OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-2129

TITLE BARBARA R. SCHREIBER, Petitioner V. BURLINGTON NORTHERN, INC., ET AL.

PLACE Washington, D. C.

DATE January 9, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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BARBARA R. SCHREIBER, :

Petitioner, :

V. : No. 83-2129

BURLINGTON NORTHERN, INC., ET AL. :

- -x

Washington, D.C.

Wednesday, January 9, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:43 o'clock p.m.

APPEARANCES:

IRVING BIZAR, ESQ., New York, N.Y.; on behalf of the petitioner.

MARC P. CHERNO, ESQ., of New York, N.Y.; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Bizar, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF IRVING BIZAR, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BIZAR: Mr. Chief Justice, and may it please the Court; the issue in this case is whether the statutory language enacted by the Congress for section 14(e) in the Williams Act is to be given a different construction in the plain meaning of the words used.

14(e) -- and I shall paraphrase that briefly for Your Honor -- provides three parts. The first part prohibits misrepresentations or omissions to state facts. The second part, preceded by the disjunctive "or", prohibits the making of any fraudulent, deceptive or manipulative acts or practices in connection with a tender offer. And the third part directs the Securities and Exchange Commission to promulgate regulations to prevent fraudulent, deceptive or manipulative acts or practices.

The courts below held, although the Third Circuit criticized this finding and my brothers argue here, that misrepresentation is required for any violation of section 14(e), and they found none below.

The facts upon which this case arises are

relatively simple. They're based upon a complaint, and a complaint which was subject to a 12(b)(6) motion, on which no evidence was considered, and, as Your Honors know, a 12(b)(6) motion assumes the truth of the complaint.

And those facts are, briefly, these: Burlington Northern, after acquiring a block of El Paso stock, made a tender offer for 51 percent of the El Paso stock outstanding, or approximately 25-odd million shares, at $24 a share. They did this on December 20, 1982.

December 30, 1982, they have received the 51 percent they had tendered for. El Pasc management, anxious to defeat this tender offer, first issued some preferred stock.

Burlington Northern attacked that issuance in the Delaware Chancery Court, and was on the very eve of receiving a victory in that court, the Chancellor having announced that that issue would be held illegal and was calling the parties in to consider what further remedies were to be considered.

I might add that the tender offer which had originally been promulgated by Burlington Northern had a number of outs. The complaint alleges that those outs were inapplicable.

Thereafter, on -- faced with defeat, the El Paso management met with Burlington Northern and arranged a new deal. The new deal called for cancellation of the old offer, notwithstanding the fact that the old offer had been fully subscribed for, and provided for, instead, the following.

El Paso would sell 4.1 million shares to Burlington Northern for the same $24 per share, so that Burlington Northern would in effect not be damaged by having cancelled its winning control of El Paso, and would give to Burlington Northern an option to acquire another 4.9 million shares at the same price.

Burlington Northern would ratify various golden parachute contracts which had been entered into for the El Paso management and insiders and then Burlington Northern would then immediately tender for 21 million shares, in which all of the shareholders of El Paso would now be free to tender, including the insiders.

Simply arithmetic would indicate that having taken advantage of the first deal and having that destroyed, any "white knight" who wished now to come into the fray would have to tender for substantially more than 30 million shares in an effort to offset the Burlington Northern position.

Needless to say, the second offer was over-subscribed and this suit follows.

Now, we submit to Your Honors that what occurred here plainly violated section 14(e), and we ask Your Honors to follow the reasoning of the Mobil case in the Sixth Circuit rather than the cases in the Second, Third and Fourth Circuits, which hold that misrepresentation is a necessary element in --

QUESTION: Are those the only Circuits?

MR. BIZAR: We think those are the only Circuits. There are a number of District Court cases throughout the country seemingly following the same rationale.

QUESTION: As the Third Circuit?

MR. BIZAR: As the Third Circuit and the Second Circuit.

QUESTION: So the Sixth Circuit is the only -- the Sixth Circuit is the only one supporting your position?

MR. BIZAR: Yes. I think the Ninth Circuit has suggested in dictum in a case we cited in our petition and in our main brief here as well that indicates that misrepresentation need not be an element of a 14(e) violation.

QUESTION: I see.

MR. BIZAR: Now I start my argument with the construction of the statute itself, the fact that there are three provisions, three subdivisions, each of which are preceded by the disjunctive "or". My brothers, in their argument, in sugggesting the affirmants below, suggest and argue that misrepresentation is a necessary element.

But they don't offer any reason why the Congress, if it wished to prohibit misrepresentation alone in 14(e), had to do it in three separate subdivisions, each preceded by "or", and in doing it in the latter two subdivisions, why they would have to use codewords rather than simply saying "you shall not misrepresent".

They also argue that please ignore the plain language of the statute and look to the general purpose of the statute and the intent of the Congress in enacting the statute, and we say that argument has two deficiencies. In the first place, it ignores the repeated holdings of this Court that you start a construction of the statute with the language itself, and that the language is to be given its plain meaning as plainly understood by the ordinary person who reads that language.

And it also ignores this Court's holding in

the U.S. against Naftalin case, where Justice Marshall, speaking for the Court, said that the use of the word "or" at the end of a subsection or at the beginning of a subsection prescribes a distinct, separate category of misconduct.

