1983

Section 14(e) of the Williams Act: Can There be Manipulation with Full Disclosure or Was the Mobil Court Running on Empty?

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Recommended Citation
Mencher, Eric M. (1983) "Section 14(e) of the Williams Act: Can There be Manipulation with Full Disclosure or Was the Mobil Court Running on Empty?," Hofstra Law Review: Vol. 12: Iss. 1, Article 5.
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol12/iss1/5
SECTION 14(e) OF THE WILLIAMS ACT: CAN THERE BE MANIPULATION WITH FULL DISCLOSURE OR WAS THE MOBIL COURT RUNNING ON EMPTY?

Section 14(e) of the Williams Act\(^1\) was created to insure the shareholder of an informed choice in a tender offer situation.\(^2\) The statutory language, however, includes the term "manipulative acts or practices"\(^3\) without defining it. In fact, the entire Securities Exchange Act\(^4\) fails to provide a definition for the term "manipulative acts or practices."\(^5\) The Supreme Court, in Santa Fe Industries v. Green,\(^6\) viewed "manipulative act" in the context of section 10(b)\(^7\) as a term of art when applied to the securities field.\(^8\) Santa Fe has been interpreted as standing for the proposition that either nondisclosure or material misrepresentation is a necessary element of manipulative acts.\(^9\) The Sixth Circuit, however, in Mobil Corp. v. Marathon Oil

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1. 15 U.S.C. § 78n(e) (1982). The Williams Act is codified at 15 U.S.C. §§ 78m(d) to (e), 78n(d) to (f) (1982).
3. Section 14(e) reads:
It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.
8. 430 U.S. at 476. "The term refers generally to practices . . . that are intended to mislead investors by artificially affecting market activity." Id.
Co.\textsuperscript{10} found that non-disclosure is not necessary,\textsuperscript{11} but failed to provide guidelines for courts to use in subsequent determinations.

This note, after briefly discussing the mechanics of tender offers and the thrust of the Williams Act, focuses on the \textit{Santa Fe} and \textit{Mobil} decisions in order to explore these courts’ approaches toward defining “manipulative acts.” It then posits that the \textit{Mobil} court’s approach follows more closely the intent of the Williams Act, with support for this position found in the reaction of other courts to the \textit{Mobil} court’s analysis.\textsuperscript{12} This note concludes that certain resistance tactics on the part of incumbent management are equivalent to manipulative acts\textsuperscript{13} because they deny the shareholders the opportunity to exercise an informed choice, and that these affirmative acts, which by design, deprive shareholders of their option, are violative of the Williams Act.

\textbf{TENDER OFFERS}

\textit{Tender Offers and Management Control}

The tender offer is but one of four major avenues to a change in the control of a corporation.\textsuperscript{14} A tender offer is made where an outside entity (the “offeror”) decides that the acquisition of another entity (the “target company”) is of value and pursues the acquisition by offering a premium to the shareholders of the target company in return for the tendering of their shares.\textsuperscript{15} Often, as a result of a suc-

\begin{itemize}
  \item \textsuperscript{10} 669 F.2d 366 (6th Cir. 1981).
  \item \textsuperscript{11} Id. at 376.
  \item \textsuperscript{12} See infra notes 110-62; see also Weiss, Defensive Responses to Tender Offers and the Williams Act's Prohibition Against Manipulation, 35 Vand. L. Rev. 1087 (1982).
  \item \textsuperscript{13} See infra notes 20-24 and accompanying text.
  \item \textsuperscript{14} See Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819, 842 (1981).
  \item \textsuperscript{15} The Williams Act itself does not define the term tender offer. The Securities Exchange Commission has offered the following definition:
    Under the first tier, proposed Rule 14d-l(b)(1)(i), the term “tender offer” consists of four elements: (1) one or more offers to purchase or solicitations of offers to sell securities of a single class; (2) during any 45-day period; (3) directed to more than 10 persons; and (4) seeking the acquisition of more than 5% of the class of securities.

    The second tier of the definition of tender offer is set forth in proposed Rule 14d-l(b)(1)(ii). . . [O]ne or more offers to purchase, or solicitations of offers to sell, securities of a single class would be a tender offer if three conditions are present. First, the offers to purchase or the solicitation of offers to sell must be disseminated in a widespread manner. . . . Second, the price offered must represent a premium in excess of the greater of 5% of or $2 above the current market price of the securi-
\end{itemize}
cessful tender offer, the incumbent management of the target company is replaced.\textsuperscript{16}

The other three avenues to change in corporate control are mergers, sales of a substantial portion of the corporation's assets, and proxy fights.\textsuperscript{17} Management plays a critical role in mergers and sales of substantial assets. Although both usually require shareholder approval,\textsuperscript{18} shareholders cannot even consider a proposal for a merger or sale of assets, unless the management first approves it.\textsuperscript{19} Management, then, can effectively deprive the shareholders of any opportunity for a merger or sale of assets should it so desire.\textsuperscript{20}

Although proxy fights do not require the cooperation of management, they are generally difficult to wage, offer little possibility of reimbursement should the challenge fail, and are prohibitively expensive.\textsuperscript{21} Furthermore, incumbent management has the use of corporate resources to resist the fight of the challenger who is using his own funds.\textsuperscript{22} Where incumbent management resists the takeover of control, the tender offer thus remains the most feasible avenue to the change of corporate control.\textsuperscript{23}

The role of management in negotiations is extremely important. The shareholders are an unorganized body of individuals, and, as such, rely upon the management team of the corporation to represent their interests in negotiations. The ability of the shareholders to act as a powerful, united entity through the management is actualized and given strength by the discretion allotted to the management.\textsuperscript{24} There must also, however, be a means of checking manage-
ment's inclination to make decisions based on the motive of self-perpetuation. At the same time management is given the discretion it needs to exercise its corporate functions, a provision must be made for a "safety valve"—a viable means of replacing incumbent management should the shareholders so desire. This "safety valve" is crucial both to the preservation of management's decision making role in mergers and sales of assets, and to the limitation of management's role in tender offer situations.

