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## RECENT DECISIONS

### SECURITIES—LOCK-UP OPTIONS EMPLOYED BY TARGET CORPORATIONS AS A DEFENSIVE TECHNIQUE TO UNWANTED TAKE-OVERS

Any corporation can become the object or “target” of an unsolicited tender offer<sup>1</sup> for its shares. The tender offer often leads to the target corporation’s forced merger with the tender offeror.<sup>2</sup> The possibility of an unwanted merger with the unsolicited tender offeror may encourage the target corporation to resist the tender offer by employing one or more defensive tactics designed to discourage the tender offeror.<sup>3</sup> For example, the target corporation may dissuade the tender offeror by making itself a less attractive candidate for merger or take-over.<sup>4</sup>

One recently developed defensive tactic involves granting a “lock-up option”<sup>5</sup> to a friendly third party or “white knight.”<sup>6</sup> To discourage the unsolicited tender offeror and avoid a possible merger with it, the target corporation might grant the white knight an option to purchase, thus inhibiting unwanted tender offerors. The lock-

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1 A publicly announced offer to all shareholders of a particular corporation, the target corporation, by another corporation, the tender offeror, constitutes a tender offer. Cohn, *Tender Offers and the Sale of Control: An Analogue to Determine the Validity of Target Management Defensive Measures*, 66 IOWA L. REV. 475, 475 n.1 (1981).

2 *Id.* at 481.

3 *Id.* at 476-77.

4 The variety of defensive tactics employed is limited only by target management’s ingenuity and creativity. Defensive tactics that have been used include, but are not limited to: repurchase of shares; open market purchases of the target’s shares by friendly third parties; dividend increases; stock splits; issuance of additional shares; creation of incompatibility between the target and the offeror; defensive mergers; discriminatory voting provisions; legal actions; and restrictive loan agreements. E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 219-76 (1973). See also Hayes & Tausig, *Tactics of Takeover Bids*, 45 HARV. BUS. REV. 135 (1967); Lynch & Steinberg, *The Legitimacy of Defensive Tactics in Tender Offers*, 64 CORNELL L. REV. 901 (1979); Schmultz & Kelly, *Cash Take-Over Bids-Defensive Tactics*, 72 BUS. LAW 115 (1967); Steinbrink, *Management’s Response to the Takeover Attempt*, 23 CASE W. RES. 882 (1978); Note, *Defensive Tactics Employed by Incumbent Managements In Contesting Tender Offers*, 21 STANFORD L. REV. 1104 (1969). For a listing of pertinent articles see Comment, *A Review of the Literature on Defensive Tactics to Surprise Cash Tender Offers*, 13 CREIGHTON L. REV. 909 (1980).

5 *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 374 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982). In *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413 (S.D.N.Y. 1982), the court did not specifically use the term “lock-up;” however, the factual situation can be characterized in this manner.

6 Cohn, *supra* note 1, at 489.

up option granted the white knight in exchange for its tender offer bid might be an option to purchase a number of the target's unissued shares at a bargain price or an option to purchase the target's most prized asset, or "crown jewel."<sup>7</sup> The unsolicited tender offeror and other parties operating without the benefit of the lock-up option must then reassess their take-over plans. The target thus attempts to discourage the unwanted tender offeror by giving a third party the opportunity to substantially decrease the target's value. The options, in effect, "lock up" the bidding for the target corporation.<sup>8</sup>

Two recent decisions, *Mobil Corp. v. Marathon Oil Co.*<sup>9</sup> and *Marshall Field & Co. v. Icahn*,<sup>10</sup> have considered the legality of devices that might be characterized as lock-up options. This note considers the *Mobil* and *Marshall Field* decisions in the lock-up option context. Part I addresses the *Mobil* case and analyzes the court's approach in that decision. Part II addresses the *Marshall Field* case and its differing approach to the problem. Part III discusses the distinctions between *Mobil* and *Marshall Field* that may account for their variant holdings. Part IV discusses the practical effect on corporate management of the two decisions and concludes that, given the many potential scenarios and the few guidelines in this area, any lock-up option may end up in litigation.

### I. *Mobil Corp. v. Marathon Oil Co.*<sup>11</sup>

In *Mobil*, the United States Court of Appeals for the Sixth Circuit ruled that two lock-up options Marathon Oil Company had granted U.S. Steel in exchange for a tender offer were unlawful.<sup>12</sup> The Sixth Circuit held that the options constituted manipulative acts or practices in connection with a tender offer, and therefore violated section 14(e) of the Williams Act.<sup>13</sup>

7 669 F.2d at 367.

8 *Id.* at 377. If the third-party white knight can acquire the target's most valuable asset or purchase the target's shares at low prices, thus decreasing the target's value to a majority shareholder, the unsolicited tender offeror may drop out of the bidding for the target's shares.

9 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982).

10 537 F. Supp. 413 (S.D.N.Y. 1982).

11 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982).

12 *Id.* at 377.

