2000

Recent Developments in Corporation Law and Practice

Norwood Beveridge

Published by the Conference on Consumer Finance Law
Editorial Office
Professor Alvin C. Harrell, Editor

INDEX

Recent Developments in Corporation Law and Practice

By Norwood P. Beveridge

I. Introduction

A. The S.E.C. Adopts Regulation FD (Fair Disclosure)

Effective October 23, 2000, the U.S. Securities

(Continued on page 276)

The *Quarterly Report* is published four times each year. Please address all correspondence concerning editorial content to Professor Alvin C. Harrell, Editor, Consumer Finance Law *Quarterly Report,* The Oklahoma City University School of Law, 2501 N. Blackwelder, Oklahoma City, Oklahoma 73106.

Coming in the next issue:

Symposium on Privacy and Predatory Lending

- Are contacts directly with a represented debtor appropriately curtailed?
- Are staff trained to handle turnovers?
- Are staff trained to monitor customer retention programs so that refinances of discharged debtors are avoided?
- Are staff trained to handle payoff requests during Chapter 13 plans?
- Have security agreements and lease documentation been reviewed and revised if necessary, to clarify what obligations are clearly secured?
  - Do leases adequately provide for turnover of a vehicle upon expiration of a lease when the debtor's obligations under the lease have been discharged? Is there a clear provision providing for termination of the lease upon filing bankruptcy, at the lender's option? Are lease cases monitored so that there can be special handling of claims for excessive usage and damage to the leased property at the end of the lease?

Recent Developments in Corporation Law and Practice

(Continued from page 240)

and Exchange Commission has adopted new rules[1] governing release of material information by reporting companies subject to the disclosure rules of the Securities Exchange Act of 1934.[2] The rules were originally published for comment in 1999,[3] and nearly six thousand letters of comment were received.[4] Substantial changes were made in the final rules in response to public and industry comments.[5] In general, the new rules require that when a publicly held issuer makes a disclosure of material nonpublic information to securities market professionals or holders of the issuer's securities, it must make general public disclosure, either simultaneously in the case of an intentional disclosure, or promptly in the case of a non-intentional disclosure of which it later becomes aware.[6]

B. Issuers Subject to Regulation FD

Not all companies are subject to the new disclosure rules; the Commission estimates that about 13,000 publicly owned companies will be affected.[7] As defined in Rule 101,[8] only domestic companies having a class of securities registered under section 12[9] or required to file reports under section 15(d)[10] of the Securities Exchange Act of 1934 are issuers subject to the rules.[11] Foreign governments, foreign private issuers, and investment companies other than closed-end investment companies, are exempted from the rules.[12]

C. Scope of Disclosures Subject to Regulation FD

Not all disclosures are subject to the rules. Only disclosures both made by and made to specified classes of persons are covered. Thus, the only disclosures affected by the rules are those which are both: (1) made by an issuer or on its behalf by a senior official such as a director or executive officer, investor relations or public relations officer and (2) made to a securities market professional, such as a broker-dealer, investment company, or investment adviser, or to a securities holder of the issuer under circumstances in which it is reasonably forseeable that the holder will trade on the information.[13] The rules are not intended to restrict ordinary course of business communications with the issuer, or disclosures to the media or government agencies.[14] In addition, Rule 100(b)(2)[15] creates four exclusions for the following types of communications: (1) communications to a person who owes the issuer a duty of trust or confidence (a temporary insider such as an attorney, investment banker, or accountant); (2) communications to any person who expressly agrees to maintain the information in confidence; (3) disclosures to an entity whose primary business is the public issuance of credit ratings if the disclosures are for the purpose of developing such a rating; and (4) communications made in connection with offerings of securities registered under the Securities Act of 1933, other than certain traditional shelf offerings under Rule 415.[16]

D. Definition of Material Nonpublic Information Subject to the Rule

The rules do not provide a definition of "material" or "nonpublic" information covered by Regulation FD, relying on existing definitions of those terms in the case law.[17] The U.S. Supreme Court has defined information as material if "there is a substantial likelihood that a reasonable shareholder would consider it important"[18] in making an investment decision. In the same case, the Court stated that there must be a substantial likelihood that the

(Continued on page 282)

