KANE KESSLER, P.C.
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About Kane Kessler...

Kane Kessler is a midsize law firm located in Midtown Manhattan, serving clients throughout the United States and globally. Kane Kessler has been in the business of providing exceptional legal services to its clients for over 80 years, with experienced and specialized lawyers practicing in many areas of the law. At Kane Kessler, we take pride in delivering personal attention to each and every client and in our ability to offer a wide range of experience and knowledge in many legal specialties to help your business grow and prosper.

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The Editors,

Judith A. Stoll
Gary E. Ostroff

Delaware Rules "Business Judgment" Standard Applies to Controlling Stockholder Going Private Transaction

On March 14, 2014, the Delaware Supreme Court (the "Court")[1] upheld the Delaware Court of Chancery's decision in In re MFW[2], regarding the standard of review to be applied in analyzing a squeeze-out merger by the controlling stockholder. The Court concluded that a transaction in which a controlling stockholder takes a company private can be evaluated using the deferential "business judgment" standard of review, rather than the onerous "entire fairness" standard if, at the outset of the negotiations, the controlling stockholder conditions the approval of the merger on (i) the approval by a special committee of independent directors, adequately empowered to select its own advisors and to say "no"; (ii) such committee's fulfillment of its duty of care in negotiating a fair price; and (iii) the affirmative vote of the majority of the stockholders unaffiliated with the controlling stockholder ("majority of the minority").

The Court reasoned that if the protections described above are in place at the outset of such a transaction, the approval process replicates that of a third-party arm's length merger transaction, and therefore the business judgment rule is the appropriate standard of review. However, the Court

noted that if triable issues of fact remain after completion of discovery surrounding the negotiation process or the subsequent disclosure to stockholders, then the "entire fairness" standard will still apply.

Background

MacAndrews & Forbes Holdings, Inc., wholly owned by Ronald Perlman and M&F Worldwide Corp. (MFW)[3], offered to take MFW private. The offer was conditioned on (i) the negotiation and approval of the transaction by an independent special committee and (ii) a nonwaivable condition that the merger be approved by a majority of the minority unaffiliated stockholders of MFW.

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The MFW board, in response to the offer, formed a special committee of independent directors that, according to the Chancery Court's review, performed its work with due care and was adequately empowered[4]. Further, the Chancery Court found that MFW's proxy disclosure to the minority stockholders fully and accurately disclosed the negotiations and the transaction, and that there was no coercion of stockholders involved in the merger vote. Approximately 65% of the unaffiliated shareholders approved the merger. The Court affirmed the Chancery Court's analysis of both the actions of the independent special committee and the vote by the majority of the minority of stockholders' processes, rejecting the plaintiffs' claim that the process should be scrutinized under the more stringent "entire fairness" standard.

Conclusion

This decision provides a clear road map for controlling stockholders to take companies private. As the Court made clear, however, it is imperative that the special independent committees formed for this purpose establish a clear record of the transaction process, be composed exclusively of independent directors with the authority to say "no," that the stockholders receive complete and accurate information and a majority of the unaffiliated stockholders approves the transaction. Failure to follow this process will likely be challenged by plaintiffs and subject the transaction to an entire fairness review standard.

Kane Kessler, P.C. counsels Boards of Directors and Independent Board Committees on the exercise of their fiduciary duties in merger and takeover transactions.

1. *Kahn v. M&F Wordwide Corp.*, No. 334, 2013, 2014 WL 996270 (Del. Mar. 14, 2014).
2. *In re MFE S'holders Litig.*, 67 A 3d 496 (Del. Ch. 2013).
3. At the time of the offer, M&F owned approximately 43% of the outstanding shares of MFW.
4. The independent special committee hired its own legal and financial experts to assist in its evaluation.

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A NEAR MISS: Dodging the Estate Tax Bullet

Effective January 1, 2014, pursuant to the American Taxpayer Relief Act of 2012, the federal estate, gift and generation-skipping transfer tax exemptions have been retained and indexed for inflation. The 2014 exemptions are $5,340,000 per person.

However, the maximum estate, gift and generation-skipping transfer tax rate has been increased from 35% to 40%. The 40% rate is reached at a taxable estate or cumulative lifetime gifts of $1,000,000. As a result, the combined federal and state estate tax rate for New York residents now approaches 50%.

