5-1-1978


Herman Fortescue Greene

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol56/iss4/10

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

From the enactment of the Securities Exchange Act (Exchange Act)\(^1\) in 1934 through 1972, United States Supreme Court opinions enabled and encouraged the expansion of implied private rights of action under the antifraud provisions of the Act.\(^2\) The Court's infrequent reviews of lower court decisions\(^3\) were pro-plaintiff, geared toward vigorous enforcement of the Act\(^4\) and the accomplishment of its "broad remedial purposes."\(^5\) Since 1972, however, Supreme Court opinions in securities fraud cases have shifted dramatically. These more recent opinions have been pro-defendant and have had the effect of restricting the scope of permissible litigation under the antifraud provisions of the securities laws.\(^6\)


3. Between the passage of the Securities Exchange Act in 1934 and 1972, the Court issued six decisions interpreting antifraud provisions of the Act. In chronological order the decisions were: J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (merger effected through circulation of false and misleading proxy statement; implied private right of action exists under § 14(a) of the Exchange Act as to both derivative and direct causes); Tcherepnin v. Knight, 389 U.S. 332 (1967) (withdrawable savings shares in savings and loan association are securities within the meaning of the Exchange Act; investors who purchase shares in reliance upon misleading advertisements are entitled to protection under § 10(b) of the Exchange Act); SEC v. National Sec., Inc., 393 U.S. 453 (1969) (purchase or sale requirement of § 10(b) of the Exchange Act does not prevent Securities and Exchange Commission (SEC) injunctive action against accomplishment of merger through misleading statements); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (stockholders can prove that merger was accomplished through proxy statement that failed to disclose material information by showing that statement is an essential link in transaction); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) (implied right of action under § 10(b) of the Exchange Act in favor of insurance company, represented by New York Commissioner of Insurance on behalf of creditors, when individual defrauded company by purchasing all of its shares through use of reserve fund); Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (plaintiffs allowed to recover from bank employees who persuaded them to cash in their stock in the Ute Development Corporation without disclosing non-Indian resale market at higher price even though plaintiffs did not prove reliance).


5. Id. at 431.

6. From 1972 until the end of the 1976 October Term, the Supreme Court decided six cases interpreting antifraud provisions of the Exchange Act. In chronological order the decisions were: Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (plaintiffs who did not purchase shares that defendant was required to offer them as result of antitrust consent decree because of overly pessimistic statement accompanying offering did not have standing to sue under § 10(b) of the Exchange Act); Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) (plaintiffs not entitled to injunctive relief against successful take-over bidder who had failed to
investors who suffer injury because of manipulative securities transactions are now prevented from seeking relief in federal courts. This result is illustrated in Crane Co. v. American Standard, Inc. (Crane III), a case in which a federal district court took note of the recent decisions and held that a defeated tender offeror had no right of relief against a company that defeated its offer by fraudulent practices that violated the Exchange Act. The inability of the court to reach the issues of fraud presented in Crane raises disturbing questions about the future of federal securities fraud litigation.

The Crane suit arose out of a battle for control of Westinghouse Air Brake, Incorporated. In the summer of 1967 representatives of Crane approached Air Brake management about a possible merger of the two companies and simultaneously began purchasing Air Brake shares on the open market. In November Air Brake informed Crane that it was not interested in a merger; Crane responded by increasing its purchases of Air Brake stock. Late in December Blyth and Company, investment bankers and representatives of American Standard, Incorporated, Crane’s largest competitor in the plumbing industry, informed Air Brake that Standard would be interested in helping Air Brake resist Crane’s incipient take-over bid. Shortly thereafter, the directors of Air Brake approved a plan to merge into Standard. Under the proposed terms of merger, Air Brake stock, then quoted at $36, would be exchanged for Standard convertible preferred stock disclose its purpose as required by § 13(d) of the Exchange Act; plaintiff did not show irreparable harm and there was an adequate remedy at law); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (defendant auditor not liable to purchaser as aider and abettor for failure to discover client’s fraudulent securities sales scheme because there was no allegation of scienter); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976) (plaintiff could not recover under § 14(a) of the Exchange Act based on allegations that defendants had accomplished a merger through a misleading proxy statement because plaintiff had not shown substantial likelihood that omitted fact would have had actual significance in deliberations of reasonable shareholder); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (tender offeror whose offer was defeated by practices that violated the Exchange Act has no standing to sue for damages under § 14(e) of the Williams Act); Santa Fe Indus. v. Green, 430 U.S. 462 (1977) (minority shareholders of company merged into defendant under Delaware short-form procedure cannot recover on grounds of unfairness and lack of notice because § 10(b) of the Exchange Act is not concerned with fairness and the disclosure requirements are controlled by state law).


9. Id. at 946-47.

10. Id.

11. On February 20, 1968, Crane filed schedule 14-B, a form required by SEC rule 14a-11(c), 17 C.F.R. § 240.14a-11(c) (1977), as a prerequisite to soliciting proxies for the election of a corporation’s board of directors. The Air Brake directors immediately met to discuss Blyth’s February 19, 1968, proposal to merge Air Brake into Standard. On March 4 the directors met in formal session and voted for the merger. On March 5 Air Brake informed its shareholders of the action taken by the directors and of the terms of the merger agreement. Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 791 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970) [hereinafter cited as Crane I].
worth approximately $50. After announcement of the proposed terms Air Brake stock rose to $44 on the New York Stock Exchange.\(^\text{12}\)

The controversial phase of the take-over contest began on April 8, when Crane mailed to Air Brake shareholders an offer to exchange Air Brake stock for Crane subordinated debentures worth approximately $50. During the same week, Air Brake mailed its proxy statement soliciting proxies in favor of the proposed Standard merger.\(^\text{13}\) On April 19, the day Crane’s offer was to expire, Standard purchased 82,400 shares on the market for cash at an average price of $49.08, while it engaged in undisclosed private sales of 100,000 shares to a friendly investment company at 44\(\frac{1}{2}\) and 20,000 shares to a friendly investment banking house at 44\(\frac{3}{4}\).\(^\text{14}\) This maneuver precluded any hope of success for Crane’s initial offer.\(^\text{15}\) Although Crane finally managed to obtain 32\% of the shares of Air Brake, the proxy count at the May 16 meeting of Air Brake shareholders ran heavily in favor of the Standard merger;\(^\text{16}\) consequently, on June 7 that merger was consummated. Crane’s stock interest in Air Brake was converted into Standard shares by the merger. On June 13, under threat of a divestiture


\(^\text{13}\) Id.

