FROM THE CHAIR

by Elizabeth S. Stong

Fall is upon us, and that means that our Committee’s Fall Meeting is just around the corner. On November 30 and December 1, Committee members and friends from around the country, including judges, inside, and outside counsel, will gather in New York City for our Fall Meeting at the Roosevelt Hotel. The opening event, on November 30 from 6:00 to 7:45 PM, will be a cocktail reception hosted by Willkie Farr & Gallagher, located at 787 Seventh Avenue, at 51st Street. The reception will be followed by our Committee dinner at Cité, which is across the street from Willkie’s offices at 120 West 51st Street and is one of New York’s most popular restaurants, at 8:00 PM. The Committee meeting and programs will be held on Friday, December 1 from 8:00 AM to 1:00 PM at the Roosevelt Hotel, Madison Avenue at 45th Street.

We have scheduled three programs with outstanding panelists on topics of interest to all business litigators. The programs have been designed with the goal of maximizing the opportunities for informal exchange between audience members and panelists.

At our first program, you will hear from Delaware Vice Chancellor Jack Jacobs, Frank Balotti, and others on the new age of electronic board meetings and other recent developments in Delaware corporate governance law. Recently, significant amendments were made to the Delaware’s General Corporation Law to address the proliferation of electronic communications in the business world and to enable corporations to effectively use electronic communications in various aspects of corporate governance, including annual stockholder meetings. A distinguished panel will discuss these amendments and present their perspective as to whether the technology amendments will change the face of corporate governance, and the potential pitfalls in communicating electronically. Even if you are only an interested observer of the new world of e-commerce and the new economy,
you will find this program both interesting and informative. And if you practice in this area, you can’t afford to miss it.

Our second program will address recent developments in class actions, including the prospects for legislative reform in light of the November election. You will hear from a panel including Justice Myron Steele of the Delaware Supreme Court, Professor John Beckerman of the University of Michigan, Bill Ruane of American Home Products Corporation, and others. Class actions are making headlines in both conventional and unconventional areas of the law, and you will not want to miss this opportunity to hear these experts discuss recent developments and hot topics in securities, employment, and insurance class actions, as well as emerging new strategies, Supreme Court developments, and possible changes to the Federal Rules governing class action practice.

Our third program will address judicial settlement conferences and mediation. Every litigant has participated in judicial settlement conferences, and increasingly, courts and judges are directing parties to participate in mediation and other ADR processes, often conducted by the court itself. How well do these techniques work? When do they work best? What are the most effective ground rules? How can you maximize the likelihood of a good result for your client? A panel including Magistrate Judge Donna Martinez, former Magistrate Judge and nationally-known mediator Kathleen Roberts, and other full-time mediators and inside and outside counsel will engage in a candid discussion of these issues, and you will be equipped for your next judicial settlement conference or mediation to use the process to get a better result for your client.

As for administrative matters, continuing legal education accreditation has been requested for the programs from every state (including California and Pennsylvania) with mandatory continuing legal education requirements for lawyers.

Registration forms for the dinner and the meeting are included in this issue of Network. The cost for the meeting is an extremely reasonable $120.00, and for the dinner an equally reasonable $100.00 (including wine, tax, and tip). A block of rooms at the Roosevelt Hotel has been arranged at $290 per night and may be booked by calling (212) 661-9600.

If you have attended this meeting in the past, you know what an outstanding event it is. If you have not, it is a terrific way to become active and involved with our Committee. A more detailed description of the program, as well as a registration form, is attached. So register today! I look forward to seeing you in New York City.

FEATURE ARTICLES

BUSINESS LAW SECTION APPOINTS FELLOWS

by Heidi M. Staudenmaier

Following an extensive nomination and selection process, the Business Law Section has appointed its Fellows class for 2000-2002. The Business & Corporate Litigation Committee, for the third straight year, is pleased to have one of the Fellows appointed to its group. Patrick T. Clendenen, a member of the Boston office of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, is amongst the five new Fellows. Prior to joining Mintz, Levin, Patrick clerked for the Honorable Ellen Bree Burns of the U.S. District Court for the District of Connecticut. He received his law degree from the Columbus School of Law at Catholic University of America in Washington, D.C. He has been active in the ABA Young Lawyers Division for many years. The Honorable Alvin Thompson will serve as Patrick’s mentor.

Tate London, an attorney with Cairncross Hempelman in Seattle, is a Fellow in the 1999-2001 class previously assigned to the Business & Corporate Litigation Committee. Elizabeth Stong is his mentor. Heidi M. Staudenmaier was in the first class of Fellows (1998-2000) and is now Co-Chair of the Section’s Fellows Program.

