KANE KESSLER, P.C.
Our Business Is You℠ | January 2013

Employers' Obligations Under THE AFFORDABLE CARE ACT

In 2010, President Obama signed the Patient Protection and Affordable Care Act ("ACA"), an act devoted to making significant improvements to the country's healthcare system by increasing access to affordable care, improving quality, and lowering costs, creating new consumer protections, and holding insurers liable for their actions. The ACA faced a sizeable speed bump earlier this year when *National Federation of Independent Business et al. v. Sebelius* questioned the Act's constitutionality. The Supreme Court determined that, with the exception of the Medicaid expansion provision, the ACA does not violate the Constitution. The ACA then faced a second potential speed bump when Governor Romney promised that he would work to repeal it if he were elected President. However, since President Obama has secured a second term in office, the ACA has likely been safeguarded for the foreseeable future.

What does this mean for employers?

The ACA contains provisions requiring many employers to provide adequate health insurance coverage or pay a penalty and report various aspects of their employer-sponsored plans. The following is a summary of the provisions applicable to employers.

Play or Pay

On January 1, 2014, the ACA's "Play or Pay" provision, which aims to share the responsibility of healthcare coverage with employers, takes effect. "Large employers," those with more than 50 full-time employees and full-time equivalents, will have to pay a fee of $2,000 per full-time employee if they do not offer minimal essential coverage to employees and their dependents. The number of full-time employees will be determined by taking a monthly average

About Kane Kessler...

Kane Kessler is a midsized 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,

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Gary E. Ostroff

of employees who worked 30 hours or more during the previous calendar year. Full-time equivalents are determined by totaling all hours worked in a month by non-full-time employees and dividing that total by 120 (30 hours per week for 4 weeks). In other words, if you have 5 employees who each work 25 hours per week, you would have 4.17 full-time equivalents (500 hours worked during the month/120 = 4.17).

The Play or Pay provision also requires that the healthcare offered be adequate. If any employee under the employer-sponsored plan is eligible to receive federally subsidized health coverage, the employer is subject to a fine for providing inadequate coverage. Although there is no current dollar limit on the cost of coverage, a 40% excise tax will be placed on employers with expensive "Cadillac" health insurance plans (greater than $10,200 for individual coverage and $27,500 for family coverage) starting in 2018.

Additionally, the ACA requires employers with more than 200 employees to automatically enroll employees in the employer's health plan. Originally, this provision was also expected to go into effect in 2014. However, a recent update from the Department of Labor explained that the guidance necessary to implement this mandate will not be ready in time for 2014, forcing the mandate to go into effect at some later date. Guidelines about automatic enrollment are not available at this time, but further updates will be provided when they do become available.

Plans maintained under collective bargaining agreements are required to comply with the foregoing as well.

Reporting Requirements

- *2012 Calendar Year: W-2 Reporting*
  Employers will be required to disclose the value of each employee's health coverage on the 2012 W-2 forms sent out to employees in early 2013. The IRS has implemented a transition relief for certain employers who will not be required to report health care costs on 2012 W-2 forms. This relief applies to multi-employer plans in which several employers contribute to a healthcare plan (including those established under a collective bargaining agreement), as well as employers who will file fewer than 250 W-2 forms during the preceding calendar year. If the IRS decides to end the transition relief, the changes will apply to calendar years beginning at least 6 months after the issuance of notice. Further details on reporting requirements can be found at http://www.irs.gov/uac/Form-W-2-Reporting-of-Employer-Sponsored-Health-Coverage.
- *March 1, 2013: Plan Reporting*
  Employers will be required to inform their employees about coverage options outside the employer-sponsored plan (including through exchanges that will be established in 2014). If an employer-sponsored plan does not cover 60% of the total cost of coverage, employers must also inform their employees that they are eligible for a tax credit.

Know Your Plan

Even though insurers bear the burden of many of the ACA's provisions, employers should be aware of the coverage mandates to be sure their plans comply with the law. Some of these plan requirements include extending dependent care through age 26, eliminating exclusions for preexisting conditions, removing annual and lifetime benefit limits, and limiting cost sharing.

