Effectuating Disclosure Under the Williams Act

Ronald J Colombo
EFFECTUATING DISCLOSURE
UNDER THE WILLIAMS ACT

Ronald J. Colombo*

ABSTRACT

The importance of adequate, timely disclosure of critical information to investors and the capital markets has never been more greatly appreciated. In furtherance of such disclosure, within the specific context of rapid stock accumulations that implicate potential changes in corporate control, Congress passed the Williams Act in 1968. Unfortunately, thanks largely to an early Supreme Court decision interpreting the Act, the remedies available to private litigants foster noncompliance and gamesmanship. Fortunately, this decision is open to reinterpretation – and arguably ripe for relegation as bad law. Such a turn of events would give rise to a remedial regime that furthers, rather than undermines, the important disclosure objectives of the Williams Act.

* Associate Professor of Law, Hofstra University School of Law. Special thanks to the Hofstra University Junior Faculty forum for its extremely helpful commentary and feedback on an earlier draft, and to Jennifer Riley for her incredibly diligent research assistance.
TABLE OF CONTENTS

Introduction .............................................................................................................2
I. The Williams Act..................................................................................................4
   A. Background, Legislative History, and Purposes .........................................4
   B. Text and Applicability ...............................................................................9
   C. Enforcement ...............................................................................................14
      1. Administrative Proceedings ...............................................................15
      2. SEC Civil Action ...............................................................................19
      3. Criminal Prosecution .........................................................................20
      4. Private Rights of Action ....................................................................21
III. Equitable Relief Under the Williams Act ..........................................................23
   A. Equitable Relief Principles .......................................................................24
   B. Application of Equitable Relief to Williams Act Violations ......................28
III. Rondeau v. Mosinee Paper Corp......................................................................31
   A. Rondeau and its Reinterpretation .............................................................31
   B. Legislative Intent and its Reinterpretation ..................................................42
   C. Rondeau Is Bad Law ...............................................................................43
IV. Additional Correctives .....................................................................................44
   A. Incentivizing Management .......................................................................45
   B. Governmental Prioritization ....................................................................48
Conclusion ..............................................................................................................48

INTRODUCTION

Crafted to close a gap in U.S. securities regulation, the Williams Act suffers from a serious loop-hole of its own. Courts construing the Act have established a remedial approach to its violation that renders the Act essentially toothless in major respects. Worse, the approach generally adopted invites gamesmanship that undermines the Act’s very purposes.

The Act fosters market efficiency and investor protection by mandating certain disclosures when someone either purchases a significant stake in a public company, or undertakes a tender offer for the stock of a public company. In each of these instances, the important question of company control is implicated. But with respect to the former situation (the purchase
of a significant stake in a public company), there is little incentive to honor the disclosure requirement given the courts’ interpretation of the Act.

As the deficiency in question is one of the judiciary’s making, the courts can rectify the situation via a reconsideration of precedent. Lacking that, Congress could amend the Act, or the SEC could engage in corrective rule-making – a move that would be particularly appropriate in light of the re-examination of U.S. securities regulation that is currently underway.¹ Further still, the SEC, through administrative proceedings and/or through the exercise of certain favorable civil litigation powers it possesses (especially in the wake of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010²), can rectify the situation unilaterally.

The timeliness of such undertakings could not be greater, as the financial crisis of 2008-2009 underscored the importance of adequate, accurate disclosure in general.³ Furthermore, the SEC appears to have taken renewed interest in the Williams Act of late, as evidenced by its high-profile investigation into Berkshire Hathaway⁴ and its equally high-profile enforcement action against billionaire brothers Sam Wyly and Charles Wyly⁵ - both of which involve alleged Williams Act violations.

Part I of this Article will set forth the background, purposes, and intended operation of the Williams Act. It will also discuss how the Act’s provisions are enforced. Since the violations that are the focus of this Article are only subject to equitable relief, Part II will lay out the principles of equitable relief generally, and survey how those principles have been applied within the context of the Williams Act. Part III will address the Supreme Court’s only decision on the subject, Rondeau v. Mosinee Paper Corporation,⁶ and proffer a means of reinterpreting that decision to remedy the problems it has engendered. Part IV will briefly outline additional corrective measures for remedying the underenforcement of the Williams Act.

I conclude that a shift toward more predictable and stringent remedies in response to violations of the Williams Act, coupled with the recognition of

² See infra text accompanying notes 100-102.
⁶ 422 U.S. 49 (1975).
a cause of action against corporate management that is dilatory in reporting violations of the Act, would better serve the ends of the Williams Act by strengthening the incentives of both insurgents to comply with the Act and of incumbent management to report instances of noncompliance.

I. THE WILLIAMS ACT

A. Background, Legislative History, and Purposes

Unlike the approaches taken by other nations, and even many U.S. states, federal securities law in the United States is primarily a disclosure-based regime. Instead of regulating the merit of potential securities transactions, U.S. securities law has traditionally regulated instead the disclosure that must (and, in some cases, must not) be provided to and by the parties involved.

The provision of quality, accurate information is considered essential for at least two interrelated reasons: investor protection and the health of the capital markets. In keeping with its philosophical preference toward disclosure and against merit regulation, the securities laws protect investors by requiring that investors be furnished with that information deemed most critical to their ability to protect themselves (as distinct from an approach more designed to protect investors from themselves). Regarding the capital markets (and, indeed, markets in general), few things are more important than price, and quality, accurate information is essential to the market’s pricing of securities. (The importance of accurate information and pricing was vividly underscored by the global economic recession that paralyzed world financial markets from 2008 to 2009. For among the many causes associated with this recession, a primary one repeatedly identified by commentators has been the lack of quality information concerning critical economic transactions, and the inability to accurately price assets.)

One category of information particularly important to investors and the market alike is that concerning corporate control. For “[t]he competence and integrity of a company’s management, and of the persons who seek

---

7 For a brief background on U.S. securities regulating, see Ronald J. Colombo, Buy, Sell, or Hold? Analyst Fraud From Economic and Natural Law Perspectives, 73 Brook. L. Rev. 91, 122 (2007).
8 See id.
9 See id at 122-23.
management positions, are of vital importance to stockholders."\textsuperscript{12} Indeed, the market price of a security generally “reflects an evaluation of the company based on the assumption that the present management and its policies will continue.”\textsuperscript{13} Thus, “[s]ecrecy in this area is inconsistent with the expectations of the people who invest in the securities of publicly held corporations and impairs public confidence in securities as a medium of investment.”\textsuperscript{14}

Not surprisingly, therefore, the securities laws have long required the disclosure of efforts undertaken to seize control of a corporation:

Where one company seeks control of another by means of a stock-for-stock exchange, the offer must be registered under the Securities Act of 1933. The shareholder gets a prospectus setting forth all material facts about the offer. He knows who the purchaser is, and what plans have been made for the company. He is thus placed in a position to make an informed decision whether to hold his stock or to exchange it for the stock of the other company.

Where corporate control is sought through a proxy contest, the Securities Exchange Act requires that shareholders be informed of the identity of the participants and their associates, their shareholders and when they acquired them. When shares are purchased with borrowed funds, the identity of the lender must be disclosed if the funds were obtained otherwise than through a bank loan or margin account. In both the exchange offer and the proxy fight the information is filed with the Securities and Exchange Commission and is subject to statutory requirements and sanctions.\textsuperscript{15}

However, as of 1968, not all efforts at seizing corporate control were

\begin{itemize}
\item \textsuperscript{12} H. Rep. No. 1711, 90\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. 1968, 1968 U.S.C.C.A.N. 2811 at 2812.
\item \textsuperscript{13} Id. at 2813.
\item \textsuperscript{14} Id. at 2812.
\item \textsuperscript{15} Id. at 2812-12.
\end{itemize}
covered by the securities acts’ disclosure requirements. Importantly, a simple cash tender offer was subject to no reporting obligations under either the Securities Act of 1933 or the Securities Exchange Act of 1934. Similarly, no disclosure was required of those who would simply purchase large quantities of a company’s stock via privately-negotiated transactions, or via open-market sales of stock. Compounding the problem, these undertakings could be (and often were) pursued together quite effectively.

These loopholes were always potentially significant, as they enabled “large accumulations of an issuer’s shares and cash tender offers to be accomplished in complete secrecy.” Such accumulations would undermine the objective of ensuring adequate disclosure to investors and the market regarding “the potential for changes in corporate control,” and, a fortiori, impede the ability of investors and the market to “adequately evaluate the company’s worth.” The loopholes gained practical significance in the 1960s, when the cash tender offer had “become an increasingly favored method of acquiring control of publicly held corporations.”

---

16 Interestingly, the term tender offer is not defined by the Williams Act. See Guy P. Lander, U.S. SECURITIES LAW FOR INTERNATIONAL FINANCIAL TRANSACTIONS AND CAPITAL MARKETS, §11:14 (2009). The SEC and courts have adopted an eight-factor test for determining whether a stock purchases constitute a tender offer:

(a) active and widespread solicitation of public shareholders for the shares of an issuer;
(b) solicitation made for a substantial percentage of the issuer's stock;
(c) offer to purchase made at a premium over the prevailing market price;
(d) firm rather than negotiable offer terms;
(e) offer contingent on the tender of a fixed minimum number of shares, often subject to a fixed maximum number of shares to be purchased;
(f) offer open only a limited period of time;
(g) pressure on offerees to sell their stock; and
(h) public announcements of a purchasing program concerning the target that precede or accompany the rapid accumulation of large amounts of the target's securities.

Id.


18 See id.


20 Jacobs, 549 F. Supp. at 1057 n.10.

21 GAF Corp., 453 F.2d at 717.

22 Id.

23 H. REP. No. 1711, 90th Cong., 2nd Sess. 1968, 1668 U.S.C.C.A.N. 2811 at 2811. A cash tender offer “normally consists of a bid by an individual or group to buy shares of a company – usually at a price above the current market price. Those accepting the offer are
publicly held corporations in 1960, there were over 100 cash tender offers for such corporations in 1966.\footnote{See id. at 2811.}

In 1965, Senator Harrison Williams of New Jersey began his fight to close these loopholes.\footnote{See Comment, Section 13(d) and Disclosure of Corporate Equity Ownership, 119 U. Pa. L. Rev. 853, 859 (1971).} That year he drafted legislation providing that “any substantial accumulation of shares of a company registered under the [1934 Securities Exchange] Act must be preceded by the filing of public information.”\footnote{See id.} That was, he argued, “the only way that corporations, their stockholders, and employees [could] adequately prepare[] in advance to meet the threat of the takeover specialist.”\footnote{Id.} Although initially unsuccessful,\footnote{See id.} Senator Williams persisted, and in 1968 Congress passed the legislation that would come to bear his name: the “Williams Act.”\footnote{Act of July 29, 1968, P.L. 90-439, 82 Stat. 454.}

An important initial stumbling block to the legislation was Senator Williams’s desire to have any substantial accumulation of stock “preceded” by the filing of public information.\footnote{See Jonathan R. Macey & Jeffry M. Netter, Regulation 13d And The Regulatory Process, 65 Wash. U. L.Q. 131, 134-35 (1987).} Although workable for tender offers per se, the SEC objected to this on account of its unworkability for open market and privately negotiated purchases of stock.\footnote{See id.} The SEC (and others) considered it impractical to require individuals and entities to disclose their intention to purchase stock in a company beforehand – especially in light of the speed in which trading decisions are often made.\footnote{See id. at 134.}

Senator Williams relented on this point, and thus the stock-accumulation provision is triggered not by plans to acquire stock in the future, but rather by the present (or past) acquisition of a certain threshold amount of stock.\footnote{See Charles J. Johnson, Jr. & Joseph McLaughlin, CORPORATE FINANCE AND THE SECURITIES LAWS § 13.01[G][2], at 13-21 (4th ed. 2006); see also Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq.}

In total, the Williams Act added sections 13(d), 13(e), 14(d), 14(e), and 14(f) to the Securities Exchange Act of 1934. Consistent with his original vision, the enacted Act’s purpose, according to Senator Williams,
was “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 through cash tender offer or through the open market or privately negotiated purchases.”

Senator Williams also explained that such disclosure is necessary so that “shareholders and potential investors can adequately evaluate a tender offer or the possible effect of a change in substantial shareholders.”

