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Committee on Business and Corporate Litigation
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FROM THE CHAIR
by Mitchell L. Bach

I feel privileged to have this opportunity to address you, as the newly-appointed Chair of the Business and Corporate Litigation Committee. After a great ABA Annual Meeting in San Francisco, and a little rest and relaxation with my family in Yosemite National Park, it is time to take stock of our recent successes and to look ahead to new challenges and opportunities for our Committee.

Transitions

At the Annual Meeting, we had a chance to express our thanks and appreciation to Elizabeth Stong, our outgoing Chair, for her years of incredible leadership. Our Committee dinner was well attended, and we marked that occasion by congratulating Elizabeth as she was about to be sworn in as the newest United States Bankruptcy Judge for the Eastern District of New York in Brooklyn. Elizabeth was almost (but not quite) at a loss for words as we surprised her with her first judicial robe, a well-deserved gift and token of our appreciation from the Committee. I am pleased to announce that my first appointment was to name Judge Stong as the Co-Chair of our Membership Subcommittee. Judge Stong will continue to be actively involved in our Committee, consistent with her new judicial duties.

Pete Walsh continues as Vice-Chair of the Committee. Please note that, after many years of dedicated service, Rosemary Daszkiewicz has stepped down as Chair of the Employment Litigation Subcommittee; and Greg Varallo has stepped down...
as Co-Chair of our Task Force on Litigation Reform and Rules Revision. The Committee is deeply indebted to them for their many valuable contributions over the years.

ABA Annual Meeting

Many of us have left our hearts in San Francisco. What a great and beautiful city! Our Committee was well-represented, and presented two outstanding programs. Kudos to Bob Gegios for chairing a remarkable and successful two-part, four-hour litigation and corporate crisis management survey program, moderated by Anne Wheeler, entitled “When the Going Gets Tough: Advising the Company in Crisis.” At our traditional Committee Forum, Mike Flynn and Bruce Jameson chaired and presented an excellent program on the latest developments in electronic discovery, “Land Mine or Treasure Trove? Managing and Planning for Electronic Discovery.”

Thanks to Pat Clendenen for organizing our Committee’s involvement in the hands-on pro bono project in San Francisco. See Pat’s report in this issue of Network for the details of the pro bono project in San Francisco. Perhaps we have started a new tradition by involving some of our older children in this effort.

Committee Stand-Alone Meeting – December 4 and 5 – New York City

Please mark your calendars for our annual Fall Meeting of the Business and Corporate Litigation Committee in New York on December 4 and 5, 2003. We have begun planning at least five hours of continuing legal education programs for Friday, December 5th, and our Committee Dinner is set for the evening of December 4th. As Judge Stong recently announced, we are moving the meeting Downtown; and Martin Grant is organizing a private tour of the Federal Reserve Bank’s gold vault for Committee members. Look for details soon, including registration information at the Millennium Hilton, located at 55 Church Street in the heart of New York’s Financial District. Please save the date, and join us in a strong Committee showing when we convene so close to Ground Zero.

Special Thanks

I want to thank all of you who have shared many good wishes with me as I embark upon this endeavor. It is a humbling experience to follow in the giant footsteps of those who have chaired this Committee in the past: Don Scott, Frank Balotti, Jim Holzman and Judge Elizabeth Stong. I truly believe that we have assembled the best group of commercial litigators anywhere. I look forward to continuing to work with all of you, and I am thankful for this opportunity.

FEATURE ARTICLES

RECENT POLICY SHIFTS IN SEC ENFORCEMENT SETTLEMENTS

by Russell G. Ryan

Like most securities lawyers, the Securities and Exchange Commission and its staff have had a very busy year. Under the mandate of the Sarbanes-Oxley Act of 2002, the SEC has proposed and promulgated an unprecedented flurry of new rules on a wide range of issues, including its controversial “up-the-ladder” reporting requirement for attorneys who appear and practice before the Commission. On a more subtle level, the SEC and its Division of Enforcement have also made several changes in their policies and practices concerning the settlement of enforcement cases. SEC practitioners should appreciate the significance of these policy shifts when counseling clients during the settlement phase of enforcement investigations.

Higher Settlement Demands

During the past year, the SEC has taken a noticeably harder line in settlements than ever before, particularly in the area of public company accounting
fraud and disclosure cases. The Commission's $500 million penalty settlement with WorldCom, for example, was 50 times higher than any previous penalty paid by a public company in an accounting fraud case. Likewise, recent settlements requiring the payment of penalties ranging from $200,000 to $1 million by executives of Xerox Corporation, HBO and Company, Sunbeam Corporation, and Rent-Way, Inc. are significantly higher than the more typical five-figure penalty settlements of only a few years ago. In several cases, moreover, the Commission has taken the relatively unusual step of demanding a civil penalty even against defendants who were not charged with fraud violations.

In related program areas such as Regulation FD and Foreign Corrupt Practices Act cases, neither of which require an allegation or finding of fraudulent conduct by the defendant, the Commission has similarly obtained precedent-setting civil penalties in its settlements. In its first wave of Regulation FD cases, the Commission obtained a $250,000 civil penalty against Siebel Systems, Inc. More recently, Schering-Plough Corporation agreed to pay a $1 million penalty in settling SEC enforcement proceedings charging it with violating Regulation FD. Also during the past year, the Commission obtained a $500,000 penalty in a settled FCPA case against Syncor International Corporation, the highest civil penalty ever imposed in such a case.