\(^\text{14}\) Crane III, 439 F. Supp. at 947. The last day of a tender offer is often the most important because of the activity of professional risk arbitrageurs, a small group of individuals associated with member firms of the New York Stock Exchange. Professional arbitrageurs make large open-market purchases of the target company’s shares somewhere between the market price and the tender offer price for the purpose of subsequently tendering their shares at a profit. The arbitrageurs usually wait until the last possible moment before deciding whether to tender their shares. See E. Aranow & H. Einhorn, Tender Offers for Corporate Control 173-91 (1973). On April 19 arbitrageurs saw the tape price of Air Brake rise five points. This sudden rise would cause the arbitrageurs not to tender their shares if they believed they could sell on the market at 50 or above or if they believed that the rise in price would result in the defeat of the tender offer and the consequent risk that shares tendered would be returned and the market price would fall. The arbitrageurs could not accurately assess the market for Air Brake shares because they and other investors were unaware that the sudden demand for Air Brake shares was artificially created by Standard (of the 26,300 shares traded at 50 that day, all but 100 were bought by Standard, Crane I, 419 F.2d 787, 893 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970)), and they were unaware of Standard’s two private sales of 120,000 shares (Standard’s telegram to one of its private purchasers confirming the sale was marked “HIGHLY CONFIDENTIAL,” id.). These private sales were made at approximately the same price that Air Brake opened at on April 19 and were indicative of the true market demand for Air Brake shares. Id. If Air Brake shares had remained at 45 throughout the day the arbitrageurs would likely have tendered to realize their profit on the offer as the price spread would make it probable that ordinary shareholders would tender, the offer would be a success, and the risk of nonacceptance would be low.

In the early proceedings in Crane the number of Air Brake shares purchased by Standard was erroneously reported to have been 170,200. At the 1976 trial it was brought to the court’s attention that the correct figure was 82,400. Crane III, 439 F. Supp. at 947 n.1.

\(^\text{15}\) Having fallen short of control, Crane extended its offer past April 19. Even with this extension, however, it was not able to secure the necessary number of shares. Crane I, 419 F.2d 787, 791 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970).

\(^\text{16}\) The proxy count was 2,903,869 for the merger and 1,180,298 against. Almost all of the proxies against the merger were voted by Crane. Id.
action to be brought by Standard under the antitrust laws, Crane sold all but 10,000 of its shares of Standard, earning a substantial profit.17

In the midst of the take-over contest Crane filed two suits against its opponents in federal district court. The first, against Air Brake, alleged misrepresentation in the Air Brake proxy statement and requested an injunction against continued solicitation and use of the proxies.18 The second suit, naming Standard and Blyth as defendants, attacked Standard’s April 19 transactions in stock as illegal purchases of proxies and as “market manipulation” and “fraud in connection with the purchase or sale of securities.”19

17. Crane earned a profit of “several million dollars” and later disposed of all but 1000 of the remaining shares. Id.

Shortly after Crane sold its stock, Standard and several Standard shareholders filed suit against Crane alleging that Crane’s sale of Standard shares within six months of its purchase of Air Brake shares was a violation of § 16(b) of the Exchange Act, 15 U.S.C. § 78p(b) (1970) (regulating short swing profits on insider trading). Crane entered a counterclaim for damages it had sustained by virtue of Standard’s allegedly fraudulent action opposing its tender offer. In American Standard, Inc. v. Crane Co., 346 F. Supp. 1153 (S.D.N.Y. 1971), the judge granted Standard’s motion for summary judgment and denied Crane’s. On appeal, 510 F.2d 1043 (2d Cir. 1974), cert. denied, 421 U.S. 1000 (1975), the court of appeals reversed. Following the rationale of Kern County Land Co. v. Occidental Corp., 411 U.S. 582 (1973), the court held that § 16(b) liability should not be imposed on Crane for its sale because plaintiffs had failed to show that there was any likelihood that Crane, as a 10% shareholder, had access to or had abused inside information. 510 F.2d at 1053-56. After the court of appeals decision Crane dropped its counterclaim and proceeded to pursue its damages in Crane III, 439 F. Supp. 945 (S.D.N.Y. 1977).

18. Crane Co. v. American Standard, Inc., 490 F.2d 332, 335 (2d Cir. 1973) [hereinafter cited as Crane II]. This suit was filed April 17, 1968.

19. Crane I, 419 F.2d 787, 791-92 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970). Illegal purchases of proxies are a violation of § 14(a) of the Exchange Act, 15 U.S.C. § 78n(a) (1970); “market manipulation” is a violation of § 9(a)(2), id. § 78i(a)(2), and “fraud in connection with the purchase or sale of securities” is a violation of § 10(b), id. § 78j(b), and SEC rule 10b-5, 17 C.F.R. § 240.10b-5 (1977).

Section 9(a)(2) makes it unlawful:
To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.
Any person who willfully participates in any act or transaction in violation of subsection (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction.
Id. § 78(e).

Section 10(b) reads as follows:
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
Id. § 78(b). Rule 10b-5, adopted by the SEC pursuant to § 10(b), provides:
It shall be unlawful for any person, directly or indirectly, by the use of any means
Crane prayed for an injunction against Standard voting its Air Brake stock, consummating the merger or performing any further acts that violated the Exchange Act and also for "such other and further relief as may be just and proper." The two suits were consolidated for trial and on June 5, 1968, the district judge entered an order dismissing the consolidated complaint on the merits. On appeal, the Court of Appeals for the Second Circuit in Crane Co. v. Westinghouse Air Brake Co. (Crane I) affirmed the dismissal except as to the claims against Standard for its April 19 stock transactions. On remand to the district court for a determination of appropriate relief, the proceedings were stultified by an order granting Standard's motion to have all issues relitigated before a jury. At Crane's request the order was certified for appeal, and in 1973 the case returned to the court of

or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
(a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

21. Id.
22. Crane II, 490 F.2d 332, 335 (2d Cir. 1969).
23. 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970). The court held that the April 19 transactions violated §§ 9(a)(2) and 10(b) of the Exchange Act and rule 10b-5, see note 19 supra, and that Crane was entitled to such relief as in equity might be required for the injury it suffered as a result of these transactions. 419 F.2d at 792, 804. The court rejected Standard's defense that it had acted in good faith simply to increase its voting position in Air Brake while keeping its holdings of Air Brake stock below 10% in order to avoid problems under § 16(b) of the Exchange Act. Id. at 792. Section 16(b), 15 U.S.C. § 78p(b) (1970), allows the issuer to recover any profits made on "any purchase and sale, or any sale and purchase of any equity security of such issuer . . . within any period of less than 6 months" by corporate insiders. Id.
24. The proceedings on remand are described in Crane II, 490 F.2d 332, 337-39 (2d Cir. 1969). One district court order on remand was reported in Crane Co. v. American Standard, Inc., 326 F. Supp. 766 (S.D.N.Y. 1971). On remand Crane disclosed the following claims for monetary relief:
(1) the difference in value between Crane's 32% block of Air Brake Stock, including the value of control, and the Standard shares which were received in exchange therefor after the merger of Air Brake into Standard, (2) similar damages with respect to Air Brake stock which Crane was prevented from acquiring as a result of Standard's alleged manipulation and deceit, (3) the value to Crane of control of Air Brake, (4) the loss which Crane allegedly suffered from the forced sale of its Air Brake stock, for antitrust reasons, subsequent to the merger, and (5) punitive damages.

