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Dan River, Inc. v. Icahn: Disclosure Violations - Relief for Subject Management?

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NOTE

DAN RIVER, INC. v. ICAHN: DISCLOSURE VIOLATIONS—RELIEF FOR SUBJECT MANAGEMENT?

I. Introduction

The heightened level of takeover activity during recent years[1] has provoked many innovative responses from the management of subject companies[2] that wish to remain independent. Since successful acquisition of a company usually involves the termination of its existing management, that management will often seek to mobilize the resources of the subject corporation to oppose the takeover attempt.[3] As a result, litigation initiated by management now plays a part in virtually every takeover contest. The case of *Dan River, Inc. v. Icahn*,[4] a recent Fourth Circuit decision, illustrates the use of litigation to forestall a takeover attempt.

A. Dan River v. Icahn

Beginning in the spring of 1982, Carl C. Icahn[5] and several companies under his control[6] (Icahn) began purchasing shares of Dan River common

1. *See After Wave of Mergers, Analysts Debate Pluses*, N.Y. Times, May 31, 1982, at D1, col. 1.

2. The Securities and Exchange Commission (SEC), under Regulation 14D, adopted new definitions in 1979 which discard the terms "offeror" and "target company" and substitute the terms "bidder" and "subject company." 17 C.F.R. § 240.14d-1 (b)(1) -(2) (1983). For the purpose of consistency, these new terms will be used throughout this note.

3. Comment, *An Implied Private Right of Action Under the Williams Act: Tradition vs. Economic Reality*, 77 Nw. U.L. Rev. 316, 316 (1982).

4. 701 F.2d 278 (4th Cir. 1983).

5. Carl Icahn has achieved great notoriety in the business world as a corporate "raider." By purchasing a significant interest in a vulnerable corporation, then forcing (or frightening) the corporation's directors into buying back his shares or selling the corporation to a "friendlier" company, Icahn nets a handsome profit. Corporations falling prey to this strategy include Tappan Company, Baird & Warner Mortgage & Realty Investors, Hammermill Paper Company, Marshall Field & Company, and Saxon Industries, Inc. This profitable strategy reputedly has garnered Icahn over 45 million dollars in the past few years. *See* Metz, *Icahn's 'Scare 'Em' Strategy Faces a Big Test In Fight Over Dan River*, Wall St. J., Nov. 17, 1982, at 33, col. 5.

6. The companies include Icahn Holding Corporation, Icahn Capital Corporation, Icahn & Company, Inc., Brett Investors Corporation, C.C.I. & Associates, Crane Associates, Wolf In-

stock on the open market. After acquiring five percent of Dan River's oustanding shares, Icahn filed a disclosure statement pursuant to the Securities Exchange Act of 1934.[7]

In this statement, Icahn set forth its intentions regarding Dan River, indicating that it would pursue any of three possible courses. Following the acquisition of control, Icahn indicated that it intended *either* to merge Dan River with one of its corporations *or* to sell the assets of Dan River to generate cash for other business activities. Icahn conceded, however, that it would abandon its takeover plans and sell its Dan River stock if given an acceptable offer.[8]

Icahn expected its reputation as a corporate "raider"[9] to coerce Dan River into accepting the latter proposal. Dan River's management, however, had no intention of falling prey to this elaborate corporate shakedown scheme. Instead, they attempted to counter Icahn's strategy by requiring that Icahn purchase the stock.[10] Dan River then filed suit in federal district court in Virginia seeking an injunction prohibiting Icahn from dealing with Dan River in any way.[11] Pending a full hearing on the merits, the district court granted a preliminary injunction to prohibit Icahn from exercising any voting rights appurtenant to any shares owned or acquired in Dan River.[12]

Icahn appealed this preliminary injunction. Dan River offered several defenses, one of which alleged that the disclosure statement filed by Icahn was inadequate because it failed to meet the requirements set forth in sections 13(d), 14(d), and 14(e) of the Williams Act[13] and in Virginia's Take-Over-Bid Disclosure Act.[14] Dan River lost on the disclosure issue, with the court of appeals emphasizing that a defect in the disclosure

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vestors Plan, Inc., and Michelle Investors Corporation. Dan River, Inc. v. Icahn, 701 F.2d 278, 280 (4th Cir. 1983).

7. 15 U.S.C. §§ 78a-78kk (1982). The Securities Exchange Act of 1934 [hereinafter cited as Exchange Act] is a continuous disclosure statute, applicable to issuers having securities listed on a national stock exchange. The Exchange Act requires corporations with assets exceeding one million dollars and with five hundred or more shareholders to comply with the registration requirements. *Id.* § 78*l*(g) (1982).

8. 701 F.2d at 281.

9. *See supra* note 5.

10. 701 F.2d at 282.

11. *Id.* at 281.

12. *Id.* at 282.

13. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982)). The purpose of the Williams Act is effectuated through a complex set of statutes and rules requiring the disclosure of certain types of information to the SEC and the subject corporation upon the occurrence of specified events. *See infra* notes 51-65 and accompanying text. *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).

14. VA. CODE ANN. §§ 13.1-528 to -540 (Repl. Vol. 1978 & Cum. Supp. 1984).

filings, namely an omission of an allegedly material fact, must assume "actual significance in the deliberations of the reasonable shareholder."[15] Since it did not appear that Dan River would prevail on the merits of its complaint, the circuit court reversed the preliminary injunction.[16]

Dan River also alleged that Icahn had violated the Racketeer Influenced and Corrupt Organizations Act (RICO)[17] by engaging in a pattern of racketeering activities, *i.e.* securities fraud, in this and earlier takeover attempts. The Fourth Circuit found, however, that Dan River had failed to establish the criminal intent necessary to prove securities fraud[18] and thus denied temporary injunction relief on this ground as well.[19]

B. *Management's Response To A Takeover Attempt*

In resisting a takeover attempt, corporations frequently assume a defensive stance analogous to that of a nation "girding" for war.[20] Contestants in these battles invariably allege violations of the Williams Act or state takeover-bid disclosure statutes in an effort to obtain equitable relief and thereby to forestall the takeover.[21] Recently target corporations have added RICO to their arsenal as an additional avenue for stalling a takeover attempt.[22] Congress has examined subject-management concerns about these takeover bids, but refuses to ban takeover offers outright, recognizing that the process does create some benefits for the free market economy.[23]

This note will examine the issues raised in *Dan River, Inc. v. Icahn*.[24] It will first discuss the statutes relied upon by subject management when contesting a takeover attempt, focusing on sections 13(d), 14(d), and 14(e) of the Williams Act, the Securities and Exchange Commission (SEC) rules accompanying the Act, and the Virginia Take-Over-Bid Disclosure Act. The note will then address the remedies for disclosure violations available to subject management under these acts. Finally, the note will discuss civil RICO and its use as a tool to ward off takeover bids.

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15. 701 F.2d at 286 (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

16. 701 F.2d at 284. *See infra* notes 132-39 and accompanying text.

17. 18 U.S.C. §§ 1961-1968 (1982).

18. *See infra* notes 213-15.

19. 701 F.2d at 280.

20. 114 Cong. Rec. 21,483 (1968) (House debate on S. 510, 90th Cong., 2d Sess. 1 (1967)).

21. *See infra* notes 25-93 and accompanying text.

22. *See infra* notes 196-264 and accompanying text.

23. 114 Cong. Rec. 21,483 (1968).

24. 701 F.2d 278 (4th Cir. 1983).

II. The Basic Disclosure Framework

A. *The Williams Act*

1. Legislative History

Prior to the enactment of the Williams Act, a sharp contrast existed between regulation of the proxy contest and the tender offer[25] — the two major vehicles for obtaining control of a corporation. While the proxy contest was subject to comprehensive federal regulation,[26] few regulations governed the tender offer process.[27] This period of securities regulation history was rife with attacks by corporate "raiders" who unfairly pressured stockholders of subject companies into selling their shares by exploiting inherent weaknesses in the tender offer process.[28]

Since the early 1960's, the cash tender offer[29] has grown in popularity and use.[30] Firms bent on normal acquisition, as well as corporate "raid-

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25. While the Williams Act does not specifically define the term "tender offer," most courts and commentators agree that:

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

Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206 (2d Cir. 1978) (quoting H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2811, 2811). *See also* SEC Proposed Rule 14d-1(b)(1), 3 Fed. Sec. L. Rep. (CCH) ¶ 24,281A (Nov. 29, 1979) (proposing a new definition of tender offer). *See generally* Wurczinger, *Toward A Definition Of "Tender Offer,"* 19 Harv. J. on Legis. 191 (1982); Note, *What is a Tender Offer?*, 37 Wash. & Lee L. Rev. 908 (1980).

26. 15 U.S.C. § 78 (1982).

27. *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 1 (1967) (remarks of Sen. Williams) [hereinafter cited as *Senate Hearings*].

28. The Exchange Act did not require a corporate bidder to disclose much information about itself, its source of funds, or its potential plans for the subject company. Even plans to fund the acquisition by liquidating various assets of the subject company did not have to be disclosed. *See generally* Comment, *Take-Over Bids In Virginia*, 26 Wash. & Lee L. Rev. 323 (1969).

29. The current tender offer movement is accomplished by the use of cash rather than by the securities packages in widespread use in the 1950's. Johnson, *Disclosure in Tender Offer Transactions: The Dice Are Still Loaded*, 42 U. Pitt. L. Rev. 1, 2 (1980). *See generally* E. Aranow & H. Einhorn, Tender Offers for Corporate Control 29-30 (1973).

For the purposes of this note, a cash tender offer will be referred to as a "tender offer."

30. In 1960, the aggregate of all tender offers was less than $200 million, but by 1965 that total had risen to almost $1 billion. *Senate Hearings*, *supra* note 27, at 17 (statement of Manuel F. Cohen, Chairman of the SEC). *See also* 113 Cong. Rec. 24,644 (1967) (statement of Sen. Williams).

The following factors have been suggested to explain the increased use of tender offers for obtaining control of a corporation:

(1) Increased access to cash can result from greater corporate liquidity and readily

ers," began using the tender offer process as a means to gain control of, or to strengthen ownership in, another corporation.[31] This onslaught of tender offers magnified the abuses in the existing tender offer process, forcing Congress to take steps to improve the situation.[32] Congress initially proposed legislation designed to protect the subject company and to inhibit tender offers,[33] but this pro-subject-management approach was abandoned with the enactment of the Williams Act in favor of a course which balanced the interests of the subject company and the bidder.[34]

The Williams Act was not designed primarily to insure neutrality between the subject company and the bidder. Congress realized that corporate investors and stockholders were suffering while subject management and bidders were fighting for control. Subject management could strip the assets of the corporation in an attempt to fend off the tender offer. Shareholders faced time constraints in deciding how to respond to the tender offer and were often unable to obtain information about potential managerial policies or even the identity of the bidder. Securities investors seldom knew whether their best interests lay in retaining their shares or tendering them to the bidder.[35]

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available credit;

(2) Relatively low price-earnings and cash or quick assets ratios, as well as comparatively low book values result from use of the tender offer;

(3) Proxy contests require those seeking control to convince shareholders that they can better handle the affairs of the company than the incumbent management, while tender offers appeal to shareholders strictly on a monetary basis;

(4) Tender offers have increased in respectability as a takeover technique, along with greater sophistication and knowledge regarding the use of the tender offer.