In addition to demanding higher penalties in settlements of accounting and disclosure cases, the SEC now frequently insists that the other common financial component of such settlements — "disgorgement" of illicit gains — include not only a defendant's proceeds from tainted stock sales, but also any bonuses and other incentive compensation the defendant received during the period of any wrongdoing. This demand is consistent with the spirit of Section 304 of Sarbanes-Oxley, which now requires chief executive and chief financial officers of public companies to forfeit certain bonuses and stock sale proceeds received during any period for which the company restates its financial statements. The Commission has also increasingly demanded in financial fraud settlements that executives responsible for the fraud agree to be barred from serving as an officer or director of any public company. Again, this trend is consistent with Sarbanes-Oxley, which lowered the standard for imposing such bars (by requiring the SEC to prove only that a defendant is "unfit" to serve as an officer or director, rather than "substantially unfit" to serve) and for the first time granted the Commission authority to impose such bars in administrative proceedings as an alternative to seeking them in federal court. Even before this statutory change, the SEC's Director of Enforcement had declared that he was "steadfastly determined to be more aggressive" in seeking such officer-director bars.

Finally, the SEC has also gotten tougher in insider trading settlements. Historically, the Commission has settled most insider trading cases if a defendant agreed to accept a fraud injunction, to disgorge all illicit profits or avoided losses, plus interest, and to pay a penalty equal to the disgorgement amount. More than ever before, the Commission is now insisting, for egregious offenses, that settling defendants pay more than the standard, single-multiple penalty. In several recent settlements, defendants have agreed to pay penalties equal to 1.5 times, 2 times, or even 3 times their disgorgement obligation.

Collateral Consequences of "Neither-Admit-Nor-Deny" Settlements

A second recent change in SEC settlement policy affects the administrative and disciplinary proceedings that typically follow any judgments the Commission obtains in federal courts against regulated persons (such as brokers and investment advisers) and professionals who appear and practice before the Commission (mostly accountants and attorneys). As most SEC enforcement practitioners know, typical court settlements with the SEC provide that the defendant neither admits nor denies the allegations of the Commission's complaint. This provision has minimized the collateral consequences of the settlement in private litigation and in proceedings by other regulators, but its effect in
subsequent disciplinary proceedings before the SEC has not been entirely clear until recently.

On July 25, 2003, the SEC clarified this issue in an important adjudicatory opinion in which it announced “a refined and expanded policy” for all future administrative disciplinary proceedings that are based on fraud injunctions previously entered in federal court with the consent of the defendant. Henceforth, the Commission stated, it “will rely on the factual allegations of the injunctive complaint in determining the appropriate remedial action,” and “will not permit a respondent to contest the factual allegations of the injunctive complaint” in the follow-on disciplinary proceeding. In practice, this policy may affect relatively few cases, because most follow-on disciplinary proceedings are resolved as part of an overall settlement between the Commission and the affected defendant. Nevertheless, SEC practitioners will see a new addition to the standard language included in settlement documents submitted to the Commission. This new language requires the settling defendant to acknowledge that, “in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Defendant understands that [he, she, it] shall not be permitted to contest the factual allegations of the complaint in this action.”

Other Settlement Policy Changes

Three other recent changes in SEC settlement policy warrant brief mention. First, the Commission has been indicating that, before it will consider a settlement recommended by the staff of its enforcement division, a defendant must place into escrow sufficient funds to cover any disgorgement and penalty obligation being offered in settlement. The purpose of this new policy is to minimize the risk that the Commission will accept a settlement that ends up with an unpaid judgment.

Second, the SEC enforcement staff has recently begun a practice of requiring settling parties to certify under oath that they have, to the best of their knowledge, fully complied with all document requests and subpoenas received from the enforcement staff. The certification is designed to ensure that settlements are based on a full evidentiary record rather than a record unilaterally restricted by the settling party. Thus, before submitting a settlement offer to the Commission, the staff will require settling parties to sign a statement certifying that they have performed a diligent document search and that all responsive documents have either been produced to the staff or identified in a log of privileged documents withheld from production.

Finally, the SEC now typically insists that settling defendants renounce any intent to seek third-party reimbursement, insurance coverage, or tax deductions for the civil penalties they agree to pay, even if the penalties will be added to a fund to be distributed to victimized investors. Thus, the Commission’s standard settlement documents now include a representation to this effect by the settling party. This new provision is designed to prevent corporate executives from negating the financial consequences of their settlement by passing the burden on to shareholders or third parties.

Conclusion

In the post-Enron era, securities lawyers have been confronted with a number of significant changes in the substantive law governing their practice. As the foregoing discussion suggests, however, those who represent clients in SEC investigations also need to keep abreast of ongoing changes in policies and practices affecting the process of negotiating settlements with the Commission and its enforcement staff.

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publication or statement of any SEC employee. The views expressed herein are solely those of the author and do not necessarily reflect those of the Commission or other members of its staff.


8 In a recent speech, the Commission’s Director of Enforcement referred to one of these settlements as “a step – but only a first step – toward ratcheting up financial fraud penalties and reversing the Commission’s historical practice.” Stephen M. Cutler, Remarks at the University of Michigan Law School, Nov. 1, 2002 (available at www.sec.gov/news/speech/spch604.htm).