The other new Fellows include: La Ronda Barnes, Georgia Supreme Court staff attorney and former Chair of the ABA Young Lawyers Division; Joseph Beach, Rosen, Cook, Sledge, Davis, Cade & Shattuck, Tuscaloosa, Alabama; David Gemunder, Fowler White, Tampa, Florida; and Dale Weppner, Danna McKittrick, St. Louis, Missouri.

The goal of the Fellows program is to give active members of the Young Lawyers Division an opportunity to become involved in the substantive work of the Business Law Section, to develop future leaders of the Section, and to enhance knowledge about the work of the Section...
among members of the Young Lawyers Division. The Fellowship appointment is for two years. To be considered for selection, a person must be a member of the Section of Business Law who is also an active member of the YLD (or an active member who has aged out within the last three years); candidates must demonstrate significant interest and achievement in an area of business law that coincides with the work of a substantive Section Committee.

If you have any questions about the Fellows program or would like additional information concerning nominations for the 2001-2003 Fellows class, please contact Fellows Program Co-Chairs Barbara Mendel Mayden (615/742-6208 or bmayden@bassberry.com), or Heidi M. Staudenmaier (602/382-6366 or hstaudenmaier@swlaw.com).

"REPORT ON THE RIGHT TO CHOOSE YOUR LAWYER ACT"
by John S. Beckerman

Representative Christopher Cox, Republican of California and Chair of the House of Representatives Policy Committee, recently introduced in the House a bill entitled "The Right to Choose Your Lawyer Act." The bill, directed at asserted class-action abuses, would dramatically alter class action practice. According to a summary description of the perceived problem, circulated by Representative Cox's office,

"many [class actions] … are filed and settled in the same day. *** The 'winning' plaintiffs in these settlements often receive little more than a coupon or a discount off their next purchase. The lawyers, on the other hand, receive millions in contingency fees. *** [U]nder the current class action rules, lawyers can use the names of persons without their knowledge to file lawsuits that litigate their rights away in a quick settlement which often results in lawyers leveraging these phantom plaintiffs to earn large fees for their own personal gain."

Representative Cox's bill would: (1) require any lawyer bringing a class action in federal court to provide to the court a written authorization from each class member expressing an intention to join the class action and to be represented by the lawyer or firm, and acknowledging that the member understands the legal consequences of joining the litigation; (3) prohibit lawyers from soliciting potential class members; (4) punish violations by prohibiting infringing lawyers from representing any person in a class action or related action, and imposing fines up to ten percent of the amount in controversy in the action or 25 percent of the maximum potential contingency fee, or $100,000 and would subject any lawyer supplying false information to a court to criminal prosecution; and (5) deprive settlements or judgments in class actions of their binding effects with respect to any person who has not "affirmatively consented" to joining the action as a member of the class.

The following is a letter which was sent by me to Representative Cox concerning his bill:

July 18, 2000

The Honorable Christopher Cox
United States House of Representatives
Washington, D.C. 20515

"The Right to Choose Your Lawyer Act"

Dear Congressman Cox:

Thank you for the electronic copy of your bill entitled “The Right to Choose Your Lawyer Act.” I respectfully suggest that the bill as written is a bad idea and unnecessary for the following reasons:

First, the statement of the supposed “problem” addressed by the bill and the finding that “individuals should be protected from a lawyer suing ostensibly in their behalf, but without their knowledge,” demonstrates serious misunderstanding of the operation and history of class actions in practice in the United States. It is true that a few extreme cases fit your description – “filed and settled in the same day”, “the ‘winning’ plaintiffs … receive little more than a coupon or a discount off their next purchase” – but they are a very small minority of the total number of class actions filed, and of those settled. To suggest that
most class actions are collusive or result in no benefits to plaintiffs or only benefit lawyers is seriously misleading. Settlements of class actions, as you know, require court approval, and the great majority of courts do not approve class action settlements that do not benefit class members. Indeed, most courts view “same day settlements” as indicative of possible collusion.

Similarly, courts do not approve coupon settlements without a demonstration that they confer benefits on their recipients. Sometimes coupons are used when defendants lack cash to distribute to plaintiff class members. Further, judicial approval of coupon settlements that confer small value on class members usually reflects doubts about the strength of plaintiffs’ claims to begin with. So the fact that a class member may receive a coupon in compromise of her legal rights does not mean that she has been damaged or received something disproportionately small for compromising her claims. Your bill thus over-generalizes from a small number of egregious cases that provide a poor basis for legislation and in the process mischaracterizes the great majority of class action lawsuits, broadly implying that most of them lack merit or are frivolous.