The waiting game is over, and the major road blocks standing in the way of "Obamacare" have been removed. Employers will need to take action to prepare for the provisions that will slowly take effect in the coming years. We urge employers to consult legal counsel to ensure compliance with the ACA.

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KEEPING FINANCIAL ADVISORS IN THE LOOP:
But Risking the Loss of the Attorney-Client Privilege

During the course of evaluating or negotiating a transaction, companies expect communications with their attorneys to be privileged. But what they may not realize is that copying third parties (such as financial advisors or investment bankers) on those communications may result in a waiver of the attorney-client privilege. The effect of a waiver is that these communications are no longer immune from discovery in a litigation or other judicial proceeding.

In most jurisdictions, the attorney-client privilege does not extend to cover financial advisors. As the Southern District of New York explained in *Urban Box Office Network, Inc. v. Interfase Managers, L.P.,* No. 01-Civ. 8854, 2006 WL 1004472, at *4 (S.D.N.Y. Apr. 17, 2006), "simply because financial consultants are employed to assist a company in a restructuring transaction does not mean that their communications with the company's attorneys are privileged." In *Steinovich v. Wachtell, Lipton, Rosen & Katz,* 195 Misc.2d 99, 756 N.Y.S.2d 367 (N.Y. Sup. Ct. N.Y. Co. 2003), the court rejected the argument that the services of financial advisors were reasonably necessary to assist the lawyers to advise their client during merger negotiations, holding that communications between the attorneys and client that included the third-party financial advisors must be produced in discovery. Likewise, in *IDX Capital, LLC v. Phoenix Partners Group, LLC,* 2009 WL 2440286, 2009 N.Y. Slip Op. 31735(U) (N.Y. Sup. Ct. N.Y. Co. Aug. 4, 2009) (No. 102806/2007), the court held that emails between the company and its outside counsel were not privileged because they were copied to an investment banker.

...copying third parties (such as financial advisors or investment bankers) on ... communications may result in a waiver of the attorney-client privilege.

Nonetheless, if certain conditions are met, it is possible to maintain the attorney-client privilege on communications with third-party financial advisors. First, the communications must be for the purpose of obtaining legal advice, not business advice. Additionally, some courts require that such communications must be "necessary, or at least highly useful, in facilitating the legal advice," and the financial advisor must serve to "translate" information between the client and attorney. *See, e.g., Dahl v. Bain Capital Partners, LLC,* 714 F. Supp.2d 225, 228, 229 (D. Mass. 2010) (holding that attorney-client privilege was waived by the inclusion of JP Morgan because the attorneys were not "relying on JP Morgan to translate or interpret information"); *IDX Capital, LLC,* 2009 WL 2440286 (finding that attorney-client privilege was waived by including the investment bank on communications where the investment bank was not used primarily for the purpose of explaining terms and aspects of the deal to further the law firm's ability to provide legal advice). Second, there must be an expectation that the financial advisors will maintain the communications in confidence.

The tests utilized by the courts are highly fact-specific and require an examination of the documents claimed to be privileged in order to make a determination. Critically, even jurisdictions that are more likely to maintain the privilege for communications copied to financial advisors require a showing that all parties, including the financial advisor, expected to maintain the communications in confidence. Accordingly, companies should be extremely cautious in including their financial advisors and others on communications with their attorneys. At the least, companies should manage the process so as to satisfy the conditions that the courts have accepted to preserve the privilege. In any event, there is always the risk that, in spite of precautions taken, a court may not necessarily find those communications to be privileged.

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JOBS ACT SERIES: PART I

General Solicitation in Regulation Offerings

The JOBS Act (Jumpstart Our Business Startups), which was passed by Congress in April 2012, is an effort in response to the recent economic recession to increase job and economic growth by facilitating greater access to the capital markets by reducing the regulation of financing activities in several different ways. This first article of a series focusing on the JOBS Act will address provisions that allow for general solicitation in Regulation D private offerings.

