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NOTES

CHRIS-CRAFT AND LOSS OF OPPORTUNITY TO CONTROL: THE LOST OPPORTUNITY

I. INTRODUCTION

The use of the tender offer¹ as a device for effecting corporate takeovers came of age in the United States in the late 1960s.² Indeed, appropriate regulatory legislation—the Williams Act—was adopted only as recently as 1968.³ Prior to that time, a regulatory gap existed which in part accounted for the relative popularity of tender offers.⁴ The dearth of regulation permitted acquiring corporations to limit their disclosures and thereby gain an element of surprise.⁵

The Williams Act was intended to put regulation of cash tender offers on the same footing as regulation of proxy contests⁶ and other forms of takeovers.⁷ Not surprisingly, the Williams Act created a new series of questions concerning civil liability under the securities laws. Section 14(e)⁸ of the

1. Tender offers are definable as “[t]he technique of acquiring control of a corporation by making a public offer to purchase part of the corporation’s stock at a fixed price—usually . . . representing a premium above market.” Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317 (1967).

2. See, e.g., *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 793 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970). During 1960 there were only eight cash tender offers reported. By comparison, during the first six months of 1966 alone there were thirty-two reported. Fleischer & Mundheim, *supra* note 1, at 317; see *Broder v. Dane*, 384 F. Supp. 1312 (S.D.N.Y. 1974). See generally 34 SEC Ann. Rep. 9-10 (1968).

3. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454, amending 15 U.S.C. §§ 78l, m, n (1964) (codified as 15 U.S.C. §§ 78l(i), m(d) & (e), n(d), (e) & (f) (1970)).

4. “When control is sought through the proxy contest, the Exchange Act and its proxy rules require disclosure to be made to shareholders concerning the identity of the participants in the contest, their associates, the shareholdings of these persons, and other relevant information. . . . Similarly, when control is sought through a stock-for-stock exchange, the offering must be registered under the Securities Act of 1933, and shareholders must be given a prospectus setting forth all material facts. Until July 1968, however, there were no comparable disclosure requirements which applied to a cash tender offer or stock acquisitions which may cause a change in control.” 34 SEC Ann. Rep. 10 (1968); see Note, *The Developing Meaning of “Tender Offer” Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1253-54 (1973).

5. Note, *supra* note 4, at 1254.

6. 34 SEC Ann. Rep. 9-10 (1968); see Fleischer & Mundheim, *supra* note 1, at 318-19. Proxy contests are regulated by § 14 of the 1934 Act, 15 U.S.C. § 78n (1970), and by SEC rules promulgated pursuant thereto, 17 C.F.R. §§ 240.14a-1 to -103 (1974).

7. 34 SEC Ann. Rep. 9-10 (1968). See generally Fleischer & Mundheim, *supra* note 1, at 318-22. For example, exchange offers, like other public offers to buy or sell securities, are regulated under the Securities Act of 1933, 15 U.S.C. §§ 77a-aa (1970).

8. Section 14(e) of the Exchange Act provides in 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

Exchange Act—the anti-fraud provision included in the Williams Act⁹—entitles a new group of private parties to recover as a result of fraudulent conduct. While doubt surrounded the standing of target corporations¹⁰ and competing tender offerors¹¹ to sue another tender offeror under 10b-5,¹² such plaintiffs clearly have standing under section 14(e).¹³

Thus, the courts faced a major new problem: how to measure damages suffered by an injured tender offeror as a result of section 14(e) violations. Where defrauded purchasers or sellers sue under rule 10b-5, courts often analogize to measures of damages well settled under the common law of fraud.¹⁴ When a defeated tender offeror sues its victorious adversary under

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." 15 U.S.C. § 78n(e) (1970).

9. 15 U.S.C. § 78n(e) (1970).

10. Several cases denied standing in this situation under rule 10b-5. *Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 791-92 (8th Cir. 1967); *Allied Artists Pictures Corp. v. D. Kaltman & Co.*, 283 F. Supp. 763 (S.D.N.Y. 1967); *Pacific Ins. Co. v. Blot*, 267 F. Supp. 956 (S.D.N.Y. 1967); see *Bound Brook Water Co. v. Jaffe*, 284 F. Supp. 702, 709 (D.N.J.), amended complaint dismissed, [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,243 (D.N.J. 1968); cf. *Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n.1 (2d Cir. 1970) (question left open); *General Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159, 164 (2d Cir. 1968), cert. denied, 393 U.S. 1026 (1969) (question left open). *Contra*, *Moore v. Greatamerica Corp.*, 274 F. Supp. 490 (N.D. Ohio 1967); *Dodge Mfg. Corp. v. Emerson Elec. Co.*, [1966-1967 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,962 (N.D. Ind. 1967) (motion for temporary restraining order) (by implication). See generally Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 459, 552-53 (1969).

11. This question had not been decided definitively prior to the passage of the Williams Act. See *Iroquois Indus., Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), cert. denied, 399 U.S. 909 (1970) (action against target—no standing); cf. *Duplan Corp. v. Iroquois Indus., Inc.*, [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,318 (W.D.N.Y. 1968) (no standing; semble alternative grounds).

12. Rule 10b-5 provides: "It shall be unlawful for any person, directly or indirectly, . . . (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1974). For a general treatment of standing under rule 10b-5 see Comment, *10b-5 Standing Under Birnbaum: The Case of the Missing Remedy*, 24 *Hastings L.J.* 1007 (1973).

13. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 358-62 (2d Cir.), cert. denied, 414 U.S. 910, 924 (1973), on remand, 384 F. Supp. 507 (S.D.N.Y. 1974), appeal docketed, No. 74-2542, 2d Cir., Nov. 26, 1974 (competing tender offeror); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969) (target).

14. E.g., *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1173 (2d Cir. 1970) (defrauded buyer; difference between purchase price and resale price); *Esplin v. Hirschi*, 402 F.2d 94, 104-05 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969) (defrauded buyers; out of pocket rule applied with actual value determined at time of discovery of fraud); *Janigan v. Taylor*, 344 F.2d 781, 786-87 (1st Cir.), cert. denied, 382 U.S. 879 (1965) (defrauded seller; out of pocket rule applied).

Not every transaction may be so easily reduced to measurable damages. See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 154-57 (1972) (value of stock approximated where no

section 14(e), however, new considerations involving the relative worth of majority and minority interests are introduced into the damages equation.

The first significant attempt to measure damages where a contestant has been unfairly deprived of the opportunity to gain control of a target corporation occurred in protracted litigation arising from the contest for control of Piper Aircraft Corporation (Piper) waged between Chris-Craft Industries (CCI) and Bangor Punta Corporation (BPC).¹⁵ This Note shall examine in detail the *Chris-Craft* decisions, focusing particularly on the measure of compensatory damages finally fixed on remand to the Southern District of New York.¹⁶ This measure of damages will be analyzed in terms of the legal and practical considerations which the court included, or more importantly, should have included in its determination of CCI's damages.

II. THE *Chris-Craft* LITIGATION

CCI began making purchases of Piper stock in late 1968, and by early 1969 held 13 percent of Piper's outstanding shares. CCI then resorted to a cash tender offer, followed by an exchange tender offer, and increased its holdings of Piper stock to 41 percent, less than it needed for control.¹⁷ Meanwhile, Piper, in an effort to thwart the CCI takeover bid, reached agreement with BPC under which BPC acquired the Piper family shares (31 percent). BPC, through open market purchases and an exchange offer, finally obtained a 51 percent controlling interest in Piper.¹⁸ However, the Second Circuit determined that BPC acquired 14 percent of these holdings by violations of section

more definite indicator available); *Gottlieb v. Sandia Am. Corp.*, 304 F. Supp. 980, 989-92 (E.D. Pa. 1969), aff'd in part & rev'd in part on other grounds, 452 F.2d 510 (3d Cir.), cert. denied, 404 U.S. 938 (1971) (rescission ordered because of difficulty of determining damages).

15. In chronological order, the reported opinions are *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 303 F. Supp. 191 (S.D.N.Y. 1969), aff'd sub nom. *Chris-Craft Indus., Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970) (en banc) (denial of preliminary injunction); *SEC v. Bangor Punta Corp.*, 331 F. Supp. 1154 (S.D.N.Y. 1971), modified, 480 F.2d 341, 383-84 (2d Cir.), cert. denied, 414 U.S. 924 (1973) (SEC allegations of market manipulation and securities fraud by BPC); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 337 F. Supp. 1128 (S.D.N.Y. 1971), rev'd, 480 F.2d 341, 355-80 (2d Cir.), cert. denied, 414 U.S. 910, 924 (1973) [hereinafter, wherever ambiguous, cited as *Chris-Craft I*], on remand, 384 F. Supp. 507 (S.D.N.Y. 1974) [hereinafter, wherever ambiguous, cited as *Chris-Craft II*], appeal docketed, No. 74-2542, 2d Cir. Nov. 26, 1974 (CCI complaint against BPC, Piper, and First Boston and their respective officers alleging sale of unregistered securities, market manipulation, securities fraud and violations of rule 10b-6; see note 19 infra); *Bangor Punta Corp. v. Chris-Craft Indus., Inc.*, 337 F. Supp. 1147 (S.D.N.Y. 1971), aff'd, 480 F.2d 341, 380-83 (2d Cir.), cert. denied, 414 U.S. 910 (1973) (BPC complaint against CCI alleging market manipulation, securities fraud, and violations of rule 10b-6; see note 19 infra).

