Boston Bar
ASSOCIATION

Volume 1
Winter 2009

Business Law Section Newsletter

Antitrust
Banking & Financial Services
Commercial Finance
Communications
Corporate Counsel
Corporate Law
Energy & Telecommunications
Immigration Law
Insurance Law
Investment Companies & Advisers
Legal Opinions
Mergers & Acquisitions
Public Policy
Pro Bono
Securities Law
Tax-Exempt Organizations

A PUBLICATION OF THE BOSTON BAR ASSOCIATION BUSINESS LAW SECTION
Winter 2009 Volume 1

Section Co-Chairs' Corner

Richard N. Kimball
Nutter McClennen & Fish LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210

Paula K. Andrews
Hinckley, Allen & Snyder LLP
28 State Street
Boston, MA 02109-1775
Tel: (617) 345-9000

Winter 2009

As your co-chairs this year, we are honored to be at the helm of one of the largest sections of one of the oldest and most respected bar associations in the country. The BBA's Business Law Section has 16 active committees and more than fifty dedicated co-chairs and steering committee members who volunteer their time and efforts to plan programs where leading experts provide guidance about new developments in the diverse and ever evolving legal landscapes in which our 1600 members practice. It is an extremely large group with many succinct constituencies. One of the many goals that we have for this year is to identify and foster a sense of interconnectivity among our many diverse committees.

Reinstating the Business Law Section Newsletter is one tool we think will further this goal. It's been several years since our Section's last newsletter was published and we think that now is a better time than ever to reestablish this important communication tool. 2009 promises to be a challenging year for all of us in the legal profession. There is strength in numbers and we hope our newsletter will serve as an effective medium for our members to communicate and share ideas and news with each other.

And speaking of communication, most of you know that we met with individually with the co-chairs of each of our Section's 16 committees this past summer. As a result of those meetings, we have some special insights that we'd like to share with all of you.

First, the dominant take-away that we got was the sense that each of our committees had a view that its practice area was isolated from the other practice areas in the Section. The common perception was that no one outside of the practice area of their committee would have any interest at all in the programs that a particular committee might be interested in sponsoring. We were struck by the irony of that perception, as we (who like most of our members practice in specialty areas) were intrigued by many of the issues that each of the committees were addressing and saw the benefits to our own practices to learning about additional business practice areas. We believe there are innumerable connections among our committees and the Business Section Newsletter provides a great vehicle to foster those connections.

Second, it became very clear to us that we have some extremely dedicated committee co-chairs who are not only approaching their roles with enthusiasm but with an incredible creative approach to designing and promoting programs that have relevancy for the legal profession in the current, if somewhat uncertain, economic environment. The brown bag programs and CLE's that some of our committees have sponsored have been well received and well attended.

Third, we noted that many of our co-chairs were not as familiar with the internal infrastructure of the BBA and its many resources available to them as one might have hoped. We hope through the monthly meetings of our Steering Committee (comprised of all committee co-chairs) and this Newsletter that we can close this information gap.

As we enter into the second half of this year's term, we want to publicly thank our committee co-chairs and their steering committee members for their hard work, their dedication to the BBA and their commitment to further the collegiality of this great association. We particularly want to thank Sarah Richmond and Greg Fryer, Co-Chairs of the Communications Committee for all their efforts to re-launch the Business Section Newsletter and each of our authors who contributed the terrific content in this newsletter. We also want to thank the BBA staff, particularly, Anna Frank, for providing those high-tech professional looking finishing touches that give the Newsletter its eye appealing presentation.

Finally, we want to extend to all the open invitation to make whatever suggestions you might have for improving the work of this Section, its outreach efforts and its educational programs. Please don't be shy about contacting us or the co-chairs of any of the committees in the Section. This is your organization. Enjoy it! Be a part of it!

Best wishes to all of you and your loved ones for a happy, healthy and productive 2009.

Richard N. Kimball
Paula K. Andrews
Co-Chairs

Editors

Gregory Fryer
Sarah Curtis Richmond

Inside this Issue

Upcoming Brown Bag Lunches

What's New in IR: Relating to Investors in a Challenging Market

Corporate Law Committee, Securities Law Committee

Tuesday, March 24, 2009 - 12:30 pm
Boston Bar Association - 16 Beacon Street
Registration Link

The Buck Starts Here

Banking & Financial Services Committee, Morin Center for Banking and Financial Law, BU School of Law

Wednesday, March 25, 2009 - 12:00 pm
Brown Rudnick LLP - 18th Floor, One Financial Center, Boston
Registration Link

Review of Money Laundering Basics: What You Need to Know

Corporate Counsel Committee

Thursday, March 26, 2009 - 12:00 pm
Holland & Knight LLP - 10 St. James Avenue, Boston
Registration Link

Waivers in the Context of Adjustment of Status

Immigration Committee

Monday, March 30, 2009 - 12:00 pm
Boston Bar Association - 16 Beacon Street
Registration Link

State Court Advocacy Day

Tuesday, March 31, 2009 - 1:30 pm
Massachusetts State House - 24 Beacon Street, Grand Staircase
Registration Link

Living in the Zone of Insolvency: Legal Dilemmas for Directors in Uncertain Times

Corporate Law Committee, Bankrupcty Section

Wednesday, April 8, 2009 - 12:30 pm
Boston Bar Association - 16 Beacon Street
Registration Link

Immigration Judges Panel

Immigration Law Committee

Tuesday, April 28, 2009 - 5:00 pm
John Adams Courthouse - Second Floor Conference Suite, One Pemberton Square, Boston
Registration Link

IWIRC New England Network's Spring Gala for the M. Ellen Carpenter Memorial Fund

International Womens Insolvency Restructuring Confederation

Wednesday, April 29, 2009 - 6:30 pm
Syline Room, Museum of Science - 1 Science Park, Cambridge
Registration Link

Refugee Roulette: Disparities in Asylum Adjudication

Immigration Law Committee

Friday, May 1, 2009 - 4:00 pm
Boston Bar Association - 16 Beacon Street
Registration Link

Upcoming CLE Programs

Hot Topics in Internet Law

Computer and Internet Law Committee

Wednesday, April 29, 2009
4:00 pm - 7:00 pm
Boston Bar Association - 16 Beacon Street, Boston
Registration Link

The fast-changing nature of the Internet is creating an increasing array of new legal issues. In recent years, these issues have been multiplied by the use of interactive technologies such as blogs, wikis, and social networking. While these technologies make possible new forms of social interaction and have created a variety of business opportunities, they also bring with them new liabilities and risks.

This seminar will focus on current legal issues presented by recent developments in the technology and use of the Internet. Topics covered will include protecting intellectual property and avoiding infringement online; employment issues and what employers can do to minimize their risks; and other potential claims arising from online conduct.

Specific Topics will include:

- Copyright issues presented by new technologies, including ownership, licensing, and fair use
- Recent developments relating to the Digital Millennium Copyright Act
- Domain names and other trademark protection issues
- Employer liability for, and right to control, employees' online conduct
- Best practices for company policies on social networking and other Internet use
- Claims under the Computer Fraud and Abuse Act
- Defamation and invasion of privacy liability for online content
- Immunity for service providers under Section 230 of the Communications Decency Act

Save the Date: Bankruptcy Bench Meets Bar Conference

Bankruptcy Section

Thursday, May 14, 2009
2:00 pm - 6:00 pm
The Colonnade Hotel - 120 Huntington Ave, Boston
Registration Link

Join us as bankruptcy judges and practitioners in the District of Massachusetts share insights, observations and analysis on key issues for 2009. Early registration is open now! Stay tuned for a list of panelists and topics.

