Federal Securities - Searching for a Definition of Manipulation under Section 14(e) of the Williams Act

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Recent Developments

FEDERAL SECURITIES—SEARCHING FOR A DEFINITION OF MANIPULATION UNDER SECTION 14(e) OF THE WILLIAMS ACT

Schreiber v. Burlington Northern, Inc. (3d Cir. 1984)*

In 1968, Congress amended the Securities Exchange Act of 19341 by enacting the Williams Act,2 a statute providing for the regulation of cash tender offers.3 By including provisions that require full disclosure, the Act was designed to enable target companies’ shareholders to make an educated decision as to whether to tender their shares.4 The Williams Act also contains a broad antifraud provision, section 14(e),5 which prohibits both omissions or misstatements of material fact, and fraudulent, deceptive, or manipulative acts in connection with any

* Editor’s Note: As a matter of policy, the Villanova Law Review generally treats decisions of the United States Court of Appeals for the Third Circuit in the Third Circuit Review, published annually in issues 3-4. This note is being published separately in view of the fact that the United States Supreme Court has granted certiorari to review the Third Circuit’s decision. See Schreiber v. Burlington N., Inc., 105 S. Ct. 81 (1984).


3. See H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811. Former Senator Harrison A. Williams, Jr. of New Jersey was the cosponsor and namesake of the Act. 113 CONG. REC. 854 (1968) (statement of Sen. Williams). Williams first introduced the bill in order to protect incumbent management from losing control of the corporation to undesirable corporate raiders. 111 CONG. REC. 28254 (1965) (statement of Sen. Williams). By the time the bill was enacted, however, Senator Williams recognized the legitimate social and economic benefits that cash tender offers could produce, such as the reduction of inefficient management. See 113 CONG. REC. 854 (1968) (statement of Sen. Williams). Consequently, the terms of the Williams Act favor neither management nor the offeror. Id. Instead, the Act relies on the target company’s shareholders to decide whether the corporation should be taken over. Id. at 855. For a discussion of cash tender offer legislation, see generally Greene & Juniewicz, A Reappraisal of Current Regulations of Mergers and Acquisitions, 132 U. PA. L. REV. 647 (1984).

4. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811. In order to comply with the requirements of the Williams Act, a tender offeror must file a statement with the Securities and Exchange Commission disclosing such information as its background and identity, the source and amount of funds to be used to pay for the tendered shares, any plans to make major changes in the target company’s corporate structure, and the existence of arrangements with any person with respect to any securities of the issuer. See 15 U.S.C. § 78m(d)(1)(A)-(C), (E) (1982).

tender offer. Presently there is a split of opinion among the circuits as to the definition of manipulation under section 14(e). Also unsettled is what a plaintiff needs to prove in order to recover on a claim for a material omission under section 14(e), particularly where the omission is of facts which also give rise to a state law claim. The Third Circuit recently addressed both of these issues in Schreiber v. Burlington Northern, Inc.

In Schreiber, Burlington Northern, Inc. (Burlington) sought to take over El Paso Gas Company (El Paso) on December 21, 1982, by making a cash tender offer bid for 25.1 million El Paso shares at $24 per share (December tender offer). El Paso’s management initially considered the takeover hostile and countered with several defensive measures. Nevertheless, the offer was fully subscribed, but not oversubscribed, by the December 30, 1982 deadline.

Subsequently, Burlington declined the shares tendered in December; instead, it entered into negotiations with El Paso’s management. As a result of these negotiations, Burlington and El Paso’s management

6. Id. The full text of § 14(e) provides:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts or practices as are fraudulent, deceptive, or manipulative.


8. For a full discussion of the elements of a material omission of fact claim under § 14(e), see infra notes 78-101 and accompanying text.

9. 731 F.2d 163 (3d Cir.), cert. granted, 105 S. Ct. 81 (1984). The case was heard by Circuit Judges Adams and Sloviter, and Judge Teitelbaum of the United States District Court for the Western District of Pennsylvania, sitting by designation. Id. at 164. The opinion was written by Judge Adams. Id.


11. 731 F.2d at 164. El Paso’s management reacted to the takeover attempt by implementing the following defensive measures: it brought suit against Burlington, threatened to dispose of its assets, announced the issuance of a new class of preferred stock, and amended its bylaws. 568 F. Supp. at 199.

12. 731 F.2d at 164.

13. Id.
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entered into a new and friendly takeover agreement. Under the terms of this agreement, Burlington covenanted to make a cash tender offer for only 21 million shares of El Paso stock at $24 per share (January tender offer). In addition, Burlington agreed to recognize "golden parachute" contracts between El Paso and four El Paso officers.

The January tender offer was greatly oversubscribed; thus the shareholders who had tendered their shares in December, and then retendered in January, were subject to substantial proration. Barbara Schreiber (Schreiber), a shareholder of El Paso, sustained a substantial loss from this proration. As a result she instituted an action in federal district court in Delaware, on behalf of herself and others similarly situated, seeking redress against Burlington, El Paso, and the board of directors of El Paso.

Schreiber alleged that the defendants' conduct violated section 14(e) in two respects. First, Schreiber claimed that defendants' cancellation of the fully subscribed December tender offer and the institution of the January tender offer constituted a manipulative act prohibited by section 14(e).

Second, Schreiber argued that defendants' failure to disclose in the January tender offer the fact that certain El Paso directors were granted golden parachutes, and the fact that El Paso's directors interfered with and finally approved the takeover because of these favorable arrangements, constituted material omissions in violation of

14. Id.
15. Id. at 165.
16. Id. A "golden parachute" is a contract that provides financial security for top officials of a target company if they are discharged or downgraded after a takeover. Id. at 165 n.2. In Schreiber, El Paso filed a Schedule 14D-9 with the Securities and Exchange Commission on January 12, 1983, describing the employment agreements in question. Id. The agreements provided four officers with "continued employment with the Company in their current positions and at not less than their current salary levels" for periods of either three or five years." Id. For a further discussion of golden parachute contracts, see Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be "Mobilized to Overcome the Business Judgement Rule?", 8 J. CORP. LAW 337, 341 (1983).

17. Id. at 165. In the January tender offer, Burlington requested only 21 million shares; however, over 40 million shares were tendered. 568 F. Supp. at 200. The Williams Act provides that if more shares are tendered than the bid originally requested, the offeror must purchase on a pro rata basis from all shares tendered within 10 days of the offer. 15 U.S.C. § 78n(d)(6) (1982). The Securities and Exchange Commission amended rule 14d-8 to require pro rata purchase of all shares tendered during the period that the offer remains open. 17 C.F.R. § 240.14d-8 (1983). Therefore, in Schreiber, each shareholder who tendered in response to the January tender offer only had approximately one-half of their shares purchased. As a result, all those who had tendered in response to the December offer, which was not oversubscribed, would have had all of their shares purchased; instead they were forced to tender their shares anew and thus were subject to extensive proration. 568 F. Supp. at 200.