Similarly, the Senator Report of the Act has Congress setting forth its purpose as follows:

...[to] correct the current gap in our securities laws by amending the Securities Exchange Act of 1934 to provide full disclosure in connection with cash tender offers and other techniques for accumulating large blocks of equity securities of publicly held companies.

As previously noted, the Williams Act addresses both outright purchases of stock (whether on national exchanges or via private negotiation), along with tender offers. The section that contains the deficiency upon which this article focuses (the accumulation of securities via their outright purchase) is Section 13(d).

(This article is not concerned with tender offers per se, and, indeed, section 13(d) “has no application to tender offers” directly.)

Before reviewing the text of the Act itself, one final thread from its legislative history warrants attention. Congress was quick to stress that the Williams Act was not to be interpreted or applied for the protection of incumbent management (or of anyone else interested in gaining or maintaining corporate control for that matter). “[T]he sole purpose of the

---

35 Bath Indus., 427 F.2d at 102 (7th Cir. 1970) (quoting 113 Cong. Rec. 24664 (1967) (Sen. Harrison A. Williams, Jr.); see also Jacobs, 549 F. Supp. at 1057 (“The purpose of Section 13(d) is to provide shareholders and potential investors with information about a change in ownership and control of the issuer to enable them to make informed investment decisions.”); accord Gen. Aircraft Corp. v. Lampert, 556 F.2d 90, 94-95 (1st Cir. 1977).

36 See Section 13(d) and Disclosure of Corporate Equity Ownership, supra note 25, at 862.


38 See supra text accompanying notes 17-20.


40 See Johnson & McLaughlin, supra note 34, §13.01[G], at 13-22.

Effectuating Disclosure Under the Williams Act

The Williams Act was the protection of investors,\(^\text{42}\) and “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.”\(^\text{43}\) As the Second Circuit recalled: “the Act’s draftsmen commented upon the ‘extreme care’ which was taken ‘to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.’”\(^\text{44}\)

B. Text and Applicability

Since its passage in 1968, the Williams Act has undergone a few minor amendments.\(^\text{45}\) As it exists today, the disclosure requirements of the Act are triggered when any investor (or group of investors acting together) “acquires more than five percent of any class of equity securities registered under the Securities Exchange Act.”\(^\text{46}\) The Act was structured this way to

\(^\text{42}\) See id.

\(^\text{43}\) ICN Pharm. v. Khan, 2 F.3d 484, 491 (2d Cir. 1993). Interestingly, this was a shift in Senator William’s initial approach, as his earlier (and rejected) version of the Act was explicitly predicated upon protecting incumbent management. See James C. Wine, Private Litigation Under the Williams Act, 7 J. CORP. L. 545, 547 (1982).

\(^\text{44}\) Id. (quoting S. REP. NO. 550, at 3 (1967)). It should also be noted that the Williams Act also added section 13(e) to the 1934 Securities Exchange Act, which regulates the purchase or securities by their issuer. See 15 U.S.C. §78m(e).

\(^\text{45}\) See Arnold S. Jacobs, THE WILLIAMS ACT – TENDER OFFERS AND STOCK ACCUMULATIONS §2:5 (2009) (setting forth the Williams Act’s legislative history). The most significant of these subsequent amendments occurred in 1970, when the threshold amount of stock required to trigger the Act’s disclosure requirements was reduced from 10% of any class outstanding to 5%. Id.

\(^\text{46}\) Id. (quoting H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968); accord, S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967)). The text of the Act in full currently reads as follows:

(d) Reports by persons acquiring more than five per centum of certain classes of securities

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.] or any equity security issued by a Native Corporation pursuant to section 1629c(d)(6) of Title 43, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors--

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;
(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a “person” for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to--

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933 [15 U.S.C.A. 77a et seq.];

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the
protect against circumvention of the Act’s disclosure provisions by dividing up a stock acquisition among several different persons acting in concert.

Once the five percent threshold has been reached, the acquiring party (or parties) must, “within ten days after such acquisition” provide notice (via registered or certified mail) to (1) the issuer of the security, (2) the exchange(s) on which the security is traded, and (3) the SEC. This notice is provided on a Schedule 13D, and must contain information regarding:

(A) the identity and background of the acquiring party or parties;
(B) the source of funds used to purchase the securities;
(C) the purpose of the purchase of the securities;
(D) the number of shares beneficially owned by the acquiring party or parties; and
(E) agreements between the acquiring party or parties and others regarding any securities of the issuer.

Perhaps the most critical provision is item C, above, requiring that the purpose motivating the purchase be revealed. The relevant text of item C is as follows:

if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make

preceding twelve months, does not exceed 2 per centum of that class;
(C) any acquisition of an equity security by the issuer of such security;
(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.


A major deficiency with this structure, as commented upon by others, is the fact that although the disclosure requirement is triggered upon acquisition of 5% of a company’s stock, by the time the requisite disclosure reaches the market ten days later, a far higher percentage of stock may have been accumulated. See Allen E. Kelinsky, Promoting Shareholder Equality in Stock Accumulation Programs for Corporate Control, 36 Am. U. L. Rev. 93, 111 (1986). This particular deficiency has been heavily discussed, and is beyond the scope of this Article. See id. at 111, 123-25.

See id.
any other major change in its business or corporate structure.\footnote{See 15 U.S.C. §78m(d)(1)(C). The reference to “prospective purposes” is apparently an unfortunate carryover from the original bill introduced by Senator Williams, which would have been triggered by planned purchases as well as actual purposes. See S. 2731 (89th Cong. 1965). As the Act’s provisions are triggered only by actual purposes, this verbiage appears inapplicable.}

Significantly, the instructions to Schedule 13D are a bit broader on this point than the authorizing text.\footnote{This potential violation of administrative law principles (see Michael Douglas Jacobs, \textit{Illuminating A Bureaucratic Shadow World: Precedent Decisions Under California's Revised Administrative Procedure Act}, 21 J. Nat'l Ass'n Admin. L. Judges 247, 277-78 (2001)) has not, apparently, been challenged.} Whereas the authorizing statutory text requires qualifying acquirers of stock to report their plans with regard to such acquisition “if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities,”\footnote{15 U.S.C. §78m(d)(1)(C).} the instructions to Schedule 13D include no such qualifier.\footnote{Id.} Instead, Item 4 of Schedule 13D instructs the acquirer to “[s]tate the purpose or purposes of the acquisition of securities of the issuer.”\footnote{Id.} As Jonathan Macey and Jeffry Netter have noted:

Item 4 of the Schedule 13D (the form filed to comply with section 13(d) and Rule 13d) goes a bit beyond the requirements of the statute, adding that the purchaser 'state the purpose or purposes of the acquisition of securities' and 'describe any plans or proposals which the reporting persons may have which relate to or would result in certain' enumerated types of changes in the management, composition, operation and policies of the issuer.\footnote{See Macey & Netter, \textit{supra} note 31, at 136. Additionally, “13D investors must file amendments to the original Item 4 in the event that there is 'any material change in the facts set forth in prior filings.’” \textit{Id.} (quoting Securities Exchange Act, Schedule 13D, Item 4, 17 C.F.R. 240, Schedule 13D-101, Item 4).} As perhaps becomes readily apparent, the notice provisions of the Williams Act set forth the information that (in Congress’s estimation) best enables investors to assess the likelihood of a change in corporate control,
and to adequately undertake its valuation.\footnote{Cf. Macey & Netter, supra note 31, at 138.}

And Congress’s concerns over the importance of this information were not merely hypothetical.\footnote{But see Macey & Netter, supra note 31, at 139-45 (questioning the benefits of Williams Act disclosure in certain circumstances, and asserting the existence of significant costs associated with such disclosure).} Detailed analysis of stock returns following the filing of a Schedule 13D suggest that such filings result in statistically significant stock price movement.\footnote{See W. H. Mikkelson and R. S. Ruhack, An Empirical Analysis Of The Interfirm Equity Investment Process, 14 J. Fin. Econ. 523-553 (1985); Gerald P. Madden, Potential Corporate Takeovers and Market Efficiency: A Note, 36 J. Fin. 1191-97 (1981).}

Exceptions to the applicability of Section 13(d) are provided for those acquisitions deemed unproblematic because either sufficient information has been (or will be) already provided to investors (as in exception “a”, infra), or because the acquisition does not reasonably implicate a potential change in corporate control (as in the other exceptions):

(a) “made or proposed to be made by means of a registration statement under the Securities Act of 1933”\footnote{15 U.S.C. §78m (d)(6)(A).};
(b) “which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class”\footnote{15 U.S.C. §78m (d)(6)(B).};
(c) “of an equity security by the issuer of such security”\footnote{15 U.S.C. §78m (d)(6)(C). The Williams Act provides for disclosure of acquisitions of securities by their issuers under 15 U.S.C. §78m (e).}; or
(d) “not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer”\footnote{15 U.S.C. §78m (d)(6)(D).}.

An exception is also recognized for those individuals or entities who acquired the securities “in the ordinary course of his business” and without the purpose of, or effect of, “changing or influencing the control of the issuer.”\footnote{15 U.S.C. §78m (d)(5) and 17 C.F.R. §240.13d-1(b)(1).} For such individuals, the required informational disclosure is reduced.\footnote{See 15 U.S.C. §78m (d)(5) and 17 C.F.R. §240.13d-1(b)(1).}
C. Enforcement

Although the requirements of the Williams Act are fairly clear, the repercussions flowing from the Act’s violation are not.

A Williams Act violation can be addressed by (a) an SEC administrative action, (b) an SEC civil action, (c) a criminal action brought by the U.S. Department of Justice, and (d) private litigation. Although this might seem sufficient to deter the Act’s violation, a review of the caselaw demonstrates the relative toothlessness of this enforcement regime. As a result, the incentive to comply with the Act’s disclosure requirements (or for incumbent management to promptly report violations thereof) is relatively weak.

The status quo is unsatisfactory because the harms occasioned by a Williams Act violation are serious. The simple fact that Congress has required such disclosure gives rise to a presumption of materiality. As Manning Warren explained:

The regulatory presumption of materiality arises from the disclosure requirements imposed upon publicly-held corporations by the 1933 Act, the 1934 Act, and by the SEC’s rules and forms under both statutes. Because Congress and the SEC have made policy decisions resulting in specific mandatory disclosure of certain types of information, a strong presumption exists that information specifically required to be disclosed is material. Accordingly, “lawyers can safely assume that required disclosure items may be presumed to be material.”

This presumption of materiality has been applied to the Williams Act,

---

64 See Manning Gilbert Warren, Revenue Recognition And Corporate Counsel, 56 SMU L. Rev. 885, 904 (2003). And “material,” for securities law purposes, means “there is a substantial likelihood that a reasonable shareholder would consider it important …. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.” TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). In other words, important.

65 Warren, supra note 64, at 904 (internal citations omitted) (quoting Richard W. Jennings et al., SECURITIES REGULATION 1010 (8th ed. 1998).
by both commentators\textsuperscript{66} and courts\textsuperscript{67}. And the presumption is particularly justifiable in this context, as “irreparable harm is present if the investing public and the present shareholders of [a target company] are trading in a market place which is deprived of important and legally required information as to the acquiring group's intentions which may affect their judgment as to whether the stock should be sold, bought, or held.”\textsuperscript{68}

Indeed, as indicated previously, statistical studies of stock price movement following the filing of a Schedule 13D strongly support this presumption of materiality.\textsuperscript{69}

This has caused Judge Pollack of the Southern District of New York to remark:

\begin{quote}
 [Section 13(d)] is not a mere “technical” reporting provision; it is, rather, the “pivot” of a regulatory scheme that may represent “the only way that corporations, their shareholders and others can adequately evaluate … the possible effects of a change in substantial shareholdings.”\textsuperscript{70}
\end{quote}

1. Administrative Proceedings

The Securities and Exchange Commission (the “SEC”) is the federal administrative body responsible for enforcing securities laws. It has the authority to investigate and take action against individuals and companies that engage in fraudulent or deceptive practices in the securities markets. The SEC's primary responsibility is to protect the integrity of the securities markets, to prevent fraudulent and deceptive practices, and to ensure the protection of investors.


