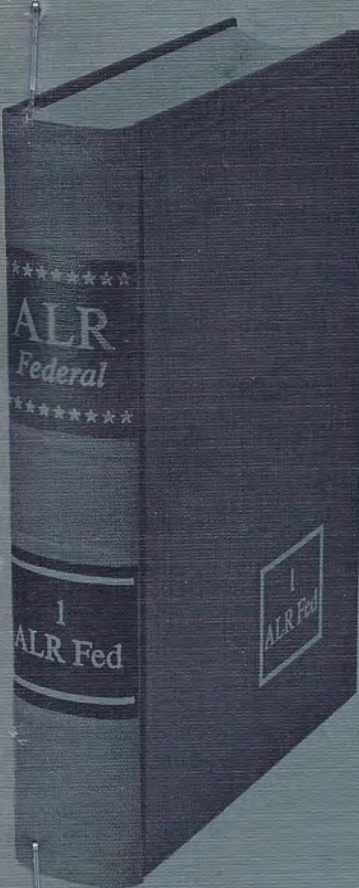




The Annotation on:

AVAILABILITY OF IMPLIED
RIGHT OF ACTION UNDER TENDER
OFFER PROVISIONS OF § 14(d)-(f),
OF SECURITIES EXCHANGE ACT OF
1934 (15 USCS § 78n(d)-(f)),
ADDED TO EXCHANGE ACT BY
WILLIAMS ACT OF 1968, AND
RULES PROMULGATED THEREUNDER
BY SECURITIES AND EXCHANGE
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AVAILABILITY OF IMPLIED RIGHT OF
ACTION UNDER TENDER OFFER PROVISIONS
OF § 14(d)-(f) OF SECURITIES EXCHANGE ACT
OF 1934 (15 USCS § 78n(d)-(f)), ADDED TO
EXCHANGE ACT BY WILLIAMS ACT OF 1968,
AND RULES PROMULGATED THEREUNDER BY
SECURITIES AND EXCHANGE COMMISSION

by

Richard Cordero, J.D., D.E.A., Ph.D.

The tender offer provisions of the Williams Act of 1968 regulate corporate control contests by requiring tender offerors to disclose material information in connection with their tender offers through filings with the Securities and Exchange Commission. However, given the Commission's limited enforcement resources, the parties to tender offers have themselves sought redress for violations of those statutory and regulatory provisions. The courts have implied such private right of action in order to enhance the provisions' effectiveness in light of Congress' purpose for enacting the Act, namely to protect the class of shareholders of target companies and investors in general by requiring that they be provided with adequate information on which to base decisions. The proper characterization of the plaintiff's role is outcome determinative, as shown in *Metropolitan Secur. v Occidental Petroleum Corp.* (1989, SD NY) 705 F Supp 134, CCH Fed Secur L Rep ¶ 94144, 120 ALR Fed 675.

Metropolitan Secur. v Occidental Petroleum Corp., is fully reported at page 675, *infra*.

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See the related annotations listed in § 1[b].

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Genfed; newer; (14(d) or 14(e) or 14(f) w/5 (Securities Exchange) or (Exchange) Act) or (15 w/5 (USC!) w/5 78n(d) or 78n(e) or 78n(f)) and standing or (right w/4 action) or (private w/4 (cause w/4 action) or (remedy))

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STATUTORY TEXT

The tender offer provisions of the Williams Act of 1968 (15 USCS § 78n(d)-(f)) provide as follows:

§ 78n. Proxies

(d) Tender offer by owner of more than five per centum of class of securities; exceptions.

(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title [15 USCS § 78l], or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title [15 USCS § 78l(g)(2)(G)], or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 13(d) of this title [15 USCS § 78m(d)], and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of

securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) **Untrue statement of material fact or omission of fact with respect to tender offer.** It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solic-

itation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) Election or designation of majority of directors of issuer by owner of more than five per centum of class of securities at other than meeting of security holders. If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 13 of this title [15 USCS § 78m(d)], any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

Rule 14e-3 of the Securities Exchange Commission (17 CFR § 240.14e-3 (1991)) provides as follows:

§ 240.14e-3 Transactions in securities on the basis of material, nonpublic information in the context of tender offers.

(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:

- (1) The offering person,
- (2) The issuer of the securities sought or to be sought by such tender offer, or
- (3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such Issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

(b) A person other than a natural person shall not violate paragraph (a) of this section if such person shows that:

- (1) The individual(s) making the investment decision on behalf of such person to purchase or sell any security described in paragraph (a) of this section or to cause any such security to be purchased or sold by or on behalf of others did not know the material, nonpublic information; and
- (2) Such person had implemented one or a combination of policies and procedures, reasonable under the circumstances, taking into consideration the nature of the person's business, to ensure that individual(s) making in vestment decision(s) would not violate paragraph (a) of this section, which policies and procedures may include, but are not limited to, (i) those which restrict any purchase, sale and causing any purchase and sale of any such security or (ii) those which prevent such individual(s) from knowing such information.

(c) Notwithstanding anything in paragraph (a) of this section to contrary, the following transactions shall not be violations of paragraph (a) of this section:

- (1) Purchase(s) of any security described in paragraph (a) of this section by a broker or by another agent on behalf of an offering person; or
 - (2) Sale(s) by any person of any security described in paragraph (a) of this section to the offering person.
- (d)(1) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, it shall be unlawful for any person described in paragraph (d)(2) of this section to communicate material, nonpublic information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of this section except that this paragraph shall not apply to a communication made in good faith,
- (i) To the officers, directors, partners or employees of the offering person, to its advisors or to other persons, involved in the planning, financing, preparation or execution of such tender offer;
 - (ii) To the issuer whose securities are sought or to be sought by such tender offer, to its officers, directors, partners, employees or advisors or to other persons, involved in the planning, financing, preparation or execution of the activities of the issuer with respect to such tender offer; or
 - (iii) To any person pursuant to a requirement of any statute or rule or regulation promulgated thereunder.
- (2) The persons referred to in paragraph (d)(1) of this section are:
- (i) The offering person or its officers, directors, partners, employees or advisors;
 - (ii) The issuer of the securities sought or to be sought by such tender offer or its officers, directors, partners, employees or advisors;
 - (iii) Anyone acting on behalf of the persons in paragraph (d)(2)(i) of this section or the issuer or persons in paragraph (d)(2)(ii) of this section; and
 - (iv) Any person in possession of material information relating to a tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from any of the above.

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- Lowenschuss v Kane (1975, CA2 NY) 520 F2d 255, CCH Fed Secur L Rep ¶ 95104—§ 3[a]

- Metropolitan Secur. v Occidental Petroleum Corp. (1989, SD NY) 705 F Supp 134, CCH Fed Secur L Rep ¶ 94144, 120 ALR Fed 675—§§ 10[e], 12[b]**
- Milstein v Huck (1984, ED NY) 600 F Supp 254, CCH Fed Secur L Rep ¶ 91591—§ 18
- O'Connor & Assoc. v Dean Witter Reynolds, Inc. (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443—§§ 3[b, c], 4[c], 6[c], 12[a, b], 16[a, b], 17, 19[a], 21[a, b]
- Pryor v United States Steel Corp. (1986, CA2 NY) 794 F2d 52, CCH Fed Secur L Rep ¶ 92804—§§ 2[a], 4[a], 8[b], 9, 10[b]
- Rand v Anaconda-Ericsson, Inc. (1985, ED NY) 623 F Supp 176, CCH Fed Secur L Rep ¶ 92330—§ 16[a]
- Stull v Bayard (1977, CA2 NY) 561 F2d 429, CCH Fed Secur L Rep ¶ 96149, 23 FR Serv 2d 1366—§ 10[a]
- Wellman v Dickinson (1979, SD NY) 475 F Supp 783, CCH Fed Secur L Rep ¶ 96918, 4 Fed Rules Evid Serv 1178—§§ 3[b], 4[a], 10[d], 13[a], 18, 23[c], 25[b]

THIRD CIRCUIT

- Angelastro v Prudential-Bache Secur., Inc. (1985, CA3 NJ) 764 F2d 939, CCH Fed Secur L Rep ¶ 92076—§ 3[c]
- Diceon Electronics, Inc. v Calvary Partners, L.P. (1991, DC Del) 772 F Supp 859, CCH Fed Secur L Rep ¶ 96930—§§ 4[a], 5, 13[a], 25[b]
- Flynn v Bass Bros. Enterprises, Inc. (1978, ED Pa) 456 F Supp 484—§ 10[a]
- Kalmanovitz v G. Heileman Brewing Co. (1985, CA3 Del) 769 F2d 152, CCH Fed Secur L Rep ¶ 92238, 1985-2 CCH Trade Cases ¶ 66733—§§ 10[c], 15[b], 23[b]
- Koppers Co. v American Express Co. (1988, WD Pa) 689 F Supp 1371, CCH Fed Secur L Rep ¶ 95012—§ 3[a], 7[c, d], 13[b]
- Polaroid Corp. v Disney (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095—§ 3[c], 4[c], 7[c], 10[d], 13[b, c], 14, 20[a, b, c]
- Revlon, Inc. v Pantry Pride, Inc. (1985, DC Del) 621 F Supp 804, CCH Fed Secur L Rep ¶ 92348—§§ 7[c], 13[b]
- Weeks Dredging & Contracting, Inc. v American Dredging Co. (1978, ED Pa) 451 F Supp 468, CCH Fed Secur L Rep ¶ 96414, 1978-1 CCH Trade Cases ¶ 62010—§§ 4[a], 15[a], 25[a]

FOURTH CIRCUIT

- Burlington Industries, Inc. v Edelman (1987, MD NC) 666 F Supp 799, CCH Fed Secur L Rep ¶ 93338, 1987-1 CCH Trade Cases ¶ 67649—§ 3[a], 6[e], 9, 13[a], 25[b]
- Horowitz v Pownall (1985, DC Md) 105 FRD 615—§ 3[a], 21[b]
- Martin Marietta Corp. v Bendix Corp. (1982, DC Md) 549 F Supp 623, CCH Fed Secur L Rep ¶ 99191—§ 20[a]

FIFTH CIRCUIT

- Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation, Re (1979, WD Tex) 467 F Supp 227—§§ 4[a], 6[a, e], 7[a], 9, 10[a, c], 20[a], 22, 23[a]
- Gearhart Industries, Inc. v Smith International, Inc. (1984, CA5 Tex) 741 F2d 707, CCH Fed Secur L Rep ¶ 91667—§§ 4[a], 9, 13[a], 25[b]
- Hundahl v United Ben. Life Ins. Co. (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815—§§ 4[a], 6[a, e], 7[a], 9, 10[a, c, e], 15[b], 20[b], 21[a], 23[a], 24
- Sargent v Genesco, Inc. (1974, CA5 Fla) 492 F2d 750, CCH Fed Secur L Rep ¶ 94496—§ 6[a]
- Smallwood v Pearl Brewing Co. (1974, CA5 Tex) 489 F2d 579, CCH Fed Secur L Rep ¶ 94405—§ 6[a]

SIXTH CIRCUIT

- Berman v Gerber Products Co. (1978, WD Mich) 454 F Supp 1310, CCH Fed Secur L Rep ¶ 96506—§§ 2[a], 6[b], 17, 19[b], 21[a, b], 22
- Luptak v Central Cartage Co. (1979, ED Mich) CCH Fed Secur L Rep ¶ 98034—§§ 15[a, b], 16[a], 18, 25[c]
- Mobil Corp. v Marathon Oil Co. (1981, CA6 Ohio) 669 F2d 366, CCH Fed Secur L Rep ¶ 98399—§§ 4[a], 8[b], 15[a], 19[a], 25[a]
- Orlett v Cincinnati Microwave, Inc. (1990, CA6 Ohio) 953 F2d 224, CCH Fed Secur L Rep ¶ 96493, 22 FR Serv 3d 118—§ 10[e]

EIGHTH CIRCUIT

- Hurwitz v R. B. Jones Corp. (1977, WD Mo) 76 FRD 149, CCH Fed Secur L Rep ¶ 96261, 24 FR Serv 2d 566—§§ 6[a], 7[e], 10[c]

NINTH CIRCUIT

- Plaine v McCabe (1986, CA9 Cal) 797 F2d 713—§§ 10[c], 20[b], 22, 23[a], 24
- Robertson v Dean Witter Reynolds, Inc. (1984, CA9 Cal) 749 F2d 530, CCH Fed Secur L Rep ¶ 91868—§ 3[c]

ELEVENTH CIRCUIT

- Florida Commercial Banks v Culverhouse (1985, CA11 Fla) 772 F2d 1513, CCH Fed Secur L Rep ¶ 92321—§§ 4[b], 7[b], 8[b], 9, 13[a], 25[b]
- Liberty Nat. Ins. Holding Co. v Charter Co. (1984, CA11 Ala) 734 F2d 545, CCH Fed Secur L Rep ¶ 91539—§§ 4[b], 7[b, e], 8[b], 13[c], 25[d]

ARTICLE**I. Preliminary Matters****§ 1. Introduction****[a] Scope**

This annotation¹ collects and analyzes the Supreme Court decision in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, where it was held that an unsuccessful tender offeror does not have an implied right of action to sue for damages for alleged violations of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), and its progeny, with respect to whether, or under what circumstances, an implied right of action exists under § 14(d)-(f) of the Exchange Act (15 USCS § 78n(d)-(f)), added to the Exchange Act by the Williams Act of 1968, and the rules adopted thereunder by the Securities Exchange Commission. Included is also the consideration given to the statutory or regulatory requirements that must be satisfied in order for plaintiff to state a cause of action that it can prosecute. Consequently, the relation between a right and a cause of action is also discussed.

[b] Related annotations

Availability of implied private action for violation of § 13 of Securities Exchange Act of 1934 (15 USCS § 78m). 110 ALR Fed 758.

Construction of "best-price rule" of Williams Act Amendment

(§ 14(d)(7)) to Securities Exchange Act of 1934 (15 USCS § 78n(d)(7)) requiring makers of tender offer to offer best price to all securities holders. 100 ALR Fed 444.

What is "control" purpose which requires acquiring entity to file with Securities & Exchange Commission statement of intent of such purpose pursuant to § 13(d) of Securities Exchange Act of 1934 (15 USCS § 78m(d)). 57 ALR Fed 806.

Intent, knowledge, or negligence as affecting civil liability for violations of proxy or tender offer provisions of Securities Exchange Act (15 USCS § 78n). 24 ALR Fed 241.

Element of scienter as affecting action to enjoin violation of federal securities laws. 21 ALR Fed 582.

Propriety, under Rules 23(a) and 23(b) of Federal Rules of Civil Procedure, as amended in 1966, of class action for violation of federal securities laws. 9 ALR Fed 118.

Validity, under commerce clause of Federal Constitution, of state statutes regulating securities transactions—federal cases. 73 L Ed 2d 1454.

Implication of private right of action from provision of federal statute not expressly providing for one—Supreme Court cases. 61 L Ed 2d 910.

Proxies provision of § 14 of Federal Securities Exchange Act (15 USC § 78n)—federal cases. 12 L Ed 2d 1235.

Lockup option defense to hostile corporate takeover. 66 ALR4th 180.

¹ This annotation supersedes §§ 4 and 5 of the annotation titled "Construction of 1968 Amendments to § 14 of Securities Exchange Act of 1934, dealing with tender offers (15 USCS § 78n(d-f))." found at 6 ALR Fed 906.

"Golden parachute" defense to hostile corporate takeover. 66 ALR4th 138.

Duty of corporate directors to exercise "informed" judgment in recommending responses to merger or tender offers. 46 ALR4th 887.

§ 2. Historical background and summary

[a] Historical background

The determination of the issue whether a private party has a right to invoke a court's adjudicating power concerning an action that it has brought under the Williams Act of 1968 (adding §§ 13(d) and (e) and 14(d)-(f) of the Securities Exchange Act of 1934, hereinafter referred to also as the Exchange Act, and codified to 15 USCS §§ 78m(d) and (e) and 78n(d)-(f)), is a preliminary procedural matter that cannot be disposed of merely by taking a look at the Act's or the Exchange Act's jurisdictional provisions or at their substantive sections, because none explicitly provides a right of action to such a party. As a result, such a right can only exist by implication, and determining whether it does requires a more complex examination of the Williams Act as a whole, as well as its legal context.

The nature and the elements of this examination were identified by the Supreme Court, in *Piper v Chris-Craft Industries, Inc.* (1977), 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, where it addressed the issue squarely. The Court indicated

that the overall consideration for creating a private right of action by implication is that where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute. Then it articulated this consideration as four factors to be weighed in determining whether to imply such a right:

(1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted;

(2) whether there was any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;

(3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and

(4) whether the cause of action is one traditionally relegated to state law.

The proliferation of cash tender offers, in which publicized campaigns were conducted for tenders of shares of stock at a fixed price, removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws.² As a result, unidentified persons could lawfully attempt to gain control of a major American corporation by operating in secrecy concerning their intentions, their commitments, and even their identities, thereby withholding from all parties concerned critical information necessary to assess the compe-

tence and integrity of the potential new management. Such maneuvers were not consonant with the Securities Exchange Act, whose legislative history reveals that it was passed to require that when a corporation registers its stock on an exchange it must make a full and complete revelation of all material facts that legitimately effect its securities.³

To remedy this gap a bill was introduced in October 1965 to subject tender offerors to advance disclosure requirements. The bill's purpose was to require full and fair disclosure of material information when a person or group of persons seek to acquire a substantial block of equity securities of a publicly held corporation by a cash tender offer or through the open market or privately negotiated purchases. As subsequently enacted, the tender offer provisions of the legislation require takeover bidders to file a statement with the Commission indicating, among other things, the background and identity of the offeror, the source and amount of funds or other consideration to be used in making the purchases, the extent of the offeror's holdings in the target corporation, and the offeror's plans with respect to the target corporation's business or corporate structure.

In addition to disclosure require-

ments, which protect all target shareholders, the Williams Act provides other benefits for target shareholders who elect to tender their stock. First, stockholders who accept the tender offer are given the right to withdraw their shares during the first seven days of the tender offer and at any time after 60 days from the commencement of the offer (15 USCS § 78n(d)(5)).⁴ Second, where the tender offer is for less than all outstanding shares and more than the requested number of shares are tendered, the Act requires that the tendered securities be taken up pro rata by the offeror during the first 10 days of the offer (15 USCS § 78n(d)(6)). Finally, the Act provides that if, during the course of the offer, the amount paid for the target shares is increased, all tendering shareholders are to receive the additional consideration, even if they tendered their stock before the price increase was announced (15 USCS § 78n(d)(7)).⁵

Besides requiring disclosure and providing specific benefits for tendering shareholders, the Williams Act also contains a broad antifraud prohibition (15 USC § 78n(e)), which makes it unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances

3. *Berman v Gerber Products Co.* (1978, WD Mich) 454 F Supp 1310, CCH Fed Secur L Rep ¶ 96506.

4. A complementary provision adopted by the Securities and Exchange Commission, Rule 14e-1(c) (17 CFR § 240.14e-1(c)), requires that where tendered shares are accepted, prompt payment of cash must be made.

5. The All Holders Rule (17 CFR § 240.14d-10(a)) of the Commission supports this provision by requiring a tender offeror to extend its offer to all security holders of the class of securities subject to the tender offer so that all are treated equally and fairly.

2. See, generally, S Rep No 550, 90th Cong, 1st Sess, (1967); HR Rep No 1711, 90th Cong, 2d Sess, (1968).

under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

This provision was aimed at removing the secrecy which had heretofore cloaked transactions involving a shift in corporate control, and was expressly directed at the conduct of a broad range of persons, including those engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer. By requiring disclosure of information to the target corporation as well as to the Commission, Congress intended to do no more than see to it that the target offeror would use a means of expressing and explaining its position to all other interested parties. Congress expressly disclaimed an intention to enable management to turn the disclosure requirement into a weapon in their arsenal to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Nor does the Act impose upon the target company management an affirmative duty to respond to a tender offer at all. However, once the target does decide to respond, it assumes the responsibility of disclosing relevant and truthful information that is material to the other parties' handling of the tender offer.⁶

By contrast to this impartial

stance toward tender offerors and target company management, the Act was expressly intended to protect target company shareholders and, in fact, investors in general, as the Supreme Court, in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, concluded from its review of the Act's legislative history. In light of this statutory intent, the Court construed the Act's antifraud provision to provide standing to shareholders and investors, the Act's protected class, to seek a remedy of damages when they have been injured by noncompliance with the provisions of the Act generally, including those on disclosure. But the Court concluded that since tender offerors and target company management are not regarded as the Act's beneficiaries, the Act's antifraud provision—or the rest of the Act, for that matter—does not afford them a right to sue for damages. However, the latter two parties, just as shareholders and investors, may be entitled, when the Act has been violated, to obtain injunctive relief.

In determining when a violation of the Act can be remedied by implying a private right of action, the courts have refined the *Piper* four-pronged test by according preeminence to the legislative intent factor. Thus, while all the four factors remain relevant, what constitutes the central inquiry is what Congress intended to accomplish through the Act and whether it gave indications, either implicit or explicit, that it intended to create, or

rather allow the creation by implication, of a private right of action as an additional means of attaining its statutory purpose.⁷ By establishing a hierarchy among those factors, the court can identify which must weigh heavier when their application produces diverging results.

In the act of balancing the Court's four-pronged test, congressional intent, practical considerations relative to supplementing Commission enforcement with private actions, and the unique statutory language of each provision, there are several principles that provide a basis of stability. The Supreme Court stated in *J. I. Case Co. v Borak* (1964) 377 US 426, 12 L Ed 2d 423, 84 S Ct 1555, that when a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. The Court deemed well settled the principle that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. Section 27 of the Securities Exchange Act grants the District Courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by this title . . ." (15 USCS § 78r). Thus, concluded the *Borak* Court, the power to enforce implies

the power to make effective the right to recovery afforded by the Act; and the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.

[b] Summary

Section 14(d)-(f) of the Securities Exchange Act of 1934 (hereinafter referred to as the Exchange Act) (15 USCS § 78n(d)-(f)), added to the Exchange Act by the Williams Act of 1968, does not provide a right of action. However, since it condemns as unlawful certain acts in connection with tender offers and the Exchange Act provides under § 27 (15 USCS § 78r) for a general right to sue for harm caused by the commission of such acts, the courts have considered that in order to render the congressional intent animating those provisions effective, a private right of action can be implied under § 14(d)-(f). To determine the precise contours of that intent as expressed at the time of enactment, the court have examined the Act's legislative history and have established that it was to protect shareholders of target companies as well as investors in general when confronted with a tender offer by requiring that tender offerors disclose material information enabling them to decide knowledgeably how to react to the offer (§ 4[a], *infra*). The courts have not found that this intent had varied by the time of the two subsequent

6. *Berman v Gerber Products Co.* (1978, WD Mich) 454 F Supp 1310, CCH Fed Secur L Rep ¶ 96506.

7. *Pryor v United States Steel Corp.* (1986, CA2 NY) 794 F2d 52, CCH Fed Secur L Rep ¶ 92804, cert den *United States Steel Corp. v Pryor* (1986) 479 US 954, 93 L Ed 2d 393, 107 S Ct 445.

amendments to the Act in 1970 and 1977; rather, they have added to their process of construction another consideration: if by the time of amendment the courts had routinely and consistently construed the Act to provide implicitly for a private right of action and Congress let that construction stand, then it can be assumed that Congress intended the Act to give private parties the right to sue thereunder (§ 4[b], *infra*).

Similarly, the courts have construed Congress' broad wording of the statutory provision empowering the Securities and Exchange Commission (hereinafter referred to as the Commission) to implement the tender offer sections by adopting rules and regulations, to provide ample room for the Commission to exercise validly its rulemaking authority. Thus, Commission rules have also been found to support the implication of a private right of action (§ 4[c], *infra*), for instance Rule 14e-3 (17 CFR § 240.14e-3 (1991)), prohibiting insider trading in connection with tender offers, and the All Holders Rule (17 CFR § 240.14d-10(a)), insuring equal treatment of all shareholders by the tender offeror. The construction of Congress' intent at the time of amendment has also led the courts to find that Rule 14e-1(c) (17 CFR § 240.14e-1(c)), requiring prompt payment of cash for shares tendered in connection with a tender offer, supports the implication of a private right of action even though the violation of the rule does not require fraud or misrepresentation while the original statutory provision made fraud a required element of the prohibited conduct (§ 4[d], *infra*).

In addition to establishing Congress' intent at the time of original enactment or of amendment, the unique wording of each section has been examined to determine the specific purpose that Congress pursued through each section. As a result of this individual determination, the finding of an implied right of action under a given provision of the Williams Act need not warrant the same finding in every other provision of the Act (§ 5, *infra*). The separability of findings has not precluded, however, the comparison between the provisions of the Act and others elsewhere in the Exchange Act, among which § 10(b) (15 USCS § 78j(b)), together with its implementing Rule 10b-5 adopted by the Commission thereunder (17 CFR § 240.10b-5), is by far the most frequent term of comparison. Thus, since the purchase-seller language of § 10(b) and Rule 10b-5 is not found in § 14(e), no purchase-seller requirement constrains the implication of a right of action under § 14(e) (§ 6[a], *infra*). Conversely, while the wording of § 14(e) as amended supports a claim for nondisclosure in the absence of fraud, that of § 10(b) and Rule 10b-5 does not (§ 6[b], *infra*); and even though all three provisions share the same objective of prohibiting manipulative and deceptive practices, the language of § 10(b) makes an allegation of such practices a requirement for suing under it, whereas a right of action can be implied under Rule 14e-1(c) of the Commission (17 CFR § 240.14e-1(c)) without having to allege fraud (§ 6[d], *infra*). This differentiated treatment of provisions is based on the specific terms of each provision that give each of them their particular scope of appli-

cation so that a right of action may be implied, for example, under § 14(e) even though a right has already been implied under Exchange Act § 10(b) (§ 6[c], *infra*). By the same token, the specificity of those terms may be such as to have a preemptive effect. Just as different wording may result in sections being treated differently with regard to the implication thereunder of a right of action, similar wording and, of course, similar congressional intent, can lead to the same treatment. This is illustrated by the analogies drawn to Rule 10b-5, on the basis of which it has been held that Rule 14e-3 (17 CFR § 240.14e-3) similarly requires that to establish a right of action for insider trading during the course of a tender offer the plaintiff must claim the same elements of (a) standing, (b) breach of duty, (c) materiality, (d) scienter, and (e) injury; and that § 14(e) affords a private right of action since its language is closely patterned after that of Rule 10b-5 (§ 6[e], *infra*).

