Tender Offer Regulation—Injunction Standards Under the Williams Act

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Recommended Citation
David W. Worrell, Tender Offer Regulation—Injunction Standards Under the Williams Act, 45 Fordham L. Rev. 51 (1976).
Available at: https://ir.lawnet.fordham.edu/flr/vol45/iss1/3
NOTES

TENDER OFFER REGULATION—INJUNCTION
STANDARDS UNDER THE WILLIAMS ACT

I. INTRODUCTION

During the nineteen-sixties the tender offer became an increasingly popular device for wresting control of a corporation away from existing management. Typically, a cash tender offer invites the shareholder to convey his shares in the corporation at a substantial premium over market value; however, the offer usually remains open only for a short period of time. In 1968, Congress passed the Williams Act, extending the disclosure and antifraud provisions of the Securities Exchange Act of 1934 to protect investors suddenly confronted with the decision whether to accept a tender offer for their shares. Prior to its enactment, a shareholder was often forced to make a hasty decision though inadequately informed of the identity of the insurgent party, its plans for the company upon gaining control, and its financial ability to carry out its program.

Section 14(d) of the Act requires a tender offeror seeking to acquire more than 5 per cent of any equity security to make an advance disclosure of specific material information directly to the shareholders at the time the offer is announced. This section was intended to provide the offeree shareholders

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1. One commentator has calculated that 31 cash tender offers were made in 1964, 76 in 1965, and 48 in 1966 as compared with an average of 16 per year for the years 1956 through 1963. See Hayes & Taussig, Tactics of Cash Takeover Bids, 45 Harv. Bus. Rev. 135, 137 (Mar.-Apr. 1967). The Senate report accompanying the Williams Act states that over 100 cash tender offers were made in 1966 as compared with eight in 1960. S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967). Despite the apparent discrepancy in these figures, which may be partly due to the lack of official records prior to federal regulation of tender offers, the dramatically increasing utilization of the technique in the mid-sixties is apparent.


with an opportunity to make an informed decision.7 In addition, section 13(d) provides that a person who, by any means, acquires more than a 5 per cent interest in any equity security must, within ten days, make a similar disclosure.8 Finally, section 14(e) of the Act prohibits all persons from making "untrue statement[s] . . . [or misleading omissions, and from] engag[ing] in any fraudulent, deceptive, or manipulative . . . practices . . . in connection with any tender offer . . . ."9

Violators of the Williams Act are subject to the liabilities generally prescribed for transgressions of the Securities Exchange Act:10 injunctive suit or administrative action by the Securities and Exchange Commission (SEC) and criminal prosecution.11 In addition, courts have implied a private right of action in favor of parties aggrieved by Williams Act violations12 and have granted standing to targets and tender offerors to sue for such violations either in the shareholders' interest, or in support of a secondary purpose of the Act: To "provid[e] the offeror and management equal opportunity to fairly present their case."13

§ 240.14d-1(c) (1976). The Act also requires that such advance disclosures be made to the SEC and to the issuer of the securities—the target corporation.


The relief sought in such cases frequently has been a preliminary injunction. Such relief has the virtue of halting the continuing flow of mischief resulting from an apparent violation. When granted too freely, however, the preliminary injunction can provide a tender offer contestant with an unfair advantage. In recent years, injunctive relief has often been granted to one contestant upon its showing a Williams Act violation by the other with scant discussion by the courts of any direct irreparable harm to the investors—one of the traditional prerequisites for such relief. This Note will analyze existing injunction standards in tender offer situations, with special reference to the Supreme Court's recent decision in Rondeau v. Mosinee Paper Corp. and its implications for the continuing availability of such relief to contestants for corporate control.

II. STANDING TO SUE

While the Williams Act does not expressly entitle any private party to injunctive relief for violation of its terms, courts have held that standing to sue for such relief would be granted in accordance with "what will best accomplish the purposes of the legislature." Thus, in Electronic Specialty Co. v. International Controls Corp., the court found that, since Congress passed the tender offer legislation as an amendment to the section of the Securities Exchange Act which regulates proxy contests, it intended that the target of a tender offer be allowed to sue to protect itself from harm just as...


15. See notes 32-36 infra and accompanying text.

An analogous problem has been created by the recent enactment of numerous state "takeover statutes." See generally Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality, 45 Fordham L. Rev. 1 (1976).

16. See notes 49-66 infra and accompanying text.

17. See notes 40-42 infra and accompanying text.

18. 422 U.S. 49 (1975). This was the first Supreme Court case to construe the Williams Act.

19. See Aranow & Einhorn, supra note 12, at 286.

20. Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 946 (2d Cir. 1969). This was the first appellate case to consider the Williams Act. Standing was expressly recognized in that case for targets to sue over § 14(d) and (e) violations. Id. at 944-46.

GAF Corp. v. Miltstein, 453 F.2d 709, 713 (2d Cir. 1971), cert. denied, 405 U.S. 910 (1972) permitted the issuer to enforce § 13(d). See also Bath Indus., Inc. v. Blot, 427 F.2d 97, 109 (7th Cir. 1970).

21. 409 F.2d 937 (2d Cir. 1969).

22. Such harm to the target can occur when a false or misleading offer causes many investors to tender their shares at an inadequate price. "Such inadequacy is likely to have a depressing effect on the market for some time.... Such depression may... harm the target corporation if it should wish to engage in financing or acquisitions, and a still different potential for harm...
incumbent management may when insurgents violate the proxy rules. In
addition, the court noted that the target corporation is usually better able to
bring timely and effective legal action against the offeror than are shareholders. Thus to grant standing to the target would advance the two express
purposes of the Williams Act: the primary purpose of investor protection and
the secondary purpose of regulating the contest for control. Similar reasoning has led courts to hold that the tender offeror has standing to complain of
the target's violations committed while defending against the offer.

III. THE PROPRIETY OF THE PRELIMINARY INJUNCTION

As pointed out by the Second Circuit in *Electronic Specialty*, "the application
for a preliminary injunction is the time when relief can best be given." At this early stage, the court is able to minimize the effects of the violation by
requiring fuller disclosure as a condition of the offer's continuation. Alternatively, the court can delay consummation of the offer to allow the effects of an
offeror's manipulations on the market value of the target's shares to dissipate.
"[T]he opportunity for doing equity is . . . considerably better [at this
time] than it will be later on" since it is more difficult to fashion an equitable
remedy after title to the tendered shares has passed to the offeror. The court
noted that to allow tendering shareholders an option to rescind at that time, to
force divestiture, or to enjoin the offending offeror from voting the shares
often would be either inadequate relief for the shareholders or too onerous a
penalty for the offeror.

will exist where it is claimed that the offeror has evil designs on its treasury or business plans." Id. at 946.

23. Id. at 945-46.
24. Id. at 946.
25. The language of the Senate report might suggest that the two purposes are equally
important. See S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). However, the sponsor of the Act stated in the Senate debate on the day of its passage that the bill was designed solely to require full and fair disclosure for the benefit of investors. See 113 Cong. Rec. 24664 (1967) (remarks of Senator Williams). The Supreme Court appears to favor this narrower construction of the Act. See *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975). At the least, it suggests that injunctive relief should not be granted merely to ensure that "incumbent management [has] an opportunity to express and explain its position." Id. at 58.

