Commerce Court Becomes a Reality

On October 13, 1999, Bar leaders and local Court officials unveiled plans for a Commerce Case Management Program to be established in the Court of Common Pleas in Philadelphia. President Judge Alex Bonavitacola and Administrative Judge John W. Herron described detailed procedures for the program, which will be effective for commerce cases filed beginning January 1, 2000. Initially, Judge Herron and Judge Albert W. Sheppard, Jr. will be assigned to the program with each case to be handled by one of the assigned judges from initial filing through all motions and trial if necessary.

The procedures define the types of cases that will qualify for Commerce Case designation, including disputes between business enterprises, governance and shareholder claims, corporate trust actions, commercial insurance disputes, intellectual property claims and class actions raising commercial claims. Cases expressly excluded from the new Commerce Case Program include personal injury, wrongful death and product liability claims as well as other types of claims that are individual, domestic or consumer in nature. While either party can designate a lawsuit as a Commerce Case, the Court's Administrative Judge will have the final say on whether a given case falls within the new Commerce Case Program. The written procedures also set time limits for completing each phase of the case, based on the degree of the case's complexity, with the goal of taking all cases to trial between 13-24 months of filing, if not settled or otherwise concluded before trial.

Judge Herron directed the development of the new Commerce Case Management Program. It is a logical new component of the existing Day Forward Program which will include many features common to the local court’s highly successful program to clear out the previous backlog of civil cases and to set standards for completing cases. For example, voluntary mediation by the parties will be encouraged and settlement conferences after completion of discovery will be mandatory. Nearly 50% of all cases filed statewide are brought in the Court of Common Pleas in Philadelphia, according to court data.

Bar Association Chancellor Ed Chacker in his remarks singled out former Chancellor Cliff Haines for his persistent efforts since 1997 to bring a commerce court program into being. He indicated without Cliff’s leadership together with Judge Herron’s the new program would not have become a reality. Chacker also praised the efforts of the Business Law Section’s four most recent Chairs, Larry Lichtenstein, Justin Klein, Len Bernstein and current Chair Greg Mathews, as well as Marc Sonnenfeld who together with Mathews served as Co-Chairs of the Business Court Task Force between 1997-1998. This year Sonnenfeld and Len Bernstein serve as Co-Chairs of the Business Court Task Force. Creation of a Commerce Court has been a top priority of both the Business Law Section and the Bar Association since 1996, when then-Chair Larry Lichtenstein challenged the leadership of the Bar Association to support the initiative.

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CYBERSMEARERS:
Defamation Comes to the Internet

Charles S. Marion

Six days after the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995, a person identified only as “Ken ZZ03” logged on to an America Online bulletin board and posted a message advertising “Naughty Oklahoma T-shirts.” The message instructed those interested in buying the shirts to call Ken Zeran’s home in Seattle, Washington, and gave both his telephone number and e-mail address. Zeran, who did not post the message or know anything about it, began receiving a high volume of angry and threatening telephone calls. He contacted America Online and got it to remove the offensive posting, however, new messages appeared under a slightly different identifier the next day. A local radio station obtained a copy of one of the postings and urged its listeners to call Zeran’s house and express their disgust and disapproval.

What would you do if you were Mr. Zeran? What can you do?

An individual or business that has been defamed or slandered has always had the ability to seek monetary damages from and, if appropriate, injunctive relief against, the responsible party through our legal system. But what can be done when the identity of the person who published the defamatory statements is not known?

That is the dilemma confronting a growing number of individuals and businesses who have been defamed by an anonymous computer user on an Internet message board or in an e-mail communication, a practice referred to as “cybersmearing.” The explosive growth of the Internet has brought with it not only the ability to communicate electronically but also the opportunity to participate in on-line discussions by posting messages to Internet bulletin boards (also referred to as a “message boards” or “chat rooms”) devoted to various topics. Message boards are operated by Internet service providers (“ISPs”), such as America Online, or operators of portals or search engines, such as Yahoo! There are separate boards for a seemingly unlimited number of subjects. Some of the most popular ones are those devoted to publicly-traded companies, which are primarily intended for individual investors looking to obtain or share information regarding a company and/or make an investment decision.

