1977

Chris-Craft: Changing Perspectives on Contests for Corporate Control

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NOTES

CHRIS-CRAFT: CHANGING PERSPECTIVES ON CONTESTS FOR CORPORATE CONTROL

I. INTRODUCTION

In late 1968, Chris-Craft Industries, Inc. (Chris-Craft), a Delaware corporation, purchased 5200 shares of the Piper Aircraft Corporation (Piper).\(^1\) This purchase initiated one of the most "sophisticated and hard fought"\(^2\) contests for control in corporate history. The litigation generated by the takeover battle spanned eight years,\(^3\) culminating in the Supreme Court's decision\(^4\) to overturn the largest judgment ever awarded under the federal securities laws: $35.8 million.\(^5\)

The Supreme Court, overruling various court of appeals' decisions, held (1) that a tender offeror, suing in his capacity as a takeover bidder, does not have standing to sue for damages\(^6\) under section 14(e) of the Securities Exchange Act of 1934\(^7\) (the Exchange

\(^7\) Section 14(e) is the antifraud provision regulating tender offers:
   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
Act). Therefore, Chris-Craft, as a defeated tender offeror, had no implied cause of action under that provision; (2) that a defeated tender offeror does not have standing under rule 10b-6 to sue for damages arising from the lost opportunity to control the target company; and (3) that the court of appeals had improvidently issued an injunction prohibiting Bangor Punta Corporation (Bangor Punta) from voting for five years the illegally acquired shares "premised as it was upon the impermissible award of damages."

In deciding these issues, the Court left many others unanswered. Although it held that a defeated tender offeror has no implied private cause of action under section 14(e), the Court left undecided whether this right might accrue to any other party. The Court also did not address the general applicability of rule 10b-6 to takeover contests. Furthermore, the new standard of causation set forth in Justice Blackmun's concurring opinion may present substantial problems to future litigants, because it places a heavier burden of proof on plaintiffs. In addition to undertaking a critical evaluation of the majority's decision, this note will examine the issues left unaddressed by the Court and draw conclusions

8. 17 C.F.R. § 240.10b-6 (1977) provides in pertinent part:
(a) It shall constitute a "manipulative or deceptive device or contrivance" as used in section 10(b) of the act for any person,
(1) Who is an underwriter or prospective underwriter in a particular distribution of securities, or
(2) Who is the issuer or other person on whose behalf such a distribution is being made, or
(3) Who is a broker, dealer, or other person who has agreed to participate or is participating in such a distribution, 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, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his participation in such distribution . . . .
9. See Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 950 (1977). The target company is the company whose securities are the target of the takeover bid.
10. See id. at 952.
11. See id. at 949 n.28.
12. See id. at 951.
13. Id. at 953-55 (Blackmun, J., concurring).
regarding the impact of *Chris-Craft* on future tender offers. To understand the issues raised by the Supreme Court's decision, a review of the facts surrounding the *Chris-Craft* litigation is essential.

II. BACKGROUND

A. The Facts

In late 1968, Chris-Craft initiated an attempt to take over Piper by making open market purchases of Piper stock.\(^{14}\) By mid-January, Chris-Craft had purchased approximately 13% of Piper's 1,644,790 outstanding shares.\(^{15}\) On January 23, Chris-Craft's president publicly announced a tender offer\(^ {16}\) for up to 300,000 Piper shares,\(^ {17}\) at $65 per share,\(^ {18}\) $12.50 more than the price Piper stock had closed at the previous day on the New York Stock Exchange.\(^ {19}\)

Piper reacted by calling a meeting on January 23 with its investment advisor, The First Boston Company (First Boston), its legal counsel, Chadbourne, Parke, Whiteside and Wolff, and its auditors, Arthur Young & Co. On January 24, Piper management announced its decision to oppose Chris-Craft's bid for control.\(^ {20}\) To

\(^{14}\) Id. at 931.

\(^{15}\) Id.

\(^{16}\) A tender offer is generally defined as:

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


\(^{17}\) Chris-Craft reserved the right to purchase additional shares if more than 300,000 were tendered. *Piper v. Chris-Craft Indus.*, Inc., 97 S. Ct. 926, 931 n.1 (1977).

\(^{18}\) Id. at 931.


\(^{20}\) There is some dispute as to the reason for Piper's opposition. Chris-Craft claims that Piper never studied the offer before deciding to oppose it, see Brief of Respondent Chris-Craft at 6, *Piper v. Chris-Craft Indus.*, Inc., 97 S. Ct. 926 (1977)
counter Chris-Craft's activities, First Boston began soliciting offers for Piper shares from other companies.\(^2\)

Piper management sent several letters to its shareholders during January 25 to 27, urging them to reject Chris-Craft's offer. Management wrote that it had "carefully studied this offer and [was] convinced that it [was] inadequate and not in the best interests of Piper's shareholders."\(^2\) However, Piper management did not disclose that First Boston had advised them that the $65 price offered by Chris-Craft was "fair and equitable."\(^3\)

At the same time, Piper negotiated an agreement with the Grumman Aircraft Corporation (Grumman) whereby Grumman was to purchase 300,000 authorized but unissued Piper shares at $65 per share,\(^4\) the same price which Chris-Craft was offering. This was designed to increase Piper's outstanding shares to 1,944,790, making it more difficult for Chris-Craft to gain control.\(^5\) Grumman was given an option to put\(^6\) the shares back to Piper after six months at cost, plus 3 1/2% interest per annum.\(^7\) Piper was also required to segregate the proceeds from the Grumman sale in a fund free from liens.

On January 29, Piper wrote a letter to its shareholders and issued a press release announcing the Grumman sale. However, there was no mention of the specific terms of the agreement. The agreement was never effectuated because the New York Stock Ex-

\(^22\) Id.
\(^25\) To gain control, it was necessary for Chris-Craft to acquire over 50% of Piper's shares. Instead of needing 822,395 shares, Chris-Craft would need at least 972,395 shares, considerably more, if 300,000 additional shares were issued.
\(^26\) A "put" is an arrangement whereby one party purchases shares of a corporation while retaining the option to sell the same shares back to the seller at a later date at a specified price. W. BLOOMENTHAL & S. WING, SECURITIES LAW 2-163 (1973).
change refused to list the 300,000 new Piper shares.28

By the expiration of Chris-Craft’s tender offer on February 3, Chris-Craft had managed to purchase approximately 33% of Piper’s outstanding shares.29 To acquire the additional 17% required for control, Chris-Craft decided to make an exchange offer of Chris-Craft securities for Piper shares. Accordingly, on February 27, Chris-Craft filed an S-1 registration statement with the Securities and Exchange Commission (SEC) along with a preliminary prospectus for an exchange offer to acquire between 80,000 and 300,000 Piper shares.

In March 1969, after the Grumman agreement fell through, Piper commenced negotiations with Bangor Punta, a Delaware corporation, looking towards a possible merger.30 On May 8, the Piper family agreed to transfer 501,090 of its own Piper shares to Bangor Punta, which would have given Bangor Punta a 31% interest.31 Bangor Punta promised to use its “best efforts”32 to acquire the additional shares it would need to bring its holdings in the company to over 50%. Bangor Punta proposed to make an exchange offer of Bangor Punta securities for Piper common stock. A press release announced that Piper shareholders would receive Bangor Punta securities valued by First Boston at $80 per Piper share.33 In the registration materials filed with the SEC and reviewed by First Boston, Bangor Punta stated that one of its subsidiaries, the Bangor and Aroostock Railroad (BAR), was valued at $18.4 million.34 This valuation was based on an appraisal made by investment bankers four years earlier. Bangor Punta did not reveal that in current negotiations for the sale of BAR, it had been valued at only $5 million.35

In May 1969, prior to the effective date of the Bangor Punta exchange offer, Bangor Punta made three block purchases of 120,200 shares (7%) of Piper stock in privately negotiated off-the-

28. See id.
30. Id. at 932. One method employed by a target corporation opposing a takeover bid is to merge with another firm which appears more attractive to the target corporation. This tactic is termed a “defensive” merger, see Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. Pa. L. Rev. 317, 322 (1967). For other defensive tactics employed by target corporations, see note 128 infra.
32. Id.
33. Id.
34. Id. at 933.
35. Id.
market exchanges. These purchases were effected despite the SEC's announcement of its proposed rule 10b-13, a provision which prohibits a tender offeror from purchasing the target company's stock while an exchange offer is pending. By August 1969, at the expiration of the competing exchange offers, Bangor Punta owned 44.5% of the outstanding Piper shares while Chris-Craft owned 40.6%. Bangor Punta continued to buy Piper shares on the open market until September 5, when it owned approximately 51% of Piper's outstanding stock. Chris-Craft, after investing more than $44 million, had lost the battle for control of Piper.