Crane II, 490 F.2d at 337 n.6. These claims led Standard to move for an order "defining and limiting the issues." The court granted this "to the extent of striking as a nonjury issue the assessment of any money damages other than such amounts as may be required to render equitable relief effective." 326 F. Supp. at 776-77. In addition, the order stated that if Crane decided to formally amend its complaint to include the claims, Standard would be entitled to a jury trial. This order was reaffirmed by another order issued July 6, 1973. The latter order became the subject of a new appeal to the Second Circuit. 490 F.2d at 334-35.
appeals as *Crane Co. v. American Standard, Inc. (Crane II).*26 The appellate court ruled that the district court’s order was erroneous and remanded, directing the district court “to get on with the task” of determining relief.27 On remand, the district court (*Crane III*)28 held a hearing on the issue of relief. After this hearing, but before the court had rendered its opinion, the Supreme Court decided *Piper v. Chris-Craft Industries, Inc.*,29 which held that a defeated tender offeror had no private right of action under section 14(e) of the Exchange Act or SEC rule 10b-6.30 In September 1977 the district court, taking note of *Chris-Craft* and other recent Supreme Court opinions,31 held that *Crane* was entitled to no relief.32

The history of the availability of relief to tender offerors under the anti-fraud provisions of the Exchange Act is essentially the history of the *Crane* case. *Crane I* established the right of a tender offeror to claim relief under these provisions. It was hailed as a landmark decision33 and was instrumen-

27. Id. at 345.
30. *Chris Craft* involved the question whether a tender offeror suing in its capacity as a take-over bidder had standing to sue for damages under § 14(e), 15 U.S.C. § 78n(e) (1970) (making fraud in connection with a tender offer unlawful), or rule 10b-6, 17 C.F.R. § 240.10b-6 (1977) (making purchases of securities outside the tender offer by the offeror unlawful). *Chris-Craft* sought to gain control over *Piper*. *Piper* decided to fight the attempt with the assistance of *Bangor Punta* and *First Boston Corporation*. *Chris-Craft* made a tender offer and *Bangor Punta* countered with its own offer. In the course of the competition *Chris-Craft* filed suit alleging that *Piper* had made misleading statements to *Piper* shareholders in opposition to the tender offer, that *Bangor Punta* had made material omissions in its tender offer statement filed with the SEC, that *First Boston* was liable for certifying the statement (all this in violation of § 14(e)) and that *Bangor Punta* had purchased 120,000 shares in a private sale during the pendency of its tender offer in violation of rule 10b-6 and proposed rule 10b-13, 17 C.F.R. § 240.10b-13 (1977) (adopted Nov. 10, 1969). The Supreme Court held that the legislative history of the Act of June 29, 1968 (Williams Act), Pub. L. No. 90-439, 82 Stat. 454 (codified as amended at 15 U.S.C.A. §§ 78l, 78m, 78n (West 1971 & Cum. Supp. 1977)), which amended the Exchange Act by adding § 14(e), showed that Congress passed the Act solely for the purpose of protecting public investors who are confronted with a tender offer, 430 U.S. at 35, and that a private right of action could be implied only in favor of "the class for whose especial benefit the statute was enacted."" Id. at 37 (quoting *Cort v. Ash*, 422 U.S. 66 (1975)). The Court’s argument denying *Chris-Craft* relief under rule 10b-6 emphasized that *Chris-Craft* came before the Court not as an ordinary shareholder but as a defeated tender offeror and as such its claim stood outside the express concern of the rule. *Id.* at 45. *Chris-Craft* is reviewed in *Aranow, Einhorn & Berlstein, supra* note 7; *1976-77 Securities Laws Developments*, 34 WASH. & LEE L. REV. 861, 950-53, 960-63 (1977).
31. *Crane III*, 439 F. Supp. at 954. For cases noticed by the district court, see note 51 infra.
32. 439 F. Supp. at 958.
33. The following statement is representative: *Crane* expands the anti-fraud provisions to an additional class of plaintiffs—those who are not purchasers or sellers directly engaged in a securities transaction. The effect is not to decrease the burden of proof required to establish a violation of rule 10b-5, but rather to toll the death knell of the *Birnbaum* [v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952); see text accompanying notes 35 & 36 infra] doctrine.
tal in setting the pattern of litigation between tender offer contestants that existed until the Supreme Court decided Chris-Craft. The court of appeals' flexible interpretation of the Exchange Act enabled Crane to overcome difficult problems of establishing standing and claim relief as a victim of securities fraud. This flexibility was clearly illustrated by the manner in which the court dealt with the issue of standing—the most serious threshold obstacle to Crane's suit.

Crane's first cause of action was based on rule 10b-5. At the time of Crane I standing under rule 10b-5 was controlled by the rule of Birnbaum v. Newport Steel Corp., requiring that one be an actual purchaser or seller in the securities transaction affected by the wrongdoer to claim relief from the wrongdoer. In the Crane I court's view the Birnbaum rule, which it implied had originally been concerned with establishing a causal link between the fraud perpetrated and the injury suffered, was satisfied when a nonpurchaser or seller, otherwise entitled to the Act's protection, was forced to sell its shares after losing the take-over contest. See note 44 and accompanying text infra. The decision to break new ground and grant Crane standing was consistent with the trend of expanding private rights of action to investors who suffered injury caused by fraudulent market activity. See cases cited note 3 supra.

On July 29, 1968, two months after the Crane litigation began, the Williams Act became effective, adding the § 14(e) antifraud provision that does not contain the purchaser-seller language of § 10(b) and rule 10b-5. See note 30 supra. The SEC had pressed for the passage of § 14(e) in that form to assure that all forms of fraudulent conduct in connection with tender offers could be challenged by private litigants. See generally E. Arañó & H. Einhorn, supra note 14, at 116-19. After the Williams Act became law, tender offerors based their claims on both § 14(e) and § 10(b). After Crane I the following cases held that the tender offeror had standing to sue under the Williams Act: Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir. 1974); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973), rev'd, 430 U.S. 1 (1977); Applied Digital Data Sys. Inc. v. Milgo Elec. Corp., [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) 95,824 (S.D.N.Y. 1977); Royal Indus., Inc. v. Monogram Indus., Inc., [1976-1977 Transfer Binder] FED. SEC. L. REP. ¶ 95,863 (C.D. Cal. 1976).


