THE THIRD CIRCUIT'S LIMITATION ON THE CLASS OF PLAINTIFFS ALLOWED TO ASSERT VIOLATIONS OF THE ALL HOLDERS RULE

Polaroid Corp. v. Disney, 862 F.2d 987 (3d Cir. 1988)

In *Polaroid Corp. v. Disney,*[1] the United States Court of Appeals for the Third Circuit limited the class of plaintiffs that may assert violations of the Securities and Exchange Commission's All Holders Rule[2] to shareholders, holding that a target corporation lacks third-party standing[3] to assert its shareholders' interests in enjoining a tender offer[4] that excluded

1. 862 F.2d 987 (3d Cir. 1988).

2. The All Holders Rule requires that a bidder hold open a tender offer to "all security holders of the class of securities subject to the tender offer." 17 C.F.R. § 240.14d-10(a)(1987). The Securities and Exchange Commission (SEC) promulgated the Rule to ensure "fair and equal treatment of all holders of the class of securities that is the subject of the tender offer." Amendments to Tender Offer Rules: All-Holders and Best-Price, 51 Fed.Reg. 25,873, 25,874 (1986). The Commission promulgated the All Holders Rule pursuant to Section 14(e) of the Williams Act. *See* 15 U.S.C. § 78n(e)(1988). Congress passed the Williams Act in 1968. The Act amended the Securities and Exchange Act of 1934 by adding §§ 13(d)-(e) and 14(d)-(e). R. CLARK, CORPORATE LAW 547 (1986). The Williams Act amendments impose disclosure requirements on acquisitions of stock through both market purchases and tender offers. *Id.* The *Polaroid* dissent read Schreiber v. Burlington Northern, Inc., 472 U.S. 1 (1985), which characterized all of the Williams Act provisions as disclosure provisions, to mean that the All Holders Rule promulgated pursuant to the Williams Act is also a disclosure provision. *Polaroid,* 862 F.2d at 1008 n. 4. The majority rejected this argument for allowing third-party standing under both the Williams Act and the All Holders Rule. *Id.* at 994-95. *See infra* notes 81-83 and accompanying text.

Neither the Williams Act nor the All Holders Rule provides an express private right of action to supplement the SEC's enforcement powers. *Id.* at 993. The Court, however, recognized an implied private cause of action under the All Holders Rule in favor of the corporation's shareholders. *Id.* at 993-97. *See also* Field v. Trump, 850 F.2d 938, 946 (2d Cir.1988) (shareholders have right of action under section 14(d)(7)); Pryor v. United States Steel Corp., 794 F.2d 52, 57-58 (2d Cir. 1986) (shareholders have a right of action under section 14(d)(6)).

3. Standing is a jurisdictional concept which requires that a party have a sufficient stake in a dispute to ensure that a justiciable controversy is presented to a court. BLACK'S LAW DICTIONARY 1260 (5th ed. 1979). Third-party, or *jus tertii,* standing refers to a plaintiff's standing to assert the legal rights of a third party. In *Polaroid,* the Third Circuit addressed for the first time the issue whether a target corporation has standing to assert a violation of the All Holders Rule on behalf of its shareholders. *Polaroid,* 862 F.2d at 989 (3d Cir. 1988). For further discussion of third-party standing, see generally C. WRIGHT, A. MILLER, & E. COOPER, 13 FEDERAL PRACTICE & PROCEDURE § 3531.9 (1984); Monaghan, *Third Party Standing,* 84 COLUM. L. REV. 277 (1984); Sedler, *The Assertion of Constitutional* Jus Tertii: *A Substantive Approach,* 70 CALIF. L. REV. 1308 (1982).

4. In a tender offer, the offeror solicits the shareholders of a target company to tender their shares for sale at a specified price. The offeror may offer cash, securities, or both as consideration for the shares. The cash price offered usually exceeds the current market price by a substantial premium. Often the tender offeror structures its offer so that it is obligated to buy the tendered shares

certain shareholders. The court, however, sanctioned the target corporation's third-party standing to enjoin a tender offeror's misrepresentations under section 14(e)[5] of the Williams Act.[6]

In *Polaroid*, Shamrock Acquisitions III, Inc. (Shamrock) made a cash tender offer for all outstanding shares of Polaroid Corporation (Polaroid) common stock, except those shares held by Polaroid's Employee Stock Ownership Plan (ESOP).[7] Shamrock expressly conditioned its tender offer on a final judicial determination, or Shamrock's satisfaction, that the ESOP shares were not validly outstanding.[8] Polaroid sought a preliminary injunction in the United States District Court for the District of Delaware, claiming that Shamrock violated the All Holders Rule by excluding the Polaroid ESOP shares from its tender offer.[9] Polaroid further claimed that certain disclosures by Shamrock violated section 14(e)

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only if certain conditions are met. Tender offers are regulated primarily by sections 14(d) and (e) of the Williams Act. R. CLARK, CORPORATE LAW 531-33 (1986). *See supra* note 2 and accompanying text.