The second problem with or second defect in my brother's argument is that there is no clear, consistent congressional statement that would suggest that 14(e) is limited solely to misrepresentation.

Yes, there are statements by the sponsors and others in Congress addressing the question of full disclosure, but there are an equal number of statements by members of Congress and the sponsor concerned about the need to protect shareholders of the tendering -- the target company with the need to have them act without pressure, without the unwarranted techniques which are frequently accompanied in tender offer fights.

QUESTION: The three words you were talking about a moment ago are "fraudulent", "deceptive" or "manipulative"; is that right?

MR. BIZAR: That is correct.

QUESTION: Do you think there is any overlap between "fraudulent" and "deceptive"?

MR. BIZAR: No, I think not, Your Honor, although it is somewhat unclear. The reason for that, I

believe, is that if the Congress intended that "misrepresentation" be part of "fraudulent" or "deceptive" I think they would have stopped with the first subdivision, which prohibits expressly and clearly what they desired with respect to misrepresentation.

I think what Congress meant when they used "fraudulent" and "deceptive", they were talking about the very subtle areas that frequently arise in tender offer fights in which they could not foresee the kinds of conduct that might be wrongful, in which the pressures would be placed on shareholders.

For example, they could have had in mind this Court's definition of fraudulent conduct, said a long time ago in Moore against Crawford, that it is a breach of any legal or equitable duty which injures a party --

QUESTION: I was really more interested in trying to find out whether you thought there was any overlap at all between the words "fraudulent" and "deceptive".

MR. BIZAR: I do not believe there is an overlap.

QUESTION: Those mean two distinct different things?

MR. BIZAR: I think they mean two distinct different categories. I could not define for you those

distinct different categories because I don't believe Congress meant to have those defined as such. I think what Congress meant to have is to allow the courts the greatest leeway to ensure that the franchise given to the target company shareholders would not be tampered with.

QUESTION: And you say "manipulative", the third word, does not require any element of deception?

MR. BIZAR: That is correct, Your Honor.

QUESTION: That isn't consistent with our Court's construction of that word in that earlier, what is it, the Santa Fe case. Didn't we define the --

MR. BIZAR: Let me address that case, because I think that case is distinguishable. In the first place, that case arose in the 10(b) context. Secondly, it arose in the context where an attack was made upon the substantive fairness of the proposed acquisition.

Let me come back to the first part, if I may, Justice Rehnquist. We say that definitions given for 10(b) considerations are not necessarily the same definitions to be given in 14(e). This Court has repeatedly said that the same terms used in the Securities Act in different sections do not necessarily have identical meanings, but they can have different meanings. For example, for 16(b) purposes, a merger is

not a sale, whereas for 10(b) purposes a merger is a sale.

Now why should it be that there should be a different consideration for 10(b) than 14(e)? We say that for 10(b) the Congress and the courts are concerned with the integrity of a purchase and a sale. They want to ensure that the trading market is above-board in all respects. 14(e) does not concern itself with trading markets.

What 14(e) is concerned with, and this is frequently lost sight of, is the right of the target company shareholder to be able to make his choice as to whether or not to elect to accept the tender offer or not to elect to accept a tender offer, or to be free to sell it someplace else.

And that choice is not to be tampered with. Indeed, the congressional statements are replete with the idea that there is a delicate balance that cannot be tipped. This Court recognized as much in the Piper Aircraft case, when it said that 14(e) was directed to a whole range of conduct by a whole range of persons who were seeking to influence either the price of or the outcome of a tender offer.

Now perhaps the best example of congressional intent is what Congress directed the Securities and

Exchange Commission to do with respect to issuing regulations under 14(e). It may recall to the Court that 14(d) also prescribes the necessity for a tender offer to contain full information, and the Commission has issued tons of regulations under 14(d) requiring full disclosure.

But in 14(e) -- and I only quote two of those regulations -- it requires, first, that the tender offer be kept open for 20 business days, and in subdivision (c) provides that when the tender offer is completed consideration has to be paid promptly or, if it's terminated, the tendered securities have to be returned promptly. And neither of those subdivisions have anything whatever to do with the necessity for full disclosure or the like.

QUESTION: Mr. Bizar, at an appropriate time it would be helpful to me if we assume, for a moment, that you are right, that you need something more -- there may be cases that don't involve deception, the manipulation word has some meaning.

It would be helpful to me if you would explain what elements you think your complaint alleges that satisfy the reading of the statute you propose. I have a little difficulty with why, other than breach of contract and so forth, why you say it violates the

statute.

MR. BIZAR: Let me start by saying that none of the lower courts considered the question of whether our complaint stated a claim for manipulation. They all assumed that misrepresentation was the necessary element. We say the manipulation occured as follows:

When they cancelled the 51 percent subscribed tender offer, not because of any event which had occurred outside but solely by virtue of the intervention of the El Paso management to induce Burlington Northern to make a better deal for the El Paso management and caused a new offer to be made under more restrictive terms in the sense of less shares, while tying up the stock, the balance of the stock needed to obtain control so that no one else, no other white knight would come in and offer a competitive bid, that manipulated the situation vis-a-vis the El Paso stock.