26. See, e.g., *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 358-62 (2d Cir.),

27. 409 F.2d at 947. See *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir.),

28. 409 F.2d at 947.
29. Id.
30. Id. at 947-48. "To afford [the tendering shareholders] an opportunity for withdrawal
would be the idlest of gestures . . . since the [target's] stock purchased by [the offeror] at $39 is
On the other hand, it is also clear that Congress deemed the tender offer device a healthy "check on entrenched but inefficient management." It declared that "extreme care [had been taken] to avoid tipping the balance of regulation . . . in favor of [either the target] or . . . [the offeror]." An excessively liberal policy of granting injunctive relief to targets for minor or inadvertent violations by the tender offeror might upset this balance and have the effect of discouraging tender offers. Due to the tenuous financing of the typical takeover, a preliminary injunction against consummation of the tender offer could become an effective defense mechanism. In many cases, if the target can gain the delay that such relief affords, it has won the war, since it is often impossible, in practice, for the offer to be renewed after a trial on the merits. Therefore, if the primary purpose of the Williams Act is investor protection, the courts, before granting preliminary injunctive relief, should consider carefully the effects such relief will have on all the shareholders of the target company—those who wish to tender as well as those who wish to retain their holdings.

Selling around $26-$27. . . ." Id. at 947. The court found that forced divestiture of the 1.2 million shares obtained would result in "certain and huge loss" to the offeror whether carried out immediately or over a longer period of time. It viewed a permanent deprivation of voting rights as a "disguised method of forcing divestiture." See id. at 947-48. Commentators have criticized this court's unwillingness to enjoin voting of shares obtained through violations of the Williams Act. It has been suggested that there is no inequity in allowing the aggrieved party to exercise control temporarily—under court supervision. Note, Cash Tender Offers, 83 Harv. L. Rev. 377, 401-02 (1969).


32. Id.
34. See Aranow & Einhorn, supra note 12, at 41-45; Tenderness, supra note 33, at 994.
35. Other defensive tactics utilized by target companies against cash tender offers include stock splits, the issuance of new shares, market purchases of its own shares, defensive mergers, and publicity campaigns designed to convince shareholders not to tender. See Aranow & Einhorn, supra note 12, at 234-76; Note, Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers, 21 Stan. L. Rev. 1104 (1969).
36. See Tenderness, supra note 33, at 994, 1007-09; cf. Bromberg, supra note 4, § 6.3(1111); Comment, Corporate Defenses to Takeover Bids, 44 Tul. L. Rev. 517 (1970).
37. In one sense, a tender offer is an investment opportunity for the shareholder in that he
IV. PRELIMINARY INJUNCTION STANDARDS

A. Irreparable Harm

Traditionally, the primary purpose of preliminary injunctive relief has been to preserve the status quo ante between the parties, to the extent possible, until trial.38 This has come to include not only a freezing of the situation as it was at the time of the suit if the court determines that plaintiff is suffering from defendant's continuing wrong, but also an affirmative decree requiring action by the defendant to restore and maintain the "last actual peaceable non-contested status . . . which preceded the pending suit . . ."39 In deciding whether preliminary relief will issue, a court considers the nature of the harm plaintiff would suffer if interim relief is denied and the nature of the harm that issuance of such relief would cause the defendant. Further, the court determines which party has shown a stronger probability of succeeding at a full trial on the merits.40 If the plaintiff has demonstrated probable success, preliminary relief will issue when the impending harm cannot be reversed at a later time and the ensuing hardship is more severe than that which defendant


40. See Dobbs, supra note 38, at 109-10; Developments—Injunctions, supra note 38, at 1056-57.

Preliminary relief will also issue where the plaintiff has made a strong showing of irreparable harm but has not clearly demonstrated probable success on the merits. Conversely, where a strong showing of probable success has been made, the plaintiff need show only the possibility of irreparable harm. See, e.g., Sonesta Int'l Hotels Corp. v. Wellington Assoc., 483 F.2d 247, 250 (2d Cir. 1973); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999 (1969); Dino DeLaurentis Cinematografica, S.p.A. v. D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953).
would suffer if enjoined. Thus plaintiff must show not only that he would suffer more than defendant but also that the harm could not be adequately remedied later, either by permanent injunction or an award of compensatory damages. A plaintiff who fails to demonstrate such irreparable harm cannot obtain a preliminary injunction under traditional standards merely by showing that the balance of hardships tips in his favor.

This strict requirement will not be applied, however, when a governmental instrumentality, pursuant to statutory authorization, is seeking to enjoin activities which are in violation of the statute. In such cases, courts reason that the legislature has determined that the practices in question involve irreparable harm to the public and preliminary relief will issue upon a showing that the agency will probably succeed in proving a material violation. The federal securities laws specifically authorize the SEC to obtain a preliminary injunction against violators of those laws and the courts have granted such relief without requiring a showing of irreparable harm to any individual investor. Private litigants, however, have not been exempted from the requirement of showing irreparable harm, even when a statutory violation has been alleged. The Supreme Court has held that a showing of a

42. See Dobbs, supra note 38, at 108-09; see, e.g., Sanders v. Air Line Pilots Ass'n, Int'l, 473 F.2d 244, 248 (2d Cir. 1972); A.K.L. Corp. v. Columbia Pictures Indus., Inc., 440 F.2d 761, 764 (3d Cir. 1971); County of Santa Barbara v. Hickel, 426 F.2d 164, 168 (9th Cir. 1970); Washington Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193, 1197 (N.D. Cal.), aff'd, 419 F.2d 472 (9th Cir. 1969).
43. “[T]he standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases.” Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944); see 3 L. Loss, Securities Regulation 1979-80 (2d ed. 1961) [hereinafter cited as Loss]; Developments—Injunctions, supra note 38, at 1059.
44. See 7 J. Moore, Federal Practice ¶ 65.04[1], at 65-40 to -41 & n.7b (2d ed. 1975) [hereinafter cited as Moore]; see, e.g., United States v. San Francisco, 310 U.S. 16, 31 (1940); Lathan v. Volpe, 455 F.2d 1111, 1116 (9th Cir. 1972); American Fruit Growers, Inc. v. United States, 105 F.2d 722, 725 (9th Cir. 1939); Davis v. Huttig Sash & Door Co., 288 F. Supp. 82, 85 (W.D. Okla. 1968); Fleming v. Salem Box Co., 38 F. Supp. 997, 998-99 (D. Ore. 1940). Some courts have found implied authority for the issuance of preliminary injunctions in statutes which do not expressly provide for such relief. See, e.g., ICC v. Big Valley Growers Co-op., 493 F.2d 888, 890-91 (9th Cir. 1974); Atchison, T. & S.F. Ry. v. Callaway, 382 F. Supp. 610, 623-24 (D.D.C. 1974).
material statutory violation "implies nothing about the form of relief to which
[the private litigant] may be entitled." However, in a number of cases
following Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea
Co., where it was suggested that a tender offer which is violative of the
Williams Act is "unlawful" and probably should be enjoined, preliminary
injunctions have been issued upon a finding of a violation of the Act with
little or no direct discussion of irreparable harm.

In the Gulf & Western case, the Second Circuit agreed with the district
court's finding that the tender offeror had probably violated sections 14(d) and
(e) in failing to disclose either its intention to gain control of A&P or the
danger that successful consummation of the offer would violate the antitrust
laws. In reviewing the propriety of the interim relief granted below, the
court announced the traditional preliminary relief standards, but added that
"the magnitude and far reaching consequences of the alleged violations of the
antitrust and securities laws are such that, in our view, the public interest
requires" a weighing of the impending injury to the public, similar to that
undertaken in government antitrust actions. In affirming the injunction, the
Second Circuit agreed that the probable violations "could have serious
detrimental effects" on the target company if not enjoined, but did not
characterize the harm as irreparable. The court urged as a further justification
that the target-plaintiff had been acting as a surrogate attorney general:

Since it is impossible as a practical matter for the government to seek out and
prosecute every important violation of laws designed to protect the public in the
aggregate, private actions brought by members of the public in their capacities as
investors or competitors, which incidentally benefit the general public interest, perform
a vital public service.