20 For prominent examples of the new settlement language, see the settlement consents of Henry Blodget and Jack Grubman in the global settlement of the research analyst conflict-of-interest cases (available at www.sec.gov/litigation/litreleases/consentblodget.pdf and www.sec.gov/litigation/litreleases/consent1811b.htm, respectively).
THE SUPREME COURT CONTINUES TO REIN IN PUNITIVE DAMAGES

by Thomas M. Benjamin

The United States Supreme Court in State Farm Mut. Auto. Ins. Co. v. Campbell, ___ U.S. ___, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003), recently provided further guidance with respect to when a punitive damages award is grossly excessive and violates due process.

In State Farm, the Supreme Court reversed a $145 million punitive damages award in a state court judgment in which $1 million in compensatory damages were also awarded. The Supreme Court reiterated that “the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor” explaining that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” 123 S.Ct. at 1520 (citations omitted). Additionally, “[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.” Id. (citations omitted).

The court then reaffirmed the “three guideposts” which it had set down in BMW of North America Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1996), for constitutional review of punitive damages:

1. the degree of reprehensibility of the defendant’s misconduct;

2. the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

3. the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id.

With regard to reprehensibility of the conduct, the court further explained that “[a] jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” Id. at 1522-23 (citations omitted). Courts may also not award punitive damages to punish or deter conduct that bears no relation to the plaintiff’s harm. Id. at 1523.

With regard to the second guidepost, the court again declined “to impose a bright-line ratio which a punitive damages award cannot exceed.” Id. at 1524. The court cited its prior decisions which concluded that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety” and further pointed out that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” Id. (citations omitted) However, ratios greater than a single-digit ratio may comport with due process where “a particularly egregious act has resulted in only a small amount of economic damages.” Id. (citations omitted). In contrast, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” Id. (emphasis added).

Additionally, the Supreme Court cautioned that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” Id. at 1525.

The reprehensible conduct in State Farm involved, among other things, fraud on the part of the insurance company, alteration or destruction of company records to manipulate the result, and evidence that the defendant insurance company had engaged in a scheme throughout the country to meet corporate fiscal goals by capping payouts and claims without regard to the merits of the claims. After
examining the guideposts, the Supreme Court in State Farm reversed the award of punitive damages and remanded the case for further proceedings commenting that the facts of the case likely would justify a punitive damages award at or near the amount of compensatory damages of $1 million. Id. at 1526.

State Farm should encourage defendants opposing a claim for punitive damages to seek the exclusion at trial of evidence relating to lawful out-of-state conduct especially where such conduct is unrelated to the plaintiff’s alleged harm. Moreover, the wealth of the defendant should only be permitted into evidence where it is relevant to the assessment of punitive damages under the applicable state or federal substantive law and should not be considered with respect to the review of the constitutionality of any award. State Farm also strongly supports the proposition that punitive damages awards to pass constitutional scrutiny should in practice rarely exceed a single-digit ratio, and where damages are substantial, should be even a lesser ratio such as only equal to compensatory damages.

Despite the attempts by the Supreme Court in State Farm to clarify the law, in the few months since State Farm was rendered, courts have continued to render varied results with regard to punitive damages. See, e.g., Lincoln v. Case, ___ F.3d ___, 2003 WL 2176271 (9th Cir. 2003) (in an intentional discrimination case involving only $500 in compensatory damages, the court reduced the punitive damages award from $100,000 to $55,000 which still amounted to a 110 to 1 ratio); Zhang v. American Gem Seafoods, Inc., ___ F.3d ___, 2003 WL 21805076 (9th Cir. 2003) (court affirmed punitive damages award of $2.6 million with compensatory damages of $360,000 which constituted just over a 7 to 1 ratio); Eden Elec., Ltd. v. Armana Co., L.P., 258 F.Supp.2d 958, 975 (N.D. Iowa 2003) (the court reduced the punitive damages awarded by the jury from $17,875,000 to $10 million which resulted in a ratio to compensatory damages of 4.76 to 1 instead of 8.5 to 1). As one district court acknowledged in reducing a punitive damages award from $1 million to $450,000 (nine times actual damages), the standard to follow even after State Farm is still far from clear. McClain v. Metabolife Intern., Inc., 259 F.Supp. 2d 1225, 1235 (N.D. Ala. 2003).

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FEDERAL RULES AMENDMENTS TAKE EFFECT DECEMBER 1, 2003

By Stephen G. Harvey and Angelo A. Stio III

The United States Supreme Court has approved and submitted to Congress amendments to the Federal Rules of Civil Procedure that will take effect on December 1, 2003, unless Congress takes action rejecting, modifying or deferring them. The amendments will affect Rule 23 (class actions), Rule 51 (jury instructions) and Rule 53 (masters). Copies of the amendments along with the Judicial Conference Report and the Report of the Advisory Committee on Civil Rules are available at http://www.uscourts.gov/rules/newrules1.html. This article summarizes the amendments, with selected comments drawn from the Judicial Conference Report and the Advisory Committee Notes.

A. Rule 23 – Class Actions

The amendments to Rule 23 are the product of a ten-year study by the Advisory Committee on Civil Rules and are the most significant changes to the Rule since 1966. The amendments are not intended, however, to bring about a sea change in class action procedure. As stated in the Report of the Judicial Conference, the amendments “focus on class action procedures rather than on substantive certification standards. The overall goal of the advisory committee has been to develop rule amendments that provide the district courts with the tools, authority, and discretion to closely supervise class action litigation.” The amendments to Rule 23
focus on five areas: timing and issuance of class certification orders; notice to the class; dismissal and settlement; class counsel appointment; and attorney fees.

