SCHREIBER v. BURLINGTON NORTHERN, INC.: MISREPRESENTATION AS A NECESSARY ELEMENT OF A SECTION 14(e) CAUSE OF ACTION

I. INTRODUCTION

In 1968, Congress passed the Williams Act,[1] an amendment to the Securities Exchange Act of 1934,[2] designed to insure that target shareholders faced with a tender offer will have adequate information with which to make a knowledgeable decision regarding the tender or retention of their shares.[3] Although section 14(e) of the Williams Act proscribes "any fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer,"[4] Congress failed to define exactly the intended meaning of the term "manipulative" as used in this context.[5] To fill this definitional void, federal courts have had to apply their interpretive skills to define "manipulative" in accordance with Congressional intent.

A conflict developed among the circuits[6] regarding the acts which were to be deemed "manipulative" by the federal courts under

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1. Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) (1982). Section 14(e) provides in pertinent part:

> 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.

2. Pub. L. No. 73-291, 48 Stat. 881, 73d Cong., 2d Sess. (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk).

3. *See Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 15 (1967) (statement of Manuel Cohen, Chairman, SEC), *cited in* Comment, *Section 14(e) of the Williams Act: Can There Be Manipulation With Full Disclosure or Was the* Mobil *Court Running on Empty?*, 12 HOFSTRA L. REV. 159 (1983)) [hereinafter Comment, *Manipulation*].

4. 15 U.S.C. § 78n(e). *See supra* note 1 (pertinent part of § 14(e)).

5. Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 374 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

6. Prior to the ruling by the Supreme Court in Schreiber v. Burlington N. Inc., 472 U.S. 1 (1985), the SEcond, Sixth, Seventh, and Eighth Circuits had given the term "manipulative" two conflicting interpretations regarding the scope of the acts prohibited by the § 14(e). *See infra* text accompanying notes 24-118. 118.

section 14(e). Therefore, the United States Supreme Court granted *certiorari* in *Schreiber v. Burlington Northern, Inc.*[7], in order to make a definitive ruling as to the meaning of the term.[8] The *Schreiber* Court held that to state a cause of action under section 14(e), the plaintiff must allege that the defendant made some omission or misstatement of material fact.[9] In so holding, the Court precluded the federal courts from reviewing the substantive fairness of tender offers under section 14(e), limiting the courts' inquiry merely to the question of full disclosure. Not only did this decision resolve a conflict among the circuit courts of appeal, but it also reaffirmed the Supreme Court's view of the role of federal securities regulation with respect to that of the states.[10]

II. BACKGROUND

A. *The Legal Backdrop*

1. Introduction

As previously mentioned, the Supreme Court granted *certiorari* in *Schreiber* in order to resolve a split of authority among the circuit courts of appeal as to whether the term "manipulative" as used in section 14(e) of the Williams Act necessarily includes the element of misrepresentation or nondisclosure.[11] The following sections present a brief background and legislative history of the Williams Act, as well as the various circuit court cases which have interpreted the section 14(e) meaning of "manipulative."

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7. 469 U.S. 815, *aff'd*, 472 U.S. 1 (1985).

8. Schreiber v. Burlington N., Inc., 472 U.S. 1 (1985). "We granted certiorari to resolve a conflict in the Circuits over whether misrepresentation or nondisclosure is a necessary element of a violation of § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e)." *Id.* at 2. The Court further stated: "The Court of Appeals for the Sixth Circuit has held that manipulation does not always require an element of misrepresentation or nondisclosure. The Court of Appeals for the Second and Eighth Circuit have applied an analysis consistent with the one we apply today." *Id.* at 5 n.3 (citations omitted).

9. *Id.* at 12-13.

10. The Supreme Court has mandated that with regard to the substantive fairness of corporate decisions, the federal courts must defer to the law of the states. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478 (1977). *See also infra* text accompanying notes 182-213.

11. *See* 15 U.S.C. § 78n(e).

2. The Williams Act

The Williams Act[12] was passed in 1968 as an amendment to the Securities Exchange Act of 1934.[13] The main impetus for enacting this amendment was the gap which existed in the federal regulatory scheme governing tender offers.[14] This gap was the result of the limited scope of the Securities Act of 1933,[15] which only required filing and disclosure when the offering involved an exchange of securities.[16] Because the federal legislation existing at the time had no comparable disclosure requirements for tender offers where cash was the consideration given in exchange for the target stock, cash offers became quite popular with tender offerors who wished to surprise the target's management by working in relative secrecy with limited disclosure of material facts.[17]

The main evil which the Williams Act addresses is the situation where an investor is faced with a cash tender offer and has been provided with minimal information regarding the identity of the offeror, its plans for the target company, its management ability, or

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12. *Id.* §§ 78m, 78n.

13. Pub. L. No. 73-291, 48 Stat. 881, 73d Cong., 2d Sess. (1934) (codified as amended 15 U.S.C. §§ 78a-78kk).

14. *See* W. CARY & M. EISENBERG, CORPORATIONS, CASES AND MATERIALS 1561-64 (5th ed. unabr. 1980) [hereinafter CARY & EISENBERG]; A. CONARD, R. KNAUSS & S. SIEGEL, ENTERPRISE ORGANIZATIONS, CASES, STATUTES & ANALYSIS 1046 (3d ed. 1982) [hereinafter ENTERPRISE ORGANIZATIONS].

15. *See* Pub. L. No. 73-22, 48 Stat. 74, 73d Cong., 1st Sess. (1933) (codified as amended 15 U.S.C. §§ 77a-77aa).

16. *See* CARY & EISENBERG, *supra* note 14; ENTERPRISE ORGANIZATIONS, *supra* note 14. The 1933 Act requires an issuer of a new security to provide an explanation as to the determination of the offering price, and the intended use of the proceeds. There also must be disclosure regarding the issuer's business and assets, a statement as to its history and past financial performance, its controlling or controlled persons, its management and their compensation, material contracts, its capital structure, including the terms of other outstanding securities, as well as certified financial statements. The 1933 Act imposes these filing and disclosure requirements for new securities being sold for the first time by the issuer. 15 U.S.C. § 77aa. Because an offer to trade the target stock for a new issue of the tenders offeror's stock is, in effect, a sale of the new issue, the transaction was within the purview of the 1933 Act. Since this was not so with a cash tender offer, tender offerors could effectively avoid the reporting and disclosure requirements of the 1933 Act by offering cash in exchange for the target security. Congress passed the Williams Act to place this type of transaction expressly within the scope of the 1934 disclosure requirements, which are substantially the same as the 1933 Act. CARY & EISENBERG, *supra* note 14; 15 U.S.C. §§ 78m, 78n.

