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Section 14(e) of the Williams Act and the Rule 10b-5 Comparisons

MARK J. LOEWENSTEIN*

The passage of the Williams Act in 1968 added a set of provisions to the Securities Exchange Act of 1934 to govern tender offers. In this article, Professor Loewenstein examines the antifraud provision of the Williams Act, codified as section 14(e) of the Securities Exchange Act of 1934, and the development of decisional law under it. After discussing the propriety of inferring a private cause of action from section 14(e), Professor Loewenstein argues that the judiciary's reliance on rule 10b-5 precedents to set the bounds of the 14(e) cause of action is unwarranted. He concludes: 1) that scienter should not be an element of the section 14(e) action; 2) that section 14(e) plaintiffs should only be required to prove reliance if it is necessary to prove causation; 3) that a tender offeror should have standing to seek equitable relief if target management breaches its fiduciary duty to its shareholders and the breach interferes with the tender offer; and 4) that the SEC did not exceed its rulemaking authority in promulgating rule 14e-3 because section 14(e) is broad enough to support 14e-3's apparent prohibition of trading activities otherwise permissible under rule 10b-5.

When Congress enacted the Williams Act¹ in 1968 to regulate cash tender offers, it added to the regulatory scheme of the Securities Exchange Act of 1934² a broad antifraud provision for the regulation of tender offers, codified as section 14(e).³ A 1970 amendment to section 14(e) granted the Securities and Exchange Commission⁴ broad rulemaking powers under the section.⁵ Neither section 14(e) nor any other section of the Williams Act expressly affords a private right of action for enforcement of its provisions. The lower federal courts, however, have found implied private rights of action to enforce

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¹ 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976). The Williams Act is the popular name of Pub. L. No. 90-439, 82 Stat. 454 (1968), originally entitled: Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids. The Act was passed in response to an increasing number of cash tender offers and the abuses perceived in those transactions. See S. REP. NO. 550, 90th Cong., 2d Sess. 2-3 [hereinafter Senate Report], reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2812. The Act added a new section 13(d) to the Securities Exchange Act of 1934, requiring certain disclosures by persons who acquire more than 10% (later amended to 5%) of any registered equity security, and a new section 14(d) requiring that certain disclosures be made in connection with a tender offer. In addition, the Act added a new section 13(e) to regulate purchases by an issuer of its own securities; a new section 14(f) to require certain disclosures of specified changes in the board of directors of an acquired company; and section 14(e), a broad antifraud rule applicable to all tender offers.


⁴ Hereinafter the SEC or the Commission.

various provisions of the Williams Act, including section 14(e).\(^6\)

In finding a private right of action under section 14(e) and shaping the elements of that cause of action, the federal courts have looked to rule 10b-5,\(^7\) promulgated under the general antifraud provision of the Exchange Act,\(^8\) for guidance.\(^9\) Similarly, rules adopted by the Commission under section 14(e) have been analyzed with reference to case law developed under rule 10b-5.\(^10\)

At first blush, interpreting section 14(e) and the rules adopted thereunder in light of the decisional law pertaining to rule 10b-5 has some appeal, since the language of section 14(e) and rule 10b-5 are similar.\(^11\) However, rule 10b-5 and section 14(e) do differ in language as well as congressional purpose and legislative history. These differences, therefore, may require a different interpretation and application of the two sections. Moreover, section 14(e) also

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6. See cases cited infra notes 29-33 and 134. See also Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1224 (4th Cir. 1980) (recognizing right of target corporation to maintain action seeking injunctive relief under section 13(d)), cert. denied, 449 U.S. 1101 (1981); Crane Co. v. Harso Corp., 511 F. Supp. 294, 301 (D. Del. 1981) (recognizing right of tender offeror to maintain action for injunctive relief under section 13(e)). But see Gateway Indus., Inc. v. Agency Rent A Car, Inc., 495 F. Supp. 92, 101 (N.D. Ill. 1980) (refusing to recognize private cause of action under section 13(d)).


9. See infra notes 34-35 and accompanying text.


11. Rule 10b-5 provides:

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

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.


Section 14(e) provides:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition 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.

bears strong resemblance to other provisions of the federal securities laws, such as section 17(a)\(^3\) of the Securities Act of 1933,\(^4\) the general antifraud provision of the Securities Act, and rule 14a-9\(^5\) promulgated under the Exchange Act, which prohibits fraud in connection with proxy solicitations. These latter provisions have been interpreted differently than rule 10b-5.\(^6\) Finally, the interpretation of rule 10b-5 is always subject to the statutory language of section 10(b)\(^7\) of the Exchange Act; to the extent rule 10b-5 prohibits conduct not prohibited by section 10(b), the rule is invalid.\(^8\) Section 14(e), however, is not subject to a similar limitation.

It is the thesis of this article that although a private right of action for damages may properly be inferred from section 14(e),\(^9\) the wholesale incorporation of rule 10b-5 decisional law into the interpretation of section 14(e) and the rules promulgated thereunder is unwarranted. In particular, section 14(e), in contrast to rule 10b-5, may not require the plaintiff to prove that the defendant acted with scienter\(^10\) or that the plaintiff relied on the defendant's misrepresentations or omissions in deciding on a course of action.\(^11\) In addition, there may be circumstances in which section 14(e) should provide relief for a breach of fiduciary duty and other wrongdoings that are clearly not bases for recovery under rule 10b-5.\(^12\) Thus, this article takes issue, to some extent, with judges who have limited the application of section 14(e) based on cases decided under rule 10b-5,\(^13\) and with commentators who have criticized the Commission for exceeding its rulemaking authority under section 14(e).\(^14\)

I. THE AVAILABILITY OF A PRIVATE RIGHT OF ACTION UNDER SECTION 14(e)

A. PRIVATE DAMAGE ACTIONS UNDER SECTION 14(e)

Justice Stevens, dissenting in Piper v. Chris-Craft Industries, Inc.\(^15\) stated that "[n]o one seriously questions the premise that Congress implicitly created a private right of action when it enacted § 14(e) in 1968."\(^16\) The majority in Piper, however, held that a defeated tender offeror did not have standing to maintain an implied cause of action for damages under section 14(e),\(^17\) ex-

\(^{13}\) 15 U.S.C. §§ 77a-77aa (1976) [hereinafter the Securities Act].
\(^{15}\) With respect to section 17(a) of the Securities Act, compare Aaron v. SEC, 446 U.S. 680, 701-02 (1980) (scienter must be demonstrated under section 17(a)(1), but not under 17(a)(2) or 17(a)(3)) with Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (scienter a necessary element of section 10(b) or rule 10b-5 violation). As to rule 14a-9, compare Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1300-01 (2d Cir. 1973) (scienter might not be required in action under rule 14a-9 or section 14(a)) with Ernst & Ernst, 425 U.S. at 193 (scienter required in section 10(b) or rule 10b-5 action).
\(^{17}\) Id.
\(^{18}\) See infra text accompanying notes 133 and 155-56.
\(^{19}\) See infra text accompanying notes 185-235.
\(^{20}\) See infra text accompanying notes 236-76.
\(^{21}\) See infra text accompanying notes 277-336.
\(^{22}\) See infra note 34 and accompanying text.
\(^{23}\) See supra note 10 and accompanying text.
\(^{24}\) 430 U.S. 1 (1977).
\(^{25}\) Id. at 55 (Stevens, J., dissenting).
\(^{26}\) Id. at 42.
pressly reserving the questions of whether the shareholder-offerees of the target corporation would have standing or whether a suit in equity for injunctive relief would lie in favor of a tender offeror under section 14(e). Numerous cases, before and after Piper, have explored the question of who has standing to maintain an action for damages under section 14(e). The lower federal courts have held that private damage actions may be inferred from section 14(e) in favor of both tendering and non-tendering shareholder-offerees, as well as option traders. The courts have also found an implied private action for injunctive relief in favor of target companies and tender offerors.

Justice Stevens' observation is factually correct—the availability of an implied private action under section 14(e) has not been seriously questioned. This is due in large part to the tendency of the lower federal courts interpreting section 14(e) to look for guidance to rule 10b-5 jurisprudence, in which the courts recognized a private cause of action for damages as early as 1946. However, decisions subsequent to Piper demonstrate the Court's reluctance to infer a private remedy in other contexts, compelling a more thorough inquiry into the basis for inferring a private damage action on behalf of shareholder-offerees or a right to injunctive relief on behalf of tender offerors under section 14(e).

Since 1975, judicial efforts to determine whether a private cause of action should be inferred from a federal statute have centered on a search for "legislative intent"—that is, did Congress intend private litigants to have a private cause of action to support their statutory rights? The Court has emphasized

27. Id. at 42 n.28.
28. Id. at 47 n.33.
29. See Bell v. Cameron Meadows Land Co., 669 F.2d 1278, 1281 & n.7 (9th Cir. 1982); Osofsky v. Zipf, 645 F.2d 107, 110 (2d Cir. 1981); Lowenschuss v. Kane, 520 F.2d 255, 267 (2d Cir. 1975).
31. See O'Connor & Assoc. v. Dean Witter Reynolds, Inc., 529 F. Supp. 1179, 1193 (S.D.N.Y. 1982) (option trader has standing under section 14(e) and rule 14e-3 to maintain action against "tippees" who purchased call options from plaintiff knowing tender offer for shares subject to call option imminent). But see Wulc v. Gulf & Western Indus., Inc., 400 F. Supp. 99, 104 (E.D. Pa. 1975) (holder of nontransferrable option rights does not have standing under section 14(e)).
34. See, e.g., Bell v. Cameron Meadows Land Co., 669 F.2d 1278, 1281 n.7 (9th Cir. 1982); H.K. Porter Co., Inc. v. Nicholson File Co., 482 F.2d 421, 425-26 (1st Cir. 1973); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 940-41 (2d Cir. 1969); Berman v. Gerber Prods. Co., 454 F. Supp. 1310, 1318, 1323-24 (W.D. Mich. 1978); Dyer v. Eastern Trust and Banking Co., 336 F. Supp. 890, 913-14 (D. Me. 1971). In Dyer, an early and influential decision in this area, the court wrote that "[a] sensible and coherent interpretation of the provisions of the two statutes mandates implication of a damage remedy under Section 14(e) corresponding to that available under Section 10(b). There is every reason to believe that Congress intended the remedies to be similar as, indeed, there is none.
36. See infra notes 44-45 and accompanying text.
the language and legislative history of statutes as guideposts to discerning this intent.\textsuperscript{38} In \textit{Piper}, however, the Court's approach appears to assume that a private action exists under section 14(e), and the only question was one of standing.\textsuperscript{39} Indeed, this is how Justice Stevens, in dissent,\textsuperscript{40} and subsequent lower courts\textsuperscript{41} have interpreted the Court's opinion.

The Court gave no explanation in \textit{Piper} for proceeding in this fashion. The reason may relate to the Court's previous finding of an implied private right of action under section 14(a) of the Exchange Act\textsuperscript{42} and its recognition, without discussion, of an implied private right of action for damages under section 10(b) and rule 10b-5.\textsuperscript{43} Because Congress was presumably aware that the federal courts had found that private damage remedies existed under these provisions at the time it adopted section 14(e), the Court may have simply assumed that Congress intended the courts to treat section 14(e) in the same fashion.

The issue of when a federal court may properly infer a private right of action from a federal statute has been the subject of so many Supreme Court opinions in recent years,\textsuperscript{44} however, and has created such divisiveness on the Court,\textsuperscript{45} that one cannot now reasonably conclude the Court would simply

\textsuperscript{38} This emphasis is particularly apparent from some of the Court's more recent cases on implied causes of action. See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981); California v. Sierra Club, 451 U.S. 287, 293 (1981); Northwest Airlines, Inc. v. Transportation Workers Union, 451 U.S. 77, 91 (1981); Touche Ross & Co. v. Redington, 422 U.S. 560, 568 (1979).

\textsuperscript{39} 430 U.S. at 24-25.

\textsuperscript{40} 430 U.S. at 55 n.4 (Stevens, J., dissenting) ("This case therefore does not present the same kind of issue discussed in \textit{Cort} v. \textit{Ash} . . ., namely, \textit{whether} the statute created an implied private remedy. Rather, the question presented here is \textit{who} may invoke that remedy.") (emphasis in original).


\textsuperscript{42} J.I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1964).


\textsuperscript{45} Several of the Court's implied right of action cases have given rise to vigorous dissenting opinions. Its most recent decision, for instance, Merrill Lynch v. Curran, 102 S. Ct. 1825 (1982), was a 5 to 4
assume that Congress intended a private cause of action without an express statutory provision to that effect. Rather, should the issue of whether Congress intended a private cause of action for the enforcement of section 14(e) come before the Court again, it should receive the same close scrutiny as other implied rights of action cases. Justice Stevens' remark in Piper must be taken with a grain of salt because he has been among the most willing of the Justices to find an implied cause of action. Indeed, in the past eight years he wrote the two leading decisions in which the Court recognized an implied cause of action under a federal statute.

An examination of the Court's opinions on implied causes of action reveals that, although congressional intent has been the lodestar of each decision, as a practical matter the party seeking a judicially-created cause of action bears the burden of proving that Congress intended that result. Aside from its rule 10b-5 decisions, the Court has recognized an implied cause of action in only three cases during the past eight years: Transamerica Mortgage Advisors v. Lewis, Cannon v. University of Chicago, and Merrill Lynch v. Curran.

The holding in Transamerica is a limited one. The Court ruled that section 215 of the Investment Advisors Act of 1940, which voids contracts made in violation of the Act, necessarily implies a right to equitable relief, such as rescission, injunction, and restitution.

decision finding an implied cause of action under the Commodities Exchange Act. Id. at 1844. Justice Powell, writing for the dissenters, characterized one of the legal theories on which the majority relied as "incompatible with our constitutional separation of powers, and . . . without support in logic or in law." Id. at 1848 (Powell, J., dissenting). Justice Powell also wrote an acerbic dissenting opinion in Cannon v. University of Chicago, 441 U.S. 677 (1979), where a 6-3 majority found a private action to enforce Title IX of the Education Amendments of 1972. Id. at 717. On the other hand, Justice White wrote a dissenting opinion for four members of the Court in Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979), in which the majority failed to find an implied private right of action to enforce section 206 of the Investment Advisors Act of 1940. Id. at 24. He wrote that in reaching its decision, "the Court departs from established principles governing the implication of private rights of action by confusing the inquiry into the existence of a right of action with the question of available relief." Id. at 25. See also Touche Ross & Co. v. Redington, 442 U.S. 560, 580 (1979) (Marshall, J., dissenting); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 53 (1977) (Stevens, J., dissenting).

46. See supra note 25 and accompanying text.
47. Merrill Lynch v. Curran, 102 S. Ct. 1825 (1982) (5 to 4 decision); Cannon v. University of Chicago, 441 U.S. 677 (1979) (6 to 3 decision). The only other recent case in which the Court has recognized an implied private right of action, aside from cases involving rule 10b-5, is Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979), which had a very limited holding. See infra note 53 and accompanying text. Justice Stevens in the Transamerica dissent would have recognized far broader private rights than the majority recognized. 444 U.S. at 36.
48. Justice Powell would go even further: "Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist." Cannon, 441 U.S. at 749 (Powell, J., dissenting).
49. See supra note 43.
52. 102 S. Ct. 1825 (1982).
53. 444 U.S. at 19. In Transamerica, the plaintiff asserted that a private right of action could be inferred from two provisions of the Investment Advisors Act of 1940: section 206, a general antifraud section, and section 215(b), which voids contracts made in violation of the Act. Although the Court denied the existence of a private damage action under section 206, id. at 24, it recognized the right of a party to seek equitable relief under section 215. Id. at 19. The Court reasoned that the statutory language of section 215 implies a right to relief in a federal court; when Congress declared certain contracts void, it must have "intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution." Id. Thus, even though a private action was recognized in Transamerica, it
more complicated and require closer scrutiny.

