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CORPORATE LAW—A SNAPSHOT OF THE TAKEOVER DECADE: POLAROID CORP. v. DISNEY — WHETHER A TARGET CORPORATION HAS THIRD PARTY STANDING TO ASSERT A VIOLATION OF THE ALL-HOLDERS RULE

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CORPORATE LAW—A SNAPSHOT OF THE TAKEOVER DECADE: *Polaroid Corp. v. Disney*—WHETHER A TARGET CORPORATION HAS THIRD PARTY STANDING TO ASSERT A VIOLATION OF THE ALL-HOLDERS RULE

Give me where to stand, and I will move the earth.[1]

Archimedes

INTRODUCTION

From an economic standpoint, the 1980s may well be remembered as the decade of the corporate acquisition.[2] An onslaught of takeover[3] activity, financed in large part by junk

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1. PAPPUS OF ALEXANDRIA, *Collectio*, bk. VIII, prop. 10, sec. 11 (c. 220 B.C.) (referring to the lever).

2. "Last year [1982], this Nation experienced a recordbreaking wave of corporate mergers and acquisitions." *Corporate Takeovers: Oversight Hearing Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 1 (1982) [hereinafter *Hearing*] (statement of Rep. Peter W. Rodino, Jr., Chairman). "The frequency of [corporate takeovers] of late is virtually without precedent." *Id.* at 148 n.2 (statement of Dennis J. Block and Yvette Miller).

The total value of mergers and acquisitions increased from $12 billion in 1975 to $122 billion in 1984 to $180 billion in 1985. Buffett, Dingman, Gray & Lowenstein, *Hostile Takeovers and Junk Bond Financing: A Panel Discussion*, in KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER 10, 10 (J. Coffee, L. Lowenstein & S. Rose-Ackerman eds. 1988); *see also* DeMott, *Comparative Dimensions of Takeover Regulation*, in KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER, *supra*, at 398, 402-04.

Total dollar value paid for corporate acquisitions in 1988 was a record $247 billion. Hyatt, *Firms' Acquisitions Rose 22% From '88 in the First Half*, Wall St. J., Aug. 30, 1989, at B5, col. 1. Acquisitions in which prices were disclosed totaled $188.1 billion for the first nine months of 1989, up 15% from the same period in 1988. *Mergers and Acquisitions Rose 13% in Third Period*, Wall St. J., Oct. 30, 1989, at A2, col. 4. Commentators have spoken of a "deluge of proposed takeovers and leveraged buy-outs." *See* Dorfman, *When a Stock Is Put in Play, Patience and a Little Study Can Pay*, Wall St. J., Oct. 21, 1988, at C1, col. 3; *see also* Smith, *In Takeover-Ridden Times, Mighty Fortresses Are Some Firms*, Wall St. J., Oct. 28, 1988, at C1, col. 3 ("Takeover-Ridden Times"). "A decade ago, LBOs [leveraged buy-outs] might have merited just a footnote in finance texts, but now they seem to be sweeping through corporate America." Anders, *With Leveraged Buy-Outs in Spotlight, Here Are Answers to Common Questions*, Wall St. J., Oct. 28, 1988, at B1, col. 3.

3. "A corporate 'take-over' actually is an acquisition of assets and liabilities or a merger of the ownership of net assets." *Hearing*, *supra* note 2, at 26 (statement of George J. Benston). Martin Lipton and Erica H. Steinberger define "takeover" in a contemporary context, employing the colorful lexica popularized during the acquisitions of the 1980s:

bonds,[4] resulted in a decrease of a significant percentage of the outstanding shares of stock on the New York Stock Exchange.[5] Exotic

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> A takeover is an attempt by a bidder ("raider") to acquire control of a subject company ("target") through acquisition of some or all of its outstanding shares. More commonly, takeover bids are made directly to shareholders of the target as a cash tender offer or as an exchange offer of raider securities for target stock.
>
> The principal takeover approaches include a "friendly" transaction negotiated with management; a "bear hug," in which the raider notifies the target of a proposed acquisition transaction; a "hostile" offer made directly to target shareholders, without management approval; and, as a supplement or alternative to these approaches, large open market and/or privately negotiated purchases of target stock.

1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS § 1.01[2] (1989); *see also* 3C H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 13.19[1] (1990) (briefly discussing takeovers and ways to effectuate them).

For a definition of corporate "raiders," see *infra* note 15.

4. A "junk bond" is a high-yielding debt security rated below investment grade by the bond-rating agencies. Jensen, *The Takeover Controversy: Analysis and Evidence*, in KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER, *supra* note 2, at 314, 337. Typically, junk bonds are used to finance a leveraged buy-out (a takeover by a third party) or a management buy-out of a company. *See* L. SOLOMON, D. SCHWARTZ & J. BAUMAN, CORPORATIONS: LAW AND POLICY 1062 (2d ed. 1988); *Management Buy-Outs: No Staying Power*, THE ECONOMIST, Nov. 18, 1989, at 79; *see also* Anders & Schwadel, *Costly Advice: Wall Streeters Helped Interco Defeat Raiders But at a Heavy Price*, Wall St. J., July 11, 1990, at A1, col. 6 (corporation used junk bonds to recapitalize itself to avoid a takeover). Ultimately, this high-yielding debt is paid off via cash flow generated from the target company's business operations or from the full or partial liquidation of the target company's assets. 3C H. BLOOMENTHAL, *supra* note 3, § 13.36. *See generally The Financing of Mergers and Acquisitions: Hearing Before the Subcomm. on Domestic Monetary Policy of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. 246-97 (1985) (report by the Congressional Research Service of the Library of Congress: "The Role of High Yield Bonds (Junk Bonds) in Capital Markets and Corporate Takeovers: Public Policy Implications"); Lipton & Brownstein, *Takeover Responses and Directors' Responsibilities—An Update*, 40 BUS. LAW. 1403, 1411-12 (1985); Comment, *Junk Bonds: Do They Have a Value?*, 35 EMORY L.J. 921, 922-32 (1986).

5. *See* Winans, *Stock Market Loses Vital Corporate Crutch*, Wall St. J., July 23, 1990, at C1, col. 3 (Takeovers and corporate stock buy-backs "reduced the market value of all New York Stock Exchange-listed issues by an average 6.5% a year."). In 1988, "5 percent of the value of publicly held shares, or $130 billion, disappeared" as a result of "corporate buybacks, leveraged buyouts and mergers and acquisitions." Elias, *Takeover Debt Turns Up Heat on Laid-back Managements*, INSIGHT, Apr. 2, 1990, at 40 (quoting Harvard Business School professor Jay O. Light). "About $500 billion of stock has been removed from the market [from 1984 to mid-1989] . . . because of mergers, leveraged buy-outs, and companies' buying their own shares." Torres, *Rapid Stock-Supply Shrinkage Continues*, Wall St. J., July 14, 1989, at C1, col. 3. "Buyouts and buybacks . . . [resulted in a] lower stock supply." Crossen, *Merger Activity Expected to Ease, Not Halt*, Wall St. J., Jan. 2, 1987, at 8B, col. 3 (citing Federal Reserve System data). "Takeovers and stock buy-backs have far outweighed new stock issues." Metz, *Bull's Run: Stocks' Five-Year Rise Has Showered Benefits Unevenly in Economy*, Wall St. J., Aug. 10, 1987, at 1, col. 6, 7, col. 5 (citing Goldman, Sachs & Co. data); *see also* Slater, *Stock Market Faced Massive Exodus in '88*,

takeover plays such as street sweeps[6] and front-end loaded, two-tiered tender offers[7] reshaped the landscape of corporate America. Mergers and acquisitions rose to the level of corporate warfare.[8] Irwin Jacobs,[9] Ronald Perelman,[10] Harold Simmons,[11] Carl Icahn,[12] and Sir James Goldsmith,[13] among others, built fortunes and developed reputations as consummate takeover artists.[14]

In response to the efforts of corporate raiders,[15] a great many

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Wall St. J., Dec. 29, 1988, at C1, col. 3 (Net outflow was a result of corporate takeovers and restructurings.); Laderman, Farrell & Frank, *The Bulls Breathe Fire: A Scorching Rally Looks Like It Has a Lot of Fuel to Burn*, BUS. WK., Nov. 25, 1985, at 34, 35 ("An unprecedented wave of corporate . . . takeovers, leveraged buyouts, and company stock repurchases . . . has shrunk the supply of stocks . . . ."); Perham, *The Case of the Vanishing Equities*, DUN'S BUS. MONTH, Nov. 1985, at 55 (Leveraged buyouts, in part, account for the shrinkage in the stock supply.).

6. "Street sweeps," also referred to as "market sweeps," are "blitzkrieg, large-scale acquisition programs in the stock markets." Oesterle, *The Rise and Fall of Street Sweep Takeovers*, 1989 DUKE L.J. 202, 202 & n.1. "Bidders and target[ ] [companies] alike found that, by combining aggressive open-market purchases with privately negotiated transactions from institutional investors and arbitrageurs, they could gain control of enough stock to end contested takeover contests." *Id.* at 202. This change of control often occurred within a matter of minutes or hours. *Id.* at 202 & nn.2-3. Such acquisitions are also known as "Saturday Night Specials." *See* 3C H. BLOOMENTHAL, *supra* note 3, § 13.35(11).

7. In a front-end loaded, two-tiered tender offer, the [potential acquiror or offeror] . . . offers to buy, at a premium price, only enough shares to establish a controlling position in the target company. Typically, the offeror accumulates up to five percent of the target's stock through open market purchases, and then makes a tender offer for enough of the outstanding shares to give it voting control. Once it gains control of the target, the offeror merges the target into itself or a subsidiary and freezes out the target's remaining shareholders by forcing them to accept cash or securities valued at a lower price per share than the original tender offer price.

Comment, *The Front-End Loaded, Two-Tiered Tender Offer*, 78 NW. U.L. REV. 811, 812 (1983) (footnote omitted); *see also* Prentice, *Front-End Loaded, Two-Tiered Tender Offers: An Examination of the Counterproductive Effects of a Mighty Offensive Weapon*, 39 CASE W. RES. 389 (1988-89).

8. *See* Comment, *Corporate Takeover Battles—Shark Repellent Charter and Bylaw Provisions that Deter Hostile Tender Offers or Other Acquisitions—A Comprehensive Examination*, 27 HOW. L.J. 1683, 1684 n.1 (1984) [hereinafter Comment, *Shark Repellent*].

9. *See* King, *Three Raging Bulls and Two Restrained Ones*, FORBES, Oct. 23, 1989, at 362; Magnet, *Is ITT Fighting Shadows—or Raiders?*, FORTUNE, Nov. 11, 1985, at 25.

10. *See The Forbes Four Hundred*, FORBES, Oct. 23, 1989, at 154.

11. *Id.* at 162.

12. *Id.* at 186; *see* Penn, *Raiding Parties: Friends and Relatives Hitch Their Wagon to Carl Icahn's Star*, Wall St. J., Oct. 2, 1985, at 1, col. 6.

13. *See* Smith, *Legendary Raider Sir James Goldsmith Adds to Lore With His Bid for B.A.T*, Wall St. J., July 12, 1989, at A4, col. 1; *see also* Lublin, *With U.S. Takeovers Grown Expensive, Sir James Goldsmith Looks to Britain*, Wall St. J., Mar. 7, 1989, at A21, col. 1.

14. *See* Worthy, *What's Next for the Raiders*, FORTUNE, Nov. 11, 1985, at 21.

15. Senator Williams, sponsor of the Williams Act Amendments to the Securities

companies developed antitakeover strategies.[16] Shark repellents and porcupine provisions,[17] poison pills,[18] asset sales,[19] golden parachutes,[20] white knights[21] and whitemailing,[22] greenmailing,[23] Pac-

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Exchange Act of 1934, termed "raiders" to be tender offerors who threaten companies with their takeover maneuvers. 111 CONG. REC. 28,257 (1965) (statement of Sen. Williams).

"The individual or group who makes the tender offer is referred to as the 'shark', 'raider', 'bidder', 'offeror' or 'acquiring company' and is obligated to purchase the tendered shares if the specifications of the offer are met." Comment, *Shark Repellent, supra* note 8, at 1686.

For a synopsis of well-known corporate raiders, see Crudele, *Corporate Raiders Looking Less Dangerous These Days*, Hartford Courant, Dec. 10, 1989, at B1, col. 5.

16. For a brief discussion of the typical takeover candidate in both an historical and a contemporary context, see 1 A. FLEISCHER, TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING 3-6 (Supp. 1987).

17. "Shark repellents," also known as "porcupine provisions," are corporate charter amendments "designed to make takeovers more difficult." Prentice, *supra* note 7, at 410-11. These amendments may include provisions implementing a staggered board of directors; limitations on the removal of directors; constraints on increasing the size of or filling vacancies on the board; or restrictions on the appointment or removal of officers and board committees. 1 SHARK REPELLENTS AND GOLDEN PARACHUTES: A HANDBOOK FOR THE PRACTITIONER § 4, at 115-28 (R. Winter, M. Stumpf & G. Hawkins eds. Supp. 1989) [hereinafter SHARK REPELLENTS]. The amendment may consist of a directive that the board consider factors other than money to be paid in a takeover. *Id.* § 6. For an overview of other "shark repellents," see 1-2 SHARK REPELLENTS, *supra*.

18. "Poison pills" are shareholder rights plans. A potential target company issues shareholders rights or preferred shares which become active only upon the occurrence of a particular event, such as the acquisition of a certain percentage of the target company's stock by an outside party. Prentice, *supra* note 7, at 412; Comment, *Corporate Takeovers: Defensive Techniques Utilized Against Raiders*, 22 CREIGHTON L. REV. 695, 707-08 (1989) [hereinafter Comment, *Defensive Techniques*]; *see also* 3C H. BLOOMENTHAL, *supra* note 3, § 13.35(1).

For a summary of the first use of a "poison pill," see *Centennial Journal: 100 Years in Business: Just What the Target's Doctor Ordered, 1983,* Wall St. J., Dec. 6, 1989, at B1, col. 5.

19. Asset sales by the target company can make it less attractive to the acquiror. These sales can include full or partial liquidation of the company ("scorched-earth defense") if liquidation value is greater than the potential acquiror's tender price, or can involve the sale of "crown jewels" (highly valuable corporate assets or subsidiaries which attract the potential acquiror to the target company). Comment, *Defensive Techniques, supra* note 18, at 710.

20. A "golden parachute" grants a manager of a target company generous severance benefits should a hostile takeover occur, thus making a takeover of the target company more expensive for the potential acquiror. Prentice, *supra* note 7, at 420. *See generally* 2 SHARK REPELLENTS, *supra* note 17, § 1-6.

A variant of a golden parachute, the "tin parachute" (sometimes known as a "silver parachute"), grants all employees of a target company severance and other benefits if they lose their jobs following a takeover. 2 SHARK REPELLENTS, *supra* note 17, § 1, at 431-32; Cowan, *New Ploy: 'Tin Parachutes'*, N.Y. Times, Mar. 19, 1987, at D1, col. 3; *e.g.*, Hymowitz, *Kodak Gives 'Parachutes' to Workers*, Wall St. J., Jan. 12, 1990, at B1, col. 6. *See generally* Ryan, *Corporate Directors and the "Social Costs" of Takeovers—Reflections on the Tin Parachute*, 64 TUL. L. REV. 3 (1989).

21. A "white knight" is a friendly third party who buys securities of or merges with a

Man defenses,[24] lock-ups,[25] recapitalizations,[26] and share repurchases and self-tender offers,[27] among other tactics,[28] became key weapons in the battles for corporate control.

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target corporation to prevent a takeover by a potential acquiror. Comment, *Defensive Techniques, supra* note 18, at 710-11. A "white knight" may also be called a "white squire." *See* Bulkeley & Rose, *Polaroid Gains Peace Accord; Stock Falls $4.50*, Wall St. J., Mar. 28, 1989, at A4, col. 1; *see also* Wander & LeCoque, *Boardroom Jitters: Corporate Control Transactions and Today's Business Judgment Rule*, 42 BUS. LAW. 29, 51 (1986).

22. "Whitemailing" occurs when a friendly third party buys a large amount of a target company's stock in advance of any takeover activity. The friendly party promises not to sell the stock for a certain period of time or not to join forces with a hostile acquiror. In return, the friendly party has a voice in running the company. This preemptive activity may frustrate potential acquirors from making any bids for the target company. *See* White, *'White Squires' Step Into Breach As Debt-Driven Investing Falters*, Wall St. J., Feb. 21, 1990, at C1, col. 4; Sandler, *Knightly Warren Buffett Trips Up 'Rescued' Champion Shareholders*, Wall St. J., Dec. 15, 1989, at C1, col. 4; *see also* White, *Ted Forstmann Struggles for Cash for Squire Fund*, Wall St. J., Feb. 21, 1990, at C1, col. 3. The friendly party may also purchase convertible preferred stock, paying favorable above-market rates. If a tender offer is made, the friendly party's stock may convert to a significant percentage of the target company's common voting shares, also frustrating potential takeover attempts. *See* Sandler, *supra*.

23. "The term 'greenmail' refers to the [target corporation's] practice of buying out a takeover bidder's stock at a premium that is not available to other shareholders in order to prevent the takeover." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 n.13 (1985).

24. In a "Pac-Man defense," the target company makes a bid for the securities of the company that is attempting to acquire it. Sappideen, *Takeover Bids and Target Shareholder Protection: The Regulatory Framework in the United Kingdom, United States and Australia*, 8 J. COMP. BUS. & CAP. MARKET L. 281, 300 (1986); *see also* Block & Miller, *The Responsibilities and Obligations of Corporate Directors in Takeover Contests*, 11 SEC. REG. L.J. 44, 64-66 (1983).

25. In a "lock-up," the target company grants options to friendly third parties. Comment, *Defensive Techniques, supra* note 18, at 712. The options, which allow the third party to purchase stock or assets of the target company, may be exercised if another party, such as a potential acquiror, accumulates a certain percentage of the target company's outstanding shares. *Id.*

26. A "recapitalization" is a financial restructuring of a target company which increases its debt/equity ratio, making the company less desirable to a potential acquiror. *See* I RESOURCE MATERIALS: TAKEOVER DEFENSES AND DIRECTORS' LIABILITIES 64 (M. Lipton ed. 1986) [hereinafter RESOURCE MATERIALS]. Typically, the target company's public shareholders exchange their stock for cash and/or debt and occasionally, for new shares in the company (the "stub"). 1 A. FLEISCHER, *supra* note 16, at 388.172. The newly-issued debt securities may contain covenants which restrict the sale of corporate assets, further lessening the attractiveness of the target company. *Id.* at 388.173.

27. A "share repurchase" occurs when a target company buys its own shares in the marketplace in order to keep the shares away from a potential acquiror or to strengthen the control position of management. 3C H. BLOOMENTHAL, *supra* note 3, § 13.30(3).

In a "self-tender offer," a target company offers to purchase its shares from its shareholders at a price above that of the potential acquiror, thus making a takeover more difficult. *See* I RESOURCE MATERIALS, *supra* note 26, at 46. For the Securities and Exchange Commission's definition of "issuer tender offer," see *infra* note 138.

28. A great variety of colorful terms describing antitakeover strategies and players

A new defensive tool, the Employee Stock Ownership Plan ("ESOP"),[29] first arrived when Polaroid Corporation ("Polaroid") successfully thwarted corporate raider Roy Disney's hostile efforts to acquire the company.[30] On September 9, 1988, Disney, through a

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have developed. *See, e.g.*, Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775, 775-76 (1982).

29. An "employee stock ownership plan" is "a form of statutory pension program[ ] designed to invest employee retirement assets in the stock of the employer." First Nat'l Bank of Blue Island Employee Stock Ownership Plan v. Board of Governors of the Fed. Reserve Sys., 802 F.2d 291, 293 (7th Cir. 1986) (construing Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461)). *See generally* 129 CONG. REC. S16,629-44 (daily ed. Nov. 27, 1983) (statement of Sen. Long) (discussing ESOPs generally and the Employee Stock Ownership Act of 1983 specifically); Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749 (1990) (discussing ESOPs and other forms of employee ownership). Specifically, an ESOP is a stock bonus or stock purchase plan in which employers give or sell stock to employees via a trust. Comment, *A Framework for Satisfying Corporate Directors' Responsibilities Under State Nonshareholder Constituency Statutes: The Use of Explicit Contracts*, 138 U. PA. L. REV. 1451, 1484 (1990). The Employee Retirement Income Security Act of 1974 and the Internal Revenue Code and Regulations are the primary federal controls governing the scope of ESOPs. *See generally* I.R.C. §§ 401-409 (1988) (general rule governing pension, profit-sharing, and stock bonus plans) (I.R.C. § 4975(e)(7) defines an ESOP.); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)) (defining an ESOP at 29 U.S.C. § 1107(d)(6)). ESOPs may be either leveraged or nonleveraged. Comment, *The Saturnization of American Plants: Infringement or Expansion of Workers' Rights?*, 72 MINN. L. REV. 173, 191 n.65 (1987). *See generally* Note, *The False Promise of Worker Capitalism: Congress and the Leveraged Employee Stock Ownership Plan*, 95 YALE L.J. 148 (1985) [hereinafter Note, *The False Promise*].

While the ESOP program's goal is to broaden ownership of capital, "Congress . . . transformed the ESOP from a simple retirement account into a corporate financing tool" by allowing it to be leveraged. *First Nat'l Bank*, 802 F.2d at 293 (construing Note, *The False Promise*, *supra*, at 154). The legislative history of the ESOP program evidences that Congress intended "to promote ESOPs as a suitable device for a broad range of corporate activity." *Id.* (construing Note, *The False Promise*, *supra*, at 154 & n.24). In this regard, the use of an ESOP as an antitakeover device may increase the obstacles and costs a potential acquiror faces:

> Prior to or during the offer, stock is issued to the plan which has the effect of diluting the voting strength of any stock the offeror may have already acquired and increasing the amount which it must acquire to gain voting control. It also puts the newly issued shares into possession of target company employees, who likely will be loyal and not tender to the offeror.

Note, *Employee Stock Ownership Plans and Other Defenses to Hostile Tender Offers*, 21 WASHBURN L.J. 580, 601 (1982) (footnote omitted) [hereinafter Note, *Employee Stock Ownership Plans*]. Employees may also be unwilling to tender their stock to an offeror due to fears over job security and unfamiliar employment policies. *Id.* at 601 n.207 (quoting E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 198 (1977)). *See generally* D. BLOCK, N. BARTON & S. RADIN, THE BUSINESS JUDGEMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 184-200 (3d ed. 1989) (discussing ESOPs as antitakeover devices). For information on Polaroid's use of its ESOP, see *infra* note 46.

30. Polaroid Corp. v. Disney, 862 F.2d 987 (3d Cir. 1988). Prior to the Polaroid-

number of wholly-owned subsidiaries of Shamrock Holdings, Inc. ("Shamrock"),[31] made a $2.6 billion cash tender offer for the outstanding common stock of Polaroid at $42 per share.[32] However, Shamrock excluded the shares held by Polaroid's ESOP,[33] claiming they were invalidly issued because the ESOP was formed to entrench incumbent management[34] and impede a potential takeover.[35] Shamrock's offer was contingent on the satisfaction of several express conditions,[36] including that the issuance of Polaroid stock to the ESOP had to be invalidated or rescinded judicially, or Shamrock had to be satisfied that the ESOP stock was not outstanding.[37]

On September 20, Polaroid brought an action to enjoin the tender offer,[38] alleging that Shamrock's exclusion of the ESOP shares from the offer violated the Securities and Exchange Commission's All-Holders Rule[39]. Shamrock questioned whether Polaroid had standing to

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Disney hostilities, stock issuance to an ESOP had been infrequently used as a tender offer defense. *See* Comment, *Shark Repellent, supra* note 8, at 1688 n.17. However, Polaroid's successful use of its ESOP in such a manner led mergers and acquisitions specialists to state that "sales to ESOPs . . . are likely to become a key anti-takeover weapon." Bulkeley & Rose, *supra* note 21. The mergers and acquisitions chief at one Wall Street firm stated, "I don't know of a Fortune 500 company that hasn't been pitched half a dozen ESOP proposals in the last three months." *Id.*; *see also* Altmann, *Another Battle in the Takeover Wars, or Just an ESOP Fable,* Wall St. J., June 12, 1989, at A14, col. 3; Hilder & Smith, *ESOP Defenses Are Likely to Increase,* Wall St. J., Apr. 6, 1989, at A2, col. 2.

