

February 6, 1973

To Our Clients:

Several recent cases are of particular interest:

H.K. Porter Co. v. Nicholson File Co., CCH ¶93,703 (D.R.I. 1972) holds that the tender offeror damaged by the target's misrepresentations to the target's shareholders to induce them not to tender has a §14(e) cause of action for damages, but not a Rule 10b-5 cause of action because it is neither a purchaser nor a seller -- thus following the Second Circuit decision in Iroquois Industries v. Syracuse China Corp. 417 F.2d 963 (1969) cert. den. 399 U.S. 909 (1970).

Allen v. Penn Central Co. CCH ¶93,709 (E.D. Pa. 1972) sustains a proxy statement against both "nitpicks" and a material omission as the result of a subsequent event. As to the latter the court denies the requested relief of receivership and states a preference for resolicitation, although in fact denying any relief. The court's language is worth preserving:

"The Plan of Refinancing which the proxy statement and supplement describe is not a simple one. We doubt that it is humanly possible in a brief proxy statement to explain this transaction completely and, at the same time, in a manner which makes it comprehensible to the ordinary investor. Defendants have fallen short of perfection but we feel that they have described the plan and its probable consequences with fair accuracy and in a sufficiently direct manner. Whatever weaknesses there are in the presentation are due more to the inherent limitations of the art form than to deception on the part of defendants. We therefore hold that in the light of all the circumstances, defendants have not committed such a violation of §14(a) and Rule 14a-9 as would justify the relief sought."

February 6, 1973

Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Inc., CCH ¶93,714 (S.D.N.Y. 1972) is a private 10b-5 damage action by a purchaser of Douglas Aircraft common on the NYSE after ML started tipping the sharp decline in 1966 earnings and after the tippees began selling and shorting Douglas common, but before the press release making public disclosure of the earnings decline. The opinion rejects the requirement of privity and holds that both the nontrading tipper and the trading tippees are liable to purchasers in the open market, even though the purchases were not shown to be from the tippees. Tippees who trade in the open market assume a duty to disclose the tipped information to all potential buyers -- failure so to do is a violation of Rule 10b-5.

Travis v. Anthes Imperial Ltd., CCH 93,718 (8th Cir. 1973) refuses to abandon the purchaser-seller requirement under Rule 10b-5, but finds that misstatements inducing retention followed by nonmisstatement purchase satisfies the requirement and holds that significant conduct (sending mail to and telephoning to U.S. persons in the U.S.) in the U.S. is sufficient for jurisdiction even though the security is a foreign security not traded in the U.S. and with little U.S. ownership interest.

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