18. Id. at 200.
19. Id.
20. Id.
section 14(e).\textsuperscript{21} Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted.\textsuperscript{22} The district court granted the motion and dismissed the complaint.\textsuperscript{23}

On appeal, the Third Circuit first addressed Schreiber's claim that the substitution of the January tender offer for the December tender offer constituted a manipulative act in violation of section 14(e).\textsuperscript{24} Noting the existence of a split among the circuits with respect to the definition of manipulation under section 14(e), the Third Circuit began its analysis by examining both the Sixth Circuit's and the Second Circuit's interpretation of the term.\textsuperscript{25}

The Sixth Circuit, in \textit{Mobil Corp. v. Marathon Oil Co.},\textsuperscript{26} defined manipulative acts as acts which affect "the market for, or price of, securities by \textit{artificial} means, i.e., means unrelated to the natural forces of supply and demand."\textsuperscript{27} This definition was set forth in the context of a takeover battle in which Marathon Oil had granted two options to a friendly bidder, United States Steel, in an attempt to defeat a hostile takeover by Mobil.\textsuperscript{28} Mobil subsequently brought an action to enjoin the exercise of

\begin{itemize}
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.} at 204-05. Defendants argued that the complaint failed to state a claim on the grounds that the willful breach of a tender offer contract is not a manipulative act in violation of \$ 14(e). \textit{Id.} at 200. In addition, defendants contended that "the failure to disclose that El Paso granted 'golden parachutes' to its directors and that these directors breached their fiduciary duties by causing the termination of the December tender offer are also not Section 14(e) violations because the failure to disclose a breach of fiduciary duty in tender offer materials is not a Williams Act violation." \textit{Id.}
  \item \textsuperscript{23} \textit{Id.} at 204-05 (citing \textit{Fed. R. Civ. P. 12(b)(6)}).
  \item \textsuperscript{24} \textit{Id.} at \textit{204-05} (citing \textit{Fed. R. Civ. P. 12(b)(6)}).
  \item \textsuperscript{25} \textit{Id.} (citing Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1, 5 (2d Cir. 1983) (manipulation under section 14(e) must involve some sort of misrepresentation), \textit{cert. denied}, 104 S. Ct. 1926 (1984); Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 760 (2d Cir.) (same), \textit{cert. denied}, 104 S. Ct. 550 (1983); \textit{Mobil Corp. v. Marathon Oil Co.}, 669 F.2d 366 (6th Cir. 1981) (manipulative act under \$ 14(e) does not require a showing of deception). For a further discussion of \textit{Mobil}, see infra notes 26-31 and accompanying text. For a further discussion of \textit{Data Probe} and \textit{Buffalo Forge}, see infra notes 32-38 and accompanying text.
  \item \textsuperscript{26} \textit{Mobil}, 669 F.2d at 366.
  \item \textsuperscript{27} \textit{Id.} at 374 (emphasis in original). The Sixth Circuit set forth this definition after reviewing Supreme Court and other court of appeals decisions interpreting various provisions of the Securities Acts which use the term manipulation. \textit{Id.} See Santa Fe Indus. v. Green, 430 U.S. 462 (1977) (Supreme Court interpreted manipulation under rule 10b-5 of the Securities Exchange Act of 1934 as conduct intended to deceive investors by artificially affecting market activity); \textit{Ernst \& Ernst v. Hochfelder}, 425 U.S. 185 (1976) (same); \textit{Cargill, Inc. v. Hardin}, 452 F.2d 1154 (8th Cir. 1971) (Eighth Circuit interpreted manipulation as used in the Commodity Exchange Act, 7 U.S.C. \textsection{} 9, 13 (1982), as conduct intended to cause the stock price not to reflect natural supply and demand), \textit{cert. denied}, 466 U.S. 932 (1972).
  \item \textsuperscript{28} \textit{Mobil}, 669 F.2d at 367-68. United States Steel (U.S. Steel) offered to buy 30 million shares of Marathon stock for $125 per share. \textit{Id.} at 367. The offer, however, was conditioned upon Marathon granting U.S. Steel two options. \textit{Id.} The first option was an irrevocable stock option to purchase ten million
\end{itemize}
the options on the grounds that they "served as . . . 'lock up' arrangement[s] to defeat any competitive offers of Mobil or third parties, thereby constituting a 'manipulative' practice 'in connection with a tender offer,' in violation of section 14(e) . . . ."29 Because the options artificially affected normal market activity and were a significant deterrent to competitive bidding for Marathon shares, the Sixth Circuit found that they constituted manipulative acts in violation of section 14(e).30 The Sixth Circuit reached this conclusion notwithstanding the fact that there was full disclosure, and thus no deception.31

In contrast to the Sixth Circuit's broad definition of manipulation, the Second Circuit, in both Buffalo Forge Co. v. Ogden Corp.32 and Data shares of authorized but unissued Marathon stock. Id. The second option was to purchase one of Marathon's most valuable assets, Yates Field Oil Reserve. Id. The Yates Field option was exercisable only if a hostile offeror, such as Mobil, gained control of Marathon. Id. Marathon's directors voted to recommend U.S. Steel's offer and to grant it the two options. Id.

29. Id. at 368. A "lock-up" is an arrangement "made in connection with the proposed acquisition . . . that gives the . . . acquiror an advantage in acquiring the target over . . . bidders or potential bidders. . . . [A] lock-up arrangement merely increases a bidder's likelihood of success and creates barriers to a competing bidder." Frajdim & Franco, Lock-Up Arrangements, 14 REV. SEC. REG. 821, 821 (1981). Target companies in the past have employed a variety of lock-up techniques including "the sale or granting of an option to sell major assets or stock, agreements not to tender shares, irrevocable proxies, and agreements not to vote shares." Note, The Future of Lock-ups After Mobil v. Marathon Oil, 27 ST. LOUIS U.L.J. 261, 265 (1983) (footnotes omitted).

30. 669 F.2d at 375. The court found that Yates Field was a significant asset and a very important attraction to potential bidders for control of Marathon. Id. The court found that by granting U.S. Steel the option to purchase Yates Field, Marathon had effectively deterred other potential bidders from proposing a tender offer. Id. Since other bidders would be deterred from bidding for Marathon, the court found that U.S. Steel's bid of $125 per share amounted to an artificial ceiling for Marathon shares. Id. As a result, the Sixth Circuit reasoned that the option was manipulative in violation of § 14(e). Id. at 377. In addition, the Sixth Circuit found the stock option that U.S. Steel received was for a large enough number of shares and at a low enough price that it prevented all other bidders from competing on par with U.S. Steel in bidding for a controlling block of Marathon's shares. Id. at 375-76. In conclusion, the court stated that "[t]he Yates Field option and the stock option, both individually and in combination, have the effect of circumventing the natural forces of market demand in this tender offer contest," and thus constitute manipulative acts in violation of § 14(e). Id. at 376.

