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1347 Cautious Evolution or Perennial Irresolution: Stock Market Self-Regulation During the First Seventy Years of the Securities and Exchange Commission

Joel Seligman

One of the most significant concepts in federal securities regulation is that of SEC supervision of industry self-regulation. As developed during the New Deal, securities industry self-regulation was based on two concepts. First, the impracticality of direct SEC regulation of several thousand broker-dealer firms and business corporations subject to SEC jurisdiction and second, a preference for business with its greater practical knowledge of its own affairs to participate in the development and application of SEC rules and reduce the likelihood of unnecessary disruption or inefficiency. Far from being a panacea, industry self-regulation subject to SEC supervision historically has repeatedly been beset by significant dysfunction beginning with the need for a reorganization of the New York Stock Exchange in 1937-38. The enactment of the Sarbanes-Oxley Act of 2002 offers a new approach to the self-regulation of public accountants that includes greater separation of the industry from the self-regulator, new funding mechanisms, and a single self-regulator for an entire industry. This Article analyzes the extent to which such an approach may be appropriate for stock market self-regulation.

1389 A New Player in the Boardroom: The Emergence of the Independent Directors' Counsel

Geoffrey C. Hazard, Jr. and Edward B. Rock

Over the last thirty years, the independent directors have occasionally been represented by independent counsel. Instances include: special litigation committees reviewing derivative suits; independent committees in parent subsidiary mergers and management buyouts (MBOs); and internal investigations of misconduct. The authors predict that, with the additional legal requirements imposed on independent directors by the Sarbanes-Oxley Act and related changes to SEC rules and Stock Exchange listing requirements, the independent directors, especially those on the Audit Committee, increasingly will be represented on a continuing basis by independent legal counsel. Out of this will emerge a new figure in the boardroom: the Independent Directors' Counsel. The authors examine the advantages and disadvantages of adding this new actor in the boardroom, and consider issues posed and implications for corporate law and legal ethics.
Separate and Continuing Counsel for Independent Directors:
An Idea Whose Time Has Not Come as a General Practice
E. Norman Veasey

In their accompanying piece in this issue, Professors Hazard and Rock present a thesis that "independent directors, especially those on the Audit Committee increasingly will be represented on a continuing basis by independent legal counsel." Thus, it is their argument that, as a general practice, there "will emerge a new figure in the boardroom: the Independent Directors' Counsel." Their contention is part prediction/part justification. Either way, it is not likely as a prediction and it is not a good model that can be justified as a general matter. In short, this is the author's opinion largely because (i) such a general practice is not necessary or desirable; (ii) such a general practice may often be disruptive overkill; and (iii) the notion that "one size fits all" is not a good model of corporate governance.

Securities Fraud, Stock Price Valuation, and Loss Causation:
Toward a Corporate Finance–Based Theory of Loss Causation
Jay W. Eisenhofer, Geoffrey C. Jarvis, and James R. Banko

Some recent decisions in securities cases and articles addressing the concept of "loss causation" have deviated from basic principles of corporate finance. In particular, certain courts and commentators have concluded that a stock drop following the disclosure of fraudulent activity is essential to establish loss causation and, hence, is a sine qua non for a plaintiff to prevail on the merits and ultimately recover damages. This Article takes the position that those decisions and commentators are either incorrect or over-broad in their statements and should not be followed. Under sound principles of corporate finance, where expectations of future cash flow have been artificially inflated because of fraud, then the resulting stock price also is artificially inflated by fraud. Under such circumstances, if the plaintiff can demonstrate that he or she overpaid for the stock as a result of the fraud, and the price of the stock declined as a result of an explicit (or implicit) disclosure of diminished future cash flow expectations, such a showing should be sufficient to meet the loss causation requirement, even if the share price decline was prior to any explicit disclosure of the fraud.

Counseling Directors in the New Corporate Culture
E. Norman Veasey

In his March 2004 Tulane speech, former Delaware Supreme Court Chief Justice Veasey argues that the business judgment rule is alive and well. Recent Delaware decisions demonstrate that the expectations of director conduct are evolving. This is partly a function of the dynamics of the times and partly because improved pleadings in stockholder complaints have focused more intently on the need for careful, loyal and good faith processes in the boardroom. The quest for best practices of corporate governance is the best prophylactic to avoid liability and to comply with new federal standards.
1459  Revisiting Delaware's Going-Private Dilemma Post-Pure Resources
Bradley R. Aronstam, R. Franklin Balotti, and Timo Rehbock

This Article revisits the issues explored in Delaware's Going-Private Dilemma: Fostering Protections for Minority Shareholders in the Wake of Siliconix and Unocal Exploration ("Delaware's Going-Private Dilemma"), an article published in the February 2003 edition of The Business Lawyer. Specifically, it reexamines Delaware's Going-Private Dilemma in light of the Court of Chancery's decision in In re Pure Resources Shareholders Litigation ("Pure Resources") and the critique offered in Going-Private "Dilemma"?—Not in Delaware (the "Response"), an article published in the August 2003 edition of The Business Lawyer. The Article argues that the Response misinterprets Delaware's Going-Private Dilemma by, among other things, treating the two steps of going-private transactions as analytically unrelated. It moreover charges that the Response overstates the supposed effectiveness of the existing safeguards available to minority shareholders in such transactions and concludes that, notwithstanding additional and laudable protections proffered by the Court of Chancery in Pure Resources, the need for the proposed reforms advocated in Delaware's Going-Private Dilemma continues.