E. ARANOW & H. EINHORN, *supra* note 29, at 65-67. *See generally* Quade, *Merger Volume Up, But No Mania Seen*, 68 A.B.A. J. 31 (1982).

31. In fact, a publicly announced tender offer is often met with a higher tender offer by another company acting on its own behalf. Multiple bidders are becoming commonplace, particularly if the subject company is a desirable acquisition. These multiple bids often push up a stock's value to several times its former listed value. *See* Brown, *Changes In Offeror Strategy In Response To New Laws and Regulations*, 28 CASE W. RES. L. REV. 843, 843-45 (1976).

32. S. REP. No. 550, 90th Cong., 1st Sess. 4 (1967). The bill came in response to the sudden increase in cash tender offers which, in the period between 1960 and 1967, increased from eight to 107. *Id.* at 2.

33. *See, e.g.*, S. 510, 90th Cong., 2d Sess., 113 CONG. REC. 24,662 (1967) (a bill to require full disclosure of corporate equity ownership of securities).

34. The Senate Report for the Williams Act stated:

> The Committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The Bill is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunities to fairly present their case.

S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967). *See also* H.R. REP. No. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811 (House committee report on the Williams Act) [hereinafter cited as HOUSE REPORT].

35. HOUSE REPORT, *supra* note 34, at 2812.

2. The Regulatory Scheme

a. Introduction

The Williams Act was enacted in 1968 by a Congress sympathetic to the plight of the corporate stockholder and investor.[36] Indeed, the United States Supreme Court, in construing congressional intent behind the Act, concluded that the sole purpose of the Williams Act was to protect corporate shareholders and investors.[37] The Williams Act added three new subdivisions, sections 13(d), 14(d), and 14(e), to the Exchange Act to deal with the previously unregulated cash tender offer.[38] These sections set disclosure requirements applicable to purchases of, and offers to purchase, stock in a public corporation.[39]

Since the shareholder in all tender offer situations must decide whether or not to tender his shares, federal securities regulations[40] require "full and fair" disclosure of information necessary to aid investors in making a reasonable investment decision.[41] But full and fair disclosure should not be taken literally, since the disclosure of all facts concerning a particular takeover attempt could produce more information than the public could assimilate. Instead, the appropriate standard for judging the adequacy of a disclosure statement is "fair accuracy, not perfection."[42] The corporation filing should "fairly . . . disclose its plans in the event of a take-

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36. It later became apparent that there were substantial gaps in the Williams Act. Therefore the SEC, using its rulemaking authority, Act of Dec. 22, 1970, Pub. L. No. 91-567, § 5, 84 Stat. 1497, has adopted several new rules to address these issues. *See, e.g.*, 17 C.F.R. pt. 240 (1983).

37. Piper v. Chris-Craft Indus. Inc., 430 U.S. 1, 29 (1977). The Court, after construing the legislative intent behind this Act, concluded:

> Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed towards a different purpose — the protection of investors.

Id.

38. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982). Although the Exchange Act regulated tender offers and proxy contests, the cash tender offer fell into a "significant gap" in the regulatory framework. *Senate Hearings*, *supra* note 27, at 2.

39. Sections 13(d) and 14(d) of the Williams Act apply to any class of equity securities that is registered pursuant to § 12(g) of the Exchange Act or any equity security issued by a closed-end investment company. *See* 15 U.S.C. §§ 78m(d)(1), 78n(d)(1) (1982). For a list of the registration requirements, see *id.* § 78*l*.

40. For the purposes of this note, the term "federal securities regulations" refers to the Exchange Act, the Williams Act, and SEC Rule 240.

41. It is important to note that the most critical information to the investor, projections of future earnings, need not be disclosed under the present system. Future earnings projections are discussed in 44 Fed. Reg. 38,810 (1979).

42. Purolator, Inc. v. Tiger Int'l, Inc., 510 F. Supp. 554, 556 (D.D.C. 1981) (quoting Laurenzano v. Einbender, 448 F.2d 1, 6-7 (2d Cir. 1971)).

over."[43] It is not, however, required to "make predictions of future behavior, however tentatively phrased,"[44] since these predictions may be misconstrued by the subject corporation and its shareholders.

The theory of full and fair disclosure is tempered by the concept of materiality. This concept holds that all facts deemed "material"[45] must be disclosed to investors.[46] By providing the stockholder with all material information concerning a substantial accumulation of stock, the investor can more easily make a reasonable investment decision.[47]

b. The Disclosure Provisions

The Williams Act requires the disclosure of information to shareholders concerning potential shifts of corporate control. For regulatory purposes, these shifts of control are divided into two categories: acquisitions of stock by a tender offer, and acquisitions by other means. Sections 14(d)[48] and 14(e)[49] govern tender offers, while section 13(d)[50] regulates non-tender offer acquisitions.

(i). Section 13(d)

Section 13(d)(1)[51] is the principal disclosure device of the Williams Act. This section requires any "person"[52] who acquires "beneficial owner-

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43. Susquehanna Corp. v. Pan Am. Sulphur Co., 423 F.2d 1075, 1085-86 (5th Cir. 1970).

44. *Id.* at 1086.

45. What is or is not material will always involve a factual determination based on the circumstances of the particular case. The present test is whether there is "substantial likelihood" that a reasonable investor would think the information relevant. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *see also* 17 C.F.R. § 230.405(1) (1983) ("The term 'material' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.").

This concept of materiality considers the stockholder's need to receive useful information without imposing unreasonable costs and burdens on the corporations which must supply this information. For an in-depth discussion of materiality, see generally Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 Bus. Law. 887 (1977); Comment, *Disclosure of Regulatory Violations Under the Federal Securities Laws: Establishing the Limits of Materiality*, 30 Am. U.L. Rev. 225 (1981).

46. Securities and Exchange Comm'n, Report of the Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963).

47. House Report, *supra* note 34, at 2812-13.

48. 15 U.S.C. § 78n(d)(1) (1982). *See infra* notes 60-65 and accompanying text.

49. 15 U.S.C. § 78n(e) (1982). *See infra* notes 66-73 and accompanying text.

50. 15 U.S.C. § 78m(d)(1) (1982). *See infra* notes 51-59 and accompanying text.

51. 15 U.S.C. § 78m(d)(1) (1982).

52. Section 13(d)(3) provides that, "[w]hen two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' . . . ." *Id.* § 78m(d)(3).

ship"[53] of more than five percent of any class of a registered equity security to file an information statement (Schedule 13D)[54] with the SEC and to send a duplicate to both the issuer and the exchanges where the stock is traded. This disclosure statement must be filed within ten days of attaining more than five percent beneficial ownership.[55] The person filing is required to disclose: 1) the background and identity of all persons retaining beneficial ownership of the stock; 2) the source and amount of funds or other consideration for past or future purchases; 3) its purpose, plans, and proposals with regard to the subject company; 4) the nature and extent of all beneficial stock ownership; and 5) any contracts, arrangements, or understandings regarding the acquisition or disposition of shares, the division of profits, or the giving of proxies.[56]

To ensure continued accuracy of the provided information, section 13(d)(2) requires a "prompt" amendment of Schedule 13D to reflect a percentage change in ownership or other material changes in the facts set forth therein.[57] While an amendment filed within ten days of the change usually satisfies this requirement to file "promptly,"[58] a more immediate amendment may be necessary where there is a significant change.[59]

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53. Beneficial ownership is broadly defined for the purposes of the Williams Act. SEC Rule 13d-3 states that a person is deemed the beneficial owner of a security to the extent that such person "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: 1) Voting power including the power to vote or to direct the voting of, such security; and/or, 2) Investment power which includes the power to dispose, or to direct the disposition of, such security." 17 C.F.R. § 240.13d-3 (1983).

The purpose of this rule is to prevent persons who agree to pool their interests from evading the disclosure requirements, since each individually owns less than five percent of the corporation's securities. See House Report, *supra* note 34, at 2817-18.

54. 17 C.F.R. § 240.13d-101 (1983).

55. 15 U.S.C. § 78m(d) (1982). This threshold amount was reduced from 10% to five percent in 1970, in acknowledgment of the possibility that an accumulation of even five percent could augur a change in control of the corporation, a change of which the investor should be informed. H.R. Rep. No. 1655, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 5025, 5027-28.

56. 17 C.F.R. § 240.13d-101 (1983). *See generally* Block & Rudoff, *Schedule 13D Problems Associated With Large Accumulations of Stock*, 10 Sec. Reg. L.J. 3 (1982).

57. *See* 15 U.S.C. § 78m(d) (2) (1982); 17 C.F.R. § 240.13d-2(a) (1983). Section 13(d)(6)(B) exempts parties whose acquisitions within the past 12-month period do not exceed two percent from the initial reporting requirements of § 13(d)(1). 15 U.S.C. § 78m(d)(1), (d)(6)(B) (1982). Rule 13d-2(a), however, makes it clear that even these parties are not exempt from the amendment requirement of § 13(d)(2). 17 C.F.R. § 240.13d-2 (1983); Exchange Act Release No. 34-17353, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,698 (Nov. 28, 1980).

58. *See, e.g.*, D-Z Inv. Co. v. Holloway, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,771 (S.D.N.Y. Aug. 23, 1974).

59. *See* GAF Corp. v. Milstein, 453 F.2d 709, 720-21 (2d Cir. 1971) ("false statements immediately place those required to file in violation of Rule 13d-2 which requires 'prompt' amendment"), *cert. denied*, 406 U.S. 910 (1972). *See also* In re United States Filter Corp., [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,803 (Jan. 7, 1981) (amendment filed one day after signing an acquisition agreement but three weeks after a change in intent is

(ii). Section 14(d)

The second major disclosure provision under the Williams Act is section 14(d)(1).[60] This section sets out filing and disclosure requirements, as well as substantive regulatory protection for tender offers.[61] A bidder commences a tender offer by making a public announcement by means of a press release, a newspaper advertisement, or a public statement.[62]

Generally, section 14(d) requires that a person file a Schedule 14D-1 statement with the SEC[63] prior to making a tender offer for, or requesting an invitation for tenders of, any class of registered equity securities which would result in that person being the beneficial owner of more than five percent of any such class.[64] The disclosure requirements of Schedule 14D-1 reflect those contained in Schedule 13D. Schedule 14D-1 additionally requires the bidder to disclose: 1) past contacts, transactions, or negotiations between the tender offeror and the subject company; 2) the applicability of antitrust laws; 3) margin requirements of section 7 of the Exchange Act; 4) the financial statement of certain bidders; and 5) any legal proceeding which may affect the tender offer.[65]

c. Materially Misleading and Fraudulent Statements

Section 14(e)[66] of the Williams Act prohibits a variety of fraudulent,

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not deemed "prompt").

60. 15 U.S.C. § 78n(d)(1) (1982).

61. *Compare* 15 U.S.C. § 78m(d)(1) (1982) *with id.* § 78n(d)(1). Under § 13(d), disclosure may be delayed for 10 days, and the more substantive provisions of § 14(d) may be avoided. As a result, a § 13(d) acquisition is significantly less costly than a § 14(d) acquisition. Fischel, *Efficient Capital Marketing Theory, The Market for Corporate Control, and The Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 18-20 (1978).

