



Doing Deals in the Garden State

A Discussion of Issues Arising in M&A Transactions in New Jersey

Our Speakers Today

- Jason Navarino, Corporate and Tax
- Adam McInerney, Labor & Employment/Employee Benefits and Executive Compensation
- Jim Maggio, Real Estate
- Wendi Oppen Uzar, Intellectual Property
- Alexa Richman-La Londe, Environmental
- Hannah Greendyk, Corporate and Tax
- Lauren Spitzer, Trusts & Estates

Pre-Deal Preparation

- Get organized to facilitate due diligence
 - Contracts
 - Financials
 - Tax returns
 - Licenses/permits
 - Litigation
 - Identify key personnel who will assist with providing diligence materials

Estate Planning Considerations

- Should be considered and implemented prior to formal negotiations
- Done to reduce income/estate taxes and for non-tax reasons, such as enhanced creditor protection
- Current Federal and New Jersey transfer tax landscape, with significantly lower Federal gift/estate exemption amounts scheduled for 2026 and beyond
- Gifts and/or sales to various types of trusts should be considered depending on tax minimization and family dynamic goals
- Valuation discounts (minority interest/lack of marketability) may apply further enhancing the tax benefits

When Does a Deal Begin?

- Expression of interest by one or more parties
 - Private deal – potential buyer and seller meet and talk
 - Strategic combinations
 - Private equity deals
 - Auction – potential seller looks for buyers
 - Exit transactions
 - 363 sales in bankruptcy

When Do the Lawyers Come In?

- Confidentiality, or Non-Disclosure, Agreement (NDA)
- This allows the potential buyer(s) to engage in preliminary financial due diligence

Letter of Intent

- Also known as a “term sheet”
- Typically non-binding, except as to:
 - Confidentiality
 - Exclusivity
 - Cooperation with respect to due diligence
 - Expenses
- Structure
- Price
- Conditions
 - Further due diligence
 - Internal and third-party approvals/consents
 - Employees
 - Leases
 - Financing
- Timing going forward

Deal Structure

- Stock/membership interest deal
 - All assets, contracts, permits and liabilities generally pass to buyer
 - Seller of C corp avoids double taxation
 - No stepped-up basis for buyer unless pass-through or 338(h)(10) election
- Asset deal
 - Negotiation of acquired and excluded assets, assumed and excluded liabilities
 - Double taxation for C corp seller, but stepped-up basis for buyer
 - Generally the only option in 363 sale
 - But creditors may choose “G reorganization” to preserve NOLs (but avoid stepped-up basis)

Deal Structure (cont.)

- Reverse triangular merger
 - Avoid need for 100% seller consent
 - Take private
 - Minority shareholders not subject to drag-along
 - 368(a)(2)(E) reorganization
- Contribution or tax-free reorganization
 - Generally desirable to avoid taxation if equity, not cash, consideration

NJ Real Estate Transfer Taxes

Seller's Tax: RTF (“Realty Transfer Fee”) – NJSA 46:15-5, et seq.

- Payable by Seller at the time Deed is recorded
- Applies to all tax classifications of real property, i.e., commercial, industrial, etc.
- Fee is based upon the amount of the “consideration” stated on the Deed (where the amount of the consideration “cannot be determined,” NJAC 18:16-4.5 provides that consideration shall be determined by using the equalized assessed value (EAV) for the property)
- The assumption of a mortgage by the grantee will trigger the RTF with “consideration” based on the current principal balance of the open mortgage
- Fee is sliding scale but **approximately 1%**

Exemptions/Mack-Cali Case

- Exemptions to the RTF are found on the RTF-1 form and in the regs (NJAC 18:16-1.1 et seq.)
- Consideration less than \$100 (*controversial*). The definition of “Consideration” in the statute and the regs is broad.
- Issue arises in transfers of property between related legal entities with common ownership
- Tax court decision in *Mack-Cali Realty, LP, et als. v. Clerk of Bergen County, et al.*, 25 N.J. Tax 243 (2009) found that a transfer from one legal entity to another for less than \$100, on its face, is exempt from the RTF (distinguishing, but not overturning, an old case law)