17. CARY & EISENBERG, *supra* note 14; ENTERPRISE ORGANIZATIONS, *supra* note 14.

its present interest in the target.[18] Under these circumstances, the investor is without adequate information to enable him to make an intelligent decision regarding the tender or retention of his shares.[19]

The Williams Act attacked this problem with disclosure requirements and rules regarding the mechanics of tender offer procedures to prevent fraud and misrepresentation.[20] There was concern at the time of its enactment, as there is today, that good faith takeover bids might be discouraged by regulation of the area, while at the same time, a *laissez-faire* approach might not fully protect the investing public.[21] In an effort to be evenhanded as between tender offerors and existing management, Congress steered a course which was "designed to require full and fair disclosure for the benefit of investors . . . ."[22]

3. The Sixth Circuit Approach

One of the broadest constructions of the meaning of "manipulative"[23] as used in section 14(e) of the Williams Act was rendered by the Sixth Circuit in *Mobil Corp. v. Marathon Oil Co.*[24] In that case, Mobil Corporation was threatening Marathon Oil with

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18. H.R. REP. No. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2812; CARY & EISENBERG, *supra* note 14.

19. 113 CONG. REC. 855-856 (1967) (remarks of Sen. Williams). "In the rather common situation where existing management or third parties contest a tender offer, shareholders may be exposed to a bewildering variety of conflicting appeals and arguments designed to persuade them either to accept or to reject the tender offer." *Id. See also Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 33 (1967); *infra* note 22; CARY & EISENBERG, *supra* note 14. *See generally* Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholder Welfare*, 36 BUS. LAW. 1733 (1981) [hereinafter Easterbrook & Fischel, *Tactics*] (discussing economic effects, legal principals, and defensive tactics of tender offers).

20. CARY & EISENBERG, *supra* note 14; 15 U.S.C. §§ 78m, 78n.

21. H.R. REP. No. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813.

22. *See* Comment, *Manipulation*, *supra* note 3, at 163; *infra* note 168.

23. Although no other decision has reached the same result as was reached in *Mobil*, numerous decisions have implicitly recognized the Sixth Circuit's approach as valid. *See* Pacific Realty Trust v. APC Investments, Inc., 685 F.2d 1083 (9th Cir. 1982); Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980); Data Probe Acquisition Corp. v. Datatab, Inc, 568 F. Supp. 1538 (S.D.N.Y. 1983), *rev'd* 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984); Oklahoma Publishing Co. v. Standard Metals Corp., 541 F. Supp. 1109 (W.D. Okla. 1982); Whittaker Corp. v. Edgar, 535 F. Supp. 933 (N.D. Ill. 1982); Comment, *Manipulation*, *supra* note 3, at 172-78.

24. 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

a hostile tender offer.[25] In an effort to resist this takeover attempt, Marathon enlisted the aid of United States Steel (USS) to act as a "white knight" to bid against Mobil for control of Marathon.[26] To ensure USS's success in its effort to gain control of Marathon, the latter granted USS an option to purchase a large block of its treasury stock at a significantly lower price than was being offered by Mobil.[27] Marathon also granted USS an option to purchase its interest in the Yates oil field, the target's "crown jewel."[28] This latter option was effective only upon the successful takeover of Marathon by a tender offeror other than USS.[29] The Sixth Circuit determined that these options had the effect of giving USS an advantage over Mobil in the bidding for Marathon's shares, and therefore held that these "lock-up" options were manipulative acts within the scope of section 14(e), notwithstanding the full disclosure of all material information.[30]

The Sixth Circuit in reaching this conclusion relied[31] heavily upon language in *Santa Fe Industries, Inc. v. Green*,[32] in which the Supreme Court stated that "manipulation," as used in Rule 10b-5,[33] was intended "to prohibit the full range of ingenious devices that might be used to manipulate securities prices."[34] Applying this statement by analogy to section 14(e), the court reasoned that the options granted to USS had the effect of creating an "artificial price ceiling" on the price of Marathon's stock, at the level of the USS bid.[35] The options gave USS such a great advantage over other offerors, that no competing bidders would even attempt to outbid USS for control of Marathon.[36] The court viewed this arrangement as artificially affecting the price of Marathon, and therefore deemed the "lock- ups" invalid under section 14(e).[37]

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25. *Id.* at 367.
26. *Id.*
27. *Id.*
28. *Id.* at 367-68
29. *Id.* at 367.
30. *Id.* at 375-77.
31. *Id.* at 373-74.
32. 430 U.S. 426 (1977).
33. 15 U.S.C. § 78j(b). *See also infra* note 143.
34. *Santa Fe*, 430 U.S. at 477.
35. *Mobil*, 669 F.2d at 375-76.
36. *Id.*
37. *Id.* at 377.

4. The Second Circuit Approach

In *Buffalo Forge Co. v. Ogden Corp.*,[38] the Second Circuit reviewed "lock-up"[39] options substantially similar to those used in *Mobil*.[40] The dispute began when Ampco-Pittsburgh Corporation attempted a hostile tender offer to gain control of Buffalo Forge Company, offering $25 for any and all shares of the target.[41] To repel the advances of Ampco, considered by Buffalo Forge to be an undesirable suitor, the target's directors enlisted Ogden Corporation to act as a "white knight" to counter Ampco's takeover bid.[42] In exchange for Ogden's bid of $32.75 per share, Buffalo Forge agreed to transfer a large block of its shares to Ogden for $32.75 per share.[43] This transfer was effected through stock purchase agreements[44] and options.[45] A bidding war for Buffalo Forge shares ensued, which culminated in Ampco's successful bid of $37.50 for any and all shares.[46]

After the merger of Buffalo Forge with Ampco, the latter refused to recognize the stock purchase rights granted to Ogden by Buffalo Forge's former management.[47] Ampco refused to allow Ogden to exercise its option to purchase a large block of treasury shares from Buffalo Forge and refused to pay dividends on the shares Ogden had already purchased.[48] Further, Ampco brought suit against Ogden in federal district court, alleging that the stock purchase and option agreements were "manipulative devices" proscribed by section 14(e), and sought rescission of the agreements.[49]

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38. 717 F.2d 757 (2d Cir. 1983), *cert. denied*, 464 U.S. 1018 (1984).