It has been well-documented that people are somewhat careless in terms of punctuation, grammar, and even decorum when communicating by e-mail. But many users have gone much farther, and sent messages containing personal attacks, harassing statements, threats, accusations and rumors, with little or no regard as to whether their statements were true or accurate. Employees of one company, Philip Services Corp. of Hamilton, Ontario, reportedly became so alarmed and concerned about the level of personal defamation, threats of stalking and violence, ethnic slurs, and sexual harassment in messages posted to a Yahoo message board devoted to Philip that the company filed a lawsuit against the anonymous users responsible for the postings in question (labeling them “John Does 1-25”) for defamation and breach of fiduciary duty (it suspected some of the responsible parties were company employees).

Raytheon Company recently experienced a slightly different situation. Earlier this year, it discovered a Yahoo! finance message board contained anonymous messages which were not only critical of the company and its operations, but which in several cases contained trade secrets or other information which was not public knowledge. This led Raytheon to conclude that some of the messages could only have been posted by its own employees.

Postings or e-mails containing false information can have a significant, detrimental impact on an individual or corporate victim. There are examples of an untrue message board posting causing a substantial change in the price of a company’s stock. A posting on a Yahoo! finance message board in April of this year, which appeared minutes before the nation’s financial markets opened and which announced that a certain company was acquiring another business, and that the person posting the message “just found [the news] on Bloomberg,” caused a 31% change in the price of the stock of the company allegedly being acquired. The posting included a “hyperlink” to a web page that appeared to be part of Bloomberg L.P.’s news site. It turned out that both the posting and the announcement it linked to were untrue, and Bloomberg filed a lawsuit a few days later seeking unspecified damages and injunctive relief against “John Does 1 through 5” in federal court in New York.

Simply ignoring untrue postings and e-mail communications is not a practical or recommended

Charles S. Marion is a member of the General Commercial Litigation Practice Group, at White and Williams LLP. He practices in the areas of Internet and technology law and intellectual property litigation.
NOMINATIONS SOUGHT FOR 1999 REPLANSKY AWARD

The Business Law Section is seeking nominations from the Philadelphia legal community for its 1999 Dennis H. Replansky Memorial Award. The award will be presented at the Section's Annual Reception on November 30 at the Pyramid Club. The award recipient will receive the privilege of designating the recipient of the Section's annual charitable contribution to a public interest organization.

Award criteria are:

- superior legal talent in the area of business law
- unique contributions to and significant achievements within the business law community in the Philadelphia area
- a reputation for mentoring young attorneys
- significant participation in and contributions to civic and charitable causes in the community
- uniform recognition in the legal community of the candidate’s honesty, integrity and professionalism.

The candidate should be a member of the Philadelphia Bar Association’s Business Law Section.

The section established the award in recognition of Replansky’s career as a lawyer and his contributions to legal, civic, religious and other charitable causes.

Replansky was a 51-year-old senior partner at the law firm of Blank Rome Cornisky & McCauley, when he died in March 1994. He was a former chair of the Business Law Section. The first two recipients of the Replansky Award were David T. Sykes and Carl W. Schneider.

Deadline for award nominations is 5 p.m. on Friday, October 29.

Letters detailing the nominee’s qualifications for the award should be sent to: Dennis H. Replansky Memorial Award, c/o Audrey C. Talley, Drinker Biddle & Reath LLP, One Logan Square, 18th and Cherry Streets, Philadelphia, PA 19103-6996; or e-mailed to: talleyac@dbb.com.

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Mathews noted that the Section’s Business Litigation Committee created a special subcommittee last year led by Ed Biester of Duane Morris & Heckscher, and Darryl May, now a partner at Ballard Spahr Andrews & Ingersoll, which developed model business litigation procedures the Court utilized in formulating the new program. “I can’t say enough about the insight and tireless effort by Ed, Darryl, Mitchell Bach and others in this group,” Mathews declared.