13 *Id.* The United States Supreme Court has stated that the Williams Act is designed to protect shareholders of the target corporation. *Piper v. Chris-Craft, Inc.*, 430 U.S. 1, 39 (1977); Williams Act §§ 13(d), (e), (f), 14(d), (e), (f), 15 U.S.C. § 78 m, 78 n(d), (e), (f) (1976). Section 14(e), the Act's general anti-fraud provision provides in pertinent part: "(e) It shall be unlawful for any person . . . to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . ."

### A. *Facts*

On October 30, 1981, Mobil Corporation (Mobil) announced its intent to purchase up to forty million Marathon shares (over one-half of Marathon's outstanding shares) for \$85 per share.<sup>14</sup> This tender offer announcement accompanied Mobil's announcement of its intent to merge with Marathon.<sup>15</sup> Marathon's directors evidently considered Mobil an unattractive merger candidate and, in response to Mobil's announcements, sought a white knight corporation with which to merge.<sup>16</sup>

Marathon's search for a white knight ended on November 18, 1981, when its directors voted to recommend that its shareholders accept a U.S. Steel offer of \$125 per share for thirty million, or over one-half, of Marathon's outstanding shares.<sup>17</sup> The U.S. Steel tender offer was part of a plan under which its subsidiary, U.S.S. Corporation (USS), would merge with Marathon if the tender offer succeeded.<sup>18</sup>

Marathon secured the USS tender offer with two options.<sup>19</sup> They were: (1) an option by which USS could have purchased ten million authorized but unissued shares of Marathon common stock at \$90 per share (stock option); and (2) an option by which USS could have elected to purchase Marathon's 48% interest in an oil-producing property, Yates Field, for \$2.8 billion (Yates Field option).<sup>20</sup> Marathon considered Yates Field its "crown jewel," or most valuable asset.<sup>21</sup>

Mobil reacted to the Marathon-USS agreement by seeking a

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14 669 F.2d at 367. Mobil, the nation's second largest oil company, sought to acquire Marathon, the nation's seventeenth largest oil company, in keeping with a "long-standing Mobil policy of acquiring and developing oil and gas assets." N.Y. Times, Oct. 31, 1981, at 1, col. 4.

15 669 F.2d at 367. Mobil intended to follow the share purchase pursuant to the tender offer with an acquisition of the balance of Marathon by merger. *Id.*

16 *Id.* In response to Mobil's tender offer, Marathon also sued to enjoin Mobil's proposed acquisition as a violation of § 7 of the Clayton Act. *See Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315 (N.D. Ohio 1981). The district court granted Marathon's request for a preliminary injunction upon a showing that Mobil's proposed acquisition would substantially lessen competition in the relevant market in violation of the antitrust laws. The Sixth Circuit later affirmed that district court order. *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1490 (1982).

17 669 F.2d at 367. Allied Industries and Gulf Oil also considered making offers for Marathon stock. *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* Yates Field is one of the world's most prolific oil fields, and is expected to produce oil for 90 more years. Both Allied Industries and Gulf Oil had conditioned their proposed

temporary restraining order to block any USS purchase of Marathon shares pursuant to that agreement.<sup>22</sup> Mobil principally claimed that the two options, taken together, constituted a "lock-up" designed to defeat competitive bidding for Marathon shares. Thus, Mobil argued, the options served as "manipulative" practices in connection with a tender offer and therefore violated the Williams Act.<sup>23</sup> The District Court granted Mobil's request for a temporary restraining order in part, forbidding any action concerning either the USS tender offer or the Yates Field option.<sup>24</sup>

On November 25, 1982, Mobil announced a new tender offer, proposing to purchase thirty million shares of Marathon's outstanding stock at \$126 per share (outbidding USS by \$1 per share). Mobil conditioned its offer on the judicial removal of the options granted USS.<sup>25</sup>

On December 7, 1981, the district court denied Mobil's application for a preliminary injunction against the Marathon-USS options.<sup>26</sup> The court found Mobil had not demonstrated a "substantial likelihood of success on the merits" of its claim that the options constituted manipulative acts in violation of section 14(e) of the Williams Act.<sup>27</sup>

On December 23, 1981, the Sixth Circuit ruled that the options constituted manipulative acts in connection with a tender offer and therefore violated section 14(e) of the Williams Act.<sup>28</sup> The court

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offers for Marathon on receiving options to acquire the Yates Field interest. This is further evidence of Yates Field's importance to tender offerors. *Id.*

22 *Id.* at 368.

23 *Id.* See Williams Act § 14(e), *supra* at note 13. Mobil also claimed that Marathon had failed to disclose material information concerning this option package to its shareholders, also a § 14(e) violation. Finally, Mobil claimed that Marathon had violated various state law provisions. 669 F.2d at 367.

24 *Id.* at 368.

25 669 F.2d at 369.