Typically, management is in an advantageous position to assess the effect of a proposed tender offer on the target company. The management may feel that a higher price may be obtainable, or that a corporation more compatible with the target's purposes and goals may be found. This has led many writers to espouse the position that management should be allowed to respond to a tender offer with a variety of maneuvers, either facilitating or interfering with the proposed offer. Granting management unlimited discretion, however, does not make any allowance for incumbent management's self-interest and the effect that this motivation may have—consciously or unconsciously—on their judgment. Most often a successful tender offer will result in the incumbent managers being replaced by a new management team selected by the offeror. In the eyes of incumbent management, the specter of losing their jobs may very well outweigh the possible benefits to the corporation when they balance the projected results of a tender offer. This conflict of interest is inherent in a tender offer situation and it would be unwise to allow full discretion and a free hand on the part of incumbent management.

If the target management decides that the tender offer is not in the best interest of the corporation (or of themselves in terms of re-

25. "Safety valve" refers to the ability of the acquiring company (or any other company) to go beyond stalled negotiations in a merger situation. Since management has relatively unfettered discretion in the negotiation process, it may effectively block the acquisition. Management's motivation may be business-oriented or self-oriented. Either way, the acquiring company may then propose a tender offer. With a "safety valve," the shareholders of the target company are thereby provided the opportunity to decide for themselves on an appropriate course of action. If management can forestall a tender offer, no such "safety valve" then exists. See id. at 113; Easterbrook & Fischel, supra note 16, at 1745-47.


27. E.g., Herzel, Schmidt & Davis, supra note 16, at 107-16; Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. Law. 101 (1979); Lipton, Takeover Bids in the Target's Boardroom; An Update After One Year, 36 Bus. Law. 1017 (1981).

taining corporate control), it may employ various defensive maneuvers to avoid the takeover. It may search for a “white knight”—another corporation which is more amenable to the management and would be willing to either merge with it or make a competing tender offer. Alternatively, the target management may acquire an asset that will cause antitrust complications for the offeror should the tender offer be successful. In addition, it may divest the corporation of certain assets attractive to the offeror, or enter into agreements with other corporations giving them options to acquire those assets should the tender offer be successful. All of these maneuvers, if successful, not only result in the elimination of competition in the bidding, but effectively eliminate the shareholders’ ability to decide whether or not to tender their shares to any bidder.

Allowing target management to engage in this type of action could enervate the effectiveness of tender offers as a control on management’s efficiency. Recognition of the importance of management’s evaluation of the impending takeover does not inexorably lead one to grant a position of free-rein to management in acting on the tender offer. There must be a role for management that benefits the shareholder while not depriving the shareholder of the ultimate power of decision.

*The Williams Act*

The Williams Act was enacted in 1968 in an effort to bring tender offers into a position in which neither the offeror nor the target company had an advantage, and in which the target company’s shareholders were able to make a free and informed choice. Before

32. *e.g.*, Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981); Whittaker Corp. v. Edgar, 535 F. Supp. 933 (N.D. Ill. 1982).
34. 15 U.S.C. §§ 78m(d) to (e), 78n(d) to (f) (1982).
the passage of the Williams Act, offerors were able to use non-disclosure, time pressure, and other techniques to force shareholders into rushed, panic-stricken decisions. By including provisions which required full disclosure and time allotments, the shareholder was given the protection needed to allow for an informed, unfettered choice. The tender offeror must file a statement with the Securities Exchange Commission disclosing such information as its background and identity; the source and amount of funds to be used to pay for the tendered shares; any plans or proposals to make major changes in the target company's corporate structure; and the existence of arrangements with any person with respect to any securities of the issuer.

According to the Williams Act, any person who tendered shares in response to the tender offer can withdraw them any time within seven days of the commencement of the offer. The offeror must purchase, on a pro rata basis, all shares tendered within ten days of the offer if more shares were tendered than the bid requested. If at any time during the tender offer, the offeror increases the bid, all tendering shareholders will receive the increases regardless of whether they tendered their shares before or after the increase. Prospective tendering shareholders, therefore, can fully deliberate prior to their decision to tender (or withdraw the tender of) their shares with the knowledge that they will share, on a pro rata basis, the ultimate price offered and that they cannot be closed out within the specified time frame. The disclosure of information, as well as the provision for sufficient time in which to decide, allows for an informed choice for all shareholders, not a pressured rush on a first-come, first-served basis.

