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RONDEAU V. MOSINEE PAPER COMPANY AND THE WILLIAMS ACT INJUNCTION

RICHARD H. PORTER* AND KATHLEEN HYLAND**

The Williams Act1 was enacted to provide certain specified information to management and shareholders in advance of a tender offer or proxy contest. The legislative history of the Act2 traces the background and need for such legislation.

It was urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company. 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.3

The legislative history also outlined whose interests the Wil-

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3. Id. at 2813. Senator Williams stated the purpose of his bill as being:
   to require the disclosure of pertinent information . . . when a person or group of persons seek to acquire a substantial block of equity securities of a corporation by a cash tender offer or through the open market or privately negotiated purchases . . . .

113 CONG. REC. 24664 (1967). In the Senate hearings on the Williams Act, Senator Kuchel stated:

   The stockholders have a right to know who they are dealing with, what commitments have been made, and the intention and plans of the offeror. Our securities market must be founded not on those whom [Thomas] Jefferson termed "gambling scoundrels" who operate in "great mystery" but on those shareholders who make informed decisions based on disclosure of pertinent facts.

One of the most frequently litigated sections of the Williams Act is section 13(d). Under section 13(d) persons acquiring ownership of more than five percent of a class of equity security registered pursuant to section 12 of the 1934 Securities Exchange Act must within ten days file with the SEC a 13d schedule containing certain prescribed information. A copy of the schedule must be sent to the issuer and each exchange where the security is traded. A 13d schedule requires comprehensive disclosure about the persons purchasing the securities. Disclosure must be made about their identities, backgrounds, financing, purposes, holdings and recent transactions in the security. The disclosed information is such "as to which an average prudent investor ought reasonably to be informed before buying or selling the security. . . ."  

Section 13(d) does not by its terms provide penalties for its violation or mandate any civil remedy. The federal courts have, therefore, been free to fashion remedies appropriate in each particular case. As in other areas of the law, the resulting remedies have been preliminary and permanent in nature, with heavy reliance placed on use of the injunction. In attempting to mold the injunction to accommodate the often competing Williams Act interests—those of the public, shareholder, management and offeror—the courts have designed several variations to the injunction, both in the standard used to determine whether to award the remedy and in designing the remedy itself. Recently, the United States Supreme Court considered, for the first time, the validity of some of these variations in Rondeau v. Mosinee Paper Co.  

4. They are listed in their general order of priority. For an examination of the interests of the offeror, management and shareholder, see Note, Judicial Control of Cash Tender Offers—A Few Practical Recommendations, 50 Ind. L.J. 114 (1974).  
5. 15 U.S.C. § 78m(d) (1970). Also subject to frequent litigation is the general antifraud provision of the Williams Act, § 14(e), 15 U.S.C. 78n(e) (1970) which provides:  

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.  
7. 422 U.S. 49 (1975).
This article will review the Williams Act injunction and its variations in preliminary and permanent relief, especially in view of the case law concerning section 13(d). It will examine the effectiveness of the injunction in light of the purpose of the Act and the interests it protects. Finally, the article will discuss the Rondeau decision and its effect on Williams Act remedies in general, and the injunction in particular.

I. PRELIMINARY RELIEF

Usually the relief awarded in Williams Act cases comes in the preliminary stages of the action, before the consummation of a takeover bid rather than afterwards. Federal courts have consistently recognized that at this stage the "opportunity for doing equity is . . . considerably better . . . than it will be later on," and the courts enjoy great flexibility due to the still fluid nature of the controversy.

Five basic forms of preliminary relief have been suggested by the courts. They are:

1. temporary restraining order pending a hearing on preliminary relief;\(^8\)
2. preliminary enjoining of the takeover bid with an opportunity to renew the offer after trial if the offeror is vindicated on the merits;\(^9\)
3. preliminary enjoining of the takeover bid with an opportunity to renew the offer before trial upon the court's approval of supplemental disclosures;\(^10\)
4. permitting the tender offer to proceed upon the filing and distribution of a proper schedule accompanied by an opportunity for shareholders who have already tendered their shares to withdraw;\(^11\)

rescission and injunction against further solicitation for a certain period or in the alternative allowing the offer to raise the price for both past and future tenders.\(^{13}\)

Which form of preliminary relief is selected in a particular case will depend on the nature of the violation and the particular facts of the case. A mere failure to file, for example, is usually deemed a less serious offense than a fraudulent disclosure. Similarly, a suit alleging a Williams Act violation alone may require less drastic relief than one alleging additional violations of the antitrust or licensing laws. Other factors such as the relative significance of the nondisclosure to the tendering shareholder, the availability of the information from other sources, similar nondisclosures by the movant, the amount of time remaining in the offer, and the necessity of an extended discovery and a lengthy trial on the merits may also influence the court's selection of a remedy.

A. Temporary Restraining Order

When instituted for only a short period the temporary restraining order results in little delay to the tender offer.\(^{14}\) However, in *Texasgulf Inc. v. Canada Development Corp.*\(^{15}\) the temporary restraining order was extended for a two-month period, with obvious adverse effects on the tender offer. The effect of the temporary restraining order was to "stop the clock" in order to give Texasgulf's board time to organize a defense to the tender offer, which was management's clear purpose in bringing the action. Although all claims of violation were ultimately rejected by the court, the delay\(^{16}\) bought enough time for Texasgulf to announce a $46,000,000 expansion program,\(^{17}\) a new ore

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\(^{13}\) Neither alternative has ever been invoked in a Williams Act case but it would be appropriate where the offeror's failure to disclose has improperly held down the price of the stock, and where without rescission the offeror stands within striking distance of his takeover goal. *See* Electronic Specialty Co. v. International Controls Corp., 409 F.2d 947 (2d Cir. 1969).

\(^{14}\) FED. R. Civ. P. 65.


\(^{16}\) Texasgulf obtained a temporary restraining order on July 27, a ten day extension on September 4 to allow Canada Development Corp. ten days to amend its offer "out of an abundance of caution" and for Texasgulf to apply for an appeal, and a further extension on September 14 pending Texasgulf's appeal on October 10. The restraining order was dissolved on October 10.

\(^{17}\) N.Y. Times, September 13, 1973, at 73, col. 2.
strike\textsuperscript{18} and high earnings\textsuperscript{19} which drove the price of Texasgulf stock above the offer price.\textsuperscript{20} This delay was won even though the court stressed that the tender offeror had repeatedly volunteered to amend its schedules in good faith.\textsuperscript{21} In addition, the court found that over two months of litigation had inflicted hardship on the tendering shareholders who could not negotiate their shares or receive money due to them from the offeror because of the temporary restraining order.\textsuperscript{22}