B. Prior Litigation

Chris-Craft I

Even while both sides were seeking to acquire shares of Piper, the takeover contest moved to the courts. Chris-Craft filed suit in the Southern District of New York in May 1969, against Bangor Punta, the Piper family, and First Boston. It alleged that Bangor Punta had violated rule 10b-6 by purchasing blocks of Piper shares in May while simultaneously engaging in an exchange offer. It further claimed that Bangor Punta had violated an SEC "gun-jumping" provision by issuing a press release reporting the $80

36. Id. at 932.
39. Id.
41. 17 C.F.R. § 230.135 (1977) provides in pertinent part:
(a) For the purposes only of section 5 of the Act, a notice given by an issuer that it proposes to make a public offering of securities to be registered under the Act shall not be deemed to offer any securities for sale if such notice states that the offering will be made only by means of a prospectus
valuation of Bangor Punta's securities. Bangor Punta and First Boston were further charged with failing to disclose the true value of BAR in Bangor Punta's registration statement filed in connection with its exchange offer. Chris-Craft also claimed that the Piper family had violated section 14(e), section 10(b),\(^42\) and rule 10b-5\(^43\) by omitting material facts from its letter and press release of January 27 to Piper shareholders. The letter had described the Chris-Craft offer as "inadequate," and the press release neglected to mention Grumman's option to put the shares to Piper at cost plus interest. Chris-Craft demanded damages and asked that Bangor Punta be enjoined both from voting the illegally purchased Piper shares and from accepting shares tendered by Piper shareholders through Bangor Punta's exchange offer.\(^44\)

In July 1969, Chris-Craft moved for a preliminary injunction to prevent Bangor Punta from gaining and exercising control of Piper.\(^45\) The district court denied Chris-Craft relief on all counts. Judge Tenney concluded that the May 8 press release did not vio-

and contains no more than the following additional information:

(1) The name of the issuer;
(2) The title, amount, and basic terms of the securities proposed to be offered, the amount of the offering, if any, to be made by selling security holders, the anticipated time of the offering and a brief statement of the manner and purpose of the offering without naming the underwriters; [and]

(4) In the case of an offering of securities in exchange for other securities of the issuer or of another issuer, the name of the issuer and the title of the securities to be surrendered in exchange for the securities to be offered, the basis upon which the exchange may be made . . . .

\(^6\) (b) Any notice contemplated by this section may take the form of a news release or a written communication directed to security holders or employees, as the case may be, or other published statement.

43. Rule 10b-5, promulgated by the SEC to implement § 10(b) of the Securities Exchange Act of 1934, provides in pertinent part:

It shall be unlawful for any person . . .
(a) To employ any device, scheme, or artifice to defraud,
(b) 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
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
in connection with the purchase or sale of any security.


late the SEC’s gun-jumping provisions\(^4\) and that Bangor Punta’s block purchases did not violate rule 10b-6.\(^5\) Judge Tenney also denied Chris-Craft’s motion for a preliminary injunction, because Chris-Craft failed to establish the threat of irreparable injury or the likelihood of success on the merits.\(^6\)

Chris-Craft appealed to the Second Circuit, which found that Bangor Punta had violated the SEC’s gun-jumping provisions.\(^7\) Furthermore, it held that Chris-Craft would prevail unless Bangor Punta could prove that its block purchases fell within one of the exemptions to rule 10b-6.\(^8\) However, the court upheld the district court’s denial of injunctive relief, asserting: “Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that the prior misdeeds of Bangor Punta so determined the course of the competition . . . that Chris-Craft was placed at any real disadvantage.”\(^9\)

Then, the SEC joined the litigation, filing suit against Bangor Punta for omitting the more current and adverse information regarding the value of BAR in Bangor Punta’s registration statement.\(^10\) The SEC sought an injunction ordering Bangor Punta to make an offer of rescission to the Piper shareholders who had exchanged their shares for Bangor Punta stock, as well as a general injunction against Bangor Punta’s engaging in future violations of the securities laws.

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\(^5\) Id. at 198.

\(^6\) Judge Tenney stated that Chris-Craft was not irreparably harmed because “neither party had gained control of Piper, and both were still in a position to do so.” Id. at 199.

\(^7\) See Chris-Craft Indus., Inc. v. Bangor Punta Corp., 426 F.2d 569, 577 (2d Cir. 1970).

\(^8\) See id. The court remanded so that Bangor Punta could attempt to establish that the block purchases fell within one of the eleven exemptions to rule 10b-6. The exemption most applicable to Bangor Punta’s situation included “unsolicited privately negotiated purchases [of stock] effected neither on a securities exchange nor from or through a broker or dealer . . . .” 17 C.F.R. § 240.10b-6(a)(3)(ii) (1977).


\(^10\) The SEC originally became aware of the takeover contest when Chris-Craft filed a Schedule 13D, as required under § 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) (1970). Accordingly, when Bangor Punta entered the contest in late spring of 1969, the SEC had knowledge of the surrounding circumstances. In the SEC’s view, Bangor Punta’s omission of the adverse information concerning BAR required the SEC to bring the injunctive action.
The district court found that Bangor Punta's registration statement was not intentionally misleading. Nonetheless, it required Bangor Punta to offer rescission to those Piper shareholders who had accepted the exchange offer.53 The court did not grant the general injunction against future violations because it believed that the SEC had not proven that Bangor Punta had a "propensity or natural inclination to violate the securities law."54 However, the Second Circuit remanded the case to the district court to adjudicate Chris-Craft's action for damages.

**Chris-Craft II**

On remand, District Judge Pollack held that the various Piper letters to its shareholders describing Chris-Craft's offer as "inadequate" were not misleading because they referred to matters other than price.55 The court found that Piper's failure to mention the option with Grumman could not seriously have injured Chris-Craft, since Chris-Craft had continued to purchase Piper shares.56 The district court also held that although the May 8 press release technically violated the SEC's gun-jumping rules, it was neither false nor misleading,57 and that Chris-Craft had failed to show consequent injury.58

The district court barred recovery on Chris-Craft's claim that Bangor Punta had overvalued BAR in its registration statement. The court concluded that Chris-Craft had failed to demonstrate that Bangor Punta had the requisite mental state to commit fraud. Instead, it found Bangor Punta's action to be a "mere negligent omission or misstatement of fact."59 Moreover, the court held that Chris-Craft failed to prove that its injury was caused by Bangor Punta's violation.60

54. *Id.* at 1163.
56. *See* id.
57. *See* id. at 1137.
58. *See* id.
59. *Id.* at 1140.
60. *Id.* at 1139. Judge Pollack differed with the Supreme Court's holding in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), which established a presumption of causation in a § 14(a) suit if the misleading proxy solicitation was an "essen-
Although Judge Pollack found that Bangor Punta's purchases did not fall within one of the exemptions to rule 10b-6,\(^6\) he held against Chris-Craft on the merits. There was no proof, he asserted, that "absent Bangor Punta's acquisitions of these blocks, Chris-Craft would have achieved its goal of control."\(^6\) Codefendant First Boston was similarly held not liable for its activities in reviewing Bangor Punta's registration statement because it had not engaged "in any course of conduct which operated as a fraud or deceit upon Chris-Craft or the public shareholders of Piper."\(^6\) Both Chris-Craft and the SEC appealed the district court's decision.\(^6\) This time, the Second Circuit held Piper, Bangor Punta, and First Boston jointly and severally liable because their violations of the securities laws contributed to the undeserved success of Bangor Punta's takeover bid.\(^6\)

The Second Circuit then reviewed Chris-Craft's section 14(e) claim that defendant had fraudulently engaged in activities to defeat Chris-Craft's takeover bid. The court held that Piper's letter derogating Chris-Craft's offer and Piper's failure to disclose the terms of the Grumman arrangement constituted false and misleading activities.\(^6\) Furthermore, the court found that Bangor Punta "showed reckless disregard"\(^6\) in failing to disclose the latest BAR negotiations reflecting the decreased value of BAR.

The case was again remanded to the district court for a calcul-

62. Id.
63. Id. at 1145.
66. See id. at 364-65.
67. Id. at 369. Bangor Punta was, however, found not to have violated the SEC's gun-jumping provisions. Id. at 366-67.
lation of Chris-Craft's damages. The district court was further instructed to enjoin Bangor Punta from voting the Piper shares acquired through the unlawful exchange offers for five years.

**Christ-Craft III**

Focusing on Chris-Craft's lost opportunity to control Piper, the district court awarded Chris-Craft damages of $1,673,988. The court also issued the voting injunction in accordance with the court of appeals's instructions. Defendants Piper, Bangor Punta, and First Boston appealed the district court's decision. The Second Circuit upheld the injunction but recalculated the damage award. It calculated the difference in price between what Chris-Craft paid for the shares and what it would have sold the shares for after Bangor Punta had gained control. This formula produced

68. See id. at 379-80. The damages were to be measured by determining "the reduction in the appraisal value of Chris-Craft's Piper holdings attributable to Bangor Punta's taking a majority position and reducing Chris-Craft to a minority position, and Bangor Punta's being able to compel a merger at any time." Id. at 380.
69. See id.
70. See Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 384 F. Supp. 507 (S.D.N.Y. 1974), modified, 516 F.2d 173 (2d Cir. 1975), rev'd on other grounds sub nom. Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926 (1977). The district court apparently ignored the Second Circuit's method of calculating damages. It asserted that the damages attributable to the possibility of an unfavorable compelled merger were too difficult to quantify, see id. at 514. Instead, the district court focused upon Chris-Craft's loss of opportunity to compete for control of Piper, see id. at 515. This court, through expert testimony, established a hypothetical "fair market value" of $48 per share for Chris-Craft's Piper stock on September 5, 1967, the date that Bangor Punta gained control, see id. at 515-17. This was based on the assumption that the 14% holdings that Bangor Punta illegally acquired were still in the hands of the public. Accordingly, on that date, Chris-Craft would have had 42% of Piper's outstanding shares, compared to 37% for Bangor Punta. Then, through expert testimony, the court determined that a potential buyer of Chris-Craft's 42% who desired to gain control of Piper would pay a maximum 5% premium for the block, for the opportunity to compete for control against Bangor Punta's hypothetical opposing block of 37%, see id. at 523. The court concluded that by losing the opportunity to gain control of Piper, Chris-Craft had suffered damages equivalent to 5% of $48 for each share it owned, or $1,673,988, see id.
71. See id. at 526.
73. See id. at 186-90.
74. See id. at 185, 188-90. The Second Circuit's damages formulation varied from the district court's in two respects. First, the Second Circuit implicitly included in damages the value of the lost opportunity to compete for control, together with any decrease in the value of Chris-Craft's Piper shares derived from any other origin. Second, the court held that the price Chris-Craft paid for its Piper stock should be used in place of a hypothetical price established by expert testimony in determining
damages of $25,793,365,75 with prejudgment interest recomputed from $600,000 to approximately $10 million.76 This resulted in a total award of nearly $36 million, the largest judgment in securities history.77

III. THE SUPREME COURT'S FIRST HOLDING

Denial of Standing Under Section 14(e)

A. The Court's Reasoning

The Court held that Chris-Craft, as a defeated tender offeror, had no implied cause of action for damages under section 14(e).78 This holding will assuredly have a great impact on the conduct of future takeover contests.

