In the

Supreme Court of the United States

FRANCIS A. RONDEAU,

Petitioner

v.

MOSINEE PAPER COMPANY

No. 74-415

Washington, D. C.
April 15, 1975

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HOOVER REPORTING COMPANY, INC.
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MOSINEE PAPER COMPANY

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Tuesday, April 15th, 1975

The above-entitled matter came on for hearing at 10:25 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DAVID E. BECKWITH, ESQ., 77 East Wisconsin Avenue, Milwaukee, Wisconsin 53202 For Petitioner

LAURENCE C. HAMMOND, JR., ESQ., 780 North Water Street, Milwaukee, Wisconsin 53202 For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-415, Rondeau versus Mosinee Paper Corporation.

Mr. Beckwith, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID E. BECKWITH, ESQ.,

ON BEHALF OF PETITIONER

MR. BECKWITH: Mr. Chief Justice and may it please the Court:

This case presents the question of what is the appropriate judgment to enter at this time for the violation of -- for a violation of the Williams Act which occurred in the spring and summer of 1971.

The District Court, Western District of Wisconsin, Judge Doyle, determined in February of 1973, that the appropriate judgment was to dismiss the complaint.

This was pursuant to a motion for summary judgment.

The Court of Appeals reversed and remanded in July of 1974, directing the District Court to enter an order sterilizing 3 percent of the stock of the Defendant, Mr. Rondeau, for a period of five years and permanently enjoining Mr. Rondeau from further violations.

The Williams Act, as you know, amended the Securities Exchange Act of 1934. In essence it provides that a shareholder who acquires more than 5 percent of the

shares of a covered company -- and that figure, incidentally, was 10 percent until December 31, 1970, approximately six months before the violation -- a shareholder who acquires more than 5 percent is required to file a schedule 13D which sets forth his identity, sources of financing, purpose and other matters.

It is a notice statute. It is designed to give management and other shareholders a notice of accumulation of stock. It sets the rules of contest for tender offers and pretender offer conduct.

QUESTION: The 13D has to be filed with the company and with the Exchange.

MR. BECKWITH: Yes.

QUESTION: And with the Commission.

MR. BECKWITH: Correct.

QUESTION: And where else, if anywhere?

MR. BECKWITH: That is all.

QUESTION: And how do shareholders readily and promptly get knowledge of this?

MR. BECKWITH: Usually through information from management, if it is filed as a pretender offer matter. It can come through publicity generally, if it is picked up -- the filing is picked up.

QUESTION: Neither the Commission nor the Exchange normally makes any efforts to disseminate the information

to the shareholders.

MR. BECKWITH: That is correct, but, of course, the Exchange and the Commission do have rules regarding what management must publicize and this might be considered such relevant information that management might be required to publicize it, in certain circumstances.

QUESTION: And it would often be deemed to be in management's interest to publicize it, too.

MR. BECKWITH: It might be.

QUESTION: Yes.

MR. BECKWITH: The District Court concluded that there was no issue of material fact as to the propositions which it included in its opinion under the heading of facts.

That matter was strenuously contested on appeal, as Judge Pell's dissent indicates, but both the majority in the Court of Appeals and the dissent, Judge Pell, agreed with Judge Doyle that summary judgment was appropriate and that the facts were not -- the operative facts were not in material dispute.

QUESTION: So that Judge Doyle's statement of facts is basically not findings of fact but statements of fact that were undisputed.

MR. BECKWITH: That is my position and that is the way he states it. That matter has been raised again here by Respondents, we think improperly be ause no cross-

petition for certiorari was filed.

The facts, as stated by Judge Doyle, are essentially these. Mosinee is a company in central Wisconsin engaged in the manufacture of pulp and paper. It is located in the small community of Mosinee near Wausau.

Mr. Rondeau is a business man in Mosinee. His business is in cold storage and cheese manufacture. He operates several companies, some of which bear his name and all of which are clearly identified with him in those smaller communities.

He began to purchase Mosinee stock in April of 1971 because he thought it to be a good investment. By May 17, his holdings had exceeded 5 percent. He had over 40,000 shares and 40,309 shares were 5 percent.

Accordingly, he was allowed to file a Schedule 13D on May 27, 1971. He did not do so and that is not contested, the fact of violation.

It was not until the chairman of the board of Mosinee, a Mr. Forester, wrote to Mr. Rondeau on July 30 and called to his attention in the letter that he might have problems, he, Rondeau, might have problems under the Securities Act, that Mr. Rondeau for the first time consulted legal counsel and was advised that he, indeed, did have problems under the Act and that he should discontinue his purchases and accumulate the information to file

a schedule 13-D which the District Court found that he promptly did. It was filed on August 25, 1971. This action was filed September 2, 1971.

That is an important fact. It is quite clear, we submit, that Mr. Rondeau did not file in response to this action, nor was the purpose, we believe, of the suit, to force Mr. Rondeau to file.

Rather, it was to neutralize him or to tie him up.

In short, it was not to enforce the Act, but it was to use the Act to the advantage of the Company.

Now, that is indicated because the customary conduct in cases of this nature is for the company to file a motion for preliminary injunction, frequently, to seek a GRO.

The motion for preliminary injunction here was not filed with the complaint, but was filed some weeks later and then was withdrawn, in itself indicating that the company was apparently not sustaining irreparable injury which required a preliminary injunction.

QUESTION: Wasn't there an amended schedule?

MR. BECKWITH: Yes, there was.

QUESTION: After the institution of the lawsuit.

MR. BECKWITH: Yes. In late September, Mr. Rondeau filed an amended -- an amendment to his schedule --

QUESTION: Right.

It does not materially change the pertinent information in the schedule. In the attempt to get all of this lined up in August, the allocation between various purchasers, various defendants, was slightly misstated.

The total number of shares was not misstated, but the allocation was slightly misstated.

QUESTION: That is, among himself and his various corporations.

