

November 3, 1988

To Our Clients:

The Interco Case

The Tuesday, November 1, decision in the Interco case came as a surprise. If it is affirmed by the Delaware Supreme Court, which yesterday scheduled an appeal for November 30, it could be the death knell for restructuring as a response to a cash tender offer for all the shares of a company, which the board of directors determines is inadequate.

The Delaware Chancery Court in Interco held that the company could not use its poison pill as a shield against the inadequate offer until it had completed the distribution to its shareholders of the dividend to be paid as part of its restructuring. Rather, the Court said, after the restructuring plan has been developed and adopted, the pill must be redeemed so that the tender offer could go forward before the distribution. This despite the fact that the Court found no fault with the restructuring plan and no reason to doubt that the Interco board reasonably concluded that the hostile tender offer was inadequate and that the restructuring plan was preferable. Further, there was no finding of entrenchment -- indeed, the restructuring plan did not roll up management's shareholdings into a blocking position and Interco was as much subject to takeover after the restructuring as before.

While the Court in the Interco case pays lip service to the doctrines that companies do not have to have permanent for sale signs and that an auction sale is not the only response a target of a hostile cash bid for all its shares can make, the practical effect of the decision is just that. I believe it flies in the face of the Delaware Supreme Court decisions in the Unocal and Newmont cases. If it is not reversed by the Delaware Supreme Court, it will be a dagger aimed at the hearts of all Delaware corporations and a further fueling of the takeover frenzy.

The Interco case and the failure of Delaware to enact an effective takeover statute, raise a very serious question as to Delaware incorporation. New Jersey, Ohio and Pennsylvania, among others, are far more desirable states for incorporation than Delaware in this takeover era. Perhaps it is time to migrate out of Delaware.

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It should be noted that press reports to the contrary notwithstanding, the Interco case did not cast any doubt on the legality of the poison pill. The pill remains the most effective means of dealing with abusive takeover tactics. But unless Interco is reversed by the Delaware Supreme Court its benefits to targets and their shareholders will be significantly curtailed.

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