31. Id. at 376-77. The court rejected Marathon's argument that § 14(e) required full disclosure and nothing more. Id. at 376. Although conceding that nondisclosure was usually an essential element of a manipulation claim, the court explained that this case was an illustration of the fact that disclosure alone will not always preclude a finding of manipulation. Id. The Sixth Circuit reasoned that even if the shareholders were fully informed of the options and their effect, the options still would have caused an artificial ceiling on the price of Marathon's shares; thus disclosure did not prevent a finding of manipulation under § 14(e). Id. at 377.

Probe Acquisition Corp. v. Datatab, Inc., held that misrepresentation is a necessary element of a manipulation claim under section 14(e).

In Buffalo Forge, plaintiff, the successful bidder in a takeover battle, brought suit against defendants, competing bidder and target company, seeking rescission of a treasury stock sale and purchase option executed in favor of the competing bidder prior to plaintiff's takeover of the target company. Plaintiff asserted that the option and sale constituted manipulative acts in violation of section 14(e). In Data Probe, a bidder in a takeover battle sought to enjoin the target company from granting an option to a competing bidder, claiming that it was a manipulative act in violation of section 14(e). Because it failed to find an element of misrepresentation in either Buffalo Forge or Data Probe, the Second Circuit denied recovery in both cases.

34. Id. at 5-6; Buffalo Forge, 717 F.2d at 759.
35. 717 F.2d at 758-59. In Buffalo Forge, plaintiff, Ampco-Pittsburgh Corp. (Ampco), made an initial bid of $25 per share to Buffalo Forge's shareholders. Id. at 758. In response to that bid, Buffalo Forge's board of directors began a search for more favorable offers. Id. After negotiations, the directors approved a merger plan with defendant Ogden Corp. which called for an even exchange of Ogden shares, then trading at $32.75 per share, for Buffalo Forge shares. Id. The merger plan also included an agreement to sell Ogden 425,000 shares of Buffalo Forge treasury stock and to grant Ogden an option to purchase additional treasury stock within one year. Id. After the agreement was executed, a bidding war ensued between Ampco and Ogden which Ampco eventually won with a bid of $37.50 per share. Id. at 759. After completing the takeover, Ampco refused to honor the Ogden treasury stock purchase agreement and sued for rescission of the transaction. Id.
36. Id. at 759.
37. 722 F.2d at 3-6. In Data Probe, CRC Information Systems, Inc. (CRC) and Datatab, Inc. initially announced a merger agreement contingent upon approval by two-thirds of Datatab's shareholders. Id. at 2. By the agreement's terms, Datatab was to become a wholly-owned subsidiary of CRC. Id. Before Datatab's shareholders voted on the agreement, Data Probe, Inc. announced a cash tender offer for any and all of Datatab's stock. Id. at 2-3. Subsequently, Datatab and CRC revised their merger agreement and included in it a grant to CRC of a one-year, irrevocable option to purchase 1,407,647 unissued Datatab shares. Id. at 3. The option, in effect, guaranteed that CRC could acquire Datatab because Datatab only had 703,836 shares of common stock outstanding; thus, no matter how many of the outstanding shares were tendered to Data Probe, CRC would have a majority by exercising its option. Id. Data Probe then brought an action to enjoin the option. Id.
38. Buffalo Forge, 717 F.2d at 759-60; Data Probe, 722 F.2d at 5-6. The Second Circuit concluded in both cases that misrepresentation is an essential element of a manipulative act; however, it used somewhat different reasoning to reach this conclusion in each case.

In Buffalo Forge, the Second Circuit ascertained from past Supreme Court cases that the purpose of the Williams Act was to furnish shareholders who are confronted with cash tender offers essential information regarding the qualifications and intentions of the tender offeror. 717 F.2d at 760 (citing Piper v. Chris-Craft Indus., 430 U.S. 1, 31 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975)). In light of the Act's purpose of full disclosure, the Second Circuit reasoned that a misrepresentation, i.e., the omission or misstatement of an
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Having considered the applicable case law defining manipulation under section 14(e), the Third Circuit examined three factors in order to determine which circuit's approach was the more accurate view.

First, the Schreiber court considered the legislative intent underlying the Williams Act. The main purpose behind the Act, the Third Circuit determined, was to provide full disclosure to shareholders to ensure that they could intelligently respond to a tender offer. In light of this purpose, the Third Circuit found that it was appropriate to require some form of misrepresentation or deception as an element of a claim for manipulation under section 14(e).

Second, the Third Circuit looked to the Supreme Court's definition of the term manipulation in actions under rule 10b-5 as set forth in Santa Fe Industries, Inc. v. Green and Ernst & Ernst v. Hochfelder. In those two cases, the Supreme Court defined manipulation as conduct

material fact, is an essential element of § 14(e) manipulation. Id. at 760. Finding no misrepresentation or misleading conduct in the facts alleged, the Buffalo Forge court held that there was no manipulation under § 14(e). Id.

In Data Probe, the Second Circuit initially found that the Supreme Court held that the proscription of manipulative devices under rule 10b-5 did not extend to complaints which solely alleged that management had treated shareholders unfairly or breached its fiduciary duty. 722 F.2d at 4 (citing Santa Fe Indus. v. Green, 430 U.S. 462, 477 (1977)). Rather, the Second Circuit pointed out that in order to prove a claim for manipulation under rule 10b-5, the Supreme Court required the plaintiff to show that management's actions artificially affected normal market activity and were intended to mislead shareholders. Id. (citing Santa Fe, 430 U.S. at 477).

Noting that it had previously held that the definition of manipulation under rule 10b-5 was applicable to manipulation under § 14(e), the Second Circuit held that in light of the Santa Fe analysis, manipulation under § 14(e) was not designed to cover shareholders' claims of mistreatment absent a showing of misrepresentation. 729 F.2d at 4 (citing Billard v. Rockwell Int'l Corp., 683 F.2d 51, 56 (2d Cir. 1982)). Concluding that the essence of plaintiff's claim was merely for breach of fiduciary duty and that there was no misrepresentation, the Second Circuit dismissed the complaint. Id. at 4, 6.

