To Our Clients

Tender Offers

The opinion in the Copperweld case covers a number of important tender offer points:

1. General attitude. The court quoted the Supreme Court opinion in Mosinee Paper that the Williams Act is not a weapon for management to discourage takeover bids and stated that that general principle would govern its approach to the case.

2. Target standing under §9(a)(2) and Rule 10b-5. In discussing the target's claim that the offeror "leaked" its intention to make an offer in violation of §9(a)(2) and Rule 10b-5, the court held that the purchaser-seller requirement as set forth in Blue Chips applies to an injunction action as well as a damage action such as Blue Chips.

3. Computation of Williams Act time period for withdrawal. The Williams Act requires that tender offers provide for withdrawal at "any time until the expiration of seven days after the time definitive copies of the offer ... are first published or sent or given to security holders ...." The court held that the day of publication is not discounted and that an offer published on the morning of September 4 which permitted withdrawal up until 5:00 P.M. on September 11 complied with the Act.

4. Creeping tender offers. The court rejected the argument that open market purchases of an aggregate of 4.4% of the target's stock during a three-month period that ended more than 60 days prior to the tender offer would constitute a tender offer even if the offeror, at the time of the purchases, intended to make a tender offer. The court cited with approval Gulf & Western, D-Z Investment, and Water & Wall. Those cases, together with Canada Development and several other recent decisions constitute an impressive body of precedent rejecting the creeping tender offer theory. It can now be said with some assurance that open market purchases which do not come within the "impact" or "equivalent to a tender offer" test are not subject to the Williams Act. The indication in Frigitemp that the courts will not extend the reach of Rule 10b-5 to market information that is no more than a buyer's intent to buy results in the conclusion that there is no legal restriction on normal open market purchases to acquire a major position in a target.

5. Financial statements of offeror. The court held that if financial statements of the offeror are material, they need not be included in the offer if they are otherwise available to the public. (The tender offer stated that the financials were available at the SEC or the NYSE) The same decision was reached in the Alaska Interstate case. The court also held that where the offer is for all the shares of the target the financials of the offeror are not a material disclosure. The court indicated that the offer's financials are material in cases like Corenco where the offer is for only part of the target's shares and a second step merger is contemplated or the target may otherwise be the ultimate source of funds for the offer. Finally, the court rejected an argument that financials prepared in accordance with foreign accounting principles and which do not comply with the SEC S-X regulations per se fail to meet tender offer disclosure requirements.

6. Materiality. The court made a very significant addition to the rapidly growing body of recent case law that rejects a mechanical approach to the determination of the materiality of a particular disclosure. In discussing the fact that the difference between American and French accounting principles resulted in an understatement of the offeror's 1974 earnings by about $100 million the court said:

> "Admittedly the difference is noteworthy but in applying the test of materiality we must be realistic. The adjustment in our opinion does not alter . . . the 'general health of the tenderor' or even undermine the tenderor's ability to pay for the shares tendered. We must not forget that these shareholders are being offered $42.50 per share for stock that prior to August 28 rarely, if ever, sold for more than $36.00. On the facts of this case we do not believe that reasonable investors would consider important the above discrepancy in arriving at a decision on whether to tender; nor the fact that [tenderor] failed to, inter alia, state the basis it used for determining the value of the inventories or list the details of its pension plan."

7. Disclosure of purpose and plans. The court followed the general principles of Susquehanna, Electronic Specialty and Cargill in rejecting the targets arguments as to the quality of the purpose and plans disclosure. Here again the difference between a partial offer and an offer for all the shares was telling. The cases that have found disclosure violations in the purpose and plans section, such as Otis and Alaska Interstate, generally involve partial offers in which a second step is denied or in which the second step and the offeror's related value and price studies have not been set forth with specificity.

8. Disclosure of state take-over statute problems. The denial of need for governmental approvals of the offer is not a disclosure violation if based on good faith reliance on opinion of counsel.

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