December 22, 1976


Dear Chief:

Before receiving your opinion, I prepared a draft dissent which I have just sent to the Printer. Further study will no doubt lead to some revisions, but I should be able to circulate my views in a few days.

In the meantime, have a wonderful Christmas.

Respectfully,

[Signature]

The Chief Justice

Copies to the Conference
Dear Chief,

I think your opinion for the Court is a fine piece of work and am glad to join it. It is possible that I may have some minor verbal changes to suggest after my return to Washington next week.

Sincerely yours,

The Chief Justice

Copies to the Conference
December 29, 1976

Re: Nos. 75-353, 75-354 & 75-355 - Piper v. Chris-Craft Industries Inc.

Dear Chief:

Although I may have some minor suggestions, I agree.

Sincerely,

The Chief Justice

Copies to Conference

Dear John:

I passed at conference but your splendid dissent is completely convincing, particularly in its persuasive treatment of the policy considerations. I'd very much appreciate your joining me.

Sincerely,

Mr. Justice Stevens

cc: The Conference
MEMORANDUM TO THE CONFERENCE:

I have now read John's dissent in this case. As a result, I propose to add the following material.

A. First, the following will be added as two new paragraphs to the text on page 32, immediately prior to subsection 3.

"The dissent suggests, however, that Chris-Craft is suing for injuries sustained in its status as a Piper shareholder, as well as in its capacity as a defeated tender offeror. That suggestion is raised for the first time. Chris-Craft's position in this Court on standing is narrowly that the Williams Act was designed to protect not only target company shareholders, but rival contestants for control as well. Brief for Respondent, at 36-40, 43, 46-48, 50-54. It is clear, therefore, that Chris-Craft has simply not asserted standing under §14(e) as a Piper stockholder. The reason is not hard to divine. As a tender offeror actively engaged in competing for Piper stock, Chris-Craft was not in the posture of a target shareholder confronted with having to decide whether to tender or retain its stock. The fact that Chris-Craft necessarily acquired Piper stock as a means of seeking control of Piper Aircraft adds nothing to its §14(e) standing arguments; Chris-Craft has correctly recognized this through seven years of litigation. Moreover, the Court of Appeals at no time intimated that it rested Chris-Craft's standing under §14(e) on Chris-Craft's being a Piper stockholder. Its opinion in this respect could hardly be clearer:
"This is a case of first impression with respect to the right of a tender offeror to claim damages for statutory violations by his adversary. And our holding is premised on the belief that the harm done the defeated contestant is not that it had to pay more for the stock but that it got less stock than it needed for control." 480 F.2d, at 362 (Emphasis supplied).

Moreover, the items of damages cited in dissent, infra, at 4 n.4, as attributable to Chris-Craft in its status as a Piper shareholder are, upon analysis, actually related under these circumstances to Chris-Craft's status as a contestant for control of a corporation. First, the alleged "loss of control premium," which Chris-Craft presumably otherwise would have enjoyed, relates on its face not to Chris-Craft as a Piper shareholder per se, but to its status as a shareholder who failed to gain control. Second, the alleged loss of value as to a "locked-in....exceptionally large block" of Piper stock likewise relates under these circumstances to a particular kind of Piper shareholder, namely one whose efforts to secure control necessarily resulted in the acquisition of major stockholdings in the company. In this regard, the Court of Appeals plausibly assumed in this case that in order to dispose of its Piper holdings Chris-Craft would have to file a registration statement with the SEC, since Chris-Craft would presumably be engaged in a distribution of Piper stock. 516 F.2d, at 188-189. In contrast, no ordinary Piper shareholder would have to comply with the 1933 Act's registration requirements in order to sell his or her stock, since the typical shareholder is not "an issuer, underwriter, or dealer." 15 U.S.C. § 77d (1).

Consequently, neither element of damages mentioned in the dissent is peculiar to an ordinary Piper shareholder "injured" by Bangor's alleged violations of the securities law."
B. I will also add the following material in footnotes:

19/ (To appear at the end of the sentence of the first line of p. 30)

The dissent emphasized that Borak involved a derivative suit brought on behalf of the corporation, in addition to the shareholder's direct cause of action. Since corporations were not the primary beneficiaries of § 14(a) --the statute involved in Borak-- the dissent concludes that Borak itself fails to meet the "especial class" requirement articulated by Cort v. Ash. Infra, at 11-12. But this is a misreading of Borak: there the Court observed that deceptive proxy solicitations violative of § 14(a) injure the corporation in the following sense: "The damage suffered results not from the deceit practiced on (the individual shareholder) alone but rather from the deceit practiced on the stockholders as a group." 377 U.S., at 432 (Emphasis supplied.)