\textsuperscript{67} See \textit{Mates v. North American Vaccine, Inc.}, 53 F.Supp.2d 814, 823 (D. Md. 1999);


\textsuperscript{69} See supra note 57 and accompanying text.

\textsuperscript{70} \textit{S.E.C. v. Drexel Burnham Lambert Inc.}, 837 F. Supp. 587, 606, (S.D.N.Y. 1993) (quoted in Jacobs, supra note 45, at §2:3); see also \textit{USG Corp. v. Wagner & Brown}, 690 F. Supp. 625, 627 (N.D. Ill. 1987) (“Although Section 13(d) is essentially a disclosure statute, an issuing corporation's remedies for a Section 13(d) violation are not limited to curative disclosure. The purpose of the reporting requirement in Section 13(d) is to insure that public shareholders facing a tender offer or the acquisition by a third party of a controlling block of shares may obtain adequate information about the qualifications and intentions of the acquiring person. Thus, the ultimate purpose of Section 13(d) is to protect shareholders. Filing a completely truthful Schedule 13D does not necessarily remedy the injuries suffered by shareholders who relied on the misstatements or omissions in the original Schedule 13D. As Judge Shadur recently noted in his well-reasoned opinion in \textit{Champion Parts Rebuilders, Inc. v. Cormier Corp.}, 650 F.Supp. 87 (N.D.Ill.1986), former shareholders who have already sold their share may have an adequate remedy at law, but existing shareholders may require “forward-looking relief because the corporation's welfare (and therefore theirs) may have been adversely affected by the tainted acquisition of control or blocking control.”) (citations omitted).
administering agency charged with enforcing U.S. securities law.\textsuperscript{71} Although not historically the case, today the SEC has broad and potent authority to remedy a securities law violation if such a violation is found.\textsuperscript{72} Among other things, the SEC “has authority to [impose] … administrative cease-and-desist orders, disgorgement with prejudgment interest, civil monetary penalties, [and] remedial undertakings.”\textsuperscript{73} The purpose of these penalties has been generally recognized as both compensatory and deterrent in nature.\textsuperscript{74} This section will examine the SEC’s powers to investigate and administratively adjudicate alleged violations of the securities laws;\textsuperscript{75} subsequent sections will examine the SEC’s powers to seek civil penalties in federal court,\textsuperscript{76} and to refer a matter to the U.S. Department of Justice for criminal prosecution.\textsuperscript{77}

“The Commission is vested with statutory authority to conduct any investigation it deems necessary to determine whether a person has violated federal securities laws and the rules and regulations promulgated thereunder.”\textsuperscript{78} Its powers in this regard are similarly broad, ranging from informal inquiries to the issuance of subpoenas,\textsuperscript{79} and have been delegated to the SEC’s Division of Enforcement.\textsuperscript{80}

Upon the discovery of a federal securities law violation, the SEC must decide how next to proceed. Although at one time, the SEC saw its enforcement mission as primarily remedial, recent times have witnessed a shift toward a philosophy that is based increasingly upon deterrence and punitive concerns.\textsuperscript{81} In its implementation of this philosophy, the SEC can opt for the imposition of no remedy, an administrative remedy, a civil

\textsuperscript{72} See Barbara Black, \textit{Should The Sec Be A Collection Agency For Defrauded Investors?}, 63 BUS. LAW. 317, 320-22 (2008).
\textsuperscript{74} See Black, supra note 72, at 323-24.
\textsuperscript{75} See Thomsen et al, supra note 73, at 604. For an overview of the SEC’s administrative enforcement process, see generally Harvey L. Pitt et al., \textit{SEC Enforcement Actions: An Overview of SEC Enforcement Proceeedings and Priorities}, C700 ALI-ABA 167 (1991).
\textsuperscript{76} See infra Part II.B.
\textsuperscript{77} See infra Part II.C.
\textsuperscript{80} See Atkins & Bondi, supra note 78, at 372.
\textsuperscript{81} See id. at 383.
remedy, or (via referral to the United States Department of Justice), a
criminal remedy.\textsuperscript{82} The path selected will depend upon the severity of the
wrongdoing, and the strength of evidence thereof.\textsuperscript{83}

Most relevant among the SEC’s administrative remedies (within the
context of Williams Act violation) are the powers afforded to the SEC
under sections 15(c)(4) and, more recently, 21C of the 1934 Securities
Exchange Act.\textsuperscript{84} These powers have been invoked by the SEC in response
to Williams Act violations.\textsuperscript{85}

Section 15(c)(4) of the Securities Exchange Act empowers the
Securities and Exchange Commission, “after notice and opportunity for
hearing,” to “publish its findings” regarding a violation of Section 13(d) and
to issue an order demanding compliance, or “steps to effect compliance,
with such provision or such rule or regulation thereunder upon such terms
and conditions and within such time as the Commission may specify in such
order.”\textsuperscript{86}

Importantly, unlike some of the SEC’s other administrative
powers\textsuperscript{87}, Section 15(c)(4) extends to “any person,” thus permitting the SEC
to invoke its powers under Section 15(c)(4) against entities and individuals
not ordinarily subject to the SEC’s regulations.\textsuperscript{88}

The effectiveness of Section 15(c)(4) has long been undermined,
however, by the fact that violation of a Section 15(c)(4) order “does not
result in any penalty other than a court order directing compliance.”\textsuperscript{89}
Recognition of this fact prompted Congress, in its 1990 Securities
Enforcement Remedies and Penny Stock Reform Act, to amend the 1934
Securities Exchange Act via the addition of Section 21C.\textsuperscript{90} Section 21C
empowers the SEC to issue cease-and-desist orders,\textsuperscript{91} the violation of which
“may be punishable by a court-imposed civil penalty in addition to a

\begin{footnotes}
\item[82] See Pitt, supra note 75, at Ch. 1, Pt. IV.
\item[83] See id.; see also DIV. OF ENFORCEMENT, SEC. & EXCH. COMM’N,
ENFORCEMENT MANUAL §2:1:1 (2010); Terrance O’Malley ET AL., An Overview of
the SEC Enforcement Process, MANAGED FUND REP. Aug./Sept. 2007; Tammy
Whitehouse, Past, Present, and Future of SEC Enforcement Policy, COMPLIANCE
past-present-and-future-of-sec-enforcement-policy
\item[84] See Arnold S. Jacobs, SE DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS
\item[85] See Miriam Albert, Because We Said So: The Sec’s Overreaching Efforts To
\item[86] 15 U.S.C. §78m (c)(4).
\item[87] Such as Rule 2(e), Section 12(j), and section 12(k), which are restricted to regulated
entities. See Jacobs, supra note 84, at §§ 20:125, 20:129; 20:130.
\item[88] See Jacobs, supra note 84, at §20:131.
\item[90] See Jacobs, supra note 84, at §20:132.
\item[91] See id. at §20:132.
\end{footnotes}
mandatory injunction directing compliance with the order."92 Armed with Section 21C, the SEC has little incentive to resort to its more limited powers under Section 15(c)(4), which, in the words of one commentator, has been rendered an “unimportant tool.”93

Thus, in the face of a Williams Act violation, the SEC would have the authority to issue a cease-and-desist order under its own administrative authority.94 Such an order could, for example, mandate that the violator cease violating the Williams Act and file the requisite Form 13D.

The Securities Enforcement Remedies Act of 1990 also included a provision enabling the SEC to levy monetary penalties in administrative proceedings – but only under limited circumstances.95 More specifically, these amendments permitted the SEC to levy monetary penalties against broker-dealers, municipal securities dealers, government securities brokers, government securities dealers, clearing agencies, and transfer agents.96 Thus, even following the Securities Enforcement Remedies Act of 1990, the SEC did not have the authority to assess a monetary violation for a Williams Act violation per se, but only if such violation were coincidentally committed by one of the aforementioned persons.

Similarly, the 1990 amendments included a provision granting the SEC authority to require disgorgement in an administrative proceeding97 – but only in such proceedings as the SEC possesses authority to levy monetary penalties.98 Thus, the availability of the SEC’s power to administratively require disgorgement against a Williams Act violator has long been dependent upon the nature of the violator.99

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010100 has significantly changed this status quo. For section 929P of the Act (aptly entitled “Strengthening Enforcement by the Commission”), empowers the SEC to impose a civil penalty “against any person” found to have violated (or who is currently violating) any provision of the 1934 Securities Exchange Act (including, a fortiori, the Williams Act) within the

---

92 Id.
93 See Jacobs, supra note 84, at §20:131. A still inferior remedial power was granted to the SEC under Section 21(a)(1) of the Securities Exchange Act, pursuant to which the SEC may “investigate violations of the 1934 Act or the rules thereunder, and to publish a report of its findings.” See Jacobs, supra note 84, at §20:127.
95 See Jacobs, supra note 84, at §20:133.
96 See id.
99 See supra text accompanying note 96.
context of a section 21C proceeding. Thus, as of July 21 2010, the SEC can punish, via a civil penalty in addition to a cease-and-desist order, anyone who has been found to have violated the Williams Act in a section 21C administrative proceeding.

2. SEC Civil Action

In addition to administrative remedies, the SEC is authorized to pursue civil remedies in federal court against securities law violators as well. As with the SEC’s administrative powers, the SEC’s authority here too was significantly expanded by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990.

As things currently stand, section 21(d) of the Securities Exchange Act authorizes the SEC to seek injunctive relief “upon a proper showing” with regard to “any person engaged” or “about to engage” in “acts or practices constituting a violation of any provision of” the Securities Exchange Act. Section 21(d) also authorizes the SEC to seek a judgment for monetary damages “upon a proper showing” that “any person has violated any provision of” the Act or the rules / regulations promulgated thereunder. This is in addition to the SEC’s longstanding authority to seek a remedy of disgorgement under certain circumstances.

Thus, whereas, administratively, the SEC may impose a cease-and-desist order enjoining further violation of the Williams Act, more creative remedies may be crafted if the SEC pursues injunctive relief in federal court. In addition to an order of disgorgement, the SEC has also been able to obtain, for example, an order sterilizing the voting rights of shares obtained in connection with a violation of the Williams Act, and an order for rescission of sales of shares made in connection with a violation of the Williams Act. Indeed, courts have recognized the authority to grant “all

---

101 Id. at §929P (emphasis added).
103 See Spehr & Annunziata, supra note 98, at 587.
104 See id.
106 Id.
107 See Spehr & Annunziata, supra note 98, at 587.
108 See supra Part II.A.
110 See Black, supra note 72, at 320-21.
necessary relief” within such contexts.\(^{113}\)

In granting the SEC’s request for injunctive relief, courts have enunciated the following guiding principles:

— Courts need not award an injunction under all circumstances
— Trial courts have discretion to grant or to deny injunctions
— Equitable considerations should be a part of a trial judge's determination
— Injunctions are designed to deter rather than to punish
— A judge can mould each decree
— Flexibility rather than rigidity is its characteristic
— Mercy and practicality are its qualities
— Injunctions should be used to ensure a nice adjustment between the public interest and private needs\(^{114}\)

As will be discussed, most courts have recognized that private litigants have standing to sue for injunctive relief as well.\(^{115}\) Unlike private litigants, however, the SEC has certain advantages in civil litigation. Although the SEC “is subject to the general requirements of Rule 65 of the Federal Rules of Civil Procedure” in its pursuit of injunctive relief,\(^{116}\) the SEC is relieved of the requirement to allege or prove irreparable injury or an inadequate remedy at law\(^{117}\) -- critically important advantages for reasons that will become clear.\(^{118}\)

3. Criminal Prosecution

“The SEC frequently refers cases to and subsequently assists the U.S.
Department of Justice and the U.S. Attorneys’ in criminal prosecution of U.S. securities law. This is explicitly authorized by §21(d)(1) of the 1934 Securities Act, which states that the SEC:

may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of [the 1934 Act] or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings….

Section 21(d)(1) should be read in conjunction with § 32(a) of the Act, which criminalizes any willful violations of the 1934 Securities Exchange Act. (Section 32(a) also criminalizes any knowingly false or misleading material statement in a document filed pursuant to the 1934 Securities Exchange Act.) Violations of the Williams Act could, therefore, be criminally prosecuted by the Department of Justice. A party’s willful failure to file a Schedule 13D would be criminal (along with a party’s decision to file a materially and knowingly false or misleading Schedule 13D). That said, criminal prosecutions for failing to make required disclosures under the securities laws (as opposed to making fraudulent disclosures) are exceedingly rare.