This language suggests that, insofar as a private petition for a preliminary

Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937) ("Courts of equity may, and
frequently do, go much farther both to give and withhold relief in furtherance of the public
interest than they are accustomed to go when only private interests are involved."). But see
Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966) where, although the court stated
that the private petitioner would have to show irreparable harm to secure a preliminary
injunction for violation of the federal proxy rules, it found that "the district court could properly
have considered that the public interest in enforcing the Proxy Rules" justified issuance of
such relief. See also the discussion of Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011, 1016-17
(7th Cir. 1974), rev'd, 422 U.S. 49 (1975) at notes 65-66 infra and accompanying text.

49. 476 F.2d 687 (2d Cir. 1973).
50. Id. at 698 & n.19.
51. Id. at 695-97 & n.18.
52. Id. at 692.
53. Id. at 693.
54. Id.
55. Id. at 698, quoting Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co., 356 F.
56. 476 F.2d at 699.
injunction of Williams Act violations is protective of the public's interest in
the "integrity and efficiency of the securities markets," the petitioner need
not point to specific irreparable harm to obtain such relief, but need only
show a probable material violation.

In two subsequent cases, General Host Corp. v. Triumph American, Inc. and Sonesta International Hotels Corp. v. Wellington Associates, preliminary injunctions issued upon demonstrations of probable success. The General Host court articulated the traditional standards, as did the Sonesta court, but neither opinion set forth how the target-plaintiff would be irreparably harmed by the violations. In General Host, the court approvingly cited the Gulf & Western case for the proposition that a violating offeror should be enjoined from completing an "unlawful" tender offer. In Sonesta, the court stated that

in the normal situation, when it appears likely that the offer may contain materially misleading statements or omissions as made, the interest of the shareholders and of the public in full disclosure of relevant circumstances renders preliminary injunctive relief an appropriate method of remedying the deficiencies in disclosure before the offer is consummated.


58. See also Elco Corp. v. Microdot Inc., 360 F. Supp. 741 (D. Del. 1973), where the court held preliminary relief justified by threatened irreparable harm to the target-plaintiff. Uncertainty over future control would lead purchasers of the plaintiff's products not to place orders and the placement of the offeror's nominees on the target's board of directors could lead to the misappropriation of trade secrets. Id. at 753-54. The court added, however, that the antitrust violations which probably would result from the successful conclusion of the tender offer, the possibility of which had not been disclosed by the offeror, in violation of the Williams Act, would involve "injury to the public [which is] entitled to considerable weight." Id. at 754.


60. 483 F.2d 247 (2d Cir. 1973).

61. 359 F. Supp. at 753.

62. 483 F.2d at 250. "Either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Id. (italics omitted); see notes 40-42 supra and accompanying text. Cf. Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975), where the court pointed out that the dual standard for preliminary injunctive relief set out in Sonesta could be misapplied as dispensing with the requirement of irreparable harm. Although the standard requiring a decided tipping of the balance of hardships is intended to be a stricter standard than that requiring only a showing of possible irreparable harm, it could be read to imply that only a weighing of harm is required and not an affirmative showing that money damages would inadequately remedy the wrong. The Copperweld court accordingly held that "to the extent that standard (2) appears to disregard irreparable harm we believe it to be contrary to recent authority ...." Id. at 607, citing Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) as the recent authority.


64. 483 F.2d at 250-51 (emphasis added).
The reasoning of these cases finds its fullest expression in *Mosinee Paper Corp. v. Rondeau*\(^\text{65}\) where the court of appeals characterized the plaintiff-issuer as the prime enforcer of the Act who need not show irreparable harm as a prerequisite to obtaining . . . injunctive relief in view of the fact that as issuer of the securities it is in the best position to assure that the filing requirements of the Williams Act are being timely and fully complied with and to obtain speedy and forceful remedial action when necessary.\(^\text{66}\)

**B. Probable Success in Showing a Material Violation**

In addition, courts have adopted a more relaxed materiality standard for Williams Act violations thereby increasing the availability of preliminary relief by making it easier for plaintiffs to show probable success. Although the judicious granting of preliminary relief may often be the appropriate, or even the only adequate, remedy for Williams Act violations,\(^\text{67}\) courts should not issue such relief for non-disclosure of information which may be of some interest to target shareholders but which would not be material to their decision.\(^\text{68}\)

A problem frequently litigated is precisely at what point a tender offeror's tentative plans with regard to the target company, assuming successful completion of the offer, are sufficiently concrete to become material and thus subject to the Williams Act disclosure requirements.\(^\text{69}\) In *Electronic Specialty Co. v. International Controls Corp.*,\(^\text{70}\) the offeror, ICC, acquired a substantial position in ELS stock and entered friendly merger discussions with ELS in July, 1968.\(^\text{71}\) ICC had been considering making a tender offer for ELS shares, but by August 2 the price of ELS stock had risen sharply, largely due to published rumors of the impending tender offer.\(^\text{72}\) On August 5, ELS an-

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65. 500 F.2d 1011 (7th Cir. 1974), rev'd, 422 U.S. 49 (1975).
66. Id. at 1017.
67. See notes 27-30 supra and accompanying text.
68. See Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 362 (2d Cir.), cert. denied, 414 U.S. 910 (1973); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 948 (2d Cir. 1969); Bromberg, supra note 4, § 6.3(1112); Practical Recommendations, supra note 63, at 118.
70. 409 F.2d 937 (2d Cir. 1969).
71. Id. at 941.
72. Id. at 941, 949. The court concluded that ELS had started the rumor to drive up the price of its stock and thus discourage ICC from making the tender offer.
nounced an agreement to merge with Carpenter Steel Company. On the same day, ICC announced termination of its merger talks with ELS and disclaimed any present intention of tendering for its shares. ELS's stock plummeted in reaction to these developments and the next day ICC sold about 12 per cent of its ELS holdings. On August 13, the ICC board authorized its president to explore anew the advisability of a hostile tender offer. On August 15, the president was quoted in the Wall Street Journal as stating ICC's "preference" to sell the remainder of its ELS stock, while adding that it will "continue to watch the progress of the proposed merger with Carpenter and may, at some point, seek to resume talks with [ELS]." Two days later, the ICC board authorized a tender offer which was made on August 19. ICC's schedule 13D stated that, upon completion of the tender offer, consideration would be given to a merger with ELS.

Upon the hearing on ELS' suit for a preliminary injunction, the district court held that ICC's schedule 13D inadequately disclosed what it found to be ICC's definite merger plans. The court also found that the published remarks of ICC's president would probably be proven at trial to be section 14(e) violations. Preliminary relief was denied, however, because the court found that consummation of the offer would not result in irreparable harm to the plaintiff corporation. In addition, the court concluded that the issuance of an injunction at this stage would irreparably harm the target shareholders for the tender offer would probably then be terminated.

The tender offer was consummated in September and ICC gained majority control. At the trial on the merits, the court found that the schedule 13D disclosures were adequate, but that both ICC and its president by their manipulative practices, had violated section 14(e).