Section 14(e) of the Securities Exchange Act of 1934 does not expressly provide private remedies. Thus, the Supreme Court analyzed the legislative history of section 14(e)79 to determine Congress' intent in enacting this statute. The Court noted the problems that inhere in relying on legislative history to determine congressional intent.80 Nonetheless, the Court relied heavily on legislative history in arriving at its decision.81

Quoting extensively from the House and Senate reports on the Williams Act,82 Chief Justice Burger's majority opinion con-

75. Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 516 F.2d 172, 190 (2d Cir. 1975), rev'd on other grounds sub nom. Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926 (1977). The court calculated the prior value as the average price Chris-Craft paid for its Piper shares, approximately $64. The subsequent value was calculated, with the assistance of expert testimony, as $27, the amount Chris-Craft could receive for its block of shares after Bangor Punta had acquired control. Chris-Craft was, therefore, entitled to per-share damages of approximately $37. This amounted to a total damage award of $25,793,365.

76. Id. at 191.


81. See id. at 942-46.

82. The Williams Act is the popular name of the 1968 amendments to the Securities Exchange Act of 1934 designed to regulate tender offers, of which § 14(e) is
cluded that protection of the individual shareholder of the target company was the “sole purpose” of the legislation.\textsuperscript{83} The Court dismissed Chris-Craft’s argument that a private right of action could be implied in the statute. Chris-Craft had argued that a right of action should be implied because Congress had committed itself to a policy of evenhandedness\textsuperscript{84} in takeover legislation. As Chief Justice Burger asserted: “Neutrality is . . . but one characteristic of legislation directed toward a different purpose—the protection of investors.”\textsuperscript{85} Chief Justice Burger viewed the legislation as “designed solely to get needed information to the investor,”\textsuperscript{86} and not to protect the opposing parties in the tender offer battle.

Although it recognized the SEC’s concern “with the ‘plight’ of takeover bidders faced with ‘unfair practices of entrenched management,’”\textsuperscript{87} the Court did not establish an implied cause of action for the offeror. Rather, the Supreme Court’s concern was with improving the climate in which a shareholder can make an informed investment decision.\textsuperscript{88}

The majority’s discussion of Chris-Craft’s lack of standing under section 14(e) focused, finally, on an analysis of \textit{Cort v. Ash}.

\textit{Cort} involved the application of a statute\textsuperscript{89} regulating corporate expenditures in campaigns for federal office. \textit{Cort} enumerated four factors relevant in determining whether a private remedy is implied in a statute:\textsuperscript{91}

\begin{quote}
\textsuperscript{83} See, e.g., \textit{Piper v. Chris-Craft Indus., Inc.}, 97 S. Ct. 926, 946 (1977). Chief Justice Burger quoted from the testimony of then Chairman of the SEC, Manuel F. Cohen: “We are concerned with the investor who today is just a person in a form of industrial warfare . . . . The investor is lost somewhere in the shuffle. \textit{This is our concern and our only concern.}” \textit{Id.} at 942. (emphasis supplied by Burger, C.J.) Chief Justice Burger also quoted from the testimony of Professor Hayes:

The two major protagonists—the bidder and the defending management—\textit{do not need any additional protection}, in our opinion. They have the resources and the arsenal of moves and countermoves which can adequately protect their interests. Rather, the \textit{investor} who is the subject of these entreaties of both major protagonists—\textit{is the one who needs a more effective champion . . . .}’’

\textit{Id.} at 943 (emphasis supplied by Burger, C.J.).

\textsuperscript{84} \textit{Id.} at 943-44.

\textsuperscript{85} \textit{Id.} at 945.

\textsuperscript{86} \textit{Id.} at 945.

\textsuperscript{87} \textit{Id.} at 942-49.

\textsuperscript{88} 422 U.S. 66 (1975).


\end{quote}

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(1) Whether the plaintiff is "one of the class for whose especial benefit the statute was enacted . . ."\(^{92}\)

(2) Whether there is "any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one . . ."\(^{93}\)

(3) Whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff . . ."\(^{94}\)

(4) Whether "the cause of action [is] one traditionally relegated to state law . . ."\(^{95}\)

In considering the first factor, the Supreme Court believed that the legislative history showed clearly that Chris-Craft was not the intended beneficiary of the legislation.\(^{96}\) In applying the second prong of the Cort test, the Court noted that although Congress did not expressly deny a damages remedy to tender offerors as a class, neither did it expressly create one. Indeed, the Court viewed the legislative history as "evinc[ing] the narrow intent to curb the unregulated activities of tender offerors. . . . [T]his purpose . . . negates the claim that tender offerors were intended to have additional weapons in the form of an implied cause of action for damages . . ."\(^{97}\)

With regard to the third factor under the Cort analysis, the Court believed that allowing Chris-Craft to collect $36 million would be inconsistent with the underlying purpose of the statute, that is, investor protection.\(^{98}\) The Court asserted that, even if shareholders benefit by allowing tender offerors damages such as those awarded to Chris-Craft, the goal of shareholder protection could "more directly be achieved with other, less drastic means."\(^{99}\) The Court failed to specify these means.

Finally, in applying the fourth criterion, the Court concluded that "it is entirely appropriate in this instance to relegate [the offeror-bidder] and others in [that] situation to whatever remedy is created by state law."\(^{100}\)

Through analysis of the legislative history, the majority thus

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92. Id. at 78.
93. Id.
94. Id.
95. Id.
97. Id.
98. See id. at 948.
99. Id. at 949.
100. Id. (quoting Cort v. Ash, 422 U.S. 66, 79 (1975)).
concluded that Chris-Craft, in its status as a defeated tender offeror, had no standing to sue for damages under section 14(e).101

B. Analysis of Court's Reasoning

Private Actions in the Enforcement of Federal Securities Laws

The denial of a private remedy to Chris-Craft eliminated one of the most effective means of insuring compliance with federal securities laws. Although the SEC may institute judicial proceedings when it appears that a violation of the Securities Exchange Act of 1934 is imminent,102 there is no statutory recognition of private rights of action.103 In J.I. Case Co. v. Borak,104 the Supreme Court indicated the impracticality of expecting the SEC to police all securities violations. It was this recognition that led the Court to declare: "Private enforcement . . . provides a necessary supplement to Commission action."105 Accordingly, courts grant implied rights of action for violations of the Securities Exchange Act of 1934.106

101. See id. at 950.

102. Section 21(e) of the Securities Exchange Act of 1934 provides in pertinent part: "Upon application of the Commission the district courts of the United States . . . shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations, and orders thereunder . . . ." 15 U.S.C. § 78u(e) (Supp. V 1975).

103. The Securities Exchange Act of 1934, however, provides for private enforcement under certain conditions. For example, § 18(a), 15 U.S.C. § 78r(a) (Supp. V 1975), authorizes a private action for damages for any person who relied on a materially misleading statement filed with the SEC under the Act and purchased or sold as security at a price which was affected by such a statement, unless the defendant can prove he acted in good faith and was unaware that the statement was false and misleading. Furthermore, § 9(e) of the Securities Exchange Act of 1934 provides:

[A]ny person who willfully participates in any act or transaction in violation . . . of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity . . . to recover the damages sustained . . . .


105. Id. at 432.

In *Chris-Craft II* the Second Circuit expanded on the necessity of private litigation in the securities area. In addition to noting Congress' concern for "the plight of the average public investor who is at a serious disadvantage in dealing with persons possessing superior knowledge, skill and resources," Judge Timbers asserted other considerations:

The integrity and efficiency of the securities markets are even more important since our entire economy is dependent upon these markets. The securities market performs the essential function of assessing the value that society places upon the efforts of a particular enterprise so that society can obtain the maximum amount of its preferred goods and services that our resources can produce. This function can be performed effectively only if the delicately calibrated balance of factors affecting demand and supply are allowed to have their impact upon the market place through an unrestricted flow of information and funds... The securities laws seek to prevent restrictions which distort the market's estimate of value. Considering the weighty interests at stake, Congress and the courts justifiably have outlawed all unfair and deceptive practices related to the trading of securities and have encouraged private damage actions to implement the enforcement of the federal securities laws.

Despite the widely accepted efficacy of private actions, the Supreme Court found it unnecessary to grant Chris-Craft, a defeated tender offeror, the right to sue to effectuate the aims of the Williams Act.

**Private Actions Under the Williams Act**

The Court's holding that a defeated tender offeror has no standing to sue under section 14(e) is most significant. The majority's decision means that "no matter how flagrant Bangor Punta's violation may have been, no matter how direct the causal connection between that violation and Chris-Craft's injury, and no matter how serious the injury," Chris-Craft cannot recover damages. A careful analysis of the legislative history of the Williams Act and judicial precedent demonstrates that allowing a private cause of action for Chris-Craft is advisable.