16. 384 F. Supp. at 523. Although other antifraud actions by defeated tender offerors have reached the courts, only *Chris-Craft* has yielded an opinion on a defeated tender offeror's damages.

17. *Chris-Craft I*, 480 F.2d at 350-51. More extensive factual treatment of the takeover battle is found at id. at 349-55; see 337 F. Supp. at 1130-32; Comment, *Chris-Craft and Section 14(e): The Expansion of Lead Underwriters' Liability*, 42 *Fordham L. Rev.* 820, 820-22 (1974).

18. *Chris-Craft I*, 480 F.2d at 352-55.

14(e) and rule 10b-6.¹⁹ By the time BPC attained the majority position, 94 percent of the Piper shares were owned either by BPC or CCI, thereby removing whatever market had existed, and leaving CCI in what effectively became a minority position in a closely held corporation.²⁰ The Second Circuit concluded as a matter of law that BPC's section 14(e) violations deprived CCI of the opportunity to compete for control of Piper.²¹ Noting that CCI no longer wished control of Piper and sought only damages for the fraudulent deprivation of its opportunity to control,²² the court held that:

The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time.²³

In addition, the court included an injunction barring BPC from voting its illegally obtained shares for a period of at least five years.²⁴ The purposes of

19. *Id.* at 373-77. In its statements filed with the SEC, BPC listed one of its assets, the Bangor & Arastook Railroad (BAR), at a value of \$18.4 million, despite the fact that BPC was then negotiating the sale of BAR for \$5 million. This sale resulted in a loss of 12% of BPC shareholders' aggregate book equity, leading the district court to conclude that BPC's public filings were "misleading in [their] failure to disclose the circumstances surrounding the negotiations for sale of the BAR interest," and thus illegal under § 14(e). 331 F. Supp. at 1162; see *Chris-Craft I*, 480 F.2d at 373-75; Comment, *supra* note 17, at 821.

The Second Circuit also affirmed the lower court's holding (337 F. Supp. at 1141-42) that BPC's open market purchases of another 7% of Piper stock constituted violations of rule 10b-6, 17 C.F.R. § 240.10b-6 (1974) (proscribes bids or purchases by or on behalf of the issuer of securities when such securities are the subject of a public distribution). 480 F.2d at 377-79.

20. BPC acquired 51% of Piper's shares, while CCI—after further small open market purchases—owned 43%. 480 F.2d at 354-55. This left only 6% of Piper's shares owned by the general public, making CCI's investment many times larger than the largest possible floating supply. See notes 134-40 *infra* and accompanying text. Before the competition, 69% of the Piper shares were publicly owned, the other 31% belonging to the Piper family. 480 F.2d at 350, 353.

21. 480 F.2d at 373-77.

22. *Id.* at 379.

23. *Id.* at 380. The court also pointed out that its directions should not preclude the granting of such additional relief as might be necessary. *Id.* The district court therefore considered whether CCI was entitled to consequential damages for being "locked into" an allegedly unsalable minority interest. The court held that such damages are awardable only upon a "clear showing of causal connection" between defendants' conduct and the alleged consequence, and that CCI had not made such a showing. *Chris-Craft II*, 384 F. Supp. at 526; see *Zeller v. Bogue Elec. Mfg. Corp.*, 476 F.2d 795, 803 (2d Cir.), cert. denied, 414 U.S. 908 (1973). The court also denied plaintiff's request for a grant of attorneys' fees, reasoning that they should be recoverable only where service of the public interest was a primary motivation for plaintiffs. 384 F. Supp. at 528. The court did grant prejudgment interest to CCI for its compensatory damages. *Id.* at 526-28.

24. 480 F.2d at 380. Courts look favorably upon injunctive relief under § 14(e), although such relief is more easily obtained at a preliminary stage in the litigation. See, e.g., *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969).

The Second Circuit also considered the possibility of divestiture but rejected it as impractical due to the extent of Piper's integration into BPC's operations. 480 F.2d at 379; accord, *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 28-31 (2d Cir. 1973); *Electronic Specialty Co. v. International Controls Corp.*, *supra* at 947. But see *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 803-04 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970) (consummation of the transaction could

the court in granting relief were twofold: to compensate CCI for the injury it had suffered, and to deny to BPC "the fruits of obtaining Piper shares illegally."²⁵

On remand, the district court determined that the value of each share held by CCI had been reduced by \$2.40 on the date when opportunity to control was lost, and awarded damages based on that finding.²⁶ This amounted to five percent²⁷ of the appraisal value (\$48) of the shares on that date,²⁸ reflecting the court's estimate of the speculative nature of CCI's opportunity to control.²⁹ Defendants had urged that no damages be awarded. They reasoned that in a contest of this type, the value of victory would be so small and the uncertainty of attaining it so great that no one would be willing to pay a premium over market value for CCI's holdings (42 percent), assuming BPC's non-fraudulently acquired position (37 percent).³⁰ Plaintiffs, on the other hand, argued for a measure of damages based on the prices that the contestants were willing to pay during the contest for control, which would have yielded damages between \$17 and \$32 per share.³¹

Finally, the court enjoined BPC from voting the 14 percent of Piper's shares that it had acquired illegally for the minimum five year period prescribed by the court of appeals, reasoning that the purpose of such an injunction was to deprive BPC of control, not to further reward CCI.³²

not be allowed to prevent divestiture if it were proper relief for the situation). See also *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386 (1970).

25. 480 F.2d at 380.

26. 384 F. Supp. at 523.

27. *Id.*

28. A \$48 per share appraisal value was arrived at by discarding the highest and lowest estimates of the experts who had testified, and then averaging the remaining estimates. *Id.* at 517.

29. The court found the value of the control premium in the Piper situation to be between 5% and 10% of fair market value. *Id.* at 523; see notes 90-97 *infra* and accompanying text. However, the court recognized that the opportunity to control was not worth as much as the actual control position, and therefore the premium was set at 5% above fair market value. 384 F. Supp. at 523.

30. Defendants' Post-Trial Memorandum With Respect to Damages at 40-41, *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 384 F. Supp. 507 (S.D.N.Y. 1974), appeal docketed, No. 74-2542, 2d Cir., Nov. 26, 1974 [hereinafter cited as Defendants' Memorandum].

31. Plaintiff's Post-Trial Memorandum at 22-27, *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 384 F. Supp. 507 (S.D.N.Y. 1974), appeal docketed, No. 74-2542, 2d Cir., Nov. 26, 1974 [hereinafter cited as Plaintiff's Memorandum]. Plaintiff argued: "[I]n calculating damages in an action under the securities laws, the starting point is the cost of the plaintiff's shares." Plaintiff's Reply Brief on Appeal at 9, *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, appeal docketed, No. 74-2542, 2d Cir., Nov. 26, 1974. Such a measure would have granted CCI damages from an average purchase price of \$64 per share. *Id.* Alternatively, CCI argued that "(w)here a wrongdoer places a value on the property it damages, the Court may not substitute a lower subjective value." *Id.* at 10. Applying this measure, CCI's damages would have been the reduction in the value of its shares from the \$80 figure that BPC was willing to pay. *Id.* at 9-10. Finally, CCI argued that, at the least, it should recover based on a starting point of either cost or value, whichever figure was greater. *Id.* at 9-10; accord, Memorandum of the SEC as Amicus Curiae at 11-13, *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, appeal docketed, No. 74-2542, 2d Cir., Nov. 26, 1974. The district court does not seem to have even addressed these possibilities.

32. 384 F. Supp. at 523-26.