1. **Timing and Issuance of Class Certification Orders**

Rule 23(c)(1) will be changed in three ways. First, under Rule 23(c)(1)(A), district courts will be required to determine whether to certify a class “at an early practicable time.” Under the current Rule, district courts are required to make the class certification determination “as soon as practicable.” The Judicial Conference Report notes that this change is “consistent with present good practices,” in which courts permit limited discovery “on the nature of the merits issues” and “decide certification motions promptly, but only after receiving the information necessary to decide whether certification should be granted or denied and how to define the class if certification is granted.” The Advisory Committee states that the “amended language is not intended to permit undue delay or permit extensive discovery unrelated to certification.”

Second, Rule 23(c)(1)(B) will require district courts in all class certification orders to “define the class and the class claims, issues or defenses” and to appoint class counsel under new Rule 23(g). This is designed to facilitate interlocutory appeals under Rule 23(f).

Third, under Rule 23(c)(1)(C), district courts will be permitted to alter or amend class certification orders at any time up to “final judgment.” The current Rule permits alteration or amendment of the class certification order only up to “the decision on the merits.” Also, under Rule 23(c)(1)(C), conditional class certification orders will be eliminated. Under the existing Rule, district courts are permitted to issue “conditional” class certification orders when the record is not fully developed, and then amend or alter those orders “before the decision on the merits.”

2. **Notice to the Class**

Under Rule 23(c)(2)(A), district courts will be authorized but not required to direct appropriate “notice” in class actions certified under (b)(1) and (b)(2). As the Judicial Conference report notes, “[m]embers of classes certified under (b)(1) or (b)(2) have interests that may deserve protection by notice.” Notice need not be given in the same manner as required for (b)(3) classes.

Under Rule 23(c)(2)(B), notice to classes certified under (b)(3) will have to “concisely and clearly state in plain, easily understood language” the following: (a) the nature of the action, (b) the definition of the class, (c) the class claims, issues or defenses, (d) that a class member may enter an appearance through counsel, (e) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and (f) the binding effect of a class judgment on class members. The current Rule requires the “best notice practicable under the circumstances” – a standard also incorporated in the new rule – but does not contain explicit details of what that notice should contain.

3. **Dismissal and Settlement**

Rule 23(e)(1)(A) will require district court approval of any settlement, voluntary dismissal or compromise of class claims, but only in cases in which a class has been certified. Approval will not be required if no class has been certified, since putative class members will not be bound.

Rule 23(e)(1)(B) will require notice in a “reasonable manner” for any proposed settlement, but only if the class members will be bound by the settlement.

Rule 23(e)(1)(C) will establish a standard for approval of settlements. No settlement will be approved unless it is found to be “fair, reasonable, and adequate,” and the district court must make detailed findings to support the conclusion that the settlement meets this standard.
Rule 23(e)(2) will require parties to file a statement identifying any agreement made in connection with a settlement. As noted in the Judicial Conference Report, "[t]here is concern that some side agreements may influence the terms of settlement by trading away possible advantages for the class in return for advantages for others."

Under Rule 23(e)(3), district courts will be permitted to grant the members of (b)(3) class a second opportunity to opt-out of a settlement that is reached after the class has been certified and after the expiration of the initial opt-out period. There is no presumption that such an opportunity should be granted; it is left to the discretion of the trial court.

4. **Class Counsel Appointment**

Rule 23(g) is brand-new and will govern appointment of class counsel. Under Rule 23(g)(1)(A), "unless a statute provides otherwise, a court that certifies a class must appoint class counsel." One statute that provides otherwise is the Private Securities Litigation Reform Act.

Rule 23(g)(1)(B) will provide that class counsel "must fairly and adequately represent the interests of the class."

Rule 23(g)(1)(C) will set criteria a district court must consider in appointing class counsel: "the work counsel has done in identifying or investigating potential claims in the action, counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action, counsel’s knowledge of the applicable law, and the resources counsel will commit to representing the class." It also authorizes district courts to request other pertinent information for making an informed decision on the appointment of counsel.

Rule 23(g)(2) will allow a district court to designate interim class counsel to represent the interests of the class before a class certification decision is made. If there is only one applicant for class counsel, the rule will allow the court to appoint that counsel only if the counsel will fairly and adequately represent the interests of the class. If there are multiple applicants, the court must appoint the one best able to represent the interests of the class. Finally, the rule states that the order appointing class counsel may include provisions about the award of attorneys’ fees or nontaxable costs.

5. **Attorneys’ Fees**

Rule 23(h) also is brand-new and will govern attorney fee awards in class actions. The first paragraph of Rule 23(h) will provide that “the court may award reasonable attorney fees.” The Judicial Conference report notes that “it is the court’s duty to determine the reasonable amount.”

Rule 23(h)(1) will provide that claims for attorneys’ fees must be made under Rule 54(d)(2) at a time set by the court.

Rule 23(h)(2) will provide that a class member or a party from whom payment is sought may object to the motion.

Rule 23(h)(3) will provide that a district court may hold a hearing on the motion for attorney fees, but in any event must find the facts and state its conclusions of law on the motion.

Finally, Rule 23(h)(4) will provide that a district court may refer issues related to the amount of the award to a special master or magistrate judge.

