MESSAGE FROM THE CHAIR

Kathleen M. Shay*

The Business Law Section is continuing its outreach into the broader legal and business communities through a number of affiliations and through Business Law Section committees.

Walt Schanbacher, of Sunoco, has served as the DELVACCA liaison to the Business Law Section for several years and has been instrumental in strengthening ties between the members of the Business Law Section and DELVACCA.

The Business Law Section has also been working closely with LawWorks in its growing pro bono efforts for businesses and transactional matters. Steve Grumm and Allison Altman regularly attend Business Law Section Executive Committee meetings, which has ensured continuing communications and strengthened ties.

Kristen Kenny is this year’s liaison to the Business Law Section from the Young Lawyers Division. The Business Law Section is continuing to explore ways to work with the Young Lawyers Division and to encourage younger members of the bar to participate in the activities of the Business Law Section and its various committees.

The Business Law Section committees continue to be active. There are 17 separate committees ranging from antitrust law through business litigation and e-commerce to venture capital and private equity law. There is certain to be a committee that would be of interest to every business and transactional lawyer, and I urge all Business Law Section members to participate in at least one committee. A recent example of a committee success is the reception for the Commerce Court judges, which has become a much anticipated annual event. Also, the Mergers and Acquisitions Committee has been recently reconstituted with Chair Michael Ecker and Vice-Chair Steven Plon. Also, committees such as the Human Resources Committee continue to be quite active and provide significant benefits to its members from both educational and networking perspectives. If you have any questions regarding committee participation, please contact me at kmshay@duanemorris.com.

On Friday, June 3, I participated in a corporate roundtable discussion for The Philadelphia Lawyer Magazine. The roundtable discussion featured local corporate counsel and corporate representatives and addressed best practices in client services for outside counsel and related topics of interest to business attorneys practicing in both law firms and in-house legal departments. Roundtable organizer Lisa Goldstein of Rainmaker Trainers and I moderated the discussion. Participants included Charisse Lillie, Vice President of Human Resources of Comcast; Richard J. DePiano, Vice President of Corporate and Legal Affairs of Escalon Medical Corp; David Freschman, CEO of Delaware Innovation Fund; Richard D. Winston, Jr., Associate General Counsel of GE Equipment Services; John Gregory, General Counsel of Streamlight Inc.; and Ramona Romero, Corporate Counsel at DuPont. I urge you all to read the roundtable discussion in The Philadelphia Lawyer Magazine when it is published.

I have enjoyed meeting and participating in programs with many of you, and I look forward to working closely with the Business Law Section attorneys during the second half of 2005.

*Kathleen M. Shay is the Chair of the Business Law Section and a partner at Duane Morris LLP.

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RECENT MUTUAL FUND COURT DECISIONS

John N. Ake and Ryan M. Orr*

Introduction

Recently three Federal Courts issued rulings on various mutual fund issues. We have summarized below these important court rulings.

- **Investment advisory fee litigation under Section 36**

  Section 36(a)—On January 21, 2005, the United States District Court for the Eastern District of New York granted the defendants’ motion to dismiss based on the theory that there is no private right of action under Section 36(a) of the Investment Company Act of 1940, as amended (the “1940 Act”). See Loren Chamberlain v. Aberdeen Asset Management Ltd., 2005 WL 195520 (E.D.N.Y. 2005). The decision marks the first time that a federal district court has held that there is no implied right to sue a fund’s investment adviser under Section 36(a).

  Section 36(b)—On March 28, 2005, the United States District Court for the District of Massachusetts denied the defendants’ motion to dismiss claims by a mutual fund shareholder that the fund’s investment adviser charged excessive fees. The court held that, under the federal notice pleading requirements, the plaintiff need not set forth all of the elements of an excessive fee claim under Section 36(b) of the Investment Company Act in order to survive a motion to dismiss. See Wicks v. Putnam Investment Management, LLC, 2005 WL 705360 (D.Mass. 2005).

- **IPO Allocation**

  On November 30, 2004, the United States Court of Appeals for the Seventh Circuit overturned sanctions the Securities and Exchange Commission (the “SEC”) imposed upon Monetta Financial Services, Inc. (“Monetta”), a registered investment adviser, that it found to have violated the Investment Advisers Act of 1940 (the “Advisers Act”) by failing to disclose that it allocated shares of IPOs to certain directors of mutual fund clients. The court also reversed for insufficient evidence the SEC’s finding that Robert Bacarella, Monetta’s president, aided and abetted the violations. See Monetta Financial Services, Inc. v. Securities and Exchange Commission, 390 F.3d 952 (7th Cir. 2004).