MR. BECKWITH: Right. And the question of financing, he was -- had some difficulty in tracing whether he had used loans of various kinds for purchases and that was clarified in the subsequent schedule and the statement of purpose was amplified but not significantly changed in the amendment that was filed.

The Amendment was perhaps filed out of an abundance of caution. We do not contend one way or the other whether it was filed in response to the lawsuit.

QUESTION: Well, didn't the amendment for the first time indicate that its purpose might be the acquisition of control of the company?

MR. BECKWITH: No. The original schedule indicated that he -- one of his purposes might be to tender for stock, to seek control and the amendment simply amplified that, with simply some additional language.

QUESTION: At the time of these purchases, the

chairman of Mosinee was a man by the name of Forester, a lawyer who did not practice but who, with his company, managed trusts.

Mr. Forester, his family and the trusts that he managed were the largest shareholders in common as a group of Mosinee.

The President was Mr. Scholtens. They became informed of Mr. Rondeau's purchases very early and both of them monitored his purchases by keeping tabulations.

Mr. Scholtens called Mr. Rondeau when his purchases reached the level of approximately 18,000 shares.

Mr. Rondeau's purchases were open and notorious. Most of the shares were purchased in his own name, some 34,000. [?] No shares were purchased in straight name.

Over 40,000 shares were purchased in his own name or in the names of companies bearing his name.

There seems to be no dispute that, at least by June or July, it was well-known to Mr. Scholtens and Mr. Forester that Ron deau was also associated with Mosinee Cold Storage and Wausau Cold Storage.

Mr. Forester's letter to Rondeau refers to "rumors in the mill" and the District Court found that it was well-known that Rondeau was purchasing stock.

His purpose, he has testified on deposition, and there were some 23 depositions taken in this case -- his

purpose initially was a matter of investment and continued to be a matter of investment.

As he acquired more shares, he expressed some interest in stockholder representation on the board but the District Court found that the -- that he had no control purpose and took no active steps toward the objective of control until after he received Mr. Forester's letter, talked to his attorney, and was advised that in the 13D he would have to state a purpose.

The conservative advice given by attorneys in filing 13D schedules is to state any purpose that you have or may have so that the veracity of your 13D cannot later be challenged if you decide to procede with a tender offer for a proxy statement.

That was what he did. But even by the time that the 13 D was filed, he had taken no real active step toward a tender offer. He had no financing lined up. He had not proceded to a higher or proxy-soliciting firm and et cetera.

The District Court concluded that there was no issue, that Mr. Rondeau had no serious intent to attempt to obtain control prior to Forester's letter, that Mr. Rondeau and his associates did not engage in intentional covert or conspiratorial conduct, rather, that the violation was unintentional and we submit the simple fact of the way he purchased the shares and how they were registered and the

fact that he knew that they knew that he was purchasing supports that and that Mr. Rondeau's schedule 13D met the requirements of the Act.

The Court therefore concluded that since there was an unintentional mistake and with the passage of time, it being some one year and a half after the violation had occurred, that it was appropriate to dismiss the complaint.

It is now, of course, several years after the violation. There has been no tender offer. There has been no proxy contest. Annual meetings have been conducted in the years 1971, or '72, '73 and '74 without contest.

As I have noted before, the motion for a prelinary injunction was withdrawn.

The Court of Appeals took quite a different view.

The Court of Appeals, in my view, accepted the facts as recited by Mr. -- by Judge Doyle but the Court of Appeals held that since there was a violation, there had to be some sort of a remedy and ordered a permanent injunction against further violation and a sterilization of 3 percent of the stock, by which I mean, he could not exercise the ordinary rights of the shareholder to vote 3 percent of his shares, the difference between the 5 percent and the 8 percent that he ultimately acquired.

The Court of Appeal's decision is somewhat ambiguous on the matter of harm. They do say that Mosinee was

harmed back in 1971 because they got the 13D information late but there is no indication of continuing harm or any harm in 1974 and they go on to state that, in all events, no proof of irreparable harm is necessary.

Obviously, this was a matter that was debated among the judges because there is a strong dissent by Judge Pell and a thorough discussion which I commend to the Court.

There was no finding by the Court of Appeals of a reasonable likelihood of future violations which would, I submit, be necessary to afford a permanent injunction and there was no explanation by the Court of Appeals of a nexus between the violation, any harm that may have resulted from the violation, and the relief that is ordered.

In short, the relief that is ordered really doesn't bear any relationship, I submit, to what the court found the violation to be or the harm to have existed back in 1971, if there was.

Perhaps I should state clearly what we are not contending.

We do not dispute that the Act was violated. We do not dispute Mosinee's standing to bring this suit, although it cannot, by this suit, benefit its shareholders who bought or sold stock during the period of violation.

We do not contend that injunctive or other remedies are inappropriate in all cases. In fact, we concede and

contend that injunctions and other remedies are appropriate in some cases. Much of the response --

QUESTION: Has there been any litigation by any of the shareholders who sold their stock to your client after May and before August?

MR. BECKWITH: There was a suit filed by the Valley Trust Company -- I may have the name wrong -- by counsel for -- same counsel that represents Mosinee.

Wisconsin Valley Trust Company happens to be the stock registrar for Mosinee Paper Company and Mr. Forester was the chairman of Mosinee. He is also a board member of the trust company.

That suit has not been pursued. Obviously, Rondeau would contest their standing to be a proper representative under Rule 23, as pleaded as a class action. It simply has pended.

QUESTION: And the class, the asserted class is the shareholders who sold their stock to Mr. Rondeau from the time of his violation until the time you made the 13D.

MR. BECKWITH: Yes, I --

QUESTION: Is that it?

MR. BECKWITH: Mr. Justice, I am not certain whether it is sold to Rondeau or sold stock, period, but it is one of those two.

QUESTION: This, I suppose, had been a relatively inactive over-the-counter market for the stock, had it?

