

U.S. EXPERIENCE
IN
TAKEOVER REGULATION
&
SUPERVISION

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- THERE IS NO SINGLE SOURCE OF CORPORATE TAKEOVER REGULATION IN THE U.S.
- REGULATION OF CORPORATE TAKEOVERS IS COMPRISED OF MULTIPLE LAYERS OF REGULATION

SOURCES OF TAKEOVER REGULATION

- STATE LAW
- CORPORATE CHARTER & BYLAWS
- FEDERAL LAW

STATE LAW

- DELAWARE STATE LAW REIGNS SUPREME IN THE AREA OF STATE CORPORTATE REGULATION
- 61% OF FORTUNE 500 COMPANIES ARE INCORPORATED IN DELAWARE
- 55% OF COMPANIED TRADED ON THE NYSE AND NASDAQ ARE INCORPORATED IN DELAWARE
- SINCE 2003, 81% OF ALL INITIAL PUBLIC OFFERINGS WERE BY U.S. COMPANIES INCORPORATED IN DELAWARE

STATE LAW CONSIDERATIONS

- DEPENDING ON THE APPLICABLE STATE LAW, BOARD OF DIRECTORS MAY HAVE BROAD DEFERENCE TO FRUSTRATE A TAKEOVER
- THIS DEFERENCE IS NOT ACCIDENTAL BUT RATHER THE RESULT OF COMPETITION AMONG STATES TO MAXIMIZE THE NUMBER OF CORPORATIONS CHARTERED OR REINCORPORATED WITHIN THEIR BORDERS

DELAWARE STATE LAW

- HIGHLY DEFERENTIAL TO BOARD OF DIRECTORS THAT HAS FOLLOWED A THOROUGH AND WELL DOCUMENTED DECISION MAKING PROCESS
- IN WALLACE COMPUTER SERVICES, INC., A DELAWARE COURT UPHELD THAT A BOARD HAS NO OBLIGATION TO SELL A COMPANY EVEN WHEN 73.4% OF ITS SHAREHOLDERS TENDERED THEIR SHARES

CHARTERS AND BYLAWS

- MOST OF A CORPORATION'S ANTI-TAKEOVER PROVISIONS EXIST IN ITS CHARTER AND BYLAWS
- THE MOST IMPORTANT OF THOSE PROVISIONS, INCLUDE.....

CHARTER AND BYLAWS PROVISIONS

- SPECIAL MEETINGS
- ADVANCE NOTICE PROVISION
- CLASSIFIED BOARD
- FILLING VACANCIES
- SHAREHOLDER ACTION BY WRITTEN CONSENT
- SHAREHOLDER POWER TO AMEND BYLAWS
- BLANCK CHECK PREFERRED STOCK

ANTI-TAKEOVER STATUTES

- MOST STATES HAVE ANTI-TAKEOVER STATUTES THAT LIMIT THE ABILITY OF A PROSPECTIVE BUYER TO ACCUMULATE A SUBSTANTIAL STAKE WITHOUT THE TARGET'S BOARD PRIOR APPROVAL

POISON PILL DEFENSE

- TRIGGERED WHEN A PERSON ACQUIRES "BENEFICIAL OWNERSHIP" OF A CERTAIN THRESHOLD OF TARGET COMPANY'S OUTSTANDING SHARES
- ONCE TRIGGERED, POISON PILLS TURN INTO THE RIGHT TO ACQUIRE SHARES OF THE TARGET COMPANY ("FLIP-IN") OR THE ACQUIRING COMPANY ("FLIP OVER") AT A SIGNIFICANT DISCOUNT (I.E. 50%)

FEDERAL LAW

- THE SECURITIES EXCHANGE ACT OF 1934
- WILLIAMS ACT (REGULATION 14D/14E)
- HART-SCOTT RODINO ("HSR" Act)
- SARBANES OXLEY ANALYST CONFLICTS OF INTEREST

OTHER FEDERAL LAW CONSIDERATIONS

- LOCK-UP AGREEMENTS
- RESTRICTIONS ON FOREIGN OWNERSHIP

CASE STUDIES

- SEC V. BILZERIAN U.S. APP. D.C. 43
- BILZERIAN ACQUIRED STOCK THROUGH AN ACCUMULATION AGREEMENT WITH BROKER DEALER
- BROKER DEALER BOUGHT THE STOCK FOR BILZERIAN BUT REMAINED RECORD OWNER UNTIL BILZERIAN BROUGHT IT FROM BROKER DEALER. BILZERIAN WAS BENEFICIAL OWNER
- AGREEMENT WAS USED TO CONCEAL HIS INTEREST IN "CLUET" AND "HAMMERMILL"
- APPEALS COURT AFFIRMED THAT BILZERIAN WAS GUILTY OF VIOLATING VARIOUS SECURITIES LAWS, SHOULD BE ENJOINED FROM FURTHER VIOLATING THE SAME AND ORDERED THAT HE DISGORGE \$33 MILLION IN UNLAWFULLY GAINED PROFITS