5. 15 U.S.C. § 78n(e). Section 14(e) provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

Id.

6. The court based this holding on two previous Third Circuit decisions in which the court recognized the right without explanation. *See* City Capital Associates Ltd. Partnership v. Interco Inc., 860 F.2d 60 (3d Cir. 1988); Ronson Corp. v. Liquifin Aktiengesellschaft, 483 F.2d 846 (3d Cir. 1973), *cert. denied*, 419 U.S. 870 (1974).

The Third Circuit remanded the case to the district court for further proceedings consistent with its holding that Polaroid presented a reasonable probability of success on the merits of its § 14(e) claim. *Polaroid*, 862 F.2d at 1003-04.

7. Through a number of shell organizations, Shamrock is controlled by Roy and Patricia Disney. *Polaroid*, 862 F.2d at 990.

8. *Id.* Shamrock's offer required tender of at least 90 percent of Polaroid's outstanding common shares, excluding the ESOP shares. In addition, Shamrock expressly conditioned its tender offer on the invalidation or recission of the ESOP stock. *Id.* The offer further provided that should the ESOP condition fail prior to the expiration of the offer, Shamrock could amend the offer so as to: (1) Waive the ESOP condition; (2) reduce the tender offer price; and (3) adjust the number of shares required to account for the ESOP shares. *Id.* Prior to Polaroid's suit, Shamrock filed suit against Polaroid in the Delaware Chancery Court, seeking to invalidate the ESOP shares. *Id.* Shamrock alleged that the Polaroid board adopted the ESOP in violation of its fiduciary duties, entrenching incumbent management, and responding unreasonably to Shamrock's interest in acquiring Polaroid on a friendly basis. *Id.* The Third Circuit ruled on the instant action prior to the completion of Shamrock's suit. *Id.*

9. *Id.* at 990. *See supra* note 2. The Polaroid ESOP held 9.7 million shares of Polaroid common stock. *Polaroid*, 862 F.2d at 992.

of the Williams Act.[10] The district court denied Polaroid injunctive relief on both claims, refusing to find a violation of the All Holders Rule or section 14(e).[11] The Court of Appeals for the Third Circuit affirmed the district court's refusal to enjoin the tender offer under Polaroid's All Holders Rule claim, vacated the district court's order involving the section 14(e) claim, and *held*: the All Holders Rule creates a private right of action for *shareholders*;[12] a target corporation does not have third-party standing to assert an All Holders Rule violation[13] but does have standing to sue under section 14(e)'s implied right of action to enjoin tender offer misrepresentation.[14]

In determining whether a target corporation may assert claims on behalf of its shareholders, a court first must decide whether the corporation possesses its own private right of action; if the corporation has no such right, then it may assert its shareholders' claims only if it has third-party standing.[15] In employing this methodology, the Third Circuit in *Polaroid* focused on Supreme Court precedent dealing with implied private right of action.[16] The Third Circuit, however, applied the Supreme Court implied private right of action decisions in the context of an agency rule.[17] The *Polaroid* court then proceeded to address whether, absent an implied right of action in its own right, a target corporation may have

10. *Id.* at 990-91. *See* 15 U.S.C. § 78n(e)(1988). Polaroid claimed that Shamrock violated section 14(e) by representing that its tender offer complied with Federal Reserve Board margin regulations limiting the use of debt securities by shell corporations in financing corporate takeovers. *Polaroid*, 862 F.2d at 990.

11. *Polaroid*, 862 F.2d at 991. In reaching its decision, the district court "assumed . . . *arguendo* that Polaroid does have standing" to assert a violation of the All Holders Rule. Polaroid Corp. v. Disney, 698 F. Supp. 1169, 1174 (D. Del. 1988). The district court, however, found no violation of the Rule. *Id.* at 1174-75. It reasoned that Shamrock should not be forced to extend its tender offer to holders of Polaroid ESOP shares while Shamrock was challenging the validity of those shares in another action. *Id.* at 1174. Polaroid appealed and moved for an injunction pending appeal. *Polaroid*, 862 F.2d at 991.