Plaintiff, pointing out the depressed state of the light aircraft industry, had argued for a longer injunction on the grounds that a five year injunction would merely saddle CCI with the responsibilities of Piper during the depressed period, only to turn it over to BPC at a time when its fortunes and the economic outlook would be considerably brighter.³³

III. BASES FOR RELIEF IN TENDER OFFER SITUATIONS

Private actions for damages have long been recognized as being one means of effectively enforcing the securities laws.³⁴ The rationale behind this "necessary supplement to Commission action"³⁵ was espoused by the Supreme Court in *Deckert v. Independence Shares Corp.*:³⁶

The power to enforce implies the power to make effective the right of recovery afforded by the [Securities Act of 1933]. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.³⁷

Determination of damages in a purchaser-seller or defrauded tendering shareholder situation poses no insurmountable problems.³⁸ In these situations damages are measured according to the "out-of-pocket" rule.³⁹ Under this rule, the defrauded purchaser is entitled to recover the difference between the price paid for the securities and the value of the securities determined at the time of purchase.⁴⁰ The defrauded seller may recover the difference between actual value and the price he received.⁴¹ A defrauded tenderer, in effect a seller, would get the seller's measure of damages.⁴² These standards do not

33. Plaintiff's Memorandum 114-16.

34. E.g., *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2d Cir. 1951); see Comment, *The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 *Yale L.J.* 1120, 1133-35 (1950).

35. *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

36. 311 U.S. 282 (1940).

37. *Id.* at 288 (emphasis deleted), quoted with approval in *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-34 (1964). See also *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381-83 (1970).

38. See note 14 *supra* and accompanying text.

39. See, e.g., *Madigan, Inc. v. Goodman*, 498 F.2d 233, 238-39 (7th Cir. 1974); *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1173 (2d Cir. 1970); *Esplin v. Hirschi*, 402 F.2d 94, 105 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); see note 14 *supra*.

40. E.g., *Gottlieb v. Sandia Am. Corp.*, 304 F. Supp. 980, 989 (E.D. Pa. 1969), *aff'd in part & rev'd in part on other grounds*, 452 F.2d 510 (3d Cir.), cert. denied, 404 U.S. 938 (1971). Some courts vary this measure by granting the difference between the price paid and the value at the time of discovery of the fraud. E.g., *Esplin v. Hirschi*, 402 F.2d 94, 105 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969).

41. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972). As with purchasers' remedies, some courts measure a defrauded seller's remedies as the difference between the price received and the highest value reached by the security within a reasonable time after discovery of the fraudulent conduct. E.g., *Fridrich v. Bradford*, [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,723, at 96,406-07 (M.D. Tenn. June 17, 1974).

42. E.g., *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544, 585 (E.D.N.Y. 1971). In addition to the remedy of damages, rescission is always available to defrauded purchasers, sellers, and tenderers. See, e.g., *Gordon v. Burr*, [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,874, at 96,981 (2d Cir., Nov. 20, 1974) (purchaser given opportunity to rescind for

avail the defeated takeover contestant, who has neither purchased nor sold securities in reliance on its opponent's fraudulent conduct.⁴³

The denial of the opportunity to compete for control is analogous to the common law tort of interference with prospective advantage.⁴⁴ Generally, this tort embraces the intentional nonprivileged interference with plaintiff's future contractual relations where the probability of plaintiff's economic benefit from such relations is not so small that damages based thereon would be speculative.⁴⁵ As Dean Prosser wrote:

In such cases there is a background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered.⁴⁶

Even where the opportunity is that of winning a prize, the damages are based upon the amount of profit that might have been realized and the chance that the injured party had of winning.⁴⁷

The value of opportunity lost through defendant's breach is also recognized in the law of contracts. According to Professor Corbin:

Where a contract right is conditional upon the happening of some uncertain event and the breach by the promisor makes it impossible to determine with reasonable certainty whether or not the event would have occurred if there had been no breach, the

rule 10b-5 violation); *Broder v. Dane*, 384 F. Supp. 1312 (S.D.N.Y. 1974) (shareholders who tendered shares as a result of non-disclosure given opportunity to rescind under § 14(e)); *Gottlieb v. Sandia Am. Corp.*, 304 F. Supp. 980, 990-92 (E.D. Pa. 1969), aff'd in part and rev'd in part on other grounds, 452 F.2d 510 (3d Cir.), cert. denied, 404 U.S. 938 (1971) (rescission ordered as part of the measure of damages).

43. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 375 (2d Cir.), cert. denied, 414 U.S. 910 (1973), on remand, 384 F. Supp. 507 (S.D.N.Y. 1974), appeal docketed, No. 74-2542, 2d Cir., Nov. 26, 1975.

44. *Id.* at 360.

45. See W. Prosser, *Torts* § 130, at 949-62 (4th ed. 1971).

46. *Id.* at 950; see Restatement (Second) of Torts § 912, comment d at 110 (Tent. Draft No. 19, 1973), which indicates that it is essential to the recovery of compensatory damages that the injured person prove that the enterprise was or was likely to be profitable and that the chance for profits has been interfered with. *Id.* Illustration 14 to § 912 is illuminating as to lost opportunity in a competitive situation:

"A is conducting a manufacturing business in which the net profits are approximately \$50,000 per year. B, a competitor, is guilty of unfair trade practices and the demand for A's goods begins to fall off instead of to increase as had been true hitherto. Some of the changes may be ascribed to competition by new competitors. The amount of harm which has been done by B cannot be told with any substantial degree of accuracy. A is nevertheless entitled to compensatory damages based upon such facts and figures as are reasonably available." *Id.* at 113; accord, *Fitt v. Schneidewind Realty Corp.*, 81 N.J. Super. 497, 196 A.2d 26 (L. Div. 1963).

47. W. Prosser, *supra* note 45, § 130, at 950-51; Restatement (Second) of Torts § 912, comment f at 114 (Tent. Draft No. 19, 1973). The leading case is *Chaplin v. Hicks*, [1911] 2 K.B. 786 (plaintiff awarded damages for loss of the opportunity to compete in a beauty contest, when she had been chosen as one of the fifty finalists). See also *Wachtel v. National Alfalfa J. Co.*, 190 Iowa 1293, 176 N.W. 801 (1920).

promisee can recover damages measured by the market value of the conditional right at the time of breach.⁴⁸

Although the cases have been infrequent, they have been consistent: a most critical factor is the certainty of the plaintiff's claim.⁴⁹ Where the claim is purely speculative it will be disallowed.⁵⁰ But if reasonable estimates of probability can be made, then the courts will evaluate the lost opportunity.⁵¹

In summary, resort to common law principles demonstrates that a defeated tender offeror's theory of damages begins with the value of its possibly controlling interest, discounted by the improbability of its attaining control absent fraud. Attention must now center on the components of both the basic evaluation and the discount factor.

IV. VALUATION OF THE LOST OPPORTUNITY TO CONTROL

"Control" has been variously defined as a corporate asset⁵² and not a corporate asset,⁵³ as the capacity to choose directors,⁵⁴ as an office and not a person,⁵⁵ as an attribute of stock ownership,⁵⁶ and as the signification of wealth, prestige and the power to dictate corporate policy.⁵⁷ To a controlling stockholder it is an instrument that he can use.⁵⁸ To the minority shareholder, however, it represents the fiduciary duty that operates to protect his investment, an investment over which he has little or no control.⁵⁹ In all events, however, control itself transfers at a premium when the seller demands one.

Purchasers would find a control position worth a premium over market price for a variety of reasons. Sometimes there is a desire to exploit the

48. 5 A. Corbin, *Contracts* § 1030, at 185 (1964); see *Restatement of Contracts* § 332, at 521 (1932).

49. See W. Prosser, *supra* note 45, § 130, at 950; 46 *Harv. L. Rev.* 696 (1933).

50. E.g., *Farabee-Treadwell Co. v. Union & Planters' Bank & Trust Co.*, 135 *Tenn.* 208, 186 *S.W.* 92 (1916) (claim of damage due to lost profits in a fluctuating grain market disallowed as speculative).

51. E.g., *Air Technology Corp. v. General Elec. Co.*, 347 *Mass.* 613, 199 *N.E.2d* 538 (1964) (damages recoverable to the extent they are ascertainable).

52. Bayne, *A Philosophy of Corporate Control*, 112 *U. Pa. L. Rev.* 22, 67 (1963).

53. *Christophides v. Porco*, 289 *F. Supp.* 403, 405 (S.D.N.Y. 1968).

54. Berle, "Control" in *Corporate Law*, 58 *Colum. L. Rev.* 1212 (1958).

55. Bayne, *supra* note 52, at 30.

56. *Christophides v. Porco*, 289 *F. Supp.* 403, 405 (S.D.N.Y. 1968).

57. Comment, *Sales of Corporate Control At a Premium: An Analysis and Suggested Approach*, 1961 *Duke L.J.* 554.

58. E.g., *Perlman v. Feldmann*, 129 *F. Supp.* 162, 184 (D. Conn. 1952), *rev'd*, 219 *F.2d* 173 (2d Cir.), *cert. denied*, 349 *U.S.* 952 (1955); see Bayne, *The Noninvestment Value of Control Stock*, 45 *Ind. L.J.* 317, 320-21 (1970); Bayne, *The Definition of Corporate Control*, 9 *St. Louis L.J.* 445 (1965).

