FROM THE CHAIR

by Elizabeth S. Stong

In this very busy time for business and corporate litigators, our Committee is actively engaged in addressing a wide range of activities in many settings. In this Letter from the Chair, we will note some of these recent events, and alert you to other events that are scheduled for the coming months. We will also note some significant transitions in committee leadership.

Our Committee presented an outstanding slate of timely programs and subcommittee meetings at the Business Law Section’s Spring Meeting on April 3-6, 2003, in Los Angeles. These programs were accompanied by written materials that will soon be accessible on the Business Law Section’s web site at http://www.abanet.org/buslaw, and materials from one of our programs, the Annual Review of Developments in Business and Corporate Litigation, will soon be available in book form as a Business Law Section publication. Our Committee is also participating in the ABA’s 2003 National conference for the Minority Lawyer, scheduled for June 5-6, 2003, in Philadelphia. And planning is under way for a terrific series of programs and meetings at the ABA’s Annual Meeting on August 9-12 in San Francisco.

Business Law Section Spring Meeting - April 3-6, 2003 - Los Angeles

The Business and Corporate Litigation Committee presented three programs at the Section’s Spring Meeting on April 3-6, 2003, in Los Angeles. Our program offerings began on Thursday morning...
when Abbott Leban chaired a timely and provocative program on “Third-Party Liability in the Post-Enron Environment.” On Thursday afternoon, from 2:00 PM to 5:00 PM, we presented our annual, and ever-popular, “Review of Developments in Business and Corporate Litigation” to a full house. This program provided informative and engaging updates on developments in about a dozen substantive areas that are routinely encountered by both in-house and outside business lawyers, including employment law, ERISA, securities litigation, ethics, corporate governance, insurance and indemnification, bankruptcy, alternative dispute resolution, among others. On Friday morning, we presented a program that was particularly appropriate for our Century City venue at our Committee Forum, chaired by Andrew Halaby, on “Finding the Hidden IP Claims in Business Disputes.” This program offered insights for both the experienced and the novice IP lawyer through a series of real-life hypotheticals that were discussed by in-house and outside counsel who were experienced in the business and legal issues associated with business dealings involving intellectual property assets.

On Saturday morning, Abigail Pessen chaired a program co-sponsored with the Alternative Dispute Resolution Committee on “Xtreme Litigation: Asbestos Claims Test the Legal System”, which explored the asbestos juggernaut that has spread to more than 6,000 companies and already bankrupted more than sixty. Judicial, ADR, and legislative solutions to the crisis were among the topics discussed.

Most of our substantive Subcommittees, from Alternative Dispute Resolution to Securities Litigation, with more than a dozen in between, also met at the Spring Meeting. Newcomers should know that these are open meetings, and as experienced Committee members are well aware, Subcommittee meetings are where most of the program and publication ideas of the Committee originate. Many Subcommittees welcomed new members into their leadership at or shortly after the Spring Meeting, including:

- Mike Flynn as Co-Chair of the Task Force on Litigation Reform and Rules Revision;
- Steve Poss as Co-Chair of Securities Litigation Subcommittee;
- Abigail Pessen as Co-Chair of the Alternative Dispute Resolution Subcommittee;
- Andy Halaby as Chair of the Intellectual Property Subcommittee;
- Bob Gegios as Chair of the Antitrust and Trade Litigation Subcommittee;
- Jay Eisenhofer as Vice Chair of the Class Actions and Derivative Suits Subcommittee
- Bret Cohen as Vice Chair of the Employment Litigation Subcommittee;
- Rick Lambert as Vice Chair of the Business Torts Subcommittee; and
- Pat Clendenen as Vice Chair of the Class and Derivative Actions Subcommittee.

These new Committee leaders, and a full roster of all Subcommittee leaders, are listed in this issue of Network, and are or will soon be listed on the Business and Corporate Litigation Committee web page at http://www.abanet.org/buslaw/bclit/home.html. Please feel free to contact any of them, or me, by e-mail at any time before, during, or after any of our Committee activities, including the Spring and Annual Meetings to learn how you can become involved.

Finally, and as always, we gathered for an open Committee dinner, held at LA Farm, and new members, non-members, and old-timers alike contributed to a delightful, delicious, and sold-out event.
National Conference for the Minority Lawyer - June 5-6, 2003 - Philadelphia

The Business and Corporate Litigation Committee has played a significant role in the planning and program for the upcoming National Conference for the Minority Lawyer, scheduled for June 5-6, 2003, in Philadelphia. This Conference, which is sponsored jointly by the ABA’s Business Law Section and Commission on Racial and Ethnic Diversity in the Profession, will be a unique program for litigators, business lawyers, in-house counsel, and government lawyers. The Conference will present programs addressing both recent developments and practical skills for lawyers in all of these practice settings. Our Committee will present a reprise of our Spring Meeting 2003 "Review of Developments in Business and Corporate Litigation," moderated by Mitchell Bach and Jay Dubow. Keynote speakers include Robert J. Grey, Jr., the first minority lawyer elected to chair the ABA House of Delegates and the second African American to serve as President of the ABA beginning in August 2004.

ABA Annual Meeting - August 8-12, 2003 - San Francisco

It is not too soon to make your plans to attend the ABA Annual Meeting in San Francisco, scheduled for August 8-12, 2003. The Section will be based at the Fairmont Hotel, on Nob Hill -- a wonderful location in a delightful city. Veterans of ABA Annual Meetings know that San Francisco -- my home town -- always provides a terrific setting for programs and events. Our Committee is planning a full schedule of programs, subcommittee meetings and mini-programs, and as always, our traditional Committee dinner at a splendid but to-be-determined location. You will not want to miss our featured program, a two-part litigation and corporate crisis management survey program chaired by Bob Gegios entitled “When The Going Gets Tough: Advising The Company In Crisis.” Part I of this program is scheduled for Saturday, August 9, from 2:30 to 4:30 PM, and Part II is scheduled for Sunday, August 10. At our Committee Forum on Monday, August 11, at 8:00 to 9:45 AM, we will present a program on the latest developments in electronic discovery, chaired by Mike Flynn and Bruce Jameson.

