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Standing Under Section 13(d) (GAF Corp. v. Milstein)

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SECURITIES LAW

STANDING UNDER SECTION 13(d)

GAF Corp. v. Milstein

In 1968 Congress passed the Williams Act[1] which added to the Securities Exchange Act of 1934[2] disclosure requirements for certain acquisitions[3] and cash tender offers.[4] In *GAF Corp. v. Milstein*[5] the

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1 Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454, *amending* Securities Exchange Act §§ 12-14, 15 U.S.C. §§ 78n (1964).

2 15 U.S.C. §§ 78a-78hh (1964).

3 Section 13(d) of the Williams Act, 15 U.S.C. § 78m(d) (Supp. V, 1965-69) provided:

(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 781 of this title or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 10 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 of all 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 or proposed 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 name and address 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 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.

Section 14(d), *id.* § 78n(d) required disclosure by tender offerors:

(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 10 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement con-

Court of Appeals for the Second Circuit[6] had its first opportunity to consider the effect of the Williams Act in other than a tender offer context.[7] The court held that when existing security holders joined together in a group so that the formation resulted in an aggregate ownership in excess of 10 percent[8] of a class of securities, the disclosure requirements of section 13(d) were automatically triggered without any further acquisitions or attempt to take control.[9] In addition, the court held that an issuer had standing under section 13(d) to seek injunctive relief against utilization of the securities held by the group where the disclosure report that had been filed was false.[10] However, the court refused to grant the issuer standing under section 10(b) and rule 10b-5 to contest the fraudulent report in the absence of a purchase or sale of securities by it.[11]

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taining such of the information specified in section 78m(d) of this title, 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.

4 Section 14(d)(8)(A) exempted tender offers where the consideration for the tender was another security registered under the Securities Act of 1933, 15 U.S.C. § 78n(d)(8)(A) (Supp. V, 1965-69). In addition, Section 14(e), *id.* § 78n(e), a general anti-fraud provision, made it unlawful to file misleading reports pursuant to section 14(d).

In 1970, the Williams Act was amended, reducing the percentage of a class of securities required to trigger sections 13(d) or 14(d) from 10 percent to 5 percent and deleting the exemption of exchange offers from section 14. Act of Dec. 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497, *amending* Securities Exchange Act § 13(d), 15 U.S.C. § 78m(d)(1) (Supp. V, 1965-69). For a thorough discussion of the Williams Act and its ramifications well beyond the scope of this comment, see Griffin & Tucker, *The Williams Act, Public Law 90-439—Growing Pains? Some Interpretations with Respect to the Williams Act,* 16 How. L.J. 654 (1971) [hereinafter Griffin & Tucker]; Robinson & Mahoney, *Schedule 13D: Wild Card in the Takeover Deck,* N.Y.L.J., August 8-10, 1972 [hereinafter Robinson & Mahoney].

5 453 F.2d 709 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972).

6 The panel consisted of Circuit Judges Mansfield and Kaufman, who wrote the unanimous opinion, and District Judge Levet, who sat by designation.

7 The Williams Act had previously been considered by the Second Circuit in the tender offer situation in Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842 (2d Cir. 1970) (exchange offer) and Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969) (cash tender offer). Section 13(d) had also been considered by the Southern District in Grow Chem. Corp. v. Uran, 316 F. Supp. 891 (S.D.N.Y. 1970) and Sisak v. Wings and Wheels Express, Inc., [1970-1971 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,991 (S.D.N.Y. 1970).

8 The 1970 Amendment reduced the threshold to 5 percent. *See* text accompanying note 3 *supra.*

9 453 F.2d at 718.

10 *Id.* at 719-21.