CASE STUDIES

- SEC v. FIRST CITY FINANCIAL
- BELZBERG AND FIRST CITY ACCUSED OF EVADING § 13(d) OF THE SECURITIES EXCHANGE ACT OF 1934 BY DELIBERATELY FILING A DISCLOSURE STATEMENT AFTER THE 10 DAY PERIOD.
- BELZBERG ASKED BEAR STEARNS CEO TO PURCHASE 330,700 SHARES OF ASHLAND STOCK IN EXPECTATION OF A TAKEOVER ATTEMPT
- SHARES PURCHASED AT \$43.96 WHILE MARKET PRICE WAS \$45.37
- BELZBERG SENT A LETTER TO ASHLAND'S MANAGEMENT INFORMING THEM OF FIRST CITY'S HOLDINGS IN THEIR STOCK AND PROPOSING A FRIENDLY TAKEOVER OF ASHLAND
- ASHLAND'S MANAGEMENT REJECTED THE OFFER AND ISSUED PRESS RELEASE DISCLOSING FIRST CITY'S INTEREST, CAUSING STOCK TO RISE BY 10%
- THE NEXT DAY, FIRST CITY FILED THE SCHEDULE 13D DISCLOSURE STATEMENT DISCLOSING THAT FIRST CITY HAD ACQUIRED 9% OF ASHLAND STOCK AND INTENDED TO LAUNCH A TENDER OFFER FOR THE REMAINING SHARES AT \$60 PER SHARE, CAUSING ASHLAND STOCK TO RISE TO \$56
- ASHLAND HAMPERED FIRST CITY'S ATTEMPT TO OBTAIN FINANCING. FIRST CITY DROPPED BID IN EXCHANGE FOR ASHLAND'S REPURCHASE OF THE STOCK AT 51%, RESULTING IN A \$15.4 MILLION PROFIT
- BELZBERG AND FIRST CITY ENJOINED FROM FUTURE VIOLATIONS OF § 13(d) AND ORDERED TO DISGORGE 2.7 MILLION IN PROFITS.

CASE STUDIES

- SEC v. HERBERT MOSKOWITZ
- MOSKOWITZ RECEIVED TWO INSTALLMENTS OF FERROFLUIDICS STOCK WARRANTS TOTALLING 150,000 SHARES, IN EXCHANGE FOR A \$3 MILLION LOAN TO HIS BROTHER, CEO OF FERROFLUIDICS
- MOSKOWITZ WAS AWARE THAT HE WAS REQUIRED TO FILE A SCHEDULE 13D WHEN HE RECEIVED THE SECOND INSTALLMENT AND DID FILE A SCHEDULE 13D OUTLINING HIS INTEREST AND THOSE OF HIS WIFE AND SON.
- MOSKOWITZ LOANED \$400,000 TO SON-IN-LAW FOR THE PURCHASE OF FERROFLUIDICS STOCK.
- SEC ALLEGED THAT MOSKOWITZ WAS THE BENEFICIAL OWNER OF THE STOCK AND ACCUSED HIM OF VIOLATING THE SECURITIES EXCHANGE ACT OF 1934 SECTION 13(d) AND RULES 13d-1 AND 13d-2 Thereunder
- SEC DETERMINED THAT IT COULD NOT CONCLUDE BASED ON THE EVIDENCE THAT MOSKOWITZ WAS THE BENEFICIAL OWNER OF THE SON-IN-LAW'S SHARES (DID NOT HAVE VOTING POWER OVER THE SHARES NOR CREATED OWNERSHIP AS PART OF A SCHEME TO EVADE THE REPORTING REQUIREMENTS)
- SEC DETERMINED THAT THERE WAS INSUFFICIENT PROOF TO ESTABLISH A VIOLATION OF THE SECURITIES EXCHANGE ACT OF 1934 SECTION 13(d) AND ALTERNATIVELY THAT EVEN IF VIOLATION HAD OCCURRED, THE FACTS DID NOT SUPPORT AN INJUNCTION