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108. *Id.* (citation omitted).
The Similarity of Section 14(e) to Section 14(a)

Despite its concession that private actions are useful in the securities area, the Supreme Court in Chris-Craft refused to permit a private action under section 14(e) of the Securities Exchange Act of 1934. This denial of standing is paradoxical in light of the Court's recognition of a private right of action under section 14(a) of the Exchange Act in J.I. Case Co. v. Borak. Borak established that an investor can bring a private action for damages under section 14(a) for a misleading proxy solicitation. The Court stated that since one of the chief purposes of section 14(a) is "the protection of investors, [that] certainly implies the availability of judicial relief where necessary to achieve that result." After Borak other courts recognized implied actions under section 14(a) for shareholders, management, and rivals for control.

The Williams Act, of which section 14(e) is an integral part, was enacted to subject tender offers to the same rules as proxy contests. As Senator Williams, for whom the legislation is named, declared: "[T]his legislation is patterned on the present law and regulations that govern proxy contests." Shortly after the Act's passage, the SEC stated:

[The] new legislation was clearly intended to provide the same scope of protection as the existing proxy rules of Section 14. . . . Chairman Manuel F. Cohen of the Commission repeatedly analogized the tender offer situation to a proxy dispute and urged that the need for protection may be greater in the case of a tender offer. . . . We believe it would be anomalous to conclude that Congress did not intend the same scope of protection for all situations arising under Section 14 absent any expression to the contrary.

111. 377 U.S. 426 (1964).
112. Id. at 432.
114. 113 CONG. REC. 24,665 (1967).
The Supreme Court took one step toward investor protection by allowing private actions under section 14(a). If investor protection is to be maximized, it is essential that this privilege be extended to plaintiffs suing under section 14(e). The Court in Borak acknowledged the SEC's limitations in regulating proxy contests. The need for regulation is even more acute in tender offers because they operate under more stringent time constraints. While a proxy contest may last months, a control contest through tender offer may last only weeks, or even days. Therefore, the target company's shareholder is even more disadvantaged in a tender offer situation because there may be insufficient opportunity to make an informed investment decision.

The similarity between sections 14(a) and 14(e) militates for similar treatment of parties injured by the perpetrators of fraud during a control contest. The private right of action granted under the proxy rules should also be available under the tender offer regulations.

**Broad Statutory Language of Section 14(e)**

Section 14(e) of the Exchange Act was patterned after section 14(a), which regulates proxy contests; courts recognize private rights of action under section 14(a). Section 14(e) was also patterned after section 10(b) of the Exchange Act and rule 10b-5 promulgated thereunder, the basic antifraud provision of the Exchange Act. The similarity in language between rule 10b-5 and section 14(e), which was enacted subsequent to the rule, indicates Congress' desire to grant similar remedies.

Rule 10b-5, under which private rights of action are well-established, prohibits fraud and manipulative acts "in connection

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116. The Court stated:
The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to the material on file with it . . . . [U]lawful manipulation would not have been apparent to the Commission until after the merger.


118. See notes 114-115 supra and accompanying text.

119. Compare note 7 with note 43.

120. See note 106 supra and accompanying text.
with the purchase or sale of any security." Section 14(e) prohibits fraud and manipulative acts "in connection with any tender offer." Unless standing is granted to parties other than buyers or sellers, section 14(e) is little more than a restatement of rule 10b-5. Congress was aware of the "buyer-seller" requirement of rule 10b-5 when it enacted section 14(e). It chose, however, not to use that limiting language, drafting section 14(e) as applicable to any tender offer. Thus, it can be argued that Congress intended section 14(e) to be available to a broad range of parties other than buyers or sellers.

**Policy of Evenhandedness**

The majority viewed equal treatment of all contestants as not necessarily creating a right to sue for damages under section 14(e). Evenhanded treatment of rivals for control, however, is a basic tenet of the Williams Act. Congress was aware that tender offers provide a means for removing inefficient management, and did not want to subvert that function. The Senate and House reports, which the majority heavily relied on, stated:

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

In barring the tender offeror's redress for his injury, the Court is "tipping the balance" toward target management; this result is contrary to congressional intent. The incumbent management has many tools at its command to defeat a takeover bid. On the

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123. See Hearings on H.R. 14,475 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 59 (1968) [hereinafter cited as House Hearings]; Kennedy, Tender Moment, 23 BUS. LAW. 1091, 1114 (1968); Swanson, S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George from the Dragon, 5 HARV. J. LEGIS. 431, 444 (1968).
125. Senate Hearings, supra note 79, at 117.
128. The methods used can include (1) different types of communications with shareholders, urging them to reject the offer, see, e.g., Piper v. Chris-Craft Indus.,
other hand, the takeover bidder has only one attraction for the target company's shareholders, a higher price for their shares. The Court's denial of standing to tender offerors gives the target company the opportunity to defraud a takeover bidder in a control contest, with immunity from suit. This is assuredly contrary to Congress' aim in enacting the Williams Act.

Investor Protection

An equally compelling rationale for granting a tender offeror the right to sue is investor protection. There is a crucial need for the target company's shareholders to receive accurate information during a tender offer.129 The protection of the target company's shareholders involves several factors. These include:

1. Litigation for an alleged disclosure violation involving (a) the background of the offeror, see, e.g., Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975); (b) the impact that the offeror's control will have on the target company, see, e.g., Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 846 (3d Cir. 1973), cert. denied, 419 U.S. 870 (1974); (c) relationships between the target and the bidder, see, e.g., Sonesta Int'l Hotel Corp. v. Wellington Assoc., 483 F.2d 247 (2d Cir. 1973); (d) alleged antitrust violations, see, e.g., Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973); Boyertown Burial Casket Co. v. Amedeo, Inc., 407 F. Supp. 811 (E.D. Pa. 1976); (3) securing a better offer from a friendly third party; (4) an acquisition in the same or related field to create antitrust hurdles for the bidder, see, e.g., Northwest Indus., Inc. v. B.F. Goodrich Co., 301 F. Supp. 706 (N.D. Ill. 1969); (5) issuance of a stock dividend; (6) threatened resignations of key employees. See generally E. Aranow & H. Einhorn, Tender Offers for Corporate Control 219-76 (1973); D. Austin & J. Fishman, Corporations in Conflict—the Tender Offer 121-39 (1970); Fleischer, Defensive Tactics in Tender Offers, Rev. Sec. Rec., Oct. 15, 1976, at 853; Hayes & Taussig, Tactics of Cash Takeover Bids, 45 Harv. Bus. Rev., March-April, 135, 142-47 (1967); Schmults & Kelly, Cash Take-over Bids—Defense Tactics, 23 Bus. Law. 115 (1967); Section of Corporation, Banking and Business Law, American Bar Association, Defending Target Companies—A Panel, 32 Bus. Law. 1349 (1977). For a recent successful defense against an attempted takeover, see Serrin, How Gerber Foiled a Takeover, N.Y. Times, Oct. 2, 1977, § 3, at 1, col. 1.

129. The dilemma of the shareholder was expressed by the House Committee Report:

The public shareholder must, therefore, with severely limited information, decide what course of action he should take. He has many alternatives. He can tender all of his shares immediately and hope they are all purchased. However, if the offer is for less than all the outstanding shares, perhaps only a part of them will be taken. In these instances, he will remain a shareholder in the company, under a new management which he has helped to install without knowing whether it will be good or bad for the company.

The shareholder, as another alternative may wait to see if a better offer develops, but if he tenders late, he runs the risk that none of his shares will be taken. He may also sell his shares in the market or hold them and hope for the best. Without knowledge of who the bidder is and what he plans to do, the shareholder cannot reach an informed decision. He is forced to take a chance. For no matter what he does, he does it without adequate informa-
shareholders is a major goal of the Williams Act. However, the appropriate means of achieving this goal is in dispute.

In his dissent, Justice Stevens stated that the majority incorrectly excluded the takeover bidder from the purview of the Williams Act. He believed that it is necessarily these bidders, not the shareholders, who have the greatest interest in the litigation and in seeking interpretation of the law. Justice Stevens stated:

The potential litigants who have the most to gain from enforcement of the statute—and the most to lose if its provisions can be ignored with the impunity—are plainly the rival contestants. Surely the contestants are in a much better position—and have a much greater incentive—than a mere shareholder to detect and to challenge conduct prohibited by the Williams Act.1

Chris-Craft is the most appropriate party to bring the suit in our adversary tradition. "[I]t is fundamental in our adversary system that the selfish interest of the litigant provides the best guarantee that a claim will be effectively asserted."131 If the tender offeror is rendered unable to sue for damages, then one of the most effective watchdogs for compliance with the Williams Act is
eliminated. As Justice Stevens indicated: "Congress would not [preclude] the person most interested in effective enforcement"\textsuperscript{132} from bringing private damage actions. Shareholders will also be protected if the tender offeror has the right to sue target management, since "[i]ndividual shareholders often lack the capacity to litigate these cases effectively."\textsuperscript{133}

A tender offeror's private action also protects those target company shareholders who accept the exchange offer and become stockholders in the offering company. These shareholders who accepted Chris-Craft's exchange offer knowingly risked that Chris-Craft might lose the takeover contest, "[b]ut they did not assume the risk that Bangor Punta would illegally deprive Chris-Craft of its opportunity to gain control."\textsuperscript{134} These shareholders clearly fall within the class section 14(e) was intended to protect. Compensating Chris-Craft most effectively assists these investors: They become holders in a company whose assets are $36 million greater.