The Second Circuit disagreed with the finding below that ICC had materially violated the Williams Act. Recognizing that a hostile tender offer is apt to generate hurried and imprecise statements on both sides, the court announced a materiality standard which would require plaintiffs to show that "stockholders who tendered their shares would probably not have tendered their shares if the alleged violations had not occurred." The court held that ICC's early interest in merger was not so definite and continuous a plan that failure to disclose it on the schedule 13D would violate the Act. It also concluded that ICC's interest in making a tender offer truly subsided after

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73. Id. at 941-42.
74. Id. at 950 n.11.
75. Id. at 942.
76. Id. at 942-43.
78. Id. at 469.
79. The tender offer yielded ICC more than a million shares. Electronic Specialty Co. v. International Controls Corp., 295 F. Supp. 1063, 1067 (S.D.N.Y. 1968). The total of ELS shares then issued and outstanding was 1.8 million. See 409 F.2d at 941.
80. 295 F. Supp. at 1078-80. See note 9 supra and accompanying text.
81. 409 F.2d at 90.
ELS' announcement of its Carpenter merger plans so that ICC's sale of ELS shares and its announcement that it was breaking off talks with ELS were not prohibited misleading practices. Finally, while conceding that the statement of ICC's president that the company preferred eventually to divest itself of its remaining ELS shares may have been inaccurate, the court found that the company's tender offer plans were not yet sufficiently certain for the statement to constitute a section 14(e) violation. The court believed that the president's failure to add that his board had authorized him to explore the possibility of a tender offer on August 13, but had reserved final decision, was not materially misleading under the circumstances.

The Electronic Specialty court's strict requirement that, to be a material violation of the Williams Act, a statement must have been decisive to the shareholder's decision was repeated in Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co. In that case, the offeror tendered for enough shares to bring its A&P holdings to approximately 20 per cent of those issued and outstanding. G&W had not stated in its schedule 13D that it sought control of A&P or that it intended to influence its management upon consummation of the offer. However, the court gleaned such intent from the fact that G&W had frequently secured control of firms after first acquiring a minority interest and that the A&P acquisition was the largest such transaction in G&W's history. The court's conclusion was also buttressed by evidence that G&W's president considered A&P stock to be a poor choice if held merely for investment income. Furthermore, the president stated that A&P could prosper under new management and added that "his 'Bohack management team' possessed the skills and experience necessary to cause a turn around of A&P."

The court, applying the Electronic Specialty materiality test, concluded that A&P stockholders who tendered would have been decisively influenced in their decision by the information withheld by G&W in violation of the Act.

82. Id. at 948-50.
83. The court appears to have reasoned that such a noncommittal statement is all that should be expected, in view of the special pressures which surround an impending tender offer. It further noted that the statement expressly reserved the possibility of a future revival of interest in a combination with ELS. Id. at 950-52. It has been suggested that the Second Circuit's failure to find a material violation was improperly induced by its conclusion that, since the tender offer already had been consummated, it was unable to fashion truly equitable relief. Young, Judicial Enforcement of the Williams Amendments: The Need to Separate the Questions of Violation and Relief, 27 Bus. Law. 391, 406-08 (1972).
84. 476 F.2d 687, 696 (2d Cir. 1973).
85. Id. at 689-90.
86. Id. at 695-97.
87. Id. at 697. G&W's president had effective control of Bohack Corporation, A&P's largest supermarket competitor in the New York area. This led to the court's further finding of probable antitrust violations upon consummation of the tender offer, the probability of which G&W failed to disclose on its schedule 13D in violation of sections 14(d) and (e). Id.
88. Id. at 696. Shareholders who tendered less than all their shares might have tendered all, or may have retained all their shares, depending upon their evaluation of G&W's management
The court also stated, however, in its discussion of materiality that shareholders "would be influenced" by the violations and that they "would have weighed them in their decision whether or not to sell." This language seems to suggest that a matter need not be decisive for the shareholder—it need only be something he might consider important. Similar ambiguity can be found in Chris-Craft Industries, Inc. v. Piper Aircraft Corp., where the court pronounced the more liberal standard, "‘whether “a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction,”' but also quoted the stricter Electronic Specialty standard with approval.

In later cases, the more liberal materiality standard gained greater acceptance. In General Host Corp. v. Triumph American, Inc., the tender offeror failed to disclose its intention to liquidate some of the target's assets in order to finance the takeover bid. The court inferred this intent from admittedly inconclusive internal documents of the offeror and from its past conduct after successful tender offers. Announcing the liberal standard, it held that the offeror's schedule 13D statement that it had no present liquidation plans for the target, even though qualified by the caveat that it may later "‘evaluate [the target's] operations to determine whether there should be any disposition of assets,'" was materially misleading in violation of section 14(e). One commentator has concluded that under the more liberal standard, "courts have tended to presume the materiality of information omitted or misstated by the offeror." Recent cases, however, appear to require a stronger showing of materiality. The finding of a material violation in the General Host case should be compared with that in Jewelcor Inc. v. Pearlman. There, the defendant's stated purpose in buying shares was simply investment, but the schedule 13D potential, had they known of G&W's intentions. Id. See MGM Inc. v. Transamerica Corp., 303 F. Supp. 1344, 1353 & n.3 (S.D.N.Y. 1969).

89. 476 F.2d at 696.
91. Id. at 363.
92. Id. at 362 n.14.
93. See, e.g., Sonesta Intl Hotels Corp. v. Wellington Assoc., 483 F.2d 247, 251 & n.3 (2d Cir. 1973); Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267, 274 (S.D.N.Y. 1975); Kaufmann v. Lawrence, 386 F. Supp. 12, 15 (S.D.N.Y. 1974); Broder v. Dane, 384 F. Supp. 1312, 1321 (S.D.N.Y. 1974); Cauble v. White, 360 F. Supp. 1021, 1028 (E.D. La. 1973). The Broder case points out that two interpretations of this liberalized standard have emerged in the decisions. Some courts require a showing that an investor would have considered the matter important; others merely require that it might have been important. See 384 F. Supp. at 1319-21.
95. Id. at 753-56.
96. Id. at 753.
97. Id. at 756.
98. Id.
99. Practical Recommendations, supra note 63, at 130, discussing General Host and Sonesta.
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further stated that, while there existed no present plans to acquire control of the issuer, the purchaser "has considered the possibility of a future acquisition of control . . . ." 101 The defendant had taken steps to further a combination with the issuer before filing the schedule 13D and such efforts continued thereafter. The court held that the defendant's "statement that it had considered possible business combinations with [the issuer] necessarily implied that one of the reasons it had bought [the] stock was the formation of some kind of business combination with [that company]."102 Here, unlike General Host, disclosure of the mere possibility of future business combinations was held to satisfy section 13(d).

