

January 8, 1986

To Our Clients

Lockups

While it is difficult to draw clear guidelines from the Revlon and SCM cases holding lockups invalid, it is apparent that the trend in the courts is unfavorable. Both the Revlon and SCM opinions say that not all lockups are illegal. However, as the dissent in SCM by Judge Kearse (who had previously written the lead New York decisions in this area) points out it is hard to postulate a case where there would be more cogent proof that management entrenchment was not a motivating factor and where the action of the directors in pursuing a white knight LBO produced a greater benefit for the shareholders.

In our view, Judge Pierce's majority opinion in SCM is incorrect in criticizing the investment banker's lockup presentation to the SCM Board and the Board's deliberations with respect to the lockups. Extensive study and due diligence was done and the presentation was excellent. The Board's deliberations were faultless and it acted on our legal advice that the approval of the lockups was within its business judgment. One is forced to conclude that the majority incorrectly dealt with the facts as found by the District Court to justify its distaste for lockups.

While lockups have not been banished from the merger world, they no longer occupy the position they did a few months ago.

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