On Saturday, August 9, in the afternoon, we are also planning a hand’s-on pro bono project, likely at a domestic violence shelter, to be conducted jointly with the Young Lawyers Division and sponsored by our Pro Bono Subcommittee. This is the third year that we have undertaken this project, co-chaired by Patrick Clendenen and La Ronda Barnes, and we hope that it will become a regular feature of your annual meeting plans. So if you can spare an afternoon during the busy Annual Meeting, bring work clothes and come join us as we lend a hand in public service to those who are truly in need. Please contact me, Patrick, or La Ronda if you have any questions about participating in this effort.

Finally, subcommittees in almost twenty substantive areas including two newer subcommittees, Securities Arbitration and Appellate Litigation, as well as ADR, Antitrust and Trade Litigation, Bankruptcy, Business Courts, Business Torts, Class and Derivative Actions, Corporate Counseling and Litigation, Criminal and Enforcement Litigation, Employment Litigation, Environmental Litigation, ERISA and Pension Litigation, Financial Institution Litigation, Indemnification and Insurance, Intellectual Property, Partnerships and Alternative Business Entities, Pro Bono, and Securities Litigation, as well as our Administrative Subcommittees, will meet from Saturday to Monday, and mini-programs will be offered by many. Subcommittee meetings are an outstanding way for newcomers to the Committee to become involved.

Publications and Other Projects

On the publications front, our Committee continues to be well represented in Section publications by the book edition of the Annual Review of Developments in Business and Corporate Litigation, a joint effort of all of our Subcommittees and the Section Publications Board. The depth and breadth of this 2002 edition of this publication is remarkable, and at some 885 pages...
addressing nineteen subjects from alternative dispute
resolution law to securities litigation, it is a splendid
reference for the generalist and expert alike. If you
are looking for a handy desk reference on a wide
range of topics, you should definitely consider this
volume for your bookshelf. One recent reviewer
described the book this way:

“The book lives up to its title; it is truly a review
of corporate and business developments in
2001, with summaries of cases, enacted and
proposed legislation and trends in the law.
There are even discussions on how these
developments will likely affect us in 2002 and
beyond.

* * *

“Like the 2001 edition, the latest volume,
comprised of 885 pages, will prove useful to
the generalist and the specialist alike, as well
as to the litigator and non-litigator. It is a must
have for any serious corporate and business
law practitioner.”

New Jersey Lawyer (December 2002) at 68
(emphasis added).

Thanks are due to Heidi Staudenmaier, chair
of the Publications Subcommittee, for her tireless
efforts in compiling the Review of Developments, and
to all of the authors, too numerous to list here, for
their contributions to this work. The 2003 edition is on
its way!

Leadership Transitions

After nearly three years as Committee Chair,
I will be finishing my term at the close of the ABA
Annual Meeting in August. I could not be more
pleased to inform you that Mitchell Bach has been
designated as the next Chair of the Business and
Corporate Litigation Committee, and that Peter Walsh
has been appointed as Vice Chair. Mitchell, a partner
in Fineman & Bach, PC, in Philadelphia, has been a
leader on our Committee for many years, and has
been particularly active in our business courts
activities. Pete, a partner in Potter Anderson &
Corroon, has taken a leading role in many Committee
efforts, including in particular our writing and program
offerings in the corporate governance area. They
have been, and will continue to be in these new roles,
outstanding contributors and leaders for our
Committee.

We look forward to seeing you in
Philadelphia in June, and in San Francisco in August!

NEWS

2003 JEAN ALLARD GLASSCUTTER
AWARD PRESENTED TO ELIZABETH S.
STONG

At the Business Law Section Luncheon
during the recent Spring Meeting in Los Angeles, the
12th Annual Jean Allard Glasscutter Award was
presented to Elizabeth S. Stong of New York City.
This award recognizes a woman who has achieved
outstanding success in breaking through barriers in
the practice of business law.

Stong, an attorney with Willkie Farr &
Gallagher, currently serves as Chair of the Business
and Corporate Litigation Committee, Chair of the
Women's Business Law Network, Section Liaison to
the ABA Commission on Women in the Profession, a
Section Delegate to the ABA House of Delegates and
an Ad Hoc Member of the Section’s Council
Committee on Finance.

Congratulations, Elizabeth!
UPDATE ON DIRECTOR LIABILITY, ADVANCEMENT AND INDEMNIFICATION, AND D&O INSURANCE DEVELOPMENTS: THE NEED FOR BALANCED PROTECTION, TO THE BENEFIT OF ALL

by William D. Johnston, Michael L. Gassmann, Janet R. McFadden*

During the recent Spring Meeting of the Business Law Section in Los Angeles, the update on director liability, advancement and indemnification, and director and officer liability insurance developments was summed up as follows: All signs point to the continuing importance, for all concerned, of (i) limitation of director liability to the extent permitted by law, (ii) advance indemnification of defense expenses and end-of-the-matter indemnification of directors, officers and non-officer employees or others, where liability is asserted, and (iii) effective D&O insurance coverage, where advancement and/or indemnification cannot or will not be provided by the company. Each of these three means of protection is addressed below.