The majority decided that although a damage award might indirectly benefit those former Piper shareholders who accepted Chris-Craft's exchange offer, it would injure Piper shareholders who exchanged their holdings for Bangor Punta stock; Bangor Punta stock would lose value on the market because of the adverse judgment.\textsuperscript{135} However, any damage award against Bangor Punta in even a stockholder suit such as that approved in \textit{Borak} could decrease the value of Bangor Punta stock.

The majority also found that damage actions do not necessarily deter fraud in tender offers. While it is true that the "deterrent value . . . can never be ascertained with precision,"\textsuperscript{136} such value may nonetheless be significant. The majority noted that it is more likely that shareholders will be injured because some offerors will be deterred from even making a bid.\textsuperscript{137} However, it is more likely that allowing either side to violate the securities laws with impunity from private damage actions will discourage even more offers from taking place. Stated directly: "[N]o rational businessman would make a multi-million dollar offer . . . if he were impotent to protect himself against foul practices by his opponents."\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{132} Piper v. Chris-Craft Indus., Inc., 97 S. Ct., 926, 960 (1977) (Stevens, J., dissenting).
\item \textsuperscript{133} \textit{Id.} at 963.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{See id.} at 948.
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{See id.} at 948-49.
\item \textsuperscript{138} \textit{Brief for Chris-Craft, supra} note 20, at 38.
\end{itemize}
Court's objective, investor protection, is entirely consistent with affording the contesting parties standing to sue. Only by permitting these suits will violations of the securities laws be most effectively discouraged.

**Application of Cort v. Ash**

The majority improperly relied on *Cort v. Ash.* The Supreme Court had previously recognized private rights of action under sections 10(b) and 14(a), the models for section 14(e). It is likely that Congress intended to extend the same protection under the Williams Act. Therefore, *Chris-Craft* does not present the same type of issue considered in *Cort,* namely, whether the statute created an implied private remedy. Rather, the real issue presented in *Chris-Craft* was who may invoke the remedy. Viewed in this light, *Chris-Craft* should be controlled by the rationale in *J.I. Case Co. v. Borak.*

*Cort* set forth a four-pronged test to determine whether a private remedy should be implied in a given statute. The first prong requires that the plaintiff be a member of an “especial class.” *Borak* involved a derivative suit brought for a violation of section 14(a) of the Exchange Act. Although these shareholders fell within the class of intended beneficiaries, the remedy was awarded to the corporation. *Borak,* therefore, does not meet the “especial class” test deemed crucial in *Cort.* However, instead of overruling *Borak,* the Supreme Court in *Cort* distinguished the facts in *Cort,* stating that there is “at least a statutory basis [section 14(a)] for inferring that a civil cause of action lay in favor of someone.” This argument also applies in Chris-Craft: Section 14(e) is quite similar to both section 14(a) and rule 10b-5, where private rights of action are well-established. *Borak,* as authority for permitting private actions for violations of the proxy rules, is further support for the existence of such a right where violations of tender offer rules have taken place, since the two sets of rules are similarly drawn.

Nowhere in *Cort* did the Court find it essential that a statute meet all four factors to imply a private cause of action. Thus, assuming arguendo that *Cort* is controlling, *Chris-Craft* easily meets the remaining three considerations.

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139. 422 U.S. 66 (1975).
140. See text accompanying notes 114-115, 118-119 supra.
143. Id. at 79.
In applying the second prong of the Cort test, Chief Justice Burger indicated that although Congress did not expressly deny a damages remedy to tender offerors as a class, neither did it expressly create one.\textsuperscript{144} In Cort the majority acknowledged that a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class"\textsuperscript{145} could substitute for an "articulated federal right in the plaintiff."\textsuperscript{146} Chris-Craft involved just such a pervasive legislative scheme, since the Williams Act was designed to regulate extensively the conduct between the opposing parties in a tender offer. Yet, the Court ignored this in denying Chris-Craft standing.

The third prong of the Cort test requires that the private remedy be necessary to effectuate the congressional purpose in enacting the statute.\textsuperscript{147} Assuming that the sole class which Congress intended to protect through the Williams Act was the shareholders, to permit either side to sue would further that end. Allowing private actions is imperative if the goal of investor protection is to be attained.\textsuperscript{148}

In applying the fourth requirement of the Cort test, the Court found that Chris-Craft might have an adequate remedy at state law and, therefore, should not rely on section 14(e).\textsuperscript{149} Chief Justice Burger suggested that Chris-Craft could bring a tort action under common law for "interference with a prospective commercial advantage."\textsuperscript{150} This tort follows the same general principles as the tort of interference with contractual relations.\textsuperscript{151} The latter tort requires some tortious conduct, such as fraud or defamation before recovery may be granted.\textsuperscript{152} Without such conduct, recovery is denied although the interference was intentional. More importantly, proof of defendant's malice is a prerequisite to recovery.\textsuperscript{153}

\textsuperscript{145} Cort v. Ash, 422 U.S. 66, 82 (1975).
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 78.
\textsuperscript{148} See notes 129-138 supra and accompanying text.
\textsuperscript{150} Id. Chris-Craft followed the Chief Justice's advice. On August 10, 1977, Chris-Craft instituted an action in New York State Supreme Court against Bangor Punta, Piper, and former officers of each company. N.Y. Times, Aug. 11, 1977, § D, at 7, col. 4. However, this action was subsequently abandoned. N.Y. Times, Oct. 8, 1977, at 33, col. 1. Chris-Craft also agreed to sell all of its Piper shares to Bangor Punta for $70 a share, ending the eight-year battle for control. Id.
\textsuperscript{151} W. PROSSER, LAW OF TORTS 949, 952 (4th ed. 1971).
\textsuperscript{152} Id. at 951.
\textsuperscript{153} Id. at 952.
To succeed in tort, Chris-Craft would have to prove that Bangor Punta had the requisite malicious intent. This is a far heavier burden of proof than that required by section 14(e), which merely requires a showing of fraud. Chris-Craft had already proven fraud in the lower courts. In most hostile tender offers, the opposing parties’ goals are simply to gain or retain control. Many Williams Act violations occur in the heat of the battle for control without any party intending to defraud. Hence, unable to show malicious intent, a defeated tender offeror has little hope of redress for his injury.

SEC Construction of the Statute

A further justification for Chris-Craft’s standing to sue for damages under section 14(e) is the position of the SEC. Courts traditionally defer to the interpretation of a statute by an agency which played a significant role in its drafting and which is responsible for its enforcement. In its amicus curiae brief in Chris-Craft, the SEC argued that Chris-Craft had standing under section 14(e). The Commission contended that “[e]ven more necessary [than in Borak] are such private rights of action to supplement Commission action to effectuate the Congressional purposes in enacting the Williams Act.”

Chief Justice Burger denigrated what he termed the “limited value” of the SEC’s “presumed ‘expertise’” in ascertaining whether there is an implied right of action under section 14(e). He stated that the issue is “one peculiarly reserved for judicial resolution.” The majority stated further that in previous deci-

155. Judge Friendly acknowledged this lack of intention to defraud in Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969):
[T]he participants on both sides act, “not in the peace of a quiet chamber,” . . . but under the stresses of the market place. They act quickly, sometimes impulsively, often in angry response to what they consider, whether rightly or wrongly, to be low blows by the other side. Probably there will no more be a perfect tender offer than a perfect trial.
Id. at 948 (citation omitted).
159. Id.
160. Id. The majority further argued that the position asserted in the SEC’s
sions involving implied causes of action, the Court did not invoke the administrative deference rule. This argument is not convincing: In all the cases cited, the Court arrived at the result advocated by the SEC. In Chris-Craft the SEC’s informed determination that private suits are necessary to aid in the enforcement of the Exchange Act should have been approved.

1970 Amendment of the Williams Act

In 1970, Congress amended the Williams Act, conferring power on the SEC to promulgate additional rules deemed necessary to effectuate the statute’s aims. Most significant concerning the amendment, however, is that Congress had had the opportunity to limit the number of parties who could sue under section 14(e), but did not draft any such limitation. Indeed, Senator Williams recognized the need to take affirmative steps to combat the problems caused by management’s opposition to takeover bids. This further indicates the impropriety of limiting the number of parties able to bring suit. When courts or administrative agencies interpret a statutory provision and Congress subsequently amends the statute without amending the interpreted provision, “[this interpretation] is deemed to have received Congressional approval and has the effect of law.” Thus, the 1970 amendment, which followed the precedents establishing standing under section 14(e) should have been regarded as a codification of those authorities.

amicus curiae brief was inconsistent with that expressed by Chairman Cohen during the legislative hearings on § 14(e). However, a careful analysis of the legislative history, see, e.g., House Hearings, supra note 123, at 59; Senate Hearings, supra note 79, at 178, 184, indicates that Chairman Cohen advocated that a private right of action should be implied.


162. See cases cited note 161 supra.


Although standing for all parties in takeover contests has received considerable support in lower courts and in commentary, the Court maintained that the issue was one of "first impression." Petitioners in Chris-Craft cited only one case where standing had been denied, Klaus v. Hi-Shear Corp. Klaus, however, was inapposite: It involved the denial of a motion for a preliminary injunction on the ground that the plaintiffs had failed to show irreparable injury. The plaintiffs in Klaus must have had standing, or the court would never have reached the issue of irreparable injury.