In Spielman v. General Host Corp.,103 the court appeared to return to the strict materiality standard of Electronic Specialty.104 The plaintiff, suing on behalf of the target's shareholders, alleged that the tender offeror had violated the Williams Act in failing adequately to disclose that its cash flow from existing operations might not be sufficient to finance the offer. It also was alleged that problems which the offeror might encounter in obtaining effective control of the target's board of directors, even after acquiring a majority stock interest, had not been sufficiently highlighted.105

The court recited the Electronic Specialty test—whether the alleged violations would have been conclusive to a shareholder's decision—and noted that materiality must be determined in the context of the surrounding circumstances.106 It found the offeror's disclosures had been adequate in light of the fact that the relevant information, damaging to the offeror, had already been adequately communicated to the shareholders by the target in the course of defending against the offer and from other sources. Whatever minimal violation there might have been was thus rendered immaterial to the shareholders.107 The court also noted that the target, which vigorously opposed the tender offer at the time it was made, had not pressed the allegation that the offeror's statements regarding difficulties in obtaining working control were materially misleading. The court concluded that such an assessment, by the party most interested in ferreting out possible Williams Act violations, was a persuasive showing that any slight inadequacy was immaterial.108

The finding by the Spielman court that the failure of the tender offeror to make disclosure of material facts is not a violation of the Williams Act if the information undisclosed was among the "'total mix' of all information con-

101. Id. at 228.
102. Id. at 237 (emphasis added).
104. Id. at 194.
105. Id. at 192-93.
106. Id. at 194.
107. Id. at 197-98, 201.
108. Id. at 204. Although the court did not set out the more liberal standard in its discussion, it hedged in its concluding statement: "[The tender offeror's disclosures] did not misrepresent or state in a misleading fashion, nor did it omit to disclose, any fact which might or would have been important to the decision of a reasonable investor . . . ." Id. at 206.
veyed or available to investors" conflicts with the reasoning of the Second Circuit in *Sonesta International Hotels Corp. v. Wellington Associates.* In *Sonesta*, the tender offeror failed to disclose certain information at the time the offer was announced. The target corporation, five days later, urged its shareholders to reject the offer, but in doing so, also failed to disclose this information. The tender offeror therefore argued that the information was shown not to be material. The court refused to infer from the target's omission that the information was "not material" and stated that it would emasculate the purposes of the Williams Act to allow the offeror to look to the target company to remedy the offeror's own material deficiencies in disclosure. The obligation is placed squarely on those making the offer in the first instance to disclose all material factors necessary to make their offer not misleading.

The adoption by the *Spielman* court of the "total mix" theory strongly influenced its finding that there had been no material violation. General acceptance of this approach would make it more difficult for a target to demonstrate that a tender offeror has failed to disclose material facts in violation of the Williams Act.

It is clear that the effect of the more liberal materiality standard, when combined with a relaxation of the requirement of showing irreparable harm, was to increase significantly the availability of the preliminary injunction as a defensive weapon for tender offer targets. The Supreme Court in *Rondeau v. Mosinee Paper Corp.* reaffirmed the need for a showing of irreparable harm as a prerequisite for injunctive relief. This decision should restrict targets' access to the preliminary relief defense. The Court, however, did not directly address the issue of materiality. Arguably, the more liberal standard for deciding whether a target has demonstrated probable success in proving a material violation of the Act—first articulated in *Gulf & Western* and applied in *Sonesta* and *General Host*—should continue to be applied. Investor decisions are more frequently based on the cumulative weight of a mass of available information than upon one decisive factor. If a court is persuaded that information, which has not been ade-
quately disclosed by the tender offeror, might be important to a shareholder in arriving at his decision whether or not to tender, and if it has concluded that shareholders, acting without such information, would suffer irreparable harm, it is submitted that preliminary relief should then issue. A further showing that the information would alone be decisive should not be required. Furthermore, it is suggested that the "total mix" theory should not be adopted, insofar as it assumes that shareholders are obliged to glean all the material facts from a variety of sources. The primary obligation of assembling such information should remain, where the Act places it, with the tender offeror.  

V. THE MOSINEE CASE—REAFFIRMANCE OF IRREPARABLE HARM REQUIREMENT

In Rondeau v. Mosinee Paper Corp.\(^{120}\) the defendant, Rondeau, had purchased on the open market more than 5 per cent of plaintiff corporation's stock by mid-May 1971. By the end of July his acquisitions had exceeded 7.5 per cent,\(^{121}\) but he had not complied with the filing requirements of section 13(d).\(^{122}\) The trial court found that Rondeau had mistakenly believed schedule 13D filing was not required until a purchaser's holdings reached 10 per cent.\(^{123}\) The plaintiff informed Rondeau on July 30 that his purchases may be in violation of the federal securities laws and Rondeau then ceased his purchases. Rondeau first filed a schedule 13D on August 25, wherein he stated that the purpose of the acquisitions, at the time made, was investment "for future income and appreciation."\(^{124}\) His present intention, however, was to "obtain effective control of the Issuer . . . . [He added that] [c]onsideration is currently being given to making a public cash tender offer to the shareholders of the Issuer . . . ."\(^{125}\) He also added that if he gained control, he would consider making changes in Mosinee's management team.\(^{126}\) Two days later, Mosinee, in a mailing to its shareholders, admitted that the recent perfor-

\(^{119}\) See note 111 supra and note 165 infra and accompanying text. The Second Circuit, in its per curiam affirmance in the Spielman case, noted that "[g]enerally, the 'total mix' would be insufficient to compensate for omissions in the prospectus since an investor is all too apt to look upon those communications as self-serving and to consider the prospectus as a more objective, self-contained statement upon which he may justifiably rely to make an informed investment decision. The 'mix' in this instance, however, pertains to a subject—the target company's own staggered board and cumulative voting—of which its own stockholders were presumably aware" since the target company had sent proxy statements, containing this information, to its shareholders shortly before the tender became effective. Spielman v. General Host Corp., No. 75-7538, at 4863 (2d Cir., July 12, 1976) (emphasis omitted).

\(^{120}\) 354 F. Supp. 686 (W.D. Wis. 1973), rev'd, 500 F.2d 1011 (7th Cir. 1974), rev'd, 422 U.S. 49 (1975).

\(^{121}\) 422 U.S. at 51-53.

\(^{122}\) Id. at 53.

\(^{123}\) 354 F. Supp. at 689-90. As originally enacted, section 13(d) did have a 10% trigger point.

\(^{124}\) 422 U.S. at 53.

\(^{125}\) Id. at 53-54.

\(^{126}\) Id. at 54.
mance of its stock had been sub-par, but considered that the stock was
underpriced in the market and urged shareholders not to accept a Rondeau
tender offer, if made.

Mosinee filed suit on September 2, alleging that Rondeau's two-month
delay in making the required filings had deprived Mosinee and its sharehold-
ers of material information. It urged that its shareholders who had sold during
this period had not been informed that Rondeau was amassing a sizable block
of shares and that its own efforts to counteract the potential takeover bid had
been delayed—all in violation of the letter and spirit of section 13(d).\textsuperscript{127}
Mosinee sought to enjoin Rondeau from voting his shares and purchasing
additional shares until the effects of his violations had dissipated, and to
compel defendant to divest himself of those shares already acquired.\textsuperscript{128}
The district court, finding the technical and inadvertent violation had not harmed
plaintiffs since an adequate schedule 13D was later filed and that Rondeau
had not, up to the trial in February 1973, initiated a tender offer, granted
defendant summary judgment.\textsuperscript{129} Furthermore, the court rejected plaintiff's
contention that irreparable harm need not be shown for injunctive relief to
issue to a private litigant.\textsuperscript{130}

The Seventh Circuit reversed, finding that the failure to file the schedule
caus ed the issuer to delay its response to the acquisition. The court did not,
however, characterize this harm as irreparable. It further held that the section
had given issuers a "vested right" to receive a timely schedule 13D and that
injunctive relief would issue upon a showing of a material violation, without
any requirement of irreparable harm.\textsuperscript{131}