CASE STUDIES

- SEC v. DAVID E. TETHER
- TETHER ACCUSED OF MULTIPLE VIOLATIONS OF FEDERAL SECURITIES LAWS
- TETHER WAS CEO OF SOLOMON TECHNOLOGIES ("SOLOMON")
- TETHER AND OTHER MAJOR SHAREHOLDERS BOUND BY A LOCK-UP AGREEMENT NOT TO SELL LARGE BLOCKS OF THEIR SHARES DURING PERIOD OF ONE YEAR FROM THE EFFECTIVE DATE OF SOLOMON'S INITIAL PUBLIC OFFERING'S REGISTRATION STATEMENT
- TETHER KNOWINGLY VIOLATED THE LOCK-UP AGREEMENT BY SELLING 200,000 SHARES DURING THE LOCK-UP PERIOD
- TETHER FAILED TO FILE A SCHEDULE 13G WITH 45 DAYS OF THE INITIAL PUBLIC OFFERING OR WITHIN 45 DAYS AFTER THE CALENDAR YEAR IN WHICH HE TRANSFERRED HIS 200,000 SHARES
- TETHER, OWNER OF MORE THAN 5% OF SOLOMON, ALSO FAILED TO FILE A SCHEDULE 13D
- TETHER FOUND LIABLE OF VIOLATING ALL FEDERAL SECURITIES LAWS ALLEGED IN COMPLAINT, ENJOINED FROM FURTHER VIOLATIONS OF THE SAME AND FORBIDDEN FROM EVER SERVING AN OFFICER OR DIRECTOR OF A PUBLICLY TRADED COMPANY

CASE STUDIES

- CHIARELLA V. UNITED STATES
- CIARELLA WAS AN EMPLOYEE OF A FINANCIAL PRINTING COMPANY
- CIARELLA CAME INTO POSSESSION OF AND TRADED USING MATERIAL NON PUBLIC INFORMATION RELATING TO TAKEOVERS, REALIZING MORE THAN \$30,000 IN PROFITS
- SEC INVESTIGATED CIARELLA, ALLOWED HIM TO ENTER CONSENT DECREE IN WHICH HE AGREED TO RETURN UNLAWFULLY GAINED PROFITS
- SEVERAL MONTHS LATER, CIARELLA WAS INDICATED ON 17 COUNTS OF VIOLATING §10(b) OF SECURITIES EXCHANGE ACT AND RULE 10b-5 THEREUNDER.
- CIARELLA WAS CONVICTED AT TRIAL. SECOND CIRCUIT COURT OF APPEALS AFFIRMED THE CONVICTION
- U.S. SUPREME COURT REVERSED THE CONVICTION ON THE GROUNDS THAT A DUTY TO DISCLOSE UNDER §10(b) DOES NOT ARISE FROM THE MERE POSSESSION OF MATERIAL NON PUBLIC INFORMATION
- SEC LATER PROMULGATED RULE 14e-3 TO PROHIBIT INSIDER TRADING IN THE COURSE OF TENDER OFFERS

CASE STUDIES

- UNITED STATES OF AMERICA v. LEE ADELMAN – 06 CRIM. 002
- SEC v. LEE DAVID ADELMAN
- EDELMAN WAS AN NASD REGISTERED REPRESENTATIVE
- EDELMAN WAS ROMANTICALLY INVOLVED AND LIVED WITH A MERGERS AND ACQUISITIONS ATTORNEY ASSIGNED TO REPRESENT APPLIED MATERIALS, INC. IN ITS INTENDED ACQUISITION OF METRON TECHNOLOGY, N.V.
- EDELMAN SAW DOCUMENTS AT THEIR SHARED APARTMENT THAT IDENTIFIED THE PARTIES TO THE PROPOSED TRANSACTION
- DESPITE WARNING BY HIS GIRLFRIEND NOT TO DISCLOSE OR USE THE INFORMATION, EDELMAN EXECUTED A SERIES OF TRADES BASED ON THE INFORMATION, REALIZING \$22,786 IN PROFITS
- SEC BROUGHT CIVIL PROCEEDINGS AND U.S. ATTORNEY OBTAINED A CRIMINAL INDICTMENT FOR AMONG OTHER THINGS, VIOLATING SECTION 10b-5 OF THE SECURITIES EXCHANGE ACT OF 1934
- EDELMAN ENTERED INTO A PLEA AGREEMENT TO ONE COUNT OF INSIDER TRADING
- INSIDER TRADING IS PUNISHABLE BY 20 YEARS OF IMPRISONMENT AND A FINE OF UP TO \$5 MILLION OR TWICE THE GROSS GAIN OR LOSS FROM THE OFFENSE

