WACHTELL, LIPTON, ROSEN & KATZ

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To Our Clients

Recent Developments

1. Short Swing Profits - Purchase and Sale after Resignation as Officer. Where the purchase and sale within six months of each other take place after the officer has resigned there is no 16(b) liability. Lewis v. Varnes, CCH ¶ 94,343 (S.D.N.Y. Jan. 4, 1974).

2. Rule 10b-5 - Purchaser-Seller Requirement. The Seventh Circuit has expressly and emphatically rejected the Birnbaum rule and held that investors who neither bought nor sold securities in their corporation may sue under 10b-5 for alleged fraud on the corporation in connection with an acquisition by the corporation from the defendants in exchange for shares of the corporation. Eason v. General Motors Acceptance Corporation, CCH ¶ 94,344 (7th Cir. Dec. 28, 1973).

3. Rule 10b-5 - Purchaser-Seller Requirement - Spin-off is a Sale. The Second Circuit has reaffirmed its adherence to the Birnbaum rule, but held that for 10b-5 purposes a spin-off constitutes a "sale" by the distributing corporation allegedly fraudulently induced to make the spin-off. International Controls Corp. v. Vesco, 171 N.Y.L.J. No. 17, Jan. 24, 1974, p. 1, col. 7 (2d Cir. Jan. 15, 1974). The Court's policy approach to 10b-5 was summarized as:

> Emerging from this maze of securities schemes, of corporate shells and subsidiary spin-offs, one point stands out in bold relief: the ingenious plotter cannot find a medium more supple than the world of securities to effectuate his design. Thus, we find in these appeals further proof of the wisdom in adopting a flexible approach to the application of section 10(b), a judicial construction consonant with that section's broad prophylactic purpose. Confidence in our securities markets can only be maintained by establishing a protective shield which cannot be circumvented by recourse simply to the novel, to the unexpected, or to entaglements difficult to unravel.

In Penn Central Securities Litigation discussed below the Court applied the de facto merger doctrine to a triangular merger in order to find a 10b-5 cause of action.

4. REITS - Sale of Investment Advisers. Scheinbart v. Certain-Teed Products Corp., CCH ¶ 94,328 (S.D.N.Y. Dec. 5, 1973) is a case seeking to apply Rosenfeld v. Black to sale of a REIT investment adviser.

5. Brokers - Separation of Advisory and Investment Banking Functions - Chinese Walls. Slade v. Shearson Hammill & Co., CCH ¶ 94,329 (S.D.N.Y. Jan. 2, 1974) rejects the Chinese Wall approach where the separated and unknowing retail department continued to advise purchase after the investment banking department obtained adverse information and holds that the broker did not fulfill its fiduciary duty to its retail customers. If the opinion stands up on appeal (the undersigned believes that it will stand up) then brokers, banks and others who have been relying on the Chinese Wall approach will have to supplement it with a restricted list.

6. Parent's Allocation of Markets to Subsidiaries no an Antitrust Violation; Parent-Subsidiary Director Interlock may Violate § 8 of Clayton Act. In Penn Central Securities Litigation, CCH ¶94,318 (E.D. Pa., Nov. 19, 1973) the Court held that a parent does not violate the antitrust laws in determining which geographical markets will be allocated to its formerly independent and competing subsidiaries, and that interlocking directors of a competing parent and subsidiary may violate § 8 of the Clayton Act.

7. Annual Reports. The SEC has proposed new rules which would prescribe the contents of annual reports to include a description of the business, line of business reporting, summary of operations as in the 10-K, two years certified financials, liquidity and working capital information, historical market prices of the company's securities and information about officers and directors and proscribe misleading charts or graphs. In addition, companies would be required to furnish 10-Ks on request and arrange and pay for brokers furnishing annual reports and proxy statements to beneficial owners.

8. Proxy Statements - Insider Remuneration Disclosure. The standard of insider remuneration materiality for proxy statement purposes has been increased, effective January 10, 1974, to $40,000 from $30,000 and now accords with the 10-K standard.

M. Lipton