B. **Rule 51 – Jury Instructions**

The amendments to Rule 51 were initiated by the Ninth Circuit Judicial Council, which found that many districts had local rules requiring submission of jury instructions before trial. According to the Judicial Conference Report, the “Council was concerned that these rules may be invalid in light of Rule 51's provision for filing requests ‘[a]t the close of the evidence or at such earlier time during trial as the court reasonably directs.’ The proposed amendments expressly validate the practices of these courts. The proposed amendments also are designed to capture many of the interpretations of Rule 51 that have emerged in practice and remove traps for the unwary.”
1. **Timing of Submission of Requests for Jury Instructions**

   Under Rule 51(a)(1), district courts will have the discretion to require parties to submit jury requests for instructions either “at the close of the evidence” or “at an earlier reasonable time that the court directs.”

2. **Untimely Submissions of Requests for Jury Instructions**

   Rule 51(a)(2) will permit untimely requests for jury instruction in two situations: when the instructions are related to issues that could not have been reasonably anticipated at an earlier time set under Rule 53(a)(1); and at any time with the court’s permission. The Advisory Committee Note suggests that the main considerations for a district court to exercise its discretion and permit a late request for jury instructions are the importance of the issues to the case and the reason for the failure to make a timely request earlier.

3. **District Court Duty to Advise Parties of Jury Instructions**

   Rule 51(b)(1) will require district courts to inform the parties, before instructing the jury, of the proposed instructions as well as the proposed action on the parties’ requests for jury instructions. The current Rule only requires a district court to inform the parties before closing arguments.

4. **Objections to Jury Instructions**

   Rule 51(b)(2) will require giving the parties an opportunity “to object on the record and out of the jury’s hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered.” The current Rule is silent on when the opportunity to object should be given.

5. **Timing of Jury Instructions**

   Rule 51(b)(3) will authorize the existing practice of permitting a district court to “instruct the jury at any time before or after argument, or both.”

6. **Objections to Jury Instructions**

   Rule 51(c)(1) will require that objections to instructions or failure to give instructions must be made on the record, “stating distinctly the matter objected to and the ground of the objection.”

7. **Timing of Objections to Jury Instructions**

   Rule 51(c)(2) will govern the timing of objections. Under Rule 23(c)(2)(A), if a party has been informed by the district court about a jury instruction as required by Rule 51(b)(1), the party must object to the giving of an instruction or the failure to give a requested instruction by the time set by the court under Rule 51(b)(1).

   Rule 23(c)(2)(B) will provide that, if a party has not been informed by the district court about a jury instruction as required by Rule 51(b)(1), then the party must object promptly after learning that the instruction or request for instruction has been, or will be, given or refused.

8. **Assigning Error**

   Under Rule 51(d)(1)(A), a party will be permitted to assign error to the jury instructions given if the party made a proper objection under Rule 51(c).

   Under Rule 51(d)(1)(B), a party will be permitted to assign error to a failure to give a jury instruction if the party made both a proper request under Rule 51(a) and a proper objection under Rule 51(c), unless the court made a definitive ruling on the record rejecting the request, in which case there is no further requirement that the party object.

   Finally, under Rule 51(d)(2), a party will be permitted to assign a plain error in instructions affecting substantial rights that has not been preserved as provided by Rule 51(d)(1)(A) or (B).

C. **Rule 53 – Special Masters**

   According to the Judicial Conference Report, the amendments to Rule 53 are designed to reflect the contemporary practice of many district courts and
to establish a framework to regularize the practice. The most significant amendments to Rule 53 are summarized below.

1. **Appointment of Special Masters**

   Rule 53(a)(1) will provide for the circumstances for appointing a special master. First, with the consent of the parties a special master can be appointed for any purpose. Second, a special master can be appointed to hold trial proceedings and make or recommend findings of fact only (a) if warranted by special circumstances, or (b) to perform an accounting or to resolve a difficult issue of damages. Third, a special master can be appointed to address pre-trial or post-trial matters that cannot be addressed effectively and timely by a district judge or magistrate judge. The Advisory Committee Notes state that the amendments will not prevent district courts from obtaining neutral assistance in complex cases. Neutral assistance is available through expert witnesses appointed by the court under Fed. R. Evid. 706.

   Rule 53(a)(2) will provide that a special master cannot have a relationship that would require disqualification unless the parties consent, and it will provide that in appointing a special master the district court must consider the fairness of imposing the expense on the parties and must protect against unreasonable expense or delay.

2. **Order Appointing Special Master**

   According to the Judicial Conference Report, Rule 53(b) will “regularize the practice governing the appointment of a master.” The district court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment. The order appointing the master must state: the master’s duties; the circumstances, if any, when ex parte communications will be permitted; the record to be maintained of the master’s activities; the terms of compensation for the master; and the procedures and standards for reviewing the master’s findings and recommendations. The order may be amended by the district court upon notice to the parties.

3. **Action on the Master’s Order, Report or Recommendations**

   Rule 53(g)(1)-(2) will provide that the district court must afford the parties an opportunity to be heard on the master’s order, report or recommendations, and that a party may file objections within 20 days unless a different time is set by the court.

   Rule 53(g)(3)(a)-(b) will provide that the district court must decide de novo all objections to the master’s finding of fact unless the parties stipulate that review will be for clear error, or, in the case of masters appointed with the consent of the parties or to address pre-trial or post-trial matters, the parties stipulate that the master’s findings will be final.

   Rule 53(g)(3)(c) will provide that the district court must decide de novo all objections to conclusions of law made or recommended by a master.

