

Winter 1978

Securities Regulation--Regulation of Tender Offers--Standing under Section 14(e)--Piper v. Chris-Craft Industries, Inc.

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Recommended Citation

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JANE PINKEPANK

SECURITIES REGULATION— REGULATION OF TENDER OFFERS— STANDING UNDER SECTION 14(e)

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

Chris-Craft Industries, Inc. (Chris-Craft) attempted to gain control of Piper Aircraft Corporation (Piper) by means of a cash tender offer, *i.e.*, a public offer to purchase shares from Piper shareholders at a premium above the market price. As is customary in such cases, the Piper management took measures to prevent the takeover.² Piper sent a letter

43. *Miller v. California*, 413 U.S. 15, 24 (1973).

1. 430 U.S. 1 (1977).

2. The target corporation management has a strong incentive to oppose such tender offers because a takeover normally is followed by a change in management. For a discussion of the mechanics of tender offers and possible maneuvers to thwart them, see Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 HARV. BUS. REV. 135 (1967).

to its shareholders describing Chris-Craft's offer as "inadequate and not in the best interests of Piper's shareholders." Piper also enlisted the aid of Grumman Aircraft Corporation and later Bangor Punta Corporation to make competing tender offers.³ Grumman withdrew from the competition, but Bangor Punta did make an offer of cash and securities to Piper shareholders and eventually achieved control of Piper.⁴

Chris-Craft, the defeated offeror, brought an action under section 14(e) of the Securities Exchange Act of 1934,⁵ alleging that the Piper management had made misrepresentations in its descriptions of both the Chris-Craft offer and the proposed Grumman offer. Chris-Craft also claimed that Bangor Punta misrepresented the value of securities it offered in exchange for Piper shares in violation of section 14(e), and that Bangor Punta made private purchases during the pendency of its own tender offer in violation of rule 10b-6 of the Securities and Exchange Commission.⁶

3. 430 U.S. at 5-7.

4. *Id.* at 9.

5. Section 14(e) was amended to the Securities and Exchange Act of 1934 by the Williams Act, Pub. L. No. 90-439, § 3, 82 Stat. 457 (1968) (codified at 15 U.S.C. § 78n(e) (1970)):

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

6. 17 C.F.R. § 240.10b-6 (1977) provides in pertinent part:

(a) It shall constitute a 'manipulative or deceptive device or contrivance' as used in section 10 (b) of the act for any person,

(1) Who is an underwriter or prospective underwriter in a particular distribution of securities, or

(2) Who is the issuer or other person on whose behalf such a distribution is being made, or

(3) Who is a broker, dealer, or other person who has agreed to participate or is participating in such a distribution, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his participation in such distribution

Rule 10b-6 was promulgated pursuant to 15 U.S.C. § 78j(b) (1970) which provides:

It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The Second Circuit held that the defeated offeror had standing to bring a private action for damages for the violation of section 14(e).⁷ Chris-Craft was eventually awarded compensatory damages of more than \$25 million for the loss of the opportunity to control Piper.⁸ The Second Circuit also held that for a period of five years Bangor Punta be enjoined from voting the Piper shares it obtained in violation of rule 10b-6.⁹ The Supreme Court reversed and held that a disappointed tender offeror has no implied right of action for damages under section 14(e).¹⁰ The Court also held that the injunction should not have been granted because it was premised on the lower court's impermissible award of damages under section 14(e) and rule 10b-6.¹¹ The Court left open the question whether a private action for an injunction would lie under section 14(e). Such an action may be a remedy available to tender offerors to combat improper conduct by the management of the target corporation and competing tender offerors.¹²

The Court in *Piper* agreed with earlier lower court decisions that the purpose of section 14(e) is to protect the target corporation shareholder

7. *Chris-Craft Ind., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

8. *Chris-Craft Ind., Inc. v. Piper Aircraft Corp.*, 516 F.2d 172 (2d Cir. 1975). For a discussion of the method of ascertaining damages, see Comment, *Remedies for Defrauded Tender Offerors under Section 14(e) of the Securities Exchange Act of 1934*, 62 GEO. L.J. 1693 (1974).

9. *Chris-Craft Ind., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 390 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

10. 430 U.S. at 42. The Court also held that Chris-Craft lacked standing to recover damages for alleged violations of rule 10b-6 by Bangor Punta because Chris-Craft based its claim on the loss of the opportunity to control Piper. Rule 10b-6, the Court said, was designed to provide a remedy to persons injured because the price at which they bought or sold securities was influenced by the manipulative practices of a tender offeror. This decision may be part of a recent trend to restrict access to the federal courts, particularly in the securities regulation area. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (a private right of action for damages will not lie under rule 10b-5 in the absence of an allegation of scienter); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (restricted private damage actions under rule 10b-5 to actual purchasers and sellers). See Triplett, *Securities Regulation—Rule 10b-5—Scienter Required for Private Actions*, 42 MO. L. REV. 337 (1977). See generally McDonald, *Has the Supreme Court Abandoned the Constitution?*, SATURDAY REVIEW, May 28, 1977, at 10. For a discussion of standing in general, see Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Sedler, *Standing Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972).