34. Crane I was the first case to grant a tender offeror standing to sue under the antifraud provisions of the Exchange Act. Crane was granted standing to sue under rule 10b-5 because it was forced to sell its shares after losing the take-over contest. See note 44 and accompanying text infra. The decision to break new ground and grant Crane standing was consistent with the trend of expanding private rights of action to investors who suffered injury caused by fraudulent market activity. See cases cited note 3 supra.
established proof of causation.\footnote{Id. at 797-98.} Under the court’s analysis, Crane satisfied the rule both because "[w]hen [it] entered the securities market with its tender offer, it was entitled to the Act’s protection not only against being deceived itself but also against deception of the investing public designed to prevent the public from entering into securities transactions,"\footnote{Id. at 796.} and because it had established that Standard’s deception of the public caused it injury.\footnote{Id. at 797.} Crane’s second cause of action was based on section 9(a)(2)\footnote{15 U.S.C. § 78i(a)(2) (1970).} of the Exchange Act, which prohibits transactions creating actual or apparent active trading in a security. Standing to sue under that section is expressly dependent upon plaintiff’s status as a purchaser or seller.\footnote{See note 19 supra.} The court concluded that Crane’s sale of stock on June 13, 1968, made it a seller under the Act because the sale was the “intended and inevitable” result of Standard’s manipulation of the market.\footnote{419 F.2d at 794.}

The passage of eight years from \emph{Crane I} to \emph{Crane III} led to quite different treatment of the case. The district court saw intervening Supreme Court opinions as requiring reassessment of four issues explicitly or implicitly decided by \emph{Crane I}: the existence of an implied private right of

\footnote{Id. at 793.}
action under rule 10b-5 in favor of a tender offeror; a nonpurchaser’s standing to sue under rule 10b-5 and section 9(a)(2); the adequacy of Crane’s proof of causation; and Crane’s entitlement to relief. With regard to the standing issues, Crane III applied the reasoning of Piper v. Chris-Craft Industries, Inc. concluding that a tender offeror is merely an incidental beneficiary of the antifraud provisions of the Exchange Act and as such cannot assert an implied private right of action for damages under rule 10b-5, and that because the gravamen of Crane’s complaint was the lost opportunity to control, rather than losses resulting from “an improper premium exacted for [Air Brake] stock,” it was not in the class of investors protected by section 9 of the Exchange Act and therefore did not have standing to sue under that section.

45. See note 41 and accompanying text supra.
46. See note 23 supra.
47. 430 U.S. 1 (1977), discussed at note 30 supra.
48. The Chris-Craft Court had developed this position in part by reexamining J.I. Case Co. v. Borak, 377 U.S. 426 (1964), the first case in which the Court had endorsed an implied private right of action under a provision of the Exchange Act. The reasoning of Borak was that private rights of action could be implied when it was shown to be a necessary supplement to SEC enforcement to make effective the congressional purpose underlying the Exchange Act. Id. at 432. According to the Chris-Craft reinterpretation, Borak held that an implied right of action is never necessary unless it protects the interests of individuals for whose direct benefit a provision of the Exchange Act is intended. See 430 U.S. at 25, 33, 41-42. The identity of those individuals is to be determined by the language of the statute, id. at 24, and its legislative history, id. at 25-26. In its examination of the Williams Act amendments to the Exchange Act, under which Chris-Craft sought relief (in particular, § 14(e)), the Court determined that the sole purpose of the Williams Act was the protection of public investors, see note 30 supra, and that while tender offerors were regulated by the Williams Act, they were not its beneficiaries. Applying this reasoning and extending it to a position that § 10(b) of the Exchange Act and rule 10b-5 as well as the Williams Act were for the exclusive benefit of the “public investor,” the district court in Crane III decided that the arguments against granting standing under § 14(e) applied to Crane’s claim of standing under § 10(b). 439 F. Supp. at 951-53.

Recognizing that Chris-Craft was “not directly analogous” to Crane, id. at 951, because Chris-Craft was concerned with claims under § 14(e) of the Williams Act and rule 10b-6 whereas Crane sued under rule 10b-5 and § 9(a)(2) of the Exchange Act, the court asked the parties to submit memoranda analyzing the impact of Chris-Craft on Crane. In the memoranda:

Standard emphasized the similarity of the two cases, noting that Rule 10b-5 and § 9, relied upon by Crane here, were both among the bases for Chris-Craft’s original complaint. Standard assert[ed] that the legislative history of the 1934 Act evidences no intent that these provisions would be applied to tender offers, or provide a private cause of action for a defeated offeror. According to Standard, if a statute designed to regulate tender offers—the Williams Act—does not give an offeror standing to sue for damages, it would be anomalous to derive such a right of action from statutes directed at other ends...

Crane, naturally, [drew] quite a different lesson from Chris-Craft. That decision, it... asserted, [did] not impair Crane’s standing in this action; its holding [was] a narrow one. The broad scope of the interests designed to be protected by the 1934 Act [was] contrasted to the narrow aim of the Williams Act.

Further, Crane’s trial posture as both a defeated tender offeror and a defrauded seller [was] argued, with emphasis upon the Crane I holding that Crane had standing to sue by virtue of its position as a forced seller.

Id. at 950-51.
49. 439 F. Supp. at 953.
50. The Crane III court took note of the comments of the Supreme Court in Chris-Craft
Of the other recent Supreme Court opinions pertinent to Crane, the district court found Blue Chip Stamps v. Manor Drug Stores, which reaffirmed the Birnbaum rule, especially relevant. It thought an anomaly would result if Blue Chip, which would bar suits against Standard under rule 10b-5 by those who did not tender their shares to Crane because of Standard's market manipulation, would nevertheless permit Crane to recover for an injury substantially derivative of the nontendering shareholders. The Crane III court also drew attention to a portion of the Blue Chip opinion countenancing the Birnbaum rule's denial of standing to "investors related to an issuer who [were not purchasers or sellers but] suffered loss in the value of their investment due to corporate or insider

with regard to Chris-Craft's claim for damages under rule 10b-6 (which included a discussion of § 9 of the Exchange Act under which Crane was suing):

Unlike Section 10(b), however, Section 9 provides an express cause of action for persons injured by unlawful market activities. Yet, that cause of action is framed specifically in favor of "any person who shall purchase or sell any security at a price which was affected by such act or transaction . . . ." Congress therefore focused in Section 9 upon the amount actually paid by an investor for stock that had been the subject of manipulative activity. This is not, as we have seen, the gravamen of Chris-Craft's complaint. It seeks no recovery for an improper premium exacted for Piper stock; rather it desires compensation for its lost opportunity to control Piper. We therefore conclude that, on its claimed basis for relief, Chris-Craft cannot avail itself of Rule 10b-6.

Id. (quoting Chris-Craft, 430 U.S. at 46) (citations omitted) (emphasis supplied by Crane III court). The district court found the similarities between the two cases controlling. Id. at 953-54.

51. The court stated:

Chris-Craft does not stand alone, it is not sui generis, distinguishable from all other cases because of unusual facts or esoteric points of law. Instead, it is one of several recent Supreme Court decisions which indicate that the Court is taking a hard, new look at federal jurisdiction under the securities laws. Included in this trend are Santa Fe Industries v. Green, 430 U.S. 462 (1977); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); and Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 . . . (1975).

