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TortSource

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Corporate Governance

Marjorie M. Kress

This issue of *TortSource* presents articles on Enron benefits litigation, the current directors and officers insurance market, and the reinsurance market in a time of increased terrorism. The authors reflect on changes that have occurred due to both corporate governance failures and risks of a more global nature that are being faced by corporations.

Dan Brandenburg, a member of TIPS Emerging Issues Committee and a former chair of the Employee Benefits Committee, discusses Enron class action benefits litigation. He summarizes the ERISA claims in the litigation and suggests some areas where plan practices are being reconsidered as a result.

David Gische and Vicki Fishman, who practice in the area of directors and officers insurance, discuss the role of that coverage in a time of executive indictments and corporate bankruptcies. They review legal and coverage concerns faced by corporate insureds, insurers, and their attorneys following recent corporate accounting scandals.

The state of the post-9/11 reinsurance market is discussed by Ronald Gass, who specializes in arbitration of insurance and reinsurance disputes. He sees a transformed reinsurance market, which includes higher premiums and reduced coverage capacity.

Special mention is also given to remembering a friend of many TIPS members and a former TIPS council member, Ernie Sevier, who passed away last year. We wish to thank B.C. Hart, a former TIPS chair, for offering his thoughts.❖

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Illustration by Andrew O. Alcala

Tittle v. Enron Corp.: ERISA Lessons for Counsel

Dan S. Brandenburg

The collapse of Enron at the end of 2001 spawned a tremendous amount of litigation. Many lessons for plaintiffs', defense, and plan drafting counsel will be learned from the ERISA claims in the class action suit *Tittle v. Enron Corp.* (No. H-01-3624, S.D. Tex.) (pending before Judge Melinda Harmon). On April 8, 2002, plaintiffs filed a first consolidated and amended class action complaint (complaint) based on ERISA, RICO, and civil conspiracy and negligence liability theories, on behalf of participants in the Enron Corporation Savings Plan, (401(k) Plan), the Enron Corporation Employee Stock Ownership Plan (ESOP), and the Enron Corporation Cash Balance Plan (CBP). This article concerns ERISA counts exclusively, taking into account the amicus brief filed by the secretary of labor on August 30, 2002, in support of the plaintiffs' oppositions to the motions to dismiss the ERISA counts of the complaint. As of early 2003, Judge Harmon had not issued a decision. A useful summary of the complaint appears in *The Enron ERISA Litigation: Overview and Update*, by Eli Gottesdiener, one of the plaintiffs'

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D&O Liability Insurance in an Environment of Corporate Scandal

David M. Gische and Vicki Fishman

Although disappointed investors routinely bring fraud charges against corporations and their officers and directors whenever a company's stock drops significantly, the recent Enron, Tyco, and WorldCom accounting scandals focused the public's attention on issues of corporate governance and boardroom fraud. With studies indicating average settlements greater than $16 million and defense costs for securities lawsuits measured in the millions, it is not surprising that directors and officers (D&O) liability insurance plays a large role in resolving such litigation. Now, with executive indictments and corporate bankruptcies almost commonplace, the role of D&O insurance is even more prominent.

Introduced to provide coverage for the "personal financial protection" of directors and officers, D&O insurance has led to the development of a large number of new and related products. The original focus on personal financial protection is no longer the single driving force behind the industry, and D&O insurance is often coupled with coverages designed to protect the corporation, in addition to its directors and officers,

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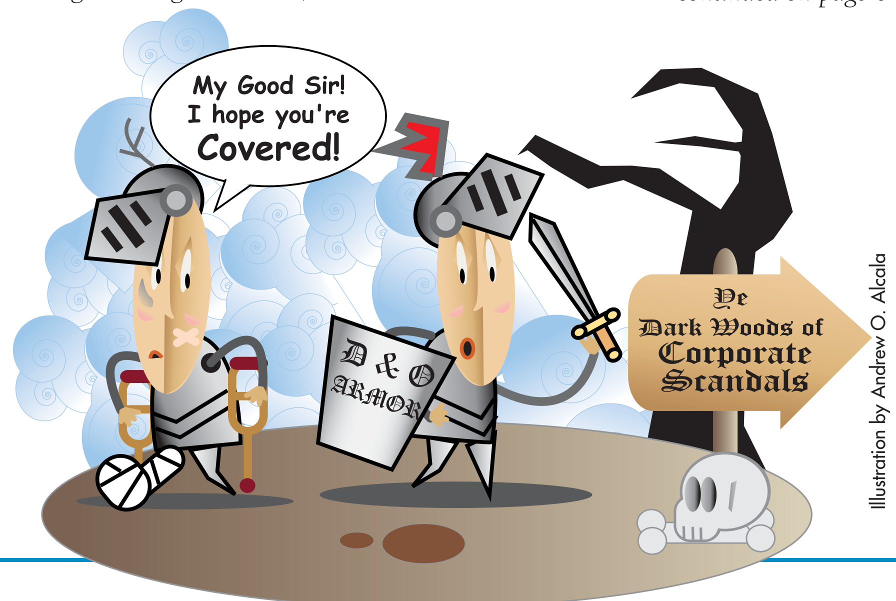

Illustration by Andrew O. Alcala

Meeting Round-Up
ABA Midyear Meeting in Seattle, WA

Randy J. Aliment

TIPS members who attended the Midyear Meeting discovered that I was correct in my prediction that February in Seattle features somewhat chilly temperatures but normally blue skies and incredible mountain views. The Seattle weather cooperated to help make the meeting a tremendous success for all who chose to journey to the Emerald City in the Pacific Northwest.

The "Ethics Ski-LE" program took place amidst the beautiful backdrop of British Columbia.

Several TIPS and YLD adventurers began the Midyear Meeting at the "Ethics Ski-LE" program at Whistler/Blackcomb, British Columbia. Steve Lesser and Laura Beckman, our esteemed speakers, served up three hours of ethics before we skied the Blackcomb Glacier and Whistler's Seventh Heaven. Cliff Stubbs and I served as guides for a vast array of challenging winter pursuits both on and off the mountain.

The Ski-LE-ers traveled south to Seattle, where they met the rest of their TIPS colleagues at the welcome reception held at Seattle's Space Needle. Friendships were rekindled and all enjoyed spectacular views of the city and ferry traffic on the Puget Sound. After dinner, many revelers headed across the promenade to the Experience Music Project, Seattle's avant garde music museum, where YLD was holding its Friday evening function.