11. 430 U.S. at 47.

12. For a general discussion of tender offers and their importance in the acquisition of corporate control, see E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* (1973); Hayes & Taussig, *supra* note 2; Mundheim, *Tender Offers*, 2 REV. SEC. REG. 953 (1969). For a discussion of the statutory law in this area, see Maylay, *Exploring the Tender Offer Provisions of the Federal Securities Laws*, 43 GEO. WASH. L. REV. 551 (1975).

who must decide whether to sell or keep his shares in the face of a tender offer.¹³ However, the Court broke with the earlier cases by refusing to recognize a private right of action in the defeated offeror, finding that such private actions were not necessary to effectuate the purpose of section 14(e).¹⁴

Without the benefit of previous Supreme Court decisions on a private right of action under section 14(e), the Court reasoned from other cases in the securities regulation area in order to decide *Piper*. The seminal case on the implied right to sue under a securities regulation statute is *J.I. Case Co. v. Borak*.¹⁵ In that case the Court found an implied private right of action under section 14(a) of the Securities Exchange Act of 1934,¹⁶ even though that statute, like section 14(e), does not expressly provide for a private right of action. A shareholder brought suit alleging that he had been deprived of his pre-emptive rights through a merger accomplished by means of a false and misleading proxy statement. Recognizing that the SEC could not investigate the 2,000 proxy statements filed each year, the Court in *Borak* stated: "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."¹⁷ In *Piper* the Court recognized this policy as stated in *Borak*¹⁸ but did not find it controlling.

To determine whether the recognition of an implied private right of action for damages was necessary to effectuate the congressional purpose behind section 14(e), the Court in *Piper* applied the four standards it had developed in *Cort v. Ash*:¹⁹ 1) whether the plaintiff was one for whose especial benefit the statute was enacted; 2) whether there was an intent

13. 430 U.S. at 34; *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421, 424 (1st Cir. 1973).

14. 430 U.S. at 45-46. See *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973), *aff'g*, 353 F. Supp. 153 (D.R.I. 1972); *Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc.*, 425 F.2d 842 (2d Cir. 1970). In *Applied Digital Data Systems, Inc. v. Milgo Electronic Corp.*, 425 F. Supp. 1145, 1152 (S.D.N.Y. 1977), Judge Weinfeld displayed a greater talent for irony than for prophesy in a decision handed down less than two months before the decision in *Piper*:

It is too late in the day, however, to argue that an offeror—or for that matter, a target corporation—does not have standing in the constitutional sense to assert violations of section 14 [part of the Williams Act] by its adversary in the contest for corporate control. . . . It is clear that an offeror has standing to seek relief for acts of a target company's management that violate section 14 and threaten direct economic injury to the offeror. (footnotes omitted)

15. 377 U.S. 426 (1964).

16. 15 U.S.C. § 78n(a) (1970). This section deals with the solicitation of proxies in contravention of SEC rules and regulations.

17. 377 U.S. at 433.

18. 430 U.S. at 25.

19. 422 U.S. 66 (1975).

on the part of the legislature to create or deny a private remedy; 3) whether the implication of a private remedy would be consistent with the underlying legislative scheme; and 4) whether the cause of action was one normally relegated to state law.²⁰ The Court in *Piper* examined these factors and concluded that the recognition of an implied private action for damages under section 14(e) was not necessary to effectuate the intent of Congress.²¹

The reliance placed by the Court in *Piper* on the *Ash* factors warrants a detailed look at *Cort v. Ash*. That case involved a shareholder's derivative action to recover damages for the corporation from its directors who had made allegedly illegal contributions to a presidential campaign.²² The shareholder also sought to enjoin the corporation from making future illegal contributions. The Court held that the shareholder did not have standing to bring the suit. The differences between the election statute in *Ash*²³ and section 14(e) in *Piper* make the validity of the Court's analogy questionable. The reasoning in *Ash* should not be extended to preclude tender offerors from maintaining a suit under section 14(e) for an injunction either against a competing offeror or against the management of the target corporation. It is enlightening to examine how the Court in *Ash* interpreted the factors relied upon in *Piper*.

The first factor was whether the plaintiff is one for whose especial benefit the statute was enacted. The purpose of the statute in *Ash* was to prevent corporations from using their aggregated wealth to corrupt the federal election process. The Court in *Ash* stated that the election statute did not directly concern the internal relationship between corporations and their shareholders; therefore, a private right of action did not exist.

