FROM THE CHAIR

By James L. Holzman

Be sure to sign up for the annual meeting in New York, which is coming up sooner than usual, in early July 2000. Plans are nearly complete for several terrific Committee programs. Our Committee events are scheduled for Saturday to Monday, July 8 to 10, and the Committee dinner will be on Saturday night, July 8. The attractions of New York are legendary, and the Section has planned a splendid reception for Windows on the World before our dinner on Saturday night. Please plan to come, and please bring a friend! Our openness to new members has always been one of our greatest strengths.

I am also very pleased to announce that Elizabeth S. Stong has been appointed chair of the Committee effective at the conclusion of the ABA Annual Meeting in New York in July. Elizabeth has served the Committee in a number of roles, most visibly as chair of the Task Force on Litigation Reform and Rules Revision, where she has been an effective advocate for the Committee and the Section. She has also taken on a number of other assignments for us in planning and presenting some of our best programs. Elizabeth is a terrific leader and will continue to develop the many opportunities available to our membership.

I hope that you were able to attend the Committee’s very successful meetings and programs at the Business Law Section's Spring meeting in Columbus, Ohio. On Thursday, March 23, our opening offering was a standing-room-only program moderated by Heidi McNeil Staudenmaier on Transactional Attorneys in Litigation. Through a series of vignettes and panel comments, panelists illustrated the pitfalls that can arise when deals become lawsuits and transactional attorneys become deposition witnesses. The Committee also offered, for the
fifth consecutive year, its popular Review of Developments in Business and Corporate Litigation, moderated by Jim Hawkins and featuring presentations on class actions, securities, intellectual property, employment, and corporate law.

On Friday, March 24, the Committee presented a very well-received program on Race and Ethnicity in the Courtroom, which was moderated by Elizabeth Stong. Based on a program first presented at the Committee’s Mid-Winter Meeting in New York, this program considered the practical professional and ethical issues that arise when clients raise questions about a trial lawyer’s race or ethnicity. A short Committee meeting followed the program. The Committee also co-sponsored programs on Parallel Proceedings in SEC Enforcement Matters: Issues of Concern for Corporate Counsel, and Discovery and Evidence: Old Rules for New Technologies.

Our Committee dinner, always a pleasant and collegial event, was a sell-out this year, at the popular Martini’s restaurant. Many new members and guests joined Committee regulars in enjoying a delightful evening. Several Subcommittees and the Task Force on Litigation Reform and Rules Revision also held meetings, providing opportunities for new members to meet Committee members who are active in their practice areas. A list of the Subcommittees and their leadership is included in the Newsletter, and committee members who have not been active should feel free to take a moment and send a letter—or an e-mail—to a Subcommittee Chair or Vice Chair in an area of their interest.

Finally, mark your calendars for the Committee’s meeting in New York from November 30 to December 2, 2000. Last year’s meeting was a great success, and this year’s promises to be just as exciting and informative.

FEATURE ARTICLE

INTERNET MESSAGE BOARD LITIGATION

Time Is Of The Essence

By Jacob S. Frenkel and Sidney S. Liebesman

Introduction

Your client is a public company. You receive a telephone call about a message posted to an Internet message board hosted by Yahoo!, Raging Bull, Silicon Investor, or some other message board host concerning your client. The message contains confidential, false and/or defamatory information. Your client wants this stopped. Your problem is you know the message board host is not liable for the content of the messages and you do not know who else to sue because the posters on the message boards use pseudonyms that hide their identities. Although some of the information appears as if it only could have come from a handful of people, you do not know with certainty who within that group may have posted the message. You need not throw up your hands in frustration and tell your client that he must stoically suffer while the posters remain protected by their anonymity. Instead, your client does have legal redress -- filing a John Doe suit, compelling discovery from the message board host, identifying the wrongdoers and taking appropriate legal action against the proper parties. Recently, numerous public companies like Raytheon Co., Callaway Golf Co. and ITEX Corporation have followed this innovative approach to stop this type of tortious conduct. Such actions, however, raise a host of thorny legal and practical issues.

The Complaint

There are four questions that need to be addressed in filing the complaint: (1) where to sue; (2) when to sue; (3) what claims; and (4) who to sue.