Regulation D under the Securities Act of 1933, as amended, is one of the most commonly relied upon regulations that enables companies to avoid the complicated, burdensome and costly Securities and Exchange Commission ("SEC") registration requirements in connection with the offerings of its securities that qualified as private placements under Regulation D. In order to qualify as private placements under Rule 506, offerings historically had to be limited to investors known as accredited investors that satisfied certain criteria such as investment experience, net worth and income levels, including a) individuals with a net worth of at least $1 million excluding primary residence or income of at least $200,000 for an individual, or $300,000, for each of the last two years with same expectation for this year; or b) corporations or partnerships with total assets in excess of $5 million. Alternatively, Regulation D private placements could be made to limited numbers of non-accredited investors if they are provided with offering materials satisfying the SEC's complex information requirements. In order to ensure that Regulation D sales of securities are made to qualified investors only, general solicitations of investors are prohibited, making it more difficult for companies to successfully raise capital under Regulation D.

The JOBS Act mandates that the SEC amend Rule 506 of Regulation D to permit general solicitations and advertising of securities offerings. The SEC proposed such amendments in August 2012, which, if adopted, would permit general solicitations in securities offerings, provided that all purchasers of the securities in such offerings are accredited investors. The proposed rule would require issuers to take "reasonable steps," through a general facts and circumstances-based verification process, to verify that an investor is accredited. This requirement would be in addition to the current Regulation D standard that requires that the investor actually be accredited or reasonably be believed by the issuer to be accredited. Under the proposed new standard, issuers of securities would have to consider particular conditions surrounding the offering, such as a) the nature of the purchaser and the type of accredited investor the purchaser claims to be; b) the amount and type of information that the issuer has about the purchaser; c) the manner in which the purchaser was solicited to participate in the offering; and d) the terms of the offering, including any minimum investment amount.

While many notable business figures have hailed the proposed amendments to Regulation D and other JOBS Act provisions as changes that have the potential to dramatically reshape the manner in which many American businesses will be financed, there have been many detractors who maintain that the legislation will invite fraud and abuse. Former New York Attorney General Elliot Spitzer notably said the JOBS Act should be called the "Return Fraud to Wall Street in One Easy Step Act." Additionally in a recent letter to the SEC, seven United States senators, including Securities Subcommittee Chair Jack Reed, argued that the proposed SEC regulations implementing the elimination of the general solicitation ban are fatally flawed because they do not dictate specific enough methods to ensure that only accredited investors participate in the offerings. As a result, the manner in which the new rules permitting general solicitations in private placements ultimately get implemented remains highly uncertain. You should, therefore, seek the specific advice of counsel before engaging in any private offering to ensure compliance with the requirements in place at such time. Kane Kessler routinely represents issuers in both private placements and public offerings of securities.

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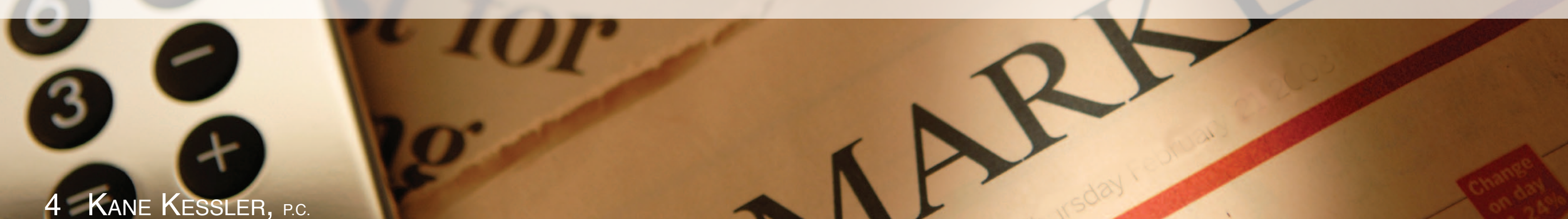

Who May Reside in Your Co-op Apartment?

We are often asked to address the question of who is permitted to reside in a co-op apartment. One fact pattern recently presented involved the issue of whether a child of a co-op shareholder who lived in the shareholder's apartment when he was younger may live in the apartment with a roommate and without the shareholder contemporaneously residing in the apartment.