12. *Polaroid*, 862 F.2d at 997. *See infra* notes 19-41 and accompanying text.

13. *Polaroid*, 862 F.2d at 1001-02. The *Polaroid* court used "*jus tertii* doctrine" and third-party standing interchangeably. *See supra* note 3 and accompanying text.

14. *Polaroid*, 862 F.2d at 990, 1003.

15. *See id.* at 993.

16. *See infra* notes 25-42 and accompanying text. The doctrine of implied private right of action originated in an early Supreme Court case, Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916). The *Rigsby* Court held that when a member of a class for whose "especial benefit" a statute was enacted is injured by a violation of that statute, that class member has an implied right to recover damages. *Id.* at 39. For further discussion of implied rights of action, see generally Schneider, *Implying Federal Rights & Remedies Under the Federal Securities Acts*, 62 N.C.L. REV. 853 (1984).

17. *Polaroid*, 862 F.2d at 993-97. The court viewed the implied private cause of action cases as

third-party standing to assert its shareholders' implied private right of action under an agency rule.[18]

In *J. I. Case Co. v. Borak*,[19] the Supreme Court first recognized a shareholder's private right of action, which involved a violation of section 14(a)[20] of the Securities Exchange Act of 1934.[21] In *Borak*, a stockholder brought suit against the corporation in which he owned shares, seeking rescission of, or damages caused by, a consummated merger between his corporation and another.[22] The stockholder alleged that the corporation violated section 14(a) by using a false and misleading proxy statement.[23] The Court concluded that the primary purpose of section 14(a) is to protect shareholders[24] and established a private right of action on behalf of shareholders to effectuate the statute's purpose.[25]

In *Cort v. Ash*,[26] the Supreme Court refined its approach to recognizing an implied private right of action. Faced with a shareholder attempting to sue the corporation for violation of a federal criminal

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a logical starting point because "[i]f a private right of action exists in favor of a party, standing follows as a matter of course." *Id.* at 993. *See infra* notes 26-43 and accompanying text.

18. *Polaroid*, 862 F.2d at 997-1002. *See infra* notes 44-53, 64-83 and accompanying text. In its third party standing analysis, the Third Circuit examined cases in which the Supreme Court allowed a plaintiff to assert, in limited circumstances, the rights of a third party when a statute expressly created a cause of action in favor of the third party. *Polaroid*, 862 F.2d at 993.

19. 377 U.S. 426 (1964).

20. Section 14(a), 15 U.S.C. § 78n(a) (1988) provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, 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, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section [12] of this title.

Id.

21. *Borak*, 377 U.S. at 431.

22. *Id.* at 427.

23. *Id.*

24. *See id.* at 432.

25. *Id.* The Court in *Borak* emphasized that private enforcement of the section 14(a) proxy rules would supplement SEC action. Specifically, the Court observed that the threat of civil damages or injunctive relief "serves as a most effective weapon in the enforcement of the proxy requirements." *Id.* at 432. In the wake of *Borak*'s expansion of judicially implied private causes of action, the Supreme Court, in Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971), found that a private cause of action existed under section 10 of the 1934 Securities Act and Rule 10b-5. The Court summarily accepted the lower court's recognition of this right without elaboration or discussion, reducing its treatment of the question to a footnote. *Id.* at 13 n. 9. With such deference, *Bankers Life* represents the most liberal example of the Supreme Court's practice of implying causes of action in federal statutes.

26. 422 U.S. 66 (1975).

statute,[27] the Supreme Court in *Cort* created a four-factor test to determine whether a court may infer a private remedy from a federal statute.[28] The four factors were: (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted";[29] (2) any explicit or implicit indication of legislative intent to create or deny a private cause of action; (3) whether it is consistent with the underlying purpose of the statute to find an implied private cause of action; and (4) whether the cause of action is one traditionally relegated to state courts such that it would be inappropriate to infer a cause of action based on federal law.[30] The Court held that the statute provided no implied right of action to the shareholder.[31]

Applying *Cort*'s four-factor analysis, the Supreme Court in *Piper v. Chris-Craft Industries*[32] held that an implied private right of action for damages is not available to an unsuccessful tender offeror under section 14(e) of the Williams Act.[33] Based on the legislative history of section 14(e), the *Chris-Craft* Court concluded that the sole purpose of the section is to protect investors confronted with a tender offer.[34] According to the Court, Congress chose to regulate tender offerors in order to protect target corporation shareholders.[35] The Court reasoned that because tender offerors are not members of the class for whose "especial" benefit section 14(e) was enacted, the first *Cort* factor[36] necessary for judicial

27. In *Cort*, a shareholder sought an injunction and damages against the corporation in which he owned shares, alleging violations of the Federal Elections Campaign Act. The Federal Election Campaign Act is a criminal statute prohibiting corporate expenditures in campaigns for federal office. *Cort*, 422 U.S. at 71. The Court addressed the issue whether a private cause of action for damages may be implied in favor of a corporate stockholder under a federal statute not expressly providing such a right.