36. See Easterbrook & Fischel, supra note 28, at 1162.
At the same time, however, the target company's management is given the opportunity to take advantage of the new timing and disclosure requirements by engaging in defensive tactics designed to defeat the tender offer regardless of the desires of the shareholders.\footnote{46}

Some commentators argue, for example, that extending the proration period will give the target company more time to undertake defensive measures, thereby defeating offers which would have been in the best interests of their shareholders or deterring potential offerors from making an offer. Similarly, it is asserted that to the extent the change would decrease the likelihood of arbitrageurs securing very favorable positions in the initial proration pool, it would reduce the price at which they are willing to purchase shares, thereby depriving shareholders of a lucrative alternative method of disposing of their shares during an offer.\footnote{47}

This development was in direct opposition to the avowed legislative purpose, which was to remain neutral and allow the shareholder free choice.\footnote{48} It was, however, inevitable as the prohibitions involved are somewhat vague. There is, for example, a prohibition against “manipulation.”\footnote{49} Unfortunately, neither the Williams Act, nor the Securities Exchange Act, defines manipulation.\footnote{50}

The scope of the term “manipulation” has been the gravamen of many cases.\footnote{51} It is at the heart of differing interpretations of section 10(b)\footnote{52} as well as of section 14(e).\footnote{53} The leading case involving the manipulation element of section 10(b) is \textit{Santa Fe Industries v. Green},\footnote{54} where the Supreme Court seems to require non-disclosure...
as an element of a finding of manipulation. In *Mobil Corp. v. Marathon Oil Co.*, however, the Sixth Circuit specifically finds non-disclosure as not essential to a determination of manipulation under section 14(e). While the language used in section 10(b) is virtually identical to the language used in section 14(e) with respect to manipulation, the thrust of the provisions may not be the same due to the unique position of the shareholder with regard to a tender offer.

**JUDICIAL INTERPRETATION OF MANIPULATIVE ACTS**

**Santa Fe Industries v. Green**

In *Santa Fe Industries v. Green*, a Delaware corporation, Santa Fe Industries, Inc. ("Sante Fe") owned ninety-five per cent of Kirby Lumber. According to Delaware Corporation Law section 253, the "short form merger" statute, if a parent company owns

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55. *Id.* at 474 & n.14.
57. *Id.* at 376-77.

[T]he proposition that *Section 14(e) and Section 10(b) are 'construed in pari materia by the courts' . . . is limited. . . . [T]he courts have also recognized that Section 14(e) contains the special, qualifying language 'in connection with any tender offer,' which makes it a provision that extends to concerns very different from those of Section 10(b).

*Id.* at 1551 (citations omitted); *see also* 114 CONG. REC. H21484 (daily ed. July 15, 1968) (statement of Rep. Moss) ("[T]he enactment of *§ 14(e)* does not represent approval [or disapproval] of any suggested rules under *§ 10(b)*. That section stands on its own feet.").
60. 430 U.S. 462 (1977).
61. *Id.* at 465.
63. A merger is the combination of two or more corporations with the surviving corporation "possessing all the rights, privileges, powers . . . and being subject to all the restrictions, disabilities and duties of each such corporations so merged. . . ." *Del. Code Ann.* tit. 8, § 259(a) (1982). In a merger between two or more independent corporations, a majority of each corporation's shareholders must approve the merger. *Del. Code Ann.* tit. 8, §§ 251(c), 252(c) (1982). A parent-subsidiary corporate relationship, however, allows for an abbreviated procedure. *Del. Code Ann.* tit. 8, § 253 (1982); *see A. Conard, Corporations in Perspective* 220 (1976):

If the parent corporation holds 90 percent of the voting shares of a subsidiary which is to be merged into the parent, the statutes brush away the formality of
at least ninety per cent of the stock of the subsidiary, and if the parent's board of directors approves, it can merge and "cash out" to minority shareholders. Section 253 does not require the consent of, or advance notice to, minority shareholders, but does require that notice be given within ten days of the merger. Shareholders dissatisfied with the payment may petition the Delaware Court of Chancery in an appropriate proceeding for fair value.

Santa Fe offered $150 per share despite an appraisal indicating the value to be $125 per share. The shareholders were properly notified. Although they did not petition the court of chancery, they did file suit in federal district court on behalf of the corporation and other minority shareholders claiming: (1) the value of each share was at least $772; (2) there was no prior notice of the merger; (3) voting in both corporations. A decision of the parent corporation's board of directors is sufficient to decide the action of both constituents. The procedure is euphemistically dubbed "short form merger." The logic of this rule with regard to the subsidiary is apparent; since the parent can cast 90 percent of the votes, no election is necessary to determine whether a majority are in favor. With regard to the parent corporation's voting, the logic is less evident, since the board of directors has no formal power to make decisions for the shareholders. Probably the draftsmen considered that there is very little economic difference between owning 90 percent of a subsidiary corporation's shares and owning the assets; the difference is an administrative detail which should be within the directors' competence.

64. Del. Code Ann. tit. 8, § 253(d) (1975) (amended 1976). Section 253(d), which has since been amended, required that "[i]n the event all of the stock of a subsidiary . . . is not owned by the parent . . . the surviving corporation shall, within 10 days after the effective date of the merger, notify each stockholder. . . ." Id.