Weighing the differences against the similarities to determine which tips the balance involves enough exercise of discretion as to lead to inconsistent results, as seen by the fact that, when compared to other federal law provisions, § 14(e) has been found to support the implication of a right of action by analogy to § 14(a) of the Exchange Act (15 USCS § 78n(a)) (§ 7[a], *infra*), and that by analogy to the same section, § 14(e) as well as § 14(d) have been found not necessarily to support such implication (§ 7[b], *infra*). Helpful as the weighing of differences and similarities may be, it constitutes only one aspect of the process of determining whether a

provision gives rise to an implied right of action; in the end, each section must provide support sufficiently strong on its own in light of its own requirements. This is illustrated by § 7 of the Exchange Act (15 USCS § 78g) or Federal Reserve Board Regulations G, T, U, and X (12 CFR §§ 207, 220, 221, and 224), regulating the use of stock as collateral securing loans for the purchase of stock (§ 7[c], *infra*), and § 4(a)(1) of the Bank Holding Company Act (12 USCS § 1843(a)(1)), prohibiting bank holding companies from acquiring direct or indirect ownership or control of any voting shares of a company which is not a bank (§ 7[d], *infra*). While these provisions have been found not to provide private parties with a right of action, the failure to disclose their violation as required under § 14(d) and (e) does support a right of action under subsections (d) and (e). The opposite might also be true. So overdisclosure under § 14(e) may give rise to action under other securities laws provisions, as when a tender offeror discloses that it intends, once the tender offer is completed, to exchange the securities of the former target company for other securities, which could be construed as an offer to sell securities prior to their registration in violation of § 5 of the Securities Act of 1933 (15 USCS § 77e); consequently, there is no right of action under § 14(e) to complain of the failure to overdisclose (§ 7[f], *infra*). Finally, the fact that there is already a right of action under another provision of the Exchange Act, such as § 18 (15 USCS § 78r), does not preclude § 14(e), in light of its particular wording and the requirements that

it engenders, from giving rise by implication to a similar right (§ 7[e], *infra*).

By contrast, where state law already provides a remedy for the alleged violation of § 14(d) and (e) and the type of action brought thereunder has traditionally been relegated to those remedies, the general principle of relegation to state law rather than implication of a private right of action under federal law has been applied. Thus, relegation has taken place where tender offerors were suing for damages or the claim was predicated on a breach of fiduciary duty (§ 8[a], *infra*). But where the basis for the claim originated with the Williams Act itself, for instance, under § 14(d)(6) (15 USCS § 78n(d)(6)), requiring the tender offeror to accept on a pro rata basis shares that oversubscribe an offer, and Rule 14e-1(c) (17 CFR § 240.14e-1(c)), requiring tender offerors to pay cash promptly for the shares tendered to and accepted by them, so that there could not possibly have been traditional relegation to state law, a right of action was implied under those provisions of the Act (§ 8[b], *infra*).

Whether a tender offer provision of the Williams Act supports the implication of a right of action depends on a number of factors, such as what the plaintiff's role is in connection with the tender offer (§§ 9-15, *infra*), whether factual and procedural requirements—necessary, strictly speaking, to state a cause of action—have been met (§§ 16-22, *infra*), and what relief is sought (§§ 23-25, *infra*). To these considerations is added the practical one that the Commission, to which the Act expressly grants a

right of action (15 USCS § 78u), does not have the resources to police compliance with those provisions in every situation where they are applicable or to ascertain the accuracy and completeness of disclosures required in connection with tender offers. Having recognized this situation, the courts have adopted the principle that allowing private parties to bring on their own actions that are in harmony with the intent and the letter of the Act contributes to its effective enforcement and, consequently, to the attainment of the goals pursued through it by Congress (§ 9, *infra*).

In the context of determining whether to imply a right of action, the consideration of the plaintiff's role has led to the following conclusions: shareholders of the target company have in principle a private right of action for damages and injunctive relief under § 14(d) and (e) since they constitute the class of persons that Congress intended those sections to protect (§ 10[a], *infra*). This is so whether they tendered their shares (§ 10[b], *infra*), or they did not (§ 10[c], *infra*), and even where the tender offer was not made to them, as it was to others, given that the exclusion from the offer of some shareholders violates both § 14(e) and the All Holders Rule (17 CFR § 240.14d-10(a)) (§ 10[d], *infra*). But a shareholder cannot benefit from an implied right of action where he is only nominally such and instead is fundamentally a participant in the making of the tender offer itself, for under those circumstances he already possesses the information in connection with the tender offer through whose disclosure the Act intended to protect him, and does

not have to decide whether to accept or reject his own offer (§ 10[e], *infra*). Nor is he the beneficiary of an implied right of action where he has not been misled because he understood the information disclosed by the tender offeror to be untrustworthy and did not act upon it; or has not been harmed by the alleged manipulation of the defendant (§ 10[e], *infra*).

However, a shareholder who is also a defeated tender offeror may bring a derivative action in a representative capacity on behalf of the target company since the damages sought are not for himself, but rather for the target so that the latter may be compensated for the alleged violations of the tender provisions by another person (§ 11, *infra*). Since the Act's protected class of persons has been construed to include not only shareholders, but also investors in general, option traders that traded in options on the target shares may also enjoy an implied right of action (§ 12[a], *infra*). However, holders of target company convertible debentures not included in the tender offer are not protected investors because they do not face any decision to tender or keep their securities (§ 12[b], *infra*).

By contrast, target companies are not part of the protected class and, therefore, do not have an implied right of action under the All Holders Rule (17 CFR § 240.14d-10(a)) of the Commission to challenge the exclusion by tender offerors of some shares of the class of shares tendered for, nor to claim under § 14(d) or (e) that a shareholder who violated those subsections should be required not to vote the shares acquired or ordered to divest

himself of them (§ 13[c], *infra*). But targets are granted an implied right of action where the suits that they bring contribute to the effective enforcement of the tender offer provisions and where they have no adequate remedy at law, provided that the protected class is not thereby harmed (§ 13[a], *infra*). Indeed, since disclosure of information material to the tender offer is the Act's key mechanism for protecting shareholders and investors, where other provisions that do not provide even an implied right of action are violated, such as Federal Reserve Board Regulations G, T, U, X (12 CFR §§ 207, 220, 221, and 224) dealing with purchase of stock on margin and § 4(a)(1) of the Bank Holding Company Act (12 USCS § 1843(a)(1)) restricting bank holding companies' ownership of nonbanks, failure to disclose such violations as required under the Williams Act and Commission rules may support the implication on behalf of target companies of a right of action for injunctive relief (§ 13[b], *infra*). But such implication is not made to allow the target to represent its shareholders against a tender offeror where the target's and its shareholders' interests are in conflict (§ 14, *infra*).

In light of this policy, tender offerors are allowed, just as targets are, to bring injunctive actions under the Act's tender offer provisions because in so doing they, too, contribute to achieving the provisions' purpose of protecting target shareholders and investors from having to confront tender offers on the basis of inadequate information disseminated by the targets in their efforts to fend off those offers (§ 15[a], *infra*). However, since of-

ferors do not belong to the Act's protected class, they, like targets, have no private right of action for damages, and this is so even where they are at the same time shareholders of the targets who sue in that capacity only as a step in their strategy to carry out tender offers (§ 15[b], *infra*).

In determining whether to imply a private right of action under § 14(d) and (e) and the rules adopted thereunder, the courts have considered not only whether the plaintiff is a member of the class of persons that Congress intended to protect or whether the action brought would benefit that class, but also whether the plaintiff has satisfied the pleading requirements that those provisions have been construed to contain. This consideration goes, strictly speaking, to the issue whether a cause of action has been stated rather than to the issue whether a plaintiff can claim a right of action under those provisions. This indifferentiation of issues can be understood as the cause or the effect of the fact that the courts have interchangeably used the terms right of action, cause of action, and standing to sue.

Thus, the courts have held that for a plaintiff to state a claim, an actual tender offer must have been addressed to him because only then would he be confronted with the need to decide what to do and require the protection of the Act to obtain adequate information on which to make that decision (§ 16[a], *infra*). But this requirement does not apply where no offer was made to the plaintiff because corporate insiders deprived him of information about a proposed tender offer precisely in order to in-

duce him fraudulently to engage in a certain course of action in connection with a tender offer known to the defendants through inside information (§ 16[b], *infra*); nor does the allegedly unlawful act need have taken place after the tender offer became effective if it was undertaken in connection with a tender offer and did not concern tender offer plans that were merely speculative, but rather involved trading on the basis of material, nonpublic information in violation of Rule 14e-1 of the Commission (17 CFR § 240.14e-3) (§ 17, *infra*). This broad coverage of the Act and the rules is further underlined by holdings to the effect that a right of action can also be found in connection with nonconventional tender offers since Congress' intent in enacting the Williams Act was to protect shareholders and investors by regulating forms of corporate control shifts existing at the time or that could come into existence subsequently (§ 18, *infra*).

Whether the Act's coverage was intended to be so broad as to include a breach of fiduciary duty depends on whether at the core of the breach lies the misuse of information. Thus, it has been held that there is a right of action under Rule 14e-3 (17 CFR § 240.14e-3) to recover from corporate insiders who traded corporation stock on the undisclosed information of the impending public announcement of a tender offer proposal, thereby breaching their fiduciary duty to the corporation and the shareholders to disclose material information or abstain from trading; and that there is also such a right under § 14(e) given the inadequacy of an action based on common law for fiduciary

duty breached by failing to make proper disclosure and engaging in manipulative acts in order to repel the tender offer (§ 19[a], *infra*). But it has also been held that no right of action can be implied from § 14(e) where the alleged violation is predicated on a breach of fiduciary duty that did not involve false or misleading statements or omissions, so that an action based on such a breach must be relegated to state law (§ 19[b], *infra*). These holdings highlight the importance for obtaining standing to sue—whether understood as flowing from having a right or a cause of action—under the tender offer provisions of properly characterizing the conduct complained of as involving a breach of fiduciary duty or rather as consisting of the misstatement of material information.

The role of the nature of information and of its disclosure or nondisclosure in determining whether to imply a right of action under § 14(e) naturally leads to the issue whether misrepresentation or fraud in connection with a tender offer is a required element of the violation of the tender offer provisions. As originally enacted, § 14 required fraud to state a cause of action and courts have continued to hold that fraudulent misrepresentation or manipulation is an element of the cause of action under § 14(e) (§ 20[a], *infra*); however, to be actionable they must have caused the injury complained of (§ 20[b], *infra*). This gives rise to the issue whether pursuant to § 14(e) the Commission can exercise its authority to adopt rules whose violation do not require fraudulent conduct, such as Rule 14e-1(c) (17 CFR § 240.14e-1(c)) requiring tender of-

ferors to pay cash promptly for the shares tendered to and accepted by it. In this context, it has been pointed out that the 1970 amendment gave the Commission authority to prevent acts and practices involving fraud, deception, and manipulation, and since prevention of an evil is at least one step ahead of the prohibition of the evil itself, the Commission has authority under § 14(e) to prohibit acts and practices that do not contain themselves fraud, deception, or manipulation (§ 20[c], *infra*). Likewise, § 14(d) itself contains subsection (6) on proration of shares when the number of those tendered exceeds the number of those sought, as well as subsection (7) on paying the best price for all shares purchased, which in turn have provided the statutory basis for rules such as the All Holders Rule (17 CFR § 240.14d-10(a)) requiring a tender offeror to extend its offer to all security holders of the class of securities subject to the tender offer; these are provisions that deal, not with disclosure of information that can be misrepresented, but rather with insuring that all shareholders and investors are treated fairly and equally (§ 20[c], *infra*). It should be noted that fairness of treatment of all shareholders and investors is not to be equated with fairness of the price paid for the shares tendered, which in a harmony with congressional intent is a matter to be decided by market operators rather than by the courts (§ 24, *infra*).

This jurisprudence can be summarized in the principle that the need to allege misrepresentation or fraud to state a cause of action under the tender offer provisions is not absolute, but rather depends on

the provision under which the suit is brought. A similar relative, rather than absolute, handling has been given to the issue of reliance on the alleged misrepresentation or fraud. Thus, the courts have held that while an affirmative misstatement requires reliance thereon on the part of the plaintiff (§ 21[a], *infra*), no reliance is required, because it is presumed, where the misrepresentation is the result of an omission to state material information that should have been disclosed pursuant to the tender offer provisions. This means that misrepresentation through silence, found often in breaches of fiduciary duty through inside trading, is actionable under the Act and the rules (§ 21[b], *infra*).

There is also general agreement on the view that establishing a cause of action under the tender offer provisions requires plaintiff to allege causation by claiming that his loss is the result of the conduct said to have violated the provision in question (§ 22, *infra*). Nor is there any doubt as to whether a private right of action can be implied depending on which type of redress for its loss a given type of plaintiff prays for. Thus, damages are available only to target shareholders and investors (§ 23[a], *infra*), but neither to tender offerors nor to target companies (§ 23[b, c], *infra*). The measure of recoverable damages may be determined by the price that the shares would have fetched had there been no violation of the tender offer provisions as opposed to the price actually received; in this computation it is irrelevant whether the price paid was fair since the price is to be set by the free interplay of market forces in an environ-

ment of full disclosure of material information, regardless of whether it is set within or outside the range of fairness. This means that even a shareholder, let alone a tender offeror, cannot state a cause of action where he only complains that the price was not fair although no misrepresentation was involved in fixing that price (§ 24, *infra*). Injunctive relief that furthers the legislative intent behind the Act of informing the shareholders' decision making process in connection with a tender offer is available to both tender offerors and target companies (§ 25[a, b], *infra*). But it is not available where the tender offeror fails to state the benefit that would accrue to the target shareholders if the court granted the injunctive relief sought, such as enjoining a competing tender offeror from further acquisitions of target shares or forcing it to sell those already acquired (§ 25[c], *infra*). Nor is injunctive relief available to a target company where granting it would offend Congress' policy of evenhandedness by tipping the balance of legal resources at the disposal of management and a tender offeror (§ 25[d], *infra*).

§ 3. Practice pointers

[a] Distinction between right and cause of action

The right of action, understood as standing to sue, is a jurisdictional matter that concerns the issue whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy under the statute or rule that arguably protects or regulates the interest alleg-

edly injured.⁸ This is conceptually different from a cause of action, which is the set of elements that the plaintiff must be able to allege in order to state, on a formal or *prima facie* basis, a legal claim against the defendant. As such, neither concerns the ultimate merits of a lawsuit.⁹ Intellectually there may seem to be a clear distinction between those two concepts, but the fact is that the line that separates the requirements for establishing a right as opposed to a cause of action under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), as well as the rules derived therefrom, appears in practice to be blurred. Establishing the right of action depends fundamentally on meeting the test developed for that purpose by the Supreme Court, in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, which rests on a determination that Congress' implicit intention in enacting the Williams Act of 1968, which added the tender offer provisions of § 14(d)-(f) to the Exchange Act (15 USCS § 78n(d)-(f)), was to protect the class of persons to which the plaintiff belongs, and that by allowing plaintiff to bring that action the attainment of the purposes that Congress pursued through the Act would be furthered. By contrast, establishing the cause of action hinges basically on a finding that the facts of the case correspond to the acts, in

connection with a tender offer, proscribed or required by the letter of the Act or of the rules adopted thereunder.

Both the right and the cause of action are challenged at the outset of the proceedings through a motion to dismiss. The fact that this procedural device is common to both and that the court's decision does not necessarily reach the merits of the action in either case contributes to blurring the line that separates the right from the cause. But the consequences of dismissal may be quite different, since a plaintiff who is found not to have a right of action may not be able to bring its case again since the defect of its complaint is not curable, at least not under the same statutory or regulatory provision or against the same party or for the same relief, while a plaintiff who has been found not to have stated a cause of action can obtain leave to amend its complaint and refile it in an attempt to make out a legally sufficient claim against the defendant and thereby save its action.¹⁰

To establish a right of action one may argue that the congressional intent of the Williams Act, which has been identified as the protection of target company shareholders and investors when making a decision in connection with a tender offer, supports such a right. To establish a cause of action one argues the specific requirements stated by the particular provision whose vio-

8. *Sierra Club v Morton* (1972) 405 US 727, 31 L Ed 2d 636, 92 S Ct 1361, 3 Env't Rep Cas 2039, 2 ELR 20192.

9. *Burlington Industries, Inc. v Edelman* (1987, MD NC) 666 F Supp 799, CCH Fed Secur L Rep ¶ 93338, 1987-1 CCH Trade Cases ¶ 67649.

10. USCS Court Rules, Federal Rules of Civil Procedure, Rules 12(b)(6) notes 71-78, 83, 93, 94-95, 99-102; and 15(a) notes 6-10, 12, 18, 19, 21.

lation is complained of. For instance, under § 14(e) of the Exchange Act, which constitutes the antifraud provision of the Williams Act, it must be alleged by the plaintiff¹¹—whether it is a shareholder or an investor suing for damages, or a target company seeking from a tender offeror, or vice versa, or a tender offeror seeking from a competing tender offeror injunctive relief in the form of disclosure of material information that (1) defendant made untrue statements of material fact or failed to state material facts required to be stated—for example, in SEC Schedule 14 D-9—in connection with the tender offer; (2) plaintiff (a) relied on such statements in deciding how to react to the tender offer, or (b) in cases involving omissions instead of misrepresentations, even when coupled with indirect availability of the omitted information, that the omitted information was material,¹² since under those circumstances reliance is presumed;¹³ (3) plaintiff

was injured as a result of defendant's misstatement or omission because of the causal nexus between that wrongful conduct and plaintiff's injury; and (4) the defendant acted with the requisite scienter—that is, that it knew or should have known of the duty to disclose or that the statement was misleading, so that some mental culpability more than negligence attached to its acts.¹⁴

[b] Determining whether the tender offer provisions are applicable

Since § 14(d) and (e) of the Securities Exchange Act, added to the Exchange Act by the Williams Act of 1968 (15 USCS § 78n(d) and (e)), as well as the rules adopted thereunder are applicable only where there is a tender offer, it is of critical importance for a person or a company and, thus, for counsel, to know how to determine whether the transaction proposed

11. See the list of pleading requirements set up by the court in *Horowitz v Pownall* (1985, DC Md) 105 FRD 615.

12. The court in *Koppers Co. v American Express Co.* (1988, WD Pa) 689 F Supp 1371, CCH Fed Secur L Rep ¶ 95012, stated that for purposes of the Williams Act, facts are deemed to be material if there is a substantial likelihood that a reasonable investor would consider them important or significant in making an investment decision. The materiality requirement does not require proof of substantial likelihood that disclosure of the omitted fact would have caused a reasonable investor to change his vote, but rather a showing that under all the circumstances the omitted fact would have assumed actual significance in deliberations of the reasonable shareholder. These views find support in *TSC Industries, Inc. v Northway, Inc.* (1976) 426 US 438, 48 L Ed 2d 757, 96 S Ct 2126, CCH Fed Secur L Rep ¶ 95615, motion den 429 US 810, 50 L Ed 2d 70, 97 S Ct 48.

13. *Affiliated Ute Citizens v United States* (1972) 406 US 128, 31 L Ed 2d 741, 92 S Ct 1456, CCH Fed Secur L Rep ¶ 93443, reh den 407 US 916, 32 L Ed 2d 692, 92 S Ct 2430 and reh den 408 US 931, 33 L Ed 2d 345, 92 S Ct 2478.

14. The court in *Koppers Co. v American Express Co.* (1988, WD Pa) 689 F Supp 1371, CCH Fed Secur L Rep ¶ 95012, stated that to be successful on the merits of its claim, a target company must prove the above elements, and in support cited *Lowenschuss v Kane* (1975, CA2 NY) 520 F2d 255, CCH Fed Secur L Rep ¶ 95104.

or already carried out is a tender offer, thereby triggering the tender offer provisions. This is all the more important because the term tender offer has never been precisely defined either in the Act itself or by the Securities and Exchange Commission; Congress left to the Commission the task of providing through its experience concrete meaning to the term and the Commission has decided to do so on a case-by-case basis.

However, the Commission has suggested some elements that are characteristic of a tender offer, which can be used to determine whether one is in the presence of a tender offer and must comply with the pertinent provisions: (1) active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only for a limited period of time; (7) offeree subjected to pressure to sell his stock; and (8) whether the public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company's securities. This list of elements was applied by the court in *Wellman v Dickinson* (1979, SD NY) 478 F Supp 783, CCH Fed Secur L Rep ¶ 90918, 4 Fed Rules Evid Serv 1178, aff'd *Wellman v Dickinson* (1982, CA2 NY) 682 F2d 355, CCH

Fed Secur L Rep ¶ 98731, cert den *Dickinson v SEC* (1983) 460 US 1069, 75 L Ed 2d 946, 103 S Ct 1522, which construed it as establishing the qualities that set a tender offer apart from open market purchases, privately negotiated transactions, or other kinds of public solicitations. It considered the absence of one particular factor, however, not to be necessarily fatal to the characterization of an operation as a tender offer because depending upon the circumstances involved in the particular case, one or more of the above features may be more compelling and determinative than others. For example, lack of publicity should be no deterrent to such a characterization since a principal objective of the Williams Act was to prevent secret corporate takeovers.

In determining how broadly or narrowly to construe this list, it is useful to bear in mind that according to the Supreme Court, in *SEC v Capital Gains Research Bureau, Inc.* (1963) 375 US 180, 11 L Ed 2d 237, 84 S Ct 275, and *SEC v National Secur., Inc.* (1969) 393 US 453, 21 L Ed 2d 668, 89 S Ct 564, CCH Fed Secur L Rep ¶ 92334, Congress intended the Securities Exchange Act to be construed not technically and restrictively, but flexibly to effectuate its remedial purposes, and that it has long been the rule that all the federal securities laws must be given a construction which effectuates their remedial objectives. Thus, the *Wellman* court considered that the absence of a definition apparently was due to the fact that Congress and the Commission believed that for purposes of the federal regulatory

scheme, the term "tender offer" might well encompass transactions yet unborn with characteristics not typical of the transactions then identified in general custom and usage as tender offers.

The advisability of construing broadly the Commission's list is shown by the fact that the open-ended nature of the statutory language on the transaction that may be covered and the broad grant of authority bestowed upon the Commission allowing it to decide on a case-by-case basis what is a tender offer means that its regulations and its application of them will be upheld so long as they concern practices in connection with a tender offer.¹⁵ By contrast, the unadvisability of attacking on constitutional grounds the Commission's way of proceeding and the large latitude accorded to it is shown by the Supreme Court statements in *American Power & Light Co. v SEC* (1946) 329 US 90, 91 L Ed 103, 67 S Ct 133. There it stated that it is constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority since private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. Moreover, the Court considers that there is no constitutional requirement that the legislative standards be translated by the Commission into formal and

detailed rules of thumb prior to their application to a particular case because if that agency wishes to proceed by the more flexible case-by-case method, the Constitution raises no obstacle.

[c] Implying right of action from Commission rules

Where an action is brought under a rule adopted by the Securities and Exchange Commission pursuant to a provision of the Securities Exchange Act, the considerations applicable to determining whether there is a right of action are somewhat different from those employed when the right is to be established directly on a section of the Act.¹⁶ To begin with, it is necessary to ascertain whether the statute under which the rule was promulgated properly permits the implication of a private right of action. To this determination, the method of analysis developed by the Supreme Court, in *Cort v Ash* (1975) 422 US 66, 45 L Ed 2d 26, 95 S Ct 2080; and *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, is fully applicable. If it is found under *Cort* and its progeny that Congress did not intend the statute to be enforced by private actions, then the inquiry is concluded. No private right of action may be implied in such a situation since an agency's rulemaking power

15. *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443.

16. *Angelastro v Prudential-Bache Secur., Inc.* (1985, CA3 NJ) 764 F2d 939, CCH Fed Secur L Rep ¶ 92076, cert den *Prudential-Bache Secur., Inc. v Angelastro* (1985) 474 US 935, 88 L Ed 2d 274, 106 S Ct 267.

cannot exceed the authority granted to it by Congress.¹⁷

However, if the enabling statute permits a private right of action, a second inquiry must then be made: whether a private right of action should be implied from the Commission rule at issue. At this stage it is necessary to determine whether (1) the Commission rule is properly within the scope of the enabling statute, and (2) implying a private right of action will further the purpose of the enabling statute. In determining whether the scope of the statute encompasses the rule it should be noted that the broader and more indefinite the statutory language is, the more latitude there is for making rules within its bounds.¹⁸ For example, § 14(e) prohibits misleading or fraudulent practices "in connection with a tender offer," which constitutes a rather open-ended formulation of the description of the transactions which might be covered by the ban.¹⁹ Where the enabling statute authorizes an implied right of action, a private suit could be permitted under Commission rules within

the scope of the enabling statute if doing so is not at variance with the purpose of the statute. The rationale that has been advanced for this conclusion is that if Congress intended to permit private actions for violations of the statute, it would be contrary to its intention to deny private parties the right to sue under the rules that implement that statute.²⁰ The second stage inquiry should focus on whether granting private parties the ability to bring suit under the rule will further the substantive purposes of the enabling statute. This evaluation is initially made by the Commission when it determines that it is necessary to adopt a rule to give effect to a statutory provision. That evaluation is entitled to deference by the courts in light of the broad grant of authority that was bestowed upon the Commission to define the particular practices that are not only prohibited by the statute, but also all those intended to prevent the prohibited ones, and all the more so if the statute being implemented is ambiguous on the point at issue

17. *Robertson v Dean Witter Reynolds, Inc.* (1984, CA9 Cal) 749 F2d 530, CCH Fed Secur L Rep ¶ 91868.

18. *Angelastro v Prudential-Bache Secur., Inc.* (1985, CA3 NJ) 764 F2d 939, CCH Fed Secur L Rep ¶ 92076, cert den *Prudential-Bache Secur., Inc. v Angelastro* (1985) 474 US 935, 88 L Ed 2d 274, 106 S Ct 267.

19. *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, *infra* §§ 12, 18[b], and 19, where that phrase was construed broadly to include fraudulent or misleading statements on the part of the offeror or the target company designed either to encourage or prevent not only direct dealings between the target company shareholders and the tender offeror, but also trading on the open market, even where option traders are involved, as well as trading on the basis of nonpublic information available only to insiders relating to the impending announcement of a tender offer and, thus, before the tender offer has become effective.