\textbf{B. Preliminary Injunction}

In Williams Act cases, preliminary injunctions have been granted upon a showing of either (1) probable success upon the merits and irreparable harm, or (2) serious questions on the merits requiring litigation, when coupled with a balance of the hardships tipping decidedly toward the party requesting preliminary relief.\textsuperscript{23} These rules differ in two major respects. First, the emphasis in the former standard is on finding irreparable harm to the movant, while the latter standard involves a process of balancing the equities between shareholders, management, the offeror, and the public in light of the purpose of the Act and the practical effect of the particular remedy. Secondly, the latter rule has been invoked where a clear, pervasive and vital public interest is involved so that the movant is in effect acting as a "private attorney general" when protecting his own private interests.\textsuperscript{24} Under the latter standard all doubts are resolved in favor of granting the injunction:

\begin{itemize}
  \item \textsuperscript{18} N.Y. Times, Sept. 22, 1973, at 38, col. 3.
  \item \textsuperscript{19} N.Y. Times, Oct. 6, 1973, at 33, col. 5.
  \item \textsuperscript{20} N.Y. Times, Oct. 13, 1973, at 54, col. 1.
  \item \textsuperscript{21} The court also noted over two months of litigation had bought Texasgulf more time than it needed to counter the tender offer and that the lengthy hearing and extensive news coverage had informed the shareholders on the matters that should be disclosed as well as any shareholders had ever been informed in a tender offer. 366 F. Supp. at 430.
  \item \textsuperscript{22} Allowing the tender offer to proceed would also work to the benefit of the nontendering shareholders because:
    \begin{quote}
      When the tender offer is consummated, one-third of Texasgulf's shares will be removed from the active market. This probably will have a bullish effect on the market for the remaining shares since Texasgulf is a highly traded stock.
    \end{quote}
  \item \textsuperscript{23} Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973); Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., 476 F.2d 687, 692-93 (2d Cir. 1973).
  \item \textsuperscript{24} Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687, 698-99 (2d Cir. 1973).
\end{itemize}
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. As the Supreme Court said in J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), private actions provide "a necessary supplement" to actions by the government and the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of laws designed to protect the public interest.\footnote{25}

1. The "Irreparable Harm" Standard

The traditional basis of injunctive relief in federal courts has always been irreparable harm and inadequacy of legal remedies.\footnote{26} The standard of irreparable harm was first considered in a Williams Act case in Bath Industries, Inc. v. Blot.\footnote{27} In this case, Blot was a shareholder of Bath Industries who conspired with others to replace the chief executive officer. At the same time, Bath was engaged in competition with another firm for a contract involving the construction of one hundred destroyers over ten years for the United States Navy. The contract would involve billions of dollars and would require Bath to acquire a substantial amount of new capital, construct a new shipyard, and more than double the number of its employees. In September of 1969, Blot hired a team of proxy fight specialists and called for a special shareholders meeting for the purpose of forcing the chief executive officer's resignation. This meeting was to be held one day before the date scheduled for the award of the Navy contract. The district court\footnote{28} found that Blot's group threatened to cause permanent and irreparable harm to the company because a strongly contested proxy fight probably would greatly diminish Bath's chances of obtaining the Navy contract. Accordingly, a preliminary injunction was granted enjoining the Blot group from proceeding with their plan or their special meeting until the court determined that they had complied with section 13(d) of the Williams Act.\footnote{29} With respect

\footnote{25. Id.}
\footnote{27. 427 F.2d 97 (7th Cir. 1970).}
\footnote{28. 305 F. Supp. 526 (E.D. Wis. 1970).}
\footnote{29. The order enjoined defendants and persons controlled by them or in active
to Blot's contention on appeal that no irreparable harm was shown to result from his failure to file a 13d schedule because there was no reason to believe the Navy would not award the contract to Bath even with new management, the court noted it was very likely that the Navy would be reluctant to deal with any Bath management during or after a divisive proxy fight. And to Blot's further contention that this harm was not caused by his failure to file because a 13d schedule would have revealed the rift in Bath management, the court replied that the adverse effects of a timely disclosure on Bath's position in the contract competition would have been significantly less than the adverse effects of a disclosure coming after the action was filed and after the defendants had already acquired sufficient Bath stock to insure a change in Bath management. Nor did the court accept the argument that Blot's late filing of a 13d schedule was sufficient compliance.

If [Blot was] in fact required to file statements pursuant to the Williams Act sometime near mid-summer of 1969, the filing of 13d schedules in October, 1969 may well be insufficient to cure the failure to file earlier. The purpose of the filing and notification provisions is to give investors and stockholders the opportunity to assess the insurgents' plans before selling or buying stock in the corporation. It additionally gives them the opportunity to hear from incumbent management on the merit or lack of merit of the insurgents' proposals. If [Blot's] late filing is sufficient, then no insurgent group will ever file until news of their existence and plan leaks out and prompts a law suit. By that time it will be too late to avoid the evils which the Williams Act is designed to eliminate.

The court of appeals, in affirming the award of a preliminary injunction against Blot, also enjoined the annual meeting of the company until it was finally determined whether the Blot group should be disenfranchised.
The meaning of "irreparable harm" also became an issue in *Ozark Air Lines, Inc. v. Cox.* That case involved a plan to take control of financially troubled Ozark Air Lines by soliciting proxies for the election of directors at the next annual meeting of shareholders. Cox Medical Center, a party to the takeover plan, controlled more than ten percent of Ozark's common stock. Management claimed that Cox Medical Center had violated section 13(d) and sought by preliminary injunction to prevent the solicitation of proxies and the voting of Cox shares for candidates for director other than those nominated by management. Ozark claimed irreparable harm in that its lenders would not continue to waive payment defaults if a proxy fight caused a change in management, and in that the expense of waging a proxy battle would further worsen the company's financial position. The court rejected Ozark's claims because it found the lenders might welcome a constructive change in management. The court would not equate the importance of default waivers with the importance of the Navy contract for Bath Industries. "An injunction at this time affecting the right of the shareholders to pass upon the performance of their management and determine for themselves who will lead the corporation out of its present difficulties seems particularly inappropriate." The court also noted that the expense of a proxy contest would have been no less if the defendant had filed a 13d schedule earlier.

Whether irreparable harm resulted from a conceded violation of the Williams Act was at issue in *Committee for New Management of Butler Aviation v. Widmark.* Plaintiff Dopp, a large shareholder and former director of Butler organized a committee to regain control of the corporation by proxy solici-

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35. *Id.* at 1119.
36. The court further noted that they were dealing with a regularly scheduled meeting of shareholders at which directors were regularly elected, and not a "special meeting presumably called at a propitious tactical moment" as in Bath. *Id.* at 1119.
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tation for the next annual meeting of shareholders. Dopp sued on a claim that management had issued misleading solicita-
tions. Management moved for a preliminary injunction on the grounds that Dopp had failed to comply with the filing require-
ments of section 13(d). Dopp conceded the violation but
claimed that Butler could establish no irreparable harm be-
cause it had been aware of his stock acquisitions. Management argued that a proper 13d schedule would have given more information about the sources of funds used to make Dopp’s purchases, and that the absence of such information constituted irreparable harm. The court emphasized that this was not a case of misunderstanding about the application of section 13(d) but an intentional statutory violation that had caused confusion which could have been avoided had early disclosure been made. “If Section 13(d) means anything, plaintiff Dopp should not be permitted to gain advantage from a course of action pursued in clear violation of the law.” Accordingly, the court enjoined Dopp from voting those shares which he had acquired after the 13d schedule should have been filed. The injunction extended only to the upcoming annual meeting.

2. The “Balancing-the-Equities” Standard

The balancing standard evolved out of and away from the irreparable harm standard. The balancing standard first ap-
peared in Gulf & Western Industries, Inc. v. Great A & P Tea Co., Inc. In that case the Second Circuit purportedly applied the “balancing of the hardships” standard in upholding the award of a preliminary injunction. Gulf & Western issued a

38. Dopp claimed that Butler learned of his stock acquisitions while he had been part of its management and from various sources, such as his 14b filing, after his resignation. 335 F. Supp. at 154.