Recent Brown Bag Lunches

Massachusetts Antitrust Enforcement, Office of Attorney General Martha Coakley: 2009 Year-In-Review and Priorities for 2009

Antitrust Committee, Business Law Section
Monday, March 23, 2009

Presenter:

William Matlack
Antitrust Division of the Massachusetts Attorney General's Office

William Matlack, Antitrust Division of the Massachusetts Attorney General's Office, met for a discussion on the Division's antitrust enforcement efforts over the past year, and its priorities for 2009.

Opportunity or Armageddon: Healthcare M&A and Financing in 2009

Mergers & Acquisitions Committee
Friday, March 20, 2009

Presenter:

Christopher J. P. Velis
Medical Capital Advisors
cvelis@medcapadvisors.com

Christopher J.P. Velis, Medical Capital Advisors, reviewed the market for health care transactions in 2008 and 2009 in terms of valuations, deal structures and buyer and seller expectations.

New FMLA Regulations - Are You in Compliance?

Labor & Employment Section, Corporate Counsel Committee
Wednesday, March 18, 2009

Presenters:

Nina Joan Kimball Esq.
Kimball Brousseau LLP
nkimball@kbattorneys.com

Jaclyn L. Kugell Esq.
Morgan, Brown & Joy, LLP
JKugell@morganbrown.com

Andrew J. Orsmond Esq.
Foley Hoag LLP

The United States Department of Labor's new regulations interpreting the Family and Medical Leave Act (FMLA) went into effect on January 16, 2009. The new regulations address changes to the substantive and procedural rights of both employers and employees. In addition, the regulations provide rules governing new categories of leave created by Congress to address the needs of injured and deploying military service members and their caregivers. While most employers were aware of the upcoming changes, questions are arising as they adapt and implement new policies and practices to comply with these changes. Where are you in the compliance process? Have you reviewed and amended or adopted policies consistent with the new regulations? Are you running into questions as you implement new policies? Nina, Jaclyn, and Andrew outlined the changes and provided answers to common questions arising out of the new regulations.

Debt Buybacks: Select Issues and Recent Developments

Corporate Law Committee
Wednesday, March 11, 2009

Presenter:

Steve Peck, Esq.
Weil, Gotshal & Manges LLP
steven.peck@weil.com

Given the illiquidity in today's debt markets, the debt instruments of many companies are trading below their face value, significantly below in many cases. Some companies, and the owners of some companies who are bullish on the companies' long term prospects, are looking to the purchase of debt at discounted prices as a potentially attractive use of capital.

Steve Peck focused on key issues that issuers of debt, and their owners, should consider when considering debt repurchases. The program also discussed the impact that the tax provisions of the recently passed stimulus legislation will have on these repurchases.

The Buck Starts Here

Banking & Financial Services Committee
Wednesday, March 11, 2009

Presenters:

Kevin Handly, Esq.
Pierce Atwood
khandly@pierceatwood.com

Kevin Bottomley
Danvers Bancorp
kevin.bottomley@danversbank.com

Francis C. Morrissey, Esq.
Edwards Angell Palmer & Dodge
fmorrissey@eapdlaw.com

The Buck Starts Here lunch programs focus on legal and business developments in the tumultuous financial services industry. Each program consists of an update on current market and regulatory events; a drill-down on a significant and timely issue; and a spotlight on a company or an industry and how it is coping with the recession.

The program on Wednesday, March 11, consisted of:

Update – Kevin Handly, gave an update on developments since our last program
Drill-down – Francis C. Morrissey spoke on the use and abuse of bankruptcy.
Company spotlight – Kevin Bottomley provided a snapshot of one community bank and of the Bank's strategy for meeting the challenges presented by the recession

Reforming the Taxation and Regulation of Mutual Funds

Investment Companies & Advisors Committee
Tuesday, March 10, 2009

Presenter:

John C. Coates, Esq.
Harvard Law School
jcoates@law.harvard.edu

John Coates spoke about reforms to improve the treatment of middle class investments, including:

- improvements of mutual fund taxation
- ways to enhance the flexibility and resources of U.S. fund regulators
- modifications of the existing ban on asymmetric advisor compensation and the exclusion of foreign funds, and
- unjustified disparities in the treatment of mutual funds and mutual fund substitutes

Review of the Foreign Corrupt Practices Act

Corporate Counsel Committee
February 18, 2009

Moderator:

William Wise, Esq.
Holland & Knight
William.Wise@hklaw.com

Presenters:

Robert Keefe, Esq.
Wilmer Cutler Pickering Hale and Dorr
Robert.Keefe@wilmerhale.com

Chris Barry
PriceWaterhouse Coopers

The panel provided an update on enforcement actions brought under the Foreign Corrupt Practices Act ("FCPA"), which has become a focal point for law enforcement both in the U.S. and around the world. The FCPA focuses on companies who engage in business with foreign governments and interact with their local officials. There was some discussion about the requirements under the FCPA and the value of instituting effective anti-corruption compliance programs to meet the challenges of the FCPA.

Antitrust & Health Care in the New Administration

Antitrust Committee, Health Law Section
February 10, 2009

Presenters:

Jesse Caplan, Esq.
Epstein Becker & Green, P.C.
jcaplan@ebglaw.com

David Balto, Esq.
Center for American Progress
dbalto@americanprogress.org

Mary Freeley, Esq.
Massachusetts Attorney General's Office

Barbara Anthony, Esq.
Health Law Advocates

Monica Noether, Ph.D.
CRA International
mnoether@crai.com

A diverse panel provided insight into the future of antitrust enforcement in the health care industry under the new administration. Key topics included an overview of President Obama's antitrust policy pronouncements, the backgrounds of the likely heads of the DOJ's Antitrust Division and Federal Trade Commission, the future of federal-state cooperation in antitrust enforcement, and the prospects for further litigation in the pharmaceutical sector and heightened scrutiny of mergers among health insurers.

What's New in Proxy Statements and Year-End Reporting

Corporate Law Committee, Securities Law Committee
January 27, 2009

Presenters:

Jonathan Wolfman, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
jonathan.wolfman@wilmerhale.com

Marisa Murtagh, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
marisa.murtagh@wilmerhale.com

Jonathan Wolfman and Marisa Murtagh discussed recent developments and trends affecting required disclosures and mechanical changes for year-end reporting and proxy statements during the 2009 reporting season. Disclosure topics addressed included the effects of current economic conditions on disclosure and climate change and other environmental disclosures. Proxy updates included a discussion of e-proxy and changes to RiskMetrics Group's voting policy. A document providing a detailed overview of new disclosure requirements and interpretations affecting calendar year-end filers during the 2009 annual meeting season was presented at the meeting, and is available from the BBA upon request.

Drafting Executive Compensation Disclosure for the 2009 Proxy Statement

Corporate Law Committee
January 14, 2009

Presenter:

Mark A. Borges
Compensia, Inc.
mborges@compensia.com

Mark Borges led a discussion of key disclosure issues relating to executive compensation for the 2009 proxy statement season. The topics that he covered included: aspects of CD&A on which the SEC staff is expected to focus in 2009; special CD&A considerations in light of the current economic environment; CD&A considerations raised by the executive compensation limitations of TARP; and drafting the CD&A for a stockholder audience in light of "say on pay".