39. 731 F.2d at 165-66.
40. Id. at 166 (citing H.R. REP. No. 1711, 90th Cong., 2d Sess. 11, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813 (Williams Act designed to provide shareholders with all relevant facts in order to intelligently decide whether to tender their shares); S. REP. No. 550, 90th Cong., 1st Sess. 2 (1967) (same)).
41. 731 F.2d at 166.
42. Because the Third Circuit found rule 10b-5 analogous to § 14(e), the court looked to Supreme Court precedent defining manipulation under rule 10b-5 as persuasive authority for its own holding under § 14(e). Id. For a further comparison of the two rules, see infra notes 79-80 and accompanying text.
43. 430 U.S. 462 (1977). In Santa Fe, defendant Santa Fe Industries, Inc. (Santa Fe), executed a short form merger with Kirby Lumber Corp. (Kirby) pursuant to Delaware law, whereby an owner of more than 90% of a corporation's stock can compel minority shareholders to sell their shares back to the corporation at a price set by the board of directors. Id. at 465. See DEL. CODE ANN. tit. 8, § 253(a) (1975). Kirby's minority shareholders objected to the terms of the merger and brought suit in federal court, alleging that Santa Fe had offered a
intended to mislead or deceive investors by artificially affecting market activity. This limited definition of manipulation further convinced the Third Circuit that an element of deception was required in order to find manipulation under section 14(e).

Third, the Schreiber court examined the Supreme Court’s broad language in Santa Fe instructing courts to be reluctant to federalize state corporate law. Reasoning from Santa Fe, the Third Circuit found that without a requirement of deception, potentially every action undertaken during a tender offer battle would amount to manipulation under section 14(e). This result, the Third Circuit found, would violate the Santa Fe instructions because it would require federal supervision of the fairness of virtually every cash tender offer, and thereby mandate the federalization of state corporate law.

For the above reasons, the Third Circuit refused to endorse an expansive interpretation of manipulation, and held, in accordance with the

fraudulently undervalued price for Kirby’s stock in an attempt to freeze out the minority shareholders in violation of rule 10b-5. 430 U.S. at 466-67.

At the outset, the Supreme Court rejected the Second Circuit’s finding that a breach of fiduciary duty, absent deception, misrepresentation, or nondisclosure, violated rule 10b-5. Id. at 476. Instead, the Supreme Court held that a plaintiff must show that the defendant’s conduct was either “manipulative” or “deceptive” in order to prove a cause of action under rule 10b-5. Id. at 473-77.

Examining the claim before it, the Supreme Court found that there was no deception because there was full disclosure to the minority shareholders of all necessary information on which to base their investment decision. Id. at 474. In determining that Santa Fe’s conduct was not manipulative, the Santa Fe Court found that, in the securities area, manipulation was virtually a “term of art” referring generally to practices such as wash sales or rigged prices. Id. at 476. This “term of art,” the Court held, was not intended to regulate the alleged violation, which constituted no more than corporate mismanagement and breach of fiduciary duty. Id. at 477. Because there was no deception or manipulation, the Supreme Court concluded that there was no rule 10b-5 violation. Id. at 477, 480.

44. 425 U.S. 185 (1976). In Ernst & Ernst, plaintiff, Hochfelder, alleged that the accounting firm, Ernst & Ernst, had negligently failed to discover an escrow account fraud scheme perpetrated by the president of a brokerage firm that retained Ernst & Ernst. Id. at 190. Hochfelder alleged that this negligent nonfeasance violated rule 10b-5. Id. The Supreme Court held that mere negligent conduct under rule 10b-5 was not enough to hold a defendant liable; rather, a defendant must have the “intent to deceive, manipulate, or defraud.” Id. at 193. Because no intentional conduct was alleged in the complaint, the Supreme Court concluded that there was no rule 10b-5 violation. Id. at 193, 214-15.

45. See Santa Fe, 430 U.S. at 477; Ernst & Ernst, 425 U.S. at 199. For a further discussion of the Supreme Court’s interpretation of manipulation, see infra notes 61-63 and accompanying text.

46. 731 F.2d at 166.

47. Id. The language in Santa Fe to which the Schreiber court referred states that “[a]bsent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities . . . .” 430 U.S. at 479.

48. 731 F.2d at 166.

49. Id.
Second Circuit's view, that deception was an essential element of a manipulation claim under section 14(e). The court concluded that because Burlington fully disclosed its withdrawal of the December tender offer, there was no deception, and thus, no manipulation under section 14(e).  

The Schreiber court next rejected Schreiber's second claim that Burlington's failure to disclose the golden parachutes constituted a material omission in violation of section 14(e). Although the Third Circuit found that the alleged nondisclosure incorporated a claim of deception, it denied recovery because the nondisclosure was not causally linked to Schreiber's losses.  

In conclusion, the Third Circuit stated that although it did not approve of the alleged self-dealing conduct of the defendants, it was constrained by the language in Santa Fe stating that the federal securities laws were designed to ensure full disclosure, and were not intended to create a federal remedy for every form of fiduciary misconduct. As a result, the court determined that Schreiber's only recourse was to file a state law claim for breach of fiduciary duty or breach of contract.  

Generally, section 14(e) contains two distinct prohibitory clauses: the first proscribes misstatements and omissions of material fact, and the second prohibits fraudulent, deceptive, or manipulative acts. Schreiber's first claim was that the defendants engaged in manipulative acts in

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50. Id. The Schreiber court conceded that the language in § 14(e) could be interpreted to proscribe a broader range of conduct than misrepresentation or deception. Id. In light of the legislative intent and relevant Supreme Court precedent, however, the Third Circuit was convinced that deception was a requirement of manipulation under § 14(e).

51. Id.

52. Id.

53. Id. Specifically, the Schreiber court held that [t]he losses . . . sustained were the result of Burlington's decision to cancel the December offer, a decision unaffected by Burlington's alleged nondisclosure in the January offer. Even if Burlington had made full disclosure in the January offer, this information would have made no difference to shareholders like Schreiber, whose injury had already been caused by the December recission. Lacking a causal link between the alleged misrepresentation and the injuries, Schreiber's second theory also fails.

Id.

54. Id. at 167.

55. Id. at 167 & n.5. A state law breach of contract and breach of fiduciary duty action on behalf of the same class of shareholders represented by Schreiber in federal court is pending before the Delaware Court of Chancery. See Gilbert v. El Paso Co., No. 7075 (Del. Ch. filed Jan. 17, 1984).

violation of the second clause of section 14(e).\textsuperscript{57} Much controversy has arisen as to what constitutes a manipulative act within the purview of section 14(e).\textsuperscript{58} Unable to find a definition of manipulation within the Williams Act or either of the Securities Acts, the Schreiber court, and other courts, have relied on the definition the Supreme Court has set forth in interpreting manipulation under rule 10b-5.\textsuperscript{59} It is suggested that this reliance is proper in light of the fact that manipulation is a technical term, and therefore should be consistently defined throughout the Securities Acts.\textsuperscript{60}

In defining manipulation under rule 10b-5, the Supreme Court in \textit{Santa Fe} found that the term refers "generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity."\textsuperscript{61} In \textit{Ernst \& Ernst}, another case involving rule 10b-5, the Supreme Court declared that manipulation "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the market price of securities."\textsuperscript{62} In these two decisions, it is submitted that the Supreme Court consistently applied a two-part definition of manipulation. This definition requires that first, the defendant engage in conduct which artificially affects the market price of the stock, and second, the defendant intend to mislead or deceive investors through this conduct.\textsuperscript{63}

In comparing this two-part definition to the formulation articulated in \textit{Mobil}, it is suggested that the \textit{Mobil} definition of manipulation fails to satisfy the Supreme Court's two requirements. In \textit{Mobil}, the Sixth Circuit held that U.S. Steel's acts were manipulative in violation of section

\textsuperscript{57} 731 F.2d at 165.