The Supreme Court, in reversing, emphasized that the traditional pre-
requisites of injunctive relief, "irreparable harm and inadequacy of legal
remedies" must be met by a private litigant.\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{127} Id. at 54-55.
\item \textsuperscript{128} 354 F. Supp. at 688. The complaint also sought a preliminary injunction, but plaintiff
withdrew this motion. Id. Money damages were also sought, and at the time of the Supreme
Court opinion in 1975, this action was still pending, class action certification having been sought.
422 U.S. at 60 n.10.
\item \textsuperscript{129} See 354 F. Supp. at 695. Further, the Supreme Court noted that no such takeover bid
had been made by the time the case reached it in mid-1975. 422 U.S. at 59.
\item \textsuperscript{130} 354 F. Supp. at 693-94.
\item \textsuperscript{131} 500 F.2d at 1016-17. The court cited the Second Circuit's reasoning in GAF Corp. v.
Milstein, 453 F.2d 709, 717 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972), that Congress' intent in enacting section 13(d) was to "alert the market place to every large, rapid . . . accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control . . . ." See note 8 supra and accompanying text. The Seventh Circuit went on to reason that since the section required disclosure to the issuer of such accumulations, the issuer takes on the quasi-official status of "prime enforcer of the [Williams Act]," and thus may obtain an injunction against violations of the public interest even though unable to show specific irreparable harm. 500 F.2d at 1016-17 & n.5. See notes 49-66 supra and accompanying text.
\item \textsuperscript{132} 422 U.S. at 57. Justices Brennan and Douglas dissented and read congressional intent as permitting injunctive relief upon showing a Williams Act violation. Id. at 65.
\end{itemize}
The Court recognized that Rondeau had violated the Act. It refrained from commenting, however, upon the materiality of the violation, noting that a class action for damages was yet pending before the district court. The two-month violation denied Mosinee shareholders information which might have suggested an imminent takeover bid—information which they might well have considered important in deciding whether or not to sell their stock on the open market. The Court based its conclusion that injunctive relief would not issue on its finding that, even if the violation was material, no irreparable harm had been shown.

In considering the harm done to the plaintiff-issuer, the Court held that "[b]y requiring disclosures . . . to the target corporation . . . Congress intended to do no more than give incumbent management an opportunity to express and explain its position" to the shareholders. The Court also noted the express congressional intent in passing the Williams Act "‘to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.'" Although the Mosinee case did not entail an actual tender offer, but only the early stages of a potential takeover bid, the place of section 13(d) within the scheme of the Williams Act is clearly to give early warning of the formation of large blocks of shares.

The Court’s reasoning suggests that it is necessary to reassess the nature of the harm the target must show to obtain injunctive relief. It is also evident that Mosinee casts doubt on the validity of the analogy drawn by the Second Circuit in Electronic Specialty between tender offers and proxy contests as a...
justification for granting a target self-protective standing.\textsuperscript{141} The Court has clearly indicated that the stated purpose of the Act, ensuring that both contestants in a takeover bid have equal opportunity to present their arguments, is subordinate to the other express purpose—protecting the interests of the shareholders.\textsuperscript{142}

In assessing the harm done to shareholders, the Court found that those who sold their shares during the two-month period of the violation at prices unfairly depressed because of the defendant's non-disclosure could be adequately compensated monetarily.\textsuperscript{143} It further concluded that the possibility of irreparable harm to those who bought shares during the period of violation was "too remote" for cognizance, and dismissed the claim that, had disclosure of an imminent takeover bid been made, these shareholders would never have invested.\textsuperscript{144}

The Court's finding that possible harm to the shareholders in this case was either too remote or compensable by damages tends to undermine prevailing conceptions of what constitutes a sufficient showing to justify injunctive relief.\textsuperscript{145} It may have been suggesting that the traditional rule denying

\textsuperscript{141} See notes 22-23 supra and accompanying text.

\textsuperscript{142} See note 25 supra and accompanying text. In Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 380 (2d Cir.), cert. denied, 414 U.S. 910 (1973), the Second Circuit, in a suit brought by a competing offeror who had failed to obtain enough shares for control, instructed the district court judge to enjoin a successful tender offeror from voting shares it had obtained in violation of section 14(e), which shares had given the offeror majority control of the target. The court found that, even though the plaintiff had not shown that its tender offer would have resulted in its gaining control but for the defendant's violation, a five-year injunction was justified in furtherance of the congressional purpose to "make sure that contests for control . . . shall proceed fairly." Id. at 375. The Second Circuit subsequently affirmed the district court's entry of such an injunction. 516 F.2d 172, 193-94 (2d Cir. 1975), cert. granted, 96 S. Ct. 1505 (1976), aff'g 384 F. Supp. 507 (S.D.N.Y. 1974). The court also instructed the district court to enter a judgment for damages. Id. at 190. In light of the Supreme Court's decision in Mosinee, which was rendered two months after Chris-Craft, the entry of the injunction in that case is problematic on two grounds: first, the claim that the defeated offeror was deprived of its chance to obtain control would not appear to be a sufficient showing of irreparable harm. See note 146 infra. Second, if the defeated contestant can be adequately compensated with damages, this should be the sole remedy granted. See notes 143-47 infra and accompanying text.

\textsuperscript{143} 422 U.S. at 60. It also noted that the damage remedy would provide a potential sanction for the defendant's violation of the Act. Id. at 60 n.10. The Second Circuit in the Electronic Specialty case summarily rejected a damage remedy in this context: "[N]o one has had the temerity to suggest that [the offeror] now be required to raise the price to a figure it was never willing to pay." 409 F.2d at 948. This view was roundly criticized in Note, Cash Tender Offers, 83 Harv. L. Rev. 377, 399-400 (1969).

\textsuperscript{144} 422 U.S. at 60. Arguably, money damages could adequately compensate two classes of shareholders not mentioned by the Court: (1) those who sold, but would not have, had they been informed of the defendant's holdings, in the hope that the company would prosper under new management; (2) those who did not sell, but would have, had timely disclosure been made.

\textsuperscript{145} It has been noted that "[i]f strict standards are employed, irreparable injury from a tender offer violation can be shown in very few instances." Bromberg, supra note 4, § 6.3(1113). Professor Bromberg also noted that neither the target nor the non-tendering sharehold-
equitable relief unless the remedy at law is inadequate should be more strictly applied to the tender offer situation, especially where it is possible to calculate the monetary damage shareholders sustained from Williams Act violations.146 To the extent that money damages might be an adequate remedy where courts have previously granted injunctions, the Mosinee decision should compel a re-examination of the established case law.147

VI. IMPACT OF THE MOSINEE DECISION

Broadly applied, the Supreme Court's decision in Rondeau v. Mosinee Paper Corp. could mean that a target corporation's standing to assert violations of the Williams Act is limited to instances where such violations can be shown to cause direct, irreparable harm to target shareholders as investors.148 The decision also implies that damages would almost inevitably be an adequate remedy for such violations.149 The Ninth Circuit in Klaus v. ers are parties to the transactions and that it is unlikely that they would be able to establish a showing of irreparable harm except in the event of a plunder of the target or a squeeze out of the minority shareholders. Id.

146. Such an approach would measure all harm to shareholders in terms of changes in the market value of the shares after the time a violation of the Act adversely influenced investors' decisions. If the value of the stock has risen since the violation, those shareholders who had accepted the tender invitation should recover the added value. If the stock's value has decreased, non-tendering shareholders should recover the loss in value.

Professor Bromberg suggests, however, that a tendering shareholder perhaps has shown irreparable harm and should be granted preliminary relief "if he was fraudulently deprived of something like control of the target company, which is hard or impossible to value in money." Bromberg, supra note 4, § 6.3(1113).

There is authority supporting injunctive relief in analogous situations. See, e.g., Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (preliminary injunction available to prevent termination of auto agency although damages might compensate plaintiff for loss of his business); Dobbs, supra note 38, at 108. See also Developments—Injunctions, supra note 38, at 1002-03.