MR. BECKWITH: Well, I don't know the trading history. I think it was traded relatively actively .

Incidentally, Mr. Forester himself, in his trust that he managed, purchased 20,000 shares in the days of July 30 and the few days following. And of course, the question would be raised as towhether shareholders who sold to Mr. Forester who then had inside information might also have the suit.

So it is a tangled skein on that side.

But this action, I submit, cannot adjust any rights between shareholders of the corporation, Mr. Rondeau and any other shareholders or former shareholders.

The purpose of the Williams Act, in our view, is to provide many of the rules of contest for tender offers and pretender offers. It is a notice statute. It filled the gap that existed in the 1934 Act.

Once a proper schedule is filed, the Act has done its job unless some sort of a cooling-off period may be required. For that reason, most cases involve preliminary injunctions.

The act of not-proscribed conduct, which is malum in se, that is to say, an uninformed businessman possessing the highest sense of business ethics would not necessarily know that if he purchased more than 5 percent of the stock of a corporation, he was guilty of violating a federal law and

required to file a schedule.

Now, that does not excuse the violation and that is not our position. What it does -- excuse me, Mr. Justice.

QUESTION: Mr. Beckwith --

MR. BECKWITH: Mr. Justice Rehnquist.

QUESTION: -- did Judge Pell's dissent indicate that on appeal to the Seventh Circuit the Plaintiff questioned the propriety of granting summary judgment suggesting that your client was not quite the innocent victim that he suggested he was?

Now, the Seventh Circuit majority apparently was willing to take Judge Doyle at his word that these facts were undisputed, but are they not in a position to raise here, if they raised in the Seventh Circuit, the question as to whether Judge Doyle should have resolved these questions without a factual hearing?

MR. BECKWITH: Well, in our reply brief, we suggest that the issue was not raised in the petition for certiorari. There was no cross-petition and that, therefore, it is not properly before the Court. But I would say to you, Mr. Justice Rehnquist, that even if one were to take that argument and even if one were to accept the fact -- and I might state in our argument -- in our arguments to Judge Doyle and in our briefs to Judge Doyle, we said, "Give Mosinee his facts and give them all the inferences that they

want from the facts."

With the passage of time and with the fact that the 13D has been filed, it doesn't make any difference.

QUESTION: Whatever Mr. Rondeau's motive might have been in the first instance.

MR. BECKWITH: That is right. I think there is ample evidence -- and if the Court is inclined to review the facts de novo, which I think would be unwise, but if that were to happen, there is ample evidence to support Judge Doyle's conclusion and the arguments of that or the description of that will be found in our Seventh Circuit brief which is -- I have the record that it is filed here.

QUESTION: Well, when you talk about ample evidence to support a judge's conclusion, it sounds like you are talking about something which has occurred after the trial and findings of facts.

MR. BECKWITH: I appreciate that and that has been the argument of Mosinee's counsel. What I really mean to say is that if you look at the testimony, there is not a substantial or significant material dispute as to the operative facts.

Those areas in which there might be some dispute or in which you might draw some inference differently are not essential, are not operative so far as the decision of this case.

Congress made it quite clear in the passage of the Act that it was not the intent of Congress to tip the balance and it was not the intent of Congress that the Williams Act could be used as a vehicle by management to neutralize a stockholder who might be kicking off the traces.

It is our position that the proper administration of the Williams Act should provide for flexibility, that the remedy should be carefully tailored to cure any corporate harm flowing from the violations as distinguished from anxiety by management.

For instance, a limited injunction for a cooling-off period might be appropriate in some cases.

Sterilization is not appropriate. That is a punitive remedy. The Act should be administered to avoid tipping the balance between the tender offeror and management.

The equal opportunity for the offeror and management to present their case will be frustrated if management can invoke a technical violation to prevent a large stockholder from exercising his rights for a long period of time.

There must be a showing of continuing, irreparable harm to the corporation as there was, incidentally, in the Bath case, which is one of the leading lower-court cases and is a Seventh Circuit Court case.

Mosinee argues that such a continuing irreparable

harm is not required. A punitive remedy is inappropriate and a punitive remedy will not deter unintentional violation.

As we point out in our brief, there is no way that a person uninformed of the Act will be deterrred by a punitive -- we submit punitive remedy here and I commend to your reading the opinion of Judge Mansfield in the Second Circuit in Corenco, 488 Fed. 2nd which we have cited at 214 on this subject.

There should be no permanent injunction in this or any other case, I submit, absent a finding of a reasonable likelihood of future violations that will cause harm to the corporation and in that regard, the standard should be higher in private litigation than it is in SEC litigation.

QUESTION: Mr. Beckwith, if you prevail here, what incentive is there left for anyone to file a form?

MR. BECKWITH: Well, there is ample incentive, as this case well-illustrates.

Litigation -- even an unintentional violation can result in litigation and will result in litigation which can tie up a shareholder who has any intent to tender or engage in a proxy contest. It would be a foolish thing to do. There is plenty of incentive for a shareholder to file.

The only time that there will be -- Mr. Justice Blackmun -- the time when you will find that deterrence is a factor is where you have an intentional, covert,

conspiratorial violation by a group who thinks that it can obtain some strategic advantage by not filing, by keeping their purpose disclosed and by proceeding to accumulate a large block of stock.

That is the time when you -- perfectly properly -- a district judge would enter an injunction. Those are the facts in Bath and in that case, an injunction was entered.

But even in that case, the injunction provided that the parties -- the defendants would be enjoined only until a legally-sufficient schedule 13D was filed.

Respondent has argued that Mosinee shareholders were deprived of information for a period of time. My response to that is, what information? What did Mr. Rondeau have to tell them in May and June that was important to them?

Furthermore, this case will not affect the rights between shareholders. The remedy does nothing for shareholders who bought or sold and I think the harm to shareholders that is referred to repeatedly by Mosinee should be put in context.