20. Note, *Private Causes of Action Under SEC Rule 14e-3*, 51 Geo Wash L Rev 290, 303 (1983).

and the Commission's interpretation is a permissible one.²¹

If this analysis concludes that a private right of action can be implied, the inquiry moves into a third stage, which is as crucial as the previous two, to determine whether the right can be implied on behalf of the specific class of person that is invoking it. This determination is based initially on the question which is the class of person that the enabling act for the adoption of any Commission rule intended to protect. If the plaintiff belongs to the protected class, then it must be determined whether an award of damages or a grant of injunctive relief would contribute to attaining the statutory objectives. Thus, even when it is found that the statute did not intend to protect the plaintiff's class by allowing it to recover damages, it could nevertheless be found, where the other requirements for implying a right of action have been met, that the statute allows the plaintiff to gain standing to seek injunctive relief if it independently satisfies the appropriate equity standards.²²

II. General Considerations

§ 4. Congressional intent as basis for implied right of action

[a] Congressional intent at time of enactment of § 14(d)-(f)

In determining whether a private right of action could be implied

under the Williams Act of 1968, which added § 14(d)-(f) of the Securities Exchange Act of 1934 (15 USCS §§ 78n(d)-(f)), the courts in the following cases relied on the purpose of the Act as enacted and revealed by the latter's legislative history, and concluded that it is to protect the interests of a company's shareholders as well as of investors generally where the company is the target of efforts to change its control through a tender offer, and that the means provided therefor is the required disclosure of material information.

The Supreme Court, in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, stated that in deciding whether to imply a private right of action for a tender offeror suing for damages under the tender offer provisions of the Williams Act of 1968, which added § 14(d) and (e) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), the proper basis of decision was the Williams Act's purpose as revealed by its legislative history. The latter showed, said the Court, that the Act's purpose was the narrow one of curbing through regulation the unregulated activities of tender offerors in order to protect target company shareholders and investors in general by affording them adequate information to enable them to decide knowledgeably how to react to a tender offer. In so

21. *Angelastro v Prudential-Bache Secur., Inc.* (1985, CA3 NJ) 764 F2d 939, CCH Fed Secur L Rep ¶ 92076, cert den *Prudential-Bache Secur., Inc. v Angelastro* (1985) 474 US 935, 88 L Ed 2d 274, 106 S Ct 267; *Polaroid Corp. v Disney* (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095.

22. *Polaroid Corp. v Disney* (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095.

doing, it referred to *Rondeau v Mosinee Paper Corp.* (1975) 422 US 49, 45 L Ed 2d 12, 95 S Ct 2069, CCH Fed Secur L Rep ¶ 95205, where it stated that the purpose of the Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information.

The court in *Pryor v United States Steel Corp.* (1986, CA2 NY) 794 F2d 52, CCH Fed Secur L Rep ¶ 92804, cert den *United States Steel Corp. v Pryor* (1986) 479 US 954, 93 L Ed 2d 393, 107 S Ct 445, stated that the class for whose special benefit the Williams Act of 1968, which added § 14(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), was enacted was that of the target company shareholders and, consequently, it was likely that Congress intended them to be able to seek relief directly by exercising a private right of action. The court pointed out that there was indication of legislative intent to create this private remedy because despite the silence in this regard of the legislative history, such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment. Such was the case, said the court, of § 14(d)(6), dealing with the pro rata acceptance by the tender offeror of tendered shares, which (a) identifies its beneficiaries—that is, shareholders that have tendered—and (b) confers a substantive right on them, namely the right to have their shares purchased on a pro rata basis. It went on to add that private enforcement was important to effectuating Congress' goal, from which

it was reasonable to infer that Congress intended such enforcement where it is the best way to secure the right created by its legislation. The court noted that adequate protection of that right might not be obtained through enforcement by the Securities and Exchange Commission since that agency has limited resources and perhaps other priorities.

The court in *Wellman v Dickinson* (1979, SD NY) 475 F Supp 783, CCH Fed Secur L Rep ¶ 96918, 4 Fed Rules Evid Serv 1178, affd *Wellman v Dickinson* (1982, CA2 NY) 682 F2d 355, CCH Fed Secur L Rep ¶ 98731, cert den *Dickinson v SEC* (1983) 460 US 1069, 75 L Ed 2d 946, 103 S Ct 1522, stated that the underlying purposes of the Williams Act of 1968, which added § 14(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), were to give protection to shareholders in shifts of corporate control, to require prior disclosure if the shift occurred through a tender offer, and to require a postacquisition filing if the shift occurred otherwise. It concluded that these purposes would be defeated if standing were denied to the shareholders to whom an offer to purchase was not made, as in this case, where an offer was made only to a select group of shareholders.

The court in *Weeks Dredging & Contracting, Inc. v American Dredging Co.* (1978, ED Pa) 451 F Supp 468, CCH Fed Secur L Rep ¶ 96414, 1978-1 CCH Trade Cases ¶ 62010, held that the fundamental purpose of the Williams Act of 1968, which added § 14(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), is to protect

investors and that it is entirely consistent with such purpose to allow a tender offeror to sue under § 78n(e) for injunctive relief against false and misleading statements made by the target company's management.

In deciding to imply a private right of action, the court in *Diceon Electronics, Inc. v Calvary Partners, L.P.* (1991, DC Del) 772 F Supp 859, CCH Fed Secur L Rep ¶ 96930, found that the Williams Act of 1968, which added the new substantive provisions of § 14(d) and (e) to the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), had as its primary concern the rising use of tender offers in contests for corporate control and the need to provide shareholders with accurate information concerning such offers. It considered the central factor of its decision to be whether Congress intended to create, either expressly or by implication, a private cause of action, and that the other three factors of the four factor test developed by the Supreme Court, in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, should not be applied with equal weight.²³ The court agreed with the

statement in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Curran* (1982) 456 US 353, 72 L Ed 2d 182, 102 S Ct 1825, that an accurate determination of legislative intent must take into account the contemporary legal context in which Congress acted.²⁴ However, noted the court, the inquiry into legislative intent cannot begin and end with only a discussion of the general principles behind the Act; rather, a key element in determining that intent is the language of the statute itself and, thus, it varies with each section's unique language.

The court in *Gearhart Industries, Inc. v Smith International, Inc.* (1984, CA5 Tex) 741 F2d 707, CCH Fed Secur L Rep ¶ 91667, stated that the purpose of the Williams Act of 1968, which added § 14(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), is not to tip the scales in favor of management or its opponents, but to insure that a public shareholder, confronted by a cash tender for his stock, can obtain adequate information about the qualifications and intentions of the offering party before responding to the offer, and held that the disclosure of misleading information violates

23. The other factors are (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (3) whether the cause of action is one traditionally relegated to state law.

24. It is appropriate to note that in *Merrill Lynch* the Supreme Court stated that in determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted and, more precisely, Congress' perception of the law that it was shaping or reshaping. The Court indicated that when Congress enacts new legislation, the dispositive question is whether it intended to create a private remedy as a supplement to the express enforcement provisions of the statute, and that if Congress' intent is construed to that effect, there is no need to consider any of the other factors discussed in *Cort v Ash* (1975) 422 US 66, 45 L Ed 2d 26, 95 S Ct 2080, for determining whether to imply a private right of action.

§ 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act, and provides the basis for implying on behalf of a target company a right of action for corrective disclosure.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, stated that where neither the Williams Act of 1968, which added § 14(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), nor case law gives a final answer to the question whether to imply a private right of action under its provisions, judicial inquiry must be guided by the apparent scope and purpose of the Act. Thus, it indicated that the legislative history of the Act reveals that one of the goals of its drafters was to avoid tipping the scales either in favor of management or in favor of the person making the takeover bid, and to avoid discouraging the making of tender offers by threatening potential offerors with the spectre of enormous financial liability.

The court in *Re Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation* (1979, WD Tex) 467 F Supp 227, stated that the legislative history of the Williams Act of 1968, which added § 14(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), shows that the Williams Act was designed specifically for the protection of the investor, and supports the implication of a private action for damages under § 14(e) on behalf of target company shareholders.

Where a tender offeror charged the target company with failing to

make proper disclosure and engaging in manipulative acts or practices in order to repel the tender offer, and sued for injunctive relief, the court in *Mobil Corp. v Marathon Oil Co.* (1981, CA6 Ohio) 669 F2d 366, CCH Fed Secur L Rep ¶ 98399, cert den *Mobil Corp. v Marathon Oil Co.* (1982) 455 US 982, 71 L Ed 2d 691, 102 S Ct 1490, guided itself by the purpose of the Williams Act of 1968, which added § 14(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), in deciding whether to imply a private right of action on behalf of the tender offeror. It found that the Act's purpose is to protect the free, informed choice of shareholders confronted with the decision whether to tender their shares to a tender offeror.

[b] Congressional intent at time of amendment of § 14(d) and (e)

The courts in the following cases, in determining whether Congress implicitly intended to provide for private rights of action under the tender offer provisions of the Williams Act of 1968, adding § 14(d) and (e) to the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), held that an important factor was that by the time Congress amended the Act the courts had routinely and consistently construed the Act to provide implicitly for such a right.

In its inquiry whether the Williams Act of 1968, as amended, which added § 14(d) and (e) to the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), gave rise to a private right of action on behalf of target companies, the court in *Florida Commercial Banks v Culverhouse* (1985, CA11 Fla)

772 F2d 1513, CCH Fed Secur L Rep ¶ 92321, found that Congress had specifically intended to create such right. In reaching this finding, the court followed the Supreme Court, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Curran* (1982) 456 US 353, 72 L Ed 2d 182, 102 S Ct 1825, where it was held that the fact that Congress has conducted a comprehensive re-examination and significant amendment of a statute and left intact the statutory provisions under which the federal courts had routinely and consistently implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.

In its examination of any evidence of legislative intent to create or deny a private cause of action on behalf of issuers suing under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), the court in *Liberty Nat. Ins. Holding Co. v Charter Co.* (1984, CA11 Ala) 734 F2d 545, CCH Fed Secur L Rep ¶ 91539, applied a test formulated in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Curran* (1982) 456 US 353, 72 L Ed 2d 182, 102 S Ct 1825, where the Supreme Court held that the fact that Congress has conducted a comprehensive re-examination and significant amendment of a statute and left intact the statutory provisions under which the federal courts had routinely and consistently implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy. The instant court commented that although this evidence is not dispositive of congressional intent, it is indicative of it. It started off its application of the test to the case at hand by

stating that § 14(d) and (e) were enacted into law by Congress in 1968 and up to the time of this case had been amended only once, in 1970. It concluded that this two-year period between 1968 and 1970 was insufficient for any judicial construction of a statute to rise to the level of being routine and consistent.

[c] Intent of SEC rules adopted pursuant to § 14(d)-(f) as enacted

In the following case, the court held that by broadly wording the originally enacted provision of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) that empowers the Securities and Exchange Commission to implement that section by adopting rules and regulations, Congress intended a rule such as SEC Rule 14e-3 (17 CFR § 240.14e-3 (1991)), prohibiting insider trading in connection with tender offers, to be a valid exercise of the Commission's rulemaking authority, and to provide the basis for implying a private right of action.

In reaching its decision that a right of action can be implied from Rule 14e-3 of the Securities and Exchange Commission (17 CFR § 240.14e-3 (1991)), which prohibits its corporate insiders from trading on the basis of nonpublic information that a tender offer has been proposed, the court in *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, had to decide first whether the Rule had been validly promulgated under its enabling statutory provision, namely § 14(e) of the Securities Exchange Act of 1934 (15 USCS

§ 78n(e)), as enacted by the Williams Act of 1968. To do so, the court considered whether the scope of the Rule was encompassed within the scope of the section's prohibition of untrue or misleading statements or fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer. It held that the Rule appeared on its face to be a reasonable administrative fulfillment of the Securities and Exchange Commission's statutory duty to define the particular acts that are banned by § 14(e) of the Act. It explained that when Congress defined the scope of § 14(e) in this indeterminate language, it intended the precise application of the statute to be worked out over time, in light of practical experience as to takeover practices, by the Commission, which it empowered to issue rules and regulations, as well as by the courts, so that this language would give both the Commission and the courts enough latitude to deal effectively with transactions not envisioned or imagined in 1968 at the time of enactment of § 14(e), but that nevertheless required the application of the statute in order to achieve its purpose—namely to afford protection to investors.

In the following case, the court held that the Securities and Exchange Commission's All Holders Rule (17 CFR § 240.14d-10(a)), insuring equal treatment of all shareholders by the tender offeror, supported the implication of a private right of action since it was adopted pursuant to the Williams Act of 1968, as to which Congress was aware that the courts would

enforce its provisions by implying private rights of action.

The court in *Polaroid Corp. v Disney* (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095, held that the Securities and Exchange Commission's All Holders Rule (17 CFR § 240.14d-10(a)) requiring a tender offeror to extend its offer to all security holders of the class of securities subject to the tender offer, represents a valid exercise of the Commission's rulemaking authority under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS §§ 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, and therefore, provides the basis for implying a private right of action. The court noted that since Congress adopted § 14(d) and (e) against a background understanding that courts would create private remedies that would further the purposes of the statute, Congress most likely intended to create a private right of action enabling target company shareholders to enforce § 14(d) and (e), pursuant to which the All Holders Rule was promulgated. It recognized that the Rule's intent of insuring that all holders of a class of securities subject to a tender offer receive fair and equal treatment was consonant with the Williams Act's purposes. The court added that implying a private right of action under the Rule itself also furthers the purpose of the Act because it serves the need to provide a high enforcement level to deter violations, to compensate injured shareholders, and to allow them to protect themselves from irreparable harm through an injunction.

[d] Intent of SEC rules adopted pursuant to § 14(d)-(f) as amended

The court in the following case held that Rule 14e-1(c) of the Securities and Exchange Commission (17 CFR § 240.14e-1(c)), requiring prompt payment of cash for shares tendered in connection with a tender offer, supported the implication of a private right of action because it was in line with the congressional intent at the time of amending § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), under which the Rule was adopted, to regulate practices relating to the timing of payment for tendered shares, and that making such implication was not determined by whether those provisions made fraud a requirement of the prohibited conduct.

After ascertaining congressional intent, the court in *Caleb & Co. v E. I. Du Pont de Nemours & Co.* (1985, SD NY) 615 F Supp 96, CCH Fed Secur L Rep ¶ 92226, recognized an implied private right of action on behalf of tendering shareholders to enforce Rule 14e-1(c) of the Securities and Exchange Commission (17 CFR § 240.14e-1(c)), which requires tender offerors to pay cash promptly for the shares tendered to and accepted by it and which was promulgated under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)). The court pointed to intent indicia in the fact that the Rule was enacted pursuant to the authority vested in the Commission by the final sentence of § 14(e), which was itself enacted in 1970 as an amendment to the remainder of that section. It observed that by the time of the amendment the courts

had already created a private right of action under § 14(e), so that Congress may be deemed to have been aware of such judicially created right. However, said the court, the sentence of § 14(e) authorizing the Commission to promulgate rules reasonably designed to prevent such acts and practices as are fraudulent, deceptive, or manipulative, altered the elements of the cause of action necessary to allege a violation, so that the 1970 amendment to § 14(e) was more similar to a new right or provision; consequently, Congress' awareness of a judicially recognized private right of action arising by implication under the statute was less meaningful when invoked as the basis for inferring Congress' intent for the judiciary to imply such a right from rules promulgated pursuant to the amendment's new provision. Considering the consistency of a private right of action with the underlying purposes of the legislative scheme, the court found that the regulation of practices relating to the timing of payment for tendered shares was a direct concern of Congress, as established by the history of the amendment, so that to imply a private right of action to enforce Rule 14e-1(c) would further the congressional goal in enacting the statute.

§ 5. Relation of Williams Act provisions among themselves

The court in the following case stated that the existence of an implied right of action under one provision of the Williams Act of 1968 (15 USCS 78m(d)-(e) and n(d)-(f)) does not mean that such a right must be implied under every provision of the Act.

The court in *Diceon Electronics, Inc. v Calvary Partners, L.P.* (1991, DC Del) 772 F Supp 859, CCH Fed Secur L Rep ¶ 96930, stated that the existence of an implied right of action for equitable relief in favor of target companies under §§ 13(d) and 14(e) of the Securities Exchange Act of 1934 (15 USCS §§ 78m(d) and 78n(e)), added to the Exchange Act by the Williams Act of 1968, does not necessarily mean that such a right of action exists under § 14(d).

§ 6. Implying right of action by comparing § 14(e) with § 10(b) of Exchange Act and SEC Rule 10b-5**[a] Purchaser-seller requirement of § 10(b) or Rule 10b-5 not applicable under § 14(e)**

In the following cases the courts recognized that the implication of a right of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is not limited by the purchaser-seller requirement found in § 10(b) of that Act (15 USCS § 78j(b)) and in Rule 10b-5 (17 CFR § 240.10b-5) of the Securities and Exchange Commission.

The Supreme Court, in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, reh den *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 970, 52 L Ed 2d 371, 97 S Ct 1668, pointed out in dictum that, unlike § 10(b) of the Securities Exchange Act of 1934 (15 USCS 78j(b)), which contains language that gives rise to a purchaser-seller requirement for gaining standing to sue under it, § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is

broadly phrased to proscribe fraudulent activities in connection with any tender offer or solicitation and, therefore, does not contain such requirement for the implication of a right of action under it. Although it expressly stated that it did not intimate any view, since the issue was not before it, on whether shareholders-offerees, the class protected by § 14(e), have an implied cause of action under that provision, it commented that it may well be that Congress desired to protect, among others, shareholder-offerees who decided not to tender their stock due to fraudulent misrepresentations by persons opposed to a takeover attempt, and those shareholders could perhaps state a claim under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), even though they did not tender their securities, which they could not do under § 10(b).

The court in *Re Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation* (1979, WD Tex) 467 F Supp 227, stated that § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), does not contain the "in connection with the purchase or sale of any security" language of Rule 10b-5 of the Securities and Exchange Commission (17 CFR § 240.10b-5) and, therefore, the Supreme Court decisions narrowing the scope of actions under the Rule do not significantly diminish the force of decisions permitting a nontendering shareholder standing under § 14(e). The court observed that absent a purchaser-seller limitation, the possibility of a boundless class of non-purchasing or nonselling plaintiffs seeking relief for violations of § 14(e) does not exist as it might

under Rule 10b-5, because the class of nontendering shareholders is limited to the persons actually confronted with the offer—that is, holders of target company stock at the time the offer was made—which is an objectively demonstrable fact.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, agreed with the view that, unlike a suit under Rule 10b-5 of the Securities and Exchange Commission (17 CFR § 240.10b-5), an action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) does not require that the plaintiff be either a seller or a buyer of any securities; on the contrary, the primary contribution of the Williams Act of 1968 (15 USCS § 78m(d)-(e) and n(d)-(f)) to the antifraud arsenal of the securities laws is that under § 14(e), added by the Williams Act, the plaintiff may gain standing if he has only been injured by fraudulent activities of others perpetrated in connection with a tender offer, regardless of whether he has tendered his shares. It followed, said the court, that the reasoning of Supreme Court decisions narrowing the scope of actions under Rule 10b-5 is not directly applicable to the question of standing under § 14(e), which does not contain the Rule's seller-purchaser requirement. To illustrate this the court noted that the possibility of a boundless class of nonpurchasing or nonselling plaintiffs seeking relief for violations of the securities laws does not exist under § 14(e) as it might under the Rule absent a

seller-purchaser requirement, since the class of § 14(e) shareholders is limited to the persons actually confronted with the offer because at the time it was made they held target shares.

☆ OBSERVATION: It should be noted that the Williams Act was construed in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, to have been adopted by Congress for the protection of not only shareholders of the target company, but also of investors in general and that as a result, a right of action implied under § 14(e) is not limited to those persons actually holding target shares at the time of the tender offer.

The court in *Hurwitz v R. B. Jones Corp.* (1977, WD Mo) 76 FRD 149, CCH Fed Secur L Rep ¶ 96261, 24 FR Serv 2d 566, held that the purchaser-seller requirement for a shareholder to gain standing to assert claims under § 10(b) of the Securities Exchange Act of 1934 (15 USCS § 78j) does not apply to deny standing under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) to a shareholder who has neither purchased nor sold shares as a result of the tender offeror's allegedly unlawful acts or omissions, since such a shareholder is also a member of the class which § 14(e) was designed to protect.²⁵

☆ CAUTION: Although the preceding cases recognized that a right of action under § 14(e) of

the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is not limited by the purchaser-seller requirement found in § 10(b) of that Act (15 USCS § 78j(b)) or by Rule 10b-5 (17 CFR § 240.10b-5) of the Securities and Exchange Commission, it may be important to note the reasoning of the Supreme Court, in *Central Bank, N.A. v First Interstate Bank, N.A.*, (1994, US) 128 L Ed 2d 119, 94 CDOS 2687, 94 Daily Journal DAR 5160, CCH Fed Secur L Rep 98178, 8 FLW Fed S 33, where the Court held that there is no private right of action for aiding and abetting a fraud under § 10(b). The Securities and Exchange Commission argued that the term "directly or indirectly" indicated the intention of Congress to create aiding and abetting liability under the statute, but the Supreme Court stated that this interpretation was incorrect, in part, because numerous other provisions of the 1934 Act used this term in a way that did not impose aiding and abetting liability. Although the Supreme Court did not list § 78n specifically in support of its conclusion, § 78n does contain the "directly or indirectly" term, and the Court analogized to § 78m in support of its reasoning, which is the section that provides the filing requirements of § 78n.

[b] Right of action for nondisclosure supported by § 14(e), not by § 10(b) or Rule 10b-5

In the following case, the court compared § 14(e) of the Securities Exchange Act of 1934 (15 USCS

§ 78n(e)) with § 10(b) of that Act (15 USCS § 78j(b)) and Securities and Exchange Commission Rule 10b-5 (17 CFR § 240.10b-5), and held that while an allegation of misrepresentation, deception, or fraud and a showing of causation are requirements common to a private cause of action predicated on any of them, § 14(e) alone supports an action based on nondisclosure.

The court in *Berman v Gerber Products Co.* (1978, WD Mich) 454 F Supp 1310, CCH Fed Secur L Rep ¶ 96506, stated that it is well established that nondisclosure alone may be deemed fraudulent or deceptive as those terms are used in the second clause of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), thereby supporting the implication of a private right of action, although the first clause of § 14(e) does not deal with total nondisclosure, and the equivalent language in Securities and Exchange Commission Rule 10b-5 (17 CFR § 240.10b-5) has been interpreted to refer only to affirmative misrepresentations and half truths. Apart from the different construction of the term nondisclosure under those provisions, the court noted that neither § 10(b) of the Exchange Act (15 USCS § 78j), nor Rule 10b-5, both of which support private rights of action, is violated by a breach of fiduciary duty without any deception, misrepresentation, or nondisclosure, and that given the similarity of purpose of § 10(b) and § 14(e), the same limitation is also applicable to § 14(e). The court explained that § 14(e) carries over the requirements of Rule 10b-5 into the area

25. On the nonapplicability of a purchaser-seller requirement to § 14(e), see also *Sargent v Genesco, Inc.* (1974, CA5 Fla) 492 F2d 750, CCH Fed Secur L Rep ¶ 94496; and

Smallwood v Pearl Brewing Co. (1974, CA5 Tex) 489 F2d 579, CCH Fed Secur L Rep ¶ 94403, cert den 419 US 873, 42 L Ed 2d 113, 95 S Ct 134.

of tender offers, so that the elements of a violation of § 14(e) are identical to those established under the Rule, and under both causation is an essential element requiring the plaintiff to demonstrate a causal nexus between the defendants' wrongful conduct and his loss; however only under § 14(e) is there the requirement that the action be "in connection with a tender offer."

[c] Right of action implied under § 14(e) despite right under § 10(b) of Exchange Act

In the following case the court held that the fact that there is a right of action under § 10(b) of the Securities Exchange Act of 1934 (15 USCS § 78j), does not preclude the creation by implication of a private right of action under § 14(e) of the same Act (15 USCS § 78n(e)).

The court in *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, held that a right of action on behalf of option traders for injuries resulting from a breach of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) and Rule 14e-3 of the Securities and Exchange Commission (17 CFR § 240.14e-3 (1991)) may be implied even though relief already exists under § 10(b) of the Securities Exchange Act of 1934 (15 USCS § 78j) because the law in the Second Circuit is that a plaintiff may simultaneously pursue duplicative remedies under the securities laws.

[d] Right of action under Rule 14e-1(c) not determined by analogy to § 10(b) of Exchange Act

In the following case the court

held that from the existence of a private right of action under § 10(b) of the Securities Exchange Act of 1934 (15 USCS § 78j) it does not follow that such a right must also be implied from Rule 14e-1(c) of the Securities and Exchange Commission (17 CFR § 240.14e-1(c)), and that the fact that § 10(b) has a fraud requirement while Rule 14e-1(c) has no such requirement does not preclude the implication of a private right of action under the Rule.

The court in *Caleb & Co. v E. I. Du Pont de Nemours & Co.* (1985, SD NY) 615 F Supp 96, CCH Fed Secur L Rep ¶ 92226, indicated that the existence of a private right of action under § 10(b) of the Securities Exchange Act of 1934 (15 USCS § 78j), at the time of the 1970 amendment to § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), which provided the statutory basis for Rule 14e-1(c) of the Securities and Exchange Commission (17 CFR § 240.14e-1(c)), requiring tender offerors to pay cash promptly for the shares tendered to and accepted by it did not set a precedent from which to infer a similar right under the latter rule, and based on other grounds its holding that a private right of action exists to enforce Rule 14e-1(c). The court explained that the relationship between Rule 10b-5 of the Securities and Exchange Commission (17 CFR § 240.10b-5) and § 10(b) does not pose the problem presented by § 14(e) and Rule 14e-1(c) of a section that is violated only by fraud and a rule that can be violated without a showing of scienter. It stated that private actions under

§ 14(e) required a showing of actual fraud, but that the rules issued pursuant to the 1970 amendment to that section, authorizing the SEC to promulgate rules "reasonably designed to prevent such acts and practices as are fraudulent, deceptive, or manipulative," did not necessarily require an assertion of scienter to allege a violation, thereby altering the elements of the cause of action necessary to allege a violation. Thus, said the court, the SEC was given the authority to forbid acts that were not themselves fraudulent but could reasonably prevent fraud. However, this substantive difference does not preclude the implication of a private right under Rule 14e-1(c) because the predicate for a private right of action under it or under § 14 is not an equivalent right under § 10(b): private rights of action under the securities laws, noted the court, do not uniformly have as a prerequisite an allegation of fraud. The court illustrated this by pointing out § 11(a) of the Securities Act of 1933 (15 USCS § 77k(a)), as to which the Supreme Court, in *Herman & MacLean v Huddleston* (1983) 459 US 375, 74 L Ed 2d 548, 103 S Ct 683, CCH Fed Secur L Rep ¶ 99058, indicated that the liability that it provides against the issuer of a security is virtually absolute, even for innocent misstatements. It further observed that a private right of action has been implied under SEC Rule 14a-7(b)(1) (17 CFR § 240.14a-7) simply where copies of proxy materials were not mailed by the issuer as required; and just as there was no requirement of fraud as an essential element of the pleadings under Rule 14a-7(b)(1) there is none under Rule 14e-1(c) either. The court added that in recognizing private

rights of action under rules issued pursuant to § 14, the predicate has been the violation of rules designed by the SEC to reach the full range of its statutory authority. As a result, concluded the court, the absence in Rule 14e-1(c) of the fraud element found in §§ 10(b) and 14(e) does not compel the conclusion that Congress did not intend to extend to it a private right of action similar to the one extended under the fraud-based Rule 10b-5.