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THE BUSINESS LAW REPORT

The periodic newsletter of the Business Law Section of the Philadelphia Bar Association

Ellen Jerrehian, Editor

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Discussion

A. No Private Right of Action under Section 36(a) of the 1940 Act

Plaintiffs in the Chamberlain case brought a class action on behalf of themselves and other shareholders of Aberdeen Global Income Fund, Inc. and Aberdeen Asia-Pacific Fund,

*John N. Ake is a partner and Ryan M. Orr is an associate at Ballard Spahr Andrews & Ingersoll, LLP.

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Inc. (together, the “Funds”) The plaintiffs alleged that Aberdeen Asset Management Limited and Aberdeen Asset Managers (C.I.) Limited (the “Defendants”) breached their fiduciary duty to the Funds and to their shareholders by devising and seeking to implement a scheme in which the Funds would issue rights to their common shareholders, essentially coercing shareholders into increasing their stakes in the Funds while correspondingly increasing the advisory fees payable by the Funds, in violation of Section 36(a) of the 1940 Act and Maryland common law. The defendants filed a motion to dismiss stating several theories, the most important of which being that there is no private right of action under Section 36(a).

The court, in reaching its decision, noted that the Second Circuit, in Olmsted v. Prudential Life Ins. Co. of New Jersey, 283 F.3d 429 (2d Cir. 2002), had recently laid out the approach a court must take when determining whether a statutory provision confers a private right of action in light of the recent Supreme Court decision in Alexander v. Sandoval, 532 U.S. 275 (2001). The first question, according to the court, is whether a provision explicitly provides a private right of action. If the answer is in the negative, the court must presume that Congress did not intend to create one. Since Section 36(a) only explicitly states that the SEC is authorized to bring an action, the provision does not explicitly confer a private right of action.

Second, a court must look at whether a provision contains rights-creating language for persons who are protected under the statute, or instead only focuses on the persons regulated. Section 36(a) is devoted solely to describing prohibited activity. Investors are only mentioned in passing, where the provision states that SEC, in awarding damages, should give due regard to the protection of investors.

Third, a court must consider whether the statute has provided an alternative method of enforcement, because the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. Section 42 of the 1940 Act explicitly provides for the enforcement of all of the 1940 Act’s provisions by the SEC through investigations and civil suits for injunctions and penalties. Likewise, Section 36(a) begins by granting the SEC the authority to bring an action for violation of fiduciary duties.

Lastly, a court must consider whether Congress provided a private right of action for enforcement of any other provision of the statute, because the explicit provision of such a right to enforce one section of the statute suggests that the omission of such a right to enforce other provisions was intentional. In this case, Section 36(b) explicitly confers a private right of action by a shareholder against an investment adviser for a breach of the duty not to charge excessive fees.

The court, after examining Section 36(a) under the preceding factors, held that there is no private right of action under Section 36(a) of the 1940 Act and consequently proceeded to grant the defendants’ motion to dismiss.

B. Excessive Advisory Fee Claim Survives Motion to Dismiss

The plaintiffs in the Wicks case were shareholders of nine mutual funds underwritten, distributed and advised by Putnam Investment Management, LLC and Putnam Retail Management, LLP (together, “Putnam”). The plaintiffs sued Putnam alleging that the distribution and advisory fees received by Putnam were so excessive as to constitute a breach of fiduciary duty under Section 36(b) of the Advisers Act. Putnam filed a motion to dismiss the claims under Section 36(b) for failure to state a claim.

The court cited the proper test for a breach of fiduciary duty by an investment adviser under Section 36(b) as “whether the fee is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm’s length bargaining.” Gartenberg v. Merrill Lynch Asset Management, Inc., 694 F.2d 923, at 928 (2d Cir. 1982). The factors to consider in judging the disproportionality of a fee, as laid out in Gartenberg, are: (1) the nature and quality of services provided to fund shareholders; (2) the profitability of the fund to the adviser-manager; (3) fall-out benefits; (4) economies of scale; (5) comparative fee structures; and (6) the independence and conscientiousness of the trustees.