Where to sue: There are several choices. You do not know which jurisdiction the posters reside in since you do not know their identities. However, until you identify and locate the posters, possible venues may include your client's principal place of business, the jurisdiction where the message board host is located or your client's state of incorporation. Once you identify and locate the poster, possible venues may only include the jurisdiction where the poster resides or your client's principal place of business. Calder v. Jones, 465 U.S. 783, 789 (1984) (establishing "efforts test" that allows exercise of jurisdiction in forum where tortious harm directed); Edias Software Int'l LLC v. Basis Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (exercising jurisdiction where plaintiff's principal place of business located on ground that plaintiff felt the economic effects of defendant's defamatory postings in that forum).

Unless your case is based on a federal question, such as securities fraud, you may have to bring your case...
in state court. Presumably, you would not have a good faith basis for asserting diversity of citizenship jurisdiction.

When to sue: The answer is "quickly". The immediate challenge is the process of identifying the proper names behind the posters' aliases. This process must be started quickly because the information necessary to identify the posters is retained by the Internet Service Providers ("ISPs") for a very short period of time, and in some cases, just a few days. Your success in identifying anonymous posters will turn on the age of the messages and the sophistication of the poster. Many of these cases are unsuccessful because the ISPs have destroyed the relevant information, consistent with their record-keeping practices, long before they receive your subpoena.

What claims: There are several potential causes of action. These include:

(1) Defamation - corporations have standing to assert claims for defamation based upon false statements of fact that damage the company’s reputation or good name.

(2) Breach of Fiduciary Duty—it will typically be a breach of an employee’s fiduciary duty to act in the company’s best interest if the employee discloses confidential information. It may also be a breach if the employee criticizes the company.

(3) Tortious Interference with Business and Contractual Relations—based on the effect the messages have on your client’s relationships with its employees and customers.

(4) Misappropriation of Trade Secrets—typically asserted against a current or former employee.

(5) Misappropriation of Identity—arises when a poster uses the proper name of another as the alias. Typically, the misappropriated identity is that of a company executive or senior official.

(6) Breach of Contract—these claims are most commonly found in situations involving current and/or former employees, franchisees, distributors or dealers.

(7) Unfair and Deceptive Trade Practices Act (UDTPA) - disparaging a company in the course of one’s own business is impermissible under most state UPTPA’s. The typical UDTPA statute provides for recovery of attorneys’ fees, costs and treble damages.

(8) Securities Fraud—possibly the most difficult theory to prove. Stock message boards are an easy medium through which shareholders, stock promoters and stock manipulators may disseminate materially false and misleading information or material non-public information to induce a rise or decline in the price of a stock.

(9) Injunctive Relief—to prevent the defendant from posting illegal or offensive messages in the future.

Who to sue: The first issue here is who you cannot sue. Under Section 230 of the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. §230(c)(1), ISPs are immune from liability for information originating with a third-party user of the service, unless it developed or created the information. Zeran v. America On Line, 129 F.3d 327, 328 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998); Blumenthal v. Drudge, 992 F.Supp. 44, 52-53 (D.D.C. 1998). Your claims against the posters must be brought as “John Doe” claims because their identities will not be known. Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980) (affording plaintiffs opportunity through discovery to identify unknown defendants). Once you determine the proper names of the posters, you should amend the complaint accordingly.

Another issue is how do you justify suing an unknown John Doe while claiming that person is an employee of your company. Some may question why you should worry about justifying your actions since the posters, sued only as John Does, will not be moving to dismiss the claim. However, as an officer of the court, you are required to bring and prosecute all claims in good faith. If that is not sufficient motivation to play it straight, remember that you may at some point have to answer these questions from a judge who will not look kindly to your having abused the authority of the court to wrongfully sue someone. Getting back to the first issue, you must have a good faith basis that the poster is an employee or an ex-employee disclosing confidential information or possibly a third party disclosing confidential information that the third party could only have obtained from an employee breaching his fiduciary duty either because of the message or the information included in the message. Even if the poster is not an employee, the poster may be aiding and abetting an employee’s breach of fiduciary duty by disclosing the confidential information. Walck v. American Stock Exchange, Inc., 687 F.2d 778, 791 (3d Cir. 1982) (citing elements of a claim for common law aiding and abetting as: (1) the existence of an independent wrong; (2) aider or abettor know of that wrong’s existence; and (3) substantial assistance given in effecting that wrong).
Discovery - The Heart Of The Matter

The issues that arise at this stage of the litigation are several. First, are there any discovery rules which may impose limitations on your ability to issue subpoenas to the message board host? Second, is the lawsuit too late – is the information that you need to proceed even available? Third, what objections or resistance may you receive from the ISPs? Finally, how do you protect your client’s interests on a going-forward basis.