28. *Id.* at 78. The *Polaroid* court cited *Cort* as the leading case on determination of implied private rights of action. *Polaroid*, 862 F.2d at 997 n.6.

29. *Cort*, 422 U.S. at 78 (quoting Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)) (emphasis in the *Cort* opinion).

30. *Id.*

31. *Id.* at 84-85.

32. 430 U.S. 1 (1977).

33. *Id.* at 42. In *Chris-Craft*, an unsuccessful tender offeror brought suit against the successful bidder for control of the target corporation, alleging, among other things, violations of section 14(e). The Supreme Court in *Chris-Craft* emphasized the limited nature of its holding: "Whether shareholder-offerees, the class protected by § 14(e), have an implied cause of action under § 14(e) is not before us. . . . Nor is the target corporation's standing to sue in issue in this case." *Id.* at 42, n.28.

34. *Id.* at 35 (citing legislative history).

35. *Id.* at 28.

36. *See supra* note 35 and accompanying text.

recognition of an implied private right of action remained unsatisfied.[37] Moreover, the Court concluded that none of the remaining *Cort* factors supported the finding of an implied right of action in favor of the party that the statute at issue regulated.[38]

A related question arises when a court decides whether an implied cause of action exists under an agency rule. The Third Circuit Court of Appeals addressed this issue in *Angelastro v. Prudential-Bache Securities, Inc.*,[39] in which it developed a three-part analysis: (1) whether the underlying enabling statute allowed implication of a private cause of action;[40] (2) whether the agency rule was properly within the scope of the enabling statute;[41] and (3) whether inferring a private cause of action would further the enabling statute's purpose.[42] The second and third parts of the inquiry apply the *Cort* statutory analysis to agency rules.[43]

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37. *Chris-Craft*, 430 U.S. at 37.

38. *Id.* at 38-40. Regarding the second *Cort* factor, the Court in *Chris-Craft* found no indication that Congress intended either to create or to deny an implied right of action in favor of tender offerors. *Id.* at 38. The Court concluded, nevertheless, that Congress did not intend to provide tender offerors with "additional weapons" in contests for control. *Id.* Addressing the third *Cort* factor, the Court determined that because the Williams Act is primarily a disclosure mechanism aimed at the protection of shareholders, the act cannot, consistent with this purpose, be interpreted to confer a monetary remedy upon one of the regulated parties. *Id.* at 39. Finally, the Court concluded that a tender offeror's cause of action for damages from loss of an opportunity to control a corporation is more appropriately relegated to state law. *Id.* at 40-41. *See supra* notes 33-36 and accompanying text. For further discussion of *Chris-Craft*, see Pitt, *Standing to Sue Under the Williams Act After* Chris-Craft: *A Leaky Ship on Troubled Waters*, 34 BUS. LAW. 117 (1978).

The Supreme Court reiterated the *Cort* analysis in subsequent decisions, addressing the issue of whether Congress intended to create a private cause of action under a federal statute. *See e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982) (legislative history of Commodity Exchange Act allowed Court to infer a private right of action under act's provisions); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1 (1981) (Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act of 1972 evidenced no congressional intent implicitly to authorize additional judicial remedies for private citizens).

39. 764 F.2d 939 (3d Cir. 1985). The *Angelastro* court specifically answered the question whether an implied private cause of action exists under Rule 10b-16 of the 1934 Securities and Exchange Act. *Id.* at 941.

40. *Id.* at 947. The court was able to rely on well-established Supreme Court precedent to show that Rule 10b-16's enabling statute allowed implied private causes of action. *Id.* at 948 (citing Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971)).

41. *Id.* at 947. The court found that the rule fell within the agency's grant of authority. *Id.* at 949.

42. *Id.* at 947. The Third Circuit found the added enforcement inherent in a private cause of action conformed to Congress' purpose behind the enabling statute. *Id.* at 949-50.

43. While the *Angelastro* opinion does not refer to *Cort*—likely because of the accepted status of implied causes of action under the enabling statute—one might assume that part one of *Angelastro's* analysis invokes the *Cort* test for finding an implied cause of action.

