WACHTELL, LIPTON, ROSEN & KATZ

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To Our Clients

Tender Offers; Delaware Takeover Statute

In A.S.G. Industries, Inc. v. MLZ, Inc., (Del. Ch. June 8, 1978) it was held that the target has standing to bring suit on behalf of its shareholders for violation of the Delaware takeover statute. In addition, the court held that a raider does not violate the proration requirements of the Delaware statute by acquiring an option on a large block of target shares which option it intends to exercise after a partial tender offer. The court refused to integrate the option with the tender offer and took the position that the option situation is no different than the situation of open market purchases followed by a tender offer, which in Telco v. Libco, (Del. Ch. C.A. No. 5129, July 29, 1976) the court had found to be permissible. The court said:

"[Target], in seeking to distinguish . . . cases [such as Telco], contends that although these cases authorize purchases of stock of a target company, in the present action [raider] has not purchased stock but has only entered into an executory agreement which is exercisable only at the conclusion of a successful tender offer. I fail to discern the difference between the purchase of a target company's stock before the tender offer, and an agreement entered into prior to a tender offer to purchase such stock contingent upon the success of the tender offer. [Raider] has fully disclosed the contractual arrangements . . . and regardless of whether or not there was an outright agreement for the purchase of [target] stock [pursuant to the option], the effect would be the same in either situation, [the optionor] being assured that all of its [target] stock is to be purchased while the [target] stockholders are faced with the possibility that only a pro rata portion of their stock may be similarly purchased. Thus, the cases cited by [raider] which stand for the proposition that pre-tender offer purchases of target company stock by an offeror are permissible are not rendered inapposite merely because the offeror, through outside parties, has struck a more favorable bargain for itself by anticipating the possibility that its tender offer may prove unsuccessful and has therefore arranged for an option to purchase rather than committing itself to the actual purchase of stock."

M. Lipton