Some states may have discovery rules similar to Fed. R. Civ. P. 26(d) requiring that counsel meet and confer with the opposing party prior to commencing any discovery. But how do you confer with counsel for John Doe? Can you issue a subpoena without conferring with unknown opposing counsel? As is always true with discovery, know the rules. If you are in federal court, or in a state with a "meet and confer" requirement, move the court for an exemption from the statutory requirement. As time is of the essence, counsel should seek expedited consideration of the motion.

Once counsel is confident that a subpoena may issue, counsel should do so expeditiously to the host of the message board. The subpoena should call for production of information sufficient to identify the parties posting as the “John Does,” including the ISPs through which each John Doe posted each message, the IP address from which each message posted, the e-mail names and addresses posting each message, and, of course, the proper name and address of each John Doe. Although lawyers often are reluctant to provide too much information, the opposite is true in "John Doe" message board discovery. The more information that you provide to the company hosting the message board (which likely is an ISP), the better the chance of obtaining timely and responsive information. Any information that you obtain, even if it is not detail concerning the poster, may be sufficient to assist with or expedite the identification process (e.g., date of birth and city of residence may be sufficient for a Human Resources Department to identify a former or current employee). Similar subpoenas should issue subsequently to the ISPs, as you learn their identities, which served as gateways for the message poster(s).

Each ISP likely will respond differently to the subpoena. At either end of the spectrum are those which will be helpful and those which may require you to file a motion to compel the production of responsive documents. Counsel always should anticipate an objection to the subpoena in the form of a motion for a protective order or a motion to quash. Whatever happens, know that the ISPs are receiving many subpoenas daily, and yours likely will just enter the queue, similar to a subpoena to a telephone company. The most important point is, once you have served the subpoena and begin communicating with a representative of the ISP, ask that they preserve evidence in the event of a dispute concerning the subpoena.

Some ISPs may advise their customers about the subpoena. In fact, should you receive a motion to quash, it likely will come from the customer, not the ISP. Because courts are vigilant about protecting the rights of an unrepresented party, counsel should always be able to explain how each message complained of is actionable. In some cases, the ISP also may require a similar explanation before it agrees to release any information.

Defenses likely to be raised by a poster include relevance, notice, privacy and the First Amendment. If counsel can articulate the basis for asserting claims against a poster, courts are usually reluctant to quash a subpoena. Relevance during the discovery stage of a case is viewed broadly. Also, there is no affirmative grant of privacy for a poster when tortious acts are being committed on the Internet. Finally, while the First Amendment generally prohibits content-based restrictions on speech, content-based restrictions are permissible in cases of fraud, defamation and obscenity.

The ISP may also file an objection, usually on the ground that the request is unduly burdensome. But, if your subpoena is narrowly tailored to seek only such information that will identify the poster, this objection should be overruled. The ISP may also object on other grounds such as privacy and the First Amendment. Because those objections are personal to the poster, however, ISPs lack standing to assert those types of objections. See In re Yassai, 225 B.R. 478, 481 (Bankr. C.D. Cal. 1998) (reading plain language of Fed. R. Civ. P. 45(c)(3)(A) to deny parties merely affected by, but not directly subject to, a subpoena from filing objection).

Conclusion

The mere filing of the John Doe action will probably slow the postings. However, once the poster’s identities have been uncovered, your client can then decide on further action. Some companies have hit home
runs through these actions and discovered that the disgruntled posters were actually competitors posing as stockholders and employees. See Ronald Grover, The Perils of Teeing Off Online, Business Week, March 13, 2000 (offending poster was competitor who admitted using 27 different aliases to post 163 messages disparaging competitor). Your company or client may not be quite so successful, but without taking aggressive, prompt action, you will never know.

SUBCOMMITTEE REPORTS

BANKRUPTCY LITIGATION SUBCOMMITTEE

By William Knight Zewadski

The Bankruptcy Litigation Subcommittee will again co-sponsor a program on new creditor and bankruptcy developments with the Creditors’ Rights Subcommittee, chaired by Catherine Bauer. The program will be held at the annual meeting in New York City, July 8, 2000 at 2 p.m.

Among our speakers will be the Honorable Margaret Mahoney, United States Bankruptcy Judge, who will discuss new developments in class actions in the bankruptcy courts.

If the new Bankruptcy Code changes have been approved by the Congressional Conference Committee or passed into law by the time of the meeting, we will also have a detailed analysis of their impact on creditors and litigation interests in bankruptcy.