11 *Id.* at 721-22. Section 10(b), 15 U.S.C. § 78j(b) (1964), provides that it shall be unlawful

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

Rule 10b-5 of the Securities Exchange Commission, promulgated at 17 C.F.R. § 240.10b-5 (1972), further provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any

GAF had commenced the action in the Southern District of New York against members of the Milstein family, alleging that defendants had violated sections 13(d), 10(b) and rule 10b-5 by failing to file a timely, accurate disclosure of their aggregate holdings of GAF preferred stock.[12] The individual defendants had received the stock, constituting 10.25 percent of GAF's outstanding preferred, in May 1967 when the Ruberoid Company merged with GAF. A conspiracy was allegedly entered into subsequent to the effective date of the Williams Act[13] for the purpose of taking over GAF, but defendants made no further acquisitions of preferred stock.[14] Defendants attempted to take control of GAF but were ultimately defeated in a proxy contest in May 1971.[15]

The Second Circuit refused to follow the ruling in *Bath Industries, Inc. v. Blot*,[16] where the Seventh Circuit held that a group owning in excess of 10 percent of a class of securities must file only when further acquisitions are contemplated.[17] The court in *Milstein* observed that the statutory purpose of section 13(d) was to alert the marketplace to any potential shift in the locus of voting power[18] rather than merely

means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud, or

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

12 GAF preferred voted share for share with GAF common. 453 F.2d at 716 n.13. Defendants filed their first report in September of 1970 but continually disclaimed any intention to take over control of GAF.

13 July 29, 1968. The precise date when the conspiracy was formed was not alleged.

14 The Milsteins did purchase GAF common but their holdings amounted to only 1.7 percent of the common stock outstanding.

15 453 F.2d at 714. The Milsteins attempted to infiltrate senior management positions. They also filed derivative actions in the state and federal courts charging waste in an effort to disparage management and depress the value of GAF stock. In addition, defendants caused Circle Floor Co., Inc., a company in their control, to sell off its substantial holdings in GAF, thereby further depressing GAF stock prices and facilitating acquisition of control of plaintiff. GAF brought an antitrust action against Circle Floor Co., Inc. and the Milsteins, alleging that defendants attempted to monopolize the manufacture and contract installation of floor tile in the New York City metropolitan area. Dismissal of the action was affirmed by the court of appeals. GAF Corp. v. Circle Floor Co., Inc., 168 N.Y.L.J. 27, Aug. 9, 1972 at 1, col. 7 (2d Cir. 1972).

16 427 F.2d 97 (7th Cir. 1970).

17 In *Bath* plaintiff contended that the duty to file arose within 10 days of group formation, whereas defendants asserted that it arose only after further acquisitions. The Seventh Circuit took a middle course and held that disclosure was required within 10 days of agreement "to act in concert *to acquire additional shares*." 427 F.2d at 109 (emphasis in original). *See* Comment, 45 N.Y.U.L. Rev. 1136 (1970) in support of this rationale. For criticism of the *Bath* holding, see Griffin & Tucker at 683-85.

18 453 F.2d at 716. The legislative reports left no doubt in the court's mind as to when a group would be required to file under section 13(d). Quoting the House and Senate reports accompanying the Williams Act, the Second Circuit stated:

to protect investors from the effect of volume transactions on price.[19] The court felt that the intention to acquire additional shares after formation was irrelevant. Although disclosure on formation might give the target of a potential takeover a decided advantage where further acquisitions are necessary to gain control, the formation itself could present management with a *fait accompli* as "[i]t hardly can be questioned that a group holding sufficient shares can effect a takeover without purchasing a single additional share of stock."[20]

The court noted that requiring disclosure on mere formation might create onerous burdens for a group whose formation does not normally represent a potential shift in control, as in the case of a management group or an institutional investor.[21] However, the court had defined "acquisition" in terms of voting control.[22] Management and investment groups normally obtain securities for their growth potential rather than voting power. Such groups might nevertheless be required to file if they agreed to exercise that aggregate voting power.[23]

A disclosure requirement on mere formation could also sweep informal groups within the Act's prohibitions. For example, section 13(d) might be applied to informal discussion among shareholders so as to inhibit opposition to management at a shareholder's meeting. This was a real fear in *Bath*[24] and contributed to its "additional purchase" rule.[25] The Second Circuit rule would not give a court the benefit of such an evidentiary aid in distinguishing the informal discussion of common issues from the actual formation of an insurgent

> The group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time they agreed to act in concert. Consequently, the group would be required to file the information called for in section 13(d)(1) within 10 days after they agree to act together, whether or not any member of the group had acquired any securities at that time.