We are talking about 16,000 shares that were purchased after May 27th out of a total of 800,000 shares issued and outstanding.

Suppose the shareholders purchased stock, which is one of Mosinee's arguments, expecting the company to be

stable and not knowing that there might be a tender offer. Those shareholders were not harmed. As soon as the schedule 13D was filed, if they decided that it was not an appropriate investment, they could have sold and sold at a gain.

So no one was materially injured by the harm here and certainly not the corporation. But even if shareholders were harmed, this action is not directed to that purpose.

This action has to do with corporate harm only.

The cases that are relied upon by the Respondent principally involve preliminary injunctions and we submit are in all instances distinguishable on their facts, particularly such cases as Chris-Craft and Butler Aviation.

Two lower court decisions support Judge Doyle, Tri-State Motor and Scott versus Multi-Amp, both of which are cited by us.

QUESTION: Is Tri-State Motor out of the Eighth Circuit?

MR. BECKWITH: Yes, sir.

QUESTION: On affirmance, wasn't it?

MR. BECKWITH: Yes, it was affirmance of a District Court decision.

QUESTION: Is that any precedent under the Eighth Circuit rule if they don't publish it?

MR. BECKWITH: I don't think so and it was cited in our petition for certiorari and it was cited in our brief.

It was referred to by Judge Pell pointing out a split in the circuits.

QUESTION: Whether it is precedent or not, in that circuit it is, at least arguably, in conflict from that point of view.

MR. BECKWITH: Oh, I think that is correct, yes. I am not sure that its precedent is such but if I were the judge in the Eighth Circuit, I suppose I'd be mindful of that case.

QUESTION: Did you say that the injunction entered here attached to the restricted voting of the stock, in no matter whose hands the stock was?

MR. BECKWITH: Well, it is not clear but presumably it does. By footnote, Respondent tries to massage that relief a bit to suggest something else that might be done but it simply says the 3 percent of the stock that Mr. Rondeau purchased shall be sterilized for a period of five years. It is not clear when the five years start so --

QUESTION: So if he tried to sell, the purchaser might not be so enthusiastic.

MR. BECKWITH: That could well be. Certainly, if the purchaser could in any respect be tied to Mr. Rondeau, then I am sure that even Respondent would argue that sterilization was covered but it is not clear as to the scope of it.

I believe I have some time remaining which I would like to reserve.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Beckwith.

Mr. Hammond.

ORAL ARGUMENT OF L. C. HAMMOND, JR., ESQ.

ON BEHALF OF RESPONDENT

MR. HAMMOND: Mr. Chief Justice and may it please the Court:

Initially, I would like to comment on Mr. Beckwith's statement to Justice Rehnquist regarding the status of the findings of fact. It is our position that the Seventh Circuit Court of Appeals did not adopt the findings of fact of Judge Doyle and I do not think that one can discern from the opinion of the Seventh Circuit that that is, in fact, the situation.

Judge Pell, in the dissent, takes that position but I do not think that it is essential to the Court's determination and I do not think that the Court did adopt all of the findings of Judge Doyle.

QUESTION: Well, then, where did the Seventh Circuit get its findings from if it didn't adopt Judge Doyle's?

MR. HAMMOND: It got its findings, Justice Rehnquist, from giving due deference to most of the claims of innocence of Mr. Rondeau and the facts that were on the record that

came up and coming to the conclusion that whether you give that due deference or not, the nature of the violation by Mr. Rondeau was such as would warrant relief.

QUESTION: So in effect it resolved all doubts in favor of Mr. Rondeau and still said an injunction was warranted.

MR. HAMMOND: That is what I believe they did.

And I would like to get into just what I think the Seventh Circuit concluded on the facts in presenting my argument.

As counsel says, there is no question of what violation did, in fact, occur and the issue apparently is whether the relief granted in this instance by the Seventh Circuit is appropriate under the circumstances where the wrong was committed.

There is no doubt in this instance that the market operated for a substantial period of time without knowing that Mr. Rondeau was involved in substantial acquisitions of shares to the level that the Congress has said is sufficient to prompt the necessity for giving public notice and when one says the notice must be given to the company, to the Exchanges upon which the stock is traded and to the SEC, one has to acknowledge that this notice is really a notice that is flowing to the public.

It is the public that is involved. Whether the

public be involved in accurately buying shares today or conceivably buying them tomorrow or selling shares today or selling them tomorrow, the failure to give the notice operated to the disadvantage of those people who sold their shares at the time Rondeau was buying.

QUESTION: Yes, but those people aren't the plaintiffs in this case.

MR. HAMMOND: That is correct, Justice Stewart. It operated to their disadvantage, just one class. It operated to the disadvantage of sellers who sold during that time period because if the knowledge had been public that this was going on and that Mr. Rondeau was quickly acquiring shares, that would have a substantial effect on the market price. It certainly affected or would have affected the judgment of people who buy shares because they look to a company for stability, long-term accretions in capital and in fact, are -- abhor getting involved in companies that have internal turmoil or management conflicts.

Those people could still buy under these circumstances not knowing that there is a potential conflict and I think the Court must keep in mind that it is not the question of whether or not there is or is not intention at the time to take over control of the company, that is, the real objective of giving the notice.

It is the potential for the conflict, potential for

change in management, potential for corporate operation to continue, potential for sufficient market interest to increase stock price.

Those are the things the 13D is aimed to provide publicity for and it is the mere potential that that goes on by virtue of one acquiring five percent of the stock of a company that prompts the Act to come into effect and the requisite for giving public notice.

It operates to the distraction of management of a company whose obligation it is to see that information is disseminated to its shareholders and see that their interests are protected and when the instance arises that it suddenly discovers somewhat belatedly someone is involved in buying stock and starts passing the information out, it then must get involved in litigation, as counsel says, because litigation is probably one of the only vehicles by which people can be required to conform to the law and that is a substantial distraction from the operation of a company.