65. Del. Code Ann. tit. 8, § 262 (1982). This statute provides appraisal rights for the minority shareholders "frozen out" as a result of a short form merger (or for dissenting shareholders in any merger). The shareholders must meet the statutory requirements of timeliness and notice. The court of chancery then appraises the stock, determines a fair value, and directs the corporation to pay that amount to the dissenting or frozen out shareholders. Id.; see Comment, Bell v. Kirby Lumber Corp.: Ascertaining "Fair Value" Under the Delaware Appraisal Statute, 81 Colum. L. Rev. 426 (1981):

Appraisal statutes were introduced to accommodate the shifting role of minority shareholders under state corporation law. At common law, a single shareholder could veto mergers and other basic corporate reorganizations. Gradually, as the complexities of commercial life demanded greater corporate flexibility, state legislatures withdrew this veto power. Instead, dissenting shareholders were given the choice of either continuing as shareholders in the new corporate entity, or receiving the value of their stock in the corporation. Recognizing that dissenters would not be satisfied with a stock value determined by the majority, the states enacted appraisal statutes, which enabled shareholders to receive a judicially determined value for their stock.

Id. at 427 (footnotes omitted). For a general discussion of appraisal, see Note, Valuation of Dissenters' Stock Under Appraisal Statutes, 79 Harv. L. Rev. 1453 (1966).

66. 430 U.S. at 466.

67. Id.
the motivation for the merger was to freeze out minority shareholders at an inadequate price; and (4) Santa Fe violated rule 10b-5 through the use of a fraudulent appraisal to arrive at a price below the shares’ real value.

The district court dismissed the complaint for failure to state a claim upon which relief can be granted, holding that with full and fair disclosure the transaction went beyond the purview of rule 10b-5. The Court of Appeals for the Second Circuit reversed, holding that neither misrepresentation nor nondisclosure was a necessary element of a rule 10b-5 action. The Supreme Court reversed the court of appeals, finding no indication that Congress intended rule 10b-5 to prohibit any conduct not involving manipulation or deception.

The Court viewed manipulation as a “term of art,” requiring some deception or nondisclosure within the market which thereby creates an artificial price for the shares. The complaint by the shareholders was reduced in the Court’s opinion to a request for relief from an action that was merely unfair. This was seen as more appropriately within the domain of a state court ruling on business judgment principles, than as a basis for a rule 10b-5 federal action. The state law already recognized the minority shareholders’ choice: As long as all information was fairly presented, the shareholders were assured of receiving the fair value of their shares through the appraisal remedy. One commentator has noted: “The procedure would be fraudulent in an economic sense only if the Delaware courts refused to take seriously their duty of appraisal; and there is no evidence of this before the court in Green.”

In other words, the state had already anticipated just such a situation occurring and had provided a remedy in the form of appraisal rights. The shareholders were in no way locked into the price offered by the parent company; that they chose not to take advantage of the alternative (i.e. to petition the court of chancery) does

68. 17 C.F.R. § 240.10b-5 (1982).
69. 430 U.S. at 467.
72. 430 U.S. at 471-73.
73. Id. at 476.
74. Id. at 477.
75. Id. at 478-80.
76. Id. at 466.
not alter the fact that it was available. It is obvious from the state legislation that it was recognized and acceptable that a parent company, owning the requisite percentage of stock of a subsidiary, may merge with that company regardless of the wishes of the minority shareholders, as the legislation expressly provided for such a circumstance.\textsuperscript{78} The only protection provided for the shareholders involved receipt of fair value for their shares. The Court did not find this violative of federal legislation, since as long as there was full disclosure, there was no violation of section 10(b) or rule 10b-5.\textsuperscript{79} The shareholders were not prevented in this situation from exercising any of their rights.

The scenario presented by the short form merger is clearly distinguishable from that of a tender offer. With full disclosure, the shareholders in a short form merger are assured of the ability to exercise their option (i.e., to receive full value for their shares). With a tender offer, however, full disclosure on the part of the target corporation is no assurance of the ability of the shareholders to make a free and informed choice. A defensive maneuver, even if disclosed, may have the effect of preventing the shareholders from exercising their option.\textsuperscript{80} A narrow reading of the term "manipulation" would, therefore, totally frustrate the thrust of the federal legislation by not providing for a cause of action based upon section 14(e)\textsuperscript{81} despite the curtailment of the shareholder's options.

\textit{Mobil Corp. v. Marathon Oil Co.}

In \textit{Mobil Corp. v. Marathon Oil Co.},\textsuperscript{82} Mobil Oil Corporation ("Mobil") offered a premium to Marathon Oil Company ("Marathon") shareholders in return for a tender of their shares. Marathon's Board of Directors decided to fight Mobil's tender offer, and sought a "white knight" in United States Steel.\textsuperscript{83} Marathon recommended United States Steel's proposed offer to its shareholders and entered into a merger agreement with United States Steel.\textsuperscript{84} Two provisions of this agreement formed the crux of what Mobil claimed were manipulative acts in violation of section 14(e). These provi-
sions—"lock up" options—granted United States Steel (1) an irrevocable option to purchase ten million unissued shares of Marathon, and (2) an option to purchase Marathon's forty-eight per cent interest in the oil field known as Yates Field\textsuperscript{86} if United States Steel's offer was not successful and a third party gained control.\textsuperscript{88}