On Saturday, YLD and TIPS rocked the Sky Bridge at the Seattle Convention Center—a glass-enclosed hall that straddles one of Seattle's downtown streets. TIPS hosted the event for YLD as we built upon our meeting theme to encourage YLD members to continue their ABA trek as members of TIPS. Although the Beatniks were the main attraction, several YLD attendees joined the band, onstage, to belt out songs by the Rolling Stones, the Beatles, and, yes, KISS!

Of course, it wasn't all fun and games at the Midyear Meeting. Council took up several important topics, including the following ABA House of Delegates proposals:

- TIPS will be primary sponsor of:
  No. 105: Improve procedures for dealing with insolvent insurance companies and improve the operation of the current receivership system.
- TIPS will co-sponsor:
  No. 104: Support initiatives designed to detect and prevent domestic international money laundering and terrorist financing.
  No. 106 A: Recommend that law schools incorporate education about domestic violence within their law curricula and law school activities.
  No. 112: Promote rededication of the Constitution and reaffirmation of commitment to the doctrine of "judicial review."
  No. 113 E: Approve the Uniform Interstate Enforcement of Domestic Violence Protection orders promulgated by NCCUSL in 2000 and amended in 2002.
  No. 115: Recommend that Congress enact the Civil Rights Tax Relief Act (H.R. 840 and S. 917 as introduced to the 107th Congress).
- TIPS will oppose No. 113 G: Approve the (UCTIA) Uniform Computer Information Transaction Act (2002) promulgated by NCCUSL.
- TIPS took no formal position on No. 302 "ABA standard for non-malignant asbestos-related disease claims" dated February 2003. However, TIPS will form a task force to review recommendations and to make suggestions.
- Finally, TIPS will co-sponsor a proposal that promotes the belief that some concerns about class action practice could be addressed with federal legislation providing for expanded federal court jurisdiction preserving a balance between state court interests and federal court jurisdictional benefits.

Council also nominated Sandra R. McCandless as vice-chair, and Peter Bennett as secretary, of the Section. Diane Dailey was nominated to represent the Section at the House of Delegates, and Janet Kloenhamer, Bob Peck, Percy Badham, Neal Ellis, and Tom Davis were nominated to Council.

I hope you all enjoyed your time in Seattle. ❖

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Tribute to a TIPS Leader Ernie Sevier

B.C. Hart

It has been said that one cannot properly measure a tall tree until it has fallen. Ernie Sevier certainly stood tall in the long line of TIPS leaders. In many ways, he was a quiet, self-effacing giant. He worked quietly but tenaciously to get things done.

Ernie's career in TIPS dates back to 1966. Old-timers will recall that he worked effectively in support of Don Haskell's drive to change the name of the Section from INCL to TIPS, in what proved to be a successful effort to attract more tort-oriented and plaintiff's lawyers. Ernie also devoted tireless efforts to collecting data and helping to preserve the history of TIPS, including his work in leading the team that produced and published the *50th Anniversary Edition of TIPS* in 1983. Ernie's efforts to collect and record the history of TIPS continued right up to the 2002 Fall Meeting in Sedona, Arizona.

Ernie was chair of the Section in 1982-1983. Ernie also served effectively on at least six different committees ranging from Scope and Correlation to Long Range Planning and, finally, the Senior Advisory Committee.

Many members will undoubtedly recall Ernie's other contributions to TIPS. What none of us who knew Ernie will ever forget are his tireless efforts to build and promote TIPS, his warm and witty friendship, and the fact that he was an outstanding lawyer. May his great contributions be long remembered. ❖

New Tort Reform in 2003-2004 and Beyond

A conference entitled "Nursing Home Liability and Damages, Liability Insurers Prices and Crises…" was held at the 2002 ABA Annual Meeting. Materials are available through the TIPS office at 312.988.5708. The following issues were addressed:

- Physicians and hospitals will be pushing tort reform by emphasizing restrictions on liability, causes of action, and above all, caps on damages. Some states are reviewing the MICRA statutes enacted by other states for a solution.
- Relationships between hospitals, physicians, and drug companies and any violations under the False Claim Act will be closely investigated in 2003 under the health care compliance programs. This will include drug company marketing practices.
- Nursing home attending physicians and medical directors are an endangered species, with sky-high liability insurance rates—and in some states no liability insurance— forcing doctors out of nursing home care.
- According to Florida Senate president Jim King, "The simple truth is that legislation passed by Florida effective 5/15/01 has not attracted insurance companies back into the arena of writing nursing home liability coverage, and we face a distinct possibility of losing federal funds if sufficient liability coverage is not made available."
- A 1997 Medicare funding cut caused numerous bankruptcies of nursing homes; further cuts were made with the 10/1/02 Medicare funding cuts. If not rectified by the 108th Congress, these cuts could cause further lack of access to adequate care of present and future nursing home residents.
- Reciprocal exchanges, risk retention groups, and captives are under consideration for Pennsylvania health care providers in the current medical malpractice crises, with Governor Ed Rendell promising to fight for aid for the doctors. ❖

The New Reinsurance Market:

Pricing Continues to Harden After a Dreadful Year

Ronald S. Gass

In the dreadful aftermath of the 9/11 terrorist attacks, the inevitable insurance and reinsurance disputes are now slowly wending their way through the arbitration and litigation pipelines. But this event and the resultant property, workers compensation, liability, aviation, and other property/casualty claims have had a profound impact on the reinsurance industry. It is obvious to even the most casual industry observer that the reinsurance marketplace has undergone a dramatic and extraordinary transformation—we have jumped at warp speed from an extended soft market, lasting more than a decade, to one of the hardest markets industry veterans have seen in years.

First, and foremost, the pervasive terrorism threat is being keenly felt throughout the reinsurance industry and by its insurance company clients, particularly in the hard-hit commercial lines. Reinsurance underwriters suddenly became much choosier about their treaty and facultative placements and seemed far less reluctant to nonrenew longstanding, but currently unprofitable, accounts. Another, and perhaps more subtle, impact of the 9/11 attacks is the market's wholesale reassessment of the terrorism risk. As a May 2002 A.M. Best special report, "P/C Industry: Its Worst Year Ever," pointed out, property, aviation, workers' compensation, liability, and life and health coverages, previously viewed by the industry as noncorrelated risks, must now be remodeled as being linked in unprecedented ways. While property-related risk concentrations have been on reinsurers' radar screens since the horrendous California earthquakes and East Coast hurricanes of the late 1980s and early 1990s, they are only just beginning to model concentrations of workers' compensation risks and underwriting accordingly, prompting sweeping revisions of capital allocation methodologies and per risk capacity. Many hope that the new Terrorism Risk Insurance Act of 2002, signed into law in November, will ease some of the pricing pressure in certain markets by providing up to a $100 billion temporary (until 2005) federal backstop in the event of future terrorist acts. But until implementing regulations are promulgated by the Department of the Treasury, it is just too early to tell how pervasive its impact will be on the cost of coverage.