All of these things flow from violation of 13D.

Now, some members of this class -- or one of these classes, are clearly identifiable and perhaps the damages that flow to them are easily discernible.

You can, for instance, take a look at the market and come to some conclusion as to what the level of damages is to someone who sold it, not knowing that this was going on

or bought not knowing that this was going on. But when you come to the issue of whether or not someone who got into the market at a later date not knowing -- and the stock never fluctuated in price -- what his injury is or the man who bought because he was looking for stability and then finds a company that is wracked in turmoil and has all kinds of considerations as to when he should sell and whether or not he should get out, tax considerations, other considerations, these people are also injured and I think that one issue that gets to the question -- or these are facts that get to the question of whether or not irreparable injury is really required and I would like to say on that that I do not think that irreparable injury in the classic sense is required in order to prompt the initiation and attainment of relief in this kind of case.

QUESTION: If Congress had intended that, Mr. Hammond, it would have been a very easy matter for them to have written that into the Act, would it not?

MR. HAMMOND: That is true, Mr. Justice Burger, but by the same token, Congress has not written into the Act many of the rights that have been pursued under the Securities law, under Section 10(B)(5), under Section 16(B), under shortswing profits, they do not, in fact establish --

QUESTION: Well, but when you are departing from a very firmly-established traditional remedy of equity in the

form of an injunction, it is a little different, isn't it, from some of the other factors you are alluding to?

MR. HAMMOND: I don't think so, Justice Burger. In fact, I think that the Court could have gone much farther in this case than it, in fact, went. I think the Court could have ordered that he dispose of the stock. I think that would probably be the ultimate penalty that they would impose but I think that they --

QUESTION: All of it, or just the excess over 5 percent or what --?

MR. HAMMOND: I think that if the situation were aggravated enough, all of it. If he -- if the facts were to disclose that this was a concerted plan devised for acquiring control of a company and the level of acquisition had achieved the level of control, for instance, that under those circumstances, he could be required to dispose of all of it.

I think that one must gradate the kind of ultimate result as is commensurate with the wrongdoing.

In this case, I think the Seventh Circuit struck a very happy balance.

Getting back for a few moments to the issue of whether or not the balance is really appropriate, I think that regardless of the level of conspiratorial intentional violation that counsel seems to think is essential for any kind of relief, that the Seventh Circuit in fact said was,

there is as much damage perpetrated -- as much mischief prompted by careless abandon and disregard of the laws in the securities field as there can be, by virtue of an intentional violation and in this case, I think the facts clearly show, without equivocation, that Mr. Rondeau acted in clear abandon of the law and made no effort whatsoever to pursue it in accordance with the level of requirement imposed upon him.

One has to take a look --

QUESTION: I think that is conceded, isn't it?

MR. HAMMOND: Well, I am not so sure it is conceded.

QUESTION: That he violated the law --

MR. HAMMOND: Mr. Justice, it is conceded he --

QUESTION: -- that he clearly, especially, explicitly violated the law.

MR. HAMMOND: But it is not conceded that he -- he is painted as an innocent, mistaken individual, not very well-skilled in the law and not very well-acquainted as to what the legal requirements are. But I think if you look at his business background, he is a knowledgeable businessman. He is not unaquainted with the legal requirements. He is a president of a couple of corporations. He is the head of a foundation which undoubtedly was established for rather sophisticated tax reasons. He is a limited partner.

He has set up limited partnerships so he can hold

his property separate from his operating business. He is engaged in many sort of sophisticated activities including the banking industry.

QUESTION: Well, if we were going to speculate about the facts here, one speculation would be that if he knew about this law, he certainly would have complied with it --

QUESTION: Yes.

QUESTION: -- because he had absolutely nothing to gain from not complying with it.

MR. HAMMOND: But there is a substantial benefit to achieve by not complying. The benefit to achieve is that if you do comply and you advise the market that you are acquiring and that you have some information and that there may be a tender offer or proxy war in the offing, the people who sold their stock suddenly are not very willing to sell it. At least, they are not willing to sell it at the prices they were formerly willing to sell it at.

So Mr. Rondeau derives the benefit of the market staying stable during that period of time when he does not report it.

In addition, Mr. Rondeau achieves the benefit of surreptitious involvement, communicating with others, all of which the management is unaware of.

QUESTION: But I thought it was the management that called his attention to the fact that he might be in legal

trouble.

MR. HAMMOND: And that is true, because the management's obligation is to advise the public and to see that Mr. Rondeau, when they find out that he is engaged in a violation, advised the public. And it was in this instance the management that advised him on July 30th when it finally discovered -- or did not even discover -- guessed, based upon putting together a lot of facts, that Mr. Rondeau was, in fact, in violation, that they said, we think we have a securities problem here.

Mr. Rondeau, however, did not promptly file -- 25 days later he filed his first 13D.

QUESTION: Were Mr. Forester and Mr. Rondeau good friends?

MR. HAMMOND: I do not believe so.

QUESTION: And yet they are on a first-name basis, aren't they?

MR. HAMMOND: No, I think that Mr. Scholtens, who is the president of Mosinee and Mr. Rondeau are good friends and they are on a first-name basis.

QUESTION: Well, I am looking at the --

QUESTION: Whatever they were, they no longer are, I would presume.

[Laughter.]

MR. HAMMOND: No, I don't even think that is fair to

say, Justice Stewart. I think Mr. Scholtens and Mr. Rondeau are still good friends, although, probably, there is a little bit more apartheid involved.

QUESTION: The July 30th letter, at least, is on a first-name basis, the one to which you made reference.

MR. HAMMOND: Yes.

QUESTION: Who is "Chum?"

MR. HAMMOND: Chum is the president of the company.

QUESTION: That is a nickname?

MR. HAMMOND: Yes.