31. Shamrock Acquisition III, Inc., which made the tender offer to purchase Polaroid, was a wholly-owned subsidiary of Emerald Isle Associates, L.P., of which Shamrock Capital Investors III, Inc. was the general partner. Shamrock Capital Investors III, Inc. was a wholly-owned subsidiary of Shamrock Holdings of California, Inc., which itself was a wholly-owned subsidiary of Shamrock Holdings, Inc., a Delaware corporation owned by Roy and Patricia Disney and their children. Appellant's Opening Brief at 5 n.2, Polaroid Corp. v. Disney, 862 F.2d 987 (3d Cir. 1988) (No. 88-3676).

32. *Polaroid,* 862 F.2d at 990.

33. *Id.*

34. *Id.* (quoting Appellee's Answering Brief at 8).

35. Appellee's Answering Brief at 1, Polaroid Corp. v. Disney, 862 F.2d 987 (3d Cir. 1988) (No. 88-3676).

The Delaware Chancery Court subsequently upheld the validity of the Polaroid ESOP. Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257 (Del. Ch. 1989).

36. *Polaroid,* 862 F.2d at 990.

37. *Id.* Shamrock eventually sued Polaroid to invalidate the ESOP. *See infra* note 46.

A related condition required that a minimum of 90% of the outstanding shares, excluding the ESOP shares, had to be tendered. *Polaroid,* 862 F.2d at 990.

38. Polaroid Corp. v. Disney, 698 F. Supp. 1169, 1170-71 (D. Del.), *aff'd in part and vacated in part,* 862 F.2d 987 (3d Cir. 1988).

39. 17 C.F.R. § 240.14d-10(a)(1) (1990). The All-Holders Rule, which focuses on the equal treatment of security holders, states that "[n]o bidder shall make a tender offer unless . . . [t]he tender offer is open to all security holders of the class of securities subject to the tender offer." *Id.*

raise such a claim.[40]

The United States District Court denied Polaroid's motion for a preliminary injunction against Shamrock's offer,[41] despite finding that Polaroid did have standing under the All-Holders Rule.[42] Polaroid immediately appealed.[43] The United States Court of Appeals for the Third Circuit affirmed the district court's decision denying Polaroid injunctive relief based on its All-Holders Rule claim, but stated that it was because Polaroid lacked standing to sue.[44] For other reasons, however, the court granted Polaroid's motion for a preliminary injunction,[45] and remanded the case for further proceedings.[46]

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40. *Polaroid*, 698 F. Supp. at 1174.

41. *Id.* at 1181.

42. *Id.* at 1174. The court assumed, in the absence of controlling case law, that Polaroid had standing, but found no violation of the All-Holders Rule. *Id.*

43. Polaroid Corp. v. Disney, 862 F.2d 987 (3d Cir. 1988).

44. *Id.* at 990. The court of appeals also affirmed the district court's holding that Shamrock's financial advisors, Wertheim Schroder & Co. Inc. and Drexel Burnham Lambert Inc., were not bidders and thus did not have to disclose financial information about themselves as required by 17 C.F.R. § 240.14d-100, Schedule 14D-1, Item 9. *Id.* at 991 n.2. In the lower court, Polaroid had argued that the financial advisors were "doing more than just financing the tender offer" because, *inter alia*, they had the option to purchase equity in the takeover. Polaroid Corp. v. Disney, 698 F. Supp. 1169, 1177-78 (D. Del.), *aff'd in part and vacated in part*, 862 F.2d 987 (3d Cir. 1988). However, the court of appeals confined its plenary discussion to misrepresentation and All-Holders Rule issues, stating that the facts concerning the bidder issue were similar enough to City Capital Associates Limited Partnership v. Interco, Inc., 860 F.2d 60 (3d Cir. 1988), to render that case controlling. Polaroid Corp. v. Disney, 862 F.2d 987, 991 & n.2 (3d Cir. 1988). For a discussion of the misrepresentation issue, see *infra* note 45.

45. *Polaroid*, 862 F.2d at 990. Polaroid had also alleged that Shamrock's disclosure misrepresented its compliance with Federal Reserve Board margin requirements, violating section 14(e), the anti-fraud provision of the Williams Act. *Id.* at 990-91. *See generally* 15 U.S.C. § 78n(e) (1988) (section 14(e) of the Williams Act). The requirements limit a shell corporation's use of debt as a financing vehicle for corporate acquisitions. *Polaroid*, 862 F.2d at 1004-05 & n.16; *see* 12 C.F.R. § 207.112 (1990). *See generally* 12 C.F.R. §§ 207, 220, 221, 224 (1990). The court of appeals reversed the district court decision denying Polaroid preliminary injunctive relief on this ground. *Polaroid*, 862 F.2d at 1005-06.

46. *Polaroid*, 862 F.2d at 1005-06. A "maelstrom of litigation" surrounded Shamrock's unwelcome effort to acquire Polaroid. Shamrock Holdings, Inc. v. Polaroid Corp., 709 F. Supp. 1311, 1313 (D. Del. 1989). In one suit, Shamrock and Polaroid's stockholders sued Polaroid and its directors to invalidate the ESOP, on the allegation that the purpose of Polaroid's decision to give control of about 14% of its common shares to its ESOP was to impede any takeover of the corporation by a potential acquiror. Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257 (Del. Ch. 1989) (ESOP was fair despite its antitakeover aspects).

In another instance, Shamrock sought to restrain Polaroid's defensive tactics. Shamrock Holdings, Inc. v. Polaroid Corp., No. 10,582 (Del. Ch. Jan. 31, 1989) (WESTLAW, DE-CS directory). Those tactics included issuing to Corporate Partners, L.P., an investor friendly to Polaroid management, $300 million in preferred stock convertible into 6,000,000 common shares, seven year warrants for 635,000 common shares, and the right to name two directors to Polaroid's board. *Id.* at 2. Polaroid also intended a $1.1 billion

In deciding whether Polaroid had standing as a target corporation to assert a violation of the All-Holders Rule, the Third Circuit Court of Appeals reviewed two strains of jurisprudence.[47] The court first examined whether Polaroid had standing under a "private right of action" theory.[48] Next, the court considered whether Polaroid had

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stock repurchase recapitalization plan, and announced that, with its investment advisor Shearson Lehman Hutton, Inc., it was exploring ways of using the proceeds of a patent infringement suit against Eastman Kodak Co. to enhance short-term shareholder value. *Id. See generally* Polaroid Corp. v. Eastman Kodak Co., 789 F.2d 1556 (Fed. Cir.) (on the issue of liability), *cert. denied*, 479 U.S. 850 (1986); Polaroid Corp. v. Eastman Kodak Co., No. 76-1634-MA (D. Mass. Oct. 12, 1990) (LEXIS, Genfed library, Dist file) (on the issue of damages), *modified*, No. 76-1634-MA (D. Mass. Jan. 11, 1991) (LEXIS, Genfed library, Dist file) (reducing damage award by $36 million). The Delaware Chancery Court ultimately denied all of Shamrock's motions for permanent injunctions. *See* Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278 (Del. Ch. 1989).

On January 19, 1989, Shamrock increased its tender offer price to $45 per share, including the ESOP shares, or $47 per share if the ESOP shares were invalidated and excluded. Shamrock Holdings, Inc. v. Polaroid Corp., 709 F. Supp. 1311, 1314 (D. Del. 1989). However, Polaroid's stock sale to its ESOP was the crucial component in its successful bid to stay independent. Bulkeley & Rose, *supra* note 21. After considerable jockeying between the parties and several courtroom losses by Shamrock, on March 27, 1989, Polaroid and Shamrock reached a settlement. *Id.*; *see also Polaroid Details Buy-Back; Shamrock Tenders Stake*, Wall St. J., Mar. 27, 1989, at C4, col. 4. Their arrangement included, *inter alia*, a standstill agreement under which Shamrock would not attempt to acquire Polaroid for ten years; an end to all litigation between the two parties; a $20 million reimbursement by Polaroid to Shamrock for offer-related expenses; a $5 million prepayment by Polaroid for advertising on radio and television stations owned by Shamrock; and an agreement by Polaroid to distribute to shareholders a portion of the after-tax proceeds recovered from Eastman Kodak Co. in the patent infringement lawsuit. Bulkeley & Rose, *supra* note 21. *See generally* Ingrassia & Hirsch, *Polaroid's Patent-Case Award, Smaller Than Anticipated, Is a Relief for Kodak*, Wall St. J., Oct. 15, 1990, at A3, col. 2 ("Polaroid promised to distribute . . . part of any damage award exceeding $750 million after taxes; based on its normal tax rate of about 35%, Polaroid's after-tax proceeds from the $909.5 million award would be about $591 million. . . . [I]t's unlikely that shareholders will receive much, if any, of the award."); Letter from I. MacAllister Booth, President and Chief Executive Officer of the Polaroid Corporation, to Polaroid shareholders (Oct. 1990) ("We have said consistently that we will use this award to enhance value for our shareholders. . . . [B]ut we will not announce how we plan to apply the proceeds until there is a final resolution of this litigation."); POLAROID CORP., 1990 THIRD QUARTER REPORT 5 (Nov. 1990) (restating the comment made in the letter from I. MacAllister Booth to Polaroid shareholders).

47. *Polaroid*, 862 F.2d at 993.

48. *Id.* at 993-97. A "private right of action" is a judicially-created cause of action implied to enforce federal laws that do not expressly provide a litigant with a remedy. *See* Cort v. Ash, 422 U.S. 66, 74-78 (1975). "If a private right of action exists in favor of a party, standing follows as a matter of course." *Polaroid*, 862 F.2d at 993. The Third Circuit Court of Appeals held that the All-Holders Rule creates a private right of action for shareholders, but not for a target corporation. *Id.* at 997. Thus, Polaroid had no standing under the private right of action theory. *See id.*

The issue of whether private rights of action exist under the Williams Act has been surveyed extensively. *See, e.g.*, Pitt, *Standing To Sue Under the Williams Act After Chris-Craft: A Leaky Ship on Troubled Waters*, 34 BUS. LAW. 117 (1978); Schneider, *Implying*

standing as a third party on behalf of its shareholders.[49] This Note focuses on the latter issue — whether a target corporation has standing *on behalf of its shareholders* to assert a violation of the All-Holders Rule.

Section I traces the origin of the All-Holders Rule[50] and the statutory framework under which it was promulgated.[51] This includes a discussion of the history and purposes of the Securities Exchange Act of 1934[52] (the "Exchange Act") and the Williams Act Amendments[53] to the Exchange Act.[54] Section II reviews standing to sue doctrine, including the requirements of standing, and third party standing and its exceptions.[55] Section II also presents the advantages and disadvantages of associational standing, which weighed in the court of appeals' conclusion.[56] Section III examines the court's decision in depth.[57] Finally, Section IV provides an analysis of the court's holding that Polaroid did not have third party standing to assert a violation of the All-Holders Rule by Shamrock.[58] In particular, Section IV addresses why the court could have ruled that Polaroid satisfied the second associational standing factor required by *Hunt v. Washington State Apple Advertising Commission*.[59] Section IV considers why conflicts of interest inherent in takeover battles weigh against granting a target corporation third party standing on behalf of its shareholders.[60] Section IV concludes that during a takeover battle, a target corporation's shareholders are the proper litigants under the All-Holders Rule, and therefore, Polaroid's ESOP, which was able to bring its own lawsuit, was a better representative of its members' interests than was the Polaroid Corporation.[61]

Private Rights and Remedies Under the Federal Securities Acts, 62 N.C.L. REV. 853 (1984); Comment, *An Implied Private Right of Action Under the Williams Act: Tradition vs. Economic Reality*, 77 NW. U.L. REV. 316 (1982) [hereinafter Comment, *An Implied Private Right*].

49. *Polaroid*, 862 F.2d at 997-1002.

50. 17 C.F.R. § 240.14d-10(a)(1) (1990).

51. *See infra* notes 62-153 and accompanying text.

52. 15 U.S.C. §§ 78a-*ll* (1988).

53. *Id.* §§ 78*l*(i), 78m(d)-(e), 78n(d)-(f).

54. *See infra* notes 69-132 and accompanying text.

55. *See infra* notes 154-211 and accompanying text.

56. *See infra* notes 212-39 and accompanying text.

57. *See infra* notes 240-86 and accompanying text.

58. *See infra* notes 287-378 and accompanying text.

59. 432 U.S. 333 (1977); *see infra* notes 295-324 and accompanying text.

60. *See infra* notes 325-68 and accompanying text.

61. *See infra* notes 369-78 and accompanying text.

I. THE STATUTORY FRAMEWORK BEHIND THE ALL-HOLDERS RULE

The Exchange Act[62] and the Williams Act[63] provided the legal foundation for the All-Holders Rule[64]. Prior to its promulgation by the Securities and Exchange Commission,[65] a corporate raider such as Shamrock could legally exclude a block of stock from its tender offer.[66] The All-Holders Rule, which requires that all shareholders of a class of stock be allowed to participate in an offer made to that class,[67] changed that aspect of corporate takeover battles.[68]

A. *The History and Purposes of the Securities Exchange Act of 1934 and the Williams Act*

Congress first passed federal securities laws in response to excessive speculation in the stock market during the late 1920s and the resultant crash of 1929.[69] Prior to that time, several bills had been introduced in Congress to regulate securities issuance and trading,[70] and most states had enacted blue sky laws.[71] However, only after the economic impact of the market collapse registered did the need for a federal scheme to regulate securities become apparent.[72] The ensuing

62. 15 U.S.C. §§ 78a-*ll* (1988).

63. *Id.* §§ 78*l*(i), 78m(d)-(e), 78n(d)-(f). The Securities and Exchange Commission ignored section 78*l*(i) when it promulgated the All-Holders Rule. *See infra* note 134.

64. 17 C.F.R. § 240.14d-10(a)(1) (1990).

65. Amendments to Tender Offer Rules—All-Holders and Best-Price, Exchange Act Release No. 23,421, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,016 (July 11, 1986) [hereinafter Amendments to Rules].

66. Despite the technical legality of excluding some stock of a class from a tender offer, the Securities and Exchange Commission frowned upon the practice. *See infra* note 145 and accompanying text.

67. *See* Amendments to Rules, *supra* note 65, at 88,191.

68. To date, Shamrock is the only corporate raider that has been accused of violating the All-Holders Rule.

69. W. ATKINS, G. EDWARDS & H. MOULTON, THE REGULATION OF THE SECURITY MARKETS 45-48 (1946); Knauss, *A Reappraisal of the Role of Disclosure*, 62 MICH. L. REV. 607, 613 (1964); *see also* Cohen, *Federal Legislation Affecting the Public Offering of Securities*, 28 GEO. WASH. L. REV. 119, 125 (1959).

For a brief history of pre-1900 securities regulation, see L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1-3 (1988).

70. Gadsby, *Historical Development of the S.E.C.—The Government View*, 28 GEO. WASH. L. REV. 6, 7 (1959).

71. L. SODERQUIST, UNDERSTANDING THE SECURITIES LAWS 16 (1987). "Blue sky laws" are state statutes which regulate securities. BLACK'S LAW DICTIONARY 173 (6th ed. 1990). Blue sky laws are said to pertain to "speculative schemes which have no more basis than so many feet of 'blue sky.' " Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917). "By 1933, every state except Nevada had [some form of blue sky law]." Gadsby, *supra* note 70, at 8.

72. Blue sky laws were ineffective as a mechanism to prevent the collapse of the

legislation, the Securities Act of 1933[73] and the Exchange Act,[74] emphasized two themes: protection of investors and disclosure of information.[75]

In 1934, Congress enacted the Exchange Act[76] to regulate trading and to prevent unfair practices from occurring on the securities markets.[77] Prior to its passage, securities prices were subject to "manipulation and control,"[78] resulting in "sudden and unreasonable" price fluctuations.[79] This caused a myriad of valuation problems affecting not only securities owners, but businesses and government entities as well.[80] The Exchange Act established the Securities and Exchange

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securities markets. Gadsby, *supra* note 70, at 8. Furthermore, in the 1920s, securities regulation received little public interest. W. ATKINS, G. EDWARDS & H. MOULTON, *supra* note 69, at 45. Legislators found little public support for securities legislation due to the widespread availability of credit, a booming stock market, and because "rags to riches [was] the theme of the day." Gadsby, *supra* note 70, at 7.

73. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a to 77bbbb (1988)).

The Securities Act of 1933 primarily regulates the issuance of securities. W. ATKINS, G. EDWARDS & H. MOULTON, *supra* note 69, at 57; Loomis, *The Securities Exchange Act of 1934 and the Investment Advisers Act of 1940*, 28 GEO. WASH. L. REV. 214, 215 (1959).

74. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-*ll* (1988)).

"The Securities Act and the Exchange Act constitute virtually the entire body of general [federal] securities regulation." L. SODERQUIST, *supra* note 71, at 3.

75. The purpose of the Securities Act of 1933 is "to provide full and fair disclosure of the character of securities sold . . . and to prevent frauds in the sale thereof." H.R. CONF. REP. NO. 152, 73d Cong., 1st Sess. 1 (1933).

The purpose of the Exchange Act is "to provide for the regulation of securities exchanges and of over-the-counter markets . . . [and] to prevent inequitable and unfair practices on such exchanges and markets." H.R. CONF. REP. NO. 1838, 73d Cong., 2d Sess. 1 (1934).

In a 1963 report to Congress, the Securities and Exchange Commission observed that "[t]he keystone of the entire structure of Federal securities legislation is disclosure. Making available to investors adequate financial and other information about securities in which they might invest or have invested is the best means . . . of protecting them against securities fraud." SECURITIES AND EXCHANGE COMM'N, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. DOC. NO. 95, 88th Cong., 1st Sess., pt. 3, at 1 (1963) [hereinafter SECURITIES MARKETS REPORT].

76. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-*ll* (1988)).

77. H.R. CONF. REP. NO. 1838, *supra* note 75, at 1. The Securities Exchange Act of 1934 regulates trading in securities that occurs after issuance. W. ATKINS, G. EDWARDS & H. MOULTON, *supra* note 69, at 66; Loomis, *supra* note 73, at 215.

78. 15 U.S.C. § 78b(3) (1988).

79. *Id.* For an overview of stock exchange practices prior to and during the early 1930s, see S. REP. NO. 1455, 73d Cong., 2d Sess. (1934).

80. *See* 15 U.S.C. § 78b(3) (1988). In a letter to Congress recommending legislation which would regulate the securities exchanges, President Franklin D. Roosevelt stated:

> [Naked] speculation has run the scale from the individual who has risked his pay envelop or his meager savings on a margin transaction involving stocks with

Commission;[81] provided for margin requirements;[82] restricted borrowing and lending by national securities exchange members, brokers, and dealers;[83] prohibited security price manipulation;[84] instituted reporting requirements by security issuers;[85] and regulated the use of proxies,[86] among other things.[87]

While the Exchange Act has been called a "remarkable legislative achievement,"[88] amendments have been required to perpetuate its effectiveness.[89] By the mid-1960s, it had been amended eleven times.[90] Despite this extensive legislation, disclosure of information in connec-

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> whose true value he was wholly unfamiliar, to the pool of individuals or corporations with large resources, often not their own, which sought by manipulation to raise or depress market quotations far out of line with reason, all of this resulting in loss to the average investor, who is of necessity personally uninformed.

H.R. REP. No. 1383, 73d Cong., 2d Sess. 1 (1934); S. REP. No. 792, 73d Cong., 2d Sess. 1-2 (1934).

81. 15 U.S.C. § 78d (1988). Section 23(a) of the Exchange Act empowered the Securities and Exchange Commission to promulgate rules and regulations necessary for implementing the Act's provisions. *See id.* § 78w(a).

82. *Id.* § 78g. "Margin" is the amount of credit extended to purchase or maintain a position in a security. *See id.*; *see also* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1100 (2d ed. 1983) ("Margin" is "speculation in which the broker advances part of the money, with reservations to protect him against loss, and the buyer deposits the rest, taking the profit and loss on fluctuations in value.").

83. 15 U.S.C. § 78h (1988).

84. *Id.* § 78i.

85. *Id.* § 78m.

86. *Id.* § 78n.

87. *See generally id.* §§ 78a-*ll*.

88. SECURITIES MARKETS REPORT, *supra* note 75, pt. 1, at xv (letter of transmittal accompanying report); *cf.* Aranow & Einhorn, *Proxy Regulation: Suggested Improvements*, 28 GEO. WASH. L. REV. 306, 309-10 (1959) (The proxy rules promulgated by the Securities and Exchange Commission under the authority granted by the Exchange Act "have wrought wonders" and "have produced light where before there was darkness.").

89. SECURITIES MARKETS REPORT, *supra* note 75, pt. 1, at xv (letter of transmittal accompanying report); *cf.* Loomis, *supra* note 73, at 219 (discussing the "considerable revision" which has been necessary in the regulation of the over-the-counter markets.).

90. The amendments are:

Act of May 27, 1936, Pub. L. No. 74-621, 49 Stat. 1375.
Act of June 25, 1938, Pub. L. No. 75-719, 52 Stat. 1070.
Act of Mar. 17, 1944, Pub. L. No. 78-258, 58 Stat. 117.
Act of Aug. 10, 1954, Pub. L. No. 83-577, §§ 201-202, 68 Stat. 683, 686.
Act of Aug. 28, 1958, Pub. L. No. 85-791, § 10, 72 Stat. 941, 945.
Act of July 12, 1960, Pub. L. No. 86-619, § 3, 74 Stat. 407, 408.
Act of Sept. 13, 1960, Pub. L. No. 86-771, 74 Stat. 913.
Act of Sept. 5, 1961, Pub. L. No. 87-196, 75 Stat. 465.
Act of July 27, 1962, Pub. L. No. 87-561, 76 Stat. 247.
Act of Aug. 20, 1962, Pub. L. No. 87-592, 76 Stat. 394.
Act of Aug. 20, 1964, Pub. L. No. 88-467, §§ 1-11, 78 Stat. 565, 565-80.

tion with cash tender offers[91] was inadequate.[92]

Cash tender offer activity had increased dramatically,[93] from eight offers for publicly traded companies on national securities exchanges in 1960 to 107 offers in 1966.[94] The dollar amount involved in the offers had increased fivefold in five years, to approximately $1 billion in 1965.[95] Tender offerors used high-pressure tactics to acquire companies.[96] They acted under a "cloak of secrecy"[97] as no requirements for disclosure to shareholders or filing of information existed.[98]

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91. The House of Representatives defined "cash tender offer" as follows:

> The [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.

H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2811; S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967); *see also* ENCYCLOPEDIA OF BANKING AND FINANCE 922 (G. Munn & F. Garcia 8th ed. 1983).

92. H.R. REP. NO. 1711, *supra* note 91, at 3, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2812; S. REP. NO. 550, *supra* note 91, at 2.

93. Cash tender offers increased because they were cheaper than proxy fights, a defeated offeror might be able to dispose of its stock without a loss, the offeror had control of both length of time of the offer and secrecy of the operation, and no specific cash tender offer regulation existed. *See* L. LOSS, *supra* note 69, at 498.

For a discussion of why cash was preferred over other forms of compensation, see L. LOSS, *supra* note 69, at 498-99.

94. *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) [hereinafter *Hearings on S. 510*]; H.R. REP. NO. 1711, *supra* note 91, at 2, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2812; S. REP. NO. 550, *supra* note 91, at 2; 113 CONG. REC. 24,664 (1967).

95. *Hearings on S. 510*, *supra* note 94, at 17 (testimony of Manuel F. Cohen, Chairman, Securities and Exchange Commission); *Takeover Bids, Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 11 (1968) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission); 113 CONG. REC. 24,664 (1967).

96. *See* 113 CONG. REC. 857-58 (1967) (statement of Sen. Kuchel, cosponsor of bill). One commentator has stated "the legal regime was one of *caveat vendor*." DeMott, *supra* note 2, at 404.