Only a Fool Would Join A Board of Directors and Here's How to Do It

Corporate Counsel Committee
December 17, 2008

Presenter:
Laurence J. Stybel, Ed.D.
Stybel Peabody Inc.
lstybel@stybelpeabody.com

Larry Stybel led an informative discussion on board of director options for in-house counsel (and others). The session focused on the benefits and risks associated with board membership. Larry also outlined how to develop a board resume and explore board options and what to do once you get on a board.

Distressed M&A in Distressed Markets

Corporate Law Committee, Bankruptcy Section
December 15, 2008

Presenters:

Bojan Stoyanov
Huron Consulting Group
bstoyanov@huronconsultinggroup.com

Joseph J. Basile, Esq.
Weil, Gotshal & Manges LLP
Joseph.Basile@weil.com

Bojan Stoyanov discussed the current state of the M&A market, including recent trends, predictions for the coming year, and valuation-related issues arising from "material adverse change" clauses. Joe Basile discussed advantages and disadvantages of conducting a sale of a business through a bankruptcy. He also discussed the differences between an asset sale under Bankrutpcy Code Sec. 363(b) and a reorganization of the business under Bankruptcy Code Chapter 11.

Unregistered Brokers (sometimes "Finders")

Corporate Law Committee, Securities Law Committee
December 10, 2008

Presenter:

Matthew C. Dallett, Esq.
Edwards Angell Palmer & Dodge LLP
mdallett@eapdlaw.com

Matt Dallett discussed considerations in determining whether a person acting as a finder qualifies as a broker that must be registered, the potential pitfalls that may occur for each of investors, issuers and finders when an unregistered broker is engaged by an issuer, and practical tips for how to counsel clients who have engaged unregistered brokers. Items discussed included:

1. SEC No Action Letter – International Business Exchange Corporation
2. SEC No Action Letter – Country Business, Inc.
3. Novelis Therapeutics, Inc. v. Kenmore Capital Partners, Ltd.
4. Additional SEC No Action Letters and cases as provided in slides

Recent Developments in Delaware Corporate Case Law

Corporate Law Committee
September 10, 2008

Presenter:

Stephen Bigler, Esq.
Richards, Layton & Finger, P.A.
bigler@rlf.com

Reprising a well-received program from 2007, Steve Bigler discussed recent Delaware cases of interest to corporate law practitioners. Among the cases covered were:

1. CA, Inc. v. AFSCME Employees Pension Plan (stockholder-proposed bylaw amendment)
2. Levy v. HLI Operating Company; Sodano v. AMEX LLC (priority of different sources of director indemnity)
3. Jana Master Fund, Ltd. v. CNET Networks; Levitt Corp. v. Office Depot (advance notice bylaw)
4. Ryan v. Lyondell Chemical Co.; McPadden v. Sidhu; In re Lear Shareholder Ltgn (good faith vs. duty of care)

Editor's Note: For a discussion of Lyondell, McPadden and Lear, please see Karen Agresti's case note at page 22 below.

For more information: To obtain the materials distributed at any of the foregoing brown bags, please contact Anna Frank at the BBA at afrank@bostonbar.org.

Recent CLE Programs

Litigating Wage and Hour Class/Collective Actions

Labor & Employment Section
Wednesday, March 18, 2009

Panelists:

Brigitte M. Duffy, Esq.
Seyfarth Shaw LLP

Ellen C. Kearns, Esq.
Foley & Lardner LLP

Philip J. Gordon, Esq.
Gordon Law Group, LLP

Shannon Liss-Riordan, Esq.
Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, P.C.

Wage and hour litigation has increased rapidly over the past decade, with important issues of law evolving on an almost monthly basis. Whether you are in-house counsel for a company with a sizeable workforce, defense counsel called upon to defend or audit wage and hour policies, or a plaintiff's attorney evaluating claims for a possible class action, wage and hour issues remain an ever-present and expanding part of employment litigation.

Specific Topics included:

- What are the differences between a Rule 23 Class Action and an FLSA collective action?
- Hybrid Class Actions--Bringing state claims into federal court. How federal and state laws impact Forum Selection and Complaint drafting.
- Conditional certification--what are the standards? What does "similarly situated' mean in a misclassification case…in an off-the clock case..in a regular rate case?
- When can a class be decertified? What is the impact of decertification on opt-in plaintiffs?
- Case Management Tools for Collective Actions:
    - Discovery Issues unique to class litigation, including—useful deposition questions and strategic discovery decisions.
    - Protective Orders
    - Bifurcation of Damages and Liability
    - Contact with Collective Action members
- Pre-trial Disposition of Cases
    - Offers of Judgment
    - Issue Preclusion
- Trial of a Collective Action
    - Use of representative testimony
    - Use of experts
    - Order and presentation of proof
- Settlement Issues Unique to Collective Actions

To Purchase Materials, Click Here

PERM Filings in Today's Economy Using Tomorrow's Forms

Immigration Law Committee
January 27, 2009

Moderator:
Ellen Kief, Esq.
Law Office of Ellen S. Kief
EKief@Kieflaw.com

Panelists:
Steven Clark, Esq.
Flynn & Clark
sclark@flynnclark.com

Sharryn Ross, Esq.
Ross, Silverman & Levy
sross@rsl-law.net

Gary Pappas, Esq.
Pappas and Lenzo
info@pappas-lenzo.com

Robin O'Donoghue, Esq.
O'Donoghue Law Office
rdod@rodonoghuelaw.com

This program helped practitioners plan strategically for success in PERM cases, to be prepared for the coming PERM changes in mid-2009 and address issues with the new 9089 form. Panelists offered advice on successful strategies, from case evaluation through recruitment through the processing of the I-140.

Topics included the role of counsel in recruitment, DOL audits aimed at the law firm, filing PERM in the age of layoffs and hiring freezes, USCIS challenges to educational credentials and the inevitable questioning of the company's ability to pay in the oncoming recession. Specific agenda items covered included the following:

Department of Labor Update
- News from October 27 Stakeholders Meeting
- Hot Topics
  - New Form 9089
  - Supervised Recruitment
  - LCA Review
  - Prevailing Wage Processing
  - Audit Bombshell: Role of Counsel
  - Will EB-2 Worldwide Regress?
    - Updated Visa Number Projections from Charles Oppenheim at DOS

Navigating the New PERM Application Form 9089
- When Will It Be Effective
- Section by Section Changes and Practice Tips
- Danger Zones: Layoffs, Worksite Information, Requirements
- Business Necessity Text Boxes: Saying It All In 3-5 Sentences – Help or Hindrance?
- Audit & Post-Audit Issues

Strategic Planning for the I-140: When is a Degree a Degree?

To Purchase Materials, Click Here

U.S. and Canadian Immigration Law Perspectives on the Northern American Free Trade Agreement in the Post 9/11 Era

Immigration Law Committee
November 12, 2008

Moderator:
Ellen S. Kief, Esq.
Law Office of Ellen S. Kief
Tel. 617-482-0200
EKief@Kieflaw.com

Panelists:

Seth Dalfen, Esq.
Gomberg Dalfen

Andrew Wilson Esq.
Serrotte Reich Wilson, LLP
awilson@srwlawyers.com

Douglas D. Hauer Esq.
Chin & Curtis, LLP
DHauer@chincurtis.com

Avi Gomberg, Esq.
Gomberg Dalfen

William Z. Reich, Esq.
Serrotte Reich Wilson, LLP
wreich@srwlawyers.com

The BBA Immigration Law Committee joined the Business and International Law Sections and the American Immigration Lawyers Association (AILA) in sponsoring this seminar regarding representing US and Canadian citizens crossing the respective borders of their countries to obtain employment benefits under NAFTA.