[e] Rule 14e-3 and § 14(e) treated like SEC Rule 10b-5 by analogy

In the following cases, courts drew analogies to Rule 10b-5 of the Securities and Exchange Commission (17 CFR § 240.10b-5) and, as a result, concluded, either expressly or by implication, that a right of action can also be implied under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)).

Reasoning by analogy to cases interpreting Rule 10b-5 of the Securities and Exchange Commission (17 CFR § 240.10b-5), the court in *Burlington Industries, Inc. v Edelman* (1987, MD NC) 666 F Supp 799, CCH Fed Secur L Rep ¶ 93338, 1987-1 CCH Trade Cases ¶ 67649, stated that a private plaintiff must prove the following elements to demonstrate a violation of SEC Rule 14e-3 (17 CFR § 240.14e-3) through insider trading during the course of a tender offer: (a) standing, (b) breach of duty, (c) materiality, (d) scienter, and (e) injury.

The court in *Re Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation* (1979, WD Tex) 467 F Supp 227, stated that the implica-

tion of a right of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), is appropriate in light of the fact that § 14(e) tracks in large measure the language of Rule 10b-5 of the Securities and Exchange Commission (17 CFR § 240.10b-5), and that it was enacted at a time when Congress was fully aware that the courts had long been entertaining private damage suits under the Rule.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, stated that in light of the fact that (1) § 14(e) of the Exchange Act (15 USCS § 78n(e)), tracks in large measure the language of Rule 10b-5 of the Securities and Exchange Commission (17 CFR § 240.10b-5), from which a private right of action has been implied, and (2) § 14(e) was enacted at a time when Congress was fully aware that the courts had long been entertaining private damage suits under the Rule, it was a sound conclusion to hold that although § 14(e) does not expressly provide for a private right of action, it nevertheless affords the basis for implying one.

§ 7. Relation to other federal law provisions

[a] Right of action under § 14(e) by analogy to § 14(a) of Exchange Act

The courts in the following cases stated that by analogy to § 14(a) of the Securities Exchange Act of 1934 (15 USCS § 78n(a)), a right of action could be implied under § 14(e) of the Exchange Act (15 USCS § 78n(e)).

The court in *Re Commonwealth*

Oil/Tesoro Petroleum Corp. Secur. Litigation (1979, WD Tex) 467 F Supp 227, stated that the implication of a private right of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is appropriate in light of the same considerations that led the Supreme Court to find a private remedy under the proxy rules of § 14(a) of the Exchange Act (15 USCS § 78n(a)) in *J. I. Case Co. v Borak* (1964) 377 US 426, 12 L Ed 2d 423, 84 S Ct 1555.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, stated that given the considerations that led the Supreme Court, in *J. I. Case Co. v Borak* (1964) 377 US 426, 12 L Ed 2d 423, 84 S Ct 1555, to find a private remedy under the proxy rules of § 14(a) of the Securities Exchange Act of 1934 (15 USCS § 78n(a)), it was a sound conclusion to hold that, although § 14(e) of the Exchange Act (15 USCS § 78n(e)) likewise does not expressly provide for a private right of action, it does afford the basis for implying one.

[b] Right of action under § 14(a) of Exchange Act but not under § 14(d) and (e)

The courts in the following cases held that from the fact that a right of action has been implied from § 14(a) of the Securities Exchange Act of 1934 (15 USCS § 78n(a)) it does not necessarily follow that a right of action must also be implied from § 14(d) and (e) of the Exchange Act (15 USCS § 78n(d) and (e)).

The court in *Liberty Nat. Ins. Holding Co. v Charter Co.* (1984,

CA11 Ala) 734 F2d 545, CCH Fed Secur L Rep ¶ 91539, determined that a private right of action could not necessarily be implied from § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)) by comparing them to § 14(a) of the same Act (15 USCS § 78n(a)). It pointed out that § 14(a), (d) and (e) are formally part of 15 USCS § 78n (1982), entitled "Proxies," and that the introductory language of § 14(d) is virtually identical to that of § 14(a), both sections beginning with these words: "It shall be unlawful for any person . . . by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise . . ." The court conceded that the identical nature of the introductory language and the fact that § 14(d) and (e) appear under the same title as § 14(a), combined with the fact that the Supreme Court, in *J. I. Case Co. v Borak* (1964) 377 US 426, 12 L Ed 2d 423, 84 S Ct 1555, found § 14(a) to provide an implied private right of action for individuals to challenge proxy contests, lend, at first blush, support to the proposition that an implied right of action for an issuer to expel an unwanted tender offeror is consistent with the congressional scheme. However, the court went on to say, the mere use of the same introductory boilerplate language cannot compel an identical treatment of § 14(a) and (d). It then observed that the Supreme Court, without overruling *Borak*, appeared to have limited its holding to its facts when it stated in *Touche Ross & Co. v Redington* (1970) 442 US 560, 61 L Ed 2d 82, 90 S Ct 2479, CCH Fed Secur L Rep ¶ 96894, that it did not ques-

tion the actual holding of *Borak*, but that it declined to read the opinion so broadly that virtually every provision of the securities Acts gave rise to an implied private cause of action. The Supreme Court then cited *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, where it construed § 14(d) and (e) not to give rise to an implied right of action for tender offerors; the instant court interpreted this citation of *Piper* to mean that the Court in *Touche Ross* did not believe that the *Borak* rationale for implying a private remedy under § 14(a) extends to § 14(d) and (e).

The court in *Florida Commercial Banks v Culverhouse* (1985, CA11 Fla) 772 F2d 1513, CCH Fed Secur L Rep ¶ 92321, stated that the implication of a private right of action did not necessarily follow from the fact that only four years before the passage of the Williams Act, which in 1968 added § 14(d) and (e) to the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), the Supreme Court, in *J. I. Case Co. v Borak* (1964) 377 US 426, 12 L Ed 2d 423, 84 S Ct 1555, held that § 14(a) of the Exchange Act (15 USCS § 78n(a)) permitted a shareholder to sue for damages on behalf of the corporation to redress injuries from false and misleading proxy solicitation materials distributed in violation of that provision. It could be argued, said the instant court, that given the Williams Act's origin in § 78n(a), Congress had ample reason to assume that the federal judiciary would imply certain private rights of action to enforce the newly enacted mandates. However, the fact that Con-

gress might have intended to preserve the private right of action implied in Borak on behalf of shareholders does not necessarily lead to the conclusion that Congress also intended to preserve or create a remedy for target companies under § 14(e), declared the court.

[c] Right of action under § 14(d) and (e) for nonactionable violations of other provisions—§ 7 of Exchange Act and Federal Reserve Board Regulations G, T, U, and X

The courts in the following cases held that while a plaintiff does not have a right of action under § 7 of the Securities Exchange Act (15 USCS § 78g) or Federal Reserve Board Regulations G, T, U, and X (12 CFR §§ 207, 220, 221, and 224), it may nevertheless have standing to sue under § 14 (d) and (e) of the Securities Exchange Act (15 USCS § 78n(d) and (e)) where noncompliance with the former provisions has not been disclosed as required under the latter provisions and regulations adopted thereunder.

The court in *Polaroid Corp. v Disney* (1988, **CA3 Del**) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095, held that a target company has an implied right of action under § 14(e) of the Securities Exchange Act (15 USCS § 78n(e)) to bring suit against a tender offeror who has misrepresented its compliance with Regulations G, T, U, and X (12 CFR §§ 207, 220, 221, and 224) promulgated by the Federal Reserve Board under § 7 of the Securities Exchange Act (15 USCS § 78g), requiring that loans made to purchase margin stock that are secured directly or indirectly by any

margin stock may not exceed 50 percent of the value of the stock being purchased, even though the target has no implied private remedy to sue under such Regulations.

Where a target company alleged that a tender offeror violated § 7 of the Securities Exchange Act (15 USCS § 78g) and Federal Reserve Board Regulations G, T, U, and X (12 CFR §§ 207, 220, 221, and 224), in that banks and broker-dealers are prohibited from lending more than 50 percent of funds used to purchase stock if such stock is to be used to secure the loan, and the tender offeror was a shell company which would incur more than 50 percent debt if it acquired the target company's stock, the court in *Koppers Co. v American Express Co.* (1988, **WD Pa**) 689 F Supp 1371, CCH Fed Secur L Rep ¶ 95012, recognized that a target lacks standing to enforce the margin requirements since § 7 does not confer any private right of action, enforcement power lying with the Federal Reserve Board, but a target certainly has standing under § 14(d) and (e) of the Securities Exchange Act (15 USCS § 78n(d) and (e)) to allege a failure to disclose material margin violations in Schedule 14D-1 of Regulation 14D of the Securities and Exchange Commission (17 CFR § 240.14d-100), which the offeror is required to file pursuant § 14(d) and (e) in connection with its tender offer.

To the same effect, see also *Revlon, Inc. v Pantry Pride, Inc.* (1985, **DC Del**) 621 F Supp 804, CCH Fed Secur L Rep ¶ 92348.

[d] —§ 4(a) of Bank Holding Company Act

The court in the following case

held that a private right of action may be implied under § 14 (d) and (e) of the Securities Exchange Act (15 USCS § 78n(d) and (e)) for failure to disclose a violation of § 4(a)(1) of the Bank Holding Company Act (12 USCS § 1843(a)(1)), which does not support the implication of such a right.

Where a tender offeror is a bank holding company which owns interests in nonbanking entities in violation of § 4(a)(1) of the Bank Holding Company Act (12 USCS § 1843(a)(1)), which prohibits a bank holding company from acquiring direct or indirect ownership or control of any voting shares of a company which is not a bank, and where it failed to disclose this violation in its Schedule 14D-1 of Regulation 14D of the Securities and Exchange Commission (17 CFR § 240.14d-100), as required under § 14(d) and (e) of the Securities Exchange Act (15 USCS § 78n(d) and (e)), the court in *Koppers Co. v American Express Co.* (1988, **WD Pa**) 689 F Supp 1371, CCH Fed Secur L Rep ¶ 95012, stated that under the Securities Exchange Act a target corporation has standing to pursue a claim that the alleged violation of the BHCA should have been disclosed in accordance with § 14(d) and (e).

[e] Right of action implied under § 14(e) despite right under § 18 of Exchange Act

In the following cases the courts held that the fact that there is a right of action under § 18 of the Securities Exchange Act of 1934 (15 USCS §§ 78j and r) neither precludes the creation nor disposes of the issue whether to create by implication a private right of action

under § 14(e) of the same Act (15 USCS § 78n(e)).

The court in *Hurwitz v R. B. Jones Corp.* (1977, **WD Mo**) 76 FRD 149, CCH Fed Secur L Rep ¶ 96261, 24 FR Serv 2d 566, rejected the defendant tender offeror's argument that the exclusive remedy for violations of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is to be found in § 18 of the Securities Exchange Act of 1934 (15 USCS § 78r) providing liability for misleading statements.

The court in *Liberty Nat. Ins. Holding Co. v Charter Co.* (1984, **CA11 Ala**) 734 F2d 545, CCH Fed Secur L Rep ¶ 91539, stated that § 18(a) of the Securities Exchange Act of 1934 (15 USCS 78r(a)), which provides a cause of action, at law or in equity, for purchasers and sellers injured by false or misleading statements in documents required to be filed with the Securities and Exchange Commission, is not dispositive of the issue whether a private right of action can be implied from § 14(e) of that Act (15 USCS § 78n(e)). The court commented that while the availability of § 18(a) gives some support for the argument that Congress did not intend to provide an additional private remedy, it does not yield a definite result concerning that issue because § 14(d) and (e) place a variety of other obligations on a party in addition to filing documents. Therefore, said the court, since § 18(a) would not provide any remedy for wrongs committed in fulfilling the obligations specific to § 14(d) and (e), it is possible that Congress did intend additional private remedies to supplement the Commissions's broad enforcement powers under the Act.

[f] Right of action not implied under § 14(e) having regard to § 5 of Securities Act

In the following case the court held that there was no right of action under § 14(e) of the Securities and Exchange Act of 1934 (15 USCS § 78n(e)), added by the Williams Act of 1968, to assert a claim for nondisclosure of information whose disclosure could have resulted in violation of § 5 of the Securities Act of 1933 (15 USCS § 77e).

The court in *Metropolitan Secur. v Occidental Petroleum Corp.* (1989, SD NY) 705 F Supp 134, CCH Fed Secur L Rep ¶ 94144, 120 ALR Fed 675, held that the holders of target company convertible debentures, which were a class of securities not included in the tender offer, did not have a right of action for the tender offeror's alleged violation of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, by its not disclosing to them how it planned to treat, after the completion of the tender offer, the option attached to those debentures for their conversion into shares of the former target company, because for an offeror to disclose at the offer stage of a two-step transaction what it intends to do at the subsequent merger stage involving the exchange of securities of the former target company for those of the offeror's company could amount to an offer to sell securities prior to registration in violation of § 5 of the Securities Act of 1933 (15 USCS § 77e). The court agreed with the view that a tender offer and a subsequent merger are distinct acts with separate concerns which are ad-

ressed by different provisions of the securities laws and rules adopted by the Securities and Exchange Commission. Thus, disclosure at the tender offer stage should not go beyond that specifically required by the Williams Act.

§ 8. Relation of § 14(d)-(f) to state law

[a] Action relegated to state law

The courts in the following cases held that actions, such as for (1) damages brought by a tender offeror, or (2) breach of fiduciary duty, had been traditionally relegated to state law and, therefore, so relegated them rather than imply a private right of action under § 14(e) of the Securities Exchange Act of 1934, added to the Exchange Act by the Williams Act of 1968 (15 USCS § 78n(d)-(f)).

In *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, reh den 430 US 976, 52 L Ed 2d 371, 97 S Ct 1668, the Supreme Court concluded that despite the pervasiveness of federal securities regulation, it was entirely appropriate to relegate to whatever remedy is created by state law an offeror-bidder and others similarly situated who had sued for damages under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, for the lost opportunity to gain control of the target company due to the alleged violations of that provision by a successful counter offeror and other regulated parties under the statute. In doing so, the Court applied the criterion of traditional relegation to state law to the issue

whether to imply a right of action under a federal provision containing none. It explained that state-law relegation was warranted here because the Williams Act was intended for the protection of shareholders of the target company, not of tender offerors, and it could not consistently be interpreted as conferring by implication a monetary remedy upon nonbeneficiaries of the Act, such as tender offerors, who are the regulated parties, especially where the award would not inure to the direct benefit of the protected class, namely target shareholders and investors.

☆ OBSERVATION: The Supreme Court has shed more light on the issue of relegating to state law an action brought under the federal securities laws rather than implying a private right of action. In *Santa Fe Industries, Inc. v Green* (1977) 430 US 462, 51 L Ed 2d 480, 97 S Ct 1292, CCH Fed Secur L Rep ¶ 95914, it held that a private right of action is not available under § 10(b) of the Securities Exchange Act of 1934 (15 USCS § 78j) in the absence of manipulation or deception, or where the issue is the fairness of the transaction, which supports a cause of action traditionally relegated to state law, so that it was appropriate to relegate the minority shareholders to the state-law remedy. Thus, the Court stated the principle that a right of action should not be implied where to do so would bring within the scope of federal law a wide variety of corporate conduct traditionally left to state regulation and would overlap and possibly interfere with state corporate law.

The court in *Litton Industries, Inc. v Lehman Bros. Kuhn Loeb, Inc.* (1989, SD NY) 709 F Supp 438, CCH Fed Secur L Rep ¶ 94345, stated that a breach of fiduciary duty alleged by a financial adviser who engaged in insider trading of the target corporation's securities to the detriment of its client, who was the tender offeror, constituted a cause of action traditionally relegated to state-law remedies and, consequently, that the tender offeror lacked standing to assert its claim under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968. The court stated that it was now beyond dispute that the Williams Act was enacted, not for the benefit of tender offerors, but rather for the protection of shareholders faced with a decision in connection with a tender offer.

[b] Action not relegated to state law

To determine whether to imply a right of action under the Williams Act of 1968, which added § 14n(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), the courts in the following cases considered whether actions concerning tender offers had traditionally been relegated to state law and, finding that they had not been so relegated, held that it was proper to imply such right under federal law.

The court in *Pryor v United States Steel Corp.* (1986, CA2 NY) 794 F2d 52, CCH Fed Secur L Rep ¶ 92804, cert den 479 US 954, 93 L Ed 2d 393, 107 S Ct 445, held that a private right of action on behalf of tendering shareholders injured by a tender offeror who violated the

pro rata provisions of § 14(d)(6) of the Securities Exchange Act of 1934 (15 USCS § 78n(d)(6)), could be implied under federal law since it was not the type of action traditionally relegated to state law. The court discussed the principle of state-law relegation applied in *Santa Fe Industries, Inc. v Green* (1977) 430 US 462, 51 L Ed 2d 480, 97 S Ct 1292, CCH Fed Secur L Rep ¶ 95914. There the Supreme Court held that fairness of merger terms is irrelevant under § 10(b) of the Securities Exchange Act of 1934 (15 USCS § 78j) where there is full disclosure and no manipulation or deception, and declined the request to create a federal remedy in the face of congressional silence on the grounds that absent a clear indication of congressional intent, it would not federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden. By contrast, said the instant court, in this case a specific substantive federal provision was violated and, thus, there was no unnecessary intrusion into the province of state contract law by recognizing a federal private remedy to enforce a requirement of a federal statute.

In implying a private right of action to enforce Rule 14e-1(c) of the Securities Exchange Commission (17 CFR § 240.14e-1(c)), which requires tender offerors to pay cash promptly for the shares tendered to and accepted by it and which was promulgated under § 14(e) of the Securities Exchange Act of 1934, added, among other provisions, to the Exchange Act by the Williams Act of 1968 (15 USCS § 78n(e)),

the court in *Caleb & Co. v E. I. Du Pont de Nemours & Co.* (1985, SD NY) 615 F Supp 96, CCH Fed Secur L Rep ¶ 92226, stated that the entire structure of the Williams Act, especially § 14, indicates that the regulation of tender offers was a major concern of Congress, and the creation of such a right based on federal law would not amount to the improper incursion of federal law in a state domain.

In considering whether a cause of action for injunctive relief against a target company charged with failing to make proper disclosure and engaging in manipulative acts or practices in order to repel a tender offer falls within the type of action traditionally relegated to state law, the court in *Mobil Corp. v Marathon Oil Co.* (1981, CA6 Ohio) 669 F2d 366, CCH Fed Secur L Rep ¶ 98399, cert den 455 US 982, 71 L Ed 2d 691, 102 S Ct 1490, stated that in its opinion the common law has not traditionally provided an injunctive remedy that would effectively protect target shareholders from nondisclosure or manipulation by the parties involved in a tender offer. It followed, said the court, that a cause of action for an injunction under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) does not have an effective counterpart under the traditional common-law principles and, thus, it is appropriate to imply it under federal law.

In deciding whether a right of action could be implied on behalf of a stock issuer who, alleging violations of § 14(e) of the Securities Exchange Act of 1934, added to the Exchange Act by the Williams Act of 1968 (15 USCS § 78n(e)), brought suit to enjoin a buyer of its

stock to divest itself of it and not to vote it while doing so, the court in *Liberty Nat. Ins. Holding Co. v Charter Co.* (1984, CA11 Ala) 734 F2d 545, CCH Fed Secur L Rep ¶ 91539, stated that while it may be informative to answer the question whether such a cause of action is traditionally relegated to state law—which is one of the questions under *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, to be considered in order to determine whether to create a private remedy by implication—the response is least likely to be dispositive of the issue of congressional intent. The court indicated that the tender offer provisions of the Williams Act of 1968 (15 USCS § 78n(d)-(f)) were intended to dominate the field, so that it is not inappropriate that a cause of action be implied under federal law as distinct from state law. However, this only means, said the court, that the existence of a state-law remedy does not give rise to the inference that a federal right of action cannot be implied, but it does not constitute a positive argument in favor of discovering an implied federal remedy.

In determining whether to imply a private cause of action for injunctive relief on behalf of a target company under the Williams Act of 1968, which added § 14n(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)), or to relegate it to state law on the grounds that it had been traditionally so relegated, the court in *Florida Commercial Banks v Culverhouse* (1985, CA11 Fla) 772 F2d 1513, CCH Fed Secur L Rep ¶ 92321, stated that since the tender offer provisions of

the Williams Act were intended to dominate the field, it would not be inappropriate to infer a cause of action under federal law, as opposed to state law.

§ 9. Limited enforcement possibilities of SEC militating in favor of private right of action

The courts in the following cases held that, for reasons such as the large number of filings received by the Securities and Exchange Commission in connection with tender offers, its limited investigative resources, and its priorities, the Commission cannot provide full enforcement of the Williams Act of 1968 (15 USCS § 78m(d)-(e) and n(d)-(f)) and the rules promulgated thereunder, and this limitation warrants implying a private right of action for other proper parties, whose actions can increase the enforcement of the Act and thereby render it effective.

The court in *Pryor v United States Steel Corp.* (1986, CA2 NY) 794 F2d 52, CCH Fed Secur L Rep ¶ 92804, cert den 479 US 954, 93 L Ed 2d 393, 107 S Ct 445, noted that compensation for the injured parties and determent of future violations of § 14(d)(6) of the Securities Exchange Act of 1934 (15 USCS § 78n(d)(6)), added by the Williams Act of 1968, which lays down the proration terms under which a tender offeror must accept shares tendered to it where its offer has been oversubscribed, might not be obtained if the enforcement of that provision were left exclusively to the Securities and Exchange Commission, an agency with limited resources and perhaps other priorities. By contrast, explained the court, private enforcement through

actions for damages represents a most efficient means of securing the right created by this provision given that (1) the injury resulting from its violation by a tender offeror is ready to calculate, (2) the victims are easy to locate, and (3) the likelihood of litigation by such victims is high if a private right of action exists. Consequently, the court implied on behalf of shareholders a right of action under § 14(d)(6).

The court in *Caleb & Co. v E. I. Du Pont de Nemours & Co.* (1985, SD NY) 615 F Supp 96, CCH Fed Secur L Rep ¶ 92226, recognized that an implied private right of action for money damages to enforce Rule 14e-1(c) of the Securities and Exchange Commission (17 CFR § 240.14e-1(c)), which requires tender offerors to pay cash promptly for the shares tendered to and accepted by it and which was promulgated under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), is likely to be the most effective means of insuring enforcement of this rule after a tender offeror's failure to pay promptly. It explained that a Commission injunction action is not an effective remedy subsequent to a violation, and an injunction prior to the date payment is due may not be feasible, given the difficulty of knowing prior to the failure to pay of the impending violation; moreover, although the Commission might be able to bring a subsequent action for money damages, the complexities involved in insuring that funds would be disgorged to those properly the beneficiaries of any judgment, and the manpower necessary to achieve such a result, make such actions unlikely. Therefore, said the court, effective en-

forcement of Rule 14e-1(c) would be assisted by recognition of a private right of action.

In *Burlington Industries, Inc. v Edelman* (1987, MD NC) 666 F Supp 799, CCH Fed Secur L Rep ¶ 93338, 1987-1 CCH Trade Cases ¶ 67649, the court recognized that the Securities and Exchange Commission (SEC) is not capable of promptly and effectively policing the tender offerors' statutory filings with the SEC of material information pursuant to § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, so that where a plaintiff target company is in a position to do so, it should be granted standing to seek equitable relief against filings by the tender offeror with the Securities and Exchange Commission of materially false and misleading information in violation of § 14(e), as well as an injunction of insider trading during a tender offer in violation of Securities and Exchange Commission Rule 14e-3 (17 CFR § 240.14e-3).

After the Securities and Exchange Commission stated on amicus brief that its resources were inadequate to police the myriad filings made each year so as to insure truthful and full disclosure pursuant to § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), the court in *Gearhart Industries, Inc. v Smith International, Inc.* (1984, CA5 Tex) 741 F2d 707, CCH Fed Secur L Rep ¶ 91667, held that a target company has a private right of action for injunctive relief under § 14(e). The court pointed out that, in light of the limited policing and enforcement of that section that the Commission

can provide, to conclude that such relief is available in no circumstances whatever, however flagrant, would be all but to license the filing of deliberately misleading § 14(e) disclosure statements on pain of nothing more than a possible damage suit by shareholders who sold their shares in connection with a tender offer.

The court in *Re Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation* (1979, WD Tex) 467 F Supp 227, stated that the creation under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, of a private right of action for damages on behalf of target company shareholders is necessary to effectuate the purposes of the Williams Act, at least absent more widespread involvement by the Securities and Exchange Commission in the early stages of takeover activity.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, considered that, absent more widespread involvement by the Securities and Exchange Commission in the early stages of takeover activity, it was necessary, in order to effectuate the purpose of the Williams Act of 1968 (15 USCS §§ 78m(d)-(e) and n(d)-(f)) of protecting target company shareholders, to create on behalf of those shareholders a private damages remedy under § 14(e) of the Securities and Exchange Act of 1934, added to the Exchange Act by the Williams Act, since monetary relief would in general redound to their benefit.

The court in *Florida Commercial*

Banks v Culverhouse (1985, CA11 Fla) 772 F2d 1513, CCH Fed Secur L Rep ¶ 92321, pointed out that since the Securities and Exchange Commission simply cannot police every tender offer or major acquisition subject to the Williams Act of 1968 (15 USCS §§ 78m(d)-(e) and n(d)-(f)), and given that in most cases shareholders simply cannot protect their own interests when confronted with a tender offer because they lack the resources to confirm the accuracy of the information submitted by the tender offeror to the Commission, whereas the target company is frequently in the best position to seek corrective disclosure within a time frame that will optimize the benefit to shareholders of such disclosures, it is necessary, in order for the Act to be effective, to imply a private right of action under the Act on behalf of the target company for the injunctive relief of corrective disclosures of information filed by the tender offeror with the Commission in violation of § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act.

III. What Parties Can Be Plaintiffs Under § 14(d)-(f)

§ 10. Shareholders

[a] Private right of action implied—generally

In the following cases the courts indicated that shareholders could in principle have a private right of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) since they are the intended beneficiaries of that section.