97. 113 CONG. REC. 858 (1967) (statement of Sen. Kuchel, cosponsor of bill); *see id.* at 24,664-65 (statement of Sen. Williams, cosponsor of bill); *id.* at 9338 (statement of Sen. Kuchel, cosponsor of bill).

98. H.R. REP. NO. 1711, *supra* note 91, at 3, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813; S. REP. NO. 550, *supra* note 91, at 3.

A disparity in filing and disclosure requirements existed among methods in which corporate control was sought. Proxy contests and exchange offers required that shareholders receive certain information about the offer and the acquiror. Exchange offers had to be registered and in both methods, information had to be filed with the Securities and Exchange Commission. In contrast, cash tender offers were not subject to these requirements. See H.R. REP. NO. 1711, *supra* note 91, at 3, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2812-13; S. REP. NO. 550, *supra* note 91, at 3.

In 1968, Congress reacted to the need for cash tender offer legislation by passing the Williams Act,[99] which amended sections 12, 13, and 14 of the Exchange Act.[100] The Williams Act was "the congressional response to the increased use of cash tender offers in corporate acquisitions, a device that had 'removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws.' "[101] The Williams Act and the resulting Securities and Exchange Commission regulations[102] imposed substantive disclosure requirements and established procedural rules governing tender offers.[103]

Senator Harrison Williams of New Jersey, cosponsor of the Williams Act, stated that the purpose of the Act was "solely to require full and fair disclosure for the benefit of investors."[104] Senator Williams also commented that it would "close a significant gap in investor protection . . . by requiring the disclosure of pertinent information,"[105] and that the thrust of the legislation was "to protect shareholders and give them the information necessary to make an intelligent decision."[106] Congress designed the Act to require "full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case."[107]

The United States Supreme Court has reiterated that disclosure and investor protection are the focal points of the Williams Act. The

99. Pub. L. No. 90-439, 82 Stat. 454 (1968).

100. Securities Exchange Act of 1934, Pub. L. No. 73-291, §§ 12-14, 48 Stat. 881, 892-95 (codified as amended at 15 U.S.C. §§ 78*l*-n (1988)).

The amendment to section 12 struck out "sections 12, 13, 14(a), 14(c), and 16" in section 12(i) and inserted "sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16" in its place. *See* 15 U.S.C. § 78*l*(i) (1988).

Section 13 was amended by adding new subsections (d) and (e). *See* 15 U.S.C. § 78m(d)-(e) (1988).

Section 14 was amended by adding new subsections (d), (e), and (f). *See* 15 U.S.C. § 78n(d)-(f) (1988).

101. Edgar v. Mite Corp., 457 U.S. 624, 632 (1982) (quoting Piper v. Chris-Craft Indus., 430 U.S. 1, 22 (1977)).

102. The Williams Act granted rulemaking authority to the Securities and Exchange Commission to enforce its provisions. *See* 15 U.S.C. §§ 78*l*-n (1988). Additionally, section 23(a) of the Exchange Act empowers the Commission to adopt rules and regulations necessary to the implementation of its provisions. *See id.* § 78w(a).

103. *See id.* §§ 78m(d)-(e), 78n(d)-(f).

104. *See* 113 CONG. REC. 24,664 (1967).

105. *Id.* at 854.

106. *Id.* at 9340.

107. H.R. REP. NO. 1711, *supra* note 91, at 4, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813; S. REP. NO. 550, *supra* note 91, at 3; *see also* 113 CONG. REC. 854-55 (1967) (statement of Sen. Williams, cosponsor of bill).

Court has stated that "Congress relied primarily on disclosure to implement the purpose of the Williams Act . . . [which is] 'to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information.' "[108] More recently, the Court has held that a basic purpose of the Williams Act is " 'plac[ing] investors on an equal footing with the takeover bidder,' ".[109]

Section 13 of the Williams Act[110] requires persons who accumulate more than five percent of any class of equity security[111] registered under section 12 of the Exchange Act[112] to file information with the Securities and Exchange Commission, the stock exchange on which the security is traded, and the issuer of the security.[113] This information must identify the person on whose behalf the purchases have been made,[114] the source and amount of funds used,[115] the amount of funds borrowed and the lender,[116] the purpose of the purchases,[117] the

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108. Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8 (1985) (quoting Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975)).

The Court has stated that the Act's sole purpose was the protection of investors confronted with a tender offer. Piper v. Chris-Craft Indus., 430 U.S. 1, 35 (1977); *see also* Edgar v. Mite Corp., 457 U.S. 624, 633 (1982) ("[I]n imposing [the Williams Act] requirements, Congress intended to protect investors."). One commentator has noted that the legislative history of the Williams Act indicates this view is more restrictive than was intended. *See* M. STEINBERG, CORPORATE INTERNAL AFFAIRS 200 (1983).

109. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 82 (1987) (quoting Piper v. Chris-Craft Indus., 430 U.S. 1, 30 (1977) (quoting the Senate Report accompanying the Williams Act, S. REP. No. 550, 90th Cong., 1st Sess. 4 (1967))).

110. 15 U.S.C. § 78m (1988).

111. In the Exchange Act, Congress defined "equity security" as follows:

> The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

Id. § 78c(a)(11).

Section 13 of the Williams Act required disclosure by ten percent acquirors. *See* Pub. L. No. 90-439, 82 Stat. 454, 454 (1968). However, a 1970 amendment to the Exchange Act lowered the threshold to five percent. *See* Act of Dec. 22, 1970, Pub. L. No. 91-567, § 1, 84 Stat. 1497, 1497 (codified as amended at 15 U.S.C. § 78m(d)(1) (1988)).

112. Section 12 of the Exchange Act imposed registration requirements for securities traded on national exchanges. *See* 15 U.S.C. § 78*l* (1988).

113. *Id.* § 78m(d). A number of qualifications and exceptions to this basic requirement exist. *See id.* § 78m(d)(2)-(5).

114. *Id.* § 78m(d)(1)(A).

115. *Id.* § 78m(d)(1)(B).

116. *Id.* If a loan is made by a bank in the ordinary course of business, the bank need not be identified if the person filing the statement so requests. *Id.*

number of shares owned,[118] and any arrangements or contracts with anyone regarding the securities.[119] Section 13 also governs issuer repurchases.[120]

Section 14 of the Williams Act[121] regulates tender offers.[122] In order to make a bid, beneficial owners of more than five percent of any class of equity security[123] registered under section 12 of the Exchange Act[124] must disclose the same information specified in section 13.[125] Additionally, the statement must include requests for tenders.[126] If directors are to be elected or designated at other than a meeting of stockholders, the offeror must provide specific information to shareholders and the Securities and Exchange Commission.[127] False statements or omissions of material facts regarding a tender offer are prohibited.[128] Section 14 also controls the tender offer process, allowing for the withdrawal of tendered securities[129] and for pro rata payment for an oversubscribed offer.[130] If an offeror increases the consideration offered for the securities, the increase must be paid to all tendering security holders.[131]

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117. *Id.* § 78m(d)(1)(C).

118. *Id.* § 78m(d)(1)(D).

119. *Id.* § 78m(d)(1)(E).

120. *Id.* § 78m(e). Section 13 primarily grants power to the Securities and Exchange Commission to regulate issuer repurchases. *See id.*

121. *Id.* § 78n.

122. *See id.*

123. Section 14 of the Williams Act required disclosure by ten percent acquirors. *See* Pub. L. No. 90-439, 82 Stat. 454, 456 (1968). However, a 1970 amendment to the Exchange Act lowered the threshold to five percent. *See* Act of Dec. 22, 1970, Pub. L. No. 91-567, § 3, 84 Stat. 1497, 1497 (codified as amended at 15 U.S.C. § 78n(d)(1) (1988)).

124. Section 12 of the Exchange Act imposed registration requirements for securities traded on national exchanges. *See* 15 U.S.C. § 78*l* (1988).

125. *Id.* § 78m. A number of qualifications and exceptions to this basic requirement exist. *See id.* § 78n(d)(2)-(4), 78n(d)(8).

126. *Id.* § 78n(d)(1).

127. *Id.* § 78n(f). This requirement applies to section 13(d) also. *Id.* The information must be substantially equivalent to that required by sections 14(a) or 14(c). *Id.* Those sections allow the Securities and Exchange Commission to prescribe what is required. *See id.* § 78n(a), 78n(c).

128. *Id.* § 78n(e).

129. *Id.* § 78n(d)(5). Securities may be withdrawn within seven days after the first definitive publication of the offer or at any time after sixty days from the date of the original offer. *Id.*

130. *Id.* § 78n(d)(6). An "oversubscribed offer" occurs if the tender offer is for less than all the outstanding equity securities of a class, but security holders deposit greater than that number of securities. *See id.* If this situation results, the offeror must purchase the securities on a pro rata basis if they were tendered within the first ten days after the offer was published. *Id.* The same ten day rule applies to securities tendered after notice of an increase in consideration is first published. *Id.*

131. *Id.* § 78n(d)(7).

The disclosure and investor protection requirements of sections 13 and 14 provided the substantive basis for the Securities and Exchange Commission's adoption of the All-Holders Rule.[132]

B. *The All-Holders Rule*

In 1986, the Securities and Exchange Commission (the "Commission") promulgated the All-Holders Rule[133] under the authority of the Williams Act Amendments[134] and the Exchange Act.[135] Prior to 1986, the Commission had proposed equal treatment of security holders[136] by both third parties[137] and issuers[138] to preclude discrimination

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132. 17 C.F.R. § 240.14d-10(a)(1) (1990) (regarding third party tender offers); *id.* § 240.13e-4(f)(8)(i) (regarding issuer tender offers); *see* Amendments to Rules, *supra* note 65, at 88,188-91.

Rule 14d-10(a)(1), adopted as a new rule, applies to third party tender offers and is referred to as the All-Holders Rule. *See generally* Amendments to Rules, *supra* note 65. However, the Commission simultaneously proposed and ultimately codified the requirement that an issuer's tender offer must also be open to all holders of that class of securities. *See id.* at 88,187; Tender Offers By Issuers, Exchange Act Release No. 22,199, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,798 (July 1, 1985) (proposed Rule 13e-4(f)(8)(i)). This resulted in an amendment to Rule 13. Amendments to Rules, *supra* note 65, at 88,187 (regarding Rule 13e-4(f)(8)(i)).

133. 17 C.F.R. § 240.14d-10(a)(1) (1990).

134. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1988). The Commission did not cite section 12 as authority or as being part of the Williams Act Amendments. *See* Amendments to Rules, *supra* note 65, at 88,188.

The Commission specifically cited subsections 13(e), 14(d), and 14(e) as vesting authority in it to promulgate the All-Holders Rule. *See id.*

135. 15 U.S.C. §§ 78a-*ll* (1988). The Commission claimed authority to promulgate the All-Holders Rule under sections 3(b) and 23(a), the enabling provisions of the Exchange Act. Amendments to Rules, *supra* note 65; *see also supra* note 81. *See generally* 15 U.S.C. §§ 78c(b), 78w(a) (1988).

The Commission also adopted the All-Holders Rule under section 23(c) of the Investment Company Act of 1940, 15 U.S.C. § 80a-23c, and sections 9(a)(6) and 10(b) of the Exchange Act, 15 U.S.C. §§ 78i(a)(6), 78j(b). Amendments to Rules, *supra* note 65, at 88,188 n.15. *See generally* 15 U.S.C. §§ 78i(a)(6), 78j(b), 80a-23c (1988).

136. Proposed Amendments to Tender Offer Rules, Exchange Act Release No. 16,385, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,374 (Nov. 29, 1979) [hereinafter Proposed Tender Offer Amendments] (proposed Rule 14e-4(b), regarding third party and issuer tender offers); Notice of Proposed Rule 13e-4 and Schedule 13E-4 under the Securities Exchange Act of 1934, Exchange Act Release No. 14,234, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,380, at 88,785 (Dec. 7, 1977) (proposed Rule 13e-4(b)(4), regarding issuer tender offers).

137. For purposes of sections 14(d) and 14(e) of the Exchange Act of 1934, the term "third party" is vicariously defined by the Securities and Exchange Commission in 17 C.F.R. § 240.14d-1(b)(1), which provides that: "The term 'bidder' means any person who makes a tender offer or on whose behalf a tender offer is made: *Provided, however,* That the term does not include an issuer which makes a tender offer for securities of any class of which it is the issuer." 17 C.F.R. § 240.14d-1(b)(1) (1990).

138. "Issuer" is defined by the Securities and Exchange Commission as "any issuer which has a class of equity security registered pursuant to section 12 of the [Exchange] Act,

in tender offers, but it did not act until prompted by the decision in *Unocal Corp. v. Pickens.*[139] Responding to a self-tender offer in which Unocal Corp. excluded the block of its shares held by Mesa Petroleum

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or which is required to file periodic reports pursuant to section 15(d) of the [Exchange] Act, or which is a closed-end investment company registered under the Investment Company Act of 1940." 17 C.F.R. § 240.13e-4(a)(1) (1990).

The Commission defines "issuer tender offer" as "a tender offer for, or a request or invitation for tenders of, any class of equity security, made by the issuer of such class of equity security or by an affiliate of such issuer." *Id.* § 240.13e-4(a)(2).

139. 608 F. Supp. 1081 (C.D. Cal. 1985).

In 1985, corporate raider T. Boone Pickens, via his Mesa Petroleum Co. and its affiliates, launched a front-end loaded, two-tiered takeover bid for Unocal Corporation's outstanding stock. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985). Mesa, owner of about 13% of the stock, proposed to acquire an additional 37% for $54.00 cash per share (the "front-end") and purchase the remaining 49% for $54.00 per share of highly leveraged subordinated debt (the "back-end"). *Id.*

In response to a bid that it felt was grossly inadequate, Unocal's board of directors approved a discriminatory self-tender offer, open to all its shareholders except Mesa, offering $72.00 per share in exchange for a package of debt securities. *Id.* at 950-51.

Mesa sued in the Delaware Chancery Court to enjoin its exclusion from the Unocal offer. Mesa Petroleum Co. v. Unocal Corp., No. 7997, slip op. (Del. Ch. Apr. 29, 1985). The court issued a preliminary injunction based on Mesa's argument that the self-tender was unlawful under Delaware law because it was discriminatory. *Id.* at 8-9. However, Mesa also sought an injunction under federal securities law in the District Court for the Central District of California. Unocal Corp. v. Pickens, 608 F. Supp. 1081 (C.D. Cal. 1985).

The district court decided in favor of Unocal. *Id.* It stated that while the Securities and Exchange Commission had twice proposed rulemaking that would have required tender offers to be open to all holders, its failure to adopt these rules indicated that the Commission felt the proposals were either outside the scope of the Williams Act or they were not required as a matter of policy. *Id.* at 1082. The court denied Mesa's motion for a preliminary injunction preventing Unocal from completing its self-tender offer unless it was open to all holders. *Id.* at 1083. It held that Mesa had failed to show irreparable harm and was unlikely to succeed on its claim that the Williams Act prohibited discriminatory tender offers. *Id.* (The court defined discriminatory tender offers as "offers to less than all persons who hold the class of securities which are the subject of the offer.").

Thereafter, the Supreme Court of Delaware vacated the Chancery Court's preliminary injunction, holding that Unocal's self-tender was not discriminatory despite its exclusion of Mesa. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 957 (Del. 1985). Thus, Unocal was successful in fending off Pickens. Rose, Cohen & Stewart, *Unocal, Mesa Group Reach Pact To End Takeover Battle for Firm*, Wall St. J., May 21, 1985, at 2, col. 2 (Mesa and Unocal reached a settlement whereby Unocal agreed to allow Mesa to partially participate in the Unocal offer. In return, Mesa agreed to sell its remaining shares and not purchase any additional Unocal stock for 25 years.).

For further discussion of the Commission's response to the *Unocal* decision, see *Divided SEC Adopts 'All-Holders' Rule in Response to Decision in Unocal Case*, 18 Sec. Reg. & L. Rep. (BNA) No. 28, at 997-98 (July 11, 1986) [hereinafter *Divided SEC*]; Proposed Amendments to Tender Offer Rules, Exchange Act Release No. 22,198, [1984-1985 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 83,797, at 87,560 & n.5 (July 1, 1985) [hereinafter Proposed Amendments].

Co.,[140] the Commission[141] proposed the All-Holders Rule[142] and an amendment to Rule 13e-4[143] requiring both third party and issuer tender offers to be open to all holders of the class of securities subject to the offer.[144] This response came although the Commission had unofficially supported the all-holders requirement since the enactment of the Williams Act and its position was "a widely known and generally accepted tender offer practice."[145]

The All-Holders Rule states that "[n]o bidder shall make a tender offer unless . . . [t]he tender offer is open to all security holders of the class of securities subject to the tender offer."[146] While nothing in the

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140. *See supra* note 139.

141. The Commission felt that the exclusionary tender offer was discriminatory and a violation of the Williams Act. Wall St. J., June 24, 1985, at 2, col. 3 (quoting an internal Commission memo).

142. Proposed Amendments, *supra* note 139, at 87,560; *see Divided SEC, supra* note 139, at 997-98.

143. Tender Offers By Issuers, *supra* note 132.

144. In addition to proposing a ban on discriminatory tender offers by third parties and issuers, both Exchange Act Release No. 22,198 (Proposed Amendments, *supra* note 139) and Exchange Act Release No. 22,199 (Tender Offers By Issuers, *supra* note 132) also advanced a Best-Price Rule, requiring that all shareholders be paid the highest consideration offered to any other shareholder at any time during the tender offer. Both releases also proposed minimum periods during which tender offers must remain open. The Commission adopted the amendments substantially as proposed. *See* Amendments to Rules, *supra* note 65.

145. Proposed Amendments, *supra* note 139, at 87,560.

146. 17 C.F.R. § 240.14d-10(a)(1) (1990). The Commission created several exceptions to the All-Holders Rule:

(1) If by administrative or judicial action taken pursuant to a constitutionally valid antitakeover statute, a state bars the making of a tender offer, then a third party or issuer may exclude security holders in that state if a good faith attempt is made to comply with the law. *Id.* § 240.14d-10(b)(2) (regarding third party tender offers); *id.* § 240.13e-4(f)(9)(ii) (regarding issuer tender offers). The third party or issuer may offer an alternative form of consideration to security holders in that state, but is not required to do so. Amendments to Rules, *supra* note 65, at 88,193. To meet the good faith requirement, the third party or issuer need not modify the terms of the consideration or the offer, but must only make the required filing and pay the required fee. *Id.*

(2) Tender offers by foreign citizens made without the use of the mails, the instrumentalities of interstate commerce, or a national securities exchange facility are exempt from the all-holders requirement. *See id.* at 88,192. The proposed new Rule 14d-10 and amendment to Rule 13e-4(f) had each included exemptions from the all-holders requirement for foreign bidders. *See Proposed Amendments to SEC Tender Offer Rules*, 17 Sec. Reg. & L. Rep. (BNA) No. 28, at 1320, 1324 (July 12, 1985) (regarding third party tender offers); *Proposed SEC Rule on Tender Offers By Issuers*, 17 Sec. Reg. & L. Rep. (BNA) No. 28, at 1310, 1319 (July 12, 1985) (regarding issuer tender offers). However, the Commission, in the belief that the law was clear in this area due to the decision in Plessey Co. PLC v. General Electric Co. PLC, 628 F. Supp. 477 (D. Del. 1986), deleted the proposed provisions as unnecessary. *See* Amendments to Rules, *supra* note 65, at 88,192.

(3) Issuers can limit offers to shareholders owning only odd-lots of its securities. 17 C.F.R. § 240.13e-4(g)(5) (1990). An "odd-lot" is an aggregate of shares that is less than

text of the Williams Act or its legislative history expressly dealt with this subject,[147] the Commission construed the Act as implicitly requiring that security holders be treated equally when a tender offer is made.[148] The Commission determined that the Williams Act's disclosure objectives would be pointless if information was divulged to all holders, but only some could participate in an offer,[149] because disclosure was designed to make information known so that "shareholders have a fair opportunity to make their decision" to tender, sell or hold their securities.[150]

Disclosure was an issue in Polaroid's attempt to ward off Shamrock,[151] but Shamrock's misrepresentations were correctable.[152] However, the determination that Polaroid lacked standing to assert an All-Holders Rule claim ended Polaroid's attempts to receive preliminary injunctive relief on that basis.[153]

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one hundred. *See* Amendments to Rules, *supra* note 65, at 88,194. The Commission stated that "the purpose of an odd-lot offer is to reduce the high costs to the issuer of servicing large numbers of small security holder accounts, and to enable those security holders to dispose of their shares without incurring the brokerage fees that normally attend odd-lot transactions." *Id.* The Commission adopted the exception "[b]ecause odd-lot offers present 'minimal potential for fraud and manipulation . . . .' " *Id.* However, the all-holders requirement applies within the odd-lot offer: an issuer must extend the offer to all security holders holding the specified number, or fewer, shares. *Id.* at 88,194-95.

(4) Issuers can offer to repurchase securities only from shareholders whose securities may have been issued in violation of state law or the registration provisions of the Securities Act of 1933. 17 C.F.R. § 240.13e-4(g)(6) (1990). Issuers normally would not make such rescission offers if required to extend the offer to all holders of the class of security subject to the offer. *See* Tender Offers By Issuers, *supra* note 132, at 87,575.

(5) A particular transaction may be exempted from the All-Holders Rule through a determination by the Commission on written request or by its own motion. 17 C.F.R. § 240.14d-10(e) (1990) (regarding third party tender offers); *id.* § 240.13e-4(g)(7) (regarding issuer tender offers).

The Commission has entertained ideas about other possible exemptions to the all-holders requirement. *See* Concept Release on Takeovers and Contests for Corporate Control: Advance Notice of Possible Commission Actions, Exchange Act Release No. 23,486, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,018 (July 31, 1986) (whether a self-governance exemption to the All-Holders Rule and other tender offer regulations should be adopted); *Commission Issues Concept Release on Poison Pills, Opt-Outs, Williams Act*, 18 Sec. Reg. & L. Rep. (BNA) No. 32, at 1157-58 (Aug. 8, 1986).

147. Unocal Corp. v. Pickens, 608 F. Supp. 1081, 1082 (C.D. Cal. 1985).

148. Proposed Amendments, *supra* note 139, at 87,560; Proposed Tender Offer Amendments, *supra* note 136, at 82,610.

149. Amendments to Rules, *supra* note 65, at 88,189.

150. *Id.* at 88,189 n.23 (quoting S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967)).

151. *See* Polaroid Corp. v. Disney, 862 F.2d 987, 1003 (3d Cir. 1988).

152. *See id.* at 1007.

153. *See id.*

II. STANDING

Standing doctrine is both confusing and amorphous.[154] As Justice Douglas stated, "[g]eneralizations about standing to sue are largely worthless as such."[155] *Polaroid Corp. v. Disney*,[156] with its focus on third party and associational standing, exemplifies the continued difficulty in this area.

A. *Definition and Summary of Requirements*

Standing is a determination of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[157] The litigant must have a "sufficient stake in a[ ] . . . controversy to obtain judicial resolution of [it]."[158] In the absence of a statute, this personal interest is required "to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' "[159] In essence, the question of standing focuses on whether the plaintiff is the proper party to litigate the dispute.[160]

There are three constitutional and three prudential limitations on

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154. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) ("concept of 'Art. III standing' has not been defined with complete consistency"); Flast v. Cohen, 392 U.S. 83, 99 (1968) (standing called one of "the most amorphous [concepts] in the entire domain of public law" (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 498 (1966) (statement of Prof. Paul A. Freund))); Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (standing law long criticized as incoherent); Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 37 ("Few judicial doctrines have generated as much . . . doctrinal confusion as standing . . . ."); *cf.* C. WRIGHT, LAW OF FEDERAL COURTS § 13, at 60 (4th ed. 1983) ("The law of standing has experienced rapid and repeated change in the years since 1968.").

155. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970).

156. 862 F.2d 987 (3d Cir. 1988).

157. Warth v. Seldin, 422 U.S. 490, 498 (1975).

158. Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

159. *Id.* at 732 (quoting Flast v. Cohen, 392 U.S. 83, 101 (1968)).