Id. at 953-54.

52. 421 U.S. 723 (1975).

53. Id. at 755. For years standing under rule 10b-5 was limited by the rule in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952), that a person who is merely misled into inaction—One who refrains from purchasing or selling because of another's misstatements or omissions—cannot sue for damages. See text accompanying notes 35 & 36 supra. After the announcement of the rule a number of exceptions to it were developed. See note 71 infra. The rule was severely criticized, see, e.g., A. Jacobs, The Impact of Rule 10b-5 § 38.01[d] (rev. ed. 1977), and one federal circuit rejected the rule, see Eason v. General Motors Acceptance Corp., 490 F.2d 654 (7th Cir. 1973), cert. denied, 416 U.S. 960 (1974). In Blue Chip Stamps v. Manor Drug Stores, Blue Chip was required by an antitrust consent decree to offer a substantial number of its shares to retailers who had used the stamp service. In its offering to the retailers Blue Chip dissuaded some of the retailers from buying by means of materially misleading statements containing an overly pessimistic appraisal of its business so that the rejected shares could be offered to the public at a higher price. The Supreme Court denied standing to the retailers, reaffirming the Birnbaum rule and declaring an end to case-by-case erosion of the rule. The Court said there were policy advantages to the Birnbaum rule—protection against vexatious litigation, indeterminate liability and difficult problems of proof. 421 U.S. at 739-49.

54. 439 F. Supp. at 955.
which violate[d] Rule 10b-5' in support of barring Crane because "Crane itself [could] be compared to [this] class of potential plaintiffs.' In the final portion of its opinion, using the fact that Blue Chip expressed concern about the problems of proving causation and damages in securities fraud cases as a springboard, the district court launched an attack on Crane's proof of these elements. Crane had tried to show that Standard's market manipulation had caused its tender offer to fail, thus leading to a failure in its take-over bid and a substantial diminution of the value of its investment in Air Brake. On the basis of the evidence presented, however, the court held that even if Crane had standing it had not proved that it had suffered any specific injury caused by Standard and therefore it was entitled to no relief.

On each of the four issues decided in Crane III—existence of a private right of action, standing to sue, causation and damages—the district court could have decided for Crane, notwithstanding the recent Supreme Court decisions. Chris-Craft's "narrow holding" that "a tender offeror, suing in its capacity as a takeover bidder, does not have standing to sue [at law] for damages under § 14(e)" left open the question whether a tender offeror could sue in equity for injunctive relief. The Court's approval of Judge Friendly's statement in Electronic Specialty Co. v. International Controls

55. Id. (quoting Blue Chip, 421 U.S. at 738). Plaintiffs in Birnbaum were of this class. Birnbaum involved a suit against the directors of Newport Steel Corporation, who, in their official capacity, turned down a merger plan with Follansbee Steel Corporation. The president then sold his controlling share of stock to Wilport Company at an above-market price. Plaintiffs, minority shareholders, sought recovery for the "control premium" the president exacted from Wilport (plaintiffs would have shared in the value of the control premium if the merger with Follansbee had been approved).

56. Id. at 955. Under the rationale of Crane I, Crane did not belong in this class because it was the intended target of Standard's fraudulent activity and was forced to sell its shares because of the activity. See note 44 and accompanying text supra.

57. 439 F. Supp. at 955.

58. See id. at 956-57. In support of its position Crane offered evidence that on April 19 there was an attractive spread between the value of the Crane offer and the market price of Air Brake stock. In addition, it presented expert testimony that but for the sudden rise in price caused by Standard's manipulation its offer would have succeeded. Id. Standard, on the other hand, presented its own experts who testified that Crane's offer was not so attractive because there was a possibility that shareholders tendering to Crane would face capital gains tax, whereas, if the merger went through, shareholders could exchange their stock for Standard stock, equal in value to the Crane offer, and not be taxed. Id. at 957.

On April 19, 1968, Standard must not have been convinced of this position; it took a half million dollar trading loss on that day to defeat Crane's "unattractive" offer. Id. at 947.

59. Id. at 958.

60. 430 U.S. at 42 n.28.

61. "We intimate no view upon whether as a general proposition a suit in equity for injunctive relief, as distinguished from an action for damages, would lie in favor of a tender offeror under either § 14(e) or Rule 10b-6." Id. at 47 n.33. Aranow, Einhorn and Berlstein express their belief that injunctive relief should be available to tender offerors. Aranow, Einhorn & Berlstein, supra note 7, at 1760-61.
Corp. that "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, 'is the time when relief can best be given'" would seem to indicate that a tender offeror does have such a right. Crane began its suit by seeking preliminary injunctive relief but was denied such relief by the district court. In Crane I the court of appeals ruled that this denial had been error and remanded the case to the district court to grant such relief as might equitably be required, including damages. In so doing, as the court of appeals explained in Crane II, it did not convert the suit from one in equity to an action at law for damages. As on remand the district court would have had the power to order divestiture, the court of appeals had mentioned damages as an alternative, "less onerous equitable remedy against Standard than what the district court had the power to decree." If Chris-Craft left open a tender offeror's right to seek preliminary injunctive relief, it arguably also left open an offeror's (Crane's) right to appeal the wrongful denial of preliminary relief and the right of a court subsequently to grant retrospective equitable relief.

62. 409 F.2d 937 (2d Cir. 1969), discussed in note 44 supra.
63. 430 U.S. at 41-42 (quoting Electronic Specialty Co. v. International Controls Corp., 409 F.2d at 947).
64. See text accompanying notes 20-22 supra.
65. 419 F.2d at 804.
66. Id. at 803-04.
67. 490 F.2d at 342.
68. Id. at 340 (emphasis added). The court of appeals stated that the power to award damages was within the district court's equitable "clean-up" jurisdiction. Id. Under the "clean-up" doctrine a court of equity has authority to accord full relief in any case within its cognizance even though giving such relief might mean redressing injuries for which there is an adequate remedy at law. See D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 2.7, at 83-84 (1973).

The Second Circuit compared the action it had taken to that taken in two prior cases decided by the Supreme Court:

[The] Borak Court approved a ruling . . . that, in a suit in equity to enjoin unlawful proxy solicitation under § 14(a) of the Securities Exchange Act with respect to a merger since consummated, a district court "has jurisdiction under Section 27 to award damages or such other retrospective relief to the plaintiff as the merits of the controversy may require." . . . In Mills v. Electric Auto-Lite Co. . . . the Court reaffirmed the right of a district court to award damages where a merger had been consummated in the face of a pending equity suit alleging a misleading proxy solicitation.

490 F.2d at 340 (citations omitted) (quoting J.I. Case v. Borak, 317 F.2d 838, 849 (7th Cir. 1963), aff'd, 377 U.S. 426 (1964)).