But when he did file the 13D, I think the Court should take notice of the rather debatable way in which his posture was put forward.

I think that the Seventh Circuit came to the conclusion that, regardless of how you view this violation, it requires some sort of responsible response and it is on that basis that the Seventh Circuit gave the response which it did.

I think that it is essential when one recognizes in this day and age the manner in which shares can be held, that it is essential to give some deference to the manner in which securities violations are pursued.

The SEC certainly would have a great deal of difficulty in pursuing violations. As a matter of fact, about the only time a violation truly gets called to the

attention of the SEC would be when a filing occurs and the filing is erroneous.

The only other instance would be if a company became aware of the violation and made its call and determined that the violation had occurred and let the SEC -- and the SEC would have to pursue all of these things.

Decisions of the courts in this country in the circuit courts of appeals have said that companies are acting in the capacity of private attorneys-general in pursuing violations that occur in the securities law and that should not be discouraged.

The private attorneys-general are the only ones, the companies, who really have the best opportunity to perceive when violation occurs because it is on their transfer book ultimately that the recordation of the violations takes place -- perhaps.

And I say perhaps because in these sophisticated days, people very often do not hold their stock in their own name. They hold them in street names. And if one holds them in street names, even then it is very difficult to ascertain when a violation occurs.

In this particular instance, Mr. Rondeau did not use street names, although he used multiple corporations and foundations for acquisition of stock.

Counsel says that he held 34,000 in his own name.

But 34,000 is less than 5 percent and as a matter of fact, in the first communication that took place between Mr. Scholtens and Mr. Rondeau, the conversation was that he intended to buy up to 40,000 shares, a very unusual figure for a man to use who has no knowledge of the securities law when one recognizes that in this case, 5 percent is about 300 shares over 40,000.

I submit that the facts can paint Mr. Rondeau in several fashions and in this particular instance, the Seventh Circuit came to the conclusion that even if you accept the painting that is given by Mr. Beckwith, non-intentional, covert, conspiratorial -- but nevertheless a businessman who is reasonably knowledgeable in the law who was about to embark on a million-dollar investment in a corporation, who did nothing to confer with counsel to determine whether or not he was -- it was necessary that he engage in any kind of protective filings -- who was aware, at least the year before -- that at 10 percent he had to file, but who went ahead without regard and caused this kind of consternation in the market then, under those circumstances, that some relief should be afforded.

If you do not grant relief under circumstances such as that, there is no deterrence to one who attempts to utilize the failure to file to his advantage and this particular case, as I indicated, it did work to Mr. Rondeau's

advantage.

QUESTION: Do you think that Judge Doyle may have taken into consideration the fact that Mr. Rondeau lived in Mosinee and that Mosinee Paper Corporation has its headquarters in Mosinee and that Mosinee is a town of about 2,500, in deciding whether to issue an injunction?

MR. HAMMOND: I think Judge Doyle may have taken that into consideration but if he did, I think it is erroneous because to say that it was generally known that Mr. Rondeau was buying shares is a misleading statement if you are attempting to state that the market was aware that Mr. Rondeau was engaging in purchase of stock.

The market is not Wausau. The market is -- this is a stock traded over-the-counter. It is traded widely and there are a great many people involved and if Judge Doyle came to the conclusion that the mere fact that a number of people on the street knew that Mr. Rondeau was buying shares and that was sufficient to really cause a nondisclosure of violation or protect, then I should think that that is an overstatement or an erroneous conclusion to draw from that fact.

The very essence of the requirement for disclosure and the filing is to disseminate the information throughout the market and the potential market and that was not achieved in this case.

QUESTION: When did Mosinee first start monitoring the buying of this stock?

MR. HAMMOND: They never really monitored it as such. I think that is an erroneous statement. What happened is, sometime in June, I think, they came to the conclusion that based upon Mr. Rondeau's buying and the recordation on the stock transfer book that he was -- he had purchased a substantial number of shares and I think it comes to about 15,000 shares.

At that point, they called him to welcome him as a substantial shareholder.

After that, they found out that he continued to buy and when they became aware of the fact that he was continuing to buy and approaching a very high level, then they started watching and monitoring.

QUESTION: And that was when?

MR. HAMMOND: And that was in -- I would say it was probably in late June or July.

QUESTION: Of the same year?

MR. HAMMOND: Of the same year.

It was not until July 30th when, coupled with the rumors and attempting to put together the various corporations and foundations that they knew Mr. Rondeau had involvement in, that the company began to suspect that he had violated and gone beyond the 40,309 shares.

QUESTION: And they promptly told him?

MR. HAMMOND: And they promptly told him.

QUESTION: And 25 days later he filed.

MR. HAMMOND: Twenty-five days later he filed.

QUESTION: Your complaint is what?

MR. HAMMOND: The complaint is that one, he should have filed way back when he first -- ten days after he achieved 5 percent, which was May 17th.

QUESTION: And how many days now are we talking about?

MR. HAMMOND: For what, Justice Marshall?

QUESTION: How many days did Mosinee suffer?

MR. HAMMOND: I think Mosinee continues to suffer.

QUESTION: Until now.

MR. HAMMOND: I think they continue to suffer now, to the fact that they are distracted from their normal business by pursuing this violation. After all, it is four years later now but they are still involved in litigation --

QUESTION: You mean, this litigation is affecting the company?

MR. HAMMOND: This litigation distracts --

QUESTION: Well, who else is involved in it but you?

MR. HAMMOND: Management, that has to get --

QUESTION: What is management doing about it?

MR. HAMMOND: It has to give time and attention and make decisions as to whether or not they are going to process appeals. But that is only a small fraction of it.

In addition to that, I think there are people, Justice Marshall, who are -- who bought stock in the company during that time period, who may still own the stock and are looking for the company to settle back to its stability.

QUESTION: All right, any such complaints on file? Or is that out of the clear blue?

