

July 20, 1981

To Our Clients:

Takeovers
Further Observations and Suggestions

1. The current frenzy of mega-takeovers and Canadian raids on U.S. energy companies is producing a growing sense of unease in Washington. Congress is clearly prepared to pass the law making the U.S. margin regulations applicable to foreign companies borrowing from non-U.S. banks for the purpose of buying U.S. securities. In addition, a moratorium on takeovers by Canadian companies is gaining momentum. Most significantly the Conoco situation has apparently sparked a high level review of the Administration's antitrust policy; it may turn out to be much less permissive than is currently assumed.

2. The courts continue to reaffirm the application of the business judgment rule to takeover bids. Two weeks ago the Seventh Circuit denied a rehearing in the Marshall Field case. Last week in the Conoco case Judge Weinfeld said: "the Board of Directors are under a duty to exercise their best business judgment with respect to any proposal pertaining to corporate affairs, including tender offers."

3. The courts continue to be hostile to attempts to enjoin tender offers. The enforcement of the state takeover statutes is now being routinely enjoined by the federal courts. On the other hand it is extremely difficult to enjoin a tender offer on disclosure, antitrust or other grounds. Indeed, in the Conoco case Judge Weinfeld rejected Conoco's attempt to enforce an alleged agreement by Seagram not to make a tender offer and implies that while a target has the right to prefer one tender offer over another and so advise its shareholders, a target does not have the right to enjoin one tender offer while recommending another. Judge Weinfeld seems to be saying that once a target decides to accept a takeover bid, it is open season and any bidder is welcome. Judge Weinfeld was not faced with a situation where one of the bids was alleged to be in violation of the disclosure or antitrust laws and, therefore, his opinion cannot be said to extend to such a situation. Nor can his opinion be said to restrict a target from favoring a white knight through lockup, option and similar agreements.

4. The Canadian raids and other partial tender offers and the continued open market accumulation raids suggest the desirability of charter or by-law provisions giving a corporation the right to refuse transfer or redeem shares that in alien or undesirable hands might cause loss of licenses, franchises or similar rights or that might be used by the holder to the disadvantage of the other shareholders. Such provisions are currently being litigated in the Conoco case in Delaware and a decision is expected this week.

5. Asset-rich companies that are substantially undervalued in the stock market should develop plans for restructuring before faced with a tender offer and contingency plans as to the types of restructuring that would be feasible when faced with a tender offer.

6. Large companies that heretofore believed that they were immune from a takeover should develop plans for dealing with a takeover situation.

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