39. For an excellent discussion of "lock-up" options, see Easterbrook & Fischel, *Tactics*, *supra* note 19; Note, *Lock-Up Options: Toward a State Law Standard*, 96 HARV. L. REV. 1068 (1983).

40. *Mobil*, 669 F.2d at 366.

41. Buffalo Forge Co. v. Ogden Corp., 555 F. Supp. 892, 897 (W.D.N.Y.), *aff'd*, 717 F.2d 757 (2d Cir. 1983), *cert. denied*, 464 U.S. 1018 (1984).

42. *Id.* at 901.

43. *Id.*

44. *Id.*

45. As was the case in *Mobil*, these options gave the "white knight" an advantage in the bidding for control of the target shares by allowing them to purchase part of the block of shares needed for control for less than any other bidder. This makes the marginal cost of increasing the bid for the publicly held shares less for the "white knight." *Mobil*, 669 F.2d at 366.

46. *Buffalo Forge*, 555 F. Supp. at 903.

47. *Id.* at 903.

48. *Id.*

49. *Id.* at 896.

After the district court determined that the agreements were not "manipulative devices" under section 14(e),[50] Ampco appealed the action to the Second Circuit, where the district court decision was affirmed.[51] In its opinion, the appellate court stated that the function of the Williams Act was to ensure full and fair disclosure of all material information necessary for the target shareholders to make an informed decision to tender or retain their shares.[52] The court held that without misrepresentation there was no cause of action cognizable under section 14(e).[53] The Sixth Circuit's interpretation of "manipulative" in *Mobil*[54] was expressly rejected by the *Buffalo Forge* court as an unwarranted extension of the Williams Act.[55]

5. The Eighth Circuit Approach

In *Feldbaum v. Avon Products, Inc.*[56], the Eighth Circuit expressly rejected the approach taken by the Sixth Circuit in *Mobil* court, in favor of the reasoning applied by the Second Circuit in *Buffalo Forge*.[57] *Feldbaum* arose out of a merger agreement between Avon Products, Inc. and Mallinckrodt, Inc.[58] The merger agreement provided that AVP, a wholly-owned subsidiary of Avon, was to acquire 49% of Mallinckrodt's outstanding common stock for a price of $50 per share.[59] The merger would be completed by exchanging the 51% of the Mallinckrodt stock which AVP did not acquire for Avon stock at an agreed upon exchange ratio.[60] The merger agreement also provided AVP with an option to purchase 3.6 million authorized but unissued shares of Mallinckrodt stock for $50 per share.[61] This option was never executed.[62] Under the merger agreement, there were to be no changes in the boards of directors of the two corporations, other

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50. *Id.* at 905-06.
51. *Buffalo Forge*, 717 F.2d at 759.
52. *Id.* at 760.
53. *Id.*
54. *Mobil*, 669 F.2d at 376-77.28
55. *Buffalo Forge*, 717 F.2d at 760.
56. 741 F.2d 234 (8th Cir. 1984).
57. *Id.* at 237.
58. *Id.* at 235.
59. *Id.* The agreement provided for 32% of Mallinckrodt's outstanding stock to be acquired through a tender offer, and 17% to be transferred to AVP from a trust over which four Mallinckrodt directors had voting control. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

than the addition of two Avon representatives to the Mallinckrodt board, and vice versa.[63]

After AVP had acquired the "front-end" of its tender offer for Mallinckrodt, and the latter's shareholders had approved the merger, the price of Avon stock fell below the $30 minimum set forth in the merger agreement.[64] Because the agreement assumed a price no lower than $30 for each share of Avon stock exchanged, the remaining Mallinckrodt stockholders actually received only about $42 worth of Avon stock for each of their shares.[65] The plaintiff alleged that the defendants violated section 14(e)[66] by failing to disclose in the solicitation materials that there was a strong likelihood that the value of Avon stock would fall during the period in which the exchange ratio price would be calculated.[67] In addition, the complaint alleged that the option granted to Avon by Mallinckrodt was a manipulative device prohibited by section 14(e).[68]

The Eighth Circuit affirmed the district court's dismissal of the plaintiff's complaint.[69] As the basis for this decision, the court noted that although the solicitation materials contained no disclosure that the price of Avon stock was likely to fall during the calculation period, these materials did reveal that Avon's earnings-per-share would be diluted by the merger.[70] The court reasoned that this fact, combined with the revelation that Avon was incurring substantial debt to finance the tender offer,[71] was sufficient to apprise even

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63. *Id.* at 235 n.3.

64. *Id.* at 235-36.

65. *Id.* at 236. The exchange ratio was to be computed by calculating the average market price of Avon stock for a 22 day period preceding the Mallinckrodt shareholder's meeting, and dividing this average by $50, with a guarantee that the Avon stock price used in this calculation would be between $30 and $35. *Id.* at 235. Mallinckrodt's shareholders were guaranteed to receive between 1.429 and 1.667 Avon shares for each share they held. *Id.* at 235 n.2. The price ultimately used in the calculation was the floor figure of $30, although the actual value of Avon's stock was lower, with the result that 1.667 Avon shares was worth only $42. *Id.* at 236.

66. The plaintiff further alleged that the defendant's conduct was violative of § 10(b). *Feldbaum*, 741 F.2d at 236.

67. *Id.*

68. *Id.* (plaintiff claimed that the granting of this option was violative of Rule 10b-5, 17 C.F.R. § 240.10b-5 (1983)). *See also supra* text accompanying notes 50-51.

69. *Feldbaum*, 741 F.2d at 236.

70. *Id.*

71. *Id.* The court also relied upon the disclosure in the solicitation materials that Avon's earnings were down in the first nine months of 1981. *Id.*

relatively unsophisticated investors that a drop in Avon's stock price was likely.[72] The court stated that inquiry under federal law was limited to determination of whether "shareholder approval is fairly sought and freely given."[73] If so, federal courts would not delve further into the wisdom or fairness of the merger transaction.[74]

The Eighth Circuit similarly affirmed the dismissal of the plaintiff's claim that the option granted to AVP by Mallinckrodt was a manipulative device proscribed by section 14(e).[75] The court expressly rejected[76] the plaintiff's contention that, although fully disclosed to all interested parties, the option was prohibited by section 14(e) under the decision in *Mobil*. Instead, the court adopted the reasoning of the Second Circuit[77] in *Buffalo Forge* which required some misrepresentation as a prerequisite to a cause of action under section 14(e).[78] In reaching its decision, *Feldbaum* relied on other federal circuit cases[80] which similarly construed section 14(e), as well as the United States Supreme Court's pronouncement that "manipulative" refers to "conduct designed to deceive or defraud investors by . . . artificially affecting the price of securities."[81] From this language the *Feldbaum* court determined that deception or misrepresentation is a necessary element of a 14(e) cause of action.[82] Finding no such allegation, the court affirmed the trial court's dismissal of the plaintiff's federal claims,[83] as well as her pendant state-law claims of breach of fiduciary duty.[84]

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72. *Id.* at 236-37.