Mobil filed suit seeking to enjoin the exercise of the options, alleging a violation of section 14(e).\textsuperscript{87} Mobil was initially granted a temporary restraining order prohibiting Marathon and United States Steel from taking any action, but was subsequently denied a preliminary injunction on the ground that it had not demonstrated a substantial likelihood of success on the merits, as all of the disclosures were in accord with section 14(e)'s requirements.\textsuperscript{88} The district court judge rejected the argument that the two options included in the merger agreement represented manipulative acts.\textsuperscript{89}

The court of appeals reversed, holding that a substantial likelihood of success on the merits had been shown.\textsuperscript{90} The court went even further and found the "lock-up" options to be manipulative,\textsuperscript{91} irrespective of their being disclosed.\textsuperscript{92} The manipulation created an artificial price ceiling in the tender offer market by deterring any competitive bidding. The effect of the stock option was to prohibit competition, as the cost to a competitive bidder trying to gain a majority interest escalated by a much greater factor (per each dollar raise in the bid) than the cost to United States Steel.\textsuperscript{93} The effect of the option on Yates Field was to present any prospective competitor with the specter of losing Marathon's best asset should it be successful in its offer. The possibility of a higher offer in the absence of the options was evidenced by Mobil's counter-offer, which was $126 per share to United States Steel's $125, but it was "conditional on the judicial removal of the options."\textsuperscript{94}

The court viewed manipulation as "an affecting of the market

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85. Marathon had referred to Yates Field as its "crown jewel." \textit{Id.}
86. \textit{Id.}
87. \textit{Id.} at 368.
88. \textit{Id.} at 368-70.
89. \textit{Id.} at 370.
90. \textit{Id.} at 369.
91. \textit{Id.} at 374-75.
92. "In short, to find compliance with section 14(e) solely by the full disclosure of a manipulative device as a \textit{fait accompli} would be to read the 'manipulative acts and practices' language completely out of the Williams Act." \textit{Id.} at 377.
93. \textit{Id.} at 375-76. For example, "every dollar raise in the bid by USS would cost USS $30 million, while each such dollar raise would cost Mobil $47 million." \textit{Id.} at 375.
94. \textit{Id.} at 376.
for, or price of, securities by artificial means, i.e., means unrelated to the natural forces of supply and demand.98 The "lock-up" provisions were seen as artificially affecting, even completely blocking, normal healthy market activity. The Second Circuit noted that the provisions could well be construed as "expressly designed solely for that purpose."99 Unlike a merger situation, where the legislation not only acknowledges but requires management decision making in the acceptance or rejection process, a tender offer is the one situation in which legislation expressly intended that the ultimate decision was left to the shareholders—with no intermediary or approval stage by management.97

Subsequent Interpretation of Santa Fe and Mobil

Santa Fe Industries v. Green98 was interpreted by the Mobil court as allowing for a finding of manipulation in acts that did not include false or misleading statements, despite the fact that the two often appear to be inextricably tied to one another.99 This view of Santa Fe can be found elsewhere,100 but it is not the overwhelming interpretation. Santa Fe is usually interpreted as standing for the proposition that misrepresentation or deception is a necessary component of manipulation.101 Although section 10(b), not section 14(e), is the statute involved in Santa Fe, the language of the two statutes are of such similar nature that they are often construed in an identical manner.102 In fact, manipulation is not defined in either section,103 and the application of the statutes can be quite different despite the similarity in language.104 In Santa Fe, for example, the shareholders had their statutorily protected options available to them.105 Nondisclosure was the only element in that situation that

95. Id. at 374 (emphasis in original).
96. Id.
97. See supra notes 34-45 and accompanying text.
99. 669 F.2d at 376.
103. Mobil, 669 F.2d at 374.
104. See supra note 59 and accompanying text.
105. 430 U.S. at 474 & n.14.
would have interfered with the exercise of their rights.\textsuperscript{108} In \textit{Mobil}, however, as in any tender offer situation, certain maneuvers by target management—whether disclosed or not—would necessarily interfere with the shareholders’ ability to exercise their protected rights.\textsuperscript{107} This maneuvering, therefore, should constitute “manipulative acts”; otherwise, legislative intent will be defeated.\textsuperscript{108} The recognition of the essential nature of this interpretation can be seen in the treatment which the \textit{Mobil} approach has received in subsequent cases.\textsuperscript{109}

If \textit{Mobil} was an anomaly, and if the subject matter were controlled by \textit{Santa Fe}, courts should have no hesitation dismissing the \textit{Mobil} analysis. While no court has as yet duplicated \textit{Mobil’s} ruling, a number of courts in other circuits have, directly or indirectly, addressed the \textit{Mobil} approach.\textsuperscript{110} For example, the \textit{Mobil} analysis was followed in \textit{Whittaker Corp. v. Edgar}.\textsuperscript{111} This case involved a tender offer by Whittaker Corporation (“Whittaker”) for shares of Brunswick Corporation (“Brunswick”). Brunswick opposed the offer and sought a “white knight.” Brunswick entered into an agreement with American Home Products Corporation (“American Home”) for the sale of an asset (Brunswick’s subsidiary—Sherwood Medical Industries, Inc.) as a defensive maneuver to avoid Whittaker’s takeover.\textsuperscript{112} Both Whittaker and Brunswick moved for a preliminary injunction—Brunswick to enjoin the tender offer, and Whittaker to enjoin the disposal of assets.\textsuperscript{113} Whittaker alleged that Brunswick, in giving American Home a “lock-up” contract regarding a valuable asset, violated section 14(e).\textsuperscript{114}

