WACHTELL, LIPTON, ROSEN & KATZ

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To Our Clients

Going Private

Two recent Delaware decisions further clarify the law with respect to freezeouts.

Roland International Corp. v. Najjar, ____ A.2d ____ (No. 153 Del. Sup. Ct. Aug. 6, 1979) held that the "intrinsic fairness" doctrine applied to long-form merger freezeouts in Singer v. Magnavox, 380 A.2d 969 (Del. Sup. Ct. 1977) was also applicable to short-form merger freezeouts. In so holding the court rejected any distinction between short-form and long-form merger freezeouts and second-step freezeouts following a tender offer and going-public-high, going-private-low freezeouts and said that the intrinsic fairness doctrine applies to all freezeouts. However, the court explicitly recognizes that the elements of fairness may be different depending on the type of transaction, with far higher requirements for the "classic" going private transaction.

In Wayne v. Utilities and Industries Corp., ____ A.2d ____ (C.A. 5733 Del. Ch. July 19, 1979) the court held that allowing the minority shareholders to determine by their vote whether or not the freezeout is approved is a major factor in establishing intrinsic fairness. The court said:

> Finally, were I not satisfied that the cash and securities proposed to be paid over to the minority stockholders in the event of consummation of the merger here in issue did not constitute an intrinsically fair proposal and in excess of what would appear to be the pre-merger fair value of such shares based on a consideration of the value of the assets, earnings as well as the market price of shares of Utilities and Industries stock, the proposal that stockholder approval of the merger in issue be made to depend on a majority of the votes cast at a special meeting of stockholders by the minority stockholders along would appear to negative any contention that the majority stockholders are exercising their coercive power to effect a merger for their exclusive benefit and that such minority's business purpose in going private for its own best interests is not to be forced on the minority public stockholders. Compare Tanzer v. International General Industries, Del. Supr., 379 A.2d 1121 (1977). In other words, at such meeting of stockholders of Utilities and Industries the majority stock hold by members of management and other proponents of the merger in issue will not be allowed to vote, thus giving significant meaning to a vote in favor of the proposed merger should a majority of the minority public stockholders vote for such result.

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