69. In Chris-Craft the Supreme Court took note that the court of appeals had given injunctive relief. 430 U.S. at 47. The Court held that the injunction against Bangor Punta, one of the tender offerors, should not have been granted, saying Chris-Craft prior to the trial on liability expressly waived any claim to injunctive relief. The case was tried . . . exclusively as a suit for damages. . . . Under these circumstances, our holding that Chris-Craft does not have a cause of action for damages under § 14(e) or Rule 10b-6 renders that injunction inappropriate, premised as it was upon the permissible award of damages.

Id. Crane does not fall within the rationale of this holding. In Crane there was no express waiver of injunctive relief. Crane III, 439 F. Supp. at 947. In dissent in Chris-Craft, Justice Stevens argued that Chris-Craft's right to injunctive relief should not have been decided
On the issue of standing, *Blue Chip* reaffirmed the *Birnbaum* rule, putting an end to "case by case erosion of the rule."\textsuperscript{70} Apparently, however, *Blue Chip* did not affect the exceptions to the *Birnbaum* rule recognized at the time it was announced.\textsuperscript{71} The most widely accepted exception to the *Birnbaum* rule was the "forced seller" exception of *Vine v. Beneficial Finance Co.*\textsuperscript{72} In *Crane I* the court of appeals granted standing to Crane relying on this theory.\textsuperscript{73} If *Blue Chip* did not affect the exceptions to the *Birnbaum* rule, then it had no application to *Crane III*. Accordingly, Crane had a strong argument that it did indeed have standing under rule 10b-5.

On the issue of causation, the district court could have found for Crane on the basis of *Mills v. Electric Auto-Lite Co.*\textsuperscript{74} and *Affiliated Ute Citizens v. United States*.\textsuperscript{75} Defendant in *Mills* successfully solicited proxies for a merger using a proxy statement that failed to disclose material information. Plaintiff was not required to prove that the solicitation would have failed but for the nondisclosure; rather, the Supreme Court held it sufficient that plaintiff had shown that the defective proxy solicitation was an "essential link in the accomplishment of the transaction."\textsuperscript{76} *Affiliated Ute*, also dealing with a problem of causation in a nondisclosure case, held:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them im-

---

\textsuperscript{70} 421 U.S. at 755.


\textsuperscript{72} 374 F.2d 627 (2d Cir.), cert. denied, 389 U.S. 970 (1967), discussed in note 44 supra.

\textsuperscript{73} See note 44 and accompanying text supra.

\textsuperscript{74} 396 U.S. 375 (1970).

\textsuperscript{75} 406 U.S. 128 (1972).

\textsuperscript{76} 396 U.S. at 385.
important in the making of this decision. . . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.\textsuperscript{77}

On the basis of these cases, the district court could have held either that Standard's April 19 fraudulent stock transactions were an essential link in, and therefore the cause of, the defeat of Crane's tender offer or that Standard failed to disclose a material fact to Air Brake shareholders on April 19 and therefore caused them not to tender their shares to Crane, thus resulting in the defeat of Crane's tender offer.\textsuperscript{78}

Even if Crane failed to prove that Standard caused specific injury for which the court could fashion a remedy it would not necessarily follow (as it did implicitly in the court's opinion in \textit{Crane III}\textsuperscript{79}) that Crane was entitled to no relief. The Supreme Court anticipated that eventuality in \textit{Mills} and said that plaintiffs would still be entitled to attorneys' fees and reasonable expenses to repay the cost of establishing the Exchange Act violation.\textsuperscript{80} Crane could in equity have been granted this same minimal relief.\textsuperscript{81}

\textsuperscript{77} 406 U.S. at 153-54 (citations omitted).

\textsuperscript{78} This reasoning was advanced by Crane in \textit{Crane III}, 439 F. Supp. at 956 n.4. The district court replied that even though there may be a presumption of reliance when it is logical to presume that reliance in fact existed, "[t]he proof submitted by Crane makes this Court doubt that such a presumption is necessarily logical." \textit{Id}. In addition, the court cited Justice Blackmun's concurring opinion in \textit{Chris-Craft}, 430 U.S. at 48, which had rejected the majority's position that a tender offeror lacked standing to sue under § 14(e) but had said that Chris-Craft should be denied relief because of insufficient proof of causation. The district court in \textit{Crane III} said its problem in finding causation was "akin to" Justice Blackmun's in \textit{Chris-Craft}:

"It is not enough for the offeror to prove that the competitor's violations caused the shareholders of the target corporation to act in a certain way. In addition, the offeror must show that the shareholders' reactions to the misstatements or omissions caused the injury for which it demands remuneration. Even though the Mills-Affiliated Ute Citizens presumption satisfies the requirement for proof of the first element of causation, the absence of any evidence that the violations might have altered the outcome of the contest for control would leave me unable to hold that the securities law violations caused the disappointed contestant's ultimate injury—its failure to acquire control of the target corporation."

439 F. Supp. at 956 n.4 (quoting Chris-Craft, 430 U.S. at 51 (Blackmun, J., concurring)). But if the presumption satisfies the requirement of proof that investors acted in a certain way, in \textit{Crane} that they failed to tender their shares, it would logically follow that this caused the tender offer to fail.

\textsuperscript{79} See text accompanying note 59 supra.

\textsuperscript{80} 396 U.S. at 392-97.

\textsuperscript{81} The "American rule" governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). There are two exceptions to this rule—attorneys' fees may be awarded "where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class," F.D. Rich Co. v. United States \textit{ex rel}. Industrial Lumber Co., 417 U.S. 116, 129-30 (1974), or "to a successful party when his opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons," \textit{id}. at 129. \textit{See also} Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-59 (1975). \textit{Mills} came under the first exception. The court held that when plaintiffs established a violation of the proxy rules they restored fair and
Despite the availability, and perhaps even the attraction, of these alternative grounds for decision, it appears that the district court reached the proper result in light of the present posture of the securities laws. The arguments made for Crane's position are supportable, but they reflect policy considerations and directions of another era of judicial decisionmaking. In its recent opinions, the Supreme Court has not sought through technical argumentation to stir the waters of securities fraud litigation, but rather has sought through policy offensive to reverse the flow. To follow the leadership of the nation's highest tribunal, judges must not simply understand new legal doctrines applicable to securities fraud litigation, they must learn a new way of thinking about the role of the judiciary in handling the cases. Judges were once admonished that the federal securities laws should be interpreted "'not technically and restrictively, but flexibly to effectuate . . . [their broad] remedial purposes'".82 By implication, the statutes are now to be read narrowly and judges are to guard against case by case informed corporate suffrage, which was a substantial service to the corporation and its shareholders. To charge defendant corporation (all the shareholders) with attorneys' fees was "to impose them on the class that had benefited from them."396 U.S. at 396-97. Crane would fall under the second exception. Standard's bad faith stock transactions made it necessary for Crane to undergo litigation to recover the value of its investment; in such circumstances the burden of attorneys' fees should be shifted to Standard. The power of a court to award attorneys' fees to a successful Rule 10b-5 litigant under the bad faith exception was recognized in Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210-11 n.30 (1976). The award of attorneys' fees in Crane would be further justified by the express provision of § 9(e), 15 U.S.C. § 78i(e) (1970), allowing recovery of attorneys' fees by a party injured by a § 9(a)(2) violation.