Interested onlookers and prospective new members of the committee are especially invited to attend the program. Those with information about new cases or developments of significance should call one of the co-chairs in advance of the meeting: Bill Zewadski, Tampa, or Phil Warden, San Francisco. We look forward to seeing you there.

BUSINESS TORTS SUBCOMMITTEE

By Jan P. Helder, Jr.

The Business Torts Subcommittee is planning to present a program or mini-program at the Spring 2001 meeting of the Section in Philadelphia. The program will be a primer on business torts for business lawyers and litigators alike. We intend to highlight both the similarities and differences in these torts in the various states.

For instance, in some states, a valid claim for tortious interference with contract can be stated when the underlying contract is at will. In other states, an at will contract cannot form the basis for a claim for tortious interference with contract. Rather, a claim may be stated for tortious interference with business expectancy, business relations, or prospective economic advantage (three different ways of describing the same tort, among others). The reason for this distinction is important is the latter tort's requirement of a wrongful act, which is typically conduct that is otherwise illegal. Many states do not require establishment of a wrongful act in cases of tortious interference with contract. As a result, whether or not a particular state permits claims for tortious interference of contract where the underlying contract is at will might well be critical to the success or failure of such a claim.

Because most business torts are based in the common law, material variances between jurisdictions are common. While a program of this nature cannot cover all of them, we intend to provide a broad overview to give those attending a better perspective of these torts. If you have expertise in this area, or are simply interested in helping with the work of the subcommittee, please contact the Business Torts Chair, Jan P. Helder, Jr., at (816) 460-2427 or jwh@sonnenschein.com.

CLASS AND DERIVATIVE ACTIONS SUBCOMMITTEE

By Gregory P. Williams

The Class and Derivative Actions Subcommittee is planning a program at the New York session of the 2000 annual meeting. The program will relate to litigation involving devices used to "protect" negotiated mergers and acquisitions – such as "no-shop" provisions, "no-talk" provisions and termination fees. Greg Williams will serve as program chair. At the 2000 annual meeting, the meeting of the Subcommittee will occur on Monday, July 10, from 3:30 p.m. to 4:30 p.m. All are encouraged to attend and participate. In addition, the Subcommittee on Class and Derivative Actions is hoping to put together a program for the Spring 2001 meeting in Philadelphia.
EMPLOYMENT LITIGATION SUBCOMMITEE

By Rosemary Daszkiewicz

Building on the incredible success of last year's "Law Firm as Employer" presentation, we are currently developing a seminar focusing on litigation-avoidance in the hiring, retention and termination of associates. We are looking for volunteers to assist us in this effort. We have also committed to providing an article for this publication, and are looking for someone to draft a relatively short (1000-2500 words) article on an employment law issue of interest to general business litigators. So here's your chance for fame and fortune, or at least a nice by-line. If you missed our meeting in Columbus, e-mail the chair for more information.

We will meet at the 2000 annual meeting in New York on Monday, July 10 from 2-3 p.m., location to be determined. To inject a little more excitement into our committee meetings, we have decided to hold a "Committee Forum" on the topic of "Harrassment: How are you advising your clients on conducting investigations, the applicability of the FCRA and what constitutes a harassing environment?" Put it on your calendar and plan to attend and participate in the discussion.

INTELLECTUAL PROPERTY LITIGATION SUBCOMMITTEE

By Mitchell L. Bach and Cindy A. Elliott, Co-Chairs

The Intellectual Property Litigation Subcommittee has been active during the past six months. The Subcommittee met at the Spring meeting in Columbus, on March 24, 2000. We discussed plans for new programs at the Section's December 2000 stand-alone meeting in New York, and the Spring 2001 meeting in Philadelphia. We also discussed current issues in intellectual property litigation, including new cybersquatting laws and court decisions.

Subcommittee Vice Chair, Audrey Millemann, did a wonderful job this year organizing and coordinating our annual submission summarizing recent developments in intellectual property litigation throughout the country. This paper was submitted at the Spring Meeting in Columbus, as part of the Section's Business and Corporate Litigation Committee's annual recent developments program. Subcommittee Co-Chair Cindy Elliott pinch hit at the last minute and delivered an address at that program in Columbus on March 23rd concerning salient points contained in the Subcommittee's written submission.