Portability of any unused estate tax exemption between spouses is now permanent. As a result, the unused portion of the $5,340,000 estate tax exemption of a decedent can be transferred to a surviving spouse, thereby increasing the cumulative exemption available to the spouse's estate. However, in order to obtain portability, a federal estate tax return must be filed. As a result, all wills and living trusts should be reviewed to ensure that the documents are sufficiently flexible to allow, where needed, a full deferral of New York estate taxes until the death of the surviving spouse.

Unrelated to the new tax law, the annual gift exclusion has been increased to $14,000 per donee or $28,000 for a married couple who elect to split gifts.

While the Taxpayer Relief Act has removed the uncertainty taxpayers have experienced over the past decade due to the threat of a reversion to pre-2001 tax laws, the current low interest rate environment presents an excellent opportunity to assess the advantages of making gifts of appreciable property in light of estate planning goals and objectives.

Kane Kessler, P.C. advises clients in all aspects of estate and gift tax planning.

Michael A. Zimmerman and **Marc A. Zimmerman** are of Counsel to the Firm's Trusts, Estates and Taxation practice group. Michael can be reached at mzimmerman@kanekessler.com or (212) 519-5137. Marc can be reached at mzimmerman2@kanekessler.com or (212) 519-5114.

ALERT

Governor Cuomo's fiscal 2015 budget makes the most significant reduction and reform of the New York Estate Tax in 17 years. Under the new law, the New York State tax exemption will be raised in stages from its current $1 million to match the federal level in effect in 2019, (currently $5,340,000 per individual) as follows:

On or after April 1, 2014 and before April 1, 2015:	$2,062,500
On or after April 1, 2015 and before April 1, 2016:	$3,125,000
On or after April 1, 2016 and before April 1, 2017:	$4,187,500
On or after April 1, 2017 and before January 1, 2019:	$5,250,000

The maximum estate tax rate will remain at 16%. In addition, the state's generation-skipping transfer tax (GST) on estate beneficiaries two or more generations removed from the decedent has been repealed. However, gifts made after April 1, 2014, and within three years of the donor's demise will be included in an individual's estate. No exception is provided for gifts of real property and tangible personal property located outside of New York State.

DATA PRIVACY AND SECURITY: Important Information for Retailers

Data is king (and the crown jewels). Not surprisingly, then, data privacy and security are of huge importance to retailers. This has never been more true than now, in the wake of recent major data breaches at Target and other retailers where the credit card information and personally identifying information ("PII") of millions of customers have been compromised. These issues are regulated by a complex framework of evolving federal and state laws, regulatory rules, and other standards. The following are a few of the ways in which data privacy and security laws may affect retailers:

• Many retailers engage customers by offering rewards programs or sending information about sales, exclusive offers, events and new product offerings, which necessarily requires contact information. Several states, including California, New York and Massachusetts, have laws regulating how stores may request such data from customers. For example, under New York law, retailers are generally prohibited from requiring or recording any PII (such as the customer's address or phone number) on a credit or debit card transaction form, when such information is not necessary for the completion of the card transaction. (NY Gen. Bus. § 520-a). California law, which provides for some of the most expansive consumer protection laws in this area, prohibits retailers from requesting, collecting or recording a customer's PII (which includes address, zip code, phone number and/or e-mail address) as a condition of accepting payment by credit card. (Song-Beverly Credit Card Act of 1971, Cal. Civ. Code § 1747-1748.95) (amended 1991). Federal courts in California have held that this law is violated whenever a request for PII could reasonably be perceived as a requirement for completing the credit card transaction. Importantly, this law allows for private claims to be asserted against retailers, and several consumer class actions have been instituted against retailers for alleged violations of this law. It is crucial for retailers to be aware of these laws and to modify, where necessary, how their employees request PII from customers.

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• Commercial websites are subject to numerous laws regulating the collection of consumer PII. For example, California law (which, as described below, can apply to businesses located in any state) requires businesses with commercial websites to conspicuously post a privacy policy online that accurately reflects the company's data collection and sharing practices, and to comply with such policy. (California Business and Professions Code ("CalOPPA") § 22575-22579). This law was recently amended to incorporate two new requirements, which went into effect on January 1, 2014: commercial websites must now disclose within their privacy policies whether and how the website responds to "Do Not Track" signals from consumer browsers (CalOPPA, § 22575(b)(5)) and whether third parties may collect PII about a consumer's online activities "over time and across different websites" (e.g., via marketing or data-sharing programs) when the consumer uses the company's website. (CalOPPA, § 22575(b)(6)). These requirements under CalOPPA apply to any website operated for commercial purposes that collects PII about consumers residing in California—thus, the reach of this law extends beyond businesses located in California. It is important for retailers with commercial websites to be familiar with these and other state law requirements, regardless of the location of their brick-and-mortar operations.

