WACHTELL, LIPTON, ROSEN & KATZ

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To Our Clients

Takeovers

Shareholders (whose holdings total 5% or more) interested in taking control of a corporation face the problem of what kind of activity will constitute them a "group" required to file a Schedule 13D. Generally, the courts have answered the question by holding that a group does not exist until there is an "agreement". However, agreement is a factual issue and frequently it is argued that shareholders who acted in concert had agreed. Where the line is drawn is more a question of attitude than law. In Lane Bryant, Inc. v. Hatleigh Corp., CCH Fed. Sec. L. Rep. ¶97,529 (S.D.N.Y. June 9, 1980) it was held that more than preliminary discussions are necessary to establish a group. The court said:

> ". . . . In general, Section 13(d) seems carefully drawn to permit parties seeking to acquire large amounts of shares in a public company to obtain information with relative freedom, to discuss preliminarily the possibility of entering into agreements and to cooperate with relative freedom until they get to the point where they do in fact decide to make arrangements which they must record under the securities laws. By requiring the existence of a 'group', the law is designed to avoid discouraging and making risky that kind of preliminary activity.
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> "It is quite clear in this case that the parties did discuss possible arrangements. But it seems unlikely that a 'group' within the meaning of Section 13(d) was formed in November when the Malsins decided not to sell their shares to the Hatleigh defendants and the Hatleigh defendants in turn told the Malsins that they did not want to make a deal with them, preferring to proceed on their own. Although defendants' decision may have been motivated by tactical considerations, it does not come close to establishing an illegal arrangement."

M. Lipton