Pace Law Review

Volume 3
Issue 3 *Spring 1983*

Article 16

April 1983

# Mobil Corp. v. Marathon Oil Co.: Tender Offeror's Right to Injunctive Relief Recognized

Mark F. Liscio



Recommended Citation

Mark F. Liscio, *Mobil Corp. v. Marathon Oil Co.: Tender Offeror's Right to Injunctive Relief Recognized* , 3 Pace L. Rev. 711 (1983)

DOI: https://doi.org/10.58948/2331-3528.1660

Available at: https://digitalcommons.pace.edu/plr/vol3/iss3/16

# *Mobil Corp. v. Marathon Oil Co.:* Tender Offeror's Right to Injunctive Relief Recognized

## I. Introduction

*Mobil Corp. v. Marathon Oil Co.,*[1] decided by the Sixth Circuit Court of Appeals in 1981, represents one thread in the legal tangle[2] created by Mobil's unsuccessful takeover bid for Marathon.[3] When Mobil announced its offer to purchase a controlling interest of Marathon common stock, Marathon engaged in various defensive tactics to defeat the takeover bid. These tactics included an antitrust suit against Mobil[4] and negotiations with a company regarded as a more attractive candidate for merger[5] — United States Steel, Inc. (USS, Inc.), a newly formed subsidiary of United States Steel Corp. (USS).[6]

Mobil brought the present suit against Marathon and USS, Inc. to enjoin them from carrying out their proposed merger.[7]

---

1. 669 F.2d 366 (6th Cir. 1981) [hereinafter appellant will be referred to as Mobil and appellee will be referred to as Marathon].

2. For a summary presentation of the cases involving the contest for control of Marathon, see Mobil Corp. v. Marathon Oil Co., [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,375, at 92,263 n.1 (S.D. Ohio 1981).

3. Marathon Oil Co. is an Ohio corporation with its principal place of business in Findlay, Ohio. Mobil Corp. is a Delaware corporation with its principal place of business in New York, New York. Both companies are among the seventeen major integrated petroleum companies in the United States. Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 317 (N.D. Ohio), *aff'd,* 669 F.2d 378 (6th Cir. 1981), *cert. denied,* 102 S. Ct. 1490 (1982).

4. *Id.*

5. Such a candidate is commonly referred to as a "white knight."

6. USS, Inc. is an indirect wholly owned subsidiary of United States Steel Corp. which is a Delaware corporation. USS, Inc. was incorporated in Ohio on November 18, 1981, the same day it entered into three agreements with Marathon. Mobil Corp. v. Marathon Oil Co., [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,375, at 92,263. *See infra* text accompanying notes 18-20.

7. Mobil Corp. v. Marathon Oil Co., [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,375, at 92,263. The district court denied Mobil's motion for a preliminary injunction and Mobil appealed to the Sixth Circuit Court of Appeals, Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981).

Mobil claimed, *inter alia*,[8] that the defendants violated the Williams Act[9] in their filings with the Securities and Exchange Commission (SEC) and in their communications with the Marathon shareholders, by not disclosing material facts relevant to the announced USS, Inc. tender offer[10] and the negotiated agreements between the defendants.[11] The district court dissolved a previously granted temporary restraining order and denied Mobil's application for a preliminary injunction[12] and Mobil appealed.[13]

The Sixth Circuit held that Mobil had standing to sue for injunctive relief as tender offeror[14] and that some of Marathon's

8. Mobil also claimed that the directors of Marathon violated state-imposed fiduciary duties to the company and its shareholders, violated state law by agreeing to dispose of corporate assets without shareholder approval and by acting beyond the scope of their authority in approving the stock option and Yates Field option. Mobil Corp. v. Marathon Oil Co., Inc., [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,263-64.

9. Securities Exchange Act of 1934, § 14(e), 15 U.S.C. § 78n(e) (1976 & Supp. IV 1980) provides that:

> 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.

*Id. See infra* notes 29-32 and accompanying text for a general discussion of the Williams Act.

10. USS, Inc. publicly announced its offer for 30 million shares of Marathon common stock at $125 per share net to the seller on November 19, 1981, one day after entering into the merger agreement with Marathon. Mobil Corp. v. Marathon Oil Co., [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,269.

11. *See infra* text accompanying notes 18-20 for a discussion of the agreements between USS, Inc. and Marathon.

12. Mobil Corp. v. Marthon Oil Co., [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,286.

13. Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981).

14. Mobil held a small percentage of Marathon common stock prior to the attempted acquisition. The court declined to recognize Mobil's status as a shareholder, giving it standing as a tender offeror only. The court reasoned that Mobil was acting primarily as a hostile tender offeror, and as such, did not need the information to make a decision on whether to accept their own offer. *Id.* at 370.

In Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977), the Supreme Court assumed this position when Chris-Craft asserted their standing under section 14(e) as a shareholder as well as a tender offeror. The Court wrote:

> It is clear . . . that Chris-Craft has not asserted standing under § 14(e) as a Piper shareholder. The reason is not hard to devine. As a tender offeror actively engaged in competing for Piper stock, Chris-Craft was not in the posture of a target share-

defensive tactics were in violation of the Williams Act.[15] The issue of whether a tender offeror had standing to sue for injunctive relief under these circumstances was one of first impression for the Sixth Circuit. This Note will analyze the court's treatment of that issue and discuss the effects of its holding.

## II. Facts

The legal actions surrounding the merger battle ensued upon Mobil's announced offer on November 1, 1981 to purchase up to 40 million shares of Marathon common stock at $85 cash per share net to the seller.[16] On November 1, 1981, Marathon filed a motion for and was granted a preliminary injunction enjoining Mobil from carrying out the proposed acquisition on the basis that a merger of the two companies would likely be found later to violate antitrust law.[17] On November 18, 1981, Marathon entered into three agreements with USS, Inc.: 1) a merger agreement whereby USS, Inc. would be merged into Marathon with Marathon becoming a wholly owned subsidiary of USS;[18] 2) a stock option agreement granting USS, Inc. an irrevocable option to purchase up to 10 million shares of Marathon common stock

---

> holder confronted with the decision of whether to tender or retain its stock. Consequently, Chris-Craft could scarcely have alleged a need for disclosures mandated by the Williams Act. In short, the fact that Chris-Craft necessarily acquired Piper stock as a means of taking over Piper adds nothing to its § 14(e) standing arguments.

*Id.* at 35-36.

15. Mobil Corp. v. Marathon Oil Co., 669 F.2d at 375. The court focused on the manipulative aspect of section 14(e) in analyzing the options granted to USS, Inc. by Marathon. Although "manipulative" is not defined, the court looked to two recent Supreme Court cases, Ernst & Ernst v. Hochfelder, 424 U.S. 185, 199 (1976) and Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 476 (1977) to characterize manipulative acts as those which artificially affect and completely block normal market activity. *Id.* at 374.

