May 7, 1973

TO OUR CLIENTS:

Class Actions. In a major and much welcome setback to the expansion of "strike suit" class actions the Second Circuit has rejected the "fluid recovery" doctrine, the effect of which is to permit class actions to be maintained even though the class is so numerous, diverse and unmanageable that there is no way to give effective notice to all members of the purported class. In Eisen v. Carlisle & Jacquelin, decided May 1, 1973, the Second Circuit held that an antitrust-treble-damage-class-action attack on the NYSE odd-lot differential, with an estimated 6 million persons in the plaintiff class of which 2 million are readily identified, could not be maintained as a class action because unmanageable, that notice to a sampling of the class could not be substituted for actual notice to identified members of the class and that where notice cannot be readily given, the cost of notice should not be imposed on the defendant. With respect to the cost of notice point, in what will undoubtedly become the "notorious" footnote 5, the court intimated that where the defendant regularly mails reports or bills to its shareholders or customers it might be appropriate to depart from the holding that the class-action plaintiff must defray the cost of notice.

Goldstein v. Regal Crest, Inc., E.D. Pa., Mar. 30, 1973, holds that a 10b-5, 12(2) and 17(a) class action cannot be maintained for oral misrepresentations on the theory that the facts as to each oral misstatement probably differ.

Acquisitions by Mutual Funds. In Peter Meenan, CCH ¶ 79,330, the SEC has taken the position that Rule 145 applies to the typical mutual fund acquisition of a personal holding company, the regular prospectus can be used together with a supplement containing the S-14 information and the Rule 145 restrictions on resales by affiliates apply indefinitely (this point being important in 145 transactions not involving a mutual fund that redeems its shares).

Inadvertent Investment Companies. The SEC's current thinking with respect to the 3(b)(3) exemption is reflected in Taylor Woodrow of Calif. Inc., CCH ¶ 79,329, and Continental Illinois (Delaware) Ltd., CCH ¶ 79,338.

Rule 144. In Salomon Bros., CCH ¶ 79,331, the SEC rejected establishing the unsolicited nature of a cross of 144 securities by means other than the written records referred to in SA Rel. 5306. A good example of the maxim "don't ask stupid questions".

Duty to Correct Erroneous Street Estimates. Green v. Jonhop, Inc., CCH ¶ 93,940, D. Ore., Mar. 16, 1973, holds that a corporation has a duty and can be held liable for failing to correct a broker's widely circulated erroneous earnings estimates.

Outside Directors. Lanza v. Drexel & Co., 2 Cir. Apr. 26, 1973, is destined to be landmark decision with respect to the duties of an outside director. The specific holding is that an outside director has no affirmative duty of investigation or disclosure to the purchasers of the corporation's securities. In broader perspective the opinion is a well reasoned recognition that the outside directors cannot be held to the same standards of knowledge, investigation, diligence and disclosure as officer-directors. The case is also the strongest expression of the Second Circuit (majority of the court) view that more than negligence is necessary to establish a 10b-5 action.

Broker's Right to Rescind for Securities Law Violation. Jefferies & Co. v. Arkus-Duntov, S.D.N.Y., Apr. 12, 1973, holds that a seller's broker is not obligated to complete an agency brokerage transaction where the seller has violated the securities laws. This is one of the many Equity Funding cases. It lends great substance to the action Salomon Bros. took with respect to the Boston Co. transactions.

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