In Cannon the Court decided that Congress intended a private remedy for the enforcement of Title IX of the Education Amendments of 1972.\textsuperscript{54} The Court examined the four factors it had first identified in the landmark case of Cort v. Ash\textsuperscript{55} as crucial for determining whether a private right of action can appropriately be recognized.

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?\textsuperscript{56}

Although the Court considered all four Cort factors in Cannon\textsuperscript{57} it seemed persuaded by the second factor—the legislative history indicating that Title IX was patterned after and would be interpreted consistently with Title VI of the Civil Rights Act of 1964.\textsuperscript{58} Because the lower federal courts had construed Title VI as providing an implied private right of action for several years prior to the adoption of Title IX, the Court inferred that Congress intended Title IX to be construed in the same fashion.\textsuperscript{59} The Court concluded that this prior jurisprudence was the "contemporary legal context" in which Congress was acting, and that it would be considered by the Court in construing the legislation.\textsuperscript{60} Express statements in the legislative history linking Title VI and Title IX supported the Court's conclusion.\textsuperscript{61}

Curran also relied on the notion of a "contemporary legal context" to determine congressional intent. In this case, a five to four majority found an implied cause of action for damages under the Commodities Exchange Act (CEA) on behalf of defrauded futures traders.\textsuperscript{62} In contrast to Cannon, in which all four Cort factors were examined, the Court in Curran simply relied on the contemporary legal context of the legislation as the critical factor.\textsuperscript{63}

was limited to equitable relief. The Court did not find it necessary to employ the factors it set forth in Cort v. Ash, 422 U.S. 66 (1975), for determining when courts should recognize an implied private right of action under a federal statute. See infra notes 55-56 and accompanying text. It would be difficult to conceive of the Court reaching a different conclusion on this point. Indeed, none of the Justices dissented from it. By comparison, the Court split 5 to 4 on whether a private action should be recognized under section 206.

\textsuperscript{54} 441 U.S. at 717.
\textsuperscript{55} 422 U.S. 66 (1975).
\textsuperscript{56} Id. at 78 (citations omitted) (emphasis in original).
\textsuperscript{57} 441 U.S. at 694-709.
\textsuperscript{58} Id. at 694-703.
\textsuperscript{59} Id. at 703.
\textsuperscript{60} Id. at 699.
\textsuperscript{61} Id. at 694 n.16, 696 n.19, 701 n.30.
\textsuperscript{62} 102 S. Ct. 1825, 1837-48 (1975).
\textsuperscript{63} Id. at 1839. See generally Selig & Steinmayer, The Curran Decisions, 15 REV. SEC. REG. 887, 889 (1982), in which the authors conclude that the majority in Curran announced a new standard for determining when private rights should be inferred from a federal statute. Id. at 889. This assessment would appear to read more into the Court's opinion than is warranted. Rather, the Court was simply
In *Curran*, the Court examined a statute that had been extensively amended by Congress against a background of federal court decisions recognizing private causes of action. Moreover, the CEA amendments occurred prior to the Court's decision in *Cort v. Ash*, during an era when the Court more freely inferred private causes of action from federal statutes. In light of this background, the majority in *Curran* felt that "the initial focus must be on the state of the law at the time the legislation was enacted." The Court declared that when Congress acts in a context in which an implied remedy has already been recognized by the courts, the issue is whether Congress intended to preserve the preexisting remedy. To resolve this issue, the Court looked to the legislative history of the CEA amendments.

An examination of the legislative history of the CEA amendments convinced the majority that Congress intended to preserve the implied remedy. The Court noted that the amendments, which provided new procedures through which defrauded traders might seek relief for violations, must have been intended to supplement rather than supplant the implied judicial remedy, since the express purpose of the amendments was "to strengthen the regulation of futures trading." The Court also cited statements by witnesses at the hearings indicating that they assumed implied judicial remedies would survive the amendments. Moreover, the legislation included a savings clause providing that "nothing in this section shall supercede or limit the jurisdiction conferred on the courts of the United States or of any State." To the majority, this was "direct evidence of legislative intent to preserve the implied private remedy."

In *Curran* the Court found it unnecessary to examine the other *Cort* factors. Based on the CEA's legislative history alone, the Court was convinced that Congress intended to preserve the implied remedy. The only remaining issues for the Court to address related to standing and the scope of the implied remedy. In resolving these issues the *Curran* Court regarded reference to *Cort* factors one, three, and four as unnecessary because the Court presumed that judicial developments to that point were impliedly incorporated into the statute.

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64. 102 S. Ct. at 1839-40.
65. Id. at 1837.
66. Id. at 1839.
67. Id.
68. Id. at 1842.
70. Id. at 1843 (quoting 7 U.S.C. § 2 (Supp. III 1979)).
71. Id. at 1843.
72. 102 S. Ct. at 1842-43.
73. Id. at 1844-46.
74. Id. at 1844.
75. Id. at 1846-48.
action for damages exists under section 14(e). First, if section 14(e) was intended to provide a type of rule 10b-5 protection to shareholders faced with a tender offer, as many federal courts have held, then surely the courts should provide a damage remedy for its enforcement as they have for rule 10b-5. The analogy to Cannon is apparent: a remedy was provided under Title IX in Cannon because one had previously been judicially approved under Title VI. The legislative history of the Williams Act, however, does not bear out the underlying premise: there is no indication that section 14(e) was patterned after rule 10b-5 or that rule 10b-5 jurisprudence should govern the interpretation of section 14(e). Cannon thus does not provide direct support for inferring a cause of action under section 14(e). The legislative history relating Title IX to Title VI in Cannon, pivotal to the outcome of that case, has no parallel in the legislative history of the Williams Act.

Second, one might argue that the federal courts were easily persuaded to read a private right of enforcement into federal legislation at the time the Williams Act was under consideration, and, therefore, Congress likely assumed that courts would provide a remedy under section 14(e). In particular, just four years prior to the passage of the Williams Act, the Supreme Court decided J.I.

76. See supra note 34.
77. See supra notes 58-61 and accompanying text.
78. Indeed, the legislative history of the Williams Act, which is rather extensive because substantial hearings were held in both the Senate and the House, contains few references to section 14(e). One interesting reference can be found in the written statement submitted to the Senate Committee by William H. Painter, then professor of law at the University of Missouri at Kansas City. He pointed out the similarities and differences among the various antifraud provisions of the federal securities laws and noted, on the basis of that analysis, that the precise meaning of section 14(e) was unclear. Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 140-41 (1967) [hereinafter 1967 Senate Hearings]. The notion that Congress intended section 14(e) to be construed with reference to rule 10b-5 is traceable, at least in part, to Judge Gignoux’s opinion in Dyer v. Eastern Trust & Banking Co., 336 F. Supp. 890 (D. Me. 1971), which sets forth that conclusion. See supra note 34. Judge Gignoux cited two district court opinions, Fabrikant v. Jacobellis, [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,686 (E.D.N.Y. 1970) and Neuman v. Electronic Specialty Co., [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,591 (N.D. Ill. 1969) as support for his decision. 336 F. Supp. at 914. Fabrikant was a decision on a motion to dismiss in which the court seemed to assume, without so stating, that a cause of action for damages existed under section 14(e). ¶ 92,686 at 99,017-18. The court did not discuss the relationship between section 14(e) and rule 10b-5.

The Neuman court did, however, discuss that relationship and, based on the following language quoted from the House and Senate Reports describing section 14(e), concluded that the provisions were to have the same interpretation: “This provision would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors of the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal.” ¶ 92,591 at 98,705 (quoting Senate Report, supra note 1, and H.R. REP. No. 1711, 90th Cong., 2nd Sess. 11 (1968). The court read this to mean that Congress intended “to ‘affirm’ the applicability to tender offers of the standards of disclosure in Rule 10b-5.” ¶ 92,591 at 98,705. Neuman may have ascribed a greater meaning to the word “affirm” than it can reasonably bear, since nowhere do the House or Senate Reports mention rule 10b-5. A more plausible reading of the Reports is that Congress was relating section 14(e) to the rest of the Williams Act “affirming” that a failure to disclose under section 14(d), for instance, has consequence, viz., such failure is also made unlawful under section 14(e). See also Judge Friendly’s opinion in Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 940-41 (2d Cir. 1969), which asserted that section 14(e) in effect applies rule 10b-5 to tender offers and which has been influential in the development of the notion that Congress intended section 14(e) to be construed with reference to rule 10b-5.

79. See supra note 58 and accompanying text.
Case Co. v. Borak, 80 in which it recognized the existence of a private cause of action to enforce section 14(a) of the Exchange Act, the section regulating the solicitation of proxies. 81

The test the Court formulated in Borak was simple: a court will find an implied cause of action if such an action is necessary to achieve the purpose Congress intended in enacting the provision. 82 An application of this test to section 14(e) could support the finding of an implied cause of action, at least for target shareholders, and possibly others. 83 However, such a finding requires too much emphasis on the result in Borak and presumes an unrealistic congressional awareness of that decision. In fact, Borak was mentioned only twice in the legislative history of the Williams Act, and then not even by legislators. 84

Putting to one side the scant mention of Borak, as well as implied remedies generally, in the legislative history of the Williams Act, it is nevertheless obvious that the Court would not elevate Borak to a level of such preeminence. If Borak governed the interpretation of federal statutes in the manner suggested above, it alone would have determined the outcome in Cannon without the

81. Id. at 430-31.
82. Id. at 433.
83. In Borak the plaintiff alleged that a merger was effected through the circulation of a false and misleading proxy statement in contravention of an SEC rule promulgated pursuant to section 14(a). 377 U.S. at 427. The Court noted that the SEC could not make an independent examination of the facts of all of the proxy statements filed with it, and thus to make effective the congressional purpose of protecting investors, "it is the duty of the courts to be alert to provide such remedies as are necessary . . . ." Id. at 433. The appropriate remedy, the Court concluded, depends upon the outcome of the trial on the merits. Id. at 435.

The congressional purpose in adopting the Williams Act was to afford a measure of protection, through disclosure requirements and other provisions, for investors confronted with a tender offer. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 35 (1977). The SEC has insisted that providing a private remedy under section 14(e) is necessary to ensure enforcement of the Williams Act and is consistent with congressional intent. Id. at 64 (Stevens, J., dissenting). As in the case of proxy solicitations, private enforcement of the tender offer provisions is necessary to supplement SEC action.

Although the Court seemed to recognize Borak as binding precedent in Piper, id. at 16, Borak and its approach have been limited in recent Supreme Court opinions on implied causes of action. See Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979) (Borak read narrowly to avoid creating implied private rights of action under virtually every provision of Securities Acts); see also Cannon v. University of Chicago, 441 U.S. 677, 735-36 (Powell, J., dissenting) (Borak constitutes singular and aberrant interpretation of federal regulatory statute). Borak was distinguished in Piper because the party seeking an implied cause of action in Piper was not a member of the class of persons for whose protection the statute was enacted. Piper, 430 U.S. at 25. In Piper, the Court concluded that the Williams Act was enacted to protect investors confronted with a tender offer, not tender offerors. Id. at 35. Indeed, the Piper plaintiff was a "member of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class, shareholder-offerees," and thus a defeated tender offeror could not argue that an implied cause of action was a necessary supplement to the realization of congressional purposes in enacting the Williams Act. Id. at 37.

Even assuming, however, that shareholder-offerees, the "protected class," are seeking to invoke a private remedy under section 14(e), reliance on Borak as supporting such an action is troubling. This use of Borak implies that it governs the interpretation of all federal statutes enacted between 1964, when it was decided, and 1975, when Cort was decided.

84. Two academicians, Professors Carlos L. Israel and William H. Painter, referred to the decision in written statements that became part of the record in the Senate hearings, and they speculated that implied remedies would be available under section 14(e) as well. 1967 Senate Hearings, supra note 78, at 67, 140. See also Piper, 430 U.S. at 31 (same). But only Professor Painter appeared before the Senate committee, and the question of implied remedies was not raised during his oral testimony. There was no senatorial comment on the issue.
necessity of delving into the legislative history of the statute.\textsuperscript{85} Instead, \textit{Borak} was hardly noted in that decision.\textsuperscript{86} The point of \textit{Cannon} and the Court's other decisions in the implied rights area was to affirm a wholly different standard for federal courts to use if petitioned to infer private remedies from federal statutes. Under this standard, \textit{Borak} would be persuasive only if it was clear from the legislative history that Congress understood the judicial decision to be applicable to the statute under consideration.\textsuperscript{87}

The third argument based on a contemporary legal context analysis is that if federal courts had already implied private damage actions at the time of the 1970 or 1977 amendments to the Williams Act, congressional acquiescence in those decisions may be inferred from Congress' silence on the issue. This was, of course, the essence of the \textit{Curran} decision with respect to the Commodities Exchange Act.\textsuperscript{88}

In 1970 Congress amended several sections of the Williams Act, including section 14(e).\textsuperscript{89} But to speculate that \textit{Curran} requires federal courts to recognize a private cause of action under section 14(e) because of the contemporary legal context of the 1970 amendments is erroneous. The principal changes did little more than increase the coverage of the Act.\textsuperscript{90} The section 14(e) amendment was not a source of controversy in the congressional committees, possibly because the SEC already had some authority to adopt rules and regulations to implement section 14(e).\textsuperscript{91} What little discussion there was of the amendment did not deal with private enforcement of the section. Likewise, the issue of private enforcement had also received little judicial attention in the months immediately following the passage of the Williams Act.\textsuperscript{92} The only two courts

\textsuperscript{85} See supra notes 58-61 and accompanying text.

\textsuperscript{86} \textit{Borak} was cited five times by the \textit{Cannon} majority, 441 U.S. at 690 n.13, 698 n.23, 703 n.35, 706 n.41, 711, but only once in the text of the opinion. \textit{Id.} at 711. The textual reference cited \textit{Borak} simply to support the statement that implied remedies may be found under a section of a complex statute that contains express remedies in other provisions. \textit{Id.} None of the other references to \textit{Borak} indicate that its holding is of any particular importance in \textit{Cannon}. \textit{Id.} at 690 n.13, 698 n.23, 703 n.35, 706 n.41.

In \textit{Curran}, a more recent decision, the Court included \textit{Borak} in a single footnote cataloging cases representing the Court's approach to implied actions prior to the 1975 decision in \textit{Cort v. Ash}. \textit{Curran}, 102 S. Ct. at 1838 n.56.

\textsuperscript{87} If it was clear in the legislative history that Congress was aware of \textit{Borak} and intended it to apply to the statute under consideration, then it could be said with some assurance that Congress intended the courts to infer a private cause of action.

\textsuperscript{88} See supra notes 64-75 and accompanying text.


\textsuperscript{90} The reporting requirements of section 13(d) were made applicable when a person acquires five percent of the outstanding shares of any registered class of equity securities, as opposed to 10% in the original Act. \textit{Id.} Similarly, the tender offer filing requirements of section 14(d) were made applicable to tender offers that would result in ownership by the offeror of five percent of the outstanding shares of any such class. \textit{Id.} Other minor changes were made as well, one of which empowered the SEC to adopt rules and regulations under section 14(e) by adding to that section the following sentence: "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." \textit{Id.} at 1497-98.

\textsuperscript{91} The Commission is authorized to adopt rules to implement section 14(d). To the extent section 14(e) "affirms" the disclosure obligations of section 14(d), see supra note 78, the express rulemaking authority under section 14(e) overlaps with that in section 14(d).

faced with the issue assumed the existence of a private cause of action, not questioning whether one could be maintained under section 14(e). It is also of some significance that neither case appears in West's Federal Supplement. Consequently, the decisions were not widely reported.