The raison d'être of a case is rooted in an adversarial relationship between the litigants. "[A] real dispute [must] exist[ ] between the prospective parties in a suit. . . . The federal courts are thus unable to respond to hypothetical or friendly suits, and they cannot render advisory opinions." R. CHANDLER, R. ENSLEN & P. RENSTROM, CONSTITUTIONAL LAW DESKBOOK § 8:107, at 544 (1987).

160. Carolina Envtl. Study Group, Inc. v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 219 (W.D.N.C. 1977), *rev'd sub nom.* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978).

standing.[161] Federal jurisdiction[162] is restricted to cases which satisfy all six requirements.[163] Under article III, section 2, clause 1 of the Constitution,[164] a litigant, to comply with the constitutional prerequisites for standing, must show an actual or threatened injury,[165] which is traceable to the defendant's conduct,[166] and is likely to be redressed by a favorable federal court decision.[167] Thus, the plaintiff must allege injury in fact, causation, and redressability.[168]

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161. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-76 (1982).

162. "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.' " *Id.* at 471. The litigant must make out a " 'case or controversy' between himself and the defendant" in order for a federal court to entertain the lawsuit. Warth v. Seldin, 422 U.S. 490, 498 (1975). The litigant fulfills this requirement by complying with the constitutional limitations on standing. *See Valley Forge Christian College*, 454 U.S. at 472.

163. E. CHEMERINSKY, FEDERAL JURISDICTION § 2.3.1, at 51 (1989). Congress may supersede the prudential requirements by conferring standing by statute where it would not otherwise exist. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976); *Warth*, 422 U.S. at 500 (citing Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)). Professor Fallon suggests that Congress' power to repudiate prudential requirements may be limited. *See* Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 30-35, 47-48, 56-59 (1984). Congress cannot supersede the constitutional limitations. *See Simon*, 426 U.S. at 41 n.22.

The prudential requirements may also be judicially superseded. *See infra* note 170.

Questions of standing in state courts are governed by state law. G. GUNTHER, CONSTITUTIONAL LAW 1576 (11th ed. 1985). State court standing requirements "may and frequently do differ from federal court standing rules." *Id.* The United States Supreme Court stated in *ASARCO*:

> [T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or . . . a federal statute.

ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989).

164. U.S. CONST. art. III, § 2, cl. 1. Article III, section 2, clause 1 states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

165. *See, e.g.*, Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

166. Allen v. Wright, 468 U.S. 737, 751 (1984); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

167. *Allen*, 468 U.S. at 751; *Simon*, 426 U.S. at 38.

168. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 108 (2d ed. 1988); *see*

The three prudential limitations are not constitutionally based,[169] and thus, they may be statutorily or judicially repudiated.[170] First, a litigant who, as a citizen or taxpayer, asserts a generalized grievance "shared in substantially equal measure by all or a large class of citizens"[171] lacks standing, where the injury asserted is that the government failed to follow the law.[172] A generalized grievance is in the domain of the United States Congress and, ultimately, the political process must address the particular subject matter the grievance concerns.[173]

Second, a litigant's claim must fall within the zone of interests protected by the statute at issue.[174] That is, the litigant must be part of the group that is the intended beneficiary of the law.[175]

Finally, the third prudential requirement for standing is that the rights one asserts must be one's own — a litigant may not champion the rights of another not a party to the litigation.[176] Thus, third party standing is normally prohibited.[177]

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also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

169. E. CHEMERINSKY, *supra* note 163, § 2.3.1, at 52.

170. *Id.* (regarding statutorily repudiated prudential requirements). Judicially repudiated prudential requirements include the exceptions to third party standing which the United States Supreme Court has carved out. *See infra* notes 198-211 and accompanying text.

171. Warth v. Seldin, 422 U.S. 490, 499 (1975).

172. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (Plaintiffs, as U.S. citizens, lacked standing to sue because they had a generalized grievance common to all citizens, and lacked concrete injury.); United States v. Richardson, 418 U.S. 166, 174 (1974) ("[A] taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.' " (quoting Flast v. Cohen, 392 U.S. 83, 114 (1968) (Stewart, J., concurring))); *Ex parte* Lévitt, 302 U.S. 633 (1937) (per curiam) (A private individual may not invoke judicial power to determine the validity of executive or legislative action unless he has sustained or is threatened by a direct injury; a mere general interest common to all members of the public is not sufficient.).

173. *Richardson*, 418 U.S. at 179.

174. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

175. E. CHEMERINSKY, *supra* note 163, § 2.3.6, at 84. The zone of interest test applies when the litigant challenges an administrative agency regulation that "does not directly control the [litigant's] . . . actions." *Id.* The test may be limited to claims in which review of agency decisions under the Administrative Procedure Act is sought. *See* Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987). In *Clarke*, the United States Supreme Court stated "the test is most usefully understood as a gloss on the meaning of § 702 [which authorizes judicial review of agency action]." *Id.*; *see also* Administrative Procedure Act § 702, 5 U.S.C. § 702 (1988). The test is not one "of universal application." *Clarke*, 479 U.S. at 400 n.16.

176. Warth v. Seldin, 422 U.S. 490, 499 (1975).

177. *See infra* notes 187-97 and accompanying text.

B. *Third Party Standing*

The Supreme Court has stated that a litigant "must assert his own legal rights and interests, and cannot rest his claim [on those] . . . of third parties."[178] When a litigant seeks to have third party, or *jus tertii*,[179] standing, the Court has indicated that three elements must be examined to determine the litigant's authority to do so.[180] The first is the relationship between the litigant and the third party.[181] A close relationship between the litigant and the third party must exist so that the litigant is "very nearly[ ] as effective a proponent of the right" as the third party.[182] The second element is the third party's ability to assert its own rights.[183] The third party must be genuinely unable to raise its own rights.[184] The third element that must be examined is the impact of the litigation on the third party's interests.[185] The issue being litigated must materially impair the third party's ability to assert its rights.[186]

Generally, a litigant does not have third party standing[187] for three reasons.[188] First, rights should not be unnecessarily adjudi-

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178. *Warth*, 422 U.S. at 499.

179. *See* Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 278 n.6 (1984) ("Third party standing" is becoming a synonym for "jus tertii standing."); Note, *Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny*, 61 B.U.L. REV. 174, 176 n.17 (1981) [hereinafter Note, *Associational Standing*].

180. Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646, 2651 n.3 (1989).

181. Singleton v. Wulff, 428 U.S. 106, 114-15 (1976).

182. *Id.* at 115; *see also* Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (rights of married couples, as third parties, likely to be adversely affected unless asserted in suit by Planned Parenthood officials in confidential relationship with them).

183. *Singleton*, 428 U.S. at 115-16.

184. *See id.*; *see, e.g.*, NAACP v. Alabama, 357 U.S. 449, 459 (1958) (third parties' assertion of right would result in loss of that right); Barrows v. Jackson, 346 U.S. 249, 257 (1953) (covenantor could maintain third party standing where it would be difficult if not impossible for third parties to present their grievance before any court).

185. Eisenstadt v. Baird, 405 U.S. 438, 445 (1972).

186. *See* Craig v. Boren, 429 U.S. 190, 196 (1976) (enforcement of statutes at issue would materially impair ability of males aged 18-20 to purchase 3.2% beer); *Eisenstadt*, 405 U.S. at 446 (enforcement of statute would materially impair ability of single persons to obtain contraceptives).

187. *Singleton*, 428 U.S. at 114; *Barrows*, 346 U.S. at 255; *see* B. SCHWARTZ, CONSTITUTIONAL LAW § 1.17, at 39 (2d ed. 1979); Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CALIF. L. REV. 1308, 1309 (1982) [hereinafter Sedler, *The Assertion*]; *see also* Flast v. Cohen, 392 U.S. 83, 99 n.20 (1968); McGowan v. Maryland, 366 U.S. 420, 429 (1961); *cf.* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 600 (1962) ("[T]o say that standing to assert the rights of third parties is denied more often than not sheds no real light on the problem.").

188. For a view that the reasoning behind third party standing doctrine is unjustifi-

cated.[189] If a third party does not wish to assert a right[190] or will be able to enjoy the right regardless of the outcome of an in-court litigant's lawsuit,[191] a prohibition against third party standing fosters judicial economy in that a question of law will not be decided in advance of the necessity of doing so.[192] Second, third parties are generally the most effective advocates of their own rights.[193] Prohibiting third party standing promotes superior litigation and judicial decision-making[194] because the champions of the right themselves are before the court.[195] Finally, where the litigant who asserts third party standing receives an unfavorable decision, a third party's ability to advance its own rights may be undermined by the doctrine of stare decisis[196] or, to a lesser extent, be injured by unfavorable precedent.[197]

Despite the general proscription against third party standing, a number of exceptions to the rule exist.[198] Where first amendment rights are at issue, a litigant may challenge a law on a third party

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able, see Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 405-06 (1981).

189. *Singleton*, 428 U.S. at 113.

190. *Id.* at 113-14; Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80 (1978).

191. *Singleton*, 428 U.S. at 114.

192. *See generally id.*; United States v. Raines, 362 U.S. 17, 22 (1960) ("[A]pplication of this rule [prohibiting third party standing] frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy."); Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (regarding unnecessary constitutional law adjudication).

193. *Singleton*, 428 U.S. at 114; *see, e.g.*, Holden v. Hardy, 169 U.S. 366, 397 (1898) (argument that third party employees' rights violation has "greater cogency" if self-asserted).

194. Baker v. Carr, 369 U.S. 186, 204 (1962) (personal stake in outcome of controversy assures concrete adverseness which sharpens presentation of issues upon which court depends); E. CHEMERINSKY, *supra* note 163, § 2.3.4, at 72.

195. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80 (1978); R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.13(f)(3), at 140 (1986).

196. *Singleton*, 428 U.S. at 114.

197. Rohr, *supra* note 188, at 405. Professor Rohr also opposes third party standing in cases where a concrete factual situation does not exist. *Id.* at 463.

198. *See generally* E. CHEMERINSKY, *supra* note 163, § 2.3.4; L. TRIBE, *supra* note 168, § 3-19; Rohr, *supra* note 188; Sedler, *The Assertion*, *supra* note 187; Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

The prohibition against third party standing has been described as being "riddled with exceptions." Meltzer, *Deterring Constitutional Violations By Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 280 (1988).

A litigant asserting third party standing still must satisfy the constitutional standing requirements. E. CHEMERINSKY, *supra* note 163, § 2.3.4, at 73.

standing basis by claiming that, while the law does not constitutionally curtail the litigant's rights, it does violate the rights of absent third parties.[199] The purpose of this exception, known as the overbreadth doctrine,[200] is to avoid laws that have a chilling effect on constitutionally protected speech or expression.[201] The Supreme Court has emphasized that the existence of a law that might chill first amendment rights outweighs potential pitfalls resulting from third party standing.[202]

A litigant may also advance the rights of another not before the court if the litigant is an adequate representative of an absent party who is unable to assert those rights. Such instances occur when the third parties cannot legally be a party to an action[203] and thus, are "denied a forum in which to assert their own rights."[204] Litigants are accorded third party standing in such cases so that third parties' interests are protected.[205]

A special or close relationship between the litigant and the third party allows for third party standing. In such circumstances, the litigant is granted third party standing where a connection exists between the litigant and the third party's exercise of a protected activity.[206]

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199. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

200. Several scholars have argued that the overbreadth doctrine is distinct in itself and not an exception to third party standing proscriptions. *See* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 195, § 2.13(f)(3), at 140-41; L. TRIBE, *supra* note 168, § 3-19, at 135 n.7; Fletcher, *supra* note 154, at 244; Monaghan, *supra* note 179, at 282-86; *see also* E. CHEMERINSKY, *supra* note 163, § 2.3.4, at 76 n.153.

201. Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984); *Broadrick*, 413 U.S. at 612; *see* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

202. *See Munson*, 467 U.S. at 956-57 ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."). *See generally Broadrick*, 413 U.S. at 610-13.

In an overbreadth situation, a court will not weigh the third party's ability to assert its own claims. *Munson*, 467 U.S. at 957; *see also supra* notes 179-84 and accompanying text.

203. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (defendant had standing to assert interests of unmarried persons where latter were denied access to contraceptives, but were unable to assert their own rights because they were not subject to prosecution); Barrows v. Jackson, 346 U.S. 249 (1953) (covenantor was proper party to represent rights of non-Caucasians unable to assert their own rights because they were not parties to contract at issue); *see also* Craig v. Boren, 429 U.S. 190 (1976) (vendor had third party standing to assert rights of vendees, males aged 18-20, refused access to 3.2% beer but not subject to prosecution under law because statute regulated sale, not use, of beer).

204. *Eisenstadt*, 405 U.S. at 446.

205. *Barrows*, 346 U.S. at 257; *see Eisenstadt*, 405 U.S. at 445-46.

206. E. CHEMERINSKY, *supra* note 163, § 2.3.4, at 74.

Professor Monaghan has urged that an investigation of a close relationship should focus on whether restrictions hamper the interaction between the litigant and the third

Courts have found close relationships between school and student,[207] physician and patient,[208] and vendor and vendee,[209] among others.[210]

Finally, an organization or association may be permitted to have third party standing to assert the rights of its members.[211]

C. *Associational Standing*

While an association has standing to seek judicial relief in its own right if, as an entity, it has suffered injury,[212] it may also have standing

party. *Cf.* Monaghan, *supra* note 179, at 299 (contending that where restrictions encumber the relationship, the litigant asserts his own, not third party, rights).

Professor Chemerinsky has stated "a close relationship is not enough for third-party standing; the advocate also must be part of the third party's exercise of the protected right." E. CHEMERINSKY, *supra* note 163, § 2.3.4, at 75 (construing Gilmore v. Utah, 429 U.S. 1012 (1976), as potentially supporting this proposition). *Compare* Whitmore v. Arkansas, 110 S. Ct. 1717, 1726-29 (1990) (death row inmate lacked standing as "next friend" to challenge validity of fellow inmate's death sentence as no evidence existed that latter was unable to proceed on own behalf) *and* Gilmore v. Utah, 429 U.S. 1012, 1012-13 (1976) (mother denied standing to seek stay of execution on son's behalf because son made a "knowing and intelligent waiver of any and all federal rights he might have asserted") *with* Lenhard v. Wolff, 443 U.S. 1306, 1312 (Rehnquist, Circuit Justice 1979) (public defender granted stay of execution on behalf of condemned man because latter's waiver of legal rights not "a rational decision").

207. Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925) (litigants have standing because "[t]heir interest is clear and immediate, within the rule . . . where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers.").

208. Singleton v. Wulff, 428 U.S. 106, 117 (1976) ("The closeness of the relationship is patent . . . . Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved."); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) ("The rights of husband and wife . . . are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.").

209. Craig v. Boren, 429 U.S. 190 (1976).

210. Considerable overlap exists among the exceptions to the general rule against third party standing. Thus, permitting the litigant to have third party standing in a case such as *Eisenstadt* can be justified under the overbreadth exception ("[T]he Court fully recognized [Baird's] standing to defend the privacy interests of third parties."). *Craig*, 429 U.S. at 196 (construing Eisenstadt v. Baird, 405 U.S. 438 (1972)). It is also maintainable where a party is unable to assert its own rights ("[U]nmarried persons denied access to contraceptives . . . are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights."). Eisenstadt v. Baird, 405 U.S. 438, 446 (1972). Finally, the litigant's third party standing in *Eisenstadt* comes within the scope of the close relationship exception ("[D]octor-patient and accessory-principal relationships are not the only circumstances in which one person has been found to have standing to assert the rights of another. . . . And so here the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so."). *Id.* at 445.

211. Warth v. Seldin, 422 U.S. 490, 511 (1975).

212. *Id.*

solely as a representative of its members.[213] According to *Hunt v. Washington State Apple Advertising Commission*,[214] three factors must occur for an organization to have representative standing: (a) an organization's members must otherwise have standing to sue in their own right, (b) the interests the organization seeks to protect must be germane to its purpose, and (c) neither the claim asserted nor the relief requested must require individual member participation in the litigation.[215] The association still must satisfy the article III constitutional requirements,[216] yet it need not allege an injury to itself,[217] only that "its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."[218]

This doctrine of associational standing is advantageous to both individual members of an association and the judicial system for a number of reasons.[219] An association suing on behalf of its members can draw upon a "pre-existing reservoir of expertise and capital" unavailable or unaffordable to its individual members.[220] The Supreme Court has noted that "[b]esides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack."[221]

Additionally, an association's focus on the particular issue being litigated may promote superior litigation and judicial decision-making.[222] Because of this focus, the association may be a better advocate of the interests at stake than its individual members.[223]

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213. *Id.*; *e.g.*, National Motor Freight Traffic Ass'n v. United States, 372 U.S. 246 (1963).

214. 432 U.S. 333 (1977).

215. *Id.* at 343.

216. *Warth*, 422 U.S. at 511; *see also* Sierra Club v. Morton, 405 U.S. 727 (1972).

217. *Warth*, 422 U.S. at 511.

218. *Id.*; *see also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 (1976).

219. UAW v. Brock, 477 U.S. 274, 289 (1986).

220. *Id.*

221. *Id.* (quoting Note, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims*, 1974 U. ILL. L.F. 663, 669).

222. *But see supra* notes 193-95 and accompanying text.

223. Harlem Valley Transp. Ass'n v. Stafford, 360 F. Supp. 1057, 1065 (S.D.N.Y. 1973) ("[W]hen exerted on behalf of its directly affected members, [the association's interest] assure[s] [that] 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions' [exists]." (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))), *aff'd*, 500 F.2d 328 (2d Cir. 1974).

"An individual class plaintiff's representation of the class can always be distorted by individual circumstances which affect his zeal in prosecuting the suit, his perception of the common problem, or his resources." Note, *From Net to Sword: Organizational Representa-*

People join associations to advance their interests.[224] "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."[225] The particular purpose for which individuals unite in an association may be furthered, in terms of both public relations and the lessened potential for conflicting decisions in different jurisdictions,[226] by allowing associational representation of individual members.[227] Avoiding repetitious litigation by "resolv[ing] the claims of many individuals simultaneously"[228] fosters judicial economy in an economic sense.[229]

Although allowing an association to assert third party standing on behalf of its members has practical effects, there can be detrimental aspects to associational standing as well. An association may inadequately represent its members' interests[230] by diverging completely from them.[231] An association may encompass such a heterogeneous

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tives Litigating Their Members' Claims, 1974 U. ILL. L.F. 663, 669 [hereinafter Note, *From Net to Sword*]; *see also* Zacharias, *Standing of Public Interest Litigating Groups to Sue on Behalf of Their Members*, 39 U. PITT. L. REV. 453, 484-85 (1978).

224. E. CHEMERINSKY, *supra* note 163, § 2.3.7, at 90; *see also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459-60 (1958) (An association "is but the medium through which its individual members seek to make more effective the expression of their own views. . . . Effective advocacy of both public and private points of view . . . is undeniably enhanced by group association . . . .").

225. UAW v. Brock, 477 U.S. 274, 290 (1986) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 187 (1951) (Jackson, J., concurring)).

226. Associational representation "enables the courts to make a judgment based on a more complete appraisal of the interests involved, and reduces the likelihood of multiple conflicting decrees." Note, *From Net to Sword*, *supra* note 223, at 668.

227. *Id.* at 668-70; *see also* Zacharias, *supra* note 223, at 479.

228. Note, *From Net to Sword*, *supra* note 223, at 668.

229. *See id.*; *see also* Heineman & Phillips, *When Groups Represent Members in Court . . . Assault on Associational Standing is Misguided*, L.A. Daily J., Apr. 24, 1986, at 4, col. 1 ("[I]f individual members' suits are brought neither as class actions nor as national suits, then the courts will face many more suits . . . . [N]o one benefits . . . ."). *But cf.* Zacharias, *supra* note 223, at 482-83 (Loosening standing requirements will merely result in additional organizational litigation.).

230. UAW v. Brock, 477 U.S. 274, 289 (1986); *see also* Note, *Associational Standing*, *supra* note 179.

231. Attorneys Heineman and Phillips feel this is not a significant problem. "Members of [an association] . . . have effective recourse if the organization fails to represent their interests adequately. . . . Members can, for example, withdraw from the organization, vote to adopt formal changes in its policy, or unite in order to oust from leadership those who decided to pursue particular litigation." Heineman & Phillips, *supra* note 229; *see* Zacharias, *supra* note 223, at 487-90 ("A [public interest litigating group]'s litigation is the result of a democratic and well-informed decision to act by its members. . . . [E]ven if a dissenting member does not wish a [public interest litigating group] to sue on his behalf in a particular case, no harm will accrue to him by the organization's activities."); *cf.* Note,

membership that it will be ineffective in reflecting the views of particular members or subgroups within the association.[232] The purposes of an association's members and those purposes to which its leaders strive may deviate regarding the particular issue being litigated,[233] in terms of litigation strategy[234] or relief sought.[235] An association may lack resources or experience,[236] or may litigate without membership authorization.[237] Finally, members may be estopped from relitigating a lawsuit in which their association unsatisfactorily represented them because of the principles of stare decisis, claim or issue preclusion.[238]

In denying Polaroid standing to assert a claim on behalf of its ESOP, the Third Circuit Court of Appeals noted several considerations that weighed against granting a corporation associational standing.[239]

From Net to Sword, *supra* note 223, at 669 (Pressures on the organization include "the threat to . . . [its] survival from inadequate or unsuccessful representation.").

232. Note, *Associational Standing*, *supra* note 179, at 179-81 & nn.34-40; Note, *From Net to Sword*, *supra* note 223, at 671; *cf.* *UAW*, 477 U.S. at 289 (association might "reflect the views of only a bare majority—or even an influential minority—of the full membership" in other than litigation strategy).

233. *See infra* note 237.

234. *UAW*, 477 U.S. at 289; *see also* Note, *Associational Standing*, *supra* note 179, at 179-80 & n.34.

235. Note, *Associational Standing*, *supra* note 179, at 180 & n.36.

236. *UAW*, 477 U.S. at 289.

237. *Id.*; Note, *From Net to Sword*, *supra* note 223, at 670-71 (Without adequate procedural safeguards, organizations "may not have the requisite structural development to insure membership control or leadership accountability. . . . The organization may also exceed the authority given to it by the members.").

Attorneys Heineman and Phillips, however, have stated that this situation is no reason for a court to deny associational standing:

> [Because members can] unite in order to oust from leadership those who decided to pursue particular litigation . . . courts should interfere with an association's decision [to litigate] only when it is beyond doubt that the litigation is ultra vires of the association's basic charter. Conflicts within the organization concerning matters relevant to its purposes are better handled by the membership than by a federal court.

Heineman & Phillips, *supra* note 229.

238. Note, *Associational Standing*, *supra* note 179, at 185-87; Note, *From Net to Sword*, *supra* note 223, at 670-71; *see also supra* notes 196-97 and accompanying text; *cf.* Zacharias, *supra* note 223, at 486-87 (benefits of allowing public interest litigating groups standing to sue on members' behalf outweighs potential costs of binding members). *But see* *UAW*, 477 U.S. at 290 (If an association does not adequately represent all injured members, "a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles."); Note, *From Net to Sword*, *supra* note 223, at 673 ("The organization representational action will not eliminate all potential plaintiffs unless they belong to the organization.").

239. Polaroid Corp. v. Disney, 862 F.2d 987, 998-1001 (3d Cir. 1988).

III. The Decision of the United States Court of Appeals for the Third Circuit

As a defensive tactic against a potential takeover,[240] Polaroid sought a preliminary injunction to enjoin Shamrock's tender offer, asserting that Shamrock had violated the All-Holders Rule by excluding the Polaroid ESOP shares from the offer.[241] Shamrock questioned whether Polaroid had standing to assert a breach of the Rule.[242] Prior to the Polaroid takeover attempt, the question of whether a target corporation has standing, on behalf of its shareholders, to maintain a violation of the All-Holders Rule by a potential acquiror, had never been addressed.[243] The district court, noting the absence of controlling law, assumed that Polaroid did have standing "[b]ecause target companies are generally allowed to assert disclosure claims on behalf of shareholders."[244] However, the issue of standing became the critical factor in the Third Circuit Court of Appeals' ruling.[245] The court held that Polaroid did not have third party standing to assert a violation of the All-Holders Rule by Shamrock.[246]

The court of appeals first examined the constitutional prerequisites for standing.[247] It held that Polaroid easily met these requirements, stating "it is evident that Polaroid can reasonably determine that it will be injured by the successful conclusion of Shamrock's tender offer."[248]

The court next scrutinized whether Polaroid had third party standing as an association.[249] While it found that some beneficial effects would result if Polaroid were granted standing on behalf of its

240. For examples of other Polaroid defensive tactics, see *supra* note 46.

241. *Polaroid*, 862 F.2d at 990.