39. Butler also claimed that filing would have prevented Dopp from concealing his purchases through the use of nominees so that his ownership would not appear on Butler’s stock transfer records. 335 F. Supp. at 155.

40. Id. at 155.

41. 476 F.2d 687 (2d Cir. 1973).

42. The court actually applied neither standard. Instead it combined a probability of success on the merits with a balance of the equities.

[In government antitrust actions involving alleged Clayton Act violations, a “balancing of the equities—in terms of injury to the public interest if an injunction were denied, as against injury to the defendants if it were granted—is a relevant factor, once the probability of success standard has been met, in deciding whether to deny or grant injunctive relief.”]

tender offer to A & P shareholders without disclosing that it controlled several suppliers and a major competitor of A & P. These facts would have alerted A & P shareholders to the possibility that control of A & P by Gulf & Western could violate the antitrust laws. The district court found a strong likelihood that Gulf & Western had failed to make adequate disclosures under the Williams Act. The court then weighed the equities between A & P, A & P shareholders, the public and Gulf & Western. The court determined that consummation of the tender offer could involve A & P in an antitrust suit at a later date when "it would be almost impossible to unravel the situation." The court also found that the magnitude and far-reaching consequences of the alleged violations of antitrust and securities laws involved such a "clear, pervasive, and vital public interest" as to warrant an injunction. Gulf & Western's interest in investing did not impress the court in view of the antitrust problems and their effect on the public interest, especially since Gulf & Western was not foreclosed from renewing its tender offer if it was vindicated on the merits.

Much of the reasoning in that case was adopted in *General Host Corp. v. Triumph American, Inc.* In balancing the equities the court in general found that the disadvantage to management resulting from the offeror's failure to comply with section 14(e) outweighed the harm suffered by the offeror who was unable to consummate its tender offer at such time as it deemed profitable. In view of the fact that the offeror brought on its troubles by failing to comply with the Williams Act, the court held: "[The offeror] has no inherent right to so proceed with an unlawful tender offer." Consummation of the tender offer was thereupon enjoined pending trial on the merits. The court considered but rejected corrective relief of rescission and supplemental disclosures. It reasoned that while this remedy might avoid frustrating the desires of those who wished to tender when all the facts were known, it would not protect the

43. 476 F.2d at 698.
44. *Id.* at 699.
46. Host alleged that Triumph's tender offer violated: (1) the federal shipping and communications laws, (2) the margin requirements of securities law, and (3) the disclosure requirements of securities law. *Id.*
47. *Id.* at 759.
48. *Id.*
public interest because the situation would be almost impossible to unravel if management's allegations were sustained at trial after the tender offer was consummated. Accordingly, the tender offer was enjoined.

In Water & Wall Associates, Inc. v. American Consumer Industries, Water & Wall solicited proxies in connection with American Consumer Industries' annual shareholders meeting. Management claimed, inter alia, that Water & Wall had failed to file a timely 13d schedule. After determining that the allegations could ultimately succeed, the court stated:

When presented with the situation such as the present one, courts have often been hard put to place their finger on a specific irreparable injury flowing from the violation[s]. . . . This is probably due to the fact that what the court seeks to enjoin is future injury. The more intelligent approach . . . is to examine the interests involved . . . with an eye toward not allowing the violator to eat his apples with "unclean hands." Using this method, the court found possible irreparable harm in that a complete change in management would be difficult to undo, and in that shareholders were denied information about the intentions of the takeover group. Because management had assumed the dual role of protecting its own interests and enforcing the securities laws, the court also found that a pervasive public interest was served by management. However, the court noted it would attempt to mold a remedy which properly recognized the interests of the offeror. Thereupon the court enjoined the voting of shares owned by the offeror but allowed other votes to be counted. The outcome of the election was to be certified if management candidates were successful, but if the offeror's candidates were chosen, the election could not be certified without application to the court.

49. Id.
51. Id. at 93,759.
52. Id.
53. Id.
54. Id. at 93,760.
C. Variations to the Preliminary Injunction

The courts and legal commentators have suggested variations to a preliminary injunction which are less drastic than enjoining the tender offer until after trial. One suggestion has been a preliminary injunction with an opportunity to renew the tender offer before trial upon filing of curative amendments to the documents, for example, a 13d schedule or the offering circular. This remedy enjoys the advantage of allowing the tendering shareholders the ultimate decision regarding the use of their shares. Moreover, this remedy causes little delay to the tender offer. The courts have elected this remedy in two cases.

In Ronson Corp. v. Liquifin Aktiengesellschaft, Liquifin was enjoined "during the pendency of the action and until the trial on the merits" from soliciting tenders, acquiring stock or voting previously acquired stock of Ronson. The court recognized that an offeror may amend its schedules to cure defects, may rely on the amendments to satisfy the statute, and may be entitled to dissolution of a preliminary injunction against the offer after curative amendments. Nonetheless, two motions to vacate Ronson's injunction, after amendment and re-statement of the tender offer, were denied before trial so that the preliminary injunction was ultimately lifted only after trial on the merits.

55. One commentator advocates permitting the tender offer to be consummated; however, requiring curative amendments and an opportunity for tendering shareholders to withdraw if a violation is found within a certain period after the consummation of the tender offer. Young, Judicial Enforcement of the Williams Amendments: The Need to Separate the Questions of Violation and Relief, 27 Bus. Lawyer 391 (1971). Another commentator favors limiting the preliminary injunction to enjoining the consumption of the tender offer but not the solicitation and collection of shares and ordering the already tendered shares into escrow. Note, Judicial Control of Cash Tender Offers—A Few Practical Recommendations, 50 Ind. L.J. 114, 139 (1974). Yet another commentator offered a completely different alternative which would require the tender offeror to submit a pre-offer filing to the SEC for clearance and the SEC to examine the offer for substantive nondisclosures. Note, The Courts and the Williams Act: Try a Little Tenderness, 48 N.Y.U. L. Rev. 991, 1017 (1973). Pre-offer filing was proposed in the original bill for the Williams Act and rejected because it would provide advance warning of the offer to the target.


58. 483 F.2d 846 (3d Cir. 1973) and 483 F.2d 852 (3d Cir. 1973).


60. Id. at 600.
A similar approach was adopted in *Sonesta International Hotels Corp. v. Wellington Associates*. Wellington's tender offer for 1,000,000 shares of Sonesta stock expired with only 419,623 shares being tendered. The appellate court found Sonesta entitled to a preliminary injunction by virtue of Wellington's failure to make material disclosures. Although these disclosures were deemed "material" to the shareholders, the court recognized that the failure of Wellington's takeover bid had eliminated any possibility of harm. The court nonetheless entered a preliminary injunction enjoining consummation of the offer unless and until Wellington made supplemental disclosures and offered tendering shareholders an opportunity to rescind their tenders within a reasonable time.