26 *Id.*

27 *Id.* at 370. The district court applied the test for granting a preliminary injunction noted in *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256 (6th Cir. 1977). 669 F.2d at 369. *Mason County* set forth a four-prong test:

1. Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;
2. Whether the plaintiff has shown irreparable injury;
3. Whether the issuance of a preliminary injunction would cause substantial harm to others;
4. Whether the public interest would be served by issuing the preliminary injunction.

563 F.2d at 261.

28 669 F.2d at 377.

thereby reversed the district court and ordered that the USS offer be kept open, without the options, for a time to be determined by the lower court.<sup>29</sup> During this time, Marathon shareholders were to be notified and allowed to withdraw any tenders already made.<sup>30</sup> The Sixth Circuit also ordered that Marathon be allowed to accept any tender offers from others no longer inhibited by the "coercive impact of the two options."<sup>31</sup>

### B. *Court's Reasoning*

After finding that Mobil had standing to seek injunctive relief under the Williams Act,<sup>32</sup> the Sixth Circuit addressed the question whether the options constituted manipulative acts or practices in violation of section 14(e).<sup>33</sup> The court concluded that Mobil had demonstrated a "substantial likelihood of ultimately establishing" its claim that using the options had violated the Williams Act.<sup>34</sup>

In doing so, the Sixth Circuit adopted the United States Supreme Court's definition of "manipulative" as applied in *Ernst & Ernst v. Hochfelder*.<sup>35</sup> "Manipulation," said the Sixth Circuit, is an "affecting of the market for, or price of, securities by artificial means, i.e., means unrelated to the natural forces of supply and demand."<sup>36</sup> In the Sixth Circuit's view, Mobil had shown a substantial likelihood of ultimately establishing that the Yates Field option and the stock option affected Marathon's stock price by artificial means unrelated to the natural forces of supply and demand.<sup>37</sup>

Taken separately and together, the two options were manipulative because they circumvented natural market forces by, in effect,

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 378.

<sup>32</sup> *Id.* at 372. The United States Supreme Court had addressed the issue of standing under the Williams Act in *Piper v. Chris-Craft, Inc.*, 430 U.S. 1 (1977). The Supreme Court held that a tender offeror such as Mobil could not assert a private claim for damages against the target corporation. Nevertheless, the Court in *Piper* expressly left open the question of whether a tender offeror such as Mobil could seek injunctive relief under the Williams Act. 430 U.S. at 47 & n.33. The Sixth Circuit answered this open question affirmatively in *Mobil*, concluding that the tender offeror had standing. 669 F.2d at 372.

<sup>33</sup> 669 F.2d at 373.

<sup>34</sup> *Id.* at 375.

<sup>35</sup> 425 U.S. 185 (1976). Manipulative "connotes intentional or willful conduct designed to deceive or defraud investors by artificially affecting the price of securities." *Id.* at 199. *Ernst & Ernst* concerned an action under § 10(b) of the Securities Exchange Act. *Id.*

<sup>36</sup> 669 F.2d at 374. The Sixth Circuit noted that it knew of no Supreme Court or Court of Appeals case addressing the question of whether options such as the ones granted USS were "manipulative" within the meaning of § 14(e) of the Williams Act. *Id.*

<sup>37</sup> 669 F.2d at 375.

not permitting the market to determine the fair price for Marathon shares.<sup>38</sup> First, the Yates Field option purported to give USS the opportunity to acquire Marathon's most valuable asset for \$2.8 billion if another bidder had successfully taken over Marathon.<sup>39</sup> The district court found \$2.8 billion to have been a fair price for Yates Field. However, the Sixth Circuit commented that, absent the option, Mobil and others might have reasonably valued Yates Field at a higher price and have been willing to reflect that higher valuation in their tender offers.<sup>40</sup> Because anyone outbidding USS for control of Marathon risked losing Marathon's most valuable asset, the option deterred Mobil and others from bidding competitively against USS for control of Marathon.<sup>41</sup>

Second, Marathon purported to grant USS a stock option, pursuant to which USS could purchase ten million authorized but unissued Marathon shares for \$90 per share.<sup>42</sup> The Sixth Circuit, citing Marathon's own investment banker's estimates, noted that this large stock option (concerning ten million shares), coupled with the USS bid (\$125 per share for thirty million Marathon shares), forced Mobil and any other tender offerors seeking forty million shares to bid an additional \$1.1 to 1.2 billion to match the USS offer.<sup>43</sup> Thus, the stock option, as well as the Yates Field option, discouraged others from competing with USS for control of Marathon.<sup>44</sup> The Sixth Circuit ruled that the stock option, like the Yates Field option, placed an artificial \$125 per share ceiling on the amount that Marathon shareholders could receive for their stock.<sup>45</sup> Mobil eventually outbid USS, but only upon the condition that both options were removed.<sup>46</sup>

Having concluded that both options violated section 14(e) of the Williams Act, the Sixth Circuit enjoined the use of the illegal options.<sup>47</sup> The court also insisted that the USS tender offer be kept open for a reasonable time, but without the unlawful options. Judge

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38 *Id.* at 376. *See* note 35 *supra*.

39 669 F.2d at 375.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* at 376.