• Various laws and rules regulate data security. For example, California law requires businesses to use "reasonable security procedures" to ensure the security of consumer PII (Cal. Civ. Code § 1798.81.5), prohibits companies from printing more than the last 5 digits of a credit card account number or the card expiration date on any printed receipt (Cal. Civ. Code § 1747.09), and requires businesses to shred customer PII records that are no longer needed. (Cal. Civ. Code § 1798.80-1798.84). Credit card companies themselves enforce the Payment Card Industry ("PCI") Data Security Standards—contractual obligations establishing security policies (e.g., data encryption, personal device policies) for organizations that handle cardholder data. A new version of the PCI standards was released in November 2013, and companies must transition to this new version by January 1, 2015. In addition, each state has specific and complex protocols to be followed in the event of a data security breach. New York requires businesses in possession of computerized data which includes private information, as defined by statute, to disclose any breach of the security system "in the most expedient time possible and without unreasonable delay." (NY Gen. Bus. § 899-aa). Companies that become aware of or suspect a breach should contact counsel immediately for instruction.

• New technologies have led to various practices, such as text advertisements and in-store mobile tracking, which have become popular among retailers. Companies should be aware that federal and state laws regulate the sending of unsolicited commercial messages, for example, texting advertisements to cell phones (e.g., California Business and Professions Code § 17538.41) and unsolicited commercial e-mails (e.g., "CAN-SPAM Act", 15 U.S. Code §§ 7701-7713; California Business and Professions Code §17529, 17538.45). There is also a push to regulate in-store mobile tracking, and a self-regulatory framework has been proposed by Senator Schumer of New York to regulate mobile location analytics companies employed by retailers that utilize such technology.

This is a rapidly changing legal landscape, and it is important to keep an eye on evolving laws. Failure to follow adequate data privacy and security standards may expose a business to litigation and can lead to a loss of consumer goodwill and trust.

Kane Kessler's Intellectual Property practice group advises companies on compliance issues relating to data privacy.

Adam M. Cohen is a Partner and Chair of and **Linda M. Dougherty** is an Associate in the Firm's Intellectual Property practice group. Adam can be reached at acohen@kanekessler.com or (212) 519-5146. Linda can be reached at ldougherty@kanekessler.com or (212) 519-5144.

THE DIGITAL MILLE
How to Avoid Liability for Posted on Your Website

The area of copyright infringement is forever changing. In an age where materials can be uploaded, reproduced and disseminated in new and varied ways, companies must continue to keep abreast of developments in intellectual property law and be vigilant about implementing and updating policies and procedures to monitor and eliminate any potential infringing uses of material protected by a copyright. One area in which companies should take a particular interest concerns so-called user-generated content. User-generated content consists of videos, writings, photographs or other material that is generated by a member of the public which is then posted on a website or platform provided by a company. Recently, more and more companies have been providing these platforms in an effort to connect directly with their consumers and target market and to explore nontraditional ways of advertising their products and services. But what if the user-generated content contains materials that infringe upon the copyright of another? Will the company be liable for such infringement? The short answer is: it depends. Under the Digital Millennium Copyright Act, (the "DMCA"), an Internet service provider, defined in part as "a provider of online services or network access, or the operator of facilities therefore," is given safe harbor protection for vicarious or contributory infringement if certain criteria are met. First, the company must adopt and implement a reasonable "repeat infringer policy" that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network. Second, the company must accommodate standard technical measures that are used by copyright owners to identify or protect copyrighted works. See, 7 U.S.C. Sec. 512 et. seq.; Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012). Even if these

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criteria are met, however, there is an exception to the applicability of the DMCA. In a recent decision issued by the New York District Court in Capital Records v. Mp3tunes, LLC, 2014 U.S. Dist. LEXIS 11218 (S.D.N.Y. January 29, 2014), the Court held that "[w]hen a service provider is aware of a high probability of the fact of infringement and consciously avoids confirming that fact, that provider is willfully blind to infringement and may lose the protections afforded under the safe harbor provisions of the DCMA." In Viacom Int'l v. YouTube, Inc., the Second Circuit Court of Appeals further held that "something less than a formal DMCA-compliant takedown notice could constitute apparent or red-flag knowledge of infringement." Therefore, an Internet service provider that has actual or red-flag knowledge of specific and identifiable instances of infringement forfeits the protections of the DMCA safe harbor for those infringements.