242. Polaroid Corp. v. Disney, 698 F. Supp. 1169, 1174 (D. Del.), *aff'd in part and vacated in part*, 862 F.2d 987 (3d Cir. 1988).

243. "No reported decision . . . has discussed the question . . . ." *Polaroid*, 862 F.2d at 997.

244. *Polaroid*, 698 F. Supp. at 1174.

245. *Polaroid*, 862 F.2d at 990.

246. *Id.* at 1001-02.

247. *Id.* at 997.

248. *Id.*

249. *Id.* at 998. The court also examined whether Polaroid had third party standing under the close relationship exception to standing to sue doctrine. *See id.* at 1000 n.8; *see also supra* notes 206-10 and accompanying text (regarding the close relationship exception). The court noted that lawsuits in which a close relationship allows for third party standing "all involve a litigation in which the merits of the suit involve the legitimacy of a restriction on the relationship" between the litigant and the third party. *See Polaroid*, 862 F.2d at 1000 n.8. As the All-Holders Rule violation occasioned no interference with the ability of Polaroid or its shareholders to mutually interact, the close relationship exception did not apply. *See id.*

shareholders,[250] it denied associational standing to the corporation on a number of grounds.[251] First, citing the second criterion for associational standing formulated in *Hunt v. Washington State Apple Advertising Commission*,[252] the court stated that it was "doubtful whether 'the interests' that Polaroid 'seeks to protect' in its litigation under the All Holders Rule 'are germane to the organization's purpose.' "[253] The court noted that litigation by an organization formed by shareholders to run a business "does not normally include protecting shareholders in their relationships with third parties."[254] Rather, "a corporation's ordinary litigation . . . seeks to protect the corporation's business."[255]

The court's second reason for denying Polaroid associational standing was based on conflicts of interest inherent in All-Holders Rule lawsuits.[256] The court found that such conflicts may make a corporation a poor representative of its shareholders' interests.[257] Two potential conflicts exist.[258] Conflicts of interest among shareholder groups as to the adversity or advantages of the tender offer make the target corporation an uncertain representative for minority shareholder groups.[259] This conflict would "undermine[ ] the basis for *jus tertii* standing—that the *jus tertii* advocate will vigorously assert the interests of the right-holder."[260]

The other conflict of interest inherent in cases where corporations seek third party associational standing is that management in a target corporation may suffer because of a successful takeover, and thus, have a built-in incentive to resist a tender offer that may be beneficial to shareholders.[261] Shareholders may welcome a tender offer.[262] The

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250. The court found that a target corporation usually will be able to finance litigation beyond the means of individual shareholders, and that "this will have the salutary effect of enforcing the securities laws." *Polaroid*, 862 F.2d at 998.

251. *Id.*

252. 432 U.S. 333, 343 (1977).

253. *Polaroid*, 862 F.2d at 999 (quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

254. *See id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 999-1000. The court noted that "[u]nless protected by 'golden parachutes' guaranteeing them a lucrative exit from corporate affairs, the corporation's top officers may suffer a substantial loss in future earnings if the tender offer is successful." *Id.* at 1000. In the "Plans for the Company" section of its Proxy Statement, Shamrock indicated it intended to seek "maximum representation on . . . [Polaroid's] Board of Direc-

court stated that even the excluded security holders could profit from such an offer by selling their stock to third parties after the offer is announced, since stock market price "jumps skyward within minutes after a credible tender offer is made."[263] The court also concluded that, at the very least, excluded security holders who do not sell their securities still have their original shares and are no worse off than if no tender offer had been made.[264] Management-instituted takeover defenses "raise 'the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.' "[265]

A third reason the court gave for denying associational standing to a target corporation under the All-Holders Rule[266] was in response to Polaroid's argument that " '[t]he public interest is . . . clearly in favor of the enforcement of the securities laws.' "[267] The court stated that Polaroid's assertion failed to consider whether any relief granted would be in excess of that contemplated by Congress or desirable in terms of public policy; what effect any enforcement would have on Congress' intent to entrust regulatory decisions to the Securities and Exchange Commission; or whether the social benefits of enforcement would outweigh the costs.[268] What constitutes good tender offer policy, the court noted, is beyond the scope of a subjective interpretation.[269]

Finally, the court responded to the idea that no reason exists for distinguishing between All-Holders Rule standing and misrepresentation standing.[270] It emphasized that allowing corporate third party standing for misrepresentation claims brought under section 14(e) of the Williams Act[271] makes sense because "[t]he bar against misrepre-

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tors." SHAMROCK ACQUISITION III, INC., PROXY STATEMENT 35 (Sept. 9, 1988). Shamrock indicated that subject to a detailed review, it might consider changes in, *inter alia*, Polaroid's management. *Id.*

262. *See Polaroid*, 862 F.2d at 999.

263. *Id.*

264. *See id.*

265. *Id.* at 1000 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)).

266. *Id.*

267. *Id.* (quoting Appellant's Brief at 37).

268. *Id.* at 1000-01.

269. *Id.* at 1001.

270. *Id.*

271. 15 U.S.C. § 78n(e) (1988). Section 14(e) of the Williams Act regulates fraudulent misrepresentations or omissions. *Id. See generally* H.R. REP. NO. 1711, *supra* note 91, at 11, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2821; SEN. REP. NO. 550, *supra* note 91, at 10-11.

sentation is meant to protect all shareholders."[272] Under a section 14(e) claim, the corporation would be representing all of its shareholders.[273] However, the All-Holders Rule generally protects only a minority of shareholders;[274] in an action under the Rule, the corporation would not be representing all shareholders, unlike an action under section 14(e).[275] The court of appeals noted that litigation instituted by a corporate litigant is more appropriate where the rights of all shareholders are being vindicated.[276] Furthermore, the court stated that fraud may be more difficult to detect and may cause greater harm than would violations of the All-Holders Rule.[277] Thus, greater need might exist for target corporation standing in a fraud action.[278] In conclusion, the court noted that its prior adoption of the rule specifying that target corporations have standing to sue for fraud had occurred without discussion, and that that rule should not be definitive as to target corporation standing outside of the fraud context.[279]

Judge Cowen concurred in part and dissented in part.[280] He agreed with the holding that Shamrock violated Williams Act section 14(e), entitling Polaroid to preliminary injunctive relief because of Shamrock's misrepresentations.[281] However, Judge Cowen dissented from the court's holding that a target company lacks standing to assert a *jus tertii* violation of the All-Holders Rule on behalf of its shareholders.[282] He stated that Shamrock's offer violated both the letter and spirit of the Rule.[283]

Judge Cowen argued that Polaroid, as a target company, does have standing to assert a violation of the All-Holders Rule.[284] He maintained that "the All-Holders Rule was promulgated by the SEC to enforce and further the purposes of section 14(e) of the Williams

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272. *Polaroid,* 862 F.2d at 1001. In addition to the All-Holders Rule claim, Polaroid asserted that Shamrock violated section 14(e) of the Williams Act by failing to disclose whether the offer complied with Federal Reserve Board margin requirements. *Id.* at 1003; *see supra* note 45 and accompanying text.

273. *Polaroid,* 862 F.2d at 1001.

274. *Id.*

275. *See id.* The court stated that "[s]hareholder litigation under the aegis of the corporation makes greater sense . . . where the class of persons whose rights the corporation is vindicating constitutes all of its shareholders." *Id.*

276. *See id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 1007 (Cowen, J., concurring in part and dissenting in part).

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

Act, which proscribes 'fraudulent or manipulative acts . . . in connection with any tender offer.' "[285] He concluded that to hold that a target corporation has standing to assert a violation of Williams Act section 14(e), the anti-fraud provision, but does not have standing to assert a violation of the All-Holders Rule, promulgated to enforce section 14(e), departs from precedent and "undermines the goal of continuity and consistency in the law."[286]

IV. ANALYSIS

The issue of target corporation standing to sue under the Williams Act has been a controversial[287] and ambiguous one.[288] While the Supreme Court has never confronted the question of whether a target corporation has third party standing on behalf of its shareholders,[289] the Third Circuit Court of Appeals found that the costs of al-

285. *Id.* at 1007-08 (quoting 15 U.S.C. § 78n(e)).

286. *Id.* at 1008.

287. Comment, *Private Litigation Under the Williams Act: Standing to Sue, Elements of a Claim and Remedies*, 7 J. CORP. L. 545, 559 (1982) [hereinafter Comment, *Private Litigation*]; *see, e.g.*, Pitt, *supra* note 48, at 186-87 (arguing against third party standing, but for standing under a private right of action for a target corporation); Tyson, *The Williams Act After* Hanson Trust v. SCM Corporation: *Post-Tender Offer Purchases by the Tender Offeror*, 61 TUL. L. REV. 1, 36 (1986) (stating that the Williams Act's purpose of neutrality indicates that in an ideal situation, both target corporation and potential acquiror should have standing); Comment, *An Implied Private Right*, *supra* note 48, at 318 (recommending that courts not imply a private right of action under the Williams Act for target managements confronted with a tender offer).

288. Tyson & August, *The Williams Act After RICO: Has the Balance Tipped in Favor of Incumbent Management?*, 35 HASTINGS L.J. 53, 54, 64, 68, 70-71 & n.93 (1983).

A target corporation's standing to sue for damages or injunctive relief under the Williams Act was "virtually unquestioned" prior to the United States Supreme Court's decision in Piper v. Chris-Craft Indus., 430 U.S. 1 (1977). Aranow, Einhorn & Berlstein, *Standing to Sue to Challenge Violations of the Williams Act*, 32 BUS. LAW. 1755, 1762 (1977); *see also* Tyson & August, *supra*, at 64 (Lower federal courts uniformly granted standing to target corporations, consistently recognizing congressional concern "with protecting investors and ensuring evenhanded regulation of contests for corporate control."). As an example, Aranow, Einhorn and Berlstein cite the Second Circuit Court of Appeals' holding in Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969), the first case to address the issue of standing under the Williams Act. Aranow, Einhorn & Berlstein, *supra*, at 1762; Comment, *An Implied Private Right*, *supra* note 48, at 335. The court held that target companies had standing to seek injunctive relief under sections 14(d) and (e) of the Williams Act. Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969).

289. Polaroid argued that Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975), supported its position that target corporations have standing to assert Williams Act violations against a potential acquiror. Polaroid Corp. v. Disney, 862 F.2d 987, 997 n.6 (3d Cir. 1988). However, the Third Circuit Court of Appeals stated that *Rondeau* never reached the private right of action or standing issues, but merely limited its focus to "the question of an appropriate remedy." *Id.* The court noted that "[e]ven if *Rondeau* stood for the propo-

lowing standing clearly outweigh the benefits.[290] Because a focal point of the Williams Act and the ensuing All-Holders Rule is investor protection,[291] the court concluded that some or all investors' interests might receive short shrift if third party standing were allowed.[292] Since shareholder groups may have differing or even opposing interests, some groups might be adversely affected by allowing Polaroid, or in reality, its management,[293] third party standing. The end result would be that some investors, in this case those favorable to the Shamrock bid, would stand unprotected.[294]

Despite this conclusion, the court's assumptions regarding why third party standing would be inappropriate for a target corporation

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sition that a target corporation has standing to raise a claim under § 13(d) [of the Williams Act], such a proposition would not necessarily establish that it has standing to raise a claim under the All Holders Rule." *Id.*

For an opposing view of the *Rondeau* decision, see Ferrara & Robinson, *The Development of Express and Implied Remedies Under the Securities Act of 1933 and the Securities Exchange Act of 1934*, in INTRODUCTION TO LITIGATION OF DISPUTES AFFECTING THE U.S. AND THE U.K. 409, 486 (Practising Law Institute, Corporate Law and Practice Course Handbook Series No. 409, 1987) (The Supreme Court arguably assumed that private litigants have standing to sue.); Comment, *Private Litigation*, *supra* note 287, at 560 n.118 (The Supreme Court assumed, without deciding, that the target corporation had a private right of action.).

290. Polaroid Corp. v. Disney, 862 F.2d 987, 997-1002 (3d Cir. 1988).

In *Electronic Specialty Co. v. International Controls Corp.*, the Second Circuit Court of Appeals determined that the benefits of allowing standing outweighed the costs. *See* 409 F.2d 937, 946 (2d Cir. 1969). Specifically, the court recognized that a target corporation's superior resources, as opposed to those of its individual shareholders, were vital to mounting a swift, forceful attack against an illegal offer. *Id.* The target corporation might also be harmed by a loss of business or financing because of misrepresentations or omissions by a potential acquiror. *Id.* While the cost of allowing standing is that a target corporation's management might resist an offer "motivated by its own interests and contrary to the best interests of the true owners, the shareholders," the court found that the shareholders' remedies for waste against the management would counter this cost. *Id.*; *see also Polaroid*, 862 F.2d at 999-1000 (noting the same conflict of interest).

Discussing the cases before the Supreme Court's decision in Piper v. Chris-Craft Indus., 430 U.S. 1 (1977), Tyson and August have stated:

> With respect to suits by target companies, standing was seen as consonant with investor protection. Damages would benefit the shareholder-investor and would serve to deter violations [of the Williams Act], and equitable relief would, for example, remedy misleading disclosures so that investors could make informed investment decisions. . . .
>
> . . . It was perceived that the target of a takeover attempt is best suited to monitor the process.

Tyson & August, *supra* note 288, at 65 & n.67.

291. *See supra* notes 104-09, 147-50 and accompanying text.

292. *See Polaroid*, 862 F.2d at 998-1002.

293. *See id.* at 999-1000 ("[T]hose in control of the target corporation have a natural incentive to resist a corporate takeover.").

294. *See id.*

were flawed in some respects. Granting third party standing to a litigant encompasses both beneficial and detrimental attributes. A determination of whether a target corporation should have standing on behalf of its shareholders requires an examination of both sides of the equation.

A. *Associational Standing Under the Hunt*[295] *Test: The Organization's Purpose*

The Third Circuit Court of Appeals may have erred in its application of the second factor established in *Hunt v. Washington State Apple Advertising Commission*,[296] namely in concluding that protecting shareholders in their relationships with third parties is not germane to a corporation's purpose.[297] In fact, representing shareholders, the owners of the corporation, in their relationships with third parties, from creditors and suppliers to the consuming public and the corporation's community, is vital to the functions of the organization, and occurs on a daily basis.[298]

The court stated it was "doubtful whether 'the interests' that Polaroid 'seeks to protect' in its litigation under the All Holders Rule

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295. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

296. *Id.* The second factor of the associational standing doctrine formulated in *Hunt* requires that the interests the organization seeks to protect must be germane to its purpose. *See supra* text accompanying notes 214-15.

297. *See Polaroid*, 862 F.2d at 999; *supra* notes 252-55. The court stated that trade associations, public interest groups and other associations have been granted third party standing to challenge federal agency rules and if Polaroid, as a corporation, fit within the contours of associational standing doctrine, it too might have third party standing under the All-Holders Rule. *Id.* at 998.

298. Legally, shareholders elect directors who hire officers to operate the corporation. R. HAMILTON, FUNDAMENTALS OF MODERN BUSINESS §§ 13.6.3, 14.4.2 (1989). Corporations have a wide spectrum of relationships with groups such as governments, suppliers, creditors, customers, etc. R. CLARK, CORPORATE LAW § 1.4 (1986); T. WHEELEN & J. HUNGER, STRATEGIC MANAGEMENT § 1.4, at 10-12 (2d ed. 1987); *see, e.g.*, Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 182 (1987) (Managers represent the corporation's shareholders when filing a bankruptcy petition.). While the corporation may be viewed as a separate legal entity, it is "simply another mode by which *individuals or natural persons* can enjoy their property and engage in business." R. HAMILTON, CORPORATIONS 4 (3d ed. 1986) (quoting W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 197 (1923)).

For an opposing view, see Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913, 917 (1982) ("In contrast to the traditional approach, which views shareholders as the 'owners' of the firm, modern theory emphasizes that the private corporation, like other forms of organization, is simply a legal fiction which serves as a nexus for a set of contractual relationships among individuals." (footnote omitted)).

For a discussion of other theories of corporate personality, see generally H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 78 (3d ed. 1983).

'are germane to the organization's purpose.' "[299] The court defined these interests as "the right of some of its shareholders to sell at a price equal to that of other of its shareholders to a third party, the tender offeror."[300] The court distinguished these shareholder interests from those "pursued in a corporation's ordinary litigation, which seeks to protect the corporation's business."[301] However, the court's distinction may be arbitrary: in both cases, a corporation may be seeking to protect the corporation's business. Were a takeover to occur, Polaroid's long-term business strategy might be adversely affected by the layoffs,[302] asset sales,[303] and lessened research and development expenditures[304] that have historically occurred after corporate acquisi-

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299. *Polaroid*, 862 F.2d at 999 (quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

300. *Id.* at 998.

301. *Id.* at 998-99.

302. *See* R. BELL, SURVIVING THE 10 ORDEALS OF THE TAKEOVER 1 (1988) ("[m]ass firings of managers due to takeovers"); Helyar, *RJR Employees Fight Distraction Amid Buy-Out Talks*, Wall St. J., Nov. 1, 1988, at A8, col. 1 ("[M]any . . . number-crunchers, planners and support personnel . . . get axed after a leveraged buy-out."); Wall St. J., Aug. 2, 1988, at 1, col. 5 ("Takeovers . . . spur managers even more to plan work-force cuts and to resist worker demands for pay-and-benefit gains, often because debt may balloon in the acquisition."). *Contra* Jensen, *Takeovers: Folklore and Science*, HARV. BUS. REV., Nov.-Dec. 1984, at 109, 114 ("No evidence . . . indicates that takeovers produce more plant closings, layoffs, and dismissals than would otherwise have occurred."); Zuckerman, *Letter of January 15, 1988 From Jeffrey I. Zuckerman, Director, Federal Trade Commission, to the Honorable Steven H. Amick*, in THE NEW DELAWARE TAKEOVER STATUTE 241, 245, 248-49 (Practising Law Institute, Corporate Law and Practice Course Handbook Series No. 598, 1988).

303. Drucker, *Taming the Corporate Takeover*, Wall St. J., Oct. 30, 1984, at 30, col. 3. Professor Drucker stated "the successful raider immediately strips his new acquisition of its best assets and drains it of cash—both to repay what he borrowed to buy the business and to make a quick killing." *Id.* Assets must be sold because the interest rates many acquired companies pay on their debt are more than twice their nominal sales growth rate. Liscio, *The Buyout Bubble: When It Bursts, There'll Be Fallout Aplenty*, BARRON'S, Oct. 31, 1988, at 6, col. 1, 32, col. 1.

Atty. Martin Lipton cites Pantry Pride's acquisition of Revlon as "[a] classic example of the junk-bond, bust-up takeover." Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 11 n.40 (1987). Pantry Pride sold nearly $1.4 billion of Revlon's assets to finance its acquisition. *Id.*

304. *E.g.*, *Restructurings, Buy-Outs Cut R&D, Survey Shows*, Wall St. J., Feb. 3, 1989, at A6, col. 4; Anders, *supra* note 2. *Contra* Hall, *The Effect of Takeover Activity on Corporate Research and Development*, in CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 69, 93 (1988) (concluding that acquisitions do not result in decreased research and development spending); Boulanger, *Corporate America Isn't a Debt Debauchee*, Wall St. J., Nov. 22, 1988, at A20, col. 3 (arguing that leveraged acquisitions allow corporations to "make the capital investments and research-and-development expenditures necessary to maintain the corporation's long-term competitiveness and increase its value" because they free the company from "the myopic discipline of the public markets.").

tions.[305] A corporation such as Polaroid, with its equity securities undervalued in the short-term either as a result of market fluctuations[306] or long-term strategy considerations,[307] might be disman-

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305. Putka, *Stop & Shop Strike Linked to Buy-Out Closes 50 Stores*, Wall St. J., Mar. 23, 1988, at 16, col. 3 ("Buy-outs often involve layoffs and asset sales to raise cash flow and pay off the heavy borrowings needed for the takeover."); *see also* Anders & Smith, *Wobbly LBOs: Leveraged Buy-Outs That Appear Shaky Are on the Increase*, Wall St. J., Dec. 5, 1988, at A1, col. 6 ("Success in these deals requires . . . cost-cutting, asset sales and rapid repayment of debt."); Queenan, *The ABCs of LBOs: Everything You Ever Wanted to Know*, BARRON'S, Sept. 5, 1988, at 58, col. 1 (To reduce debt to more manageable proportions, new owners "sell off assets, streamline operations, or get rid of employees.").

Harold M. Williams, former chairman of the Securities and Exchange Commission, and Professor Peter Drucker both have stated that even fear of a takeover adversely affects long-term business strategy. *See* Williams, *It's Time for a Takeover Moratorium*, FORTUNE, July 22, 1985, at 133, 136; Drucker, *supra* note 303.

306. Shiller, *Fashions, Fads, and Bubbles in Financial Markets*, in KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER, *supra* note 2, at 56 (arguing that the notion of short-term market efficiency is incorrect); *see also* B. GRAHAM, D. DODD & S. COTTLE, SECURITY ANALYSIS: PRINCIPLES AND TECHNIQUE 694-96 (4th ed. 1962) (stating that stocks may be overvalued or undervalued depending in part on the state of the business cycle); Shubik, *Corporate Control, Efficient Markets, and the Public Good*, in KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER, *supra* note 2, at 31; Swartz & Smith, *Market Movers: Program Traders Sway Prices of Many Stocks Even More Than Ever*, Wall St. J., May 2, 1988, at 1, col. 6 (noting that program trading results in "large, extremely quick intraday [stock market] swings that may have little to do with the economy or market fundamentals.").

For a description of the efficient market hypothesis, see E. BRIGHAM & L. GAPENSKI, FINANCIAL MANAGEMENT: THEORY AND PRACTICE 249-51 (6th ed. 1991); R. HIGGINS, ANALYSIS FOR FINANCIAL MANAGEMENT 157-62 (2d ed. 1989). *See also Schools Brief: Risk and Return*, THE ECONOMIST, Feb. 2, 1991, at 72 (discussing the efficient market hypothesis' "most famous offspring," the capital-asset pricing model, and newer financial theories).

307. *See* Paramount Communications v. Time, Nos. 10,866, 10,670, & 10,935, at 19 (Del. Ch. July 17, 1989) (WESTLAW, DE-CS directory) (noting that immediate market valuation might undervalue a stock despite the theory of an efficient capital market that does not discount for long-term profit maximizing behavior except to reflect the time value of money); *see also Introduction* to KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER, *supra* note 2, at 3-4 (At a November, 1985 symposium, three chief executive officers stated that "prices in the stock market frequently fail to reflect a firm's long-term prospects."). *But cf.* Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 WIS. L. REV. 467, 482 (Vaguely stated goals, such as the long-term interests of a corporation, should not permit a firm's managers to ignore current share price value.).

Atty. Martin Lipton's study indicated that the target corporation's stockholders generally benefitted after a hostile takeover was defeated. Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 106-09, 132-33 (1979) [hereinafter Lipton, *Takeover Bids*]. Specifically, a majority of target corporations that resisted hostile takeovers either later traded at higher stock market prices than the potential acquiror offered, or were acquired by another company at a higher price after the tender offer was defeated. *See id.* at 106; Jarrell, *The Wealth Effects of Litigation by Targets: Do Interests Diverge in a Merge?*, 28 J.L. & ECON. 151, 152-53 (1985) (Defensive litigation by the target company very frequently resulted in "rivalrous bidding involving many potential suitors" or "improved bids

tled[308] or effectively emasculated[309] after a takeover.[310] Alternately, it

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by the original suitors."); *cf.* Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 254 (7th Cir. 1986) ("[T]he first tender offer may not be the best. . . . You may want to see whether you can sell it for even more . . . ."), *rev'd*, 481 U.S. 69 (1987). *But see* Jarrell, *supra*, at 174 ("The targets that defeat the takeover attempt by vigorous litigation lose the entire takeover premium."); Jensen, *supra* note 302, at 116 (Target companies that receive no other bid lose the entire takeover-generated stock price increase.); Jensen & Ruback, *The Market For Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5, 14-16 (1983) (Two years after the announcement of a takeover attempt, targets of unsuccessful tender offers that do not receive subsequent offers trade at prices slightly lower than the pre-announcement price.). An updated study confirmed this, noting that 81% of target corporations later sold at prices higher than the potential acquiror offered. Lipton & Brownstein, *Takeover Responsibilities and Directors' Responsibilities: An Update*, in A.B.A. NAT'L INST. ON THE DYNAMICS OF CORP. CONTROL 10 (1983). Accounting for the time value of money, the 81% figure lowered to 64%. *Id.* For a contrary view, see Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. LAW. 1733, 1739-45 (1981).