62. 17 C.F.R. 240.14d-2(b) to (c) (1983).

63. Tender offerors are exempt from the requirements of § 14(d) if: 1) the total acquisitions during the preceding 12 months would not exceed two percent of that class, 15 U.S.C. § 78m(d)(6)(B) (1982); 2) the SEC determines that the bidder did not have the intent to change, nor did he actually change, the control of the subject company, *id.* § 78m(d)(6)(D); or 3) the bidder is the issuer of the shares, *id.* § 78m(d)(6)(C).

64. The § 14(d) definitions of the terms "person" and "beneficial ownership" are essentially the same as those of § 13(d). *See supra* notes 52-53.

65. 17 C.F.R. § 240.14d-100 (1983).

66. Section 14(e) 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 or in favor of any such offer, request, or invitation. The Commission shall, for the purpose of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative.

deceptive, or manipulative acts or practices and any material misstatements or omissions concerning a tender offer. The requirements of section 14(e) are not limited to the statutorily required disclosure statement and other tender offer material, but include all conduct "in connection with any tender offer."[67] This broad antifraud provision provides the basis for most of the private litigation instituted under the Williams Act.[68] In some circumstances, section 14(e) may be applied to misstatements made prior to the effective date of a tender offer.[69] Even statements made in advance of a public announcement of a tender offer have the potential to negate the disclosure safeguards enacted for stockholders' protection. However, some factual nexus must exist between the misstatements and the tender offer. If no tender offer was contemplated at the time the statements were made, no factual nexus exists.[70]

Section 14(e) is only a general prohibition against certain practices, authorizing the SEC to promulgate the rules necessary to prevent fraudulent disclosure to stockholders. In this regard, the SEC has used its rulemaking authority under section 14(e) to design a rule, Rule 14e-1, to prevent "lightning" takeover attempts.[71]

Rule 14e-1 has two major provisions. A tender offer must remain open for at least twenty business days,[72] allowing shareholders of the subject company time to receive and assimilate the information necessary to make an informed investment decision. In addition, the offer must remain open for ten business days after the bidder has increased the consideration offered for the stock,[73] removing the time constraints which could lead to misinformed decision making.

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15 U.S.C. § 78n(e) (1982).

67. *Id.*

68. Rule 10b-5 is the broad antifraud provision that prohibits material omissions, misleading statements, and fraudulent or manipulative practices in connection with the purchase or sale of a security. *See* 17 C.F.R. § 240-10b-5 (1983). Section 14(e), containing similar language, basically extends Rule 10b-5 to tender offers. *See* Golub v. PPD Corp., 576 F.2d 759, 764 (8th Cir. 1978); Hurwitz v. R.B. Jones Corp., 76 F.R.D. 149, 161 (W.D. Mo. 1977).

69. "It is well settled that statements made by either the offeror or the target company prior to the actual effective date of a tender offer but after the announcement of the offer and preliminary filings fall within the purview of § 14(e)." Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1318 (W.D. Mich. 1978). *See also* Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir.) (false and misleading statements made "on the eve of a tender offer" met the "in connection with a tender offer" requirement), *cert. denied*, 449 U.S. 951 (1980).

70. *See Berman*, 454 F. Supp. at 1323-24.

71. 17 C.F.R. § 240.14e-1 (1983).

72. *Id.* § 240.14e-1(a). Business days do not include Saturdays, Sundays, or federal holidays. *Id.* § 240.14d-1(b)(6).

73. *Id.* § 240.14e-1(b).

B. *The Virginia Take-Over-Bid Disclosure Act*

Prior to the 1968 enactment of the Williams Act, Virginia was the only state to enact legislation regulating the tender offer process.[74] Since that time, thirty-six states have enacted similar statutes,[75] usually in an attempt to fill in the gaps left by the Williams Act. The Williams Act is not intended to preempt state regulation; indeed section 78bb(a) of the Exchange Act expressly recognizes the right of a state to legislate in this field.[76] The United States Supreme Court supports this view, holding that "[this] section was plainly intended to protect, rather than to limit, state authority."[77]

To a large degree, the Virginia Take-Over-Bid Disclosure Act[78] (Virginia Act) reiterates the procedural and disclosure requirements set forth by the Williams Act. Like its federal counterpart, the Virginia Act clearly states that its purpose is to protect the shareholders and investors of a subject company.[79] Upon the announcement of a takeover offer, a disclosure statement must be filed with the State Corporation Commission.[80]

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74. *See* Take-Over-Bid Disclosure Act, VA. CODE ANN. §§ 13.1-528 to -541 (Repl. Vol. 1978 & Cum. Supp. 1984).

75. Note, *Kneeling To The SEC Rules: The Virginia Takeover Act and SEC Tender Offer Rule 14d-2(b)*, 22 WM. & MARY L. REV. 487, 487 & n.5. (1981).

76. 15 U.S.C. § 78bb(a) (1982) (stating that nothing in the Exchange Act "shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.").

77. Leroy v. Great W. United Corp., 443 U.S. 173, 182 (1979).

78. VA. CODE ANN. §§ 13.1-528 to -541 (Repl. Vol. 1978 & Cum. Supp. 1983).

79. "The purpose of this chapter is to protect the interests of offerees, investors and the public by requiring that an offeror make fair, full and effective disclosure to offerees of all information material to a decision to accept or reject a take-over bid." *Id.* § 13.1-528(b). *See also* Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1034 (4th Cir. 1980) ("[T]he entire purpose of the Virginia Take-Over Bid Disclosure Act has not been shown to be other than to protect the interests of offerees, investors, and the public.").

80. This disclosure statement must contain:

> (i) The name, address and business experience of the offeror and each associate of the offeror;
>
> (ii) The terms and conditions of the take-over bid, which shall include the applicable provisions of § 13.1-530;
>
> (iii) The source and amount of the funds or other consideration used or to be used in making the take-over bid, and if any part of such funds or consideration is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of making such bid, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan or loans made in the ordinary course of business by a bank or financial institution customarily engaged in the business of making loans, it will be sufficient to so state;
>
> (iv) Any plans or proposals that the offeror may have to liquidate the offeree company, to sell its assets to or merge it with any other person, or to make any other material change in its business or corporate structure;
>
> (v) The number of offerors' presently owned shares;

This disclosure statement so closely parallels the one required by the Williams Act that a Schedule 14D-1 may be filed in lieu of the statement required by theVirginia Act.[81]

The Virginia Act does differ from the Williams Act in some respects.[82] First, the Williams Act is national in scope, while the Virginia Act is limited to companies that are incorporated and have their principal place of business in Virginia.[83] The primary difference between these two acts is that the Williams Act makes an offer effective on the day filed,[84] while the Virginia Act prohibits a bidder from making a takeover bid until twenty days after a disclosure statement is filed with the State Corporation Commission.[85]

The SEC has generally opposed the proliferation of state tender offer legislation.[86] In fact, the SEC has requested Congress to enact legislation

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(vi) Information as to any contracts, arrangements, or understandings with any person with respect to any securities of the offeree company, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof . . . .

VA. CODE ANN. § 13.1-531(b)(i)-(vi) (Cum. Supp. 1984).

For a list of exemptions to this disclosure requirement, see *id.* § 13.1-529(b)(ii)-(viii).

81. *Id.* § 13.1-531(b)(1). (Note though that the State Corporation Commission may later require the bidder to supplement this disclosure with additional information.).

82. One major divergence between the two acts is no longer relevant. Previously, the Virginia Act had required purchasers of more than 10% of a Virginia corporation's stock to refute a statutory presumption that control of the company was intended. Act of Mar. 9, 1980, ch. 216, 1980 Va. Acts 228 (current version at VA. CODE ANN. § 13.1-529(b)(iii) (Cum. Supp. 1984)). The court in Telvest, Inc. v. Bradshaw, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,044, at 94,972-73 (4th Cir. Jan. 6, 1983), questioned the validity of this presumption and determined that it placed an unconstitutional burden on interstate commerce. Therefore, the court declared this presumption null and void as violative of the commerce clause. *Id.* at 94,973. In response to this decision by the Fourth Circuit, the Virginia legislature repealed the provision concerning the presumption of an intent to change or control. VA. CODE ANN. § 13.1-529(b)(iii) (Cum. Supp. 1983).

83. State takeover statutes regulate the acquisition of control of publicly held corporations which have a certain nexus with the state. While some states may try to apply their takeover statutes to all corporations organized within the state, *see, e.g.*, DEL. CODE. ANN. tit. 8, § 203 (Repl. Vol. 1983), the Virginia Act applies only to corporations which additionally have substantial assets and activities within the state. VA. CODE ANN. § 13.1-529(e) (Cum. Supp. 1984). For a list of jurisdictional requirements of state takeover statutes, see E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 234-36 (1977); Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510 (1979).

84. 15 U.S.C. § 78n(d) (1982).

85. VA. CODE ANN. § 13.1-531(a) (Cum. Supp. 1983). Given this early warning under state law, subject management usually has the opportunity to plan defensive tactics to thwart the acquisition attempt.

86. *See, e.g.*, SEC. REG. & L. REP. (BNA) No. 351, at A-4 (May 5, 1976).

"which would make it clear [that] the Williams Act preempts the area of regulation of takeover statutes."[87] Congress, however, has shown no inclination to enact such legislation, and the SEC has utilized its rulemaking powers to enact rules in direct conflict with most state takeover statutes.[88] The five-day waiting period of Rule 14d-2[89] is one such example, creating a direct conflict with the twenty-day pre-commencement waiting period required in the Virginia Act.[90]

The Supreme Court, in *Edgar v. MITE Corp.*,[91] addressed this conflict between the SEC rules and state tender offer regulations and struck down the Illinois pre-commencement waiting period as unconstitutional under the supremacy clause.[92] State regulation of interstate tender offers can stand only insofar as it does not frustrate the Williams Act or place an impermissible burden on interstate commerce.[93] The practical effect of this case makes the Virginia Act substantively and procedurally identical to the Williams Act where interstate securities transactions are involved, affording no added advantages beyond the additional recourse of seeking relief from the State Corporation Commission.

III. Remedies

Before beginning an analysis of specific remedies available for disclosure violations, it is necessary to review the responsibilities and obligations of subject management. Every manager has a fiduciary duty to act as a prudent businessman and to ensure that the company is organized and operated for the benefit of its shareholders.[94] This duty is fulfilled when subject management exercises sound business judgment. The "business judgment rule"[95] grants management broad discretion in determining what is in the best interest of the corporation, as long as this discretion is

87. Letter from Harold M. Williams to Sen. W. Proximire (Feb. 15, 1980), *reprinted in* Rich & McSherry, *Conflict Between Federal and State Regulation of Tender Offers: The SEC's Challenge and New York's Response*, 52 N.Y. St. B. J. 446, 446 (1980).

88. This rulemaking authority is based on the broad grant of authority by Congress to the SEC "to make such rules and regulations as may be necessary or appropriate to implement the provisions" of the Exchange Act. 15 U.S.C. § 78w(*l*) (1982).