And, more importantly, we say what it did do was take awary the results and fruits of the prior tender offer. We say 14(e) has to cover a situation in which a tender offer is made pursuant to the regulations, pursuant to the statute, full information having been given, the shareholders of the target company make their choice and tender, and so that the

offer is fully subscribed for.

To have respondents then take away the fruits of that choice tampers with the free choice that was given to the shareholders under 14(e). That is the two elements we say --

QUESTION: Would you say that every breach of contract suit was also a violation of 14(e)? I guess arguably there was a breach of contract here. One could claim that.

MR. BIZAR: Our situation does not involve, necessarily, a breach of contract, and I think that's my brother's attempt to characterize the complaint, but it is not a breach of contract. It may be a breach of contract. Some breach of contracts may have elements of manipulation. I cannot state to Your Honor all those times when breach of contracts will have manipulation and those times when they will not.

For example, supposing Burlington Northern had the 51 percent stock and then told the people it wasn't going to pay. That might be a breach of contract that may not constitute a manipulation. But that didn't happen here.

What happened here is the conspiring between the El Paso people and the Burlington Northern to take away the fruits of the first subscribed tender offer and

then to resubmit a new tender offer on less favorable terms, but more favorable to the insiders and ensuring that Burlington Northern would not be damaged in any respect by virtue of the sale of stock and the option given to it.

QUESTION: Is it essential in your theory that there be a breach of some fiduciary obligation by the inside management, by the existing management?

MR. BIZAR: Yeah, I think so. I think I would argue that, certainly. I think there would have to be that. I certainly don't want to argue the broader proposition. Certainly on the narrow facts presented here, that's clear that there was a breach of fiduciary duty.

But that doesn't end the inquiry. That just starts the inquiry because if the impact is to prevent the free auction market, to prevent the free choice, or take away the free choice that was given, then you've got a 14(e) violation. That was Congress' intent, and that was why it provided what it did.

Let me come back to the question of manipulation for a moment. We did not have the opportunity to submit the facts or to obtain the evidence and demonstrate to the courts below that a manipulation had occurred, that the outs really didn't

apply, that the respondents estopped to assert any outs, and that, as a matter of fact, the market was artificially impacted and prevented from freely functioning. That showing was permitted in Mobil because it arose under different procedural circumstances.

Now my brothers ignore the rule that a 12(b)(6) motion kind of addresses only the complaint and attempt to assert a whole slew of other facts, principally addressed to the fact that respondents acted in good faith and a slew of related circumstances.

I must say not only were we deprived of the opportunity to contest that, but in fact that is contested. We say -- no matter what they say, we say the outs do not apply and did not apply.

And we say further that whatever facts they have asserted, these outside facts, they are the subject of great dispute. For example, respondents argue that the second stage of the Burlington Northern offer -- as Your Honors know, in a tender offer, frequently after control occurs later on they make a tender for the balance of the shares in order to merge the companies in, and that's what occurred here with respect to the second tender offer.

That under the second stage, the target

shareholders received, those who hadn't tendered at the first stage, got $24 in consideration. We contest that. What they got was $12 in cash and some paper which we say, had we been given the opportunity, we would have demonstrated that that was not worth the $24 cash offered in the original 51 percent subscribed tender offer.

Now I think I have recited to Your Honors the factual pattern. My brothers try to argue that their -- that those kinds of things are really breach of contract, breach of fiduciary obligations, and suggest to you that those are best left to the state court. We say that that is clearly not that they have attempted to isolate the transaction into different parts, but that the transaction is a continuous one and running it continuously through there was an attempt taken to interfere with the franchise given to the target company shareholders to make their election and, as a result, damage occurred.

Now I might remind the Court of what the Second Circuit said a long time in the Crane Company case, that manipulative schemes should not be allowed to succeed solely because they are novel.

Now my brothers argue that the state courts provide a remedy. I'd like to address that for a few

moments because I think that really poses a false issue. The fact is the state courts and state remedies are totally inadequate. Let me demonstrate why.

You have a national offer which spreads over 50 states pursuant to Federal statutes. The injured shareholders will now have to sue in any one of those 50 states. State one may claim the conduct was legal; state two may say the conduct was impermissible. Each of the tender offer states will find litigations ensuing at different stages; the net result will be that the tender offer will be clogged with endless litigation, with no real resolution as to whether an injury has occurred or not.

There being no uniform standards of what fiduciary conduct or breach of contract are vis-a-vis all 50 states, state A may rightly say there was no breach of fiduciary duty. State B may say there was.

QUESTION: Mr. Bizar, wouldn't most of these cases be brought as class actions on behalf of the entire body?

MR. BIZAR: Let me address that. There is no uniform class action statutes in -- throughout the United States.

QUESTION: I know, but usually somebody gets there first and that's the one that proceeds, isn't it?

MR. BIZAR: Which state would have the class action? Which state would have the uniform class statute, class act statute, which would encompass all of the injured --

QUESTION: Well, that's true of any corporate class litigation, isn't it?

MR. BIZAR: No.

QUESTION: There are a lot of them that are rather successful, as I remember it.

MR. BIZAR: No. Let me go on. A number of states have opt-ins; a number of states have opt-outs. Some states provide no notice to the class; some states provide notice to the class in terms of whether plaintiff is an adequate representative.