147. It has been noted that the recent award in excess of $25,000,000 by the Second Circuit in the Chris-Craft case, together with the effects of the Mosinee decision, may influence plaintiffs to seek damages rather than injunctive relief for Williams Act violations. Survey of 1974 Securities Law Developments, 32 Wash. & Lee L. Rev. 721, 789 (1975).

The First Circuit in H.K. Porter Co. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1973) cautioned, however, that damages should be awarded against an offending corporation only to the extent such an award would further the purpose of investor protection and would not result in harm to the shareholders. Id. at 424-25.


The Securities Exchange Act of 1934, § 18, 15 U.S.C. § 78r (1970) provides that buyers and sellers have standing to sue for damages, but does not preclude the extension of standing to other parties. This limitation is inconsistent with the apparent intent of Congress not to subject the Williams Act to the purchaser-seller limitations of rule 10b-5.

148. See notes 141-47 supra and accompanying text.

149. See notes 143-47 supra and accompanying text.
Hi-Shear Corp. fully adopted both broad implications of Mosinee. In that case, the target corporation had stated that the tender offeror would gain majority control if the offer were successful. The trial court found this statement, made while the target was also attempting to frustrate the takeover by issuing additional shares, was false and misleading in violation of section 14(e). The court, on February 5, 1975, granted a preliminary injunction against voting the newly issued shares at the shareholders' meeting held, pursuant to court order, on February 28.

On appeal, the Ninth Circuit conceded that the offeror may have been irreparably harmed since he was deceived by the target into making a tender offer for fewer shares than needed for control. However, the court held that "the [Supreme] Court decided in Rondeau that the Williams Act was designed to protect . . . tender offerees, not offerors." The court further remarked that Mosinee requires as a prerequisite for injunctive relief that "[irreparable] harm must be threatened not to the immediate contestant in the takeover bid, but to those parties whom Congress intended the Act to protect—the investors to whom the tender offer was made." Finally, the court saw "no possibility" that shareholders who may have based their decision whether or not to tender their shares on the targets misleading statements suffered harm—"certainly none that could not be compensated by money damages."

Other post-Mosinee cases have not adopted all the implications of its reasoning. In Otis Elevator Co. v. United Technologies Corp., two directors of the defendant corporation formulated a plan for a merger with Otis, the plaintiff-target, which contemplated a cash tender offer for 40 per cent of the target's stock to be followed by two exchange offers for the remaining 60 per cent of the shares. Negotiations with Otis, aimed at a friendly merger in accordance with this scheme, reached an impasse. Subsequently, UTC's plans focused on the cash tender offer aspect of the scheme, although the documents revealed that the tender offer was still being contemplated in the context of the "40/30/30" package plan.

On October 14, 1975, the remainder of UTC's directors, having received the first inkling only a day earlier that such a plan existed, were fully informed of UTC's proposal to make only the cash tender offer for approximately 40 per cent of Otis' shares. The documents presented to them at that time were those which had been prepared on the basis of the original "40/30/30" merger plan. The board authorized the tender offer, the schedule 13D was filed that day, and the offer was announced to the public on October 150.

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150. 528 F.2d 225 (9th Cir. 1975).
151. Id. at 230. Through this and other manipulations, Hi-Shear's management has succeeded in defeating the takeover bid to date. Id. at 228-29.
152. Id. at 232.
153. Id.
154. Id. at 231-32.
155. Id. at 232.
The offer stated that UTC and Otis had previously discussed a merger, that such discussions had been terminated, that UTC "has not formulated any plan or proposal to merge" with Otis, and that UTC reserved the right to continue to study merger possibilities and perhaps actively seek a merger in the future. UTC also disclosed its intention to obtain control of Otis through the present tender offer.\textsuperscript{158}

The court, on application by Otis for a preliminary injunction to halt the tender offer, finding that UTC had not at any point abandoned its plan to merge with Otis, imputed the plans of the acquisition's planners, its two highest officers, to the corporation.\textsuperscript{159} Adopting the most liberal materiality standard,\textsuperscript{160} the court found that Otis had demonstrated probable success in showing that UTC had materially violated section 14(d) by inadequately disclosing such plans on its schedule 13D.\textsuperscript{161}

In considering whether the preliminary injunction should issue, the court recited the traditional standards for such relief\textsuperscript{162} and applied the more stringent formulation of the irreparable harm requirement as set forth by the Second Circuit in Sonesta: "a balance of hardships tipping decidedly toward the party requesting the preliminary relief."\textsuperscript{163} The court summarily concluded that denial of preliminary relief would not result in "any significant hardship" to the plaintiff corporation.\textsuperscript{164} It then considered the effect which such denial would have on Otis' shareholders. Noting that UTC had already amended the terms of its offer three times, the court found that if it allowed the offer to be consummated upon UTC's filing another corrective amendment, the danger of shareholder confusion in construing the various documents would be unacceptably great. A preliminary injunction thus was issued to prevent irreparable harm which would otherwise likely result to the shareholders.\textsuperscript{165}

While the court did not cite Mosinee, it is clear that it intended to require a showing that the threatened harm to Otis and its shareholders was such that its effects could not adequately be reversed later.\textsuperscript{166} The Otis court also gave

\begin{itemize}
\item \textsuperscript{157} Id. at 962.
\item \textsuperscript{158} Id. at 962-63.
\item \textsuperscript{159} Id. at 972.
\item \textsuperscript{160} "Where the event, if it should occur, could influence the stockholder's decision to tender, the chance that it might well occur is a factor that should be disclosed to the investor . . . ." Id. at 971, quoting Sonesta Int'l Hotels Corp. v. Wellington Assoc., 483 F.2d 247, 251 (2d Cir. 1973). Compare the contrary conclusion on similar facts in Jewelcor Inc. v. Pearlman, 397 F. Supp. 221 (S.D.N.Y. 1975). See notes 100-02 supra and accompanying text.
\item \textsuperscript{161} 405 F. Supp. at 973.
\item \textsuperscript{162} See note 62 supra which quotes the modern formulation of these standards, as set forth in Sonesta.
\item \textsuperscript{163} 483 F.2d at 250 (emphasis added).
\item \textsuperscript{164} 405 F. Supp. at 973.
\item \textsuperscript{165} Id. at 973-74.
\item \textsuperscript{166} See notes 41-42 supra and accompanying text. Thus the court avoided the error which the court in Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975) warned against. See note 62 supra.
\end{itemize}
far greater consideration to the interests of the shareholders than it accorded to the claims of the plaintiff-target. To this extent, its holding appears to be consistent with *Mosinee*. The court did not, however, point to any specific irreparable harm beyond general interference with the shareholders' ability to make informed investment decisions. The seriousness of this harm, the court suggested, was magnified by the problem described by the Second Circuit in *Electronic Specialty*—that of fashioning equally appropriate relief once consummation of the offer has been allowed.\(^1\) Though the *Otis* court's finding of irreparable harm does not adopt the full implications of *Mosinee*, the issuance of the injunction does appear to have achieved equity. UTC was able to make a "new" offer within a week, eventually gaining control of *Otis*.\(^2\) Thus the shareholders had the benefit of full disclosure set out in a single, new schedule 13D and those shareholders who would have wished to tender their shares in any event were not deprived of the opportunity.