CASE STUDIES

- SEC v. WHX CORPORATION – CEASE AND DESIST PROCEEDINGS
- WHX, A DELAWARE CORPORATION WAS CONSIDERING A HOSTILE TAKEOVER OF DYNAMICS CORPORATION OF AMERICA (DCA), A NEW YORK CORPORATION
- WHX FACED TWO IMPEDIMENTS TO THE TAKEOVER,

(A) A POISON PILL DEFENSE WHICH WOULD BE TRIGGERED IF ANY SHAREHOLDER ACQUIRED 20% OR MORE OR MADE AN OFFER TO ACQUIRE 25% OR MORE OF DCA, AND

(B) A NY LAW WHICH PROHIBITS ANY NY CORPORATION FROM ENTERING INTO ANY BUSINESS COMBINATION WITH A BENEFICIAL OWNER OF 20% OR MORE OF THE CORPORATION'S OUTSTANDING STOCK FOR A PERIOD OF 5 YEARS AFTER ACQUIRING THE 20% INTEREST, UNLESS THE NY CORPORATION'S BOARD OF DIRECTOR GIVES ITS CONSENT

CONTINUED

CASE STUDIES

- ON ADVICE OF COUNSEL WHX DEvised A TWO PART STRATEGY TO TAKE DCA OVER

(1) A CASH TENDER OFFER
(2) SIMULTANEOUS PROXY SOLICITATION

- THE OBJECTIVE OF THE STRATEGY WAS TO AVOID TRIGGERING THE POISON PILL BY PURCHASING ONLY THOSE DCA SHARES THAT KEPT THEIR INTEREST BELOW 20% AND USING THE VOTES ASSOCIATED WITH THOSE SHARES AT THE ANNUAL SHAREHOLDERS MEETING TO ELECT FOUR DIRECTORS TO THE DCA BOARD OF DIRECTORS, WHO WOULD IN TURN VOTE TO NEUTRALIZE THE PROVISIONS OF THE POISON PILL
- STRATEGY WAS NOT RISK-FREE AS WHX FACED THE PROSPECT OF ACQUIRING SHARES TENDERED BY THE RECORD HOLDER AFTER THE RECORD DATE, SHARES WHICH WOULD NOT BE ABLE TO VOTE AT THE ANNUAL SHAREHOLDERS MEETING

CONTINUED

CASE STUDIES

- WHX INCLUDED A "RECORD HOLDER CONDITION" IN ITS TENDER OFFER WHICH DICTATED THAT ONLY SHARES OWNED BY A RECORD HOLDER AS OF THE RECORD DATE OR BY A SHAREHOLDER WHO HAD OBTAINED A PROXY TO VOTE THE SHARES FROM THE SHAREHOLDER AS OF THE RECORD DATE COULD BE TENDERED
- ON ADVICE OF COUNSEL, WHX PROCEEDED WITH TENDER INCLUDING "RECORD HOLDER CONDITION" NOTWITHSTANDING SEC'S GUIDANCE TO THE CONTRARY BECAUSE COUNSEL WAS CONFIDENT THAT IT WAS CONSISTENT WITH THE "ALL HOLDERS RULE (SECURITIES EXCHANGE ACT RULE 14-d-10(a)(1))
- SEC WARNED WHX'S COUNSEL THAT IT WAS PREPARED TO INITIATE AN ENFORCEMENT ACTION UNLESS IT WITHDREW THE CONDITION, TO WHICH COUNSEL REPLIED WITH REASONS FOR HIS POSITION THAT "RECORD HOLDER CONDITION" WAS CONSISTENT WITH ALL HOLDERS RULE
- SEC COMMENCED ENFORCEMENT ACTION – ADMINISTRATIVE LAW JUDGE FOUND FOR WHX LARGELY ON THE BASIS THAT WHX HAD ACTED ON THE ADVICE OF COUNSEL AND THAT NO HARM HAD RESULTED FROM INCLUSION OF THE RECORD HOLDER CONDITION IN THE TENDER OFFER
- ON APPEAL BY SEC'S DIVISION OF ENFORCEMENT, THE COMMISSION CONCLUDED THAT WHX VIOLATED THE ALL HOLDERS RULE BECAUSE IT EXCLUDED SHAREHOLDERS WHO WERE UNABLE TO PROVIDE A PROXY TO VOTE AN ANNUAL SHAREHOLDERS MEETING. WHX WAS ORDERED TO CEASE AND DESIST FROM FURTHER VIOLATIONS OF §14(d)(4) OF THE SECURITIES EXCHANGE ACT OR RULE 14d-10(a)(1) THEREUNDER

QUESTION & ANSWER PERIOD

THE FLOOR IS NOW OPEN FOR YOUR QUESTIONS