What assurance is there that that particular state you may get jurisdiction over all the defendants who may have only committed one act --

QUESTION: Yes, but aren't these problems that experts like yourself regularly deal with and regularly know what state it's best to proceed in, and it's part of the daily business of bringing these actions?

MR. BIZAR: No. I would say, Justice Stevens, that they are basically brought in the Federal courts for Federal statutes, for Federal jurisdiction and a uniform Federal class action rule which governs, so that

it becomes easy to fit where the parts belong and who the parties are.

That is not true in the states. Nor is it clear that any particular state constitutionally could assert a nationwide class action when the only basis for jurisdiction might be a few of its citizens live in its own state, and that, I understand, is before this Court in another matter.

So we say that you have given the stockholders of the target company a remedy, a right, but you haven't given them an adequate remedy if you leave it to the states to continue to litigate this question in successive stages.

QUESTION: I take it your position is that you need not even prove in a case like this that the action complained of artificially affected the market price.

MR. BIZAR: I would have to prove that, I would guess, perhaps. I am not sure that I would have to prove it artificially affected the market price. I think I would have to prove that it artificially locked the market in such a manner that there couldn't be a free auction for shares, and we were deprived of that opportunity to prove that because the 12(b)(6) motion takes the complaint on its face and there is no opportunity to do so.

QUESTION: I take it the Second Circuit in Buffalo Forge has said that manipulative acts reached only transactions that might mislead investors in the making of investment decisions. Do you think you have to prove something like that?

MR. BIZAR: No. I think what Buffalo Forge was adopting was that --

QUESTION: I know. But what must you prove?

MR. BIZAR: I must prove that the market was artificially locked up by the defendant's conduct.

QUESTION: Well, would that mislead investors?

MR. BIZAR: It is not a question of misleading investors because frequently these facts are disclosed to the investors well after the fact and the so-called potential white knights or whatever say well, we can't go into this situation because we have to bid for 30 million, 40 million, we have to raise $200 million in a relatively short period of time. We're not going to be in a position to do all that so quickly.

It's not a question of disclosure. It's a question of whether you have a free market in the first instance.

QUESTION: May I ask on that point about the locked-up price, are you contending the price went up

too high or down too low?

MR. BIZAR: I make no contention with respect to the price itself. Unlike Santa Fe, which came out of the context of an unfair price, the Williams Act does not address the question of an unfair price. What the Williams Act addresses is the right of the target company shareholder to sell his shares or to tender his shares once given full information, but to ensure that all of the information and all of the market factors are neutral so that he can make it without having the balance tipped.

I see that my time is up. I would like to reserve the balance for rebuttal.

QUESTION: Very well.

Mr. Cherno.

ORAL ARGUMENT OF MARC P. CHERNO, ESQ.

ON BEHALF OF RESPONDENTS

MR. CHERNO: Mr. Chief Justice and may it please the Court: The question in this case, as we see it, is whether Congress, when it enacted the Williams Act, meant for the courts to fashion, without any congressional guidelines or any standards, a Federal common law of contract or of corporate governance. The answer is, as we see it, by any standard in which statutes are interpreted, that Congress intended no such

result.

Any such result, any such cause of action, such as plaintiff claims here, would be inconsistent first with the plain language of the statute, the plain language of the Williams Act, which talks in terms of fraud, of deception, of manipulation, and not in terms of contract.

It would be inconsistent with the legislative history of the Williams Act, which demonstrates over and again that the Williams Act was intended as a disclosure statute, intended to provide and extend the disclosure regulations which existed for other change in control transactions, such as proxy contests and exchange offers, to what it viewed as the new phenomenon of a cash tender offer, which it viewed as functionally equivalent to those other change in control transactions.

It would be inconsistent with the legislative history of section 14(e) itself, which clearly was intended to police and regulate the new disclosure obligations created by the remainder of the Williams Act. And it would be inconsistent with the teachings and dispositive opinions of this Court, particularly the decisions in the Piper-Chris-Craft case and the Santa Fe-Green case.

And it would be inconsistent with the fundamental principles of federalism which infuse and underly the relationships between the Federal securities laws, on the one hand, and state law on the other hand. And those principles basically are that the Federal securities laws regulate the disclosure that's to be made to people who are asked to engage in securities transactions, and they regulate, in some instances, procedures designed to make sure that that disclosure is effective, and that the state law, on the other hand, which was never intended to be supplanted by the Federal securities laws, regulate matters of contract, matters of corporate governance, matters of fiduciary obligations.

So creating this new and totally uncharted and uncontoured cause of action that petitioner would have the Court create would be inconsistent, I submit, with all of those basic principles. Indeed, it would be to do what Justice Brennan warned against in the Bergsen-Lasker case, and that is to have the Federal -- where he said that the Federal courts were not to fashion an entire body of Federal corporate law out of whole cloth.

They would have to do that if the cause of action which petitioner seeks to create actually came

into existence.

Now before I go to the facts which underlie this case, I'd like to mention a few things on Mr. Bizar's argument. In the first instance, Mr. Bizar said he's not suing for a breach of contract. If I read his complaint correctly, that's all he's suing for. When he talks in his complaint about what violates the Williams Act, what violates section 14(e) in paragraph 25, what he says was that the conduct violated the Williams Act in the following respects.