Id., *quoting* S. Rep. No. 550, 90th Cong., 1st Sess. 8 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 8-9 (1968).

For a thorough treatment of the legislative history and statutory purpose of the Williams Act, see Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership*, 119 U. Pa. L. Rev. 853 (1971).

19 427 F.2d at 109.

20 453 F.2d at 718.

21 *Id.* at 719.

22 *Id.* at 716. The court was in accord with *Bath* on this point. In *Bath* the Seventh Circuit quoted the language of the legislative reports:

> "[O]ne who has the *right* to determine how the stock is voted has a beneficial interest for the purposes of the Act."

427 F.2d at 112 (emphasis added).

23 The court felt such groups were not, per se, formed for the purposes of the Act but it left open the question of disclosure requirements when management groups pooled their interests to resist a takeover threat. 453 F.2d at 719 n.20. *See* Robinson & Mahoney at 4, col. 3, arguing that they should file.

24 427 F.2d at 110.

25 At least under the *Bath* rule an actual conspiracy and attempt to wrest control would be evidenced by additional security purchases. *Id.*

group. However, in *Milstein*, no such additional evidence was necessary to demonstrate the existence of a takeover group. Plaintiff's allegations showed a conspiracy through acts other than additional purchases[26] and the court was bound, for the purposes of the appeal, to take these allegations as true.[27]

It must be noted that the Milstein group was an informal arrangement in which the individual members were not bound to vote their shares as in a stock pool.[28] Nor did the group itself ever have the right to vote the shares as in a voting trust.[29] Yet, both the *Bath* decision[30] and the legislative history[31] require only persons who have the *right* to vote the stock to file, since it is only they who pose a potential threat to the status quo. The court recognized that it would not be necessary for legal title to have been transferred to the group but, unless the group as an entity could direct the voting of the stock held by its members, it is arguable that the group, for the purposes of the Williams Act, never "acquired" the GAF securities. The group, as an entity, never had an enforceable right to vote, as would a purchaser in an executory contract for the sale of securities or the holder of convertible securities or options.[32]

The court of appeals also held that GAF, as issuer of the securities

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26 *See* note 15 *supra*.

27 In a motion to dismiss for failure to state a claim upon which relief can be granted under FED. R. CIV. P. 12b(6), plaintiff's allegations are taken as true. *See generally* 2A J. MOORE, FEDERAL PRACTICE ¶ 12.08 (2d ed. 1968).

28 *See, e.g.*, N.Y. BUS. CORP. LAW § 620(a) (McKinney 1963) which defines a stock pooling agreement as:

> An agreement between two or more shareholders, if in writing and signed by the parties thereto [which provides] that in exercising any voting rights, the shares held by them shall be voted as therein provided, or as they may agree, or as determined in accordance with a procedure agreed upon by them.

29 *See, e.g.*, *id.* § 621 where both the legal title and the right to vote the shares are transferred to the trustee.

30 On this point the Second Circuit agreed with *Bath*. *See* note 22 *supra*.

31 The legislative reports state that section 13(d) "would prevent a group of persons who seek to *pool* their voting or other interests in the securities of any issuer from evading the provisions of the statute because no one individual owns more than 10 percent of the securities." S. REP. No. 550, 90th Cong., 1st Sess. 8 (1967). H.R. REP. No. 1711, 90th Cong., 2d Sess. 8 (1968) (emphasis added). In addition, the rules adopted by the Securities Exchange Commission require that in determining, for the purposes of sections 13(d) and 14(d), whether a person is the beneficial owner of securities, a person shall be deemed to be an owner of securities "which such person has the *right* to acquire through the exercise of presently exercisable options, warrants or rights or through conversion of presently convertible securities, or otherwise." 17 C.F.R. § 240.13d-3 (1972) (emphasis added). Finally, section 13(d)(1) requires disclosure only from a person "who [acquires], directly or indirectly the beneficial *ownership* of any equity security . . . ". 15 U.S.C. § 78m (d)(1) (1964) (emphasis added). If ownership does not require legal title, then at least it must require some measure of dominion and control. It is submitted that the only control that the Milstein group, as an entity, could exercise over the voting of GAF securities was *familial* in nature.