Mansion Tax/Controlling Interest Transfer Tax (CITT)

- Mansion Tax (NJSA 46:15-7.2, et seq.)
 - Usually payable by the buyer at the time the Deed is recorded
 - Applies only to transfers of certain “classified” real property (see NJSA 46:15-7.2) - most common: Class 2 “Residential” and Class 4A “Commercial Properties”
 - Applies only if consideration recited in the Deed exceeds \$1 million
 - Fee equals **1% of entire consideration** (not just amounts over \$1 million)
 - Certain exemptions exist

Mansion Tax/Controlling Interest Transfer Tax (CITT) (cont.)

- CITT (NJSA 54:15C-1)
 - Imposes on **buyer** of a “controlling interest” in an entity which possesses (directly or indirectly) a “controlling interest” in **Class 4A “Commercial”** property a **1% fee** if consideration is in excess of **\$1 million**
 - Exemptions include a transfer “incidental” to a corporate merger/acquisition and the EAV of the property transferred is less than 20% of the value of all the assets in the merger. (However, per NJ Div. of Taxation, this is a *limited* exemption which only applies if entities have filed certificate(s) of merger with the state as part of the M&A)

Due Diligence

- Further financial (accounting, tax) diligence
- Operational diligence
- Legal diligence
 - Contracts and permits – term, assignability, change of control
 - Liens
 - Litigation
 - Other hidden liabilities

Due Diligence Considerations – Employment

- Employment Contracts
 - Change of Control
 - Non-Competes/Restrictive Covenants
 - Other Promises (offer letters)
- Union or Non-Union?
- WARN Act/NJ WARN
 - Who gives notice or pay in lieu?
- Litigation/Internal Complaints
- Employee Benefit Plans
- Employee Handbook/Training
- Exempt/Non-Exempt & Other Wage and Hour Issues

Due Diligence Considerations – Intellectual Property

Every company owns
Intellectual Property

To some, it is the most
valuable asset.

- Company and Product Names
 - Common law uses
- Registered trademarks, patents, copyrights
- Domain Name
- Website Content
- Logos
- Product tags



Due Diligence Considerations – Intellectual Property

- Confirm the correct entities own the relevant IP
- Confirm there are no Liens
- Confirm no current litigation or proceedings involving the IP
- Confirm proper transfer of IP
- Review IP representations & warranties



US009914063B1

(12) **United States Patent**
McCoskery

(10) **Patent No.:** **US 9,914,063 B1**
(45) **Date of Patent:** **Mar. 13, 2018**

(54) **TOY DESIGNED TO SPIN IN A USER'S HAND**

USPC 473/569, 588; 446/233, 236, 250, 256
See application file for complete search history.

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(56) **References Cited**

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U.S. PATENT DOCUMENTS

(73) Assignee: **MD INTELLECTUAL HOLDINGS LLC**, Bainbridge Island, WA (US)

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(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 0 days.

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Related U.S. Application Data

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A63B 67/14 (2006.01)
A63H 33/00 (2006.01)
A63H 29/08 (2006.01)
A63H 1/30 (2006.01)
A63F 9/16 (2006.01)

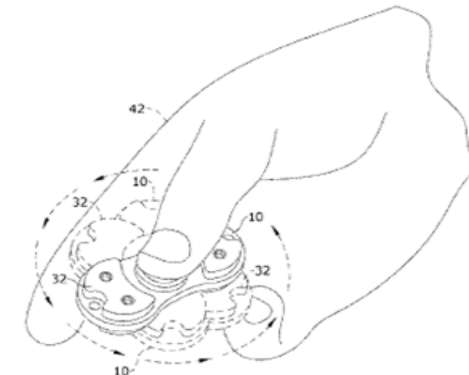
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(52) **U.S. CL.**
CPC *A63H 33/00* (2013.01); *A63B 67/14* (2013.01); *A63F 9/16* (2013.01); *A63H 1/00* (2013.01); *A63H 1/30* (2013.01); *A63H 29/08* (2013.01); *A63B 2067/146* (2013.01); *A63B 2208/12* (2013.01)

(57) **ABSTRACT**
A device designed to spin in a user's hands may include a body with a centrally mounted ball bearing positioned within a center orifice of the body, wherein an outer race of the ball bearing is attached to the frame; a button made of a pair of bearing caps attached to one another through the ball bearing and clamped against an inner race of the ball bearing, such that when the button is held between a user's thumb and finger, the body freely rotates about the ball bearing; and a plurality of weights distributed at opposite ends of the body, creating at least a bipolar weight distribution.