4. Private Rights of Action

Although the Williams Act “does not, by its terms, create a right of action in favor of any private party to redress a violation,” of the Act, 

119 Ferrara & Khinda, supra note 97, at 662.
121 See Jacobs, supra note 84, at §20:161. Whether a violation of the 1934 Act is “willful” has varied from court to court, with some jurisdictions requiring specific intent, to other jurisdictions predicating criminal liability upon recklessness. See id.
122 See id.
125 Hubco, Inc., 628 F. Supp. at 352. It should be added, however, that § 18(a) of the
within two years of the section’s promulgation a court had recognized such a right, and within three years issuers were explicitly recognized as holders of this right as well.

This right does not extend to all actors under all circumstances, however. The critical question for the purposes of this article is who has standing to sue on account of a party’s failure to timely file a Schedule 13D?

Standing under the Williams Act was determined by the Supreme Court via application of the following rule: “where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute.” And within the context of the federal securities laws, private enforcement has long been seen as a necessary supplementation to that of the SEC.

In applying this rule to the Williams Act, it has been determined that the Act exists to “protect shareholders and prospective shareholders.” As such, shareholders (and prospective shareholders) have standing to sue for a Williams Act violation.

Courts have also held that standing to sue under §13(d) exists for the target issuer (the company whose stocks are being acquired). Although the issuer has not been deemed part of the class intended for protection under the Williams Act, the issuer has been granted standing to sue on the theory that such standing serves the protection of shareholders, and that the issuer is often in the best position to detect and litigate Williams Act violations.

1934 Securities Exchange creates an express right of action for anyone who relies upon a false or misleading statement in a document filed under the 1934 Act. Arnold S. Jacobs, THE WILLIAMS ACT -- TENDER OFFERS & STOCK ACCUM. § 2:88 (2009). Thus, to the extent that someone violated the Williams Act by filing a false or misleading Schedule 13D, an express right of action could exist pursuant to §18(a).


See GAF Corp., 453 F.2d at 719-21; see also See Bath Indus., 429 F.2d 97 (not addressing—or questioning—issuer’s standing).

Piper, 430 U.S. at 25. For a review of how the Court’s approach to implied rights of action have changed over time, see generally Susan J. Stabile, The Role Of Congressional Intent In Determining The Existence Of Implied Private Rights Of Action, 71 Notre Dame L. Rev. 861 (1996).

See Piper, 430 U.S. at 25.


See id. at §2:88.

See Richard C. Morrissey, Developments In European Leveraged Finance: Selected Materials, 1580 PLI/Corp 393, 396 (2007) (citing Rondeau v. Mosinee Paper Co., 422 U.S. 49, 65 (1975); Hallwood Realty Partners, L.P. v. Gotham Partners, L.P., 286 F.3d 613, 621 n.9 (2d Cir. 2002)).

See Jacobs, supra note 136, at §2:88.
violations.\footnote{134} For similar reasons, at least one court has held that a tender offeror also has standing to sue under §13(d).\footnote{135}

Interestingly, successful plaintiffs in §13(d) Williams Act suits are not ordinarily entitled to monetary damages awards, regardless of their injury.\footnote{136} Whether monetary damages can be awarded depends on whether a false or misleading Schedule 13D was filed (in which case damages are available), versus whether no Schedule 13D was filed whatsoever (in which case no damages are available).\footnote{137} This curiosity results from the courts’ reading of the Williams Act in light of §18(a) of the 1934 Securities Exchange Act.\footnote{138} Section 18(a) provides a damages remedy for 1934 Securities Exchange Act violations involving materially false or misleading statements.\footnote{139} Although the filing of a fraudulent Schedule 13D falls within the scope of §18(a), the failure to file a Schedule 13D altogether does not. Thus, when confronted with a private right of action predicated upon the failure to file a Schedule 13D, courts have uniformly eschewed awarding damages, and have opted instead for injunctive or other equitable relief.\footnote{140} The form that such injunctive or equitable relief has taken is set forth in Part III, below.

\section*{III. Equitable Relief Under the Williams Act}

As discussed, courts have declined to infer a damages remedy for failure to file a Schedule 13D on the grounds that such a remedy would be inconsistent with the primary purpose of the Williams Act.\footnote{141} Instead, the

\begin{footnotes}
\item[135]See id.; Jacobs, supra note 136, at §2:88 (citing Torchmark Corp. v. Bixby, 708 F. Supp. 1070, 1078-79 (W.D. Mo. 1988) (in which defendant shareholders of the target company were accused of violating §13(d) of the Williams Act by failing to file a Schedule 13D in connection with their alleged decision to act in concert – and thereby crossing the 5\% ownership threshold as a “group”)).
\item[136]See Arnold S. Jacobs, \textit{THE WILLIAMS ACT -- TENDER OFFERS & STOCK ACCUM.} § 2:88 (2009); Motient Corp. v. Dondero, 529 F.3d 532, 536 (5th Cir. 2008) (“No other Circuit has found a private right of action for money damages under Section 13(d)”).
\item[137]See id.
\item[138]See id.
\item[135]See Jacobs, supra note 136, at §2:88; Motient Corp., 529 F.3d at 536 (“Since any material misstatement or omission to an investor who purchases or sells the security and actually relies on that information gives rise to a private cause of action under Section 18(a) of the Exchange Act, Section 18(a) provides the sole basis for a private right of action for damages resulting from a violation of Section 13(d)” (citation omitted).
\item[141]See supra text accompanying notes 136-140; see also Joy Flowers Conti, Raymond F. Kozlowski, Jr., & Leonard S. Ferleger, \textit{Claims Trafficking In Chapter 11 -- Has The
relief granted has invariably been injunctive or equitable in nature. This part will explore equitable relief in more detail, starting with the principles of equitable relief in general, and then proceeding to the application of those principles within the context of a §13(d) Williams Act violation.

A. Equitable Relief Principles

Federal courts possess the authority to grant equitable, injunctive relief to resolve the disputes before them. This discretion is bound, however, by certain traditional principles. Among these is the notion that injunctions are “designed to deter, not to punish.” As the Supreme Court has explained:

Flexibility rather than rigidity has distinguished [the injunction]. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

In applying these principles to securities cases, one commentator has identified the following salient holdings:

— An injunction need not be granted in every instance
— The trial court has discretion to issue an injunction
— Equity should guide courts in granting or withholding injunctions
— Injunctions are designed to deter rather than to punish
— A trial judge has the power to mould each decree to the necessities of the situation


142 See supra text accompanying note 140.
143 See infra Part III.A.
144 See infra Part III.B.
145 See Meredith v. Winter Haven, 320 U.S. 228, 235 (1944).
147 Id.
148 Id.
Injunctions are a flexible remedy
— Mercy and practicality have made
injunctions the instrument for nice adjustment
of the litigants' rights.  

Additionally, it should be noted that courts have expressed a greater willingness to order prohibitory relief (such as ordering a defendant to refrain from certain actions) over mandatory affirmative relief (such as ordering a defendant to undertake certain actions). And all injunctive relief is considered “extraordinary” and as such granted “sparingly” by the courts.

In assessing the appropriateness of injunctive relief, different circuits have employed different tests. Further, within each circuit the test differs whether the injunction sought is preliminary versus permanent.

Within the context of a Williams Act violation, both forms of injunctive relief are in play. With time often being of the essence, parties frequently rush to court seeking a preliminary injunction to enjoin the acquisition of additional shares on the part of the Williams Act violator, or to enjoin the holding of a shareholder meeting/vote until such time as the Williams Act violation in question has been cured. Other times, the potential feared effects of a Williams Act violation may be sufficiently remote in time, or may have already been realized, to make permanent injunctive relief a sensible remedy (following a full trial on the merits). Thus, standards relevant to each form of injunctive relief must be considered here.

“In a sentence, depending upon the circuit, a court will grant an injunction based on the strength of the plaintiff’s case and a showing of irreparable injury plus, in the case of some circuits, the public interest and weighing the defendant’s and plaintiff’s harm if an injunction were

---

149 See Jacobs, supra note 84, at §20:90.
150 See id.
151 See id. at §20:91.
152 See id. at §20:91.
153 See id. A preliminary injunction is a temporary measure designed to preserve the status quo, or prevent continuing or threatened harm, prior to a proceeding on the merits. See AM JUR., Injunction §8. A permanent injunction is a remedy granted following a proceeding on the merits, as part of the relief measures deemed appropriate. Id. at §10.
155 E.g. Grow Chem. Corp. v. Uran, 316 F. Supp. 891, 891 (S.D.N.Y. 1970) (plaintiff asserting that he overpaid for the stock he purchased in Guardsman Chemical Coatings, Inc. as a result of defendant’s failure to file a Schedule 13D disclosing its ownership stake in excess of 10%).
issued.\footnote{\textit{Jacobs, supra} note 136, at §2:107.} Where the injunction sought is permanent (not preliminary), the “strength of the plaintiff’s case” element drops out (for a permanent injunction is granted \textit{after} a proceeding on the merits has already transpired).\footnote{See \textit{Jacobs, supra} note 84, at §20:91.}

The strength of the plaintiff’s case is largely a factual matter that need not detain us for long here. For although there are certainly legal issues that could come into play in assessing whether or not an individual (or group) violated the Williams Act by failing to file a Schedule 13D\footnote{See \textit{e.g. Jacobs, supra} note 84, at §§20:.83-86}, for the most part the question of whether someone who should of filed a Schedule 13D failed to do so would be rather easy to resolve.

Of critical concern, however, are the inquiries regarding irreparable injury, public interest, and the weighing of harms. For although these too are certainly imbued with strong factual components, there are certain important legal presumptions that can be applied to tilt the playing field in one direction or the other.

“Irreparable harm” means “substantial injury to a material degree, coupled with inadequacy of monetary damages.”\footnote{\textit{Jacobs, supra} note 84, at §20:91; \textit{see also} 43A C.J.S. \textit{Injunctions} §59 (2008).} “Inadequacy of monetary damages” is not construed strictly, and can encompass situations where “fixing damages is unusually difficult or where the uncertainty as to the correct measurement will result in a potentially great injustice to either party.”\footnote{\textit{Jacobs, supra} note 84, at §20:91.}

As for the public interest component, this is usually interpreted by courts (within the Williams Act context) as related to the furnishing of full and accurate information to the public as per Congress’ intent – without unduly burdening a potential acquirer.\footnote{\textit{E.g. Polaroid Corp. v. Disney}, 862 F.2d 987, 1006 (3d Cir. 1988); \textit{Martin-Marietta Corp. v. Bendix Corp.} 690 F.2d 558, 568-69 (6th Cir. 1982).} The Second Circuit reflected the common approach to the public interest component with this language:

\begin{quote}
If [the offeror] is in fact proceeding in violation of the ... securities laws, a preliminary injunction would serve the public interest as much as [the target company’s] private interest. In this regard, by asserting these claims, [the target company] is assuming a dual role, including that of a private attorney general. Since it is impossible
\end{quote}
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 [84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (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. Therefore, as in actions brought by the government, doubts as to whether an injunction sought is necessary to safeguard the public interest-when the public interest involved is as clear, pervasive and vital as the record here demonstrates-should be resolved in favor of granting the injunction.162

Issues unrelated to these concerns have been held irrelevant to the public interest determination.163

With regard to the weighing of harms, Arnold Jacobs has compiled an incredibly helpful (and comprehensive) list of harms credited by the courts within the tender offer context (a field distinct but often overlapping to that of nonpublic accumulations of stock on open markets).164 As would be expected, the harms usually asserted by potential acquirers revolve around the acquirer’s inability to consummate his/her/its acquisition;165 target issuers usually complain about the disruption to management posed by the


164 See Jacobs, supra note 84, at ¶20:91.

165 See id.
illicit potential takeover;\footnote{See id.} and shareholders usually complain about the effect of the potential takeover on stock price (complaints that sometimes run in favor or granting an injunction, and which sometimes run in opposition to granting an injunction).\footnote{See id.}