The terms by which the shareholders of a co-op may use their apartments, including, inter alia, the categories of persons who may occupy the apartment and the process by which a shareholder must abide in order to sublet his/her apartment are governed by the co-op's proprietary lease.

The proprietary lease we were asked to review contained the following provision with regard to "Use of Premises":

> *The Lessee may occupy or use the apartment or permit the same or any part thereof to be occupied or used as a private dwelling for the Lessee and Lessee's spouse, their children, grandchildren, parents, grandparents, brothers and sisters, and domestic employees, and for such other purposes as may be permitted under applicable zoning laws and are otherwise legal. In no event shall more than one unrelated married couple occupy the apartment without the written consent of the Lessor. In addition to the foregoing, the apartment may be occupied from time to time by guests of the Lessee for a period of time not exceeding one month, unless a longer period is approved in writing by the Lessor, but no guests may occupy the apartment unless one or more of the permitted adult residents are then in occupancy or unless consented to in writing by the Lessor.*

In 2002, the Appellate Division, First Department, ruled in *445/86 Owner's Corp. v. Haydon,* 300 A.D.2d 87 (1st Dep't. 2002), that language similar to that in the paragraph above precluded the lessee's mother-in-law from residing within the subject apartment absent the lessee. The First Department stated that "to hold that [this] paragraph permits [lessee's] mother-in-law to live in the apartment without [lessee] also living in there at the same time would be to permit [lessee's] domestic employee to live in the apartment without [lessee] also living there at the same time – a patently unintended if not absurd result." Id. at 88.

However, in 2004, the New York City Civil Court distinguished *Haydon*, despite similar language in the proprietary lease, based upon the facts that (i) the managing agent had apparent authority to act on behalf of the board of directors and granted the lessee's son permission to live in the apartment absent the lessee; and (ii) the board accepted rent for 11 years while knowing of the noncontemporaneous occupancy. *See 201 East 37 Owners Corp. v. Cass*, 3 Misc. 3d 1102(A), 2004 WL 109804 (N.Y. City Civ. Ct. April 23, 2004).

Thus, the proprietary lease provision set forth above would likely be held to require the shareholder's contemporaneous occupancy of the apartment with the adult child *provided* that the child has not received permission to reside in the apartment from the board and/or managing agent deemed to have actual or apparent authority, and the board does not accept rent/maintenance from the child. While this proprietary lease provision is typical of co-op corporation leases in New York City, each co-op's proprietary lease must be examined on its own terms.

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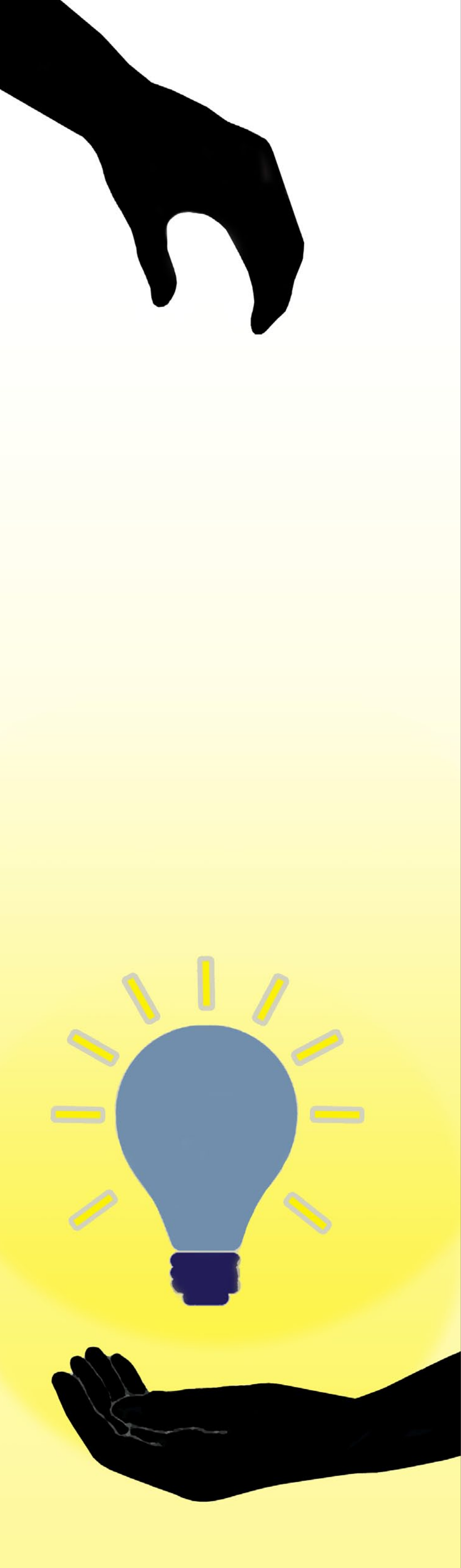