89. 17 C.F.R. § 240.14d-2 (1983).

90. Va. Code Ann. § 13.1-531(a)(Cum. Supp. 1984).

91. 457 U.S. 624, 634-39 (1982).

92. *Id.* The Court held, "This ten day waiting period . . . underscores the basic purpose of the Williams Act — to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success." *Id.* at 638 (quoting H.R. Rep. No. 1373, 94th Cong., 2d Sess. 12 (1976)).

93. 457 U.S. at 630.

94. *E.g.*, Singer v. Magnavox Co., 380 A.2d 969, 976-77 (Del. 1977); Kaplan v. Goldsamt, 380 A.2d 556, 568 (Del. Ch. 1977).

95. *See generally* Block & Miller, *The Responsibilities and Obligations of Corporate Directors in Takeover Contests*, 11 Sec. Reg. L. J. 44 (1983); Johnson, *Anti-Takeover Actions and Defenses: Business Judgment or Breach of Duty?*, 28 Vill. L. Rev. 51 (1982).

"uninfluenced by personal considerations and is exercised in good faith."[96] The business judgment rule allows subject management to resist a particular takeover attempt if it reasonably believes there are valid business reasons to do so.

A. *Litigation Under the Williams Act*

A subject company may desire to bring suit in federal court to seek equitable relief for a bidder's alleged disclosure violations. However, inadequacies in a bidder's disclosure statement will seldom succeed in blocking an offer. Normally, the only defensive benefit of litigation is delaying the tender offer process, since disclosure deficiencies can usually be cured by subsequent statements.[97]

1. Implied Private Cause of Action

For the judicial system to protect a private party's rights and interests, that party or another party who can and will assert such rights and interests must have standing to contest the offending acts or practices.[98] The Williams Act is silent on the issue of private causes of action;[99] only the SEC is given explicit authority to institute judicial enforcement proceedings.[100]

a. Development of the Implied Rights Doctrine

The history of implied private causes of action under the Williams Act closely parallels the history of the implied rights doctrine. Federal courts, which were uniformly liberal in allowing implied private rights of action when the Williams Act was enacted in 1968, extended this liberality to tender offer cases.[101] Few courts have hesitated to imply a private right of

96. Miller v. American Tel. & Tel. Co., 507 F.2d 759, 762 (3d Cir. 1974).

97. *See, e.g.*, Chromalloy Am. Corp. v. Sun Chem. Corp., 474 F. Supp. 1341, 1348 (E.D. Mo. 1979). This delay, however, may be important, particularly if a takeover by a "friendlier" corporation is under way.

98. Since the Supreme Court emphasizes statutory construction in resolving both questions of standing and implied private causes of action, the Court often treats these issues as a single inquiry. *See, e.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977). The Court constantly rephrased the issue as a cause of action for damages, *id.* at 24, 31, or standing to sue for damages, *id.* at 35-36, 38.

99. In contrast, other sections of the Exchange Act expressly provide for private causes of action. *See, e.g.*, 15 U.S.C. § 78r(a) (1982).

100. As the Act was originally enacted, even the SEC was not explicitly granted the authority to sue. Congress amended the Williams Act in 1970 to give the SEC this privilege. Act of Dec. 22, 1970, Pub. L. No. 91-567, § 5, 84 Stat. 1497, 1498.

101. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 430-32 (1964) (concluding that private enforcement was necessary to supplement the enforcement scheme established by Congress in the Exchange Act). *See generally* Comment, *An Implied Private Right of Action Under*

action in favor of virtually any conceivable plaintiff.[102] The Supreme Court, however, has significantly limited the implied rights doctrine in the past decade.[103]

b. *Piper v. Chris-Craft Industries*

The Supreme Court, in *Piper v. Chris-Craft Industries*,[104] for the first time rejected the implication of a private right of action under federal securities laws. In *Piper*, an unsuccessful bidder brought an action for damages against a subject corporation, alleging violations of section 14(e) of the Williams Act.[105] The Court, employing a stricter standard than that used in previous decisions, held that before a private cause of action could be implied, such cause of action must be necessary to carry out the intent of the statute.[106] Congress clearly intended to protect the stockholder while maintaining neutrality between the bidder and subject management.[107]

The Court analyzed the legislative intent of the Williams Act by applying a test developed in *Cort v. Ash*.[108] The *Cort* test lists four factors to be considered before the Court will infer a private cause of action:

> 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

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the Williams Act: Tradition vs. Economic Reality, 77 Nw. U.L. Rev. 316 (1982).

102. As recently as January, 1977, an implied right for nearly every party to bring suit under the Williams Act was virtually uncontested. E. Aranow, H. Einhorn, & G. Berlstein, *supra* note 83, at 104. Most courts prior to *Piper* did not even consider whether a private cause of action could be implied. *See, e.g.*, Missouri Portland Cement Co. v. H.K. Porter Co., 535 F.2d 388 (8th Cir. 1976) (subject company's standing to sue is assumed under § 14(d)).

Only two cases restricted implied private causes of action prior to 1977. However, in neither of these cases were harmful misrepresentations made to the stockholders. *See* Klaus v. Hi-Shear Corp., 528 F.2d 225, 232 (9th Cir. 1975) (where the bidder was the party misled); Sargent v. Genesco, Inc., 492 F.2d 750, 770 n.28 (5th Cir. 1974) (where the actual issue was whether the bidder had violated any duties it had towards the shareholder).

103. *See infra* notes 104-12, 274 and accompanying text.

104. 430 U.S. 1 (1977).

105. *Id.* at 4. The Supreme Court first dealt with disclosure violations under the Williams Act in Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975). Since the defendant did not question the existence of a private right of action under the Williams Act or the subject management's standing to sue, the Supreme Court declined to pursue these issues. *Id.* at 62.

106. 430 U.S. at 25, 42.

107. The availability of an action by an unsuccessful bidder does not provide a necessary supplement to the congressional purpose of protecting corporate investors. *Id.* at 22-37.

108. 422 U.S. 66 (1975).

> 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?[109]

The Court in *Piper* came to the conclusion that Congress did not intend a private cause of action for damages to be inferred. Surprisingly, the Court explicitly left open the question of whether a private cause of action for damages could be implied for subject management under section 14(e).[110]

The Court concluded its analysis of section 14(e) by noting the limited nature of its holding. As only money damages were requested in *Piper*,[111] the Court did not address the question of standing to sue for *injunctive relief*: "We intimate no view upon whether as a general proposition a suit in equity for injunctive relief, as distinguished from an action at law for damages, would lie in favor of a tender offer or under . . . § 14(e). . . ."[112] Therefore, it appears under *Piper* that subject management, as well as bidders, may have an implied private cause of action, at least for injunctive relief, under sections 13(d), 14(d), and 14(e).

c. Federal Courts After *Piper*

Even after *Piper*, most courts do not consider whether a private cause of action may be implied under the Williams Act.[113] Those courts which even mention the issue usually brush it aside by citing *GAF Corp. v. Milstein*[114] for the proposition that a private cause of action for subject management is well established.[115] A number of federal district courts, however, have recently begun to address the issue of an inferred private cause of action for subject management, using the test developed by the Supreme Court in *Transamerica Mortgage Advisors, Inc. v. Lewis*.[116] The relevant inquiry under *Transamerica* is the intent of Congress. Other factors, such as the public interest, harm to the parties, and general constitutional considerations, have been relegated to a position of vanishing significance.[117]

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109. *Id.* at 78 (original emphasis) (citations omitted).

110. *Piper*, 430 U.S. at 42 n.28.

111. *Id.* at 47.

112. *Id.* at 47 n.33.

113. *See, e.g.*, Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240 (9th Cir. 1977) (assuming without discussion subject management's standing to sue under § 13(d)).

114. 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

115. *See, e.g.*, Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1222-23 (4th Cir. 1980) (citing *GAF Corp.* as the "landmark authority" for the establishment of implied private causes of action), *cert. denied*, 449 U.S. 1101 (1981).

116. 444 U.S. 11 (1979).

117. *Id.* at 15-25. *See, e.g.*, Gateway Indus., Inc. v. Agency Rent A Car, Inc., 495 F. Supp. 92, 97 (N.D. Ill. 1980).

d. The Virginia Courts' View

The federal courts in Virginia uniformly agree that an implied private right of action exists for subject management to seek injunctive relief or damages from a bidder for disclosure violations.[118] The court in *Dan River, Inc. v. Unitex Ltd.*,[119] considered the implied private cause of action and cited *GAF Corp. v. Milstein*[120] as "the landmark authority on the point."[121] In *GAF Corp.*, the court stated that of all possible private plaintiffs, "the issuer unquestionably is in the best position to enforce section 13(d) . . . . [T]he issuer has not only the resources, but the self-interest so vital to maintaining an injunctive action."[122] The court concluded that *J.I. Case Co. v. Borak*,[123] stood for the proposition that an inferred private cause of action under the Williams Act is well established.[124] In later Virginia cases, the federal courts have not questioned either the existence of a private right of action or standing to sue.[125]

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118. Although the general trend denies an implied damage action, *see, e.g.*, W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc., 466 F. Supp. 800 (D. Neb., 1979) (subject management may sue for an injunction, but not damages, under § 13(d)), the Virginia courts remain an exception to this trend. *See infra* notes 149-155 and accompanying text.

119. 624 F.2d 1216 (4th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981). The court relied entirely on previous lower court decisions and ignored the then-recent Supreme Court reformulations of the implied rights test in Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).

120. 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). *See also* Missouri Portland Cement Co. v. H.K. Porter Co., 535 F.2d 388 (8th Cir. 1976) (subject management's standing assumed under § 14(d)).

121. 624 F.2d at 1222-23. The *Unitex* court primarily examined Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 55 (1975) (involving a late filing under § 13(d), with the defendant alleging that he was unaware of this duty to file after acquiring five percent of the plaintiff corporation's stock). The *Rondeau* Court did not directly address the questions of standing or the existence of a private right of action but focused on whether the plaintiff was entitled to the injunctive relief requested. *Id.* at 59 n.9. The *Unitex* court, 624 F.2d at 1223, concluded that *Rondeau* had not affected the holding in *GAF Corp.* The court also noted that *Rondeau* reserved the right to injunctive relief under § 13(d) and that *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 n.28 (1977), reserved the issue of whether the subject company has standing under § 14(e). *Unitex*, 624 F.2d at 1222.

122. 453 F.2d at 719.

123. 377 U.S. 426, 430-35 (1964) (providing the basic foundation for decisions inferring a private cause of action under federal securities regulations and focusing on the adequacy of existing liability provisions to implement congressional intent to provide a private cause of action for § 14(a) violations).

124. 453 F.2d at 719.

125. *See, e.g.*, Telvest, Inc. v. Bradshaw, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,044 (4th Cir. Jan. 6, 1983); Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983).

2. Civil Remedies

a. Injunctive Relief

The problem of determining appropriate relief for disclosure violations presents a challenge to the judiciary because of timing problems inherent in the tender offer process. Since violations of this sort can quickly injure the stockholder, courts must be able to provide swift judicial aid.[126] Courts commonly employ the interlocutory injunction to accomplish this goal.