In *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, the Supreme Court, while expressly stating that it did not intimate, since the issue was not before it, any view on whether shareholders-offerees have an implied right of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, hinted at an affirmative resolution of that issue when it pointed out in dictum that the legislative history of the Williams Act shows that its sole purpose was the protection of investors who are confronted with a tender offer for their stock so that they are not required to respond without adequate information; and that where a statute, such as this one, does not expressly provide a private remedy, a private right of action may be implied on behalf of a plaintiff that belongs to the class for whose especial benefit the statute was enacted.

The Supreme Court, in *Schreiber v Burlington Northern, Inc.* (1985) 472 US 1, 86 L Ed 2d 1, 105 S Ct 2458, CCH Fed Secur L Rep ¶ 92056, decided a suit brought under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) by shareholders of a target company and, in so doing, did not discuss the issue of standing as such, thereby implicitly recognizing that this provision gives rise to an implied right of action in such shareholders.

☆ **OBSERVATION:** It should serve to highlight the difference between a right and a cause of action that the Court nevertheless held that the plaintiffs had failed to state a cause of action because

the conduct complained-of, in which both the target company and the tender offeror had engaged, was not manipulative as that term is used in § 14(e), which requires misrepresentation or nondisclosure and connotes conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities, and because any defendants' conduct which could have conceivably affected the price of the shares involved was done openly.

The court in *Stull v Bayard* (1977, CA2 NY) 561 F2d 429, CCH Fed Secur L Rep ¶ 96149, 23 FR Serv 2d 1366, cert den 434 US 1035, 54 L Ed 2d 783, 98 S Ct 769, recognized that a shareholder of a target company, regardless of whether he tendered or withheld his shares, has a federally created right under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, upon which he can claim full disclosure of accurate information which would have helped him to decide whether to retain his stock or surrender it to the tender offeror.

Where stock sellers sued a tender offeror alleging that it had violated § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), the court in *Flynn v Bass Bros. Enterprises, Inc.* (1978, ED Pa) 456 F Supp 484, recognized their standing by stating that it was beyond question that this provision gives rise to an implied private right of action on behalf of shareholders.

The court in *Re Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation* (1979, WD Tex) 467 F

Supp 227, held that the creation on behalf of target company shareholders of a private damages remedy under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, is a reasonably necessary means of effectuating the purpose of the Williams Act.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, deemed it sound to create under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, a private right of action for damages on behalf of aggrieved target company shareholders because it was a reasonably necessary means of effectuating the purpose of the Williams Act, and because the failure to imply such right for the benefit of those shareholders could render the Act's protection of them a snare and a delusion.

[b]—Tendering shareholders

In the following cases, the courts held or implicitly recognized that § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, affords a private right of action on behalf of the shareholders of the target company in situations such as when the shareholders, who have tendered their shares, have been affected by the violation of (1) § 14(d) on proration period; or (2) Prompt Payment Rule 14e-1(c) (17 CFR § 240.14e-1(c)).

The court in *Pryor v United States Steel Corp.* (1986, CA2 NY)

794 F2d 52, CCH Fed Secur L Rep ¶ 92804, cert den 479 US 954, 93 L Ed 2d 393, 107 S Ct 445, held that tendering shareholders had an implied right of action under § 14(d)(6) of the Securities Exchange Act of 1934 (15 USCS § 78n(d)(6)), against a tender offeror who extended its offer's proration period after the offer had been oversubscribed within the 10 days specified by the offer and required by § 14(d)(6), and after the proration deadline had passed, thereby favoring late tenderers by buying shares from them at the expense of those shareholders who had tendered their shares within the proration period and who, as a result, saw the number of shares bought from them diminished by the same number of those purchased from the late tenderers. The court pointed out that it was appropriate to imply a private right of action on behalf of the plaintiffs because § 14(d)(6) (1) identifies its beneficiaries—that is, shareholders that have tendered—and (2) confers a substantive right on them—namely, the right to have their shares purchased on a pro rata basis. The court noted that these results might not be obtained through enforcement by the Securities and Exchange Commission, an agency with limited resources and perhaps other priorities.

Where a shareholder alleged that a tender offeror had failed to pay cash promptly for the shares tendered to and accepted by it delaying such payment until after the termination of the offer and thereby violating Rule 14e-1(c) of the Securities and Exchange Commission (17 CFR § 240.14e-1(c)) promulgated under § 14(e) of the Securi-

ties Exchange Act of 1934 (15 USCS § 78n(e)), added to the Act by the Williams Act, as amended in 1970, the court in *Caleb & Co. v E. I. Du Pont de Nemours & Co.* (1985, SD NY) 615 F Supp 96, CCH Fed Secur L Rep ¶ 92226, held that a private right of action exists for tenderers to enforce Rule 14e-1(c). The court considered that the regulation of practices relating to the timing of payment for tendered shares was a direct concern of Congress, as established by the history of the amended Williams Act, so that to imply a private right of action to enforce Rule 14e-1(c) would further the congressional goal in enacting the statute. It observed that the existence of a private action for money damages after a tender offeror's failure to pay promptly is likely to be the most effective means of insuring enforcement of this rule as opposed to actions for injunctive relief or money damages instituted by the Commission.

[c] —Nontendering shareholders

In the following cases, the courts held that even shareholders who do not tender their shares as a result of the tender offer may have the benefit of an implied right of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, since they are members of the class that the Act intended to protect.

The Supreme Court, in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, pointed out in dictum that it may well be that shareholders-offerees, the class protected by

§ 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, who decided not to tender their stock due to fraudulent misrepresentations by persons opposed to a takeover attempt could perhaps state a claim under § 14(e), even though they did not tender their securities, since that section is broadly phrased to proscribe fraudulent activities in connection with any tender offer or solicitation. The court lent support to this remark by noting that § 14(e) does not limit the protection that it offers to shareholders by requiring that they be either purchasers or sellers in the tender offer in question.

The court in *Re Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation* (1979, WD Tex) 467 F Supp 227, held that nontendering shareholders of a target company have standing to assert claims under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) where they have at least dealt in the security to which the alleged misrepresentation relates—including having held the security at the time of the tender offer—and such dealing is an objectively demonstrable fact. The court took the view that the fact that the vast majority of target shareholders tendered their shares did not deprive nontendering shareholders of their standing since it did not negate the possibility that the plaintiffs were induced through misrepresentations to refuse the offer, though such evidence may weigh heavily at trial against the conclusion that these materials were misleading. The court also noted that while a nontenderer suffers no immediate injury from

the inadequacy of the tender offer price in the sense that he retains his stock, such inadequacy is likely to have a depressing effect on the market for some time and, thus, may hurt him if, for one reason or another, he should later find it desirable or necessary to sell.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, expressed the opinion that nontendering shareholders of a target company should also be able to invoke a private right of action under the Williams Act of 1968, which added § 14(e) to the Securities Exchange Act of 1934 (15 USCS § 78n(e)), since they are within the class for whose protection the Williams Act was specifically designed. The court agreed with the view that while a nontenderer suffers no immediate injury from inadequacy of price in the sense that he retains his stock, such inadequacy is likely to have a depressing effect on the market for some time and, thus, may hurt him if, for one reason or another, he should later find it necessary or desirable to sell. It pointed out that to gain standing under § 14(e), a nontenderer need not be a seller or purchaser of any securities, but must have been actually confronted with the offer because at the time it was made he held target shares.

The court in *Hurwitz v R. B. Jones Corp.* (1977, WD Mo) 76 FRD 149, CCH Fed Secur L Rep ¶ 96261, 24 FR Serv 2d 566, held that a shareholder, despite his failure to tender or otherwise sell his shares in response to a tender offer, has standing to assert his claims against the offeror under § 14(e) of the Securities Exchange Act of 1934

(15 USCS § 78n(e)), since he is also a member of the class which that section was designed to protect.

Where a shareholder of the target company did not tender her shares, but alleged that the false information and omissions in the proxy materials led other shareholders to tender their shares so that the successful tender offeror was eventually able to carry out a freeze-out merger, in reference to which the shareholder claimed that her shares had been merged out at an inadequate price and that the merger had been rendered possible by the offeror's misstatements in connection with the tender offer and in violation of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), the court in *Plaine v McCabe* (1986, CA9 Cal) 797 F2d 713, held that a shareholder has standing to sue under § 14(e) regardless of whether she has tendered her shares if her injuries have occurred as a result of fraudulent activity in connection with a tender offer.

[d] —Shareholders to whom no tender offer was made

The courts in the following cases held that a private right of action can be implied on behalf of a shareholder (1) to whom the tender offeror did not extend its tender offer in violation of § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, or (2) who held a type of shares excluded from the tender offer by the tender offeror in disregard of the All Holders Rule of the Securities and Exchange Commission (17 CFR § 240.14d-10(a)).

The court in *Wellman v Dickinson* (1979, SD NY) 475 F Supp 783, CCH Fed Secur L Rep ¶ 96918, 4 Fed Rules Evid Serv 1178, affd (CA2 NY) 682 F2d 355, CCH Fed Secur L Rep ¶ 98731, cert den *Dickinson v SEC* (1983) 460 US 1069, 75 L Ed 2d 946, 103 S Ct 1522, held that § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added by the Williams Act of 1968, does not limit standing only to those shareholders of the target company to whom a tender offer has actually been made. The court indicated that this construction of the Act was not contrary to the Supreme Court statement in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, that the sole purpose of the Act was the protection of investors who are confronted with a tender offer. The instant court pointed out that that statement had to be read in context since the Court was only making a broad distinction between public investors who were the intended beneficiaries of the Williams Act, and tender offeror contestants whom the Act was designed to regulate rather than protect. It added that in *Piper* the plaintiff was an unsuccessful tender offeror, whereas here the plaintiffs were shareholders of the target company who were not given the opportunity to decide whether to tender because they, unlike a select group of shareholders of the target, were deliberately bypassed by the tender offeror. In support of its view, the court quoted *Piper* as saying that the class that the Act sought to

protect was the shareholders of the target company, and implied from this that since the Supreme Court made no distinction between those to whom a tender offer had been made and those to whom none had, all shareholders were equally covered under the Act. The instant court then invoked the Supreme Court principle that the substance of the federal securities laws must be broadly construed,²⁶ and concluded that since public investors are the intended beneficiaries of the Williams Act, its provisions should be construed to facilitate their coverage.

The court in *Polaroid Corp. v Disney* (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095, stated that target company shareholders injured by a tender offer express exclusion from its bid of all the target shares in the target's employee stock ownership plan, have standing to assert a violation of the Securities and Exchange Commission's All Holders Rule (17 CFR § 240.14d-10(a)) requiring a tender offeror to extend its offer to all security holders of the class of securities subject to the tender offer. In reaching this holding the court found that the Rule represents a valid exercise of the Commission's rulemaking authority under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, since it intends to insure that all holders of a class of securities subject to a tender offer receive fair and equal treatment.

26. *SEC v National Secur., Inc.* (1969) 393 US 453, 21 L Ed 2d 668, 89 S Ct 564, CCH Fed Secur L Rep ¶ 92334; and *SEC v Capital Gains Research Bureau, Inc.* (1963) 375 US 180, 11 L Ed 2d 237, 84 S Ct 275.

The court noted that implying under the Rule itself a private right of action on behalf of shareholders serves the need to provide a high enforcement level to deter violations of tender offer provisions, to compensate injured shareholders, and to allow them to protect themselves from irreparable harm through an injunction, all of which furthers the purpose of the Williams Act.

[e] Private right of action not implied

The courts in the following cases held that § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, did not give rise to an implied private right of action on behalf of the plaintiff shareholders where, for example, (1) plaintiffs were suing for alleged wrongs done to them as holders of convertible debentures not included in the tender offer, or (2) the plaintiff was only nominally a shareholder, but was instead a substantial financial participant in the making of the tender offer itself; (3) the plaintiffs were not misled by the tender offeror; or (4) the plaintiffs suffered no loss as a result of the alleged manipulations of the defendant.

The court in *Metropolitan Secur. v Occidental Petroleum Corp.* (1980, SD NY) 705 F Supp 134, CCH Fed Secur L Rep ¶ 94144, 120 ALR Fed 675, held that the plaintiff target company shareholders who brought action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, were in effect suing as debenture holders, rather than as

shareholders, and as such were not members of the class of persons that the Williams Act intended to protect, namely shareholders. For the discussion of the reasoning of the court, see this case in § 11, *infra*.

Where a tender offeror owned only several hundred dollars worth of shares in the target company, but had a stake of almost \$60 million in the company through which the tender offer was channeled, yet invoked his status as a target shareholder to bring suit under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) against the target company as well as the successful tender offeror, the court in *Kalmanovitz v G. Heileman Brewing Co.* (1985, CA3 Del) 769 F2d 152, CCH Fed Secur L Rep ¶ 92238, 1985-2 CCH Trade Cases ¶ 66733, affd without op Appeal of *Jacobs* (1986, CA3 Del) 804 F2d 1248 and affd without op (CA3 Del) 804 F2d 1248, held that a plaintiff who occupies the dual roles of a very substantial tender offeror and a mere nominal target shareholder may be considered to be only an offeror for the purpose of determining his § 14(e) standing. The court noted that even though a private right of action may be implied from a particular statute or rule, not every private suit brought thereunder is proper. It explained that there may well be a conflict of interest between the positions of a target shareholder and a tender offeror, and that it would almost be a sham to permit an individual to bring suit formally in his capacity as a shareholder when the suit is not in the interest of the target shareholders

and, in fact, the plaintiff's true motivation, and his only real stake in the matter, stems from his position as an offeror.

Where target company shareholders were apparently aware of the alleged inadequacy of the price offered by the tender offeror for target company shares so that they were not misled into tendering their shares by the complained-of omissions and misrepresentations made in connection with the tender offer, the court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, held that such nontenderers did not fall within the class that could be accorded standing under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968. The court described the class of § 14(e) beneficiaries as composed of shareholders confronted with a tender offer and, thus, with the need to decide whether to accept or refuse it, and protected in making that decision by the full disclosure requirements of the Williams Act. But the nontenderers here neither had been misled nor were members of the class that was misled. The court stated that to allow them to sue would expand the scope of the Williams Act, which the Supreme Court, in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, indicated should receive a narrow construction.

Where a nontendering shareholder sued the tender offeror, who was at the same time the target

company bidding for its own outstanding stock, and alleged that it had made misleading statements violative of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) with the intent to take the company private at a bargain price, the court in *Orlett v Cincinnati Microwave, Inc.* (1990, CA6 Ohio) 953 F2d 224, CCH Fed Secur L Rep ¶ 96493, 22 FR Serv 3d 118, held that the shareholder lacked standing to complain about the allegedly unfairly low tender price as long as he chose not to tender his shares. The court pointed out that because the plaintiff nontenderer elected to keep all his shares, he had a higher percentage interest in the company after completion of the tender transactions than before, and that if the defendant target-offeror was able to buy back 44 percent of its outstanding stock at a bargain price, that could only have benefited the nontendering shareholder. It also indicated that the offer was available proportionately to all holders of 100 shares or more, that the dominant shareholder received no pecuniary benefit that was not proportionately available to the plaintiff, who could have received exactly the same price for exactly the same percentage of his holdings, and that there was no proof of any other damage to the plaintiff.

§ 11. Representative in derivative action

In the following case, the court held that § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) affords standing to bring a derivative action to an unsuccessful

ful tender offeror,²⁷ who in such type of action cannot seek damages for itself, but rather sues on behalf of the target company in order to compensate it for the damages that the company has suffered as a result of the violation of the Act's tender offer provisions.

In *Bolton v Gramlich* (1982, SD NY) 540 F Supp 822, CCH Fed Secur L Rep ¶ 98438, the court held that an unsuccessful tender offeror has standing to bring a derivative action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) on behalf of the target company. The court explained that such a holding does not sidestep the limitations of *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, where the Supreme Court held that a tender offeror is not among the class protected under that section because, although it may be a shareholder, it is not faced with the decision whether to tender so that it is not among the intended beneficiaries of the section's disclosure requirements. The instant court declined to infer from the *Piper* decision on individual standing that anyone who has made a tender offer will fail to adequately represent the interests of the issuer. Rejecting such an inference did not amount to circumventing *Piper*, reasoned the court, because in a derivative action a defeated tender offeror cannot seek reimbursement for its expenses, which was the relief sought in *Piper*, but only remedy for injury to the issuer.

²⁷ See also § 15, *infra*, on tender offerors as plaintiffs seeking an implied right of action under the tender offer provisions of the Act.

§ 12. Investors

[a] Private right of action implied

The courts in the following cases held that option traders have standing under Rule 14e-3 of the Securities and Exchange Commission (17 CFR § 240.14e-3) as well as under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968.

The court in *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, held that option traders have standing to sue under Rule 14e-3 of the Securities and Exchange Commission (17 CFR § 240.14e-3), because that Rule specifically includes options trading within its scope of coverage, and is within the scope of the statute under which it was promulgated by the Commission, namely § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, which is not limited to trading between the tender offeror and the target shareholders, but includes open-market trading within its scope.

The court in *Re Gulf Oil/Cities Service Tender Offer Litigation* (1989, SD NY) 725 F Supp 712, CCH Fed Secur L Rep ¶ 94708, 1989-2 CCH Trade Cases ¶ 68779, held that option traders have standing to sue under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Ex-

change Act by the Williams Act of 1968. In reaching its decision the court relied on *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, supra. The court stated that the Commission's inclusion of options markets within Rule 14e-3 shows that it believes that the Williams Act is intended to protect investors in such markets. It added that the Commission's interpretation of securities laws is entitled to substantial deference. The court went on to say that the plaintiff option traders had purchased call options in reliance on defendant tender offeror's affirmative misrepresentations, and that the price for such call options was intimately connected to the stock market's price for the underlying securities; thus, it was reasonably foreseeable that defendants' affirmative misrepresentations would affect the plaintiffs, who should now be entitled to seek redress for the negative effect that they suffered. The court pointed out that although dicta in *Rondeau v Mosinee Paper Corp.* (1975) 422 US 49, 45 L Ed 2d 12, 95 S Ct 2069, CCH Fed Secur L Rep ¶ 95205; and *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, state that the Williams Act was designed primarily to protect tendering shareholders, there is no indication that the Supreme Court intended those pronouncements to exclude other classes of persons, and that in this context it was worth noting that in *Piper* the Court had used the term "investor" rather than shareholder to describe those whom the statute was intended to protect.

[b] Private right of action not implied

The court in the following case held that § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, did not give rise to an implied private right of action on behalf of the plaintiff debenture holders because they were not members of the class protected under the Williams Act.

Where holders of convertible debentures of the target company claimed that a tender offeror had violated § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, by not disclosing to them what the effect of its tender offer would be on their debentures or how it planned to treat, after the completion of the tender offer, the option attached to those debentures for their conversion into shares of the target company, the court in *Metropolitan Secur. v Occidental Petroleum Corp.* (1989, SD NY) 705 F Supp 134, CCH Fed Secur L Rep ¶ 94144, 120 ALR Fed 675, held that the plaintiffs did not have a right of action under § 14(e) because as debenture holders they were not members of the class of persons that the Williams Act intended to protect, namely shareholders, and even if they were also shareholders of the target company they were asserting their claim not as shareholders, but rather as debenture holders. The court stressed the point that as debenture holders the plaintiffs were not confronted with the decision whether to tender their shares in response to the tender

offer, which the tender offeror had not addressed to them, and that the offeror was under no duty pursuant to § 14(e) to disclose to every class of holders of non-tendered-for securities of the target company the effect of the tender offer on the particular type of security that each held so that the offeror had no such duty to the plaintiffs as holders of convertible debentures. The court distinguished this case from *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, § 12[a], supra, where traders in options on target shares were held to be investors with a right of action, because that was a case of insider trading involving concealment of information which if disclosed would have led the plaintiff option traders not to trade in those shares, and the provision sued on there was Securities and Exchange Commission Rule 14e-3 (17 CFR § 240.14e-3) prohibiting insider trading and including explicitly trading in option markets. By contrast, noted the court, there was no authority for considering debenture holders as investors protected under the Act, not to mention § 14(e).

§ 13. Target company

(a) Private right of action implied—generally

In the following cases the courts held that a target company has an implied right of action under § 14(d) and (e) of the Securities Exchange Act (15 USCS § 78n(d) and (e)) to bring an action for injunctive relief because, for example, it has no adequate remedy at law or its action contributes to the effective enforcement of the those provisions.

The court in *Wellman v Dickinson* (1979, SD NY) 475 F Supp 783, CCH Fed Secur L Rep ¶ 96918, 4 Fed Rules Evid Serv 1178, affd (CA2 NY) 682 F2d 355, CCH Fed Secur L Rep ¶ 98731, cert den *Dickinson v SEC* (1983) 460 US 1069, 75 L Ed 2d 946, 103 S Ct 1522, held that a target company has an implied private right of action under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, to seek *equitable relief* after the tender offer which allegedly violated those provisions has been consummated. The court pointed out that the standing that a target company clearly seems to lack under *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, is that necessary to bring a *damages action* against a purchaser of its stock in a takeover or partial takeover transaction for violation of § 14(d) and (e), but that the Supreme Court had expressly stated that its holding was a limited one since a target corporation's standing to sue was not in issue in *Piper*.

The court in *Diceon Electronics, Inc. v Calvary Partners, L.P.* (1991, DC Del) 772 F Supp 859, CCH Fed Secur L Rep ¶ 96930, held that a plaintiff target company had an implied private right of action for injunctive relief under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) where the defendants' allegedly fraudulent tender offer was still outstanding, thereby giving rise to continuing violations of the securities laws, and the plaintiff target company did not have an adequate remedy at law.

The court in *Burlington Industries, Inc. v Edelman* (1987, MD NC) 666 F Supp 799, CCH Fed Secur L Rep ¶ 93338, 1987-1 CCH Trade Cases ¶ 67649, recognized that a target corporation has standing to seek (1) equitable relief against filings by the tender offeror with the Securities and Exchange Commission of materially false and misleading information in violation of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968; and (2) an injunction of insider trading during a tender offer in violation of Securities and Exchange Commission Rule 14e-3 (17 CFR § 240.14e-3). The court commented that the target is the only party capable of promptly and effectively policing the statutory filings. However, it pointed out that in ruling on a target's injunction motion, it is incumbent upon courts to remember that the disclosure provisions of the Williams Act seek to protect shareholders rather than target companies.

The court in *Gearhart Industries, Inc. v Smith International, Inc.* (1984, CA5 Tex) 741 F2d 707, CCH Fed Secur L Rep ¶ 91667, held that a target company has a private right of action for injunctive relief under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)).

In *Florida Commercial Banks v Culverhouse* (1985, CA11 Fla) 772 F2d 1513, CCH Fed Secur L Rep ¶ 92321, the court held that target companies have a private right of action to seek the remedy of corrective disclosure of information connected with a tender offer and required to be filed with the Securities

and Exchange Commission pursuant to § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968. The court grounded its decision on the finding that targets are in an optimal position to proceed in a way that furthers the Act's purpose, thereby rendering it effective. To determine whether target companies should be given such a private right of action, the court devised a test that balances the likelihood that the shareholders, who are the intended beneficiaries of the Act, will benefit by obtaining necessary information against the likelihood that shareholders will be harmed by (1) the potential misuse of the right of action by the management of target companies seeking to thwart takeover attempts, and (2) other aspects of the particular remedy sought. Applying it to the instant case, the court said that since the particular remedy sought here was corrective disclosures, there was no chance that shareholders would be harmed by it. It pointed out that if target management attempted to use this right to tie up a tender offeror in litigation by unsupported allegations that the information that it had filed with the Commission was false, shareholders would have their usual remedies for waste and courts could invoke appropriate sanctions under Rule 11 of the Federal Rules of Civil Procedure. By contrast, said the court, in most cases shareholders simply cannot protect their own interests because they lack the resources to confirm the accuracy of the information submitted by the tender offeror to the Commission, which simply cannot police every tender offer or major acquisition subject to the Williams Act; but the

target company is frequently in the best position to seek corrective disclosure within a time frame that will optimize the benefit to shareholders of such disclosures.

(b) —For nondisclosure of nonactionable violations of other provisions

In the following cases, the courts held that a target company has an implied right of action under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)) to seek injunctive relief for the defendant's failure to disclose information as required by that section, including information concerning the violation of other legal provisions which do not provide any implied right of action, such as Federal Reserve Board Regulations G, T, U, and X (12 CFR §§ 207, 220, 221, and 224) dealing with margin purchase, and § 4(a)(1) of the Bank Holding Company Act (12 USCS § 1843(a)(1)) prohibiting bank holding companies from owning interests in non-banking entities.

The court in *Polaroid Corp. v Disney* (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095, held that a target company has standing to sue under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) to enjoin the misrepresentations of a tender offeror who did not disclose material information concerning the issue whether its offer complied with Federal Reserve Board Regulations G, T, U, and X (12 CFR §§ 207, 220, 221, and 224), promulgated by the Board under § 7 of that Act (15 USCS § 78g) and providing that loans made to purchase on margin stock that is secured

directly or indirectly by any stock purchased on margin may not exceed 50 percent of the market value of the stock being purchased, even though the target company did not have an implied private remedy to sue directly under those margin regulations. The court agreed with the view that allowing a target company to sue under § 14(e) would best accomplish the purposes of the legislation because the superior resources available to the corporation for litigation can be vital where remedial action must be speedy and forceful.

The court in *Koppers Co. v American Express Co.* (1988, WD Pa) 689 F Supp 1371, CCH Fed Secur L Rep ¶ 95012, stated that under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to it by the Williams Act of 1968, a target corporation has a private right of action to obtain corrective disclosures from a tender offeror who has allegedly violated § 14(d) and (e) because in Schedule 14D-1 of Regulation 14D of the Securities and Exchange Commission (17 CFR § 240.14d-100), which pursuant to that section a tender offeror must file with the Commission in connection with its tender offer, the offeror has failed to disclose its alleged violations of other federal laws, even though the target company lacks standing to sue directly under such laws since they do not provide any expressed or implied right of action. Consequently, the plaintiff target company was allowed to sue the tender offeror under § 14(d) and (e) for allegedly violating § 7 of the Securities Exchange Act of 1934 (15 USCS § 78g) and Federal Reserve Board

Regulations G, T, U, and X (12 CFR §§ 207, 220, 221, and 224), prohibiting banks and broker-dealers from lending more than 50 percent of funds used to purchase stock if such stock is to be used to secure the loan, where the tender offeror was charged with failing to disclose that it was a shell company which would incur more than 50 percent debt if it acquired the target company's stock. The target company was likewise recognized an implied right of action for the violation of § 4(a)(1) of the Bank Holding Company Act (12 USCS § 1843(a)(1)), which prohibits a bank holding company from acquiring direct or indirect ownership or control of any voting shares of a company which is not a bank, where the tender offeror failed to disclose that it was a bank holding company that, in contravention of that provision, owned interests in nonbanking entities.