59. See, e.g., *Southern Pac. Co. v. Bogert*, 250 *U.S.* 483, 487-88 (1919); *Gerdes v. Reynolds*, 28 *N.Y.S.2d* 622, 650 (Sup. Ct. 1941); Bayne, *The Sale-of-Control Premium: The Intrinsic Illegitimacy*, 47 *Texas L. Rev.* 215, 220 (1969); Bayne, *A Legitimate Transfer of Control: The Weyenberg Shoe—Florsheim Case Study*, 18 *Stan. L. Rev.* 438, 442-43 (1966); Leech, *Transactions in Corporate Control*, 104 *U. Pa. L. Rev.* 725 (1956).

acquisition for the acquiror's benefit. The courts⁶⁰ and the commentators⁶¹ have been unanimous in decrying such situations. The legitimate benefits of control, however, are sufficient to command a premium. Paramount here is the ability to "control . . . your own destiny."⁶² The prestige of control must also command some increment.⁶³ More important, however, are the ability to dictate corporate policy and direction, the ability to assume management positions with all the benefits they contain, the use of corporate property, and the ability to arrange mergers and consolidations. Finally, the acquiror will pay for his chance to improve the target's profitability, which would raise the market value of his investment.⁶⁴

Control premiums have developed in varying fact situations.⁶⁵ In the first pattern, non-voting shareholders compensate voting shareholders who have relinquished exclusive voting privileges.⁶⁶ Premiums paid in such cases are sometimes staggering.⁶⁷ A leading case in this category is *Manacher v. Reynolds*.⁶⁸ There, the Reynolds family held all voting stock of Foil, a holding company which owned 50.09 percent of the outstanding voting shares of Reynolds Metals.⁶⁹ Under a reorganization plan merging Foil into Metals, each Foil voting share (class A) was to be exchanged for three shares of a new class of voting stock, while the non-voting shares (class B) were to be exchanged one-for-one.⁷⁰ The Reynolds family holdings, including the shares exchanged for both the class A and the class B shares, increased from 14.2 percent of the net worth of Metals to 17.4 percent,⁷¹ an increase of 19 percent over their prior holdings. The entire increase, however, was the result of the "3 for 1 premium"⁷² on the class A shares, since all class B holders, including

60. E.g., *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir.), cert. denied, 349 U.S. 952 (1955) (see note 82 *infra* and accompanying text); *Commonwealth Title Ins. & Trust Co. v. Seltzer*, 227 Pa. 410, 76 A. 77 (1910) (president sold control to outsider when he knew transaction was against best interests of corporation). See also *Gerdes v. Reynolds*, 28 N.Y.S.2d 622 (Sup. Ct. 1941) (directors sold control to outsiders who then looted corporation's assets).

61. E.g., Jennings, *Trading in Corporate Control*, 44 Calif. L. Rev. 1 (1956); Leech, *supra* note 59, at 779-96.

62. Plaintiff's Memorandum, *supra* note 31, at 105.

63. Bayne, *The Noninvestment Value of Control Stock*, 45 Ind. L.J. 317, 325 (1970).

64. *Id.* at 322-26.

65. Prior to *Chris-Craft*, control premiums have been usually paid in non-contest situations. In such settings, the premium value is greatly enhanced. See notes 66-77 *infra* and accompanying text.

66. E.g., *Honigman v. Green Giant Co.*, 309 F.2d 667 (8th Cir. 1962), cert. denied, 372 U.S. 941 (1963).

67. E.g., in *Honigman*, the common stock was divided into two classes; these had equal equity and dividend rights, but only one had voting rights. During a reorganization under which voting rights were given to the previously non-voting shares, one voting share could be exchanged for 1000 new shares, while the old non-voting shares were to be exchanged one-for-one. This amounted to a 100,000% premium. *Id.* at 669.

68. 39 Del. Ch. 401, 165 A.2d 741 (Del. Ch. 1960).

69. *Id.* at 404, 165 A.2d at 743. See notes 70-73 *infra* and accompanying text.

70. 39 Del. Ch. at 408, 165 A.2d at 745.

71. See *id.* at 406, 165 A.2d at 744.

72. *Id.* at 413, 165 A.2d at 748.

the Reynolds family, exchanged their shares at a one-to-one ratio. The court approved the reorganization, concluding that the "overwhelming" approval of the plan by those shareholders not connected with the Reynolds family demonstrated its fairness.⁷³

In a second group of cases, control passes from one group of shareholders to another. In *Essex Universal Corp. v. Yates*,⁷⁴ the president of Republic Pictures sold his controlling interest to Essex Universal Corporation. The Second Circuit declared that receipt of a premium over market price for the sale of controlling shares involved no impropriety per se.⁷⁵ In *Essex*, defendant had received a premium of approximately one-third over market;⁷⁶ in other instances, courts have upheld premiums ranging up to 200 percent.⁷⁷

In determining the value of control to an acquiring corporation, the basic indicator must be the amount that the corporation is willing to pay over market value for such control.⁷⁸ As Judge Learned Hand stated: "When all is said, value is nothing more than what people will pay for the shares . . ."⁷⁹

Valuation becomes more complex, however, under circumstances involving tender offers. Situations in which control premiums have been paid in the past have been much less volatile than in the typical tender offer battle,⁸⁰ where other significant factors limiting the controlling party's ability to "use" his position freely must be taken into consideration.

Courts have long recognized that the controlling shareholder stands as a fiduciary of the corporation.⁸¹ Thus, when a controlling shareholder sells his stock at a premium knowing that the purchaser intends to expropriate a corporate opportunity, as in the leading case of *Pertman v. Feldmann*,⁸² he has been held accountable.⁸³ Since *Pertman*, many commentators have

73. *Id.* at 424-26, 165 A.2d at 756.

74. 305 F.2d 572 (2d Cir. 1962).

75. *Id.* at 576.

76. Republic's market price was approximately \$6 per share; the purchase of Yates' controlling interest was to be consummated at \$8 per share. *Id.* at 573.

77. E.g., *Levy v. American Beverage Corp.*, 265 App. Div. 208, 38 N.Y.S.2d 517 (1st Dep't 1942) (stock which sold on the open market for as little as \$1.12 per share sold in a 53% controlling block for \$3.50 per share).

78. Cf. *Levin v. Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y.), *aff'd mem. sub nom. Wesson v. Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1973).

79. *Borg v. International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925).

80. It is worth noting at this juncture that in *Chris-Craft*, BPC was willing to exchange first \$79.25 cash, then a stock package worth \$80 for each Piper share. *Chris-Craft I*, 480 F.2d at 351-52. Piper was then trading at \$65 per share; the district court on remand found that a reasonable market value for Piper stock, absent the inflationary factors introduced by the takeover battle, was \$48. 384 F. Supp. at 517. Thus, BPC paid a premium of 23% over a market price itself 35% above an estimated non-contest market price.

81. E.g., *Pepper v. Litton*, 308 U.S. 295, 306 (1939); *Southern Pac. Co. v. Bogert*, 250 U.S. 483, 492 (1919).

82. 219 F.2d 173, 178 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

83. "Both as director and as dominant stockholder, Feldmann stood in a fiduciary relationship to the corporation and to the minority stockholders as beneficiaries thereof. . . .

. . . [T]he responsibility of the fiduciary . . . includes the dedication of his uncorrupted

generalized that any control premium represents a corporate asset, and should therefore be paid directly to the corporation or distributed ratably to all shareholders.⁸⁴ The courts, however, have rejected this theory, limiting liability to those instances where the sale of control is accomplished in the context of a breach of the seller's fiduciary duty to the minority.⁸⁵

Courts have increasingly protected minority rights.⁸⁶ This fiduciary duty to the minority was found in *Chris-Craft* to bind the victorious tender offeror even though the minority was composed mainly of the offeror's erstwhile antagonist.⁸⁷ Moreover, as *Chris-Craft* observed, this minority shareholder is likely to be bigger, better financed, more aggressive and more capable of protecting itself than the minority shareholders in the situations discussed above.⁸⁸ The value of control to the newly controlling shareholder declines accordingly. Finally, the value of control to the victorious tender offeror will decrease further if the incumbent management opposed and continues to oppose it. The transition period would necessarily be more difficult, and hostility towards the "interlopers" would create an atmosphere hindering the

business judgment for the sole benefit of the corporation, in any dealings which may adversely affect it. . . . [T]he same rule should apply to his fiduciary duties as majority stockholder, for in that capacity he chooses and controls the directors, and thus is held to have assumed their liability." *Id.* at 175-76 (citations omitted); accord, *Gerdes v. Reynolds*, 28 N.Y.S.2d 622, 649-50 (Sup. Ct. 1941). But see *Levy v. American Beverage Corp.*, 265 App. Div. 208, 38 N.Y.S.2d 517 (1st Dep't 1942) (held, where purchasers looted corporation, that sellers of controlling shares were not fiduciaries of minority shareholders, and were not liable when they did not know purchasers' intentions).