\textsuperscript{58} There is currently a split of opinion among the circuits as to whether some form of deception or misrepresentation is a necessary element of manipulation under \$ 14(e). For a further discussion of this controversy, see \textit{supra} notes 25-38 and accompanying text.

\textsuperscript{59} \textit{See}, e.g., \textit{Schreiber}, 731 F.2d at 166 (citing \textit{Santa Fe; Ernst \& Ernst}); Ballard v. Rockwell Int'l Corp., 683 F.2d 51, 56 (2d Cir. 1982) (same); \textit{Mobil}, 664 F.2d at 374 (same).

\textsuperscript{60} \textit{See} \textit{Santa Fe}, 430 U.S. at 476-77 (manipulation is a "technical term"). In \textit{Ernst \& Ernst}, the claim before the Supreme Court was for manipulation under rule 10b-5, but the Court looked beyond the rule and found that manipulation is "virtually a term of art when used in connection with securities markets." 425 U.S. at 199 (emphasis added).

\textsuperscript{61} 430 U.S. at 476 (emphasis added). For a discussion of the facts and reasoning in \textit{Santa Fe}, see \textit{supra} note 43.

\textsuperscript{62} 425 U.S. at 199 (emphasis added). For a discussion of the facts and holding in \textit{Ernst \& Ernst}, see \textit{supra} note 44.

\textsuperscript{63} In \textit{Schreiber}, the district court clearly set forth this two-part definition, stating that manipulative activity must \textit{artificially} affect the market price and do so in a misleading or deceptive manner. 568 F. Supp. at 202. \textit{See also} Note, \textit{Tender Offer Defensive Tactics and The Business Judgment Rule}, 58 N.Y.U. L. Rev. 621, 634 (1983) (definition of manipulation contains two elements: first an intent to deceive or mislead; second an artificial affecting of market activity).
14(e) solely because they artificially affected market activity.\textsuperscript{64} This holding is improper because it focuses exclusively on the artificiality element. Moreover, the Sixth Circuit disregarded the second requirement by expressly finding that manipulation occurred despite the fact that all conduct affecting the market was fully disclosed, and thus could not have misled or deceived the investors.\textsuperscript{65}

Because the Mobil court failed to require this second element of deception in its definition of manipulation, it is suggested that the Schreiber court properly declined to follow that court’s reasoning.\textsuperscript{66} By following the lead of the Second Circuit in Buffalo Forge and Data Probe instead, the Third Circuit correctly agreed that the definition of manipulation under section 14(e) includes an element of deception.\textsuperscript{67}

Furthermore, in applying the Supreme Court’s two-part definition to the manipulative conduct alleged in Schreiber, it becomes clear that Burlington’s conduct did not constitute manipulation. Schreiber alleged that the cancellation of the validly accepted December tender offer was a manipulative act in violation of section 14(e).\textsuperscript{68} Arguably, the withdrawal of the December tender offer artificially affected El Paso’s stock price, and therefore satisfied the first element of the Supreme Court’s definition.\textsuperscript{69} In order to satisfy the second element of the Supreme Court’s definition, however, the defendants must have also intended to mislead or deceive the shareholders by cancelling the Decem-

\textsuperscript{64} 669 F.2d at 375. For a full discussion of the Mobil holding, see supra notes 26-31 and accompanying text.

\textsuperscript{65} Id. at 376-77. The Sixth Circuit did concede that nondisclosure is usually an essential element of manipulation; nonetheless, the Mobil court concluded that there were instances, such as the case before it, where disclosure will not prevent a finding of manipulation. Id. at 376. The Mobil court’s major concern was that Marathon’s shareholders had no real choice but to accept U.S. Steel’s offer, even if they were fully informed of the effects of the lock-up options. Id. at 377. In other words, the concern that prompted the Mobil court to find manipulation was that the defendants had treated the shareholders unfairly. That was exactly the problem before the Santa Fe Court, however, where the minority shareholders claimed that they were treated unfairly because they had no choice but to sell their stock to the majority. See Santa Fe, 430 U.S. at 477. Yet the Supreme Court held that unfair treatment alone did not amount to manipulation under the federal securities laws. Id.

\textsuperscript{66} 731 F.2d at 166. For further criticism of the Mobil decision see Prentice, supra note 16, at 555-58; Profusek, Tender Offer Manipulation: Tactics and Strategies After Marathon, 36 Sw. L.J. 975, 991-95 (1982); Note, supra note 29, at 281-82; Note, Lock-Up Enjoined Under Section 14(e) of Securities Exchange Act, 12 SETON HALL L. REV. 881, 891-95 (1982).

\textsuperscript{67} 731 F.2d at 165-66. For a discussion of the Second Circuit’s holdings in Buffalo Forge and Data Probe, see supra notes 32-38 and accompanying text.

\textsuperscript{68} 731 F.2d at 165.

\textsuperscript{69} The district court conceded that the defendants’ conduct with respect to the tender offer influenced the price of the stock. 568 F. Supp. at 203. After finding no deception in its analysis of Schreiber’s manipulation claim, however, the Third Circuit did not proceed to analyze whether the defendants’ conduct artificially affected the market price of El Paso’s stock. 731 F.2d at 166-67.
ber tender offer. All of the defendants’ conduct in the course of cancelling the December offer was fully disclosed, and therefore was not misleading or deceiving.\(^70\) As a result, Burlington’s alleged misconduct fails to satisfy the second part of the Supreme Court’s definition of manipulation, and thus the Schreiber court properly dismissed Schreiber’s manipulation claim.