Where a target company alleged that the tender offeror and the banks providing it with finance had violated margin regulations G, U, and X, which were promulgated by the Federal Reserve Board (12 CFR §§ 207, 221, and 224) under § 7 of the Securities Exchange Act of 1934 (15 USCS § 78g), and which lay down the terms under which a tender offeror can borrow funds to finance the purchase of target stock and secure those funds with stock purchased on margin, the court in *Revlon, Inc. v Pantry Pride, Inc.* (1985, DC Del) 621 F Supp 804, CCH Fed Secur L Rep ¶ 92348, held that although a plaintiff cannot maintain a private action directly on those margin regulations, it does have standing under § 14(e) of the Securities Exchange Act of 1934

(15 USCS § 78n(e)) to allege that parties to the tender offer failed to disclose their violations of those regulations as required under § 14(e).

[c] Private right of action not implied

In the following cases, the courts held that a target company, which issued the shares solicited in a tender offer, does not have an implied right of action either (1) under the Securities and Exchange Commission's All Holders Rule (17 CFR § 240.14d-10(a)) to challenge the exclusion by the tender offeror of some shares of the class of shares tendered for, or (2) under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)) to require that a shareholder who violated those subsections be required not to vote, and to divest himself of, the shares acquired.

Where a target company challenged a tender offeror's express exclusion from its bid of all the target shares in the target's employee stock ownership plan, the court in *Polaroid Corp. v Disney* (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095, held that a target company does not have standing to assert a violation of the Securities and Exchange Commission's All Holders Rule (17 CFR § 240.14d-10(a)) requiring a tender offeror to extend its offer to all security holders of the class of securities subject to the tender offer.

The court in *Liberty Nat. Ins. Holding Co. v Charter Co.* (1984, CA11 Ala) 734 F2d 545, CCH Fed Secur L Rep ¶ 91539, held that issuers, such as the target company that issued the shares that were the

subject of the tender offer in question, are not the class for whose especial benefit § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added in the Exchange Act by the Williams Act of 1968, were enacted and, thus, have no standing to sue thereunder to require a shareholder who allegedly violated that provision to divest himself of his holdings in the issuer and not to vote his shares in the meantime. The court found that when an outsider acquires a large amount of stock in a publicly held company this creates at the very least a nascent potential conflict between the outsider and management to permit the issuer to oust the new stockholder simply because he made a tender offer without complying with the filing requirements of § 14(d) or committed certain fraudulent acts in violation of § 14(e), would tip the balance towards management, thereby defeating the legislative scheme based on a policy of evenhandedness. The court went on to say that incumbent management could solidify its position by subjecting to suit any outsider who accumulated more than 5 percent of the shares of the company, which would discourage such accumulations; the threat of this sort of litigation might remove from the field a player whose self-interest is to monitor management, and who is poised to mount a tender offer or a proxy contest. This would be detrimental, said the court, to existing shareholders, whom the Williams Act intended to protect, because they benefit when an outsider with a significant financial stake in the company polices management. The court added that when an outsider is perceived as threatening to displace the insiders,

management has a clear economic interest in protecting its position, even though this might not be in the economic interest of the firm or its shareholders. It followed, concluded the court, that the creation of a private right of action on behalf of management would allow it to use corporate resources, rather than their own, which would injure shareholders, and to harass and burden aggressive outsiders, who might not be able to avoid vexatious litigation by any manner of careful craftsmanship in their filings because they would always be liable to a charge of being false or misleading. All of this would injure shareholders, said the court, who are the class that Congress intended to protect by enacting § 14(d) and (e).

§ 14. Target company on behalf of its shareholders

In the following case, the court held that a target company does not have standing based on associational rights (*jus tertii*) under the Securities and Exchange Commission's All Holders Rule (17 CFR § 240.14d-10(a)), requiring a tender offeror to treat all shareholders equally, to sue on behalf of its shareholders a tender offeror because the interests of the target and the shareholders as well as those of different types of shareholders are not the same and may even be in conflict so that the target could not represent all of them.

The court in *Polaroid Corp. v Disney* (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095, held that a target company does not have associational standing as a third party to assert the interests of its shareholders in a suit

to enjoin a tender offeror's express exclusion from its bid of all the target shares in the target's employee stock ownership plan, which exclusion allegedly violated the Securities and Exchange Commission's All Holders Rule (17 CFR § 240.14d-10(a)) requiring a tender offeror to extend its offer to all security holders of the class of securities subject to the tender offer. In its reasoning, the court stated that the Constitution requires that a plaintiff allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief, but it does not require that the merits of the lawsuit directly relate to the plaintiff's injury. Yet, said the court, for an entity to gain standing to sue on behalf of its members, it must show that (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The court pointed out that in favor of granting plaintiff this associational standing (*jus tertii*) was the fact that while individual shareholders may often find the cost of the litigation beyond their means, the target corporation would usually have the resources to finance it, and in many cases this would have the salutary effect of enforcing the securities laws. However, said the court, heavier considerations militate against recognizing a corporation's standing as a third party: (1) a corporation, such as plaintiff, does not ordinarily undertake litigation on behalf of its shareholders so that it is doubtful whether the interests that it would

seek to protect by asserting its shareholders' right under the All Holders Rule are germane to its corporate purpose; (2) a plaintiff corporation may be a poor representative of all the shareholders because their interests under the Rule are inherently in conflict: (a) some shareholders would view litigation to enjoin the tender offer as adversely affecting their opportunity to collect on the tender offer premium and others would view it as favoring their chances of defeating a tender offer that had excluded them; under those circumstances, a corporation could hardly advocate vigorously the interests of advantaged and disadvantaged shareholders alike; (b) even excluded shareholders may want to see the tender offer go on because they can profit from the much higher market prices attending a credible tender offer, and if they do not sell their shares in the market and the tender offer succeeds, they still have their shares, just as they did before the offer, as well as an action for damages against the offeror who excluded them; (c) the corporation's management may try to enjoin the tender offer in order, not to protect its shareholders, but rather to save their own jobs, a situation generating conflict of interests between management and the shareholders; (3) given that even excluded shareholders can continue dealing in shares with the corporation and receiving from it dividends and proxies, the corporation cannot argue as the basis of associational standing that the violation of the Rule restricted the corporation's and its shareholders' freedom to interact with each other; and (4) target corporation standing to sue a tender offeror who has engaged

in misrepresentations is distinguishable from and, thus, not a precedent for, associational standing in cases of All Holders Rule violation because in an action to enjoin fraud shareholders are protected equally by the target corporation and fraud is very difficult to detect and causes monetary loss that is also very difficult to compute, which may result in irreparable harm; but this is quite different both from learning from the terms of the offer that the tender offeror has excluded a minority of the shareholders, and from requiring that it treats them equally by simply extending the same offer to all of them, equality of treatment that the target corporation, for its part, could not provide to all its shareholders since it would only aim at protecting the excluded minority.

§ 15. Tender offeror

[a] Private right of action implied

In the following cases, the courts held that § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, supports the implication of a private right of action on behalf of tender offerors suing for injunctive relief, such as disclosure of truthful and relevant information, as opposed to suing for damages, given that in so doing offerors would contribute to achieving the provision's purpose of protecting the shareholders from having to confront the offer on the basis of inadequate information. See also § 25, *infra*, on injunctive relief.

The court in *Humana, Inc. v American Mediacorp, Inc.* (1977, SD NY) 445 F Supp 613, CCH Fed Se-

cur L Rep ¶ 96298, held that a tender offeror has standing under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, to sue for injunctive relief. It distinguished this case from *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, where the Supreme Court held that a tender offeror suing for *damages* does not have an implied right of action under § 14(e), expressly stated that it had decided the issue before it narrowly and, thus, that it did not intimate any view on offerors' standing to sue in equity for injunctive relief under that provision. Moreover, the instant court construed the Court's comment—to the effect that tender offerors, the persons most interested in effective enforcement of the Williams Act, were not excluded from § 14(e) standing by Piper's narrow holding—to mean that it is appropriate to consider a tender offeror's particular interest in effective enforcement in order to determine whether it should be accorded standing to sue for injunctive relief. To make this determination, the court developed the twofold test as to whether the shareholders of the target company would be benefited if the allegations of the complaint are proven to be true and the relief requested is granted, followed by the secondary consideration whether granting it would also benefit the tender offeror. The court supported this test and its priorities on the grounds that it is aimed at furthering the purpose of the Act, which the decision in Piper stated to be the protection of the target company shareholders. Applying this test to the

case at hand, the court held that granting the relief requested here would result in increased disclosure of the terms of the competing tender offeror and the character of its management so that the target company shareholders could more intelligently choose between the competing offers of the plaintiff offeror and the defendant competing one.

See *Bolton v Gramlich* (1982, SD NY) 540 F Supp 822, CCH Fed Secur L Rep ¶ 98438, supra § 11, where the court held that it was not a circumvention of *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, to permit an unsuccessful tender offeror to bring a derivative action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) on behalf of the target company.

Where a tender offeror sued under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, for injunctive relief against false and misleading statements made by the target company's management, the court in *Weeks Dredging & Contracting, Inc. v American Dredging Co.* (1978, ED Pa) 451 F Supp 468, CCH Fed Secur L Rep ¶ 96414, 1978-1 CCH Trade Cases ¶ 62010, held that implying the right to such a remedy in favor of the tender offeror would not be inconsistent with the legislative scheme, which was designed to protect investors rather than tender offerors. The court explained that in a tender offer situation, where a battle is joined by the tender offeror and the target company, often it will only be the management of both entities

that is aware of whether statements made to the investors are misleading; thus, it will be the knowledge held by these parties that allows for a timely suit to be brought under § 14(e) through which the interest of the investors will be protected. The court concluded that to disallow a tender offeror's application for injunctive relief solely because it is put forward by a tender offeror would apparently conflict with the Williams Act's interest in protecting investors.

Where a tender offeror charged the target company with failing to make proper disclosure and engaging in manipulative acts or practices in order to repel the tender offer and sued for injunctive relief, the court in *Mobil Corp. v Marathon Oil Co.* (1981, CA6 Ohio) 669 F2d 366, CCH Fed Secur L Rep ¶ 98399, cert den 455 US 982, 71 L Ed 2d 691, 102 S Ct 1490, held that a tender offeror has an implied right of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, to obtain timely injunctive relief for violations of that section's tender offer provisions. Although recognizing that a tender offeror does not belong to the class for whose especial benefit the Act was enacted, the court considered whether there was any indication of legislative intent, explicit or implicit, either to create such a private right or to deny one. It indicated that allowing an injunctive action by a tender offeror would clearly inure to the benefit of the target shareholders by protecting them from having to decide whether to tender without full information, thereby serving to prevent the ma-

nipulative practices at which the Williams Act was aimed. The court then looked to the practical realities of a tender offer and determined that implying a right of action was necessary to aid the Williams Act's intended beneficiaries, namely the target company shareholders, in preventing violations of the Act. It explained that in a tender offer battle events occur with explosive speed and require immediate response by a party seeking to enjoin the unlawful conduct. Issues such as incomplete disclosure and manipulative practices can only be effectively spotted and argued by parties with complete knowledge of the target, its business, and others in the industry; frequently, the tender offeror has made intensive investigations before deciding to commence its offer, and may often be the only party with enough knowledge and awareness to identify nondisclosure or manipulative practices in time to obtain a preliminary injunction. Thus, the court considered that granting an offeror's application for an injunction against manipulation would often constitute the only means of preserving the shareholders' free choice, based on full information, whether to tender, which the Williams Act was designed to protect; yet, added the court, granting the application would not deter either management or competing offerors from engaging tender offer battles given that injunctive actions do not threaten monetary loss for one who inadvertently violates the Williams Act.

The court in *Luptak v Central Cartage Co.* (1979, ED Mich) CCH Fed Secur L Rep ¶ 98034, recognized that a tender offeror may

have standing to sue under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) when he is requesting injunctive relief rather than damages. However, the court denied plaintiff standing by reason of his failure to satisfy the standard of showing how the shareholders of the target company would benefit if the allegations of his complaint were proven and the relief requested were granted.

[b] Private right of action not implied

In the following cases, the courts held that § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, does not give rise to an implied private right of action for damages on behalf of tender offerors, who are not the class of persons that the Williams Act intended to protect.

The Supreme Court, in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, reh den 30 US 976, 52 L Ed 2d 371, 97 S Ct 1668, held that a tender offeror has no implied right of action for damages under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, for the lost opportunity to gain control of the target company due to the alleged violations of that provision by a successful counter offeror or other regulated parties under the statute. The Court based its holding on its conclusion that the Act was intended for the protection of shareholders of the target company, not of tender offerors from whom protection was sought. Although Con-

gress was committed, said the Court, to a policy of neutrality between tender offeror and existing management in contests for corporate control, furthering a policy of evenhandedness was not the purpose pursued by the legislation, which does not contain on behalf of those contesting parties an implicit private right of action for damages; neutrality is but one characteristic of legislation directed toward a different purpose, namely the protection of investors through disclosure requirements imposed on the contestants. The Court concluded that the disclosure provision of § 14(e), as a mechanism aimed especially at protecting shareholders of target companies, cannot consistently be interpreted as conferring a monetary remedy upon nonbeneficiaries of the Act, such as tender offerors, who are the regulated parties, especially where the award would not inure to the direct benefit of the protected class.

In *Litton Industries, Inc. v Lehman Bros. Kuhn Loeb, Inc.* (1989, SD NY) 709 F Supp 438, CCH Fed Secur L Rep ¶ 94345, the court held that a successful tender offeror lacks standing under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, to sue for damages its own financial adviser who allegedly victimized it by engaging in insider trading in the target corporation's securities. The court stated that it was now beyond dispute that the Williams Act was enacted to protect shareholders faced with a decision regarding a tender offer and not the tender offeror. It pointed out that breaches of fiduciary duty, such as those that had occurred in the in-

stant case, are traditionally relegated to state-law remedies.

The court in *Kalmanovitz v G. Heileman Brewing Co.* (1985, CA3 Del) 769 F2d 152, CCH Fed Secur L Rep ¶ 92238, 1985-2 CCH Trade Cases ¶ 66733, *affd* without *op* Appeal of Jacobs (1986, CA3 Del) 804 F2d 1248 and *affd* without *op* (CA3 Del) 804 F2d 1248, held that a tender offeror who is also a mere nominal shareholder of the target company since his stake in it is minimal in comparison to his interest as an offeror, does not have standing to bring suit for damages under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)). The court explained that there may well be a conflict of interest between the positions of a target shareholder and a tender offeror, and that it would almost be a sham to permit an individual to bring suit formally in his capacity as a shareholder when the suit is not in the interest of the target shareholders and, in fact, the plaintiff's true motivation, and his only real stake in the matter stems from his position as an offeror.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, stated that giving rise under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) to a private remedy for damages on behalf of tender offerors, as opposed to doing so on behalf of shareholders, would tip the scales either in favor of management or in favor of the person making the takeover bid, and discourage the making of tender offers by threatening potential offerors with the spectre of enormous financial liability.

The court in *Luptak v Central Cartage Co.* (1979, ED Mich) CCH Fed Secur L Rep ¶ 98034, held that the plaintiff did not have standing to sue for damages under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) because, although he brought his action in his individual capacity as a target company shareholder, he admittedly intended his action to provide him with the opportunity of making a proper tender offer of his own to all target company shareholders, and tender offerors lack § 14(e) standing for damages. The court noted that plaintiff's individual stake in the outcome of the suit as a shareholder was minimal when compared with his interest as a potential offeror; thus, it was more realistic to characterize him as a competing tender offeror for purposes of determining his standing to bring a § 14(e) claim.

IV. What Requirements Must Be Met to Bring Suit

§ 16. Whether actual offer must have been made

(a) Tender offer must have been made

In the following cases, the courts indicated that in order for the plaintiff to state a cause of action under § 14(d) and (e) of the Securities

Exchange Act of 1934 (15 USCS § 78n(d) and (e)), a tender offer must have been made to the plaintiff.

The court in *Lewis v McGraw* (1980, CA2 NY) 619 F2d 192, CCH Fed Secur L Rep ¶ 97344, *cert den* 449 US 951, 66 L Ed 2d 214, 101 S Ct 354, held that where a company has never made a tender offer proposal to the shareholders of a potential target company, but approached only the target with a proposal for a tender offer, the shareholders lack standing to bring an action for damages under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) against the target company for alleged misstatements that it made in rejecting the preliminary tender offer proposal made to the target company only. The court explained that one element of the cause of action under § 14(e) is a showing that there was misrepresentation upon which the target corporation shareholders relied, but the shareholders in the instant case could simply not have relied upon the target corporation statements, whether true or false, since they were never given an opportunity to tender their shares because no proposal for a tender offer was ever made to them.²⁸

Noting that the plaintiff share-

28. ☆ OBSERVATION: This case was distinguished by the court in *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443 (§ 16[b], *infra*), on the grounds that while shareholders cannot invoke the protection of the tender offer provisions from a tender offer that has not been made to them so that in principle it cannot have harmed them, they can seek that protection where the tender offer has not yet been made to them precisely for the purpose of engaging in inside trading before such offer is made to them, which trading is in principle harmful to the shareholders and satisfies the statutory requirement of being in connection with a tender offer. See also the Comment following the *O'Connor* case in § 21[b], *infra*.

holders' complaint did not allege the existence of any tender offer or actions suggesting a tender offer at the time the defendant's misleading statements were made, the court in *Rand v Anaconda-Ericsson, Inc.* (1985, ED NY) 623 F Supp 176, CCH Fed Secur L Rep ¶ 92330, reconsideration den (ED NY) CCH Fed Secur L Rep ¶ 92778 and affd (CA2 NY) 794 F2d 843, CCH Fed Secur L Rep ¶ 92827, 1986-1 CCH Trade Cases ¶ 67183, cert den 479 US 987, 93 L Ed 2d 582, 107 S Ct 579, held that plaintiffs had failed to meet the "in connection with any tender offer" requirement of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)). Consequently, it dismissed the complaint.

The court in *Luptak v Central Cartage Co.* (1979, ED Mich) CCH Fed Secur L Rep ¶ 98034, held that a plaintiff does not have standing to sue under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, where no tender offer has been made. The court indicated that here target company shares had simply been bought over an extended period of time through a series of over-the-counter market transactions at the then-current market prices by the defendant, who had made no general solicitation of target shareholders, nor any public announcement concerning its investment, nor contacted the target management. The court noted that both the provisions of the Williams Act and its legislative history reveal that the Act was passed with full awareness of the difference between tender offers and large-scale stock accumulations

through purchases on the market; indeed, the regulatory scheme established by the Act is incompatible with its application to programs of market purchasing, to the point where the provisions of § 14(d)(5)-(7), regulating the treatment by the tender offeror of shares tendered in connection with its tender offer, would be rendered unworkable if § 14 were held applicable to large-scale market transactions. The court agreed with the view that the consequences of bringing such large open market and privately negotiated purchases within the scope of the Williams Act would be to rule, in effect, that no large-scale acquisition program may be lawfully accomplished except in the manner of a conventional tender offer; and that while this may be a sensible legislative provision, there is nothing in the legislative history or the text of the Williams Act which suggests that it intended to bring about such consequences.

[b] No tender offer must have been made

The court in the following case held that no tender offer must have been made to the plaintiff for it to state a cause of action under either § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, or Rule 14e-3 of the Securities Exchange Commission (17 CFR § 240.14e-1), which prohibits inside trading in connection with tender offers, where the alleged fraudulent conduct preceding the announcement of a tender offer was in connection with such offer.

The court in *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981,

SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, held that plaintiff's claim under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, and Rule 14e-3 of the Securities Exchange Commission (17 CFR § 240.14e-1), prohibiting inside trading on the basis of material, nonpublic information in connection with a tender offer, was not defeated by the fact that at the time of the allegedly fraudulent conduct involving trading on inside information about an impending public announcement of a tender offer proposal no tender offer to the shareholders of the target company was actually in force because the conduct complained of occurred prior to the announcement of the offer. The court reasoned that unless preoffer fraudulent conduct relating to the impending tender offer is deemed to satisfy the § 14(e) language "in connection with a tender offer" and to provide, as a result, the required support for the valid promulgation thereunder of Rule 14e-3, which includes in its prohibition trading by corporate insiders on the basis of nonpublic information that a tender offer has been proposed, there would be a risk of defeating in substantial part the very purpose of the Williams Act, namely informed decisionmaking by shareholders. The court explained that the alleged failure to disclose the impending announcement of the tender offer proposal worked to deny the target investor the relevant information on which to decide whether to sell his shares in the same manner as fraudulent conduct operates when an offer has already been publicly announced; the very information that the share-

holder is denied in such circumstances is the information that the transaction, unbeknownst to him, is in connection with a tender offer attempt. The court noted that the person trading on the basis of the information stands to gain, whether through a future tender or through an open market sale, precisely because of the impending announcement of the tender offer proposal; the loss suffered by the target shareholder-seller is the direct result of his having been deprived of knowledge of the proposed tender offer.

§ 17. Tender offer need not have become effective

In the following cases the courts held that for a plaintiff to state a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1934, or Rule 14e-1 of the Securities Exchange Commission (17 CFR § 240.14e-3), which prohibits inside trading in connection with tender offers, it is not necessary that the conduct complained of occurred after the tender offer became effective provided that conduct was in connection with a tender offer and did not concern plans that were not firm.

The court in *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, held that plaintiff's claim stated a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, and Rule 14e-1 of the Securities Exchange Commission (17 CFR § 240.14e-3), prohibiting transac-

tions in securities on the basis of material, nonpublic information in connection with tender offers, despite the fact that the defendants' tender offer proposal was conditioned on the approval of the target company board and the board rejected the proposal at the same time that it publicly announced it. The court explained that since the sole purpose of those insiders—who in this case traded on the basis of nonpublic information that a tender offer proposal was being considered by the target board and would soon be publicly announced—was to capitalize on the pending tender offer proposal, the alleged fraud was “in connection with a tender offer,” as required under § 14(e), regardless of whether the offer actually became effective. The court added that the announcement of a proposed tender offer has significant market ramifications in the securities markets, regardless of whether the offer ultimately becomes effective; in the context of those ramifications, informed decisionmaking by the security holder of a target company is defeated when others in the market trade on information, which he lacks, about a tender offer proposal having been made. The court pointed out that such type of insider trading is among the ills at which the Williams Act is directed and could rightly be prohibited by the Commission under Rule 14e-3.

In *Berman v Gerber Products Co.* (1978, **WD Mich**) 454 F Supp 1310, CCH Fed Secur L Rep ¶ 96506, the court stated that it is well settled that statements made by either the tender offeror or the target company prior to the actual effective date of a tender offer but after the

announcement of the offer and preliminary filings fall within the purview of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)). The court explained that during this interim period the policies behind § 14(e) apply with as much force as they do following the effective date of the tender offer. It indicated that because in this case the overtures of the tender offeror to the target company were not firm offers they should not be deemed material information required to be disclosed under § 14(e) because parties are not required to disclose plans which are contingent or indefinite.

§ 18. Nonconventional tender offers

In the following cases, the courts recognized that for the tender offer provisions of the Williams Act of 1968 (15 USCS § 78n(d)-(f)) to support the implication of a private right of action, the tender offer in question need not be conventional.

The court in *Wellman v Dickinson* (1979, **SD NY**) 475 F Supp 783, CCH Fed Secur L Rep ¶ 96918, 4 Fed Rules Evid Serv 1178, affd (CA2 NY) 682 F2d 355, CCH Fed Secur L Rep ¶ 98731, cert den *Dickinson v SEC* (1983) 460 US 1069, 75 L Ed 2d 946, 103 S Ct 1522, agreed with the statement that case law, in defining “tender offer,” has followed the legislative history of the tender offer provisions of the Williams Act of 1968 (15 USCS § 78n(d)-(f)), which history makes it clear that the Act was not intended to be restricted to conventional tender offers, but rather was meant to encompass all methods of takeover by a large scale purchase program, so that

such methods provide the factual basis for the implication of a right of action under the Act.

In *Milstein v Huck* (1984, **ED NY**) 680 F Supp 354, CCH Fed Secur L Rep ¶ 91591, the court stated that the tender offer provisions of the Williams Act of 1968 (15 USCS § 78n(d)-(f)) is not limited to conventional tender offers so that § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act, applies to nonconventional transactions and supplies a private right of action for violations of its requirements.

The court in *Luptak v Central Package Co.* (1979, **ED Mich**) CCH Fed Secur L Rep ¶ 98034, stated that the Securities Exchange Act of 1934 (15 USCS §§ 78 et seq.), does not define the term “tender offer,” and its precise contours elude even judicial definition; nevertheless, the term embraces not only conventional tender offers, but also other activities designed to lead to an offer of shares. The court pointed out that purchases of shares on the stock market, even if they build up a large-scale stock accumulation but without involving any general solicitation of target shareholders, or any public announcement concerning the investment, or contact with the target management, do not constitute a tender offer under the Williams Act of 1968, which added the tender offer provisions of § 14(d)-(f) of the Exchange Act (15 USCS § 78n(d)-(f)), and could not be the subject of an implied right of action.

§ 19. Breach of fiduciary duty

(a) Private right of action implied

The courts in the following cases

held that a breach of fiduciary duty involving misrepresentation through nondisclosure or disclosure of misleading information in connection with a tender offer provided the basis for the implication of a right of action under either Rule 14e-3 of the Securities Exchange Commission (17 CFR § 240.14e-3) or § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)).

The court in *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, **SD NY**) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, held that option traders had standing under Rule 14e-3 of the Securities Exchange Commission (17 CFR § 240.14e-3), promulgated under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), to recover from corporate insiders who injured them when, in breach of their fiduciary duty to the corporation and the shareholders to disclose material information or abstain from trading, they traded corporation stock on the undisclosed information of the impending public announcement of a tender offer proposal. The court likened the defendants' fiduciary duty under the Rule to that which they also owed under § 10(b) of the Act (15 USCS § 78j(b)).

In *Mobil Corp. v Marathon Oil Co.* (1981, **CA6 Ohio**) 669 F2d 366, CCH Fed Secur L Rep ¶ 98399, cert den 455 US 982, 71 L Ed 2d 691, 102 S Ct 1490, the court stated that an action based on the common-law principles of breach of fiduciary duty and asserted by a tender offeror against a target company charged with failing to make proper disclosure and engaging in manipulative acts or practices in or-

der to repel the tender offer, did not constitute an adequate substitute for an action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, because manipulation under the Williams Act cannot be justified by the good-faith performance of fiduciary duties. The court concluded that state law did not provide the plaintiff with an effective counterpart under the traditional common-law principles and, consequently, that it was appropriate to imply a right of action under § 14(e) on behalf of the plaintiff.