The continuous flow of goods, services and people between the U.S. and Canada requires an understanding of how the government agencies interpret the immigration provisions of the North American Fair Trade Agreement (NAFTA). The panel discussed how NAFTA is interpreted by U.S. and Canadian officials in terms of work permit issuance, the definition of a business visitor, and entry requirements for eligible citizens of the U.S. and Canada seeking to enter either country to work. In addition, the panel discussed the impact of increased border enforcement and expanded data sharing capabilities on the flow of people between the U.S. and Canada in the post-9/11 era.

The program addressed NAFTA's immigration provisions for professional workers, permissible business visitor activities, criminal issues and questions of admissibility at the U.S./Canadian border, same-sex spouses and unmarried partners entering the U.S. and Canada, challenges faced by U.S. and Canadian employers in transferring personnel to Canada or the U.S., similarities and differences in the cultures of adjudication within Canadian and U.S. agencies dealing with immigration, and practical considerations for U.S. employers considering Canada as an alternative location for employing professionals in light of the H-1B cap.

To Purchase Materials, Click Here

Corporate Governance 2009

Business Law Section
October 15, 2008

Moderators:

Susan Permut Esq.
EMC Corporation
permut_susan@emc.com

Russ Hansen Esq.
Burns & Levinson LLP
rhansen@burnslev.com

Panelists:

John C. Wilcox
Chairman, Sodali Ltd
Senior Advisor, TIAA_CREF

Mark T. Beaudoin
Waters Corporation

Carol Hansell Esq.
Davies, Ward, Phillips & Vineberg LLP
chansell@dwpv.com

Jamie Heard
RiskMetrics Group

John F. O'Brien, Director
TJX Companies, Inc.
Cabot Corporation
LKQ Corporation

The panelists covered the following topics as the core part of the presentation:

- What Shareholders Expect from Boards;
- Thoughts for Board Counsel;
- Working Effectively with Proxy Advisors;
- Roles & Responsibilities of Boards & Shareholders;
- Managing Shareholder Relations; and
- Predictions for the Hot Issues for 2009.

To Purchase Materials, Click Here

For more information: To obtain the materials distributed at any of the foregoing CLEs, please contact Anna Frank at the BBA at afrank@bostonbar.org.

BBA's Consumer Finance Working Group

The BBA has convened a Consumer Finance Working Group to consider the many legal issues facing consumers during the current financial crisis. The Working Group is chaired by Adam Ruttenberg of Looney & Grossman and the BBA's Bankruptcy Section. Pratt Wiley and Andrew Dennington of the Business Law Section's Public Policy Committee regularly attend these meetings, along with other members from the Bankruptcy, Business, and Real Estate Sections.

At its last meeting on January 23, 2009 the Working Group discussed proposed changes to the Attorney General's regulations concerning debt collectors, 940 C.M.R. § 7.00. At its next meeting, the Working Group hopes to mark up a first draft of these proposed amendments.

Carol Lewis of the Federal Reserve Bank also spoke regarding the Fed's Consumer Outreach Unit. The Fed's Consumer Spotlight at http://www.bos.frb.org/consumer/index.htm is a valuable resource for all attorneys. Ms. Lewis reported that the Fed is looking for volunteer attorneys to supervise its law student interns in working to assist distressed consumers facing foreclosure.

The Working Group is also actively discussing public education efforts concerning deceptive loan modification programs and possible amendments to regulations concerning mortgage servicers and automobile dealers.

The M. Ellen Carpenter Financial Literacy Program

The M. Ellen Carpenter Financial Literacy Program, a joint project of the United States Bankruptcy Court for the District of Massachusetts and the Boston Bar Association, is in its fourth year and continues to expand. The program seeks additional volunteers to instruct high school students about basic financial issues. Volunteers teach students through modules dealing with personal finance, budgeting, buying a car, using credit, and the consequences associated with credit problems. Attorneys of all backgrounds are encouraged to volunteer to teach one class session. The time commitment is less than six hours and the program provides training and program materials.

For more information, please contact Rebecca Rantz, the BBA's Department of Community Affairs at Rrantz@bostonbar.org, 617-778-1922.

Case Reviews

Delaware Bankruptcy Judge Finds that Allegedly Lax Sales Processes may Breach Duty of Loyalty and Good Faith

By Gregory S. Fryer

Under Delaware law and that of many other states (including Massachusetts), corporate charters may exculpate directors from liability for monetary damages for breach of the duty of care, but not for breach of the duty of loyalty or for acts or omissions not in good faith. Where personal self-interest in a transaction is not at issue, what level of neglect or inattention by a board of directors will state a claim for breach of the duty of loyalty or good faith? Several recent cases out of Delaware have explored the boundaries between due care and loyalty or good faith. One of the most provocative is *Bridgeport Holdings, Inc. Liquidating Trust v. Boyer*, 388 BR 548 (Bankr. D. Del. 5/30/08) (Walsh, J.).

FACTS: In January 2000, Bridgeport Holdings took Micro Warehouse private through a leveraged buyout, at a value of about $680 million. The Company (a computer and peripherals reseller) soon encountered significant financial difficulties, and was forced to renegotiate its credit facility in 2001 and again in early 2003. The situation continued to deteriorate, and after repeating urgings from its lenders, the Company in mid-August 2003 hired turnaround specialist Alix Partners and appointed one of that firm's principals (Lawrence Ramaekers) as chief operating officer. By that time, the Company was in desperate shape. On September 9, 2003, the Company sold its principal business assets to a competitor, CDW Corporation, for $28 million. The Company filed for bankruptcy the next day. At the time the sale was announced, a number of financial analysts reported that CDW had gotten a very favorable price. (It would later be revealed that at a CDW board meeting on September 4, 2003, a CDW vice president had opined that the Micro Warehouse assets to be acquired had a net present value of $128 million.) In February 2007, CDW settled a fraudulent conveyance claim brought by the Bridgeport Holdings Liquidating Trust, paying an additional $25 million. Judge Walsh described this as "Obviously . . . not a nuisance settlement."

COMPLAINT: After settling the fraudulent conveyance claim, the Liquidating Trust then brought suit against the Micro Warehouse directors and officers (including Ramaekers), alleging various breaches of fiduciary duty and corporate waste. Characterizing the CDW transaction as a "fire sale" for a grossly inadequate price, the complaint contains extensive allegations to the effect that Micro Warehouse directors and officers were extremely lax in pursuing alternative solutions to the Company's growing problems, displayed no particular urgency in hiring Alix Partners, made only cursory efforts to solicit strategic buyers other than CDW, solicited no financial buyers whatsoever, did not retain an investment banker to shop the deal or opine on fairness, and gave Ramaekers nearly unfettered discretion to negotiate and close a deal with CDW on the basis of a hasty and ill-informed process.

PROCEDURAL POSTURE: The defendants moved to dismiss the complaint for failure to state a claim on which relief could be granted. Noting that the complaint was devoid of any suggestion that the board acted out of self-interest or lacked independence in regard to the transaction, they argued that the plaintiff's allegations, even if true, set forth a classic claim for breach of the duty of care, but failed to state a claim for breach of the duty of loyalty or for bad faith. As such, they argued, the exculpatory provision in the Compa ny's charter precluded any recovery of monetary damages.