(a) The improper termination and withdrawal of a tender offer constituted a willful breach of the tender offer agreements. Now that's precisely a breach of contract claim and that is precisely what's going on in the state court with respect to this very transaction.

There is a litigation pending in the state courts. It's a litigation called the Gilbert case. It was started by a group of shareholders similarly situated to Mr. Bizar. It was certified as a class action and indeed it includes Mr. Bizar's client among the plaintiffs in that case.

In that Delaware state court action, there is being litigated at this moment whether Burlington in fact breached its contractual obligations to El Paso

shareholders, whether in fact El Paso directors violated in any way, shape or form their fiduciary obligations to their shareholders. Those are the precise litigation that is going on in the Delaware state court, and that's the court where it should be going on.

Now to create the cause of action that petitioner seeks to create would not only be contrary to every principle of statutory interpretation but it would be entirely unnecessary. It would simply and merely duplicate the existing causes of action under state law, which, as I said, are proceeding right here.

And, in fact, as I pointed out in our brief, the state court has already held that the outs which Mr. Bizar has claimed do not exist in fact exist. It has already held on our motion for summary judgment that Burlington Northern had an absolute right under the contract conditions contained in the tender offer to terminate its contract.

To create this cause of action would be to allow Federal courts, without any standards, any contours, or any guidelines, to fashion Federal common law without any notice to any of the parties who may be involved in tender offers as to what conduct might be prohibited and what conduct might be permitted.

Any such cause of action could only, in the

long run, unnecessarily burden, inhibit and deter tender offers, and defeat the very tender offers which Congress wished to regulate and to preserve when it enacted the Williams Act.

And an example of this is shown by what's happened after the Sixth Circuit's Mobil decision. And to respond, let me interject that it's the Second Circuit, the Third Circuit, the Fourth Circuit, the Fifth Circuit, the Eighth Circuit, and the Seventh Circuit which have all held -- they have all rejected Mobil and all held that the misleading of investors is required under 14(e) for a cause of action to be stated.

But to come back, in the aftermath of the Sixth Circuit's Mobil decision every single thing that's happened in a tender offer has been called a manipulative device by a plaintiff's attorney and everything has been hauled into a Federal court.

Now all of those Federal courts have rejected those claims, but the burdens, the expense, the unnecessary inhibition of tender offers is precisely what's happened and precisely what would happen if this type of cause of action were sanctions.

The facts of this case I should turn to, because this is a case in which the facts are absolutely

dispositive for if the conduct at issue in this case could be called fraud, there is no conduct which couldn't be called fraud in some allegation under the Federal securities laws, and you would have an automatic Federal cause of action for any conduct that takes place in a tender offer.

QUESTION: When you said "fraud" there, that would include misleading investors?

MR. CHERNO: Fraud would require the misleading of investors.

QUESTION: And that would be an example of the kind of fraud you are talking about?

MR. CHERNO: That's the kind of fraud which has traditionally been required to state a claim under the Federal securities laws. That's precisely what your opinion in Santa Fe says, as I read it, and it's precisely --

QUESTION: You mean the Court's opinion.

MR. CHERNO: The Court's opinion, I am sorry, that you authored and Santa Fe stated, and I think it is consistent with every other decision of this Court which deals with the Federal securities laws. There is nothing in any decision of this Court which states other than that the misleading of investors is required to state a claim for fraud under the Federal securities

laws and under their anti-fraud provisions.

Now the facts of this case, I think, are, as I said, dispositive. What was the bottom line of the Burlington Northern bid? What it did was make a premium acquisition of El Paso Corporation at a price which provided premium prices to all El Paso shareholders. At every step along the way it told El Paso shareholders what did happen and what could have happened.

It made a tender offer for 50 percent of El Paso's stock. The tender offer was at a premium price. The offer included conditions. All tender offers include conditions. There is no claim that those conditions were not unequivocally stated, in the plaintiff's language, to shareholders.

And what those conditions are for, as they always are, is to protect an offeror and its own shareholders, who have committed hundreds of millions of dollars to an acquisition effort from circumstances which could defeat or frustrate the purpose of an offer.

The shareholders were fully informed of these conditions and they were fully informed of the fact that if any of these events took place that could lead to the termination of the offer. And there's been no claim by Mr. Bizar that they were not so fully informed or that

there was anything confusing or misleading in any way about these conditions. They were unequivocally stated.

And let me say that these conditions were not arcane or abstruse or irrational or arbitrary, although they could have been. An offeror has, I submit, the same freedom of contract as any other party that conducts business. These conditions were essential, basic conditions that went to the heart of the acquisition process and the acquisition effort. What were they?

They were, first, if anyone instituted litigation seeking to enjoin the offer, that was a basis on which the offer could be terminated. Again, an offeror hardly has to run the risk of being tied up in endless litigation if it chooses to avoid that risk.

If any governmental body attempted to come in and enjoin the tender offer, again that was a condition which permitted Burlington Northern to withdraw that offer. If the target company issued any stock, any new class of stock, which would dilute the voting rights that the offeror hoped to acquire by the offer, again that was an event which permitted the offer to be withdrawn.