16. *Id.* at 367. Mobil conditioned the purchase on receipt of at least 30 million shares, which represented at least half of Marathon's outstanding stock. In addition, Mobil intended to acquire the remaining Marathon assets by a merger of the two corporations after the purchase of those shares. *Id.*

17. Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 326 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982). Marathon demonstrated that the combined market shares of Mobil and Marathon in several states would probably lessen competition in those states in violation of section 7 of the Clayton Act, 15 U.S.C. § 18 (1976). *Id.*

18. Mobil Corp. v. Marathon Oil Co., [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,263, 92,268-269. *See supra* note 6.

at $90 per share;[19] 3) the Yates Field option agreement granting USS, Inc. an option to purchase Marathon's interest in Yates Field for $2.8 billion if the USS, Inc. offer did not succeed and if a third party gained control of Marathon.[20] On November 19, 1981, USS, Inc. announced its tender offer[21] and on November 24, 1981, the United States District Court for the Southern District of Ohio issued a temporary restraining order, upon the application of Mobil, restraining USS, Inc. and Marathon from taking any action in connection with the Yates Field option or the USS, Inc. tender offer.[22] On the following day, November 25, 1981, Mobil announced a second tender offer for 30 million common shares of Marathon at $126 per share,[23] upon condition that the stock option and Yates Field option agreements be cancelled or held invalid by court order.[24] Thereafter, on December 7, 1981, the district court dissolved the temporary restraining order and denied Mobil's application for a preliminary injunction.[25] Mobil appealed this decision,[26] as well as the district court's earlier grant of a preliminary injunction on the antitrust grounds in

19. Mobil Corp. v. Marathon Oil Co., [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,375, at 92,263, 92,270.

20. *Id.* at 92,263, 92,273-274. The Yates Field has been described as "[o]ne of the world's most remarkable oil fields," *id.* at 92,273 (quotation omitted), although petroleum engineers consider the field to be in the intermediate state of depletion, *id.* (citation omitted). Marathon's interest in Yates Field was a principal reason several companies sought acquisition of Marathon, e.g., Gulf Oil and Allied Industries. *Id.* at 92,267-268.

21. The terms of USS, Inc.'s tender offer were disclosed to the Marathon shareholders in a letter prepared and mailed by the Marathon Board. The terms of the offer were that USS, Inc. was to purchase up to 30 million Marathon common shares (about 50% of the outstanding shares) at $125 per share, USS, Inc. would merge into Marathon, and the shareholders who did not receive $125 in cash for their shares would receive $100 principal amount of USS, Inc. 12 year 12½% notes for each share of Marathon stock. *Id.* at 92,272.

22. *Id.* at 92,275.

23. Marathon brought an antitrust suit after Mobil's first tender offer, *supra* note 3; the District Court for the Northern District of Ohio issued a temporary restraining order prohibiting Mobil from purchasing any Marathon shares but allowed Mobil to continue to receive tenders. Mobil went forward with the second offer with these conditions still imposed. *Id.* at 92,266.

24. *Id.* at 92,275.

25. The court wrote that "Mobil has failed to demonstrate a strong or substantial likelihood of success on the merits of its claim that the defendants have violated section 14(e) of the Williams Act." *Id.* at 92,285.

26. Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981).

favor of Marathon.[27]

In separate decisions, the Sixth Circuit Court of Appeals affirmed the injunction against Mobil on antitrust grounds[28] and reversed the decision denying Mobil's prayer for injunctive relief.[29] These decisions permitted Mobil's tender offer to remain in effect and barred USS, Inc. from exercising the Yates option.

## III. Legal Background

The Williams Act of 1968[30] was enacted as an amendment to the Securities Exchange Act of 1934[31] and comprises sections 13(d)-(e) and 14(d)-(f) of that Act. It supplements federal regulation of corporate acquisitions by creating disclosure requirements and prohibiting certain practices in connection with tender offers. The statute is widely accepted as one which protects shareholder rights.[32] Former Senator Harrison Williams, sponsor of the Act, wrote that "Congress first amended the securities laws in 1968 expressly to recognize and provide for basic investor protections in tender offer situations. . . ."[33]

The Williams Act does not provide for private rights of action.[34] Courts have recognized that in order to effectuate the goals of the Act, private causes of action should be implied

---

27. Marathon Oil Co. v. Mobil Corp., 669 F.2d 378 (6th Cir. 1981).

28. *Id.*

29. Mobil Corp. v. Marathon Oil Co., 669 F.2d at 366.

30. Securities Exchange Act of 1934, §§ 13(d)-(e), 14(d)-(f), 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. IV 1980).

31. 15 U.S.C. § 78a-78hh (1976 & Supp. IV 1980).

32. For a general discussion of the Williams Act, see E. ARANOW, H. EINHORN & G. BERLSTEIN, TENDER OFFERS FOR CORPORATE CONTROL (1973) and E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL (1977) [hereinafter referred to as ARANOW]. For a discussion of the Act as it relates to the standing issue, see generally Note, *Tender Offers: Standing To Sue, Prohibited Practices, Reliance of Non-Tenderers,* 37 WASH. & LEE L. REV. 930 (1980); *The Uncertain Evolution Of Private Actions Under The Williams Act,* 3 J. CORP. L. 364 (1978); Note, *Tender Offer Regulation-Injunction Standards Under The Williams Act,* 45 FORDHAM L. REV. 51 (1976).

33. ARANOW, *supra* note 32, at Introduction.

34. Express provisions for private causes of action in other sections of the Exchange Act are found at: § 9(e), 15 U.S.C. § 78i(e); § 16(b), 15 U.S.C. § 78p(b); § 18(a), 15 U.S.C. § 78r(a); § 20, 15 U.S.C. § 78(t). *See also* Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734 (1975); National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); T.I.M.E. Inc. v. United States, 359 U.S. 464, 471 (1959).

under the Act in favor of those sought to be protected, namely, shareholders;[35] some courts have also granted standing to target corporations.[36] Since tender offerors were not intended as the principal parties to be protected under the statute,[37] private causes of action are not as readily implied for them.

### A. *Implying Private Causes of Action*

The *J.I. Case Co.* v. *Borak*[38] decision marked the beginning of the Supreme Court's recognition of private causes of action under the Exchange Act. In *Borak,* the Court faced the issue of whether shareholders of a merged corporation had standing to assert resolutions of the proxy disclosure requirements of section 14(a) of the Act.[39] The Court viewed the section as designed "to

35. *See, e.g.,* Lowenschuss v. Kane, 520 F.2d 255 (2d Cir. 1975); Broder v. Dane, 384 F. Supp. 1312 (S.D.N.Y. 1974); Grow Chem. Corp. v. Uran, 316 F. Supp. 891 (S.D.N.Y. 1970). For a general discussion of tender offer litigation, see ARANOW, *supra* note 32, at 104-05.

36. *See, e.g.,* Kirsch Co. v. Bliss & Laughlin Indus., Inc., 495 F. Supp. 488 (W.D. Mich. 1980) (target company with standing to sue for declaratory and injunctive relief under the Williams Act); H.K. Pocter Co. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1973) (target company with standing to sue for damages under section 14(e) of Williams Act); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969) (target company with standing to seek injunctive relief under section 14(e) of the Exchange Act). *But see* Gateway Indus., Inc. v. Agency Rent-A-Car, Inc., 495 F. Supp. 92 (N.D. Ill. 1980), *appeal dismissed,* No. 80-1871 (7th Cir. Aug. 11, 1980).

37. Former Senator Harrison Williams said of the Williams Act that "[w]e have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. Section 510 is designed solely to require full and fair disclosure for the benefit of investors." H.R. 17-11, 90th Cong., 1st Sess., 113 CONG. REC. 24,664 (1967).

38. 377 U.S. 426 (1964).