HOLDING: As to the principal claims, the Bankruptcy Court denied the motion to dismiss. Judge Walsh found that the complaint:

alleged sufficient facts to support the claim that the [director and officer] Defendants breached their duty of loyalty and acted in bad faith by consciously disregarding, i.e., abdicating, their duties to the Company. Fiduciaries breach their duty of loyalty by intentionally failing to act in the face of a known duty to act, demonstrating a conscious disregard for their duties. *Stone*, 911 A.2d at 369; see also *Desimone v. Barrows*, 924 A.2d 908, 933 (Del. Ch.2007) (fiduciaries can be held liable if they are "disloyal" to the corporation, including if they fail to obtain information as result of their "knowing *abdication* of their directorial duties") (emphasis added). In other words, "acts taken in bad faith breach the duty of loyalty." See *Ryan v. Gifford*, 918 A.2d 341, 357 (Del.Ch.2007) (citing Stone for this proposition). A fiduciary acts in bad faith when, among other things, he takes or fails to take any action that demonstrates a "faithlessness or lack of true devotion to the interests of the corporation and its shareholders." Id.

* * *

I believe it is fair to say that the sale to CDW was a failed transaction from Micro Warehouse's view. Was it the result of a combination of events beyond the control of the D & O Defendants or is it explained (as alleged in the Complaint) by the D & O Defendants' abdication of their fiduciary duties? At this stage of this proceeding, there is no record to support the former and the reasonable inferences drawn from the allegations in the Complaint favor the latter.

IMPLICATIONS: Price inadequacy is generally more apparent in hindsight than in the crush of a deteriorating situation, and allegations of inept process are the hallmark of a claim for breach of the duty of care. Was the Micro Holdings board process alleged here so much more lax or inattentive than that for which the Delaware Chancery court excoriated the Disney directors (but did not impose liability) over Michael Ovitz' $130 million severance deal? See In *re The Walt Disney Company Derivative Litgn, 907 A.2d 693 (Del. Ch. 2005) aff* 'd, 906 A.2d 27 (Del. 2006). Were the Micro Holdings directors clearly (and culpably) mistaken in concluding that a sale outside bankruptcy was likely to preserve more value than filing for Chapter 11 first? Had they filed first, they would not be facing claims for an inadequate sale process, no matter how poor the ultimate price and no matter how many jobs were lost in the meantime. They still may have faced claims for not having acted earlier, but those now seem like easier claims to defend than the ones that Judge Walsh refused to dismiss here.

The *Bridgeport Holdings* case dealt with a business failure in the relatively tame economic climate of 2003. By contrast, how many boards today face the prospect of a liquidity crisis with no graceful exit? Difficult times, indeed, for directors and their lawyers.

Editor's Note: *The Bridgeport Holdings case and related issues will be discussed at a Brown Bag Lunch on April 8, 2009: Living in the Zone of Insolvency - Legal Dilemmas for Directors in Uncertain Times.* *See page 5 above.*

Delaware Supreme Court Provides New Guidance for Directors and Officers Evaluating a Corporate Sale or Restructuring

By Dimitry S. Herman

A recent decision by the Delaware Supreme Court, *Gantler v. Stephens*, C.A. No. 2392 (Del. January 27, 2009) provides new guidance for directors and officers on their fiduciary duties arising in connection with a possible corporate sale or restructuring. In *Gantler*, the Court held that directors and officers of an Ohio bank (*the "Bank*") could be found to have breached their fiduciary duty by rejecting an opportunity to sell the Bank and instead pursuing a recapitalization that favored the insiders. The case was brought by a former director (Gantler) and minority shareholders of First Niles Financial, Inc. ("*First Niles*"), the Bank's holding company.

In short, the historical position under Delaware corporate law has been that certain conflicts of interest of insiders (such as trying to keep one's employment or directorship) are inherent and unavoid able, and if properly disclosed, would not result in a higher level of scrutiny by courts over board decisions. *Gantler* holds that this is not always true, and that specific facts can alter that position.

Specifically, where directors and/or officers are -- or with 20/20 hindsight, may be argued to be -- motivated to prefer one particular transaction over another, even if the motivation is reasonable and disclosed to shareholders, extreme care should be taken to ensure that the board evaluation and deliberation process is balanced and well-documented. Failure to do so may prevent a board from being entitled to the business judgment rule and subject the directors and officers to a stricter standard that the actions meet the "entire fairness" test under Delaware law.

BACKGROUND: After a strong acquisition market, in August 2004, the First Niles board agreed to put the Bank up for sale and hired investment bankers to pursue the opportunity. Shortly thereafter, the managing officers of First Niles (and the Bank), several of whom were also directors, advocated that the Bank abandon the process and privatize the company by delisting from the NASDAQ Small-Cap Market. The Bank received offers from three strategic purchasers, each considered by the investement bankers to be within the recommended range. Two offers made clear that the purchaser would terminate the incumbent First Niles board upon closing. In the months that followed, management did not respond to the bidders' due diligence requests and delayed the process (resulting in the withdrawal of one bid, which was not disclosed to the board until after the fact) and continued to discuss the privatization proposal. In March 2005, notwithstanding a favorable opinion from the investement bankers as to one of the offers, the board voted 4 to 1 to reject the offer, with Gantler being the only dissenting vote, and turned its attention to the privatization plan.

In April 2005, management presented to the board its privatization proposal, which would reclassify the First Niles common stock held by holders of 300 or fewer shares into a new class of Series A Preferred Stock that would pay higher dividends and have the same liquidation preference as the common stock, but that would not have voting rights except in the event of a proposed sale of the company. In December 2005, the proposal was approved 3 to 1 by the Board, with Gantler again being the only dissenting vote. Shortly thereafter, Gantler was replaced on the Board by an officer of the company. The following June, the newly-composed First Niles Board unanimously approved a charter amendment to effect the reclassification and proceeded with the proxy solicitation process for shareholder approval. The proxy statement did disclose that the directors and officers had a conflict of interest with respect to the reclassification and the alternative transactions that the board had considered, including a business combination that was turned down.

Following shareholder approval of the charter amendment, the plaintiffs brought suit in the Delaware Chancery Court alleging, among other things, that the board violated its various fiduciary duties by sabotaging due diligence and abandoning the sales process in favor of their own incumbency. In March 2008, the Chancery Court dismissed the case for failure to state a claim and the plaintiffs appealed.

ANALYSIS: In reversing the Chancery Court's dismissal, the Supreme Court clarified several issues of Delaware corporate law, including the following:

- *Higher Scrutiny for Transactions with Potential Conflict of Interest.* The Court agreed with the defendants that the Board's duty in this case should be analyzed under the more favorable business judgment rule, as opposed to the "enhanced scrutiny" standard under Unocal.

  However, the Court did hold that the business judgment presumption could be rebutted in this case because reasonable inferences of self interest could be drawn from thedefendant directors' and officers' lack of cooperation with the due diligence requests and sabotaging of the bid process. In its analysis, the Court highlighted the specific conflicts arising from a sale of the Bank for each of the directors -- the potential loss of employment for the Chairman/CEO; and the loss of the Bank as a key client for businesses operated by two different directors. It is also interesting to note that the Court relied on the disclosure in the proxy statement of the potential for conflict of interest as an admission that the conflict did in fact exist.

There can be little question that the extreme facts of this case heavily influenced the Court's decision to rebut the presumption of good faith by the board, and that the outcome may have been different if the "sabotaging" activity was not present and if the board deliberations regarding the sale proposals were more extensive. The Court specifically noted that after only one bidder remained and the bankers opined that the bidder may continue to improve their offer, the board did not discuss the offer at one meeting and rejected in another, "without discussion or deliberation."