Second, as to the specifics of the bill, the requirement that any lawyer bringing an action as a class action provide written authorization from all persons included in the class would effectively end class action practice as we know it, ending mandatory class actions and substituting “opt-in” class actions for mandatory or “opt-out” class actions. Other than to deprive plaintiffs’ lawyers of bargaining power and to strengthen defendants’ hands, why would one want to do this? It would dramatically and effectively end class actions to enforce and protect civil rights. It exhibits hostility towards the enforcement and deterrent purposes of class actions, not only in the civil rights arena, but also in the areas of consumer and environmental protection and mass torts as well.

Third, the requirement that any lawyer bringing a class action provide each class member with an estimate of the dollar amount of anticipated attorneys’ fees together with an explanation of how such fees would be calculated and funded, and an explanation of the relative recoveries that the lawyers and the class member would receive in a settlement or judgment would dramatically raise the expenses the lawyers would have to incur, expenses that would ultimately be passed on to class members so as to diminish their ultimate recoveries even further.

Fourth, ending opt-out and mandatory class actions would deprive defendants of the res judicata effects of class actions settlements and leave companies and individual defendants exposed to the expenses and uncertainties of having to defend multiple repetitive lawsuits arising out of the same cores of operative facts.

Fifth, the prohibition of attorney solicitation of potential clients is unnecessary. All of the states already prohibit attorneys from soliciting clients as a matter of state law. Further, federal courts already have the power under Rule 23, Fed.R.Civ.P., to order such notice as they deem necessary to notify individuals of the effect that class actions would have on their rights.

Sixth, the penalties for violations are draconian and superfluous. Lawyers who willfully provide false information to courts are already subject to both criminal and disciplinary sanctions. The bill is thus another step in the unnecessary federalization of offenses better left to state enforcement processes. Moreover, the provision that any lawyer who violates any provision of the act shall result in disqualification of the lawyer from representation in any federal action based upon or arising out of the subject matter of the action suggests hostility to lawyer-initiated litigation generally, no matter how meritorious, no matter how much the litigation may help others.

It is easy to criticize class actions as inefficient and costly mechanisms for compensation and redistribution of wealth. However, to conclude from a few egregious examples that class actions should therefore be prohibited or dramatically restricted would throw out the baby with the bathwater. It overlooks the many beneficial but unquantifiable reforming and deterrent effects of class actions. It ignores the many benefits that class actions, even though lawyer initiated and lawyer driven, have achieved for Americans in the areas of civil rights, consumer protection, investor protection, and environmental protection, and others.

In conclusion, I suggest that “The Right to Choose Your Lawyer Act” is ill considered and would create more problems than it would solve. It should therefore be withdrawn or abandoned.

Very truly yours,

John S. Beckerman
Visiting Professor
SUBCOMMITTEE REPORTS

EMPLOYMENT LAW SUBCOMMITTEE

by Rosemary Daszkiewicz

The Employment Law Subcommittee plans to hold another roundtable discussion at the Spring meeting of the Business Law Section in Philadelphia at the Philadelphia Marriott Hotel, from March 22-25, 2001. The topic will be the implementation of the NLRB’s new requirement that employers allow all employees to include a witness at meetings that could lead to the employee’s discipline. We’ll compare notes on how our clients are dealing with this change, what the intended and unintended consequences of this rule are to date, and what, if any, steps have been taken to change this rule through legislation. If you’re interested in participating as a speaker (and adding participation at the Section’s Spring Meeting in the “Presentations” portion of your CV) please contact Rosemary Daszkiewicz as 206-892-3213, or rdaszkiewicz@cairnycross.com.

INDEMNIFICATION AND INSURANCE SUBCOMMITTEE

by William D. Johnston

Members of the Indemnification and Insurance Subcommittee will get together November 30 – December 1 during the “stand-alone” meeting of the Business and Corporate Litigation Committee in New York. The next “formal” meeting of the Subcommittee will take place during the Spring meeting of the Business Law Section in Philadelphia, when we will again join forces with the Corporate Counseling and Litigation Subcommittee. At that time, we’ll discuss significant case law, legislative and (with respect to director and officer liability insurance) “market” developments, and we’ll share ideas for future programs and articles. We’ll also participate, as before, in the annual “Review of Developments” program.