32 *See generally* Griffin & Tucker at 686-89.

held by defendants, had standing under section 13(d),[33] but not under section 10(b) and rule 10b-5, to seek injunctive relief against the defendants' voting their stock, or continuing in their efforts to gain control. The court reaffirmed the *Birnbaum* doctrine[34] and held that the issuer lacked standing under section 10(b) and rule 10b-5 to contest the fraudulent filings in the absence of a purchase or sale of securities by it.

There are, however, some recognized exceptions[35] to the purchaser-seller requirement of *Birnbaum*: (1) where the plaintiff can be treated as a forced seller or a forced purchaser;[36] or (2) where the plaintiff, as in

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33 453 F.2d at 719-21. The court reasoned that, since the issuer was a required recipient of the disclosure report, it was in an excellent position to police violations. In addition, the issuer had both the resources and self-interest to bring section 13(d) actions. Moreover, the court recognized a congressional intent in sections 14(d) and (e) to give an issuer standing to resist tender offers where there are fraudulent disclosure reports. Section 13(d) had been enacted as part of the same regulatory scheme and, therefore, an issuer should have standing under it as well.

34 This doctrine, so-called because of its evolution from the Second Circuit's opinion in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), requires that, in order for a plaintiff to have standing under the general anti-fraud provisions of the Securities Exchange Act, he must have actually bought or sold securities in reliance on the fraud.

In *Birnbaum*, plaintiff shareholder of Newport Steel Corporation sued the corporation and its president who owned a controlling block of stock. Plaintiff alleged that the defendant president had made fraudulent misrepresentations to the shareholders in an effort to abort a tender-offer which would have been profitable to them so that defendant could then consummate a highly profitable sale of his own stock to another corporation. The court dismissed plaintiff's allegations under rule 10(b)-5:

> Prior to its adoption the only prohibitions against fraud in the sale or purchase of securities were contained in Section 17(a) of the 1933 Act, 15 U.S.C.A. § 77q(a), and § 15(c) of the 1934 Act, 15 U.S.C.A. § 78*o*(c). Section 17(a) of the 1933 Act only made it unlawful to defraud or deceive *purchasers* of securities, and Section 15(c) of the 1934 Act dealt only with fraudulent practices by security brokers or dealers in over-the-counter markets. No prohibition existed against fraud on a seller of securities by the purchaser if the latter was not a broker or a dealer. Consequently, on May 21, 1942, the SEC adopted Rule X-10B-5 to close this ". . . loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." SEC Release No. 3230, May 21, 1942.

193 F.2d at 463 (emphasis in original).

35 *See generally* Kellogg, *The Inability to Obtain Analytical Precision Where Standing to Sue Under Rule 10b-5 Is Involved*, 20 BUFFALO L. REV. 93 (1970-71) [hereinafter Kellogg].

36 *See, e.g.*, Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970) (standing under 10b-5 given to plaintiff who bought stock to resist merger, was fraudulently defeated, and thus had to sell out); Vine v. Beneficial Finance Co., Inc., 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967) (standing given to non-tendering shareholder where offeror fraudulently acquired 95 percent of target's stock so as to permit a short-form merger with itself and thus force plaintiff to sell out). *Compare Crane, supra, with* Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 337 F. Supp. 1128 (S.D.N.Y. 1971), *appeal pending*, [current] CCH FED. SEC. L. REP. ¶ 93,512 (2d Cir. 1972) (standing denied under 10b-5 to tender offeror who acquired shares of target, was fraudulently defeated by competitor, and thus sold out its previously acquired shares in absence of merger by target and competitor). *See also* Allico Nat'l Corp. v. Amalgamated Meat Cutters & Butcher Workmen of N. America, 397 F.2d 731 (7th Cir. 1968)