Limitation of Director Liability

With regard to limitation of director liability, or limited “exculpation” pursuant to Section 102(b)(7) of the Delaware General Corporation Law (the “DGCL”), recent case law developments arguably have demonstrated a weakening of the defense in two respects.


Recent decisions also have emphasized the need to assert an exculpation defense on a director-by-director basis. See In re The Student Loan Deriv. Litig., supra; In re The Limited, Inc. Shareholders Litig., supra. Trial court decisions have expressed reservations as to whether even an indisputably independent director can obtain dismissal of claims before the fairness of a transaction is determined. See In re The Student Loan Corp. Deriv. Litig., supra; Orman v. Cullman, supra; In re The Limited, Inc. Shareholders Litig., supra.

Finally, courts seem to be favoring consideration of exculpation defenses on at least a fuller pre-trial record — in particular, on a motion for judgment on the pleadings or for summary judgment, rather than by way of the previously typical Rule 12(b)(6) motion to dismiss. See, e.g., Orman v. Cullman, supra (following procedural guidelines of Malpiede v. Townson, 780 A.2d 1075 (Del. 2001) and Emerald Partners III to convert consideration of the pending motion to dismiss from a Rule 12(b)(6) standard to a Rule 56 summary judgment standard where the Section 102(b)(7) charter provision had not been incorporated into the plaintiff’s complaint or the defendant’s answer); but see In re The Limited, Inc. Shareholders Litig., supra (effectively rejecting Section 102(b)(7) portion of dismissal motion without converting to motion for summary judgment); Goldman v. Pogo.com Inc., supra (same), California
Public Employees Retirement System v. Coulter, supra (not expressly applying summary judgment standard to analysis of pending Rule 12(b)(6) dismissal motion directed to Section 102(b)(7) defense, but referring to what the surviving claims “may implicate” and finding a need for “further development of the record”).

Second, in terms of substantive law, cases in the increasingly important “director oversight” area have addressed what level of “sustained or systematic failure of the board to exercise oversight” (in the words of In re Caremark Int’l, Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996)) may fall outside the protection of an exculpatory charter provision -- whether that conduct is viewed as “constructive bad faith,” “reckless indifference,” or “conscious disregard.” See In re: Abbott Laboratories Deriv. Shareholders Litig., 293 F.3d 378 (7th Cir. 2002), opinion withdrawn, 299 F.3d 898 (7th Cir. 2002); Salsitz v. Nasser, 208 F.R.D. 589 (E.D. Mich. 2002); see also Charles Hansen, In re Abbott Laboratories: The Seventh Circuit Strikes Out, Corporation Vol. LXXIII No. 23 (Dec. 2, 2002). Of particular note has been a decision of the Delaware Court of Chancery, Johnson v. Shapiro, C.A. No. 17651, 2002 Del. Ch. LEXIS 122, Lamb, V.C. (Del. Ch. Oct. 18, 2002). There, the Court held that a “reckless” failure to disclose material information to shareholders, if proved, would fall outside an exculpatory provision, the Court apparently equating reckless conduct with conduct “not in good faith.”

Directors and prospective directors of Delaware corporations can continue to take heart from the assurance of the Delaware Supreme Court in Malpiede v. Townsend and Emerald Partners III that, “if a shareholder complaint unambiguously asserts only a due care claim, the complaint is dismissible once the corporation’s Section 102(b)(7) provision is properly invoked.” See Orman v. Cullman, 794 A.2d at 39 (quoting Emerald Partners III, 787 A.2d at 91, with emphasis in the original). But, empirically, the observation is inescapable that none of the decisions of note from 2002 resulted in pre-trial dismissal based upon an exculpatory charter provision, making even that much more important broad advancement and indemnification provisions and access to meaningful D&O liability insurance coverage.

And still to be seen, of course, is the full effect of the Sarbanes-Oxley Act of 2002, and any related SEC rule-making, on directors and officers of public companies. Commentators have suggested, for example, that violations of the Act may be viewed as de facto breaches of fiduciary duty. Dan A. Bailey and J. David Washburn, The Effect of the Sarbanes-Oxley Act on Directors and Officers, The Sarbanes-Oxley Act of 2002 with Analysis (2002).

**Advancement and Indemnification**

Turning to the area of advance indemnification of defense expenses, or “advancement,” and end-of-the-matter indemnification, the most significant case law development during 2002 was the decision of the Delaware Supreme Court in Stifel Financial Corp. v. Cochran, 809 A.2d 555 (Del. 2002). In that case, the Supreme Court addressed three important issues of first impression. First, the Court concluded that the statute of limitations for an indemnification claim is three years. Second, the Court held that there is no pre-suit “demand” requirement in connection with an indemnification claim (unless the bylaws include such a requirement). Finally, the Court confirmed the ability of a successful indemnification (or, presumably, advancement) claimant to be made whole by recovering prosecution expenses, or “fees for fees,” at the end of the case, where bylaws provide that indemnification is to be provided “to the full extent authorized by [Delaware] law.”