Polaroid's stock market prices immediately after Shamrock's unsuccessful takeover bid support Atty. Lipton's conclusions. Less than seven months after Shamrock and Polaroid settled, Polaroid traded at prices almost 20% higher than Shamrock had offered. *See* Wall St. J., Oct. 12, 1989, at C5, col. 1 (Polaroid traded at 50 3/8.). However, this may have resulted from restructuring forced on Polaroid in order to avoid Shamrock's overtures. *See* Shamrock Holdings, Inc. v. Polaroid Corp., No. 10,582 (Del. Ch. Jan. 31, 1989) (WESTLAW, DE-CS directory) (noting a self-tender offer); *supra* note 46; *see also* POLAROID CORP., PROXY STATEMENT (Feb. 21, 1989) (offer to purchase up to 16 million shares at $50/share). *See generally* Ingrassia, *Polaroid Falls 22% on Negative News*, Wall St. J., Oct. 16, 1990, at C1, col. 3 (Noting that Polaroid received less than expected in its patent infringement suit against Eastman Kodak Co. and had closed at 22 3/4 the previous day, one commentator wrote: "[g]one are the giddy days of last year, when Polaroid was fending off a $45-a-share hostile bid . . . . The stock now is barely above half the level of the takeover bid.").

308. *See* Coffee, *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 2-3 (1986) (Recent acquirors of corporations "intend[ ] not to assimilate the target [corporation], but to dismantle it."). The target corporation is dismantled because its liquidation value is greater than its going-concern value. *Id.* at 3 n.4. One reason target corporations are dismantled is that "offerors . . . are compelled by the pressures of the financing of the takeover to effect a total or partial liquidation [of the acquired company]." Note, *A Policy Analysis of New York State's Security Takeover Disclosure Act*, 53 BROOKLYN L. REV. 1117, 1136-37 (1988) [hereinafter Note, *A Policy Analysis*] (quoting a New York State Executive Department memorandum which noted adverse effects caused by highly leveraged takeovers). Companies that have been completely or partially dismantled subsequent to a takeover include Beatrice and Safeway. Johnson & Burrough, *Beatrice's Kelly Is Said to Plan Spinoff of Unit*, Wall St. J., Mar. 4, 1988, at 2, col. 2; Bulkeley, *Stop & Shop, Kohlberg Reach Buy-Out Pact*, Wall St. J., Mar. 1, 1988, at 2, col. 2.

309. For a view that corporate raiders diminish wealth even when target corporations elude them, see Lipton, *supra* note 303, at 23-25; Anders & Schwadel, *supra* note 4; Sandler, *Generating Wealth: Do Savvy Managers Do Better by Investors Than Raiders Can?*, Wall St. J., Apr. 26, 1988, at 1, col. 6.

310. Although Shamrock stated that it had no present intention to make any significant sales of Polaroid's assets, it did intend to cause Polaroid to drop plans to enter the 35 mm film business, to sell at least a substantial portion of Polaroid's undeveloped real estate, to minimize excess manufacturing capacity, and to refocus Polaroid's research and development activities. SHAMROCK ACQUISITION III, INC., PROXY STATEMENT 35 (Sept. 9,

may become so highly leveraged that it becomes ineffective as a business entity, concentrating not on developing its business, but paying off the massive debt incurred as a result of the takeover.[311] Polaroid,

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1988). Shamrock also announced it was considering changes in Polaroid's "business, corporate structure, Certificate [of incorporation], By-laws, capitalization or management." *Id.* Shamrock did not rule out the possibility of sales of "certain other assets or businesses of . . . [Polaroid]." *Id.*

While Shamrock left itself wide leeway regarding its future plans for Polaroid, "takeover artists aren't always viewed as being pure of heart." Lowenstein, *Note-Holders, Perelman Clash Over a Pledge*, Wall St. J., Jan. 26, 1990, at C1, col. 3 (discussing a civil suit in which it is alleged that corporate raider Ronald Perelman, after making obligations to bondholders to effectuate his takeover of Revlon, reneged on those obligations).

311. Discussing Campeau Corp.'s petition for Chapter 11 bankruptcy, Guy Peyrelongue, chief executive of Cosmair, Inc., a large cosmetics supplier to Campeau stores, stated " 'The department stores are good stores, with loyal customers. Their problem is not the way they've been managed, but the unbearable levels of debt taken on by Campeau.' " *Campeau's Woes: Bankruptcy Petition Brings Fresh Risks for Allied, Federated*, Wall St. J., Jan. 16, 1990, at A1, col. 6, A10, col. 3. The bankruptcy filings of Campeau's U.S. retailing units "capped long periods of uncertainty in which store executives had spent as much time worrying about their jobs as about their companies," resulting in interrupted merchandise shipments, weakened customer confidence, questioned creditworthiness, and tarnish to reputations that had taken decades to build. Trachtenberg, *Damaged Goods: Lessons for Campeau: It's Not Easy Being a Chapter 11 Retailer*, Wall St. J., Jan. 30, 1990, at A1, col. 6.

The New York State Executive Department believed that " '[a]fter a highly leveraged takeover, a very high percentage of the revenues produced by the acquired assets are diverted to pay the acquisition debt.' " Note, *A Policy Analysis*, *supra* note 308, at 1137 (quoting a memorandum which noted adverse effects caused by highly leveraged takeovers). Furthermore, the standard junk-bond prospectus states that unless asset sales or debt refinancing occur in the future, "the bondholders may never see their money again." Grant, *Corporate Finance, 'Leveraged to the Hilt': Will History Repeat Itself?*, Wall St. J., Oct. 25, 1988, at A26, col. 3. The standard prospectus also states that the issuing company must produce significantly greater future cash flow than it has historically, merely to avoid bankruptcy. *Id.*; *see also* Liscio, *supra* note 303, at 6, col. 1, 7, col. 1. Taken together, these statements imply a focus on managing leverage rather than developing a corporation's business.

In leveraged buy-outs, where "investors rely almost entirely on debt financing to acquire a company," the risks that occur in traditional acquisitions "are magnified because of the companies' heavy debt burdens." Anders & Smith, *supra* note 305 (discussing potential bankruptcy candidates and companies that have filed for bankruptcy protection because takeovers imposed too heavy a debt burden for them to manage). As one financial advisor stated, " '[t]he numbers are tight; there isn't a lot of room for a slip-up.' " *Id.* Because the balance sheet of an acquired leveraged corporation often resembles that of a bankrupt company, it is rational for a corporate raider to focus on paying down debt. *Cf.* Grant, *supra* (discussing the high debt, low cash, low or negative net worth, and nonexistent interest coverages common to both the Chapter 11 bankruptcy and the leveraged buyout).

Even corporate acquiror Theodore J. Forstmann has cautioned that "[t]oday's financial age has become a period of unbridled excess with accepted risk soaring out of proportion to possible reward . . . [because] with ever-increasing levels of irresponsibility, many billions of dollars in American assets are being saddled with debt that has virtually no chance of being repaid." Forstmann, *Corporate Finance, 'Leveraged to the Hilt': Violating Our Rules of Prudence*, Wall St. J., Oct. 25, 1988, at A26, col. 5. "[T]he corporate debt

incorporated in Delaware, states in its certificate of incorporation that it may "do all and everything necessary or incidental to the accomplishment of any of the [business] purposes [set forth in the certificate]."[312] Polaroid also has "all the rights, powers and privileges . . . conferred by the laws of the State of Delaware upon business corporations."[313] Delaware courts have stated that a corporation's directors have the latitude under the business judgment rule to reject a tender offer they feel is not in the best interests of the corporation.[314] Logically, it is germane to Polaroid's best interests to avoid a takeover if the offer undervalues the corporation.[315] By representing an impor-

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generated by takeovers and LBOs may be ballooning to dangerous levels." Salwen, *Investors Fret Over Possible LBO Curbs*, Wall St. J., Nov. 10, 1988, at C1, col. 3. This debt occurs "at the long-term expense of . . . companies." Forstmann, *supra*. *Contra* Boulanger, *supra* note 304 (Not only has the increased debt of corporate America not led to widespread problems, but "[o]ne of the principal benefits from taking a company private in a LBO is the ability of management to concentrate on long-term growth."); *but see Defusing the Debt Bomb*, THE ECONOMIST, Nov. 3, 1990, at 75 ("[T]he record level of corporate debt is less worrying than it seems.").

312. POLAROID CORP., 1985 RESTATED CERTIFICATE OF INCORPORATION § 3(m). The business purposes set forth in Polaroid's certificate include a wide variety of objectives consonant with operating a multinational, multibillion dollar business. *See id.* § 3(a-m).

313. *Id.* § 3(m); *see also* New York State Club Ass'n v. City of New York, 487 U.S. 1, 10 n.4 (1988) (discussing whether an association's purpose as stated in its certificate of incorporation meets the second requirement of Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977)).

314. *See* Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341-42 (Del. 1987). The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). The *Polaroid* court itself stated that "those who manage the corporation have a fiduciary duty to respond to takeovers in the best interests of the corporation's shareholders." Polaroid Corp. v. Disney, 862 F.2d 987, 1000 n.7 (3d Cir. 1988).

315. Professor Kripke argues that "[p]leas of the defending management that the stock is undervalued and the offer is insufficient fall on deaf stockholder ears." H. KRIPKE, THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE 267 (1979). He states that a person offered cash for his stock is primarily concerned with how much money he can get, how he has to go about getting it, and when he can get it. *See id.* (arguing that cash tender offer disclosure is useless). This supports the Third Circuit Court of Appeals' notion that a conflict of interest exists between corporate management and its shareholders, and corporate standing on behalf of the shareholders is properly denied as a result of it. *See Polaroid*, 862 F.2d at 999.

Arguably, however, all stakeholders of a target corporation have parallel interests where the effect of the sale of the corporation would be to render it insolvent, unable to repay its debt, or lacking sufficient capital to conduct its business. *See* Dockser, *Creditors of Buy-Out Firms That Fail Sue Ex-Holders*, Wall St. J., Dec. 22, 1988, at B1, col. 5. In such a case, *anyone* involved in the transfer is subject to fraudulent conveyance laws which permit creditors to invalidate certain transactions. *See* Sherwin, *Creditors' Rights Against Participants in a Leveraged Buyout*, 72 MINN. L. REV. 449, 452, 472-96 (1988) (buying and selling shareholders, and independent lenders, may be liable); Baird & Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 851, 852 n.51 (1985)

tant constituent in its business, its employees, via an efficient mechanism, the employees' ESOP, Polaroid may be protecting its long-term business interests by preventing the dismantling of its workforce — a strategic asset — for less than adequate consideration.[316] By protecting its ESOP — and the employees represented by that ESOP — Polaroid may be protecting its own business.[317] It may be effectuating the greatest long-term value for *all* its shareholders by focusing on long-term returns,[318] instead of sacrificing the corporation to a corpo-

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(managers and selling shareholders might be liable); *see also* Pollock, *Filings of Campeau Units May Spur Suits in Murky 'Fraudulent Conveyance' Area*, Wall St. J., Jan. 16, 1990, at A10, col. 4. As "fraudulent conveyance is still evolving as a legal theory in leveraged buyouts," it is a potential pitfall, despite that "shareholders of publicly traded companies . . . probably aren't at significant risk under . . . [the] law." Dockser, *supra*, at B1, col. 5, B6, col. 3-4; *see also* Sherwin, *supra*, at 479-80 (Shareholder liability to creditors has rarely been litigated where outside lenders finance buyouts.). Under this scenario, since the interests of management and shareholders correspond, avoidance of a takeover financed largely by debt promotes corporate third party standing.

For a further discussion of fraudulent conveyance law in leveraged buy-out situations, see Kupetz v. Wolf, 845 F.2d 842, 845-47 (9th Cir. 1988); Carlson, *Leveraged Buyouts in Bankruptcy*, 20 GA. L. REV. 73 (1985); Kirby, McGuinness & Kandel, *Fraudulent Conveyance Concerns in Leveraged Buyout Lending*, 43 BUS. LAW. 27 (1987); Murdoch, Sartin & Zadek, *Leveraged Buyouts and Fraudulent Transfers: Life After* Gleneagles, 43 BUS. LAW. 1 (1987); Note, *Fraudulent Conveyance Law and Leveraged Buyouts*, 87 COLUM. L. REV. 1491 (1987).

316. Campeau Corp.'s efforts to continue paying employee severance benefits even while in bankruptcy, in order to "reassure their thousands of staff and prevent them [from] jumping ship," illustrate the importance of employees to a corporation's long-term business interests. *See Campeau Units Can Pay Benefits; Sale of Bloomingdale's Is Delayed*, Investor's Daily, Feb. 2, 1990, at 4, col. 2. Federated Department Stores, Inc. and Allied Stores Corp. had filed for Chapter 11 bankruptcy, unable to meet interest payments on the heavy debt incurred when corporate raider Robert Campeau acquired them. *Id.*

317. In *GAF Corp. v. Union Carbide Corp.*, the court found the interests of employees and corporate managers who service investors' interests to be a legitimate concern of "[a] corporation with a perceived threat of dismemberment." GAF Corp. v. Union Carbide Corp., 624 F. Supp. 1016, 1019-20 (S.D.N.Y. 1985). The Delaware Supreme Court stated that directors confronted with a takeover may consider its "impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

318. The recovery of damages by target corporations from potential acquirors may be of sufficiently direct benefit to the target's shareholders that the right to seek such damages may be implied from the legislative intent in passing the Williams Act. *Cf.* E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 112 (1977). This indicates that granting third party standing to a target corporation may offer short-term benefits in the form of damages to the target's shareholders.

Other short-term benefits might also accrue by allowing the target corporation third party standing. For example, it has been stated that hostile takeovers divert managerial attention. Coffee, *supra* note 308, at 11. Allowing the target corporation third party standing may increase the potential acquiror's risks and, consequently, lessen the potential for a bid. Thus, management can concentrate on business operations rather than the potential acquiror's threats to the company. Polaroid spent millions of dollars warding off Sham-

rate raider who stands to make a huge short-term gain.[319] Shareholders in a widely traded corporation who object to a corporate decision to focus on long-term prospects instead of short-term gains are, as the court stated, "generally free to sell their stock on any terms that they wish [on or off the stock exchanges] without interference from the corporation."[320] A number of states have enacted antitakeover

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rock's takeover attempts. *See supra* note 46. The rational shareholder would much rather have had this money invested in the corporation than have it in the pockets of the lawyers and investment bankers Polaroid used to defend itself or in Shamrock's pockets. *Id.* (regarding terms of Polaroid's settlement with Shamrock); *see also* Cohen, *Takeover Boom Is Expected to Benefit Usual Small Circle of Wealthy Law Firms*, Wall St. J., Oct. 25, 1988, at B8, col. 5. *See generally* Drucker, *supra* note 303 (unfriendly takeover may benefit no one other than the corporate raider, investment bankers, and merger lawyers).

The same line of reasoning — supporting short-term benefit accrual by allowing a target corporation standing on behalf of its shareholders — applies to the argument that hostile takeovers divert employee attention as well. Employee attention will focus on operations rather than on potential layoffs or unfamiliar employment or salary policies that might result if a hostile takeover is consummated. *Cf.* E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra*, at 198, 204 n.24 (discussing employee reluctance or disposition to tender shares to a potential acquiror).

319. For example, Ronald Perelman, who used junk bonds to buy undervalued assets, dismantle acquired companies, and raid larger ones, had a net worth estimated at $2.75 billion in 1989. *The Forbes Four Hundred*, *supra* note 10, at 154. Corporate raider Henry Kravis increased his net worth by over $300 million in the 1980s. *See* Wall St. J., Jan. 26, 1990, at B8, col. 3. Billionaire Harold Simmons built his fortune via hostile takeovers. *The Forbes Four Hundred*, *supra* note 10, at 162. Undervalued, asset-rich companies provided the foundation for corporate raider Victor Posner's estimated 1989 net worth of $295 million. *Id.* at 284.

Corporate acquiror Theodore J. Forstmann quoted the managing partner of a major investment banking firm as stating that " 'all of us have been somewhat corrupted by the potential for short-term gain.' " Forstmann, *supra* note 311 (discussing the precarious financial straits that resulted when investment banks began viewing buyouts and corporate acquisitions as vehicles for high-margin agency business).

320. Polaroid Corp. v. Disney, 862 F.2d 987, 999 (3d Cir. 1988). *But cf.* Macey, *supra* note 307, at 481 (Differentiating between shareholders interested in only short-term or only long-term considerations is fatuous because all shareholders realize the same gain from future events, as reflected in a firm's current share price.).

Controversy over investment time-frames did not begin with the recent spate of takeovers. In 1936, economist John Maynard Keynes, discussing the dialectical extremes between long and short-term investing, stated:

> [I]t is the long-term investor . . . who most promotes the public interest [but] . . . [t]here is no clear evidence from experience that the investment policy which is socially advantageous coincides with that which is most profitable. . . . Investment based on genuine long-term expectation is so difficult to-day as to be scarcely practicable. He who attempts it must surely lead much more laborious days and run greater risks than [the short-term investor] . . . and, given equal intelligence, he may make more disastrous mistakes.

J. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 157 (1936). Keynes noted that the long-term investor will be most criticized, "[f]or it is in the

laws in furtherance of the objective of promoting long-term business interests.[321] These state antitakeover laws are not incongruent

essence of his behaviour that he should be eccentric, unconventional and rash in the eyes of average opinion." *Id.*

More recently, corporate raider T. Boone Pickens has discussed this polarity vis-à-vis the management-shareholder relationship:

> On a rational level, [long-term investment] . . . theory attracts support because it seems plausible to those not closely involved with takeover activity. On an emotional level, the theory appears to embrace basic American values such as patience, perseverance, and faith in future rewards.
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> . . . [M]anagers have learned to portray themselves as long-term visionaries and their dissident stockholders as short-term opportunists.
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> . . . [I]t is questionable how much more long-term planning America's shareholders can stand. What many managements seem to be demanding is more time to keep making the same mistakes.

Pickens, *Professions of a Short-Termer*, HARV. BUS. REV., May-June 1986, at 75, 76, 78.

321. *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-1202 (Supp. 1990); MINN. STAT. ANN. § 302A.251(5) (West Supp. 1991); OHIO REV. CODE ANN. § 1701.59(E) (Anderson Supp. 1990); 1990 Pa. Legis. Serv. 94, 97 (Purdon). For example, the Ohio statute states:

> [A] director, in determining what he reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider . . . [t]he long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

OHIO REV. CODE ANN. § 1701.59(E) (Anderson Supp. 1990).

The Arizona statute states that "a director . . . *shall* consider the long-term as well as the short-term interests." ARIZ. REV. STAT. ANN. § 10-1202 (Supp. 1990) (emphasis added).

States have also enacted legislation that allows directors, in considering the best interests of the corporation, to take constituencies other than shareholders into account. *See, e.g.*, ILL. ANN. STAT. ch. 32, ¶ 8.85 (Smith-Hurd Supp. 1990); IND. CODE ANN. § 23-1-35-1(d) (West Supp. 1990); ME. REV. STAT. ANN. tit. 13-A, § 716 (Supp. 1990); MINN. STAT. ANN. § 302A.251(5) (West Supp. 1991); MO. ANN. STAT. § 351.347(1)(4) (Vernon Supp. 1991); OHIO REV. CODE ANN. § 1701.59(E) (Anderson Supp. 1990); 1990 Pa. Legis. Serv. 94, 97 (Purdon). These constituencies include employees, suppliers, customers, creditors, communities, and others. *See, e.g.*, MINN. STAT. ANN. § 302A.251(5) (West Supp. 1991). *See generally* Coffee, *The Uncertain Case For Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-ups*, 1988 WIS. L. REV. 435 (arguing that it is a valid legislative goal to protect these constituencies); Drucker, *Corporate Takeovers—What Is to Be Done?*, 82 PUB. INTEREST 3, 22-24 (1986) (contending that by law or otherwise, a way must be found to protect these constituencies); Jensen, *supra* note 302, at 110-11 (maintaining that stockholders, as bearers of the corporation's residual risk, should be the ultimate holders of the rights to organizational control); Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, 43 WASH. & LEE L. REV. 781 (1986) (offering three options for considering these constituencies' interests during a takeover); Pickens, *supra* note 320, at 78 (stating that shareholders' interests should take precedence over other constituencies because shareholders own the companies). Impliedly, these statutes allow directors to address long-term as well as short-term concerns. *See Stakes, Shares and Digestible Poison Pills*, THE ECONOMIST, Feb. 2, 1991, at 61 (stating that "a concern for stakeholders," which includes "em-

with the federal securities laws promoting investor protection.[322] Under these circumstances, representing shareholders in their relationships with third parties — corporate raiders — is germane to a target corporation's purpose.[323] In terms of granting third party

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ployees, suppliers, customers and neighbours" is "associated with long-term investment"). *See generally* Lipton, *Takeover Bids*, *supra* note 307, at 109-12 (discussing the importance of a long-term outlook). For a view that state antitakeover statutes should not permit or encourage target corporation directors to consider non-shareholder interests, see Comment, *Takeover Dangers and Non-Shareholders: Who Should Be Our Brothers' Keeper?*, 1988 COLUM. BUS. L. REV. 301.

Missouri has enacted a statute authorizing corporate directors to consider "[t]he future value of the corporation over a period of years as an independent entity discounted to current value" if an "acquisition proposal" is made. MO. ANN. STAT. § 351.347(1)(1)(c) (Vernon Supp. 1991). Directors may consider political, economic or other factors bearing on securities prices generally or the corporation's securities in particular. *Id.* § 351.347(1)(2). They may consider the corporation's current value in a freely negotiated merger, consolidation, or asset sale; the corporation's current value if liquidated; whether the acquisition proposal might violate any laws; and the competence, experience, integrity, financial condition, and earning prospects of the person making the bid, including debt servicing abilities. *Id.* § 351.347(1)(1)(a)-(b), (1)(3), (1)(5), (1)(6). The sum total of these subsections enhances directorial control over the takeover process, giving a target corporation's board greater leeway in exercising its fiduciary duties, and thus, making hostile takeovers more difficult. Garfield, *State Competence to Regulate Corporate Takeovers: Lessons From State Takeover Statutes*, 17 HOFSTRA L. REV. 535, 567 (1989) ("[M]odified fiduciary statutes simply give corporate managers additional discretion to be used in a takeover fight."). The authorization to consider items such as a corporation's future value over a period of years and a potential acquiror's debt servicing abilities indicates that directors may account for long-term business interests. *See* MO. ANN. STAT. § 351.347(1)(1)(c), (1)(5) (Vernon Supp. 1991).

The Delaware Supreme Court has stated that in the face of a takeover bid, corporate directors "may reasonably consider the basic stockholder interests at stake, including those of short term speculators, whose actions may have fueled the coercive aspect of the offer at the expense of the long term investor." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955-56 (Del. 1985).