   Rule 53(g)(3)(d) will provide that unless the order of appointment establishes a different level of review, the rulings of a master on procedural matters will be reviewed only for abuse of discretion.  

   There are also technical amendments to Rule 54(d) and Rule 71A(h) and to Forms 19, 31, and 32.

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SUBCOMMITTEE REPORTS

ANTITRUST AND TRADE REGULATION SUBCOMMITTEE
by Hilary E. Ware

Bob Gegios and I chaired the meeting of the Antitrust and Trade Regulation Subcommittee at the Annual Meeting. As discussed at that time, the Subcommittee is working towards presenting a program at the Business Law Section Spring Meeting in Seattle, hopefully on antitrust and IP issues. We're also trying to revitalize the Subcommittee. If you are interested in getting involved with the Subcommittee, please contact me at hware@hewm.com, or Bob Gegios at rgegios@kmklawfirm.com.

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

The Bankruptcy Litigation Subcommittee again met jointly with the Creditors’ Rights Subcommittee, headed by Duane Geck, at the Annual Meeting in San Francisco. Three excellent substantive presentations were heard by a full room of attendees, and extensive materials accompanied each presentation.

Paul Singerman, who is from Miami, provided an update on the notable and long running Lawrence case, outlining the litigation involving offshore planning and the contempt powers of the bankruptcy court, on the topic “Can an Asset Protection Plan Survive Bankruptcy?”

Elizabeth M. Bohn (also of Miami) spoke on “Proving Fraud in Proceedings Objecting to Dischargeability of Debts under §523(a)(2) and Objections to Discharge under §727 (a)(4),” and she provided extensive research materials as well.

Thirdly, Thomas Gump (of San Francisco) spoke on Revised Article 9 security interests - "A Look back at the First Two Years," and provided materials that included forms for a model security agreement and a pledge agreement, as excerpts from the recently published book he helped author on the subject.

In addition to three programs of this type each year, our Subcommittee supplies the pertinent chapter to the ABA Committee on Business and Corporate Litigation’s annual review of business litigation developments. It also participates in more general programs put on by the section and committee, such as Bill Zewadski's participation in the Committee’s two day program in San Francisco, "When the Going Gets Tough: Advising a Company in Crisis."

Our Bankruptcy Litigation Subcommittee meeting at the National Conference of Bankruptcy Judges in San Diego will occur at 7:45 AM on Thursday, October 16, 2003 and Bankruptcy Judge Elizabeth Stong (EDNY) will give one of her first presentations as a new bankruptcy judge. Don't miss it! At that time several late-breaking topics of interest will be discussed, as always. Your input on topics of interest would be appreciated. After that, a further meeting is planned for the Business Section Spring Meeting in Seattle April 2004.

Joining the Bankruptcy Litigation Subcommittee is as simple as being a member of the ABA and emailing to co-chairs Philip Warden or William Zewadski with a note of your interest in joining. Send your email to z@trenam.com.

BUSINESS COURTS SUBCOMMITTEE
by Mitchell L. Bach

The Business Courts Subcommittee continues to be quite active. There were a number of
interesting developments involving the Subcommittee at the recent ABA Annual Meeting.

We have developed a strong and mutually rewarding relationship with Judge Ben F. Tennille, who has presided over the North Carolina Business Court since its inception. Earlier this year, Judge Tennille asked us to assist him in spreading the word about a newly-organized Committee exclusively for business court judges which has been formed by the National Conference of State Trial Judges. The purpose of this NCSTJ Committee, in Judge Tennille’s words, “is to provide a forum for the exchange of information between judges who are presently sitting on, or planning to organize, or just plain interested in, the concept of courts or divisions of courts dedicated to the trial of business and commercial cases. The committee will also coordinate with other entities of the ABA that are concerned with this subject,” such as our Subcommittee. We were happy to assist Judge Tennille in this respect, making full use of the Subcommittee’s extensive network of attorneys and judges throughout the country who have participated in Subcommittee matters.

Judge Tennille invited us to attend and participate in the inaugural meeting of the NCSTJ Business and Commercial Courts Committee in San Francisco, on August 8, 2003. An important item on that Committee’s agenda was directed at facilitating coordination of its activities with those of our Subcommittee. For example, one of Judge Tennille’s ideas is to work with our Subcommittee to develop a “guide book” for attorneys and judges in states where there is an interest in starting a new business court or commercial litigation program.

We were delighted when Judge Tennille accepted our invitation, interrupted his busy schedule at the Annual Meeting, and dashed across town to attend our Subcommittee meeting in San Francisco, on August 11. Judge Tennille actively participated in an interesting discussion of recent developments in several states which have either formed new business courts or are actively considering doing so, including Georgia, Florida, Maryland, Hawaii, Michigan, New Jersey, Ohio and Maine. We intend to continue to assist Judge Tennille’s efforts and those of other attorneys, judges and local bar leaders, in these and several additional states, who are interested in launching new specialized business courts or commercial litigation programs.

We continuously monitor such efforts throughout the United States; and Subcommittee 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.

The Subcommittee 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 an extensive paper and 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 Subcommittee welcomes new members. If you are interested in participating or would like further information regarding the Subcommittee’s activities, please contact Mitchell Bach, Subcommittee 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 (email).