(i). Interlocutory Injunctions

An interlocutory injunction[127] may be issued at any time to preserve the status quo pending a determination on the merits.[128] Once granted, an interlocutory injunction stands as a binding restraint on the respondent until rescinded by further action of the court.[129]

There are two types of interlocutory injunctions: the preliminary injunction and the temporary restraining order.[130] These two interlocutory injunctions are essentially the same except that, with a temporary restraining order, the respondent is given no notice or opportunity to be heard. Since there is no hearing for a temporary restraining order and the hearing for a preliminary injunction is usually limited in scope, various

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126. Courts have the power to enforce interlocutory and permanent injunctions by means of contempt proceedings. Every court of the United States has the inherent power to punish, by fine or imprisonment, any willful disregard or disobedience of any lawful writ, process, order, rule, or decree. 18 U.S.C. § 401 (1982). *See generally* Note, *Preliminary Injunctive Relief and Tender Offers: An Analysis Under The Williams Act*, 49 GEO. WASH. L. REV. 563 (1981).

127. Because an interlocutory injunction is equitable in nature, the petitioner is subject to the traditional defenses recognized by courts of equity. Therefore, if both the bidder and subject management violate the Williams Act, a court would rule that the parties were *in pari delicto* and refuse to grant an interlocutory injunction. *See, e.g.*, Cauble v. White, 360 F. Supp. 1021, 1029 (E.D. La. 1973). In addition, federal courts have uniformly held that a trial court's decision to grant or deny an injunction should be upheld, absent a clear abuse of discretion or an erroneous application of legal principles. *See, e.g.*, Sargent v. Genesco, Inc., 492 F.2d 750, 770 (5th Cir. 1974).

128. American Smelting & Ref. Co. v. Godfrey, 158 F. 225, 233-34 (8th Cir.), *cert. denied*, 207 U.S. 597 (1907). An interlocutory injunction also aids the court by preventing the respondent from taking action which could prevent the court from granting any meaningful relief after a trial.

129. Kent Prods., Inc. v. Hoegh, 245 Iowa 205, ____, 61 N.W.2d 711, 716 (1953).

130. The temporary restraining order (TRO) is issued ex parte, and is normally granted only where the petitioner will suffer irreparable injury if relief is not granted immediately. A TRO will preserve the status quo until the court can determine whether a preliminary injunction should be granted. *See* Inhabitants of Lincolnville v. Perry, 150 Me. 113, ____, 104 A.2d 884, 887 (1954); Perseverance Common School Dist. v. Honey, 367 S.W.2d 243, 246 (Mo. Ct. App. 1963).

safeguards have been devised by courts to prevent abuse of these interlocutory injunctions. The most important safeguard requires the petitioner to post a bond to protect the respondent's rights if the petitioner ultimately fails at trial.[131]

Courts follow two basic approaches in deciding whether to impose a preliminary injunction. The first approach was originated by courts which believed it easier to enjoin a proposed tender offer than to try to correct it after the completion of a fraudulent or deceptive transaction.[132] Courts following this line of reasoning have relaxed the requirements necessary for a preliminary injunction by utilizing a disjunctive test that requires a petitioner to show *either* probable success on the merits and possible irreparable injury[133] *or* a sufficiently serious question about the merits and a balance of hardship in the petitioner's favor.[134]

The second approach, at the other end of the spectrum, is the traditional balance-of-hardship test. Under this test:

> [f]our factors enter into the determination of whether to grant or to withhold interim injunctive relief: (a) plaintiff's likelihood of success in the underlying dispute between the parties; (b) whether plaintiff will suffer irreparable injury if interim relief is denied; (c) the injury to defendant if an injunction is issued; and (d) the public interest.[135]

Courts apply this more stringent test to prevent subject management from abusing preliminary injunctions for "allegedly" fraudulent and deceptive tender offers.[136]

Federal courts in Virginia presently follow the balance-of-hardship approach.[137] These courts provide further guidelines regarding the degree of importance assigned to each factor:

> There is a correlation between the likelihood of plaintiff's success and the probability of injury to him. If the likelihood of success is great, the need

131. *See, e.g.*, Page Communication Eng'rs, Inc. v. Froehlke, 475 F.2d 994, 996-97 (D.C. Cir. 1973) (citing FED. R. CIV. P. 65(c)).

132. *E.g.*, Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969).

133. "Irreparable injury justifying an injunction is that which cannot be adequately compensated in damages, or for which damages cannot be compensable in money . . . ." Even then, an injunction "should issue only where the party seeking [the injunction] . . . is threatened with irreparable loss or injury without adequate remedy at law . . . ." Greenberg v. De Salvo, 254 La. 1019, ____, 229 So.2d 83, 86 (1969).

134. *See, e.g.*, Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 866 (2d Cir.), *cert. denied*, 418 U.S. 919 (1974); D-Z Inv. Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. Aug. 23, 1974).

135. Dan River, Inc. v. Icahn, 701 F.2d 278, 283 (4th Cir. 1983) (quoting North Carolina State Ports v. Dart Containerline Co., 592 F.2d 749, 750 (4th Cir. 1979)).

136. *See, e.g.*, Mobile Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981); Scott v. Multi-Amp Corp., 386 F. Supp. 44 (D.N.J. 1974).

137. *See, e.g.*, *Dan River*, 701 F.2d at 283.

> for showing the probability of irreparable harm is less. Conversely, if the likelihood of success is remote, there must be a strong showing of the probability of irreparable injury to justify issuance of the injunction.[138]

The courts have held that these standards are fully applicable in cases involving tender offers and the strictures of the Williams Act.[139] Should the Virginia petitioner ultimately succeed in satisfying this balance-of-hardship test, the court will grant a preliminary injunction.

The degree of preliminary injunctive relief imposed in a particular situation usually depends upon the nature of the violation. If the violation is relatively minor, a court will generally enjoin the perpetrator from voting his shares or otherwise attempting to acquire control over the subject company until he complies with the Williams Act.[140] If the violation is serious, the court may supplement injunctive relief with other equitable remedies, such as allowing shareholders a reasonable time to withdraw their stock[141] or ordering total divestiture of all stock acquired by the bidder.[142] These more stringent remedies are used only when further disclosure would be irrelevant and where no other remedy is available to prevent a bidder from profiting from wrongdoing.[143]

(ii). Permanent Injunctions

In *Rondeau v. Mosinee Paper Corp.*[144] the Supreme Court indicated that permanent injunctive relief may be a remedy for a violation of the Williams Act.[145] Following a full hearing on the merits, a court is empowered to alter the circumstances in accordance with the court's understanding of justice and equity.[146] Once a permanent injunction has been issued, the respondent is forever barred from engaging in the proscribed

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138. *Id.* (quoting North Carolina State Ports v. Dart Containerline Co., 592 F.2d 749, 750 (4th Cir. 1979)).

139. 701 F.2d at 283.

140. *See, e.g.*, Life Investors, Inc. v. AGO Holding Co., [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,356 (8th Cir. Oct. 21, 1981) (enjoining further tender offer activity until bidder makes adequate disclosure under § 14(d) and (e)); Bath Indus., Inc. v. Blot, 427 F.2d 97 (7th Cir. 1970) (enjoining defendant from voting stock, requesting a special shareholders' meeting, or acquiring additional shares until filing a Schedule 13D); Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248 (W.D. Okla. 1972) (enjoining defendant from voting any shares acquired during the period of violation).

141. Mobile Corp. v. Marathon Oil Co., 669 F.2d 366, 377-78 (6th Cir. 1981). In this case, U.S. Steel Corporation coupled a tender offer with two illegal options. The court struck the illegal options and ordered U.S. Steel to keep the tender offer open to give shareholders a reasonable time to withdraw their shares.

142. Hanna Mining Co. v. Norcen Energy Resources Ltd., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶¶ 98,742, 98,878 (N.D. Ohio June 11, 1982).

143. *See Mobil Corp.*, 669 F.2d at 377.

144. 422 U.S. 49 (1975).

145. *Id.* at 59 n.9.

146. United States v. Diapulse Mfg. Corp. of Am., 262 F. Supp. 728, 730 (D. Conn. 1967).

activities.[147] Because participants in a tender offer need relief quickly, most cases under the Williams Act involve requests for preliminary rather than permanent injunctive relief.[148]

b. Damages

The general trend is to deny damages for violations of the Williams Act.[149] This is not to say, however, that a stockholder cannot recover for any damage suffered. Damage actions under the Williams Act are governed by section 28(a),[150] which limits recovery to a claimant's actual damages.[151]

It is well settled that section 28(a) allows recovery for compensatory but not punitive damages,[152] though different theories have been developed to recompense the plaintiff for his loss. Most courts follow the out-of-pocket rule.[153] The purpose of this rule is to compensate the plaintiff for any loss sustained and to restore him to his position prior to the defendant's fraudulent actions.[154] The plaintiff is entitled to "the difference between the contract price, or the price paid, and the real or actual value at the date of the sale, together with such outlays as are attributable to the defendant's conduct."[155]

B. *SEC Relief*

A subject corporation may present evidence of disclosure violations before the SEC and request that the SEC take steps to alleviate the problem. Should the SEC decide to act, it has various tools at its disposal, including administrative sanctions, injunctive proceedings, and referrals to the Department of Justice for criminal procecution. These enforcement alternatives permit the SEC to choose a remedy or a combination of remedies in order to fashion corrective action that most effectively protects

147. Because the respondent is forever barred from engaging in the activity, courts are very reluctant to grant permanent injunctions. *See, e.g.*, SEC v. Northeastern Fin. Corp., 268 F. Supp. 412 (D.N.J. 1967).

148. E. Aranow, H. Einhorn, & G. Berlstein, *supra* note 83, at 129.

149. Virginia courts are an exception to this trend. *See, e.g.*, Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1225 (4th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981).

150. 15 U.S.C. § 78bb(a) (1982).

151. *Id.*

152. *See* Byrnes v. Faulkner, Dawkins & Sullivan, 550 F.2d 1303, 1313 (2d Cir. 1977); Gould v. American-Hawaiian S.S. Co., 535 F.2d 761, 781 (3d Cir. 1976).

153. *See generally* Mullaney, *Theories of Measuring Damages in Security Cases and the Effects of Damages on Liability*, 46 Fordham L. Rev. 277 (1977); Note, *The Measure of Damages in Rule 10b-5 Cases Involving Actively Traded Securities*, 26 Stan. L. Rev. 371 (1974).