\section*{B. Application of Equitable Relief to Williams Act Violations}

The myriad forms of relief sought by plaintiffs (including the SEC in civil litigation\footnote{The SEC can seek the additional remedy of disgorgement in civil litigation. See Jacobs, supra note 136, at §2:108.}) in Williams Act cases is as follows:

Plaintiffs have sought injunctions:
\begin{itemize}
  \item to correct an inaccurate Schedule 13D;
  \item to file a Schedule 13D when no Schedule 13D has been filed yet;
  \item to enjoin future violations of Section 13(d);
  \item to enjoin purchases until disclosure is made;
  \item to prohibit a tender offer;
  \item to impose a “cooling-off” period on purchases once full disclosure is made;
  \item to require divestiture of shares acquired;
  \item to offer rescission to persons who sold to the defendant;
  \item to enjoin sales of the purchased shares;
  \item to sterilize the vote of purchased shares;
  \item to enjoin solicitation of proxies;
  \item to enjoin the holding of a stockholders meeting;
  \item to enjoin attempts to influence the issuer;
\end{itemize}
• and to bar the defendants from becoming officers or directors of a public company.\(^{169}\)

Despite this long list of remedies pursued, courts have been reluctant to order injunctive relief along many of the lines requested. Indeed, except in cases where the SEC is the plaintiff, courts oftentimes deny relief altogether.\(^{170}\) A survey of the case law demonstrates that the following responses largely encompass the courts’ reactions to a request for injunctive relief as a result of a Section 13(d) violation:

• deny the relief requested as moot or otherwise unnecessary if (a) compliance with Section 13(d) has eventually been achieved and if (b) the violation in question did not affect control of the corporation whose stock purchase(s) went unreported;\(^{171}\)

• enjoin the annual shareholder meeting until such time as accurate Section 13(d) disclosures are made;\(^{172}\)

\(^{169}\) See Jacobs, supra note 136, at §2:107.

\(^{170}\) The SEC has apparently invariably succeeded in procuring injunctive relief in the cases it has brought against violators of §13(d) of the Williams Act. See SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997) (affirming disgorgement remedy); SEC v. First City Financial Corp., 890 F.2d. 1215 (D.C. Cir. 1989) (affirming disgorgement remedy); SEC v. Sierra Brokerage Servs., 608 F. Supp. 2d 923 (S.D. Ohio 2009) (granting disgorgement and enjoining defendants from committing further Section 13(d) violations); SEC v. Drexel Burnham Lambert, Inc., 837 F. Supp. 587 (S.D.N.Y. 1993) (granting disgorgement and enjoining defendants from committing further Section 13(d) violations); SEC v. Bilzerian, 814 F. Supp. 116 (D.D.C. 1993) (granting disgorgement); SEC v. Zimmerman, 407 F. Supp. 623 (D.D.C. 1976) (ordering the filing of a Schedule 13(d)); SEC v. General Refractories Co. 400 F.Supp. 1248 (D.C. District Court 1975) enjoining defendants from committing further Section 13(d) violations). This could be a result of the strength of these cases (all of which include alleged violations of other provisions of the securities laws in addition to Section 13(d)); and/or from the SEC’s ability to proceed without a showing of irreparable harm. See supra note 117 and accompanying text.

\(^{171}\) See, e.g., Gearhart Indus., 741 F.2d at 715; Treadway Cos., 638 F.2d at 380; Gen. Aircraft Corp., 556 F.2d at 97; Int’l Banknote Co. v. Muller, 713 F. Supp. 612, 620 (S.D.N.Y. 1989); Drobbin v. Nicolet Instrument Corp., 631 F. Supp. 860, 913 (S.D.N.Y. 1986) (“It is well-settled that once the informative purpose of § 13(d) has been fulfilled by curative disclosure, there is no risk of irreparable injury to shareholders and no basis for injunctive relief.”); Hubco, Inc., 628 F. Supp. at 355 (“the court finds that defendants’ amendments to their original Schedule 13D moots plaintiffs’ charges in almost all respects”); Condec Corp., 573 F. Supp. at 1386; see also Jacobs, supra note 136, at §2:102.

\(^{172}\) Camelot Indus. v. Vista Resources, Inc., 535 F. Supp. 1174, 1184-84 (S.D.N.Y. 1982) (enjoining tender offer until such time as Section 13(d) disclosures are made).

- enjoin the Section 13(d) violator from violating Section 13(d) again in the future.\footnote{CSX Corp. v. Children’s Inv. Fund Management (UK) LLP, 562 F.Supp.2d 511, 573-74 (S.D.N.Y. 2008).}

Of these three responses, the most commonly seen is the denial of relief on the grounds of mootness, as most Section 13(d) violators apparently cure their violations shortly after being called to task.\footnote{See supra note 171 and accompanying text; see also Jacobs, supra note 84, at §20:107. Indeed, one judge has remarked that the “scope of properly permissible relief” for a §13(d) violation consists of “the prompt filing of an adequate Schedule 13D, followed, perhaps, by a cooling-off period and other limited, specific relief adapted carefully, cautiously, and expeditiously to the individual facts of the particular case.” Seilon, Inc. v. Lamb, No. C 83-314, 1983 U.S. Dist. LEXIS 15163, *31 (N.D. Ohio 1983).} That said, in \textit{dicta}, some of these same courts denying relief have noted that their decisions might have been different if faced with “an imminent contest for control” or “shares rapidly acquired just before a contest for control following a Section 13(d) violation,”\footnote{Gen. Aircraft Corp., 556 F.2d at 97.} thus holding out the promise of more stringent relief.

Indeed, courts have explicitly acknowledged—if not outright endorsed—some of the more severe forms of relief sought as potentially appropriate remedies to a Section 13(d) violation.\footnote{See Bath Indus., 427 F.2d at 112 n.8; Jacobs, 549 F. Supp. at 1063; Marshall Field & Co., 537 F. Supp. at 419; but see Hubco, Inc., 628 F. Supp. at 354 (“it is difficult to imagine circumstances in which the extreme remedy of sterilization of shares would be equitably warranted”).} Consider, for example, share sterilization (the disenfranchisement of those shares acquired in violation of Section 13(d)).\footnote{E.g. CSX Corp. v. Children’s Inv. Fund Management (UK) LLP, 562 F.Supp.2d 511, 568 (S.D.N.Y. 2008) (discussing, but not granting, share sterilization); Medical Imaging Centers of America Inc. v. Lichtenstein, No. 96-0039-B, 1996 U.S. Dist. LEXIS 22362, *14-16 (S.D. Cal. Feb. 29, 1996) (diluting, but not completely sterilizing, §13(d) violator’s voting rights).} Although only rarely employed, the courts...
have long recognized the potential availability of such a remedy.\textsuperscript{179} Further, at least one other court has acknowledged that it “theoretically has the equitable power to set aside . . . [a] shareholders’ meeting if it finds violations of the federal securities laws,”\textsuperscript{180} which would effectively constitute an \textit{ex post} sterilization of shares.

The disconnect between the wide range of relief potentially available to plaintiffs versus the narrow range of relief ordinarily afforded is a function of two factors: the traditional grounds upon which equitable relief will be granted, and a misreading of the lead Supreme Court case on the subject of equitable relief within the context of a Williams Act violation: \textit{Rondeau v. Mosinee Paper Corporation}.\textsuperscript{181}

\section*{III. \textit{Rondeau v. Mosinee Paper Corp.}}

With regard to the Williams Act, the importance of \textit{Rondeau v. Mosinee}\textsuperscript{182} cannot be overstated. \textit{Rondeau} is the Supreme Court case interpreting Section 13(d) and remedies thereunder. As will be explained,\textsuperscript{183} \textit{Rondeau}, and/or its misreading, has stymied more stringent injunctive relief in the face of a Williams Act violation, undermining the objectives of the Act.

\subsection*{A. Rondeau and its Reinterpretation}

The 1975 Supreme Court case \textit{Rondeau v. Mosinee Paper Corp}\textsuperscript{184} continues to supply the most authoritative guidance with regard to the propriety and purpose of remedies for Williams Act violations.\textsuperscript{185} That this

\begin{itemize}
  \item \textsuperscript{179} See id.; Bath Indus., 427 F.2d at 112 n.8; Jacobs, 549 F. Supp. at 1063; Marshall Field & Co., 537 F. Supp. at 419; but see Hubco, Inc., 628 F. Supp. at 354 (“it is difficult to imagine circumstances in which the extreme remedy of sterilization of shares would be equitably warranted”). Interestingly, in \textit{Drobbin v. Nicolet Instrument Corp.}, 631 F. Supp. 860, 913-914 (S.D.N.Y. 1986), share sterilization was ordered as a remedy to state law violations, thereby mooting the request for share sterilization as a remedy to an accompanying Section 13(d) violation. See also \textit{Podesta v. Calumet Indus., Inc.}, No. 78 C 1005, 1978 U.S. Dist. LEXIS 17847, *40-42 (N.D. Ill. May 9, 1978) (sterilizing defendant’s shares on account of its breach of the “primary duty of fairness and honesty”, but not on account of its accompanying §13(d) violation).
  \item \textsuperscript{180} \textit{MTD Serv. Corp. v. Weldotron Corp.}, No. 93 Civ. 4980, 1994 WL 455154, at *7 (S.D.N.Y. Aug. 19, 1994).
  \item \textsuperscript{181} 422 U.S. 49 (1975).
  \item \textsuperscript{182} 422 U.S. 49 (1975).
  \item \textsuperscript{183} See infra Part III.A.
  \item \textsuperscript{184} \textit{Rondeau v. Mosinee Paper Corp}, 422 U.S. 49 (1975).
  \item \textsuperscript{185} \textit{E.g. CSX Corp. v. Children’s Inv. Fund Management (UK) LLP}, 562 F. Supp. 2d 511 (S.D.N.Y. 2008).
\end{itemize}
short (16-page) decision of a divided (6-3)\textsuperscript{186} Court remains so influential is unfortunate for a variety of reasons. First, the case is filled with dicta that misstates (to a degree) the Williams Act’s legislative history, and/or fails to fully appreciate the harms that the Act was directed to protect against.\textsuperscript{187} Second, subsequently caselaw has largely misconstrued \textit{Rondeau}, reading the case to more aggressively curtail the use of equitable relief than is necessary.\textsuperscript{188} Third, and most importantly, \textit{Rondeau} rested, in part, upon a presumption that no longer holds (a presumption that aggrieved investors have recourse to a suit for damages) – calling into question whether \textit{Rondeau} even remains good law.\textsuperscript{189} For these reasons, as elaborated upon below, \textit{Rondeau} can legitimately be distinguished from most other cases and/or largely set aside.