45 *Id.* Mobil also had claimed that Marathon breached its fiduciary duty under Ohio Rev. Code § 1701.76. 669 F.2d at 368. The Sixth Circuit deemed unnecessary a consideration of any state law claim. Since it granted the preliminary injunction based on the Williams Act, no other basis for the injunction was necessary. *Id.* at 369 n.3.

46 *Id.* at 376.

47 *Id.* at 377.

Engel reasoned that if USS immediately withdrew its offer, it would benefit unjustifiably, because others were unlawfully dissuaded from competing with it for Marathon tenders.<sup>48</sup> In ordering that the USS \$125 per share offer be kept open, the court sought to give Marathon shareholders time to consider offers from others, "uninhibited by the coercive impact of the two options," and the opportunity to withdraw tenders already made.<sup>49</sup> The Sixth Circuit presumably wanted the lower court to grant enough time for the stock price to reach its true market price.

Finally, the Sixth Circuit noted that their decision did not define all forms of options or lock-up devices as manipulative under the Williams Act. The court stated, "[we] leave these issues to developing law in this new and difficult area of securities regulation."<sup>50</sup>

## II. *Marshall Field & Co. v. Icahn*<sup>51</sup>

In *Marshall Field*, the United States District Court for the Southern District of New York denied a request for a temporary restraining order filed by an investment group that Icahn headed (Icahn Group or Icahn).<sup>52</sup> The Icahn group held approximately 30% of Marshall Field and Company's (Marshall Field or Field) stock.<sup>53</sup> The group sought to prevent Marshall Field and BATUS, Inc. (BATUS) from furthering BATUS's tender offer for Marshall Field's stock as long as certain BATUS-Field agreements remained effective.<sup>54</sup> Icahn failed to convince the court that the agreements were among the "manipulative acts" that section 14(e) of the Williams Act proscribes.<sup>55</sup>

The controversy in *Marshall Field* developed gradually. Over a four month period, Icahn acquired a large percentage of Field stock,<sup>56</sup> apparently in attempt to gain control. Evidence indicated that Icahn sought to control Marshall Field because Icahn believed certain Field properties would be worth more if liquidated than if

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48 *Id.*

49 *Id.* at 377-78.

50 *Id.* at 377.

51 537 F. Supp. 413 (S.D.N.Y. 1982).

52 *Id.* at 420. The court found that Icahn had shown neither "irreparable harm, nor likelihood of success on the merits, nor a balance of hardships tipping in its favor." *Id.*

53 *Id.* at 418.

54 *Id.* at 420.

55 *Id.* at 422.

56 *Id.* at 417. The Icahn group's involvement in the case began in the winter of 1981-82, when it purchased approximately 900,000 shares, or 8.7%, of Marshall Field's outstanding stock. *Id.*

retained as part of a going concern.<sup>57</sup>

Marshall Field disapproved of Icahn's seeming attempt to gain control and made several attempts to thwart it. Field not only sought judicial help,<sup>58</sup> but while Icahn continued to buy stock, Field sought competing tender offers from possible white knights. On March 17, 1982, BATUS announced its tender offer for Field stock; Field had found its white knight.<sup>59</sup>

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57 *Id.* at 415. The evidence to which District Judge Leval referred included a study prepared for Mr. Icahn that concluded that Field assets had been undervalued. Judge Leval also referred to "sketchy evidence" indicating that Icahn had tentatively planned to invest cash raised by selling the assets of undervalued companies. Thus, Judge Leval evidently concluded that Marshall Field was among those undervalued companies that Icahn had intended to acquire and sell at a profit. In his opinion, Judge Leval suggested that the Icahn group had planned to acquire Marshall Field, cause Marshall to sell its undervalued real estate properties at a profit, and invest the cash. *Id.*

58 On February 16, 1982, the district court granted a temporary restraining order preventing the Icahn group's further acquisition of Marshall Field stock (the group had acquired 8.7% of Field's stock under an inadequate Schedule 13D statement) until a proper 13D statement was filed. *Id.* at 416. Schedule 13D, Item 4 of the Securities Exchange Commission Regulations, promulgated pursuant to § 13(d)(i) of the Securities Exchange Act of 1934, requires potential acquirers to state the purpose of their acquisitions. 17 C.F.R. § 240.13d-1 (1982). Judge Leval noted that Schedule 13D reporters (like the Icahn group) must indicate in their filings whether they intend to follow an acquisition with "extraordinary corporate transactions, material sales of assets and material changes" in the issuer's business. 357 F. Supp. at 415-16. Judge Leval concluded that Icahn had tentatively intended such action and was therefore required to reveal its intent in its Schedule 13D filing. The court found that the statement Icahn had filed under Schedule 13D of the Securities Exchange Commission regulations was defective because it had failed to adequately state Icahn's intention concerning its acquisition and disposition of Field assets. On February 19, 1982, Icahn amended its 13D statement to properly disclose its intent regarding the Field assets; the district court then lifted the temporary restraining order. *Id.* at 417. Icahn continued to acquire Field stock until it owned 23% of Field; Field then sought another temporary restraining order against further Icahn stock purchases. The district court denied Field's second request, ruling that the amended 13D statement adequately disclosed Icahn's intentions. While it refused to block Icahn's continued stock acquisitions, the court left open the possibility of other relief for Field. Specifically, the court noted that it could, if appropriate, bar the Icahn group from voting the 8.7% of Field stock it had acquired while the initial, allegedly misleading 13D statement was filed, or it could grant misinformed Field stock sellers rescission or damages. Nevertheless, the court denied Field's request for the temporary restraining order, and the Icahn group continued to acquire Field stock through its tender offer. *Id.*