39. 15 U.S.C. § 78n(a) (1976 & Supp. IV 1980). Section 14(a) provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The plaintiffs attempted to bring their claim to enforce section 14(a) under § 27 of the Act. Section 27 provides in part:

> The district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and

prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. . . ."[40] and furthermore, "for the protection of investors."[41] Additionally, private enforcement of the proxy rules was deemed to be an important supplement to the SEC's own enforcement actions.[42] The Court thus held that private causes of action be implied to effectuate the Congressional purpose, namely, the protection of the investors.[43]

Eleven years later the Court elaborated its *Borak* holding. In *Cort v. Ash*,[44] the Court established the determinative factors for deciding whether a private cause of action should be implied from a statute not expressly creating one. In *Cort*, a shareholder of Bethlehem Steel Corp. sought damages and injunctive relief to prevent management from making campaign contributions to the 1972 presidential elections. The contributions allegedly violated 18 U.S.C. § 610, a criminal statute which prohibits "corporations from contributions or expenditures in connection with specified federal elections."[45] The Court, in holding that no implied cause of action could be maintained by the shareholder[46]

---

actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.

15 U.S.C. § 78aa (1976 & Supp. IV 1980).

40. J.I. Case Co. v. Borak, 377 U.S. at 431.

41. *Id.* at 432.

42. *Id. See* Securities Exchange Act of 1934, § 14(a), 15 U.S.C. § 78n(a) (1976 & Supp. IV 1980). *See also* SEC v. Caterinicchia, 613 F.2d 102 (1980) (SEC injunctive action under 15 U.S.C. § 77q(a)).

43. J.I. Case Co. v. Borak, 377 U.S. at 432-33.

44. 422 U.S. 66 (1975).

45. Section 610 provided in part:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

18 U.S.C. § 610 (repealed 1970).

46. Cort v. Ash, 422 U.S. at 85.

reasoned that neither the congressional purpose[47] nor the Act itself[48] contemplated enforcement of the statute by shareholders of the corporate violators. The Court articulated four factors which consider:

1. whether the plaintiff is one of the class for whose especial benefit the statute was enacted;
2. whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;
3. whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff;
4. whether the cause of action is one traditionally relegated to state law.[49]

Since *Cort*, courts[50] have relied in varying degrees on these four factors to determine whether private causes of action can be implied to enforce sections 13 and 14 of the Williams Act.

### B. *Limiting Private Causes of Action*

In 1979, the Supreme Court began to limit implied private actions under the securities laws. In *Touche Ross & Co.* v. *Redington*[51] and *Transamerica Mortgage Advisors, Inc. v. Lewis*,[52] the Court declined to imply private causes of action under section 17(a) of the Securities Exchange Act[53] and section 206 of

---

47. The Court wrote: "The legislation was primarily concerned with corporations as a source of . . . possible corrupting influence, and not directly with the internal relations between the corporations and their stockholders." *Id.* at 82. "[I]n this instance the remedy sought would not aid the primary congressional goal." *Id.* at 84.

48. The Court wrote: "[T]here is no indication whatever in the legislative history of § 610 which suggests a congressional intention to vest in corporate shareholders a federal right to damages for violations of § 610." *Id.* at 82.

49. *Id.* at 78.

50. *See infra* text accompanying notes 61, 69-71, 78-84, 93, 118, 125.

51. 442 U.S. 560 (1979).

52. 444 U.S. 11 (1979).

53. In 1972, section 17(a), as set forth in 15 U.S.C. § 78q(a) (1970 ed.) read as follows:

> Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 78q of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and

the Investment Advisers Act of 1940,[54] respectively.

In *Touche Ross,* the trustee of a liquidated securities brokerage firm[55] attempted to hold the accounting firm, Touche Ross, liable for damages for an allegedly improper audit of the brokerage firm's financial condition. The trustee asserted that Touche Ross violated section 17(a)[56] of the Exchange Act which

---

> other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

*Id.* Section 17 of the 1934 Act was substantially amended by the Securities Acts Amendments of 1975. § 14, 89 Stat. 137. The present § 17(a)(1) contains essentially the same language as the first sentence of the 1972 version of § 17(a). Compare 15 U.S.C. § 78q(a) (1970 ed.) with 15 U.S.C. § 78q(a)(1) (1976 ed.).

54. 15 U.S.C. § 80b-6 (1976) provides:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
>
> (3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this pargraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;
>
> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

*Id.*

55. Weis Securities, Inc. (Weis) was a securities brokerage firm registered as a broker dealer with the SEC and a member of the New York Stock Exchange. In 1973, the Securities Investor Protection Corporation (SIPC), a nonprofit organization of securities dealers established by Congress, learned of Weis' unstable financial position. The SIPC petitioned the United States District Court for the Southern District of New York to appoint a trustee to protect the assets of Weis' customers.

During the subsequent liquidation of Weis, the assets appeared to be insufficient to cover all the claims and the trustee, along with the SIPC, sued Touche Ross for damages arising from their allegedly improper audit and certification. The trustee alleged that if a proper audit had been conducted, the true position of Weis would have been discovered earlier and less adverse financial consequences would have taken place. Touche Ross & Co., v. Redington, 442 U.S. at 565-66.

56. *Id.* at 566.

requires broker-dealers to keep records and file reports with the SEC.[57] The Supreme Court noted that the section simply required proper record keeping and filing[58] and that Congress did not intend a private cause of action for anyone.[59] The Court also declined to give such effect to *Borak*[60] and *Cort*[61] whereby "virtually every provision of the Securities Act gives rise to an implied cause of action."[62] The Court instead wrote that "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."[63]

In *Transamerica,* the Court implied a cause of action in favor of a shareholder of a mortgage investment trust[64] under

---

57. *Id.* at 562.

58. *Id.* at 569.

59. *Id.* The Court wrote that there was an express cause of action against professionals, inclusive of accountants, under section 18(a) of the Exchange Act, 15 U.S.C. § 78r(a) (1976).

60. The Court wrote that in *Borak,* "a private cause of action was implicit in § 14(a). We do not now question the actual holding of that case, but we decline to read the opinion so broadly that virtually every provision of the Securities Acts gives rise to an implied private cause of action." *Id.* at 577 (citations omitted).

61. In regards to the SIPC and the trustee's reliance on *Cort,* and its rationale of using private causes of action to effectuate the purpose of the legislation, the Court "believe[d] such inquiries [had] little relevance to the decision of [the] case. It is true that in *Cort v. Ash,* the Court set forth four factors that it considered 'relevant' in determining whether a private remedy [was] implicit in a statute not expressly providing one. But the Court did not decide that each of these factors [was] entitled to equal weight." *Id.* at 575.

62. *Id.* at 577.

63. *Id.* at 575.

64. The plaintiff, a shareholder of Mortgage Trust of Am. (Trust), sued Trust, several trustees, Trust's investment advisor (Transamerica Mortgage Advisors, Inc.) (TAMA) and several affiliated corporations. In three causes of action the plaintiff alleged, *inter alia,* that the advisory contract between the Trust and TAMA was unlawful because both parties were not registered under the Investment Act and that the compensation was grossly excessive, that TAMA breached its fiduciary duty to the Trust by causing the Trust to purchase inferior securities, and that TAMA misappropriated profit investment opportunities for the benefit of the affiliated corporations. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. at 13. The complainant shareholders sought injunctive relief preventing performance of the contract, rescission of the contract, restitution of fees (all provided for under § 215 of the Investment Act) and for award of damages (§ 206 was used as a basis for asserting damages).