CRIMINAL AND ENFORCEMENT LITIGATION SUBCOMMITTEE
by Jay Dubow

The Criminal and Enforcement Litigation Subcommittee was very busy during the Annual Meeting. At our combined meeting with the Securities Litigation and Financial Institutions Subcommittees we had as our guests, Patrick Robbins, Chief of the
Securities Fraud Unit of the U.S. Attorneys Office for the Northern District of California as well as Robert Mitchell, Head of Enforcement for the Securities and Exchange Commission's San Francisco Office. Both Patrick and Rob described developments and initiatives in their respective offices and answered questions from the attendees at the meeting. In addition to the joint meeting, Jay Dubow, Co-Chair of the Subcommittee, participated in the two-day program, "When the Going Gets Tough: Advising a Company in Crisis." This well-attended, multi-discipline program was well received. As always, the Subcommittee welcomes new members. Anyone wishing to join, please e-mail Jay Dubow at jdubow@wolfblock.com. Also, if you are interested in working on the Subcommittee's Annual Review of Developments, please let Jay know. Finally, we will be looking for another opportunity to invite local regulators to attend our meeting in Seattle in conjunction with the Business Law Section Spring Meeting.

INDEMNIFICATION AND INSURANCE SUBCOMMITTEE
by William D. Johnston

During the Annual Meeting, members of the Indemnification and Insurance Subcommittee again met jointly with members of the Corporate Counseling and Litigation Subcommittee. The meeting was well-attended, especially given the many “competing” meetings and programs. Discussion at the meeting included an update on legislative developments, case law developments, and (in connection with director and officer liability insurance) “market"-related developments.

It was reported that there had been no recent legislative developments in connection with charter provisions limiting the liability of directors pursuant to 8 Del. C. § 102(b)(7), or in connection with the advancement of defense expenses or end-of-the-matter indemnification pursuant to 8 Del. C. § 145.

With regard to limitation of director liability, first discussed by way of case law developments was the post-trial decision on remand in Emerald Partners v. Berlin, Del. Ch., C.A. No. 9700, 2003 Del. Ch. LEXIS 42, Jacobs, V.C. (April 28, 2003). There, the Court reiterated its view, from its initial post-trial opinion, that the director defendants could not be held liable for money damages because none of the exceptions enumerated in the company’s exculpatory charter provision were applicable. In doing so, the Court rejected the plaintiff’s argument that the defendants engaged in acts “not in good faith” because the defendants (allegedly) were “deliberately indifferent” or acted with “conscious indifference” to the company’s minority stockholders. The decision is now on appeal to the Delaware Supreme Court.

Reflecting a different result, at least at the pleading stage, is In Re The Walt Disney Company Derivative Litigation, Del. Ch., 825 A.2d 275 (2003). In that case, the Court denied the director defendants’ motions to dismiss, finding that “the facts alleged here, if true, portray directors consciously indifferent to a material issue facing the corporation...” Accordingly, the Court concluded that the facts as pled reflected “acts or omissions not undertaken honestly and in good faith, or which involve intentional misconduct” and thus fell outside the protection otherwise afforded by Disney’s exculpatory charter provision. The parties are proceeding with discovery.


In Fasciana, the Court addressed the request of a former outside counsel to EDS for an award of “fees-on-fees” – expenses he had incurred in prosecuting an advancement enforcement action pursuant to Section 145(k) of the Delaware General Corporation Law. In doing so, the Court ruled on two matters of first impression. First, the Court concluded that fees-on-fees as a general matter are
appropriately recoverable in connection with an advancement action, just as such expenses may be recoverable in connection with an indemnification action (as held by the Delaware Supreme Court in Stifel Financial Corp. v. Cochran, Del. Supr., 809 A.2d 555 (2002)). Second, the Fasciana court ruled that the plaintiff was entitled only to one-third of his litigation expenses. The Court concluded that both Section 145 and bylaw provisions like those adopted by EDS are subject to an implied reasonableness requirement and that an award of one-third of the expenses would be proportionate to the level of success the plaintiff achieved in the underlying advancement action. See Fasciana v. Electronic Data Systems Corp., Del. Ch., C.A. No. 19753-NC, 2003 Del. Ch., LEXIS 19, Strine, V.C. (Feb. 27, 2003). As of the time of this writing, the Court’s ruling has not been appealed.

Conway presented the question whether, under a regulation adopted by the predecessor of the Office of Thrift Supervision, a former officer of a federally chartered savings bank was entitled to mandatory indemnification for attorneys’ fees and expenses relating to a class action resulting from his alleged misconduct where the former officer had refused to become a party to a bona fide stipulation of settlement but the stipulation nevertheless resulted in the dismissal with prejudice of all of the claims against him. The Court concluded that he was not entitled to mandatory indemnification and granted summary judgment to the defendant. The Court reasoned that, based upon the language, structure and purpose of the controlling regulation, the claim for indemnification was entirely permissive in character, thus requiring that the plaintiff demonstrate he had acted in good faith within the scope of his employment and that he reasonably believed his actions under the circumstances were in the best interests of the savings bank or its members (propositions rejected by the boards of the bank and its holding company). The Court noted that the federal regulation required mandatory indemnification only when the claimant receives a “[f]inal judgment on the merits,” in contrast to New York and Delaware statutes and the Model Business Corporation Act, each of which required mandatory indemnification when the claimant had been successful “on the merits or otherwise.” The ruling is on appeal.