A word of special thanks to Jim Holzman, immediate past Chair of the Business and Corporate Litigation Committee, and to Elizabeth Stong, new Chair of the Committee. Thanks to Jim for his outstanding leadership, as he increased Committee membership, enhanced Committee programs, encouraged collaboration with other committees within the Business Law Section, and expanded the Committee’s involvement in thoughtfully commenting on matters important to numerous sections of the ABA. And thanks to Elizabeth for all that she already is doing and will be doing on our behalf. Congratulations to her for putting in place the Committee’s first e-mail list-serve.

The Subcommittee’s list-serve, at the time of this writing, is still in the “development” stage, but (with apology for the delay) I expect that it will be activated very shortly. The list-serve should prove to be of assistance to Subcommittee members and others as a way of sharing recent developments and “practice pointers”, and as a means of communicating with one another regarding what has taken place or will take place during ABA and other meetings. Indeed, we’ve already seen the utility of the Committee list-serve in this regard.

As always, new members of the Indemnification and Insurance Subcommittee are welcome, and don’t hesitate to “audit” one of our Subcommittee meetings on a no-obligation basis! Vice Chair Mike Gassmann and I hope to see you in New York.

INTELLECTUAL PROPERTY LITIGATION SUBCOMMITTEE

by Mitchell L. Bach and Cindy A. Elliott

The Intellectual Property Litigation Subcommittee is again working on a comprehensive survey of recent developments in intellectual property law and intellectual property litigation, throughout the country, as part of the 2001 Committee on Business and Corporate Litigation’s annual recent developments program at the Section of Business Law annual Spring meeting in Philadelphia. If anyone would like a copy of our previous, 173-page submission in April of 2000, please contact Subcommittee Co-Chair Mitchell L. Bach, Fineman & Bach, P.C., 1608 Walnut Street, 19th Floor, Philadelphia, PA 19103 (Telephone No. 215-893-8708; Fax No. 215-893-8719; Email address mbach@finemanbach.com). If anyone would like to volunteer to work with us on this substantial project, please contact Subcommittee Vice Chair Audrey Anne Millemann, Weintraub, Gensheia & Sproul, 11th Floor, 400 Capitol Mall, Sacramento, CA 95814-4407.
The next business meeting of the Intellectual Property Litigation Subcommittee will be conducted at the Spring meeting of the Business Law Section. The exact date, time and location have not yet been announced. We look forward to seeing members of the Subcommittee and anyone else interested in joining or working with the Subcommittee. We shall discuss possible programs to be presented at future ABA meetings.

Subcommittee Co-Chair Cindy A. Elliott has moved her practice to Wolf, Block, Schorr and Solis-Cohen LLP, in Philadelphia, where she continues to specialize in intellectual property law. Cindy can be reached at 1650 Arch Street, 22nd Floor, Philadelphia, PA 19103-2097. Her direct phone number is (215) 977-2049, and her new email address is celliott@wolfblock.com.

PARTNERSHIPS AND ALTERNATE BUSINESS ENTITIES SUBCOMMITTEE

by Vernon Proctor

The Partnerships and Alternate Business Entities Subcommittee remains in search of a vice-chair (non-Delaware lawyer preferred, but beggars can't be choosers). Any interested person should call Vern Proctor at (302) 429-4202. We'd like to develop a program or forum on alternate entity issues (specifically fiduciary duties and dispute resolution) for possible presentation in Philadelphia next spring. Anyone interested in being a panelist should likewise call Vern.

PUBLICATIONS SUBCOMMITTEE

by Heidi M. Staudenmaier

The Publications Subcommittee is in the process of submitting a proposal to the Business Law Section's Publications Board which would entail publication, on an annual basis, of the Survey of Developments in Business and Corporate Litigation. The Survey of Developments has been a traditional and extremely popular program at the Section's Spring meeting. The Survey involves a comprehensive update of the law at a very high level. For example, the 2000 Survey included legal updates and trends for class action law, corporation law, derivative litigation, director liability and indemnification, directors' and officers' liability insurance, employment law, environmental law, financial institutions, federal securities litigation, intellectual property law and partnership law.

Publication of the Annual Survey would permit a wider audience to receive the benefits of the excellent and in-depth information included in the Survey. Additionally, based on the extensive work involved in the effort of compiling the Survey, it provides greater recognition to the multiple authors involved.

The Publications Board will hopefully consider the proposal this Fall and make a decision on how to proceed forward.