322. *See* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (upholding Indiana statute regulating takeovers against claim that it was preempted by federal securities laws). The U.S. Supreme Court held that the Indiana statute furthered a basic purpose of the Williams Act, that of " 'plac[ing] investors on an equal footing with the takeover bidder,' ". *Id.* at 82 (quoting Piper v. Chris-Craft Indus., 430 U.S. 1, 30 (1977) (quoting the Senate Report accompanying the Williams Act, S. REP. NO. 550, 90th Cong., 1st Sess. 4 (1967))). Arguably, the Indiana statute, which regulates shareholder voting rights, is different than the fiduciary statutes that expand directorial discretion. *See* Prentice, *The Role of States in Tender Offers: An Analysis of* CTS, 1988 COLUM. BUS. L. REV. 1 (discussing types of state antitakeover statutes); *supra* note 321. However, Professor Prentice stated that the fiduciary statutes are likely to be held constitutional under the theory that they do not deter the making or hinder the successful completion of tender offers. *See* Prentice, *supra*, at 65-66, 69-70. He also stated that while fiduciary statutes run the risk of being preempted because they frustrate the Williams Act's main goal of shareholder protection, an argument could be made that "the states have every right to regulate their own corporations and . . . Congress did not mean to alter this situation through the Williams Act." *Id.* at 71, 74-75. This latter argument was the thrust of the Court's opinion in *CTS*. *Id.* at 74.

323. To have associational standing to bring suit on behalf of its shareholders under

standing to oppose a takeover, this second *Hunt* factor is not, as the court of appeals stated, "too latent with difficulties to yield a definitive answer."[324]

B. *Associational Standing Under the Hunt*[325] *Test: The Conflicts of Interests*

The third *Hunt* associational standing factor is that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[326] Despite a potentially erroneous application of the second *Hunt* factor, the Third Circuit Court of Appeals correctly denied Polaroid third party standing to enforce the All-Holders Rule because the conflicts of interest inherent in the situation required individual member participation.[327] Dissenting Judge Cowen implied that the court addressed the issue in the abstract,[328] but in

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the All-Holders Rule, Polaroid would have to fulfill the other two factors of the *Hunt* test. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977); *supra* text accompanying notes 214-15. The first factor requires Polaroid's shareholders to have standing to sue in their own right. *Hunt*, 432 U.S. at 343. Since the court of appeals found that the All-Holders Rule created a private right of action for shareholders, this part of the test was satisfied. Polaroid Corp. v. Disney, 862 F.2d 987, 997 (3d Cir. 1988).

Additionally, neither the claim asserted nor the relief requested must require individual member participation in the litigation. *Hunt*, 432 U.S. at 343. The court of appeals determined that conflicts of interests precluded it from granting Polaroid third party standing under this third factor of the *Hunt* test. *See Polaroid*, 862 F.2d at 999-1000. For a discussion of the conflicts of interests, see *infra* notes 325-68 and accompanying text.

324. *Polaroid*, 862 F.2d at 1001. In making this statement, the court of appeals brushed off Polaroid's argument that granting Polaroid standing would promote securities laws enforcement, which was in the public interest. *See id.* at 1000-01. The court, posing several policy counterarguments, first stated that Polaroid's assertion failed to consider whether granting a target company standing would result in an excessive level of enforcement, in terms of policy or congressional intent. *Id.* at 1000. Furthermore, Polaroid's statement "fail[ed] to consider the impact of [granting a target corporation third party standing] . . . on any congressional decision to entrust regulatory decisions to . . . [the Securities and Exchange Commission] rather than private litigants and the courts." *Id.* at 1000-01. Finally, the court stated that Polaroid's argument failed to weigh the social costs versus the benefits of a corporate takeover. *Id.* at 1001.

Unfortunately, the court did not address any of these issues. *Id.* at 998-1001. It merely stated that "any attempt to rely upon one's own conception of what would constitute good tender offer policy, in addition to being inappropriate, is too latent with difficulties to yield a definitive answer." *Id.* at 1001. While this statement seems to indicate that it would be easier or more appropriate to direct policy arguments about granting a target corporation third party standing to Congress or the Securities and Exchange Commission, discussion about the theoretical limitations of judicial activism or of private policing of the marketplace are beyond the scope of this article.

325. *Hunt*, 432 U.S. 333 (1977).

326. *Id.* at 343; *see supra* text accompanying notes 214-15.

327. *Polaroid*, 862 F.2d at 999-1000; *see supra* notes 256-65 and accompanying text.

328. *Polaroid*, 862 F.2d at 1008 (Cowen, J., concurring in part and dissenting in part); *see also supra* notes 280-86 and accompanying text (relating Judge Cowen's position).

fact, courts have never granted an association standing where serious conflicts of interest exist.[329] The takeover battle further illustrates these conflicts. Here, potential conflicts exist not only between the corporation and its shareholders, but also among the shareholder groups themselves.

While courts have allowed associational standing even where conflicting interests exist among association members and the association's courtroom success may harm the interests of some of them,[330]

Judge Cowen argued that a target corporation has standing to sue under the All-Holders Rule. *See Polaroid*, 862 F.2d at 1007-08. He noted that the Securities and Exchange Commission promulgated the All-Holders Rule to enforce and further the purposes of section 14(e), the anti-fraud provision of the Williams Act. *Id.* Judge Cowen found the majority's holding that Polaroid had standing to assert a violation of section 14(e), but had no standing to assert an All-Holders Rule violation, to be both inconsistent and a departure from precedent. *Id.* at 1008. While this position may support an argument that Polaroid had a private right of action under the All-Holders Rule (although the majority held otherwise), it clearly contradicts existing requirements under which third party standing is granted. *See id.* at 993-97 (regarding the majority's determination that Polaroid did not have standing under a private right of action theory). A genuine obstacle must exist which prevents a litigant from raising its own rights. Singleton v. Wulff, 428 U.S. 106, 115-16 (1976). Furthermore, the issue being litigated must materially impair the third party's ability to assert its rights. *See* Craig v. Boren, 429 U.S. 190, 196 (1976). No obstacle existed nor did the issue being litigated prevent the ESOP trustee from raising an All-Holders Rule claim. Thus, Polaroid would not meet the Supreme Court's prerequisites for third party standing. *See also supra* notes 183-86 and accompanying text.

329. *Polaroid*, 862 F.2d at 999.

330. *See, e.g.*, Humane Soc'y of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988); Gillis v. United States Dep't of Health & Human Servs., 759 F.2d 565, 572-73 (6th Cir. 1985); *cf.* National Maritime Union v. Commander, Military Sealift Command, 824 F.2d 1228 (D.C. Cir. 1987) (despite contrary interests of membership groups, unions would have satisfied associational standing requirements, but lacked standing because their members lacked standing individually); NCAA v. Califano, 622 F.2d 1382, 1391-92 (10th Cir. 1980) (where potential conflicts exist among association's members, the association does not have standing if more members declare against its litigating position than in favor of it). *But see* Associated Gen. Contractors v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979) (diversity of members' interests and "actual and potential conflicts" among them make association inadequate representative in litigation). *See generally* Note, *Associational Standing*, *supra* note 179, at 180-81 & nn.37-40 (citing cases in which actual or potential conflicts of interests among association members occurred).

The *Hunt* associational standing test implicitly supports the premise that conflicting member interests do not preclude associational standing. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); *National Maritime Union*, 824 F.2d at 1232 n.7. The third factor of the test mandates that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343; *see also* Warth v. Seldin, 422 U.S. 490, 511 (1975) (stating that associational standing is valid "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause"); *supra* note 215 and accompanying text. Only when member interests become *so* diverse that the claim asserted or the relief requested require individual participation would associational standing fail. *See* Harris v. McRae, 448 U.S. 297, 320-21 (1980) (association conceded that membership held diverse abortion viewpoints; Supreme Court concluded

these cases have involved only one potential conflict, that between dif-

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that a proper understanding and resolution of members' free exercise of religion claims required their individual participation).

In *National Maritime Union*, the court stated that the defendants' contention that the plaintiff associations lacked standing because their members had conflicting interests "may be seen as an attempt to add a fourth factor to . . . *Hunt*." 824 F.2d at 1231-32. The court held that associational standing does not require that member interests be conjunctive. *Id.* at 1232. In part, this is because harm to some members' interests is usually accepted as part of the cost of obtaining associational benefits. *Id.* at 1233. Furthermore, "[m]embers, as individuals or groups, if they had standing, could intervene to advance their interests in the merits against the association's position." *Id.* at 1233-34. The court also maintained that UAW v. Brock, 477 U.S. 274 (1986), "arguably suggested that conflicting interests of members did not preclude associational standing" because "associational standing was too valuable to jettison." *National Maritime Union*, 824 F.2d at 1232-33.

Third party standing is allowed in other types of situations where conflicting interests exist between a litigant and represented parties. In a class action, a representative party sues or is sued on behalf of a common group, of which the representative must be a member. *See* FED. R. CIV. P. 17(a) (discussing the real party in interest requirement); FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued . . . ."); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.20 (1985). The representative has third party standing on behalf of other class members. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.9, at 627 (1984). Where inadequate representation or representational conflicts exist, the litigation must be dismissed or the parties modified. *See* FED. R. CIV. P. 23(a)(4) (The representative must "fairly and adequately protect the interests of the class."); 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1765, at 279-85 (1986). The conflicts between the representative and other class members must go to the "heart of the controversy" before this occurs. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 16.2, at 731 (1985); *see also* 7A C. WRIGHT, A. MILLER & M. KANE, *supra*, § 1768, at 327 ("[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status."). However, standing analysis is distinct from adequacy of representation analysis. *E.g.*, Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988); *cf.* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) ("That a suit may be a class action . . . adds nothing to the question of standing . . . ."). Review of standing is a threshold inquiry made before that of representational adequacy. *See* O'Shea v. Littleton, 414 U.S. 488, 494 n.3 (1974); Bailey v. Patterson, 369 U.S. 31, 32-33 (1962); *Hassine*, 846 F.2d at 176 & n.3.

In a derivative action, the beneficiary of a fiduciary enforces a right of the fiduciary. C. WRIGHT, *supra* note 154, § 73, at 487. For example, a trust beneficiary may sue on behalf of a trust if a trustee refuses to do so or a shareholder may sue on behalf of a corporation if those in control fail to enforce a right properly asserted by the corporation. *Id.* The beneficiary has third party standing on behalf of the fiduciary and other beneficiaries similarly situated. *See* H. HENN & J. ALEXANDER, *supra* note 298, §§ 358, 360, at 1038, 1045 (Regarding shareholder derivative suits, "[i]n this sense, a derivative action is both a representative action and a class action."); *cf.* Ross v. Bernhard, 396 U.S. 531, 538 (1970) (stating that the corporation is the real party in interest and the stockholder is "at best the nominal plaintiff"). The beneficiary must fairly and adequately represent the interests of other beneficiaries similarly situated. *See* FED. R. CIV. P. 23.1 (regarding shareholder derivative suits and actions by members of an unincorporated association); C. WRIGHT, *supra* note 154, § 73, at 487 (stating that the same general principles apply in trust beneficiaries' actions as in shareholder derivative suits, except that federal rule 23.1 is not controlling). The adequacy of representation standards, including those regarding conflicts of interest, are analogous to those in class actions. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra*, § 16.9, at 761 & n.25; *see also* 7C C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRAC-

ferent membership groups of the association.[331] They did not involve a battle for control of the association.[332] In the Polaroid takeover attempt, potential conflicts existed among Polaroid's shareholder groups and between Polaroid's management and its shareholders.[333]

1. Shareholder Versus Shareholder

The first conflict of interest concerned those shareholders in favor of a takeover and those opposed to it. Shareholder groups may have incongruent views for a variety of reasons.[334] Some groups, such as

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TICE AND PROCEDURE § 1833, at 133-35 (1986) (noting that dismissal of a shareholder derivative suit requires that serious conflict must exist between plaintiff and other shareholders and plaintiff must not be expected to act in their interests as it would be self-injurious). Similarly, standing analysis is distinct from the adequacy determination. *See* H. HENN & J. ALEXANDER, *supra* note 298, § 361, at 1053 ("Before suing derivatively, the shareholder must meet certain [standing] qualifications . . . .").

331. *See, e.g.*, *Humane Soc'y of the United States*, 840 F.2d at 59-60 & n.25 (some members might not share goal being litigated); *Gillis*, 759 F.2d at 572 (theoretical conflict between association members exists); *National Maritime Union*, 824 F.2d at 1232 (temporary and permanent mariners, both represented by same associations, have contrary interests); *cf. NCAA*, 622 F.2d at 1391-92 (plaintiff and defendant associations include many of the same members, whose interests would conflict depending on which side of the litigation each supported).

A shareholder derivative suit "is almost invariably brought by minority stockholders to challenge action that a majority of the stockholders approve." C. WRIGHT, *supra* note 154, § 72, at 475. However, the requirement exists that the representative plaintiff "fairly and adequately represent the interests of the shareholders . . . similarly situated." *See* FED. R. CIV. P. 23.1; *supra* note 330. Majority stockholders are not comparable to a different membership group in an association as they are not forced to join the minority shareholder group's litigating position; the plaintiff is not seeking to represent them. *Cf.* 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 330, § 1833, at 133. Thus, the majority and minority shareholders are not "similarly situated." *Id.* at 138 & n.9. Furthermore, unlike the Polaroid situation, the corporation itself, by definition, is not the force behind the action in a shareholder derivative suit, although the suit is technically brought by the corporation. *See* Polaroid Corp. v. Disney, 862 F.2d 987, 1001 n.10 (3d Cir. 1988); Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 527-28, 535 n.11 (1984).

332. In cases where a battle for control of the entity occurred, the conflict between different membership groups did not exist, and standing was allowed. *See supra* note 330 and accompanying text. For example, in *Air Line Pilots Association v. UAL Corp.*, the court held that the plaintiff, who was an employee, shareholder, union member and potential acquiror of the corporation, was an adequate representative of all stockholders in the derivative action because his economic interest and that of the stockholders were compatible. 717 F. Supp. 575, 579 (N.D. Ill. 1989), *aff'd*, 897 F.2d 1394 (7th Cir. 1990). Thus, no conflict existed between different shareholder groups. *See supra* note 330 and accompanying text. The court ruled that the plaintiff had standing to bring the derivative action. *See Air Line Pilots Ass'n*, 717 F. Supp. at 578-79 & n.6 (confusing the standing and adequacy of representation determinations).

333. *See Polaroid*, 862 F.2d at 999-1000.

334. The rational investor normally makes investment decisions by balancing risk against reward. *See* B. GRAHAM, D. DODD & S. COTTLE, *supra* note 306, at 65 (discussing "the spectrum of safety vs. opportunity"); P. MOORE, THE BUSINESS OF RISK 140 (1983).

ESOPs, may have an interest in maintaining the status quo, and therefore, oppose any takeover.[335] Some investors may have a long-term investment outlook, and may foresee greater returns on their investment if the target corporation remains independent than if it is acquired.[336] Other stockholders, noting that the target corporation's stock price has increased significantly because of the tender offer, may see little upside potential remaining in their investment and feel that

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Each rational investor makes an investment decision based on his or her risk averseness or receptiveness. *See* B. GRAHAM, D. DODD & S. COTTLE, *supra* note 306, at 66 (stating that security buyers are either defensive or aggressive, enterprising investors). However, other personal considerations, such as tax implications, portfolio diversification strategies, or social or business philosophy, also color the decision to invest in or divest oneself of a particular investment. *See* E. BRIGHAM & L. GAPENSKI, *supra* note 306, at 106 (regarding portfolio diversification); B. GRAHAM, D. DODD & S. COTTLE, *supra* note 306, at 68-70 (concerning tax considerations); P. MOORE, *supra*, at 116-29 (regarding portfolio diversification); Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 670-71 (1988) (discussing portfolio diversification); Siwolop, *Ethical Investing?*, FIN. WORLD, June 27, 1989, at 86 (noting various socially conscious investment agendas); *see, e.g.*, A. DOMINI & P. KINDER, ETHICAL INVESTING (1984) (regarding social policies); E. JUDD, INVESTING WITH A SOCIAL CONSCIENCE (1990). Group behavior may also be an influential factor in such decisions. *See* I. FISHER, THE NATURE OF CAPITAL AND INCOME 296-97 (1906); *cf.* S. FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO, in XVIII THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 117 (1955) (concerning "the herd instinct" and human dependence on group reinforcement).

335. For reasons why employees may be unwilling to tender their stock to a tender offeror, see *supra* note 29. Employees investing in an ESOP may have an acute interest in avoiding a takeover since so much of their economic well-being is tied exclusively to the firm for which they work. *See* P. MOORE, *supra* note 334, at 128 (stating that employee interests may run counter to those of other shareholders because of employees' general inability to diversify their risks); *cf.* Doernberg & Macey, *ESOPs and Economic Distortion*, 23 HARV. J. ON LEGIS. 103, 135-36 (1986) (arguing that employees should diversify their investments and thus lower their overall portfolio risk, rather than invest in "the firm and industry to which their human capital is tied."); White, *As ESOPs Become Victims of '90s Bankruptcies, Workers Are Watching Their Nest Eggs Vanish*, Wall St. J., Jan. 25, 1991, at C1, col. 3 (quoting a pension consultant as stating that "ESOPs are the ultimate definition of an undiversified investment."); Gottschalk, *Too Much Loyalty May Have a High Price*, Wall St. J., Nov. 29, 1990, at C1, col. 3 (discussing the financial risks employees incur from economic nondiversification — "being dependent on one company" for "income, insurance *and* investments."). Because the portfolios of employees investing in an ESOP may be less diversified than those of employees who do not invest in their own companies, the risk that "unforeseen developments" will threaten their firm's viability is particularly significant. Doernberg & Macey, *supra*.

336. *See* Robinson, *Developing and Analyzing a Corporation Shareowner Profile*, in SHAREOWNER ACTIVISM: THE EMERGING ROLE OF INSTITUTIONAL INVESTORS 89, 140 (Practising Law Institute, Corporate Law and Practice Course Handbook Series No. 575, 1987) (stating that individual holders of record tend to be long-term investors and "represent the most assured source of management support"); *cf.* McCarthy, *Coke Stake of 6.3%, 2nd Biggest Held in Soft-Drink Giant, Bought by Buffett*, Wall St. J., Mar. 16, 1989, at A4, col. 2 (quoting investor Warren Buffett as stating that his "favorite holding period is forever").

better investment opportunities exist elsewhere.[337] This last shareholder group would react favorably to a takeover.

Another conflict between shareholder groups would occur if some stockholders were excluded from a tender offer. The court of appeals stated:

> Even shareholders injured by their exclusion from a tender offer may sometimes profit handsomely . . . . The market price of the stock of a corporation jumps skyward within minutes after a credible tender offer is made. Excluded holders of the security can thus profit . . . by selling their shares at the market price to third parties.[338]

While this is true, it ignores the fact that the excluded stockholders do not have the potential to sell their securities at the tender offer price. The financial markets often discount a tender offer price by two variables:[339] risk[340] and the time value of money.[341] Both excluded and nonexcluded stockholders can eliminate the risk that a tender offer will be unsuccessful by selling their stock.[342] However, regarding the time value of money, only the excluded stockholders are denied the opportunity to realize the full tender offer price. They can only receive the value of the tender offer discounted by an interest rate re-

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337. *See, e.g.*, B. GRAHAM, D. DODD & S. COTTLE, *supra* note 306, at 27 (discussing a valuation approach concerned with relative rather than intrinsic values of individual investments).

338. Polaroid Corp. v. Disney, 862 F.2d 987, 999 (3d Cir. 1988).

339. *Cf.* I. FISHER, THE THEORY OF INTEREST AS DETERMINED BY IMPATIENCE TO SPEND INCOME AND OPPORTUNITY TO INVEST IT 223-24 (1930) (discussing risk and time value as factors influencing investment opportunity).

340. *See* Ryngaert, Netter & Malmquist, *Shareholder Welfare and Substantial Share Acquisitions Outside of the Williams Act*, 1988 COLUM. BUS. L. REV. 505, 509.

341. *See, e.g.*, Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 271 (2d Cir. 1986) (noting testimony about how the time value of money would affect the relative values of two competing offers); *In re* Holly Farms Corp. Shareholders Litig., 564 A.2d 342, 351 (Del. Ch. 1989) (restating an assertion that "the time value of money alone reduces the value of both [tender] offers by approximately $1 per share for each month's delay in closing of the offer.").

Assuming all other elements are equal, the financial markets will discount a tender offer only if the tender offer price is viewed as fair or likely to succeed. If the markets view the offer price as too low, the stock will trade at a premium to it. *See* Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693, 1728 (1985). The premium will reflect the markets' view of a reasonable or likely takeover price discounted by a time value factor. *See Hanson Trust PLC*, 781 F.2d at 271; *In re Holly Farms*, 564 A.2d at 351.

342. *See* H. KRIPKE, *supra* note 315, at 267. By selling their stock, stockholders lock in their returns on their investments. *See id.* No more risk exists because the stockholder no longer owns the asset. *See id.*

flecting the value of money invested until the offer is executed.[343] Assuming everything else is equal, after a successful tender offer, the remaining outstanding shares (those of excluded stockholders) will trade at a lower price, reflecting their percentage of ownership in the corporation at that time.[344] The conflict, then, is between stockholders allowed to participate in the tender offer and receive the full value offered for their shares and excluded stockholders who can never receive that amount.[345] Unless they are willing to sell their shares on the market for less than the tender offer price or hold onto their shares, excluded stockholders may well be opposed to a takeover in which they are treated unfairly.[346]

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343. The highest price an excluded shareholder may receive, assuming that the tender offer's success is certain and the financial and economic markets are stable between the tender offer announcement and its execution, is the stock price on the last day prior to the tender offer execution date. *See In re Holly Farms*, 564 A.2d at 351 (discussing the time value of money).

344. *See* Ryngaert, Netter & Malmquist, *supra* note 340, at 512. This argument assumes that all other influences are nonexistent. However, in reality, other factors may affect stock price. For example, the post-tender offer price of the outstanding shares may trade at a discount to their actual value, reflecting their lack of control of the firm (because of their minority position) or a loss of liquidity (because a ready market for the shares no longer exists). *See* Bebchuk, *The Pressure to Tender: An Analysis and a Proposed Remedy*, in KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER, *supra* note 2, at 371, 373-75, 377-78, *reprinted in* 12 DEL. J. CORP. L. 911, at 917-20, 925-27 (1987); Bebchuk, *supra* note 341, at 1696, 1708-13; *cf.* E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra* note 318, at 268 (discussing the thin market existing after a corporation's self-tender offer). Other important factors are general financial and economic conditions, and conditions within the industry in which the corporation exists. *See* B. GRAHAM, D. DODD & S. COTTLE, *supra* note 306, at 3-4, 88; *see also* T. HOPKINS, MERGERS, ACQUISITIONS, AND DIVESTITURES: A GUIDE TO THEIR IMPACT FOR INVESTORS AND DIRECTORS 10 (1983) (company, industry, and stock market on which it is traded influence market price of a particular issue).

345. *See* Bebchuk, *supra* note 341, at 1696, 1730, 1733 ("[T]endering shareholders can generally expect to receive in the event of a takeover more than their pro rata share of the acquisition price" while "non-tendering shareholders . . . receive significantly less than their pro rata share.").

346. Several other reasons may support excluded stockholders' opposition to a tender offer. The *Polaroid* court stated that "[i]f the excluded holders fail to sell to third parties, they still have the shares they started out with when the tender offer closes; in this sense they are no worse off than if there had been no tender offer." Polaroid Corp. v. Disney, 862 F.2d 987, 999 (3d Cir. 1988). This statement fails to account for the opportunity cost excluded stockholders incur by being unable to cash out of an investment which has increased greatly because of a tender offer (and thus, may offer little future appreciation potential) and reinvest the proceeds in another investment vehicle with greater possibilities. *See* W. BAUMOL & A. BLINDER, ECONOMICS PRINCIPLES AND POLICY 36 (4th ed. 1988) (defining opportunity cost); 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 718-21 (1987) (discussing the concept of opportunity cost). It also fails to consider that excluded stockholders' shares may ultimately be worth less, given the risk, if the successful acquiror increases corporate debt to finance the acquisition. *See* Kahn v. United States Sugar Corp., No. 7313, at 7 (Del. Ch. Dec. 10, 1985) (WESTLAW, DE-CS directory). The

In the situation where excluded and nonexcluded stockholders have opposing viewpoints regarding a takeover, as in those instances where shareholder groups have different investment expectations or have vested interests, the target corporation, no matter what side it chooses, will be in a position antithetical to a shareholder group.[347] Yet, the All-Holders Rule does not consider the target corporation's relationships with its shareholder factions. The Rule precludes discrimination among shareholder groups by requiring potential acquirors to open the tender offer to all *security holders* of that class of securities subject to the offer.[348] It addresses potential conflicts among security holders — the owners of the corporation — not a conflict between the target corporation and its shareholders.[349] Under the All-Holders Rule, only the security holders are able to show an actual or threatened injury[350] and only they have a personal stake in the outcome of the controversy.[351] The All-Holders Rule litigation and the Polaroid Corporation should have been mutually exclusive: the litigation had nothing to do with exclusion of corporate shares from the tender offer, because the corporation had none at stake. Rather, Polaroid's only interest was that the outcome of the All-Holders Rule controversy might indirectly affect whether the takeover attempt succeeded. Thus, the court properly denied Polaroid third party standing

court's statement that excluded shareholders may be better off for having been excluded because they can sue the tender offeror for damages is unrealistic. *See Polaroid*, 862 F.2d at 999. Rational investors normally will not buy into a risky lawsuit if they have the opportunity to realize substantial gains on their investments and reinvest the proceeds elsewhere. *Cf.* H. KRIPKE, *supra* note 315, at 267 (A person offered cash for his stock is mainly concerned with how much money he can get, the procedures he must follow, and when he can get it.).

