Committee Reports

Banking Law Committee

The Banking Law Committee met four times in 2008. The Committee has heard presentations on judicial, regulatory, legislative, litigation and transactional developments, including those involving the subprime mortgage crisis. Speakers have included the General Counsel of the New York Banking Department and the Regional Counsel of the OCC. We continue to seek to build attendance at our meetings by providing quality presentations, CLE credit and a forum for idea exchange.

—Clifford Weber, Chair

Bankruptcy Law Committee

Jeffrey Reich on behalf of the Bankruptcy Law Committee made a presentation on sanctions and damages awarded by bankruptcy courts against mortgage lenders and on assumption of executor contracts and Chapter 13 issues at the Section's annual meeting in September. The Committee presented a statewide CLE program on Basic Bankruptcy Skills at the end of October. Finally, a special subcommittee has been looking at alternatives to allow a partial "cram-down" of consumer home mortgages in Chapter 13 cases that would be acceptable to lending institutions (at press time, this issue was pending before the Congress).

—Mark Tulis, Chair

Corporations Law Committee

The Corporations Law Committee was particularly active last spring in commenting on proposed legislation in New York. The two bills which the Committee supported were approved by both houses and signed into law. The first bill amends Section 614 of the BCL to provide that the plurality default for the election of directors of New York corporations can be overridden by a bylaw provision as well as an amendment to the certificate of incorporation. In recent years, many corporations have shifted from a standard that directors are elected by a plurality vote to a majority vote standard, except in the case of contested elections. Because this shift previously required an amendment to the certificate of incorporation, which required board and shareholder approval, it was more difficult for New York corporations to make this change and more difficult for shareholders of New York corporations to force this change, unlike in Delaware, where the change could be made with a bylaw amendment that shareholders can adopt without board approval. While disagreeing with the much stated rationalization for majority voting—"where a single 'for' vote could elect a director" because directors in companies with plurality voting have almost always also received a majority of the votes cast—the Committee acknowledged that majority election of directors was being adopted increasingly by New York as well as Delaware corporations, and the bill would facilitate that change. The bill would not eliminate the need to amend the certificate of incorporation where the corporation's certificate of incorporation explicitly provided for plurality voting.

The second bill supported by the Committee amended paragraph (b) of Section 510 of the BCL to permit New York corporations to pay dividends out of net profits (either in the year the dividend is paid or in the prior year) in addition to paying dividends out of surplus. Under the BCL, "surplus" is the excess of the net assets of the company over the stated capital. The Committee acknowledged that in the era of no-par and low-par shares, it has been long recognized that stated capital provides no protection to creditors, and that the Model Act and most other states have eliminated the concepts of capital and surplus and adopted tests of financial condition in determining whether a corporation may pay dividends. New York's amendment would follow Delaware law, in permitting dividends to be paid out of net profits, where surplus was insufficient.

The four bills with respect to which the Committee submitted memoranda in opposition did not become law. Two of them were consecutive versions of a bill mandating New York corporations (in the first instance with 100 or more shareholders, and in the second instance publicly traded corporations) to make the annual shareholder meeting available by remote access and to permit shareholders to vote electronically throughout the meeting (the first version also would have required the corporation to consider those shareholders attending electronically to be present for quorum purposes). While the Committee supported the concept of having permissive provisions, it explained in its memoranda that mandating these requirements was not appropriate because they were either technologically or economically not feasible at present. Very few corporations as of yet Webcast their annual meetings;

the Committee could not find any example where a corporation whose shareholders remotely accessed the meeting were considered present for quorum purposes, and the voting during the meeting requirement was contrary to the practices of most issuers (where the mechanics of compiling the vote require an earlier cutoff for proxies, as opposed to ballots submitted at the meeting). Moreover, the Committee noted that because most shares are held in nominee name, and these provisions applied only to record holders, the legislation would not have the intended effect.

The Committee also opposed a bill that would have amended subdivision (3) of the limited liability company law to require, among other things, New York LLCs to include in their articles of organization the names and addresses (which must be an actual location, rather than a post office box) and a description of the duties and responsibilities of all members, the actual addresses of all offices of the LLC wherever located, and the amendment of the articles of organization whenever any changes in the foregoing occurred. While the stated purpose of the bill was to assist cities in enforcing local codes and ordinances and the collection of taxes and judgments, the Committee noted that imposing these onerous requirements would simply cause entities seeking to avoid such obligations to gravitate to another form of entity, and force most of the hundreds of thousands of New York LLCs that were not shunning these obligations to also change to another form of entity to avoid continual amendments of the articles of organization, resulting in considerable transaction costs and the likely abandonment of the LLC as a business entity in New York.

Finally, the Committee opposed an Assembly bill that would have amended the limited liability company law and the general construction law with respect to the definition of newspaper to eliminate the requirement that a "newspaper" has a paid circulation. The Committee noted that the Assembly Memorandum in Support provided no data or analysis as to the difference in publication costs, public availability and archival retrieval between newspapers with or without paid circulations, and that given the number and significance of legal notices that must be published in a "newspaper," such an analysis should be undertaken before making the change.

—Janet Geldzahler, Chair

Franchise, Distribution and Licensing Law Committee

The Franchise, Distribution and Licensing Law Committee held a meeting in May 2008 with a presentation by Craig R. Tractenberg on the subject of "Bankruptcy Issues and Strategies in Franchising."

Attendees also discussed New York State Assembly Bill A10963, introduced by Assemblyman Adam Bradley on May 8, 2008, shortly before the legislative session ended. The Legislature did not act on the bill in its 2008 session, but Mr. Bradley's staff has indicated that he intends to reintroduce the bill in the next legislative session, which begins in January 2009. Thomas Pitegoff, the Chair of this Committee and a resident in Mr. Bradley's election district, assisted Mr. Bradley's staff in preparing this bill.

The bill would conform the definition of a "franchise" in New York more closely to the definitions used by the Federal Trade Commission (FTC) and other states. It would add the concept of a "business opportunity," consistent with the FTC approach. It would exempt franchise sales by New York franchisors to franchisees outside of the state, bringing New York law in line with the approach taken by other states. Finally, the bill would exempt the grant of master franchise rights to a single company in New York.

The coverage of the current franchise law in New York is so broad that it is often a trap for the unwary. The broad scope of the law discourages companies from doing business in New York and creates uncertainties that make compliance difficult.

These changes would improve the environment for business in the state. They would also remove barriers to international business in New York and enhance New York's reputation as an international center of business. At the same time, the changes would not eliminate the private right of action by aggrieved franchisees, and they would preserve the authority of the Attorney General's Office to prosecute franchise fraud.

The Committee welcomes comments on this bill. The Committee also welcomes suggestions for future presentations and programs. Contact the Committee Chair at pitegoff@pitlaw.com.

—Thomas M. Pitegoff, Chair