

May 17, 1976

To Our Clients

Going Private

1. Coercive Tender Offers. In Bertozzi v. King Louie International, Inc., Civ. No. 76-0158 (D.R.I. Apr. 30, 1976) the court enjoined a going private tender offer on the basis that the decisions in Marshel and Green establish that the coercive tender offer theory is inherent in Rule 10b-5 and Section 14(e). In Raffa v. The Mechanics Bldg. Mat. Co. ESOT, CCH ¶ 95,535 (S.D.N.Y. Apr. 28, 1976) the opposite result was reached on procedural grounds with the court indicating that where the purpose was to provide incentive to employees the Merrit rationale would be preferred to that of Marshel and Green.

2. Freezeout Mergers. In Nash v. Farmers New World Life, CCH ¶ 95,519 (S.D. Ohio Mar. 30, 1976) the court refused to follow Marshel and Green. First, the court held that a freezeout merger is not a per se violation of Rule 10b-5 (holding that neither Marshel nor Green so held). Then the court found distinguishing features in the adequacy of the price (twice market); the impaired liquidity of the minority shares; the approval by 77% of the minority (although the minority was not given the power to determine the merger); the absence of a going public high, going private low sequence; the prior notice to the minority before the merger; and, although not specifically noted, that the freezeout was a common stock rather than a cash merger and that there were dissenters appraisal rights.

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