The Subcommittee's last CLE program, at the 1999 ABA annual meeting in Atlanta, "Lost in Cyberspace: Jurisdiction and the World Wide Web", was well received. We were fortunate to have four very fine panelists: Joan McGivern, ASCAP, who gave background on web sites and some current initiatives in jurisdiction; Ramon Mullerat, Bufete Mullerat - Abogados Asociados, who spoke about the European perspective; Bill Steffin, Lyon & Lyon, discussed case law in the U.S.; and Denis Rice, who talked about the status of laws in various Asian-Pacific countries. This program, which was co-sponsored by the Section's Cyberspace Law Committee, is available on audio tape from the Business Law Section.

The next business meeting of the Intellectual Property Litigation Subcommittee will be conducted at the annual meeting in New York, in July 2000. We look forward to seeing members of the Subcommittee and anyone else interested in joining or working with the Subcommittee. In addition to seeking new members, we are recruiting volunteers to assist us in compiling recent developments in intellectual property litigation in all of the Federal Circuits, to be presented at the next Spring meeting. If you are interested in joining the subcommittee or working on this project, please contact Mitchell L. Bach, Fineman & Bach, P.C., 1608 Walnut Street, Philadelphia, PA 19103; phone 215-893-8708; fax 215-893-8719; email mbach@finemanbach.com.

MEMBERSHIP SUBCOMMITTEE

By Michael J. Crane

The Spring meeting of the ABA's Section on Business Law was held in Columbus, Ohio from March 23-26. Your Committee sponsored several programs, including its annual Review of Developments in Business and Corporate Litigation. This program, which resulted from the outstanding efforts of several Subcommittees, was well attended and extremely informative. A host of recent legal developments were discussed and, as always, the extensive written materials contain something for virtually any business lawyer. The Committee's dinner was also a success. Please make plans to join us in New York this summer for the annual meeting and mark the
evening of Saturday, July 8 on your calendar for the Committee's dinner.

**TASK FORCE ON LITIGATION REFORM AND RULES REVISION SUBCOMMITTEE**

*By Elizabeth S. Stong*

The Task Force on Litigation Reform and Rules Revision met during the Section’s Spring meeting in Columbus to consider the proposed Report and Recommendations Regarding Model Standards For Judicial Selection in State Courts that has been prepared by the ABA’s Standing Committee on Judicial Independence, and to continue its discussions of the litigation issues that are raised by the possibility of multidisciplinary practice.

George Frazza, former Section Chair, and Bill Clark, Chair of the Ad Hoc Committee on State Business Courts joined the Task Force for its discussion of the Model Standards For Judicial Selection. The Task Force was strongly in favor of the proposed standards. The Task Force also made several recommendations for specific changes to the standards, in order to clarify the need for outreach to attract a diverse and highly qualified pool of candidates for judicial positions; to clarify that anonymous comments concerning a candidate should not be accepted; and to clarify that the media should publicize the standards in order to increase the transparency of the selection procedures, while protecting the confidentiality of information concerning a particular candidate. The Task Force’s comments have been reported to the Chair of the ABA’s Standing Committee, and we have been advised that they will be incorporated into the next draft.

The Task Force also continued its discussion of the ABA’s multidisciplinary practice proposal, and in particular, the litigation issues that may arise if proposals to allow multidisciplinary practice are adopted and professionals from different disciplines, such as lawyers and accountants, enter into partnerships together. Jan Helder is coordinating Task Force efforts on this project, and any interested members of the Committee should express their views to him.

**"BUSINESS LAW TODAY" ARTICLES REQUEST**

“Business Law Today” is the national magazine of the Section of Business Law of the American Bar Association. The magazine is published six times a year as a membership benefit for about 55,000 Section members. “Business Law Today” is a magazine, not a law review. We are looking for articles that are enjoyable to read. We publish basic articles directed to business lawyers unfamiliar with a substantive area as well as articles on technical legal issues, but the presentation should be direct and comprehensible. Humor is encouraged, but not required.

Articles run around 2,000 to 3,000 words. Manuscripts must not have been published previously. However, seminar materials that have been revamped into simple, readable articles are acceptable. The complete author guidelines are available through the Business Law Section’s Website, or you can contact me directly at: Heidi McNeil Staudenmaier, “Business Law Today” Editorial Board Member, Snell & Wilmer, Phoenix, (602) 382-6366, hstaudenmaier@swlaw.com.

Future potential "mini-theme" issues include Healthcare Law, Bankruptcy/Consumer Bankruptcy, Internet and Intellectual Property, Privacy and the Internet, Technology and Internationalization, and Class Actions. If you are interested in writing an article on any of these topics, please contact Heidi.
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