“BUSINESS LAW TODAY” ARTICLES REQUEST

by Heidi M. Staudenmaier

“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.
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ABA Business and Corporate Litigation Committee
Fall Meeting
November 30-December 1, 2000
Schedule of Events

November 30, 2000 – Reception and Dinner
6:00 to 7:45 PM  Committee Reception  Willkie Farr & Gallagher
                 787 Seventh Avenue
                 New York, New York

8:00 to 11:00 PM  Committee Dinner  Cité
                  120 West 51st Street
                  New York, New York
                  (across 51st Street from Willkie)

December 1, 2000 – Registration and Meeting
7:30 AM  Registration and Breakfast  Roosevelt Hotel
         Madison Avenue at 45th Street
         New York, New York

8:00 to 9:30 AM  Program:  Developments in Delaware Corporate Governance Law:  Will Bricks and Mortar Become
                 Clicks and Mortar?

9:30-9:45 AM  Break


11:15-11:30 AM  Break

11:30 AM-1:00 PM  Program:  Judicial ADR:  When?  By Whom?  How?  Do We Have To?
American Bar Association Section of Business Law  
BUSINESS AND CORPORATE LITIGATION FALL COMMITTEE MEETING  
The Roosevelt, New York, NY  
December 1, 2000

MEETING REGISTRATION FORM

Name: 
Firm: 
Address: 
City: ___________________________ State: ___________________________ Zip: ___________________________
Telephone: ___________________________ Fax: ___________________________ E-mail: ___________________________
Spouse/Guest: ___________________________

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Are special arrangements needed for the physically challenged? If yes, please explain.

Please list any special dietary needs:

Payment method

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Please return this form and your payment no later than November 17, 2000 to:

Donald Quarles  
American Bar Association • Section of Business Law  
750 North Lake Shore Drive • Chicago, Illinois  60611  
Phone: (312) 988-5564  Fax: (312) 988-5578

(Faxed registrations without credit card payment will not be processed.)

Refunds will be granted for all written requests received by November 24, 2000. No refunds will be granted after this date. Registrations received after November 17, 2000 cannot be processed in advance of the meeting.
American Bar Association • Section of Business Law
Business and Corporate Litigation Committee

Dinner Reservation Form

Cité
120 West 51st Street
(between Sixth and Seventh Avenues)
New York, NY

Thursday, November 30, 2000

Name: ____________________________

Firm: ____________________________

Address: ____________________________

City: __________________ State: __________ Zip: __________

Business Telephone: __________ Fax: __________ E-mail: __________

Accompanied by: ____________________________

Are special arrangements needed for the physically challenged? If yes, please explain.

_____________________________________________________________________

Dinner Fee

_____ Tickets @ $100.00 each = ________

Please indicate special dietary needs: ____________________________

Check made payable to “Paul, Weiss, Rifkind, Wharton & Garrison”

Please return this form and your payment no later than November 17, 2000 to:

Linda R. Daly
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064
Section of Business Law
Application for Membership

I, ____________________________________________, hereby apply for membership in the ABA Section of Business Law (formerly Section of Corporation, Banking and Business Law) and enclose $45.00 as my annual membership dues for the year 2000-2001. I understand that Section dues include $20 for a basic subscription to *The Business Lawyer* for 1 year and $14 for a basic subscription to *Business Law Today* for 1 year; these subscription charges are not deductible from the dues, and additional subscriptions are not available at these rates.

Membership in the American Bar Association is a prerequisite to enrollment in the Section of Business Law.

Please send me an application to join the American Bar Association.

Please enroll me in the Business Law Section's Committee on Business and Corporate Litigation.

I am interested in joining the following Business and Corporate Litigation Subcommittees:

- Alternative Dispute Resolution
- Antitrust & Trade Litigation
- Bankruptcy Litigation
- Business Torts
- Class & Derivative Actions
- Corporate Counseling & Litigation
- Criminal and Enforcement Litigation
- Employment Litigation
- Environmental Litigation
- ERISA & Pension Litigation
- Financial Institution Litigation
- Indemnification & Insurance
- Intellectual Property
- Partnership & Alternative Business Entities Litigation
- Pro Bono
- Securities Litigation
- Membership
- Newsletter
- Programs
- Publications
- Small Firms

Please send information about the Business Law Section's Committee on Business and Corporate Litigation and its subcommittees.

**Complete and return to:**

ABA Section of Business Law
750 North Lake Shore Drive
Chicago, IL 60611

For further information, call (312) 988-5588.

Name ____________________________ Date ________________

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Phone: Business (______) ________________________ Home (______) ________________________

Payment enclosed. (Make check payable to American Bar Association.)

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Please sign and date this application.

NOTE: Membership dues in the American Bar Association and ABA Sections, Divisions and Forums are not deductible as charitable contributions for federal income tax purposes. However, such dues may be deductible as business expenses.
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