(58) **Field of Classification Search**
CPC A63B 67/14; A63B 2208/12; A63B 2067/146; A63H 1/00; A63H 1/30; A63F 9/16

14 Claims, 4 Drawing Sheets



Due Diligence Considerations – Real Estate

- Title and Survey
- Title Insurance (Non-Imputation Endorsements)
- Transfer Requirements (C of O)
- Zoning/Violations (PZR Report)
- Structural/Engineering Inspection
- Leases/Estoppels/Consents
- Property-related/service contracts
- Governmental Approvals (any planned redevelopment?)

Due Diligence Considerations – Environmental

- Does the Industrial Site Recovery Act apply?
 - Understand the business operation and transaction
 - ISRA requires environmental assessment and cleanup
- “All Appropriate Inquiry” in New Jersey
 - Preliminary Assessment/Site Investigation
 - Rights of access and inspection
 - Lender requirements
- Use of a Licensed Site Remediation Professional (LSRP) or other environmental professionals
 - Confidentiality, reporting to seller and NJ DEP
 - Obtaining a Response Action Outcome (RAO)
- PFAS
- NJDEP on-line resources

Definitive Agreements

- Stock purchase agreement (SPA)
- Membership interest purchase agreement (MIPA)
- Asset purchase agreement (APA)
- Agreement and plan of merger (merger agreement)
- Contribution agreement

Definitive Agreement - Contents

- Deal structure, price and allocation
- Price adjustments and earn-outs
- Closing – when, where, deliverables
- Representations and warranties
 - Lists/exceptions in disclosure schedules
 - Organization and authority of parties
 - Third party consents
 - Capitalization and subsidiaries of target
 - Financial statements
 - Assets – title, condition, sufficiency
 - Material contracts
 - Compliance with laws and permits
 - Litigation
 - Intellectual Property

Definitive Agreement – Contents (cont.)

- Representations and warranties (cont.)
 - Real estate
 - Environmental
 - Employment
 - Employee benefits
 - Taxes
 - Brokers
 - No other reps of seller (and buyer has independently investigated, or is otherwise taking “as is, where is”) OR full disclosure rep
- Buyer’s financing and ability to close
- Covenants – interim conduct of business, cooperation and confidentiality before and after closing, employment matters
- Tax matters – tax returns, tax indemnities, tax contests, refunds, transfer taxes, bulk sale compliance

Definitive Agreement – Contents (cont.)

- Closing conditions
 - No breaches
 - Internal and third-party consents/acts/omissions
 - Permits
 - Deliverables
 - Financing
- Indemnification
 - Scope
 - Survival periods
 - Baskets and caps
 - Walk or waive
 - Mitigation/insurance/tax benefit requirements
 - Procedure
- Termination
- Miscellaneous
 - Choice of law – NJ, NY or DE
 - Dispute resolution
 - Litigation – choice of forum, jury waiver
 - Arbitration

New Jersey Tax Bulk Sale Law

- Law applies to any sale, transfer or assignment of business assets not in the ordinary course of business
 - No consideration or payment required
 - What is a “business asset?”
- Buyer must make a bulk sale filing with the New Jersey Division of Taxation (the “Division”) at least ten (10) business days prior to closing
- If the Division notifies the buyer of a claim for New Jersey taxes, buyer may not pay such amount to seller and must escrow or pay the amount of the claim as instructed by the Division
- If buyer fails to comply, buyer is liable for all of seller’s New Jersey taxes

New Jersey Bulk Sale Filing

- Form C-9600 (notification of sale, transfer or assignment in bulk)
- Filing made by buyer using form C-9600
- Filing must contain all required information to be valid
- Fully executed transfer agreement must be attached
- Purchase price must be provided
- Allocation of purchase price must be made
- Limited delivery options (registered and certified mail, overnight delivery)
- Don't close without a response from the Division
- Buyer must follow the Division's instruction with respect to its claim for New Jersey tax (e.g., escrow, pay to the Division)

New Jersey Bulk Sale Filing (cont.)

