

December 17, 1988

To Our Clients:

You Can't Just Say No
In Delaware No More

The Pillsbury decision yesterday fulfills the threat to Delaware corporations presaged by the Interco decision. In Pillsbury a single Delaware judge substituted his judgment for the business judgment of the Pillsbury Board of Directors and sentenced Pillsbury to death as an independent company. The death sentence was passed despite the fact that the Pillsbury Board was not found to be acting in bad faith or negligently and despite the fact that the Pillsbury Board, on the advice of independent investment bankers, had determined that the takeover bid on the table was inadequate and was asking for \$5 per share more as the price for a negotiated merger.

The Pillsbury decision confirms the fear that the Delaware judges have abandoned the Business Judgment Rule in takeover cases and will substitute their business judgment for that of a target company's board of directors, even though the board is acting in good faith and on a reasonable basis.

The effect of the Pillsbury decision will be disastrous for American business and the American economy. It will fuel the takeover frenzy. It guarantees that any highest cash bid for all the shares of a company will result in the bidder acquiring the target. It even threatens the effective use of the poison pill as a means of achieving the time and circumstances necessary for a target's board to obtain the highest value for the shareholders. The Pillsbury decision means that the constant threat of takeover will be ever present for Delaware corporations, and, to survive, they will have to satisfy the demands of institutional investors and arbitrageurs for short-term stock price performance by increasing their leverage to dangerous levels and decreasing research, development and capital investment to levels that will ultimately destroy their ability to compete in world markets.

The Pillsbury decision shows that Delaware either does not understand, or does not care about, the long-range macroeconomic problems of the takeover frenzy and the concomitant deequitization of American business and its forced refocus on short-range stock market performance. Unless Delaware acts quickly to correct the Pillsbury decision, the only avenues open to the half of major American companies incorporated in Delaware will be federal legislation of the type now being considered by the Treasury Department or leaving Delaware for a more hospitable state of incorporation.

While the institutional investors and speculators who profit from the Pillsbury decision and the takeover frenzy will likely oppose a company lowering its takeover profile by leaving Delaware, the necessary votes are probably obtainable (witness Time and Inco) if the migration is accompanied by a special dividend or reasonable restructuring. In this connection, a company should consider a dividend of Share Price Protection Preferred Stock.

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