It is further suggested that the Schreiber court properly rejected Schreiber’s manipulation claim in light of the Supreme Court’s rationale in *Santa Fe*. In *Santa Fe*, the Supreme Court held that conduct which gave rise to a state law claim did not implicate the federal securities laws if the full disclosure requirements of federal law were satisfied.\(^71\) A main policy consideration behind this holding was the Supreme Court’s reluctance to federalize areas of traditional state law when the federal interest in disclosure had been served.\(^72\) This reluctance is equally applicable in the context of Schreiber’s claim for manipulation which essentially constituted a state law claim—breach of contract.\(^73\) As the Schreiber court noted, the conduct which gave rise to this claim was fully disclosed to the El Paso shareholders.\(^74\) As a result of this disclosure, the Third Circuit properly adhered to the principles set forth in *Santa Fe*, and found that the federal securities laws did not provide Schreiber a remedy, because to do so would federalize an area of traditional state law.

Schreiber’s second claim alleged that defendants violated section 14(e)’s prohibition of misstatements and omissions of material fact\(^75\) by failing to disclose in the January tender offer the material facts that (1) El Paso granted golden parachutes to certain members of its board of directors, and (2) El Paso’s management interfered with the December offer and approved the January offer because of self-dealing motives.\(^76\) Schreiber alleged that this misconduct, which essentially constituted a breach of the directors’ fiduciary duty, injured her to the extent that she was deprived of the benefits of the December tender offer.

\(^70\) 731 F.2d at 166. The Schreiber court specifically found that the defendants disclosed all conduct concerning the withdrawal of the December tender offer to the shareholders. *Id.*

\(^71\) 430 U.S. at 479-80.

\(^72\) *Id.* For a full discussion of the *Santa Fe* opinion, see *supra* note 43 and accompanying text.

\(^73\) 731 F.2d at 165. Schreiber’s manipulation claim alleged that Burlington wrongfully withdrew its December offer after it was fully subscribed by the El Paso shareholders. *Id.* This claim could be litigated under traditional state law contract principles of offer and acceptance. *See id.* (Schreiber seeks to “convert an arguable breach of contract into a Williams Act violation”).

\(^74\) *Id.* at 166. The Schreiber court specifically stated that defendants “disclosed to the shareholders and to the general public the acts that allegedly constitute a breach of contract.” *Id.*

\(^75\) For a discussion of § 14(e)’s two prohibitory clauses and their application, see *supra* note 6 and accompanying text.

\(^76\) 731 F.2d at 166.
Although the Third Circuit, in analyzing Schreiber’s manipulation claim, recognized that actions under rule 10b-5 and section 14(e) were analogous, the court failed to consider whether the principles governing rule 10b-5 decisions were applicable in analyzing Schreiber’s material omission claim. It is suggested that rule 10b-5 case law should apply because the language prohibiting material omissions and misstatements of fact in rule 10b-5 and section 14(e) is identical. Therefore, Congress arguably intended the two antifraud provisions to be interpreted similarly, at least in regard to material omission and misstatement claims.

77. Id.
78. Id. at 167.
79. Rule 10b-5 reads in part as follows:

It shall be unlawful for any person . . .

(1) to employ any device scheme, or artifice to defraud,
(2) 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
(3) 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 a security.


80. Because § 14(e) and rule 10b-5 have similar language and goals, both courts and commentators alike have held that the two antifraud provisions are analogous. See, e.g., Panter v. Marshall Field & Co., 646 F.2d 271, 282 (7th Cir.) ("[T]he two provisions are coextensive in their antifraud prohibitions . . . [T]hey are therefore construed in pari materia by courts."); cert. denied, 454 U.S. 1092 (1981); Golub v. PPD Corp., 576 F.2d 759, 764 (8th Cir. 1978) ("Section 10(b) and Rule 10b-5 and . . . § 14(e) are obviously aimed at the same general evils . . . and should be similarly construed."); Note, Tender Offer Defensive Tactics—Federal Regulation of Management’s Prerogative, 10 Fordham Urb. L.J. 633, 642 (1982) (no indication in legislative history that the two antifraud provisions should be interpreted differently). It is arguable, however, that § 14(e) should have a broader application than rule 10b-5 because of the Supreme Court’s mandate in Santa Fe that rule 10b-5 be read in light of § 10(b). See 430 U.S. at 471-74. Section 10(b) provides:

It shall be unlawful for any person . . .

(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate . . .

15 U.S.C. § 78j(h) (1982). Because rule 10b-5 is limited by § 10(b), and § 10(b) only prohibits manipulative and deceptive acts, while § 14(e) prohibits not only manipulative and deceptive acts, but also fraudulent acts, § 14(e) could be read to cover more conduct than rule 10b-5. See, e.g., Juniewicz, The Appropriate Limits of Section 14(e) of The Williams Act, 62 Tex. L. Rev. 1171, 1194-95 (1984) (use of term fraudulent in § 14(e) connotes § 14(e) has broader coverage than rule 10b-5); Steinberg, Fiduciary Duties and Disclosure Obligations in Proxy and Tender Contests for Corporate Control, 30 Emory L.J. 169, 226 (1981) (use of fraudulent acts and
The Third Circuit, instead of adopting this approach, used a truncated analysis, found no causation between the alleged omissions and Schreiber's injury, and dismissed Schreiber's second claim.\textsuperscript{81} Although stating that it did not approve of the alleged self-dealing conduct, the court concluded that the language in Santa Fe required it to find that Schreiber's claims were not actionable under the securities laws.\textsuperscript{82}

Upon a closer reading of the Santa Fe decision and in light of the Supreme Court's holding in Affiliated Ute Citizens v. United States,\textsuperscript{83} it is suggested that the Third Circuit's reliance on the instructions in Santa Fe and its analysis of causation were improper.

In Santa Fe, the Supreme Court, in arriving at its conclusion, specifically relied on the trial court's finding of fact that there was full disclosure to the shareholders of all information concerning the merger.\textsuperscript{84} Based on this finding, the Santa Fe Court held that a "breach of fiduciary duty, . . . without any deception, misrepresentation or non-disclosure," did not violate rule 10b-5.\textsuperscript{85} In contrast to Santa Fe, the claim in Schreiber was not merely that defendants' breached their fiduciary duty, but also that they failed to disclose the material facts underlying this breach.\textsuperscript{86} Therefore, it is submitted that the Santa Fe Court's analysis relied on by the Third Circuit does not control the issue at hand.\textsuperscript{87}

practices language in § 14(e) suggests § 14(e) has a broader scope than rule 10b-5).

Regardless of whether § 10(b)'s limitation on rule 10b-5 results in § 14(e) having a broader application, it is suggested that material omission and misstatement claims under § 14(e) and rule 10b-5 should be similarly analyzed. The mandate that rule 10b-5 be read in light of § 10(b) does not affect material omission or misstatement claims under rule 10b-5 because such claims incorporate an element of deception, and thus fit within the scope of § 10(b). \textit{See} Santa Fe, 430 U.S. at 475 n.15 (citing Affiliated Ute, 406 U.S. 128). Because Congress took the language proscribing material omissions and misstatements in § 14(e) verbatim from rule 10b-5, these claims should be similarly analyzed under either provision.