The court noted that the First Circuit had not yet expressly adopted the factors set forth in Second Circuit’s Gartenberg opinion, nor had it established a specific pleading requirement for claims under Section 36(b). Agreeing with the plaintiffs, the court stated that Gartenberg, if it were to be the appropriate test for liability in the case, did not establish a heightened pleading requirement for Section 36(b) excessive fee claims. Therefore, the court’s focus in reviewing the defendants’ motion to dismiss was on whether or not the complaint satisfied the notice pleading requirements of the Federal Rules of Civil Procedure, namely whether or not the complaint set forth a “short and plain statement of the claim showing that the pleader[s] are entitled to relief.” Fed.R.Civ.P. 8(a)(2). The court concluded that the plaintiffs had set forth allegations sufficient to survive a motion to dismiss, and consequently denied Putnam’s motion.
PHILADELPHIA LAWWORKS UPDATE

Alison Altman*

Philadelphia LawWorks, a creation of Philadelphia VIP, the Business Law Section of the Philadelphia Bar Association, and other Philadelphia public interest agencies, provides free legal services to eligible non-profit organizations and businesses to further community economic development and job creation in Philadelphia. Philadelphia LawWorks serves the community by providing organizations and businesses with pro bono legal referrals and conducting community education events.

Philadelphia LawWorks is trying to expand upon the services it provides to small business and nonprofit clients by holding more community education events and creating client education materials. Volunteers are needed to conduct seminars for small business owners and non-profits on topics such as choice of business entity, real estate, employment, and intellectual property law. Volunteers are also needed to create pamphlets on these and other topics that can be distributed to Philadelphia LawWorks clients.

If you are interested in volunteering with Philadelphia LawWorks, either by taking a case, teaching a seminar, or creating client education materials, please contact Alison Altman at 215-523-9563 or aaltman@philadelphialawworks.org.

*Alison Altman is the Philadelphia LawWorks Americorps Attorney

ARTICLES WANTED!

Please send any articles or news that would be of interest to the Business Law Section to:
Ellen Jerrehian at jerre@ballardspahr.com

*The next deadline is July 29, 2005*

RECENT MUTUAL FUND COURT DECISIONS

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C. Seventh Circuit Overturns SEC Sanctions against Monetta and Dismisses Findings against its President for Aiding & Abetting.

In the Monetta case, Monetta and its president, Robert Bacarella ("Bacarella"), appeal to the U.S. Seventh Circuit a SEC administrative enforcement action against them. The SEC had found that Monetta violated the Advisers Act through acts that amounted to “fraud and deceit” in violation of Section 206(2) of the Advisers Act by failing to disclose that it had allocated shares of IPOs to certain directors of its mutual fund clients, and that Bacarella aided and abetted the violations. The Seventh Circuit overturned the SEC’s order on appeal and remanded for further consideration. The court found that: (1) while Monetta violated the Advisers Act by failing to disclose material information, the sanctions imposed by the SEC were excessive; and (2) there was insufficient evidence to find that Bacarella aided and abetted the violation.

The court agreed with the SEC that the allocation of IPO shares to directors of mutual fund clients was a material fact and that failure to disclose such allocation amounted to “fraud or deceit” actionable under the Advisers Act. In support of this conclusion, the court noted that opportunities to invest in IPO shares are rare and therefore valuable to investors, and that when Monetta allocated the shares to directors of clients, it did so at the expense of its own mutual fund clients. The court also agreed with the SEC’s assertion that there was a potential conflict because Monetta allegedly had an incentive to favor directors over fund clients, given the directors’ duty to police the fund’s relationship with the investment adviser. The fact that Monetta did not, in fact, favor the directors over the funds was of no consequence, as the mere potential for abuse was sufficient to hold Monetta responsible for the failure to disclose the allocation. The court, however, found that the sanctions imposed by the SEC on Monetta were excessive given that: (1) the conduct was not particularly egregious; (2) the allocations were isolated incidents; (3) Monetta had voluntarily ceased the allocations and no longer had individual clients, making future violations unlikely; and (4) the SEC, despite having dismissed most of the charges, imposed the sanctions recommended by the administrative law judge based on all of the initial charges.