MR. HAMMOND: Well, I think it is out of the clear blue, Justice Marshall, but it is out of the clear blue with some degree of realism. I think that when you talk about --

QUESTION: Out of the clear blue with some -- oh, go ahead. I'll catch up with you.

MR. HAMMOND: When one talks about irreparable harm, unfortunately I think, too often one comes to the conclusion that that is such a horrendous harm occasioned to individuals as to be immeasurable in dollars and unaccountable and I think that there is a great area of irreparable harm that has to do with the sort of out of the blue, only evaluative by conjecture, that is occasioned to people by virtue of other peoples' wrongdoings for which protection must be afforded and which --

QUESTION: Do you know of any equity case that has used the phrase, "considered irrevocable harm, out of the

blue"? You have got to be specific when you say "irreparable harm."

MR. HAMMOND: I do --

QUESTION: What is harm and what is irreparable?

MR. HAMMOND: I do think, however, Mr. Justice Marshall --

QUESTION: But don't take both of them out of the clear blue, please.

MR. HAMMOND: I do think that there are cases that say that irreparable harm covers the spectrum of wrong or damages, including those which are so superficial as to be -- and so diffuse -- as not to be measurable but yet to be wrongs that are occasioned to people and I think this includes that kind of a wrong and I think when you enforce the securities law, it is intended to protect the kinds of people, not the sophisticated investor, but the man on the street who buys --

QUESTION: But the man is -- all the securities law said was to file it. He has filed it.

MR. HAMMOND: That is true. But it also says that the wrong that he accomplishes by not filing during the time period must be set right. I think that is natural and in addition to that, if one is to only consider that once one files that that remedies the wrong, there is no incentive to file.

QUESTION: Mr. Hammond, would your client, Mosinee, have had an action for money damages?

MR. HAMMOND: I think that -- yes, I think that my client could bring a claim for money damages. I think it would be almost impossible to prove what the damages are in dollars and cents. I think under the normal rules of evidence it would be practically impossible.

How do you evaluate the distraction of management during the course of processing these things?

QUESTION: You didn't ask for damages, did you?

MR. HAMMOND: I think we asked for money damages.

QUESTION: You did.

MR. HAMMOND: Yes. I think it would be almost impossible to --

QUESTION: That has just dropped out of the case, has it?

MR. HAMMOND: Yes, it has just dropped out of the case.

QUESTION: There are cases, of course -- or are there not? -- under this statute where money damages have been allowed to shareholders.

MR. HAMMOND: That is true, yes. Well, certainly.

QUESTION: Where the damage is relatively easy to prove.

MR. HAMMOND: Where it is easy to prove and where the

damage is of sufficient substance as to warrant the pursuit of the litigation in that fashion.

QUESTION: Isn't this cause of action a judicial creation anyway?

MR. HAMMOND: Yes, it is a judicial creation.

QUESTION: Congress has not provided for it one way or another.

MR. HAMMOND: No. It flows from that body of law which says if there is a prohibitory statute or a directory statute which requires an act and it is violated that the wrong that is occasioned to people prompts relief or warrants relief and including injunctive relief.

QUESTION: And your submission is that in fashioning that remedy, the judiciary should grant an injunction even absent irreparable injury.

MR. HAMMOND: Even absent irreparable injury. But I am not willing to acknowledge in this case that there is no irreparable injury because I think, as I explained to Justice Marshall, that it covers that difficult-to-prove diffuse area of injury.

QUESTION: Mr. Hammond, does the record show what percentage of the stock in Mosinee Paper Company is owner or controlled by management, using management to include the board of directors and officers?

MR. HAMMOND: No, I do not think it does.

QUESTION: Would you say 50 percent?

MR. HAMMOND: No, I do not believe so.

QUESTION: What percentage?

MR. HAMMOND: Well, I think the only information that is provided is the ownership of Mr. Forester, who is the chairman of the board and his company is -- and I do not recall offhand what it is, but it is substantially less than controlling interest.

QUESTION: What percentage would you regard as evidence of control?

MR. HAMMOND: Well --

QUESTION: The SEC uses the figure, 10 percent in a good many contexts. Are you talking about 25 percent?

MR. HAMMOND: Well, in this instance, the statute really talks about 5 percent as being a controlling interest, whatever controlling interest means and the law sets it at different standards, different levels.

QUESTION: But if you don't --

MR. HAMMOND: In this particular instance, I think if one controlled 25 percent, one may well have control of the company.

QUESTION: The statement of the facts in the petitioner's brief says that Mr. Forester, his wife and the trust managed by him were collectively the largest shareholders in Mosinee. You would agree that is true?

MR. HAMMOND: Yes, that is correct.

QUESTION: Mr. Hammond, broadly speaking, there are two categories of stockholders, those who are in management, as I have indicated how management might be defined, and just the run-of-the-mill stockholder who owns his stock as an investment.

It isn't clear to me from what you have said so far how the latter category of stockholders will benefit if you win this case. Or even would benefit from your bringing it. I can perceive how management may be an entirely different category because insulating 3 percent of the stock from participating in voting would tend to entrench management but focus your response to my question on the non-management stockholders.

MR. HAMMOND: The question, as I understand it, is what benefit will flow to those non-management shareholders in the event --

QUESTION: Yes.

MR. HAMMOND: -- we are successful in the suit.

QUESTION: Yes.

MR. HAMMOND: I think the only response to that one can give is that Mr. Rondeau will be precluded from utilizing shares he improperly acquired and to the extent that those people are shareholders who are satisfied with the operation of the company, who bought the stock for normal

business accretion, earnings, that the company which they bought into will have those characteristics.

At least, it will not be beset by those particular shares acquired in violation of being utilized to create turmoil in the company.

That is about the only degree to which those people will be benefited.

QUESTION: There may possibly be shareholders who are not entirely enchanted by management.

MR. HAMMOND: That is true. There may be.