73. *Id.* at 237 (quoting Popkin v. Bishop, 464 F.2d 714, 720 (2d Cir. 1972)), *quoted in* Golub v. PPD Corp., 576 F.2d 759, 764 (8th Cir. 1978).

74. *Id.*

75. *Id.*

76. *Id.*

77. *See supra* text accompanying notes 13-22.

78. *Buffalo Forge*, 717 F.2d at 760.

79. *Feldbaum*, 741 F.2d at 237.

80. *See* Schreiber v. Burlington N., Inc., 731 F.2d 163, 166 (3d Cir. 1984), *aff'd*, 472 U.S. 1 (1985); *Data Probe*, 722 F.2d at 4; Dan River v. Icahn, 701 F.2d 278, 285 (4th Cir. 1983); Panter v. Marshall Field & Co., 646 F.2d 271, 283 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

81. *Feldbaum*, 741 F.2d at 237 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976)).

82. *Id.*

83. Although in the text of its opinion the court did not address the plaintiff's claims that the option granted to Avon by Mallinckrodt constituted a violation of § 10(b) and Rule 10b-5, the court stated, in a footnote, that its remarks regarding § 14(e) were equally applicable to § 10(b) and Rule 10b-5. *Feldbaum*, 741 F.2d at 237 n.8.

84. *Feldbaum*, 741 F.2d at 237-38.

6. The Seventh Circuit Approach

In *Panter v. Marshall Field & Co.*,[85]section 14(e) of the Williams Act[86] was given one of its most restrictive interpretations. In *Panter*, the Seventh Circuit held that under 14(e) a plaintiff must establish some omission or misstatement of material fact, and show that it acted in reliance[87] upon those statements.[88]

The dispute in *Panter* had its genesis[89] in 1977 when the management of Marshall Field & Co., a major department store retailer, was approached by representatives of Carter Hawley Hale (CHH), another large retail chain.[90] The CHH representatives proposed that the two retailers merge.[91] As CHH began to press its proposal, Field investigated the antitrust implications of the prospective merger.[92] The investigation revealed several possible antitrust violations arising from the geographic proximity of certain CHH stores to stores which Field was already operating or was proposing to open.[93] Undaunted

85. 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

86. 15 U.S.C. § 78n(e).

87. *Panter*, 646 F.2d at 283-84. However, the *Panter* court recognized that often in cases where the wrong claimed is nondisclosure in a securities transaction, the federal courts will apply a judicial presumption of reliance where the information withheld is deemed material. *Id. See also* Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972) ("[P]ositive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision."); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384-85 (1970) (plaintiff need not supplement the requirement of showing materiality "with a requirement of proof of whether the defect actually had a decisive effect on the voting"). The *Panter* court also noted, however, that the purpose of this presumption is to eliminate the impracticability of requiring each shareholder in the plaintiff class to testify as to his reliance upon the defendant's misstatements. It would therefore be inappropriate to apply this presumption as urged by the plaintiff in *Panter*, "[w]here no reliance [is] possible under any imaginable set of facts." *Panter*, 646 F.2d at 284 (quoting Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980).

88. *Panter*, 646 F.2d at 283-84.

89. Throughout the late 1960s and mid-1970s, Marshall Field had been approached on numerous occasions by potential suitors. Field's management had been advised by counsel to consider any merger proposal, and if deemed not to be in the best interests of the stockholders, the management could acquire other stores. *Id.* at 278. Field subsequently was able to resist potential takeovers by proposing to or actually acquiring stores in places which would create possible antitrust questions if the unwanted suitor acquired Field. Field's management was generally unreceptive to the overtures of potential suitors. *Id.*

90. *Id.* at 279.

91. *Id.*

92. *Id.*

93. *Id.*

by Field's desire to remain independent, as well as its antitrust concerns, CHH's president telephoned each of Field's directors and threatened that unless Field's management entered into merger negotiations within two days, CHH would make a public exchange proposal.[94] Treating this ultimatum as the beginning of a hostile tender offer, Field's board responded by filing an antitrust suit.[95]

At a special meeting called the following day, the Field board voted unanimously to oppose the CHH takeover attempt.[96] In addition to bringing an antitrust suit against CHH, the Field board resisted the CHH takeover by directing a number of appeals to the company's stockholders advising against a Field-CHH merger.[97] Approximately one month following the CHH ultimatum, the Field board voted to proceed with an expansion into a Dallas shopping center and the acquisition of five other stores in the Pacific Northwest.[98] These expansion plans had been first considered long before there was any discussion of a Field-CHH merger.[99]Subsequent to the Field board's resolution to proceed with its expansion plans, CHH announced a proposal to exchange a combination of cash and CHH stock valued at $42[100] for each share of Field stock tendered.[101] This exchange offer was, however, withdrawn before it became effective when CHH learned of Field's expansion plans.[102]

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94. *Id.*

95. *Id.*

96. *Id.* at 280. At the meeting, the board received evaluations of the proposed merger from its investment bankers and attorneys. The attorneys reported that the merger would be likely to create an antitrust violation. Further, Field's investment bankers opined that Field's prospects for future performance appeared favorable, and the $36 worth of CHH stock offered by the CHH president in exchange for each Field share contained an inadequate premium for corporate control which would be purchased by CHH in the tender offer. *Id.* On the Friday before CHH delivered its ultimatum to Field's board, Field's stock was trading at approximately $22 per share. *Id.* at 279. *See also infra* notes 97, 100, & 102.

97. *Panter*, 646 F.2d at 280. During this period where a CHH tender offer seemed imminent, but the actual terms of such an offer were not yet known, Field's stock traded in the $28 to $32 range. *Id. See also supra* note 96 and *infra* notes 100, 102.

98. *Panter*, 646 F.2d at 280.

99. *Id.*

100. *Id.* After formal announcement of the proposed tender offer, the market price of Field's stock rose to $34, and traded in the $30 to $34 range until CHH withdrew the inchoate offer. *Id. See also supra* notes 94, 97 and *infra* note 102.