Each of the above examples of the effects of discriminatory treatment of excluded stockholders provides that group with additional reasons to oppose a takeover favored by other shareholder groups. *See also* Sesit, *Many Suchard Minority Holders Steamed Over Philip Morris Offer*, Wall St. J., July 16, 1990, at C1, col. 5, C19, col. 1 (discussing how the lack of an All-Holders Rule in Switzerland left minority stockholders in one takeover "with the option of being an oppressed minority or a disadvantaged seller").

347. For a discussion of the management-shareholder conflict, see *infra* notes 352-68 and accompanying text.

348. *See* 17 C.F.R. § 240.14d-10(a)(1) (1990); Amendments to Rules, *supra* note 65, at 88,188-91.

349. *See* Amendments to Rules, *supra* note 65, at 88,188. The Securities and Exchange Commission did not discuss the target corporation at all, only its stockholders. *See id.* It focused on eliminating discriminatory treatment among target corporation security holders, stating that the All-Holders Rule "further[ed] the purposes of the Williams Act by assuring fair and equal treatment of all holders of the class of securities that is the subject of a tender offer." *See id.*

350. *See supra* notes 164-67 and accompanying text.

351. Polaroid Corp. v. Disney, 862 F.2d 987, 999 (3d Cir. 1988); *see supra* note 194.

on behalf of its ESOP because the Rule was designed to address conflicts of interests among shareholders only.

2. Management Versus Shareholders

The second conflict of interest was between Polaroid's management and its shareholders. The court of appeals stated that "[e]ven though some shareholders are disadvantaged by their exclusion from the tender offer, a great majority of shareholders will often benefit from [it]" and thus, the corporation "may have an eye to protecting the interests of the majority" at the expense of the minority shareholders.[352] While this is theoretically true,[353] in practical terms, corporate management is more inclined to resist a takeover as it may result in a loss of management earnings, employment, and perquisites.[354] Proxy fights[355] are difficult and expensive for even large shareholders to mount.[356] In the modern corporate context, shareholder voting rights

352. *Polaroid*, 862 F.2d at 999. A variety of shareholder groups with their own agendas may complicate a takeover situation even more than a simple majority-minority split will. *See* Law, *Corporate Takeovers*, in Letters to the Editor, HARV. BUS. REV. Jan.-Feb. 1985, at 172, 173-74. Professor Law wonders whose wealth among them should be maximized. *Id.* at 174. In this regard, some corporate managers feel that short-term investors should be ignored. Fogg, *Takeovers: Last Chance For Self-Restraint*, HARV. BUS. REV., Nov.-Dec. 1985, at 30, 32.

353. *See* Fogg, *supra* note 352, at 31-32.

354. Bamonte, *The Dynamics of State Protectionism: A Short Critique of the* CTS *Decision*, 8 N. ILL. U.L. REV. 259, 261 n.10 (1988); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1175 (1981); Jensen, *supra* note 302, at 116; Macey & Miller, Trans Union *Reconsidered*, 98 YALE L.J. 127, 141 (1988); Rosenzweig, *Target Litigation*, 85 MICH. L. REV. 110, 120 (1986); Note, *Toward Standards for Managers Subject to Hostile Bids: The Tri-Level Model*, 50 U. PITT. L. REV. 269, 277-79 (1988); *cf.* DeMott, *Introduction—The Biggest Deal Ever*, 1989 DUKE L.J. 1, 15 (discussing incumbent management perquisites of the RJR Nabisco Corp.).

355. In a "proxy contest," management and dissident stockholders fight for control of the corporation. 3C H. BLOOMENTHAL, *supra* note 3, § 13.10. Each side solicits other stockholders' votes, generally for the election of a new slate of directors. Jensen, *supra* note 302, at 112. For a short history of pre-Williams Act proxy contests, see Hablutzel & Selmer, *Hostile Corporate Takeovers: History and Overview*, 8 N. ILL. U.L. REV. 203, 203-05 (1988).

356. *See* Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 6-7 (1978); *see also* Johnson & Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1876 n.67 (1989) (noting that the tender offer has been a popular method to gain control of a corporation because of the difficulties that one incurs when challenging management in a proxy contest). One reason proxy contests are difficult is because "management controls the proxy machinery." Johnson & Millon, *supra*. Management is likely to have a decisive impact on shareholder voting and the results of that vote. *Id.*; *e.g.*, Hylton, *Advisers in Forefront of New Proxy Wars*, N.Y. Times, Mar. 30, 1990, at D1, col. 4, D4, col. 4 (Lockheed Corp.'s management moved up the company's annual meeting by six weeks, thus reducing the time Harold

are a fiction; in most instances, management runs the corporation as it sees fit without regard to shareholder interests.[357] Thus, whether some shareholders, such as Polaroid's ESOP which held a 14% minority stake in the company,[358] are disadvantaged by the tender offer, or others see it as advantageous good fortune,[359] is irrel-

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Simmons had to convince shareholders to vote his position. "[T]he longer the period of time the dissident has to wage the proxy fight, the better chance he has to succeed."); *see also* Hylton, *supra*, at D1, col. 4, D4, col. 4 (noting that the cost of Harold Simmons' quest to seek control of the Lockheed Corp. via a proxy contest will be about $6 million); Wartzman & Blumenthal, *Lockheed Wins Proxy Battle With Simmons*, Wall St. J., Apr. 11, 1990, at A3, col. 1 (Simmons "spent considerably more than $6 million.").

357. *See* Easterbrook & Fischel, *supra* note 354, at 1170-71. Easterbrook and Fischel have stated:

> Each shareholder will recognize that his votes will not affect the outcome of any dispute unless he has a large bloc of shares. . . . If each shareholder reasons in the same way, as he should, the managers of the firm will prevail in any contest about their operation of the company. And that is the pattern in the market. Shareholders routinely vote for managers or pay no attention to elections. Successful campaigns against managers are rare, and they seldom succeed even if one dissident shareholder holds a large bloc of stock that he can vote in his own favor.

Id. at 1171. However, the authors state that the threat of a takeover is a mechanism for monitoring and replacing poor managers. *Id.* at 1173-74. Professor Fischel reemphasized this point:

> In any agency relationship—such as the relationship between shareholders and managers—the interests of the agent will diverge from those of the principal. The agent will have incentives to consume excess leisure or otherwise act in ways inconsistent with maximizing the wealth of the principal. . . .
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> . . . .
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> . . . [However], the market for corporate control, particularly the merger and the tender offer, provide a mechanism for displacing inefficient managers . . . . The existence of this mechanism provides managers with . . . [an] incentive to minimize agency costs to avoid being the target of a takeover bid.

Fischel, *supra* note 298, at 918-19 (footnote omitted); *see also* Baysinger & Butler, *Antitakeover Amendments, Managerial Entrenchment, and the Contractual Theory of the Corporation*, 71 VA. L. REV. 1257, 1302 (1985) (stating that "the threat of hostile takeovers provides an incentive for incumbent management to act in the best interest of stockholders, and thus to maximize the market price of the company's stock"); Jensen & Ruback, *supra* note 307, at 29-30 (Takeovers partially deter "major managerial departures from maximization of stockholder wealth."); Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 958-59 & nn.98-101 (1984) (noting an argument which theorizes that managers do not act adversely to shareholder interests because stock values would decline, and the threat of employment loss via a takeover acts as a deterrent). *See generally* Geneen, *Why Directors Can't Protect the Shareholders*, FORTUNE, Sept. 17, 1984, at 28, 28-29 (in which former ITT Chairman Harold S. Geneen states that corporate boards of directors "follow meekly where the chief executive leads" and that "there are few if any genuine checks or balances on the power of the chief executive in large public corporations").

358. Polaroid Corp. v. Disney, 698 F. Supp. 1169, 1171 (D. Del.), *aff'd in part and vacated in part*, 862 F.2d 987 (3d Cir. 1988); Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 281 (Del. Ch. 1989); Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 272 (Del. Ch. 1989).

359. *See* H. KRIPKE, *supra* note 315, at 267.

evant.[360] The key determinative is the position that management perceives to be in *its* best interests.[361] In this case, Polaroid's management saw that by setting up an ESOP and by suing Shamrock, it was

360. In Polaroid's case, Delaware's business combination statute further allowed management to take into account considerations in addition to shareholders' interests. *See generally* DEL. CODE ANN. tit. 8, § 203 (Supp. 1990). Business combination statutes are a type of state antitakeover law which prevents corporate raiders from completing certain business combinations, such as mergers, consolidations, substantial asset sales, or liquidations, for 3-5 years after a successful tender offer. Johnson & Millon, *supra* note 356, at 1874. "The key feature of these statutes is that they expressly inject target company management into the decisionmaking process, giving it an effective veto power over hostile bids to be followed by 'business combinations' — a veto that the bidder and target company shareholders are virtually powerless to override." *Id.* at 1875; *see id.* at 1876 n.68 ("One should not be misled by efforts to package these antitakeover laws in proshareholder terms."). Delaware's business combination statute provides that a raider who acquires 85% or more of a corporation's stock is excepted from the statute's provisions. *See* DEL. CODE ANN. tit. 8, § 203(a)(2) (Supp. 1990). Professors Johnson and Millon cite the Delaware statute as a reason Shamrock's efforts to acquire Polaroid were unsuccessful:

> In Shamrock Holdings, Inc. v. Polaroid Corp., [559 A.2d 257 (Del. Ch. 1989)], the Delaware Chancery Court upheld Polaroid's action of issuing approximately 14% of its outstanding stock to a newly established Employee Stock Ownership Plan. When coupled with Polaroid's share repurchase plan and placement of preferred stock into friendly hands, the ESOP measure made it virtually impossible for Shamrock to acquire 85% of Polaroid's stock as needed to escape operation of Delaware's antitakeover statute. As a result, Shamrock dropped its bid.

Johnson & Millon, *supra* note 356, at 1875-76 n.66 (citation omitted); *see* Note, *The Delaware Takeover Statute: Constitutionally Infirm Even Under the Market Participant Exception*, 17 HOFSTRA L. REV. 203, 209-10 & n.41 (1988). Management's control over the course of events rendered shareholder sentiment immaterial. *See* Johnson & Millon, *supra* note 356, at 1875-76.

361. *See generally* Rosenzweig, *supra* note 354. The *Polaroid* court stated:

> As Polaroid's home state of Delaware has recognized, measures adopted to ward off a takeover raise "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders . . . ."
>
> While those who manage the corporation have a fiduciary duty to respond to takeovers in the best interests of the corporation's shareholders, this legal duty may only limit the extent to which the disparate interests of management and shareholders affect managerial behavior.

Polaroid Corp. v. Disney, 862 F.2d 987, 1000 & n.7 (3d Cir. 1988) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)). Where antitakeover devices are substantial, "[t]he incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced." *See* Edgar v. Mite Corp., 457 U.S. 624, 643 (1982); *see also* Dann & DeAngelo, *Corporate Financial Policy and Corporate Control: A Study of Defensive Adjustments in Asset and Ownership Structure*, 20 J. FIN. ECON. 87, 96-99 (1988) (Decreased shareholder wealth results when management defensively responds to attempted hostile takeovers.); Easterbrook & Fischel, *supra* note 354, at 1175 (arguing that management defensive tactics decrease shareholder welfare); *cf.* Jarrell, Brickley & Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980*, J. ECON. PERSP., Winter 1988, at 49, 66 ("[D]efensive measures that require shareholder voting approval are less likely to be harmful to shareholder wealth than are defensive measures not subject to shareholder approval.").

bettering its own position.[362] However, management's interests conflicted with those of any shareholders who wished to tender their shares.[363] Thus, its position was incongruent with this shareholder group.[364] To allow management third party standing to assert an All-Holders Rule violation on behalf of another shareholder group, its ESOP, would "undermine[ ] the basis for *jus tertii* standing—that the *jus tertii* advocate will vigorously assert the interests of the right-holder."[365] The shareholders in favor of the offer would effectively be

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362. By setting up an ESOP, Polaroid's management improved its position in three ways. First, it increased the cost required to effectuate a takeover. *See* Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 274 (Del. Ch. 1989) (discussing the dilutive effect of issuing the ESOP shares); *supra* note 46. Second, Polaroid's management arguably gained the support of a constituency who might vote against a takeover because of job security concerns and the fear of a new employment environment. *See* Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 281 (Del. Ch. 1989); *supra* note 29. Third, the ESOP gave employees an incentive to improve production and increase efficiency, since as owners, the results would directly accrue to them in the form of higher stock prices and dividend payments; this would result in increased longterm management benefits. *Cf.* Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 272 (Del. Ch. 1989) (noting that ESOPs are effective employee motivators). Thus, an ESOP "can effectively eliminate a hostile offer and maintain operation of the corporation by the current management." Note, *Employee Stock Ownership Plans*, *supra* note 29, at 606.

A "variety of tactical considerations" can lead target corporations to sue potential acquirors. Rosenzweig, *supra* note 354, at 120. Target managers' self-interest plays a large part in these lawsuits. *Id.* at 126. Polaroid used many of the tactics discussed by Professor Rosenzweig. *See id.* at 120-26. For example, Polaroid's tactics included seeking a preliminary injunction enjoining Shamrock's tender offer. Polaroid Corp. v. Disney, 862 F.2d 987, 989 (3d Cir. 1988). Polaroid also asserted that Shamrock violated disclosure requirements regarding margin regulations. *Id.* at 1003. Delay allowed Polaroid time to find a white knight. *See supra* notes 21 & 46. It also increased the risk and expense of the tender offer, which Shamrock ultimately abandoned. *See supra* note 46; *see also* Comment, *An Implied Private Right*, *supra* note 48, at 318 (stating that target counsel often sue potential acquirors, alleging Williams Act violations and asking to enjoin the tender offer, as the delay creates a litigation overhead cost). Additionally, the circumstances surrounding the creation of the ESOP "had to have been motivated, at least in part, by a desire to add one more obstacle to Shamrock's potential acquisition bid." Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 276 (Del. Ch. 1989). In short, Polaroid's clear goal in its litigation was to avoid a takeover and to allow management to retain control. *See* Rosenzweig, *supra* note 354, at 133.

Judge Richard Posner has summed up target corporation antitakeover attempts by stating, "the arguments for defensive measures . . . giv[e] too little weight to the effect of 'defensive' measures in rendering shareholders defenseless against their own managements." Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 255 (7th Cir. 1986), *rev'd*, 481 U.S. 69 (1987).

363. *See* Jarrell, *supra* note 307, at 152, 174 (1985) ("[I]t is hard to find any case where remaining independent was beneficial to target shareholders, as measured by stock returns.").

364. *See* Note, *Employee Stock Ownership Plans*, *supra* note 29, at 606 ("Frequently, incumbent management will respond to a hostile tender offer with tactics harmful to current owners. An ESOP is such a tactic.").

365. Polaroid Corp. v. Disney, 862 F.2d 987, 999 (3d Cir. 1988). One commentator

represented only by an outside party, the potential acquiror, instead of the corporation of which they were owners. Therefore, the litigation required individual member participation[366] because shareholder groups' interests were so diverse[367] and the corporation was unable "to vindicate the interests of all."[368]

Thus, the potential conflicts of interest in litigation under the All-Holders Rule strongly discourage granting a corporation third party standing on behalf of its shareholders.

C. *The Existence of a Better Associational Representative: The ESOP*

To assert an All-Holders Rule violation during a takeover, a target corporation's shareholders — not the corporation itself — must bring their own lawsuit.[369] In *Polaroid Corp. v. Disney*,[370] because the ESOP trustee had standing to sue,[371] and thus, had the ability to assert the ESOP's rights,[372] a prerequisite to a grant of third party standing

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has noted that "target management is an inappropriate party to charge with initiating enforcement [of the Williams Act]." Comment, *An Implied Private Right*, *supra* note 48, at 317 (discussing target management's self-interest in maintaining control of the target corporation).

366. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977); *supra* text accompanying notes 214-15.

367. *See* Harris v. McRae, 448 U.S. 297, 320-21 (1980); *supra* note 330. The potential diversity of viewpoints among shareholder groups rendered Polaroid an ineffective representative of all those positions. *See supra* note 232 and accompanying text.

368. *See* UAW v. Brock, 477 U.S. 274, 290 (1986) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 187 (1951) (Jackson, J., concurring)); *supra* notes 224-27 and accompanying text.

369. The *Polaroid* court stated that "the All Holders Rule creates a private right of action enabling injured shareholders to sue a tender offeror whose offer violates the Rule." *Polaroid*, 862 F.2d at 1001-02.

370. 862 F.2d 987.

371. *See id.* at 1002; *supra* note 369.

372. Under one commentator's view, whether Polaroid or the ESOP trustee litigated the claim was irrelevant because they maintained a cooperative relationship. *See* Note, *Does a Target Corporation Have Standing to Sue Under the All Holders Rule? The Third Circuit Says No in* Polaroid Corp. v. Shamrock, 862 F.2d 987 (3d Cir. 1988), 58 U. CIN. L. REV. 717, 744-45 (1989) (stating that the Polaroid ESOP trustee was a mere puppet of management and arguing that ESOP standing should thus be determined on a fact-specific basis). Nonetheless, "[a]n ESOP trustee is required to act for the exclusive benefit of the participants and beneficiaries and to act in a reasonably prudent manner." Ershick v. Greb X-Ray Co., 705 F. Supp. 1482, 1486 n.1 (D. Kan. 1989) (citing Eaves v. Penn, 587 F.2d 453, 459 (10th Cir. 1978)). As the *Ershick* court stated:

> 29 U.S.C. § 1104(a)(1) imposes upon an ESOP trustee certain fiduciary duties. The trustee must act prudently in the discharge of its duties. It must act "solely in the interest of the participants and beneficiaries" of the ESOP, and it must act "with the care, skill, prudence and diligence under the circumstances then prevailing" that a reasonable person would exercise.

— that the third party must be genuinely unable to raise its own rights — would not have been satisfied.[373] Therefore, in addition to the intrinsic conflicts of interests, Polaroid was an inappropriate litigant in this context.[374]

Associational standing doctrine would not have stood in the way of the ESOP trustee litigating an All-Holders Rule claim. Polaroid had no "pre-existing reservoir of expertise and capital" unavailable to its ESOP; it merely hired a large New York law firm to represent its position.[375] The ESOP trustee, representing a large block of stock and a significant Polaroid constituency, its employees, could have done the same.[376] If the ESOP trustee's concern about being excluded from the tender offer had risen to the point where it decided to file suit, arguably this would promote superior litigation and judicial decision-making because the right-holders themselves would be before the court.[377] Only if the ESOP had brought its own lawsuit would the Williams Act's objective of investor protection[378] — in this case, protection of shareholders in favor of the tender offer — be promoted.

CONCLUSION

Max Holland spoke of "[h]uge pools of concentrated capital" and "swollen and unfocused corporations" as fueling the rise of corporate raiders during the 1980s.[379] As a former target company employee stated, "[It] can [all] be summarized in one word: greed."[380] The war between the Polaroid Corporation, that is, Polaroid's management, and Roy Disney for control of the company's resources exemplifies the contests that have occurred between raiders and undervalued corporations in the past decade. At its heart, the issue of whether a target

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Id. at 1486 (quoting 29 U.S.C. § 1104(a)(1) (1988)); *see also* Ingrassia, *Polaroid ESOP Has Independent Role in Shamrock Bid, Labor Agency Advises,* Wall St. J., Mar. 10, 1989, at A4, col. 2.

373. *See supra* notes 183-84 and accompanying text.

374. *See supra* notes 203-05 and accompanying text (discussing the legal inability of a third party to assert its rights).

375. *See supra* notes 219-20 and accompanying text; *see also* Polaroid Corp. v. Disney, 862 F.2d 987, 989 (3d Cir. 1988) (citing Cravath, Swain & Moore as Polaroid's counsel).

376. The ESOP, which could afford to purchase 9.7 million Polaroid shares (about 14 percent of Polaroid's outstanding stock) for $300 million, would not "find the cost of the litigation beyond . . . [its] means." *Polaroid,* 862 F.2d at 998; *see* Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 271-72 (Del. Ch. 1989).

377. *See supra* notes 193-95 and accompanying text.

378. *See supra* text accompanying notes 103-08.

379. M. HOLLAND, WHEN THE MACHINE STOPPED 255 (1989).

380. Helyar, *supra* note 302.

company should have third party standing on behalf of a shareholder group provides an insight into the conflicts that can occur during a hostile takeover and demonstrates how shareholders may end up mere pawns, their interests of secondary importance in the battle between target and potential acquiror.

In *Polaroid Corp. v. Disney*,[381] the Third Circuit Court of Appeals confronted the question of whether a target corporation should have third party standing to assert a violation of the All-Holders Rule by a potential acquiror. While the court held that the Rule does not permit a target corporation to have standing in an associational context, a determination of the relative congruency of protecting shareholders and organizational purpose may well satisfy the requirements of the second factor of the *Hunt*[382] test. A key variable is the weight given to the promotion of long-term business prospects.

The court's concern about the potentially serious conflicting interests that exist in a takeover situation augmented its decision to deny Polaroid third party standing. Different shareholder groups may have conflicts depending on their perspectives as to the benefits or detriments of a takeover. Additionally, the inability of excluded stockholders to receive the same value for their shares as nonexcluded stockholders may result in conflicts. As the All-Holders Rule addresses relationships among security holders, the target corporation is an inappropriate party to address these conflicts. Under the court's reasoning, the target would be unable to vigorously assert the rights of all stockholders.

A second conflict potentially exists between target corporation management and its shareholders. Management's hostile reaction to a tender offer may not only make it an inappropriate advocate of shareholder interests favoring a takeover, but presents a genuine conflict of interest which weighs against it representing any shareholder in takeover litigation.

A basic tenet of third party standing doctrine is that the third party must be genuinely unable to raise its own rights. Since shareholders have standing under the All-Holders Rule, an ESOP trustee may represent the employee shareholders of the target corporation. Granting a target corporation third party standing would be improper because shareholders themselves are able to raise their own rights. The ESOP is a better associational representative than the target corporation.

381. 862 F.2d 987 (3d Cir. 1988).

382. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

Diverse shareholder interests, combined with management's self-interest and the existence of a litigant which may represent itself in court, make the target corporation an unsuitable representative under the All-Holders Rule. Allowing corporate management to have third party standing on behalf of a shareholder group would give it too much added advantage in the tug of war between target and acquiror. Neither of the Williams Act's purposes of disclosure and investor protection would be served by allowing a target corporation to litigate an All-Holders Rule claim. Rather, stockholders might well receive unequal treatment depending on the viewpoint they favored or the shareholder group to which they belonged.

Thomas D'Urfey once wrote that "[a]ll shoes fit not all feet."[383] Recognizing this truth, the United States Court of Appeals for the Third Circuit appropriately turned down Polaroid's attempt to stand in the shoes of its ESOP, and in doing so, added one more dimension to the takeover wars that dominated the corporate world during the 1980s.

Joseph Kershenbaum

383. T. D'URFEY, QUIXOTE, Act V, sc. 2.