In its discussion of the plaintiff's claims under section 215 the Court wrote: "[W]hen Congress declared in "§ 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. at 24.

section 215 of the Investment Act,[65] which provides that contracts whose formation or performance would violate the Act shall be void.[66] The Court refused, however, to imply a cause of action under section 206,[67] the general antifraud provision of the Act, analogous to section 10(b) of the Exchange Act.[68] In reaching these dissimilar results, the Court narrowly read *Cort* and *Borak* and reasoned that no private cause of action could be implied where it is clear that Congress did not intend to create such a remedy.[69] Hence, as to section 215, the Court found that the plaintiff shareholder was intended to be protected by that section and could sue for injunctive relief thereunder.[70] As to plaintiff's action for damages under section 206, the Court determined that Congress was "unwilling to impose any potential monetary liability on a private suitor."[71] The Court's rationale, in *Transamerica,* as well as in *Touche Ross,* apparently centers on whether Congress intended a particular party to have an implied cause of action. The four factors of *Cort* may be illustrative of whether Congress intended to imply a private cause of action, but are certainly not determinative.

---

65. 15 U.S.C. § 806-15 (1976).

66. 15 U.S.C. § 80b-15 (1976) provides in part:

> Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

*Id.*

67. 15 U.S.C. § 80b-6 (1976). *See supra* note 54.

68. In his dissenting opinion, Justice White, joined by Justices Brennan, Marshall and Stevens, wrote: "The provisions of § 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6, are substantially similar to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(h) (1976), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1979) both of which have been held to create private rights of action for which damages may be recovered." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. at 25 n.1 (White, J., dissenting) (citations omitted).

69. *Id.* at 23-24.

70. *Id.* at 19.

71. *Id.* at 21.

### C. *Tender Offerors and Implied Private Causes of Action*

#### 1. Piper v. Chris-Craft Industries, Inc.

Prior to 1977, it was clear that tender offerors had standing to sue under the Williams Act.[72] In *Piper v. Chris-Craft Industries, Inc.*,[73] however, the Supreme Court denied standing to a tender offeror seeking relief under section 14(e) of the Williams Act. In that case, Chris-Craft, a manufacturer of recreational products, attempted to obtain control of Piper,[74] a family controlled manufacturer of light aircraft. The Piper family resisted, and ultimately foiled Chris-Craft's takeover attempt, by assisting a third company, Bangor Punta, in obtaining 50 percent of the outstanding stock of Piper.[75] Chris-Craft brought suit against Piper and Bangor Punta, seeking damages for alleged disclosure violations. The Supreme Court excluded tender offerors as benefitted parties under the Williams Act and thus denied Chris-Craft damages.

The Supreme Court based its decision in part on a narrow reading of the Williams Act and its legislative history, in stating:

> ['T]here is, as we have noted, no indication that Congress intended to create a damages remedy in favor of the loser in a contest for control. Fairly read, we think the legislative documents evince the narrow intent to curb the unregulated activities of tendor offerors. The expression of this purpose, which pervades the legislative history, negates the claim that tender offerors were

72. *See* Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 695-96 (2d Cir. 1975); Missouri Portland Cement Co. v. Corgill, Inc., 498 F.2d 851, 871 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); GAF Corp. V. Milsteen, 453 F.2d 709, 719-20 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 944-46 (2d Cir. 1969); Crane Co. v. Anaconda Co., 411 F. Supp. 1208 (S.D.N.Y. 1975); Applied Digital Data Systems Inc. v. Milgo Elec. Corp., 425 F. Supp. 1145, 1152 (S.D.N.Y. 1977).

73. 430 U.S. 1 (1977). Chief Justice Burger delivered the opinion of the Court and was joined by Justices Stewart, White, Marshall, Powell and Rehnquist. Justice Blackmun filed a concurring opinion. Justice Stevens dissented and was joined by Justice Brennan.

74. Chris-Craft began its bid by purchasing 13% of Piper's common stock on the open market, then publicly announced a cash tender offer for approximately one fifth of Piper's common stock. The offer was $12 over the market price. *Id.* at 5.

75. Piper approached Bangor Punta with an exchange offer of 31% of Piper's stock for the same number of shares of Bangor Punta stock. Piper secured Bangor Punta's promise to obtain as many outstanding shares of Piper stock as possible. These subsequent purchases effectively barred Chris-Craft's takeover bid. *Id.* at 6.

> intended to have additional weapons in the form of an implied cause of action for damages, particularly if a private damages action confers no advantage on the expressly protected class of shareholder-offerees . . . .[76]

Furthermore, the Court found "no hint in the legislative history, on which respondent so heavily relies, that Congress contemplated a private cause of action for damages by one of several contending offerors against a successful bidder or by a losing contender against the target corporation."[77]

The Court supported its interpretation of the Williams Act by using its analysis in *Cort v. Ash.*[78] The majority in *Piper* declined to recognize Chris-Craft as a party for whose benefit the statute was enacted.[79] Indeed, the Court remarked that the statute was enacted to regulate parties such as Chris-Craft — "to curb the unregulated activities of tender offerors."[80] Thus, the Court determined that there was no legislative intent to create a private cause of action for tender offerors,[81] and that implying one would be inconsistent with the underlying purpose of the statute.[82] Finally, the Court noted that it would be appropriate to relegate Chris-Craft to its remedy under the state law.[83] Chief Justice Burger left open the question "whether as a general proposition a suit in equity for injunctive relief, as distinguished from an action in damages, would lie in favor of a tender offeror under either §14(e) or Rule 10b-6."[84]

Mr. Justice Stevens, in a strenuous dissent, viewed tender offerors as having standing under section 14(e)[85] as provided by

---

76. *Id.* at 38. The Court stated: "[W]e hold only that a tender offeror, suing in its capacity as a takeover bidder, does not have standing to sue for damages under § 14(e)." *Id.* at 42 n.28.

77. *Id.* at 42. The Court stated: "[S]hareholder protection, if enhanced at all by damages awards as Chris-Craft contends for, can be more directly achieved with other, less drastic means more closely tailored to the precise congressional goal underlying the Williams Act." *Id.* at 40.

78. 422 U.S. 66 (1975).

79. Piper v. Chris-Craft Indus., Inc., 430 U.S. at 37.

80. *Id.* at 38.

81. *Id.*

82. *Id.*

83. *Id.* at 40-41.

84. *Id.* at 47 n.33.

85. *Id.* at 55 (Stevens, J., dissenting).

*J.I. Case Co. v. Borak.*[86] Regarding the shareholder's implied private cause of action to enforce the proxy statement disclosure requirements, Justice Stevens noted that "[s]uch a remedy was regarded as essential for the protection of investors because practical considerations made it impossible for the SEC to enforce the . . . proxy requirements completely and effectively. This practical concern applies with even greater force to tender offers which are processed on a highly expedited schedule."[87] The *Borak* decision also provided support for Justice Stevens' position that tender offerors should be able to enforce section 14(e).[88] Assuming private rights of action could be implied to ensure full compliance with the statute, argued Justice Stevens, then "the remedy must be available to the litigants who are most vitally interested in effective enforcement."[89]

The *Piper* dissent further focused on practical considerations in deciding that tender offerors should have standing to sue for damages. Tender offerors have the most to gain from enforcement of the statute, and the most to lose if the disclosure requirements are not met.[90] Also, the tender offerors are in the best position to detect any prohibited conduct.[91] The tender offerors, as well, are the best suited to litigate the case.[92]

Justice Stevens' considerable reliance on *Borak* and a concern for practical considerations obviated the necessity of relying on *Cort*[93] to imply a cause of action under the statute. In *Borak* and *Piper,* reasoned Justice Stevens, there was "at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone"[94] and, furthermore, a failure to imply a tender offeror's private action would hinder the congressional purpose.[95] Justice Stevens concluded that that the four-

86. 377 U.S. 426 (1964).