Another suggested variation of the preliminary injunction is to permit the tender offer to proceed upon the filing and distribution of a proper schedule, accompanied by an opportunity for the shareholders who have already tendered their shares to withdraw. Under this remedy, the tender offer is not interrupted. This remedy is applicable only when there remains enough time in the tender offer to accommodate the distribution of curative amendments and the allowance of a reasonable time to withdraw. In *Butler Aviation International, Inc. v. Comprehensive Designers, Inc.*, only the lack of sufficient time caused the appellate court to affirm the award of a preliminary injunction instead of allowing curative amendments. This was an action for violations of sections 14(e) of the Securities Exchange Act and SEC Rule 10b-5. The district court issued a preliminary injunction twenty days before the expiration of the offer. The injunction forbade the offeror to take any steps to effect its offer. On appeal, the Second Circuit found the offeror had misrepresented its earnings to the press

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61. 483 F.2d 247 (2d Cir. 1973).
62. For example, one alleged nondisclosure was Wellington's decision to abstain from voting on two proposals scheduled for Sonesta's annual shareholders meeting which probably would have prevented the required two-thirds vote for approval from being attained. However, the annual meeting for which the voting on Sonesta's proposals was scheduled had already taken place and the proposals had been approved by the time of the court's decision.
63. In Note, *Judicial Control of Cash Tender Offers—A Few Practical Recommendations*, 50 Ind. L.J. 114, 130 (1974), a similar remedy was suggested—a conditional injunction, enjoining the tender offer after a specified period of time, such as ten days, unless the offer satisfactorily cures the nondisclosures.
64. 425 F.2d 842 (2d Cir. 1970).
while the tender offer was under consideration, but the damage caused thereby was minimal, the effect of the misstatements had been largely dissipated, and in any event they were already corrected. Moreover, Butler's management had unclean hands in that it also made misleading earnings predictions. The appellate court, reluctant to frustrate informed shareholders who desired to tender their stock, preferred to allow curative amendments. But the court recognized that the time remaining was insufficient for curative amendments to be distributed since the appeal had taken most of the time outstanding in the offer. Forced to affirm or reverse, the court affirmed the grant of the preliminary injunction. However, the offeror was explicitly allowed to renew its tender offer after full disclosure.

**D. The Effectiveness of Preliminary Relief**

Preliminary relief has been granted whenever the Williams Act violation threatened to cause a change in management without adequate prior notice to the shareholders and the public that such a change was planned. Without such advance notice the price of shares of the target company may not reflect the premium which takeover bids generally cause, especially when widely advertised. Moreover, knowledge of the impending proxy struggles could cause some investors either to sell their shares or not to buy any because of the uncertainty and instability which frequently results. Preliminary relief has proven useful in preventing takeover by surprise. However, it is no substitute for timely notice to the marketplace. Case law shows that the courts do not place a high value on the damage done to an offeror whose plans are upset because of its own failure to comply with the Williams Act. Courts have already ruled that the offeror's interest in not losing an investment

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66. The court also noted that some of the shares were tendered by sophisticated investors who tendered with full knowledge of Butler's claims. 425 F.2d at 845.
67. Id.
68. In Otis Elevator Co. v. United Technologies Corp., CCH Fed. Sec. L. Rep. ¶ 95,342 (1976), the court acknowledged that an extension of the tender offer would allow for corrective disclosures but chose, nevertheless, to award a preliminary injunction instead of granting an opportunity for consummation. The court reasoned that the offeror had already "modified" the terms of its tender offer three times and with a further supplemental disclosure, the shareholder would be required to read four notices to understand the contents of the offer. Consequently, it felt that only an entirely new offering statement could cure the problems inherent in the tender offer.
opportunity at such time as it deems ripe and profitable will not save an otherwise unlawful tender offer. Case law also shows that no formula has yet been devised to consider or to compensate the investing public which has been deprived of its Williams Act notice. Because the Act adopts a neutral stance toward takeover bids, its purpose would seem to be served, in theory, by a preliminary injunction which is intended to maintain the status quo during the pendency of the action. But it is unlikely that a preliminary injunction which simply halts the progress of the tender offeror will maintain the status quo because a viable tender offer depends on the existence of several factors which cannot be controlled by injunction. For example, a privately financed offeror may be unable to keep its money tied up during the injunctive period. Also the price of the stock may rise above the price offered by the tender offeror, or the target management may implement defensive tactics which dissuade stockholders from tendering. Consequently, the practical effect of the preliminary injunction may often be to destroy the tender offer. This problem was recognized as early as 1969 when the court in Electronics Specialty Corp. v. International Controls Corp. warned that target companies often


As far as Microdot is concerned, the issuance of a preliminary injunction will mean that it will lose an opportunity to acquire a controlling interest in Elco. The loss may or may not be temporary. The same conditions may not exist again. If so, Microdot will be irreparably injured. I conclude, however, that where the probability of unlawfulness and of injury to others is as strong as it is here, the acquiring corporation's interest in the consummation of the transaction must be subordinated. Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Company, supra; Allis-Chalmers Mfg. Co. v. White Consolidated Indus. Inc., supra.

Similar considerations apply with respect to those Elco shareholders who have tendered their shares in response to the offer. Microdot stresses that a preliminary injunction barring consummation of the tender offer will deprive these stockholders of their premium. If Microdot's acquisition is in violation of the Clayton Act, this is a premium to which they cannot justly lay claim. If Microdot is vindicated and conditions permit the resuscitation of the offer, the loss will be a temporary one. If conditions do not permit renewal of the offer at the termination of this litigation, the tendering stockholders may indeed suffer some irremedial loss. On this record, however, I conclude that this limited interest of Elco's tendering stockholders must yield. [Footnote omitted].

360 F. Supp. at 754-55.

70. 409 F.2d 937 (2d Cir. 1969).
"resort to the courts on trumped up or trivial grounds as a means for delaying and thereby defeating legitimate tender offers," and that preliminary relief should not be granted lightly. The wisdom in that warning was demonstrated only too well in *Texasgulf*, where the court allowed itself to become a tool for management. If the Williams Act is to fulfill its purpose of protecting shareholders without favoring either management or offeror, the courts must mete out preliminary relief so as to prevent unnecessary delays by the target management. This applies to the court's determination of whether to award preliminary relief and to the court's selection of the form of relief.

Prior to 1975 the cases evidenced a significant trend away from the requirement of irreparable harm used in *Bath* and toward the balancing-the-equities formula used in *Gulf & Western* to determine whether to award a preliminary injunction. Although the balancing-the-equities formula properly provides for weighing all the interests protected under the Act, it also tended to undermine the general rule that preliminary injunction must not be granted lightly.

One reason for this was the elimination of the irreparable harm standard. As originally conceived, a need for irreparable harm was coupled with the requirement of finding a balance of the hardships in favor of the movant. The balancing test was used to lighten the burden of showing a probability of success on the merits. Instead, more recent cases viewed balancing

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71. *Id.* at 947. *See also* Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 207, 209-10 (2d Cir. 1973) where the court stated:

A familiar defensive tactic increasingly used by target companies to delay or thwart a take-over bid made by the tender offeror has been the institution of a lawsuit against the offeror charging violation of the federal antitrust laws or non-disclosure of material information in violation of the Williams Act . . . .