There were signs that property/casualty insurance and reinsurance pricing was firming well before the 9/11 attacks, but these shocking events served as the catalyst for rapid global price restructuring. By the end of the first quarter 2002, prices had hardened substantially as capacity dwindled or disappeared entirely for certain types of commercial property and liability risks. According to a 2002 Reinsurance Association of America study, there was a meager 7 percent improvement in net premiums when the first halves of 2001 and 2002 are compared, suggesting that the industry had already begun its long slow march toward achieving some measure of underwriting profitability. The trend in the reinsurance segment is mirrored by the sudden rise of primary insurance premiums, which reportedly increased an average of 20 percent to 50 percent during January 2002 renewals, with commercial property/casualty premiums jumping by as much as 10 percent to 30 percent by the end of 2002. The cost of directors and officers coverage soared, with major publicly traded companies seeing increases of 50 percent or more triggered largely by the bankruptcy of the energy trader Enron and alarming WorldCom financial disclosures.

The new hard market must be viewed, however, against the backdrop of 2001, the property/casualty industry's worst year ever, in which the market sustained three of the industry's top ten catastrophes of all time—the 9/11 attacks ($20.35 billion), Tropical Storm Allison ($2.5 billion), and the St. Louis hailstorm ($2.2 billion), according to the Property Claims Services unit of the Insurance Services Office, Inc. Thus, it comes as no surprise that in 2001 the property/casualty industry reportedly sustained its "first-ever" year-end net loss of $7.3 billion and saw its surplus slide from $317.4 billion at year-end 2000 to $290 billion at year-end 2001, according to the A.M. Best special report. Other important contributing factors noted in that May report, aside from the impact of 9/11, were increased loss costs and moderating investment returns, a bearish equity market, and declining interest rates. In fact, part of the untold story is that the industry sustained an $18 billion unrealized capital loss primarily due to the downturn in equity values. Between 2000 and 2002, according to Standard & Poor's, the global insurance and reinsurance market reportedly suffered a $170 billion net reduction in capital. By any measure, 2001 industry results were dreadful, and management was compelled to take decisive pricing action to strengthen company balance sheets.

Of the three major industry segments—reinsurance, commercial lines, and personal lines—the first two were clearly the hardest hit after 9/11. The reinsurance segment posted a stunning 26 percent decline in U.S. statutory surplus in 2001, according to the A.M. Best special report, and reported underwriting losses totaled $12.8 billion, resulting in a pernicious combined ratio of 146.2 for the year. While the terrorist attacks were certainly an important factor, so was the emergence of adverse reserve development from prior accident years, due in part to the past decade's highly competitive pricing environment, relaxed underwriting standards, and a surge in predicted asbestos-related claims. This adverse development led a number of major reinsurers to bolster their reserves in 2001. A.M. Best forecasted $65 billion in asbestos-related claims and estimated that U.S. property/casualty insurers are still underreserved by about $33 billion in relation to their ultimate asbestos liabilities. On top of this, A.M. Best considers pricing in the personal and commercial automobile, workers' compensation, and medical malpractice segments to be below "adequate levels" and believes that a number of these depressed business lines will require additional double-digit rate increases just to achieve economic break-even combined ratios. Another A.M. Best special report, "P/C Industry—2001 Insolvencies," reveals a disturbing upswing in insolvencies in 2000 and 2001 due largely to deficient loss reserves.

Cedents and their policyholders are reacting to these difficult market conditions by reemphasizing the importance of risk management to improve their loss profiles, restructuring their retentions to hold premium costs down, and pressuring their brokers to scour the market for the most favorable deals. A 2002 attitude survey of risk managers and corporate financial officers revealed that insurer-customer loyalty is eroding and the days of insurer value-added services are dwindling as risk managers concentrate on price and coverage availability. This trend is also likely to spill over into the reinsurance market as cedents increasingly shop based on price, capacity, and financial stability.

The new hard reinsurance market has definitely revived the languishing excess and surplus lines business and stimulated a surge of interest in captives, risk retention groups, insurance securitization, and other creative alternative risk transfer vehicles. All have played an important role since 9/11 as pricing continues to firm and capacity declines in certain lines. However, these alternatives are not immune from increased reinsurance pricing, making some programs difficult to pull together quickly to address the market's more immediate needs. Interestingly, the anticipated upsurge in innovative capital markets products has not quite materialized, largely because these investment vehicles tend to be complex, relatively illiquid, costly and time consuming to structure and model the risk, and difficult to explain to rating agencies and potential investors. Thus, much of the post-9/11 capital investment is being directed to more traditional reinsurance ventures, especially offshore. Nevertheless, some observers report growing interest in the securitization of workers' compensation and aviation risks, perhaps using a multi-tranche approach to attract a broader array of investors with differing risk appetites.

There are already signs that property catastrophe capacity may not be as tight as anticipated, due in part to the influx of new capital in Bermuda and elsewhere, reminiscent of the upsurge in catastrophe insurance startups in the late 1980s and early 1990s. Some observers predict the return of a soft market due to industry senior management's reportedly "weak resolve" to achieve adequate returns in the face of aggressive competition, particularly from Bermuda startups. Only time will tell whether these new sources of capital will be around for the long haul. Many of these offshore reinsurers were disappointed with their share of renewals as the more established Bermuda players fought hard to maintain their underwriting portfolios despite the adverse market conditions. In 2003 and beyond, look for some of the financially fragile startups to be swallowed up by their larger, more stable competitors as the market goes through its inevitable shakeout.

As the global war on terrorism continues, it is clear that the reinsurance market has undergone a dramatic and lasting transformation, from the doldrums of more than a decade of intense competition and weak pricing to one of the toughest markets ever. Policyholders, insurers, and reinsurers are only just beginning to figure out how to cope in this new environment, which brings its own set of challenges—higher prices, increased underwriting discipline, reduced capacity, consolidations, insolvencies, new capital and offshore competition, innovative risk transfer products, and the very real possibility that the cycle may turn again before the industry's market sins of the past can be fully absolved. ❖

Ron Gass, formerly vice president and associate general counsel of XL Reinsurance America, Inc., is currently an ARIAS-U.S. certified arbitrator providing reinsurance and insurance dispute resolution services to the industry. He can be reached at rgass@gassco.com, or through his website at www.gassco.com.