87. Piper v. Chris-Craft Indus., Inc., 430 U.S. at 59-60 (Stevens, J., dissenting).

88. *Id.* at 61 (Stevens, J., dissenting) (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).

89. Piper v. Chris-Craft Indus., Inc., 430 U.S. at 61 (Stevens, J., dissenting).

90. *Id.* at 62 (Stevens, J., dissenting).

91. *Id.* (Stevens, J., dissenting).

92. *Id.* at 68 (Stevens, J., dissenting). *See infra* text accompanying note 194.

93. 422 U.S. 66 (1975).

94. Piper v. Chris-Craft Indus., Inc., 430 U.S. at 66 (Stevens J., dissenting) (quoting Cort v. Ash, 422 U.S. at 79).

95. *Id.* (Stevens, J., dissenting) (quoting Cort v. Ash, 422 U.S. at 85).

part *Cort* test[96] need not be addressed in depth because of the absence of the aforementioned factors.[97]

2. *Post* Piper

Soon after Piper, and before *Touche Ross*[98] and *Redington,*[99] two lower federal courts granted tender offerors standing to sue for injunctive relief under the Williams Act. In *Humana, Inc. v. American Medicorp., Inc.,*[100] a thwarted tender offeror seeking injunctive relief against a target corporation for alleged material misrepresentations under section 14(e) of the Exchange Act,[101] attempted to join the competing tender offerors in the action.[102] Humana alleged that the competing tender offerors violated the section 14(e) disclosure requirements by supplying incomplete information on their own management and its tender offer.[103] The issue faced by the District Court for the Southern District of New York was "whether, in light of *Piper,* and offeror (Humana) has standing to sue a competing offeror . . . for injunctive relief."[104] The court resolved the issue in favor of Humana,[105] finding support in the Supreme Court's reservation in *Piper* concerning injunctive relief.[106] The court thus reasoned that: where shareholder protection can be achieved by less drastic means than damages, a private action for injunctive relief would be proper.[107] The exigency of the situation,[108] the nature

---

96. *Id.* (Stevens, J., dissenting) (quoting Cort v. Ash, 422 U.S. at 79, 84-85).

97. *Id.* at 67 (Stevens, J., dissenting).

98. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

99. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).

100. 445 F. Supp. 613 (S.D.N.Y. 1977).

101. *See supra* note 9.

102. The competing tender offerors were Trans World Airways and its wholly owned subsidiary Hilton International Co. The Court, in addressing the procedural background, wrote:

> Humana moved by Order to show cause to file a second amended and supplemental complaint to its action against Medicorp and to all [the competing tender offerors] as defendants; to state new causes of action relating to the [other tender offerors] competitive offer; and to request injunctive relief against [the compelling tender offerors].

Humana, Inc. v. American Medicorp., Inc., 445 F. Supp. at 614.

103. *Id.* at 616.

104. *Id.* at 614.

105. *Id.* at 616.

106. *Id.* at 615. *See supra* note 84 and accompanying text.

107. Humana, Inc. v. American Medicorp., Inc., 445 F. Supp. at 615. The court

of the relief sought,[109] and the benefit to be derived by full disclosure to the shareholders,[110] led the court in *Humana* to recognize a tender offeror's implied cause of action under section 14(e).[111]

The District Court for the Eastern District of Pennsylvania similarly restricted *Piper* to a tender offeror's action for damages. In *Weeks Dredging & Contracting, Inc. v. American Dredging Co.,*[112] the court held that the tender offeror (Weeks) had standing to seek injunctive relief against the target company (American) under section 14(e) of the Exchange Act.[113] The *Weeks* court reasoned that the "Supreme Court in *Piper* recognized the beneficial effects [of injunctive relief] when it said that 'in corporate control contests the stage of preliminary injunctive relief, rather than post contest lawsuits is the time when relief can best be given.' "[114] Moreover, the court simply chose to recognize the tender offeror's standing "for the reasons stated in the *Humana* decision,"[115] though it chose not to expand on any particular theme.

In 1981, a third district court granted standing to a tender offeror seeking to enjoin a target corporation from purchasing its own stock as a defensive maneuver. In *Crane Co. v. Harsco*

wrote: "No remedy can be more 'closely tailored' to the needs of [tender offer situations] than injunctive relief, when appropriate. The very purpose of injunctive relief is to afford a remedy precisely contoured to the requirements of the situations." *Id.*

108. Humana's offer was set to expire 13 days after the district court opinion was rendered.

109. *See supra* note 107.

110. The court wrote: "In sum, the thrust of the complaint is to request increased disclosure of the terms of the [competing] offer and the character of the [competing] management so that Medicorp. stockholders may more intelligently choose between . . . Humana and [the competing] offers." Humana, Inc. v. American Medicorp., Inc., 445 F. Supp. at 616.

111. *Id.* at 615.

112. 451 Supp. 468 (E.D. Pa. 1978).

113. Weeks alleged that material representations and omissions ôccurred when remarks made by the President of American Dredging Co. appeared in a financial newspaper. The remarks, said to violate section 14(e), concerned the valuation of American stock and the financial condition of the corporation. *Id.* at 471-72.

114. Weeks Dredging & Contracting, Inc. v. American Dredging Co., 451 F. Supp. at 476 (quoting Piper v. Chris-Craft Indus., Inc., 430 U.S. at 42).

115. Weeks Dredging & Contracting, Inc. v. American Dredging Co., 451 F. Supp. at 476.

*Corp.*,[116] the court first addressed the question of whether the tender offeror had standing to assert its claims.[117] To answer in the affirmative, as the court did, it was necessary to distinguish the *Piper* decision and to satisfy the four-part *Cort* test.[118] The court also had to overcome the limitations placed on implying causes of action by the *Touche Ross* and *Transamerica* cases.[119]

The court in *Crane* distinguished *Piper* by paralleling the approaches adopted in *Humana*[120] and *Weeks*:[121] the injunctive nature of the relief sought by the tender offeror neutralizes the concerns of the majority in *Piper*.[122] The court noted that the additional disclosure compelled by the injunctive nature of the action would aid the shareholders to make informed decisions.[123] It further noted that damages do not aid in disclosure, but rather impede tender offerors and penalize shareholders.[124]

The protection of the shareholders led to the *Crane* court's determination that the four *Cort* factors did not preclude a tender offeror from being denied a private cause of action.[125] Rather than apply the four factors (class benefit, legislative intent, consistency with the legislative scheme, and whether the cause of action is traditionally relegated to state law) to the section at issue, 13(e), the court applied the factors to the Williams

116. 511 F. Supp. 294 (D. Del. 1981).