And in *Checker Motor Corp. v. Chrysler Corp.*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969), the standard which we find particularly applicable here was set forth as follows:

"The purpose of a preliminary injunction is to maintain the status quo pending a final determination of the merits. . . . It is an extraordinary remedy, and will not be granted except upon a clear showing of probable success and possible irreparable injury (emphasis that of the Court). . . . However, 'the burden [of showing probable success] is less where the
the equities as an alternative to finding irreparable harm.\footnote{75} The closest these cases came to finding irreparable harm was to foresee that a denial of preliminary relief might create a situation almost impossible to unravel if the tender offer were consummated and a takeover occurred.\footnote{76} This standard appears less stringent than that of irreparable harm inasmuch as any change of management resulting from a proxy fight may be difficult to unravel, but such a change should not be automatically deemed to cause irreparable harm.\footnote{77} The better test would require the movant to show that he and/or the shareholder will suffer irreparable harm absent the relief sought, that it is likely he will prevail at a final hearing upon the merits, and that the balance of the equities between the offeror, the tendering and nontendering shareholders, the target company, and the public favors granting the relief requested.\footnote{78}

The requirement of irreparable harm was also undermined by the broadened meaning given to "clear, pervasive, and vital public interest," which when found compelled all doubts to be resolved in favor of injunctive relief. In \textit{Gulf & Western}, the first case to raise the public interest standard, the possibility of antitrust violations in the supermarket industry was sufficient grounds, without more, to compel the granting of a preliminary injunction.\footnote{79} It is important to note that the court could very easily have cast its decision in terms of irreparable harm. A & P was arguably faced with irreparable harm if Gulf

\begin{quote}
\textit{balance of hardships tips decidedly toward the party requesting the temporary relief.} Dino De Laurentiis Cinematografica, S. p. A. v. D-150, Inc., 366 F.2d 373, 375 (2d Cir. 1966). In such a case, the moving party may obtain a preliminary injunction if he has raised questions going to the merits so serious, substantial and difficult as to make them a fair ground for litigation and thus for more deliberate investigation. Unicon Management Corp. v. Koppers Co., 366 F.2d 199, 205 (2d Cir. 1966); Dino De Laurentiis Cinematografica, S. p. A. v. D-150, Inc., supra; Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 735, 740 (2d Cir. 1953)." (emphasis added) (some citations omitted). 405 F.2d at 323.
\end{quote}


\footnote{76} Id.


& Western gained control in violation of the antitrust laws. The facts of that case were sufficiently compelling that failure to use the language of irreparable harm did not amount to a significant departure from the substance of that standard.

In subsequent cases, however, the language of the court in Gulf & Western took on a life apart from the facts in that case. The courts came to believe that they could enjoin proxy solicitations whenever they found any violation of the Williams Act and a public interest that was served by enjoining the solicitation.

In Host, the threat to the public interest supposedly lay in the possibility that the margin requirements of the securities law were violated by the guarantee of the offeror's loan to finance the tender offer. That the public interest in averting an illegally financed takeover is as great as the public interest in enforcement of the antitrust laws is a proposition requiring considerable proof, but the Host court made this assumption of equal importance without discussion.

In none of these cases was the meaning of "public interest" clearly defined. In none of these cases did the courts indicate why the public interest, as they chose to define it, should take precedence over the interests of the tender offeror. Logically, it became necessary to ground the public interest somewhere other than the personal preferences of particular judges. Therefore, the courts took another step. They decided that the public interest required an injunction because of the violation of the Act. This step was taken in Water & Wall Associates where the need for enforcement of the security laws, i.e., the Williams Act, was sufficient of itself to raise a clear, pervasive and vital public interest compelling injunctive relief.

In finding a vital public interest not only in probable antitrust violation but also in probable Williams Act violation, the courts took a major interpretative step. But in view of the consequences of a preliminary injunction on the tender offer,

80. 359 F. Supp. at 759. It is interesting to note that the court, in the interest of time, did not consider the possibility of success on the merits on the claimed violations of the margin requirements of the securities laws, stating:

This Court, at this time, has selected for determination of probability of success on the merits two of the issues which commend themselves for immediate consideration, leaving for trial those issues which, however substantial, are not critical to the determination of this motion.

Id. at 753.
it would be better to require more than a potential filing error before automatically granting a preliminary injunction. At the very least the courts should explain the basis for their holdings by detailing the nature of the public interest they decide to protect and the threat they see to it.

Although lower federal courts have most frequently used the balancing-the-equities formula as a substitute for irreparable harm, the real value of the formula may lie in the court’s selection of the form of relief once a case for relief has been made. Its application at this stage is perhaps the most effective means by which a court can take the tender offeror’s interests into account. For example, in *Bath*, the court was faced with an imminent annual shareholders meeting at which a battle for corporate control had been scheduled. By enjoining the shareholders meeting, the court balanced the equities to avoid giving management an unnecessary upper hand. In *Committee for New Management of Butler Aviation*, on the other hand, the court took a tougher stance and enjoined Dopp from voting his illegally acquired shares without cancelling the upcoming corporate election. However, the *Butler Aviation* case involved an intentional violation, whereas *Bath* did not.

The alternatives to the preliminary injunction which allow for curative amendments further give consideration to the offeror’s interests by requiring only a minimal delay in the tender offer. It is regrettable that these remedies have not been awarded more frequently. Of course, not every case warrants minor relief. By itself curative amendment would be an inappropriate remedy, where, for example, irreparable harm, as in *Bath*, or potential antitrust violations, as in *Gulf & Western*, will not be prevented by proper disclosure. However, curative amendments could be justified in the case of an unintentional violation or where a “public interest,” however defined, is not involved.

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81. Thus far, curative amendment has been suggested only where the tender offer has already been defeated, Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973), or where substantial mitigating factors are present, Butler Aviation International, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842 (2d Cir. 1970). Even when curative amendments are allowed, the court may not approve them and lift the injunction. Ronson Corp. v. Liquifin Aktiengesellschaft, 370 F. Supp. 597 (D. N.J.) aff’d 497 F.2d 394 (3d Cir. 1974), cert. denied, 000 U.S. 000 (1975).

82. It should be noted that even the most lenient remedy, curative amendments without injunction, can be awarded only after a hearing for preliminary injunction. Consequently, curative amendments are ineffective in a situation like that presented
II. PERMANENT REMEDIES

In Williams Act cases it is said that in fashioning a remedy, the court's "object all sublime" should be to "let the punishment fit the crime."

This can more easily be accomplished when the court is apprised of the Williams Act violation before consummation of the takeover bid. Once the tender offer has been consummated and new management has assumed control, it becomes difficult, if not impossible, to "unscramble the eggs." At this stage any remedy imposed threatens to exceed the culpability of the offender and to punish rather than deter.

The four forms of permanent relief sought by Williams Act plaintiffs are:

(1) forced rescission of the sale of stock tendered to the offeror so as to nullify consummation of the tender offer;

(2) divestiture of shares acquired by the tender offeror in a court supervised sale to an outside buyer;

(3) limitation by injunction on the voting of shares acquired in violation of the security laws either permanently or for a period of years; and

(4) pecuniary damages, awarded alone or in conjunction with another permanent remedy.

The problems inherent in these remedial tools were first discussed in Electronic Specialty Corp. v. International Controls Corp. The action arose out of an attempt by International Controls Corp. (ICC) to acquire control of Electronics Specialty Corp. (ELS) by cash tender offer. Management and

in Texasgulf Inc. v. Comprehensive Designers Corp., 366 F. Supp. 374 (S.D. Tex. 1973), where a one month delay resulted from a temporary restraining order imposed before the hearing on the preliminary injunction. In fact, curative amendments were the source of further delay because the temporary restraining order was extended to allow for their distribution even though the court had determined the offer to be lawful.