59 357 F. Supp. at 418. During this search, Field again moved for a preliminary injunction to enjoin Icahn from acquiring more Field stock and to prevent Icahn from voting the shares acquired while Icahn had operated under its initial, deficient 13D statement. *Id.* at 417. The district court denied the preliminary injunction request on March 23, 1982. *Id.* at 420. Once again, Field contended that Icahn's 13D filings had misrepresented its intent, and, once again, the court ruled that the statements had been adequate. *Id.* at 417. In the alternative, Field sought to enjoin Icahn from voting the 8.7% of Field's stock that Icahn had acquired under the inadequate filing. Field argued that, absent an injunction, Icahn would benefit from having violated the securities laws. The court admitted that Icahn had offered a strong argument, but denied the injunction request. *Id.* at 418. Judge Leval first reasoned that the original 13D statement's falsity had been determined only tentatively, justifying the

In response, Icahn asked the court to issue a temporary restraining order against Marshall Field and BATUS to prevent BATUS from acquiring Field stock via its tender offer.<sup>60</sup> The Icahn group, which now held 30% of Marshall Field's stock, objected to several agreements between BATUS and Marshall Field that Icahn contended gave BATUS a competitive advantage over other bidders for Field. Icahn contended that the agreements were manipulative and thus violated section 14(e) of the Williams Act. Icahn argued that the agreements had discouraged others from competing with BATUS to control Field.<sup>61</sup> On March 26, 1982, the district court denied the temporary restraining order and concluded that the harm Icahn sought to prevent was purely speculative.<sup>62</sup> The court distinguished the *Mobil* case and expressed doubts as to *Mobil's* validity in the Second Circuit.<sup>63</sup> Judge Leval noted that *Mobil* could prevent management from combating a takeover attempt that it in good faith believed to be harmful to its shareholders.<sup>64</sup> He further noted that the rule might be different if management acted only in its own interests, breaching its fiduciary duties owed to shareholders.<sup>65</sup>

The first agreement to which Icahn objected committed BATUS to purchase, and Field to sell, two million shares of Field treasury stock at \$25.50 per share (treasury stock agreement).<sup>66</sup> The \$25.50 price per share matched BATUS's original March 17 tender price, which BATUS increased to \$30 per share the next day.<sup>67</sup> Under the treasury stock agreement, Field was to relieve BATUS of

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temporary restraining order and no more. *Id.* at 419. Second, an action denying Icahn the power to vote the stock would not have benefitted the Field stock sellers whom the incorrect filing misinformed. *Id.* Third, no shareholder vote was scheduled for eight months; thus, the preliminary injunction application was premature. Icahn may not have even owned the disputed stock after eight months. *Id.*

Field also contended that certain Icahn group members had failed to file the required 13D statement. The court ruled that, even if such a failure to file had violated the law, the filed statement clearly outlined those members' roles in the acquisition. Thus no one was misled. *Id.* at 420.

Finally, Field claimed that Icahn had violated the anti-racketeering statute, the RICO Act, 18 U.S.C. §§ 1961-1968 (1976). The court found no likelihood that Field would have been successful on the merits of the claim and denied the preliminary injunction request. 537 F. Supp. at 420.

60 537 F. Supp. at 420.

61 *Id.*

62 *Id.* at 422.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.* at 420.

67 *Id.*

its stock purchase commitment if BATUS or any third party obtained 51% of Field stock, or if BATUS kept its tender offer open until April 1, 1983.<sup>68</sup> Icahn primarily objected to the treasury stock agreement because of the possibility of BATUS using the stock to purchase Field properties.<sup>69</sup>

The second objection was to an agreement that gave BATUS the opportunity to buy Marshall Field's Chicago Division properties, should Field have offered them for sale within one year after the BATUS-Field merger agreement had terminated (right of first refusal agreement).<sup>70</sup> Thus, had Field offered its prized Chicago Division properties for sale within one year after any termination of the merger agreement with BATUS, BATUS could have denied any other party the opportunity to purchase the properties by purchasing them itself. The agreement permitted BATUS to pay for the Chicago Division properties with Field stock valued at BATUS's cost.<sup>71</sup>

