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To Our Clients:

Tender Offers

Three recent cases contain a number of significant holdings.

Weeks Dredging & Contracting, Inc. v. American Dredging Co., CCH Fed. Sec. L. Rep. ¶ 96,414 (E.D. Pa. 1978) held that both the raider and the target have standing to assert violations of Section 14(e) and discusses several interesting disclosure questions.

Raider has standing to sue for 14(e) injunction. The court said:

> As a preliminary issue, American raised in a Motion to Dismiss the question of whether Weeks, as a tender offeror, had standing to sue for injunctive relief under Section 14(e). This was the question left open by the Supreme Court in Piper v. Chris-Craft Industries, 430 U.S. 1 (1977). While the Supreme Court in Piper held there was no implied cause of action for damages in favor of an unsuccessful tender offeror under Section 14(e), it specifically refused to rule upon whether a tender offeror could bring a suit for injunctive relief under the Williams Act 430 U.S. at 43 n.33.
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> The Piper decision was based, in part, upon a finding that implication of a damage remedy would be inconsistent with the legislative scheme of Section 14(e). The damage remedy in favor of a tender offeror was found not to serve the purpose of Section 14(e) which is the "protection of investors who are confronted with a tender offer." 430 U.S. at 35. To the contrary, the Supreme Court found that if investors remained shareholders in the target company, they might bear the burden of a substantial damage award in favor of the tender offeror which resulted from the misleading statements of the target company's management. In addition, the Court concluded that any deterrent effect the threat of a damage award might have on the target company's management would be insignificant.

However, where the tender offeror seeks preliminary and final injunctive relief against false and misleading statements made by the target company's management, this Court concluded that implying such a remedy in favor of the tender offeror would not be inconsistent with the legislative scheme. Unlike the damage remedy, the injunctive remedy does not appear to impose any burden upon investors when it is properly invoked. Furthermore, when the injunctive remedy is employed prior to the time when investors are called upon to render their decision on the tender offer, it allows the investors to arrive at their decision in an environment purged of false and misleading information. The Supreme Court in Piper recognized the beneficial effects of this equitable remedy when it said that "in corporate control contests the stage of preliminary injunctive relief, rather than post contest lawsuits' is the time when relief can best be given.'" 430 U.S. at 42. The effects of the injunctive remedy for violations of Section 14(e) appear entirely consistent with and further the purposes of the legislative scheme, even though the results are obtained through the efforts of the tender offeror. In fact, to disallow the use of the injunctive remedy solely because its use is urged by the tender offeror would apparently conflict with the Williams Act's interest in protecting investors. In a tender offer situation, where a fight arises between the tender offeror and the target company, often it will only be the management of both entities that is aware of whether statements made to the investors are misleading; it will be the knowledge held by these parties that allows for a timely suit to be brought under Section 14(e) which will protect the interest of the investors. To preclude such a suit solely because it is instituted by the tender offeror would appear inconsistent with the fundamental purposes of Section 14(e).

In Humana Inc. v. American Medicorp, Inc., 46 U.S.L.W. 2416 (S.D.N.Y. December 28, 1977), the court held that the Supreme Court's decision in Piper v. Chris-Craft Industries, did not preclude a tender offeror from suing for injunctive relief under Section 14(e). And, in that case, the court concluded that a tender offeror

> indeed did have standing under Section 14(e) when it sought injunctive relief. For the reasons stated in the Humana decision and the reasons mentioned above, this Court arrived at the same decision as was reached in Humana.

Target's statement as to value. The president of the target, Mr. Greaser, gave a newspaper interview in which he said the target shares were "worth" $150 per share (against a $30.25 per share offer). While the target did have a net asset value of $150 per share, the highest market price in the prior five years was $28 per share and there was no plan to liquidate the target. The court said:

> In the context of a tender offer of $30.25 by Weeks, the statement that the shares were worth $150 per share would seem to indicate that if the shareholders held on to their shares they could expect to realize $150 per share on the open market; as Mr. Greaser indicated during the hearing, that was not the case. If Mr. Greaser had explained the basis for his statement, the shareholders or investors might not have been misled. For example, if Mr. Greaser had informed the investors that the asset value of the shares only becomes relevant in a liquidation proceeding or the like, then stating the worth of the shares in terms of their asset value might not have been misleading. Another alternative available to Mr. Greaser would have been to state the asset value of the shares, but inform the shareholders that they could only expect to receive more than the current market price of the shares on the open market if the earnings of the company increased. But to issue a blanket statement of the shares' worth in terms of their asset value could only mislead the shareholders and cause them to believe that they could receive $150 per share if they sold their shares on the open market. American argued that as it was possible that Weeks, if it assumed control, might liquidate the assets of the company, it was not misleading to state the value of the shares by asset value. Nevertheless, even if this eventually was to occur, the shareholders of American at the time when the statement was made were faced with the decision of whether they should tender their shares. The statement by Mr. Greaser appeared calculated to convince the

shareholders not to accept Weeks' offer, because they could receive more for their shares if they held on to American stock. But the fact is, as admitted by Mr. Greaser, if the shareholders refused the offer and remained American shareholders they could not expect to receive more than the current market price for their shares unless earnings increased, since American did not intend to liquidate the assets of the company. Therefore, the statement was still misleading in the context in which it was made.