83. My object all sublime
   I shall achieve in time—
   To make the punishment fit the crime.
   The Mikado, Act II.


85. Id.


87. Id.

88. Id.

89. 409 F.2d 937 (2d Cir. 1969).
major shareholders commenced an action under section 14(e) of the Williams Act, alleging that ICC had distributed misleading information about its intentions to make a tender offer. When the district court refused to grant a preliminary injunction, the controlling interests of ELS capitulated and tendered their holdings to ICC. Consequently, when the actions came to trial, ICC already controlled most of the outstanding shares of ELS, at a cost of $48,000,000. The court awarded only an injunction against future violations of the Williams Act. ELS appealed denial of their claim for divestiture, an injunction against voting, or rescission. The court of appeals rendered the remedy issue moot by reversing the lower court’s finding of violation, but in dictum, rejected such “strong medicine” as divestiture and permanent deprivation of voting rights in a case where two-thirds of the target’s stock had been tendered. The court estimated that divestiture of 1,200,000 shares would involve a loss approaching $15,000,000, assuming a purchaser could be found, and an even greater loss if the stock had to be sold in small quantities. In the latter event, innocent nontendering shareholders would be harmed as well. The court rightly recognized that a permanent injunction against voting, or an injunction against the solicitation of proxies, was a disguised method of forcing divestiture, with the added complication that, because management had sold out, control of ELS would be put in the hands of shareholders holding only 45 percent of the stock. Since the price of ELS stock had sunk from the tender offer price of thirty-five dollars to between twenty-six and twenty-seven dollars, offering shareholders an opportunity to withdraw was the “idlest of gestures.”

Awards of permanent relief have been limited to those cases in which willful and calculated violations of the Williams Act have been clearly shown. Such was the case in Chris-Craft Industries v. Piper Aircraft Corp. which involved a bitter battle between Chris-Craft and Bangor Punta Corp. for control of Piper Aircraft. After Chris-Craft lost its takeover bid, it brought suit charging Piper Aircraft, Bangor Punta, and other defendants with deliberate misstatements in violation of sec-

91. 409 F.2d 937 (2d Cir. 1969).
92. Id. at 948.
93. Id. at 947.
tion 14(e) of the Williams Act, inter alia. The court found in Chris-Craft's favor and awarded damages for the financial loss it suffered when the appraisal value of its Piper holdings shrank due to Chris-Craft's reduction to minority shareholder position. The court further imposed a five-year ban which prevented voting of the stock which Bangor Punta acquired during the Williams Act violation. However, the court declined to force divestiture of Bangor Punta's Piper shares because Piper Aircraft had been operated by Bangor Punta management for several years by the time the litigation was concluded. Therefore, divestiture would be difficult to administer and would unnecessarily reopen the control battle that Chris-Craft no longer desired to renew in view of the changed character of the Piper company.

In *Cattlemen's Investment Co. v. Fears*, the court suggested that balancing the equities would be a viable alternative to requiring irreparable harm for an award of permanent injunction. In this case, defendant Fears admitted he had not complied with section 14(d) of the Securities Exchange Act and Rule 14d of the SEC. The court noted that plaintiff and the shareholders had been deprived of information material to their investment decisions and that

in view of the public interest in insuring fair practices and honest dealing in the acquisition of corporate shares by tender offers, a showing by plaintiff of irreparable injury in the usual sense is not a necessary prerequisite to an issuance of an injunction. Accordingly, defendant Fears was permanently enjoined from voting all stock acquired in violation of the Williams Act.

Other courts have contemplated permanent relief without awarding it. In *Corenco v. Schiavone & Sons*, the district court permanently restrained the offeror from acquiring any shares of Corenco as a result of their tender offer "unless and until the Schiavone defendants made full disclosure. . . ."
The circuit court,\textsuperscript{101} one week later, modified the district court's injunction to permit Schiavone to continue soliciting the tender of Corenco shares upon filing an amendment to their 13d statement, distributing an amended offer to purchase and providing tendering shareholders an opportunity to withdraw within thirty days.\textsuperscript{102} The Second Circuit suggested in dicta, however, that even if the deficiencies in the tender offer were corrected, permanent injunctive relief could still be appropriate to insure future compliance with the Williams Act where the offeror willfully withheld information from the target company's shareholders. The court noted that the district court had the equitable power to expressly limit the duration of a permanent injunction until the defendant offerors made full disclosures.

In \textit{H. K. Porter v. Nicholson File Co.},\textsuperscript{103} the plaintiff had issued a tender offer to defendant's shareholders for 437,000 shares of Nicholson common stock. Only 132,292 shares were tendered. The offeror alleged that management defeated its tender offer by issuing false statements to its shareholders. In overruling a motion to dismiss, the court noted that if the offeror established a violation of the Williams Act, an award of damages to the offeror would be justified.

In \textit{Scott v. Multi-Amp Corp.},\textsuperscript{104} the court refused to award permanent relief for a "technical" violation of the Williams Act. The violation arose when the offeror failed to file a 13d schedule within the statutory period. Plaintiff conceded that the offeror's assumption of control of Multi-Amp was accomplished with the knowledge and cooperation of the management then in control,\textsuperscript{105} that the acquisition was extensively publicized, and that the takeover had been consummated for four and a half years before the action was brought. Neverthe-

\begin{footnotesize}
\begin{enumerate}
\item[101.] \textit{Id.} at 214.
\item[102.] The court stressed that the offeror had not been shown to have "guilty knowledge or intent" to violate the Act because the supplemental disclosures ordered by the district court had never before been required under the Williams Act.
\item[103.] 482 F.2d 421 (1st Cir. 1973). See also \textit{Ozark Air Lines, Inc. v. Cox}, 326 F. Supp. 1113 (E.D. Mo. 1971) where the court intimated that, in spite of Ozark's failure to show irreparable harm, it might have awarded disenfranchisement of all nonexempt shares acquired by the group if there had been evidence of an acquisition and if there had been no 13d filing before the commencement of the action.
\item[104.] 386 F. Supp. 44 (D. N.J. 1974).
\item[105.] \textit{Id.} at 53. There was no failure to alert management of the shift in control since it was management itself from whom the stock was purchased.
\end{enumerate}
\end{footnotesize}
less, plaintiff demanded that defendants be disenfranchised from voting their shares. Noting that the violation harmed no significant interests protected by the Act, and deprived no one of material information, the court denied relief, stating: "A violation of section 13(d) . . . does not automatically cause the invocation of . . . drastic sanctions." The court accepted defendants' assertion that their counsel had failed to advise them of the filing requirement and that their failure to file was both inadvertent and unintentional. The court also found bad faith on the part of the plaintiff in delaying the suit for four and a half years after the acquisition.

These cases indicate that the court faces a more difficult task in accommodating the goals of the Williams Act at this stage of the proceeding than it did in the preliminary stages. Violations which could have been cured by supplemental disclosures and an opportunity to withdraw before the tender offer was consummated can only be cured after consummation by: (1) nullifying the effect of an unlawful tender offer by rescission, divestiture, or permanent injunction on voting; (2) a time limited injunction on voting; or (3) monetary damages. The form of permanent relief awarded should be related to the nature of the offer. The literature used by the offeror varies greatly depending on whether the offeror is making a cash tender offer, an exchange offer, or mere purchase of securities. The potential damage to shareholders is greater when an exchange offer is made because shareholders of the target would be asked to become shareholders of the offeror. Thus a great deal more information is needed to make an intelligent decision. The potential damage to shareholders of the target is less when the offeror merely purchases securities for cash from willing buyers.