Perlman precipitated considerable comment when it was decided, and the arguments continue to this day on how broadly its holding should be taken. See, e.g., Bayne, *A Philosophy of Corporate Control*, 112 U. Pa. L. Rev. 22 (1963); Berle, "Control" in *Corporate Law*, 58 Colum. L. Rev. 1212 (1958); Hill, *The Sale of Controlling Shares*, 70 Harv. L. Rev. 986 (1957); Jennings, *Trading in Corporate Control*, 44 Calif. L. Rev. 1 (1956); Leech, *Transactions in Corporate Control*, 104 U. Pa. L. Rev. 725 (1956); Comment, *Sales of Corporate Control at a Premium: An Analysis and Suggested Approach*, 1961 Duke L.J. 554; Note, *The Sale of Control of the Widely-Held Corporation and the Strict Trust Doctrine*, 59 Iowa L. Rev. 1286 (1974).

84. See Andrews, *The Stockholder's Right to Equal Opportunity In the Sale of Shares*, 78 Harv. L. Rev. 505 (1965); Bayne, *A Legitimate Transfer of Control: The Weyenberg Shoe-Florsheim Case Study*, 18 Stan. L. Rev. 438 (1966); Berle, *supra* note 83. But see Hill, *supra* note 83; Javaras, *Equal Opportunity in the Sale of Controlling Shares: A Reply to Professor Andrews*, 32 U. Chi. L. Rev. 420 (1965); Comment, *supra* note 83.

85. "There is no obligation . . . to 'share and share alike.' Control is not a corporate asset, but is rather an attribute of stock ownership." *Christophides v. Porco*, 289 F. Supp. 403, 405 (S.D.N.Y. 1968) (citation omitted).

86. Rams, *Judicial Valuation of Dissenting Shareholders' Interests*, 8 Lincoln L. Rev. 74, 75-76 (1973); see, e.g., *Ferraioli v. Cantor*, 281 F. Supp. 354 (S.D.N.Y. 1967) (controlling stockholder may not use position to take unfair advantage of minority shareholders); *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969) (majority shareholders have a duty to use good faith and fairness in dealings with minority). See also Address by Commissioner Sommer, "Going Private": A Lesson in Corporate Responsibility, [Current Binder] CCH Fed. Sec. L. Rep. ¶ 80,010 (Nov. 20, 1974).

87. See *Chris-Craft II*, 384 F. Supp. at 519-21; Bayne, *supra* note 84, at 325-26.

88. See *Chris-Craft II*, 384 F. Supp. at 519.

institution of changes by the new controlling party. If the new management is unfamiliar with the business, such problems are exacerbated.⁸⁹

These discounting factors operated in *Chris-Craft*. Had CCI been victorious, a sizeable BPC minority interest would have been ready to turn to the courts to protect its interests, and equally ready to exert a limiting effect on CCI's use of the accoutrements of control.⁹⁰ In addition, CCI would have taken control over the bitter opposition of Piper management. While CCI might have been able to attract knowledgeable—and loyal—management for Piper, it could not do so from its own organization.⁹¹ All these factors would have seriously hindered maximization of the value of control.⁹²

However, what CCI actually lost was not control itself, but merely the opportunity to gain control. CCI argued that, with a 42 to 37 percent lead absent BPC's violations, it was a statistical certainty that it would have been able to maximize its opportunity.⁹³ However, as defendants pointed out,⁹⁴ and as the court decided,⁹⁵ the tender situation is so volatile and contains so many factors not amenable to simple statistical reduction that such certainties do not exist. The constantly changing size of the competitive tender offers, and especially the effect of management support for the BPC bid⁹⁶ could defeat "statistical certainties." The court correctly concluded that there was no certainty that CCI would have been successful in winning absolute control of Piper, and thus no basis on which to award the full control premium as a measure of the worth of CCI's opportunity to control.⁹⁷

V. REDUCTION TO A MINORITY POSITION

A. Theories of Stock Valuation

An award of the value of the opportunity to control does not fully compensate a fraudulently defeated tender offeror. It must also be compensated because it has been wrongfully relegated to a minority position in the target corporation.⁹⁸ In order to quantify this loss, the value of the stock prior to reduction to a minority position, absent the artificial stimulation of the price due to the contest itself, must be determined. The value of a premium for control or the opportunity to control is an addition to this basic value.⁹⁹

89. See generally Defendants' Memorandum, *supra* note 30, at 35.

90. Donald Gant, an investment banker and witness for defendants, indicated that a premium under such circumstances would not be "very much." Defendants' Memorandum 35-36.

91. In *Chris-Craft*, a "wholesale—and expensive—replacement and reorganization of the Piper corporate management structure" probably would have resulted. *Chris-Craft II*, 384 F. Supp. at 519-20.

92. *Id.* at 519.

93. Plaintiff's Memorandum, *supra* note 31, at 20-21.

94. Defendants' Memorandum, *supra* note 30, at 25-26.

95. 384 F. Supp. at 518-19. The court of appeals did not attempt to decide if CCI would have been successful. *Chris-Craft I*, 480 F.2d at 378-79.

96. *Chris-Craft II*, 384 F. Supp. at 521.

97. *Id.*

98. *Chris-Craft I*, 480 F.2d at 376.

99. The district court in *Chris-Craft* determined that the value of CCI's Piper holdings at the

Similarly, this basic value must be the starting point of any determination of loss of value through reduction to a minority position. The amount of this loss is the difference between the basic value and the value of the tender offeror's stock after relegation to a minority position in a corporation now controlled by its adversary.¹⁰⁰ This will in turn require an examination of the value of the block if the tender offeror then seeks to sell the entire block. Depending on the use of either an appraisal method or a market-oriented method, the damages may vary considerably.

Pennsylvania law controlled in *Chris-Craft*.¹⁰¹ Following the generally accepted appraisal principles, courts apply an appraisal formula which considers three basic factors in arriving at a share's value:¹⁰² net asset value, or "the share which the stock represents in the value of the net assets of the corporation;"¹⁰³ investment value, "an estimate of present worth in light of past, present, and prospective financial records of the company . . . obtained by capitalizing earnings;"¹⁰⁴ and market value, "the price at which the stock was selling on the market prior to the action which is objected to, disregarding any change in price due to the action."¹⁰⁵ Considering these three values and assigning them weighted percentages according to their reliability in the

time the opportunity to control was lost was \$48 per share. See 384 F. Supp. at 517. To this amount, the court added \$2.40 per share as the value of the lost opportunity to control. *Id.* at 521-23.

100. See *id.* at 511-14.

101. See note 123 *infra*.

102. See generally *Adams v. R.C. Williams & Co.*, 39 Del. Ch. 61, 158 A.2d 797 (Del. Ch. 1960); *Jacques Coe & Co. v. Minneapolis-Moline Co.*, 31 Del. Ch. 368, 75 A.2d 244 (Del. Ch. 1950); see notes 103-05 *infra*.

103. In *re Watt & Shand*, 452 Pa. 608, 611 n.7, 304 A.2d 694, 698 n.7 (1973). Inclusion of net asset value has been criticized insofar as it reflects the stock's liquidation value. Appraisal, these critics contend, is designed to show the value of the stock as part of a going concern. See, e.g., *In re Marcus*, 273 App. Div. 725, 728-29, 79 N.Y.S.2d 76, 79-80 (1st Dep't 1948), appeal dismissed for failure to prosecute, 302 N.Y. 881, 100 N.E.2d 55 (1951); Kaplan, *Problems in the Acquisition of Shares of Dissenting Minorities*, 34 B.U.L. Rev. 291, 299-300 (1954); Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv. L. Rev. 1453, 1457-60 (1966).

104. 452 Pa. at 611 n.7, 304 A.2d at 698 n.7. Investment value has been favorably treated by the commentators. See Kaplan, *supra* note 103, at 297-300; Note, *supra* note 103, at 1464-68. However, many courts have not found it easy to apply due to difficulty in choosing the proper capitalization ratio. E.g., *Francis I. duPont & Co. v. Universal City Studios, Inc.*, 312 A.2d 344, 348 (Del. Ch. 1973).

105. 452 Pa. at 611 n.7, 304 A.2d at 698 n.7; see notes 113-20 *infra* and accompanying text. Generally market value is heavily favored by the courts. See, e.g., *Levin v. Mississippi River Corp.*, 59 F.R.D. 353, 370 (S.D.N.Y.), *aff'd mem. sub nom. Wesson v. Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1973); *Jones v. Healy*, 184 Misc. 923, 55 N.Y.S.2d 349 (Sup. Ct. 1945), *aff'd mem.*, 270 App. Div. 895, 62 N.Y.S.2d 605, motion for leave to appeal denied, 270 App. Div. 998, 64 N.Y.S.2d 170 (1st Dep't 1946): "The market may not always appear to be in line with earnings, dividends, or asset value, but in the market all the factors which enter into a realistic determination of value are appraised by those who are most realistic, the actual buyers and sellers, and the market prices, reflecting the composite judgment of the informed and interested, are apt to be more significant than any individual opinion." *Id.* at 936, 55 N.Y.S.2d at 360.

particular circumstances of the case, the appraiser will derive a figure for the value of the stock.