If the target company threatened to sell its

assets, again an event which permitted the tender offer to be withdrawn. And again that just makes obvious good sense. One wouldn't want to go through with a tender offer and find that the assets that it made the tender offer for in the first place were gone. There's no principle of securities law or contract law which says that you have to wait till the horse is gone to close the barn door. And that again was a clear provision in the tender offer contract.

And a particularly important provision and one that shareholders were totally on notice of is that the offer could be terminated if an acquisition agreement was reached between the offeror and the target company. That's the way most acquisitions indeed take place. That's the way many hostile offers are ultimately resolved and shareholders were told in unequivocal terms that what ultimately happened was exactly what could happen.

If El Paso and Burlington Northern got together and reached an agreement, that would permit Burlington Northern to terminate this tender offer. There is no question that they were precisely on notice that that's what could happen.

Now in addition to that happening, almost all of the other events that could give rise to the right to

terminate this tender offer in fact took place. There was extensive litigation instituted by El Paso against this tender offer. On the eve of the -- on the morning that the agreement between Burlington and El Paso was reached, that litigation was about to go to trial in El Paso, Texas.

The State of Texas came in and instituted a state antitrust action seeking to enjoin this offer, and again on that same morning that antitrust action was going to go to trial.

El Paso issued preferred stock, the effect of which would have been to dilute the voting rights that Burlington would have acquired if it had gone ahead with the tender offer. That was the precursor of the poison pill preferred stock that people now talk about in tender offers, and it's nice to know from Mr. Bizar that we would have gotten that declared illegal, but it never happened.

The court had not yet rendered its decision. It had not told any of us how it was going to rule, and the court had not ruled as of the day the agreement was reached. And Mr. Bizar's statement is just fanciful. It's just made up out of whole cloth.

QUESTION: Mr. Cherno, can I ask you kind of a general question? Your opponent argues that we should

start with the plain language of the statute. There are three clauses in it and the words "fraud", "deception", and "manipulation".

MR. CHERNO: That's right.

QUESTION: And he says that if we have added all those words in the word "manipulation" must mean something other than fraud or deception.

What do you think "manipulation" means in this statute?

MR. CHERNO: I think manipulation means, in this statute, conduct intended to mislead investors by artificially affecting market activity. It's the same thing that this Court said it meant in Hochfelder.

QUESTION: Well, would you say that -- I'm not an expert on the use of these terms, but he said somehow or other you locked out a white knight or scared him away or did something about a potential white knight. Would that be manipulative?

MR. CHERNO: Certainly not, Your Honor. There's no -- first, it didn't happen. In fact, what happened --

QUESTION: I understand. We've got to assume it did, I think, under a 12(b)(6) motion.

MR. CHERNO: No. I think we only have to take the facts, not conclusory allegations as assumed. In

the first place, it didn't happen. Indeed, what happened here was because of the fact that there was a second tender offer there was another three weeks in which a white knight could have come in.

Let me say something else --

QUESTION: But assume for the moment that everything was above-board in the sense of full disclosure but the arrangement somehow or other gave special inducements to inside management, which in turn made it implausible for a third party to make an offer to take over the company.

Is there any set of facts on which that could ever violate 14(e) without deception?

MR. CHERNO: Although that is not this case --

QUESTION: I understand.

MR. CHERNO: -- I would say that that does not violate section 14(e). What that might be, Justice Stevens, is your classic example of a breach of fiduciary obligations, and if Burlington somehow --

QUESTION: And you don't think Congress was at all concerned with that kind of problem in the Williams Act?

MR. CHERNO: If you read the legislative history, you see no concern whatever with that kind of problem. And again let me say what a manipulative

practice could be in a tender offer I think is well indicated by one of the cases that Mr. Bizar mentioned, the Crane and Westinghouse case.

There's almost a standard example. There was a tender offeror and there was a favored bidder that had entered into a merger agreement with the target company. On the last day before the hostile tender offeror's tender offer was about to expire, what this other merger partner did was go into the market, buy a lot of securities in unreal transactions, because they were secret sales that were to take place the next day. It drove up the price of the target company stock beyond the tender offer price that the hostile offeror was offering, and operated to defeat the tender offer. The shareholders, seeing what the price was, said why should I take this tender offer.

So that seems to me to be a classic example of manipulation and misleading investors in a tender offer context. The creation --

QUESTION: But it's also fraud, in your view?

MR. CHERNO: Yes, it's also fraud, in my view.

QUESTION: So you don't think manipulation means something different from fraud?

MR. CHERNO: I think manipulation is a species

of fraud. I think fraud is a broader concept that includes among it manipulation, and I think that manipulation --

QUESTION: So this was just a piece of bad draftsmanship in writing the Williams Act in saying "or"?

MR. CHERNO: Well, I think 10(b)(5), Justice White, was drafted the same way. It talked about the separate --

QUESTION: Well, that may be. That may be, but one wrong -- one sloppy job doesn't justify another.

MR. CHERNO: Well, I don't think 10(b)(5) was sloppy, nor do I think that the --

QUESTION: Well, it took a lot of cases to prove that it wasn't, didn't it?

MR. CHERNO: Nor do I think the Court's Santa Fe opinion, which said that manipulative conduct would have to include deceptive conduct, despite the use of the word "or" was a sloppy opinion. Nor do I think it would be sloppy for the Court similarly to hold that fraudulent, deceptive and manipulative all require the misleading of investors, as those terms were used by Congress and have been traditionally defined under the securities laws.