At a conference before Icahn's application for the temporary restraining order, Judge Leval had expressed concern that this right of first refusal might prevent competitive bidding for the Chicago Division properties.<sup>72</sup> In response, BATUS and Field modified the agreement to provide that, if BATUS exercised its right of first refusal, Field would reopen the bidding for the Chicago properties.<sup>73</sup> Despite the modification, Icahn contended that, by using Field stock valued at BATUS's cost, BATUS could purchase the properties at a bargain price should Field stock drop in value.<sup>74</sup> Judge Leval countered by

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68 *Id.* Thus, BATUS would have had to execute the agreement only if it *needed* the stock to gain control and was excused if a third party gained control. Also, BATUS would be excused from the agreement if it kept its tender offer open until April 1, 1983 (about one year). *Id.* By then, Marshall Field would have presumably been safe from Icahn's "threat" to purchase and cause liquidation of Marshall Field assets. *See* note 57 *supra*.

69 *Id.* at 421.

70 *Id.*

71 *Id.* One could speculate that Field had intended this right of first refusal agreement to dissuade Icahn from acquiring control of Marshall Field. Such an agreement might thereby prevent Icahn from quickly liquidating the business and selling Field's undervalued assets, such as its "crown jewel" Chicago Division properties, at a substantial profit. The right of first refusal would have put Icahn, or any other potential controlling shareholder of Field to a choice: (1) the controlling shareholder could wait one year before selling the Chicago Division properties; or (2) it could sell them sooner and risk a sale to BATUS for stock valued at BATUS's cost. Icahn's suit demonstrates that such a sale to BATUS may not have yielded the quick liquidation profit that Icahn desired.

72 *Id.*

73 *Id.* With this modification the court believed that no one could contend that exercising the right of first refusal could cause a sale below market price because bidding would have been open even if BATUS had exercised the option. *Id.*

74 *Id.* To illustrate, suppose that BATUS's cost for Field stock was \$10 per share, and

noting that the only stock BATUS conceivably would use would be the treasury stock which it had purchased at a premium price, not a bargain price.<sup>75</sup>

Judge Leval further noted that the possibility of BATUS exercising its right of first refusal was remote.<sup>76</sup> The right of first refusal would have arisen only if Field had announced a sale of its Chicago Division properties within one year after the BATUS-Field merger agreement ended. By simply waiting one year, Field's new management could have denied BATUS its right of first refusal under the second agreement.<sup>77</sup>

Icahn's third group of objections concerned two Field agreements (bidding process agreements), one with prospective "white knights" during the period Field "shopped" its company,<sup>78</sup> and that part of the BATUS-Field merger agreement in which Field agreed not to solicit competing bids for Field stock.<sup>79</sup> First, Marshall Field had provided confidential information to prospective white knights for those white knights to use to formulate bids.<sup>80</sup> In return, each prospective white knight agreed with Field, before the BATUS-Field merger agreement, that none would purchase Field shares without prior Field board-of-directors approval.<sup>81</sup> Judge Leval noted that this agreement for board approval was "well justified," considering the possibility of purchases based upon inside information (a reference to potential securities laws violations).<sup>82</sup>

This agreement required potential white knights to get Field

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that the price later dropped to \$5 per share. If BATUS used Field stock valued at \$10 (BATUS's cost) to purchase the Chicago Division properties, a stock price dip to \$5 would indeed yield a bargain purchase. Judge Leval rebutted this conclusion by noting that, since BATUS owned no Field stock, it would have had to use treasury shares purchased at \$25.50 per share under the first agreement. *Id.* \$25.50 per share was a premium price (above the market price). Thus, had BATUS exercised its rights under the second agreement and purchased the Chicago properties, it would have paid with Field stock for which it had already paid a premium price. Since Field would have previously received \$25.50 per share, the court reasoned that accepting these shares sold at that premium price would not have hurt Field. *Id.*

75 *Id.* at 421.

76 *Id.*

77 *Id.*

78 *Id.* While searching for its white knight to avoid the Icahn takeover, Field "shopped" itself through Mr. Goldman Sachs. *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* Securities laws prohibit certain persons from trading certain stocks based on inside information. *See, e.g.*, Securities Exchange Act of 1934 §§ 10(b), 16(b), 15 U.S.C. §§ 78(j)(b) and 78(p) (1976).

board approval for bids.<sup>83</sup> At oral argument, Judge Leval questioned the propriety of requiring potential bidders to gain Field board approval before purchasing any Field stock.<sup>84</sup> Judge Leval implied that, since BATUS's March 17 tender offer had publicized the previously confidential information, restricting the other bidders froze competition without sufficient reason.<sup>85</sup> After Judge Leval's inquiry, Field waived its right of approval for offerors seeking to purchase 51% or more of the Field stock.<sup>86</sup>