Regarding Bacarella, the court disagreed with the SEC, stating that he could not be found liable for aiding and abetting because no specific rule had required the disclosure of such an allocation and because the IPO shares were not, in fact, distributed inequitably. Under the liability standard for aiding and abetting, one must be “generally aware” that his/her conduct is illegal or improper. Had the shares been distributed inequitably, the court noted, the SEC would have had a stronger case against Bacarella.
THE EUROPEAN REGISTERED COMMUNITY DESIGN TURNS TWO

Robert J. Ballarini and Anthony S. Volpe*

April 1, 2005 was the second anniversary of the European Registered Community Design (RCD). The RCD program is administered by the Office for Harmonization in the International Market (OHIM), which is the European Union agency responsible for the promotion and management of trademarks and designs. The OHIM is a public establishment which enjoys legal, administrative and financial independence. The OHIM was created under European Community law and is a European Community body with its own legal distinction. Since its activities are subject to European Community law, the Community Courts - the Court of First Instance and the Court of Justice of the European Communities - are responsible for overseeing the legality of the OHIM’s decisions.

What is an RCD? As its name suggests, an RCD protects a design. A design is defined as the appearance of the whole or a part of a product resulting from the features of the lines, contours, colors, shape, texture and/or materials of the product and/or its ornamentation. This covers all tangible goods like clothing, cell phones and jewelry, as well as graphics, i.e., computer icons, logos, typefaces, etc.

The advantages of securing an RCD are numerous. First, a single registration protects your design in a market of 440 million people in 25 different member countries. The RCD gives its proprietor a uniform right applicable in all Member States of the European Union on the strength of a single procedure which simplifies design policies at the European level. This type of multinational recognition and international market dominance was previously unavailable.

Second, the official costs associated with an RCD application for smaller applicants are minimal. Official Registration fees are just 230€ (approx. $315), plus a publication fee of 120€ (approx. $165). The RCD application process can actually cost less than a trademark application.

Third, the period from application to registration is brief since there are no novelty examination or opposition proceedings before registration. In just four to six months an applicant can have an RCD. By way of contrast, a utility patent application is typically granted in two years at the earliest.

Fourth, the RCD offers a one-year “grace” period that allows applications to be filed up to 12 months after an initial disclosure. This enables applicants to show a design and gauge whether there is reasonable interest before registration. Publication can be deferred for up to 30 months from application, thus allowing a design to be kept secret.

Fifth, it is also possible to apply for any number of different designs in one “multiple” application. Although additional fees are required, the “multiple” application still represents a substantial savings over the cost of filing separate individual applications. Each separate design in a “multiple” application is eventually registered separately, i.e., given a unique registration number.

The initial term of an RCD is five years and the RCD is renewable every five years for up to a maximum term of 25 years. The renewal fee is centrally payable which eliminates the need to individually pay fees in each member country.

An RCD is valid in all 25 European Union Member Countries without the need to individually “validate” the RCD in the various countries as is the case with European Patents. Furthermore, no translations (and translation fees) are required by the individual countries. This further serves to reduce costs since European associate interaction is limited to a single associate in one country.

Due to its relatively low cost and quick processing, the RCD has become a very popular vehicle for protecting interests in Europe. As evidenced by data released by OHIM, many U.S. applicants are taking advantage of this relatively new registration. During the first two years, over 90,000 applications were filed – roughly 78% by Europeans, 9% by Americans, and the balance by the rest of the world.

*Robert J. Ballarini is a patent agent and Anthony S. Volpe is president and a shareholder of Volpe and Koenig, P.C.
BUSINESS LITIGATION COMMITTEE NEWS

The Business Litigation Committee held a general membership meeting on February 23, 2005. One result of that meeting is the formation of a subcommittee, co-chaired by Greg Mathews and Ed Biester, to explore the uses of Judges Pro Tem in the Commerce Court. The Business Litigation Committee sponsored “Practice in the Commerce Court from the Judges’ Perspective” on May 3, 2005, a well-received lunch seminar attended by nearly 90 attorneys. The Business Litigation Committee’s annual Commerce Court Reception was held on May 12, 2005, attended by nearly 170 guests, serving to mark the Program’s notable success as it is now well into its fifth year. On June 8th the Business Litigation Committee will sponsor a conversation between two deans of the bar, Dennis Suplee and Elizabeth Ainslie, who will share some of their experience and insights on the litigator’s practice. We hope to make such conversations between deans of the bar an ongoing part of the service that the Business Litigation Committee provides.