PROTECTING YOUR TECH:
HOW TO PREVENT THE
(AND WHAT TO

Every business has its secrets. Preserving and protecting those secrets can be crucial to maintaining a competitive edge in a field. Below, we briefly explore some of the mechanisms for protecting proprietary information.

TRADE SECRETS

First, if a business has proprietary information, it should be treated as a trade secret and kept in confidence. A trade secret is any type of information that derives independent economic value from not being publicly known and is the subject of reasonable measures to protect the information. There is no set registration procedure for a trade secret as there are for patents or trademarks. However, a trade secret is a legally recognized property right. Misappropriation of a trade secret is theft, actionable like any other theft. Unlike patents, which last no longer than 20 years from filing, trade secrets can last indefinitely, or as long as they can be kept secret. Examples of what can constitute a trade secret include the famous formula for Coca-Cola®, end-user software subject to a shrink-wrap license, and client/vendor lists.

...trade secrets should not be shared with anyone unless absolutely necessary.

Although it seems obvious, it bears repeating: trade secrets should not be shared with anyone unless absolutely necessary. That means not blogging about them or mentioning them to a customer, to friends, and certainly not to competitors. Even in-house, secrets should be kept on a need-to-know basis. Internally, confidential documents and information should be stamped "confidential," password-protected and/or encrypted, and the like.

Of course, at some point one typically must share a trade secret with another, be it a manufacturer, a vendor, or any other entity assisting in the commercialization of the proprietary information. To the extent practical, such sharing must be accomplished pursuant to a non-disclosure agreement ("NDA").

PATENTABLE SECRETS–NOT SECRET FOR LONG

Sometimes proprietary information is valuable yet difficult to keep secret; it may make more sense to file for patent protection rather than to try to keep the information secret. Patents are eventually published as part of the bargain between the inventor and the government for a limited time monopoly to prevent others from making, using, and selling the invention. Because one must disclose the best mode of an invention, one is not allowed to omit or keep secret the salient aspects of an invention from a patent.

Just as with trade secrets, patentable inventions may be and are often "stolen" by ex-employees, vendors, suppliers and others. In some cases, that theft is concomitant with the filing of the thief's own patent application in an attempt to secure its own (albeit improper) monopoly. Depending on when the conduct occurs, there are two mechanisms for addressing this situation: interferences or derivation proceedings.

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Pre-AIA: Patent Interferences

In some instances, two competitors may file patent applications for the same or very similar inventions. Up until the passage of the America Invents Act ("AIA") in 2011, the United States had been a first-to-invent patent system, with the first person to invent the invention being the one who obtains priority of rights. Prior to the upcoming enactment of key provisions of the AIA in March 2013, when two patent applications are in process simultaneously, one may settle the right of priority by provoking an interference proceeding in the U.S. Patent and Trademark Office ("USPTO"). This litigation-like procedure seeks to determine which inventor had the first concept of the invention, combined with diligence in reducing the invention to practice (e.g., sale, continued research and development, filing a patent application). Even if the first inventor was the later to reduce the invention to practice, as long as that earlier conception is followed by reasonable diligence in reducing the invention to practice, the first-conceiving inventor is awarded priority of rights. If the first inventor conceived of the invention first but failed to exercise diligence in reducing the invention to practice, the second inventor wins the interference. Interferences are available for any patent applications filed before March 16, 2013, the effective date of relevant provisions of the AIA.