117. Crane commenced a tender offer for 15% of the outstanding Harsco stock. The Delaware District Court denied Harsco's motion to enjoin the offer on violations of federal securities laws and on antitrust grounds. Crane then moved to prevent Harsco from purchasing 15% of its outstanding shares, alleging a violation of section 13(e) of the Williams Act. The court granted a temporary restraining order, ultimately denying Crane's prayer for injunctive relief. *Id.* at 297. The court held that Crane, the tender offeror, failed to establish sufficient grounds to justify an injunction under section 13(e) of the Exchange Act. *Id.* at 306.

118. *See supra* text accompanying note 49.

119. *See supra* text accompanying notes 51-71.

120. 445 F. Supp. 613.

121. 451 F. Supp. 468.

122. Crane Co. v. Harsco Corp., 511 F. Supp. at 299-300 (citing Piper v. Chris-Craft Indus., Inc., 430 U.S. at 42).

123. The court wrote: "Crane itself would not directly benefit from injunctive relief; rather, the shareholders would be protected from management's manipulative or fraudulent actions which would otherwise nullify the informational advantages granted by the Act. Crane Co. v. Harsco Corp., 511 F. Supp. at 300.

124. The court wrote: "[D]amage awards to parties other than the protected class of shareholders would not serve to insure disclosure and might even impede attractive tender offers." *Id.*

125. *Id.*

Act in general to determine if a tender offeror has standing.[126] With this broad approach, the court had little trouble satisfying the second, third, and fourth factors.[127] As to the first, however, the *Crane* court adopted a pragmatic approach. Realizing that the tender offeror was not the intended beneficiary, the court circumvented this requirement by asserting that the shareholders, as the intended beneficiaries, would indeed by benefitted if the tender offerors would be allowed to assert the claims of misrepresentation and nondisclosure.[128] The court perceived the tender offeror as possessing the "timely knowledge of misrepresentations and thus the practical opportunity to enforce" the provisions of the Williams Act.[129]

## V. Decision of the Court

### A. *Majority Opinion*

The *Mobil* court first analyzed whether *Piper* prevented defeated tender offerors from seeking relief.[130] The court observed that although in *Piper* a defeated tender offeror could not maintain a cause of action for damages, the Supreme Court did not rule on the availability of private causes of action for injunctive relief.[131] The Supreme Court's express reservation of "whether as a general proposition a suit in equity for injunctive relief . . . would lie in favor of a tender offeror under . . . section 14(e),"[132] in fact provided the *Mobil* court the opportunity to look beyond the limitations of *Piper*[133] and determine whether a private

126. Section 13(e) was only discussed in the context of the fourth requirement: whether the cause of action is relegated to state law. *Id.* at 301. This factor, however, is least important. All four factors should have been analyzed to determine whether a private cause of action can be implied under section 13(e).

127. 511 F. Supp. at 300-01.

128. *Id.* at 300. This practical view of tender offer situations is shared by the noted commentators, Messrs. Aranow, Einhorn and Berlstein who stated that it "is *essential* to ensure that shareholders receive complete and accurate information concerning tender offers from the management of the target as well as from the offeror." ARANOW, *supra* note 32, at 110.

129. Crane Co. v. Harsco Corp., 511 F. Supp. at 300.

130. Mobil Corp. v. Marathon Oil Co., 669 F.2d at 370.

131. *Id.* (citing Piper v. Chris-Craft Indus., Inc., 430 U.S. at 47). *See* discussion of *Piper, supra* notes 72-89 and accompanying text.

132. Piper v. Chris-Craft Indus., Inc., 430 U.S. at 47 n.33.

133. *See* Humana, Inc. v. American Medicorp., Inc., 445 F. Supp. at 614.

cause of action for injunctive relief could be implied for a frustrated tender offeror. In making such a determination, the majority relied primarily on the *Cort v. Ash*[134] decision.

The first of the four *Cort* factors applied by the *Mobil* majority was "whether the plaintiff is one of the class for whose especial benefit the statute was enacted."[135] The court, without hesitation, decided that Mobil did not meet this criterion.[136] As a tender offeror, Mobil was not an intended beneficiary of the Williams Act. The court, however, reasoned that the practical purpose of the first *Cort* factor is ultimately to benefit the shareholder: "A preliminary injunction against manipulative practices would be the only means of preserving the free, informed choice of shareholders that the Williams Act was designed to protect."[137] Tender offerors are often in the best position to spot and control manipulative acts prohibited by the Williams Act.[138] Thus, the majority found that Mobil should be allowed to maintain a cause of action for injunctive relief for the benefit of the Marathon shareholders.

The second factor applied by the majority was whether there exists "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one."[139] The court, at best, could only conclude that injunctive relief was not inconsistent with the legislative intent, as an action for damages was.[140] The court reasoned that injunctive relief acted to protect

134. 422 U.S. 66 (1975). *See supra* notes 44-50 and accompanying text.

135. Mobil Corp. v. Marathon Oil Co., 669 F.2d at 371 (emphasis in original).

136. Id. at 371.

137. *Id.*

138. The court, in describing the dynamics of a tender offer situation, wrote:

> In a tender offer battle, events occur with explosive speed and require immediate response by a party seeking to enjoin the unlawful conduct. Issues such as incomplete disclosure and manipulative practices can only be effectively spotted and argued by parties with complete knowledge of the target, its business, and others in the industry. The tender offeror has frequently made intensive investigations before deciding to commence its offer, and may often be the only party with enough knowledge and awareness to identify nondisclosure or manipulative practices in time to obtain a preliminary injunction.

*Id.*

139. *Id.* at 372.

140. The *Mobil* court recognized the Supreme Court's position in *Piper* that an action for damages could not stand because it would be inconsistent with the legislative intent of the Williams Act. *Id.*

shareholders because it "serves merely to prevent the manipulative practices at which the Williams Act was aimed . . . ."[141] Therefore, a cause of action for injunctive relief could be implied as a means of achieving such protection, and, as such, furthers the purpose of the Williams Act.

The third factor applied by the court attempted to match the remedy sought with the underlying purpose of the legislative scheme.[142] The majority in *Mobil* reasoned that injunctive relief "would protect *all* Marathon shareholders by preventing management or competing tender offerors from failing to disclose fully or from using manipulative tactics."[143] The court felt that injunctive relief would protect the interests of shareholders, provide full disclosure, and is therefore consistent with the statutory scheme.[144]

The fourth factor applied by the court was whether "the cause of action is one traditionally relegated to state law."[145] The court concluded that common law has been inadequate to prevent nondisclosure or manipulation;[146] and Ohio law "is by no means adequate to serve as a substitute for an action under section 14(e)."[147] Because the Ohio statute was inadequate, the court determined that this issue was subject to federal securities law.[148]

After concluding that Mobil's suit for injunctive relief was consistent with both the underlying purpose of the Williams Act and the Supreme Court decision of *Cort v. Ash*,[149] the majority examined whether the Supreme Court's recent constriction on implying private causes of action under the securities laws affected Mobil's bid for injunctive relief.[150] The Court conceded

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. The court wrote: "We are mindful that as a general rule the Supreme Court has cautioned against the implication of private causes of action under the securities laws . . . ." *Id.*

that the general rule is to limit private causes of action.[151] The special circumstances of the case, reasoned the Court, led to a conclusion inapposite with such a rule. The circumstances noted by the Court were: the timeliness of the action (at a relatively early stage in the takeover bid),[152] the status of the plaintiff (tender offerors as plaintiffs possess the requisite information to successfully challenge Williams Act violations),[153] the nature of the relief sought (injunctive relief is more closely tailored to the underlying goal of the Williams Act of shareholder protection than that of damages as sought in *Piper*)[154] and finally, that the antitrust considerations in the companion case, *Marathon Oil Co. v. Mobil Corp.*, were still appealable.[155]

## B. *The Dissent*

In his dissent, Judge Merritt considered all of Marathon's disclosure violations moot because of the prior disposition of the antitrust case.[156] The dissent reasoned that Mobil's ability to raise the Williams Act violations rested upon its ability to make a tender offer for Marathon stock.[157] Since Mobil was barred from making a tender offer due to the antitrust considerations, it could not argue that Marathon improperly defended against the offer by manipulative acts. The dissent concluded that the manipulation question could best be recognized and raised by an ordinary shareholder or a competing tender offeror[158] since "the interests of the stockholders are not represented" by Mobil.[159] Thus, Judge Merritt argued that the court should not have considered the standing to sue issue.[160]

151. *Id. See supra* text accompanying notes 60-63.