The legislative history of the 1970 amendments to the Williams Act and the state of the law at that time stand in sharp contrast to the facts of the Curran decision. The Curran majority noted the comprehensiveness of the 1974 amendments of the CEA, the consistent recognition by the federal courts of private damage actions under the CEA, and statements in the legislative history indicating a congressional intent to preserve the private remedy. None of these factors are present in the 1970 amendments to the Williams Act.

In 1977 Congress amended section 13(d)(1) of the Exchange Act, one of the sections added by the Williams Act, to increase the amount of information required to be disclosed by persons who acquire five percent of a corporation's equity securities. The amendment was part of Title II of the Foreign Corrupt Practices Act of 1977 that, among other things, amended section 13(b) of the Exchange Act and added a new section 30A to that Act. In comparison to the other portions of the legislation, the amendment to section 13(d) was very minor and was not a part of a reexamination of the Williams Act. Thus, Congress had no occasion to consider judicial developments under other sections of the Williams Act, nor, of course, to consider the decision of some courts to recognize a private action under section 14(e). It would be inappropriate, therefore, to conclude that Congress impliedly approved of those cases that recognized private actions under the Williams Act.

A final argument based on the contemporary legal context approach begins with reference to the 1975 amendments to the federal securities laws. These amendments have been described as the "most substantial and significant revision of this country's federal securities laws since the passage of the Securities Exchange Act of 1934." In view of the comprehensive undertaking embodied in this legislation, any significant judicial interpretations of the securities laws which were not legislatively modified were impliedly accepted by Congress. The Supreme Court employed such reasoning in its recent decision in Herman & MacLean v. Huddleston, in which it held that the existence of an express

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93. See supra note 78.
94. 102 S. Ct. 1825, 1827 (1982).
95. Id. at 1839-40.
96. Id. at 1841.
97. Prior to the 1977 amendment, Section 13(d)(1)(A) simply required disclosure of the background and identity of the purchasers filing the Schedule 13D. The amendment added disclosure of residence, citizenship and nature of beneficial ownership. The amendment was passed against a background of increased concern over foreign control of U.S. corporations. The 1977 amendments also added section 13(g) to require any person who owns more than five percent of any security described in section 13(d)(1) to file a disclosure statement with the SEC. The effect of this amendment would be to require persons who reached the five percent amount before 1970 to make disclosures, thus removing an exemption implicit under the then existing law. See S. Rep. No. 114, 95th Cong., 1st Sess. 12-15, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4110-4115.
100. 103 S. Ct. 683 (1983).
remedy under section 11 of the Securities Act does not preclude the plaintiff from pursuing an implied remedy under section 10(b) of the Exchange Act.101 After noting that the federal courts had, at the time of the 1975 amendments, consistently permitted plaintiffs to proceed under section 10(b) even where express remedies were available under section 11 or other provisions,102 the Court said: "In light of this well-established judicial interpretation, Congress' decision to leave Section 10(b) intact suggests that Congress ratified the cumulative nature of the Section 10(b) action."103 The Court cited Curran in support of this proposition.104

This statement in Herman & MacLean represents an extension of Curran, because the 1975 amendments to the securities laws, unlike the 1974 amendments to the Commodities Exchange Act, were not concerned with remedial provisions. The 1975 amendments to the securities laws effectuated no changes in any of the express liability provisions of the Securities Act or Exchange Act, nor do the committee reports indicate any concern on the part of Congress with implied causes of action. Rather, Congress was primarily concerned with the national market system, self-regulatory organizations and municipal securities, and it added three new sections to the Exchange Act to deal with its concerns on these subjects.105 Despite the fact that Congress had specific concerns in mind, and did not legislate in an area involving implied causes of action, a unanimous Court106 in Herman & MacLean found it significant that Congress left undisturbed a series of lower federal court decisions interpreting the implied action under section 10(b).

If a similar analysis is applied to section 14(e) litigation, a case may be made that the failure of Congress to amend section 14(e) in 1975 to deny private actions was an implicit approval of the numerous decisions that had theretofore either implicitly or explicitly recognized private actions under section 14(e).107 By 1974, four circuit courts and district courts in two other circuits

101. Id. at 689.
102. Id. at 689 n.21.
103. Id. at 689.
104. Id.
105. In all, 17 sections of the Exchange Act were amended and three new sections were added. In addition, Congress made minor changes to the Securities Act, the Investment Companies Act of 1940 and the Investment Advisors Act of 1940. The Senate Report indicated ten areas of congressional concern: the national market system; self-regulation and SEC oversight; municipal securities; regulation of clearing agencies and transfer agencies; regulation of securities trading by members of national securities exchanges; payment for research services with brokerage commissions; sale of investment company advisors for a profit; commission rates; SEC enforcement actions; and institutional investors. S. REP. No. 75, 94th Cong., 1st Sess. 1-88, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 179-266 (1975).
107. E.g., Sargent v. Genesco, Inc., 492 F.2d. 750, 769-70 (5th Cir. 1974) (suggesting private right of action for damages may be inferred under section 14(e)); Smallwood v. Pearl Brewing Co., 489 F.2d 579, 595-99 (5th Cir.) (holding private cause of action for damages may be maintained under section 14(e) by non-tendering stockholder-offerees), cert. denied, 419 U.S. 873 (1974); Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 846, 849 (3rd Cir. 1973) (affirming lower court entry of a preliminary injunction under section 14(e) against tender offeror in favor of offeree), cert. denied, 419 U.S. 870 (1974); Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 251-52 (2d Cir. 1973) (reversing denial of preliminary injunction sought by target company under section 14(e)); H.K. Porter Co., Inc. v. Nicholson File Co., 482 F.2d 421, 423-25 (1st Cir. 1973) (holding defeated bidder has standing under section 14(e) to seek damages from target and its management); Chris-Craft Indus., Inc. v. Piper
recognized, at least implicitly, that private actions may be maintained under section 14(e). Moreover, the issue had arisen numerous times in the Second Circuit, a frequent situs of tender offer litigation, and the courts consistently recognized a private cause of action under section 14(e), particularly for injunctive relief.

The answer to this argument is two-fold. First, the pervasiveness of rule 10b-5 litigation cannot be compared to litigation under the Williams Act which, at the time of the 1975 amendments, was only seven years old. By comparison, private actions under rule 10b-5 had been recognized for almost 30 years by 1975 and had already been the subject of a Supreme Court decision. Under this response, in essence, Herman & McLean is limited to its facts. Second, even if the courts routinely granted injunctive relief under section 14(e) prior to 1975, damage actions were relatively rare and, thus, Congress could not have sanctioned them. The responses are persuasive, particularly on the issue of damage actions.

The contemporary legal context analysis, though not inconsistent with the four factor approach of Cort v. Ash, circumvents the tedious examination of each factor when legislative intent is very apparent. Thus, in Curran the Court concluded that Congress intended to preserve the preexisting remedy and, therefore, the Court was "not faced with the Cort v. Ash inquiry." In Cannon the Court examined all four Cort factors, but placed considerable reliance on the relationship between Title VI and Title IX in concluding that Congress intended that private remedies be available to enforce Title IX. The legisla-

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108. See supra note 107.
109. Id.
110. See supra note 8.
111. Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 9-14 (1971) (holding section 10(b)'s prohibition against the use of any deceptive device in the "sale" of any security by "any person" applicable to sale by corporation acting through its corporate officers and applicable even though transaction not conducted through a securities exchange or organized market).
112. 102 S. Ct. at 1843.
113. Id. at 1846.
114. After comparing Title IX with Title VI, the Court concluded in Cannon: "We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." 441 U.S. at 703. In a footnote, the Court responded to Justice Powell's vigorous
tive history of 14(e), however, does not make the propriety of finding a private cause of action readily apparent. Although the contemporary legal context approach affords some basis for finding an implied right of action under section 14(e), existing precedents do not compel such a conclusion. The traditional Cort v. Ash analysis is warranted. The second factor, focusing on indications of legislative history, is reviewed above. The other three Cort factors are analyzed below.

The Remaining Cort v. Ash Factors. The first Cort factor asks whether the plaintiff is a member of the class for whose especial benefit the statute was enacted. This factor can be viewed as directed to standing, rather than to discerning whether Congress intended the courts to infer a private cause of action. Thus, in Piper v. Chris-Craft Industries, Inc. the Court held that Congress did not intend tender offerors to benefit under section 14(e), but suggested that investors confronted with a tender offer were members of the intended class of beneficiaries. Consequently, based on the first Cort factor, the Piper Court concluded that it was inappropriate to infer a cause of action in favor of tender offerors, but that it might be appropriate to find one in favor of shareholder-offerees.

Although the language of section 14(e) appears to create duties on the part of persons for the benefit of the public at large, the legislative history of the Williams Act does demonstrate fairly conclusively that it was intended to benefit investors confronted with a tender offer. The Court seemed unreceptive in Piper to the argument that inferring a private right of action for damages on behalf of tender offerors would benefit the protected class because the existence of such a right would act as a deterrent to possible wrongdoing by others who might harm the protected class. Indeed, in Cannon, the only Supreme Court case condoning an implied private damage action under a Cort analysis, the plaintiff was a member of the special class. Therefore, under the first dissent by maintaining that "the evidence of legislative intent is so compelling that we have no hesitation in concluding that even the test now espoused by Mr. Justice Powell . . . is satisfied in this case." Id. at 703 n.34. Justice Powell argued that the Court should condone the implication of a private cause of action only when there is compelling evidence that Congress intended one to exist. See supra note 48 and accompanying text.

117. Id. at 35, 37.
118. Id. at 42 n.28.
119. The Court in Cannon so characterized the language of section 14(e). 441 U.S. at 692 n.13.
120. Piper, 430 U.S. at 26-35.
121. Id. at 39-40. A similar argument was rejected by the Court in two recent cases, Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 92-94 (1981) and Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 636-37 (1981), in which the Court refused to find an implied cause of action for contribution under the Equal Pay Act and Title VII of the Civil Rights Act, Northwest Airlines, 451 U.S. at 94-95 or the federal civil antitrust laws, Texas Indus., 451 U.S. at 640. The possible deterrent effect of a right to contribution was deemed irrelevant in the absence of congressional intent that the right be inferred by the courts. Northwest Airlines, 451 U.S. at 92-94; Texas Indus., 451 U.S. at 636-37. See generally Loewenstein, Implied Contribution Under the Federal Securities Laws: A Reassessment, 1982 DUKE L. J. 543, 561-63 (discussing judicial analysis of these cases under Cort and its progeny).
122. Cannon, 441 U.S. at 699. Curran did not depend on a Cort analysis. 102 S. Ct. at 1844. See supra note 113 and accompanying text. The Curran Court acknowledged that "[u]nder Cort v. Ash, the...
Cort factor, if a private damage remedy is appropriate under section 14(e), it would appear to be limited to shareholder-offerees.\footnote{123}

The third Cort factor considers whether a private remedy is consistent with the underlying purposes of the legislative scheme. To the extent the possibility of a damage award in favor of shareholder-offerees would enhance the purposes of the legislation, it is salutary to provide it. However, according to \textit{Piper}, the identity of the defendant must also be considered. This factor, therefore, is more complex than it might initially appear.

The Court expressed concern in \textit{Piper} that an award of damages in favor of a defeated tender offeror against the successful bidder would at least indirectly be borne by part of the protected class, since they would be among the shareholders of the successful bidder.\footnote{124} If one can infer from this that the Court would not sanction any cause of action in which the protected class bears any substantial portion of the judgment, even indirectly, then the actions that might be recognized would be severely limited. A non-tendering shareholder, alleging that he was discouraged from tendering by the fraudulent actions of the bidder, could not maintain the action if the bid was successful. Many of the target shareholders, comprising part of the protected class, will by definition have become shareholders of the successful bidder and would be indirectly injured by any award of damages against the successful bidder. Furthermore, assuming a bid is unsuccessful due to the fraudulent actions of the target company, disgruntled shareholders would be foreclosed from bringing suit against their management under section 14(e) if management had a right to indemnification from the corporation.\footnote{125} Among the numerous combinations of potential defendants and theoretical violations, the most compelling scenario for recognizing a cause of action is one in which a target shareholder sues an unsuccessful bidder.\footnote{126} But this scenario does not often arise since a bidder would not act in such a way as to intentionally defeat its own bid.

The objection that target shareholders may bear a portion of the damages could be mooted by careful judicial structuring of damage awards.\footnote{127} In suits by target shareholders against their own management, the court may be able to preclude or limit indemnification of the defendant directors and officers.\footnote{128} Similarly, in suits against a successful bidder, the damages otherwise proven may be reduced by a percentage equal to the equity ownership of

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statutory language would be insufficient to imply a private cause of action under [some] of these sections." \textit{Id.} at 1845. In a footnote, the Court emphasized the importance of the first Cort test in a Cort analysis. \textit{Id.} at 1845 n.91.
\end{flushright}
the originally targeted shareholders in the defendant company.\textsuperscript{129}

Beyond this objection, the Court was concerned in \textit{Piper} that a large damage award might prejudice shareholders because some offers might never be made.\textsuperscript{130} One would expect that any substantial risk of litigation and damage awards would be significant in the decisionmaking process of the bidder. To some extent this risk will have a salutary effect; it will encourage more fastidious attention to the disclosure and antifraud provisions of the law. But it will also have a detrimental effect; it may discourage some offers from ever being made, or adversely affect the price of offers that are made. Assessing these possibilities is a complex undertaking required by the \textit{Cort} approach. The court must decide whether the proposed implied private right is consistent with the legislative purpose. In this connection it is noteworthy that Congress, in passing the Williams Act, was sufficiently concerned with regulating tender offers to run the risk that its legislation might discourage or affect the price of some offers, because the disclosure and antifraud provisions add economic costs to bidders that were clearly not present before the legislation. Therefore, it is not inconsistent with the overall intended impact of the Act to find an implied private right of action.

The final \textit{Cort} factor, whether the cause of action is one traditionally relegated to state law,\textsuperscript{131} calls for a consideration of the nature of the alleged violation. If the theory of the plaintiff's cause of action is that the defendant violated an SEC rule promulgated pursuant to section 14(e) and the violation of that rule constitutes a fraudulent "act or practice" under section 14(e), then state law would likely have little to say on the matter. On the other hand, if the plaintiff alleges that the defendant violated some state law in connection with a tender offer, and this violation forms the basis for a claim under section 14(e), then, arguably, the cause of action is one "traditionally relegated to state law" and the federal courts ought not recognize it as a federal claim.\textsuperscript{132} Thus, to the extent that the fourth \textit{Cort} factor is determinative, some alleged violations of section 14(e) are cognizable in federal court even though others are not.

The four \textit{Cort} factors, applied in this fashion, do not really resolve the question of whether Congress intended that section 14(e) be enforced through private action. Rather, the factors become policy considerations the federal courts can look to in deciding who has standing to assert a private right of action under section 14(e), who may be held accountable in a damage action,\textsuperscript{132} Even if the damage award is reduced in this fashion, the book value of the shares owned by the target shareholders will be adversely affected. The only way to fully protect the target shareholders who tendered is to indemnify them against the loss they will suffer as a result of the payment of a damage award, either by paying them money or increasing their equity interest in the company.

\textsuperscript{130} \textit{Piper}, 430 U.S. at 40.

\textsuperscript{131} \textit{Cort}, 422 U.S. at 78.

and what claims are cognizable. Those members of the Court who share the view that a private cause of action ought not be inferred from a federal statute in the absence of "the most compelling evidence that Congress in fact intended such an action to exist" could not, under this analysis, find an implied action under section 14(e). This view is not shared by the whole Court, however, and a majority may be willing to find that claims brought by shareholder-investors under section 14(e) are cognizable in federal court if the claim is not one ordinarily recognized in state courts and if the damage award can be fashioned to minimize its impact on the protected class of shareholder-investors.