☆ COMMENT: The holding of the court impliedly recognized that a breach of fiduciary duty can provide the factual basis for a private action under the Williams Act, at least insofar as it has a component of manipulation and, thus, that the breach of fiduciary duty component of a claim does not necessarily cause the relegation to state law of the whole of an action that otherwise has an element, such as manipulation, which is prohibited under the Act and thereby supports the implication of a right of action under it. Indeed manipulation, which entails deceit and fraud, is the outcome determinative element that explains the apparently opposite results reached in the cases in this section and in the following one. Where in an action predicated on a breach of fiduciary duty manipulation was undertaken in connection with a tender offer and constituted the cause of the harm complained of, a right of action under the Williams Act was implied; otherwise it was not.

[b] Private right of action not implied

The courts in the following cases held that, since § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) was not intended to remedy a breach of fiduciary duty in connection with a tender offer, it does not support the implication of a private right of action predicated on the allegation that the plaintiff was victimized by such a breach, rather than misled in his decision-making in connection with the tender offer.²⁹

The court in *Bolton v Gramlich* (1982, SD NY) 540 F Supp 822, CCH Fed Secur L Rep ¶ 98438, stated that there is no evidence of legislative intent to create a private right of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) for issuers harmed by a breach of fiduciary duty that was not in connection with a tender offer because the alleged false and misleading statements and omissions did not constitute the cause of the harm complained of. It added that the legislative history of that section speaks in terms of providing truthful information to shareholders, not in terms of fending off actions that management might take to destroy the value of the takeover without resorting therefor to false and misleading statements and omissions. The court added that breaches of fiduciary duty are traditionally relegated to state-law remedies, a fact which satisfies one of the factors laid down by the Supreme Court, in *Cort v Ash* (1975) 422 US 66, 45 L Ed 2d 26, 95 S Ct 2080, for not

implying a private right of action under federal law and instead leaving a cause of action up to state law.

Where a successful tender offeror sued for damages resulting from its own financial adviser who allegedly injured it by engaging in insider trading in the target corporation's securities in breach of its fiduciary duty to its tender offeror client, the court in *Litton Industries, Inc. v Lehman Bros. Kuhn Loeb, Inc.* (1989, SD NY) 709 F Supp 438, CCH Fed Secur L Rep ¶ 94345, held that it lacked standing to assert its claim under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968. The court stated that it was now beyond dispute that the Williams Act was enacted, not for the benefit of tender offerors, but rather for the protection of shareholders faced with a decision in connection with a tender offer. It pointed out that a breach of fiduciary duty, such as the one alleged here, is traditionally relegated to state-law remedies.

☆ OBSERVATION: It should be noted that, unlike most cases where the parties are either shareholders, investors, tender offerors, or target companies, in this case the parties were a tender offeror and a financial adviser, and that this configuration of parties seems to have weighed heavily in the court's decision that the Williams Act could not be invoked here because the tender offeror was not an intended beneficiary of the Act. Moreover, allowing the offeror's action against its adviser would not have benefited the Act's intended beneficiaries, namely target shareholders and investors in general,

in any way whatsoever. From this outcome determinative decision flowed the court's comments on the relegation to state law of an action on breach of fiduciary duty rather than the other way around.

The court in *Berman v Gerber Products Co.* (1978, WD Mich) 454 F Supp 1310, CCH Fed Secur L Rep ¶ 96506, stated that § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is not violated by a breach of duty not involving any deception, misrepresentation, or nondisclosure. The court explained that § 14(e) carries over the requirements of Securities and Exchange Commission Rule 10b-5 (17 CFR § 240.10b-5) into the area of tender offers so that the elements of a violation of § 14(e) are identical to those established under the Rule, with the exception of the "in connection with any tender offer" clause of § 14(e). The court pointed out that given the similarity of purpose of § 10(b) of the Act (15 USCS § 78j(b)) and § 14(e), the limitation that neither § 10(b) nor Rule 10b-5 is violated by only a breach of duty is also applicable to § 14(e).

§ 20. Misrepresentation or fraud

[a] Misrepresentation or fraud required under § 14(e)

The courts in the following cases held that a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) contains as one of its elements misrepresentation or fraudulent activity in connection with a tender offer.

The Supreme Court, in *Schreiber v Burlington Northern, Inc.* (1985) 472 US 1, 86 L Ed 2d 1, 105 S Ct 2458, CCH Fed Secur L Rep ¶

29. In connection with the cases in this section, see the Comment in § 19[a], supra.

92056, held that a shareholder fails to state a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) where he does not allege nondisclosure or misrepresentation. The Court pointed out that the provision's prohibition of manipulation does not reach acts which, although fully disclosed, artificially affect the price of the target's stock that is the subject of a tender offer; rather, § 14(e) only bans misrepresentation or nondisclosure involving conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities in connection with a tender offer.

☆ **OBSERVATION:** In this context it is appropriate to note that the Supreme Court, in *Ernst & Ernst v Hochfelder* (1976) 425 US 185, 47 L Ed 2d 668, 96 S Ct 1375, CCH Fed Secur L Rep ¶ 95479, reh den 425 US 986, 48 L Ed 2d 811, 96 S Ct 2194, stated that the word "manipulative" is virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities. In *Santa Fe Industries, Inc. v Green* (1977) 430 US 462, 51 L Ed 2d 480, 97 S Ct 1292, CCH Fed Secur L Rep ¶ 95914, the Court added that the term "manipulation" refers generally to practices, such as wash sales, matched order, or rigged

prices, that are intended to mislead investors by artificially affecting market activity.

It should also be noted that for the misrepresentation to be actionable it must be material. The Supreme Court, in *TSC Industries, Inc. v Northway, Inc.* (1976) 426 US 438, 48 L Ed 2d 757, 96 S Ct 2126, CCH Fed Secur L Rep ¶ 95615, motion den 429 US 810, 50 L Ed 2d 70, 97 S Ct 48, laid down the general standard of materiality as follows: an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.³⁰

The court in *Lewis v McGraw* (1980, CA2 NY) 619 F2d 192, CCH Fed Secur L Rep ¶ 97344, cert den 449 US 951, 66 L Ed 2d 214, 101 S Ct 354, stated that one element of the cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is a showing that there was misrepresentation upon which the target corporation shareholders relied.

The court in *Polaroid Corp. v Disney* (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095, held that a misrepresentation under § 14(e) of the Securities Exchange Act (15 USCS § 78n(e)) that is material because there is the substantial likelihood that a reasonable shareholder would consider it important in deciding whether to sell his stock, provides a target company with an implied right of action.

30. Although the Court gave this definition of materiality in deciding a claim under Rule 14a-9 of the Securities and Exchange Commission (17 CFR § 240.14a-9), it linked the definition to the statutory goal of promoting the public interest and protecting investors; therefore, the definition is applicable to other provisions of the securities laws that pursue the same goal.

In *Martin Marietta Corp. v Bendis Corp.* (1982, DC Md) 549 F Supp 893, CCH Fed Secur L Rep ¶ 98161, the court stated that § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is solely a disclosure provision, in that Congress has not authorized the federal judiciary to scrutinize the substantive fairness of tender offers as long as adequate disclosure is made; thus, in a tender offer case there is no manipulation analysis separate from the disclosure analysis because misrepresentation is a necessary element of any § 14(e) violation.

The court in *Re Commonwealth Oil Fields Petroleum Corp. Secur. Litigation* (1979, WD Tex) 467 F Supp 997, stated that fraudulent intent to deceive, or scienter, is an essential element of a private anti-fraud claim under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)). The court added that § 14(e) plaintiffs are required to allege knowledge of the fraud, not simply knowledge of the facts underlying the fraud. On that basis it held that plaintiffs failed on the face of their complaint to meet the scienter requirement as to those defendants that they charged with lack of sufficient knowledge of the target company and its financial condition to make any representation with respect to a consolidation between the target and a company of the tender offeror.

(b) Nature of actionable misrepresentation or fraud under § 14(e)

The courts in the following cases held that while misrepresentation or fraud is a requirement of a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15

USCS § 78n(e)), to be actionable it must have had a direct impact on the plaintiff, in that such misrepresentation or fraud occurred in connection with a tender offer and gave rise to the injury complained of.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, stated that under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, a target shareholder may gain standing if he has been misled, and thereby injured, by fraudulent misrepresentations of others perpetrated in the course of a tender offer, and that even a nontenderer may sue for damages at least in the typical case where he relied upon those misrepresentations, so that the misrepresentations must have had a direct, rather than indirect, impact on the plaintiff. The court started off its discussion of the nature of an actionable § 14(e) misrepresentation by explaining that the class of § 14 beneficiaries is composed of shareholders confronted with a tender offer and, thus, with the need to decide whether to accept or refuse it, and protected in making that decision by the full disclosure requirements of the Williams Act. It then applied these principles to nontendering target company shareholders who contended that they had suffered injury as a result of the tender offeror's alleged violations of § 14(e), in that through omissions and misrepresentations the offeror acquired more than 80 percent of the target company, thereby significantly reducing the value and marketability of the nontenderers' shares; but the latter, as the court

noted, had been apparently aware of the alleged inadequacy of the price offered by the tender offeror for target company shares so that they had not been misled into tendering their shares by the complained-of omissions and misrepresentations. The court held that such injury is not of the type at which the Williams Act was aimed since it was not injury caused by fraud that induced a target shareholder to the unwise response of tendering or withholding his shares in connection with a tender offer. The court indicated that a § 14(e) injury is directly caused by misstatements in the tender offer materials, and typically will be easily measured as the difference between the price for which shares were tendered, or not tendered, and the "genuine" value of those shares. However, said the court, the injury suffered by the plaintiffs here flowed, if at all, from the successful completion of the tender offer, and only indirectly from alleged misstatements in the tender offer materials. The court was of the opinion that to permit suit by such plaintiffs for monetary relief under § 14(e) would contravene at least the spirit of the Supreme Court decision in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, because establishment of a § 14(e) damage remedy on behalf of those plaintiffs was not necessary to effectuate Congress' goals in enacting the Williams Act.

☆ OBSERVATION: It should be noted that the Hundahl court viewed the issue here as being whether a private right of action should be created for the plaintiff shareholders, rather than as be-

ing whether shareholders, who under § 14(e) have an implied right of action, had satisfied a statutory requirement to state a cause of action, the requirement being that the injury must have been caused by the defendant's misrepresentation or fraudulent conduct. Compare this case with *Schreiber v Burlington Northern, Inc.* (1985) 472 US 1, 86 L Ed 2d 1, 105 S Ct 2458, CCH Fed Secur L Rep ¶ 92056, supra §§ 10[a] and 20[a], where the Supreme Court implicitly recognized that the shareholders had a right of action, but held that they had failed to state a cause of action because the challenged conduct did not involve manipulation or deception. See also § 3[a], supra, for a discussion of the difference between a right and a cause of action.

Where a shareholder of the target company did not tender her shares, but alleged that the false information and omissions in the proxy materials, although not misleading her, led other shareholders to tender their shares so that the successful tender offeror was eventually able to carry out a freeze-out merger, in reference to which the shareholder claimed that her shares were merged out at an inadequate price and that the merger was rendered possible by the offeror's previous misstatements in connection with the tender offer and in violation of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), the court in *Plaine v McCabe* (1986, CA9 Cal) 797 F2d 713, held that a shareholder has standing to sue under § 14(e) regardless of whether she has tendered her shares if her injuries have occurred

as a result of fraudulent activity in connection with a tender offer.

☆ COMMENT: In the previous two cases the courts applied the same requirement that the misrepresentation or omission in connection with a tender offer must give rise to the injury complained of, but reached opposite decisions under similar factual situations: in *Hundahl* the court held that the drop in price of a nontenderer's shares following a tender offer that succeeded allegedly through misrepresentations and omissions was not directly connected with such tender offer and, thus, did not satisfy the requirement. But in *Plaine* the court found the requirement satisfied even though the drop in share price was removed from a tender offer one step further since it occurred when shares reduced to a minority position after a successful tender offer were bought out at a low price through a merger. In this context, it is worth pointing out that the court in *Hundahl* noted that cases where a nontendering shareholder had not been misled by alleged misrepresentations in the course of a tender offer—which was the case of the *Hundahl* and the *Plaine* plaintiffs—had resulted in decisions at least facially inconsistent. The inconsistency in these two cases may be explained as a result of the different principles that the courts considered to be outcome determinative: in *Hundahl* the principle was the congressional intent to benefit shareholders through the Williams Act by disclosing to them pertinent information on which to decide how to react to a ten-

der offer, so that the intended benefit has been received where a shareholder identifies some information as false. By contrast, in *Plaine* the outcome determinative principle was the statutory language "in connection with" so that where the injury can be linked to a tender offer, the statutory provision is applicable and affords a private right of action.

[c] Misrepresentation or fraud not required under Rule 14e-1(c) and All Holders Rule

The courts in the following cases held that fraud in connection with a tender offer is not a requirement to state a cause of action under Rule 14e-1(c) (17 CFR § 240.14e-1(c)) and the All Holders Rule (17 CFR § 240.14d-10(a)) of the Securities and Exchange Commission.

The court in *Caleb & Co. v E. I. Du Pont de Nemours & Co.* (1985, SD NY) 615 F Supp 96, CCH Fed Secur L Rep ¶ 92226, recognized that fraud is not an element of Rule 14e-1(c) of the Securities and Exchange Commission (17 CFR § 240.14e-1(c)), which requires tender offerors to pay cash promptly for the shares tendered to and accepted by it. The court noted that the Rule supports an implied right of action because the absence of fraud as an element does not compel the conclusion that Congress did not intend to extend to it the private right of action that it was aware courts had implied under the fraud-based § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)).

☆ OBSERVATION: Compelling as the argument of the Caleb court is, it should be noted, however,

that the Supreme Court, in *Schreiber v Burlington Northern, Inc.* (1985) 472 US 1, 86 L Ed 2d 1, 105 S Ct 2458, CCH Fed Secur L Rep ¶ 92056, supra § 20[a], stated that without misrepresentation or nondisclosure, § 14(e) is not violated. It is true that in *Caleb* the provision sued under was Rule 14e-1(c) rather than § 14(e). But if § 14(e) is limited to prohibiting fraud committed through the use of misrepresentation or nondisclosure, then a Commission rule that prohibits acts or practices that are not fraudulent in themselves but that can prevent their commission might be said to exceed the scope of § 14(e), which is the enabling statutory provision affording any rule adopted thereunder the necessary support. Yet, it must also be noted that it is only the first sentence of § 14(e) that deals with the prohibition of statements, both those made when their content was false and those not made when they concerned material facts. By contrast, the second sentence deals with a grant of authority to the Commission for it to prohibit acts and practices, both those that are themselves fraudulent, deceptive, or manipulative, and those that prevent them—that is, those that precede them in time as well as in nature because they are the means by which the prohibited acts and practices are committed. Thus, it can be argued that a plaintiff that sues directly under § 14(e) sues necessarily on the basis of the first sentence alone and, therefore, is limited to alleging what that sentence prohibits, which is only the misrepresentation or nondisclosure of material

information by the defendant. A plaintiff cannot complain of acts and practices that are fraudulent, deceptive, or manipulative because they are dealt with in the second sentence, which is addressed exclusively to the Commission so that no party other than the Commission can invoke it as a source of a right entitled to judicial protection. For its part, the Commission adopts rules on the basis of the second sentence—which contains a grant of regulatory authority—not the first sentence, and since the scope of the second sentence is much broader than that of the first sentence, the validity of Commission rules must be measured against the scope of the second sentence, not that of the first one. As a result, a plaintiff can invoke a right of action under a rule to complain of acts and practices of which it could not complain under § 14(e), which is limited, as far as plaintiffs go, to the narrower first sentence.

The court in *Polaroid Corp. v Disney* (1988, CA3 Del) 862 F2d 987, CCH Fed Secur L Rep ¶ 94095, found that the Securities and Exchange Commission's All Holders Rule (17 CFR § 240.14d-10(a)) requiring a tender offeror to extend its offer to all security holders of the class of securities subject to the tender offer, and promulgated under § 14(d) of the Securities Exchange Act of 1934 (15 USCS § 78n(d)), is not an attempt to proscribe manipulative practices, which would make misrepresentation or fraud necessary for it to be violated; rather, it is an attempt to insure that all holders of a class of securities subject to a tender offer

receive fair and equal treatment. To underline this manipulation-free nature of the Rule, the court compared it with two sections of the Act, namely § 14(d)(6) on proration of shares when the number of those tendered exceeds the number of shares sought, and § 14(d)(7) on paying the best price for all shares purchased. The court pointed out that they, too, are only tangentially related to insuring that investors make fully informed decisions and, thus, their violation is not dependent on whether truthful and complete information was provided, but depends instead on whether the investors were treated fairly and equitably. Consequently, the court implied from the All Holders Rule a private right of action on behalf of target company shareholders injured by a tender offer express exclusion from its bid of all the target shares in the target's employee stock ownership plan.

§ 21. Whether there must have been reliance on misrepresentation

(a) Reliance required if misrepresentation is through disclosure

The courts in the following cases held that to state a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), the plaintiff must have relied on the alleged misstatement when deciding whether to tender its target shares in response to a tender offer; therefore, the reliance requirement is not met where no misstatement was made at all, or those made were not in connection with a tender offer made to the plaintiff, or the plaintiff was aware that the defendant's statements had misstated the facts.

In *Schreiber v Burlington Northern, Inc.* (1985) 472 US 1, 86 L Ed 2d 1, 105 S Ct 2458, CCH Fed Secur L Rep ¶ 92056, the Supreme Court stated that the primary congressional concern in the Williams Act of 1968 (15 USCS §§ 78m(d)-(e) and 78n(d)-(f)) was to provide disclosure, and that the process of the Act's development suggests that the mechanism adopted by Congress to make the Act work was reliance by market participants, in evaluating the quality of any offer, on full information disclosed by contenders for corporate control presenting their arguments in a neutral setting. The Court noted that such reliance, rather than court-imposed principles of fairness or artificiality, was the congressionally preferred method of market regulation. Consequently, the Court held that target company shareholders suing under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act, had failed to state a cause of action when they alleged manipulation of the target share price that did not entail reliance on their part since it had not involved either nondisclosure or misrepresentation.

The court in *Lewis v McGraw* (1980, CA2 NY) 619 F2d 192, CCH Fed Secur L Rep ¶ 97344, cert den 449 US 951, 66 L Ed 2d 214, 101 S Ct 354, stated that one element of a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is a showing that the shareholders of the target corporation relied on the alleged misrepresentation in connection with a tender offer. The court found that element missing in this case

because the tender offer was conditional upon its approval by the target board and the board disapproved it so that no tender offer was ever made to the shareholders and, therefore, they never had to rely on any statement, whether true or false, to decide whether to tender their shares. Consequently, the court held that the shareholders of the potential target company lacked standing to sue that company because its misstatement as to the inadequacy of the tender offer price did not constitute a reliance-inducing misstatement affecting a trading decision connected with a tender offer and, as a result, failed to state a cause of action under § 14(e).³¹

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, recognized that where shareholders of the target company at the time of the tender offer relied on misrepresentations in the tender offer either to tender or withhold their target shares and thereby suffered harmful consequences, their injury may be redressed through an implied right of action for damages under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968. It noted that for non-tenderers of the target company to have in principle a § 14(e) right of action they must have relied upon the fraudulent misrepresentations of others committed in the course of the tender offer and while they held target shares. On this basis,

the court refused to extend standing under § 14(e) to nontendering target company shareholders who clearly did not rely on alleged misstatements made in connection with a tender offer because they were apparently aware of the alleged inadequacy of the price offered by the tender offeror for target company shares so that they were not misled into tendering their shares. The court explained that there was no reliance on the misstatements because the plaintiff shareholders already possessed at the time of the offer knowledge of the facts whose disclosure the Williams Act was designed to insure; thus, since there was no need for the Act's protection, no relief could be sought under it. The court added that to permit suit by such persons would broaden the scope of the Act and would be out of harmony with the decision in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, where the Supreme Court ascribed to the Act a narrow purpose.

The court in *Berman v Gerber Products Co.* (1978, WD Mich) 454 F Supp 1310, CCH Fed Secur L Rep ¶ 96506, stated that in the context of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) in particular and of the securities laws in general, the element of reliance is required and essentially concerns whether the misrepresentation or omission actually induced the plaintiff himself to act differently from the way he would have acted in his investment

decision had the defendant made truthful and full disclosure to him. The court distinguished the requirement of reliance from that of materiality, which it defined as that disclosure of facts withheld from disclosure that with substantial likelihood would have made a reasonable investor consider those facts important in the making of his decision concerning the tender offer. It noted, however, that the distinction between materiality and reliance is one of degree.

(b) No reliance required if misrepresentation is through nondisclosure

The courts in the following cases held that reliance is not an element of a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) where the alleged violation of that section consisted in the omission by the defendant of material information in connection with a tender offer because under those circumstances reliance is presumed.

Discussing the principle that reliance is an element of a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) in the context of that provision's requirement that the alleged violation be "in connection with a tender offer," the court in *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443, stated that since reliance is presumed if the information withheld is material, where the information withheld is precisely that a tender offer has been proposed, even though conditioned on the approval of the target company board, the impossibility for the

plaintiff to have relied on a tender offer that he did not know about does not defeat his cause of action based on the fact that he engaged in trading in the target stock, which he would not have traded had he known of the conditionally proposed tender offer. The court distinguished this situation from that in which the proposal for a tender offer, even if conditioned on the target board's approval, has been disclosed, so that a plaintiff holding target stock at the time could not possibly have relied on a tender offer that by its own terms was never made to him; under those circumstances, the fact that the board rejected the conditional proposal by falsely stating that the proposed price was inadequate does not provide the basis for a cause of action under § 14(e).

☆ COMMENT: The case cited by the O'Connor court to make this distinction was *Lewis v McGraw* (1980, CA2 NY) 619 F2d 192, CCH Fed Secur L Rep ¶ 97344, cert den 449 US 951, 66 L Ed 2d 214, 101 S Ct 354, supra § 21[a]. If the whole of those cases are integrated they provide the basis for the following propositions: the sole purpose of the tender offer provisions of the Williams Act of 1968, adding § 14(d)-(f) to the Securities Exchange Act of 1934 (15 USCS § 78n(d)-(f)) is, as the Supreme Court stated in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, to protect investors who are confronted with a tender offer by insuring that they are not required to respond to such an offer without adequate information; therefore,

31. See the Comment in § 21[b], *infra*, for a discussion of this case in connection with the way it was distinguished by the court in *O'Connor & Assoc. v Dean Witter Reynolds, Inc.* (1981, SD NY) 529 F Supp 1179, CCH Fed Secur L Rep ¶ 98443.

one element of a cause of action under § 14(e) is a showing that in connection with a tender offer there was misrepresentation of a material fact upon which the target corporation shareholders relied. Where a tender offeror proposes a tender offer conditioned on the target board's approval, and investors in general, as well as target corporation shareholders in particular, know of such a conditional proposal, they are not faced with the decision whether to tender their target stock. The fact that the target board disapproves the offer by misstating the adequacy of its price is irrelevant because even a disapproval based on true statements would have had the same result, namely the tender offeror would have withdrawn its proposal, which was conditioned on its approval by the target board, and no investor would have been confronted with any trading decision in connection with a tender offer. Thus, where false statements just the same as true statements, and even no statement at all, but a mere declaration of disapproval, have the same effect of not placing investors before the need to decide whether to trade in connection with a tender offer so that no reliance on any statement is called for, § 14(e) is not applicable since there is no need for the protection that it affords investors against misstatements in reliance on which they are induced to make a trading decision connected with a tender offer. By contrast, that section is applicable where a tender offeror proposes a tender offer conditioned on the target board's approval, but neither investors in general nor

target corporation shareholders in particular are informed of such a conditional offer so that they trade in the target stock with insiders who are so informed but who misstate the offer's existence by not disclosing it to those investors and shareholders, thereby depriving them of the opportunity to decide on the basis of adequate information whether to trade in stock connected with a tender offer. The existence of a tender offer proposal does not have to be affirmatively denied; it may be simply concealed by the insiders' trading with shareholders and investors who can reasonably assume that no proposal exists because if it did it would constitute a material fact and the insiders would be under a duty to either disclose it or to abstain from trading.

In *Horowitz v Pownall* (1985, DC Md) 105 FRD 615, the court stated that where a shareholder's claim under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is based primarily upon omissions, reliance is presumed. It cited *Affiliated Ute Citizens v United States* (1972) 406 US 128, 31 L Ed 2d 741, 92 S Ct 1456, CCH Fed Secur L Rep ¶ 93443, reh den 407 US 916, 32 L Ed 2d 692, 92 S Ct 2430 and reh den 408 US 931, 33 L Ed 2d 345, 92 S Ct 2478, for the proposition that where a claim alleges material omission, proof of reliance is not required, only proof that the facts withheld were material in the sense that a reasonable investor might have considered them important in the making of his decision.

The court in *Berman v Gerber Products Co.* (1978, WD Mich) 454

F Supp 1310, CCH Fed Secur L Rep ¶ 98500, indicated that although reliance is required in the context of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), where the violations alleged by plaintiffs arise from non-disclosure of material facts, positive proof of reliance is not a prerequisite to recovery.

§ 22. Causation of injury by violation of tender offer provision is required

In the following cases, the courts held that in order for the plaintiff to state a cause of action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), it is not sufficient to plead that the action was violated, but must also be pleaded that the violation is causally linked to the plaintiff's injury.

In *Bolton v Gramlich* (1982, SD NY) 540 F Supp 822, CCH Fed Secur L Rep ¶ 98438, the court held that in order to maintain an action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), the plaintiff must show that the injury complained of was caused by the violation of that provision; therefore, although an allegation of false and misleading statements and omissions may state a violation of § 14(e), it must also be shown that such statements and omissions had a material effect in causing that injury. The court found that the defendants violated that section through various misleading statements and omissions in their opposition to the tender offer in

question, they never connected those violations to the injury—namely the sale of property and termination of a trust. Nor was such a causal link established by alleging merely that in connection with the tender offer defendants had breached their state-law fiduciary duties by engaging in such a sale and termination of the trust.³²

The court in *Re Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation* (1979, WD Tex) 467 F Supp 227, recognized that causation is an essential element of a claim under the antifraud provision of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), and that it can be stated where it is alleged that the misrepresentations in the tender offer material were the cause of the failure to tender and, consequently, the cause of the plaintiff's injury. The court explained that what § 14(e) requires is simply a misleading statement or omission of a material fact made with intent to deceive in connection with a tender offer, but it does not require that a stockholder be misled in the way that the alleged wrongdoer intended. Liability, said the court, is not predicated upon specific intent to induce a stockholder to act in a certain way, but rather upon general intent to deceive. It added that, while there may also be a requirement that the stockholder acted reasonably in response to the alleged misrepresentations, it may not be possible to determine on the basis of the pleadings and documents submitted that the plaintiffs' response to announcements by other parties to the tender offer was unreasonable.