152. Mobil Corp. v. Marathon Oil Co., 669 F.2d at 373.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 378 (Merritt, J., dissenting).

157. *Id.* (Merritt, J., dissenting).

158. *Id.* (Merritt, J., dissenting).

159. *Id.* (Merritt, J., dissenting).

160. *Id.* (Merritt, J., dissenting).

## VI. Analysis

The majority opinion in *Mobil Corp. v. Marathon Oil Co.*[161] is the product of a court which has rendered a proper decision but has been judicially dishonest in its application of the law. The *Mobil* court's analysis of whether Mobil had standing under section 14(e) paralleled the approach adopted by the *Piper* majority in form, but not in substance. Both courts examined the *Cort* factors[162] to determine whether a cause of action could be implied under the statute. The *Mobil* court, however, applied the rationale of the *Piper* dissent[163] to the factors discussed by the *Piper* majority.[164] This strained use of legal precedent illustrates the *Mobil* court's determination to reduce the effect of *Piper* on granting tender offerors private causes of action. Indeed, the court undertook to establish a tender offeror's implied cause of action on its own initiative — neither party raised the standing issue at trial.[165]

In their analyses of the first *Cort* factor (class of beneficiaries of the statute), both the *Mobil* majority and Justice Stevens applied a test of practicality.[166] Although the tender offeror was not among the intended benefitted class, both reasoned that the tender offeror was best suited to protect the shareholders' interests.[167] As practical and fair as this seems, the fact remains that *Mobil*, as tender offeror, is not in the class contemplated by

161. 669 F.2d 366 (6th Cir. 1981).

162. *See supra* text accompanying note 49.

163. In his dissenting opinion, Justice Stevens read the Williams Act as broadly implying a cause of action. He noted that private actions were an effective way of enforcing the statute and that all parties interested in full disclosure must have such actions available to them. Piper v. Chris-Craft Indus., Inc., 430 U.S. at 61-62. Additionally, tender offerors have greater financial and data resources to detect and challenge any Williams Act violations. *Id.* at 68. *See* ARANOW, *supra* note 32, at 108-10 (better position of tender offerors to bring suit for injunctive relief evidences congressional intent to allow such relief).

164. *See supra* notes 135-47 and accompanying text.

165. The court wrote that "although the issue has not been raised by either party, out of an abundance of caution we believe it necessary to determine whether Mobil has a private cause of action for injunctive relief under section 14(e) of the Williams Act." Mobil Corp. v. Marathon Oil Co., 669 F.2d at 370.

166. *See* Mobil Corp. v. Marathon Oil Co., 669 F.2d at 371; Piper v. Chris-Craft Indus., Inc., 430 U.S. at 67 (Stevens, J., dissenting).

167. *See supra* note 166.

Congress to benefit from the Williams Act.[168] The legislative history is clear on the point that neither the tender offeror nor the target management was meant to benefit from the statute — only the shareholder.[169] It is undeniable that the shareholders will benefit from the tender offeror's suit (increased disclosure), but the tender offeror also derives benefits. In *Mobil,* the tender offeror's offer was sustained and the competing tender offeror was temporarily enjoined. The court made a value judgment that in order to protect the integrity of the shareholders' decisions tender offerors will be allowed to bring injunctive suits to enforce the disclosure requirements of section 14(e).[170] The consequence of such a conclusion vis-a-vis the expanded role of the tender offeror in takeover situations appears inapposite with the *Piper* Court's legislative analysis of the Williams Act. As interpreted in *Piper,* the sponsors of the Williams Act were concerned with not tipping the scales in favor of the tender offeror or management.[171] As evidenced by the *Mobil* decision though, the tender offeror was able to play the role of the enforcer — a role traditionally relegated to the SEC[172] or target shareholder.[173]

The narrow issue presented by the first *Cort* factor, whether tender offerors can bring a private cause of action for the benefit of the shareholders even though they are not the intended beneficiary of the statute, proves difficult to reconcile in a logical manner. Nevertheless, the idea of shareholder protection as a sufficient justification for permitting tender offerors to pursue their desired injunctive relief is too compelling to dismiss. Indeed, the *Mobil* court wrote:

> We believe . . . that we can look to the practical realities of this type of action and determine that a cause of action is necessary to aid the shareholders of Marathon . . . .[174]

---

168. *See supra* note 31.

169. *See supra* note 37.

170. *See supra* note 9.

171. *See supra* notes 74-78 and accompanying text.

172. *See supra* note 34 and accompanying text.

173. *See supra* note 35 and accompanying text.

174. Mobil Corp. v. Marathon Oil Co., 669 F.2d at 371. This concept was used in Crane Co. v. Harsco Corp., 511 F. Supp. 294 (D. Del. 1981), though the *Mobil* court did not cite *Crane* in this regard. For a discussion of *Crane,* see *supra* notes 116-29 and

The *Mobil* majority further relied on the Stevens' dissent in analyzing the second *Cort* factor, congressional intent to create or deny a remedy. The majority conceded that Congress did not intend to give tender offerors a private remedy for damages.[175] The court asserted, however, that injunctive relief "has significantly different effects than a damage action" in that an injunction ensures full disclosure and prevents manipulative acts.[176]

The court's assertion that injunctive relief is a suitable remedy here is irrelevant to the necessary inquiry of whether Congress intended to create or deny a remedy. Such an inquiry requires the court to look to the language of the statute and the legislative history.[177] The court could have cited the language which indicates that Congress would, at the very least, have contemplated a tender offeror's cause of action if it were for the benefit of the shareholders.[178]

By not addressing whether Congress intended to create a remedy for tender offerors, the *Mobil* court avoided dealing with the *Touche Ross*[179] & *Transamerica*[180] decisions. Those cases illustrated that the central inquiry in implying private causes of action is the existence of congressional intent to create one.[181] If

---

accompanying text.

175. Mobil Corp. v. Marathon Oil Co., 669 F.2d at 371.

176. The court wrote:

> On the other hand, an injunctive action by a tender offeror has significantly different effects than a damage action. First, clear benefit is derived by the shareholders of the target. An injunction would protect the Marathon shareholders from making their decisions whether to sell without full information. As such, it furthers the purpose of the Williams Act. Second, an injunctive action does not tip the balance in favor of one tender offeror. This type of action serves merely to prevent the manipulative practices at which the Williams Act was aimed without deterring management or competing offerors from engaging in the battle.

*Id.* at 371-72.

177. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. at 38; Touche Ross & Co. v. Redington, 442 U.S. at 575-76.