B. ACTIONS FOR INJUNCTIVE RELIEF ON BEHALF OF TENDER OFFERORS

The lower federal courts have consistently held that tender offerors have standing to seek injunctive relief against target management and competing offerors under section 14(e). These holdings are based, in part, on the suggestion in Piper that "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, 'is the time when relief can best be given.'"

Citing this and other language in Piper that seemed to treat injunctive actions on a different footing than damage actions, the United States District Court for the Southern District of New York, in an early post-Piper decision, Humana Inc. v. American Medicorp, Inc., concluded that an offeror has standing to sue a competing offeror for injunctive relief under section 14(e). The Humana court reasoned that if an offeror's allegations are ever to be effectively explored, they must be explored before the offer expires, so that the shareholder-offerees will have complete and accurate information prior to that date. Furthermore, if the allegations in the complaint were proven true and relief was granted, the stockholders of the target company would be benefited and, thus, the purposes of the Act would be furthered. This, the court concluded, "is the test by which a tender offeror's right to sue for injunctive relief must be determined"—that is, are the purposes of the Act furthered? In the context of a Cort analysis, the court focused solely on the third factor, and because examination of the third factor favored implying a right of action, the court reached that result.

Whether the Supreme Court would agree with the result reached by the district court in Humana is at least questionable. First, the Supreme Court has applied the Cort analysis to suits for injunctive relief without indicating that

135. 430 U.S. at 42 (quoting Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969)).
137. Id. at 615.
138. Id.
139. Id. at 616.
140. Id.
the nature of the relief sought should affect the analysis.\textsuperscript{141} Second, when someone other than a shareholder-offeree is suing, the first \textit{Cort} factor (the especial benefit test) is still answered in the negative,\textsuperscript{142} and the second \textit{Cort} factor (indications of legislative intent) remains a neutral factor, neither favoring nor disapproving of private remedies.\textsuperscript{143} Finally, the Court's recent decision in \textit{California v. Sierra Club}\textsuperscript{144} provides support for denying private enforcement of the Williams Act by tender offerors.

In \textit{Sierra Club} an environmental organization and two private citizens sought to enjoin the construction and operation of certain water diversion facilities that were part of the California Water Project.\textsuperscript{145} The plaintiffs alleged a violation of section 10 of the Rivers and Harbors Appropriation Act of 1899,\textsuperscript{146} which prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States."\textsuperscript{147} The Court held that the plaintiffs could not maintain the action because the Act does not explicitly create a private enforcement mechanism and one cannot properly be inferred from the Act.\textsuperscript{148}

In denying an implied cause of action, the Court relied on an examination of the first two \textit{Cort} factors. As to the first factor, the Court noted that neither the language of the statute nor its legislative history indicate that section 10 of the Rivers and Harbors Act was created for the especial benefit of a particular class.\textsuperscript{149} Rather, the statute states no more than a general proscription of certain activities, and nothing in the legislative history expands on this purpose. The Court concluded, therefore, that the Act was designed to benefit the public at large.\textsuperscript{150}

As to the second \textit{Cort} factor, the Court observed in \textit{Sierra Club} that the legislative history was silent on the question of congressional intent to afford or deny a private remedy.\textsuperscript{151} From this the Court concluded that "Congress was concerned not with private rights but with the federal government's ability to respond to obstructions on navigable waterways."\textsuperscript{152}

In \textit{Sierra Club} the Court never examined the third and fourth \textit{Cort} factors, stating that they are of relevance \textit{only} if the first two factors indicate congressional intent to create a private remedy.\textsuperscript{153} Thus, because the first two \textit{Cort} factors were held to be dispositive, the plaintiffs' argument for an implied right to bring the action failed.

\begin{itemize}
\item[142.] See \textit{supra} notes 115-23 and accompanying text.
\item[143.] See \textit{supra} notes 76-114 and accompanying text.
\item[144.] 451 U.S. 287 (1981).
\item[145.] \textit{Id.} at 289-90.
\item[146.] \textit{Id.} at 291-92.
\item[147.] 33 U.S.C. § 403 (1976).
\item[148.] \textit{Sierra Club}, 451 U.S. at 297-98.
\item[149.] \textit{Id.} at 294-95.
\item[150.] \textit{Id.} at 295.
\item[151.] \textit{Id.}
\item[152.] \textit{Id.} at 296.
\item[153.] \textit{Id.} at 297-98. See \textit{also} \textit{Touche Ross & Co. v. Redington}, 442 U.S. 560, 574-76 (1979) (emphasizing first two \textit{Cort} factors to determine whether Congress intended to create a private right of action).
\end{itemize}
If a similar analysis is applied to the standing of tender offerors to seek injunctive relief under section 14(e), the same conclusion might be reached: the statute was not enacted to create federal rights for the especial benefit of tender offerors and there is no evidence that there should be a private remedy. Arguably, a private action for injunctive relief under the Williams Act in favor of offerors would fail because it stands on "all fours" with Sierra Club, notwithstanding dictum in Piper indicating that such an action is possible.\textsuperscript{154}

The problem with this analysis, and indeed a shortcoming of the \textit{Cart} approach itself, is its overly mechanistic approach. In enacting the Williams Act, Congress sought to increase the protection available to investors by bringing a measure of order to a complex and sometimes chaotic area of securities practice. In this sense, one could assert that Congress intended a private right of enforcement, or, more accurately, intended those private remedies necessary to accomplish the Act's objectives. An attempt to find more positive indicia of intent, one way or the other, is unavailing.

In light of \textit{Cart}'s effect on statutory interpretation, Congress should give more careful consideration to whether private remedies are necessary, and if it fails to provide private remedies in post-\textit{Cart} statutes the federal courts should refuse to infer them. But in construing statutes enacted before \textit{Cart v. Ash},\textsuperscript{155} the courts should be more flexible in deciding whether to find implied actions and should, as the \textit{Humana} court recognized, pay greater heed to fulfilling congressional purposes. This "flexible" approach might well explain the result in \textit{Curran}, although the Court expressed its conclusion as a consideration of the "contemporary legal context" of the legislation.\textsuperscript{156}

Although one cannot maintain with certainty that the Court would recognize even a limited private action under section 14(e), both the traditional \textit{Cart} approach and the contemporary legal context approach afford rationales for finding a private right. Assuming the court will recognize the existence of a private action under section 14(e), Part III below explores the contours of such an action, following a brief examination of section 14(e) itself.

\section*{II. A SYNOPSIS OF SECTION 14(e)}

\subsection*{A. THE STATUTORY LANGUAGE OF SECTION 14(e) AND ITS AMBIGUITIES}

Section 14(e) of the Exchange Act\textsuperscript{157} has three aspects: First, in language nearly identical to clause (2) of rule 10b-5, section 14(e) prohibits the making of false or misleading statements; second, in language reminiscent of clause (1) of rule 10b-5, although more similar to section 15(c)(1) of the Exchange Act,\textsuperscript{158} section 14(e) prohibits "fraudulent, deceptive or manipulative acts or practices;" and third, in language similar to section 15(c)(1), the SEC is authorized under section 14(e) to "define, and prescribe means reasonably designed to

\textsuperscript{154} See \textit{Piper}, 430 U.S. at 41-42 (judicial relief to competing offerors can better be afforded at preliminary injunction stage than in post-contest lawsuit) (quoting Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969)).

\textsuperscript{155} The Supreme Court handed down its decision in \textit{Cart} on June 17, 1975. 422 U.S. 66 (1975).

\textsuperscript{156} 102 S. Ct. at 1844.

\textsuperscript{157} Section 14(e) is reproduced \textit{supra} at note 11.

prevent, such acts and practices as are fraudulent, deceptive or manipulative.”
The prohibitions of section 14(e) apply “in connection with any tender offer,” irrespective of whether the filing requirements of section 14(d) apply.159

A few observations concerning this statutory language are in order. Although the statute prohibits the making of untrue or misleading statements of material facts, on its face it does not require that the prohibited statements or omissions be made “knowingly” or with the intent to deceive or defraud. In short, there is no explicit requirement that scienter be shown to prove a violation of the statute. In 1976, however, the Supreme Court held that similar language in rule 10b-5 requires proof of scienter160 and, as a result of that holding, lower courts have similarly required plaintiffs in 14(e) private actions to prove scienter.161 A subsequent Supreme Court decision construed virtually the same language in section 17(a)(2) of the Securities Act, however, as not requiring proof of scienter.162 At the very least, this latter decision suggests that scienter may not be a necessary element if the violation of section 14(e) is premised on an untrue statement or omission. Nevertheless, this decision does not resolve the question since other factors ought to be considered as well, including the legislative history of the Williams Act,163 the relation of section 14(e) to other sections of the Securities Act and the Exchange Act,164 and what “may be described as policy considerations”165 in determining the elements of a section 14(e) cause of action.166

A second observation of section 14(e) concerns its proscription of “fraudulent, deceptive or manipulative acts or practices.” The word “fraudulent” does not appear in section 10(b), although clause (1) of rule 10b-5 does prohibit the use of “any device, scheme, or artifice to defraud.” Can it be said that by including the word “fraudulent” in section 14(e) Congress thereby intended to expand the kinds of activities prohibited in connection with tender offers beyond section 10(b)’s prohibition? Are there fraudulent acts or practices not already covered by rule 10b-5 in the context of purchases and sales of securities? The Supreme Court has held that an element of deception must be present for a cause of action to be stated under section 10(b) and rule 10b-5.167 Arguably, a fraud can occur in the absence of a deception,168 so that a cause of action under section 14(e) might be premised on conduct that did not include a

159. The filing requirements of section 14(d) apply to tender offers for equity securities (1) registered pursuant to section 12 of the Exchange Act; (2) of an insurance company which would have been registered under section 12 but for a specific exemption in section 12; and (3) issued by a closed-end investment company registered under the Investment Company Act of 1940.


163. See infra notes 204-13 and accompanying text.

164. See infra notes 214-27 and accompanying text.


166. See infra notes 226-35 and accompanying text.


168. See infra notes 285-99 and accompanying text.
deception.  

B. RULE 14e-3

Rule 14e-3 is the only rule promulgated under section 14(e) that is likely to spawn private litigation. The rule generally prohibits trading on nonpublic information regarding tender offers, and appears to prohibit trading activities permissible under rule 14b-5. Rule 14e-3 raises several issues relating to the scope and purpose of section 14(e) and the extent of the Commission's power to enforce the section.

III. PRIVATE LITIGATION UNDER SECTION 14(e): RULE 10b-5 COMPARED

The years since 1975 have seen several Supreme Court decisions restricting private damage actions under rule 10b-5. The Court has held that scienter is a necessary element of a section 10(b) violation, that mere breaches of fiduciary duty are not contemplated within the section, that silence in connection with the purchase or sale of a security cannot constitute a violation of rule 10b-5 unless the defendant has some independent duty to disclose, and that only purchasers and sellers of securities have standing to maintain private damage actions under section 10(b) and rule 10b-5. These decisions rest primarily on an analysis of the language of section 10(b) and its legislative history. But the message from the Supreme Court is clear: the federal securities laws are not a panacea for all wrongdoing in which securities are involved. The

169. See infra notes 300-36 and accompanying text.
171. The Commission cited section 14(e) (together with sections 3(b), 10(b), 13(d), 14(d), and 23 (a)) as authority for the adoption of rules 14d-1 through 14d-4 and rules 14d-6 through 14d-9, Exchange Act Rel. No. 16384, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. ¶ 82,373 at 82,577 (1979). These rules, as well as the Regulation 14E rules other than rule 14e-3 (rules 14e-1 and 14e-2) differ from rule 14e-3 in that these other rules cannot, for the most part, be surreptitiously violated, individuals violating them are unlikely to profit personally, and there is not a significant pecuniary incentive to violate them. That is not to say that litigation challenging these rules is unlikely, but rather that private litigation seeking money damages is unlikely to occur outside of rule 14e-3.
173. See infra notes 337-65 and accompanying text.
177. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754-55 (1974). The Court departed from a restrictive approach of interpreting the federal securities laws in its recent decision in Herman & MacLean v. Huddleston, 103 S. Ct. 683 (1983). The Court held that an action may be maintained under rule 10b-5 even if the conduct giving rise to the action would also support an action under section 11 of the Securities Act, and that persons seeking to recover under section 10(b) must prove their cause of action by a preponderance of the evidence only, not by clear and convincing evidence. Id. at 690-93.

The Court's decision in United States v. Naftalin, 441 U.S. 768 (1979), might also be viewed as a departure from its restrictive approach. In Naftalin, the Court held that the proscriptions of section 17(a)(1) of the Securities Act were applicable to frauds perpetrated on brokers as well as "investors." Id. at 771-79. To the extent, however, that the Court reached its conclusion by close attention to the language and legislative history of section 17(a), its opinion is entirely consistent with its section 10(b) decisions. See Steinberg, Section 17(a) of the Securities Act of 1933 after Naftalin and Redington, 68 GEO. L.J. 163 (1979).
178. Chiarella, 445 U.S. at 233-34; Santa Fe, 430 U.S. at 477-80; Ernst & Ernst, 425 U.S. at 733-36.
179. See Sante Fe, 430 U.S. at 478. The Court's reluctance to extend the use of the federal securities laws is most evident in its cases deciding what is a "security" for purposes of the federal securities laws. See Marine Bank v. Weaver, 455 U.S. 351, 555-61 (1982) (bank certificate of deposit and private profit-
lower federal courts have, for the most part, heeded this message and reduced the importance of rule 10b-5 as a principal litigating weapon. More importantly for present purposes, the lower federal courts have applied this philosophy to other sections of the federal securities laws, including section 14(e), limiting the impact of these sections as well.

Consistent with this philosophy, the federal courts have held that scienter is a necessary element in a section 14(e) action and that a mere breach of fiduciary duty may not be a basis for an action under that section. Based on principles established in other rule 10b-5 litigation, the courts have also held that reliance is a necessary element of claims brought under section 14(e). These decisions analogize section 14(e) to rule 10b-5 in ways that may conflict with congressional intent and sound jurisprudence, as an examination of each of these areas will demonstrate.

sharing agreement not securities within meaning of Exchange Act); International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 558-70 (1979) (noncontributory, compulsory pension plan was not a security); United Housing Found., Inc. v. Forman, 421 U.S. 837, 847-58 (1975) (shares issued by a nonprofit cooperative housing corporation not securities).