QUESTION: Who might welcome a tender offer.

MR. HAMMOND: There are --

QUESTION: That is one of the premises of the Williams Act, isn't it?

MR. HAMMOND: That is correct. As a matter of fact, that may well be one of the class of people who are so diffuse as not to be recognizable as being injured.

There are people in today's market who buy shares solely for the purpose of getting involved in corporations that have this kind of conflict going on because they see quick accretions in value and those people would not be involved in this because of the non-filing of Mr. Rondeau.

The entire thing is geared for knowledge but when one talks about the knowledge, one must put it in perspective and the perspective is, that it must be related to the shares

that are acquired in the transactions in the market that take place or don't take place as a consequence of the lack of knowledge.

QUESTION: Mr. Hammond, I gather there will be further proceedings in the District Court?

MR. HAMMOND: There would be further proceedings in the District Court under the Seventh Circuit's decision.

QUESTION: Because there has to -- I guess the date from which the five years begins has yet to be established, doesn't it?

MR. HAMMOND: That is correct.

QUESTION: And what about the colloquy you had with your colleague whether Mr. Rondeau is in any position where he cannot dispose of the stock?

MR. HAMMOND: I think that --

QUESTION: Will that matter have to be straightened out, too?

MR. HAMMOND: Yes and I do not believe that this in an in realm determination.

QUESTION: How far do you think there ought to be a modification of --

MR. HAMMOND: I think that Mr. Rondeau is -- is free to dispose of his shares without the restriction of the voting rights on those particular shares subject, of course, to a restriction on the voting right if he were to engage in

a sale as a subterfuge.

QUESTION: In other words, sell it to one of his corporations.

MR. HAMMOND: One of his corporations or one of his friends who would agree to vote it for him.

QUESTION: Do you think -- would you press for any kind of a restriction on his right to transfer the shares?

MR. HAMMOND: No, I do not believe that I would put any restriction on his right to transfer shares.

QUESTION: If he wanted to sell them all in one day, regardless of the effect on the market, it would be all right with you?

MR. HAMMOND: Well, I think that there are some restrictions on his right to sell it that way. I think there are securities regulations that would prohibit him from selling by putting it all on the market one day. I think he would have to register it as an offering, a secondary offering.

So I think there are controls in that fashion. I do think that the Court should -- that the summary judgment issue is properly before the Court and I think that there is a determination that anything which would support the trial court or the Circuit Court of Appeals determination is properly before the Court and the Circuit Court determination is the upsetting or the overruling of the summary judgment

and I think that that should also be considered by the Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hammond.

Do you have anything further, Mr. Beckwith?

MR. BECKWITH: Just a few points, Mr. Chief Justice.

REBUTTAL ARGUMENT OF DAVID E. BECKWITH, ESQ.

MR. BECKWITH: Mr. Justice Powell, a pro pos of your question to my colleague, Mr. Hammond, Section 13D is not designed to promote management stability, which is the phrase used repeatedly in argument and the briefs.

In fact, there is no public policy that says a stable management is necessarily a good management or a beneficial management and, indeed, it may be to the advantage of shareholders to permit a large, influential stockholder like Mr. Rondeau to exercise his rights and see that the corporation is better managed.

So far as the effect --

QUESTION: Even if it doesn't ultimately take over?

MR. BECKWITH: That is correct.

QUESTION: Just the --

MR. BECKWITH: His lurking presence, effective lurking presence may be helpful.

Now, so, Mr. Justice Rehnquist, on the factual

matter, I call your attention to that portion of the Court of Appeals' decision which is reported on page 169 of the Appendix where they say, "Having considered all circumstances concerning Mr. Rondeau's violation of 13D, giving effect especially to the District Court's findings that Mr. Rondeau and the other defendants did not engage in intentional, covert and conspiratorial conduct in failing to timely file the 13D and was unaccompanied by tender offer or proxy solicitation, we instruct this District Court --" and so forth.

Had the Circuit Court considered other facts, it seems to me they would have had to remand for a trial.

Four judges have considered these factual arguments and have rejected them and there is no indication that the Seventh Circuit accepted them.

Four years have gone by since this technical -- I submit -- technical violation occurred in the spring and summer of 1971. If managment has been distracted for four years, it is by virtue of its own conduct, not by virtue of Mr. Rondeau's conduct.

So far as the arguments that classes have been damaged in whatever manner, whether it is out of the blue or any other way, I submit those arguments are directed primarily to the question of violation or standing and not remedy.

The issue here is remedy, not whether management can sue or should sue, or whether somebody might be injured or will be injured, the question is, what do we do now, four years later?

The Seventh Cirucit Court of Appeals' decision, I submit, will lead to abuse in our circuit. It will turn this Act that was designed to provide fair rules of conduct in tender offer situations into a weapon that can be used by management to neutralize a shareholder that may effectively gain control or affect the management of a corporation and that is good. That is not bad.

So far as the benefit to Mr. Rondeau in not filing, it was well-known he was purchasing stock. Mr. Forester wrote to the directors on May 7th -- that is just about 30 days after Mr. Rondeau made his first purchase -- calling their attention to the fact that Mr. Rondeau was purchasing stock and I believe the record shows that Mr. Forester and Mr. Scholtens started tabulating his purchases virtually from the first day that they appeared on the registrar of the corporation and that was in about April 26th.

The market price of this stock -- it is suggested that he might have benefitted because he was buying in a stable market. Even after he filed his 13D, there was a day or two when the market blipped up. There was no indication there was any trading at the higher level

because it is over-the-counter but then it settled back at the same level so but for this lawsuit, Mr. Rondeau could have purchasing after the 13D at approximately the same level.

In conclusion, your Honors, I submit that it is appropriate for this Court to consider the remedy aspect here and to put Section 13D in the Williams Act back in the proper context in the Seventh Circuit.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:25 o'clock a.m., the case was submitted.]