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To Our Clients:

Tender Offers; Fiduciary Duties of the Target's Board of Directors

The Gerber directors have been exonerated from liability for their successful defense against the Anderson, Clayton tender offer. Berman v. Gerber Products Co., CCH Fed. Sec. L. Rep. ¶ 96,506 (W.D. Mich. July 19, 1978) is the first direct holding on the issue of the liability of a target's board if it successfully resists a tender offer. The court held that even where the tender offer price is substantial and there has been no determination that it is unfair or inadequate, the directors of the target may defend on the ground that the offer violates the securities laws or the antitrust laws and that such defense does not breach their fiduciary duty to the shareholders. The court said: "Far from violating the fiduciary duty imposed on them, Gerber's directors were seeking protection of a statutorily established right. It has been noted, moreover, that corporate management has an affirmative duty not to refrain from bringing actions under circumstances like those present here, but to 'oppose offers which, in its best judgment, are detrimental to the company or its stockholders.'"

The basic holding of the Gerber case can be summarized as: Where directors of a target act in good faith and exercise reasonable business judgment they are free to reject a tender offer and bring litigation to enjoin it even though the price is not inadequate or unfair.

The Gerber case also held that failure of the directors of a target to entertain proposals for White Knight deals was not action "in connection with any tender offer" and therefore not within Section 14(e) of the Williams Act; that Section 14(e) is limited to deception and disclosure and does not determine the fiduciary duties of the directors of a target; that integrity of management of a raider is a material disclosure item in a tender offer and sensitive payments are discoverable in detail and must be disclosed with particularity;

that where a tender offer is resisted on the ground of illegality and no statement is made as to the adequacy or fairness of the price, the failure to disclose the opinion of the target's investment banker that the price is "substantial" and market and earnings information was not a material omission; and that the Williams Act does not impose an affirmative duty on the directors of a target to respond to a tender offer.

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