83. Of the recent "restrictive" opinions, three, Santa Fe Indus. v. Green, 430 U.S. 462 (1977); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977); and Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), turned on narrowing constructions of the language of the Exchange Act. In Hochfelder the Supreme Court held that a private cause of action for damages would not lie under § 10(b) and rule 10b-5 in the absence of any allegation of "sciente," i.e., intent to deceive, manipulate or defraud on the defendant's part. Id. at 199-214. The Court reached this conclusion on the basis of the language of the statute saying that "'[t]he use of the word 'manipulative' . . . is virtually a term of art," id. at 199, its reading of the legislative history, id. at 201-06, its observation that in other sections in which Congress created express civil liability for acts of negligence it had no trouble specifying its purpose, id. at 206-11, and its determination that the administrative history of the Exchange Act indicated that when the SEC adopted rule 10b-5 the rule was intended to apply to activities that involved scienter, id. at 212-14.

Plaintiffs in Green challenged the fairness of the terms of a short-form merger. The Supreme Court relegated plaintiffs to "whatever remedy is created by state law," 430 U.S. at 478, and said that the concern of rule 10b-5 was full disclosure and that "once full . . . disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute," id. The Court added that "'[a]bsent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden." Id. at 479.

Chris-Craft studied the legislative history of the Williams Act to determine the main purpose of the statute and denied plaintiffs' right of action as not based upon that purpose. See note 30 and accompanying text supra.
erosion of established rules.\textsuperscript{84} Once judges were encouraged to be "alert to provide such remedies as are necessary to make effective the congressional purposes"\textsuperscript{85} now judges are instructed to be on their guard against vexatious litigation\textsuperscript{86} and the dangers of indeterminate liability.\textsuperscript{87} Once it was proposed that the federal securities laws were a pervasive scheme of regulation intended to secure fair markets for all investors; it now appears judges are to regard them as a limited, somewhat tentative effort\textsuperscript{88} to regulate the securities markets for the benefit of public investors.\textsuperscript{89}

Many reservations have been expressed about this abrupt change of the judicial mind. The sharpest and most telling criticism has come from within the Supreme Court itself. Mr. Justice Blackmun, in dissent in \textit{Blue Chip}, argued that the majority had let certain policy considerations—namely, guarding against vexatious litigation and avoiding difficult procedural issues—dominate its thinking and had evaded fundamental issues of substance.\textsuperscript{90} The salient issue in the case, said Blackmun, was the fact that plaintiff had raised "disturbing claims of fraud."\textsuperscript{91} The majority in rendering their decision, paid no heed to the unremedied wrong but rather devoted their attention to worries about the possible motives of potential

\begin{itemize}
  \item \textsuperscript{84} Blue Chip Stamps v. Manor Drug Stores, 421 U.S. at 755.
  \item \textsuperscript{85} J.I. Case v. Borak, 377 U.S. 426, 433 (1964).
  \item \textsuperscript{86} Blue Chip Stamps v. Manor Drug Stores, 421 U.S. at 739-49.
  \item \textsuperscript{87} \textit{Id.} at 739-41.
  \item \textsuperscript{88} In the majority opinion in Santa Fe Indus. v. Green, 430 U.S. 462, 477-80 (1977), it was argued that rule 10b-5 is only concerned with disclosure and that once there is disclosure federal courts should have no concern for fairness. This holding emasculates subsections (a) and (c) of rule 10b-5, 17 C.F.R. § 240.10b-5(a), (c) (1977), which prohibit any device, scheme, or artifice to defraud, or conduct that operates as a fraud or deceit upon, any person in connection with the purchase or sale of any security. The Court feared, however, that if the federal judiciary got into questions of fairness
  \begin{itemize}
    \item \textit{Id.} at 748-79. The Court added: "There may well be a need for uniform federal judicial standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of § 10(b) and Rule 10b-5 'to cover the corporate universe.'"
  \end{itemize}
  \item \textsuperscript{89} See generally Piper v. Chris-Craft Indus., Inc., 430 U.S. at 30-40.
  \item \textsuperscript{90} 421 U.S. at 761-71 (Blackmun, J., dissenting).
  \item \textsuperscript{91} \textit{Id.} at 762 (Blackmun, J., dissenting).
\end{itemize}
plaintiffs and the problem that proof of causation might depend on "oral testimony." He concluded:

The facts of this case, if proved and accepted by the factfinder, surely are within the conduct that Congress intended to ban. Whether this particular plaintiff will be able to carry the burdens of proving fraud and of proving reliance and damage is a matter that should not be left to speculations of "policy" of the kind now advanced in this forum so far removed from witnesses and evidence.

I am uneasy about the type of precedent the present decision establishes. Policy considerations can be applied and utilized in like fashion in other situations. The acceptance of this decisional route in this case may well come back to haunt us. I would decide the case to fulfill the broad purpose that the language of the statutes and the legislative history dictate.

Mr. Justice Stevens, in dissent in Chris-Craft, criticized the majority for focusing on the narrow intent of ensuring enforcement of the securities laws to protect the "public investor" and being oblivious to the fact that this could only be accomplished by ensuring enforcement of the laws on behalf of all investors who had an interest in the integrity of the securities market. Stevens forcefully argued that in Chris-Craft the majority had excluded from the class of plaintiffs those most interested in and most capable of ensuring effective enforcement—the tender offeror itself.

92. Certainly, this Court must be aware of the realities of life, but it is unwarranted for the Court to take a form of attenuated judicial notice of the motivations that defense counsel may have in settling a case, or of the difficulties that a plaintiff may have in proving his claim.

Id. at 770 (Blackmun, J., dissenting).

93. [The greater portion of the Court's opinion is devoted to its discussion of the "danger of vexatiousness" that accompanies litigation under Rule 10b-5 and that is said to be "different in degree and in kind from that which accompanies litigation in general." It speaks of harm from the "very pendency of the lawsuit," something like the recognized dilemma of the physician sued for malpractice; of the "disruption of normal business activities which may accompany a lawsuit," and of "proof which depend[s] almost entirely on oral testimony," as if all these were unknown to lawsuits taking place in America's courthouses every day. In turning to and being influenced by these "policy considerations," the Court, in my view, unfortunately mires itself in speculation and conjecture not usually seen in its opinions. In order to support an interpretation that obviously narrows a provision of the securities laws designed to be a "catch-all," the Court takes alarm at the "practical difficulties," that would follow the removal of Birnbaum's barrier.