Appraisal was developed to give a measure of protection to minority shareholders, who, while being frozen out, had been offered less than fair value for their shares.¹⁰⁶ Theoretically appraisal will compensate the minority shareholder fairly under these circumstances, but such has not always been the case.¹⁰⁷ Probably the most serious problem is the uncertainty created by the lack of definite fixed weights to be assigned to each value.¹⁰⁸ This is apparent from examinations of appraisals rendered under Delaware law, which is substantially identical to that of Pennsylvania. In *Francis I. duPont & Co. v. Universal City Studios, Inc.*,¹⁰⁹ claims calculated under the appraisal method ranged from \$52.36 to \$131.89 per share, while the appraiser granted \$91.47.¹¹⁰ Considerably more disparity is frequently the case.¹¹¹

Presumably for reasons such as these,¹¹² the Delaware appraisal statute was amended in 1967 to limit its use to those situations where no active market existed in the stock in question.¹¹³ This followed the view expressed

106. See generally Kaplan, *supra* note 103; Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189 (1964); Note, *Freezing Out Minority Shareholders*, 74 Harv. L. Rev. 1630 (1961).

107. As Professor Vorenberg recognized, "resort to appraisal will, even under the best of the statutory procedures, often give the stockholder less than his stock is worth. . . . Inevitably, the procedure involves delay and uncertainty, with expenses which may cut into his recovery." Vorenberg, *supra* note 106, at 1201 (footnote omitted).

108. Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv. L. Rev. 1453 (1966).

109. 312 A.2d 344 (Del. Ch. 1973).

110. *Id.* at 350.

111. In *re Olivetti Underwood Corp.*, 246 A.2d 800 (Del. Ch. 1968), the plaintiffs claimed that their stock was worth \$16.39 per share, while the corporation valued it at \$2.85. The appraiser found it to be worth \$11.83, but the court lowered that valuation to \$9.78. The disparities resulted from the following assignments of values and weights by the different calculators:

	Shareholders	Corporation	Appraiser	Court
Earnings Prospects (Investment Value)	\$16.00 (25%)	\$0 (30%)	\$0 (20%)	\$0 (25%)
Market Value	14.50 (50%)	9.50 (30%)	14.25 (60%)	14.25 (50%)
Asset Value	20.53 (25%)	0 (30%)	16.38 (20%)	10.62 (25%)
Dividend Value	(0%)	0 (10%)	(0%)	(0%)
Weighted Value	\$16.39	\$2.85	\$11.83	\$9.78

Id. at 803, 809. Similarly in *Adams v. R.C. Williams & Co.*, 39 Del. Ch. 61, 158 A.2d 797 (Del. Ch. 1960), the plaintiffs claimed \$15 for their \$25 preferred stock, while the corporation offered \$4.49. The appraiser found its value to be \$9.71. *Id.* at 63-64, 158 A.2d at 798-99.

112. Vorenberg, *supra* note 106, at 1203.

113. Del. Code Ann. tit. 8, § 262(k) (1975). The Delaware statute limits use of appraisals to those situations where the stock is not registered on a national exchange or held of record by more

by many commentators¹¹⁴ and by Judge Weinfeld in *Levin v. Mississippi River Corp.*¹¹⁵ that, where there is an active market in a stock, "[t]heory must yield to the reality of the market place, 'the true appraiser.'" ¹¹⁶

The market value of a stock also controls in Pennsylvania¹¹⁷ and in New York¹¹⁸ when there is an existing active market. If there is no current market, the appraisal process will attempt to determine value by "constructing" a market value¹¹⁹ through the use of such indicia as comparable corporations, marketability, net asset value, and investment value, *i.e.*, what the value of the stock would be if the corporation's shares were actively traded.¹²⁰

B. *Evaluating the Minority Position*

As is readily apparent from *Chris-Craft*, the tender contest situation is a hybrid: an active (albeit artificially stimulated) market existed in Piper stock prior to the battle, but no active market existed for the same shares once the battle was over.¹²¹ The court of appeals in *Chris-Craft* commanded that damages be measured by the reduction in appraisal value of CCI's Piper holdings as a result of its relegation to a minority position.¹²²

than 2000 stockholders, unless otherwise provided. *Id.* Indeed, "[t]he Delaware law is that in the absence of a reliable market for stock, a reconstructed market value 'must be given consideration', if one can be made." *Francis I. duPont & Co. v. Universal City Studios, Inc.*, 312 A.2d 344, 352 (Del. Ch. 1973).

114. See generally Kaplan, *supra* note 103; Manning, *The Shareholder's Appraisal Remedy: An Essay For Frank Coker*, 72 *Yale L.J.* 223, 231-32 (1962); Rams, *Judicial Valuation of Dissenting Shareholder Interests*, 8 *Lincoln L. Rev.* 74 (1973).

115. 59 F.R.D. 353 (S.D.N.Y.), *aff'd mem. sub nom. Wesson v. Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1973) (federal common law).

116. *Id.* at 370.

117. Pa. Stat. Ann. tit. 15, § 1515(L) (Cum. Supp. 1974). The Pennsylvania statute limits use of appraisals to those stocks held by less than 2500 shareholders and listed on neither the New York nor the American Stock Exchanges. *Id.*

118. *E.g.*, *In re Deutschmann*, 281 App. Div. 14, 116 N.Y.S.2d 578 (1st Dep't 1952) (challenge to market value as proper determinant held vexatious as matter of law); *In re Marcus*, 273 App. Div. 725, 79 N.Y.S.2d 76 (1st Dep't 1948), appeal dismissed for failure to prosecute, 302 N.Y. 881, 100 N.E.2d 55 (1951) (valuation on basis of going concern, not liquidated value); *Jones v. Healy*, 184 Misc. 923, 55 N.Y.S.2d 349 (Sup. Ct. 1945), *aff'd mem.*, 270 App. Div. 895, 62 N.Y.S.2d 605, motion for leave to appeal denied, 270 App. Div. 998, 64 N.Y.S.2d 170 (1st Dep't 1946) (market value best evidence for all purposes where it fairly reflects opinion of informed buyers and sellers).

119. See *Francis I. duPont & Co. v. Universal City Studios, Inc.*, 312 A.2d 344, 352 (Del. Ch. 1973).

120. See *Jones v. Healy*, 184 Misc. 923, 55 N.Y.S.2d 349 (Sup. Ct. 1945), *aff'd mem.*, 270 App. Div. 895, 62 N.Y.S.2d 605, motion for leave to appeal denied, 270 App. Div. 998, 64 N.Y.S.2d 170 (1st Dep't 1946).

121. The total percentage of Piper shares acquired from sources other than the Piper family by BPC and CCI was 67% of all shares issued and outstanding, or over a million shares. Following the contest and the concluding open market purchases by both CCI and BPC, 6% of Piper's shares remained outstanding, not nearly enough to maintain a stable market in the event of sales by CCI. See note 20 *supra*.

122. 480 F.2d at 380. There is some question as to the court's intent in indicating "appraisal

On remand, applying Pennsylvania law, the district court employed the three-factor appraisal method discussed above.¹²³ The court took no cognizance of the size of the CCI block. All its evaluations were done on the basis of a standard 100 share block.¹²⁴ Using this reference, it determined that since there were no changes in asset, investment, or market values as a result of BPC taking majority control,¹²⁵ there were no damages for reduction to a minority position.¹²⁶ The court concluded that "CC[I] is presently in a position no different from that of any minority owner (albeit a large one) of any publicly held corporation."¹²⁷

However, just as the premium for control inures to a large block of shares but is absent in any valuation of the same shares using a 100-share block, so the use of a 100-share block in valuing a minority position cannot comprehend the factors appurtenant to the 700,000 share block which CCI held.¹²⁸ Thus, the district court accepted a \$48 per share valuation of the 100-share block as a starting point for its grant of a \$2.40 opportunity-for-control premium.¹²⁹ Since its valuation of the minority position did not go beyond the 100-share block, it could not reflect the reduction in value of the CCI block introduced by such problems as blockage, minority position, and unmarketability.¹³⁰ In applying the appraisal method as strictly as it did, the

value" as the determinant of CCI's damages. A strict application of Pennsylvania's appraisal statute would require the type of three-factor test applied in *In re Watt & Shand*, 452 Pa. 608, 304 A.2d 694 (1973). See text accompanying notes 101-05 *supra*. However, it is doubtful whether Pennsylvania would have applied this method in light of the active market that existed during the contest. The Pennsylvania legislature specifically limited appraisals to non-market situations. See note 116 *supra* and accompanying text. On remand, the district court applied the appraisal formula. 384 F. Supp. at 513.