Milstein, merely seeks prophylactic relief.[37] But the court reasoned that, since Congress found it necessary to enact section 14(e), the anti-fraud provision dealing with section 14(d) disclosures, it was clear that a target corporation had no independent standing under rule 10b-5 to contest a fraudulent report, absent a purchase or sale by it of its securities. "This same reasoning is just as meaningful in the framework of section 13(d)."[38] If the Second Circuit is correct in assuming that section 14(e) is *necessary* to give an issuer standing to contest violations of section 14(d), the absence of a comparable provision under section 13 would be strong grounds for denying GAF standing under section 13(d) and for relegating plaintiff to its state remedies for contesting fraudulent disclosures.[39] If, however, section 14(e) were merely *declaratory* of an issuer's standing to contest a fraudulent takeover,[40] then an issuer would have standing under section 14(d) even if section 14(e) had never been enacted. No negative inference with respect to standing

(fraudulent breach by seller of executory contract for sale of securities gives defrauded purchaser standing as a forced seller); A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967) (fraudulent breach by prospective purchaser of executory contract for sale of securities gives defrauded seller standing as forced purchaser).

37 *See, e.g.*, Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967) (complaint alleging controlling stockholder fraudulently kept dividends at a minimum to force minority stockholders to sell out at depressed values stated a claim under rule 10b-5 for injunctive relief, but not for damages in absence of actual sale by minority stockholder-plaintiff).

The Second Circuit, oddly enough, cited *Mutual Shares Corp.* in support of the proposition that GAF had standing to seek prophylactic relief under section 13(d) but not under 10(b)! 453 F.2d at 720 n.22.

38 453 F.2d at 722.

39 The court noted this argument but rejected it, reasoning that, since a tender offer involves communications to shareholders, whereas a section 13(d) disclosure does not, a general anti-fraud provision under section 14(e) was mandated. *Id.* at 720 n.22. The court seems to have lost sight of the fact that the purpose and effect of a section 13(d) report is to communicate a shareholder's position not only to the SEC but also to the *issuer*, who was the plaintiff here.

40 This position was rejected by the Second Circuit in Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969). In granting a non-tendering shareholder and the target company standing under section 14(e), the court stated:

> § 14(e) [i]n effect . . . applies Rule 10b-5 both to the offeror and to the opposition —very likely, *except perhaps for any bearing it may have on the issue of standing*, only a codification of existing case law.

409 F.2d at 940 (emphasis added). The court went on to say:

> While a nontenderer suffers no immediate injury from inadequacy of price in the sense that he retains his stock, such inadequacy is likely to have a depressing effect on the market for some time and thus may hurt him if, for one reason or another, he should later find it necessary or desirable to sell. Such depression may also harm the target corporation if it should wish to engage in financing or acquisitions. . . .

Id. at 946.

The same reasoning should give the issuer a sufficient interest to seek at least injunctive relief under 10b-5. *Compare* Newman v. Electronic Specialty Co., [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,591 (N.D. Ill. 1969) (nontendering shareholder given standing under both 14(e) and 10(b) in case based on same facts as *Electronic Specialty Co.*, *supra*).

under section 10(b) could, therefore, be drawn by the absence of such a provision in section 13.

The Second Circuit also based its denial of standing under rule 10b-5 on the ground that, if otherwise, issuers would be permitted to seek more than just prophylactic relief. Thus, the court intimated that *only* prophylactic relief is available under the Williams Act. In *Grow Chemical Corp. v. Uran*,[41] cited with approval by the court of appeals,[42] a purchaser of securities was given standing under sections 13(d) and 16(a)[43] to recover damages for the excessive price he had paid (he would have paid less had he known defendant had a 10 percent interest in the issuer). Clearly, limiting standing to the provisions of the Williams Act will not limit relief where damages are appropriate. Hence, such reasoning by the court provides no justification for denying an issuer standing under section 10(b) and rule 10b-5. The true reason may simply be that there is no need for such standing. In view of the fact that section 13(d) will permit an issuer to seek both prophylactic and compensatory relief in a federal forum, the court can provide an adequate remedy against violations of the Williams Act without discarding the *Birnbaum* doctrine.[44]

In holding that section 13(d) of the Williams Act requires disclosure on the formation of a group of shareholders where their aggregate holdings exceed 10 percent of a particular class of securities, and where no further acquisitions are intended, the Second Circuit was faithful to the legislative purpose of alerting the marketplace to potential shifts in the locus of voting control. However, the court's inability to develop a consistent[45] rationale for denying standing to the issuer,

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41 316 F. Supp. 891 (S.D.N.Y. 1970).