If a party does not have an implied right of action under a particular statute or rule, she may have third-party, or *jus tertii*, standing[44] to sue on behalf of a party that does possess such an implied right of action.[45] Historically, the Supreme Court has recognized third-party standing with considerable reluctance, requiring that a plaintiff assert his own legal rights without resting his claim on the rights of a third party. In *Warth v. Seldin,*[46] several parties sought declaratory and injunctive relief against a town, claiming a local zoning ordinance unconstitutionally excluded low- and moderate-income individuals from living in the community.[47] The Court held that a plaintiff may assert the rights of a third party if "countervailing considerations" outweigh judicial reluctance to allow one party to assert the claims of another.[48]

One context in which the Supreme Court recognizes third-party standing involves an association asserting a legal claim on behalf of its members.[49] The Court laid the groundwork for the associational standing doctrine in *NAACP v. Alabama ex rel. Patterson* by holding that an asso-

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44. *See supra* note 3.

45. *See infra* notes 49-53 and accompanying text.

46. 422 U.S. 490 (1975).

47. *Id.* at 495. The plaintiffs were apparently asserting the rights of third parties under the Privileges and Immunities Clause. *Id.*

48. *Id.* at 500-01. The *Warth* Court failed to elaborate on the "countervailing considerations" required to overcome the judicial reluctance to allow plaintiffs to assert the rights of third parties. But the Court did delineate factors necessary to consider in determining whether a litigant is entitled to have a court decide the merits of his case. *Id.* at 498. Specifically, the Court noted that the issue of standing involves both constitutional, case-and-controversy limitations on a federal court's jurisdiction and the court's own circumspection in exercising its jurisdiction. Both these considerations, the Court asserted, are founded on the "concern about the proper—and properly limited—role of the courts in a democratic society." *Id.*

In addition to the Article III threshold case-and-controversy requirement, the standing issue also involves prudential rules that limit the role of courts in solving disputes. *Id.* at 500. Within the bounds of these limitations, the standing question asks whether the statute upon which the plaintiff's claim rests properly grants the plaintiff a right to judicial relief. *Id. See also* Craig v. Boren, 429 U.S. 190 (1976); Singleton v. Wulff, 428 U.S. 106 (1976).

49. *See* Sierrra Club v. Morton, 405 U.S. 727 (1972) (the associational standing doctrine reflects the general principle that an organization may represent its injured members' legal interests in judicial proceedings. Traditionally, the Supreme Court has allowed trade associations, public interest groups and other such associations to assert the legal claims of their members. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230-31 n.4 (1986) (Administrative Procedure Act did not prevent third-party implied private right of action under the Pelly Amendment to the Fishermen's Protective Act); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 (1976) (third-party standing could obtain if Article III injury requirement could be proven on behalf of organization members); National Motor Freight Traffic Ass'n v. United States, 372 U.S. 246, 247 (1963) (per curiam) (Association of Motor Carriers granted standing under 49 U.S.C. § 5(b) to assert claims for its members).

ciation may have standing to assert the legal claims of its members even absent injury to itself.[50]

The Supreme Court expanded third-party associational standing in *Hunt v. Washington State Apple Advertising Commission*.[51] The *Hunt* Court held that an entity's status as a state agency, rather than a traditional voluntary membership association, did not preclude it from asserting the rights of its constituents.[52] The Court held that an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing in their own right; (2) the interests the association seeks to protect are "germane to the organization's purpose"; and (3) neither the claim nor the relief requires the individual members' participation in the lawsuit.[53]

In *Polaroid Corp. v. Disney*,[54] the Third Circuit held that the All Holders Rule,[55] promulgated pursuant to the Williams Act,[56] creates an implied private right of action for *shareholders*.[57] The court, however, refused to recognize either a target corporation's implied cause of action or third-party standing to assert an All Holders Rule claim on behalf of its shareholders.[58]

In recognizing an implied right of action for shareholders under the

50. 357 U.S. 449, 458-61 (1958) (organization can assert first amendment rights of its members). *See generally* Monaghan, *supra* note 3, at 288. The Court in *Warth v. Seldin* decided that, to assert its member's legal rights under the associational standing doctrine, the association must allege that its members suffered or might suffer some injury, sufficient to "make out a justiciable case had the members themselves brought suit." 422 U.S. at 511.

51. 432 U.S. 333 (1977). In *Hunt*, a state agency responsible for the promotion and protection of the Washington state apple industry challenged the constitutionality of a North Carolina statute prohibiting the display of Washington state apple grades on apples shipped into North Carolina. *Id.* at 335. The District Court granted injunctive relief, recognizing the Commission's standing to challenge the statute on behalf of the Washington apple growers. *Id.* at 339-40.