Although the court did not find a sufficient likelihood of success on the merits to sustain a preliminary injunction for either side,\textsuperscript{115} its analysis is important. While acknowledging that the Sixth Circuit’s

\begin{footnotes}
\footnotetext{106. See supra notes 41-55 and accompanying text.}
\footnotetext{107. See supra notes 56-73 and accompanying text.}
\footnotetext{108. See supra notes 34-45 and accompanying text.}
\footnotetext{110. See cases cited supra note 109.}
\footnotetext{111. 535 F. Supp. 933 (N.D. Ill. 1982).}
\footnotetext{112. \textit{Id.} at 941.}
\footnotetext{113. \textit{Id.} at 943-44.}
\footnotetext{114. \textit{Id.} at 944.}
\footnotetext{115. \textit{Id.} at 945.}
\end{footnotes}
Mobil opinion is not binding precedent, the court went on, after a lengthy explanation of the Mobil approach, to conclude that Whittaker had standing to allege a private cause of action for injunctive relief under section 14(e) regarding Brunswick's disposition of its assets. The court then distinguished Mobil by noting that the effect of the sale of the asset in this case would not create an artificial price ceiling nor pose a threat to other bidders. This entire aspect of the case was discussed in the context of full disclosure, and the manner in which the court approached the activities leaves little doubt that had there been a "lock-up" type provision, manipulation would have been found:

The fact that the Brunswick sale of Sherwood to American Home permits the acquisition to be made by way of tender offer, shares plus cash, or cash does not make the transaction fall within the definition of a lock-up under Mobil. Brunswick has not granted any lock-up option to American Home, nor did Whittaker revise its offer for Brunswick in an attempt to compete with the proposed sale of Sherwood as Mobil did in the Mobil case. Thus, the sale of Sherwood has not created an artificial price ceiling in the tender offer market for Brunswick common shares which would be a manipulative act in violation of the Williams Act.

When faced with a similar situation in Kennecott Corp. v. Smith, the Third Circuit looked to the intent of the Williams Act in deciding the scope of section 14(e). The issue in this case involved a conflict in the timing of disclosure as required by the state takeover disclosure law, with the timing required by the Williams Act.

Kennecott Corporation ("Kennecott") made a cash tender offer for shares of Curtiss-Wright Corporation ("Curtiss-Wright"). Kennecott, which under state law was prohibited from commencing

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116. Id. at 947-49.
117. Id. at 949.
118. Id. (emphasis added).
119. 637 F.2d 181 (3d Cir. 1980).
120. Id. at 187-88.
121. N.J. STAT. ANN. § 49:5-3 (West Supp. 1983). Under this law, the corporation initiating the tender offer is prohibited from commencing its offer until at least 20 days after the announcement of its tender offer.
122. Under the Williams Act and rule 14d-2(b), 17 C.F.R. 240.14d-2(b) (1982), the corporation initiating the tender offer is required to disclose certain information within five days of commencement of the tender offer.
123. 637 F.2d at 182.
its offer until at least twenty days after the announcement, was threatened with further delay by the New Jersey State Bureau of Securities which decided to hold hearings on the proposed offer. Curtiss-Wright resisted the tender offer and hearings were scheduled. Kennecott filed an action seeking an injunction of the state law restraints since, it claimed, it would not be possible to comply with both the federal and state regulations. The district court found a lack of likelihood of success on the merits and a lack of likelihood of irreparable injury. The court of appeals, in reversing, emphasized the potential damage arising from defensive tactics by a target company. The court stated: "A primary purpose of the Williams Act . . . is to ensure that . . . the shareholders of a target company . . . may exercise a knowledgeable and an unfettered choice. The Act is also designed to preserve a balance between incumbent management and challenging groups, so that neither has an undue advantage." In discussing further the deleterious effects of allowing defensive tactics, the court noted that "[w]hile being subject to [defensive tactics], . . . the shareholders cannot enjoy their federally protected right . . . to make a choice about the governance of their corporation and the disposition of their shares."

The court found that the element of time would enable the target company to erect barriers which would negatively affect the offeror and the shareholders. The analysis points to the timing involved in various disclosures (as opposed to nondisclosure) and to defensive maneuvers that are "designed to deprive the shareholders of their free choice."

Another case implicitly acknowledging the Mobil approach is Oklahoma Publishing Co. v. Standard Metals Corp. The plaintiff in this case sought control of the defendant corporation through the acquisition of stock and proxies. The plaintiff brought this suit alleging, inter alia, a violation of section 10(b) based on certain manipu-

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124. See supra note 121.
125. 637 F.2d at 182.
126. Id. at 184.
127. Id. at 183.
128. Id. at 188-89.
129. Id. at 187-88.
130. Id. at 189.
131. Id.
132. Id.
133. 541 F. Supp. 1109 (W.D. Okla. 1982).
lative activities. The plaintiff based its claim on the Mobil court's analysis. The defendants, on the other hand, argued that the allegations were subject to a Santa Fe analysis. The court initially applied the holding in Santa Fe to a separate count involving defendant-management's personal benefit in a tender offer. In another count, involving alleged unfair transactions by management in order to perpetuate themselves in control, Santa Fe and Mobil were both raised. Instead of holding that Santa Fe was controlling over Mobil, the court distinguished Mobil on the facts, thereby implicitly accepting the validity of Mobil's approach. The court found that Mobil "does not provide authoritative support for plaintiff's theory" because in this case the plaintiff chose to solicit proxies instead of conducting a tender offer, and that there was no showing that the plaintiff was being prevented from soliciting such proxies. The pains taken by the court to distinguish Mobil leads inexorably to the conclusion that the court was willing to employ the Mobil analysis should the facts of the case be similar enough to warrant its application.