While the *Otis* decision is reconcilable with the suggestion in *Mosinee* that the target corporation may assert Williams Act violations only on behalf of its shareholders, the Second Circuit in *Stecher-Traung-Schmidt Corp. v. Self*,\(^3\) gave no indication that it would adopt that approach. The court affirmed the issuance of a preliminary injunction at the behest of the target of a potential takeover bid. In its complaint before the lower court, the plaintiff-issuer alleged that defendants' failure to file a schedule 13D, though they had acquired more than a 5 per cent interest in the plaintiff's stock, would cause it irreparable harm unless the defendants were preliminarily enjoined from "taking further steps toward control of STS."\(^4\) The district court issued the injunction upon finding that plaintiff had shown both probable success and irreparable harm. Defendants filed a schedule 13D ten days later and, urging the Supreme Court's *Mosinee* decision as support, appealed the issuance of the injunction.\(^5\)

The Second Circuit affirmed the district court's entry of the injunction on the ground that, unlike *Mosinee* where the schedule 13D had been filed before the district court hearing, in the instant case the district court "made an explicit finding that 'plaintiff is likely to sustain irreparable damage' on a record that did not include defendants' later-filed Schedule 13D."\(^6\) The court did not elaborate on the nature of the irreparable harm involved,\(^7\) but held

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167. See notes 27-30 supra and accompanying text.
170. 529 F.2d 567 (2d Cir. 1976) (per curiam).
171. Id. at 568.
172. Id. The per curiam opinion does not set forth in detail what reliance the defendants placed on Mosinee. Defendants apparently claimed that the subsequent filing cured any harm that the delay might have caused.
173. Id.
174. See also Myers v. American Leisure Time Enterprises, Inc., 402 F. Supp. 213 (S.D.N.Y. 1975), where it was alleged that the defendants' purchase of shares resulted in their gaining control. The court, relying on Mosinee, dismissed the complaint and held that plaintiff
that the district court judge had not abused his discretion in issuing preliminary relief.\textsuperscript{175} It also distinguished \textit{Mosinee} on its facts.\textsuperscript{176}

It is difficult to imagine what irreparable harm could have been involved in STS that had not been contemplated by the broad language of \textit{Mosinee}, but the court declined to conclude that money damages would provide an adequate remedy.\textsuperscript{177}

Moreover, the district court in \textit{Mesa Petroleum Co. v. Aztec Oil & Gas Co.}\textsuperscript{178} appears to have made an even greater departure from the strictest implications of \textit{Mosinee}. Mesa announced its tender offer on January 2, 1976, and three days later sought an injunction to require the target, Aztec, to supply it with its list of shareholders. It alleged that Aztec's refusal prevented Mesa from effectively soliciting the shareholders and thus deprived the shareholders of material information in violation of section 14(e).\textsuperscript{179} While citing \textit{Mosinee} as requiring irreparable injury, the court found, by analogy to the proxy contest situation, that the interest of the target's shareholders in receiving full disclosure—the primary purpose of the Williams Act—justified injunctive relief requiring the target to supply the offeror with the list.\textsuperscript{180}

Concerned that the offer was to remain open for only eleven days,\textsuperscript{181} the court conditioned relief on Mesa's extending the offer to give shareholders a more adequate opportunity to consider it.\textsuperscript{182} This was the first court to use its injunctive powers to compel a target to aid a tender offeror in this fashion. While concern is growing over the time pressures caused by a tender offeror's prescribing a very short duration for its offer,\textsuperscript{183} the remedy adopted in this case placed the onus on the target when, arguably, it should be on an offeror who sets an unfairly short deadline. Nonetheless, the court, in granting preliminary relief, did not point to any direct irreparable harm which would had not adequately shown irreparable harm. Id. at 215. The opinion does not set forth the details of the injury.

\textsuperscript{175} 529 F.2d at 569. The court added, however, that the district court should reconsider the equities between the parties arising from defendants' subsequent filing to determine whether the injunction should now be vacated. Id.

\textsuperscript{176} Id. at 568.

\textsuperscript{177} See notes 143-46 supra and accompanying text.


\textsuperscript{179} Id. at 911-12.

\textsuperscript{180} Id. at 915.

\textsuperscript{181} Id. at 911.

\textsuperscript{182} Id. at 915.

\textsuperscript{183} See Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267 (S.D.N.Y. 1975) where the court held that while brevity of the offer period alone is not a violation of the Williams Act, the offeror will be held to a higher materiality standard when the period is unusually short. Id. at 274-75 n.1.

The SEC has held hearings on the problem of unfairly short tender offer periods. See 174 N.Y.L.J., Dec. 15, 1975, at 42, col. 1. See also Aranow & Einhorn, supra note 12, at 50-52.

In a recently filed complaint, a target sought an injunction of a tender offer which was to remain open for only eight days. It alleged that the offeror was attempting to panic shareholders into accepting the offer. Garlock, Inc. v. Colt Indus., Inc., Civil No. 75-5831 (S.D.N.Y. Nov. 19, 1975); see 174 N.Y.L.J., Nov. 20, 1975, at 4, col. 3.
result to shareholders that could not, under the reasoning of Mosinee, be adequately compensated with money damages.\(^\text{184}\)

**VII. Conclusion**

It is difficult at this early time to assess the full impact the Mosinee decision will have on judicial enforcement of the Williams Act.\(^\text{185}\) The Ninth Circuit in Hi-Shear has applied its language broadly—beyond the context of pre-offer open market purchases—as a restriction on the availability of injunctive relief to the contesting parties involved in a tender offer. That court also strongly reinforced the suggestion in Mosinee that irreparable harm to target shareholders cannot be shown since money damages would be an adequate remedy.\(^\text{186}\) Other courts, however, have not found these conclusions compelling. While STS, Otis and Mesa all construe Mosinee as requiring a strong showing of irreparable harm as a prerequisite for the issuance of preliminary relief, none appear to have concluded that shareholders confronted with a tender offer might be adequately compensated for Williams Act violations with an award of money damages.\(^\text{187}\) Further, in STS, the court affirmed issuance of the preliminary injunction on the basis of irreparable harm to the plaintiff-target from a potential takeover bid.\(^\text{188}\) The Otis court, however, in concert with Mosinee, appears to have given far greater consideration to the possibility of direct irreparable harm to the shareholders than it did to the claimed harm to the target corporation itself.\(^\text{189}\)

It does seem clear that the Supreme Court in Mosinee intended to signal lower courts that a stricter irreparable harm standard should be applied in deciding whether tender offers should be enjoined for Williams Act violations. The injunction issued in the Otis case, while perhaps inconsistent with the farthest reaches of Mosinee's reasoning, does appear to have achieved an equitable result. It is submitted that the significance of Mosinee as it relates to the availability of preliminary injunctive relief should be that a showing of irreparable harm remains imperative for private litigants. It should not be interpreted as precluding such relief in cases such as Otis where, while damages might be calculable, injunctive relief can best safeguard the interests of all the shareholders.

_David W. Worrell_

\(^\text{184}\) See notes 143-46 supra.

\(^\text{185}\) A noted authority on the tender offer phenomenon has recently described the Supreme Court's Mosinee decision as having "whittled down the strength of the Williams Act." 174 N.Y.L.J., Dec. 15, 1975, at 42, col. 2 (quoting Herbert A. Einhorn). Mr. Einhorn expressed agreement with the dissenters' view that the Court's holding "completely undermines the congressional purpose to preclude inquiry into the results of [a] violation," quoting Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 65 (1975) (Brennan, J., dissenting).

\(^\text{186}\) See notes 143-46 supra and accompanying text.

\(^\text{187}\) See notes 156-84 supra and accompanying text.

\(^\text{188}\) See notes 170-77 supra and accompanying text.

\(^\text{189}\) See notes 166-69 supra and accompanying text.