The lawsuit in \textit{Rondeau} was brought by Mosinee Paper Corporation (“Mosinee”), which sought an award of substantial equitable relief against Mr. Francis Rondeau on account of Rondeau’s violation of §13(d) of the Williams Act.\textsuperscript{190} Although Rondeau acquired more than 5% of Mosinee’s common stock by May 17, 1971, he did not file the requisite Schedule 13D until August 25, 1971 – approximately three months beyond the 10-day deadline set by the Williams Act.\textsuperscript{191} By the time he filed his Schedule 13D (on August 25, 1971), Rondeau had accumulated approximately 7.5% of Mosinee’s common stock in total.\textsuperscript{192}

In his Schedule 13D, Rondeau disclosed that although he originally acquired shares in Mosinee for investment purposes, as of August 25, 1971 he had decided to “acquire additional common stock … in order to obtain effective control” of Mosinee.\textsuperscript{193}

Mosinee alleged that Rondeau’s tardy Schedule 13D filing harmed investors “who had sold shares without the information which defendants were required to disclose” and thus who “lacked information material to their decision whether to sell or hold.”\textsuperscript{194} Consequently, Mosinee sought an injunction prohibiting Rondeau from voting or pledging his Mosinee stock, from acquiring additional stock in Mosinee, and requiring Rondeau to divest his current holdings of Mosinee stock.\textsuperscript{195} Mosinee also sought an

\textsuperscript{186} Justice Burger delivered the opinion of the Court, from which Justices Brennan, Douglas, and Marshall dissented. \textit{See} 422 U.S. at 49, 65.
\textsuperscript{187} \textit{See infra} text accompanying notes 216 - 225.
\textsuperscript{188} \textit{See infra} text accompanying notes 231- 251.
\textsuperscript{189} \textit{See infra} text accompanying notes 261 - 266.
\textsuperscript{190} \textit{See Rondeau}, 422 U.S. at 51-53.
\textsuperscript{191} \textit{See id.}
\textsuperscript{192} \textit{See id.}
\textsuperscript{193} \textit{Id.} at 53.
\textsuperscript{194} \textit{Id.} at 54-55.
\textsuperscript{195} \textit{See id.} at 55.
award of money damages.\textsuperscript{196}

In response, Rondeau argued as follows (as summarized by the Seventh Circuit Court of Appeals):

[defendant] argued that his violation of Section 13(d) did not warrant the imposition of any remedy or equitable relief in view of the following circumstances: He unknowingly and unintentionally failed to file a Schedule 13D; his purchase of eight percent of the common stock was for investment purposes, not control; he did not formulate an intention to seek control of Mosinee Paper until after he was informed by his attorney . . . of the filing requirement under Section 13(d); and he filed a Schedule 13D within a reasonable time after learning of his duty to file.\textsuperscript{197}

Upon this record, the district court denied injunctive relief.\textsuperscript{198} In doing so, the district court applied the traditional standards for determining the appropriateness of injunctive relief, and exercised its discretion thereunder.\textsuperscript{199} Finding no scienter on the part of Rondeau, and no damages to Mosinee or its shareholders, the district court granted summary judgment in favor of Rondeau.\textsuperscript{200}

On appeal, however, the Seventh Circuit reversed, reasoning that the district court’s findings did indeed show harm to Mosinee.\textsuperscript{201} Moreover, the Seventh Circuit held that Mosinee “need not show irreparable harm as a prerequisite to obtaining permanent injunctive relief in view of the fact that as issuer of the securities it is in the best position to assure that the filing requirements of the Williams Act are being timely and fully complied with and to obtain speedy and forceful remedial action when necessary.”\textsuperscript{202}

The Supreme Court took issue with the Seventh Circuit’s decision to reverse the district court under such circumstances, granted certiorari, and

\textsuperscript{196} See id.
\textsuperscript{197} Mosinee Paper Corp. v. Rondeau, 500 F.2d 1011, 1015 (7th Cir. 1974), rev’d, 422 U.S. 49 (1975).
\textsuperscript{198} See Rondeau, 422 U.S. at 49.
\textsuperscript{199} See id.
\textsuperscript{200} See id. at 55.
\textsuperscript{201} See id. at 56-57.
\textsuperscript{202} Id. at 57.
reversed the Circuit.\footnote{See \textit{Rondeau}, 422 U.S. at 49.}

In so doing, the Supreme Court properly described the issue before it as a “narrow” one, and I suggest that its holding be similarly interpreted as a “narrow” one.\footnote{\textit{Rondeau}, 422 U.S. at 57.} More specifically, I would suggest that it’s holding be limited to its own articulation of why it granted certiorari in the first place: “We disagree with the Court of Appeals’ conclusion that the traditional standards for extraordinary equitable relief do not apply in these circumstances…”\footnote{\textit{Id}.} Put different (but also in the Court’s own words):

\ldots the District Court was entirely correct in insisting that [Mosinee] satisfy the traditional prerequisites of extraordinary relief by establishing irreparable harm. Moreover, the District Judge’s conclusions that [Rondeau] acted in good faith and that he promptly filed a Scheduled 13D when his attention was called to this obligation support the exercise of the court’s sound judicial discretion to deny an application for an injunction.\footnote{\textit{Id}. at 61-62.}

What has made the Court’s holding difficult to interpret “narrowly” is the broad dicta that accompanied it. Indeed, the trouble starts almost immediately, when the Court misstates the very issue before it as “whether this record supports the grant of injunctive relief, a remedy whose basis ‘in the federal courts has always been irreparable harm and inadequacy of legal remedies.’”\footnote{\textit{Id}. at 64.} For, as just discussed, that’s not exactly what’s being decided.\footnote{\textit{Id}. at 61.} The issue is not whether the record supports the grant of injunctive relief, but rather whether the record (and the law) supports the \textit{reversal of a denial} of injunctive relief.

The Court proceeded to criticize the Seventh Circuit for conflating “the questions of liability and relief,”\footnote{See supra text accompanying notes 204-205.} and held that the existence of a private right of action under Section 13(d) of the Williams Act does not dispense with the need of a party to “satisfy the traditional prerequisites of extraordinary relief by [among other things] establishing irreparable harm.”\footnote{\textit{Id}. at 64.} The Court then explained that, on the record before it, such

\begin{itemize}
\item \textit{Id}. at 61.
\item \textit{Id}. at 64.
\item See supra text accompanying notes 204-205.
\end{itemize}
traditional prerequisites (particularly the existence or threat of irreparable harm) were lacking. As the Court observed:

[Rondeau] has not attempted to obtain control of the [Mosinee], either by a cash tender offer or any other device. Moreover, he has now filed a proper Scheduled 13D, and there has been no suggestion that he will fail to comply with the Act’s requirements of reporting any material changes in the information contained therein. On this record, there is no likelihood that [Mosinee’s] shareholders will be disadvantaged should the petitioner make a tender offer, or that respondent will be unable to adequately place the case before them should a contest for control develop.

Although the Court’s holding per se is unproblematic, its application of that holding, and its elucidation of that holding, creates some unfortunate and unnecessary difficulties.

With regard to the holding’s application, the Court seriously downplays the harms of inadequate disclosure per se, and fixates on tender offers as “the principal object of the Williams Act” to the exclusion of secretive open market stock accumulations.

Indeed, the Court went so far as to state that “none of the evils to which the Williams Act was directed has occurred or is threatened in this case.” Admittedly, not all of the evils to which the Williams Act was directed has occurred (as there was no subsequent tender offer or change in control) – but have none of the evils inspiring the Williams Act occurred? The Court’s hyperbole here leads to error. For, as previously discussed, the Williams Act was enacted so that “shareholders and potential investors can adequately evaluate a tender offer or the possible effect of a change in

---

211 See id. at 59.
212 Id. at 59.
213 See supra text accompanying notes 216-218.
214 Rondeau, 422 U.S. at at 60.
215 Recall the words of Senator Williams, who stated that the Act’s purpose was “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 through cash tender offer or through the open market or privately negotiated purchases.” Bath Indus., 427 F.2d at 102 (7th Cir. 1970) (quoting 113 Cong. Rec. 24664 (1967) (Sen. Harrison A. Williams, Jr.) (emphasis added).
216 Id. at 59.
Information regarding a group or individual’s acquisition of a 5% or greater stake in a company is important to shareholders regardless of whether a tender offer or change of control actual transpires because of the effect that this information has on stock prices.

In attempting to understand the Court’s approach here, perhaps it would help to bear in mind that Rondeau was decided thirteen years before Basic v. Levinson, 485 U.S. 224 (1988), and thus before the Court’s approval of the efficient capital markets hypothesis. This could explain, in part, the Court’s failure to fully appreciate the importance of the requisite informational disclosures provided for by the Williams Act. It is unlikely that the Court would opine similarly today. Judge Parker captured things well in his 1988 opinion on the Williams Act, in which he observed that “Section 13(d) serves a vital public function to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed.” He appropriately contextualized the Act as follows:

The Supreme Court reaffirmed only recently that a fundamental purpose of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78a et seq. (“1934 Act” or “Act”) was “to protect investors against manipulation of stock prices” and to implement a “philosophy of full disclosure.” Basic Inc., et al. v. Levinson, et al., --- U.S. ----, 108 S.Ct. 978, 982, 99 L.Ed.2d 194 (1988). In delivering the ruling, Justice Blackmun was addressing problems of false statements and materiality under section 10(b) of the Act. The same underlying principle applies to litigation arising under section 13(d) of the Act which imposes strict disclosure requirements where there are large scale accumulations of equity securities affecting corporate control.

---

217 See supra note 36 (emphasis added).
218 See supra notes 57 and 70.
219 Namely, that “the market price of shares traded on well-developed markets reflects all publicly available information.” Basic, 485 U.S. at 246.
221 Id. at 707.
The Court in *Rondeau* also erred when it declared that “the principal object of the Williams Act is to solve the dilemma of shareholders desiring to respond to a cash tender offer.”\(^\text{222}\) Certainly, that was *an* object of the Williams Act, but as just discussed, not *the only* object.\(^\text{223}\) Indeed, one could argue that there are two halves to the Williams Act: one concerning tender offers, and another concerning open market stock accumulations.\(^\text{224}\) Although these halves can be and often are interconnected, the Court in *Rondeau* focused solely on the former to the expense of the latter.\(^\text{225}\)

Moreover, the Court seemed to give no credit to the argument that the mere failure to comply with the Williams Act gives rise to a *prima facie* case of harm, but instead declared that “the fact that respondent is pursuing a cause of action which has been generally recognized to serve the public interest provides no basis for concluding that it is relieved of showing irreparable harm and other usual prerequisites of injunctive relief.”\(^\text{226}\)

And then there’s the Court’s explanation of the “traditional equitable principles” pertaining to injunctive relief.\(^\text{227}\) On two occasions the Court made a point of admonishing that injunctions were historically designed to “to deter, not to punish.”\(^\text{228}\) Rather than highlight the courts’ broad discretionary powers in this area, the Supreme Court instead stressed the need for equitable relief to reflect “[f]lexibility rather than rigidity,” “mercy and practicality,” and that an injunction should be “an instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.”\(^\text{229}\) Certainly not incorrect, but an important choice of emphasis.

Arguably, much of the Court’s language here constitutes dicta. For at its heart (as discussed\(^\text{230}\)), *Rondeau* is a case about “the exercise of the [trial] court’s sound judicial discretion to deny an application for an injunction.”\(^\text{231}\) The Seventh Circuit was wrong to override the district

---

\(^\text{222}\) *Rondeau*, 422 U.S. at 60.

\(^\text{223}\) See supra text accompanying notes 217-218.

\(^\text{224}\) Recall the words of Senator Williams, who stated that the Act’s purpose was “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 through cash tender offer *or through the open market or privately negotiated purchases.*” *Bath Indus.*, 427 F.2d at 102 (7th Cir. 1970) (quoting 113 CONG. REC. 24664 (1967) (Sen. Harrison A. Williams, Jr.) (emphasis added).

\(^\text{225}\) See *Rondeau*, 422 U.S. at 59-60.

\(^\text{226}\) *Rondeau*, 422 U.S. at 64-65.

\(^\text{227}\) *Rondeau*, 422 U.S. at 60-62.

\(^\text{228}\) *Rondeau*, 422 U.S. at 61, 62.

\(^\text{229}\) Id. at 61 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 229-30 (1944)).

\(^\text{230}\) See supra text accompanying notes 217-218.

\(^\text{231}\) Id. at 61-62.
court’s exercise of this discretion (on the record before it), and doubly wrong to impose a different standard for the adjudication of prayers for injunctive relief.\(^{232}\)

But Supreme Court dicta is important and influential.\(^{233}\) “Commentators frequently stress the need for lower courts to give substantial deference even to Supreme Court dicta,”\(^{234}\) and that appears to be what they’re doing (at least with respect to \emph{Rondeau}). For rather than reading and applying \emph{Rondeau} narrowly (or, arguably, straight-forwardly), the lower courts have been reading and applying \emph{Rondeau} more broadly than is necessary.\(^{235}\) Instead of standing for the proposition that injunctive relief under the Williams Act is subject to the same traditional elements that always inform the availability of injunctive relief, \emph{Rondeau} has been read to (essentially) hold that “[t]he mere failure to file a timely Schedule 13D cannot in itself amount to irreparable injury sufficient to justify equitable relief.”\(^{236}\) Indeed, the mainstream reading of \emph{Rondeau} is such that one Williams Act defendant was emboldened to “contend that … injunctions are never proper remedies for 13(d) violations, by characterizing the law as ‘a technical reporting rule.’”\(^{237}\)

This attitude is seriously problematic. For as a result of it, insurgents (those wishing to seize control of a particular target corporation) have reduced incentive to make full and timely disclosures as per the Act’s requirements. Indeed, in the event of a Williams Act violation, the usual outcome is for the violator to tardily file a Schedule 13D and have the case against him or her dismissed as moot.\(^{238}\) The Seventh Circuit recognized the seriousness of such a lack of incentive in \emph{Bath Industries v. Blot}:

The purpose of the [Schedule 13D] filing and notification provisions is to give investors and stockholders the opportunity to assess the

\(^{232}\) See id. at 60-62.
\(^{235}\) See \textit{e.g. infra} note ___.
\(^{238}\) See \textit{supra} text accompanying note 175; see also CSX Corp. v. Children’s Inv. Fund Mgt. (UK) LLP, 562 F. Supp. 2d 511, 569-70 (S.D.N.Y. 2008) (\emph{Rondeau} … make[s] clear that a prerequisite to [injunctive] relief is a showing of irreparable harm…. Second Circuit cases go so far as to suggest, in \textit{dicta}, that irreparable harm can not be established once corrective disclosure is made.“).
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 the defendant-appellants’ 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.  

