

May 4, 1976

Tender Offers

The opinion by the Eighth Circuit on May 3, 1976 in Missouri Portland Cement Co. v. H.K. Porter Co., No. 75-1971, contains discussions of several interesting tender offer issues:

(1) The standard for issuing a preliminary injunction in a tender offer case is substantial probability of success at trial and irreparable injury.

(2) The standard boiler plate disclosure of possible delisting by the NYSE of the target's stock (which gives rise to the coercive tender offer claim) is not misleading in a partial tender offer situation in which the maximum number of shares to be purchased would not reduce the number and market value of outstanding shares below the NYSE 600,000 and \$5,000,000 criteria, if it is possible, even though remote, that the number of round lot holders after the offer is consummated might be less than 1,200 and therefore trigger delisting. ✓

3. If open market purchases by an offeror prior to its formal tender offer are a creeping tender offer and therefore violate the Williams Act, the shareholders who sold in the open market have an adequate remedy at law for damages and the target is not entitled to an injunction on the basis of such purchases.

4. A defective tender offer can be cured by an amending offer.

5. Disclosure by the target at a time when shareholders still have a reasonable amount of time to withdraw tendered shares can cure a disclosure defect in the tender offer.

6. A tender offeror who has not formulated a plan to liquidate the target is not required to disclose a past policy of liquidating acquired companies.

7. Where prior to the making of a tender offer the target has announced an agreement in principle for a merger with a third company, the tender offeror has no duty to disclose the details of the proposed merger in the tender offer. The disclosure obligations of a tender offeror are not the same as those of a corporation and its insiders.

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8. Divestiture or deprivation of voting rights are drastic remedies not appropriate for tender offer disclosure situations where both tendering shareholders and shareholders who bought after the tender have an adequate damage remedy.

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