81. 731 F.2d at 166. For the Third Circuit's specific holding on the issue of causation, see supra note 53.

82. \textit{Id.} at 167. In arriving at this conclusion, the Schreiber court relied on the language of Santa Fe, stating: "Once full and fair disclosure has occurred, the fairness of the transaction is at most a tangential concern of the statute." \textit{Id.} (citing Santa Fe, 430 U.S. at 477-78). It is suggested, however, that the Third Circuit improperly relied on this language because in Schreiber's second claim, she was specifically asserting a lack of full disclosure.


84. 430 U.S. at 474. For a full discussion of the facts of Santa Fe, see supra note 43.

85. \textit{Id.} at 476 (emphasis added).

86. 731 F.2d at 166. For the specific allegations set forth in Schreiber's second claim, see supra text accompanying notes 75-77.

87. \textit{See} Note, Suits for Breach of Fiduciary Duty Under Rule 10b-5 After Santa Fe Industries, Inc. v. Green, 91 HARV. L. REV. 1874 (1978) (Santa Fe decision eliminates from rule 10b-5 coverage only a case which includes no allegation of deception).
In what has been found to be an important footnote,\(^88\) however, the Santa Fe opinion did address this issue. Footnote fourteen addressed the Santa Fe plaintiff's alternative claim that the failure to give advance notice of the merger was a material nondisclosure in violation of rule 10b-5. Fairly read, the footnote stated that there was no material omission because the shareholders did not indicate how they could have acted to avoid their injuries had the undisclosed facts been disclosed.\(^89\) Conversely, it seems that if the shareholders had indicated how they could have prevented their damages by acting differently had they known the undisclosed facts, the Court would have found a material omission.\(^90\)

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\(^88\) 430 U.S. at 474 n.14. Footnote 14 of the Santa Fe opinion reads as follows:

In addition to their principal argument that the complaint alleges a fraud under clauses (a) and (c) of Rule 10b-5, respondents also argue that the complaint alleges nondisclosure and misrepresentation in violation of clause (b) of the Rule. Their major contention in this respect is that the majority stockholder's failure to give the minority advance notice of the merger was a material nondisclosure, even though the Delaware shortform merger statute does not require such notice. But respondents do not indicate how they might have acted differently had they had prior notice of the merger. Indeed, they accept the conclusion of both courts below that under Delaware law they could not have enjoined the merger because an appraisal proceeding is their sole remedy in the Delaware courts for any alleged unfairness in the terms of the merger. Thus, the failure to give advance notice was not a material nondisclosure within the meaning of the statute or the Rule.


\(^89\) 430 U.S. at 474 n.14. The shareholders could not indicate how they might have acted differently had notice been given because they would not have been able to stop the merger in any event. Under Delaware law, as it was understood at that time, the sole remedy available to dissatisfied minority shareholders was to petition the Delaware Court of Chancery for an appraisal of the fair value of their shares. *Id.* at 465. After Santa Fe was decided, however, the Delaware Supreme Court reevaluated its merger law precedent and adopted a new approach. See, e.g., Roland Int'l Corp. v. Najjar, 407 A.2d 1032 (Del. 1979); Tanzer v. Int'l Gen. Indus., 379 A.2d 1121 (Del. 1977); Singer v. Magnavox Co., 580 A.2d 969 (Del. 1977). For a discussion of this change in Delaware law, see Ferrara & Steinberg, supra note 88, at 264, 277-81.

\(^90\) It is suggested that this analysis of materiality is consistent with the Supreme Court's holding in TSC Indus. v. Northway, Inc., 426 U.S. 438 (1976). In TSC, the Supreme Court held that under §14(e), a fact is material if "the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *Id.* at 449. The only way a fact could assume actual significance in an investor's decision, it is submitted, is if the investor could take some action pursuant to its disclosure.

The TSC definition has subsequently been applied to actions brought under both rule 10b-5 and §14(e). See, e.g., Huddleston v. Herman & Maclean, 640 F.2d 534 (5th Cir. 1981) (rule 10b-5), aff'd in part, rev'd in part on other grounds, 459 U.S. 375 (1983); Healey v. Catalyst Recovery, Inc., 616 F.2d 641 (3rd Cir. 1980) (rule 10b-5); Seaboard World Airlines v. Tiger Int'l, Inc., 600 F.2d 355 (2d Cir.
The consequence of deeming the omission material is very significant in light of the Supreme Court's holding in Affiliated Ute.91 In a rule 10b-5 decision, the Affiliated Ute Court held that in cases involving non-disclosure, a showing that the omitted fact was material established the necessary element of causation in fact.92

Read together, Santa Fe and Affiliated Ute provide a framework for analyzing material omission claims under section 14(e), even in cases such as Schreiber where the omission was of conduct which constituted a breach of fiduciary duty actionable under state law. The two cases stand for the proposition that if a plaintiff can show an alternate course of action that could have been taken to avoid harm had there been full disclosure, then the nondisclosure is material, and the causation element is established.93 Applying this analysis to the Schreiber case, Schreiber needed to demonstrate that she could have followed an alternate

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92. Id. at 152-54 (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)). In Mills, the Supreme Court applied the same test under the proxy rules. 396 U.S. at 385. The Mills holding was later reaffirmed by the Supreme Court in TSC, 426 U.S. at 444 (noting that the definition of materiality now assumes a "heightened significance").

Before the Affiliated Ute decision, reliance was a necessary element of a rule 10b-5 cause of action. See, e.g., List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.) (reliance required for civil action under rule 10b-5), cert. denied, 382 U.S. 811 (1965). This requirement arose because actions under rule 10b-5 were shaped around the common law action of deceit, in which proof of reliance was necessary to show that the fraudulent conduct caused the alleged injury. See Note, The Reliance Requirement in Private Actions Under SEC Rule 10b-5, 88 Harv. L. Rev. 584, 586-87 (1975).

In Affiliated Ute, the Supreme Court recognized the difficulties inherent in showing proof of reliance on a fact that was not disclosed. 406 U.S. at 152-54. As a result, the Court reasoned that in cases of nondisclosure, "positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material. . . . [The] obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact." Id. (citations omitted).