Finally, the Subcommittee discussed the status of the D&O insurance market. It was reported that the market continues to tighten in numerous respects – with premiums still on the rise, and with some insureds agreeing to reduced coverage limits, increased deductibles, and/or co-insurance payments. It also was reported that insurers are more vigorous than ever in their underwriting (especially in scrutinizing company financials and certifications), and that rescission lawsuits are becoming increasingly common. On the better-news side, it was reported that premium increases are not as dramatic as those last year for most companies, that some coverage is being renewed with virtually no increase, and that severable coverage for outside directors-only – as well as certain “non-rescindable” coverage – may be available. Finally, it was noted that certain recent bankruptcy court rulings have been to the effect that, in the absence of “entity” coverage, a D&O policy and its proceeds are not considered to be “property of the estate.”

The next meeting of the Subcommittee will take place during the Spring Meeting of the Business Law Section in Seattle. In the meantime, all subcommittee members are encouraged to attend the upcoming stand-alone meeting of the Business and Corporate Litigation Committee scheduled to take place December 4-5, 2003 in New York City and promising to offer (as always) informative programming and a wonderful opportunity to get together with new and former colleagues. Hope to see you there!

Also, Subcommittee vice chair Mike Gassmann and I would be remiss were we not to take this opportunity to thank Elizabeth Stong for her inspired and tireless leadership of the Business and Corporate Litigation Committee, and to wish her our very best as she joins the Bankruptcy Court.
PARTNERSHIPS AND ALTERNATIVE ENTITIES SUBCOMMITTEE  
by Vernon Proctor

The Partnerships and Alternative Entities Subcommittee had a productive meeting at the Annual Meeting. Bob Keatinge, the chair of the Partnerships and Unincorporated Business Organizations committee of the Section of Business Law (which is primarily a transactional group), attended to discuss the concept of a "joint venture" program with us on a "dispute resolution" topic. Tentatively, we would like to present this program at next year’s annual meeting in Hot-lanta. The attendees also reviewed recent Delaware case law developments. If anyone is interested in participating in the possible 2004 program, please call Vern Proctor at (302)429-4202, or send him an e-mail at vproctor@bayardfirm.com.

PRO BONO SUBCOMMITTEE  
by Patrick T. Clendenen

At the recently concluded Annual Meeting, the Committee’s Pro Bono Subcommittee and the Business Law Section’s Pro Bono Committee held their Third Annual "Hands-On" Public Service Project at the Booker T. Washington Community Service Center, which was co-sponsored by the National Association of Women Judges and the SF Barristers.

The Booker T. Washington Community Service Center is the oldest and only African American-owned center in San Francisco (founded in 1919). The Center provides a full spectrum of services to youth, seniors, and families. They own their own building and have been renovating it and the grounds. The Mission of the Center is to provide leadership to a community in action, in an inclusive environment, and to respond to and nurture individuals to become positive, contributing leaders in the Greater San Francisco community.

A hardy group of lawyers and judges spent their Saturday afternoon doing necessary yard work, painting, and renovating the children’s play room! All had a wonderful time. Participants included Elizabeth Stong, outgoing Committee Chair; Mitchell Bach (and his two daughters), incoming Committee Chair; Kathleen Hopkins (and her son), Business Law Section’s Pro Bono Committee Chair; Bea Ann Smith, President of the National Association of Women Judges; Guy Lescault, ABC Project Director, Georgia Legal Services; Stacey Campbell, Vice Chair of the Committee’s Employment Litigation Subcommittee; Haydee Alfonso, Supervising Attorney, Community Organization Representation Project, SF Volunteer Legal Services; Mike Miner, Manager, The Booker T. Washington Community Service Center; and Patrick Clendenen, Co-Chair of the Committee’s Pro Bono Subcommittee and Business Law Section’s Fellows Committee and Vice Chair of the Committee’s Class and Derivative Actions Subcommittee. Please include this wonderful event in your ABA Annual Meeting plans for Atlanta in 2004!

PUBLICATIONS SUBCOMMITTEE  
by Heidi M. Staudenmaier

The Annual Meeting saw the unveiling of the 2003 edition of the "Annual Review of Developments in Business and Corporate Litigation". The publication is comprised of 20 chapters of substantive legal case updates and developments in a wide variety of business and corporate litigation areas, ranging from corporate law, ERISA, criminal and enforcement litigation, intellectual property and securities litigation. For more information on how to order this excellent reference tool, please see details elsewhere in the "Network".

Thank you again to the 60-plus authors who contributed significant time and effort in making the publication a success. ABA Publication staff members Jackie McGlamery and Whitney Ward also deserve special recognition for their valuable guidance and assistance in the publication process.
Work will commence soon on the 2004 "Annual Review of Developments", which already is shaping up to be bigger and better than the previous publications. The Annual Review materials also form the framework for the Business and Corporate Litigation Committee's ever popular Spring Program. If you are interested in assisting with the 2004 Annual Review materials, please contact Heidi Staudenmaier at (602) 382-6366, or at hstaudenmaier@swlaw.com.

ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION

The 2003 Edition of the Annual Review of Developments in Business and Corporate Litigation, a time-saving guide summarizing legal developments on business and corporate litigation issues, is available. By the Committee, the Annual Review 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 Annual Review 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.

To order this publication, click http://www.abanet.org/buslaw/catalog/r5070397.html or call (800)-285-2221. 2002, 7 x 10, 904 pages, Paperback: $99.95 (Section member price); $119.95 (Regular price); Product Code: 5070397.

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 Today,” Editor-in-Chief, Snell & Wilmer, Phoenix, (602) 382-6366, hstaudenmaier@swlaw.com.
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