123. See 384 F. Supp. at 512-14 & n.5, citing Pa. Stat. Ann. tit. 15, § 1908 (Cum. Supp. 1974). Pennsylvania law applied because the shares to be appraised were issued by a Pennsylvania corporation, Piper. See *Chris-Craft I*, 480 F.2d at 350.

124. 384 F. Supp. at 514.

125. *Id.* at 514-15.

126. *Id.* at 514.

127. *Id.* While a 100-share block could be marketed without difficulty, such would not be the case with a 700,000 share block. See notes 134-38 *infra* and accompanying text.

128. Cf. *Chris-Craft II*, 384 F. Supp. at 517 & n.12.

129. *Id.* at 523.

130. To some extent these factors will be considered in arriving at the three basic values, especially market value, but where a 100-share unit is the basis for appraisal of a much larger block, it is submitted that these values should be used as independent factors in reaching an appraisal price. Many courts, including those of Pennsylvania and Delaware, apparently would uphold their independent use in a proper case. See *Jacques Coe & Co. v. Minneapolis-Moline Co.*, 31 Del. Ch. 368, 372, 75 A.2d 244, 246-47 (Del. Ch. 1950) (approved of less arbitrary procedures for valuation, and inclusion of independent values where proper); *Tri-Continental Corp. v. Battye*, 31 Del. Ch. 523, 526, 74 A.2d 71, 72 (Del. 1950) (appraiser must consider "all factors and elements which reasonably might enter into the fixing of value"); *In re Watt & Shand*, 452 Pa. 608, 610, 304 A.2d 694, 697-98 (1973) (all relevant factors must be considered in fixing value).

In *Austin v. City Stores Co.* (No. 1), 89 Pa. D. & C. 57, 59 (C.P. Philadelphia County 1953), the court asserted that "[a]sset value; market value; market prices of comparable companies;

court apparently took the 100-share measure beyond its intended use.¹³¹ Appraisal was developed to provide dissident shareholders a fair valuation in return for surrendering their shares to the issuer when the absence of an active market prevents disposal of the shares in any other manner.¹³² In a sense, appraisal seeks to discover fair liquidation values for minority positions. Even if a large minority position is appraised and surrendered, it makes little difference if blockage or unmarketability exist, since these factors are eliminated with the tender of the shares. In *Chris-Craft*, however, this critical premise was missing: the appraisal would have fairly compensated CCI for the value of its position only if the blockage, minority, and unmarketability factors could be eliminated—in other words, if the shares were tendered and full value received as part of the appraisal. Since CCI continued to hold the shares, exclusion of the size factor in determining CCI's loss resulted in substantially less than full compensation for its injury.¹³³ Moreover, CCI's reduction to a minority position was "caused"¹³⁴ by BPC's illegal acquisitions. A small investor calculates and accepts the risk that the market for his shares will dissolve and that his shares will consequently be acquired at appraisal value. CCI took this risk only to the extent that it calculated a certain likelihood that, in a fairly conducted battle, it would lose. Certainly, to the extent these calculations were thrown off by BPC's conduct, consideration of the increase in risk to CCI of reduction to minority status which it could not have put into its risk analysis should have been considered. Such an approach should have led to some compensation for reduction to minority status.

The blockage concept recognizes that even if a corporation's stock is widely held and traded on a national securities exchange, if the block to be marketed is significantly larger than the normal floating supply (the amount of stock available for trading at a given time—*i.e.*, the amount held by brokers,

market price and earnings ratio; management and its policies; earnings; dividends; valuation of assets; reserves for various contingencies; tax liabilities; future earnings; [and] predictions of future business events . . . all . . . must be considered and given their proper weight in order that a just result might be attained." *Id.* at 59, quoted with approval in *In re Watt & Shand*, *supra* at 610, 304 A.2d at 698.

131. See Note, Valuation of Dissenters' Stock Under Appraisal Statutes, 79 *Harv. L. Rev.* 1453, 1454 (1966).

132. See generally Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 *Yale L.J.* 223, 226-27 (1962); Note, Valuation of Dissenters' Stock Under Appraisal Statutes, 79 *Harv. L. Rev.* 1453 (1966); Note, Freezing Out Minority Shareholders, 74 *Harv. L. Rev.* 1630, 1634-35 (1961). Appraisal statutes themselves, however, seem to have developed to allow corporate management more freedom to accommodate dissident minority shareholders while effecting mergers and acquisitions. See Manning, *supra* at 227; Note, Valuation of Dissenters' Stock Under Appraisal Statutes, *supra* at 1453; Note, Freezing Out Minority Shareholders, *supra* at 1630.

133. CCI's experts testifying on the issue of damages estimated that once CCI had been reduced to a minority position in Piper, CCI's holdings could command between \$20 and \$30 per share. Plaintiff's Memorandum, *supra* note 31, at 34. Deducted from the \$48 per share appraisal value, such a measurement would indicate a loss to CCI of between \$18 and \$28 per share. BPC's experts found CCI's bloc to be virtually unmarketable under existing circumstances, without BPC's cooperation. *Id.* at 64.

134. See *Chris-Craft I*, 480 F.2d at 375-76.

traders, etc., but not investors), this will severely inhibit the block's marketability and correspondingly decrease its market value.¹³⁵ This was explicitly recognized by the Internal Revenue Service in 1958.¹³⁶ Blockage also recognizes that an inordinately large block of shares thrown on the market at one time would lead to a significant reduction in market price until the market absorbs the block.¹³⁷ Blockage discounts have been substantial, ranging as high as one-third where the block involved represented more than 50 percent of the floating supply.¹³⁸ Moreover, none of these cases dealt with a block many times the size of the float, such as CCI held.¹³⁹ Expert witnesses agreed that this block was unmarketable except by a registered public offering.¹⁴⁰ Plaintiff's experts also testified that the discount in this case should substantially exceed the discounts allowed in conventional blockage cases.¹⁴¹

135. "[T]he adjustment for blockage is . . . a recognition of the economic fact that a large block of stock dumped upon a market not having enough buyers to purchase it at its quoted price per share will have to be reduced in price in order to be sold." *In re Joslyn*, 500 F.2d 382, 384 (9th Cir. 1974) (discounting a block by 12%).

136. The IRS had for many years resisted recognizing blockage, but had to do so once "the judicial attitude hardened from one permitting the trier of fact to consider the blockage effect to a rule requiring that it be considered . . ." *Rushton v. Commissioner*, 498 F.2d 88, 91 (5th Cir. 1974) (emphasis omitted). The regulation concerning blockage provides that "[i]n certain exceptional cases, the size of the block of securities . . . in relation to the number of shares changing hands in sales may be relevant in determining whether selling prices reflect the fair market value of the block of stock to be valued. If the donor can show that the block of stock to be valued . . . is so large . . . that it could not be liquidated in a reasonable time without depressing the market, the price at which the block could be sold as such outside the usual market, as through an underwriter, may be a more accurate indication of value than market quotations." 26 C.F.R. § 25.2512-2(e) (1974). The courts require that the party claiming the benefit of the blockage rule must show that a reasonably skilled broker could not have liquidated the block for the assessed value within a reasonable time. E.g., *Rushton v. Commissioner*, *supra* (blockage discount disallowed where no proof that shares could not be marketed successfully); *Richardson v. Commissioner*, 151 F.2d 102 (2d Cir. 1945), cert. denied, 326 U.S. 796 (1946) (same); see *Helvering v. Maytag*, 125 F.2d 55 (8th Cir.), cert. denied, 316 U.S. 689 (1942) (blockage discount allowed where shares could not be absorbed into market within reasonable time); *Bull v. Smith*, 119 F.2d 490 (2d Cir. 1941) (blockage discount disallowed where it was shown that broker could market shares successfully within a reasonable time period).

137. "It is a matter of common knowledge that the value of any product or commodity, whether it be wheat, hogs or otherwise, is affected by the law of supply and demand, and that where the former far exceeds the latter, it has a depressing effect upon value. Reference to the daily markets of the country support [sic] this statement. No doubt the value of corporate stock is similarly affected." *Commissioner v. Shattuck*, 97 F.2d 790, 792 (7th Cir. 1938); see *In re Joslyn*, 500 F.2d 382 (9th Cir. 1974); *Havemeyer v. United States*, 59 F. Supp. 537 (Cl. Ct.), cert. denied, 326 U.S. 759 (1945).

138. *Helvering v. Maytag*, 125 F.2d 55, 58 (8th Cir.), cert. denied, 316 U.S. 689 (1942).