182. See supra note 161.

183. See supra note 181.

A. SCIENTER

In *Ernst & Ernst v. Hochfelder*\(^{185}\) the Supreme Court held that a private cause of action for damages under section 10(b) and rule 10b-5 will not lie in the absence of an allegation of scienter—that is, an intent to deceive, manipulate or defraud.\(^{186}\) This holding was based primarily on the language of section 10(b): the words “manipulative or deceptive” are used in conjunction with “device or contrivance,” suggesting that the section was intended to proscribe knowing or intentional misconduct. The Court attached particular significance to the word “manipulative” which, the Court said, “connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.”\(^{187}\) The Court found some support for its conclusion in the scant legislative history of section 10(b)\(^{188}\) and greater support in the overall scheme of the federal securities law.\(^{189}\)

With respect to the securities laws in general, the Court in *Ernst & Ernst* noted, for instance, that the language of section 11 of the Securities Act, which permits recovery for negligent acts, differs considerably from the language of section 10(b), suggesting that section 10(b) cannot also cover negligent conduct.\(^{190}\) Furthermore, the Court recognized that under the express civil remedy provisions of the Securities Act, which allow recovery for negligent conduct,\(^{191}\) Congress imposed significant procedural safeguards, but that similar procedural limitations do not exist for the judicially created private damage remedy under section 10(b).\(^{192}\) From this the Court concluded that extending section 10(b) to cover negligent conduct would conflict with congressional intent because plaintiffs could bring causes of action under 10(b) rather than under the express liability provisions of the Securities Act, and thereby avoid the carefully drawn procedural limitations of the express liability provisions.\(^{193}\)

In the course of the *Ernst & Ernst* decision, the Court conceded that, “viewed in isolation, the language of subsection [(2) of rule 10b-5] and arguably that of subsection [(3)] could be read as proscribing, respectively, any type of material misstatement or omission, and any course of conduct, that has the

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186. Id. at 193. The Court has extended the holding of *Ernst & Ernst* to injunctive actions brought by the SEC. Aaron v. SEC, 446 U.S. 680, 687-95 (1980).
187. Id. at 193 n.12. In *Ernst & Ernst* the Court defined “scienter” as “a mental state embracing intent to deceive, manipulate or defraud.” 425 U.S. at 193 n.12. The Court expressly left undecided the question of whether reckless behavior is sufficient to impose civil liability under section 10(b) and rule 10b-5. Id. The federal circuit courts that have ruled on this question have decided that recklessness satisfies the scienter requirement of *Ernst & Ernst*. E.g., Hackbart v. Holmes, 675 F.2d 1114, 1117-18 (10th Cir. 1982); G.A. Thompson & Co. v. Partridge, 636 F.2d 945, 959 (5th Cir. 1981); Nelson v. Serwald, 576 F.2d 1332, 1337 (9th Cir.), cert. denied, 439 U.S. 970 (1978); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44 (2d Cir.), cert. denied, 439 U.S. 1039 (1978). Given its narrowest reading, *Ernst & Ernst* holds that a defendant who is merely negligent does not have the mental state required to violate section 10(b) and rule 10b-5. This article uses scienter in that sense, i.e., a mental state embracing something more than simple negligence. See generally Bucklo, *Scienter and Rule 10b-5*, 67 Nw. U.L. Rev. 562 (1973).
188. Id. at 199.
189. Id. at 202-03.
190. Id. at 206-11.
191. Id. at 209-10.
192. Id.
193. Id. at 210.
effect of defrauding investors, whether the wrongdoing was intentional or not."  

This reading of the rule, advocated by the SEC in an amicus brief, would have made the rule broader than the Court's reading of section 10(b) and, therefore, would have exceeded the SEC's rulemaking authority under section 10(b). For this reason, the Court could not accept the SEC's argument.

The factors that convinced the Court that section 10(b) requires an allegation of scienter are not present with respect to section 14(e). The language of the first clause of section 14(e), which provides that it is unlawful "to make any untrue statement of 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," is not patterned after section 10(b). Instead, this language of section 14(e) is identical to that of subsection (2) of rule 10b-5, which the Court conceded in Ernst & Ernst could be read as covering unintentional wrongdoing, and which the Court essentially read as covering negligent conduct when it construed very similar language in section 17(a)(2) of the Securities Act.

Based on the statutory language alone, a case might even be made for imposing absolute liability for misstatements and omissions in connection with tender offers. Language in the Securities Act's section 11(a), which is identical to section 14(e), imposes absolute liability on the issuers of registered securities for misstatements and omissions in a registration statement, subject to the limitations of section 11(e). Experts and certain others connected with a registration statement may also be liable for misstatements and omissions contained therein. Section 11(b) provides a "due diligence" defense, indicating that the draftsmen of section 11 believed that in the absence of some qualifying language, the language concerning misstatements and omissions, standing alone, imposes absolute liability.

The language of the first clause of section 14(e) might also be compared to the second clause, which prohibits "fraudulent, deceptive, or manipulative acts or practices." If by section 14(e)'s first clause Congress intended to prohibit only those misstatements or omissions that were accompanied by an intent to deceive, or scienter, then the section is redundant because the acts and practices prohibited by the second clause include fraudulent misstatements and omissions. Traditional statutory interpretation would reject such a reading because the first clause would be rendered meaningless. To give the two clauses independent significance, scienter cannot be a necessary element in the

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194. Id. at 212.
195. Id. at 187, 212.
196. Id. at 212-14. The Court also felt that the history of rule 10b-5 indicated that it was intended to apply only when intentional misconduct was involved. Id. at 212 n.32.
197. See supra note 194 and accompanying text.
first clause. Thus, there is no basis for concluding that the language of section 14(e) requires an allegation of scienter if the plaintiff's cause of action is based on misstatements or omissions.

Just as the language of 10(b) and 14(e) differ, so do their legislative histories. The *Ernst & Ernst* Court noted that the legislative history of the Exchange Act was bereft of any explicit explanation of Congress' intent with respect to section 10(b); but the Court was apparently persuaded by the few bits of relevant legislative history brought to its attention suggesting that section 10(b) contemplated a scienter standard, not merely negligence.203 Although the legislative history of section 14(e) is not extensive, there is evidence that the first clause of section 14(e) was not intended as a scienter provision. For instance, in explaining section 14(e), the Senate Report of the bill said:

Proposed subsection (e) would prohibit any misstatement or omission of material fact, or any fraudulent or manipulative acts or practices, in connection with any tender offer. . . . This provision would affirm the fact that persons engaged in making or opposing tender offers . . . are under an obligation to make full disclosure of material information to those with whom they deal.204

The Senate Report, like the language of section 14(e) itself, separates the prohibition against misstatements and omissions from the prohibition against fraudulent or manipulative acts or practices, and gives no indication that the misstatements or omissions had to be made knowingly or with an intent to deceive, or with any other specific mental state.205

The legislation, when viewed as a whole, together with relevant statements made during the Senate hearings,206 do not support the conclusion reached by several lower courts that section 14(e) was intended to incorporate the pro-

203. 425 U.S. at 201-06.
204. See Senate Report, supra note 1, at 10-11; see also supra note 78 and accompanying text (discussing legislative history of the Williams Act).
205. Id.
206. During the course of the Senate hearings, a panel of securities law experts, consisting of Arthur Fleischer, Jr. and Professors Stanley A. Kaplan, Robert H. Mundheim, and William H. Painter appeared before the subcommittee. At one point Professor Kaplan commented on what he perceived to be a significant problem: the "increasing tendency on the part of management in office to feel that it is able to engage almost on its own in a series of efforts to continue its own control arrangements." 1967 Senate Hearings, supra note 78, at 125. Professor Mundheim then commented: "I would say in that connection that I would certainly favor [section 14(e)]. I think that [it] is very salutary and gets to the kind of problem you are talking about." Id. This suggests that, at least for Professor Mundheim, section 14(e) represented something more than a garden variety antifraud provision. See also id. at 131 (statement of Arthur Fleischer, Jr.).
Professor Painter's prepared remarks pointed out the differing language among the various antifraud provisions of the securities laws and asked whether the language of these various provisions meant the same thing. Id. at 140-41. Nothing in the legislative history suggests an answer to Professor Painter's query.

Finally, references can be found in the legislative history suggesting that the Williams Act was patterned after the laws and rules governing proxy solicitation. During the Senate debate, for instance, Senator Javitz remarked: "The Senator [Williams] represents to the Senate, and I accept his representation fully, that this [bill] is analogous to the proxy rules, so that very much the same principles obtain as to what the British call a takeover, as to a proxy fight by a group of stockholders." 113 Cong. Rec. 24,665 (1967). Senator Williams responded: "this legislation is patterned on the present law and the regulations which govern proxy contests." Id. See also Senate Report, supra note 1, at 2811-13; 1967 Senate Hearings, supra note 78, at 16 (remarks of SEC Chairman Manuel F. Cohen).

These references, together with the remarkable absence of any affirmative indication in the legislative
scriptions of rule 10b-5 into tender offer law. The Williams Act is not simply another piece of antifraud legislation. Rather, the Act seeks to regulate tender offer contests by positive means: the accumulation of more than five percent of a class of registered securities must be disclosed; a tender offer may not be made unless certain disclosures are filed with the SEC; shareholders who tender pursuant to a tender offer are afforded certain withdrawal and proration rights; and if a tender offeror increases the consideration offered to shareholders, the increased consideration must be paid to those who tendered prior to the announced increase.

By prohibiting material misstatements and omissions, section 14(e) serves as more than an antifraud provision; it gives meaning to the disclosure provisions in the same way that a prohibition against material misstatements and omissions in section 1(a) of the Securities Act gives meaning to the disclosure requirements of section 7. Like the disclosure provisions of the Securities Act, the disclosure provisions of the Williams Act are intended to do more than merely prohibit fraud.

If anything, the legislative history indicates that the Williams Act should be construed with reference to the proxy rules. Several statements made during the hearings support this view as do statements made by Senator Williams, the Act's principal sponsor, on the floor of the Senate during debates on the Act. For example, Senator Williams stated: "What this bill would do is to provide the same kind of disclosure requirements which now exist, for example, in contests through proxies for controlling ownership in a company. . . . This legislation is patterned on the present law and the regulations which govern proxy contests." Moreover, reference to the proxy rules is logical as proxy contests are, of course, another means by which one might gain control of a company. Materially false or misleading proxy statements violate rule 14a-9(a) of the rules adopted by the SEC under section 14(a) of the Exchange Act and may form the basis of a private damage action. The courts generally have not insisted that plaintiffs allege and prove that defendants acted with scienter in actions based on rule 14a-9.

history that section 14(e) was intended to incorporate rule 10b-5 jurisprudence into the Williams Act, suggest that section 14(e) should be construed independently of rule 10b-5.

212. See supra note 206.
213. 113 CONG. REC. 24665 (1967). See also supra note 206 and Judge Friendly's observation comparing tender offers and proxy contests in Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 948 (2d Cir. 1969).
214. Rule 14a-9(a) provides:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

The leading case discussing whether scienter is a necessary element in a private damage action based on rule 14a-9 is *Gerstle v. Gamble-Skogmo, Inc.*, 216 a 1973 opinion of the Second Circuit authored by Judge Friendly. The court concluded that scienter was not required under rule 14a-9, noting as support several differences between section 14(a), on the one hand, and section 10(b) and rule 10b-5, on the other hand—differences that are equally applicable to a comparison of section 14(e) and rule 10b-5. For instance, the *Gerstle* court first concluded that the statutory language of section 14(a), unlike that of section 10(b), does not emphasize the prohibition of fraudulent conduct but rather indicates a congressional concern with “protection of the outsider whose proxy is being solicited.”217 Similarly, at least with respect to material misstatements and omissions, section 14(e) is not concerned with fraudulent conduct, but with protecting shareholders confronted with a tender offer.218

Second, the court noted in *Gerstle* that although a negligence standard in rule 10b-5 would undercut the express civil liability provisions of the securities laws,219 reading rule 14a-9 as not requiring scienter is completely compatible with the statutory scheme.220 The express civil liability provision that concerned the court was section 18221 of the Exchange Act, which provides a private right of action to persons who purchase or sell a security in reliance upon a material misstatement or omission contained in a document filed with the SEC. A defense is provided under section 18 if the defendant “acted in good faith and had no knowledge that such statement was false or misleading.”222 Arguably, a negligence standard under rule 14a-9 would be inconsistent with the congressional intent, expressed in section 18, of providing a good faith defense.223 Nevertheless, the court found no incompatibility because section 18 applies to any document filed with the SEC, while section 14(a) was specifically directed at proxy regulation, and because most of the documents filed pursuant to section 18 are not distributed to stockholders for the purpose of inducing action.224 These distinctions apply with equal force to section 14(e). Applying a negligence standard to the first clause of section 14(e) in the face of the higher standard under section 18 can be rationalized on another basis as well: section 14(e) may be violated in the absence of a purchase or sale of a security, which is a necessary prerequisite to an action based on section 18.225

Finally, the court in *Gerstle* assessed the effect of permitting a negligence standard under section 14(a), again comparing it to rule 10b-5. In concluding

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623 F.2d 422, 428-31 (6th Cir.) (scienter should be an element of liability in private suits under the proxy rules as they apply to outside accountants), cert. denied, 449 U.S. 1067 (1980).
216. 478 F.2d 1261 (2d Cir. 1973).
217. Id. at 1299.
218. Piper, 430 U.S. at 35.
219. 478 F.2d at 1299. See also Ernst & Ernst, 425 U.S. at 210.
220. 478 F.2d at 1299 & n.18.
222. Id.
223. It is not clear that section 18(a) is a scienter provision. Professor Loss has referred to plaintiff's burden of proof under section 18(a) as "a first cousin to scienter." 3 L. Loss, *Securities Regulation* 1752 (2d ed. 1961). In any event, it clearly requires something more than negligence. *Ernst & Ernst*, 425 U.S. at 209 n.28 ("Each of the provisions of the 1934 Act that expressly create civil liability [other than section 16(b)] . . . contains a state-of-mind condition requiring something more than negligence").
224. 478 F.2d at 1299 n.18.
225. The same may, of course, be said with respect to proxy solicitations.
that negligence was the appropriate standard for actions based on section 14(a), the court said:

[A] broad standard of culpability here will serve to reinforce the high duty of care owed by a controlling corporation to minority shareholders in the preparation of a proxy statement seeking their acquiescence in this sort of transaction, a consideration which is particularly relevant since liability in this case is limited to the stockholders whose proxies were solicited. While "privity" is not required for most actions under the securities laws, its existence may bear heavily on the appropriate standard of culpability.226

The court contrasted this assessment with the effect of allowing a negligence standard under rule 10b-5, which, the court surmised, would deter the laudable corporate policy of publicly disclosing important business and financial developments. Although the court's conjecture regarding rule 10b-5 may be questioned,227 its conclusion with respect to section 14(a) seems sound and equally applicable to section 14(e).

Providing a negligence standard under the first clause of section 14(e) is particularly appropriate since an obvious use of this provision would be in suits by target stockholders against target management claiming that a tender offer was defeated as a result of management's allegedly false statements.228 In such a suit, a number of factors justify a strict standard of liability: Requiring a high duty of care is not unreasonable because management owes a fiduciary duty to its stockholders;229 individuals in management would gain personally if the tender offer is defeated and, therefore, they should proceed cautiously when advising stockholders;230 and management is under no obligation to express any opinion with respect to a tender offer, so that when it undertakes to do so it should exercise care.231

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226. 478 F.2d at 1300 (footnote omitted).
228. As a result of the decision in Panter v. Marshall Field & Co., 646 F.2d 271, 286 (7th Cir. 1981), the shareholders' cause of action is contingent upon an offer actually being made.
230. The personal gain is the retention of a corporate office, which is of value even to directors who are not otherwise employed by the company. See Panter v. Marshall Field & Co., 646 F.2d 271, 300 (7th Cir. 1981) (Cudahy, C.J., dissenting). The courts have held that this personal interest does not create a conflict of interest that would shift the burden of proof to management to justify its actions. Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980). See generally Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. Law. 101 (1979); Lipton, Takeover Bids in the Target's Boardroom; An Update After One Year, 36 Bus. Law. 1017 (1981). However, given the delicate situation in which management finds itself, it is entirely appropriate to require management to proceed with due care and to hold management responsible if it acts negligently.
231. Rule 14e-2 provides:

(a) Position of subject company. As a means reasonably designed to prevent fraudulent, decep-
Damage actions might also be brought by target stockholders against the bidder alleging material misstatements or omissions. These actions may include allegations that the bidder sought to discourage stockholders from tendering to a rival bidder or, for some reason, to itself; or that the bidder made a misrepresentation in its tender offer materials regarding the value of the deal to the stockholders. In any of these situations, liability should be imposed even if the misstatement or omission was only negligent since a bidder who seeks to discourage tenders to a rival bidder is, in some respects, like target management seeking to discourage its stockholders from tendering to a bidder. Like management, the dissuading bidder stands to gain from successful influence, and, like management, the dissuading bidder is under no obligation to make any statements regarding its rival. Although the bidder may not owe a fiduciary duty to the shareholder-offerees, these other factors suggest that, like management, a tender offeror should be held to a high standard of care in its communications with target stockholders. If the bidder seeks to discourage certain stockholders from tendering to itself, as might happen when the bidder has arranged to purchase a sufficient number of shares from a select group of insiders, the bidder must have acted intentionally and thus the question of the appropriate standard is mooted.