If directors or officers do have personal financial interests that diverge from the interests of other shareholders, a board should now be prepared for a higher standard of review of their actions. That said, *Gantler* should not be read to require a board to reach any particular decision (e.g. sell, recapitalize, etc.), but only that the process to reach that decision is fair and informed. Therefore, to the extent that certain opportunities can later be reasonably argued to have been more preferable for certain (minority) shareholders, boards should be advised to more carefully evaluate those opportunities and to document why they may not have been in the best interests of all shareholders.

Where a potential conflict does exist, boards should be advised to consider the appointment of an independent committee for the M&A process, where such committee would have the authority to engage its own advisors and independent legal counsel. Another approach may be to engage multiple investment banking advisors to provide a board with a comparative analysis of the opportunities. Finally, extreme care should be take to distribute all studies, reports and materials in advance of board meetings, to have substantive discussions on those issues at the meetings and properly memorialize in the minutes to evidence that the board fulfilled its duty of care (which it would seem was not met in *Gantler*).

- *Fiduciary Duty of Officers equal to that of Directors.* As an issue of first impression, the Court held that officers of a Delaware corporation have the same fiduciary duties as directors. While this position has been implied, the Supreme Court has now explicitly held that officers owe fiduciary duties of care and loyalty that are the same as those of directors of Delaware corporations.

- *Shareholder Ratification Limited.* The Court also disagreed with the Chancery Court's finding that the shareholder approval of the privatization plan, as submitted by the First Niles board and described in the proxy, "ratified" the prior actions of the board, absolving them of liability. To clarify this area of the law, the Court imposed a number of specific limitations on this doctrine.

First, shareholder ratification is effective only where a "fully informed shareholder vote approves director action that does not legally require shareholder approval in order to become more legally effective." Therefore, where a shareholder vote is otherwise required – such as for the approval of a charter amendment or a merger – the shareholder vote does not carry any ratifying effect of the preceding board action.

Second, the only director action that can be ratified is that which shareholders are specifically asked to approve. For example, the ultimate approval of a merger by shareholders does not mean that shareholders have also ratified all related director actions, such as defensive measures that may have been taken in the context of that transaction.

Third, the effect of shareholder ratification does not extinguish all claims in respect of the ratified director action, but rather subjects the challenged action to business judgment review (as opposed to the entire fairness test). Therefore, companies should not assume that a valid shareholder vote would sanitize the prior actions of a board in connection with any particular corporate decision or transaction.

Recent Developments in Director Liability in a Sale of Control

By Karen Agresti

Recent decisions out of the Delaware Chancery Court provide conflicting guidance to boards of directors on what level of diligence is necessary to avoid a claim for breach of the duty of loyalty or the duty to act in good faith. *Ryan v. Lyondell, McPadden v. Sidhu,* and *In re Lear Corporation Shareholder Litigation* address the board's fiduciary obligations to stockholders in the context of a sale of control, and discuss the limits of exculpatory provisions adopted pursuant to Delaware General Corporation Law Section 102(b)(7).

Ryan v. Lyondell (Del. Ch. July 29, 2008)

On July 29, 2008, Vice Chancellor Noble issued an opinion in *Ryan v. Lyondell*, which seems to hold directors to high standards of loyalty and good faith in overseeing a sale of the business. The case involved the merger between the Lyondell Chemical Company ("Lyondell") and Basell AF ("Basell"). Lyondell stockholders alleged (among other things) that the Lyondell board (1) violated its *Revlon* duties by failing to take a more active role in seeking the best terms obtainable, (2) consented to unreasonable deal protections that discouraged more favorable bids, and (3) lacked sufficient market information to ensure adequate vetting of the offer. The defendants filed a motion for summary judgment, arguing that the alleged inadequacies in the board process at most constituted a breach of the duty of care, and that the exculpation provision in the company's charter precluded any award of damages from such a breach. Despite evidence that the merger price constituted a "blowout offer" that was high enough to preclude competing bids, the court criticized the board's relatively passive role in evaluating the proposed terms. In analyzing the board's behavior, the court emphasized (1) the speed with which the board approved the sale, (2) the lack of direct involvement by the board in negotiations, and (3) the board's ready adoption of deal protection measures that made competing bids less likely. The court cited allegations that the board neglected to seek out independent confirmation of the market value of the business, even though Lyondell stock had arguably been "in play" for several weeks prior to receipt of the offer from Basell. The court did find that most of the directors were independent and disinterested. The court rejected plaintiffs' argument that the directors were conflicted by personal gain to be realized upon early vesting of their shares. Nonetheless, the court declined to dismiss plaintiffs' claims outright, stating that "the Board's failure to engage in a more proactive sale process may constitute a breach of the good faith component of the duty of loyalty as taught in *Stone v. Ritter*" and thus potentially falls outside the exculpation permitted by DGCL Section 102(b)(7).

On August 29, 2008, the Vice Chancellor Noble denied the defendants' request for an interlocutory appeal and confirmed the original holding. The court chose to reaffirm its conclusions regarding the inadequacy of the board's actions. In a rare occasion of disagreement amongst Delaware courts, on September 15, 2008, the Delaware Supreme Court accepted the defendants' request for an interlocutory appeal pursuant to Supreme Court Rule 42. The Delaware Supreme Court will hopefully seize the opportunity to clarify the scope of fiduciary duties and resolve remaining questions on the standard for director liability.

Post-Lyondell Decisions: A Return to Director Protection from Personal Liability

The *Lyondell* decision sparked extensive commentary, reflecting anxiety over what level of diligence by directors would be needed to invoke exculpation. Following *Lyondell, McPadden v. Sidhu (Del. Ch. Aug. 29, 2008)* and *In Re Lear Corporation Shareholder Litigation* (Del. Ch. Sept. 2, 2008) seemed to set forth less stringent standards for directors who approve sale of control transactions.

In *McPadden v. Sidhu*, Chancellor Chandler ruled that even an allegedly reckless sale process, resulting in a grossly undervalued sale to a former executive, does not constitute bad faith for purposes of applying an exculpatory provision under DGCL Section 102(b)(7). The case involved the sale of i2 Technologies' wholly-owned subsidiary. Plaintiffs alleged the board entrusted the negotiations to a vice president of the subsidiary, Anthony Dubreville, who had previously expressed an interest in purchasing the subsidiary himself. As in *Lyondell*, the directors in *McPadden* allegedly failed to take any active role in reviewing and comparing bids to ensure the best price to shareholders. Despite what the court deemed to be allegations of gross negligence on the part of the directors, the holding preserved protection from personal liability for the directors by virtue of the 102(b)(7) provision contained in the company charter. The court refused to equate gross negligence, even recklessness, with bad faith, and dismissed the claims as to the directors.