32. See also § 19[b], *supra*, on the court's discussion of the insufficiency of a breach of fiduciary duty to give rise to a private right of action under § 14(e).

The court in *Berman v Gerber Products Co.* (1978, **WD Mich**) 454 F Supp 1310, CCH Fed Secur L Rep ¶ 96506, indicated that there is no question that causation is an essential element of a private cause of action brought under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), so that in order to prevail, a plaintiff must demonstrate a causal nexus between the defendants' wrongful conduct and his loss. It added that the statutory obligation to disclose and the unlawful withholding of a material fact establish the requisite element of causation in fact.³³ By way of illustration, the court indicated that causation under § 14(e) is as necessary as it is under Rule 10b-5 of the Securities and Exchange Commission (17 CFR § 240.10b-5).

In *Plaine v McCabe* (1986, **CA9 Cal**) 797 F2d 713, the court recognized that an essential element of a claim under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) is that the plaintiff prove injury caused by the violation of that provision.

V. What Remedies Can Be Sought

§ 23. Damages

[a] Held to be available to shareholders or investors in general

The courts in the following cases held that § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, and Rule 14e-1(c) of

the Securities and Exchange Commission (17 CFR § 240.14e-1(c)), make available an implied right of action for damages where such relief is sought by the shareholders of the target company or investors in general since they constitute the class of persons for whose protection in connection with tender offers the Williams Act was enacted.

The court in *Caleb & Co. v E. I. Du Pont de Nemours & Co.* (1985, **SD NY**) 615 F Supp 96, CCH Fed Secur L Rep ¶ 92226, held that where a tender offeror has failed to pay promptly for the shares tendered a private right of action for money damages can be implied on behalf of the tendering shareholders under Rule 14e-1(c) of the Securities and Exchange Commission (17 CFR § 240.14e-1(c)), which requires tender offerors to pay cash promptly for the shares tendered to and accepted by it. In reaching this decision, the court noted the implicit recognition of other courts that rules, such as this one, promulgated under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) may be enforced in private actions; and that such actions for money damages are likely to be the most effective means of insuring enforcement of Rule 14e-1(c) as opposed to actions brought by the Commission for money damages or injunctions.

The court in *Re Commonwealth Oil/Tesoro Petroleum Corp. Secur. Litigation* (1979, **WD Tex**) 467 F Supp 227, held that an implied remedy for damages in favor of target company shareholders is

supported by § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968. It agreed with the view that the failure to recognize simplified rights of action for damages on the part of aggrieved target shareholders would render the protection of the Williams Act a snare and a delusion. The court indicated that the reasoning of the Supreme Court in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 134, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, denying tender offerors a private damages remedy under § 14(e), did not preclude the implication of such a right in favor of target shareholders because the Act was specifically designed for their protection so that awarding them monetary relief would in general not rebound to their detriment.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, **ND Tex**) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, indicated that creating a remedy for damages on behalf of shareholders under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, would do far less to tip the scales either in favor of management or in favor of the person making the takeover bid, and would far less discourage the making of tender offers by threatening potential offerors with the spectre of enormous financial liability, than would the creation of the same remedy on behalf of tender offerors, to whom the Supreme Court denied it in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 134, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864. The instant court

explained that creating a private right of action for damages on behalf of aggrieved target company shareholders would in general rebound to the benefit of the shareholders, for whose protection the Williams Act was designed. It pointed out that awarding monetary relief was warranted under *Piper* because it constituted a reasonably necessary means of adequately effectuating the purpose of the Act, and that the failure to imply the right to such relief on the part of those shareholders could render the Act's protection of them a snare and a delusion.

The court in *Plaine v McCabe* (1986, **CA9 Cal**) 797 F2d 713, held that a plaintiff ex-shareholder, whose shares had been acquired by the successful tender offeror in its freeze-out merger of the former target company, had standing to sue for damages under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) even though a state corporations commission had found that the freeze-out price paid to her had been fair and such decision was entitled to collateral effect in federal court.

[b] Held not to be available to tender offerors

The court in the following case held that § 14(d)-(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, does not make available to tender offerors an implied right of action for damages since they do not form part of the class of persons for whose protection in connection with tender offers the Williams Act was enacted.

In *Piper v Chris-Craft Industries,*

33. The court noted that causation has been most often analyzed in terms of materiality or reliance. For a distinction between these two concepts, see this case in § 21[a], *supra*.

Inc. (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, reh den 430 US 976, 52 L Ed 2d 371, 97 S Ct 1668, the Supreme Court held that tender offerors are not the intended beneficiaries of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, but rather a class whose unregulated activities Congress intended to curb by statute; as a result, they do not have a right of action for damages thereunder. The Court found no hint in the legislative history that Congress contemplated a private right of action for damages by one of several contending offerors against a successful bidder or by a losing contender against the target corporation. The Court explained that as a disclosure mechanism aimed especially at protecting shareholders of target corporations, who must decide whether to tender or retain their stock, § 14(e) cannot consistently be interpreted as conferring a monetary remedy upon the parties from whom protection was sought, particularly where the award would not redound to the direct benefit of the protected class. It then stated that awarding damages under § 14(e) to parties other than the protected class has only a remote, if any, bearing upon implementing the congressional policy, pursued through the Williams Act, of protecting shareholders. Thus, it rejected the argument that an ever-present threat of damages against a successful contestant in a battle for control would have such deterrent value as to provide significant additional protection for shareholders in general. It deemed it more likely that such threat would prejudice

shareholders because some tender offers may never be made if there is a possibility of massive damages claims for what courts subsequently hold to be an actionable violation of § 14(e); under these circumstances, a damages award for tender offerors may well be inconsistent with the interests of many members of the protected class. Moreover, said the Court, the availability of a damages award may be of only indirect value to shareholders who accepted the exchange offer of the defeated tender offer contestant or even of that of the winner, for they may wind up exposed to, or actually engaged in, costly postcontest litigation and liable to a large substantive judgment. Thus, the Court concluded that shareholder protection, if enhanced at all by damages awards to tender offerors, can more directly be achieved with other, less drastic means more closely tailored to the precise congressional goal underlying that provision of protecting the shareholders, such as by granting injunctive relief. See the Court's views on injunctive relief in § 25[a], *infra*.

In *Litton Industries, Inc. v Lehman Bros. Kuhn Loeb, Inc.* (1989, SD NY) 709 F Supp 438, CCH Fed Secur L Rep ¶ 94345, the court held that a successful tender offeror lacks standing under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, to sue for damages its own financial adviser who allegedly victimized it by engaging in insider trading in the target corporation's securities.

The court in *Kalmanovitz v G. Heileman Brewing Co.* (1985, CA3

Del) 788 F2d 159, CCH Fed Secur L Rep ¶ 93236, 1985-2 CCH Trade Cases ¶ 90734, *affd* without op 801 F2d 1248 and *affd* without op 804 F2d 1248, held that a tender offeror who is also a mere nominal shareholder of the target company since his stake in it is minimal in comparison to his interest as an offeror, does not have standing to bring suit for damages under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)).

Not Held not to be available to target company

The court in the following case held that § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, does not make available an implied right of action for damages to target companies since they do not belong to the class of persons for whose protection in connection with tender offers the Williams Act was enacted.

The court in *Wellman v Dickinson* (1979, SD NY) 475 F Supp 783, CCH Fed Secur L Rep ¶ 96918, 4 Fed Rules Evid Serv 1178, *affd* (CA2 NY) 682 F2d 355, CCH Fed Secur L Rep ¶ 98731, *cert den* Dickinson v SEC (1983) 460 US 1000, 75 L Ed 2d 946, 103 S Ct 1599, indicated that the Supreme Court's reasoning in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, narrows a damage suit by a target company against a purchaser of its stock in a takeover or partial takeover transaction for violation of § 14(d) and (e) of the Securities

Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968.

§ 24. Measure of damages

The courts in the following cases held that the recoverable damages in an action under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, may be determined by the price that the shares would have fetched had there been no violation of § 14(e) as opposed to the price actually received; so that, for example, they are not limited to the difference between the fair price of the shares sold in connection with a tender offer and the actual sale price.

☆ **OBSERVATION:** The importance of the issue of the proper measure of damages as a criterion in determining whether to imply a right of action is consistent with the congressional intent expressed in the Williams Act as illustrated in *Schreiber v Burlington Northern, Inc.* (1985) 472 US 1, 86 L Ed 2d 1, 105 S Ct 2458, CCH Fed Secur L Rep ¶ 92056. Commenting specifically on § 14(e), the Supreme Court said that nowhere in the legislative history is there the slightest suggestion that the courts are to oversee the substantive fairness of tender offers, which is a task that Congress reserved for the marketplace. The Court added that the application by judges of their own sense of what constitutes unfair or artificial conduct would inject uncertainty into the tender offer process, since it would not be known until after

the tender offer had closed whether fully disclosed actions of one side or the other were judicially found to be manipulative, and such uncertainty would directly contradict the expressed congressional desire to give investors full information. It would thus appear that where a court has to engage in speculation or resort to the arbitrary fixation of damages were it to imply a right of action on behalf of the plaintiff suing under the Williams Act, such implication would not be warranted by the Act in light of its underpinning congressional intent.

The court in *Hundahl v United Ben. Life Ins. Co.* (1979, ND Tex) 465 F Supp 1349, CCH Fed Secur L Rep ¶ 96815, stated that the type of injury at which § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, was aimed is caused directly by misstatements in the tender offer materials that induced a target shareholder to the unwise response of tendering or withholding his shares in connection with a tender offer, and typically will be easily measured as the difference between the price for which shares were tendered, or not tendered, and the "genuine" value of those shares (emphasis in the original).

The court in *Plaine v McCabe* (1986, CA9 Cal) 797 F2d 713, held that a federal law measure of damages could be applied by a plaintiff ex-shareholder, whose shares had been acquired by the successful tender offeror in its freeze-out merger of the former target company, so that she was not deprived of standing to sue under § 14(e) of the Se-

curities Exchange Act of 1934 (15 USCS § 78n(e)), even though a state corporations commission had found that the freeze-out price paid to her had been fair and such decision was entitled to collateral effect in federal court. The court indicated that although the issue of price fairness must be considered precluded from relitigation to the extent that it might be involved in the federal proceedings, the damages awarded to a successful § 14(e) plaintiff may go beyond a determination of a fair price. To begin with, the state commission here merely decided that the merger price was within a range of fairness, but a determination of actual damages in the federal claim may well produce a different price. The court went on to indicate that the purpose of § 14(e) is to compensate plaintiffs injured by violations of the federal securities laws, whether the measure of damages is out-of-pocket loss, benefit of the bargain, or some other appropriate standard; it agreed that actual damages may include loss of possible profit, unless wholly speculative, from securing a merger agreement more favorable to the plaintiff. Thus, added the court, even though the freeze-out price per share was considered fair, the plaintiff might be able to show that had § 14(e) been fully complied with, the shareholders' negotiating position would have produced a higher amount.

§ 25. Injunctive relief

[a] Held to be available to tender offerors

The courts in the following cases recognized or held that § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and

(e)), added to the Exchange Act by the Williams Act of 1968, makes available to tender offerors an implied right of action for injunctive relief where that relief would further the legislative intent behind the Williams Act.

In *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, reh den 430 US 976, 52 L Ed 2d 371, 97 S Ct 1668, the Supreme Court expressly left open the question whether injunctive relief is available to a tender offeror suing under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)). But it recognized the possibility for such relief by agreeing with the statement that in corporate control contests, such as those regulated under § 14(e), the stage of preliminary injunctive relief, rather than postcontest lawsuits, is the time when relief can best be given since it is apt to be the most efficacious form of remedy. See the Court's views on damages in § 23[b], supra.

The court in *Humana, Inc. v American Medicorp, Inc.* (1977, SD NY) 445 F Supp 613, CCH Fed Secur L Rep ¶ 96298, held that a tender offeror has standing under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, to sue for injunctive relief. It pointed out that in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, holding that damages cannot be sought by a tender offeror suing under that provision, but leaving open the question whether injunctive relief is available to such an offeror, the Supreme

Court concluded that rather than damages, less drastic means could be more closely tailored to the precise congressional goal underlying the Williams Act of protecting shareholders. Commenting on this dictum, the instant court pointed out that no remedy can be more closely tailored to the needs of the occasion than injunctive relief, when appropriate, since its very purpose is to afford a remedy precisely contoured to the requirements of the situation. The court then went on to develop a test to determine when injunctive relief should be granted to a § 14(e) tender offeror, namely whether the shareholders of the target company would benefit if the allegations of the complaint are proven to be true and the relief requested is granted, to which is added the subsidiary, but appropriate consideration whether granting it would also benefit the tender offeror. The justification for this test and its priorities, the court said, is that it is aimed at furthering the purpose of the Williams Act, which the decision in *Piper* found to be the protection of the target company shareholders. Applying it to the case at hand, the court held that granting the relief requested here would result in increased disclosure of the terms of the competing tender offeror and the character of its management so that the target company shareholders could more intelligently choose between the competing offers of the plaintiff offeror and the defendant competing offeror.

Where a tender offeror sued under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, for

injunctive relief against false and misleading statements made by the target company's management, the court in *Weeks Dredging & Contracting, Inc. v American Dredging Co.* (1978, **ED Pa**) 451 F Supp 468, CCH Fed Secur L Rep ¶ 96414, 1978-1 CCH Trade Cases ¶ 62010, held that implying the right to such a remedy in favor of the tender offeror would not be inconsistent with the legislative scheme, even though such scheme was designed to protect investors rather than tender offerors. The court stated that unlike the damage remedy, the injunctive remedy does not appear to impose any burden upon investors when it is properly invoked. On the contrary, said the court, when the injunctive remedy is employed prior to the time when investors are called upon to render their decision on the tender offer, it allows the investors to arrive at their decision in an environment purged of false and misleading information; and this result, although obtained through the efforts of the tender offeror rather than the investors themselves, furthers the purposes of the legislative scheme. The court explained that in a tender offer situation, where battle is joined by the tender offeror and the target company, often it will only be the management of both entities that is aware of whether statements made to the investors are misleading; thus, it will be the knowledge held by these parties that allows for a timely suit to be brought under § 14(e) which will protect the interests of the investors. The court concluded that to disallow the use of the injunctive remedy solely because its use is urged by the tender offeror would apparently conflict with the Williams Act's interest in protecting investors.

Where a tender offeror charged the target company with failing to make proper disclosure and engaging in manipulative acts or practices in order to repel the tender offer, and sued for injunctive relief, the court in *Mobil Corp. v Marathon Oil Co.* (1981, **CA6 Ohio**) 669 F2d 366, CCH Fed Secur L Rep ¶ 98399, cert den 455 US 982, 71 L Ed 2d 691, 102 S Ct 1490, held that allowing an injunctive action by a tender offeror under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) would clearly inure to the benefit of the target shareholders by protecting them from having to decide whether to tender without full information; in so doing, the action would serve to prevent the manipulative practices at which the Williams Act was aimed, while not deterring either management or competing offerors from engaging battle, nor tipping the balance in favor of one tender offeror over another. The court felt that implying a private right to injunctive relief was consistent with the underlying purpose of the legislative scheme since such relief would protect all target shareholders by preventing management or competing tender offerors from failing to disclose fully or from using manipulative tactics. The court was of the view that given the offeror's unique ability to act quickly while armed with information necessary to prove any § 14(e) violations, an injunctive action may often constitute the only means to provide adequate assurance that the shareholders have a fully informed, free choice; thus, it agreed that the stage of preliminary injunctive relief, rather than postcontest lawsuits, is the time when relief can best be given. It concluded that

since no monetary loss is threatened for one who inadvertently violates the Williams Act, an action for injunction does not pose the danger of deterring future offers. Finally, the court stated that in its opinion the common law has not traditionally provided an injunctive remedy that would effectively protect target shareholders from non-disclosure or manipulation by the parties in the bidding. It followed, said the court, that a cause of action for injunction under § 14(e) does not have an effective counterpart under the traditional common-law principles and, thus, it is appropriate to imply it under federal law.

[b] Held to be available to target companies

The courts in the following cases held that § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, makes available to target companies an implied right of action for injunctive relief, where that relief would further the legislative intent behind the Williams Act of protecting shareholders and investors.

The court in *Wellman v Dickinson* (1979, **SD NY**) 475 F Supp 783, CCH Fed Secur L Rep ¶ 96918, 4 Fed Rules Evid Serv 1178, affd (CA2 NY) 682 F2d 355, CCH Fed Secur L Rep ¶ 98731, cert den Dickinson v SEC (1983) 460 US 1069, 75 L Ed 2d 946, 103 S Ct 1522, held that equitable relief can be sought by a target company after the tender offer has been consummated which is alleged to have violated § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to

the Exchange Act by the Williams Act of 1968. The court acknowledged that the Supreme Court decision in *Piper v Chris-Craft Industries, Inc.* (1977) 430 US 1, 51 L Ed 2d 124, 97 S Ct 926, CCH Fed Secur L Rep ¶ 95864, supports an equitable remedy before the takeover or partial takeover has been effectuated rather than after the acquisition. However, the instant court pointed out that it appeared from the manner in which the acquisition was secured in this case that one of the defendants' primary objectives was to conclude its maneuver swiftly and secretly enough to prevent the target company from seeking relief before the transaction had been consummated, when a preliminary injunction might have had a meaningful effect. The court reasoned that it would be drastic to hold that defendants' tactics had successfully deprived the target company of standing to seek a post-acquisition equitable remedy as well.

Finding that the defendants' allegedly fraudulent tender offer was still outstanding, thereby giving rise to continuing violations of the securities laws, and that the plaintiff target company did not have an adequate remedy at law, the court in *Diceon Electronics, Inc. v Calvary Partners, L.P.* (1991, **DC Del**) 772 F Supp 859, CCH Fed Secur L Rep ¶ 96930, held that the target company had an implied private right of action for injunctive relief under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)). It explained that the Supreme Court, in *Rondeau v Mosinee Paper Corp.* (1975) 422 US 49, 45 L Ed 2d 12, 95 S Ct 2069, CCH Fed Secur L Rep ¶ 95205, held that a plaintiff seeking equitable relief under the

securities laws must establish those factors traditionally required for equitable relief, one of which is that some cognizable danger of recurrent violation must be present. The instant court indicated that the most significant factor is whether the plaintiff will suffer irreparable harm if the equitable relief is not granted. It added that under *Rondeau* an adequate remedy by way of an action for damages negates the basis for equitable relief. In discussing the statutory basis for such relief, the court stated that the existence of an implied right of action for equitable relief in favor of target companies under §§ 13(d) and 14(e) of the Exchange Act (15 USCS §§ 78m(d) and 78n(e)), does not necessarily mean that such a right of action exists under § 14(d) because, aside from the general principles behind the Act shared by all sections, each section has its own unique language, which constitutes a key element in determining the legislative intent supporting the respective section. The court then stated that under §§ 13(d) and 14(e) the plaintiff could obtain the equitable remedies of (1) ordering the defendants to make corrective disclosures pursuant to § 13(d); (2) enjoining the defendants' tender offer or other acquisitions of the plaintiff's stock for a period of 30 days after corrective disclosures have been made; (3) barring future violations of the securities laws by the defendants; and (4) granting whatever other relief the court believes is appropriate.

The court in *Burlington Industries, Inc. v. Edelman* (1987, MD NC) 666 F Supp 799, CCH Fed Secur L Rep ¶ 93338, 1987-1 CCH Trade Cases ¶ 67649, recognized

that injunctive relief can be sought by a target company against filings by the tender offeror with the Securities and Exchange Commission of materially false and misleading information in violation of § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act of 1968, as well as an injunction of insider trading during a tender offer in violation of SEC Rule 14e-3 (17 CFR § 240.14e-3). The court pointed out that in ruling on a target's motion for injunction, it is incumbent upon courts to remember that the Williams Act disclosure provisions seek to protect shareholders rather than target companies.

The court in *Gearhart Industries, Inc. v. Smith International, Inc.* (1984, CA5 Tex) 741 F2d 707, CCH Fed Secur L Rep ¶ 91667, held that injunctive relief is available to a target company under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)), added to the Exchange Act by the Williams Act, to require corrective disclosure from the tender offeror, and that to that end, the tender offer can be enjoined temporarily until the required disclosure has been made and for such number of days thereafter as necessary in order to permit target shareholders to learn of the disclosure and evaluate it. The court stated that to conclude that the relief of corrective disclosure is not available under any circumstances whatsoever, regardless of how flagrant the violation complained of may have been, would be all but to license the filing by the tender offeror of deliberately misleading § 14(e) disclosure statements on pain of nothing more

than a possible damages suit by sellers or intervention by the Securities and Exchange Commission, a body which had assured the court on amicus brief that its resources were inadequate to police the myriad filings made each year so as to insure truthful disclosure. However, the court found that, since the purpose of the Williams Act was solely to require full and fair disclosure for the benefit of investors, injunctive relief under it did not include either permanently enjoining a tender offer on grounds that the tender offeror had breached its agreement with the target company not to acquire any more target shares during a standstill period, or sterilizing the voting rights of acquired target shares, given that the shares in question had not been acquired by misleading investors through misinformation.

The court in *Florida Commercial Banks v. Culverhouse* (1985, CA11 Fla) 772 F2d 1513, CCH Fed Secur L Rep ¶ 92321, implied a private right of action under the Williams Act of 1968 (15 USCS § 78m(d) and (e) and n(d)-(f)) on behalf of the target company for the injunctive relief of corrective disclosures of information filed by the tender offeror with the Securities and Exchange Commission in violation of § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act. In determining whether the Williams Act's purpose of protecting target shareholders would be served by the target companies having that private right of action, the court devised a test that balances the likelihood that the shareholders will benefit by obtaining

necessary information against (a) the likelihood that shareholders will be harmed by the potential misuse of the cause of action by management seeking to thwart takeover attempts, and (b) the likelihood that shareholders will be harmed by other aspects of the particular remedy sought. Applying it to the instant case, the court said that since the particular remedy sought here was corrective disclosures, there was no chance that shareholders would be harmed by it. It pointed out that if management attempted to use this right to tie up a tender offeror in litigation by unsupported allegations that the information that it had filed with the Commission was false, shareholders would have their usual remedies for waste and courts could invoke appropriate sanctions under Rule 11 of the Federal Rules of Civil Procedure. By contrast, added the court, in most cases shareholders simply cannot protect their own interests because they lack the resources to confirm the accuracy of the information submitted by the tender offeror to the Securities and Exchange Commission, and the Commission simply cannot police every tender offer or major acquisition subject to the Williams Act; but the target company is frequently in the best position to seek corrective disclosure within a time frame that will optimize the benefit to shareholders of such disclosures. The court concluded that it is necessary to grant this private right of action to the target in order for the Act to be effective.

[c] Held not to be available to tender offerors

The court in the following case

held that injunctive relief was not available to the tender offerors suing under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), since, for example, they neither belonged to the class of persons for whose protection those provisions were enacted nor did their action benefit that class, and granting the relief sought would disrupt the balance that the legislative scheme intended to establish between the different parties to a tender offer.

The court in *Luptak v Central Cartage Co.* (1979, ED Mich) CCH Fed Secur L Rep ¶ 98034, held that standing to sue for injunctive relief under § 14(e) of the Securities Exchange Act of 1934 (15 USCS § 78n(e)) cannot be asserted by a tender offeror who fails to satisfy the standard of showing how the shareholders of the target company will benefit if the allegations of its complaint are proven and the relief requested is granted. The court noted that although a tender offeror is not necessarily precluded from suing for injunctive relief in a § 14(e) action, the instant plaintiff tender offeror had not even asserted that any benefit would accrue to the target shareholders if the defendant competing tender offeror were enjoined and forced to sell its target shares on the market. On the contrary, it would appear, observed the court, that precisely the opposite would be true because court ordered divestiture could well entail a drop in price of target stock; while such consequence would clearly benefit the plaintiff, who intended to become a tender offeror himself and was treated by the court as such, given that he could acquire target shares at a reduced price, it

certainly would be harmful to current target shareholders, who would suffer the resulting loss in the value of their shares.

[d] Held not to be available to target companies

The court in the following case held that injunctive relief was not available to a target company suing under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), since it did not belong to the class of persons for whose protection those provisions were enacted and granting the relief sought would disrupt the balance that the legislative scheme intended to establish between the different parties to a tender offer.

The court in *Liberty Nat. Ins. Holding Co. v Charter Co.* (1984, CA11 Ala) 734 F2d 545, CCH Fed Secur L Rep ¶ 91539, held that a target company has no standing to sue under § 14(d) and (e) of the Securities Exchange Act of 1934 (15 USCS § 78n(d) and (e)), added to the Exchange Act by the Williams Act of 1968, for the injunctive relief of requiring a shareholder who allegedly violated those provisions to divest himself of his holdings in the target and not to vote his shares in the meantime. It explained that such relief would not be consistent with the underlying purpose of the legislative scheme of the Williams Act of providing the offeror and management with equal opportunity to present their case since it would tip the balance of regulation in favor of management and against the person making the takeover bid. The court pointed out that when an outsider acquires a large amount of stock in a publicly held company, this creates at the very least a na-

scent potential conflict between the outsider and management; thus, to permit the issuer to oust the new stockholder simply because he made a false filing would tip the balance towards management. Moreover, said the court, with a private right of action for this type of relief, incumbent management could solidify its position by subjecting to suit any outsider who accumulated a large holding, thereby creating the threat of costly and protracted litigation that would discourage such accumulations. The court noted that the removal from the field of a player whose self-interest is to monitor management, and who is poised to mount a proxy fight or a tender offer, would injure existing small stockholders, who are generally not in a position to protect their interests by monitoring and challenging incumbent management and, as a result, need this to be done by large shareholders. In addition, said the court, requiring the divestiture of a

large-share holding by selling it back to nonparties or on the open market would depress the price by increasing the supply without a corresponding increase in the demand. The court also observed that when an outsider is perceived as threatening to displace the insiders, management has a clear economic interest in protecting its position, even though this might not be in the economic interest of the firm or its shareholders, as would not be the use by management of corporate resources, rather than the managers' own, to harass and burden aggressive outsiders. The court concluded that the chilling effect of granting the relief sought would have a deleterious impact on the market for outside corporate monitoring and control as well as on the value of securities generally, all of which would harm target shareholders and investors generally, who are the only intended beneficiaries of the Williams Act.

Consult POCKET PART in this volume for later cases and statutory changes