101. *Panter*, 646 F.2d at 280.

102. *Id.* at 281. After CHH withdrew the tender offer proposal, the market price of Field's stock fell to $19 per share. *Id. See also supra* notes 96, 97, & 100.

As a result of its successful defense against the CHH takeover bid, suit was brought against the Field board by its shareholders, alleging violations of section 14(e).[103] The plaintiffs claimed that by successfully spurning CHH's advances, the Field board denied the plaintiffs the opportunity to sell their shares at a substantial premium.[104] The plaintiffs further claimed that the Field board's press releases and letters to its shareholders deceived the plaintiffs by convincing them not to dispose of their shares in the rising market.[105]

The Seventh Circuit affirmed the district court's[106] granting of the defendant's motion for a directed verdict.[107] The court reached this result by reasoning that the purpose of the Williams Act was to protect shareholders from having to make tender offer decisions without the benefit of adequate or accurate information.[108] The court held that to state a cause of action under section 14(e), the plaintiff must establish that a misrepresentation was made and relied upon by the target corporation's shareholders.[109] The court concluded that because the CHH offer was withdrawn before it became effective, the plaintiffs were never faced with a tender offer decision, and therefore could not possibly establish that they had relied upon any alleged misrepresentation in making a decision to tender or retain their shares pursuant to the CHH offer.[110]

The plaintiff alternatively argued that the Field board had made misstatements in press releases and letters to its stockholders which caused the plaintiffs to miss the opportunity to dispose of their shares

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103. *Panter*, 646 F.2d at 282.

104. *Id.* at 283.

105. *Id.*

106. Panter v. Marshall Field & Co., 486 F. Supp. 1168 (N.D. Ill. 1980), *aff'd*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

107. *Panter*, 646 F.2d at 299.

108. *Id.* at 283.

109. *Id.* (citing Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 373 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973)).

110. *Id.* at 283-84. For this issue, the *Panter* court relied heavily upon Lewis v. McGraw, 619 F.2d 192 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980). In *Lewis*, the American Express Company proposed a "friendly merger" with McGraw-Hill. After having one merger proposal rejected by the McGraw-Hill board, American Expess made a second public offer for McGraw's stock. American Express conditioned the offer on McGraw's agreement not to oppose it. *Id.* at 195. The McGraw board rejected the second offer and is expired without becoming effective. *Id.* The Second Circuit affirmed the district court's dismissal of hte plaintiff's complaint, stating "the target's shareholders simply could not have relied upon McGraw-Hill's statements, whether true or false, since they were never given an opportunity to tender their shares." *Lewis*, 619 F.2d at 195, *quoted in Panter*, 646 F.2d at 284.

in the rising market.[111] The *Panter* court rejected this argument based upon its evaluation of the legislative history of the Williams Act.[112] The court focused upon statements made during legislative committee hearings prior to the Act's passage,[113] as well as subsequent court interpretations,[114] and determined that the purpose of the statute was to prevent shareholders from making pressured, uninformed investment decisions.[115] The court concluded that because the plaintiffs were not faced with coercive circumstances characteristic of a tender offer, they were not entitled to invoke the Act's protections.[116]

B. *The* Schreiber *Dispute*

Against this legal backdrop, the dispute in *Schreiber* began on December 21, 1982, when Burlington Northern, Inc. made a hostile tender offer[117] for shares of El Paso Gas Co.[118] Through its wholly-owned subsidiary, R-H, Inc., Burlington proposed to purchase 25.1 million shares of El Paso stock for $24 per share.[119] The offer further provided that it was terminable by Burlington in the event that Burlington deemed it inadvisable to proceed with the purchase.[120] The plaintiff tendered her El Paso shares pursuant to this offer on December 29, 1982.[121] The offer was fully subscribed shortly thereafter.[122]

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111. *Panter*, 646 F.2d at 285.
112. *Id.*
113. *Id.*
114. *Id.* at 285-86.
115. *Id.* at 286.
116. *Id.*
117. This offer is referred to by the district court as the "December offer" in order to distinguish it from the "January offer." Schreiber v. Burlington N., Inc., 568 F. Supp. 197, 199 (D. Del. 1983), *aff'd*, 731 F.2d 163 (3d Cir. 1984), *aff'd*, 472 U.S. 1 (1985).
118. *Schreiber*, 568 F. Supp. at 199.
119. *Id.*
120. The "December offer" specifically provided:

> Notwithstanding any other provision of the Offer, the Purchaser shall not be required to accept for payment or pay for tendered Shares, or may terminate or amend the offer . . . if, at any time on or after December 17, 1982 and prior to the acceptance for payment of any such Shares . . . , any of the following shall occur: . . . if, inthe sole judgement of the Purchaser, in any such case, regardless of the circumstances (including any action or inaction by the purchaser) giving rise to any such condition, such condition makes it inadvisable to proceed with the Offer and/or with such purchase or payment.

Id.

121. *Id.*
122. *Id.*

Although El Paso initially resisted Burlington's advances,[123] a favorable settlement between the corporations was subsequently negotiated[124] and Burlington rescinded the December tender offer.[125] In its place, a new tender offer[126] was made, promising $24 per share for only 21 million shares of El Paso stock.[127] Another 4,166,667 shares were to be purchased directly from El Paso for the same price of $24.[128] Additionally, El Paso granted Burlington an option to purchase another 1,959,000 shares for $24 per share.[129] Burlington further agreed to recognize the "golden parachutes" which El Paso had granted to its directors during the course of the tender offer struggle.[130]

In response to Burlington's offer to purchase 21 million El Paso shares, nearly 40 million were tendered.[131] As a result, the shares tendered by the plaintiff and the members of her class were accepted by Burlington on a pro-rata basis.[132] The proration significantly reduced the return which would have been realized by the plaintiff had the "December offer" remained effective.[133]

Subsequently, the plaintiff brought a class action under section

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123. *Id.* El Paso's defensive maneuvers included suits against Burlington in the Delaware Court of Chancery and the United States District Court for the Northern District of Texas; filing of a Schedule 14D-9 with the SEC in preparation for disposal of its assets; amendments to its bylaws; and the issuance of a new class of preferred stock with voting rights designed to inhibit business combinations. *Id.*

124. *Id.* at 199-200. During the course of these negotiations, the El Paso directors caused El Paso to grant them substantial "golden parachutes" of extended employee benefits which became effective when El Paso was taken over. The directors' failure to disclose these "golden parachutes" to the El Paso shareholders was one of the acts alleged by the plaintiff to be "manipulative" within the purview of § 14(e). *Id.*

125. *Id.* at 199.

