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To Our Clients:

Going Private

Two recent New York decisions may have a major impact on the going private phenomenon. In Matter of Endicott Johnson Corp., decided on October 23, 1975 by the New York Court of Appeals, the issue was the appraisal valuation of shares held by minority shareholders who dissented from a second step merger following acquisition of 70% of the acquired company stock. The Court reiterated the customary tripartite approach to appraisal valuation -- net asset value, investment value and market value and held that the weight to be accorded each approach was to be determined on a case-by-case basis depending on the particular facts.

In Endicott Johnson the issue was narrowed to whether the market price for the six months preceding the merger ($26.25 per share) or the investment value ($42.77 per share) should prevail. Noting that the stock had been delisted from the NYSE after the acquisition of 70%, the Court accepted the argument that market value should be rejected as the dominant factor and said, "the right of dissenting stockholders to obtain fair value rather than market value for their stock protects them from being forced to sell at unfair values arbitrarily and unilaterally fixed by those who may dominate a corporation". Implicit in the decision is a reaffirmation of the principle that the majority shareholders can eliminate the minority and that appraisal is the exclusive remedy of the minority. If the majority fixes a price based on market or other unfair criteria, the appraisal procedure provides a remedy. The availability of investment value in an appraisal proceeding goes a long way toward meeting the argument that the ability to freeze-out minority shareholders ignores the shareholder who has invested for the long-term and does not wish to accept a premium over the current market. The Court said:

> "Important policy considerations are behind ... the appraisal approach ... [not] the least of these are ... the protection of investors whose expectations do not center on the market."

The combination of an appraisal remedy which recognizes investment value as more significant than market value with the voluntary forebearance by the majority from effecting a freeze-out unless approved by a vote of a majority of the minority answers all the policy questions raised in the Bourns and Power/Mate cases and should achieve universal acceptance of going private as a proper corporate procedure.

In People v. Concord Fabrics, Inc. decided last week, the Appelate Division of New York Supreme Court, affirmed, four to one, without a majority opinion, a decision granting the New York Attorney General a preliminary injunction under the antifraud section of the New York Blue Sky Law against a typical going-private cash-merger freeze-out. The dissenting opinion argued that where full disclosure has been made and there is no other indication of fraud, then the statutory appraisal procedure is the exclusive remedy of the minority shareholders. As stated above, the Endicott Johnson case implicity supports the dissent in Concord Fabrics.

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