to police and to prosecute adequately each violation.<sup>151</sup>

Chris-Craft might have been accorded standing in this case had it been more careful in phrasing the capacity in which it sought damages for defendant's violations. Indeed, had it asserted injury in its capacity as an injured Piper shareholder rather than in its capacity as a defeated tender offeror, Chris-Craft might have been granted standing under the Court's determination that the underlying policy of the Williams Act is to protect shareholders of the target company.<sup>152</sup>

#### CONCLUSION

By refusing to accord Chris-Craft standing to sue for violations of section 14(e), the Supreme Court effectively undermined the congressional purposes underlying the enactment of section 14(e). Apparently, the Court is satisfied that the securities laws can be vigorously enforced by the SEC and by individual shareholders. However, the SEC cannot detect and prosecute every violation of the securities laws. Indeed, the Court itself noted that the SEC decided not to pursue actions by BPC which subsequently *were* pursued by Chris-Craft.<sup>153</sup> In addition, it has been shown that the reliance placed by the Court upon the ability of the individual shareholder to detect and

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149. How many individual shareholders would have the resources available to pursue violations through intricate litigation involving a preliminary injunction, discovery, trial on liability, another trial on damages, three appeals (one en banc) to the Second Circuit, two petitions to and one argument before the Supreme Court? In other words, how many shareholders could pursue the extensive litigation found in *Chris-Craft*?

150. Chris-Craft had invested nearly \$44,000,000 in its effort to acquire Piper. 480 F.2d at 354.

151. See note 134 and accompanying text *supra*.

152. The Court suggests as much on several points. See note 89 and accompanying text *supra*.

153. 430 U.S. at 8. These actions were found to be violations of rule 10b-6 by the Second Circuit in *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 392 (2d Cir. 1973).

to prosecute violations in a tender offer battle is seriously mistaken from a practical point of view. The Court is content to expect the virtually non-existent threat of suit by individual shareholders to be an effective deterrent to violations of section 14(e). In effect, the Court is encouraging contestants in a tender offer contest to manipulate the securities laws to enhance their prospects of gaining control. It is difficult to understand how such conduct will redound to the benefit of the individual shareholder. The Court's concern with protecting the individual shareholder seems somewhat superficial when viewed in this light.

Indeed, it is very doubtful that the Court would deny standing to a defeated tender offeror who could, unlike *Chris-Craft*, prove that violations by the successful tender offeror caused the demise of the defeated tender offeror's bid for control. In rendering the blanket holding that no tender offerors have standing to sue under section 14(e), the Court denies standing even to those tender offerors who can link the defendant's violations with their defeat. It is hoped that the decision in *Chris-Craft* will be subsequently limited to its facts, thus limiting its value as precedent. If *Chris-Craft* is not so limited it will be the individual shareholder who will have to pay the price of the artful games of deception and sleight of hand which will surely be employed by contestants in the heat of a tender offer battle. The control contest could deteriorate into a battle of skilled retaliation between tender offerors.

The desire of the Court to dispose of *Chris-Craft* through statutory interpretation is inexplicable. The Court's reading of the legislative history underlying section 14(e) is inconsistent at best and result-oriented at worst. The Court's selection of *Cort* as the controlling precedent for *Chris-Craft* is puzzling because *Cort* and *Chris-Craft* have virtually nothing in common.

The Court's holding in *Chris-Craft* violates the congressional mandate that

the bill [avoid] tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.<sup>154</sup>

The *Chris-Craft* ruling does not maintain the integrity of the tender

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154. 113 CONG. REC. 24,664 (1967) (statement of Sen. Williams). Thus, the argument that the Court actually aided one of the contestants in this tender offer battle can reasonably be asserted.

offer as a mechanism of corporate acquisition because it fails to ensure fair and adequate disclosure of the information which was determined by Congress to be the subject of disclosure requirements in takeover attempts.

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