52. *Id.* at 344.

53. *Id.* at 343. In decisions subsequent to *Hunt*, the Supreme Court has hesitated to expand third-party standing. *See* Allen v. Wright, 468 U.S. 737 (1984) (recognizing limits on the exercise of federal jurisdiction in the context of third-party standing); Duke Power Co. v. Carolina Envtl. Study, 438 U.S. 59, 78 (1978) (recognizing a plaintiff's third-party standing to assert the unconstitutionality of the Price-Anderson Act but enumerating several limitations on the doctrine).

54. 862 F.2d 987 (3d Cir. 1988).

55. *See supra* note 2.

56. *See id.*

57. *Polaroid*, 862 F.2d at 996-97.

58. *Id.* at 1001-02. The court summarily declared that it could find no evidence that the All Holders Rule creates a private right of action for the target corporation. *Id.* at 997. In reaching this conclusion, the court determined that Polaroid was not " 'one of the class for whose especial benefit the statue was enacted.' " *Id.* at 997 (citing Cort v. Ash. 422 U.S. 66, 78 (1975) (quoting Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916))).

All Holders Rule, the *Polaroid* court concluded both that the SEC acted within its authority in promulgating the rule and that the rule is properly within the scope of the Williams Act.[59] Additionally, Congress intended courts to infer private rights of action to facilitate enforcement of the act.[60] The *Polaroid* court reasoned that an implied private right of action under the All Holders Rule would further the Williams Act's purpose of protecting shareholders from irreparable harm through injunctive relief and compensating injured shareholders through damages.[61] The Third Circuit decided, nevertheless, that because the Williams Act was enacted for the "especial benefit"[62] of shareholders, no evidence existed that the All Holders Rule also creates a private right of action on behalf of the target corporation.[63]

In addressing whether a target corporation has third-party standing under the All Holders Rule,[64] the Third Circuit first concluded that a target corporation meets constitutional standing requirements.[65] The court then applied third-party associational standing analysis.[66] The

59. *Id.* at 994-95.

60. *Id.* at 995. The Third Ciruit considered it "reasonable to conclude that Congress passed the Williams Act with an understanding that courts would construe the Act as creating private remedies," because of *Borak* and other courts' construction of Rule 10b-5. *Id.* at 996. *See supra* notes 19-25 and accompanying text.

61. *Polaroid*, 862 F.2d at 997.

62. *See supra* note 29 and accompanying text.

63. *Polaroid*, 862 F.2d at 997.

64. Having found no implied right of action in favor of the target corporation, the Third Circuit addressed whether the plaintiff could sue as a third party. At the outset of this inquiry, the court found that, because Polaroid premised its claim on the violation of a rule promulgated pursuant to a Williams Act provision, and because Congress intended that the act protect shareholders, Polaroid necessarily sought to vindicate the rights of its shareholders rather than its own. *Id.* at 998. Thus, the court turned to third-party standing analysis.

65. *Id.* at 997. Quoting Allen v. Wright, 468 U.S. 737 (1984), the Third Circuit emphasized that a litigant must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" in order to meet the constitutional facet of the standing requirement. *Polaroid*, 862 F.2d at 997. Polaroid easily met this requirement, as the court found it evident that a successful Shamrock tender offer would injure Polaroid. *Id.*

66. *Id.* at 997. *See supra* notes 45-50 and accompanying text. The *Polaroid* majority, while applying associational standing doctrine, refused to apply a second strand of third-party standing decisions, exemplified by Craig v. Boren, 429 U.S. 190 (1976) and Singleton v. Wulff, 428 U.S. 106 (1976). In that line of cases, the Supreme Court granted sellers of products or services the right to sue on behalf of purchasers when the restriction involved might interfere with the purchasers' rights. For example, in *Craig*, vendors were permitted to sue on behalf of male vendees between the ages of 18-20 who, unlike their female counterparts, were not allowed to purchase 3.2% beer. *Craig*, 429 U.S. at 195-97. The *Polaroid* court distinguished these cases on the ground that they involved interference with the plaintiff-third party relationships, whereas Polaroid could allege no interference in its dealings with its shareholders. *Polaroid*, 862 F.2d at 1000 n.8.

court identified factors that would weigh in favor of granting Polaroid standing to assert the rights of its shareholders.[67] Specifically, shareholders would benefit from Polaroid's third-party standing because, while the cost of litigation is often prohibitive to individual shareholders, the target corporation usually possesses the necessary resources.[68] Furthermore, allowing target corporations to assert violations of the All Holders Rule might result in increased enforcement of the securities laws.[69]