The announcement was attended not only by many members of the Business Law Section, but also Chancellor Elect Doreen Davis, former Chancellors Cliff Haines and Mark Aronchick and a number of other Bar leaders. A representative of the Chamber of Commerce who attended said he believes businesses will be more confident in the Philadelphia court system as a result of the new program. “The Commerce Case Management Program will put Philadelphia in the forefront of jurisdictions nationwide in modern civil case management. That’s got to make Philadelphia more attractive to business,” he said.

With the announcement, Philadelphia becomes the ninth jurisdiction in the country to adopt business court litigation procedures. Such courts already are operating in New York, New Jersey, Delaware, Illinois, North Carolina, Massachusetts, Virginia and Wisconsin. Copies of the new Commerce Case Management Program procedures are available from the court or the Business Law Section’s Business Litigation Committee.
strategy. As alleged by the plaintiff in one recent lawsuit filed against anonymous posters of defamatory messages, Yahoo!’s web pages enjoy upwards of 167 million hits per day. That translates into plenty of opportunities for users to consider, act on, and possibly forward on to others, untrue information.

The chief executive officer of HealthSouth Corp. recently found himself answering questions from analysts at an investors’ conference about allegations made on a Yahoo! message board that he did not even know existed. As reported in the Wall Street Journal, the bulletin board devoted to HealthSouth apparently contained anonymous postings calling the company “a house of cards starting to tumble,” and predicting that the CEO would be probed for billing fraud. There was even a series of messages alleging that executives of the company were swapping their spouses.

The cybersmearing problem is exacerbated by the ease with which those posting the messages can remain anonymous. In fact, rarely do message board participants reveal their true identities. Making things worse, ISPs and others who provide e-mail accounts often do so without obtaining much information about the user, or, if they do obtain information, without verifying its accuracy. In addition, various services have emerged which assist users in remaining anonymous when sending e-mail or other messages. For example, anonymous re-mailers (also referred to as “anonymizers”) allow users to send an e-mail message to the anonymous re-mailer’s site. The anonymous re-mailer then sends the communication to the recipient, protecting the author’s identity.

The basic issue with cybersmearing is what the appropriate balance should be between an individual’s right to anonymously voice his or her opinion, as critical as it might be, and a company’s (or, in some cases, individual’s) right to protect and defend its interests and reputation. In other words, it is a battle between anonymity (or privacy) and accountability.

So what can be done by the victims of defamatory message board postings? Early cases in this area (early being the mid-1990s) focused on whether the ISPs that enabled a third party to post defamatory statements on the Internet could be held liable for plaintiff’s damages, as publishers or distributors of defamatory material. For example, Mr. Zeran sued America Online for being negligent “in failing to respond adequately to the bogus notices on its bulletin board after being made aware of their malicious and fraudulent nature.” However, in 1996, Congress passed legislation that immunized ISPs from publisher liability for information provided or posted by third parties. Section 230 of the Communications Decency Act, which is part of the broader Telecommunications Act of 1996, states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” The court in Mr. Zeran’s case held that Section 230 preempted Mr. Zeran’s defamation and related claims, and that America Online could not be treated as the “publisher” of the defamatory statements. Zeran v. America Online, Inc., 958 F.Supp. 1124 (E.D. Va.), aff’d, 129 F.3d 327 (4th Cir. 1997), cert. denied, 118 S.Ct. 2341 (1998).

While ISPs have been granted immunity by Congress, they are still the best place to begin for victims trying to seek relief from defamatory postings. Upon discovery of the defamatory posting or e-mail message, the victim should notify the ISP and request that it remove the defamatory material from the bulletin board or site immediately. Most ISPs have terms and conditions e-mail users must agree to which prohibit the sending or posting of communications which are false, defamatory, harassing, etc.