Also significant last year were cases which emphasized the continuing importance of the “official capacity” showing that an advancement or indemnification claimant must make and the “standard of conduct” showing that an indemnification claimant must make unless the claim is for mandatory indemnification. See In re: William L. Miller, 290 F.3d 263 (5th Cir. 2002) (capacity showing); Perconti v. Thornton Oil Corp., C.A. No. 18630-NC, 2002 Del. Ch. LEXIS 51, Noble, V.C. (Del. Ch. May 3, 2002)


And again, a review of developments in this area would not be complete without touching on the potential impact of the Sarbanes-Oxley Act. More specifically, an issue raised by practitioners has been whether Section 402 of the Act, which prohibits personal loans to directors or officers, can be viewed as prohibiting the advancement of defense expenses to directors or officers. In short, the issue seems to break down to three sub-issues: (i) Is advancement, subject to a contingent obligation to repay, an “extension of credit” or a “loan” under Section 402? (ii) If so, is the advancement “personal,” if the “official capacity” requirements for advancement have been satisfied and/or the advancement is viewed as being in the “best interests of the corporation”; and (iii) Finally, even if the advancement may be viewed as “personal,” is it appropriate that Section 402 would pre-empt state law governing the internal affairs of corporations when Section 402 does not expressly address advancement, when advancement is expressly addressed by Section 145 of the DGCL and by implementing corporate documents, and when state corporation law typically reflects a policy of attracting and retaining highly-qualified persons to serve as directors and officers? See, e.g., Sarbanes-Oxley Act Interpretive Issues Under §402 – Prohibition of Certain Insider Loans, at item 22j. (Oct. 15, 2002 issues outline prepared by twenty-five law firms); see also E. Norman Veasey, The Ethical and Professional Responsibilities of the Lawyer for the Corporation in Responding to Fraudulent Conduct by Corporate Officers or Agents, 70 Tenn. L. Rev. 1 (2002) (Chief Justice of the Delaware Supreme Court stresses the need for a balanced judicial and legislative approach in responding to challenged conduct of corporate directors and officers); Leo E. Strine, Jr., Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle, 57 Bus. Law 1371 (2002) (Vice Chancellor of the Delaware Court of Chancery emphasizes the current and future need to articulate and enforce standards of fiduciary conduct expected of corporate directors, while balancing “the equally important public interest in attracting and retaining high-quality directors”).

Section 402 of the Sarbanes-Oxley Act, unlike other sections of the statute (such as Sections 302 and 307) does not expressly contemplate SEC rule-making on this point, and, to date, there has not been any guidance from the SEC in this regard. Of note, however, is a recent advancement decision of the Delaware Court of Chancery, Fasciana v. Electronic Data Systems Corp., C.A. No. 19753, 2003
Del. Ch. LEXIS 19, Strine, V.C. (Del. Ch. Feb. 27, 2003) where, in footnote 50, the Court states:

A §145 advancement is best thought of as credit advanced to a director, officer, employee, or agent of a corporation. See Advanced Mining Sys., Inc. v. Fricke, 623 A.2d 82, 84 (Del. Ch. 1992).

Thus, it may be that the three sub-issues described above are being narrowed to two.

Finally, important for practitioners to consider is the January 20, 2003 “Ashcroft Memo,” a revised version of the “Holder Memo.” In describing the factors to be considered by federal prosecutors in determining whether to seek charges against a company, the Ashcroft Memo views the advancement of defense expenses to “culpable employees and agents” as, inferentially, a failure on the part of the corporation to cooperate which can weigh in favor of a “corporate prosecution.” See http://www.usdoj.gov/dag/cff/corporate_guidelines.htm, at 1, 5-6. A footnote in the Ashcroft Memo states that such an inference should not be drawn where the advancement is required by governing state law. Id. at 10n.4 (“Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation’s compliance with governing law should not be considered a failure to cooperate.”). But query whether “mandatory advancement” bylaw provisions, adopted pursuant to the permissive, enabling provisions of state corporation laws such as DGCL Section 145(e), will come within the safe harbor of the footnote. And, if not, query how a company is to meaningfully make the “culpability” determination in response to an advancement request, when the very purpose of advancement has been to avoid such an early determination (with the understanding that any expenses advanced will be repaid if it is later determined that the claimant is not entitled to indemnification). Moreover, to what extent would the results of such a “culpability” determination later be discoverable by the government and/or by shareholder plaintiffs?

The focus shifts, then, to what can be of critical importance: access to adequate D&O insurance coverage.

D&O Insurance

Case law trends have reflected a continuing evolution of the extent to which D&O insurers’ obligations are affected when the company involved is in bankruptcy. More specifically, cases have continued to wrestle with whether policies and/or policy proceeds should be viewed as property of the bankruptcy estate, often triggering a motion for relief from the automatic stay. Compare In re Cybermedica, 280 B.R. 12 (Bankr. Mass. 2002) (D&O policy proceeds are assets of the bankruptcy estate where the policy also provides entity coverage, but relief from the automatic stay is appropriate to permit payments to or on behalf of directors and officers in the absence of claims against the entity) with G-1 Holdings, Inc. v. Reliance Ins. Co., 278 B.R. 725 (Bankr. N.J. 2002) (coverage action under D&O policy is not a core proceeding because the proceeds of the D&O policy were not shown to be assets of the bankruptcy estate).

As a practice pointer, inclusion of a “priority of payments” clause in a D&O policy will afford greater protection to directors and officers (with the payment of “unindemnifiable loss” first, prior to reimbursement of the company for amounts paid by way of advancement or indemnification).

Conseco, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA, Marion County (Indiana) Circuit Court (Dec. 31, 2002) is a decision reflecting a trend in the case law to the effect that coverage may be unavailable for awards/settlements where the damages sought are restitutionary in nature, sometimes described as the disgorgement of “ill-gotten gains.” A similar decision was reached the previous year in Level 3 Communications, Inc. v. Federal Ins. Co., 272 F.3d 908 (7th Cir. 2001). Conseco addressed many of the arguments which had been raised in intervening efforts to limit or distinguish Level 3. Read literally, Conseco seems to stand for the proposition that there will not be
coverage for damages and settlements in connection with Section 11 and 12 claims against an issuer of securities.