126. This second offer was termed the "January offer" by the district court. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 199-200.

131. *Id.* at 200.

132. *Id.* The Williams Act requires pro-rata acceptance of the shares tendered while the offer remains effective in the event that the offer is oversubscribed. 15 U.S.C. § 78n.

133. *See Schreiber*, 472 U.S. at 4. Had the "December offer" remained effective, the plaintiff would have received the tender offer price of $24 per share for all the shares she tendered. Because the "January offer" was oversubscribed nearly two to one, the plaintiff only received $24 for approximately one-half of the shares tendered. The remaining half was purchased by Burlington pursuant to a "squeeze out merger" for $12 per share. *Id.*

14(e) of the Williams Act[134] against Burlington, R-H, El Paso and the latter's directors, alleging that termination of the "December offer" was a breach of tender offer agreements between the plaintiff class and R-H.[135] The complaint further alleged that El Paso wrongfully interfered with the tender offer process and failed to disclose the grant of the "golden parachutes" to the El Paso directors.[136] It was also alleged that the El Paso directors individually caused the cancellation of the "December offer" in order to tender their own shares for personal gain to the detriment of the public shareholders of El Paso.[137] The defendants responded to the complaint with a motion to dismiss for failure to state a claim upon which relief can be granted, contending that their conduct was not in violation of section 14(e).[138] The district court granted this motion, reasoning that because the alleged manipulation had no element of misrepresentation it did not violate section 14(e).[139] The trial court looked to the legislative history of the Securities Exchange Act of 1934 and of the Williams Act in particular[140] concluding that the intent of Congress in enacting these statutes was to ensure that shareholders were provided with adequate information to make an informed choice regarding their stock transactions.[141] The trial court also relied upon cases construing section 10(b) of the Securities Exchange Act[142] as requiring some misrepresentation to sustain a claim under that section's[143] proscription of "manipulative" devices.[144]

The district court also addressed the plaintiff's allegations that the "golden parachutes" granted by El Paso to its directors were not disclosed to the target shareholders and that the El Paso directors caused the withdrawal of the "December offer" in order to participate in the "January offer" for their personal gain.[145] The court noted that, although a tender offeror was required by the Williams Act to

134. 15 U.S.C. § 78n(e).
135. *Schreiber*, 568 F. Supp. at 200.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 201-03.
140. *Id.*
141. *Id.* at 201.
142. 15 U.S.C. § 78j(b).
143. Section 10(b) provides, in pertinent part: "It shall be unlawful for any person . . . to use or employ, in connection with the purchase or sale of any security . . . *any manipulative or deceptive device* or contrivance . . . ." *Id.* (emphasis added).
144. *Schreiber*, 568 F. Supp. at 202.
145. *Id.* at 204.

disclose all material information to the target shareholders, where the nondisclosure has no causal connection to the damages alleged, the court need not determine whether the unrevealed information was material to the stockholders decision to tender or retain their stock.[146]

On appeal, the Third Circuit affirmed this decision.[147] The appellate court agreed with the district court's characterization of section 14(e) as solely a disclosure statute.[148] The court expressed its concern that if section 14(e) were to be read so expansively as to encompass conduct beyond mere misrepresentation, the federal courts would be required to pass on the substantive fairness of all tender offers.[149] As this would conflict with the Supreme Court's policy of restraint in the federalization of state corporation law,[150] the Third Circuit declined to construe the statute so broadly.[151]

III. ANALYSIS

The United States Supreme Court granted *certiorari*[152] in *Schreiber* to resolve the split among the circuits regarding the meaning of "manipulative" in section 14(e).[153] The Court began its analysis with an evaluation of the petitioner's contention that the section 14(e) phrase "fraudulent, deceptive or manipulative acts or practices"[154] was intended to prohibit fully disclosed acts which affect the price of the target stock.[155] The Court rejected this argument, relying upon its previous decisions[156] construing "manipulative" as used in section

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146. *Id.*

147. Schreiber v. Burlington N., Inc., 731 F.2d 163 (3d Cir. 1984), *aff'd*, 472 U.S. 1 (1985).

148. *Id.* at 165-66.

149. *Id.* at 166.

150. *See Santa Fe*, 430 U.S. at 479.

151. *Schreiber*, 731 F.2d at 166.

152. *Schreiber*, 469 U.S. at 815.

153. *See supra* text accompanying notes 117-51.

154. *See supra* note 1 (pertinent portion of § 14(e)).

155. *Schreiber*, 472 U.S. at 6.

156. The Court relied primarily upon *Ernst & Ernst*, 425 U.S. at 199 ("[the word 'manipulative'] connotes intentional or willful conduct *designed to deceive or defraud* investors by controlling or artificially affecting the price of securities") (emphasis added by the Supreme Court in *Schreiber*); and *Santa Fe*, 430 U.S. at 476-477 ("[Congress] would [not] have chosen this 'term of art' if it had meant to bring within the scope of § 10(b) instances of corporate mismanagement such as this, in which the essence of the complaint is that shareholders have been treated unfairly by a fiduciary.).

10(b) as only prohibiting those acts which *artificially affect market activity or prices in order to mislead investors.*[157] The Court noted that nondisclosure is usually essential to the type of manipulative scheme prohibited by section 10(b) and that the section had been construed as not providing a remedy for claims of unfair treatment or breach of fiduciary duty in the absence of some allegation of misrepresentation.[158] It also rejected the contention that the choice of the word "or" used in section 14(e) implied that a manipulative act need not be fraudulent or deceptive to fall within the prohibition of the act.[159] The Court reasoned that such a construction of section 14(e) would be in conflict with the commonly recognized tenets of statutory construction[160] and the basic purpose[161] behind the amendment.[162]

To support its initial finding that section 14(e) does not prohibit corporate acts in the absence of some misrepresentation, the Court looked to legislative history[163] of the Williams Act.[164] It was noted that the Williams Act was added to the Securities Exchange Act of 1934[165] to insure that shareholders faced with a cash tender offer[166] be given sufficient information to make their decision to sell or retain their shares.[167] Congress carefully tailored[168] the Williams Act to create a neutral arena in which tender offer contestants could vie for control of the target.[169] The Court found nothing in the legislative history

157. *Schreiber*, 472 U.S. at 6-7.