93. Underlying this approach is the premise that all information the disclosure of which would allow a shareholder to alter her position in order to avoid harm is material, i.e., it is that type of information which a reasonable holder would consider in making an investment decision. See supra note 90. A further premise behind this analysis is that once materiality is shown, causation is established without the need to show reliance. It is suggested that this premise is correct because both the letter and spirit of Affiliated Ute show, at least in cases of nondisclosure, that proof of materiality has been substituted for proof of reliance as the necessary element to prove causation. See, e.g., Titan Group, Inc. v. Faggen, 513 F.2d 234 (2d Cir. 1975) (materiality rather than reliance is the decisive element to show causation in nondisclosure cases); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 240 (2d Cir. 1974) (Affiliated Ute eliminates any reliance requirement in nondisclosure cases; only materiality need be shown); A. Jacobs, Litigation and Practice Under Rule 10b-5, § 64.02, at 3-326 (1984) (once materiality is shown, causation is established as a matter of law). But cf. Note, supra note 92 (in nondisclosure cases
course of action aimed at preventing the withdrawal of the December tender offer had there been full disclosure. For example, she could have argued that had there been full disclosure in connection with the January tender offer, she could have sought to enjoin El Paso’s management from wrongfully interfering with the fully subscribed December tender offer. Alternatively, she could have asserted that had there been full disclosure, she could have attempted to rally the other shareholders to reject the less lucrative January tender offer, which would most likely have led to Burlington’s reinstatement of the December tender offer. In this manner, Schreiber would have provided the court a basis upon which to find that the omissions were material and caused her injury.

Admittedly, Schreiber’s material omission claim, like her claim that the substitution of the January tender offer for the December tender offer constituted a manipulative act, incorporates an element of state law—breach of the directors’ fiduciary duties. It is suggested, however, that unlike Schreiber’s manipulation claim, the policy concerns underlying the Santa Fe decision do not justify a refusal to resolve Schreiber’s after Affiliated Ute, a showing of materiality leads only to a rebuttable presumption of reliance).

94. A similar line of argument has been accepted by the circuit courts in deciding claims for failure to disclose a breach of fiduciary duty under rule 10b-5. See, e.g., Healey v. Catalyst Recovery, Inc., 616 F.2d 641 (3d Cir. 1980). Alabama Farm Bureau Mut. Cas. Co. v. American Fidelity Life Ins. Co., 606 F.2d 602 (5th Cir. 1979), cert. denied, 449 U.S. 920 (1980); Kidwell ex rel. Penfold v. Meikle, 597 F.2d 1273 (9th Cir. 1979); Goldberg v. Meridor, 567 F.2d 299 (2d Cir. 1977), cert. denied, 434 U.S. 1069 (1978); Wright v. Heizer Corp., 560 F.2d 296 (7th Cir. 1977), cert. denied, 434 U.S. 1066 (1978). But see Beisenbach v. Guenther, 588 F.2d 400 (5d Cir. 1978). In this line of cases, the courts have looked solely to the issue of whether the shareholder could have brought a state court action to enjoin the transactions if the undisclosed facts were disclosed; if the plaintiff could have brought such an action, then the omission was material and the plaintiff could recover.

Much controversy has arisen, however, as to whether a plaintiff need actually prove that the state court action would have been successful. The circuit courts have taken a variety of positions on this key issue. See, e.g., Healey, 616 F.2d 641 (test is whether there would have been a reasonable probability of ultimate success in the state court action); Alabama Farm Bureau, 606 F.2d 609 (plaintiff need only show a prima facie case for relief under state law). For an in depth discussion of this line of cases, see Note, supra note 88.

95. As this proposed allegation suggests, it is submitted that these cases need not be limited to the narrow issue of whether there was a state law claim which could have been brought if there had been full disclosure. See supra note 94. If a plaintiff can show that there was some preventative action that could have been taken to avoid harm had there been dislocation, including a state law suit, then it is submitted that the omitted facts were material, causation is established, and the plaintiff should recover. The degree to which a plaintiff must prove that the alternate course of action would have been successful would still need to be settled. It is suggested, however, that requiring too great a burden of proof would undermine the policy behind Affiliated Ute, because it would effectively reinstate the need for the plaintiff to show reliance on the undisclosed facts.
material omission claim under the federal securities laws.\textsuperscript{96} The principal claim in \textit{Santa Fe} was found to be completely a state law issue because there was no assertion of nondisclosure.\textsuperscript{97} As a result, the Supreme Court refused to find a cause of action under the federal securities laws for fear of federalizing state corporate law.\textsuperscript{98} Unlike the \textit{Santa Fe} plaintiff, however, Schreiber also asserted that the defendants' nondisclosure of the existence of the golden parachutes and their impact on the El Paso directors constituted a material omission in violation of section 14(e).\textsuperscript{99} Because the main goal of section 14(e) and the federal securities laws in general is full disclosure,\textsuperscript{100} a federal remedy should be allowed where frustration of that goal causes injury to the investor—the person for whose protection the disclosure requirements were enacted.\textsuperscript{101} This federal cause of action should be available in cases of nondisclosure, regardless of whether state law is also implicated.

In conclusion, it is suggested that courts should not expand the definition of manipulation under section 14(e) to encompass more activity than that which falls within the Supreme Court's two-part definition. As a result, manipulative acts should only include conduct that artificially affects the stock market price \textit{and} is intended to mislead or deceive investors. In light of this definition, the Third Circuit's requirement of an element of deception as an essential ingredient of manipulation under section 14(e) was proper.

In addition, as the Third Circuit's resolution of Schreiber's second claim indicates, there is much uncertainty as to what constitutes a material omission actionable under section 14(e). Furthermore, it is unclear how federal courts should analyze nondisclosures of conduct which constitutes a breach of a director's fiduciary duty under state law. It is suggested that the analysis derived from \textit{Santa Fe} and \textit{Affiliated Ute} provides a good basis upon which to resolve section 14(e) material omission claims, regardless of whether the claim is also actionable at state law. It is strongly urged, however, that the Supreme Court address the unanswered issues raised in \textit{Schreiber} by setting forth the appropriate definition.

\textsuperscript{96} For a further discussion of the policy concerns underlying \textit{Santa Fe} and their effect on Schreiber's manipulation claim, see supra note 72-74 and accompanying text.

\textsuperscript{97} 430 U.S. at 474-79. The Supreme Court specifically found that this "case comes to us on the premise that the complaint failed to allege a material misrepresentation or material failure to disclose." \textit{Id}.

\textsuperscript{98} \textit{Id.} at 478.

\textsuperscript{99} 731 F.2d at 166.

\textsuperscript{100} See \textit{Santa Fe}, 430 U.S. at 477-78 (the fundamental purpose of the Securities Exchange Act is to assure full and fair disclosure).

\textsuperscript{101} The Williams Act was specifically designed to protect investors. \textit{See} Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (the sole purpose of the Williams Act is the protection of investors). For a further discussion of the purpose of the Williams Act and, specifically, § 14(e), see supra notes 2-5 and accompanying text.
tion of manipulation under section 14(e), and by defining the proper scope of section 14(e)'s prohibition of material omissions, particularly where the omissions also give rise to state law claims. Such guidelines are essential to enable courts to adjudicate properly future claims under section 14(e).

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