Icahn contended that, even as modified, the white knight bidding process agreement improperly interfered with the market. As a Field shareholder, Icahn contended that Field's agreement not to solicit any bids, and its denying some potential bidders an opportunity to make offers for less than 51% of the Field stock, deprived Icahn of competitive bidding for Field's stock.<sup>87</sup> Judge Leval found that these bidding process restrictions were proper and served the best interests of Field's shareholders. Judge Leval reasoned that, even though Icahn might offer a better price per share than BATUS, Icahn need only purchase about 20% of Field's outstanding shares to gain control of Field, because Icahn already controlled 30%.<sup>88</sup> On the other hand, BATUS had bid for over 50% of Field stock and had committed itself, under the stock agreement, to purchase more Field shares at a premium price (under the treasury stock agreement). Under the BATUS package, many more Field shares would be sold; therefore, more Field shareholders stood to benefit.<sup>89</sup>

Icahn contended that the bidding process agreements thwarted potential bidders. Judge Leval commented that no indication existed that any potential competing bidder had been thwarted.<sup>90</sup> In fact, Field had notified each so-called potential bidder, prior to

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83 537 F. Supp. at 421.

84 *Id.*

85 Because BATUS's public tender offer for Field stock had publicized the previously confidential information, the justification for the board approval requirement (preventing trading based on inside information) was no longer valid. *Id.*

86 *Id.* at 421.

87 *Id.* at 421-22. Icahn's claimed injury as a Field stockholder makes some sense. The bidding process agreements removed Marshall Field from the open market in the sense that potential bidders could not bid without approval. This requirement injured all Field shareholders, contended Icahn, by restricting the bidding market at the whim of Field's board. Judge Leval considered this argument "purely theoretical" since Icahn had offered no evidence that Field's board had denied anyone permission to buy Field stock. The court would simply not grant relief based on this argument since Icahn had shown no harm. *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

BATUS's March 17 bid, that the time to bid was at hand.<sup>91</sup> None had approached Field to ask either for approval to bid or to be relieved of the approval requirement.<sup>92</sup> The court stated that Icahn's purely speculative assertions of harm did not warrant a temporary restraining order.<sup>93</sup>

Judge Leval noted that *Mobil* could be distinguished from *Marshall Field* even if *Mobil* had been a Second Circuit decision. The agreements in *Marshall Field* were not options, such as the stock option or Yates Field option in *Mobil*.<sup>94</sup> Further, the options in *Mobil* created an artificial price ceiling in the tender offer market,<sup>95</sup> while the *Marshall Field* agreements did not.<sup>96</sup> Significantly, Judge Leval questioned the *Mobil* decision and contended that it could interfere with management's ability to combat a take-over attempt viewed as harmful to the target's shareholders.<sup>97</sup>

### III. Comparison of *Mobil* and *Marshall Field*

At first blush, the district court's decision to deny a temporary restraining order in *Marshall Field* conflicts with the Sixth Circuit's decision to grant a preliminary injunction in *Mobil*. However, a closer comparison reveals that the contractual arrangements involved were actually quite different and that the holdings are not inconsistent.

First, the stock options at issue should be examined. In *Mobil*, the stock option Marathon gave to USS was critical to the Sixth Circuit's decision to issue an injunction.<sup>98</sup> The court said the \$90 per share option on ten million shares effectively prevented other bidders from "competing on a par with USS," thus giving USS a competitive advantage and discouraging competitive bidding.<sup>99</sup> The stock option was therefore manipulative.<sup>100</sup> By contrast, the district court in *Marshall Field* apparently did not consider the stock sale agreement for two million treasury shares at \$25.50 per share to be significant, ex-

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91 *Id.* at 422.

92 *Id.*

93 *Id.*

94 *Id.*

95 669 F.2d at 375.

96 537 F. Supp. at 421-22.

97 *Id.*

98 See notes 43-45 *supra* and accompanying text.

99 669 F.2d at 376.

100 *Id.* at 377. Potential competitors for control of Marathon would be forced to offer \$125 per share for each share of Marathon while USS could purchase its first ten million shares for only \$90 per share. The court found this difference to be manipulative. *Id.* at 376.

cept as it applied to the sale of the Chicago Division properties.<sup>101</sup> The opinion mentioned neither the market price of Marshall Field shares at the time of the agreement nor the price Icahn offered shareholders for their stock. However, the court noted that the sale was "at a premium."<sup>102</sup> Therefore, the \$25.50 price may have been above the market price, not \$35 below the tender offer price, as in *Mobil*.<sup>103</sup> Consequently, the stock deal in *Mobil* gave USS an unfair advantage over other tender offerors, while in *Marshall Field*, BATUS was given no corresponding advantage by the stock deal.