42 453 F.2d at 719 n.21.

43 Section 16(a) of the Securities Exchange Act, 15 U.S.C. § 78p(a) (1970) provides: (a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 78*l*(g) of this title, or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership during such month, shall file with the Commission (and if such security is registered on a national security exchange, shall also file with the exchange), a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

44 *See* notes 34-36 *supra.*

45 One author argues that:
[w]hile consideration may have been given to problems of proof of causation and damages in evolving a "purchaser-seller requirement", particularly, as the potentiality of proof problems in such actions may have been weighed in light of

under the 1934 Act's general anti-fraud section, might prompt it to re-evaluate the purchaser-seller rule in view of the recognized injury to issuer and shareholder alike resulting from false Williams Act filings.[46]

AN EXCHANGE PURSUANT TO A MERGER — NOT A 16(b) SALE

Abrams v. Occidental Petroleum Corp.

Section 16(b)[47] of the Securities Exchange Act of 1934[48] provides that a corporation may recover from a statutory insider[49] any profit made on its stock which is sold within six months of purchase. Despite an ostensibly clear purpose of preventing insiders from using their status to acquire information that will enable them to realize speculative profits through short-swing trading in the equity securities of their corporations, the section has had "both a litigious and controversial history."[50]

In *Abrams v. Occidental Petroleum Corp.*,[51] the Second Circuit was required to decide whether a tender offeror who derives a substantial profit from a defensive merger by the target corporation should be subject to section 16(b) liability. In exempting two profitable transactions, the court found no possibility for speculative abuse in appel-

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> potentially unlimited liability, it is submitted that such proof problems ought not to be considered at the outset on a motion to dismiss for lack of standing to sue.

Kellogg, *supra* note 35, at 116.

46 *See* note 40 *supra.*

47 15 U.S.C. § 78p(b) (1970).

48 15 U.S.C. § 78p (1970). The Securities Act Amendments of 1964 amended the Securities Act of 1934 and, for purposes of analysis, can be divided into two parts.

> The main feature of [the first] portion is an extension of the registration, periodic reporting, proxy and insider trading provisions of sections 12, 13, 14 and 16 of the Exchange Act to larger over-the-counter companies. These provisions were formerly applicable only to listed companies. . . . The second part of the act deals primarily with broker-dealers in securities and their personnel. It imposes upon such persons increased qualifications standards, as well as strengthened and refined administrative disciplinary controls.

R. Phillips and M. Shipman, *An Analysis of the Securities Acts Amendments of 1964*, 1964 DUKE L.J. 706-07 (1964). These amendments "constitute the most significant items of federal securities legislation since" 1940. *Id.* at 706.

49 The term statutory insider applies to any

> person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity (other than an exempted security) which is registered pursuant to [section 12 of the Securities Exchange Act of 1934], or who is a director or an officer of the issuer of such security.

15 U.S.C. § 78p(a) (1970).

50 Bateman, *The Pragmatic Interpretation of Section 16(b) and the Need for Clarification*, 45 ST. JOHN'S L. REV. 772 (1971) [hereinafter Bateman]. The author, in tracing the development of the current pragmatic interpretation of section 16(b) indicates that while most cases adopting this interpretive method have been clear in pointing out that 16(b) should be interpreted in the light of its purposes, these same courts have not been clear in discerning exactly what those purposes are. Despite an ostensible clarity of purpose within the statutory language, there remains unpredictability in the decisions.

51 450 F.2d 157 (2d Cir. 1971), *cert. granted*, 405 U.S. 1064 (1972).