

March 8, 1988

To Our Clients:

"No Comment"

The Supreme Court decision yesterday in Basic emphasizes the importance of the "no comment" response to inquiries about merger negotiations.

The Court rejected the argument that it is not necessary to disclose merger negotiations until an agreement in principle is reached. The Court adhered to the probability of occurrence and significance to the company test for determining materiality. Applying this test, the Court held that denials that merger negotiations were taking place prior to an agreement in principle having been reached were misleading in violation of Rule 10b-5.

The Court recognized that silence -- a no comment position -- is permissible during merger negotiations. In a footnote, the Court endorsed the SEC position in the Carnation case and cited with approval the NYSE position that "premature public announcement may properly be delayed for valid business purposes where adequate security can be maintained."

The Basic case makes advising on mergers more difficult. There are no clear guidelines. Each situation will require day-to-day monitoring. The tension between disclosure and the desire not to be put in play until there is an agreement will be strong.

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