The Borak court was thus focusing on all stockholders, the owners of the corporation, as the beneficiaries of § 14(a). Stockholders as a class therefore constituted the "especial class" for which the proxy provisions were enacted.

23/ (To appear as a new paragraph at the end of present footnote 23 on page 36)

This should dispose of many observations made in dissent. Thus, the argument with respect to the "exclusion" from standing for "persons most interested in effective enforcement" is simply unwarranted in light of today's narrow holding. See Infra, at n. 28.

28/ (To appear as a new paragraph at the end of present footnote 28 on page 42)

The extravagant suggestion that § 14(e) is a "virtual nullity" unless standing encompasses rival contestants is therefore premature, as well as unwarranted; this case does not present the issue which the dissent mistakenly concludes has been resolved by the Court's holding.
C. Finally, the following will be added and enlarged as new footnote 22, to appear on page 36, line 18.

22/ It is a novel idea to suggest that an adversary position asserted by a regulatory agency in an amicus brief in this Court—as distinguished from a long-standing agency interpretation of its own statute—comes within the reach of judicial recognition of the so-called "expertise" of such an agency. The present adversary position of the SEC is, of course, in conflict with the testimony of the SEC chairman in the evolution of § 14(e). Ante at 25, 31-32.

Regards,
Nos. 75-353, 75-354 and 75-355
(The Bangor Punta Cases)

Dear Chief:

Please join me in the exceptionally fine opinion that you have written for the Court.

I have noted your memorandum of December 28 commenting on the injunction issue, and I am in accord with your resolution of it. Indeed, if we allowed the injunction to stand, the victory of Piper and Bangor Punta might have Pyrrhic overtones. If Chris-Craft were allowed to retain voting control for another two years, knowing that at the end of the period control must be surrendered, it would have little or no incentive to manage the company with a view to its long term best interests.

As the foregoing possibility demonstrates, there is some incongruity in distinguishing, for standing purposes, between injunctive and damage relief. I am aware that some courts have drawn this distinction, but I am not entirely at rest on this issue. I would prefer, therefore, that you omit the last two sentences in footnote 28 which seem - despite the disclaimer in the first sentence - to lean in favor of standing for injunctive relief. It may be preferable to remain strictly neutral.

On further comment. John emphasized in his dissent that the Court of Appeals concluded that the petitioners were guilty of violating § 14(e) and Rule 10b-5. But the issues of liability (i.e., whether there were violations of law) are not before us and are irrelevant to our decision. I would like to make clear that we imply no view as to liability.
You do indicate in note 22 (p. 35), with respect to the Piper family, that the half-a-dozen judges who have expressed opinions as to liability - including the district judges who perhaps were in the best position to decide the issues - sharply disagreed. As I indicated at Conference, if the liability issues were before us I would have agreed with Judge Pollock. The imposing of liability on the Piper family for its relatively bland (and ambiguously worded) defense of a corporation that family had created and built up over the years, strikes me as little short of outrageous. It would be quite unfair to the parties, and especially the Pipers, to leave any inference that this Court endorsed the view of CA2 as to culpability.*

Moreover, if our opinion could be construed as impliedly affirming the CA2 standard of liability, the management of target corporations may well be deterred from interposing a vigorous defense against takeover bids for fear of being sued for relatively trivial inaccuracies or overstatements. A takeover fight resembles an election contest. There must be reasonable latitude for hyperbole, for widely differing opinions as to value, as to management and other relevant facts.** There is nothing in the Williams Act that is intended to limit expression of this kind.

In sum, although I will join the opinion as circulated I do feel rather strongly that it is important - as a matter of fairness to the parties involved and also to prevent possible misunderstanding - to make clear that no inferences are to be drawn from the Court's opinion that we either agree or disagree with CA2's decision or with its rationale with respect to the issues of liability.

Sincerely,

The Chief Justice

lfp/ss
cc: The Conference

**The principal "culpability" of Bangor Punta in the view of CA2 was its perceived violation of 10b-6. As the District Court held, even if there were a technical violation of 10b-6 (and until the SEC clarified its rules, the prevailing understanding at the time was that the purchases would not have violated the Rule), there was no causation between the alleged violation and the asserted damage.

**Not infrequently, the tender offeror is a predatory type company that seeks control for the purpose of liquidating (sometimes "looting") the target company to the disadvantage of minority stockholders.
December 30, 1976

Re: Nos. 75-353, 75-354 and 75-355 - Piper v. Chris-
Craft Industries, Inc.

Dear Chief:

Please join me in your opinion. Like Byron and Potter, I might have some minor changes to suggest with respect to the final part; I think your memorandum of December 28th is an entirely satisfactory justification for the reversal of the injunction, and I think that the printed draft of that part of the opinion might conceivably be improved by incorporating a couple of the ideas in that memorandum which do not presently appear in the printed draft.