And one of the maxims that I set forth in my brief is that a word is known by the company it keeps, and when words are used together it is often because they have the same essential generic meaning and that they all carry with it a thread of similar conduct.

QUESTION: Well, that argument certainly carried the day in 10(b)(5), didn't it?

MR. CHERNO: I would hope it would carry the day in section 14(e) also.

Let me -- coming back to the facts of this case, all of these conditions, all of these events, came into place. I was mentioning the sale of assets. El Paso went out and announced that it was going to sell and negotiating to sell its major assets, again a clear condition which permitted us to withdraw the tender offer.

So what did Burlington -- in light of all these conditions, I submit, it is clear that Burlington could have withdrawn its offer, packed its bags and gone home entirely and had nothing more to do with El Paso. Under those circumstances, El Paso shareholders would have gotten nothing at all. No one would have gotten a premium price.

What it did instead was something that was far more beneficial to El Paso shareholders, and that was to

enter into an agreement with El Paso. Let me say one other thing. At the time that this agreement was entered into there's a lot of talk about us having the shares locked up in our treasury, that we had the right to purchase them. We had no right to purchase those shares at that time.

The shareholders had two more days in which to withdraw their tenders. The world knows that a lot of things happen to tender offers in those two days. If a white knight or some other party had come in on one of those two days, we have no right to buy those shares. So just as we had the right under our contract to terminate the tender offer, El Paso shareholders similarly had the right under the Williams Act to withdraw their tenders.

Both sides at that moment in time still had the rights provided for them both by the Williams Act and by the contractual provisions themselves. So what we did, what Burlington and El Paso did, was enter into an agreement which -- a normal and typical acquisition agreement which provided benefits for everyone. The benefit it provided for Burlington, first, is that we were able to acquire the 50 percent interest that we had sought to acquire.

Another benefit it provided for Burlington was

that we were freed from the risks of the sale of assets, we were freed from the risks of a court injunction, El Paso agreed to use its best efforts with the State of Texas to get it to terminate the state antitrust action.

We were not freed, by the way, from the risk of a white knight. In fact, since the mechanism that was adopted was a new tender offer with a new 20 business days, a white knight -- there was more opportunity in fact for a white knight to come in under this mechanism than there would have been if we had gone ahead with our tender offer. But we were freed from the particular risk that the contract, the tender offer contract itself, sought to protect us against.

What did this do for El Paso shareholders? First, it got them the premium prices that we were offering. Second, El Paso asked and we agreed to put $100 million of badly-needed capital, what El Paso's directors believed was badly-needed capital into the corporation. Third, and most important, I think, from El Paso's shareholders' rights or standpoint is El Paso exacted and Burlington agreed that -- to very important protections against any second-step merger.

Previously, one of El Paso's complaints about our tender offer was that there were no protections

whatever if we -- if, after we had acquired the 50 percent we wanted to go ahead and acquire the company, the rest of the shares, in a merger transaction, we could dictate the price; we'd have majority ownership.

What El Paso management exacted from us is an undertaking that we would have no second-step merger transaction unless it was approved by a majority of the remaining El Paso directors who are not associated with Burlington, and unless it was approved by a majority of the remaining minority public shareholders -- non-Burlington shareholders.

That was the nature of the agreement and it's an agreement that made a lot of sense to everyone concerned. And in fact what happened later on down the pike was a merger was completed and it was completed under the procedures set up under that agreement.

Now, Your Honors, if that constitutes fraud, there is nothing that doesn't constitute fraud under the Federal securities act and any claim of any nature could be alleged to be fraud or manipulative or deceptive and brought into Federal court and a wholly new and uncharted and uncontoured burden could be placed on those who participate in tender offers. That is not what Congress intended.

Coming back to the statutory guidelines, let's

talk for a second about the plain language of the statute. If there's one thing about plain -- if there's one thing that's plainer, it's that contract doesn't mean fraud and that fraud doesn't mean contract. The words "fraudulent", "deceptive", and "manipulative" do not mean contract. It's easy to regulate contractual relationships if Congress wants to. It could write the word down; it didn't.

It used in fact words which are almost jurisprudentially opposite. It used tort concepts, fraud concepts, deception concepts, not contract concepts. If it wanted to regulate the breach of fiduciary obligations, it could do that also. It didn't.

Let's talk about the legislative history. The Williams Act is blessed with an extensive legislative history and it's blessed with a very pointed legislative history. And what that legislative history says over and again is this is a disclosure statute. It's intended to extend the disclosure protections which exist on other types of change in control transactions to cash tender offers.

This is a new phenomenon. It's not regulated. Let's extend those disclosure protections to cash tender offers. It says that over and over again in

the legislative history. There isn't a word in the legislative history to suggest that Congress was concerned with contractual issues. There isn't a word in the legislative history to suggest that Congress was concerned with the conditions that were put on contracts.

There isn't any of that. It's not a question -- I suggest that before you displace a whole body of state law you'd have to have the most clearest and unequivocal statement of congressional intent to do that, but you don't even come close to that here. You don't have a word. You don't have an iota. You don't have an inkling of congressional intent to accomplish such a broad-gauged, sweeping purpose as displacing state law, regulating contract, regulating fiduciary obligations.