Legislative Update

Leo J. Jordan

Reforming the Legal System

To give TIPS members first-hand knowledge of how the 18th Congress may affect their practices, ABA senior legislative counsel Lillian Gaskin and I recently attended a joint U.S. Chamber of Commerce/*Congressional Quarterly* conference entitled "The State of American Business." This conference highlighted chief executives representing America's foremost industries.

Although the real possibility of added terrorist attacks is our most pressing concern, our members will have a major interest in the expected efforts to reform the legal system. In 2003, the Chamber, through its Institute for Legal Reform (ILR), will concentrate its political capital upon working toward a federal solution to the medical malpractice problem; reintroduction of the Class Action Fairness Act; attempting to develop a major business consensus and congressional support to achieve asbestos litigation management reform; and seeking a legislative solution to the "misuse" of the 200-year old Alien Tort Claims Act.

Medical Malpractice

High among the legislative priorities is a proposal to reduce medical malpractice insurance premiums by limiting the amount of damages that juries can award in malpractice cases. According to a recent kaisernetwork.org report, Senate Republicans are developing a strategy to move a bill first through the Senate that would cap noneconomic and punitive damages awarded in malpractice lawsuits.

The business community will have the solid support of the Bush administration in a joint effort to place strict limits on jury awards. Proponents of such relief argue that out-of-control jury awards and frivolous lawsuits are a major cause of major insurance premium increases. President Bush in his State of the Union speech emphasized the importance of medical malpractice reform.

According to a *New York Times* comprehensive report of January 17, 2003, on medical malpractice, the average malpractice judgment a decade ago was $404,646. By 2001, the average had risen to $593,647. However, the National Practitioners Data Bank operated by the Department of Health and Human Services showed a decline for the first nine months of 2002 to $426,247.

While President Bush and others blame trial lawyers for the pending crisis, many persons also blame insurance industry practices for the premium increases. These practices include initiating pricing wars during good times that are now being offset by a steep drop in bond and stock market yields. Some members of Congress have proposed a limited removal of the insurance industry antitrust exemption to foster greater competition, or even a national reinsurance company to serve as a backup for insurers.

Given the makeup of the new 108th Congress, with Republicans holding an edge in the House and Senate—as well as a major hold on the White House, one could argue that caps on general and punitive damages will indeed be enacted. However, while House passage is almost assured, success in the Senate is less likely. Republicans hold a scant 51-49 edge. Under Senate rules, 60 votes are required to break a filibuster. Republicans will still need Democrat support to be successful.

A cap on damages, especially any amount close to the $250,000 level, will almost surely prompt a major fight in the Senate. Any relief will likely involve a more realistic limit for those who have suffered serious harm from negligent care. Moreover, a balanced package will almost surely involve a direction to state insurance regulators to look more closely at insurance company pricing practices and to suggest ways of spreading out the hills and valleys of medical malpractice insurance underwriting.

Bad Faith and Punitive Damages, Second Edition. is now available on CD-ROM for $179 (regular) and $149 (TIPS members), PC 5190335, at 800.285.2221 or www.ababooks.org.

Class Action Legislation

The Class Action Fairness Act of 2003 was introduced on February 4, 2003, by Senate Finance Committee Chair Charles Grassley (R-IA), Herb Kohl (D-WI), and Orrin Hatch (R-UT). Class action proposed legislation can be divided into two parts. One part could be termed administrative issues; the other, more substantive and jurisdictional. The administrative issues include efforts to ensure greater judicial scrutiny of litigation. These would include scrutiny of coupon settlements; review of settlements that tend to result in net loss to class members; more clear and more concise settlement information; payment of so-called bounties to initiating class representatives; and greater disclosure of attorney fees.

The more substantive jurisdictional issues are at the heart of the debate. Class action reform bills intend to force many more cases into federal court. Federal jurisdiction would apply in what is called "minimal diversity" situations. In such cases, federal removal procedures would apply if the amount in controversy exceeds the aggregate sum of $2 million and, generally speaking, if any member of a class is a citizen of a state different from any defendant.

Federal jurisdiction would not apply if a "substantial majority" (not defined) of the proposed plaintiffs' class and the primary defendants are citizens of the forum state. There are other elements affecting federal jurisdiction not considered here because of space restraints.

Under the leadership of former ABA president Robert Hirshon, a task force was created to review the proposed federal legislation and make recommendations to the House of Delegates. This was a multi-section effort, and TIPS was represented by Thomas J. Minton and this author. The House of Delegates approved the task force recommendations during the 2003 Midyear Meeting.

The House of Delegates recognized that some concerns over class action practice could be addressed by expanded federal court jurisdiction; however, the House emphasized that "any expansion should preserve a balance between legitimate state-court interests and federal-court jurisdictional benefits." The House recommended that in drafting such legislation, Congress should consider such factors as aggregate amount in controversy; number of plaintiffs in the class; percentage of the class who are citizens in the forum state; whether the defendants are all residents of the forum state; standards for removal; existence of overlapping classes or cases; and especially how the entire mix of all factors balances state-court interests and the expected benefits of removal to federal court. The impact on federal judicial resources should also be taken into account and added resources provided to meet any added burden.

The House recommends that any legislation respecting class action litigation be confined to the jurisdiction of the federal courts and that procedural matters contained in the current bills dealing with procedural issues are retained in the rule-making process.

The ABA recognizes the vast policy differences between supporters and opponents of expanded federal class action jurisdiction. In adopting the current policy, the ABA will now be in position to add its voice in this debate.

Asbestos Litigation Reform

With Republicans assuming control of both the House and Senate, one might conclude that asbestos reform legislation might have a better opportunity of passage. Washington sources report that Senators Orrin Hatch (R-UT) and Patrick Leahy (D-VT) are working on a bill to address asbestos legislation. The question for the moment is whether this effort will be asbestos-specific or included in a more general tort reform bill. Leahy reportedly favors the former approach. The ABA House of Delegates tackled this issue as well during the 2003 Midyear Meeting. In November 2002 the ABA Board of Governors formed the ABA Commission on Asbestos Litigation. The Commission's charge was to work with medical experts to develop a legal standard for those impaired with nonmalignant asbestos-related illness.

