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To Our Clients

Does The Board of Directors Have A Duty To  
Adopt A Rights Plan

With the now proven benefits of rights plans in protecting shareholders against abusive takeover tactics and enabling targets to negotiate for the best obtainable price, there is a question as to whether the failure of a board of directors to adopt a rights plan might subject the board to the risk of liability for breach of its fiduciary duties. The opinion by Delaware Vice Chancellor Hartnett in Tate & Lyle PLC v. Staley Continental, Inc. is interesting in this regard. Staley had adopted a flip-in rights plan in 1986 and, in response to the hostile bid by Tate & Lyle, announced its intention to seek a white knight or LBO and refused to redeem the rights. The court found:

At this point, while the market price is greater than the tender offer price, the Rights Plan is obviously serving a useful purpose in allowing the Board to seek a more realistic offer. To do otherwise could conceivably subject the Board to actions predicated upon their failure to earnestly seek the highest bidder. See, e.g., Revlon, Inc., v. MacAndrews & Forbes Holdings, Inc., Del. Supr., 506 A.2d 173 (1986). Thus, the plaintiffs have not shown a reasonable probability that the Board's failure to redeem the poison pill is a breach of any fiduciary duty. (Emphasis added.)

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