With regard to “market”-related developments, the current theme seems to be “Getting Less for More.” Five trends are evident on the part of D&O insurers, which have faced unprofitable periods over the last few years and which project less-than-robust profits for the near-term future. First, premiums for D&O insurance policies have increased substantially (from 50% to as much as 500% or 1,000%). Second, individual policies are being written with lower limits, requiring companies acquiring or renewing D&O insurance to arrange for a greater number of insurers in order to assemble the company’s insurance “program.” Third, insurance programs are reflecting lower aggregate limits. Fourth, coverage terms have become more restrictive, with “entity” coverage either unavailable or, if available, included subject to a co-insurance payment requirement. Relatedly, coverage for directors and officers sitting on the boards of other entities at the company’s request simply may be unavailable. Finally, carriers are pursuing more rigorous underwriting in the application and renewal processes. Potential insureds can expect more probing and exacting reviews of the company’s business operations and its board and committee structures, as well as a detailed examination of certifications of financial reports filed with the SEC pursuant to the Sarbanes-Oxley Act. The enhanced underwriting obviously will have a bearing on the information to be provided to insurers and the length of the application or renewal processes. In addition, however, it is important for insureds and potential insureds to be aware of an increasing willingness on the part of carriers to later seek rescission of policies when accurate information has not been provided at the underwriting stage.

Conclusion

In summary, the less protection that is afforded by exculpatory charter provisions, advancement and indemnification provisions, and director and officer liability insurance coverage, the fewer highly-qualified persons who will be willing to become or remain corporate directors and officers, and the fewer value-generating risks that those who do become and remain directors and officers will be willing to take. All of which brings us back to where we started: the importance -- from the director’s and officer’s perspective and, presumably from the company’s and shareholders’ perspective as well -- of the tripartite protection afforded by balanced and effective limitation of liability, advancement and indemnification, and D&O insurance coverage.

“William D. Johnston practices in the Wilmington, Delaware office of Young Conaway Stargatt & Taylor, LLP. Michael L. Gassmann and Janet R. McFadden practice in the Washington, D.C. office of Drinker Biddle & Reath LLP. For a more detailed discussion of the subjects addressed in this article, please see Chapters 9 and 10 of the ABA Business Law Section’s forthcoming Annual Review of Developments in Business and Corporate Litigation.
Harley from Berkeley, defense counsel Joe O’Hara from Chicago, and – for the ADR perspective – CPR Institute for Dispute Resolution president Tom Stipanowich from New York, debated the ABA’s recommendations and pending legislation in the Congress, bankruptcy proposals, and potential uses of ADR in seeking a solution to the “elephantine mass” of litigation. The discussion was lively and informative for business lawyers (whose clients are likely to find themselves defendants in the “unrolling carpet” of asbestos claims).

**BANKRUPTCY LITIGATION SUBCOMMITTEE**  
by William K. Zewadski and Philip S. Warden

At the Spring Meeting, the Bankruptcy Litigation Subcommittee again met jointly with the Creditors’ Rights Subcommittee. Phil Warden of San Francisco gave a detailed presentation of "Drafting Technology Licenses in a Down Market - Protecting Licensees from the Bankruptcy or Business Failure of Licensors," complete with a research paper and, more especially, extensive forms that may be invaluable to the practitioner. The novel issues of a technology license in the era of "dot coms go bust" made the program especially relevant.

Our next meeting will be held in San Francisco at the ABA annual meeting at 2:00 p.m. on August 9, 2003, and it is hoped all will take note of the time for planning your meeting agenda. At that time several topics will be discussed, including an update on the famous and long-running Lawrence case, involving the parameters of the contempt power of the bankruptcy court and the jailing for an extended period of a debtor charged with sheltering assets offshore.

Joining the Bankruptcy Litigation subcommittee is as simple as being a member of the ABA and emailing to co-chair, William Zewadski, Tampa, your interest in joining. Send your email to z@trenam.com.

**BUSINESS COURTS SUBCOMMITTEE**  
BY Mitchell L. Bach

The Business Court Subcommittee has been quite active during the past six months. This activity is directly related to the increased level of interest in specialized business courts and commercial litigation programs throughout the country.

We continue to support attorneys, judges and local bar leaders who are interested in launching new specialized business courts or commercial litigation programs. We currently are assisting such efforts in Detroit, Michigan and Orlando, Florida. As a result of such efforts in Maryland, the Maryland Business and Technology Case Management Program recently went into effect, on January 1, 2003.

We continuously monitor such efforts throughout the United States; and committee members participate in the update and circulation of a nationwide survey regarding attempts to establish business courts and specialized commercial litigation programs, in virtually every state. We currently intend to republish this survey in "The Business Lawyer," along with an article which summarizes these developments and advocates new efforts in other locations where we perceive a need for better methods of handling commercial litigation.

As a result of these activities, we were asked to participate in a meeting in Washington, D.C., on March 11, 2003, with the Chief Justice of the Supreme Commercial Court of the Russian Federation and other representatives of that commercial court in Russia. This Russian delegation was interested in obtaining current information about business courts in the United States, and was exploring ways to improve their own commercial court which is well-established and fairly advanced.

At the Spring Meeting, members of the Business Courts Subcommittee met. This meeting attracted several new members and is expected to result in new business court activity in several states.
The Business Court Subcommittee also has been asked to participate in a Symposium on Business Courts, on November 7, 2003, to be sponsored jointly by the staff of "The Business Lawyer" and the University of Maryland School of Law. We intend to submit written materials for that symposium, and to provide speakers on subjects ranging from jurisdiction, procedure, judicial expertise and results of newly-created business courts.

The Business Courts Subcommittee welcomes new members. If you are interested in participating or would like further information regarding the committee’s activities, please contact Mitchell L. Bach, Committee Chair, at Fineman & Bach, P.C., 1608 Walnut Street, 19th Floor, Philadelphia, PA 19103; 215-893-8708 (phone), 215-893-8719 (fax); mbach@finemanbach.com.