A minor (and, I posit, justifiable) interpretive shift here can go a long way in remedying this situation. It lies in recognizing the difference between asserting that a Williams Act violation relieves a plaintiff from showing irreparable harm (which is what the Seventh Circuit held), to arguing that a Williams Act violation gives rise to merely a rebuttable presumption of irreparable harm. And it is upon this difference that my suggested reinterpretation of Rondeau is founded.

In re-interpreting Rondeau, I start from the proposition that courts have “broad discretion to evaluate the irreparability of alleged harm,” and thus there is a degree of latitude in determining the nature of a Section 13(d) violation. (Indeed, the Rondeau court explicitly conceded this, observing that “we have not hesitated to recognize 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 previously discussed, the traditional standard for assessing whether an injury is irreparable is whether “the damages occasioned are estimable only by conjecture, and not by an accurate standard.” It would seem fair to presume a Section 13(d) violation to be irreparable under a broad range of circumstances (for example: if discovered too close to the date of an annual meeting, or after corporate control has changed hands—a position that already enjoys case law support). Reference to SEC Regulation 13D...

---

239 Bath Indus., 427 F.2d at 113 (emphasis added) (decided in 1970 – 5 years before Rondeau was handed down).
241 Rondeau, 422 U.S. at 62.
243 See 18 Am. JUR. 2d, Corporations § 1111, at 919 (1985) (“If a material misrepresentation is shown in connection with solicitation of proxies, courts will ordinarily declare the proxies invalid, possibly altering or rescinding the outcome of any vote for which the proxies were used. Thus, after an election, losers may be successful in seeking to overturn the result.”) and Bath Indus., 427 F.2d at 110 (“The Williams Act is clearly...
suggests that ten days is the minimum amount of time before an annual meeting for a Section 13(d) violation to be cured without a finding of irreparable injury, for Regulation 13D declares that “until the expiration of the tenth day from the date of the filing of the Schedule 13D . . . that person shall not: (i) Vote or direct the voting” of recently acquired shares.\textsuperscript{244}

Given the complexities and uncertainties of the marketplace, a Section 13(d) violation cured even earlier than that could still fairly be presumed irreparable on account of the countless number of individual shareholder decisions that might have been made differently but for the Section 13(d) violation. Indeed, courts have expressed concern over the voting or purchasing of shares during an ongoing Section 13(d) violation, and have sometimes enjoined such activity (including the holding of an annual shareholders’ meeting) until such time as the Section 13(d) violation was cured.\textsuperscript{245} Armed with this established understanding, courts could readily adopt a rebuttable presumption of irreparability when confronted with a Section 13(d) violation. Making this presumption rebuttable, and acknowledging that certain extenuating circumstances could cause a Section 13(d) violation to be reparable, brings this general rule into full conformity with \textit{Rondeau}. This approach would also guard against the use of Section 13(d) to the advantage of incumbent management.

Whereas the Seventh Circuit’s position (which the Court reversed in \textit{Rondeau}) would have precluded a defendant from arguing that its violation of 13(d) was harmless or otherwise not irreparable, my proffered reinterpretation of \textit{Rondeau} does not preclude this defense.\textsuperscript{246}

\textsuperscript{244} See 17 C.F.R. § 240.13d-1(e)(2) (“From the time the person has acquired or hold the securities with a purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect of the securities described therein; or (ii) Acquire an additional beneficial ownership interest in any equity securities of the issuer of the securities, nor of any person controlling the issuer.”).

\textsuperscript{245} See supra nn. 172-173 and accompanying text.

\textsuperscript{246} Defendant in \textit{Rondeau} unsuccessfully made this very argument to the Seventh Circuit. \textit{See Mosinee Paper Corp.}, 500 F.2d at 1016 (“[Defendant] contends that it would be improper to grant plaintiff’s claim for equitable remedies in view that [plaintiff] has suffered no harm, let alone irreparable harm by reason of his violation of Section 13(d).”)

In the last paragraph of the \textit{Rondeau} decision, the Supreme Court indeed declares that a Section 13(d) claimant is not “relieved of showing irreparable harm and other usual prerequisites for injunctive relief.” \textit{Rondeau}, 422 U.S. at 65. This can be fairly construed as dicta, however, as the holding of \textit{Rondeau}, strictly speaking, is the reversal of the Seventh Circuit’s decision to forgo the traditional analysis of injunctive relief. And even if not considered as dicta, \textit{Rondeau} does not preclude finding of irreparable harm on the basis of a Section 13(d) violation coupled with a showing of numerous shareholders or active related to the proxy provisions and should be construed to operate in harmony with them.”); see also \textit{MTD Serv. Corp. v. Weldotron Corp.}, No. 93 Civ. 4980, 1994 WL 455154, at *7 (S.D.N.Y. Aug. 19, 1994); \textit{supra} notes 176-180 and accompanying text.
This reinterpretation is consistent with *Rondeau’s* holding (understood properly), and as such does not change the result in *Rondeau*. Recall that the factual predicate in *Rondeau* was a district court’s decision not to provide injunctive relief for violations of the Williams Act that were “inadvertent” and coupled with “immediate steps to rectify them.” At issue was the correctness of a subsequent Seventh Circuit conclusion that Mosinee’s “claim was not to be judged according to traditional equitable principles, and that the bare fact that petitioner violated the Williams Act justified entry of an injunction against him.” The aggressive, broad position here was the one staked out by the Seventh Circuit – a position which held that, as a matter of law, a Williams Act violation justified (and seemingly required) the order of injunctive relief. In response, the Supreme Court took a much more narrow view, one which merely stated that the traditional rules governing injunctive relief – including its discretionary nature – remain applicable.

Because of the particulars of the *Rondeau* case, therefore, I posit that *Rondeau* does not preclude a plaintiff from arguing—and a court from concluding—that barring extenuating circumstances, a Section 13(d) violation, without more, does indeed result in irreparable injury. All it precludes is a plaintiff from arguing that a Section 13(d) violation automatically results in irreparable harm. In other words, a rebuttable presumption of irreparable harm flowing from a Section 13(d) violation remains a legitimate (and, in my opinion, the best) interpretation of *Rondeau*.

Such an interpretation (or reinterpretation) of *Rondeau* would further the objectives of the Williams Act by more properly incentivizing would-be violators to comply with Section 13(d). No longer assured of “one free pass” (pursuant to which their violation could readily be cured by merely doing that which they were obliged to do in any event: file a Scheduled 13D), accumulators of more than 5% of a company’s stock (under the conditions set forth by the Williams Act) would recognize that failure to follow the Act’s requirements comes with potentially serious consequences.

And concerns over “flexibility,” “mercy,” and “practicality” can all be trading (for example). That is, *Rondeau* does not explicitly forbid a minimalist approach to showing irreparable injury in the context of a Section 13(d) violation; the only thing it explicitly forbids is dispensing with this showing and analysis altogether.  
247 *Rondeau*, 422 U.S. at 60.  
248 Id.  
249 See *id.*  
250 See *supra* note 206 and accompanying text.  
251 In keeping with this reading of *Rondeau*, the Seventh Circuit could be said to have erred in holding that a Section 13(d) violation gave rise to an irrebuttable presumption of irreparable harm.
Effectuating Disclosure Under the Williams Act

respected by precluding stringent equitable relief under those circumstances where the violation of Section 13(d) was unintentional and insignificant (indeed, such are the exact circumstances under which the Supreme Court called upon courts exercising equitable relief to exemplify such characteristics). Such an approach would strike a “nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims” by (i) safeguarding the investing public and corporate shareholders from trading stock without accurate knowledge of the potential for a change in corporate control, (ii) protecting insurgents who unintentionally violated Section 13(d) in situations where their violations were inconsequential, and (iii) promoting compliance with—and private enforcement of—the Williams Act.

Finally, the dichotomy between “punishment” versus “deterrence” (a traditional consideration in awarding injunctive relief – as highlighted by the Court in Rondeau) should not be overstated. Stringent equitable relief, although punitive in feel, would certainly serve to deter both the defendant in a Williams Act suit, and others similarly situated, from failing to file the requisite Scheduled 13D in the future.

B. Legislative Intent and its Reinterpretation

Compounding the common (mis)reading of Rondeau is the lower courts’ misapprehension of the Williams Act’s legislative intent. As discussed, the Act, as ultimately passed, was carefully crafted to avoid “tipping the scales either in favor of management or in favor of the person making the takeover bids.” Although recognizing that “[t]he discretion of a district court to fashion remedies in this area is broad” in order to “preserv[e] the integrity of the requirements of the securities laws and preventing violators from profiting by the violation,” courts have interpreted the legislative history of the Williams Act as “militat[ing] against injunctive remedies . . . that go beyond correction of past violations and unduly favor incumbent management.” As a result, in practice the courts “generally have refused requests for more extensive or long-lasting relief.”

---

252 See Rondeau, 433 U.S. at 61.
253 Id. at 61 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 229-30 (1944)).
254 See supra text accompanying notes 114, 147, 228.
255 Gearhart Indus. v. Smith Int’l, Inc., 741 F.2d 707, 715 (5th Cir. 1984); see supra notes 41-44 and accompanying text.
256 Bath Indus., 427 F.2d at 113.
258 ICN Pharm. v. Khan, 2 F.3d 484, 491 (2d Cir. 1993).
259 See Joy Flowers Conti, Raymond F. Kozlowski, Jr., & Leonard S. Ferleger, Claims
What the courts have overlooked, however, is the difference between the operation of Section 13(d) when complied with versus the operation of Section 13(d) when breached. If complied with, the Act is largely neutral in its effects. If breached, any remedy imposed would, inevitably, function to the disadvantage of the party committing the breach. Such a consequence should not be read as violating the intended neutrality of the Act.

In short, the intended neutrality of the Act’s reporting provisions should not constrain the courts in fashioning a remedy in the event of the Act’s breach.

C. Rondeau Is Bad Law

Lastly, the continued influence of the Rondeau decision is regrettable for one final, important reason: Rondeau rested upon a presumption that no longer holds. Specifically, in response to the argument that “an injunction is necessary to protect the interests of shareholders who either sold their stock … at predislosure prices or would not have invested had they known that a takeover bid was imminent,” Rondeau, 422 U.S. at 59, the Court, after first wondering out loud whether “the type of ‘harm’ identified … is redressable” under the Williams Act, stated that:

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.

As previously discussed, caselaw subsequent to Rondeau has proven this presumption wrong. Plaintiffs do not have an action at law for damages in the event that someone violates the Williams Act by failing to

---


260 It should be noted that the Second Circuit did explicitly counsel against stringent remedies on the ground that they too would “unduly favor incumbent management.” ICN Pharm., 2 F.3d at 491. But, as explained, this conflates the effect of compliance with the effect of violation.

261 Rondeau, 422 U.S. at 59.

262 Id. The Court made this statement in light of its reading of the “principal object of the Williams Act” as addressing “the dilemma of shareholders desiring to respond to a cash tender offer,” id. at 60. I criticize this reading as narrow and incomplete. See supra text accompanying notes 222-225.