HEALTH CARE LAW COMMITTEE NEWS

The Health Care Law Committee, co-chaired by Shelley Goldner of Jennings Sigmond and Debbie Datte of Post & Schell, has been holding a series of lunch and learns. On April 22, 2005, Nancy Weinman of Schnader Harrison Segal & Lewis spoke on limits on the kinds of procedures that may be performed by ambulatory surgery facilities and Jean Hemphill and Melissa Merkel, both of Ballard Spahr Andrews & Ingersoll, addressed gainsharing, new developments in hospital-physician relationships.

At the May 20, 2005 meeting, Brad Rostolsky of Cozen O’Connor discussed the Department of Health and Human Services proposed regulations regarding HIPAA enforcement and Debbie Datte of Post & Schell gave a presentation on the key modifications to the Personal Care Home licensure requirements.

The schedule of upcoming Health Care Law Committee meetings is:


September 23, 2005: Jeremy Lutsky of Reed Smith: Physician Credentialing – Hospital Compliance with Federal and State Regulations.

The “learn” portions of the programs are approved for 1 CLE credit for a tuition fee of $49. Attorneys may attend these brown bag lunch meetings at no cost without receiving CLE credit.

Constance Kaendler, Esq. has been appointed liaison for the Health Care Law Committee to the Legislative Liaison Committee of the Philadelphia Bar Association.

For further information on the committee or to suggest meeting topics, please contact committee co-chairs Shelley Goldner at sgoldner@islex.com or Deborah Datte at ddatte@postschell.com. Check the Philadelphia Bar Association website www.philadelphiabar.org for updates on the committee and its programs.

WOULD YOU LIKE TO BE A MEMBER OF A SUBCOMMITTEE OF THE BUSINESS LAW SECTION?

Subcommittee membership is free if you are a paid member of the Business Law Section.

E-mail Andrea Morris, Membership Coordinator, at amorris@philabar.org and specify which subcommittee(s) you would like to join.
MERGERS AND ACQUISITIONS COMMITTEE NEWS

Such a deal - the M&A Committee is back!

With the M&A market heating up, what better time to revive the Business Law Section’s Committee on Mergers and Acquisitions? Michael Ecker has been appointed Chair, and Steven Plon Vice Chair, through 2006. Monthly meetings will be held at the offices of Dilworth Paxson LLP in the Mellon Bank Building (32nd Floor, 1735 Market St). All meetings will be held from 12:00 noon until 1:30 p.m. and include a buffet lunch and a one hour substantive discussion on a topic relating to mergers and acquisitions.

The first meeting of the revived M&A Committee will be held on June 30, 2005, and is entitled “Let’s Get Started - Valuation Issues”. Our speakers will be Susan Saidens, CPA, CVA, CITP from Asher & Company Ltd., Robert Haas, Jr., from Robert M. Haas Associates, Inc., and George Mooshburner, President and Managing Director of PA Capital Advisors, LLC.

At the July 28th meeting, Ron Hoxter, Sunbelt Business Brokers, will address the Committee on selection of and expectations for investment bankers and business brokers. After a break in August, the Committee will meet again on September 15th, when Roger Wood, Dilworth Paxson, will discuss term sheets and letters of intent, and on October 13th Michael Ecker, the Committee’s Chair, will lead a discussion regarding non-disclosure agreements and the due diligence process.

Please contact Michael Ecker, at mecker@dilworthlaw.com, if you would like to join the M&A Committee, receive a list of meeting topics, volunteer to be speaker (or suggest one), or if you would like to attend any of the Committee’s lunch sessions.

JOIN THE BUSINESS LAW SECTION!

If you would like to join the Business Law Section, please complete the form below and return it, along with a check for the amount of the dues, to the Bar Association today! Or, join securely online with a credit card at www.philadelphiabar.org.

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Please indicate your Committee interests:

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____ Bankruptcy Law  ____ Securities Regulation  ____ Small Business
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____ Business Organizations  ____ Franchise Law  ____
____ Cyberspace & E-Commerce  ____ Health Care Law  ____ Human Resources & Employee Relations

Annual Dues:
Member of the Bar Association less than five years: $5
Member of the Bar Association five or more years: $20
Enclosed is my check for $____ payable to the Philadelphia Bar Association. I am currently a member of the Association.

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