CLASS AND DERIVATIVE ACTIONS SUBCOMMITTEE
by Susan T. Spence

The United States Supreme Court has adopted extensive revisions to Fed. R. Civ. P. 23, the federal class-action rule. The Court submitted the amendments to Congress on March 27, 2003; the amendments will become effective December 1, 2003 unless Congress rejects, defers, or modifies the amendments.

The most significant revision to Rule 23 expressly authorizes a court to reject a proposed settlement of a class certified pursuant to Rule 23(b)(3) unless class members have a second opportunity to opt out of the action. Under the new rule, the district courts will have discretion to require a second opt-out opportunity before approving a settlement.

Other new rules concerning class settlements require notice “in a reasonable manner” to all class members who would be bound by the settlement; require settlements to be “fair, reasonable, and adequate;” require parties to file a statement identifying any agreements made in connection with a proposed settlement; and provide that any class member may object to a proposed settlement and that such an objection may be withdrawn only with the court’s approval. These rules apply only to settlement of claims of certified classes.

The new rules also set forth procedures for appointing class counsel, including criteria that courts must consider in appointing class counsel. A new provision explicitly states that a court may award attorney’s fees to class counsel only when authorized by law or by agreement of the parties, and the award must be a “reasonable” amount. The rule does not address whether fees should be based on a percentage of recovery or calculated by the lodestar method.


CORPORATE COUNSELING AND LITIGATION SUBCOMMITTEE
by Peter J. Walsh, Jr.

After a brutally cold winter in the Northeast, Los Angeles proved to be an inviting and hospitable location for our Spring Meeting. Once again, the Corporate Counseling and Litigation Subcommittee met jointly with the Indemnification and Insurance Subcommittee. Although our time slot for the meeting was not ideal, attendance at the meeting was good, and we enjoyed an informative discussion of recent corporate developments, as well as developments and trends in the D&O insurance market. Members of our Subcommittee also participated in the ever-popular "Review of Developments in Business and Corporate Litigation" on Thursday afternoon. We will again meet jointly with the Insurance and Indemnification Subcommittee at the annual meeting in San Francisco. Tentatively, that meeting is
scheduled for August 10, 2003 at 10:00 a.m. We look forward to seeing you there.

CRIMINAL AND ENFORCEMENT LITIGATION SUBCOMMITTEE

by Jay A. Dubow

At the Spring Meeting, Subcommittee Co-Chair, Jay Dubow, was a member of the Corporate Crisis Panel at the "Review of Developments in Business and Corporate Litigation." The Subcommittee’s written presentation focused on criminal and SEC enforcement litigation. For next year, we would like to include other regulatory litigation. If you are interested in authoring such a section of the materials, please contact Jay Dubow at 215-977-2058, jdubow@wolfblock.com.

EMPLOYMENT LITIGATION SUBCOMMITTEE

by Bret A. Cohen

At the Spring Meeting’s Review of Developments presentation, Rosemary Daszkiewicz presented a well-received update regarding federal employment cases. In short, discrimination cases continued to lead the Supreme Court’s employment law docket in 2002. Three cases were decided -- all of which continue the Court’s trend towards narrowly construing the ADA. First, in Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002), the Court concluded that a person is disabled only if his/her medical impairment impacts his/her personal life as well as his/her work life. Similarly, in US Airways v. Barnett, 535 U.S. 391 (2002), the Court allowed an employer-created seniority program to trump an employee’s request for an accommodation, which included a transfer to a position the employee did not have sufficient seniority to obtain. Finally, in Chevron USA, Inc. v. Echazabal, 536 U.S. 73 (2002), the Court expanded the “direct threat standard,” the doctrine that allows a company to treat differently disabled workers who pose a direct threat to others (or even to the employee himself/herself) in the workplace. The Court essentially ruled that an employer did not discriminate when it refused to hire an employee with a medical condition the company reasonably believes would be significantly worsened by exposure to the company’s chemical-intensive workplace.

Also at the Spring Meeting, the Subcommittee met to discuss future projects and programs. The Subcommittee decided to put together a program for next year’s Spring Meeting. The prevailing wisdom was that the program would best serve the Business Law Section if it was designed for corporate lawyers dealing with practical, every day employment matters. This program ideally would include a complimentary cross-section of members from other subcommittees to both better the program and to encourage attendance.

If you have any questions or comments, please contact either Rosemary Daszkiewicz at rdaszkiewicz@cairncross.com or Bret Cohen at bcohen@pepehazard.com.

FINANCIAL INSTITUTION LITIGATION SUBCOMMITTEE

by Marsha G. Rydberg

During a well-attended meeting at the Spring Meeting, the Subcommittee considered recent case law affecting banks and other financial institutions. Among the cases of interest was the Bank of America v. City and County of San Francisco case, 309 F.3d 551 (9th Cir. 2002). As a consumer protection measure, the City and County enacted ordinances prohibiting financial institutions from charging fees to non-bank customers for use of their ATMs. The Ninth Circuit overturned the ordinances on federal preemption grounds, rejecting the governments’ claims that the Electronic Funds Transfer Act authorized their acts.

In a far-reaching RESPA decision affecting mortgage brokers, title insurance agents and others in
the real estate settlement business, the Eleventh Circuit effectively reversed its previous opinions as a result of a changed HUD regulation. Heimmerman v. First Union Mortgage Corp., 305 F.3d 1257 (11th Cir. 2002). The Subcommittee commented on the extraordinary occurrence of an agency regulation essentially overruling prior federal appellate court precedent. Given the judicial deference accorded to agency determinations within their field of regulation, this counter-intuitive situation, nonetheless, is consistent with sound judicial policy.