Policy Considerations

The Court observed that if it were to allow a tender offeror to seek damages, some tender offers "may never be made if there is a possibility of massive damage claims." Recent history dispels these apprehensions. The number of tender offers since Chris-Craft II, where damages were granted, has steadily increased. Presently, tender offers are the most popular form of takeover device. Indeed, if encouraging tender offers is the Court's goal,


169. 528 F.2d 225 (9th Cir. 1975).


171. Appleton, The Proposed Requirements, 32 Bus. Law. 1381 (1977). (The author is Chief, Office of Tender Offers, Acquisitions and Small Issues, SEC.) Tender offers have become so prevalent that there has been a recent spate of state takeover statutes. These enactments were motivated, at least in part, by the states' desire to protect local businesses from foreign takeovers, id. at 1381. See generally State Takeover Statutes and the Williams Act, 32 Bus. Law. 187 (1976). As of July 15, 1977, 30 states had passed this form of legislation. Wall St. J., July 15, 1977, at 1, col. 6. The constitutionality of these statutes is in question, however. Idaho's takeover statute was recently held preempted by the Williams Act, and thus an unconstitutional burden on interstate commerce. Great W. United Corp. v. Kidwell, [1977] 419 Sec. Reg. & L. Rep. (BNA) M-1 (N.D. Tex. Sept. 2, 1977). For a discussion
then a grant of standing to both the tender offerors and the target company's management is essential. 172

The Court's decision will effectively shift the burden of enforcing the Williams Act to the SEC. However, serious manpower shortages detract from the ability of the Commission to police these offers. This realistic assessment has been made by both the Court in Borak and by the SEC. 173

Disallowing private suits "creates an incentive to violate the Act in retaliation for violations by the other side." 174 If "self-help" 175 becomes attractive to one who believes the judicial process unresponsive to his needs, takeover battles will be reduced to a form of "jungle warfare." 176 This result is assuredly not what the Court desires. Nonetheless, it seems destined to occur if the Chris-Craft rationale is preserved.

The Court's expressed desire to encourage tender offers led to its denial of standing in Chris-Craft. 177 Without more convincing reasoning, it might be inferred that the denial of Chris-Craft's claim is fundamentally a reaction to the unprecedented $36 million judgment.

Ostensibly, the Supreme Court was reviewing the damage award as calculated by the Second Circuit in 1975. However, the questions addressed by the Court had been adjudicated in 1973 in Chris-Craft II. 178 In Chris-Craft II the matters of standing and liability were discussed extensively. The court held that Chris-Craft had an implied right of action under section 14(e), 179 and that it was entitled to damages for the defendant's violations of the securities laws. 180 When defendants petitioned the Supreme Court

172. See text accompanying note 138 supra.
173. This point was articulated in Borak, where the SEC stated that it reviewed over 2,000 proxy statements annually, see note 116 supra. Harvey Pitt, General Counsel for the SEC, stated the Court's refusal to allow private enforcement actions of this type placed more responsibility on the SEC to regulate tender offers. He observed that this "could impose a significant manpower burden" on the Commission. Wall St. J., Feb. 24, 1977, at 4, col. 1.
175. Id.
179. Id. at 362.
180. Id. at 366, 369, 373.
for certiorari, the petition was denied. Only after Chris-Craft was awarded damages of $36 million did the Supreme Court agree to hear the case. As Justice Stevens stated in dissent: "The fact that error may have been committed in this case in the consideration of the liability and damage issues—or might be committed in other cases—should not be permitted to color the analysis of the threshold standing issue." Calculating damages in a securities context is extremely difficult and complex. The Court was understandably wary in dealing with this issue: Denial of standing is one way to avoid the problem. However, the basic policy of liberally construing securities legislation to protect investors militated in favor of standing for Chris-Craft under section 14(e), notwithstanding the $36 million judgment.

Standing of Other Parties

a. Shareholder Rights

Left unanswered by the Court's decision was whether section 14(e) provides a private action right of damages for any party other than the takeover bidder. The majority clearly limited its holding to denying such right to a defeated takeover bidder. The Court refrained from deciding whether shareholders of the target corporation have an implied cause of action under section 14(e). Noting in a footnote that it declined to decide this issue, the Court relied on the premise that it was the shareholder of the target company, not the offeror, who needed the protection of the Williams Act. With its belief that the individual investor is a focus of the legislation, the majority would have been hard-pressed to deny the applicability of Borak, which granted an implied right of action under section 14(a). The Court had distinguished Borak on the ground that a derivative suit is necessary to effectuate the aims of the statute. According to the Court, the Williams Act was aimed at protecting the target company's shareholders. Under that reason-

183. 3 L. Loss, SECURITIES REGULATION 1792-93 (1961); 6 id. at 3920 n.370b (Supp. 1969).
185. See id. Chris-Craft had argued that all concerned parties have standing under § 14(e). See Brief for Chris-Craft, supra note 20, at 38-54.
187. Id. at 944-45.
ing, allowing a private damage action by these shareholders would be consistent with both *Borak* and *Chris-Craft*.

The four prongs in the test which determines whether a private cause of action can be implied under *Cort v. Ash*\(^{188}\) militate in favor of granting standing to the target company’s shareholders. Shareholders assuredly fall within the class “for whose especial benefit the statute was enacted.”\(^{189}\) The Court itself noted that it was this very class which the Williams Act was enacted to protect. The Court would probably view these shareholders as the intended beneficiaries of the statute.\(^{189}\)

With regard to the second factor enumerated in *Cort*, the Court in *Chris-Craft* interpreted Congress’ intention as a desire “to curb the unregulated activities of tender offerors.”\(^{190}\) It mentioned that Congress may possibly have intended to protect shareholders who did not tender their stock.\(^{191}\) Because these shareholders are viewed as the intended beneficiaries of the legislation, granting them the right to sue for damages is appropriate. Furthermore, there is no evidence that Congress intended to deny this remedy to shareholders.

Under the third prong of the *Cort* test, section 14(e)’s goals would be fostered by allowing the target company’s shareholders to sue for damages. In a tender offer, the shareholder of the target company can be injured in two ways. First, he may be induced to tender his shares for inadequate compensation.\(^{192}\) Resulting financial loss thereby may be measured as the difference between compensation for the shares and their worth.

Second, he may retain his shares while other shareholders tender their shares to “unworthy newcomers.”\(^{193}\) The shareholder thereby suffers a loss by holding a block of stock in a company of which he no longer desires to be part.\(^{194}\) It is a fundamental precept of our legal system that a party who has been wronged may seek compensation for injury. It is also entirely consistent with the goal of investor protection to allow the shareholder to sue the defrauding party. The Court has held that a tender offeror cannot

\(^{188}\) 422 U.S. 66 (1975).

\(^{189}\) *Id.* at 78.


\(^{191}\) *Id.* at 947.

\(^{192}\) *Id.* at 948.

\(^{193}\) *Id.* at 956 (Stevens, J., dissenting).

\(^{194}\) *Id.*

\(^{195}\) See note 129 *supra*. 
sue in this situation, even for the benefit of the shareholder. Therefore, it is essential to grant the individual shareholder this right; otherwise, his protection under the legislative scheme will be severely circumscribed.

Finally, there is no evidence that the cause of action is one "traditionally relegated to state law," the fourth component of the Cort test. The form of relief which shareholders have sought has been private actions under section 14(e). As of this writing, there has been only one case where a party has been forced to rely upon state law: Chris-Craft. Presently, there is no indication that an adequate state remedy exists.

In sum, if the Court were to decide whether there is an implied cause of action for shareholders under section 14(e), it would be forced to answer in the affirmative. The Court's decision in Chris-Craft is replete with recognition that this class is the intended beneficiary of the legislation. It is essential that this group be allowed to bring a private suit for damages if the congressional goal of investor protection is to be realized. Furthermore, an analysis of Cort v. Ash, a case which the majority considered crucial, demonstrates that this class is entitled to sue for damages.

b. Chris-Craft's Status as a Piper Shareholder

The majority noted that Chris-Craft was suing in the posture of a contestant for control, and not as a shareholder. Therefore, Chris-Craft was not entitled to the standing privileges that would probably be afforded a shareholder. The majority believed that Chris-Craft's claim should be denied because damages were sought under "Chris-Craft's status as a contestant for control," and not under its status as a shareholder. The majority thus implied that a shareholder who is not in the position of a takeover bidder may have standing to sue while a shareholder who is also a bidder may not have standing. This necessarily discriminates against one group of shareholders.

In his dissent, Justice Stevens assumed the opposite position: that Chris-Craft could sue as a Piper shareholder. He believed that a target company's shareholder is injured when other shareholders

197. See note 150 supra.
200. Id.
are fraudulently induced to tender their holdings. This shareholder would then be part of a company whose management he neither wanted nor helped to install. He would still have the option of selling his shares, but may suffer a loss in so doing. One determining factor in calculating Chris-Craft’s damages was the loss it suffered from being locked-in as holder of a large block of Piper stock. These damages are distinguishable from the damages arising out of the loss of control premium.

The Supreme Court asserted that the loss from being locked-in related only to Chris-Craft’s position as a tender offeror and not to its position as an “ordinary” Piper shareholder. The Court reasoned that Chris-Craft was an atypical shareholder who would not fall within the registration exemptions to section 4(1) of the Securities Act of 1933 because of its large holdings. It would thus be forced to file a registration statement with the SEC to dispose of its Piper stock. The Court’s analysis is faulty because it does not distinguish between Chris-Craft and other large holders of Piper stock. Any holder of a large block of Piper stock would probably not fall under one of the exemptions to the registration process provided in section 4(1) of the Securities Act of 1933. Thus, according to the Court’s reasoning, any large shareholder who was injured because Bangor Punta had gained control would be unable to recover damages.