Sincerely,

The Chief Justice

Copies to the Conference

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference
January 13, 1977

Re: Nos. 75-353, 75-354, 75-355 - Piper v. Chris-Craft

Dear Chief:

In my dissent, I plan to add the following paragraph at the end of footnote 18 on page 12.

Respectfully,

[Signature]

The Chief Justice

Copies to the Conference
Add to end of n. 18 on page 12 of printed draft.

January 19, 1977

Bangor Punta

Dear Chief:

I notice that footnote No. 1 in Harry's dissent states:

"Like the dissenters, I also accept the premise that the petitioning defendants violated § 14(e) and Rule 10b-6."

This will be read, I am afraid, as implying that the dissenting Justices agree as to these violations. Of course, the dissenters are privileged to entertain that view, but I again express the hope that you will add a note making somewhat more explicit the facts that issues of liability are not before us, and we imply no view with respect thereto.

In the section of your opinion dealing with Rule 10b-6, there are two or three references - without any qualification - to the 'violation' by Bangor Punta of this rule. For reasons we have discussed, I would prefer to say "alleged violation" unless the general footnote mentioned above makes clear that we are not endorsing CA2's finding of guilt.

Sincerely,

The Chief Justice

lfp/ss
January 21, 1977

Re: (75-353 - Piper v. Chris-Craft Industries, Inc.
(75-354 - First Boston Corp. v. Chris-Craft Industries
(75-355 - Bangor Punta Corp. v. Chris-Craft Industries

Dear Lewis:

I agree that a strong disclaimer is needed as to CA 2's findings of securities-law violations. The prior draft contained this sort of caveat as to the alleged Rule 10b-6 violations and we are trying to make sure "alleged" is used in these references. Fn. 25, at p. 38. The second draft which is being circulated today not only retains the Rule 10b-6 footnote (new footnote 30 under the renumbering), but I am also adding a new footnote 24:

"In light of our holding, there is, of course, no occasion to pass on the Court of Appeals' underlying determination that petitioners actually violated the securities laws in their efforts to defeat Chris-Craft's bid. See also infra, at 41 n. 30.

Finally, our footnote about the Piper family's alleged violations (old footnote 22; new footnote 26) should also put the reader on notice that we are not giving any endorsement on the Second Circuit's reading of the 1934 Act.

Regards,

Mr. Justice Powell
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75-353 Piper v. Chris Craft
PRELIMINARY MEMORANDUM

April 15, 1977 Conference
List 1, Sheet 3

No. 75-355

BANGOR PUNTA CORP.

v.

CHRIS-CRAFT INDUSTRIES, INC.

Petition for Rehearing

PRELIMINARY MEMORANDUM

April 15, 1977 Conference
List 1, Sheet 3

No. 75-354

FIRST BOSTON CORP.

v.

CHRIS-CRAFT INDUSTRIES, INC.

Petition for Rehearing

Preliminary Memorandum

April 15, 1977 Conference
List 1, Sheet 3
No. 75-353
Piper
v.
Chris-Craft Industries, Inc.

No. 75-354
First Boston Corp.
v.
Chris-Craft Industries, Inc.

No. 75-355
Bangor Punta Corp.
v.
Chris-Craft Industries, Inc.

Petition for Rehearing

(Same)
Petr Chris-Craft Industries, Inc. seeks rehearing of the Court's decision in this case to the extent that it vacated the injunction granted below. The injunction prevented Bangor Punta Corp. from voting its illegally acquired swing blocks until Nov. 1979 and restored the status quo ante as to corporate by-laws and related matters. Petr argues that the injunction prevented Bangor from enjoying the fruits of its illegal conduct and thus vindicated the public interest in adherence to law and that it protected the public shareholders of Piper, including petr, from Bangor's merger of the corporation at an "inopportune" time.

Petr argues that the injunction was consistent with the rationale of the majority opinion in that it protected Piper shareholders, rather than rewarding a defeated contestant illegally deprived of control. Petr also argues that the "plain error" doctrine was not applicable to this case. According to petr there was no waiver of the claim for an injunction, and if there were one, CA 2 relieved petr of it. Petr takes exception with the view that the interests of the public shareholders were not considered. Finally, petr argues that the injunction was not based on the rejected damage award.

Petr nowhere explains the language about waiver in the lower court opinions, cited in the majority opinion. Slip Op., at 45. The arguments made in this petn were in large part made by Justice Stevens in his dissent. Id., at 18-20. I see nothing here that was not available for consideration at the time of the original decision. 3/29/77

Baker