Other recent decisions relevant to financial institutions were considered and discussed among Subcommittee members, who contributed additional insights for the group. The Subcommittee provides a forum for questions, opinions, insights and exchange of experience and information for any attorney who litigates for or against financial institutions. Everyone is welcome to participate. The next meeting of the group is scheduled for Monday, August 11, at 10:30 a.m. at the ABA Annual Meeting in San Francisco.

INDEMNIFICATION AND INSURANCE SUBCOMMITTEE
by William D. Johnston

During the Spring Meeting, members of the Indemnification and Insurance Subcommittee participated as authors and presenters in the “Review of Developments in Business and Corporate Litigation” program sponsored by our Committee. The program was well-attended and, as always the “Phone Book” of reference materials seemed to be a big hit.

Also during the Spring Meeting, members of the Subcommittee met jointly with members of the Corporate Counseling and Litigation Subcommittee. I reported on director liability, indemnification and advancement developments, and Janet McFadden, colleague of vice chair Mike Gassmann (who was sidelined with the flu), reported on D&O liability insurance developments. We were pleased to have numerous folks attending the joint meeting for the first time.

Case law, legislative and insurance “market” developments addressed during the Review of Developments program and during the joint subcommittee meeting are described in the article appearing elsewhere in this issue of "Network."

The Indemnification and Insurance Subcommittee will next meet this August during the Annual Meeting of the ABA in San Francisco, and we will again meet jointly with the Corporate Counseling and Litigation Subcommittee. New members (and visitors) are always welcome, and questions/comments/program ideas/ideas for articles are always appreciated. Mike and I look forward to seeing you in San Francisco!

INTELLECTUAL PROPERTY SUBCOMMITTEE
by Andrew F. Halaby

Our Committee Forum, “Finding the Hidden IP Claims in Business Disputes: A Litigation Perspective,” was very well received by the audience at the Spring Meeting. Chris Littlefield, the Dial Corporation’s general counsel, Susan Reardon, KCET-TV’s general counsel, and intellectual property specialist Chuck Hauff of Snell & Wilmer provided interesting insights on the role that intellectual property causes of action can play in garden variety commercial litigation.

Our Subcommittee wants to hear from you about how it can meet your needs regarding intellectual property issues. We are very interested in new members and new activities, particularly as we plan for the August meeting in San Francisco. Please feel free to contact Andy Halaby at (602) 382-6277 or ahalaby@swlaw.com should you wish to join the subcommittee, or simply to share any thoughts you may have for the subcommittee’s future activities or programs.
At the most recent Spring Meeting, the Pro Bono Committee recapped its accomplishments for the year and planned for the future. First, as reported previously, the Section's Pro Bono Committee and your Pro Bono Subcommittee held its second successful Public Service Project at last year's ABA Annual Meeting at the District of Columbia's Community Action Group, a local institution devoted to providing comprehensive rehabilitative social services to disenfranchised citizens, including the homeless, unemployed, and substance abusers. The Pro Bono Subcommittee, including Kendall Butterworth and Dale Weppner, the Pro Bono Committee, including Kathleen Hopkins (Chair) and Peter Carson (Vice Chair), our very own Business Law Section Fellow, Suzanne Gilbert, and the National Conference of Women Judges are in the process of planning the next public service project. Please join us for this fun and meaningful tradition in San Francisco at the 2003 ABA Annual Meeting on Saturday afternoon, August 9. Details will be announced this Summer.

Second, the Pro Bono Subcommittee authored its first addition to the Annual Review of Developments in Business and Corporation Litigation. Patrick Clendenen and Lisa Glahn wrote Chapter 20, entitled "Pro Bono," which focuses on developments in non-profit litigation and governance.

Third, the Pro Bono Subcommittee co-sponsored and co-organized a fantastic Pro Bono Committee CLE program at the BLS Annual Meeting in Los Angeles, entitled "Business Law Pro Bono and Public Service: Setting Up a Model Program and Adding to the Bottom Line." Speakers included Esther Lardent, President, Pro Bono Institute; Dennis White, General Motors Corporation; Peter Gilhuly, Latham & Watkins; Tom Samoluk, John Hancock Financial Services; and Peter Carson, Cooley Godward LLP. The BCL Pro Bono Subcommittee hopes to generate enough interest to present a similar program at the 2004 BLS Annual Meeting around the subject of litigation pro bono programs.

Please contact me if you are interested in becoming involved in any of our activities.

PRO BONO SUBCOMMITTEE
by Patrick T. Clendenen

PUBLICATIONS SUBCOMMITTEE
by Heidi M. Staudenmaier

Thanks to the tremendous efforts of over 60 authors, the 2003 issue of the Annual Review of Developments in Business and Corporate Litigation was the most impressive of all program materials at the Spring Meeting (fondly dubbed the “Phone Book”). Thanks to Jackie McGlamery and Whitney Ward at ABA Publications, the materials will be available in publication form this summer.

