

To Our Clients

Going Private

The fast pace of developments in the going private area continues. Judge Carter's decision yesterday in the Wells, Rich, Greene case rejects the concept that the federal securities laws per se proscribe freezeouts. The opinion recognizes that going private raises serious questions of fairness and disclosure, but refuses to accept the argument that a public company must remain a public company. The court said:

"There is nothing invalid per se in a corporate effort to free itself from federal regulations . . . provided the means and the methods used to effectuate that objective are allowable under the law.

Nor has the federal securities law placed profit-making or shrewd business tactics designed to benefit insiders, without more, beyond the pale.

Those laws . . . are satisfied if a full and fair disclosure is made, so that the decision of the holders of WRG stock to accept or refuse the exchange offer can be said to have been freely based upon adequate information.

Whether the offer is fair or unfair or a good or bad transaction . . . does not raise a federal question. . . . Obviously, defendants are seeking to capitalize on the current economic downtrend and are offering their shareholders a package which is attractive only because of unfavorable economic conditions.

. . . The prospectus gives . . . all the relevant facts and he can act on the basis of full information. This is not the case of any hidden or secret action by an outside group to take over control of the company."

While Wells, Rich, Greene has become the leading case of the moment, it does not answer the serious issues raised by Commissioner Sommer or the cogent arguments voiced by senior

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members of the SEC staff. It also fails to satisfy the basic fairness issues raised by minority shareholders and the financial press. The law for the moment is clear, but we believe that freezeouts and going private tenders will continue to be attacked and that SEC and judicial innovation will mandate fairness through comprehensive disclosure and procedural requirements.

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