



GUNSTER

FLORIDA'S LAW FIRM FOR BUSINESS

More Hits, Fewer Errors: Disclosure, Governance and Litigation in Tumultuous Times

ACC South Florida
8th Annual CLE Conference



Our Presenters



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Litigation Developments



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Contracts with Public-Private Agencies: No Secrets

- *The Pitbull Case (Corcoran v. PDR Productions, Inc., 2nd Judicial Circuit 2016)*
- Pitbull claimed his contract with Visit Florida should not be disclosed because it is a trade secret
- After the suit was filed, Pitbull revealed that his company was paid \$1 million from Visit Florida to film the music video “Sexy Beaches”
- Visit Florida had an annual budget of \$78 million

Demise of Disclosure Only Settlements

- *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016)
- This case involved a stockholder class action challenging Zillow’s acquisition of Trulia in a stock-for-stock merger based on the claim that directors breached fiduciary duties in approving an unfair stock exchange ratio.
- The proposed settlement – only after 4 months of litigation – was a “disclosure settlement.”
- Terms: (1) Trulia would supplement proxy materials to stockholders before they voted on transaction; (2) Plaintiffs would drop their claims and provide a release; (3) Plaintiffs would receive no economic benefit; and (4) the only money exchanged would go to Plaintiffs’ counsel.
- The Court rejected the settlement “because none of the supplemental disclosures were material or even helpful to [the] stockholders ... and does not afford them any meaningful consideration to warrant providing a release of claims...”

Demise of Disclosure Only Settlements “But Not in NY”

- *Gordon v. Verizon Communications, Inc.*, 148 A.D.3d 146 (N.Y. 2017)
- This case involved a disclosure only settlement of class action litigation concerning Verizon’s acquisition of Vodafone.
- The court approved the disclosure only settlement even though the settlement lacked monetary compensation for the Plaintiffs.

Disclosure as Disinfectant

- *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015)
- The business judgment rule applies “when a merger that is not subject to entire fairness... has been approved by a **fully informed**, uncoerced majority of the disinterested stockholders.”

Disclosure as Disinfectant

- *In re Volcano Corp. Stockholder Litigation*, 143 A. 3d 727 (Del. Ch. 2016)
- The court granted a motion dismiss and stated: “acceptance of a first-step tender offer by **fully informed**, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares...has the same cleansing effect under *Corwin* as a vote in favor of a merger by a fully informed, disinterested, uncoerced stockholder majority.”

When Independent Directors Are Not Independent

- *Sandys v. Pincus*, 152 A.3d 134 (Del. 2016) involved a stockholder's derivative claims for breach of fiduciary duty against certain directors and officers of the company who sold shares in a secondary stock offering after which the trading price dramatically fell.
- The court found that one director was not independent of the company's controlling CEO because the director and her husband co-owned a private airplane with the CEO.
- The court also found that two other directors were not independent of the CEO because the directors were partners in a private equity firm that had invested in a company co-founded by the controlling stockholder's wife and another company where a conflicted member of the board was a director.

When Independent Directors Are Not Independent

- *Delaware County Employees Retirement Fund v. Sanchez*, 124 A.3d 1017 (Del. 2015)
- The Court found a director lacked independence based on allegations that the director was the interested director's "close personal friend...[,] derives his primary employment from a company over which [the interested director] has substantial control [and] has a brother in the same position."
- These allegations of friendship went beyond "thin social-circle friendship" which would not result in a finding of lack of independence.

An Independent Shares Analysis?

- *Cement Masons Local 780 Pension Fund v. Schleifer, et al.* (Supreme Court of the State of New York County of New York: Party 39 June 29, 2017)
- The Court denied a motion to dismiss a complaint brought by a stockholder in Regeneron against directors.
- A proposed 2014 plan granted the Compensation Committee “sole and absolute discretion” to grant themselves and other non-employee directors any amount of “Nonqualified Stock Options.”
- The Board of Directors “unanimously” recommended approving the 2014 Plan, but two proxy advisors advised shareholder to vote against it. There were 65 million votes in favor of the plan and 41 million votes against it. Of the 65 million votes in favor, the Board effectively controlled 24 million of those votes.
- The Plaintiffs argue the vote was invalid because directors and interested shareholders controlled about 30% of the vote through Class A shares that carry ten votes each.
- If the court ultimately agrees that the plan needed a majority of disinterested shareowners to pass, dual-class firms may need to rethink their approach—as might single-class issuers.