Next, the Yates Field option Marathon granted USS differed significantly from the right of first refusal Marshall Field granted BATUS on the Chicago Division properties. The option Marathon granted USS was exercisable by USS only if a third party gained control of Marathon. This option was designed to rob Marathon of its most valuable asset.<sup>104</sup> Such an option represents a more powerful deterrent to potential tender offerors than a right of first refusal. Judge Leval pointed out that BATUS's right of first refusal would be significant only if Field management had decided to sell the Chicago properties within a year after the Field-BATUS merger had terminated.<sup>105</sup> Field's management could have effectively eliminated BATUS's ability to acquire the Chicago Division properties simply by not offering them for sale. Significantly, this restriction would have deterred only a potential offeror who was interested in immediately selling the Chicago properties. Evidence indicated that this might have been Icahn's motive.<sup>106</sup> If so, the deterrence was directed only at the Icahn group and other liquidation-minded tender offerors. Also, the option Marathon granted USS contained no time limitation.<sup>107</sup> BATUS's right of first refusal, on the other hand, was limited to one year; this was another mitigating factor.<sup>108</sup> As Judge Leval pointed out, any new management could simply wait one year to defeat BATUS's right of first refusal.<sup>109</sup> When thus compared, the Yates Field option much more readily fits the label of "manipulative" than the right of first refusal granted BATUS.

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101 See notes 76-83 *supra* and accompanying text.

102 537 F. Supp. at 421.

103 See note 75 *supra*.

104 See notes 77-78 *supra* and accompanying text.

105 See note 78 *supra* and accompanying text.

106 See note 57 *supra* and accompanying text.

107 669 F.2d at 367-68.

108 See notes 78-82 *supra* and accompanying text.

109 537 F. Supp. at 421.

Judge Leval also gave significance to two BATUS-Field agreement modifications he had instigated. The first allowed Field to reopen the bidding for the Chicago Division properties if BATUS exercised its right of first refusal.<sup>110</sup> The parties made this modification when Judge Leval expressed concern that the right of first refusal would prevent competitive bidding for the Chicago properties.<sup>111</sup> This agreement gave BATUS the right of first refusal at the highest bid price, but prevented a sale of the properties below a fair market price.<sup>112</sup> No similar provision allowed the market to determine the price of the Yates Field in the option Marathon granted USS.<sup>113</sup>

Judge Leval also instigated a second modification—Field's waiver of its right to approve competing tender offers it received from previously solicited white knights.<sup>114</sup>

Judge Leval's involvement in shaping the Marshall Field agreement emphasizes the difference in the procedural stages of the two cases. A district court judge, such as Judge Leval, may suggest certain modifications to correct the situation from which relief is sought. Therefore, he will be more likely to deny relief where he *can* and *does* correct the situation by modifying the agreement.

Further, the plaintiff must meet a far less stringent standard for a temporary restraining order than for a preliminary injunction.<sup>115</sup> The Sixth Circuit's grant of a preliminary injunction and the *Marshall Field* district court's refusal to issue a temporary restraining order indicate the significance of the circumstances in each case.

#### IV. Conclusion

When faced with an unsolicited tender offer, target management can find itself in a difficult position if it deems the possible results of a successful tender offer undesirable. Any defensive tactic employed by target management is likely to be strictly scrutinized under the Williams Act. However, the Williams Act does not per se

110 See notes 79-80 *supra* and accompanying text.

111 *Id.*

112 See notes 81-82 *supra* and accompanying text.

113 669 F.2d at 375.

114 537 F. Supp. at 421. See notes 90-92 *supra* and accompanying text.

115 See note 27 *supra* for preliminary injunction standards. By contrast, Rule 65(b) of the Federal Rules of Civil Procedure allows a temporary restraining order upon a "clear" showing "that immediate and irreparable injury, loss, and damage will result to the applicant before the adverse party, or his attorney can be heard in opposition, and . . . the applicant's attorney certifies to the court . . . the reasons . . . that notice should not be required." FED. R. Civ. P. 65(b).

forbid target management defensive tactics, but only forbids those that are "fraudulent, deceptive, or manipulative."<sup>116</sup> As the holdings in *Mobil* and *Marshall Field* illustrate, the distinction between what is manipulative and what is not can be slight.

Target management should not be completely hamstrung in its response to an undesirable tender offer. Management's position imposes upon it a fiduciary responsibility to the corporation and stockholders;<sup>117</sup> this duty could require a defensive response to an undesirable tender offer. Conversely, a nonmanipulative defensive tactic could still be attacked as a breach of management's fiduciary duty under state law if the response was unjustified.<sup>118</sup> The options granted USS by Marathon were certainly manipulative. The district court's refusal to brand the *Marshall Field* arrangements as manipulative allows target management some leeway to respond to an undesirable tender offer.

The *Marshall Field* and *Mobil* decisions reflect neither different policies nor different standards. Rather, the decisions simply reflect a difference in the factual arrangements presented to the courts. Any arrangement between a tender offer target company and a "white knight" that resembles a "lock-up" will probably end up in litigation. Given the infinite number of possible variations and the paucity of definitive law in the "lock-up" area, the outcome of any case depends upon how the court resolves the factual questions presented.

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116 15 U.S.C. § 78n(e) (1976).

117 3 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, *Directors, Other Officers And Agents* § 838 (Rev. Ed. 1975).

118 "Like agents in general, a director or other corporate officer must be loyal to his trust, use ordinary and reasonable care . . . act in good faith . . . and is generally liable for negligence . . ." *Id.* § 990.