A victim can also request that the ISP provide the identity of the poster, however this is normally not done without a subpoena or court order. Yahoo!, for example, protects the privacy of its subscribers, but does comply with court subpoenas. If an ISP resists removing defamatory material from a message board or web site, the victim can file a lawsuit against however many “John Does,” or anonymous defendants, are involved, and may want to join the ISP as a defendant as well. Under most states’ John Doe statutes, a plaintiff may file a complaint against defendants whose names are unknown to the plaintiff.

While ISPs are immune from liability, having them in the case as a party will give the victim and the court more power over the ISP in terms of getting it to respond to subpoenas or comply with other court directives and discovery requests. Once the lawsuit is filed, the plaintiff can then subpoena the ISP to disclose the identity of, and any other information it has regarding, the defendants in question.

This strategy has been successful for various plaintiffs. In the Raytheon case described above, the company’s action in filing a lawsuit against 21 “John Does” and subpoenaing various ISPs to reveal their identities resulted in several of the employees who were responsible for the postings voluntarily resigning from the company.

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In another case, a Caribbean dive shop owner and a scuba instructor filed a motion in the Cook County, Illinois Circuit Court to force America Online to reveal the name of a subscriber they claimed defamed them on an America Online bulletin board. America Online released the name after the subscriber failed to object to the action. Itex Corp. also reportedly filed suit in Oregon against 100 John Does and asked the court to order several ISPs to reveal the names of those who allegedly made defamatory statements online.

In the Philip Services Corp. case mentioned above, Philip filed complaints in both California and Ontario against various “John Does” for defamation and breach of fiduciary duty. The complaints alleged that the defendants published false and unprivileged communications on a Yahoo! message board which tended to “directly injure Philip’s business and professional reputation, and disparage[d] Philip’s and its officers’ and directors’ integrity, honesty and competence.”

The Canadian Court entered an Order directing the ISP, Weslink Datalink Corporation, to disclose the names of the 26 John Does named in the Complaint (they were identified in the Complaint by the user identifications listed in their postings). Wade Cook Financial Corp. used this strategy after discovering that someone using a pseudonym had begun posting unflattering comments about the company’s chief executive on one of Yahoo!’s message boards. Because it did not know who the critics were, Wade Cook filed a libel suit in federal district court in Seattle, charging ten “John Does” with defamation. It then served subpoenas on Yahoo! in order to unmask the anonymous speakers and add their real names to the lawsuit.

There are some possible disadvantages with this strategy. For one thing, it can be very costly and, even if the victim prevails, it may not be able to collect on whatever judgment is entered. Filing such a lawsuit could also have negative public relations implications. A large company could be perceived as a bully intent on quashing or silencing any critics.

There are some other alternatives a victim could consider. First, it could hire “cybersleuths,” or experts in investigating and determining the identity of anonymous posters. If the identities of the individual(s) responsible for the posting(s) are determined, the victim can more easily take legal action against them. HealthSouth Corp. successfully used cybersleuths to unmask several message writers. It then sued some of them to put a stop to their postings. One poster turned out to be the husband of a disgruntled employee; another was a former employee.

Another risk to consider: as truth is a defense to a defamation claim, one of the former HealthSouth employees who posted some of the more damaging messages and has been sued by the company has demanded access to the corporation’s records so that she can prove that the accusations contained in her postings were correct.

Preventive strategies businesses may want to employ include:

• Monitoring message boards regarding the business.

The business should consider monitoring or becoming active itself in the message board(s) in question, and, if an untrue and defamatory message is posted, it should quickly and firmly respond in the company’s name, and perhaps issue a press release refuting the untrue information. Not surprisingly, there are now services which can be hired to monitor message boards or, indeed, the entire Internet, for any negative messages or information which may have been posted regarding the business.

• Creating and distributing an e-mail and Internet use policy.

In order to prevent or discourage disgruntled employees from posting harmful messages, businesses should create and distribute to all current and new employees a carefully-crafted e-mail and Internet use policy, and should consider monitoring of employee e-mail and Internet activities; and

• Obtaining Insurance.