The majority found “that in no meaningful sense was either Chris-Craft or Bangor Punta . . . a ‘target shareholder’ of Piper Aircraft.” The Court overlooked that Chris-Craft had the same options open to it that the other Piper shareholders had: to retain the stock, to sell it, to try to acquire more, or even to tender it to an opposing tender offeror. If, in July 1969, Chris-Craft had decided that Bangor Punta’s exchange offer was more attractive than control of Piper, Chris-Craft would have been entitled, as any other shareholder, to exchange its shares pursuant to the offer. Chris-Craft would have needed accurate disclosure by Bangor Punta as much as any other Piper shareholder.

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201. See id. at 956 (Stevens, J., dissenting).
202. Id.
203. See notes 74-75 supra.
205. See id. at 947.
IV. THE SUPREME COURT'S SECOND HOLDING: DENIAL OF STANDING UNDER RULE 10b-6.

Rule 10b-6 prohibits bids for, or purchases of, a security by or on behalf of the issuer of a security if the security is "the subject of . . . [a] distribution."\(^\text{208}\) This includes prohibitions on bids for or purchases of "any right to purchase such security."\(^\text{209}\) This rule is designed to prevent stimulative trading by an issuer in its own securities in order to create a deceptive appearance of market activity.\(^\text{210}\) Purchases made during an exchange offer are presumed to stimulate the price of the distributed security and therefore fall within the rule.

The Second Circuit held, and the Supreme Court did not dispute, that Bangor Punta's cash purchases of Piper stock, concurrent with its exchange offer, violated rule 10b-6.\(^\text{211}\) However, the Supreme Court held that, in this particular case, Chris-Craft was without standing to sue for Bangor Punta's violation of rule 10b-6.\(^\text{212}\) The Court rested its decision not on whether a violation had occurred, but on how the complaint was stated. Chris-Craft's error was in phrasing its right to damages on the basis of a lost opportunity to gain control of Piper. If Chris-Craft had asserted standing as a Piper shareholder and had complained that it was injured because it had paid too much for the manipulated stock, it might have been successful.\(^\text{213}\) The majority construed rule 10b-6 very narrowly, stating that the rule is aimed only at maintaining orderly markets for the distribution of securities. It decided that rule 10b-6 is "not directed at or concerned with contests for corporate control."\(^\text{214}\) The Court viewed Chris-Craft's complaint as "beyond the bounds of the specific concern of Rule 10b-6."\(^\text{215}\)

However, nothing in the language or history of rule 10b-6 supports the Court's limited reading on tender offers.\(^\text{216}\) In May

\(^{208}\) 17 C.F.R. § 240.10b-6(a)(3) (1977).
\(^{209}\) Id.
\(^{210}\) E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 131 (1973).
\(^{213}\) Id.
\(^{214}\) Id. at 951.
\(^{215}\) Id.
\(^{216}\) Rule 10b-6 does not contain the phrase "in connection with the purchase or sale of any security," which limits a cause of action under rule 10b-5, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952).
1969, the SEC issued a release stating that purchases of stock of a target corporation by a tender offeror while engaged in an exchange offer violated rule 10b-6.\textsuperscript{217} In promulgating these rules, the SEC had interpreted rule 10b-6 as applying to takeover contests, as well as to more conventional distributions.

In the present instance, the Court assumed that the Piper shareholders were deceived by the overvaluation of Bangor Punta's exchange offer. This alleged value increase in the package made Bangor Punta's exchange offer appear more favorable than Chris-Craft's.\textsuperscript{218}

It is impossible to state with certainty that Chris-Craft would have won the battle for control of Piper. It is clear, however, that the seven percent acquired fraudulently was determinative of the outcome of the contest. Without the seven percent illegally acquired, Bangor Punta would have had only 44%, not enough to be assured of winning the takeover contest. Hence, the Supreme Court's decision is inequitable. The court of appeals specifically held that Bangor Punta violated rule 10b-6.\textsuperscript{219} The Supreme Court did not overturn this finding,\textsuperscript{220} yet it refused to impose any sanctions on Bangor Punta. In effect, the Court held that even if one has been harmed by a rule 10b-6 violation, his prayer for relief must contain the proper verbiage. This meaningless distinction elevates form over substance.


\textsuperscript{218} The Court did not dispute the Second Circuit's determination that Bangor Punta's cash purchase of Piper stock during its exchange offer constituted purchase of "right[s] to purchase" Bangor Punta stock. Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 950 (1977). The Court found it unnecessary to decide whether the cash purchases violated rule 10b-6, see id. at 950 n.30. However, the cash purchases were of the type the rule was designed to prevent. The exchange offer was effectively a distribution of Bangor Punta securities. The block purchases undoubtedly created an unnatural and unwarranted appearance of market activity. The Second Circuit has twice found that the purchases violated rule 10b-6, see Chris-Craft Indus., Inc. v. Bangor Punta Corp., 426 F.2d 569, 576-77 (1970) (Chris-Craft I); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 377-78 (1973) (Chris-Craft II). The Court interpreted the rule as protecting the "hoodwinked investor victimized by market manipulation." Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 951 (1977). Chris-Craft could have framed its complaint to include this injury. The impression given by the Court's decision is that Chris-Craft would have been granted standing if it had included as one of its allegations a claim that it paid too much for the Piper stock.


V. The Supreme Court's Third Holding: Overturning the Injunction

The Supreme Court also overturned the injunction prohibiting Bangor Punta from voting the illegally acquired Piper shares for five years. The right of the parties to bring injunctive actions was not disputed. In *Rondeau v. Mosinee Paper Corp.*, the Court discussed standards for injunctive relief under the Williams Act. Such discussion certainly implies the availability of an injunction against Williams Act violations.

Importantly, neither of the parties raised the injunction issue in their petitions for certiorari. Chief Justice Burger, explaining that the Court had authority to decide the injunction issue anyway, stated that review was necessary due to the "unusual circumstances" presented by this case and because the injunction "supplement[ed] an improper award of damages."

In the Court's view, Chris-Craft had waived any claim to equitable relief in the prior trial. Furthermore, the Court decided already that Chris-Craft did not have standing under section 14(e) or rule 10b-6 to bring a private action for damages. Accordingly, the majority viewed the injunction as "inappropriate premised as it was upon the impermissible award of damages."

The majority's view that the injunction was "premised" upon the award of damages is erroneous. The Second Circuit favored, as Judge Timbers declared, denying to Bangor Punta "the fruits of [its] obtaining Piper shares illegally." This decision was based on two considerations. First, the court of appeals in *Chris-Craft II* determined that Bangor

221. See id. at 952.

222. See Brief for Petitioner Bangor Punta Corp. at 46-47, Brief for Petitioner Piper Aircraft Corp. at 38, Brief for Petitioner First Boston Co. at 24, Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926 (1977).

223. 422 U.S. 49 (1975).


225. *Id.* (citing State Bd. v. Correllis Sand & Gravel Co., 97 S. Ct. 582 (1977); Mapp v. Ohio, 367 U.S. 643 (1961); United Bhd. of Carpenters v. United States, 330 U.S. 395, 412 (1947); Sibbach v. Wilson, 312 U.S. 1, 16 (1941); Mahler v. Eby, 264 U.S. 32, 45 (1924)).


227. *Id.*

228. See id. at 952.

229. *Id.*

Punta had violated these laws and that Chris-Craft was entitled to compensation for injuries it had suffered.\textsuperscript{231} Second, the Court did not wish Bangor Punta to have control of Piper.\textsuperscript{232}

Therefore, the injunction was an independent remedy fashioned by the court to deal with Bangor Punta's violations of the securities laws. If it had wanted to deal with the equitable relief, the Court should have addressed the merits of the claims to determine if the situation warranted an injunction.

The injunction would have had the effect of granting control of Piper to Chris-Craft for the five-year period.\textsuperscript{233} Since the Supreme Court had never determined whether Chris-Craft would have acquired control of Piper absent petitioners' violations, it would have been unseemly for the Court to allow this particular result. By denying Chris-Craft equitable relief, the Court effectively allowed Bangor Punta to retain control of Piper without any sanctions.

\textbf{VI. JUSTICE BLACKMUN'S CONCURRING OPINION: THE STANDARD FOR CAUSATION}

Justice Blackmun's concurring opinion\textsuperscript{234} stated the reasons for his belief that Chris-Craft had not established causation between the petitioners' violations of the securities laws and its defeat in the control contest for Piper. He enunciated a new, stricter standard for proving causation in a securities case. According to Justice Blackmun, the previous standards enunciated in \textit{Mills v. Electric Auto-Lite Co.}\textsuperscript{235} and in \textit{Affiliated Ute Citizens v. United States},\textsuperscript{236} do not adequately deal with the problems raised in tender offers. His test places a greater burden on the aggrieved party to show that the alleged violation caused the harm at issue. The \textit{Mills} and \textit{Affiliated Ute} standard for proving causation in a securities case involves, first, a determination of whether the misstatement or omission was "material." Although the term has been variously interpreted, "materiality" most recently has been defined by the Su-

\begin{itemize}
\item \textsuperscript{231} See id. at 362-80.
\item \textsuperscript{232} See id. at 380.
\item \textsuperscript{233} Instead of 1,644,790 shares of Piper outstanding, there would have been only 1,413,788 (1,644,790, less the 120,200 shares Bangor Punta acquired through its three off-exchange block purchases and less the 110,802 shares acquired through its misleading exchange offer). Chris-Craft would then have owned approximately 49% of Piper's outstanding shares, enough to control the company, or to enable Chris-Craft to purchase easily enough shares for a majority.
\item \textsuperscript{234} \textit{Piper v. Chris-Craft Indus., Inc.}, 97 S. Ct. 926, 953-55 (1977) (Blackmun, J., concurring).
\item \textsuperscript{235} 396 U.S. 375 (1970).
\item \textsuperscript{236} 406 U.S. 128 (1972).
\end{itemize}
preme Court to mean that "the omitted fact would have assumed actual significance in the deliberation of the reasonable shareholder." It is undisputed by both the Second Circuit in *Chris-Craft* II and by Justice Blackmun that the petitioner’s misstatements and omissions were of sufficient magnitude to be material.