Days later, Vice Chancellor Strine handed down his decision in In *re Lear Corporation Shareholder Litigation*. The case involved Carl Icahn's offer to purchase Lear Corporation. When it became apparent that Icahn's offer of $36 per share would not receive requisite shareholder approval, Lear pressed Icahn for a better price. Icahn agreed to offer an additional $1.25 per share (more than a $90 million increase in the total price), but on the condition that the company pay him a $25 million termination fee if the shareholders voted "no." The board approved these revised terms; the shareholders voted the merger down; and the company paid the $25 million termination fee. Alleging that it was virtually certain that the shareholders would vote against the revised price, the plaintiffs charged that the directors acted in bad faith when they approved the "no vote" termination fee. The Chancery Court held the pleadings to a rigorous standard:

> *[B]ecause the plaintiffs concede that eight of the eleven Lear directors were independent, the plaintiffs must plead facts supporting an inference that the Lear board, despite having no financial motive to injure Lear or its stockholders, acted in bad faith to approve the Revised Merger Agreement. Such a claim cannot rest on facts that simply support the notion that the directors made an unreasonable or even grossly unreasonable judgment. Rather, it must rest on facts that support a fair inference that the directors consciously acted in a manner contrary to the interests of Lear and its stockholders.*

Since there was no apparent breach of the duty of loyalty, the directors were protected from personal liability by virtue of the exculpatory provision.

The Future of Lyondell

The acceptance of the interlocutory appeal in *Lyondell* provides the Delaware Supreme Court with the opportunity to clarify the scope of fiduciary obligations of directors in a sale of control. It remains to be seen whether the *Lyondell* case turned principally on its unique set of facts and the standard for sum mary judgment or whether boards that fail to take a vigorous role in sale negotiations run the risk of extended litigation over allegations that they breached their duty of loyalty or otherwise failed to act in good faith.

FAS141(R) - Significant Impact on Acquirers in 2009

By Sarah Curtis Richmond

In December 2007, the Financial Accounting Standards Board (FASB) released a revised version of Statement of Financial Accounting Standards No. 141 ("Business Combinations"), significantly impacting the business combinations that occur on or after the beginning of the first annual reporting period after December 14, 2008. Thus for any calendar year entities, any acquisition or business combination in 2009 will need to be accounted for under FASB 141(R).

The revised standard implements a number of changes which could lead to very different results in reporting business combinations than under the previous standard. Included among the significant changes implemented under FAS 141(R) are the following:

- Consideration transferred in a business combination must now be defined as the aggregate of the fair value of assets transferred from, liabilities incurred, and equity interests issued by the acquiring company to the target company and its owners.
- Earn-outs and other contingent consideration will be recognized at its fair value as of the transaction date, instead of waiting to recognize the consideration when the contingency is finally determined.
- Assumed contractual contingent liabilities must now be recognized at an estimated fair value on the transaction date, with non-contractual obligations recognized at fair value when the liability becomes "more likely than not."
- The method of measuring goodwill is changed, taking into account the fair values of the entire target company and its identifiable assets, rather than just the component parts subject to the transaction.
- The acquirer is now required to record as an expense all restructuring costs and acquisition costs in the period incurred.
- The scope of disclosure requirements is now significantly expanded, in a number of areas.

These changes, and others not addressed here, will have a significant impact on business acquisitions in 2009 and thereafter.

Massachusetts' New Data Security Regulations Demand Attention

By Joseph Laferrera

By January 2010, virtually all Massachusetts businesses must develop and implement a comprehensive data security program to ensure the security, confidentiality and integrity of "personal information." This new legal requirement derives from sweeping regulations the Massachusetts Office of Consumer Affairs and Business Regulation promulgated this past October. These regulations, which are arguably the broadest of their kind in the country, apply to any organization handling Massachusetts residents' Social Security numbers, driver's license numbers, credit card numbers or bank account numbers, whether or not that organization is located in the Commonwealth.

The new regulatory scheme differs markedly from the breach notification laws enacted in Massachusetts and forty-three other states across the country. Those laws are fundamentally reactive in nature, compelling certain actions in the event of a data breach. The Massachusetts regulations, however, are designed to prevent such breaches from occurring, and speak in detailed and technical terms about how sensitive data is to be stored, transported, and accessed. For example, the regulations mandate the encryption of personal data stored on laptops and PDAs, or sent over the Internet or any wireless network. They require the use of enterprise-type net work software to restrict data access to authorized users, and to document unauthorized login attempts. They demand the use of anti-virus software, up-to-date security patches and firewall protection to avoid known vulnerabilities to hackers. They compel organizations that engage third-party service providers to process personal information to certify compliance with the regulations, and obligate themselves to such compliance in written contracts. The regulations also cover myriad other aspects of data security, addressing in astounding detail how organizations large and small must act to protect Massachusetts residents' personal information.

The new regulatory regimen is so robust, there are likely few organizations that will be able to achieve compliance without some measure of concerted effort, modification of existing processes and procedures, and expenditure of resources. For companies whose personal information is limited to human resources data, the task may be quite manageable, but for many others, it may be daunting. It is beyond dispute that, as of January 2010, many thousands of companies will fail to meet the Commonwealth's deadline for implementing the comprehensive data security program.

In practical terms, the Commonwealth is unlikely to actively pursue all non-compliant companies. However, those companies that suffer a data breach, for example, will be legally required to notify the Attorney General's Office of the incident, and can expect to be asked to provide their written information security programs and discuss their implementation. The Attorney General's Office can be expected to treat harshly those companies which have no such program to provide.

Organizations must also realize that the Commonwealth does not represent the only potential exposure in the event of non-compliance. Insurance policies, for example, may include representations regarding compliance with applicable laws or regulations, and a failure to develop and implement a comprehensive security program pursuant to the Massachusetts regulations may put coverage at risk. Similarly, contractual relationships may also be jeopardized, particularly in connection with agreements containing representations and warranties addressing compliance with applicable data laws. And, although untested, the new regulations may impose a de facto standard of care that plaintiffs' attorneys may try to use to establish liability in litigation arising from data breaches.

Parties differ on whether the Massachusetts regulations represent a step forward (by protecting residents' data), or a step backward (by foisting burdensome and unnecessary requirements on its businesses). But whichever position you take, the new standard is coming and it can only be ignored at great risk. It is time to take stock of your data, and formulate a plan.

Editors

Gregory Fryer

Gregory Fryer has practiced corporate and securities law for more than 25 years. Before moving to Maine to head Verrill Dana's securities practice, he practiced law in New York (Chadbourne & Parke) and Atlanta (McKenna, Long & Aldridge). He is a graduate of Dartmouth College (1976, magna cum laude) and Cornell Law School (1979, Cornell Law Review). Gregory is a former Chair of the Business Law Section of the Maine State Bar Association and since 1993 has served as Chair of its Securities Law Subcommittee. His principal areas of practice are Maine and Delaware corporation law, mergers and acquisitions, venture capital, and SEC regulation and reporting. Gregory has been recognized in The Best Lawyers in America; Chambers USA; and New England Super Lawyers. He is active in the Corporate Law Committee of the Boston Bar Association, and is a co-chair of the Communications Committee of the Business Law Section.

Sarah Curtis Richmond

Sarah Curtis Richmond is a partner at Gesmer Updegrove, LLP, a full-service Boston law firm focused on the technology sector. Sarah specializes in providing general corporate, transactional and intellectual property legal services for high-tech companies and their investors. Before joining Gesmer Updegrove in 1996, Sarah was a corporate attorney with WilmerHale in Boston. Prior to that, she practiced law with Tomotsune, Kimura & Mitomi, a Japanese international finance law firm in Tokyo. Sarah received her undergraduate degree in mathematics from Columbia University (magna cum laude, Phi Beta Kappa) and she received her law degree from Harvard Law School (cum laude). Sarah is the Chair of the Attorney Group of the Boston Club, the Co-Chair of the Communications Committee of the Boston Bar Association, and the former Co-Chair of the Corporate Law Committee of the Boston Bar Association. Sarah was selected as a Massachusetts Super Lawyer in 2006, 2007 and 2008.

