

TOP DEFENSE WINS OF 2005

That's one less billion for tycoon

Kerkorian, offered \$30 million to settle with DaimlerChrysler, said no. Then he lost his case.

By June D. Bell
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WHEN DAIMLERBENZ A.G. and Chrysler Corp. joined forces in 1998, Chrysler's biggest stockholder, real estate tycoon Kirk Kerkorian, watched his investment's value rocket from nearly \$3.7 billion to \$4.8 billion.

That was fine with him. But two years later—when new information about the deal caused him to suspect that he'd been shortchanged—he headed to court.

His holding company, Tracinda Corp., sued DaimlerChrysler A.G. for fraud, saying it had been deceived into believing it was supporting a "merger of equals" when the transaction actually was a takeover that should have entitled Tracinda to a premium for relinquishing control of its stock. Tracinda sought more than \$1 billion in damages, making the case the largest securities claim ever tried in federal court.

The automaker claimed that Kerkorian was too sophisticated an investor not to grasp the intricacies of the deal. "From the outset, we believed it was more a personal vendetta, rather than about money," said lead defense attorney Jonathan J. Lerner, a partner in the New York home office of Skadden, Arps, Slate, Meagher & Flom.

U.S. District Judge Joseph J. Farnan Jr. last year sided with DaimlerChrysler, finding that Kerkorian had not been misled and that no misrepresentation had been made. The defense hadn't expected such receptiveness; Farnan had denied every pretrial motion DaimlerChrysler had filed.

The scale of DaimlerChrysler's victory makes the case *The National Law Journal's* top defense win of 2005.

The lawsuit was triggered by an interview that Jurgen Schrempp, DaimlerChrysler's chief executive, gave two years after Chrysler and DaimlerBenz joined forces. Schrempp told the *Financial Times* that he had always envisioned Chrysler as a division of DaimlerChrysler rather than a partner.

Kerkorian alleged fraud, saying the proxy statement described the deal as "merger of equals." *In re DaimlerChrysler A.G. Securities Litig.*, 294 F. Supp. 2d 616 (D. Del.)

Kerkorian, who held 89 million shares, wasn't the only unhappy Chrysler stockholder; a class action sought redress on behalf of thousands of shareholders, including Tracinda. Before Kerkorian went to trial,

the class settled for \$300 million—a substantial amount but far safer, Lerner noted, than risking the possibility of a jury award "at a catastrophic level."

Holding roughly 13% of Chrysler stock, Tracinda was entitled to about \$30 million from the settlement. But Kerkorian could collect only if he abandoned his own litigation. He opted to pass up a guaranteed payout for the chance to collect much more, or perhaps lose it all, pursuing his own case.

Kerkor "Kirk" Kerkorian, 88, has always been a gambling man, and his bets have paid off handsomely. The son of poor Armenian immigrants, he spent his early years as an amateur boxer and World War II pilot for the British Royal Air Force. Kerkorian's fortunes grew with an airline he launched in the 1960s, and he began investing in Las Vegas real estate.

Today, he owns 11 casino hotels on the Vegas Strip, including the Bellagio, Luxor, MGM Grand and Mandalay Bay, and is a major shareholder in General Motors Corp. and DaimlerChrysler. *Forbes* magazine has estimated his fortune at more than \$10 billion.

Kerkorian keeps his life private and rarely discusses his investment philosophy. People who know him well say he has an uncanny knack for making sometimes counterintuitive investment choices that pay off handsomely. DaimlerChrysler's defense team knew its key to success would be to force Kerkorian to reveal himself as too experienced to be hoodwinked in a corporate deal.

The defense team hoped the case would not get that far. They moved for summary judgment, claiming that Kerkorian could not show reasonable reliance for his fraud claim. Ten days before trial, on Nov. 20, 2003, Farnan denied every defense motion, writing: "Tracinda has advanced evidence supporting its allegation that a merger of equals never occurred, that Defendants never intended for a merger of equals to occur, and that the Proxy/Prospectus contained false and misleading information in this regard."

Was Lerner concerned? "You betcha," he said. "It certainly raised my anxiety level."

The trial was held in a packed Wilmington, Del., courtroom for 13 days in December 2003 and February 2004. Lerner cross-examined Kerkorian during the plaintiff's case to hammer home Kerkorian's drive to consummate the DaimlerChrysler deal. "Kerkorian didn't care about corporate governance," Lerner said. "He just wanted the merger done."

The defense showed that the magnate was no fool about Chrysler's operations: His representative sat on Chrysler's board, and Kerkorian had hired Chrysler's former chief financial officer as an investment adviser.

Lerner said the most memorable moment in trial came during his Kerkorian cross-examination. After a particularly rigorous line of questioning, the octogenarian magnate appealed to his attorney, Terry N. Christensen, saying, "Terry, this thing is getting out of line." Kerkorian admonished Lerner: "Listen, you are representing a client who is in deceit and



SMILING: Jonathan J. Lerner, lead attorney for DaimlerChrysler, leaves the courthouse in Wilmington on Dec. 3, 2003.

fraud, and you're treating me the same way right now. I don't like it."

Tracinda's 'sophistication' cited

On April 7, 2005, Farnan issued a 125-page opinion finding no fraud on DaimlerChrysler's part. The judge wrote that Tracinda had supported the deal even before the companies described it as merger of equals. "Tracinda did not find corporate governance or the 'merger of equals' label to be important at the time of the merger," the judge concluded.

As for Kerkorian and his investment company, the judge said: "The court cannot ignore the sophistication of Tracinda as an investor and its subjective views regarding the transaction in light of the information that was available to it, which was far more than that which is available to the average investor."

Christensen, a partner at Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro of Los Angeles, told the *Delaware Law Weekly* that Tracinda was apparently held to a different standard than the other DaimlerChrysler shareholders, who had filed their suit "based on our exact claims and key discovery."

Tracinda plans an appeal based on the court's denial of a jury trial, said Mark G. Krum, a partner at Christensen Miller who represented Tracinda at trial. Another ground is the court's "moment of time" analysis; Tracinda claims the judge focused on an inappropriately tiny window of time in deciding that DaimlerChrysler's corporate disclosures were not misleading.

The defense team included Lea Haber Kuck and Joseph N. Sacca, partners in the New York office of Skadden, Arps, Slate, Meagher & Flom; and Thomas J. Allingham II and Robert S. Saunders, partners in the firm's Wilmington office.

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