The Ninth Circuit demonstrated its acceptance of the Mobil court's analysis in Pacific Realty Trust v. APC Investments, Inc. This case involved a tender offer by APC Investments ("APC") for shares of Pacific Realty Trust ("PacTrust") and an attempt to block the takeover by the trustees of PacTrust. The action by the trustees included: (1) enacting a bylaw prohibiting any shareholder from owning more than 9.8% of PacTrust's stock; (2) suing in state court to enjoin APC pursuant to the newly enacted bylaw; and (3) suing in federal district court to enjoin APC's offer pending disclosure of information that would remedy alleged material misrepresentations made by APC. The federal district court permanently enjoined APC from proceeding with the offer, finding that the newly enacted bylaw would block the lawful completion of the offer—a result that

134. Id. at 1111-13.
135. Id. at 1113.
136. Id.
137. Id. at 1112-13.
138. Id. at 1113.
139. Id.
140. Id.
141. Id.
142. 685 F.2d 1083 (9th Cir. 1982).
143. Id. at 1085.
144. Id.
disclosure could not cure.148

Upon appeal, the Ninth Circuit remanded the case to the district court for reconsideration of the issue of full disclosure after determining that the PacTrust shareholders would be adequately protected by full disclosure since APC’s proposed tender offer did not create a “no-win predicament” for the shareholders.146 The circuit court held that the shareholders would then be adequately protected despite the presence of the bylaw.147 In discussing PacTrust’s argument that APC’s tender offer was a violation of section 14(e)—in light of the PacTrust bylaw which supposedly made completion of the offer impossible—the court stated its acceptance of the Mobil court’s analysis:

There are instances when violations of [section 14(e)] are unrelated to the information supplied to the shareholders. In Mobil Corp. v. Marathon Oil Co., . . . for example, . . . [t]he court held that by creating an artificial price ceiling for competing tender offerors, these “lock-up” options were manipulative acts which violated the Williams Act and could not be cured by disclosure. . . . But the alleged misconduct here, unlike in Mobil, did not artificially affect market activity.148

The most direct support for the Mobil court’s analysis came with the full adoption of its approach by a district court in the Southern District of New York in Data Probe Acquisition Corp. v. Datatab, Inc.149 Although both misrepresentation and manipulation

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145. Id.
146. Id. at 1087.
147. Id.
148. Id. at 1086.
149. 568 F. Supp. 1538 (S.D.N.Y. 1983). As this note went to press, the Second Circuit Court of Appeals reversed the district court’s decision. No. 83-7639 (2d Cir. Nov. 22, 1983), petition for cert. filed, 52 U.S.L.W. 3512 (U.S. Dec. 21, 1983) (No. 83-1023). In its reversal, the court of appeals expressly rejected the Mobil approach. The court, however, failed to analyze the Mobil approach and dismissed it merely by reference to dictum in a previous decision, stating: “We disagree, therefore, with Mobil Corp. v. Marathon Oil Co. . . . to the extent that Marathon creates judge made substantive obligations imposed upon offerors or the management of offerees engaged in a tender offer contest and repeat our conviction [as stated in Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 760 (2d Cir.), cert denied, 52 U.S.L.W. 3461 (U.S. Dec. 12, 1983) (No. 83-784)] that it is ‘an unwarranted extension of the Williams Act.’” Slip Op. at 9-10. The failure of the court to analyze the Mobil approach vis-a-vis the facts in Data Probe is unfortunate. The case in which they did analyze and reject Mobil was Buffalo Forge. The facts in that case, however, did not warrant the application of the Mobil approach. The plaintiff in Buffalo Forge alleged manipulation by the target company despite the fact that the options entered into increased the amounts offered for the target, and that the plaintiff was the ultimate victor in the bidding war that ensued. 717 F.2d at 758-59. On the
were involved, the court discussed at great length the availability of section 14(e) to protect against manipulation even in situations in which there was full disclosure.140 The conflict in this case revolved around the arranged merger between Datatab, Inc. ("Datatab") and CRC Acquisition Corporation ("CRC"), a wholly owned subsidiary of CRC Information Systems, whose board was dominated by former Datatab employees.141 The merger negotiations also resulted in lucrative employment agreements for certain Datatab employees in management positions.142 Before the shareholder vote on the planned merger, Data Probe, Inc. ("Data Probe") initiated a tender offer for Datatab stock at a higher price per share than provided for by the merger.143 After determining that Data Probe would not provide the same type of employment contracts as CRC, Datatab's management attempted to block the tender offer by granting CRC an irrevocable option to purchase authorized but unissued voting shares of Datatab stock in an amount equal to 200% of the then outstanding voting shares.144 This option provided CRC with the voting strength to approve the planned merger regardless of the wishes of any other shareholders, effectively blocking any other offers and locking the price to that of the CRC merger. This action by Datatab's management was the basis of Data Probe's claim of manipulation in violation of section 14(e).145

The court declared the option agreement void,146 viewing the question before it as "whether the Williams Act permits the management of a target company unilaterally to thwart an ongoing tender offer by granting to one contestant an option that effectively precludes further bids."147 The court analyzed Mobil, a number of other cases, and the legislative history before adopting the Mobil court's approach, and concluding:

[T]he [Williams] Act was written to assure stockholders access to the information necessary to make informed judgments, which they

other hand, Data Probe presents the appropriate fact pattern for the application of the Mobil approach and, therefore, warrants fuller consideration than the Second Circuit was willing to provide in its decision.