The next step requires analysis of whether a connection or "essential link" between the misstatement or omission and the alleged injury has been shown. Under *Mills* once materiality is demonstrated, causation is shown if the misleading proxy statement was an "essential link in the accomplishment of the transaction." Subsequent to the decision in *Mills*, the Court elaborated on this test in *Affiliated Ute*:

Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite for recovery. All that is necessary is that facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. . . . The obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.

After *Affiliated Ute*, causation should not have been difficult for Chris-Craft to prove. The letters and press releases Piper sent out in January 1969 were clearly material. The misstatements and omissions placed Chris-Craft in a less favorable light.

Similarly, causation also would have been easily established in connection with the exchange offer through which Bangor acquired 7% of Piper’s stock. In the registration statement accompanying the exchange offer, the omission of Bangor Punta’s $13 million loss was material. The Piper shareholders were faced with competing exchange offers; they responded by tendering 112,000 shares to Chris-Craft and 111,600 to Bangor Punta. It is not unreasonable to believe that disclosure of the large BAR loss would have had an impact on the number of shares Bangor Punta attracted.

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240. Id.
243. Id. at 354.
244. BAR’s $13 million loss would have eliminated 36% of Bangor Punta’s re-
Bangor Punta's purchases of 7% of Piper stock in May 1969, in violation of rule 10b-6, were also critical.\textsuperscript{245} Since Bangor Punta eventually acquired only 51% of the Piper shares, without these blocks of stock Bangor Punta would not have gained control.

However, Justice Blackmun would have expanded the causation criteria: "[T]he offeror must show that the shareholders' reactions to the misstatements or omissions caused the injury for which it demands remuneration."\textsuperscript{246} Justice Blackmun advocated the adoption of the "but-for" requirement of traditional tort law.\textsuperscript{247} Under Justice Blackmun's standard, Chris-Craft would have to show that "but-for" petitioners' violations of the securities laws, it would have acquired control of Piper. This is a much stricter standard than the "essential link" test. Previous court decisions recognized the impracticality and unrealistic nature of such a standard.\textsuperscript{248} Essentially, Justice Blackmun would require that Chris-Craft show that all those shares that Bangor Punta illegally acquired would have gone to Chris-Craft instead. There are numerous factors that enter into a shareholder's investment decision. To require Chris-Craft to show how these particular shares would have been transferred is an impossible burden. The Second Circuit stated:

[I]t would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and

\textsuperscript{245} This view was supported by the Second Circuit's decision in Chris-Craft II. Judge Timbers found: "Since [Bangor Punta] eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success." Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 375 (2d Cir.), cert. denied, 414 U.S. 910 (1973). Judge Gurfein stated that "the seven percent illegally acquired by [Bangor Punta] caused it to win." Id. at 393 (Gurfein, J., concurring).

\textsuperscript{246} Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 954 (1977) (Blackmun, J., concurring).

\textsuperscript{247} This approach was proposed in Note, Chris-Craft: The Uncertain Evolution of Section 14(e), 76 COLUM. L. REV. 634, 640-59 (1976).

\textsuperscript{248} The Court noted this when Justice Harlan declared that the "essential link" test would "avoid the impracticality of determining how many votes were affected . . . and [would] effectuate the Congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 385 (1970). Justice Harlan also noted in Mills that "proof of actual reliance by thousands of individuals would . . . not be feasible; and reliance on the nondisclosure of a fact is a particularly difficult matter to define or prove." Id. at 382 n.5 (citations omitted) (emphasis in original).
knowledge. It would be impractical to require [Chris-Craft] to prove that each individual Piper shareholder who failed to trade for [Chris-Craft's] stock, or who traded for [Bangor Punta's] stock, relied upon defendants' misrepresentations in doing so.\(^{249}\)

Assuming arguendo that Justice Blackmun’s standard of causation is correct, an examination of the facts compels the conclusion that Chris-Craft would have gained control of Piper absent the petitioners' violations of the securities laws.

Justice Blackmun's first error was in treating each violation separately to determine whether the particular violation caused Chris-Craft to be defeated.\(^{250}\) Instead, he should have evaluated the series of violations jointly to determine if they prevented Chris-Craft from gaining control of Piper. There is no rationale for examining the violations independently: In fact, they possess a synergistic quality. Their aggregate effect should determine causation. Therefore, they should be examined from that more realistic perspective.

By examining these violations jointly, one may fairly conclude that in all probability, Chris-Craft would have been successful in its takeover attempt. Bangor Punta acquired 7% of Piper stock for cash in violation of rule 10b-6 and acquired an additional 7% through its materially misleading exchange offer. Without either of these illegally obtained blocks, Bangor Punta would have had less than 50% of the Piper stock. Chris-Craft would then have led by at least a 41% to 31% margin at the end of the competing exchange offers in August 1969. The Second Circuit in *Chris-Craft III* noted that such a lead would have commanded a premium for the opportunity to gain control.\(^{251}\) Additionally, Chris-Craft would undoubtedly have had an even greater lead; its opponents' fraudulent activities dissuaded Piper's public shareholders from tendering even


\(^{250}\) Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 954-55 (1977) (Blackmun, J., concurring). Justice Blackmun first examined the letters and press releases sent out by Piper in January 1969. He decided that “Chris-Craft [had] failed to prove that the Piper actions caused the injury of which Chris-Craft complain[ed].” Id. at 954. Next, Justice Blackmun analyzed the actions of Bangor Punta and First Boston. He concluded that “neither Bangor nor First Boston may be held liable” for the alleged violations regarding the BAR negotiations. Id. at 955. Finally, he examined the alleged rule 10b-6 violations in determining that Chris-Craft had failed to prove that the violations had caused its defeat. Id.

more shares to Chris-Craft at the beginning of the tender offer and during the exchange offer.\textsuperscript{252}

Assuming that Chris-Craft’s lead would have been at least 41% to 31% in August 1969, it is unlikely that Bangor Punta would have invested the $9 million necessary to purchase these blocks on the open market.\textsuperscript{253} The risks involved would have been too great. Chris-Craft, on the other hand, would have been in a far superior position to garner the additional 9% needed to win the takeover contest.

CONCLUSION

The Supreme Court’s denial of standing to seek damages under section 14(e) of the Securities Exchange Act of 1934 will assuredly work against the interests of the investing public. If the party with the greatest financial incentive, the takeover bidder, is eliminated from effectively challenging violations of the Williams Act, then the small shareholders and investors also lose a measure of protection.

The SEC’s recognition of its own limitation in dealing with this area\textsuperscript{254} highlights the need for damage actions under the Williams Act. The Supreme Court in \textit{Chris-Craft} denied tender offerors the right to bring suit under section 14(e) in what may be an attempt to cut back on the amount of litigation in the courts. Although this may appear inconsistent with the congressional intent of protecting investors, it is not inconsistent with the recent restrictive trend of Supreme Court decisions involving the securities laws. The Supreme Court has repeatedly increased the plaintiff’s burden in areas such as scienter, standing, and harm.\textsuperscript{255}

\textsuperscript{252} Only 304,606 shares of Piper were tendered to Chris-Craft, Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926, 931 (1977), despite its offered price of $12.50 more than the stock’s previous selling price. Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 351 (2d Cir.), \textit{cert. denied}, 414 U.S. 910 (1973).

\textsuperscript{253} Brief for Chris-Craft, \textit{supra} note 20, at 81.

\textsuperscript{254} \textit{See} notes 116 & 173 \textit{supra} and accompanying text.

\textsuperscript{255} The Supreme Court’s trend limiting access to the courts is apparent by its recent decisions, \textit{see} Santa Fe Indus., Inc. v. Green, 97 S. Ct. 1292 (1977) (suit challenging short-form merger belonged in state, not federal, court); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (scienter, not mere negligence, required in private action under rule 10b-5); Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) (litigant must show irreparable harm to obtain injunction barring defendant’s violations of Williams Act); United Hous. Foundations, Inc. v. Forman, 421 U.S. 837 (1975) (narrowed definition of “security”); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (right to sue for rule 10b-5 violation limited to only persons who actually bought or sold security); Alyeska Pipeline Serv. v. Wilderness Soc’y, 421 U.S. 240 (1975) (successful environmental plaintiff not entitled to attorneys’ fees).
To reverse this trend, Congress should expressly articulate the parameters of a cause of action under section 14(e). If Congress truly desires to protect investors and not to "tip the balance of regulation in favor of management or in favor of the person making the takeover bid," it will expressly provide for private damage suits under the Williams Act. Past decisions speak of an implied right of action under the Williams Act. Congress should either amend the present section 14(e) or enact a new section to include an express right. This would obviate the need for deliberation as to whether an implied right was intended. In this way, the right of tender offeror and target company to sue each other will be specifically recognized. Until this occurs, investor protection cannot be maximized, and the congressional intent will be frustrated.

James A. Berns

257. See cases cited note 167 supra.