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Court’s Latest Fourth Amendment Cases Give Nod to Police

By Margaret Paris and Andrew E. Taslitz

In more than half a dozen recent cases, the U.S. Supreme Court appears to be loosening constraints on law enforcement in order to “facilitate on-street policing” at the expense of the Fourth Amendment “ideal” of individualize justice, the authors contend. The article reviews and comments on each case, concluding with a brief list of suggestions for defense counsel.

14 Client Perjury:
When Do You Know the Defendant Is Lying?

By J. Vincent Aprile II

It would seem clear that if a client expresses an intent to lie on the stand, defense counsel must seek a means to prevent it. Not always so, says author J. Vincent Aprile II, a longtime defense practitioner and ethics consultant, who explains in this article the complex issues surrounding a lawyer’s obligation to the client and the courts.

20 In the Time of Brown:
An Interview with Judge Arthur L. Burnett, Sr.

Conducted by Myrna S. Raeder

Here, Judge Arthur L. Burnett, Sr., of the Superior Court of the District of Columbia, recounts his experiences as a young African-American male coming of age in the South during the height of the civil rights movement, relating the impact racial discrimination had on his early efforts to enter the legal profession, his association with Thurgood Marshall, and his view of how race still affects the lives of young people today.

26 Admissibility of Lab Reports
The Right of Confrontation Post-Crawford

By Paul C. Giannelli

For 25 years, Ohio v. Roberts established “reliability” as a component in analyzing the constitutionality of hearsay statements. The High Court’s recent decision in Crawford threw all that out the window, relying on cross-examination as the standard for determining when hearsay is “testimonial.” This article, by a noted forensic legal scholar, looks specifically at the question of when laboratory reports fall under the definition of “testimonial,” noting how various lab reports may be treated differently.

34 Author Milton Hirsch, Briefly . . .

Interview by Carol Garfield Freeman

Milton Hirsch is the author of the ABA's first novel (published by the Criminal Justice Section)—a mix of murder, mystery, humor, and an insider's knowledge of the courtroom with Miami Judge Clark Addison as its main protagonist. Here Hirsch displays his witty style in a short, off-the-cuff interview about his creation: The Shadow of Justice.
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Leigh Walton and Joel I. Greenberg
Compliance with Sarbanes-Oxley can be challenging enough for a single entity, but when two separate entities merge, the compliance questions multiply. In this article, Leigh Walton and Joel I. Greenberg discuss the compliance issues for public-private combinations and entities that become issuers, due diligence procedures in M&A regarding financial condition, internal controls, disclosure controls, loans to executives and directors, certifications, and corporate governance documentations, and offer sample language for financial statements, SEC reports, and more.

The New Indecency Law Landscape
Lisa Davis and Kesari Ruza
A few highly-publicized episodes catalyzed a flurry of interest in indecency over the airwaves not too long ago. The F.C.C. responded with a surprising departure from its well-established analysis of indecency. In this article, Lisa Davis and Kesari Ruza discuss how the F.C.C. has made it easier for members of the public to lodge complaints, the traditional test for determining whether content is indecent, the F.C.C.’s recent and more stringent analysis, the serious implications for even fleeting instances of indecency, some recent developments in light of the new regulatory atmosphere, and offer suggestions on how to help clients steer clear of problems in this area.

Ten Suggestions For Negotiation In Employment Mediation
Bette J. Roth
The volume of employment litigation is not likely to abate anytime soon, and alternative dispute resolution continues to gain in popularity. An especially good alternative is mediation, since it provides significant flexibility and gives the parties an active role in creating the solution. In this article, Bette J. Roth discusses how to propose mediation to your opponent, choosing the best mediator, how to prepare, judging which preparation steps to take (and how much money to spend), creative approaches to addressing clients’ interests, how to avoid getting mired in an impasse, who should attend, and how to keep in the right frame of mind for the process.

Workplace Privacy Issues: Potential Pitfalls For Unwary Employers (with Forms)
Stephanie I. R. Fidler
The boundaries of workplace privacy are still being established through legislation and case law, but one thing is clear: personal privacy does exist in the workplace. The problem for the employer is striking the right balance between its legitimate interests in workplace order and productivity and the privacy rights of the employees. In this article, Stephanie I. R. Fidler discusses dangers inherent in e-mail and computer monitoring, searching an employee’s property, conducting reference and background checks, disclosure of employee health information, and medical examinations.

Workplace Harassment: Prevention Is Priceless
Jonathan A. Segal
A question that has arisen in constructive discharge harassment cases is whether the employer can avail itself of the Ellerth/Faragher affirmative defense. The Supreme Court answered this question in Pennsylvania State Police v. Suder, and the decision underscores the need for effective harassment prevention, reporting, and remedial policies. In this article, Jonathan A. Segal discusses the elements of an effective policy, and how to establish a complaint procedure that is flexible, accessible, and easy for employees to use.
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