Post-AIA: Derivation Proceedings

Under the AIA, the U.S. is switching to a first-inventor-to-file system in which the priority of right is essentially determined by who files first with the USPTO. For all applications filed on or after March 16, 2013, interferences will not be an option. However, a new procedure will cover the narrower instance of when one party directly misappropriates the idea of another and then attempts to patent it as its own. This new procedure is called a derivation proceeding, and it is available either within the USPTO or in federal district court. Derivation proceedings require evidence that the earlier-filing party derived its invention directly from the later-filing party. Evidence as to the communication of the invention between the parties is a must. This is a major departure from previous interference practice, in which the two parties may have been working on the invention completely independently. Another major point of distinction between interferences and derivation proceedings is the lack of diligence requirement for either party between conception and reduction to practice. Of course, as there have yet to be any derivation proceedings instituted, stay tuned for the specific mechanics of how they will play out either in court or at the USPTO.

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Firm News...

JOINING THE FIRM

Linda M. Dougherty: Ms. Dougherty is an Associate in the Firm's Intellectual Property practice group. Her experience includes trademark clearance, prosecution and enforcement; trademark and copyright litigation; TTAB practice; and advising clients in brand management and general intellectual property issues. Ms. Dougherty has negotiated and drafted license agreements, consent agreements, distribution agreements, private label agreements and other industry-specific agreements. While attending Brooklyn Law School, Ms. Dougherty was a member of the Brooklyn Law Review.

Tanya C. Pohl: Ms. Pohl is an Associate in the Firm's Litigation practice group. She has represented clients in jurisdictions across the United States in litigation matters involving securities class actions, shareholder disputes, breach of contract cases involving complex financial products, commercial litigation, white collar defense and government investigations. Ms. Pohl has handled substantial matters for multinational corporations during SEC, U.S. and New York Attorney General's and other investigations and FINRA inquiries. Ms. Pohl was also an integral member of a trial team that successfully defended an individual client in a civil enforcement action brought by the SEC in the Southern District of New York. While attending Boston College Law School, Ms. Pohl was on the editorial board of the Boston College Law Review (2007-2008).

SPEAKING ENGAGEMENTS

Jeffrey Daichman, Co-chair of the Firm's Litigation practice group, has been invited to participate as a featured panelist at the American Bar Association Forum on Communications Law to be held on February 9, 2013, at the St. Regis Resort in Laguna Beach, California. The focus of the panel is the 25th anniversary of the Supreme Court's decision in *Falwell v. Flynt*. Mr Daichman represented the Rev. Jerry Falwell in that landmark case.

Barry Negrin, Counsel in the Firm's Intellectual Property practice group, spoke at The Cooper Union's Invention 2 Venture ("12V") symposium on December 1, 2012, about securing intellectual property rights for startups. 12V is a daylong workshop designed by the National Collegiate Inventors and Innovators Alliance ("NCIIA") and crafted to engage students in entrepreneurship and innovation, teaching technology entrepreneurship basics, helping build networks and providing a framework for moving ideas forward.

Adam Cohen, Chair of the Intellectual Property practice group, was the moderator at the third annual "Lawyers on the Clock" panel held at the October 2012 annual meeting of the Association of Independent Commercial Producers ("AICP"). AICP is a nationally recognized trade association serving the advertising industry.

ACHIEVEMENTS

The Firm's Corporate and Securities practice group represented a public company in the successful disposition of a retail business.

The Firm's Corporate and Securities practice group represented a public company in the successful acquisition from a publicly traded private equity firm of a consumer products, manufacturing and design engineering services business for approximately $100 million.

In December 2012, Kane Kessler assisted a private equity investor in negotiating, documenting and closing an acquisition of a majority interest in a manufacturer of mobile shelters and related equipment from an affiliate of a leading private equity investment firms and the founder of the company for an aggregate purchase price of approximately $41 million.

The Firm also negotiated and closed a $25 million term loan credit facility to finance the acquisition and a $10 million credit facility for future acquisitions.

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

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