Disclosure: The Regulatory Landscape



David
Scileppi

Dodd-Frank Open Rulemaking

- Clawbacks
 - Proposed in 2015 and somewhat draconian
- Hedging
 - Proposed in 2015 and probably unnecessary
- Pay for Performance
 - Proposed in 2015 and probably unnecessary and confusing
- Financial CHOICE Act

Dodd-Frank Rules in Effect

Will these survive?

- Pay Ratio
 - Disclosure required in 2018, SEC softened some
- Say on Pay
 - Been around since 2009 (TARP) and 2011 (everyone else)
- Conflict Minerals
 - Disclosure required since 2014

Reform that Actually Would Help

- SEC Effectiveness Disclosure Initiative
 - Too much info and material info is buried
 - SEC can't fix it alone
- Proxy Plumbing
 - We are relying on an antiquated system with real consequences
 - Delaware and blockchain

SaaS and Other Technology Agreements



Don't Drop the Ball!



Stephanie
Quiñones

Some Key Issues

1. Technical specifications and acceptance testing
2. Uptime and availability
3. Data breach – risk allocation, cooperation and the like

Technical Specifications & AUP

- Aspects of these issues typically relegated to an exhibit
- Get your IT team on board
- Acceptance testing
 - Timing
 - What are your remedies?

Uptime and Availability

- What are your expectations?
- Uptime guarantees
 - “Commercially reasonable efforts”
 - Measure
 - Exclusions from “downtime”
- Technical support – availability, response times, and resolution SLA
- What are your remedies? – Credits, extensions of the term, termination rights for chronic failures?

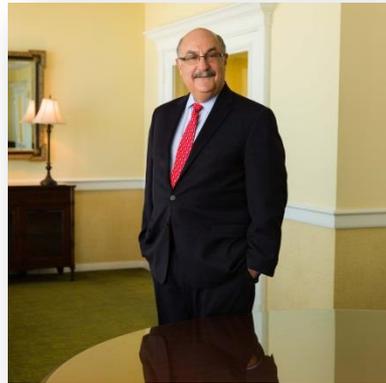
Data Breach

- Data protection
- Risk allocation - Indemnification and limitations on liability
- Do your due diligence
 - Review vendor's info-sec policy and/or disaster recovery plan
 - Security audits
- Cooperation on data breach

Don't Strike Out



Hot Topics in Governance



Bob
Lamm

Skill Sets, Diversity and Matrices

- Important to companies and investors (e.g., activists)
 - JPMorgan Chase experience
 - Activists unlikely to raise – until they engage
- Diversity
 - Initial focus on gender
 - Increasing focus other factors – e.g., ethnicity, age and experience
 - SEC rulemaking status
- Independence
 - Lack of industry knowledge doesn't sound like a good thing; can encourage dominating CEO
 - Recent study shows higher incidence of financial misconduct, lower profits and overpaid CEOs

Skill Sets, Diversity and Matrices

- Skills matrices
 - Incredibly useful internal tool to analyze skill sets, diversity, succession planning needs; highly customizable
 - Some tricks – e.g., rank by anticipate retirement; look at peer company boards
- External use limited, but growing
 - Use of full matrix vs. “composite” matrix
 - Pluses and minuses
 - Note current NYC Controller campaign to get companies to disclose

Tenure/Refreshment

- What is the goal?
- Oldies are goodies (recent study)
- Approaches
 - Age limits
 - Term limits
 - Historical
 - New trends (e.g., GE)
 - Average tenure

Disclosure II

Not Your Parent's Disclosure

- Disclosure is increasingly used as a communications and advocacy tool
 - Proxy statements: Make a case why shareholders should vote for board proposals, say on pay
 - 10-Ks: Explain your business, strategy, etc. in a way that informs owners
 - Some indications that investors increasingly expect this
- Tools
 - Executive summaries
 - Infographics
- Examples
 - 10-K/Annual Reports: GE
 - Proxy Statements: CVS Health, Southern Company
- Note: SEC is moving forward with disclosure effectiveness initiatives, so get ahead of the curve!!!

Questions?

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