154. Restatement (Second) of Torts §549 comment g (1977).

155. Estate Counseling Serv., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F.2d 527, 533 (10th Cir. 1962).

the public interest.[156]

The SEC, in undertaking its administrative and enforcement responsibilities, has employed adjudication, rulemaking, and legislation. However, this "enforcement machinery" is used to ensure statutory compliance rather than to effect relief for investors. Investors must seek their own relief for violations of federal securities regulations.[157]

1. Administrative Proceedings

Two courses are available to the SEC should it choose to proceed administratively for alleged disclosure violations: Section 15(c)(4) and trading suspensions.

a. Section 15(c)(4)

Section 15(c)(4)[158] provides:

> If the Commission finds, after notice and opportunity for hearing, that any person subject to the provisions of section 78*l* or 78m of this title or subsection (d) of this section [Public Law Sections 12, 13, or 15(d)] or any rule or regulation thereunder has failed to comply with any such provision, rule, or regulation in any material respect, the Commission may publish its findings and issue an order requiring such person to comply with such provision or such rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order.[159]

This statutory provision enables the SEC to compel a bidder who filed an inadequate, misleading, or false Schedule 13D statement to make appropriate revisions. Similarly, a bidder who fails to file any statement could be compelled to file by a section 15(c)(4) proceeding.[160]

b. Suspensions of Trading

The SEC has the power to summarily suspend all trading on a national securities exchange for a period not exceeding ten days.[161] While a bidder

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156. Ferrara, *SEC Division of Trading and Markets: Detection, Investigation and Enforcement of Selected Practices That Impair Investor Confidence in the Capital Markets*, 16 How. L.J. 950, 964-65 (1971).

157. E. ARANOW & H. EINHORN, *supra* note 29, at 278.

158. 15 U.S.C. § 78o(c)(4) (1982).

159. *Id.* The Supreme Court has determined that the SEC, in an administrative proceeding, must base its findings on a preponderance-of-the-evidence standard rather than the clear-and-convincing standard needed in private actions. Steadman v. SEC, 450 U.S. 91, 102 (1981).

160. E. ARANOW & H. EINHORN *supra* note 29, at 278-79.

161. 15 U.S.C. § 78*l*(k) (1982). Presently, the suspension order can only last 10 days. Previously, the SEC followed the practice of "rolling over" suspension orders for successive

is not prohibited from accepting shares tendered by persons other than broker-dealers, most will refrain from doing so, as the bidder's acceptance of tendered shares may subject him to further liability under the anti-fraud provisions of the federal securities regulations.[162]

2. Judicial Relief

Enforcement of the federal securities regulations sometimes requires the SEC to procure an injunction against the violator. Section 21(d) of the Exchange Act gives the SEC authority to initiate action in the appropriate United States district court[163] and to obtain injunctive relief for disclosure violations.[164] Injunctive relief is the SEC's primary civil remedy under the federal securities regulations.[165] The SEC may seek a preliminary injunction to compel compliance with the disclosure laws[166] or a permanent injunction if there is reasonable likelihood that the defendant will

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periods of 10 days to keep the suspension in effect for a longer period of time. This practice is no longer allowed. *See* SEC v. Sloan, 436 U.S. 103 (1978). The Court in *Sloan* left open the question whether a second summary suspension could be entered on a different set of circumstances. *Id.* at 110.

162. E. ARANOW & H. EINHORN, *supra* note 29, at 279.

163. 15 U.S.C. § 78u(d) (1982). This section states:

> Wherever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

While a literal reading of this section would result in limiting courts to enjoining violations of the Exchange Act, courts, once jurisdiction is properly invoked, have the discretionary power to grant equitable relief based upon the rationale that one who violates securities regulations should not be allowed to profit from his wrongdoing. E. ARANOW & H. EINHORN, *supra* note 29, at 281.

164. The jurisdiction of a federal district court to hear actions is conferred by § 27 of the Exchange Act. 15 U.S.C. § 78aa (1982).

165. *See* 15 U.S.C. § 78u(d)-(e) (1982). In recent years, the SEC has obtained ancilliary jurisdiction allowing the court to grant additional equitable relief to accompany an injunction. *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 93 (S.D.N.Y. 1970) (defendants were required to disgorge profits earned in transactions involving disclosure violations); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103-05 (2d Cir. 1972) (defendants were ordered to rescind transactions involving disclosure violations).

166. 15 U.S.C. § 78u(d) (1982).

continue to violate the Act.[167]

C. *Criminal Proceedings*

Criminal sanctions may be imposed for willful violations of the federal securities laws.[168] While the SEC is granted broad subpoena powers to investigate apparent violations,[169] it may not initiate criminal proceedings sua sponte. Upon completion of an investigation, the SEC must refer the matter to the United States Department of Justice, detailing the criminal conduct and recommending that violators be indicted and prosecuted.[170] If the Department of Justice concurs, it will then institute criminal proceedings.[171]

Criminal sanctions are extremely uncommon.[172] However, one may surmise that the probability of criminal prosecution for disclosure violations will increase where there is an obvious or repeated failure to comply with the federal securities regulations or where the nature of the violation is the principal cause of substantial losses for shareholders.[173]

D. *Remedies Under the Virginia Take-Over-Bid Disclosure Act*

The Virginia Act, unlike the Williams Act, expressly authorizes civil,[174] as well as criminal,[175] sanctions. The civil liabilities section, by its own terms, applies only to infractions of the actual takeover bid and disclosure requirements.[176] It imposes civil liability upon the bidder and every other person who materially aids or participates in the takeover bid.[177]

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167. *See, e.g.*, SEC v. Falstaff Brewing Corp., 629 F.2d 62, 77 (D.C. Cir. 1980); SEC v. Bangor Punta Corp., 331 F. Supp. 1154, 1163 (S.D.N.Y. 1971) (an injunction should be issued where the defendant is shown to have "a propensity or natural inclination to violate the securities law"). For a discussion on modifying or dissolving SEC injunctions, see generally Steinberg, *SEC and Other Permanent Injunctions — Standards for Their Imposition, Modification, and Dissolution*, 66 CORNELL L. REV. 27 (1980).

168. 15 U.S.C. § 78ff (1982). "Willful" violations are construed by the courts to mean that the defendant must know he is committing a wrongful act, but he does not have to know the specific SEC rule he is violating. United States v. Peltz, 433 F.2d 48, 54-55 (2d Cir. 1970).

169. 15 U.S.C. § 78u(a)-(b) (1982).

170. *See, e.g.*, *id.* § 78u(d) (1982); *see also* E. ARANOW & H. EINHORN, *supra* note 29, at 284.

171. 15 U.S.C. § 78u(d) (1982); E. ARANOW & H. EINHORN, *supra* note 29, at 284.

172. *See* E. ARANOW & H. EINHORN, *supra* note 29, at 285 (there have been no reported criminal prosecutions involving tender offers to date).

173. *Id.* at 286.

174. VA. CODE ANN. § 13.1-539 (Repl. Vol. 1978). Civil actions have a two-year statute of limitations. *Id.* § 13.1-539(d).

175. *Id.* § 13.1-536.

176. *Id.* § 13.1-539. The statute specifically provides that these rights are in addition to any other rights and remedies that may exist at law or in equity. *Id.* § 13.1-539(f). Thus, a person aggrieved by an infraction not specifically covered is not entirely without recourse.

177. While these persons are considered jointly and severally liable, any of the parties,

The remedy provided for shareholders (which indirectly benefits incumbent management) includes rescission, the return of tendered shares and dividends received, and attorneys' fees.[178] If the bidder no longer possesses the stock, the shareholder will receive the substantial equivalent in damages.[179]

The State Corporation Commission (SCC) is authorized to administer criminal sanctions for disclosure violations sua sponte.[180] This regulatory agency has been given the power of a court of record to issue both interlocutory and permanent injunctions.[181] In addition, the SCC may punish for contempt, as would a court of equity, anyone violating these injunctions.[182] Finally, the SCC may choose to prosecute a disclosure violation as a misdemeanor,[183] or to conduct its own hearings and punish violations by imposing a penalty of up to five thousand dollars.[184] To accomplish its enforcement task, the SCC may make any investigation, either inside or outside the state, it deems necessary to determine whether a party has violated, or is preparing to violate, the provisions of the Act or any order or injunction issued by the SCC.[185]

IV. Civil RICO as a Remedy for Securities Law Violations

A. *Introduction*

In an attempt to combat the proliferation of organized crime in the United States, Congress in 1970 enacted the Organized Crime Control Act (OCCA).[186] Title IX of OCCA, the Racketeer Influenced and Corrupt Organizations Act (RICO),[187] was promulgated in an effort to eradicate the infiltration of organized crime and racketeering[188] into American busi-

except the bidder, may escape liability if "he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist." *Id.* § 13.1-539(b).

178. *Id.* § 13.1-539(a)(2)(i).

179. *Id.* § 13.1-539(a)(2)(ii).

180. *Id.* § 13.1-534 (Cum. Supp. 1984).

181. *Id.* § 13.1-535 (Repl. Vol. 1978).

182. *Id.* These injunctions have the same force and effect as do judicial injunctions. *See supra* notes 127-48 and accompanying text.

183. Va. Code Ann. § 13.1-536 (Repl. Vol. 1978). If convicted of a misdemeanor, a person may be fined up to $5,000, sentenced to one year in jail, or both.

184. *Id.* § 13.1-537.

185. *Id.* § 13.1-534. To insure service of process on out-of-state bidders, the Virginia Act includes a long-arm statute which states, "Every nonresident offeror who makes a takeover bid shall be deemed to have appointed the clerk of the Commission as his agent upon whom maybe served . . . process . . . ." *Id.* § 13.1-540.

186. Pub. L. No. 91-452, 84 Stat. 922 (1970).

187. 18 U.S.C. §§ 1961-1968 (1982).

188. Racketeering is defined as "[a]n organized conspiracy to commit the crimes of extortion or coërcion, or attempts to commit extortion or coercion" as well as "[a]ctivities of organized criminals who extort money from legitimate businesses by violence or other forms

nesses.[189] Although RICO is not a securities law, anyone who fraudulently buys or sells securities may be subject to RICO's powerful sanctions.[190] Violators of the Act face both criminal[191] and civil penalties[192] in actions brought by the government, as well as treble damages in suits brought by private parties whose businesses have been injured by a RICO violation.[193] Until recently, however, private parties have not pursued these available civil RICO remedies.[194] In the civil RICO actions that have been filed, some courts have attempted to restrict RICO's application because of its broad and far-reaching powers, while others have favored a liberal interpretation.[195]

B. *The Structure and Requirements of RICO*

1. The Racketeering Activity Requirement

The heart of a RICO violation is "racketeering activity,"[196] identified in

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of threats or intimidation or conduct of illegal enterprises . . . ." BLACK'S LAW DICTIONARY 1132 (rev. 5th ed. 1979). RICO identifies those types of conduct that constitute racketeering but does not define the term. 18 U.S.C. § 1961(1) (1982).

189. Statement of Findings and Purpose, Pub. L. No. 91-452, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 1073: "It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process . . . and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *See also* McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 56-60 (1970). (Senator McClellan, a proponent of the bill, discusses the need for the bill and cites statistics on the involvement of organized crime in business.)

190. 18 U.S.C. §§ 1963-1964 (1982).

191. *Id.* § 1963.

192. *Id.* § 1964. *See infra* text accompanying notes 265-78.

193. *Id.* § 1964(c).

194. By 1978, only two cases involving private RICO claims under 18 U.S.C. § 1964(c) had been reported. *See* Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978) (civil action brought by the bank against a defendant who had an earlier criminal conviction under OCCA); Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975) (action by customers of an answering service alleging that defendants had conspired to fix prices and had willfully overcharged customers).

195. For cases applying a restrictive interpretation of RICO, see, e.g., Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983); United States v. Webster, 639 F.2d 174 (4th Cir. 1981), *modified*, 669 F.2d 185 (4th Cir. 1982); Marshall Field & Co. v. Icahn, 537 F. Supp. 413 (S.D.N.Y. 1982).