178. The congressional record for the Williams Act contains the following language: "The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case." H.R. 17-11, 90th Cong., 1st Sess., 113 Cong. Rec. 854-55 (1967).

179. 442 U.S. 560 (1979). For a discussion of the case, see *supra* notes 55-63 and accompanying text.

180. 444 U.S. 11 (1979). For a discussion of the case, see *supra* notes 63-71 and accompanying text.

181. *See supra* text accompanying notes 63 & 71.

the *Mobil* majority had followed those precedential cases, it would not have gauged the effect of the relief sought by Mobil, but would have rather concentrated on whether the statute granted private rights to any class[182] or whether the statute proscribed any conduct as unlawful.[183] The *Touche Ross* and *Transamerica* Courts held that absent these factors, no cause of action could be implied.[184] Section 14(e), however, does prohibit manipulative practices in the sale of securities and inadequate disclosure.[185] In *Mobil,* USS, Inc. and Marathon did not provide sufficient information on their agreements and options and also conducted manipulative practices.[186] Because these are articulable violations of section 14(e), the *Mobil* court, at this point, should have asserted that Mobil's private cause of action is consistent with the congressional intent to create causes of action as interpreted in the *Touche Ross* and *Transamerica* cases.

Had the *Mobil* court adopted this line of reasoning, there would have been no need to modify the first *Cort* factor as was done.[187] Indeed, the Supreme Court in *Touche Ross* indicated that not all the *Cort* factors had to be given equal weight.[188] Thus, the majority could have relied primarily on the *Touche Ross* and *Transamerica* rationales of stressing congressional intent.[189]

The *Mobil* majority's analysis of the third *Cort* factor, the private remedy must be consistent with the legislative scheme, also illustrates its reliance on the Stevens' dissent. To limit the effect of *Piper,* the *Mobil* majority successfuly distinguished the injunctive relief sought by *Mobil* from the damages sought in *Piper.* As Stevens had done,[190] the majority astutely reasoned

182. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. at 24; Touche Ross & Co. v. Redington, 442 U.S. at 576.

183. *See supra* note 182.

184. *Id.*

185. *See supra* note 9.

186. *See supra* notes 10-11 & 18-20 and accompanying text.

187. *See supra* notes 167-74 and accompanying text.

188. 442 U.S. at 575. The Supreme Court in *Touche Ross* wrote that "the court [in Cort v. Ash] did not decide that each of these factors is entitled to equal weight." *Id.*

Indeed, Justice Stevens in the *Piper* dissent stated that the *Cort* decision did not regard the "especial class" factor as essential. Piper v. Chris-Craft Indus., Inc., 430 U.S. at 67 (Stevens J., dissenting).

189. *See supra* notes 59 & 69 and accompanying text.

190. Piper v. Chris-Craft Indus., Inc., 430 U.S. at 62 (Stevens, J., dissenting).

that tender offerors hold the necessary information to detect any section 14(e) violations.[191] Keeping in mind the legislative purpose of protecting shareholders, arming tender offerors with a private cause of action is consistent with that purpose if tender offerors can act quickly to enforce section 14(e) disclosure requirements. The *Mobil* court's reasoning on this narrow issue was supported by the facts: the Marathon shareholders were neither fully apprised of the Marathon-USS, Inc. agreements,[192] nor were they aware that those respective managements had violated the securities laws by their "lock-out" options.[193] Had Mobil not held a vested interest in the ultimate dispositions of Marathon's assets, it would not have compelled, by court order, the Marathon Board of Directors to make further disclosure of the USS, Inc. merger. The potential result: the Marathon shareholders might have made uninformed investment decisions. Any such occurrence dramatically underscores the need for arming tender offerors with private causes of action under section 14(e) for injunctive relief.

The majority's claim that a tender offeror's injunctive action may be the *only* means of assuring the target shareholders a fully informed free choice appears extreme; it overlooks the shareholders of Marathon Oil Co. as potential plaintiffs. The nature of tender offer situations, however, shifts the analysis, again, from the theoretical level to the practicalities at hand. For shareholders to bring an injunctive action to enjoin their own management from participating in manipulative practices and to ensure adequate disclosure, they must first have sufficient knowledge to identify any such practices or any inadequate disclosure. Second, they must have sufficient resources to bring a suit. Third, they must overcome the logistics problems of coordinating other shareholders. Thus, a well informed and zealous tender offeror is probably better suited to sue for injunctive relief.[194]

---

191. Mobil Corp. v. Marathon Oil Co., 669 F.2d at 372.

192. *See supra* text accompanying notes 18-20.

193. *See supra* notes 17-22 and accompanying text.

194. *See supra* text accompanying note 92. Justice Stevens wrote in his *Piper* dissent that:

> [P]rotection of tender offerors is not only consistent with protection of shareholders. It is also indispensable to protecting shareholders. Individual shareholders

## VII. Conclusion

The Sixth Circuit Court of Appeals' holding in *Mobil Corp. v. Marathon Oil Co.* revitalizes a remedy for tender offerors.[195] If injunctive relief is sought, courts may circumvent the Supreme Court's holding in *Piper v. Chris-Craft Industries, Inc.* which barred a tender offeror's standing to sue for damages. The Sixth Circuit joined district courts from three other circuits in overcoming the *Piper*-inspired moratorium on allowing tender offerors to bring private causes of action under the federal securities laws. The *Mobil* decision also overcomes the Supreme Court's recent trend restricting private causes of action in general.[196] Since, in many ways, granting tender offerors injunctive relief does protect investors, this cause of action does not appear inconsistent with the underlying purpose of the Williams Act of protecting investors. The grant of such a remedy, however, may indeed be tipping the scales in favor of the tender offeror in takeover situations, a result clearly unintended by the Williams Act. In view of the paradox thus presented, it is necessary that the Supreme Court address the issue of whether tender offerors should be entitled to injunctive relief.

*Mark F. Liscio*

---

often lack the capacity to litigate these cases effectively. Few indeed could afford to pursue the course Chris-Craft has taken of hiring counsel with experience in complex litigation of this kind to litigate through a preliminary injunction, discovery, trial on liability, another trial on damages, three appeals to the Second Circuit, including an en banc, and three petitions to this Court. Thus, the most realistic deterrent to fraud on shareholders is a damages suit brought by the opposition in the tender contest. Moreover, disallowing such suits creates an incentive to violate the Act in retaliation for violations by the other side. When no effective judicial remedy is available, self-help is more attractive. Finally a damages remedy for the tender offeror is necessary for the protection of one particular class of shareholders: those shareholders of target corporations who accept an exchange offer and thereby become shareholders of the tender offeror.

Piper v. Chris-Craft Indus., Inc., 430 U.S. at 68 (Stevens, J., dissenting).

195. *See supra* note 72 and accompanying text. Humana, Inc. v. American Medicorp., Inc., 445 F. Supp. 613 (S.D.N.Y. 1977); Weeks Dredging & Contracting, Inc. v. American Dredging Co., 451 F. Supp. 468 (E.D. Pa. 1978); Crane Co. v. Harsco Corp., 511 F. Supp. 294 (1981). For a discussion of *Humana*, see *supra* notes 100-11; for a discussion of *Weeks*, see *supra* notes 112-15 and accompanying text; for a discussion of *Crane*, see *supra* notes 116-29 and accompanying text.

196. *See supra* notes 50-70 and accompanying text.