

To Our Clients

Takeovers

1. Fairness of Price. In the United Technologies attempt to takeover Babcock and Wilcox, both Ohio and New Jersey have held that a premium over the market price at the time the offer was announced is prima facie fair. The Ohio decision can be read as establishing a per se rule. The New Jersey decision is ambiguous with an indication that a hearing on fairness would have been ordered if the target company had put forward the price it considered to be fair. The New Jersey decision again raises the question of the efficacy of the reverse bearhug -- the target responding to a bearhug approach by saying that it would recommend an offer at a substantial amount over the raider's proposed price and would oppose anything less as unfair to the target's shareholders.

2. State Takeover Hearings. In the Anderson, Clayton attempt to take over Gerber, the Great Western attempt to take over Sunshine Mining and the Babcock and Wilcox takeover, the decisions by Arkansas, Michigan, New Jersey and New York not to hold hearings may evidence an attitude by the states not to allow their takeover statutes to be used to unduly delay tender offers. The New Jersey decision not to duplicate the Ohio hearing in the Babcock takeover and the New York decision that Sunshine, which has its principal office in New York but is incorporated and has its principal physical properties elsewhere, was not within the New York statute on the basis of its intangible assets, are particularly significant.

3. Constitutionality of State Takeover Statutes. A decision in the Sunshine case is expected this week.

4. Questionable Payments. The federal courts in Babcock and Gerber have permitted broad discovery in this area. In Babcock the court granted a very restrictive protective order; in Gerber the court limited the protective order to cases of life and death. As yet there is no federal court decision as to the scope of disclosure in the tender offer document or whether a tender offer may go forward if the questionable payments matter has not been investigated adequately. In Babcock Ohio and New Jersey paid scant attention to questionable payments and took the position that repetition of the current state of the SEC disclosure was sufficient.

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5. Regulatory Agency Approval of Change of Control.

It has generally been assumed that the change of control provisions of such statutes as the Federal Communications Act, the Interstate Commerce Act and the Bank Holding Company Act were effective showstoppers and targets that were subject to such statutes were immune from takeover. The decision by the NRC in the Babcock takeover to, in the exercise of its discretion, refrain from enforcing the Atomic Energy Act so as to avoid interfering with the tender offer may presage the attitudes of the other agencies when and if they are tested. At least it now appears that these statutes may not be absolute showstoppers.

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