The 2003 Annual Review includes the following chapters (with acknowledgments to the chapter authors):

CH. 1: Alternative Dispute Resolution Law
Author: Abigail Pessen

CH. 2: Antitrust Litigation
Author: Bruce C. Fox

CH. 3: Bankruptcy Litigation
Author: William Knight Zewadski

CH. 4: Business Torts Litigation
Authors: Rick L. Lambert and Robert K. Radcliff

CH. 5: Class Action Law
Authors: Anne P. Wheeler and Susan T. Spence

CH. 6: Corporate Law
Authors: Peter J. Walsh, Jr. and Richard L. Renck

CH. 7: Criminal and Enforcement Litigation
Authors: Jay A. Dubow, Michael F. Gerber, Benito Romano and Michelle A. Clark

CH. 8: Derivative Litigation
Authors: Gregory P. Williams and Evan O. Williford
SECURITIES LITIGATION SUBCOMMITTEE

by Stephen D. Poss

The Securities Litigation Subcommittee was quite active at the Spring Meeting. The Subcommittee members gave two presentations at the "Review of Developments in Business and Corporate Litigation" program on April 3, 2003. Subcommittee Co-Chair Lisa Klein Wager was a member of the Corporate Governance Panel. Lisa spoke about the ways in which the Sarbanes-Oxley statute and associated SEC regulations may create increased risks of litigation for corporate officers and directors. Subcommittee Co-Chair Steve Poss was a member of the Corporate Crisis Panel and provided an annual update on securities litigation cases. Steve reported on the increase in the number of issuers sued in securities class action cases in 2002 – with a new case being filed, on average, almost every business day of the year – as well as on a number of court decisions which may be viewed as increasing the risk of secondary liability for lawyers, investment banking firms, and accountants in private securities class action litigation.

On April 4, 2003, members of the Securities Litigation Subcommittee met in Los Angeles. The Subcommittee meeting featured a lively open roundtable discussion on how to advise clients in order to minimize litigation risks under Sarbanes-Oxley. Participants discussed issues concerning the taking of notes and keeping of records and minutes by clients, how to advise audit committees, interacting with clients on securities disclosure issues, and various matters relating to the CEO and CFO.
certifications required under the new statute and regulations. The Subcommittee also decided to look into ways in which securities litigation materials, such as briefs and decisions, may be made more readily available to practitioners.

The Securities Litigation Subcommittee welcomes new members. If you are interested in participating and would like further information regarding the Subcommittee’s activities, please contact any one of the Committee’s Co-Chairs, Lisa Klein Wager of Morgan, Lewis & Bockius LLP, (212) 309-6113, lwager@morganlewis.com, Stephen D. Poss of Goodwin Procter LLP, (617) 570-1886, sposs@goodwinprocter.com, or James R. Hawkins of Finn Dixon & Herling LLP, (203) 325-5000, jhawkins@fdh.com.

The Task Force also discussed changes in its leadership, and we welcome Mike Flynn of Oakland California as the new Vice Chair of the Task Force.

Finally, the Task Force discussed emerging trends in the law relating to electronic discovery, and Mr. Flynn agreed to head up a group which will examine whether an opportunity exists to create a set of "best practices" or practical guidelines for corporations faced with document requests or subpoenas which include requests for e-mail and other digitized information. The "best practices" group also will consider how to handle routine e-mail destruction policies in the event of litigation. In the event that any of our readers are interested in participating in the work of that group or have suggestions or ideas, please contact Mike Flynn directly atMFlynn365@worldsavings.com.

BUSINESS LAW SECTION SEEKS FELLOWS NOMINATIONS

by Patrick T. Clendenen

The Business Law Section is seeking nominations for its Fellows class for 2003-2005. Applications are due by May 30, 2003. Our Committee, for the fifth-straight year, is pleased to have one of the Fellows appointed to its group. Suzanne E. Gilbert, a Senior Litigation Associate with Holland & Knight, LLP in Orlando, is amongst the five new Business Law Section Fellows. Elizabeth Stong is her mentor. Jeff Paskert, a member of Mills, Paskert & Divers, P.A. in Tampa, is a Fellow in the 2001-2003 class previously assigned to the Committee. Jim Holzman is his mentor.

Each one of us is encouraged to nominate deserving candidates for the Fellows Program. 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 Business Law Section Committee.

If you have any questions about the Fellows program or would like to nominate a candidate, please contact Fellows Program Co-Chairs Patrick T. Clendenen (617/348-1827 or pclendenen@mintz.com) or Maury B. Poscover (314/622-0617 or maury.poscover@husch.com). We will be happy to forward an application.

ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION

The 2003 Edition of a time-saving guide summarizing legal developments on business and corporate litigation issues is available. By the Committee, the Annual Review of Developments in Business and Corporate Litigation, brings together thorough summaries of recent cases, legislation, trends and developments in business litigation topics. Experts with in-depth litigation experiences address key concerns such as What issues did the Supreme Court address in deciding a key securities arbitration case last year?; and What are the latest developments in intellectual property law? Other topics addressed in the 2003 Edition include Antitrust Litigation, Criminal and Enforcement Litigation, ERISA, and Securities Arbitration. This reference will keep you current with annual updates. A necessary reference for every business litigator.

* Corporate Law
* Criminal and Enforcement Litigation
* Derivative Litigation
* Director Liability and Indemnification
* Directors' and Officers' Liability Insurance
* ERISA
* Employment Law
* Environmental Law
* Financial Institution Litigation
* General Partnerships, Joint Ventures, Limited Partnerships and Limited Liability Companies
* Intellectual Property Law
* Labor Law
* Securities Arbitration
* Securities Litigation, and
* Table of Cases

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Overnight delivery is available for an additional cost when orders are placed before 2:00 p.m. Central Time. Please ask the service representative for details when you place your order.

AUTHOR! AUTHOR! – “BUSINESS LAW TODAY” ARTICLES REQUEST

by Francis G.X. Pileggi

“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 approximately 60,000 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.

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. Additionally, any articles previously
published in an ABA newsletter (such as Network) or
firm newsletters are acceptable. The complete author
guidelines are available through the Section's
Website, www.abanet.org/buslaw/blt/guidelines.html,
or Heidi M. Staudenmaier directly at “Business Law
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