Nevertheless, the Third Circuit concluded that other considerations outweighed any salutary effect that might result from allowing a target corporation to assert violations of the All Holders Rule on behalf of its shareholders.[70] The court observed that potential conflicts of interest weighed against allowing a target corporation third-party standing to vindicate shareholder rights under the Rule.[71] First, the court envisioned a conflict arising between shareholders who would collect a premium from the tender offer and those who were excluded from the offer.[72] The court reasoned that the corporation would probably be more inclined to protect the majority, thus undercutting the policy of third-party standing for the minority.[73]

Second, the court identified a potential conflict between shareholders of the target corporation and its management, which, according to the court, "ha[s] a natural incentive to resist a corporate takeover."[74] The court concluded that it would disallow associational standing when the

67. *Polaroid*, 862 F.2d at 998.

68. *Id.*

69. *Id.*

70. *Id.* at 997. *See infra* notes 71-80 and accompanying text.

71. *Polaroid*, 862 F.2d at 998-99.

72. *Id.* at 999.

73. *Id.* The court asserted that, because of this conflict, the target corporation would not be an aggressive advocate of all shareholders' rights. *Id.*

74. *Id.* at 999-1000. The court noted that even shareholders injured by their exclusion from the tender offer "profit handsomely" from it and actually may be injured by litigation that would defeat the offer. *Id.* at 999. The *Polaroid* court supported this conclusion by pointing out that the market price of a corporation's stock usually increases soon after a tender offer is made. *Id.* Shareholders can thus profit from the tender offer by selling their shares to the offeror at the tender offer premium price or to third parties at the increased market price. Unless top corporate officers are protected by an anti-takeover provision guaranteeing them compensation upon dismissal, they stand to suffer a great loss of earnings if the takeover is successful. *Id.* at 1000 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)). *See also* Edgar v. Mite Corp., 457 U.S. 624, 643-44 (1982) (describing welfare and incentive effects of corporate takeovers). *See generally* E. HERMAN, CORPORATE CONTROL, CORPORATE POWER (1981); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249 (1983).

potential for serious conflicts of interest exists among the members of an association or between an association and its members.[75] Thus, because Polaroid failed to meet the *Hunt* criteria,[76] it could not assert the rights of its shareholders.[77]

The court rejected Polaroid's contention that allowing target corporations standing to assert violations of the All Holders Rule would result in increased enforcement of the securities laws.[78] The court observed that Polaroid failed to consider the level of enforcement that Congress contemplated and the impact of allowing third-party standing on the congressional decision to entrust enforcement of the securities laws to the SEC.[79] Furthermore, Polaroid's position failed to take into account other policy considerations such as balancing the costs of private litigation to both the parties and the court system with the benefits gained from expanding third-party standing.[80]

The *Polaroid* court next defended its implicit distinction between third-party standing to assert All Holders Rule violations and standing to assert section 14(e) misrepresentation violations.[81] First, the court asserted that the section 14(e) bar against misrepresentation protects *all* shareholders while the All Holders Rule is likely to protect only a *minority* of shareholders.[82] Second, the court reasoned that a target corporation's standing is necessary under section 14(e) because of the difficulty in detecting misrepresentations and the irreparability of the harm caused by such violations.[83]

Judge Cowen, in dissent, disagreed with the majority's refusal to grant Polaroid third-party standing to assert violations of the All Holders

75. *Polaroid*, 862 F.2d at 999.

76. *See supra* note 53 and accompanying text.

77. *Polariod*, 862 F.2d at 1001-02. *See supra* notes 51-53 and accompanying text. Implicit in the *Polaroid* court's holding is the basic premise that claims brought under the All Holders Rule require the individual shareholders' participation in the lawsuit.

78. *Polaroid*, 862 F.2d at 1000.

79. *Id.*

80. *Id.* For further discussion of the tender offer as a socially beneficial transaction, see generally R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 270-72 (1985); Frankel, *Implied Rights of Action*, 67 VA. L. REV. 570-85 (1981); Stewart & Sanction, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1229-32 (1982).

81. *Polaroid*, 862 F.2d at 1001. See *supra* note 6 and accompanying text for a discussion of the Third Circuit cases holding that a target corporation has standing to raise § 14(e) claims.