Contributors

Joseph Laferrera

Joseph Laferrera is a litigation partner at the Boston law firm of Gesmer Updegrove LLP, where he concentrates on serving technology companies and emerging businesses. He also heads the firm's Employment Law Department, where he provides providing counseling and litigation assistance to both employers and executives. In addition, Joe leads the firm's Privacy and Data Security Law practice areas, and has written and spoken extensively on these issues for the Boston business and legal communities. Presently, Joe co-chairs the Privacy Law Committee of the Boston Bar Association.

Karen Agresti

Karen Agresti is a corporate attorney, formerly of Gunderson Dettmer Stough Villeneuve Franklin & Hachigian LLP, specializing in high technology company and venture capital fund clients. She is currently living in Washington, D.C. and working with public interest law organizations through the Washington Council of Lawyers as she pursues permanent employment.

Dimitry S. Herman

Dimitry Herman is a partner in the corporate department at Hinckley, Allen & Snyder LLP in Boston, Massachusetts. His practice concentrates in the areas of corporate mergers and acquisitions, venture capital and private equity transactions. Dimitry is also an adjunct faculty member of New England Law - Boston, where he teaches a class on Mergers and Acquisitions. Dimitry is a co-Chair of the Committee for Mergers and Acquisitions for the Boston Bar Association.

Section Leadership

Section Co-Chairs

Paula Andrews
Hinckley, Allen & Snyder LLP
28 State Street
Boston, MA 02109-1775
Tel: (617) 345-9000
pandrews@haslaw.com

Richard Kimball
Nutter McClennen & Fish LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210
Tel: (617) 439-2056
rkimball@nutter.com

Antitrust

Mark Ford
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Tel: (617) 526-6423
mark.ford@wilmerhale.com

Christopher Holding
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
Tel: (617) 570-1679
cholding@goodwinprocter.com

Banking & Financial Services

Stefan Jouret
Deutsch Williams Brooks DeRensis & Holland, P.C.
One Design Center Place
Suite 600
Boston, MA 02110
Tel: (617) 946-1218
SJouret@dwboston.com

Nancy Wilsker
Brown Rudnick LLP
One Financial Center
Boston, MA 02111
Tel: (617) 856-8343
NWilsker@brownrudnick.com

Commercial Finance

Victor Milione
Nixon Peabody LLP
100 Summer Street
Boston, MA 02110
Tel: (617) 742-4200
vmilione@nixonpeabody.com

Peter Palladino
Choate Hall & Stewart LLP
Two International Place
Boston, MA 02110
Tel: (617) 227-5020
PPalladino@Choate.com

Communications

Gregory Fryer
Verrill Dana LLP
One Portland Square
Portland, ME 04101
Tel: (617) 309-2600
gfryer@verrilldana.com

Sarah Richmond
Gesmer Updegrove LLP
40 Broad Street
Boston, MA 02109
Tel: (617) 350-6800
sarah.richmond@gesmer.com

Corporate Counsel

John Beccia
Boston Private Bank & Trust Company
Ten Post Office Square
Boston, MA 02109
Tel: (617) 937-6700
jbeccia@bostonprivate.com

Thomas Grilk
Brooks Automation, Inc.
15 Elizabeth Drive
Chelmsford, MA 01824
Tel: (978) 262-2400
tom.grilk@brooks.com

Corporate Law

Susan Permut
EMC Corporation
176 South Street
Hopkinton, MA 01748
Tel: (508) 293-7254
permut_susan@emc.com

Anne Plimpton
McDermott Will & Emery
28 State Street
Boston, MA 02109-1775
Tel: (617) 535-4039
aplimpton@mwe.com

Energy & Telecommunications

Paul Gromer
Peregrine Energy Group, Inc.
Old City Hall
45 School St.
Boston, MA 02108
pgromer@peregrinegroup.com

Jed Nosal
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Tel: (617) 727-2200
jed.nosal@state.ma.us

Immigration Law

Paul Glickman
Glickman Turley LLP
250 Summer Street
Boston, MA 02210
Tel: (617) 399-7770
pmg@glickmanturley.com

Ellen Kief
Law Office of Ellen S. Kief
8 Winter Street, 12th Floor
Boston, MA 02108
Tel: (617) 482-0200
ekief@kieflaw.com

Insurance Law

Michael Roche
The Cytokine Institute
470 Atlantic Avenue
4th Floor
Boston, MA 02110
Tel: (617) 273-8272
mroche@cytoinst.com

Michael Weinberg
LeClairRyan
One International Place, 11th Floor
Boston, MA 02210
Tel: (617) 502-8217
michael.weinberg@leclairryan.com

Investment Companies & Advisers

Joseph Fleming
Dechert LLP
200 Clarendon Street, 27th Floor
Boston, MA 02116
Tel: (617) 728-7100
joseph.fleming@dechert.com

James Thomas
Ropes & Gray LLP
One International Place
Boston, MA 02110-2624
Tel: (617) 951-7000
james.thomas@ropesgray.com

Legal Opinions

Mark Burnett
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
Tel: (617) 570-1031
mburnett@goodwinprocter.com

Stephen Patterson
Nutter McClennen & Fish LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210
Tel: (617) 439-2827
spatterson@nutter.com

Mergers & Acquisitions

Dimitry Herman
Hinckley, Allen & Snyder LLP
28 State Street
Boston, MA 02109-1775
Tel: (617) 345-9000
dherman@haslaw.com

Mark Tarallo
Morse, Barnes-Brown & Pendleton, PC
1601 Trapelo Road
Waltham, MA 02451
Tel: (508) 359-9462
mtarallo@mbbp.com

New Lawyers Section Liaison

Sarah Bresolin Silver
106 Myrtle Street, Apt. 8
Boston, MA 02114
Tel: (617) 717-4535
sarahbresolin@gmail.com

Adela Cufe
103 Norfolk St
Cambridge, MA 02139
Tel: (978) 877-2346
adelacufe@gmail.com

Pro Bono

Julia Conn Espitia
Gunderson Dettmer Stough Villeneuve
Franklin & Hachigian, LLP
610 Lincoln Street
Waltham, MA 02451
Tel: (781) 795-3517
jconn@gunder.com

Public Policy

Andrew Dennington
Conn Kavanaugh Rosenthal Peisch &
Ford, LLP
Ten Post Office Square
Boston, MA 02109
Tel: (617) 348-8298
adennington@ckrpf.com

Pratt Wiley
Nutter McClennen & Fish LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210
Tel: (617) 439-2816
pwiley@nutter.com

Securities Law

Mark Johnson
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Tel: (617) 526-6038
mark.johnson@wilmerhale.com

John Pickett
Edwards Angell Palmer & Dodge LLP
111 Huntington Avenue
Boston, MA 02199
Tel: (617) 573-0100
jpickett@eapdlaw.com

Tax Exempt Organizations

Martha Frahm
Goulston & Storrs - A Professional
Corporation
400 Atlantic Ave
Boston, MA 02210-3333
Tel: (617) 574-4063
mfrahm@goulstonstorrs.com

Kendi Ozmon
Ropes & Gray LLP
One International Place
Boston, MA 02110-2624
Tel: (617) 951-7000
kozmon@ropesgray.com

Winter 2009

Volume 1

A PUBLICATION OF THE BOSTON BAR ASSOCIATION BUSINESS LAW SECTION

Boston Bar Association

16 Beacon Street
Boston, MA 02108
Phone (617) 742-0615
Fax (617) 523-0127
www.bostonbar.org