WACHTELL, LIPTON, ROSEN & KATZ

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To Our Clients

Going Private

TBK Partners, Ltd. v. Warshow, 77 Civ. 972 (S.D.N.Y. Mar. 10, 1977) is an extremely significant holding sustaining under rule 10b-5 a going private transaction where there was no "valid corporate purpose", but the public shareholders were given the right by a majority vote to determine whether or not the freezeout would take place. The court confined Green v. Santa Fe Industries, Inc. and Marshel v. AFW Fabric Corp. to situations where there is no valid corporate purpose and the public shareholders have no choice as to whether or not the freezeout will take place. The court said:

> "Read together Popkin, Green and Marshel teach that, although misrepresentation or lack of disclosure is not essential to 10b-5 liability in all cases, where an affirmative vote of the public (non-inside) shareholders is required to approve a proposed merger, including a merger that is part of a plan to 'go private,' a showing of misrepresentation or lack of disclosure is necessary to establish a 10b-5 claim. Accord, Singer v. Magnavox Co. [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,830 (D. Del. January 4, 1977)."

The Warshow case was a classic going public high, going private low situation with the corporate assets being used to finance the cash merger freezeout and with a significant increase in pro forma book value and earnings per share for the insiders. The court rejected the natural results of going private as a valid corporate purpose and also rejected a thin market and a lack of correlation between market price and earnings as a sufficient justification for going private. The court basically held that rule 10b-5 does not apply if the public shareholders have a meaningful vote and full disclosure is made in connection therewith.

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