158. *Id.* (citing *Santa Fe* 430 U.S. at 476-77).

159. *Id.* at 7-8.

160. *Id.* at 8. The Court stated that the words "fraudulent, deceptive or manipulative" should be construed as merely guiding and not delineating separate types of prohibited acts, applying the rule of statutory construction that "words grouped in a list should be given related meaning." *Id.*

161. Because the Court determined that the main concern of the Williams Act was disclosure, the simple use of the word "manipulation" was an insufficient basis for finding that Congress intended to prohibit acts which involved no misrepresentation. *Id.*

162. *Schreiber*, 472 U.S. at 8.

163. H.R. REP. No. 1711, 90th Cong., 2d Sess. 1, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813 (legislative history of the Williams Act). *See also supra* text accompanying notes 11-12.

164. *Schreiber*, 472 U.S. at 8.

165. 15 U.S.C. § 78a.

166. *See supra* notes 12-22 and accompanying text.

167. *Schreiber*, 472 U.S. at 8.

168. *Id.* at 9 (Remarks of Sen. Williams regarding the Act: "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. [The Williams Act] is designed solely to require full and fair disclosure for the benefit of investors.").

169. *Id.* at 8-9.

to support the petitioner's contention that section 14(e) required anything other than full disclosure.[170]

The Court observed that construction of section 14(e) in the manner urged by the petitioner would be in conflict with Congressional intent in enacting the statute.[171] By allowing federal judges to pass on the substantive fairness of a particular transaction, the tender offer process would be subject to uncertainty pending federal court approval of the offer's terms.[172] As Congress sought to avoid shareholder uncertainty in enacting the Williams Act, the Court reasoned that this type of federal oversight was not intended by the legislature.[173]

The Court concluded that Congress intended the role of federal tender offer legislation to simply require full disclosure and for the substantive evaluation of tender offer contests to be done by the target shareholders.[174]Consequently, the Court held that nondisclosure or misrepresentation was a necessary element of a section 14(e) cause of action.[175] Applying this rule to the facts of *Schreiber*, the Court held that there was no actionable manipulation, and affirmed the district court's dismissal[176] of the petitioner's claim.[177]

The Court also affirmed dismissal[178] of the plaintiff's claim that nondisclosure of the "golden parachute" agreements was in violation of section 14(e).[179] It noted that the damages alleged by the plaintiff were related to the cancellation of the first tender offer.[180] Consequently, because the undisclosed agreements entered into by the defendants were related only to the second tender offer, the Court concluded that there was no causal connection between the "golden parachutes" and the damages alleged by the plaintiffs.[181]

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170. *Id.* at 12.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Schreiber*, 568 F. Supp. at 204.
177. *Schreiber*, 472 U.S. at 12-13.
178. *Schreiber*, 568 F. Supp. at 204.
179. *Schreiber*, 731 F.2d at 166.
180. *Schreiber*, 472 U.S. at 12-13.
181. *Id.* at 13.

IV. EVALUATION

Although the circuit courts have interpreted "manipulative" differently,[182] the interpretation adopted by the Supreme Court in *Schreiber*[183] is supported by the overwhelming weight of authority.[184] The view of the *Mobil* court,[185] that misrepresentation is not an essential element of a section 14(e) cause of action,[186] is untenable and was properly rejected by the Supreme Court.[187]

In *Mobil*, the Sixth Circuit relied upon language used in *Ernst & Ernst v. Hochfelder*[188] and *Santa Fe Industries v. Green*[189] indicating that section 14(e) was intended to prohibit any conduct which had an artificial effect on stock prices that was unrelated to the natural forces of supply and demand.[190] The *Mobil* court's reliance[191] on *Santa Fe* and *Ernst & Ernst* was, however, somewhat misplaced in that both of those cases also contained language indicating that the conduct proscribed by section 10(b) is that which deceives investors as to the value of their stock by fraudulently affecting market prices or activity.[192] Another part of *Santa Fe* ignored by the *Mobil* decision is the recognition that nondisclosure is usually essential to the success of the type of scheme proscribed by section 10(b), and that the Williams Act combats this type of fraud through disclosure require-

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182. *See supra* text accompanying notes 23-116.

183. The interpretation adopted by the Supreme Court was the same as that of the Second Circuit. The term manipulative as used in § 14(e) requires a material misrepresentation. *Schreiber*, 472 U.S. at 12. *See supra* text accompanying notes 38-55.

184. *See infra* notes 185-213 (more complete explanation).

185. Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

186. *Id.* at 376.

187. *Schreiber*, 472 U.S. at 5 n.3.

188. 425 U.S. 185 (1977). "Use of the word 'manipulative' is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to *deceive or defraud investors by controlling or artificially affecting the price of securities.*" *Id.* at 199, *quoted in Mobil*, 669 F.2d at 374 (emphasis added).

189. 430 U.S. 462 (1977). "The term [manipulative] refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to *mislead investors by artificially affecting market activity.*" *Santa Fe*, 430 U.S. at 476, *quoted in Mobil*, 669 F.2d at 374 (emphasis added).

190. *Mobil*, 669 F.2d at 374.

191. *Id.*

192. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

ments.[193] Indeed, the weakness in the *Mobil* court's position is illustrated by the surgical precision of the opinion's dissection of the language used in *Santa Fe*.[194] These difficulties with the *Mobil* analysis, combined with its other inherent weaknesses[195] has caused it to be rejected or questioned by numerous other courts.[196]

Conversely, the Supreme Court's holding in *Schreiber* is consistent with its previous decisions[197] interpreting the meaning of the term "manipulative" as used in the Securities Exchange Act of 1934.[198] This consistency is mandated by the high court's decision in *Ernst & Ernst*, characterizing the word "manipulative" as a term of art when used in connection with securities markets.[199] Consequently,

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193. *Santa Fe*, 430 U.S. at 476-77.

194. In *Mobil*, the court quoting from *Santa Fe* stated: "No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices." *Mobil*, 669 F.2d at 374. Through careful editing, the court was able to avoid reconciliation of the immediately following sentence:

> But we do not think it [Congress] would have chosen this "term of art" if it had meant to bring within the scope of sec. 10(b) instances of corporate mismanagement such as this, in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary.

Santa Fe, 430 U.S. at 477.