The report approved by the House of Delegates recites that congressional action on asbestos litigation is urgently needed. The House-approved recommendation proposed that Congress enact a standard that would (a) identify nonmalignant claims that are entitled to compensation and defer those that do not currently belong in the courts; and (b) ensure that state and federal statutes of limitations do not run against individuals who do not yet (and may never) meet the medical criteria in the standard. It is important to stress that the commission's standard deals only with nonmalignant claims and does not in any way deal with claims for asbestos-related malignancies.

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"When I Was a Young Lawyer"

Juanita (Nita) Bolland Luis
Associate General Counsel
UnitedHealth Group

What was your background like and what inspired you to become a lawyer?

During my high school years in Minnesota, I was active in debate and extemporaneous speaking and was particularly interested in a criminal defendants' rights topic my senior year. I was the first in my extended family to go to college. When I graduated from the University of Minnesota with a B.A. magna cum laude in history in 1972, there were few women going to law school, and I had no lawyer role models. I considered going to the first paralegal institute in Philadelphia but soon got a job as an employment interviewer for the State of Minnesota. I continued to think about law as a career, and after two years I started at the University of Minnesota Law School, where I was part of the first class with a large number of women (nearly a third).

Nita Luis, then and now

Where did you go to law school and what did you do right after that?

University of Minnesota Law School, J.D., cum laude, 1977. I enjoyed being a law clerk for a small plaintiff's law firm during law school but also liked my contracts and corporate law classes the best, so I decided to concentrate my job search on becoming an in-house corporate lawyer. (So much for the debate and criminal law interests that sent me to law school!) I was hired by St. Paul Fire and Marine Insurance Co. to do insurance regulatory and corporate transactional law, and advanced within their law department for 17 years. Then I spent several years providing legal consulting advice to other companies on a part-time basis to give me more time for other interests. One of my clients, UnitedHealth Group, finally persuaded me to become a part-time employee.

Do you have any young lawyer experiences that particularly stand out in your memory? If so, what have you learned from them/how have they helped you to become successful?

I had some good mentors among the executives and lawyers at St. Paul Fire & Marine, and one of the lessons I needed most was not to be afraid to say "I don't understand what you're talking about, explain it to me further." But first I got burned several times by pretending I understood the facts or a business or legal concept. I also learned business people want the law translated into practical advice they can understand and apply. They need creative legal alternatives instead of a lawyer who just says no to their initial proposal.

Whom do you most admire?

No one person in particular. I admire the great accomplishments of many historical figures, but they all seemed to have their personal flaws, too.

What is your greatest source of professional pride?

Having other lawyers come to me for advice.

What got you started with ABA involvement?

I was looking for connections with insurance regulatory, corporate attorneys who did work similar to mine. Marjorie Kress, a law school classmate who worked for an affiliate, told me how much she was enjoying being on *The Brief* editorial board and what a welcoming home TIPS was for attorneys like us. She recommended me to Dianne Dailey, who was forming the first publications editorial board, and with a mentor like Dianne, I was hooked. The TIPS Task Force on Insurance and Corporate Counsel Interests and Involvement will make us an even better home for insurance practitioners.

What was the worst professional advice you ever received?

Stick strictly to giving legal advice and don't get involved in the broader business or societal issues.

What personality trait has served you best over the years?

Being practical and organized.

What challenges you the most?

Trying to hold core corporate legal functions and information together in a company with decentralized law departments and frequent acquisitions.

What is the one thing you cannot stand (regarding the law/lawyers)?

Lawyers who think they need to be obnoxiously combative all the time and show little civility in their professional or personal relations.

What is your favorite type of legal work?

Post-merger and acquisition cleanup: learning what was missed during the due diligence phase and getting new people and operations integrated into the corporate legal culture, during merger or dissolution of extraneous corporations.

What can the ABA do to be a good home to young lawyers?

Be friendly; provide mentoring, networking, and training in basics via publications and CLE programs.

Nita Luis's Advice for Young Lawyers:

- Ask good questions. Understanding the facts is at least half the battle, and clients will be flattered that you want to know more about their situation.
- Network for professional and personal development, as well as for rainmaking. TIPS can give you a national network for referrals and advice as well as provide you with opportunities to publish, be a CLE speaker, and improve your group skills through committee work.
- Don't be too proud or afraid to ask for mentoring. I've always found TIPS members willing to share their time and expertise, no matter how busy or important they are.
- Think outside the box—the legal structure does not prevent creative solutions.
- Try to see all sides of an issue.
- Keep balance in your life.

Legislative Update

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This action by the House of Delegates gives the ABA an important voice in the asbestos legislation debate. Several members of Congress have said they would welcome ABA views on this legislative issue.

Alien Tort Claims Act of 1789 (ATCA)

For those who have little knowledge of this act, some summary background is in order. The Alien Tort Claims Act of 1789 grants federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Those familiar with this act suggest that there have been increasing efforts to use the ATCA to sue transnational corporations for violations of international laws.

For example, a Washington-based law firm is filing a lawsuit against 20 banks and multinational corporations for supporting the former South African apartheid government's crimes against humanity. A U.S. federal appeals court ruled that multinational corporations are accountable under U.S. law for violations of human rights committed by others abroad.

Multinational companies have alleged that this act is being abused by lawyers in ways not intended by the first Congress. The U.S. Chamber of Commerce reports that there are more than 20 cases pending under this act alleging that U.S. firms carrying out operations in foreign countries are liable for actions in those countries. In many cases they had no direct connection other than being present in those countries. The Chamber expects to support legislation either to restrain legal actions under this law or to work for its ultimate repeal. ❖

Leo J. Jordan is chair of the TIPS Government Relations Committee.

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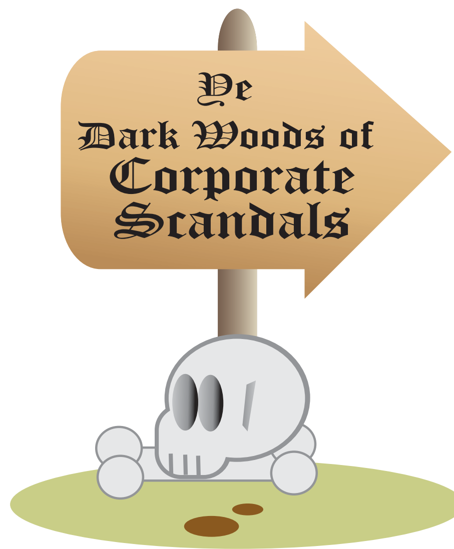
from various liabilities. This article provides a brief overview of some of the primary legal and coverage concerns that must be considered by D&O underwriters, claims handlers, corporations and their executives, and disappointed investors—and the attorneys who represent them.