As with other business risks, insurance for this type of problem or loss is an excellent way to minimize the risk of loss for such activity. The insured should confirm that claims for defamation and other Internet-related lawsuits are covered by its policy.

Relief from this problem may ultimately be provided by legislation various states have passed or are considering which would make this activity a criminal offense and impose heavy fines for those found guilty of engaging in such activity.
Anti-Cybersquatting Act and Other Recent Developments in Cybersquatting

Kim R. Jessum

On August 5, 1999, the Senate unanimously adopted the Anti-Cybersquatting Consumer Protection Act (S.1225), a bill that protects consumers and promotes electronic commerce by amending trademark infringement, dilution, and counterfeiting laws.

The bill aims to stop the registration of well-known marks of others as domain names with the intent to receive payments from rightful trademark owners. The bill further aims to stop the registration of domain names that detour Internet users to sites, which are pornographic or competitor sites, by taking advantage of consumer confusion. Senator Hatch has emphasized that the bill “represents a balanced approach that will protect American consumers and the businesses that drive our economy while at the same time preserving the rights of Internet users to engage in protected expression online and to make lawful uses of others’ trademarks in cyberspace.”

Most significantly, the Act would allow trademark owners to recover civil damages from a party who registers domain names that are identical or similar to their mark. Under the Act, the court may award actual damages and profits or statutory damages between $1,000 and $100,000 per domain name for bad faith registrations of others’ marks by parties who seek to profit unfairly from the good will associated with the others’ marks.

The Act would also provide for a trademark owner to file an in rem action seeking forfeiture, cancellation, or transfer of an infringing domain name. The action would provide remedies for trademark owners who were unable to find the owner of the domain name by allowing owners to file against the domain name itself.

The passage of the bill is a major step for Congress toward establishing legal guidelines for domain name issues. Previously, cybersquatting issues have only been considered by the courts and groups overseeing the Internet.

For instance, a well-known cybersquatter, Dennis Toeppen, has appeared before the courts in numerous cases involving the registration of domain names for the purpose of selling the names to the companies who owned the trademarks with those names. By registering famous marks, the courts found that Mr. Toeppen violated the Federal Trademark Dilution Act.

In May 1999, the World Intellectual Property Organization (WIPO) recommended procedures to protect trademarks against cybersquatting. These procedures included the prohibition of registration of generic top-level domains for famous or well-known trademarks by anyone other than the trademark owner.

Network Solutions, Inc. (NSI), a domain name registrar, has also taken steps to stop cybersquatting. NSI is changing its registration policy by requiring payment of the registration fee before registration. This new policy aims to prevent individuals from tying up domain names for the purpose of preventing others from obtaining them.

More recently, in August 1999, the Internet Corporation for Assigned Names and Numbers (ICANN) announced a plan to adopt an alternative dispute resolution procedure for cybersquatting. An initial draft of the Model Domain Name Dispute Resolution Policy is available at http://www.icann.org/santiago/registrar-dispute-policy.htm. The details of the policy have not been finalized, but ICANN has asked a drafting committee to consider the issues of whether a domain name holder has a legitimate use of a trademark without bad faith intent and whether the domain name holder is commonly known by the domain name. These considerations are similar to some of the language of the Act passed by the Senate.

Trademark owners and their attorneys are hopeful that the Anti-Cybersquatting Consumer Protection Act and the continuing developments by Internet groups and registrars will establish legal guidelines for domain names on the Internet.

Kim R. Jessum is an attorney in the Intellectual Property group of Schnader Harrison Segal and Lewis in its Philadelphia office.
Cyberspace and E-Commerce Committee Holds First Meeting

The Cyberspace and E-Commerce Committee was organized in early July and held its first meeting on July 9. Meetings were held on August 10 and on September 14. The Committee has already attracted forty members, and the Committee has had lively discussions in its meetings of the anticipated electronic contracting law to be submitted in Pennsylvania and the proposed Uniform Computer Information Transactions Act (UCITA) (formerly proposed UCC Article 2B).