For cases applying a liberal interpretation, see Spencer Cos. v. Agency Rent-A-Car, Inc., [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,214 (D. Mass. Nov. 17, 1981); United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); *see generally* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982) (discussing both liberal and restrictive applications of civil RICO).

196. 18 U.S.C. § 1961 (1982) provides:

> "[R]acketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dan-

the Act as any of four different types of illegal activities. First, RICO prohibits the use or investment of income derived from a pattern of racketeering activity[197] to acquire or operate an interest in an enterprise[198] which affects interstate or foreign commerce.[199] Second, the Act forbids the acquisition or maintenance of an interest in any enterprise through a pattern of racketeering activity.[200] Third, it prohibits anyone associated[201]

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gerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), Section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2341-46 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

197. *See infra* notes 204-09 and accompanying text, discussing the definition of a "pattern" of racketeering activity.

198. *See infra* notes 220-29 and accompanying text, defining an "enterprise."

199. 18 U.S.C. § 1962(a) (1982) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family and his or their accomplices in any pattern [of] racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

200. *Id.* § 1962(b) provides: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the

with the enterprise from conducting business affairs through a pattern of racketeering activity.[202] Finally, RICO constrains any person from conspiring to violate any of these provisions.[203] Under this broad definition of racketeering activity, certain takeover bid strategies can clearly fall under the auspices of RICO.

2. The Pattern of Racketeering Activity Requirement

Before RICO sanctions can be imposed, there must be more than one incident of racketeering activity; the challenger must demonstrate a pattern of racketeering activity. A pattern of racketeering requires proof of at least two acts prohibited by RICO,[204] "one of which occurred after [RICO was enacted] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."[205] Courts are divided on whether a nexus must exist between these two acts of racketeering.[206]

A prerequisite to challenging a corporate takeover attempt under RICO is proof that the defendant committed at least two acts of racketeering in the past ten years.[207] This could be satisfied by a showing that at least some part of the income derived from racketeering activity was used in the acquisition of an interest in another business.[208] The other racketeering act need not be a securities violation, though depending upon the court, a common link between the two acts may be necessary.[209]

In *Dan River, Inc. v. Icahn*,[210] Dan River alleged racketeering activity

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activities of which affect, interstate or foreign commerce."

201. *See infra* notes 230-41 and accompanying text.

202. 18 U.S.C. § 1962(c) (1982) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

203 *Id.* § 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

204. *See supra* notes 196-202 and accompanying text.

205. 18 U.S.C. § 1961(5) (1982).

206. *Compare* United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (a widely cited case stating that "racketeering acts [must be] connected with each other by some common scheme, plan, or motive so as to constitute a pattern."), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) *with* United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.) (stating there was "no reason for reading [a requirement of interrelatedness] into the statutory definition"), *cert. denied*, 439 U.S. 953 (1978).

207. *See supra* notes 204-05 and accompanying text.

208. 18 U.S.C. 1962(a) (1982). *See* United States v. McNary, 620 F.2d 621, 628-29 (7th Cir. 1978); Spencer Cos. v. Agency Rent-A-Car, Inc., [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,215 (D. Mass. Nov. 17, 1981).

209. *See supra* note 206 and accompanying text.

210. 701 F.2d 278 (4th Cir. 1983).

after a "buy-me-out-or-face-a-takeover" ultimatum by the defendant Icahn, charging that Icahn's interest in Dan River was being financed with money derived from a pattern of racketeering activity.[211] Dan River asserted prior offenses by Icahn of securities fraud and mail fraud, as well as Icahn's earlier uses of a "buy-me-out-or-face-a-takeover" strategy.[212] The Fourth Circuit, applying a restrictive interpretation of RICO, found several flaws in Dan River's claim, primarily Dan River's difficulty in proving Icahn's criminal intent,[213] a prerequisite to a finding of mail or securities fraud.[214] The court noted that defendant Icahn's reliance upon legal counsel constituted evidence of good faith, thereby rebutting any inference of criminal intent.[215]

In *Spencer Cos. v. Agency Rent-A-Car, Inc.*,[216] a recent case closely paralleling *Dan River*, the United States District Court of Massachusetts required only that the plaintiff allege a series of predicate racketeering activities to establish a cause of action.[217] The *Spencer* court felt it consistent with congressional intent to look only at whether the conduct alleged fit within the generic categories of RICO.[218] This more liberal interpretation of RICO contrasts sharply with the restrictive approach applied by the *Dan River* court.[219] The threshold requirements for establishing a pattern of racketeering activity in a takeover bid situation will thus vary, depending on the jurisdiction in which the case is brought.

3. The Enterprise Requirement

A RICO action also requires that the violation be against an enterprise.[220] The Act defines "enterprise" as "an individual, partnership, corporation, association, or other legal entity, and union or group associated in fact although not a legal entity."[221] This loose definition has created controversy and dissension among the courts. The courts have interpreted the RICO definition of enterprise to include a wide range of activities,

211. *Id.* at 282.

212. *Id.* at 289-90. *See supra* note 5 and accompanying text.

213. 701 F.2d at 290.

214. *See* United States v. Mandel, 591 F.2d 1347, 1363 n.11 (4th Cir. 1979) (criminal intent is a requirement for mail fraud), *cert. denied*, 445 U.S. 961 (1980); United States v. Vandersee, 279 F.2d 176, 179 (3d Cir. 1960) (criminal intent is a requirement for securities fraud), *cert. denied*, 364 U.S. 943 (1961).

215. 701 F.2d at 291. The *Dan River* court seems to establish yet another requirement for an action under RICO, the "lack of good faith" test, illustrating again how courts can impose hurdles for plaintiffs in an effort to restrict the broad powers of RICO.

216. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,214 (D. Mass. Nov. 17, 1981).

217. *Id.*

218. *Id.*

219. *See generally* Note, *supra* note 195.

220. 18 U.S.C. § 1961(b) (1982).

221. *Id.*

including private businesses,[222] government agencies,[223] prostitution rings,[224] and labor organizations.[225] Until 1981, the greatest controversy over this definition was whether the enterprise need be legitimate.[226] The Supreme Court that year, in *United States v. Turkette*,[227] rejected the assertion that RICO applies only to defendants who have infiltrated legitimate enterprises[228] and stated that the defendant could be associated with either a legitimate or an illegitimate entity.[229]

Once the existence of an enterprise recognized by RICO is established, an issue arises over the association between the enterprise and the defendant.[230] The defendant must personally have some association with the enterprise and a direct or indirect participation in its affairs "through a pattern of racketeering activity or collection of an unlawful debt."[231]

In a case of securities fraud, many persons or organizations will likely have little, if any, knowledge of illegalities in the takeover attempt. Courts probably will not extend RICO to cover such persons; the potential, however, for such an extension remains. The Fourth Circuit, in *United States v. Mandel*,[232] held that the defendant must have some involvement in the operation or management of the business to meet the conduct or participation requirement of RICO.[233] On the other hand, the Fifth Circuit, in *United States v. Elliott*,[234] indicated that virtually anyone associated with the enterprise is liable.[235]

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222. *See, e.g.*, United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978) (holding a restaurant to be an enterprise), *cert. denied*, 441 U.S. 933 (1979); United States v. DePalma, 461 F. Supp. 778 (S.D.N.Y. 1978) (holding a theater to be an enterprise).

223. *See, e.g.*, United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977) (holding that the Pennsylvania Bureau of Cigarette and Beverage Taxes was an enterprise), *cert. denied*, 434 U.S. 1072 (1978); United States v. Brown, 555 F.2d 407 (5th Cir. 1977) (holding a city police department to be an enterprise), *cert. denied*, 435 U.S. 904 (1978).

224. *See, e.g.*, United States v. Clemones, 577 F.2d 1247, *modified*, 582 F.2d 1373 (5th Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

225. United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

226. *See* United States v. Turkette, 452 U.S. 576 (1981); Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1025-28, nn.89-91 (1980).

227. 452 U.S. 576 (1981).

228. *Id.* at 591-93.

229. *Id.* at 582.

230. *See generally* Note, *Application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to Securities Violations*, 8 J. CORP. L. 411, 424-26 (1983) (discussing the association of the individual with the enterprise).

231. 18 U.S.C. § 1962(c) (1982).

232. 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

233. 591 F.2d at 1374-75 (finding that Governor Mandel's eight percent limited partnership interest was not sufficient involvement to constitute a RICO violation).

234. 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978).

235. *See* 571 F.2d at 902-03. In the words of the court, "the RICO net is woven tightly to

The Supreme Court, in *United States v. Turkette*,[236] adopted some restrictions that may prevent abuse and misapplication of RICO. The Court held that an " 'enterprise' is not the pattern of racketeering activity; it is an entity separate and apart from the pattern of activity in which it engages."[237] In order to secure a RICO conviction, "the government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' "[238] The Supreme Court articulated a three-prong test for this enterprise requirement. First, the Court defined an enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct."[239] Second, the Court stated that an "enterprise is proved by evidence of an ongoing organization, formal or informal . . . ."[240] Finally, the Court set forth the requirement that there must be "evidence that the various associates function as a continuing unit."[241]

In a takeover attempt, the three-prong test espoused in *Turkette* could restrict a misapplication of RICO by denying its application to persons only remotely connected to the wrongdoing. By requiring both a common purpose of engaging in racketeering activity and an ongoing organization whose associates function as a continuing unit, the test probably affords protection for persons only remotely involved in a takeover scheme. The question still remains as to whether this test is underinclusive, thus allowing some defendants to escape a RICO conviction.[242]

4. The Organized Crime Requirement

Neither the legislative history[243] nor the express language of RICO suggests that Congress intended plaintiffs to prove that defendants are asso-

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entrap even the smallest fish, those peripherally involved with the enterprise." *Id.* at 903. The court also noted that "[u]nder the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs." *Id.* at 902-03.

236. 452 U.S. 576 (1981).

237. *Id.* at 583.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *See, e.g.*, United States v. Bledsoe, 674 F.2d 647 (8th Cir.) *cert. denied*, 103 S. Ct. 456 (1982) (defendants who were involved in a massive securities fraud operation escaped a RICO conviction for failure to meet a three-prong test patterned largely on the one set forth in *Turkette*).

243. H. R. REP. NO. 1549, 91st Cong., 2d Sess. 186, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4007, 4032-36. *See id.* at 4081 (dissenting views of Rep. Conyers, Mikva, and Ryan); *see generally* McClellan, *supra* note 189, at 142-43 (discussing lack of congressional intent to impose organized crime requirement).

ciated with organized crime.[244] Some courts, however, have imposed such a requirement to restrict the application of the Act.[245] Other courts have rejected this interpretation, reasoning that this was not the intent of the statute's drafters.[246]

In *Dan River, Inc. v. Icahn*, the Fourth Circuit did not directly address whether Dan River would have to establish Icahn's connection with organized crime.[247] The court, however, seemed to follow those courts giving RICO a restrictive application, stating that "Congress was out to attack the problem of organized crime, not the problems of corporate control and risk arbitrage."[248] In *Spencer Cos.*, however, the Massachusetts District Court espoused the liberal view and explicitly rejected the requirement of an association with organized crime.[249] This view was echoed by the District Court of Ohio, in *Hanna Mining Co. v. Norcen Energy Resources, Ltd.*,[250] which held it unnecessary for plaintiff "to prove or even allege that defendant is a member of organized crime."[251]

5. The Competitive Injury Requirement

Several courts have limited plaintiffs under civil RICO by imposing a "competitive injury" requirement.[252] Under RICO a private plaintiff sustaining an injury to himself or to his business may bring a civil action.[253] The Act leaves "injury" undefined, and courts have consequently had difficulty determining what type of injury gives rise to a violation. Some courts have acted to impose limitations on the "injury" requirement. In *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*,[254] the

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244. 18 U.S.C. §§ 1961-1968 (1982).