139. See note 20 *supra* and accompanying text.

140. Plaintiff's Memorandum, *supra* note 31, at 34. Indeed, under the circumstances, only one of the experts who testified for CCI would have distributed the shares, and BPC's expert would not have done so. *Id.* at 38. Two witnesses for CCI who managed portfolios indicated that they would not have considered purchasing the 42% minority interest under any circumstances. *Id.* at 37.

141. Appraisals of the minority position by CCI's experts yielded estimates discounting the

But blockage is only one of the problems facing a defeated tender offeror attempting to dispose of his holdings. The post-contest target corporation resembles a closely held corporation more than a publicly held one, with relatively insignificant trading in its shares.¹⁴² It is demonstrable that the stock of a closely held corporation generally trades at a lower price than that of a comparable publicly held corporation.¹⁴³ In addition, minority positions in closely held corporations traditionally have been valued at substantial discounts from net asset value or from comparable positions in actively traded corporations.¹⁴⁴ As the United States Court of Claims said in *Richter v. United States*,¹⁴⁵ a case involving disputed estate taxes:

[T]here is the significant fact that the stock involved here was a minority interest of only 17 percent in a closely held corporation. It is logical to assume that this would adversely affect its value if it were offered for sale on the open market, as few people would be interested in buying it under these circumstances.¹⁴⁶

Thus, where minority interests in closely held corporations have been transferred, discounts of one-third have not been unusual.¹⁴⁷

The importance of marketability in valuing a security is again emphasized by the discounts from market value made in the case of letter stock. In *Kaufman v. Diversified Industries, Inc.*,¹⁴⁸ the court stated:

Such stock cannot be sold freely to the public and thus has limited marketability. In brief, although the shares to be delivered were to have a value of \$486,377.50 as defined in the contract, the market value of the shares would actually be significantly less than the defined value.¹⁴⁹

block by between 40% and 60%. Plaintiff's Memorandum, *supra* note 31, at 34. Appraisals by BPC's experts, using a different factual situation—and 100-share units—yielded estimates without discounts at all. Defendants' Memorandum, *supra* note 30, at 19.

142. The remaining shares amounted to only about 6% of the Piper shares issued, far less than was necessary to maintain an active market. See note 20 *supra*.

143. "[A]n unlisted closely held stock of a corporation . . . in which trading is infrequent and which therefore lacks marketability, is less attractive than a similar stock which is listed on an exchange and has ready access to the investing public. This factor would naturally affect the market value of the stock." *Central Trust Co. v. United States*, 305 F.2d 393, 405 (Ct. Cl. 1962).

144. E.g., *Richardson v. Commissioner*, 151 F.2d 102 (2d Cir. 1945), cert. denied, 326 U.S. 796 (1946) (substantial difference found between the price which could be obtained for minority interests in closely held corporations and prices based on asset value); *Drybrough v. United States*, 208 F. Supp. 279, 287 (W.D. Ky. 1962) (same); *Cravens v. Welch*, 10 F. Supp. 94 (S.D. Cal. 1935) (minority interests in a close corporation worth much less than the proportionate share of assets of the enterprise). See note 143 *supra*.

145. 439 F.2d 1204 (Ct. Cl. 1971).

146. *Id.* at 1218.

147. E.g., *Drybrough v. United States*, 208 F. Supp. 279 (W.D. Ky. 1962) (discount of 35% applied to 45% interest in closely held corporation); *Whittemore v. Fitzpatrick*, 127 F. Supp. 710 (D. Conn. 1954) (discount of 33% applied to minority interest).

148. 460 F.2d 1331 (2d Cir.), cert. denied, 409 U.S. 1038 (1972).

149. *Id.* at 1335. In *Thomas v. Duralite Co.*, [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,864 (D.N.J. Nov. 7, 1974), the court stated that "lettered stock [was] worth really only a fraction of the stock then actually free to trade." *Id.* at 96,943; accord, *Alloys Unlimited, Inc. v. Gilbert*, 319 F. Supp. 617, 619 (S.D.N.Y. 1970).

In *Kaufman*, a discount of fifty percent was considered a reasonable reflection of unmarketability.¹⁵⁰

The tender contest situation, readily exemplified by *Chris-Craft*, involves all the discounting factors noted previously: an enormous blockage which could not be absorbed by the market even if one indeed existed;¹⁵¹ a substantial minority position in a structurally closed corporation;¹⁵² and the inherent discount introduced into any but a majority position by lack of an active market.¹⁵³ Any appraisal of the CCI shares that failed to take these factors into consideration would considerably over-value the shares, and thereby unreasonably diminish CCI's recoverable damages for its reduction to a minority position.

VI. CONCLUSION

In order to determine reasonable compensatory damages to a defeated contestant in a battle of tender offers aimed at takeover of a target corporation, two factors should have been considered by the *Chris-Craft* court. First, the opportunity to control the target should have been evaluated by determining the value of control *under the particular circumstances involved*, and then discounting that sum by the percentage probability that control would not have been won had the battle been fairly fought by BPC. In determining the value of control, the amount the contestants were willing to pay for Piper shares and control should have been the starting point, and such factors as the impact of BPC as a minority shareholder and the potential enmity of Piper management, as well as the skills—or lack thereof—which CCI would bring to Piper's business should have been given appropriate consideration. The *Chris-Craft* court did fairly assess these factors to arrive at damages for CCI's loss of opportunity to control Piper.¹⁵⁴ Second, the loss of value of the contestant's stock by being reduced to a minority position should have been evaluated by the court by either appraisal or market examination, depending upon the existence or possible construction of reliable market values. Under either method of valuation, the contestant's position should have been measured as it actually existed, not in hypothetical terms such as 100-share blocks. Only in this way could the court properly evaluate such valid discounting factors as blockage, minority position, and lack of an active trading market. Using such valuations presented the only realistic method of fully compensating the defeated contestant. *Chris-Craft* failed to take these factors into consideration,¹⁵⁵ and thereby deprived CCI of the damages resulting from the practical unmarketability of its minority block.

It is submitted, then, that *Chris-Craft* is sound guidance on only one of the

150. See 460 F.2d at 1335; cf. *Penn Yan Agway Cooperative, Inc. v. United States*, 417 F.2d 1372 (Ct. Cl. 1969) (cooperative bank stock not redeemable for several years, and then only at face value, discounted 93% from face value).

151. See notes 133-39 *supra* and accompanying text.

152. See notes 142-47 *supra* and accompanying text.

153. See notes 148-50 *supra* and accompanying text.

154. 384 F. Supp. at 518-23.

155. See notes 130-33 *supra* and accompanying text.

two major remedial questions it addresses. A defeated tender offeror, like any other litigant, will properly object to the award of one fortune when fraud has deprived it of two. *Chris-Craft* had the opportunity to set definitive guidelines on valuation of the loss of opportunity to control in the tender offer context. The court's failure to take into account reduction to minority status leads to the conclusion that the court lost this opportunity. It is hoped that the Second Circuit will recognize the injury consequent to CCI's wrongful reduction to a minority position. Failing that, one must hope that stare decisis will yield to reason, and that *Chris-Craft* will survive only to the limited extent that its soundness warrants.

[After this Note went to press, the Second Circuit reversed the district court decision in *Chris-Craft* on the issue of damages.¹⁵⁶ Writing for the panel, Judge Timbers took exception to the methods used in computing damages by the district court, emphasizing that damages must reflect the amount CCI could have realized in a sale of its shares.¹⁵⁷ Without denominating it as such, the court applied a "greater of cost or value" measure of damages,¹⁵⁸ finding that CCI had paid an average of \$63.98 per share.¹⁵⁹ To measure CCI's loss, the court rejected use of a 100-share block, declaring that such an approach would defeat the intent of the court's earlier decision.¹⁶⁰ Instead, it determined that the market value of CCI's block as a 700,000 share unit was \$27 per share, noting that problems inherent in attempting to market such a large minority interest in a de facto closed corporation would significantly reduce the value of the shares.¹⁶¹ The court thus fixed CCI's damages at \$36.98 per share. In its analysis and conclusions, the court's opinion is similar to the criticisms of the lower court opinion developed in this Note.¹⁶² On the issues of consequential damages,¹⁶³ attorneys' fees,¹⁶⁴ and injunctive relief,¹⁶⁵ the Second Circuit affirmed the district court decision.]

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156. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, Nos. 74-2542, 75-7003 (2d Cir., Apr. 11, 1975).

157. *Id.* at 2847-48, 2858-59.

158. See note 31 *supra*.

159. *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, Nos. 74-2542, 75-7003, at 2849-53 (2d Cir., Apr. 11, 1975).

160. *Id.* at 2847-48.

161. *Id.* at 2858-59.

162. See notes 121-53 *supra* and accompanying text.

163. See note 23 *supra*.

164. See note 23 *supra*.

165. See text accompanying notes 32-33 *supra*.