Finally, if the offering materials include a material misrepresentation, a case can be made that liability ought to be imposed without regard to fault, at least with respect to those matters within the knowledge or control of the bidder. If, for instance, the bidder misrepresents the value of securities to be delivered to stockholders in a post-offer merger, the effect of such a misrepresentation is analogous to a misrepresentation by an issuer in a registration statement. In both cases the investor is asked to make an investment decision based on inaccurate or incomplete information furnished by a party who seeks a certain response from the investor. Section 11(a) of the Securities Act imposes virtually absolute liability on the issuer for deficiencies in the registration statement, presumably because some party must be responsible for the contents of a registration statement. This same rationale would apply to tender offer materials prepared by the bidder.

233. Osofsky v. Zipf, 645 F.2d 107, 115 (2d Cir. 1981) (tendering shareholders may maintain an action against successful bidder who misrepresented value of preferred stock to be issued in merger); McCloskey v. Epko Shoes, Inc., 391 F. Supp. 1279, 1282 (E.D. Pa. 1975) (nontendering shareholders may maintain suit against bidder who allegedly overstated the value of securities being exchanged and understated consideration received by insiders in prior block purchase).
234. See supra note 232.
235. See supra note 200.
B. RELIANCE

As a general proposition, proof of reliance is a necessary element of a private damage action under rule 10b-5. This requirement arose because rule 10b-5 jurisprudence has been shaped with reference to the common law action of deceit.\(^\text{236}\) The common law insists that the plaintiff prove reliance to establish a causal connection between the wrongful conduct and the resulting damage, a requirement typical in the law of torts.\(^\text{237}\)

Many rule 10b-5 actions would have failed, however, if the courts had not recognized the difficulties inherent in a strict adherence to the common law reliance requirement. Thus, when the rule 10b-5 cause of action is based on a failure to disclose or an omission, as opposed to a misrepresentation, the Supreme Court has said "positive proof" of reliance is not necessary.\(^\text{238}\) Rather, a plaintiff need only prove that the facts withheld would be material to a reasonable investor.\(^\text{239}\) The obligation to disclose combined with materiality establishes the necessary causation in fact.\(^\text{240}\)

Similarly, the courts have been troubled by the reliance requirement when the suit is a class action\(^\text{241}\) or when the plaintiff alleges that he "relied" on the integrity of the marketplace in making his investment decision.\(^\text{242}\) In each of these instances, the courts have also been willing to find exceptions to the traditional reliance requirement.\(^\text{243}\) The rationale for these exceptions has generally proceeded from a perceived need to simplify the proof of reliance in the given action.\(^\text{244}\)

Because early section 14(e) cases analogized the private damage action thereunder to rule 10b-5 actions, proof of reliance was assumed to be an element of the section 14(e) plaintiff's cause of action.\(^\text{245}\) The courts have not been unanimous in requiring proof of reliance, and some courts have carved out exceptions to the rule.\(^\text{246}\) A few prominent decisions, however, such as Lewis v. McGraw\(^\text{247}\) and Panter v. Marshall Field & Co.,\(^\text{248}\) have turned on the absence of reliance. To the extent that the courts in these cases failed to ex-

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\(^{236}\) L. Loss, supra note 223, at 1430-44; A. Jacobs, Litigation and Practice Under Rule 10b-5 1-6 (1981).


\(^{239}\) Id. at 153-54.

\(^{240}\) Id. at 154. The Fifth Circuit has interpreted Affiliated Ute as holding that a material nondisclosure creates a presumption of reliance that may be rebutted by the defendant. Shores v. Sklar, 647 F.2d 462, 468 (5th Cir. 1981), cert. denied, 103 S. Ct. 722 (1983); Rifkin v. Crow, 574 F.2d 256, 261 (5th Cir. 1978).


\(^{243}\) See cases cited supra note 241 and infra note 244.


\(^{245}\) See supra note 184 and accompanying text.

\(^{246}\) See supra note 184.


\(^{248}\) 646 F.2d 271 (7th Cir. 1981).
plain why reliance must be shown, the opinions may be criticized. Therefore, they provide a framework for discussing the applicability of reliance in section 14(e) actions.

*Lewis v. McGraw* arose out of the aborted effort of American Express to take over McGraw-Hill.249 After the McGraw-Hill board rejected as "reckless," "illegal," and "improper" an American Express merger offer, American Express announced its intention to make a cash tender offer for any and all McGraw-Hill stock.250 This tender offer was never made, however, and was replaced with a new proposal, submitted to the McGraw-Hill board.251 The new offer, which was to take the form of a tender offer to McGraw-Hill shareholders, provided for a substantially higher price than the first offer rejected by the McGraw-Hill board, but would not become effective unless McGraw-Hill's management agreed not to oppose it by "propaganda, lobbying or litigation."252 This offer, too, was resisted by the McGraw-Hill board and subsequently expired by its own terms.253 The plaintiffs' action, brought on behalf of McGraw-Hill stockholders, alleged that public statements by the McGraw-Hill board were false and misleading and resulted in American Express failing to consummate the tender offer.254 This, in turn, allegedly damaged the plaintiff class because it denied the class the opportunity to tender at a price substantially above the market price.255

The district court in *Lewis* dismissed the plaintiffs' action because the complaint failed to allege that the plaintiffs relied on the defendants' misstatements and omissions.256 The Second Circuit affirmed, reasoning that since a tender offer was never made for McGraw-Hill stock, the plaintiffs could not have relied on the defendants' misstatements in deciding whether to tender.257 Therefore, because reliance could not be demonstrated, no cause of action could be stated under section 14(e).

Although the outcome in *Lewis* may have been correct, the court painted with too broad a brush. The opinion seems to require that any damage a section 14(e) plaintiff suffers must arise in connection with his decision to tender. Section 14(e) is, however, broader than the common law action of deceit.258 For instance, the section prohibits fraudulent and manipulative acts—that is, acts which might damage target shareholders whether or not the decision to tender is influenced.

250. *Id.* at 194.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
257. 619 F.2d at 195.
258. The Supreme Court recently made a similar observation with respect to rule 10b-5. In *Herman & MacLean v. Huddleston*, 103 S. Ct. 683 (1983), the Court held that the common law rule that fraud must be proved by clear and convincing evidence would not govern actions under rule 10b-5. *Id.* at 690-92. In rejecting the common law rule, the court reasoned: "[T]he antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud. Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common law protections by establishing higher standards of conduct in the securities industry." *Id.* at 691.
Furthermore, the court's decision in Lewis makes proof of reliance the sine qua non in section 14(e) actions, failing to recognize that reliance is important only to establish causation. If a link between the plaintiff's loss and the defendant's violation of the statute can be shown, it should not matter if reliance is present. In Lewis causation of a sort was alleged. The defendants' resistance to the final American Express offer prevented the offer from going forward and denied shareholders the opportunity to tender at an attractive price. The real problem with the plaintiffs' complaint was the lack of any causal link between the defendants' alleged misstatements and the plaintiffs' loss. The tender offer failed to materialize not because the defendants made false and misleading statements, but simply because the defendants resisted it. Management's resistance of a hostile tender offer does not violate section 14(e).259

Panter v. Marshall Field & Co.260 presented facts similar to Lewis: an announced tender offer was withdrawn before it became effective as a result of vigorous resistance by target management.261 As in Lewis, the disappointed shareholders filed a class action against the target company and its directors, alleging that the defendants' actions deprived the plaintiffs of the opportunity to tender their shares.262 In Panter, however, the plaintiffs also alleged that they would have sold their shares in the market but for their reliance on the defendants' false and misleading statements, which caused them to retain their shares.263 Nevertheless, the plaintiffs' action failed.

Relying heavily on Lewis, the Seventh Circuit disposed of the lost tender offer opportunity claim, stating that the requisite element of reliance was lacking.264 The Panter court also rejected the plaintiffs' claim that they were unlawfully persuaded not to sell into the market, holding simply that section 14(e) does not provide a damage remedy for misrepresentations or omissions if the proposed tender offer never becomes effective.265 Although this holding would appear to make the decision one in which reliance was not a pivotal issue, the reasoning of the opinion has a significant impact on the reliance issue. To reach its conclusion that section 14(e) does not apply if a tender offer does not become effective, the court reasoned that the proscriptions of section 14(e), at least in private damage actions, are limited to protecting a shareholder faced with a decision to tender or retain his shares.266 This narrow reading of the purpose of the Williams Act, and section 14(e) in particular, has an impact on the reliance issue because, if the court was correct, the type of

259. See authorities cited supra note 167. In Lewis the court suggested that the plaintiffs' cause of action must rest on state law. 619 F.2d at 195.
260. 646 F.2d 271 (7th Cir. 1981).
261. Id. at 281.
262. Id. at 277.
263. Id. at 285.
264. Id. at 283-85.
265. Id. at 285.
266. The court reasoned first that the language of section 14(e), which applies to conduct "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," suggests that an effective offer must come into existence. Second, the legislative history indicates that the intent of Congress was to afford a measure of protection to shareholders faced with a tender offer decision. Finally, the court noted the trend of Supreme Court cases that have "continually limited the federal remedy in private federal securities actions." For these reasons, the court denied relief when the offer does not become effective. Id. at 285-86.
damage a shareholder can suffer as a result of a violation of section 14(e) is limited to the loss he may suffer as a result of an incorrect investment decision under the pressure of a tender offer. This type of loss would naturally be caused by some type of reliance. But if, on the other hand, the purposes of the Williams Act are broader and include protection of shareholders from the effects of false and misleading statements in the absence of reliance, then reliance is not necessarily the sole causal link between the violation and the loss.

In *Panter* the Seventh Circuit cited legislative history to support its narrow reading of the purposes of the Williams Act.267 None of the legislative history cited by the court related directly to section 14(e); rather, it was directed to the disclosure provisions of the Act.268 Congress was apparently concerned with more than disclosure, however, as the substantive provisions of the Act noted above demonstrate.269 Section 14(e), which prohibits any fraudulent, manipulative, or deceptive act or practice is also concerned with more than disclosure.270 In short, Congress was concerned with the "industrial warfare" that results when a tender offer is announced, and the damage to shareholders that may ensue.271 Surely management's misleading statements made to resist a hostile tender offer are part of that "industrial warfare" whether or not the tender offer becomes effective. To the extent shareholders act on those statements, surely they may be damaged.272

Another difficulty with *Panter* is that while shareholders may still have a claim for damages against their management for misleading statements made during a pre-effective period if an offer is subsequently made,273 a damage claim will not be available to the defeated bidder.274 Thus, the decision in *Panter* favors management vis-a-vis the potential bidder and runs contrary to the neutrality principle that Congress sought to achieve in the legislation.275

267. Id.
268. Id. at 286.
269. See supra notes 207-10 and accompanying text.
270. During hearings on the 1970 amendments to the Williams Act, Sen. Williams asked the SEC to submit a memorandum describing the problem areas it would address if granted rulemaking authority under section 14(e). The problems delineated by the Commission included areas other than disclosure problems and thus demonstrate that the Commission has long held the view that section 14(e) deals with more than misrepresentations and omissions. Additional Consumer Protection in Corporate Takeovers and Increasing the Securities Act Exemptions for Small Businessmen: Hearings Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. 12 (1970) [hereinafter 1970 Senate Hearings].
271. The use of the term "industrial warfare" to describe tender offer battles appears from time to time in the course of the legislative history of the Williams Act. See, e.g., 1967 Senate Hearings, supra note 78, at 178.

The type of rule which the majority advocates is simply an invitation to incumbent management to make whatever claims and assertions may be expedient to force withdrawal of an offer. Management could speak without restraint knowing that once withdrawal is forced there is no Securities Act liability for deception practiced before withdrawal took place. Such a rule provides a major loophole for escaping the provisions of Section 14(e) and obviously frustrates the remedial purpose of the Act.
646 F.2d at 310 (Cudahy, J., dissenting).
273. 646 F.2d at 285; see Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir. 1980).
275. At several points in the legislative history, Sen. Williams and others made it clear that the intent
The proper approach to the reliance issue must recognize two principles. First, section 14(e) is broader than the common law deceit action; and second, reliance is relevant only insofar as it is needed to establish causation—if causation can otherwise be established, lack of reliance ought not dispose of a claim under section 14(e). The judicial decisions supporting these principles are sound because they further shareholder protection and do so in a way that favors neither management nor bidders. Under these principles management is not inhibited from resisting a tender offer, but is only prohibited from resisting by improper means. Bidders are not liable for every material misstatement or omission, only those that cause damage to shareholder-offerees. Finally, reliance remains an element of the plaintiff's cause of action if the plaintiff alleges that the misstatement or omission affected his investment decision.

C. BREACH OF FIDUCIARY DUTY

Since the Supreme Court's 1977 decision in Santa Fe Industries, Inc. v. Green, a cause of action under rule 10b-5 must allege conduct that “can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute.” In Santa Fe the Court rejected the Second Circuit's conclusion that a complaint alleges a claim under rule 10b-5 when it alleges a breach of fiduciary duty by a majority shareholder in effecting a short-form merger under Delaware law without justifiable business purpose. The appellate court based its conclusion on clause (3) of rule 10b-5, which prohibits “an act, practice, or course of business which operates or would operate as fraud,” reasoning that such conduct by the majority shareholder constitutes fraud.

Significantly, the Supreme Court did not hold that a breach of fiduciary duty is not a fraud; rather, the Court held, in an opinion paralleling its decision in Ernst & Ernst v. Hochfelder, that the language of section 10(b) contemplates only manipulative or deceptive conduct. Because the complaint in Santa Fe alleged neither, it did not state a claim under section 10(b). The Court recognized that the appellate court was relying on the language of rule 10b-5, but, citing Ernst & Ernst, noted that such reliance was inappropriate:

To the extent that the Court of Appeals would rely on the use of the term “fraud” in Rule 10b-5 to bring within the ambit of the Rule all breaches of fiduciary duty in connection with a securities transaction,
its interpretation would, like the interpretation rejected by the Court in *Ernst & Ernst*, "add a gloss to the operative language of the statute quite different from its commonly accepted meaning." 283

Based on *Santa Fe*, numerous lower federal courts have held that shareholder actions under section 14(e) alleging breach of fiduciary duty fail to state a claim under that section. 284 The language of section 14(e), however, specifically prohibits "fraudulent . . . acts or practices." Therefore, if conduct that constitutes a breach of fiduciary duty is "fraudulent," it is presumably violative of section 14(e). 285 The appellate court decision in *Santa Fe* is arguably still good law to the extent it determined that a breach of fiduciary duty by the controlling shareholder was a fraud on the minority shareholders, and the court's reasoning, or lack thereof, is worth examining.

The appellate court decision in *Santa Fe* relied on three things: Earlier Second Circuit decisions which minimized the importance of deception as a necessary element in a rule 10b-5 action; 286 the Supreme Court's observation in *Superintendent of Insurance v. Bankers Life and Casualty Co.* 287 that "[s]ection 10(b) must be read flexibly, not technically and restrictively"; 288 and a statement in the Court's 1963 decision in *SEC v. Capital Gains Research Bureau, Inc.* 289 that fraud, in the sense of a court of equity, properly includes "all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence . . . and are injurious to another, or by which an undue and unconscientious advantage is taken of another." 290 The appellate court opinion, however, failed to address why a breach of fiduciary duty, standing alone, is a fraud and, more broadly, whether fraud can exist in the absence of a deception. The majority avoided these questions by reading rule 10b-5 as a proscription against unfairness. 291 Judge Mansfield's concurring opinion 292 also failed to discuss why a breach of fiduciary duty is a fraud.