195. In support of its decision, the court in *Mobil* relied upon Cargill v. Hardin, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972), in which the term "manipulative" was construed in the context of the Commodity Exchange Act, 7 U.S.C. §§ 9, 13 (1982). The *Mobil* court's reliance on *Cargill* was also misplaced in that *Ernst & Ernst* has indicated that "manipulative" has a specialized meaning when used in connection with securities markets, and any definition developed outside that context is inapplicable. *See* Note, *Circuits Split on the Elements of Williams Act "Manipulation"—Validity of Tender Offer Defenses Uncertain*, 21 CHI.-KENT L. REV. 935, 962 (1984) [hereinafter Note, *Circuits Split*].

196. *See, e.g.*, Swanson v. Wabash, Inc., 557 F. Supp. 1308 (N.D. Ill. 1983) (*Mobil* holding that nondisclosure was not the only basis for a § 10(b) and § 14(e) claim and that manipulation could exist independent of any misstatement or omission of material facts was contrary to the established interpretation of those statutory provisions); Martin-Marietta Corp. v. Bendix Corp., 549 F. Supp. 623 (D. Md. 1982) (*Mobil's* interpretation of the *Santa Fe* decision was inaccurate because the *Mobil* court failed to interpret the definition of "manipulative" set out by the *Santa Fe* Court); Marshall Field & Co. v. Icahn, 537 F. Supp. 413 (S.D.N.Y. 1982) (reasoning in *Mobil* could affect attempts by management of a target corporation to thwart takeover attempts which it believes in good faith could be harmful to the target's shareholders).

197. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

198. *See* 15 U.S.C. §§ 78a-78kk.

199. *Ernst & Ernst*, 425 U.S. at 199. (The Court in discussing the degree of scienter required to trigger the antifraud provisions of § 10(b) and Rule 10b-5 characterized the term "manipulation" as "virtually a term of art when used in connection with securities markets.").

in the course of construing federal securities laws a consistent definition should be applicable to the same term absent a showing of Congressional intent to the contrary.[200]

In *Santa Fe*,[201] the Supreme Court held that absent an allegation of material omission or misstatement, there was no "manipulation" under section 10(b) of the 1934 Act.[202] This decision was the primary authority for the Court's holding in *Schreiber*.[203] It is not surprising that the term "manipulation"would be given an identical meaning in connection with both section 10(b) and section 14(e).[204] The actual text of the two statutes is strikingly similar,[205] prompting the Supreme Court to adopt the Seventh Circuit's assumption that the latter was modeled after the former.[206]

The requirement of a material misrepresentation as an element of a section 14(e) cause of action also comports with public policy considerations.[207] The Supreme Court's holding in *Schreiber* is consistent with its *Santa Fe*[208] mandate that the substantive fairness of transactions between corporate fiduciaries and their constituents be regulated by state law, with the federal regulatory scheme concerned only with actions involving misrepresentation or nondisclosure.[209] Historically, securities legislation, as interpreted by the Supreme Court, has been intended to ensure the integrity of the securities markets through a policy of full disclosure.[210] State securities laws

200. In *Schreiber*, the Supreme Court used the above quoted language from *Ernst & Ernst* as support for the application of the definition of "manipulative" as construed in the cases under § 10(b) and § 14(e). *Schreiber*, 472 U.S. at 6.

201. *Santa Fe*, 430 U.S. at 476-77.

202. 15 U.S.C. § 78j(b).

203. *Schreiber*, 472 U.S. at 6-7.

204. The Seventh Circuit has held that both § 10(b) and § 14(e) are coextensive antifraud provisions and should be considered *in para materia*. *Panter*, 646 F.2d at 282. Based on the Supreme Court's definition of "manipulation" in *Santa Fe*, the Seventh Circuit determined that this definition was also applicable to § 14(e) of the Williams Act. *Id.* at 283. *Accord Chris-Craft Indus.*, 480 F.2d at 362 (court determined that the underlying proscription of § 14(e) is virtually identical to that of Rule 10b-5); Martin-Marietta Corp v. Bendix Corp., 549 F. Supp. 623, 626 (D. Md. 1982) (court examined both § 14(e) and § 10(b) in determining whether the tender offer of the target corporation violated the Williams Act).

205. *See supra* notes 1, 143.

206. *Schreiber*, 472 U.S. at 10 n.10.

207. Note, *Circuits Split*, *supra* note 195, at 963.

208. The Supreme Court has mandated that claims of corporate mismanagement and breach of fiduciary duty against corporate directors be redressed under state law. *Santa Fe*, 430 U.S. at 477-78.

209. *Id.*

210. *Id.*

are given deference, provided the state laws do not interfere with the main purposes of the federal legislation in the same area.[211] This judicial attitude is owing to the Supreme Court's recognition that "corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of the directors with respect to the stockholders, state law will govern the internal affairs of the corporation."[212] By maintaining a bright line between the federal and state spheres of securities regulation, the Court has prevented the introduction of a new source of uncertainty into the tender offer process. Under the rationale of *Mobil*, federal judges would have the authority to pass on the fairness of all tender offers in which there is a dissenting party, under the guise of preventing artificial affectation of the market. Given the fact that there are virtually no federal standards for the conduct of a corporate director, the decisions of individual judges in any particular case would be exceedingly unpredictable. Under *Schreiber*, corporate directors will have no question as to what is required of them under section 14(e). Full disclosure will provide them with immunity from liability under federal law.[213]

V. CONCLUSION

Schreiber is a case in which the United States Supreme Court resolved a conflict among the circuit courts of appeal regarding the meaning of the term "manipulative" as used in section 14(e) of the Williams Act. The Court determined that to state a cause of action under the section, the plaintiff must allege that the defendant committed some misrepresentation of material fact. The decision is consistent with the Supreme Court's earlier decisions, the legislative history of the Williams Act, and sound public policy with regard to

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211. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Edgar v. MITE Corp., 457 U.S. 624, 631 (1982); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 137 (1973).

212. Cort v. Ash, 422 U.S. 66, 84 (1975). In *Cort*, the Supreme Court set forth a four part test to determine when a cause of action is to be implied from federal legislation. One of the factors to be considered is whether the cause of action the plaintiff seeks to establish is "one traditionally relegated to state law." *Id.* at 78. If so, a federal cause of action should not be implied. The application of this rule to federal securities laws further indicates the Supreme Court's deference to state corporation law.

213. *See* Note, *Circuits Split*, *supra* note 195, at 963.

tender offer contests. Additionally, the decision precludes federal oversight of the substantive fairness of tender offer contests, placing upon state law the burden of protecting shareholders from the ingenious devices which would undermine the integrity of the corporate securities markets.

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