Similarly relief should be related to the ultimate plans of the offeror. Divestiture, in particular, could become more or less desirable depending on: (1) whether the offeror intends to

106. Id. at 55.
107. The case of Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 207 (2d Cir. 1973) demonstrates that curative amendments may be prescribed in connection with a permanent injunction when the parties agree under FED. R. CIV. P. 65 to merge their applications for preliminary and final relief into one trial.
108. An incidental problem arises with this remedy in that the federal securities laws place restrictions on the resale of large blocks of securities. See, e.g., § 16(b) of the Securities Exchange Act of 1934; § 5 of the Securities Act of 1933.
hold the target as a subsidiary; (2) whether a merger is intended in which case minority shareholders would be found out; or (3) whether pro rata liquidation is intended, again forcing out minority shareholders. Furthermore, attempting divestiture years after the successful completion of the takeover bid and after new management is installed would prove costly and confusing, and would serve no one's interests, unless intentional misconduct required punishment in the public interest. As in Chris-Craft, the losing side of the proxy struggle may not want a drastically changed corporation. On the other hand, no award of relief could be inequitable to the innocent claimant and would provide no deterrent to future violators.\textsuperscript{109} The less drastic remedy of monetary damages would be easier to administer and a satisfactory deterrent in a majority of cases.\textsuperscript{110}

Both preliminary and permanent relief cases raise two important questions. First, could irreparable harm, traditionally the sole criterion for any kind of injunction, be supplemented or replaced by a balancing-the-equities process when a public interest was alleged to be involved? And secondly, how should the courts react to supposedly "technical" violations of the Williams Act? These questions were raised in the recent case of \textit{Rondeau v. Mosinee Paper Co.}\textsuperscript{111}

\textbf{III. RONDEAU V. MOSINEE PAPER COMPANY}

Between April and August of 1971, Francis Rondeau purchased a substantial number of shares in Mosinee Paper Corporation, a company engaged in the business of manufacturing, converting and selling specialty papers, paper products and plastics. In early July, Mosinee's stock register showed that Rondeau controlled more than five percent of its issued and outstanding stock; the acquisition of five percent had occurred

\textsuperscript{109} At least one commentator feels that not every Williams Act violation warrants relief. Young, \textit{Judicial Enforcement of the Williams Amendments: The Need to Separate the Questions of Violation and Relief}, 27 BUS. LAWYER 391 (1971).

\textsuperscript{110} The court in \textit{Rondeau v. Mosinee Paper Co.}, 422 U.S. 49, 60 (1975) noted: In any event, those persons who allegedly sold at an unfairly depressed price have an adequate remedy by way of an action for damages, thus negating the basis for equitable relief.

The court was advised by respondent that such a suit is now pending in the District Court and class action certification has been sought. Although we intimate no views regarding the merits of that case, it provides a potential sanction for petitioner's violation of the Williams Act.

\textsuperscript{111} 422 U.S. 49 (1975).
earlier, in May, 1971. At the end of July, Mosinee's management wrote to Rondeau to advise him that he might be violating the federal securities laws. Upon learning of the five percent filing requirement, Rondeau placed no further orders for Mosinee stock, and he retained counsel to prepare a 13d schedule, which was filed at the end of August. Thereafter Mosinee's management brought an action seeking to prevent Rondeau from buying more Mosinee stock, voting the shares he already had, or seeking to gain control of the corporation; the complaint also sought damages and divestiture. After extensive discovery, Rondeau moved for summary judgment. The district court granted that motion because it found no danger of irreparable harm to Mosinee, and because it found Rondeau's violation of section 13(d) to be the result of unintentional oversight, rather than intentional covert and conspiratorial conduct. On appeal the Seventh Circuit, in a two to one decision, reversed the district court. The grounds for reversal were (1) that irreparable harm was not necessary for injunctive relief under the Williams Act and (2) that violation of the Act in and of itself mandated injunctive relief against the violator regardless of the reasons for the violation. The circuit court remanded the case to the district court with instructions to enter a decree enjoining Rondeau from further violations of section 13(d) and from voting the shares of Mosinee stock acquired between the due date of the 13d schedule and the date of its actual filing. The injunction against voting extended to any takeover, proxy contest, or election of officers or directors for a period of five years. The decision of the Seventh Circuit followed the line of cases in which injunctive relief automatically resulted from a proven statutory violation because of the public interest in assuring that the market receives adequate and timely disclosure of relevant information. The majority held that no showing of irreparable harm was needed in view of the fact that Mosinee was in the best position to administer the Act, as its prime enforcer. As a result of this decision, irreparable harm had been entirely supplanted as a prerequisite of injunctive relief.

Rondeau petitioned the Supreme Court for a writ of certiorari on two questions: (1) Did the Seventh Circuit correctly decide that a showing of irreparable harm was not a prerequisite to granting injunctive relief under section 13(d); (2) Did the Seventh Circuit correctly decide that an unintentional viola-
tion of section 13(d) must be neutralized to deny the violator the benefit of his wrongdoing after the violation had been corrected? The petition was granted on December 15, 1974. The Supreme Court issued its decision on June 17, 1975.\textsuperscript{112} It decided both questions raised by Rondeau's petition for certiorari in his favor. The Court held (1) that irreparable harm is a prerequisite to injunctive relief absent explicit statutory language to the contrary and (2) that absent a showing of irreparable harm no negative sanction was needed in response to Rondeau's technical and unintended violation of the Williams Act. Accordingly, the Seventh Circuit was reversed and the judgment of the district court reinstated.

The importance of this decision lies in its meaning for the fashioning of injunctive relief in particular and the fashioning of relief for judicially created implied causes of action in general. Not surprisingly for this Court, the majority declined to broaden the traditional bases for granting injunctions. As a historical tool of the common law, the injunction was court molded and designed to prevent irreparable harm, that is, immediate injury which could not later be compensated through damages. Additionally, as the Court explicitly noted, "the historic injunctive process was designed to deter, not to punish."\textsuperscript{113} And finally the injunction was to be a flexible tool fit for nice adjustment and reconciliation between competing claims. On all three grounds the Seventh Circuit's use of the injunction was found wanting. That court conceded the absence of irreparable harm, but nonetheless imposed an injunction which severely penalized Rondeau for an unintentional violation without taking into account the nature of the violation. During oral argument the Chief Justice noted that it was within the power of Congress to create lesser or different standards for issuance of injunctions. But in the Williams Act Congress had not done so. In this part of its decision the Court did not cut back on the scope of injunctive relief; it only reiterated

\textsuperscript{112} The vote was six to three, Justices Douglas, Brennan and Marshall dissenting. Justice Marshall dissented without opinion. Justice Brennan wrote a brief dissenting opinion, joined by Justice Douglas, who did not sit for oral argument. Justice Brennan's dissent emphasized his belief that Congress had meant to change the traditional elements needed for injunctive relief under the Williams Act. Chief Justice Burger authored the Court's Opinion, on behalf of himself and Justices Stewart, White, Blackmun, Powell and Rehnquist.