In *Ash* the Court itself contrasted that statute with the securities regulation area where a pervasive federal scheme does govern the relationship between plaintiffs and defendants. The Court cited *J.I. Case v. Borak* as an example of a case in which such a statutory scheme governing the relationship between a corporation and its shareholders was found to exist and in which a private right of action was implied under section 14(a). An equally strong argument can be made that section 14(e) governs the relationship between tender offerors, the management of the target corporation, and the corporation's shareholders, thereby satisfying the first *Ash* factor.

The second consideration was whether there was an indication of legislative intent either to create or to preclude a private remedy. When the Congress enacted section 14(e) in 1968, it did not enter unmarked legislative territory as it did in enacting the election campaign reform

20. 430 U.S. at 37-41.

21. *Id.* at 42.

22. 18 U.S.C. § 610 (1970 and Supp. V 1975).

23. 422 U.S. at 74-75.

statute. Private causes of action already had been found to lie in the securities area under section 14(a)²⁴ and rule 10b-5,²⁵ even though there was no *express* grant of such right in either of those provisions. There was no indication by Congress that a similar private cause of action should not be implied under section 14(e). The Court in *Ash* recognized that in situations in which it is clear that federal law has granted a class of persons certain rights, "it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling."²⁶ The Court in *Ash* stated that, without a prior history of private rights of action in the election area, the election statute gave no indication that Congress intended to give shareholders broader rights than those provided by state corporation laws.

The third factor was whether it would be consistent with the underlying purpose of the legislative scheme to imply such a private remedy. The Court in *Ash* pointed out that the recovery of damages in that case would not cure the influence exerted on the election by the illegal contribution. Again the Court contrasted this situation with that in *J.I. Case v. Borak* where it was held that a private right of action could deter the undesirable manipulation of the securities market.²⁷ In addition, injunctive relief was denied to the plaintiff in *Ash* because of a statutory provision expressly vesting primary jurisdiction in the Federal Election Commission over alleged violations of the Act.²⁸ Any person who believed a violation had occurred was required to make a complaint to the Commission rather than resort to the courts in the first instance.²⁹ In *Piper* the Court freely adopted the reasoning in *Ash* without addressing this important distinction between the two cases.

The practical aspects of regulating federal election campaigns are in sharp contrast to the problems of regulating the continuous series of transactions covered by section 14(e). Compared to the context of a federal election campaign, the number of potential plaintiffs in the tender offer situation is relatively small. The plaintiff in the tender offer situation is also more likely to have a direct interest in the outcome of the litigation. The involvement of private plaintiffs in the tender offer situation is not as burdensome as in the context of a federal election campaign in that the result of the delay and uncertainty of litigation would

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

25. 17 C.F.R. § 240.10b-5 (1977). *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971). *But see Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (a private cause of action for damages will not lie under rule 10b-5 absent an allegation of scienter); Triplett, *supra* note 9.

26. 422 U.S. at 82.

27. *Id.* at 84.

28. 2 U.S.C. § 437c(b) (Supp. V 1975).

29. 2 U.S.C. § 437g(a)(1) (A) (Supp. V 1975).

not be nearly as serious in a tender offer as it might be in a presidential election. For these reasons, the argument in favor of ready access to the courts is stronger in the tender offer situation than in the context of a federal election campaign.

The fourth factor was whether the cause of action was one traditionally relegated to state law. The misuse of corporate funds in *Ash* has been primarily a matter for state law. The Court in *Ash* contrasted this to securities regulation which is an area into which federal law has made substantial incursions. Again, the Court in *Ash* cited *J.I. Case v. Borak* as an example of a case in which a private right of action under a federal securities statute was implied because the Court believed the intrusion of state law would impede the congressional intent to regulate proxy statements.³⁰

In addition to the distinctions which can be drawn between *Ash* and *Piper*, there are practical considerations which weigh in favor of recognizing the standing of a tender offeror to enjoin violations of section 14(e). The legislative history is clear and the Court in *Piper* recognized that the purpose of the Act is to protect the shareholders of a target corporation and not to provide its management with a means of discouraging take-over bids.³¹ Unless tender offerors have some means to prevent violations by the incumbent management, *i.e.*, through a private injunction remedy under section 14(e), this balance will be destroyed and the management will have gained an advantage.

More importantly, a private injunctive remedy is necessary to protect the shareholder of the target corporation. It may be unrealistic to expect a shareholder of a target corporation to bring an action against the management of that corporation. Shareholders are generally unaware of the background information necessary to judge the truth or falsity of statements made either by management or by one of the competing offerors.³² A tender offeror also will have a greater economic stake in the outcome of the contest than an individual shareholder and, there-

30. 422 U.S. at 85.

