WACHTELL, LIPTON, ROSEN & KATZ

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Recent Developments

To Our Clients:

1. Derivitive Actions; Home Fire Rule Upheld. The Supreme Court has reversed (5 to 4) the First Circuit and reaffirmed the Home Fire rule that the purchaser of all of the shares of a corporation cannot bring a derivitive action for wrongs committed by his vendor, even when the injured corporation is a "public interest" corporation such as a railroad and the wrongs were violations of the federal securities and antitrust laws. Bangor Punta Operations, Inc. v. Bangor & Aroostock Railroad Co., 257 SRLR p. G-1 (U.S. Sup. Ct. June 19, 1974).

2. Antitrust Review of Exchange Rules. Jacobi v. Bache & Co., CCH ¶ 94,578 (S.D.N.Y. June 3, 1974) sums up the current learning of Silver, Thill and Gordon as: "Where the concedely self-regulatory rule or practice complained of is within the explicit mandate of the Exchange Act and also is actively reviewed by the Commission, that body may and appropriately should itself consider the policies of both the antitrust and the securities laws. But, where the Act contains no explicit directive to the Commission to supervise the practice or rule, the antitrust court may properly consider it. In so doing, it must evaluate both the policies against restraint of competition and the policies of investor protection and fair dealing in securities".

3. Tender Offer; Definition. In ICM Realty v. Cabot, Cabot & Forbes Land Trust, CCH ¶ 94,585 (S.D.N.Y. June 6, 1974) the court holds that a tender offer proposed to be made in the future, after a contract to purchase shares of the target is consummated, is a "tender offer" within § 14(e) and the target has standing under § 14(e) in connection therewith.

4. Securities Law Violations; Arbitration. Scherk v. Alberto Culver Co., CCH ¶ 94,593 (U.S. Sup. Ct. June 17, 1974) holds (5 to 4) that the arbitration provision of an international contract overrides the provisions of the 1933 and 1934 Acts voiding waiver of rights under the Acts and heretofore held to void agreements to arbitrate violations of the Acts. The decision has the effect of limiting Wilko v. Swan to domestic cases.

5. Stock Exchange Rules; Implied Federal Civil Liabilty. NYSE Rule 405 (know your customer; suitability) and NYSE Rule 345.17 (proscribing guarantees of customers against losses) are for the protection of customers qua customers and violation gives rise to implied civil liability under the 1934 Act. Starkman v. Seroussi, 73 Civ. 3826 (S.D.N.Y. June 18, 1974).

6. Tax Shelters; Proposed NASD Underwriting Rules. The SEC has informed the NASD that the SEC does not think it appropriate for the NASD rules to contain substantive requirements applicable to issuers of tax shelters. The SEC thinks that the NASD rules should be grounded on suitability requirements - be customer orientated rather than issuer orientated. The SEC reiterates that suitability applies to private placements as well as public offerings of tax shelters. The SEC letter contains the following definition of suitability in this context: "It would, of course, be inappropriate to select customers on a basis that failed to match the investment profile of the customer and the characteristics of the [tax shelter]". CCH ¶ 79,810.

7. Rule 145; Back-Door Merger. In Windsor Nuclear, Inc. CCH ¶ 79,812 (Avail. May 10, 1974) the Staff (surprisingly) took the position that where a public company merges with a private company in a transaction in which the public company issues 5-1/2 times its outstanding stock to the the three shareholders of the private company who take in a 4 (2) transaction, the vote of the shareholders of the public company authorizing the transaction is not within Rule 145.

8. Bank Automatic Investment Services; Fractional Share Investment Companies; Suitability. The Comptroller of the Currency has ruled that bank automatic investment services do not violate the Glass-Steagall Act. The Comptrollers opinion states that the bookkeeping of fractional shares for participants does not create a "separate security" and hence an investment company. It also states that where the bank "expressly and clearly disavows any role in the customer's selection process" the suitability requirement does not apply. CCH ¶ 79,817.

9. Form 10K. The SEC has amended Form 10K to make clear that a full description of business is required each year; not just updating changes. Release No. 34-10854 (June 14, 1974). CCH ¶ 79,818.

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