\textsuperscript{113} 422 U.S. at 61.
the prevailing legal understanding about the terms of its use. In so doing the Court exercised its special duty to oversee the maintenance of uniformity in the construction of uncodified rules of practice throughout the federal judiciary. As we shall see in a later part of this article, a contrary decision would have resulted in serious confusion had federal courts been at liberty to simultaneously set new contours on the scope of the remedies they ordered and define new judicially created causes of action.

Secondly, this decision is important because of the words of caution the Court addressed to federal judges dealing with implied causes of action. The Court recognized the "power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to enforcement by the Securities and Exchange Commission." But the relief obtainable through such a cause of action would have to be chosen from the existing arsenal of judicial weapons. In the securities field that arsenal includes rescission, divestiture, damages, stock voting limitations, and injunctions. What the Court has done then is to free the practicing lawyer to advance new implied causes of action requiring new variations to old remedies, while at the same time restraining the judiciary from ignoring the traditional standards which must be met before those remedies may be granted. This combination of freedom and restraint found its way into the Rondeau decision. "The power to make the right of recovery [under the securities laws] effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." [emphasis added]. In other words, if the Court was willing to change the concepts upon which litigation might go forward it was unwilling to completely change the rules by permitting novel remedies to result from novel claims. Such judicial restraint no doubt reflects proper concern about the vague, but


It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes to be served by the Act.

115. 422 U.S. at 62.
nonetheless real, line of demarcation between the primary roles and responsibilities of the judicial as contrasted to the legislative branch of government. It also reflects justifiable concern that litigation not be a voyage on entirely uncharted waters. One parameter should remain fixed as a guide buoy which is familiar to the legal profession and against which changes can be measured for effect. By contrast the Seventh Circuit in its decision had created a new remedy to complement an implied right of action for a statute that by its terms spoke to neither litigation nor relief. The Court's ruling on the Williams Act in the Rondeau case fits squarely within the foregoing analytical framework. Mosinee brought its lawsuit under the Williams Act on a judicially created implied cause of action. The Seventh Circuit granted relief by designing a new remedy founded on injunction without irreparable harm. As matters stood before appeal, Mosinee had won novel extraordinary relief based on a notice statute that by its terms created no right of action. In reversing, the Supreme Court preserved the traditional elements for injunctive relief and followed its practice of judicial restraint by requiring implied actions to satisfy those traditional elements by consideration of the same factors that would govern relief in similar actions familiar to the federal judiciary.

As another indication of its judicial restraint the Court limited its decision to the narrowest possible grounds. The Court did not decide whether or under what circumstances a corporation could obtain a decree enjoining a shareholder who is currently in violation of the Williams Act from acquiring further shares, exercising voting rights, or launching a takeover bid, pending compliance with the reporting requirements of the Act. This important question has thus been left to the lower courts to continue to resolve on a case by case basis. A review of Williams Act cases to date shows that the lower courts have generally insisted that violations be cured but have imposed no further permanent or punitive remedies, absent proof of intentional violation.

If the Rondeau decision heralds any trends at all, they are simply that the Supreme Court will be very wary of getting too far ahead of Congress in imposing remedies on implied causes of action, and that the Court will be very careful to fix parameters within which litigants contest their claims. These are modest trends because they represent nothing new in the approach the Court takes to its work. But they are powerful trends be-
cause they represent an ongoing concern by the Court about the relationship of its work to the work of the Congress, and an ongoing respect for orderly, measured change when the need for change arises.\textsuperscript{116}

116. Two Williams Act cases since Rondeau v. Mosinee Paper Co. support the view taken by this article that the Rondeau decision may reverse the trend toward replacing the requirement of irreparable harm for an injunction with a balancing the equities test. In Klaus v. Hi-Shear Corp., CCH Fed. Sec. L. Rep. ¶ 95,404 (1976), the Ninth Circuit rejected the balancing-the-equities test altogether, holding that preliminary injunctions against voting had been improperly issued by the lower court because the offeror-plaintiff could not establish irreparable harm from the alleged section 14(a) and 14(e) violations.

In issuing each of its injunctions, the court concluded that money damages would not afford Klaus adequate relief for the harm caused him by management's violation of the law. It found that a balancing of the equities in each instance indicated that management should not be permitted to vote the shares in question pending a final judgment. We find that the court applied an improper test for the availability of injunctive relief.

The Supreme Court has recently restricted the availability of injunctive relief to either of the parties contesting a take-over bid for an alleged violation of the federal securities laws. Rondeau v. Mosinee Paper Corp., ___ U.S. ___ (1975). . . . [It held] that a showing of irreparable harm remained essential for injunctive relief; furthermore, the 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. The Court found that any possible harm which Rondeau's violation of section 13(d) caused the investing public was either too remote to warrant injunctive relief or could be adequately redressed by money damages. Klaus, supra at 95,404.

The authority of this decision, however, is diminished by the court's further statement that the [Supreme] Court decided in Rondeau that the Williams Act was designed to protect cash tender offerees, not offerors. Klaus, supra at 99,068. This is clearly a misinterpretation of the Rondeau decision as the court stressed the extreme care which was taken by the Act's draftsmen "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." 422 U.S. at 58-59.

In Mesa Petroleum Co. v. Aztec Oil and Gas Co. CCH Fed. Sec. L. Rep. ¶ 95,424 (1976), a Texas district court did not reject the balancing the equities test, but downplayed its importance, saying:

A second principle found in the litany of standards for review of an application for preliminary injunction is that the plaintiff must prove that denial of the requested relief would result in irreparable injury. Rondeau v. Mosinee Paper Corp., ___ U.S. ___., 95 S. Ct. 2069 (1975); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). See also, Moore v. Greatamerica Corp., 274 F. Supp. 490, 493 (N.D. Ohio 1967); Symington Wayne Corp. v. Dresser Industries, Inc., supra. Finally, the courts have added as a measure, the "balancing of equities." This is probably no more than another means of expressing an ultimate conclusion that, all things considered, the final determined relief is proper.

There is a great overlap among these standards partly concealed by their seriatim listing. And with irreparable injury the overlap may be almost complete at least as to the "adequacy of the remedy at law" (complete enough to avoid a separate listing). . . .
This case involved alleged violations of Section 14(e) of the Securities Exchange Act of 1934 and Section 7 of the Clayton Act. On the other hand, the Southern District of New York has ignored the *Rondeau* ruling and continued to endorse the balancing-the-equities test. See The Anaconda Company v. Crane Co., CCH Fed. Sec. L. Rep. ¶ 95,364 (1976), Otis Elevator Co. v. United Technologies Corp., CCH Fed. Sec. L. Rep. ¶ 95,342 (1976). These cases may no longer be precedent for the balancing-the-equities test, however, because on appeal from the Western District of New York, the Second Circuit has since cited *Rondeau* with approval. Stecher-Traung-Schmidt Corp. v. Self, CCH Fed. Sec. L. Rep. ¶ 95,427 (1976). Although the court held that the district court had based its injunction for violation of section 13(d) on a likelihood of irreparable harm, it advised the court to determine whether the plaintiff was still being harmed. CCH Fed. Sec. L. Rep. ¶ 99,178 (1976).