1. Regulation FD, 17 CFR §§ 243.100-243.103, 65 F.R. 51716 (Aug. 24, 2000).
2. 15 U.S.C.A. §§ 78a-78mm (1997 & West Supp. 2000).
3. Selective Disclosure and Insider Trading, Exchange Act Rel. No. 34-42259, 64 F.R. 72590 (Dec. 28, 1999).
4. Selective Disclosure and Insider Trading, Exchange Act Rel. No. 34-43154, 65 F.R. 51716, 51717 (Aug. 24, 2000).
5. 65 F.R. at 51718.
6. 65 F.R. at 51719.
7. 65 F.R. at 51732.
8. 17 CFR § 243.101(b) (2000).
9. 15 U.S.C.A. § 78l (1997). These are generally companies whose securities are listed on a national securities exchange, or issuers having a class of equity security held by at least 500 persons and more than $10 million in assets, 17 CFR § 240.12g-1.
10. 15 U.S.C.A. § 78o(d) (1997). These are generally companies who have made a registered public offering under the Securities Act of 1933, 15 U.S.C.A. §§ 77a-77z-3 (1997 & West Supp. 2000).
11. 65 F.R. at 51724.
12. 17 CFR §§ 243.100(a) and 243.101(b).
13. 17 CFR §§ 243.100(b) and 243-101(c) and (f).
14. 65 F.R. at 51719.
15. 17 CFR § 243.100(b)(2).
16. *Id.*; 65 F.R. at 51720.
17. 65 F.R. at 51721.
18. TSC Ind., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Basic, Inc. v. Levinson, 485 U.S. 224, 231 (1988); *see* Securities Act Rule 405, 17 CFR § 230.405 and Securities Exchange Act Rule 12b-2, 17 CFR § 240.12b-2.

of whether or not to settle, and for how much. The pendency of large numbers of cases by class members tends to suggest that plaintiffs have plenty of incentive to sue and a desire to control their own litigation.

Some courts seem to broaden this question and consider whether the legal system or all parties would be better off if the case proceeded as a class action. In *In re Rhone-Poulenc,*[47] for example, the Seventh Circuit granted a writ of mandamus to vacate class certification, citing in part a concern that the defendant company would face a choice of bankruptcy or settlement on claims for which it had not been found liable in almost all of the individual cases that had been tried. In *Castano*, the Fifth Circuit similarly referred to the underlying claims of tobacco liability as an "immature tort" as to which caution was appropriate.[48] Critics have branded these cases "corporate protectionism."

Although the Supreme Court long ago mandated that a "rigorous analysis" be undertaken before a class was certified,[49] most courts have taken this instruction to heart only recently. A recitation of Rule 23's text followed by a conclusion on each requirement is increasingly recognized to lack the requisite rigor. A focus on each requirement in isolation, moreover, obscures the fact that the requirements of Rule 23 are interrelated, with each describing a facet of constitutionally permitted representative litigation. Certifying a class where a class trial cannot be held consistent with due process dissserves both unnamed class members, by inviting collusive settlements, and class defendants, by exerting a sometimes crushing pressure to settle that is unrelated to the merits of the litigation.

The Supreme Court's *Amchem* holding that all requirements of class certification must be met for settlement classes, except for consideration of whether or not a trial is manageable, ironically may be resulting in less-than-rigorous analysis of some issues. Specifically, where the parties propose a settlement, courts are often hard-pressed to decline, and inclined to attempt to stretch the boundaries of class certification requirements accordingly. Often reinforcing this tendency is the absence of any vigorous adversary process once the principal parties have settled. Objectors, if present, may have limited objectives or limited means.[50] A good—or bad—example of this tendency is the Third Circuit's decision in *In re Prudential Insurance Company Sales Practice Litigation*,[51] in which the court seemed to gloss over the predominance requirement with respect to certification of fraud and deceptive trade practice allegations under the laws of fifty states by simply referring to a grand "common scheme"—rather than holding, as the court might have, that manageability problems that would defeat class certification outside the settlement context did not preclude certification of a class that was sufficiently "cohesive" under *Amchem* in a settlement context.[52] The case and its result-oriented progeny are nonetheless now widely cited in support of certification in contested settings.

V. Summary and Conclusions

All of these questions aside, a technically irrelevant factor is often dispositive in class certification litigation: does the class have a good claim? A compelling argument on either side of this question often points the way to victory on class certification—on other stated grounds, of course. Ignore it at your peril.

47. 51 F.3d at 1299.

48. *See also* Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 758 (1998) (district court denying certification properly considered that "trying the suit as a class action would be unwieldy and unfair to Circuit City"), *modified on other grounds after remand*, 206 F.3d 431 (4th Cir. 2000).

49. General Tel. Co. of S.W. v. Falcon, 457 U.S. 147 (1982).

50. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 423 (2000).

51. 148 F.3d 283 (3d Cir. 1998); *see also* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022-23 (9th Cir. 1998). The Third Circuit recently distinguished instructively its *Prudential* decision. *See In re* LifeUSA Holding, Inc., 2001 WL 213975 (3d Cir. 2001).

52. *Id.* at 314-15. *See also Amchem*, 521 U.S. at 623.

Recent Developments in Corporation Law and Practice

(Continued from page 276)

fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[19]

In the adopting release, the S.E.C. gives the following as examples of information which may be material, depending on the circumstances: (1) earnings information; (2) mergers, acquisitions, tender offers, joint ventures, or changes in assets; (3) new products or discoveries, or developments regarding customers or suppliers; (4) changes in control or in management; (5) change in auditors or auditor notification that the issuer may no longer rely on an auditor's audit report; (6) events regarding the issuer's securities—repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, public or private sales of additional securities; and (7) bankruptcies or receiverships.[20]

(Continued on page 290)

19. *TSC Ind., Inc.*, 426 U.S. at 449.