That's just not what Congress was about, and there's nothing in the legislative history that remotely suggests it.

Let's talk about the legislative history of section 14(e) itself. There you have a much sparser legislative history and the reason is, I submit, because no one suggested that section 14(e) was intended to do anything singularly new in the securities laws. It was intended to be the same type of anti-fraud provision as

applied to tender offers as already existed in the anti-fraud -- in the securities laws with respect to other transactions, and one hardly needs a lot of congressional statements to accomplish that purpose.

The language of the statute was clearly modeled on an amalgam of rule 10(b)(5) and section 10(b), and it was obviously intended to police the disclosure obligations which the rest of the Williams Act was created. It's clearly what section 14(e) was about.

QUESTION: Mr. Cherno, can I ask you one more question about -- I perhaps should ask your adversary this about your understanding of the theory of the complaint. What do you understand the theory of damages to be -- the difference between what they got and what they would have got under the original offer, or the difference between what they got and what a white knight might have offered?

MR. CHERNO: You know, I'm puzzled by the whole theory of the case. I think it's what -- the difference between the price of the stock under the original offer and what the stock may have fallen to at some point after the original offer was withdrawn.

It's the best that I can surmise from the complaint, and that seems to be posited on some theory

that when a tender offer is made you have an absolute right of all shareholders to get that tender offer price irrespective of the conditions under which it's made. It's like it writes the conditions out of the tender offer. We made an offer for $24 and he has the right to it.

QUESTION: I'm not sure whether the wrong is withdrawing the first offer or the form of the second offer.

MR. CHERNO: I'm not sure either, but in either case I think it's posited on the wholly falacious theory that somehow once an offeror starts a tender offer he has -- shareholders have the right to that price. It's theirs. It's in their pocket. It doesn't matter that conditions exist. It doesn't matter that the conditions say you can terminate it and walk away entirely. It doesn't matter that the offer says you can make a deal with the target company management.

You somehow have the right to, in this case, $24.

QUESTION: I suppose the law could contemplate a situation in which you had a legal right to withdraw but you might nevertheless withdraw for an improper reason or part of an improper conspiracy.

MR. CHERNO: I think that the law can

contemplate that, Justice Stevens, and that's what's in front of the Delaware Chancery Court. If we breached our contract, if we did something under that tender offer contract that we shouldn't have done, the Delaware Chancery Court will so hold. That's the ligitation it's conducting and that's exactly what that litigation is about.

And the law may possibly contemplate that. We argue there that it doesn't. We argue that if we have the right under express conditions to withdraw the contract and to withdraw the offer and those conditions take place, we've complied with all we have to comply with.

I thank you.

QUESTION: Mr. Bizar.

ORAL ARGUMENT OF IRVING BIZAR, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. BIZAR: Mr. Chief Justice, let me attempt to address some of the arguments made by my brother Cherno. First, he has gone through a long recitation of facts. Let me state that none of those facts were submitted below and I think unfair for him to argue it here when we have been deprived of the opportunity to contest those facts.

Let me address the question of the outs which

he says took place. The complaint specifically alleges that the outs were inapplicable. Indeed, the Delaware court very expressly said that the estoppel argument, to wit that respondents could not assert those outs, were abandoned in the state court proceeding.

QUESTION: Mr. Bizar, can I just ask you this one question? Is it your view that the wrong was the withdrawal of the first offer or the making of the second offer?

MR. BIZAR: It is a combination of both, because I suppose, Justice Stevens --

QUESTION: Does it then follow that if we didn't have a first offer but they just came in with the second offer and that's all there was alleged there would be nothing wrong with that?

MR. BIZAR: That's correct. I think the problem was --

QUESTION: I see. And, similarly, if they had just made the first offer and withdrawn it without the second one, there would be nothing wrong with that?

MR. BIZAR: That's right. It's the combination of both. They made the first offer. It was over-subscribed. When these various events occurred that my brother Cherno was -- adverts to, they didn't stop the offer. They went forward with the offer. They

contested the litigations and they only withdrew those, the first offer, as a result of the direct agreement they made with the El Paso management which favored the El Paso management. That, we say, is manipulation.

Now let me just --

QUESTION: it's the agreement you say they could have made if they hadn't made the first offer?

MR. BIZAR: That is correct.

Now let me address the Delaware action which my brother, Cherno, made reference. In the first place, Barbara Schreiber is not a party to that action. In that action, which was started second to our case, they stipulated to class action status ex parte, without notice to any representative, without notice to the class.

To assert that whether or not that plaintiff or those plaintiffs are adequate representatives, I don't think that any result reached in that court would be binding anyplace either constitutionally or under any fair sense of fair play.

Finally, it may be possible that the conduct of respondents violates state law, but it is equally true that it also violates Federal law. And contrary to what my brother, Cherno, argues, the legislative history makes clear that in this unique sense of a cash tender

offer Congress was directly concerned with that. You are not required to fashion a whole new body of law; you are simply being required to enforce the statute which the Congress directed; to wit, to ensure that the franchise given to the target company shareholders not be tampered with as it was tampered here.

That's simple enough. We ask that the decisions be reversed.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:41 o'clock p.m., the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)