

A Biweekly
Newsletter of
Federal Securities,
Corporate &
Banking Law
Developments

Minority Shareholder May Be Liable for Appointed Directors' Actions

A Massachusetts court recently ruled that a minority shareholder in a Delaware corporation may be liable to the corporation for aiding and abetting an alleged breach of fiduciary duties by two directors that were appointed by the shareholder. *CCBN.com Inc. v. Thomson Financial, Inc.*, No. 02-11532-PBS (D.Mass. July 2, 2003).

The defendant Thomson made an equity investment in CCBN in exchange for a minority ownership position and the right to appoint two directors to CCBN's five-person board. CCBN alleged that while serving on the board, these two directors provided Thomson with confidential and proprietary information about CCBN's business in breach of their fiduciary duties owed to CCBN. Thomson then used the information to launch a competing business.

CCBN sued Thomson, alleging that Thomson was liable for the breach by the two Thomson-appointed directors in the same way that an employer is responsible for its employees' acts. The court rejected this argument because of established Delaware law that only majority and controlling shareholders owed fiduciary duties to a company. In contrast, Thomson was a minority shareholder with limited ability to appoint directors.

However, the court noted that Thomson might be liable under a different legal theory—for aiding and abetting the breach of fiduciary duty by the Thomson-appointed directors if Thomson knowingly participated in the alleged breach. **Financing parties who negotiate board representation rights in connection with their investment in a company should ensure that any confidential information**

received from the directors is not used against the company.

■ NEW REPORTING OBLIGATIONS FOR ATTORNEYS BECAME EFFECTIVE YESTERDAY

Beginning August 5, 2003, the SEC requires both in-house and outside attorneys for public companies to report evidence of a material violation of securities laws "up-the-ladder" within the company. (<http://www.sec.gov/rules/final/33-8185.htm>) The attorney must first report the evidence to the chief legal counsel or the chief executive officer, and if that person does not respond appropriately, the attorney must then report the evidence to the audit committee, another committee of independent directors, or the board of directors.

The SEC is still considering a "noisy withdrawal" proposal that would require attorneys who give evidence of a possible violation and do not receive a satisfactory response from the company to withdraw from representation of the company and alert the SEC in writing of this withdrawal. **Please note that the rule now in effect only requires the attorney to report within the company, not to the SEC.**

■ GOING PRIVATE MAY BECOME MORE DIFFICULT UNDER PROPOSAL SUBMITTED TO SEC

Some money managers have become concerned that the recent going-private trend could make it more difficult to obtain accurate

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information about companies in which they invest. Thus, a group of nine money management firms has recently petitioned the SEC to make going private, or de-registering with the SEC, more difficult. De-registering stock is currently allowed for any company whose stock is held by fewer than 300 "owners of record." Currently, an "owner of record" is the person or entity whose name appears on the stock books of the company. However, because most people hold stock through their brokers, the shares of many investors can be held under the single account of the brokerage, and thus, the broker would be considered the sole "owner of record."

The money manager group is asking that each investor be counted toward the 300 stockholder limit on "owners of record." Thus, the underlying beneficial owner of the shares would need to be counted, which would make reaching this threshold much more difficult. **This proposal must still go through the SEC's petitioning process, which includes a public-comment period and a review by the SEC's commissioners.**

■ HOUSE COMMITTEE PASSES FAIR CREDIT BILL; WILL LIKELY MOVE TO HOUSE AND SENATE VOTE IN SEPTEMBER

On July 24, 2003, the House Financial Services Committee approved a bill renewing many aspects of the Fair Credit Reporting Act, which is currently scheduled to expire at the end of this year. The bill would continue to prohibit states from interfering with federal rules on how businesses use, report and share consumer credit histories for lending and marketing purposes.

Several amendments were added to the bill, including:

- requiring credit bureaus to inform consumers that a number of recent credit inquiries on their report could hurt their

credit rating;

- making it easier for consumers to expunge incorrect information from their credit reports; and
- requiring companies to encode their customers' medical information to protect their privacy.

The chairman of the Senate Banking Committee, Richard Shelby (R.—Ala.), recently indicated that he does not support a permanent re-authorization of the Fair Credit Reporting Act. Instead, he would prefer for the legislation to expire periodically so that lenders and credit bureaus have a continuing incentive to provide consumer protection measures. In contrast, the House version of the bill makes the Fair Credit Reporting Act permanent, which may become a point of contention during House-Senate negotiations over the final shape of this bill. **The full House of Representatives and Senate are expected to consider this bill in September.**

Kutak Rock LLP is a national law firm with more than 325 attorneys located in 16 offices throughout the United States practicing in the areas of corporate, banking and securities law, public and corporate finance and complex commercial litigation matters.

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