Basic Coverages

At its most basic, D&O insurance protects directors and officers from liability arising from actions connected to their corporate positions, but in recent years D&O insurance has expanded beyond this original coverage. Thus, a single policy now may provide multiple and varied options—such as employment practices liability and entity securities coverage—by standard form or endorsement. Although each policy employs its own language, and individual coverages within each policy are subject to distinct terms, conditions, and deductibles, some common threads run through each policy and coverage.



Insuring Agreement A typically provides coverage directly to the directors and officers for claims made against them and applies when they are not indemnified by the corporation. The coverage is limited to claims connected to an insured's capacity as a director or officer—not, for example, to the insured's capacity as a shareholder. This coverage is often implicated when the corporate entity goes into bankruptcy and is not financially able to indemnify its directors and officers.

Insuring Agreement B typically reimburses a corporation for its loss when the corporation indemnifies its directors and officers for claims against them. "B-side coverage" does not provide the corporation coverage for its own liability. The language and conditions of Insuring Agreement B typically mirror Insuring Agreement A.

D&O policies commonly offer a coverage provision to protect the corporation against its own liability for securities claims. A policy may provide such coverage to the corporation with or without the requirement that its directors and officers also be sued. Because entity securities coverage may deplete the policy and leave the directors and officers unprotected, both insurers and corporate directors and officers are rethinking the wisdom of including entity securities coverage in D&O policies.

Defense Issues

Most D&O policies do not impose a duty to defend on the insurer. However, they do provide coverage for defense costs and give the insurer the right to associate with the defense and approve defense strategies, expenditures, and settlements. The insured generally has the right to select counsel, subject to the insurer's consent, which usually may not unreasonably be withheld.

The primary questions regarding defense costs involve control over the costs incurred and the timing of the insurer's defense payments. As to the first, D&O policies generally require reimbursement of *reasonable* defense costs, a limitation that gives the insurer some control over expenses. The question of timing brings up insurers' often conflicting interests. Many issues affecting coverage cannot be resolved until the claim is resolved. In such situations, coverage remains uncertain, and insurers may have an interest in not advancing defense costs until the situation is clarified. Insurers also have an interest in seeing claims against their insureds vigorously defended, however, which may put the cost well beyond an insured's means. Thus, many policies provide that the insurer will advance defense costs under the condition that, should the facts ultimately demonstrate a lack of coverage, the insured will reimburse the advanced monies.

Key Provisions and Issues

Coverage. Common to most D&O policies is that coverage generally is offered on a claims-made basis for claims made during the policy period. Typically the insured also must report the claim to the insurer during a specified time period. One of the common threshold questions, then, is what constitutes a claim?

D&O policies generally define a claim as any (1) civil, criminal, or administrative proceeding or (2) written demand for damages against an insured. Some policies further refine the definition and specify that a "civil proceeding" includes arbitration, mediation, and other alternative dispute resolution, or explain that an "administrative proceeding" includes a formal investigation. Many policies limit the definition to those claims made against an insured *in his or her capacity as an insured*, Although the term "insured" generally includes a duly elected or appointed director or officer, it also may include the corporations or employees as specified in each policy or coverage.

Covered losses generally include damages, judgments, awards, settlements, and defense costs. The definition of loss usually excludes fines or penalties, taxes, treble (or other multiplied) damages, and matters uninsurable under law. Where punitive and exemplary damages are not excluded, they are covered only to the extent permitted by applicable law. Where treble or multiplied damages are assessed against an insured, a D&O policy generally covers the base amount but not the multiplied portion.

Exclusions. An insured versus insured exclusion generally bars coverage for claims made by an insured against another insured (or sometimes by anyone affiliated with or assisted or directed by an insured). This exclusion may bar coverage for claims brought by a bankruptcy trustee on behalf of the debtor, or shareholder claims brought by former directors or officers. Professional liability exclusions bar coverage for liability associated with the provision of professional services, such as a bank officer's liability for acts as a lender rather than as an officer of the bank. Prior acts exclusions bar coverage for claims arising out of an insured's wrongful acts before a specified date. Prior and pending litigation exclusions generally exclude coverage for claims pending before the inception of the policy and for subsequent claims based on the same or related facts and circumstances.

Most likely to be implicated in the recent corporate accounting scandals is the dishonesty exclusion, which bars coverage for claims related to an insured's dishonesty, fraud, or willful violation of laws or statutes. Personal profit exclusions, barring coverage in connection with an insured's illicit gain, also are likely to be implicated. Some dishonesty exclusions include a clause requiring a final adjudication of fraud or dishonesty. The case law generally requires the final adjudication to be in the underlying claim rather than a parallel coverage action, but the issue is not completely settled. Practically speaking, therefore, if an underlying lawsuit is settled without a specific admission of liability, a dishonesty exclusion may not apply.

Dishonesty exclusions typically are followed by a severability clause—an insurance caveat providing that the acts or knowledge of one insured will not be imputed to any other insured for the purposes of applying the exclusion. The exclusion bars coverage only for the insured(s) whose acts or knowledge are the basis of the claim at issue. In this regard, the Private Securities Litigation Reform Act of 1995 permits a securities defendant to request a special verdict from the jury identifying its judgment of each defendant's state of mind. PSLRA, 15 U.S.C. 77z-1(d). Although a special verdict would assist in the proper application of the dishonesty exclusion, most securities lawsuits do not reach a verdict at all, being either settled or decided on motions.

Allocation. Allocation is typically required where there are insured and uninsured claims or defendants in the same lawsuit. In the past, allocation issues often arose where a securities lawsuit was brought against directors and officers *and* the corporate entity. Under such circumstances, a policy would cover the expenses attributable to the directors and officers but not those attributable to the entity. In 1995 the Ninth Circuit affirmed a 100 percent allocation of liability to the directors and officers for the settlement of an underlying 10b-5 securities action. *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1425 (9th Cir. 1995). Policies written since then are more likely to have entity coverage for securities claims, making allocation unnecessary. D&O policies now also tend to include extensive allocation clauses that require the parties to negotiate an allocation agreement in non-securities claims.