140. 568 F. Supp. at 1543-45.
151. Id. at 1541.
152. Id.
153. Id. at 1541-42.
154. Id. at 1542.
155. Id. at 1543.
156. Id. at 1542.
157. Id. at 1543.
would then in fact be allowed to exercise, however positive or detrimental the economic consequences. Congress therefore imposed in the Act not one, but two duties on tender-offer participants, including target corporations: first, to provide shareholders the required information; and second, to refrain from any conduct that unduly impedes the shareholders' exercise of the decision-making prerogative guaranteed to them by Congress.158

This court went beyond the Mobil court in specifying conduct that is permissible by target corporations, finding acceptable any tactic that has the purpose and effect of enhancing "the shareholders' prospects, such as to attract rather than to repel competitive bidding."159 While recognizing the need for the Securities and Exchange Commission to provide guidance by way of defining the terms used in section 14(e),160 the court called on other courts to apply the Mobil court's analysis:161

[F]ederal decisions both before and after the [Mobil] case make clear that federal authority to enforce the [Williams] Act goes beyond its disclosure objectives. Federal jurisdiction and responsibility for enforcing the Williams Act matches precisely, as it should, the legislation's dual objectives of assuring both an informed decision and a meaningful opportunity to decide.162

CONCLUSION

The legislative history of the [Williams] Act is replete with indications that Congress intended to protect an investor faced with the pressures generated by the exigencies of the tender offer context, and that the sole purpose of § 14(e) is protection of the investor faced with the decision to tender or retain his shares . . . .163

The Mobil Corp. v. Marathon Oil Corp.164 court recognized that the purpose and thrust of the Williams Act165 is the protection of the shareholder's options in a tender offer situation.166 The court also recognized that to require misrepresentation or deception as an

158. Id. at 1545.
159. Id. at 1559.
160. Id. at 1550-51.
161. Id.
162. Id. at 1548.
164. 669 F.2d 366 (6th Cir. 1981).
165. 15 U.S.C. §§ 78m(d) to (e), 78n(d) to (f) (1982).
166. 669 F.2d at 376.
element of manipulation is to read the term manipulation out of section 14(e)\textsuperscript{167} of the Williams Act, as the statute already prohibits misrepresentation and deception.\textsuperscript{168} Manipulation covers a wide range of activities which, even when disclosed, can deprive a shareholder of his statutorily protected choice.\textsuperscript{169} Any interpretation of manipulation under section 14(e) which requires deception not only contravenes congressional intent, but eviscerates the essence of the statute.\textsuperscript{170} Such a construction is tantamount to saying: It is acceptable to deprive a shareholder of his statutorily protected options as long as it is effected in the open with adequate disclosure.

The \textit{Mobil} court was correct in allowing for a finding of manipulation in spite of full disclosure. It did not, however, extend its decision far enough, since it left no guidelines as to what acts fall within the parameters of manipulation.\textsuperscript{171} There is no question that incumbent management has the right, if not the duty, to evaluate the effect of the tender offer, and to advise the shareholders of the results of the evaluation.\textsuperscript{172} In helping the shareholders to be as informed as possible before exercising their options, management may advise the shareholders as to what course to follow. Management may even solicit and propose alternatives to the shareholders.\textsuperscript{173} Yet, in no way should the incumbent management be allowed to take any action that eliminates the shareholders' ability to make their choice and exercise their options. A fair reading of section 14(e), in light of the legislative intent,\textsuperscript{174} would define manipulation to include any act, whether disclosed or not, which does not allow the shareholders to exercise an informed choice. As one court has noted: "The legislation

\begin{itemize}
\item[168.] 669 F.2d at 377; see supra note 3.
\item[169.] \textit{See supra} note 20.
\item[171.] The \textit{Mobil} court defines manipulation as the creation of an artificial and significant effect on the market. 669 F.2d at 374. In \textit{Mobil}, an artificial price ceiling was created. \textit{Id}.
\item[172.] Management is in a better position than the average shareholder to evaluate the effect of the impending tender offer. Management should, therefore, conduct an evaluation. It must inform the shareholders of its position with respect to a tender offer within 10 days of the announcement of the offer. Securities Exchange Commission rule 14e-2, 17 C.F.R. § 240.14e-2 (1982).
\item[173.] \textit{See} Herzel, Schmidt & Davis, \textit{supra} note 16, at 113-15; Gilson, \textit{supra} note 14, at 878-79.
\item[174.] \textit{See supra} notes 58-59 and accompanying text.
\end{itemize}
as adopted concerned not only the provision of information, but the guaranty of a fair opportunity to use it."\textsuperscript{175}

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