

April 15, 1988

To Our Clients:

Maybe Lockups Are Back

The Delaware Chancery Court in the J.P. Stevens case rejected the argument that the decision of the Delaware Supreme Court in the Revlon case prohibits the grant of bust-up fees, topping fees or other advantages to one of the competing bidders for a company that is for sale. Instead, the Court confines Revlon to cases where it is shown that the board of the target was not acting in good faith. Where the board is not so shown, the Court holds that the business judgment rule applies and the Court will not second guess the directors' decision that the grant of an advantage to one bidder was an appropriate means to obtain the best price for the shareholders. The Court recognizes that the grant of an advantage to a bidder may be the way to get a better price. While the case did not involve stock or crown jewel lockup options, the reasoning would be the same and perhaps they are back. Since the Court's confinement of the Revlon doctrine that the directors of a company for sale must act as impartial auctioneers to breach of the duty of loyalty cases is questionable, the confusion in this area continues.

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