31. 430 U.S. at 28-31; H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4, *reprinted in* [1968] U.S. CONG. CODE & ADM. NEWS 2811, 2813:

The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

In *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975), the Court stated: "The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts."

32. *GAF Corp. v. Milstein*, 453 F.2d 709, 721 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). This case deals with the standing of a target corporation under section 13(d) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78m(d) (1970).

fore, a greater incentive to detect violations and vigorously pursue remedies.³³ In addition, the SEC probably does not have the same day-to-day familiarity with the facts possessed by an adversary in the struggle; a familiarity necessary to appraise the accuracy of the statements required by section 13(d).³⁴ The problem becomes even more acute when the management enlists another company, as Piper enlisted Bangor Punta and Grumman to make a competing tender offer. The new offeror normally will agree to retain the incumbent management in return for that management's help in the tender offer contest. Management will want the new offeror to win, and therefore will have no incentive to police the statements of this offeror.

Unless the offeror can obtain equitable relief, the shareholders of the target corporation may be limited in effect to the information their management wishes them to receive.³⁵ The offeror will be unable to compel the management to correct misrepresentations or to enjoin manipulative acts or false statements of a competing tender offeror who is supported by the management. If the tender offeror does not have standing under section 14(e), he will be forced to seek an injunction in a state court applying state law with all the hurdles such a course might involve, *e.g.*, security deposits, venue and jurisdiction problems, lack of experience of state judges in dealing with such cases, and the lack of state law to cover securities regulation problems. If a state happened to attach no liability to the behavior sought to be enjoined, the purpose of section 14(e) might be frustrated.³⁶

There are also policy reasons favoring the development of a less restrictive test for standing to obtain an injunction than for standing to seek damages. If an injunction can be obtained while the illegal activities are in progress, or before they begin, the public interest in having the outcome of tender offers determined by well-informed shareholders is more likely to be vindicated. If a large number of shareholders is involved, it will be easier and more economical to grant injunctive relief than to attempt full redress by awarding damages to those shareholders. Fraud and other illegal practices are more likely to be prevented and not merely redressed. There would be no chance the plaintiff recovering damages he might not deserve and which might not of benefit the persons injured by the illegal acts.³⁷

33. *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421, 424 (1st Cir. 1973).

34. 15 U.S.C. § 78m(d) (1970).

35. *See, e.g., Mesa Petroleum Co. v. Aztec Oil & Gas Co.*, 406 F. Supp. 910 (N.D. Tex. 1976). The Court granted an injunction under § 14(e) compelling the management to provide a shareholder list to a tender offeror. This was done to enable the offeror to correct the misrepresentations made by the management concerning the tender offer.

36. *J.I. Case Co. v. Borak*, 377 U.S. 426, 434-35 (1964).

37. *Binder, The Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 580 (1973). Binder develops these factors in an argument advocating the relaxation

The majority in *Piper* indicated that the question of standing to seek an injunction under section 14(e) was not decided.³⁸ The Court concluded that "Chris-Craft, as a defeated tender offeror [had] no implied cause of action for damages under section 14(e)."³⁹ In response to Mr. Justice Stevens' dissent that Congress would not have intended to "exclude the persons most interested in effective enforcement from the class authorized to enforce the new law,"⁴⁰ the Court stated that the holding was a limited one and that Justice Stevens' argument was "simply unwarranted."⁴¹ Indeed, the Court reserved for another day the question whether a suit in equity for injunctive relief, as distinguished from an action for damages, would lie in favor of a tender offeror under either section 14(e) or rule 10b-6.⁴² When that day arrives, there are strong arguments to be made in favor of a finding that a tender offeror does have standing to seek an injunction under section 14(e).

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of the buyer/seller rule for standing to obtain an injunction under rule 10b-5. 17 C.F.R. § 240.10b-5 (1977). This rule was developed in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

38. 430 U.S. at 42 n.28. The Court did reverse the injunction granted by the circuit court under rule 10b-6. This injunction was granted to prevent Bangor Punta from voting its illegally obtained shares and thus to deprive Bangor Punta of the benefit of its violations. In contrast, an injunction under § 14(e) could be sought to enjoin illegal acts such as those allegedly engaged in by Piper and Bangor Punta.

39. *Id.* at 42 (emphasis added).

40. *Id.* at 62 (Stevens, J., dissenting). "Once one recognizes that Congress intended to rely heavily on private litigation as a method of implementing the statute, it seems equally clear that Congress would not exclude the persons most interested in effective enforcement from the class authorized to enforce the new law." Justice Stevens also observed that "[w]hen no effective judicial remedy is available, self-help is more attractive." *Id.* at 68.

41. *Id.* at 42 n.28.

42. *Id.* at 47 n.33.