82. *Polaroid*, 862 F.2d at 1001. The court reasoned that a target corporation litigating its shareholders' rights makes "more sense" when the corporation is defending the rights of all its shareholders. *Id.*

83. *Id.*

Rule.[84] First, he noted that ample precedent exists allowing a corporation third-party standing to sue under section 14(e).[85] Second, Judge Cowen reasoned that because the SEC promulgated the All Holders Rule to enforce section 14(e), the majority's refusal similarly to recognize third-party standing under the Rule illogically departs from this policy.[86] Finally, the dissent asserted that both the Rule and section 14(e) were driven by the purpose of disclosure to the shareholder.[87]

The Third Circuit, in its analysis of standing under the All Holders Rule, followed Supreme Court precedent limiting judicially implied private causes of action.[88] The court, however, departed from sound logic in accepting precedent granting a target corporation third-party standing to assert violations of section 14(e), while denying the same corporation third-party standing to assert violations of a rule promulgated pursuant to section 14(e).[89] Recognizing that the statute and the regulation have the same underlying purpose[90] accentuates this flaw.

The Third Circuit advances a weak argument in support of its decision.[91] The court appears to rest its holding primarily on the possible conflicts resulting from a corporation asserting All Holders Rule violations on behalf of its shareholders.[92] The first conflict envisioned by the court lies between the majority shareholders, who view the offer as beneficial, and the minority excluded from the offer. Because of this conflict the court concludes that a corporation is "an uncertain representative" of the interest of minority shareholders, as it may tend to protect only ma-

84. *Id.* at 1007 (Owen, J., dissenting).

85. *Id.* at 1008. *See supra* note 8 and accompanying text.

86. *Polaroid*, 862 F.2d at 1008.

87. *Id.* n.4. The dissent relied on Schreiber v. Burlington Northern, Inc., 472 U.S. 1 (1985) for its conclusion. *See supra* notes 2, 6 and accompanying text.

88. *See supra* notes 19-42 and accompanying text.

89. *See supra* notes 51-68 and accompanying text.

90. *See supra* note 71 and accompanying text.

91. In applying the *Hunt* test for associational third-party standing, the Third Circuit summarily concludes that the interests a corporation would seek to protect in All Holders Rule litigation are not "germane to the organization's purpose." *Polaroid*, 862 F.2d at 999. Specificially, the court states that the interest a corporation would be vindicating in All Holders Rule litigation is the right of some shareholders to sell at a price equal to that of other shareholders to a third-party tender offeror. *Id.* at 998. This interest, the court concludes, is different from that ordinarily pursued in corporate litigation: protection of the corporation's business. *Id.* at 999. When one considers that, in today's highly fluid market, corporate stock represents not only its business-profit value, but its resale value as well, the contemporaneous duty of directors to protect shareholders from undervalued offers refutes the court's conclusion.

92. *Polaroid*, 862 F.2d at 999.

jority interests.[93] This argument does not support the court's holding, however, for even if a corporation with standing does not sue, the minority shareholders themselves may assert All Holders Rule violations.[94]

The second conflict that the court hypothesized involves the shareholders and the corporation's management[95]: directors might use All Holders Rule suits to forestall a merger offer actually in the shareholders' interest, solely for the purpose of entrenchment.[96] Yet management misconduct manifesting itself as attempted entrenchment is more properly addressed in an action under state law.[97] In light of the lack of strong support for its holding, the court's approval of third-party standing for corporations in the 14(e) context could easily and logically be extended to the All Holders Rule.[98]

Because of the lack of sound logic and principled rationale supporting the *Polaroid* decision, it is unlikely that courts in other jurisdictions will accept the Third Circuit's analysis as persuasive.

Deborah K. Rush

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93. *Id.*

94. An alternative interpretation of the court's first concern is that it feared a corporate board justifiably bringing an All Holders Rule action, but then not pressing the claim in good faith, thus hurting the minority shareholders' chances of success. This argument, like the court's second concern, represents a valid concern, but one which traditionally has been the subject of a state fiduciary duty suit. *See infra* notes 95-98 and accompanying text.

95. *Polaroid*, 862 F.2d at 999-1000. The court notes that even shareholders excluded from the tender offer can profit from the offer by selling their shares in the market at a premium after the announcement of the offer. *Id.* at 999. On the other hand, the corporation's management often resists tender offers because of the potential loss of future earnings. *Id.* at 1000.

96. *Id.* at 999-1000.

97. Such a move by managment would be clear breach of fiduciary duty, and thus fall squarely under state corporation law.

98. Given the Third Circuit's approval of target corporations' standing under section 14(e), the decision in *Polaroid* seems illogical. Though the court fears director abuse of an All Holders Rule suit, it expresses no such concern over an equally disruptive section 14(e) suit.