WACHTELL, LIPTON, ROSEN & KATZ

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To Our Clients:

Poison Pill Again Upheld

In the Gelco case the Federal District Court for Minnesota has upheld a rights plan with both a flip-over and a 20% flip-in.

Relying on Delaware law, the Court not only sustained all aspects of the rights plan, but also the refusal of the board of directors to redeem the rights in the face of a premium cash offer for all the shares. The Court specifically rejected the questionable reading of New Jersey law in the NL case.

We believe the decision is a correct statement of the law with respect to poison pills and the fiduciary duty of directors and reflects what the vast majority of courts will hold under similar circumstances. The opinion is worth quoting at length:

> As a starting point, Poison Pills are not a *per se* invalid defensive tactic. *See Moran v. Household International, Inc.*, *supra*, 500 A.2d 1346. In *Moran*, the Delaware Supreme Court held that directors' adoption of a preferred share purchase rights plan was a legitimate exercise of business judgment.
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> Central to the *Moran* decision was the court's determination that the plan was not adopted in response to a specific threat but instead adopted to ward off possible future advances. This is exactly what occurred here; Gelco adopted the plan some four months prior to Coniston's hostile bid. The *Moran* court also placed much emphasis on the fact that the plan would not deter all hostile tender offers. The same can be said of Gelco's Rights Plan.
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> The *Moran* court also emphasized that the Poison Pill was *not* inherently coercive because shareholders would always be protected because the directors would be subject to regular fiduciary duties in deciding whether or not to exercise discretion and redeem the Rights as part of an acceptable outside tender. Such protection was not abused in the present case.

> Directors have not only the right, but a duty, to adopt defensive measures to defeat a takeover attempt contrary to the best interests of the corporation and its shareholders. MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., 501 A.2d 1239, 1247 (Del. Ch.), aff'd, 506 A.2d 173 (Del. 1985). The Gelco Board devoted a five and one half hour meeting to evaluating the merits of the Coniston proposal, including the issue of whether to redeem the Rights Plan in [view] of the offer. The Board's refusal to redeem the Rights Plan was clearly a reasonable response to the hostile bid, which the Board, partially based on advi[c]e from its investment banker, concluded was inadequate from a financial point of view.
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> The mere fact that the Coniston bid represented a premium above prevailing market values is not alone sufficient to require a merger. See e.g. Smith v. Van Gorkom, supra, 488 A.2d at 875-76. Gelco management reasonably concluded that current market values are not reflective of the company's intrinsic worth especially in lieu of anticipated benefits of the restructuring program.
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> Moreover, the Board rightfully considered factors other than price. Reasonableness of a decision involving defensive tactics may properly involve numerous concerns, including: "nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e. creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange." Unocal, supra, 493 A.2d at 955.
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> In addition to the Board's confidence that the restructuring program would yield superior long term benefits for its shareholders, the Board was also understandably, and reasonably, concerned by Coniston's reputation as a raider, uninterested in continued operation of the Company. Given these concerns, keeping the Rights Plan in place was a reasonable course of action.

The Gelco decision is well reasoned and, taken together with the recent Seventh Circuit decision in CTS, lays to rest the fears raised by NL and Preway, which now may be treated as aberrations.

M. Lipton