Rescission. Given the recent corporate scandals, many D&O insurers look closely at whether the policy was procured through material misrepresentations or omissions in the underwriting process; if so, the insurer may be able to rescind the policy. As a purely practical matter, an insurer rescinds a policy by fully refunding the insured's premium and treating the policy as void *ab initio*. Unfortunately, rescission leaves the insured not only unprotected for any additional claims but also tainted with a blemished record. Because most policy applications ask whether the insured has ever been refused coverage or had a policy rescinded, the offender may have difficulty obtaining coverage in the future.

Although specific requirements differ from jurisdiction to jurisdiction, the general standard is that a policy may be rescinded where the insured's application contained a misstatement or omission of fact material to the risk insured, so that the insurer would not have issued the policy or would not have agreed to the same terms had it known the true fact(s). Jurisdictions differ on many factors: how materiality is defined, whether the insurer must show fraud in the application process, and whether the insurer must show it would not have issued *any* policy had it known the true facts. D&O policies may also include severability provisions for application misrepresentations, which spell out under what circumstances misrepresentations of one insured will be imputed to other insureds for purposes of rescission. ❖

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Tittle v. Enron Corp.

continued from page 1

lawyers, for a presentation at the 15th Annual ERISA Litigation Conference (Glasser Legalworks), September-October 2002.

Five ERISA counts are included in the *Tittle* complaint. In very general terms, the plaintiffs allege that fiduciaries for the various plans should have stopped participants from investing further and should have sold the plans' Enron stock, in certain instances, after it became clear that Enron stock was a bad investment, even though plan terms provided for investment in Enron stock. The plaintiffs also allege that certain fiduciaries purposely misled plan participants into further purchases when the fiduciaries knew that Enron stock was no longer a good investment, which was proven by their own simultaneous sales of Enron stock and by their withholding information from other plan fiduciaries and plan participants that made it clear the stock was overvalued. During blackout periods in the 401(k) Plan and the ESOP, when participants were not permitted to sell their holdings, Enron stock depreciated further in value. The complaint alleges that the directed trustee, Northern Trust, should have exercised fiduciary control by stopping further investments in Enron stock and by overriding blackout period instructions to cease participant changes in the plans, even though the blackout period was part of a transition replacing Northern Trust as trustee and record keeper. The final allegation is that Enron stock was overvalued under the CBP, with its stock value offsetting the CBP's benefits.

The complaint alleges that the compensation committee of Enron's board of directors and certain Enron executives, as fiduciaries under the plans, are liable for general plan losses for the following reasons: The parties did not use their authority to appoint, monitor, and replace members of the administrative committee, who permitted plan participants to continue to invest in Enron stock; did not diversify plan investments out of Enron stock; permitted the administrative committee to implement the investment blackout under the 401(k) Plan; and permitted the administrative committee to operate without "insider" information that, as alleged, would have enabled them to make better decisions regarding investments. The complaint also alleges that compensation committee members had general fiduciary liability because they selected administrative committee members who did not have the expertise and training to understand the issues for which they were responsible. If the plaintiffs prevail, companies will need to implement more elaborate procedures for screening, selecting, and monitoring administrative committee members than those currently used.

In addition, the Department of Labor (DOL) amicus brief appears to argue that a directed trustee has an obligation to exercise its fiduciary duty to override directions when it becomes clear that the directions may harm plan participants. The department's position is generally viewed as an aggressive interpretation of the law; procedurally, however, the case is only at the motion to dismiss stage. The department acknowledges that it is taking a legal position for purposes of opposing a motion to dismiss that may or may not be supported by the facts.

The complaint alleges the fiduciaries had irreconcilable conflicts regarding further purchases and holding of Enron stock and suggests that an independent fiduciary would have ceased purchasing Enron stock and disposed of its holdings of Enron stock before the investments lost their value. The author believes that, implicitly, the DOL amicus brief raises a serious question whether a company should have company stock in a 401(k) plan and, if so, whether that stock should be managed by an independent fiduciary.

The most troubling aspect of the DOL position is the belief that persons who are fiduciaries by virtue of appointment authority over administrative committees have the responsibility to warn the administrative committee about corporate events that might materially affect the price of company stock. The DOL attempts to reconcile this position with SEC rules against insider trading and fraud. Specifically, the department argues that, even if disclosure to all shareholders may not be warranted under SEC rules, corporate executives and possibly the boards of directors nevertheless owe disclosure to administrative committees, and could be required to halt further purchases of company stock. This may be an easy position to take in the Enron case or similar circumstances but could be problematical in a more common situation where the severity of the problem depends on the outcome and the facts are less dramatic than with Enron. This issue may arise as a result of a positive development as well as a negative development—for example, where a company is close to receiving a major product order that the stock market is expected to view favorably.

The complaint, the plaintiffs' motion in opposition to certain motions to dismiss, and the DOL's amicus brief repeatedly rely on the provisions of the various plans to impose on fiduciaries certain rights and duties that ERISA would not otherwise impose. Yet many of these provisions appear to be boilerplate. For example, Northern Trust appears to be labeled a trustee and given broad discretion in the plans' documents, contrary to the apparent intent that it function as a directed trustee. In another example, language indicates that the fiduciaries were not required to put 100 percent of ESOP investments into Enron stock, contrary to the presumed intent. The lesson for all parties is to read all plan documents carefully and to make sure that they actually say what they are generally "intended" to say. At this point in the Enron litigation, it appears that the plans' provisions may be interpreted literally. Plan drafting counsel in particular should read boilerplate carefully, making sure it is appropriate to the circumstances.

In addition, the plaintiffs and the DOL took the position that section 404(a)(1)(D) of ERISA requires a fiduciary to depart from plan terms unless it is imprudent to follow them. This position is contrary to the belief among many ERISA practitioners (particularly ESOP practitioners) that plan terms requiring employer stock investments in 401(k) plans (especially in ESOPs) are not subject to being overridden by fiduciary responsibilities of prudence and diversification that might otherwise apply.

This lawsuit has a long way to go before resolution, but the old adage that bad facts make bad law is personified here. Assuming that the alleged facts prove to be true, most people will agree that the participants were severely harmed by the wrongdoing of the company, its executives, and its agents. Fewer people will agree that the harm is legally actionable. If *Tittle* results in appellate decisions, it could break new ground in developing law under ERISA. Unfortunately, the precedents that may be set in this case will impact far less egregious cases. Regardless, companies and fiduciaries would do well to reconsider their plan practices, particularly those that involve company stock. ❖

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In Motion

Patrick E. Broom, of Tucson, Arizona, has joined the firm of Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.