This shortcoming in the majority and concurring opinions did not go unnoticed in Judge Moore's vigorous dissent. He wrote: "It states the obvious to say that essence of fraud is deliberate *deception or concealment* which is calculated to deprive the victim of some right or to obtain, by some *deceptive means*, an impermissible advantage over him." 293 Judge Moore cited only Black's and

283. *Id.* at 472 (quoting *Ernst & Ernst*, 425 U.S. at 199) (emphasis added).
285. The notion that a breach of fiduciary duty may be fraudulent within the meaning of section 14(e) has not met with judicial approval. *In re Sunshine Mining Co. Sec. Litig.*, 496 F. Supp. 9, 11 (S.D.N.Y. 1979).
286. 533 F.2d at 1290-92.
288. *Id.* at 12. The Court reaffirmed this statement in *Herman & MacLean v. Huddleston*, 103 S. Ct. 683, 690 (1983).
290. *Id.* at 194. (quoting from Moore v. Crawford, 130 U.S. 122, 128 (1888)).
291. 533 F.2d at 1291.
292. *Id.* at 1294 (Mansfield, J., concurring).
293. *Id.* at 1301 (Moore, J., dissenting) (footnote omitted) (emphasis added).
Ballentine's law dictionaries to support this proposition, but went on to demonstrate that each of the earlier Second Circuit cases the majority relied upon involved an element of deception. Although Judge Moore concluded that the defendant did not breach its fiduciary duty, he also argued, in contrast to the majority opinion, that breach of fiduciary duty and fraud "are wholly different from one another."

The court of appeals opinions in Santa Fe thus join issue on whether fraud can exist in the absence of deception. Judge Moore’s observation that the answer is obvious is not borne out by a review of judicial decisions or the literature concerning the meaning of the term “fraud.” Fraud is used in a variety of contexts, only some of which involve deception. The meaning of “fraud” is

294. Id.
295. Id. at 1301-04. In Santa Fe the Supreme Court disposed of these cases in a lengthy footnote, demonstrating that each involved an element of deception. 430 U.S. at 475 n.15.
296. 533 F.2d at 1304.
297. Compare Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (construing a prohibition against fraudulent entries in flight logbook as requiring proof of "(1) false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) with the intent to deceive and (5) with action taken in reliance upon the representation") and People v. Federated Radio Corp., 244 N.Y. 33, 38-39, 154 N.E. 655, 657 (1926) (construing fraud in context of New York blue sky statute as including “all deceitful practices contrary to the plain rules of common honesty”) with Arlington Trust Co. v. Hawk-eye-Security Ins. Co., 301 F. Supp. 854, 857-58 (E.D. Va. 1969) (construing fraudulent acts within coverage of fidelity bond as including acts “which show a want of integrity or breach of trust”) and Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 228, 293 A.2d 682, 688 (1972) (stating in dictum that consumer fraud statute may be violated “even though one has not in fact been misled or deceived by an unlawful act or practice”).

A number of cases finding fraud under various sections of the securities laws speak in terms of deception, but in reality turn on findings of unfairness or breach of fiduciary duty. Typical are the cases brought against brokers and dealers alleging a violation of the antifraud rules because of excessive mark-ups, Charles Hughes & Co. v. SEC, 139 F.2d 434, 435 (2d Cir.) cert. denied, 321 U.S. 786 (1944), or excessive trading (churning), Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 425 (N.D. Cal. 1968), modified, 430 F.2d 1202, 1207 (9th Cir. 1970). Language from the court’s opinion in Charles Hughes & Co. is telling:

Even considering petitioner [the broker-dealer] as a principal in a simple vendor-purchaser transaction . . . it was still under a special duty, in view of its expert knowledge and proffered advice, not to take advantage of its customers’ ignorance of market conditions. The key to the success of all of petitioner’s dealings was the confidence in itself which it managed to instill in the customers. Once that confidence was established, the failure to reveal the mark-up pocketed by the firm was both an omission to state a material fact and a fraudulent device.

139 F.2d at 437. The evil in excessive mark-up and churning cases is not the failure to disclose, but the unfairness of what the broker-dealer has done to its customers. Consequently, bringing churning within the proscription of rule 10b-5 has proved somewhat difficult. S. GOLDBERG, FRAUDULENT BROKER-DEALER PRACTICES 12-13 (1978) (“A rather technical chain must be forged through the Securities Exchange Act, and the various rules adopted thereunder, in order to prove churning a violation of section 10(b) and rule 10b-5”). See also Dirks v. SEC, 681 F.2d 824, 840 (D.C. Cir.) (noting that the Second Circuit has applied rule 10b-5 to nondeceptive breaches of fiduciary duty by broker-dealer), cert. granted, 103 S. Ct. 371 (1983), argued, March 21, 1983.

More recently, the Second Circuit held that an indictment charging defendant with aiding others in violating their fiduciary duties of honesty, loyalty and silence was sufficient to allege a criminal violation of section 10(b) and rule 10b-5. United States v. Newman, 664 F.2d 12, 15-16 (2d. Cir. 1981).

This broad concept of fraud is consistent, however, with the definition set forth in the seventh edition of William Kerr’s 19th century treatise on fraud:

The Courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety. The fertility of man’s invention in devising new schemes of fraud is so great, that the Courts have always declined to define it, or to define undue influence, which is one of its many varieties, preserving to themselves the liberty to deal with it under whatever form it may present itself. Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all
elusive and has prompted many writers to observe that “fraud” is a vague term with numerous definitions. By carefully choosing one’s authorities and relying on selected quotations, a persuasive case can be made on either side of the issue.

One might argue that the language of section 14(e) prohibiting “fraudulent, deceptive, or manipulative acts or practices” supports the conclusion that fraud can exist in the absence of deception because, unless fraud and deception are different acts, the section would be redundant, a result that courts seek to avoid in construing legislation. Furthermore, in light of the meticulous attention the Court has paid to statutory language in its recent securities laws decisions, one can easily imagine the Court saying that if Congress wanted section 14(e) to be construed identically to section 10(b), it could have easily done so by utilizing identical language. Failing to do this, and having purposefully used the ambiguous term “fraudulent,” Congress “intended” the courts to give broader meaning to section 14(e) than to section 10(b).

Although this argument has some surface appeal, it presumes too much regarding congressional intent. The language of section 14(e) is typical of the antifraud provisions of the securities laws and probably was not drafted with the care that the above analysis implicitly assumes. Little of the rather long legislative history of the Williams Act is devoted to the meaning of the language of section 14(e). Indeed, only Professor Painter commented on it and then only in passing. The reports of the Senate and House committees that held hearings on the Williams Act contained identical, cryptic comments as to the purpose of the section. It does not appear that the congressional commit-

acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered as fraud.


298. Pomeroy, writing in 1882, observed:

It is utterly impossible to formulate any single statement which shall accurately define the equitable conception of fraud, and which shall contain all of the elements which enter into that conception; these elements are so various, so different under the different circumstances of equitable cognizance, so destitute of any common bond of unity, that they can not be brought within any general formula. To attempt such a definition would therefore be not only useless but actually misleading.

3 J. POMEROY, EQUITY JURISPRUDENCE II 420-21 § 873 (5th ed. 1941). Professor Prosser, writing many years later, noted that the term “fraud” was “so vague that it requires definition in nearly every case.” W. PROSSER, supra note 237, at 684. The courts have been similarly mystified by the term fraud.

299. See authorities cited supra note 297. Compare Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U.S. 206, 216 (1908) (promoter’s duty was to corporation as it then existed, not as it was contemplated) with Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 196, 89 N.E. 193, 209 (1909) (promoter’s disclosure must extend beyond current shareholders to extent of promoted plan), aff’d on other grounds, 225 U.S. 111 (1912).

300. See Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976).


302. See supra notes 78 and 206.

303. See supra notes 78 and 204 and accompanying text.
tees considered the precise wording of the statute significant; if they had, a more extensive explanation of the language would likely have been provided. In sum, one must go beyond the language of the statute and historical precedent to determine its meaning.

Another approach utilized to determine meaning is that of Cort v. Ash. In Santa Fe the Supreme Court applied Cort as an alternative basis in deciding that section 10(b) did not cover breaches of fiduciary duty. The Court first identified the fundamental purpose of the Exchange Act as the implementation of a philosophy of full disclosure. The Court then concluded that recognizing a cause of action for breach of fiduciary duty would at best serve a "subsidiary purpose" of the federal legislation. As another reason to deny a federal remedy, the Court noted that the action it was being asked to recognize in Santa Fe was one "traditionally relegated to state law."

Although a similar analysis might be applied with respect to section 14(e), some differences are noteworthy. First, although Congress was primarily concerned with disclosure in adopting the Williams Act, it also expressed a concern for the fair treatment of shareholders. The resulting presence in the Act of substantive protections for shareholders shows that this was something more than a subsidiary congressional concern.

The second factor of importance to the Court in Santa Fe, the existence of state law on the subject, provides a basis for resolving the question of whether a breach of fiduciary duty ought to be actionable under section 14(e). Shareholders claiming that management's actions in resisting an attractive tender offer were motivated by a desire to maintain itself in office may state a claim recognizable under state law. That shareholders may not fare terribly well in such litigation is no reason to federalize the cause of action. So long as management does not issue false or misleading statements or otherwise engage in deceptive or manipulative conduct, the tender offer process can proceed as contemplated in the Williams Act. Thus, claims of unfairness that shareholders might have can be left to the state courts.

When management's actions or proposed actions in the face of a hostile tender offer would effectively terminate the offer, however, and would breach management's fiduciary duty to the shareholders imposed by state law, the bidder ought to be able to obtain equitable relief against such actions in fed-

305. 430 U.S. at 477-80 (1977). Justices Blackmun and Stevens dissented from this portion of the Court's opinion. Id. at 480 (Blackmun, J., concurring in part); id. at 480-81 (Stevens, J., concurring in part).
306. Id. at 477-78.
307. Id. at 478.
308. Id. at 478-79.
309. See supra note 1.
310. Id. See also Proposed Amendments to Tender Offer Rules, [1978-1979 Transfer Binder] Fed. Sec. L. REP. (CCH) ¶ 82,374 at 82,610 (1979) ("The congressional purpose underlying the Williams Act was to require fair and equal treatment of all holders of the class of security which is the subject of the tender offer").
311. 430 U.S. at 478.
313. See Easterbrook & Fischel, The Proper Role of Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161, 1163 (1981).
eral court. Legislative history, administrative necessity, and historical precedents all favor this conclusion. The recent Sixth Circuit decision in Mobil Corp. v. Marathon Oil Co. illustrates a factual context in which breach of fiduciary duty might have been utilized to give the plaintiff the relief it was seeking. Instead the court chose a novel, and questionable, interpretation of the statute to reach an equitable result.

Mobil arose out of the contest between Mobil and U.S. Steel for Marathon. After an uninvited bid by Mobil for 40 million shares of Marathon at $85 per share, Marathon sought a “white knight” and eventually reached an agreement with U.S. Steel pursuant to which U.S. Steel agreed to make a tender offer through a subsidiary for 30 million shares of Marathon stock at $125 per share. To help assure the success of the U.S. Steel offer, Marathon granted it two options: First, an irrevocable option to purchase ten million authorized but unissued shares of Marathon common stock for $90 per share; and second, an option to purchase Marathon’s forty-eight percent interest in oil and mineral rights in the Yates Field for $2.8 billion. This latter option, giving U.S. Steel the right to acquire the “crown jewel” of Marathon’s assets, was exercisable only if the U.S. Steel offer failed and another offer succeeded.

Mobil filed suit to enjoin the exercise of the options, arguing that Marathon failed to disclose to its shareholders material information regarding the purpose of the options, that the options were “manipulative” in violation of section 14(e), and that the grant of the options violated the corporate law of Ohio, the state of Marathon’s incorporation. Underlying these arguments was the reality that the options had damaging effects on Mobil’s attempt to acquire Marathon. The effect of U.S. Steel’s Yates Field option was to decrease the interest Mobil, or any other bidder, might have in Marathon. As to the stock option, because the exercise price was below the tender offer price and related to authorized but unissued shares, the stock option had the effect of increasing the cost to any bidder competing with U.S. Steel. For instance, Marathon’s investment banker calculated that it would cost Mobil an additional 1.1 to 1.2 billion dollars to match U.S. Steel’s tender offer. Thus, the two options effectively “locked up” Marathon for U.S. Steel by deterring rival bids.

The Sixth Circuit first held that Mobil had standing to seek injunctive relief under section 14(e) as a tender offeror. It then found this “lock-up” effect “manipulative” within the meaning of section 14(e), and thus granted Mobil’s plea for equitable relief. The court’s analysis of the manipulation issue be-

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315. Id. at 367.
316. Id.
317. Yates Field, in West Texas, has been one of the largest producing oil fields in the world. See id. at 368-69.
318. Id. at 367.
319. Id.
320. Id. at 368.
321. Id. at 375.
322. Id. at 375-76.
323. Id. at 372.
324. The court effectively voided the two options, required that the shareholders be notified and
gan with a citation to the Supreme Court's definitions of the term "manipulative" in *Ernst & Ernst* and *Santa Fe*. In *Ernst & Ernst* the Court said: "It is and was 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* the Court offered this illustration of the term "manipulation": "The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." The appellate court in *Mobil* reasoned that the options had the effect of creating an artificial price ceiling in the tender offer market for Marathon stock and therefore fell within the Supreme Court's definition of manipulation.

The Sixth Circuit's conclusion in *Mobil* that the options constituted manipulation is at odds with the traditional meaning of the term and the spirit of the Supreme Court's decisions from which the court quoted. Professor Loss' discussion of the term "manipulation," cited with approval by the Supreme Court, demonstrates that the term generally refers to undisclosed stock transactions intended to mislead investors. Although the effect of the Marathon-U.S. Steel options may have been to place an artificial ceiling on the price of Marathon stock, that alone cannot render the options manipulative because manipulation relates to manner as well as effect. Therefore, although an announcement by a corporation that it will repurchase its own shares at a given price creates a floor below which the stock price will not fall, it can not be seriously argued that such an announcement is manipulative. By comparison, wash sales or matched orders or other schemes which might have the same effect would be deemed manipulative. The difference is that, in the latter case, investors are misled as to the truth, while in the former they are not. The prohibition against manipulation was intended to deal only with the latter case. Moreover, the significance of the Marathon-U.S. Steel options was not their impact on the price of Marathon's stock, but their effective foreclosure of rival bids.

The real issue in the *Mobil* case, therefore, was whether target management violated section 14(e) when it undertook a course of conduct that did not involve misstatements, omissions or manipulative or deceptive conduct but that had the effect of eliminating the plaintiff as a tender offeror. The resolution of
given an opportunity to withdraw their shares, and ordered that the tender offer be extended for a reasonable time. *Id.* at 377-78.