The purpose of the Committee is to keep members informed regarding new developments in electronic commerce law and to provide a forum for members to discuss these developments and common legal issues in representing individuals and companies doing business electronically and on the Internet. The Committee will be assisting the Bar Association in updating its website, and commenting on the new contemplated electronic contracting law.

Persons who would like to become members should send an e-mail to Steve Foxman at smf@escm.com. The Committee maintains an egroup (electronic mail list) for members to provide information about meetings, electronic commerce resources and other matters of interest to the Committee.

SAVE THE DATE

Business Law Section Annual Reception
Set for November 30

The Business Law Section’s Annual Reception has been scheduled for Tuesday, November 30, 1999. The Reception will be held from 5:30 p.m. - 7:30 p.m. at the Pyramid Club, Mellon Bank Center, 1735 Market Street. The highlight of the evening will be the awarding of the Section’s annual Replansky Award.

Additional details and a response form will be sent to all Section members shortly.
SMALL BUSINESS COMMITTEE KICKS OFF ACTIVITIES

The newly-formed Small Business Committee serves as a forum for analysis and discussion of business law issues, as well as practical business operating issues, arising in the representation of closely-held corporations, family-owned businesses, and other small and emerging business enterprises. The Committee will also focus on small firm operating and management issues, and facilitating communication and interaction amongst small business attorneys.

Business Legal Issues Section
Blonde Grayson Hall, Esquire and G. Bradley Rainer, Esquire, Section Co-Chairs

Objective - presentation of educational seminars for attorneys regarding business law issues and problems encountered by business clients which are closely-held corporations, family-owned businesses, and other small and emerging business enterprises.

Firm Management Section
Martha I. Macartney Esquire and Terri N. Gelberg Esquire, Section Co-Chairs

Objective - facilitate forum for addressing small firm operating and management issues and how to enhance the firm practice.

Professional Service Reference Section
Eva Marie Victor, Esquire, Section Chair

Objective - development of reference directory of non-lawyer professional service providers for use by attorneys representing business clients which are closely-held corporations, family-owned businesses, and other small and emerging business enterprises.

Lawyer ‘Connect’ Section
Edmond Collier, Esquire, Section Chair

Objective - promote occasions and opportunities for small business lawyers to share ideas, experiences and to interact with each other in an informal, social environment.

The Small Business Committee welcomes new members, including small business practitioners in small and large firms and corporate counsel.

SMALL BUSINESS COMMITTEE
1999 - 2000 Calendar

Where Do Small Businesses Go For Loans?
October 20, 1999 - 12:00 - 1:30 p.m.
Jan M. Smith, Senior Vice President,
Summit Bank

How To Get The Most Out Of Your Technology Dollar
November 11, 1999 - 12:00 - 1:30 p.m.
Storm Evans, Technology & Management Support Consultant

How To Assist Your Client in Enhancing Its Business Through The Internet
December 9, 1999 - 12:00 - 1:30 p.m.

Finding and Attracting Venture Capital Funding
January 13, 2000 - 12:00 - 1:30 p.m.

Employment Issues
February 10, 2000 - 12:00 - 1:30 p.m.

Cutting Edge Billing Practices: Retainer Letters, Billing & Collection
March 9, 2000 - 5:30 - 7:00 p.m.

Business Succession Planning: Financing Products
April 13, 2000 - 5:30 - 7:00 p.m.

Tax Planning: Use of Plans for Tax Advantage; Investing, Retirement & Business Succession
May 11, 2000 - 5:30 - 7:00 p.m.

Marketing Strategies That Really Work To Increase Your Firm’s Business
June 8, 2000 - 5:30 - 7:00 p.m.

All Meetings will be held at the Philadelphia Bar Association, 1101 Market Street, 10th Floor Board Room. For Reservations call Nellie Stuessy at (215) 238-6318.