- Form TTD (Asset Transfer Tax Declaration)
 - Provides estimated tax due on the sale
 - Filed by seller
 - Optional
 - Could result in a reduction of amount of Division's claim for New Jersey tax
 - Recommend sending with Form C-9600

New Jersey Tax Bulk Sale - Agreement Provisions

- Purchase and sale agreement
 - Additional section covering New Jersey bulk sale
 - Indemnification for seller's New Jersey taxes
 - Closing condition regarding amount of Division's NJ tax claim
- Escrow agreement
 - Escrow agent is solely buyer's agent
 - Seller may not have any rights with regard to the escrow until "clearance letter" issued to buyer
 - No investment of escrowed funds
 - Agent's fees may not be taken from escrowed funds

Environmental Terms of the Agreement

- Industrial Site Recovery Act
 - Applicability
 - Timing of notification to NJ DEP
 - Allocating responsibility and methods for compliance pre- or post-closing
 - Remediation Funding Source
- Reps, warranties and covenants should address NJ-specific requirements
 - LSRP, remediation requirements, RAOs, re-openers (PFAS)
 - NJ DEP permits and approvals as necessary
 - Consider disclosure of non-compliance
- Especially in NJ, rights to participate in, review or comment on compliance frequently are valuable

Getting to Closing

- Difficult to have simultaneous signing and closing in NJ – ISRA, bulk sale, etc.
- Closing checklist:
 - Conveyance instruments – bill of sale, assignment, deed, title certificates, stock powers
 - Certificates – bringdown, incumbency, FIRPTA, good standing
 - Escrow agreement(s)
 - Leases
 - IP licenses
 - Transition services agreement
 - Employment agreements
 - Non-compete agreements
 - Resignations
 - Guaranties

Getting to Closing (cont.)

- Closing checklist (cont.):
 - Third party consents
 - New permits
 - Hart-Scott-Rodino and non-U.S. antitrust filings
 - Third party financing
 - Payoff letters
 - Estimated working capital statement
 - Closing statement/funds flow memo
 - Resale/sales tax exemption certificate
 - Bulk sale filings

The Deal Closes

- Signature pages are released from escrow when the wire is received
- And everyone is happy . . . hopefully
- Post-closing decisions, adjustments, cooperation, etc.

We Are — Riker Danzig

Our proven track record is highlighted by our numerous awards and accolades, including 2022 “Powerhouse Law Firm” by *Law360* and 2022 “Litigation Department of the Year” by the *NJ Law Journal*. We are proud that *Best Lawyers*, *U.S. News - Best Lawyers* “Best Law Firms,” *Chambers USA Guide*, and other highly-regarded legal sources consistently single out Riker Danzig’s practice groups and attorneys with distinction. Our proud history with luminaries in the legal community serves as the foundation of our current experienced and vibrant partnership, poised to meet the most complex challenges faced by our clients.

Riker Danzig has a long history of commitment to diversity and inclusion in the workplace. We are proud of our heritage as a leader in promoting women and people of color, including some who broke traditional leadership barriers within law firms, and others who built on their foundation at Riker to break new ground in the courts and government, including most recently: our Firm Co-Chair who is the **First** female in a Top 20 New Jersey-based law firm in the senior role; Riker Of Counsel who is the **First** African-American appointed as a Judge to the New Jersey Superior Court, Middlesex County, and the **First** African-American Assignment Judge and Presiding Judge, General Equity, of that vicinage; and former Riker Partner who is the **First** Muslim American federal judge in U.S. history and the **First** Asian Pacific American to serve on the federal bench in New Jersey history.

IN ADDITION TO OUR MORRISTOWN AND TRENTON OFFICES IN NEW JERSEY, OUR MIDTOWN MANHATTAN OFFICE SERVES THE NEEDS OF OUR NEW YORK CLIENTS.



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