Targets statement as to earnings. The president of the target also stated that the target was "shaping up all right" when its basic business was continuing to operate at a loss and its earnings were attributable to a land condemnation settlement. The court found a 14(e) violation in the failure to disclose the nonrecurring nature of the earnings. The court said:

"... even if Mr. Greaser's statement was not untrue, it was misleading in the context in which it was made. By failing to explain the reasons for his assessment of the financial situation of American, his statement that things were 'shaping up all right' would reasonably lead the shareholders to conclude that the company's dredging business had strengthened. Prior to the publication of the Bulletin article, American shareholders had been made aware that their company was suffering a loss in operating revenues in the year 1977.... Therefore, by failing to disclose that the settlement award was the reason for American 'shaping up all right," American shareholders could reasonably be misled and believe that operating revenues at American had increased.'

Raider's failure to disclose intent to change duties of target's management. The court said:

An offeror's failure to disclose its intention to change the duties of management upon gaining control of the target company is a material omission for it is a fact that shareholders are likely to think important in deciding whether to tender their shares; who the management of the company will be and what their duties and responsibilities will consist of are considerations that will reasonably be factored into a shareholder's decision of whether to remain an investor in a company.

<u>Raider's failure to disclose factors to be considered in an appraisal proceeding</u>. The court said:

> Weeks' failure to inform the shareholders of the various factors that are employed in assessing "fair value" [in an appraisal proceeding following a second step merger after the tender offer] would allow the shareholders to be misled into believing that only the market value of the shares are important in making the fair value determination. The [offer] stressed the effects of the tender offer on the market value of the shares. In the [offer], Weeks informed the shareholders that if the tender offer was accepted, it was possible that the liquidity and market value of the remaining shares held by the public could be adversely affected.... Weeks' emphasis on market value would possibly misguide the shareholders and permit them to believe that only market value, which might be adversely affected by the tender offer, would be considered in the computation of fair value. As this was not the case in that other factors are taken into consideration when determining fair value, the statements made in the [offer] were misleading. The omission of the factors employed to determine fair value is material for there is a substantial likelihood that a reasonable shareholder would find the rights available to him or her after the tender offer an important consideration in deciding whether to accept Weeks' offer.

<u>Raider's disclosure of fair market value of target's assets</u>. The court held that where the raider does not have knowledge of the fair market value of the target's assets, the raider has no disclosure duty with respect thereto. The court said:

> In fact, if [the raider] had attempted to state the fair market value of the equipment, based on the scanty information before it, [the raider] probably would have made a false statement.

<u>Raider's disclosure of intent with respect to a second step merger</u>. The court held that where a second step merger is a strong possibility but not definite, a statement that such a merger would be considered following the tender offer is sufficient.

Misleading offering price. The target argued that an offer price of $30.25 was inherently misleading in that the 25 cents implied that the raider "gave great thought and consideration to the value of the [target] shares and to a 'proper price'", and therefore, the raider was required to disclose that it did not make a detailed analysis in determining the offer price. The court rejected the argument holding that the raider has no duty to "inform the shareholders of how it arrived at the tender offer price."

Raider's failure to disclose that nontendering shareholders would receive more than offer price in a second-step merger appraisal proceeding. The court rejected the argument based on a $150 per share net asset value versus a $30.25 per share offer price that the raider was required to disclose that non-tendering shareholders would, if they demanded appraisal upon a second-step merger, receive more than the offer price. The court said:

> ... there are a number of factors that are employed to determine the "fair value" of a company's stock in appraisal proceedings. How these factors will be balanced at a future time cannot now be known. A prediction of the results of an appraisal proceeding, therefore, cannot be the basis for finding a present Section 14(e) violation. Beyond requiring the offeror to delineate the factors employed in such a proceeding so that the shareholders will have sufficient information to make their own evaluation as to the future "fair value" of the shares, the Court can do no more. The Court cannot determine that the appraisal proceedings will yield more than tender offer price.

Podesta v. Calumet Industries, Inc., CCH Fed. Sec. L. Rep. ¶ 96,433 (N.D. Ill. 1978) held:

> 1. The proxy rules require disclosure that the primary purpose of the issuance of shares was to preserve control by management, if such is the case, and that Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) does not stand for the proposition that a breach of state law fiduciary duty cannot be the basis of a federal securities law disclosure violation.
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> 2. Where no tender offer is involved and management bands together to defeat a proxy fight, the management group is subject to Section 13(d) and must file a Schedule 13D.

3. Under Delaware law, the issuance of shares for the primary purpose of perpetuating control is a breach of fiduciary duty.

Calumet Industries, Inc. v. MacClure, CCH Fed. Sec. L. Rep. ¶ 96,434 (N.D. Ill. 1978) held that open market purchases are not a tender offer and followed the Seventh Circuit Bath Industries v. Blot test for when a 13(d) group is formed.

Proxy Contests

The Calumet Industries case contains several interesting proxy contest holdings:

1. The organization of an opposition group to solicit proxies does not by itself constitute "solicitation" and therefore there can be more than 10 members of such a group.

2. A Delaware consent is the same as a proxy for the purpose of determining revocability and therefore can be irrevocable only if coupled with an interest.

3. A misstatement, even of a question of law, that goes to the exercise of shareholder voting rights is a violation of Rule 14a-9 and should be remedied by injunction.

4. The corporation has standing to complain of a 14a-9 violation.

5. A party to a proxy contest is not required to set forth the other side of an issue and use of exaggerated expressions such as "double-dealing" and "costly" are not so misleading as to violate Section 14(a).

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