John A. Michener, of St. Louis, Missouri, has joined Evans & Dixon, L.L.C. as a member. ❖

Mark Your Calendar

TIPS Spring Meeting, May 1-4 in Austin, TX (312.988.5672)

Fidelity & Surety Law Committee Spring Meeting, May 7-10 in Chicago, IL (312.988.5708)

How to Succeed as Staff Counsel, May 13-14 in New York, NY (312.988.5708)

ABA Annual Meeting, August 7-13 in San Francisco, CA (312.988.5672) ❖

TortSource

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Tort Trial and Insurance Practice

"My San Francisco"

Sandra R. McCandless

Join Us for the Annual Meeting August 7-13, 2003

To TIPS colleagues who report San Francisco is your favorite travel destination and second home, a warm welcome home! During the 2003 ABA Annual Meeting, join other TIPS members at two San Francisco landmarks: on Friday, August 8, at the open-air reception at the **Monadnock Building**; and on Sunday, August 10, at the beautiful **St. Francis Yacht Club** for dinner. Make sure to visit several San Francisco neighborhoods, each with its own character. Let's start close to the Marriott Hotel, where TIPS members will reside, and move out from there.

Union Square/Financial District: Union Square has had a major rejuvenation, and everything else you'd want for a few days on the town is here: four theatres (the **Curran** and the **Golden Gate**, which host Broadway shows; the **Geary**, home to the American Conservatory Theatre; and the **Lorraine Hansberry Theatre**, featuring productions by black playwrights) and more than 30 art galleries. Favorite stores for locals are **Gump's** for art and collectibles and **Shreve & Co.** for jewelry; **North Beach Leather** and **Wilkes-Bashford** are two famous San Francisco clothing institutions. My personal favorite is **Fumiki**, which has Asian crafts at prices hard to beat. Get a quick snack at **Morrow's Nut House**, and entertain the kids at the **Sanrio Superstore.**

For Union Square dining, try **Anjou** for French; **Biscuits & Blues** (Southern cuisine); **E & O Trading Company** for Southeast Asian in a hip atmosphere; **Farallon** for seafood; **First Crush** (California cuisine and a fine collection of California wine); and **Kuleto's** or **Zingare** for Italian. Venture out a few blocks toward the Financial District and find our French Quarter on Belden Lane. Belden eateries are **Café Bastille**, **Plouf**, and **Café Claude**. SF's best paella is at **B44**. Other Financial District restaurants worth a visit are upscale **Aqua** for seafood; **Boulevard** for fabulous American cuisine; **Kokkari** (Greek); and **Shanghai 1930** and **Tommy Toy's** for Chinese. My personal favorite is **Zare**; it can't be beat for service and intimacy**.** **Hawthorne Lane** (Asian-Californian) and **Maya** (upscale Mexican) are just off the beaten path on the outskirts of the Financial District.

North Beach: If you haven't seen **Beach Blanket Babylon**, the world-famous and uniquely San Franciscan comedy revue, call **Club Fugazi** and book now. North Beach is San Francisco's "Little Italy," so dine before or after the show at **Fior d'Italia** or **La Felce** for old-style Italian; **Moose's** to dine with the In crowd; or **Rose Pistola** and the **Stinking Rose** for a raucous time. Spend the end of your evening, as the locals do, at **Tosca**, for a specialty of the house coffee liqueur drink, or **Vesuvio Café** (next to the world-famous **City Lights Bookstore**) for a more artsy crowd. If you want to find out what a North Beach "regular" is like and are not faint of heart, check out **Gino & Carlo**.

Other neighborhood restaurant recommendations requiring a taxi ride are in the **Mission District**: **Alma** for Nuevo Latino food; **Delfina**, popular Italian-Mediterranean; **Foreign Cinema** (to watch subtitled movies as you dine); and **Limon** for Peruvian cuisine; and in the **Inner Sunset P.J.'s Oyster Bed** for New Orleans cuisine; **Park Chow** for comfort food; and **Ebisu** for sushi.

The newest "destinations" are **Pac Bell Park**, a 20-minute walk from the Marriott; the "new" **Asian Art Museum** (accessible to the Marriott and not to be missed); and the **Redwood Room Bar** and **Asia de Cuba** in the **Clift Hotel**, destinations in themselves. The **Ferry Building** at the foot of Market Street has been remodeled; it's worth a visit on your way to the **Tiburon Ferry** for a jaunt to Marin and nibbles at delicious **Sam's** or **Guaymas** in Tiburon.

Three tips for TIPSters about venturing into the San Francisco neighborhoods: Log onto **www.sfgate.com** and check out the neighborhoods and eateries for yourself. Bring a sweater or layers of clothing because you never know what the weather will be like in August. Finally, on arrival buy a good map so you can truly make the neighborhoods of the City by the Bay your own. ❖

Sandra R. McCandless is vice chair-elect of TIPS and a partner at Sonnenschein in San Francisco, California.

Practice Management

Galina Y. Davidoff

Preparing Corporate Testimony in Times of Mistrust

More often than not, jurors have no idea how senior executives occupy their time. Sitting in meetings and playing golf do not sound like a job description, but these activities invariably come to mind for most jurors when they think of senior executives. Jurors are also likely to recall having seen senior executives testifying before Congress in cases involving corporate misconduct or consumer fraud. The reputation of corporate management is at an all-time low, and thus more work is required to prepare corporate witnesses for courtroom testimony.

Lack of knowledge about corporate life gives many jurors an exaggerated idea of the extent of executives' knowledge of the day-to-day detail of everyday operations within their companies. Recently a juror confidently assured me that senior management should know everything happening on the floor of any one of many production facilities because "they have weekly meetings." Jurors appreciate managers who know exactly what is going on at every level of their company and resent managers who work at a distance and do not come in contact with regular workers.

Diffusing these negative predispositions and presenting corporate witnesses in a more personable light is essential in today's legal environment. When introducing corporate officers or other corporate witnesses, take jurors through a brief summary of their daily, weekly, and monthly tasks. You may want to cover some or all of the following areas:

- Types of decisions they are expected to make;
- Time spent working and traveling;
- How they develop relationships with lower level executives and supervisors;
- Business developments that are and are not regularly reported to them;
- When relying on other people's judgment is necessary—and sometimes mandatory;
- How they maintain contact with regular employees; and
- Procedures that enable employees to gain access to the executives.

Keeping this testimony short, comprehensive, and relevant takes planning and vigilance, but in the current atmosphere of mistrust, such a review is critical. Without introducing accurate background information and humanizing the witnesses, jurors explain corporate decisions with the only motives they know—greed and corruption. ❖

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