263 Rondeau, 422 U.S. at 60.

264 See supra text accompanying notes 136-140.
file a Schedule 13D. Thus, contrary to the Court’s conclusion in Rondeau, the basis for equitable relief is not negated in these situations. This casts significant doubt on the continued viability of Rondeau as precedent.

IV. ADDITIONAL CORRECTIVES

As discussed, due largely to a misinterpretation of Rondeau (a case which is of dubious precedential value in any event due to subsequent caselaw), coupled with a misreading of the legislative history, courts over the last 35 years have failed to properly remedy violations of the Williams Act. In fact, the current regime of remedies for Williams Act violations undermines the objectives of the Act by encouraging gamesmanship and, in some instances, discouraging disclosure.

A reinterpretation of Rondeau, along the lines suggested, will go for toward incentivizing greater disclosure on the part of insurgents. But additional correctives could further promote the Williams Act’s objectives. This short section outlines two potential such correctives.

---


266 See Rondeau, 422 U.S. at 60.

267 See Thomas J. Long, Deciding Whether Conflicts With Supreme Court Precedent Warrant Certiorari, 59 N.Y.U. L. Rev. 1104, 1107 (1984) (“Factors that may lead a lower court to conclude that applicable precedent is no longer good law….”). Of course, the ability of lower courts to disregard Rondeau on such grounds is a controversial question beyond the scope of this Article. See, e.g., Bradley Scott Shannon, Overruled by Implication, 33 Seattle U. L. Rev. 151, 151 (2009). But even if it is not outright disregarded, the suggestion that Rondeau is no longer good law most certainly counsels in favor of reading the case as narrowly as possible, and confining it to its specific facts and procedural context.

268 See supra Part III.

269 See Joy Flowers Conti, Raymond F. Kozlowski, Jr., & Leonard S. Ferleger, Claims Trafficking in Chapter 11 – Has the Pendulum Swung Too Far? 9 Bankr. Dev. J. 281, 335 (1992) (“An acquiror could simply ignore or violate the reporting requirements under the Williams Act until a court orders it to make curative disclosure, at which time it would make such a curative filing with little concern for other sanctions.) But see Macey & Netter, supra note 31, at 137 (referring to the usual remedies for a Williams Act violation as “draconian” and “very costly,” and as such creating a “strong incentive” for compliance with the Act’s provisions).
A. Incentivizing Management

Individual shareholders are highly unlikely to spot a Williams Act violation, and thus are unable to effectively police Section 13(d). Further, the SEC has not made enforcement of Section 13(d)’s filing requirements a priority.\textsuperscript{270} This leaves the incumbent management of a target corporation as the party best positioned to catch and litigate a Williams Act violation. For incumbent management has both the ability, and (usually) the wherewithal to find and confront Williams Act violators.\textsuperscript{271} Additionally, incumbent management has an incentive to do so: changes in corporate control often result in new management.\textsuperscript{272}

Thus, one might expect incumbent management to actively ferret out and pounce upon Williams Act violators, thereby mitigating the problem of too little voluntary compliance with Section 13(d).\textsuperscript{273} However, in light of the remedies currently available to management, there is little incentive to do this. In fact, given the stringent approach taken by the courts to the issue of “irreparable harm,”\textsuperscript{274} there is every incentive for management to sit on knowledge of a Section 13(d) violation until a cure (via the violator’s filing of a Schedule 13D) would no longer be possible (e.g., very shortly before

\textsuperscript{270} In fact, I have been able to unearth only a single decided case brought by the SEC predicated solely on a defendant’s failure to file a Schedule 13D. \textit{See SEC v. First City Financial Corp.}, 688 F. Supp. 705 (D.D.C. 1988). In every other case brought by the SEC involving a defendant’s failure to file a Schedule 13D, this particular violation is added to a long list of additional, more serious securities law violations – usually fraudulent in nature. \textit{See}, e.g., \textit{SEC v. Diversified Industries, Inc.}, 465 F. Supp. 104 (D.D.C. 1979); \textit{SEC v. General Refractories Co.}, 400 F. Supp. 1248 (D.D.C. 1975); \textit{SEC v. Prousalis}, 2005 U.S. Dist. LEXIS 6113 (S.D.N.Y. Feb. 8, 2005); \textit{SEC v. World-Wide Coin Inv.}, 567 F. Supp. 724 (N.D. Ga. 1983); \textit{SEC v. Savoy Industries, Inc.}, 665 F.2d 1310 (D.C. Cir. 1981). The closest other case on point would be \textit{SEC v. Palmer}, 1988 U.S. Dist. LEXIS 9216 (D.D.C. Aug. 18, 1988), which was an order to show cause brought by the SEC against a defendant whose failure to file a Schedule 13D (along with certain other documents) had violated the provisions of a pre-existing permanent injunction entered against him. \textit{Id.} at *6-7. This record also serves to marginalize the deterrent effect of any potential criminal liability for failing to file a Schedule 13D, of which there are apparently no decided cases (the closest being the civil case \textit{SEC v. Prousalis}, 2005 U.S. Dist. LEXIS 6113 (S.D.N.Y. Feb. 8, 2005) against Thomas Prousalis which was “based on the exact same facts, and charging essentially identical violations” as an earlier criminal case brought against him. \textit{Id.} at *2.

\textsuperscript{271} \textit{See supra} note 134 and accompanying text.


\textsuperscript{273} \textit{See supra} text accompanying notes 238-239.

\textsuperscript{274} \textit{See supra} text accompanying notes 236-247.
an annual meeting\textsuperscript{275}. For only under such circumstances could management hold out hope for a judicial remedy with real bite.\textsuperscript{276} Such a strategy is in obvious frustration of Section 13(d)’s objective of timely disclosure.\textsuperscript{277}

One’s first reaction to such gamesmanship on the part of management may be to argue that such a course of conduct would cause a court to find that management had waived its right to object to the Section 13(d) violation, or that management could somehow not maintain a claim against the violator on account of “unclean hands.” However, the courts have correctly noted that these arguments hold little water: Section 13(d) exists to protect investors, not management, and thus the mistakes or connivings of management should not preclude enforcement of the statute.\textsuperscript{278} As one court explained:

To bar equitable relief on the grounds that management has also acted improperly would ignore the rights of the true party in interest and add to the information withheld from investors and shareholders. While existing management may have ulterior motives in seeking injunctive relief for alleged violations of Section 13(d), such relief will be granted only to protect shareholders and the investing public from irreparable harm that results when the Section is violated. The alleged “unclean hands” on the part of the plaintiff is not a bar to the injunctive relief sought in this case.\textsuperscript{279}

Should \textit{Rondeau} be reinterpreted as suggested (or disregarded as bad law),\textsuperscript{280} this would, it seem, go a long way toward incentivizing incumbent management to swiftly report Williams Act violations. After all, the current reticence to do so stems from the lack of a strong remedial regime – which itself stems from the \textit{Rondeau} decision. But even if \textit{Rondeau}’s effects have

\textsuperscript{275} See Jacobs, 549 F. Supp. at 1063.
\textsuperscript{276} See supra notes 114, 147, 228.
\textsuperscript{277} See supra text accompanying note 35.
\textsuperscript{278} See K-N Energy, Inc., 607 F. Supp. at 770; but see Dan River, Inc. v. Icahn, 701 F.2d 278, 287 (4th Cir. 1983) (questioning management’s “serious[ness] in its desire to get all relevant information to its shareholders”, and deciding that “[o]n the particular facts of the case” the relief of share sterilization would not be granted).
\textsuperscript{280} See supra Part III.
been muted, bear in mind that the presumption of harm would remain rebuttable. Thus, gamesmanship on the part of management would persist – its time frame would simply change (admittedly in a beneficial direction). That is, management would still have little incentive to report upon a Section 13(d) violation if it learns of the violation at a point in time so early and innocuous that the assertion of irreparable harm could most likely be rebutted.

Thus, to rectify the ongoing possibility of management’s intentionally delayed reporting of Williams Act violations, and to address the fact that Rondeau may continue to be interpreted and followed as it traditionally has been, courts should readily recognize claims for breach of fiduciary duty by shareholders against incumbent management that learns of, but fails to act upon, a Section 13(d) violation.

Under state corporate law, directors and officers of a corporation have a fiduciary relationship with the corporation’s shareholders, which gives rise to the duties of care and loyalty. The duty of care demands that “‘directors … conduct themselves as ordinarily prudent persons managing their own affairs.’” The duty of loyalty is violated, in relevant part, “[w]here directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities….”

Thus, management’s failure to act upon knowledge of a Section 13(d) violation can fairly be argued as either a breach of the duty of care or the duty of loyalty – depending on the circumstances. And as such, management would be vulnerable to a shareholder derivative lawsuit for this breach. Although it may be very difficult for shareholders to prevail in such a lawsuit, for a variety of reasons, the mere specter of this litigation would certainly create some incentive against management’s holding back information of a Section 13(d) violation for strategic use at a later time. It may possibly even encourage greater vigilance on the part of

---

286 Especially if the breach alleged is the breach of the duty of care, due to the imposition of the business judgment rule defense. See id. at 2071-72.
management in identifying and reporting such violations.\textsuperscript{287}

\textbf{B. Governmental Prioritization}

There are a range of measures that either the Congress, or the SEC, could potentially take to remedy the problems identified in this Article.

Congress could amend the Williams Act in such a way as to overrule \textit{Rondeau}. More specifically, Congress could add a provision declaring the Act’s violation to constitute a rebuttable presumption of irreparable injury, thereby giving rise to injunctive relief (without more).

As mentioned, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress amended 21C of the 1934 Act, enabling the SEC to levy monetary penalties for Williams Act violations regardless of the violator.\textsuperscript{288} The SEC could take advantage of this amendment to fine Williams Act violators in administrative proceedings.

Lastly, the SEC could more aggressively pursue Williams Act violators in general. As discussed, such actions (at least when brought on account of solely a failure to file a Schedule 13D) appear quite rare.\textsuperscript{289} This prioritization would be significant because of the SEC newly acquired ability to levy fines in administrative proceedings against any Williams Act violator, and the SEC’s long-standing absolution from the need to prove irreparable injury when seeking injunctive relief in civil actions – thereby allowing the SEC to avoid the obstacles placed by \textit{Rondeau} in the path of other private litigants.\textsuperscript{290} And with greater SEC scrutiny would come the possibility of potential criminal liability for those particular cases that the SEC deemed egregious enough to warrant criminal prosecution at the hands of the Department of Justice.

\textbf{CONCLUSION}

It is beyond reasonable dispute that judicially-crafted remedies to Williams Act violations should have as their object the promotion of the

\textsuperscript{287} \textit{Cf.} In Re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del.Ch. 1996)

\textsuperscript{288} \textit{See supra} text accompanying notes 100-101.

\textsuperscript{289} \textit{See supra} note 270. Even the SEC’s recent enforcement action against the Wyly brothers is only partially predicated upon alleged Williams Act violations; the action in large part concerns securities fraud in violation of Rule 10b-5 and the other antifraud provisions of the securities laws. \textit{See SEC v. Wyly}, No. 10-CV-5760 (July 29, 2010) (complaint).

\textsuperscript{290} \textit{See supra} note 117 and accompanying text.

\textsuperscript{291} Which may contribute to the SEC’s greater success rate in Schedule 13(d) litigation. \textit{See supra} note 170.
aims of the Act. Thus, these remedies should serve to effectuate the informational disclosures mandated by the Williams Act. In order to accomplish this, these remedies must create a set of incentives that encourage compliance with the Act on the part of potential violators (and, concomitantly, would encourage the ready reporting of violations by those in the best position to monitor compliance: incumbent corporate management). The current remedial regime, which is marked by undue leniency, fails to provide such incentives; indeed, the current remedial regime is arguably counterproductive in that it discourages both strict compliance with Section 13(d) and the early reporting of violations thereof.

By shifting the nature of relief toward greater severity, potential violators of the Williams Act will more likely be dissuaded from noncompliance, and issuers fearing potential takeover bids will be more likely to readily report instances of noncompliance because of the increased possibility of obtaining significant injunctive relief at an earlier date. Such a remedial approach would better protect investors from trading on inaccurate or incomplete information—an interest that is as compelling today as it was when Congress passed the Williams Act.