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Accordingly, although the DMCA does not impose an affirmative duty on the part of service providers to monitor user content, as a result of the court decisions interpreting the DMCA, companies would do well to be vigilant about responding quickly and effectively to any notice or indication that user-generated content appearing on their website or other platform may contain infringing material. Swift and effective action not only will aid in avoiding liability for contributory or vicarious liability for copyright infringement, but also demonstrates good corporate citizenship and respect for the rights of others.

Kane Kessler, P.C. counsels businesses to help avoid potential liability for copyright and trademark infringement for material posted on their websites and other platforms and to aid in their compliance with applicable federal and common law, including the Digital Millennium Copyright Act.

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Firm News...

ACHIEVEMENTS

The Firm's **Corporate and Securities practice group** represented a global public company in the successful completion of a $690 million private offering of Senior Subordinated Convertible Notes.

The Firm's **Corporate and Securities practice group** represented an NYSE-listed company in the successful completion of a $750 million facilities increase under its senior credit facility.

The Firm's **Corporate and Securities practice group** represented a provider of diverse consumer products in the successful completion of the redemption of $275 million of senior subordinated notes.

The firm's **General Business practice group** represented an outside professional fundraiser in its negotiation, registration and launch of a multimillion-dollar fundraising campaign benefiting an Ivy League university medical program.

The firm's **General Business practice group** represented a startup e-commerce and social media business in its structuring and closing of a $1 million+ convertible note offering with angel investors, the hiring of its initial executive team and the launch of its website and business.

The Firm's General Business practice group with the support from its Intellectual Property and Real Estate practice groups, represented an internationally known restaurant owner and operator in the successful sale to a private equity fund of a 50% interest in the group, which included a financing commitment for future expansion, in transactions worth in excess of $100 million.

The Firm's **Litigation practice group** was successful in winning a motion to dismiss claims in excess of $1 million for breach of contract, fraud and violation of the New York Debtor and Creditor Law against a corporate officer who acted in his individual capacity on behalf of the corporate entity. The Court concluded that there was no evidence that the individual defendant acted in a capacity other than as an agent for the corporation.

The Firm's **Real Estate practice group** represented the owner of a commercial/hotel property in the sale and closing of the real property valued at approximately $12 million.

JOINED THE FIRM

Matthew C. Carroll is an Associate in the Firm's **Corporate and Securities practice group**, focusing on the areas of corporate finance and securities law. He represents public and privately held companies, funds, and investors in a broad range of corporate transactions that includes mergers and acquisitions, public securities offerings, equity and debt placements, initial public offerings, and other general corporate matters.

Mr. Carroll also advises public companies with respect to their compliance and reporting obligations under the federal securities laws and counsels officers and boards of directors concerning compliance with state corporation laws and stock exchange governance rules.

Mr. Carroll received his JD from Villanova University School of Law in 2009. He is admitted to the bars of the States of New York and New Jersey.

CONGRATULATIONS

Jeffrey Daichman, Co-Chair of the **Firm's Litigation practice group**, was a featured panelist along with Larry Flynt and Floyd Abrams at a First Amendment conclave sponsored by the Fordham Law School's Forum on Law, Culture & Society held at the Time Warner Center on March 13, 2014.

David Rothfeld, Chair of the Firm's **Labor & Employment practice group**, has been invited to join the Advisory Board of the Cornell Institute for Hospitality Labor and Employment Relations. The Institute supports educational programs, sponsors and disseminates research, and holds conferences and roundtables dedicated to the improvement of labor and employment relations, labor and employment law, human resource management, and leadership in the hospitality industry.

Practice Groups

Bankruptcy, Reorganization and Creditors' Rights
Corporate and Securities
Corporate Investigations
General Business
Intellectual Property
Labor and Employment Law
Litigation
Matrimonial
Mediation
Real Estate
Trusts, Estates and Taxation