Id. at 769-70 (Blackmun, J., dissenting).

94. Id. at 770-71 (Blackmun, J., dissenting).

95. Protection of tender offerors is not only consistent with protection of shareholders. It is also indispensable to protecting shareholders. Individual shareholders often lack the capacity to litigate these cases effectively. Few indeed could afford to pursue the course Chris-Craft has taken of hiring counsel with experience in complex litigation of this kind to litigate through a preliminary injunction, discovery, trial on liability, another trial on damages, three appeals to the Second Circuit, including an en banc, and three petitions to this Court. Thus, the most realistic deterrent to fraud on shareholders is a damage suit brought by the opposition in the tender contest.

430 U.S. at 68 (Stevens, J., dissenting).

96. If a private remedy must be applied to ensure full compliance with the statute, the
The criticisms of Justices Blackmun and Stevens can be applied to Crane. The factual situation presented to the district court was that on April 19 Standard willfully perpetrated a fraud on the shareholders of Air Brake for the purpose of defeating Crane's tender offer. The substantive question raised by the facts was whether, under either section 9(a)(2) or rule 10b-5, Crane was entitled to the protection of the Exchange Act and could, therefore, sue to recover for the injury it suffered as a result of the fraud. To deny that Crane had such a right on substantive grounds the Crane III court would have had to refute the holding of Crane I that Crane was "entitled to the Act's protection not only against being deceived itself, but also against the deception of the investing public designed to prevent the public from entering into securities transactions." But Crane III finessed the substantive issue by invoking the standing requirement of the Birnbaum rule. It is doubly ironic that Blue Chip, which had resurrected the Birnbaum rule to guard against vexatious litigation and then had applied the rule in a suit bearing none of the indicia of vexatious litigation, would be applied in Crane, a suit similarly devoid of such indicia. Crane III also avoided the substantive issue by relying on the stare decisis effect of Chris-Craft even though Chris-Craft involved different sections of the Exchange Act. In applying Chris-Craft to Crane the Crane III court did not seriously question whether tender offerors were excluded from the protection of section 10(b) as they were from the narrower section 14(e) as interpreted by the majority in Chris-Craft. As a result, Crane III was able to achieve the same result as Chris-Craft—denying standing to the party most interested in and capable of enforcing the Exchange Act and permitting the defendant to achieve control of a corporation by the use of fraudulent means expressly proscribed by that Act. In the last portion of the district court's opinion, concerning proof of causation, Crane was ostensibly assumed to have standing to sue. But even there the substantive issue was not faced squarely because Crane was only granted second-class standing: it did not have the benefit of the presumption of causation to which, as plaintiff in a nondisclosure case, it would normally be entitled.

The result in Crane and the results it presages are unsettling. The new rules permit violators of securities laws to escape liability and deny relief to their innocent victims. By so favoring defendants the Supreme Court has not

---

remedy must be available to the litigants who are most vitally interested in effective enforcement. . . . Once one recognizes that Congress intended to rely heavily on private litigation as a method of implementing the statute, it seems equally clear that Congress would not exclude the persons most interested in effective enforcement from the class authorized to enforce the new law.

Id. at 61-62 (Stevens, J., dissenting).

97. 419 F.2d at 797.

98. See note 78 and text accompanying notes 74-78 supra.
restored equilibrium in the administration of justice. It has only, as demonstrated in *Crane III*, restricted the ability of the federal judiciary to deal with substantive issues of fraud. The recent decisions may have the effect of exposing the limitations of the existing securities laws and expediting the adoption of more comprehensive federal legislation, but the movement to develop new federal legislation should not delay the effort to restore in judicial interpretation of the Exchange Act primary concern both for dealing with substantive issues of fraud and for fulfillment of the Act’s broad remedial purposes.

HERMAN FORTESCUE GREENE


100. *Crane III* is currently on appeal to the Second Circuit. Telephone conversation with Mr. Peter J. McKenna, attorney for plaintiff, New York, New York (Jan. 31, 1978).
Practical Tools for the Practicing Lawyer from BNA!

■ THE UNITED STATES LAW WEEK
Gives you full or partial text and digests significant decisions of federal district courts and courts of appeal, and state courts of last resort, long before publication in regional reporters. Covers every disposal by formal opinion, summary affirmance or reversal, or denial of review. Brings you full text and digests of Supreme Court opinions on the days they’re handed down. Plus, text and digests of significant federal agency rulings weeks before other sources. Indexed.

■ ANTITRUST & TRADE REGULATION REPORT
Weekly reports on FTC and Justice Department’s Antitrust Division activities; legislative developments; Supreme Court arguments, opinions, and orders; decisions of other courts; changes in state antitrust and trade regulation; private litigation; class actions; suits for injunctions; and treble damage cases. Full texts of appropriate material, plus special analyses of major developments. Indexed.

■ THE UNITED STATES PATENTS QUARTERLY
This is the only accepted and cited source of decisions exclusively dealing with patents, trademarks, copyrights, and unfair competition. You get advance sheets weekly, volumes quarterly. Indexed from 1929 to date.

■ THE CRIMINAL LAW REPORTER
Weekly review and analysis of current developments in criminal law administration, interpretation, and enforcement. Covers Supreme Court proceedings, arguments, actions, filings; decisions of federal courts of appeal and district courts, and of principal state courts; Congressional and state legislative action; reports and recommendations of commissions, associations, the Bar, and law journals. Full text and digests of all Supreme Court opinions in criminal cases, and text of significant federal legislation. Indexed.

■ FEDERAL CONTRACTS REPORT
Supplies you with weekly coverage of U.S. Government procurement and grant programs, policies, and regulations; decisions of Boards of Contract Appeals, Comptroller General, Renegotiation Board, Courts of Claims, Tax Court, and other courts and agencies; plus federal legislation affecting the Government and its contractors and grantees. Indexed.

■ BNA’s PATENT, TRADEMARK & COPYRIGHT JOURNAL
Gives you weekly notification, analysis, and interpretation of important current developments in these fields; plus full or partial text of proposed or enacted legislation and treaties; congressional reports; important court and agency rulings; pertinent policy statements and speeches; Patent and Trademark Office and Copyright Office opinions, statements, and rules. Indexed.

■ THE FAMILY LAW REPORTER
Weekly notification and reference service on domestic relations; adoption; children’s rights; abortion; tax aspects; and much more. Full text of all current state divorce statutes, and pertinent federal statutes. Covers latest legislative actions; litigation results; Supreme Court arguments and filings. You get full text of Supreme Court decisions and select lower court opinions. Includes case table and special monographs on practice-oriented subjects. Indexed.

For further information, please write or call:

THE BUREAU OF NATIONAL AFFAIRS, INC.
1231 25th St. N.W. Washington, D.C. 20037
Telephone: 202-452-4200