

May 29, 1979

To Our Clients:

Role of Independent Directors
Takeovers

The Supreme Court decision in Burks v. Lasker on May 14 (see our memo of May 22, 1979) and the Federal District Court decision in Brascan Ltd. v. Edper Equities Ltd., 79 Civ. 2288 (PNL) (S.D.N.Y. May 25, 1979) are of great significance.

Apart from the basic reaffirmation in Burks by the Supreme Court that state law, not the federal securities laws, governs the internal affairs of corporations, the decision is an implicit recognition by the Supreme Court of the validity of the practice of creating special committees of independent directors to consider and pass on matters involving conflicts of interest between a corporation and certain of its directors or a controlling shareholder.

The Brascan case holds that open market purchases on an exchange, including solicitation of 30 to 50 institutions and large individual shareholders, are not a "tender offer" within the Williams Act. The case is of particular significance in that the SEC appeared as amicus curiae and made the same argument that it made in the Becton Dickinson case which is still pending decision. The Brascan court rejected the SEC argument as follows (emphasis added):

The Securities Exchange Commission, at this Court's request, submitted a brief amicus curiae in which the Commission takes no position as to whether the acts of Edper constituted a tender offer, but in which the Commission proposes eight factors which should be considered in determining whether acquisitions constitute a tender offer under the Williams Act. The SEC does not specify which of the eight factors or how many must be met or how clearly before an acquisition will be considered a tender offer. I have doubts as to whether the Commission's view constitutes either a permissible or a desirable interpretation of the statute. As to permissibility, I have some question

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whether it expands the scope of the statute beyond what Congress can reasonably be understood to have intended. I believe it is not desirable because the application of these vague factors would introduce a crippling uncertainty in an area in which practitioners should be entitled to be guided by reasonably clear rules of the road. The consequences of having purchased on the open market where a court would later determine on the basis of assessment of eight vague factors that the provisions of Sections 13(d) and 14(d) should have been respected would be catastrophic beyond reason. Since no one could ever afford to take this risk, the practical consequences of adopting such a rule of construction of the Williams Act would be to construe the statute as meaning that large scale acquisitions can only be accomplished by the method of conventional tender offers and, as noted above, this is not a permissible reading of the Act.

-- slip op. at 50-51.

* * *

While I would have no disagreement with legislation which imposed pre-acquisition disclosure requirements, comparable to those required by § 13(d), whenever a purchaser intended to acquire by any means a large specified percentage of publicly held stock, that is not what the Williams Act now requires. It is not in my view within the power of a court to so rewrite its provisions.

-- slip op. at 54.

M. Lipton