The court conceded that nondisclosure is "usually essential to the success of a manipulative scheme," *Mobil*, 669 F.2d at 376 (quoting from *Santa Fe*, 430 U.S. at 477), but, focusing on the effect of the options, the court concluded that the fact of disclosure in this case would not render the options nonmanipulative. The court said, "to find compliance with section 14(e) solely by the full disclosure of manipulative acts as a *fait accompli* would be to read the 'manipulative acts and practices' language completely out of the Williams Act." *Mobil*, 669 F.2d at 377.
this issue should turn on whether management violated its fiduciary duty. If management's actions were consistent with its fiduciary duty, no basis exists for judicial interference. If, however, management's actions violated a fiduciary duty, then the Williams Act ought to afford a measure of protection, at least to the extent of providing a cause of action for injunctive relief for the tender offeror. Unlike the shareholders of the target company, the offeror may not have a state remedy: it may lack standing to maintain an action for breach of fiduciary duty, and an action alleging interference with prospective commercial advantage may not be adequate. In addition, the argument that a breach of fiduciary duty is a fraud is strongest when the complaining party seeks only an equitable remedy. Finally, this result is consistent with the purpose and legislative history of the Williams Act: shareholder protection is enhanced when the tender offeror can obtain injunctive relief to help assure that the offer will become effective. Thus, section 14(e) should be construed as providing a cause of action to a tender offeror to seek injunctive relief against target management when management breaches its fiduciary duty to its shareholders and the effect of that breach is to thwart the offeror's efforts.

D. TRADING ON NONPUBLIC INFORMATION: CHIARELLA AND RULE 14e-3

Relying on rule 10b-5 jurisprudence, some commentators have criticized Commission rule 14e-3 because that rule prohibits certain conduct that the

332. Cf. United States v. Newman, 664 F.2d 12, 16-17 (2d Cir. 1981) (indicating that an employee's breach of his fiduciary duty to his employer may give rise to a cause of action under section 10(b) and rule 10b-5 in favor of third parties who might have been injured thereby).

333. Under state law, only shareholders would have standing to allege a breach of fiduciary duty by corporate management. The tender offeror may be, but need not be, a shareholder of the target. Even if the offeror is a shareholder, however, it is conceivable that a state court could deny it relief on the grounds that it is seeking relief not in its capacity as a shareholder but in its capacity as a tender offeror. Cf. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 35-36 (1977). See also A & K R.R. Materials, Inc. v. Green Bay and W. R.R. Co., 437 F. Supp. 636, 644 (E.D. Wis. 1977) (tender offeror has no standing under state law to challenge target management's breach of fiduciary duty). In Piper the Court noted that plaintiff-tender offeror was a shareholder of the target company. Nevertheless, the Court analyzed the standing issue as though the plaintiff was suing solely as a disappointed tender offeror, because the damages it was seeking were those it suffered in its capacity as a defeated tender offeror, not a target shareholder. Id.

334. The Mobil court referred to dictum in Piper suggesting that a defeated tender offeror may have a common law cause of action for damages under principles of interference with a prospective commercial advantage. Mobil, 669 F.2d at 372. See Piper, 430 U.S. at 40-41. The Mobil court went on to observe: "While such an action may be an effective common law alternative for a damage action, we do not believe that the common law has traditionally provided an injunctive remedy that would effectively protect Marathon shareholders from nondisclosure or manipulation by the parties in the bidding." 669 F.2d at 372. See also Belden Corp. v. InterNorth, Inc., 90 Ill. App. 3d 547, 413 N.E.2d 98 (1980), in which the court vacated a preliminary injunction in favor of Belden enjoining InterNorth's tender offer for Crouse-Hinds. Belden had argued that the tender offer interfered with its proposed merger with Crouse. Id. at 553, 413 N.E.2d at 103. The appellate court rejected this contention, setting forth a test for obtaining relief under the theory of interference with prospective advantage: "Belden cannot meet the requirements for interference with prospective advantage unless it makes a showing of unfair competition on the part of InterNorth." Id.

335. See SEC v. Capital Gains Research, 375 U.S. 180, 193 (1963) ("Fraud has a broader meaning in equity [than at law] and intention to defraud or to misrepresent is not a necessary element") (quoting W. DeFRIIAX, HANDBOOK OF MODERN EQUITY 235 (2d ed. 1956)).


Supreme Court found unobjectionable under rule 10b-5 in *Chiarella v. United States.*338 Rule 14e-3, which was adopted by the Commission pursuant to the rulemaking authority granted it in section 14(e), generally prohibits anyone other than the offeror from trading in target company securities on the basis of nonpublic information relating to a proposed tender offer until the information is made public.339 By comparison, in *Chiarella*, the Court reversed the criminal conviction of an employee of a financial printer who, in the course of his employment, deciphered the names of target companies and traded the securities of those companies at a profit without disclosing to the target shareholders his knowledge of the proposed takeover.340 The Court held that the printer had not violated section 10(b) because he had no duty to the target shareholders to disclose the information he deciphered.341

In *Chiarella* the Court grappled with the issue of who, under section 10(b), has a duty to disclose material, nonpublic market information before trading on that information.342 Although the language of the statute and its legislative history are silent on the question, the Court found support for its narrow holding in previous administrative and judicial decisions343 and in the notion that Congress, not the courts, should mandate the broad expansion of liability that the government was seeking in that case.344 The administrative and judicial decisions the Court cited established that silence in connection with the purchase or sale of a security may be fraudulent when there is a "duty to disclose arising from a relationship of trust and confidence between the parties to a transaction."345 In the absence of a duty to disclose, the Court said, the defendant's actions could not violate section 10(b), despite the unfairness inherent in his actions.346 Citing *Santa Fe*, the Court noted that not all unfairness is fraudulent.347

In a footnote, the *Chiarella* Court dealt with the liability of "tippees." The Court noted that a person who receives material, nonpublic information from an insider should refrain from trading on that information or risk being cast as "a participant after the fact in the insider's breach of fiduciary duty."348 Presumably, persons tipped by noninsiders are free, under section 10(b), to trade on the information.

Two issues were left open by the Court in *Chiarella*.349 The first, and more

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338. 445 U.S. 222 (1980). Moreover, since rule 14e-3 contains a "should have known" or negligence standard, one might speculate that it is inconsistent with the scienter standard of *Ernst & Ernst*. See Peloso & Krause, *supra* note 10, at 945.


341. *Id*.

342. The Court distinguished "market information" from "inside information." In the context of this case, inside information would concern the earning power or operations of the target company, while market information would relate to the plans of the acquiring company. *Chiarella*, 445 U.S. at 231. See generally Fleischer, Mundheim & Murphy, *An Initial Inquiry Into the Responsibility to Disclose Market Information*, 121 U. Pa. L. Rev. 798 (1973).

343. 445 U.S. at 230.

344. *Id* at 235.

345. 445 U.S. at 230.

346. *Id* at 232.

347. *Id*.

348. *Id* at 230 n.12.

349. The first issue was explicitly left open by the Court. *Id* at 221. The second issue is impliedly
important, was whether the petitioner might have been convicted on the theory that trading on misappropriated nonpublic information violates section 10(b) and rule 10b-5 because the misappropriation involves a breach by the defendant of his fiduciary duty to his employer. This issue was not clearly before the Court because the jury was not instructed that a breach of a defendant’s duty to his employer may form the basis of liability under rule 10b-5. Subsequent federal courts that have faced this issue have decided it in the affirmative.

The second issue left open in Chiarella was whether possession of “inside information” creates different duties than possession of “market information.” Inside information is information about and emanating from the target company, generally concerning its earning power or operations. Market information is information external to the company, such as information about plans of another to acquire the company. Obviously, market information often comes from a source other than the target company. By specifically noting that this case involved market information, the opinion implied that the two types of information might be subject to different treatment. A rationale for treating the two types of information differently may be that private disclosure of inside information would likely involve an insider who breached his fiduciary duty. A person who trades on that information then becomes “a participant after the fact in the insider’s breach of fiduciary duty.” It is also possible, however, for a person to obtain inside information in a way that does not involve a breach of fiduciary duty by an insider, and it is difficult to see why such a person should be treated differently than the petitioner in Chiarella.

The Commission seized upon the first of these open issues as a basis for supporting its rule 14e-3: “The Commission continues to believe that such conduct undermines the integrity of, and investor confidence in, the securities markets, and that persons who unlawfully obtain or misappropriate material, nonpublic information violate rule 10b-5 when they trade on such information.”

Implicit in this position is a suggestion that even if section 10(b) and rule 10b-5 create the parameters for section 14(e), rule 14e-3 can still be justified left open by the Court’s specific distinction between market information and insider information. Id. at 231, 233.

350. Id. at 235-37. Chief Justice Burger, dissenting, thought that the jury instructions covered the misappropriation theory and, even if the instructions were deficient in failing to charge misappropriation with sufficient precision, any error was harmless beyond a reasonable doubt. Id. at 243-45.


352. See Dirks v. SEC, 681 F.2d 824, 834 (D.C. Cir.) (defining market information as information relating “solely to the market for the securities” rather than their intrinsic value), cert. granted, 103 S. Ct. 371 (1982), argued March 21, 1983.

353. 445 U.S. at 231, 233.

354. Id. at 230 n.12.

355. Assume, for instance, Chiarella had, as a printer, worked on a press release that disclosed material, nonpublic information about the company that was issuing the release. If he traded on the “inside” information before it was made public, it could not be said that he was participating in “an insider’s breach of fiduciary duty.” See also ALI FED. SEC. CODE § 1603 (COMMENT (2)(i)) (PROPOSED OFFICIAL DRAFT) (suggesting there is no reason to distinguish an “insider’s” use of “market information” from “inside information”).

because *Chiarella* did not reach or question the rationale for rule 14e-3. The only problem with the Commission's position is that its rule covers a larger class of persons than those who "unlawfully obtain or misappropriate nonpublic information." For instance, the rule prohibits a tippee from trading on the nonpublic information if he knows or has reason to know that the information has been acquired directly or indirectly from the offeror, the target, or any officer, director, partner, employee, or any other person acting on behalf of the offeror or the target.\(^\text{357}\) Since a tippee is, in the normal case, simply told the information, he may not be involved in a misappropriation, but would be in violation of the rule if he had reason to know its source was the target or offeror.

One might argue that the tippee has unlawfully obtained the information simply by receiving it. This argument, however, assumes its conclusion. It would mean, for instance, that if A overheard B and C discussing a proposed takeover of XYZ, Inc., A could not trade on that information if the other requirements of the rule were satisfied because the information was unlawfully obtained. Although this result is no doubt what the Commission intended in promulgating rule 14e-3, it is a far cry from the undecided issue in *Chiarella* and difficult to sustain on the basis of any existing precedent.

A stronger basis of support for rule 14e-3 lies in the language and legislative history of the Williams Act. The original bill included a five-day pre-offer filing requirement; that is, no tender offer could be made unless notice thereof was filed with the SEC at least five days prior to the commencement of the offer.\(^\text{358}\) Because of the potential impact of disclosure of an impending offer, the SEC would have been required to keep the filing confidential. Commentators objected to this provision because it increased the likelihood that trading might occur to the disadvantage "of those innocent stockholders who sell their shares unaware of the impending offer."\(^\text{359}\) Deletion of this provision by Congress suggests that Congress agreed with the objectors and was concerned about pre-offer trading by those who knew of the impending offer.\(^\text{360}\)

Further support for the rule is found in the 1970 amendments to the Williams Act that, among other things, granted the SEC broad rulemaking authority to implement section 14(e).\(^\text{361}\) In the course of the Senate hearings on the proposed amendments, Senator Williams asked the Commission to give his committee some examples of fraudulent, deceptive, or manipulative practices used in tender offers that the proposed rulemaking powers would prevent.\(^\text{362}\) The Commission's memorandum in response included the following example of a "problem area" that might be dealt with by rulemaking:

The person who has become aware that a tender bid is to be made, or has reason to believe that such a bid will be made, may fail to dis-

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\(^{357}\) 17 C.F.R. 240.14e-3(a) (1980).

\(^{358}\) S. 510, 90th Cong., 1st Sess. § 2 (1967).

\(^{359}\) [*1967 Senate Hearings*, supra note 78, at 73 (statement of Donald L. Calvin, Vice President, New York Stock Exchange)].

\(^{360}\) Sen. Bennett, a member of the subcommittee, also expressed concern about trading on nonpublic information about a tender offer. *Id.* at 74.


\(^{362}\) [*1970 Senate Hearings*, supra note 270, at 11].
close material facts with respect thereto to persons who sell to him securities for which the tender bid is to be made.\textsuperscript{363}

The Commission did not limit its concern to insiders or persons who misappropriated or illegally obtained the information. This memorandum was a part of the public record and received no adverse comment.

It also might be argued that the rulemaking authority granted to the Commission in section 14(e) is sufficiently broad to sustain rule 14e-3. Under section 14(e), the Commission is empowered to promulgate rules and regulations to “define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.”\textsuperscript{364} By comparison, the Commission’s rulemaking authority under section 10(b) does not include the power to define manipulative or deceptive devices or contrivances, nor does it include the power to adopt prophylactic measures. Under section 10(b), the Commission is simply empowered to adopt rules and regulations to prohibit the manipulative or deceptive devices or contrivances, consistent with the public interest and the protection of investors. That the Commission views the powers to “define” and “prevent” as particularly broad powers is apparent from the rules it adopted under section 15(c)(1) and (2), where similar rulemaking authority is granted.\textsuperscript{365} It is difficult to see why Congress would grant such broad powers to the SEC if the SEC was not expected to have some leeway in utilizing its powers. The practices the Commission has prohibited in rule 14e-3 are, at least arguably, fraudulent practices, and it would appear to be within the broad rulemaking authority of section 14(e) for the Commission to prohibit them.

The validity of rule 14e-3 ought not be judged as though it were promulgated pursuant to section 10(b). As in the other areas of comparison noted above, the language, legislative history, and spirit of the Williams Act support a contrary conclusion.

**Conclusion**

Early decisions from the lower federal courts that simply assume a correspondence between section 14(e) and rule 10b-5 are questionable. From the very existence of a private cause of action to the elements of that cause of action, the courts have depended on developing rule 10b-5 decisions. If rule 10b-5 was the model for section 14(e), and if Congress intended to incorporate rule 10b-5 decisional law into the meaning of section 14(e), one might argue that rule 10b-5 cases decided after 1968, when the Williams Act was passed, should not be binding on the interpretation of section 14(e) if those post-1968 decisions mark a departure from prior case law. No court has so held, because the fortunes of rule 10b-5 and section 14(e) have become so intertwined as to obliterate any distinction between them. Indeed, in many decisions that involve both provisions, it is often unclear which one the court is discussing.

\textsuperscript{363} Id. at 12.
\textsuperscript{365} 24 C.F.R. cl-I to cl-11 (1982). Congressional legislation against the background of the Commission’s section 15(c) rules suggests that its rulemaking authority under section 14(e) should be similarly broad.
The courts ought to look anew at section 14(e) and redetermine its parameters. In such a fresh look, a court might reasonably conclude that no basis exists for recognizing a private damage action under section 14(e). However, even if private actions are sanctioned, the courts should be alert to the differences between rule 10b-5 and section 14(e) and shape the contours of each with reference to those differences. Those differences justify the conclusions discussed above:

1. Scienter ought not be a necessary element in an action based on the first clause of section 14(e). Negligent misstatements or omissions may form the basis for a damage action under section 14(e) and, if a bidder makes a misrepresentation in its offering materials, it should be held liable without regard to fault.
2. The plaintiff in a section 14(e) damage action should not be required to prove reliance unless proof of reliance is needed to prove causation.
3. A tender offeror should have standing to seek equitable relief against target management that breaches its fiduciary duty to its shareholders when that breach unduly interferes with the tender offeror's offer.
4. SEC rule 14e-3 is not subject to criticism on the grounds that the rule exceeds the SEC’s rulemaking authority. Such criticisms are based on judicial decisions construing rule 10b-5 and the SEC’s rulemaking authority under section 10(b). Section 14(e) is, however, broader than section 10(b), as is the SEC’s rulemaking power under section 14(e). These factors validate a rule that might not withstand scrutiny under section 10(b).