245. *See, e.g.*, Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 746-48 (N.D. Ill. 1981); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975).

246. *See, e.g.*, United States v. Bledsoe, 674 F.2d 647, 663 (8th Cir.), *cert. denied*, 103 S. Ct. 456 (1982); United States v. Uni Oil, Inc., 646 F.2d 946, 953 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982); United States v. Aleman, 609 F.2d 298, 303-04 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); Hanna Mining Co. v. Norcen Energy Resources Ltd., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742, at 93,735-37 (N.D. Ohio July 11, 1982).

247. 701 F.2d at 291.

248. *Id.* The general restrictive application of RICO by the Fourth Circuit seems to indicate that the court would require a connection between a RICO defendant and organized crime.

249. Spencer Cos. v. Agency Rent-A-Car, Inc., [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,214-15 (D. Mass. Nov. 17, 1981).

250. [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742, at 93,735 (N.D. Ohio July 11, 1982).

251. *Id.*

252. *See, e.g.*, North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207 (N.D. Ill. 1980) (widely cited case setting forth the competitive injury requirement).

253. 18 U.S.C. § 1964(c) (1982) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . ."

254. 527 F. Supp. 206 (E.D. Mich. 1981).

court held that the injury must be "something more or different from the predicate acts."[255] Although not requiring that a plaintiff demonstrate a competitive injury, the court suggests the plaintiff should be a direct victim of the predicate crime.[256] In *Spencer Cos.*, the court held that direct injuries from the infiltration by defendants through a pattern of racketeering activity were sufficient to support an action.[257] Another court, however, has held that no action will lie unless commercial harm results from a racketeering enterprise injury.[258]

Other courts have declined altogether to impose this restrictive competitive injury requirement.[259] In *Hellenic Lines, Ltd. v. O'Hearn*,[260] the court expressly held that Congress did not intend a competitive injury requirement.[261] Furthermore, the *Hellenic Lines* court noted that "RICO does not countenance racketeering activity [even when] it is done uniformly among competing concerns."[262]

Even those courts which require no proof of competitive injury are concerned with potential abuse of RICO.[263] Absent statutory reform, the competitive injury requirement may be a logical method by which the judiciary can restrict RICO's applicability.[264]

C. *Civil Penalties*

Section 1964 of RICO provides multiple civil remedies for violations of the Act.[265] Federal courts have jurisdiction to prevent or restrain violations of RICO, and have express powers to grant equitable relief, including divestiture of a violator's interest in an enterprise, restrictions on the violator's future activities or investments, and dissolution or reorganiza-

255. *Id.* at 208-09.

256. *Id.* at 209.

257. Spencer Cos. v. Agency Rent-A-Car, Inc., [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,216 (D. Mass. Nov. 17, 1981). The court insisted that a plaintiff demonstrate a "legally compensable injury" before initiating discovery. *Id.* at 92,217.

258. *See* Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125, 1136-37 (D. Mass. 1982) (neither commercial harm nor racketeering enterprise injury were defined by the court).

259. *See* State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 682 (N.D. Ind. 1982); Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244, 248 (S.D.N.Y. 1981).

260. 523 F. Supp. 244 (S.D.N.Y. 1981).

261. *Id.* at 248.

262. *Id.*

263. *Spencer Cos.*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,217.

264. *See* Campbell, *Civil RICO Actions in Commercial Litigation: Racketeer or Businessman?*, 36 Sw. L.J. 925, 949 (1982).

265. 18 U.S.C. § 1964 (1982). RICO also provides for criminal penalties of up to $25,000 in fines, up to 20 years' imprisonment, and forfeiture of any interest acquired in violation of § 1962. *Id.* § 1963. Criminal penalties under RICO are beyond the scope of this note.

tion of an enterprise.[266] In addition, the Act provides for a governmental civil RICO action to be brought by the Attorney General.[267] Finally, private parties are given the right to sue for treble damages and costs, including reasonable attorneys' fees.[268]

The major dispute to arise over the interpretation of this section has been the question of whether a private litigant may obtain equitable relief under section 1964(c).[269] A literal reading of the statute provides that only the Attorney General can seek injunctive relief.[270] Two courts, however, have expanded the scope of this section and have interpreted RICO as granting a private right to injunctive relief.[271] Other courts have expressed doubt as to a private party's right to this equitable remedy.[272]

The legislative history of RICO does not clearly express Congress's intent to grant private plaintiffs a right to injunctive relief.[273] Recent Su-

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266. *Id.* § 1964(a) provides:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

267. *Id.* § 1964(b) provides:

> The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

268. *Id.* § 1964(c) provides: "[A]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorneys' fee."

269. *See* Campbell, *supra* note 264, at 935-36.

270. 18 U.S.C. § 1964 (1982). *See supra* note 267.

271. Aetna Casualty & Sur. Co. v. Liebowitz, 570 F. Supp. 908 (E.D.N.Y. 1983). This is the only case granting injunctive relief to a private party under RICO. *See also* Vietnamese Fishermen's Assoc. v. Ku Klux Klan, 518 F. Supp. 993, 1014 (S.D. Tex. 1981) (court assumed that equitable relief was available under RICO, but denied an injunction on other grounds).

272. *See, e.g.,* Dan River v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983); Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982) (which did not reach the "difficult question" of the ability of the court to grant injunctive relief under RICO to private plaintiffs); Trane Co. v. O'Connor Sec., 561 F. Supp. 301, 307 (S.D.N.Y.), *appeal dismissed,* 718 F.2d 26 (2d Cir. 1983) (expressing serious doubt RICO can be invoked to secure injunctive relief).

273. *See, e.g.,* H.R. REP. No. 1549, 91st Cong., 2d Sess. 58, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4007, 4010 (House Committee on Judiciary clarified that § 1964 provides only relief of treble damages to a private party alleging a RICO violation); *see also* Blakey & Gettings, *supra* note 226, at 1014, 1038 nn. 132-33, stating that equitable relief under RICO

preme Court decisions indicate that a clear expression of congressional intent is necessary to establish an implied right to injunctive relief where the language of the statute itself is silent.[274]

In *Dan River*, the plaintiff's complaint sought solely equitable relief.[275] The Fourth Circuit expressed substantial doubt as to whether this remedy would be available to a private party such as Dan River.[276] The court further noted that Dan River would have to establish "that actions for equitable relief are implied in the statute"[277] before any injunction would be granted.

Thus, it remains unclear whether a private party who is the subject of a takeover bid would be entitled to injunctive relief. Since RICO does not expressly grant such a remedy, the court would have to look to congressional intent to imply the right of action.[278]

D. *The Future of the Application of RICO in a Takeover Bid*

An examination of developing case law on the application of RICO to civil actions points out substantial barriers to a private party's ability to bring a RICO claim during a takeover bid. The first problems lie in the necessity to establish the requisite elements of racketeering activity,[279] pattern of racketeering activity,[280] and enterprise.[281] Assuming that a private party is able to meet these elements, other hurdles follow. Courts, concerned with the potential abuse in the application of RICO to "white collar" crime, have sought other means to restrict RICO's far-reaching powers. By imposing the organized crime[282] and the competitive injury[283] requirements, courts have been successful in restricting RICO in civil actions. Ironically, the likelihood of a private party succeeding in a RICO claim in a takeover bid situation will probably depend on the particular

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is available to private parties, but citing no case authorities. Congressman Sam Steiger proposed an amendment to clarify the scope of remedies for private plaintiffs under RICO, which he believed already granted a right of injunctive relief to private plaintiffs. Congressman Steiger withdrew his proposed amendment at the request of Congressman Richard Poff to permit further study by the Judiciary Committee. 116 CONG. REC. 35,346-47 (1970).

274. *See, e.g.*, Middlesex County Sewage Auth. v. National Sea Clammers Assoc., 453 U.S. 1, 13 (1981) (stating that, absent statutory language, inquiry must focus on legislative intent); Touche Ross & Co. v. Redington, 442 U.S. 560, 578-79 (1979) (finding no implied cause of action in the absence of congressional intent).

275. 701 F.2d at 290.

276. *Id.*

277. *Id.*

278. *See* Campbell, *supra* note 264, at 936. *See supra* note 274.

279. *See supra* notes 196-203 and accompanying text.

280. *See supra* notes 204-09 and accompanying text.

281. *See supra* notes 220-29 and accompanying text.

282. *See supra* notes 243-51 and accompanying text.

283. *See supra* notes 252-64 and accompanying text.

court hearing the case.

Dan River and *Spencer* are excellent examples of the divergent approaches courts have taken when applying RICO to the challenge of a takeover bid. Although it is possible to distinguish these two cases,[284] they clearly illustrate the difference between the restrictive interpretation[285] and the liberal interpretation[286] of RICO by different circuits. Until the Supreme Court steps in and addresses these varying interprtations, the confusion in the lower courts will continue, and the plaintiff's best remedy will be astute forum shopping.

In evaluating civil RICO case law development, the major problem arising in the majority of cases is determining the Act's legislative intent. Certainly the Supreme Court can delve into the legislative history of RICO to attempt to determine congressional intent. A more likely solution, however, would be for Congress to undertake a revision of RICO. Many proponents have urged such congressional revision to clarify the application of RICO in civil actions.[287] Until Congress or the Supreme Court acts, it will remain unclear whether a private party can succeed in a claim of a RICO violation in a takeover bid scheme.

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284. In *Spencer Cos.*, there was a clear nexus beween the predicate acts since both acts alleged related to the acquisition of the plaintiff's shares. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,215. On the other hand, in *Dan River* there was no clear nexus between the predicate acts, and the court questioned whether the plaintiff could in fact prove the existence of earlier RICO violations. 701 F.2d 278, 291 (4th Cir. 1983).

285. *Dan River*, 701 F.2d at 289-91. The Fourth Circuit applies not only a more restrictive approach to the application of RICO, but expresses doubt that Congress intended RICO to be used to attack problems of corporate control. *Id.* at 291. Because of the broad language of RICO, a court fearing the far-reaching powers of the statute has multiple avenues to select to restrict the application of RICO to "white collar" crime. Had *Dan River* been decided by a court applying a liberal interpretation of RICO, the outcome would likely have been different.

286. *Spencer Cos.*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶98,361, at 92,214-16. The Massachusetts District Court believed that Congress intended for the provisions of RICO to be liberally construed to attack "white collar" crime.

287. *See* Note, *supra* note 195, at 1118-20.