20. 65 F.R. at 51721.

class certification.[64] Others have adopted a more flexible approach that allows the district court to approve settlement and dismissal without a certification hearing or notice to members of the putative class so long as there is no evidence of collusion or resulting prejudice.[65]

Another consideration is the possibility that over-use of this tactic will encourage plaintiffs to file class certification motions with their complaints—even if they were not initially planning to pursue a class certification until later in the proceedings—just to preserve the option. There have been cases where plaintiffs' counsel have sought ex parte certification orders from friendly courts before the defendants are even served. Moreover, if the named plaintiff is mooted out, the plaintiff's counsel might search high and low, even advertising, for a successor representative plaintiff. The increase in lawsuits as a result of serial replacement of class plaintiffs would likely frustrate trial judges, as well as present additional strains on an already overburdened system.

Along these same lines, there is the possibility of judicial and legislative backlash. For example, in *Oruga v. AT&T Wireless of Florida, Inc.*,[66] the Florida Appellate Court was sympathetic to, though ultimately unpersuaded by, the plaintiff's argument that defendants could moot all class actions simply by making offers of judgment to class representatives early in the litigation when discovery may not have commenced and at a time when the representatives may have insufficient information as to the potential damages of the putative class. Acknowledging what it called "valid and legitimate concerns" of the plaintiffs, the court held that it could not exempt class actions by judicial fiat from the offer of judgment rule which, by its plain language, applied to all civil actions.[67] Thus, too many offers of judgment and settlement might be the clarion call to either change the rules or abrogate their application.

IX. Conclusion

Class action defendants can obtain a dismissal on mootness grounds if they make an offer of judgment or settlement before the plaintiff moves for class certification, so long as they offer complete monetary or equitable relief. Or they can do so after class certification has been denied, although the denial is still reviewable on appeal. In either event, the cases suggest that this can be done by defendants as a matter of right. While an offer will wield great force in those circumstances, it is virtually useless to effect dismissal of a class action case after a motion for certification has been filed. Defendants should also carefully consider whether an offer of judgment can be used against them in future litigation because of collateral estoppel effects. Thus, the effectiveness of this "secret weapon" depends upon the care and accuracy with which it is aimed.

64. Caston v. Mr. T's Apparel, Inc., 157 F.R.D. 31, 34 (S.D. Miss. 1994).

65. Shelton v Pargo, Inc., 582 F.2d 1298, 1314 (4th Cir. 1978); Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401 (9th Cir. 1989).

66. 712 So. 2d 1141 (Fla. App. 1998).

67. *Id.* at 1143.

Recent Developments in Corporation Law and Practice

(Continued from page 282)

E. Timing of Required Public Disclosures

The timing of the required public disclosure turns on whether or not the disclosure is "intentional."[21] If the disclosure is intentional, public disclosure must be simultaneous; if not, public disclosure must be made promptly.[22] A disclosure is intentional if the person making it either knows, or is reckless in not knowing, that the information is both material and nonpublic.[23] "Promptly" means "as soon as reasonably practicable" after a senior official of the issuer discovers there has been a nonintentional disclosure of information that the official knows, or is reckless in not knowing, is both material and nonpublic, but in no event after the later of twenty-four hours or the commencement of the next day's trading on the New York Stock Exchange.[24]

F. Procedures for Making Required Public Disclosure

Alternative methods are provided for making the required public disclosure. On the one hand, the issuer may make disclosure by either "filing with" or "furnishing to" the S.E.C. a current report on Form 8-K.[25] If Form 8-K is "filed," the disclosure is made in Item 5, and the information is subject to the usual rules of liability for false and misleading statements in filed documents under section 18 of the Securities Exchange Act of 1934 and under sections 11 and 12(a)(2) of the Securities Act of 1933 when incorporated by reference in registration statements under that Act.[26] If Form 8-K is "furnished," the disclosure is made in Item 9, and the information is not deemed "filed" for purposes of section 18 of the 1934 Act.[27] In either case, the filing is not deemed an admission by the issuer that the information is material.[28]

In lieu of filing or furnishing a Form 8-K, the issuer may make public disclosure by any other method "reasonably designed to provide broad, non-exclusionary distribution of the information to

(Continued on page 301)

21. 17 CFR § 243.100(a).

22. *Id.*

23. 17 CFR § 243.101(a).

24. 17 CFR § 243.101(d).

25. 17 CFR § 243.101(c).

26. 65 F.R. at 51723.

27. *Id.*

28. *Id.*

the authority of a federal savings association to issue letters of credit and made other technical agreements.[123]

XIII. Gramm-Leach-Bliley Act

There was a flurry of agency activity in the wake of the passage of the GLB Act. The FRB defined a number of terms to be used in connection with operating subsidiaries, listed permissible activities for these entities, added the conditions a national bank must satisfy in connection with a financial subsidiary and in general revised its rules to deal with the provisions of the GLB Act on this point.[124]

The FRB amended Regulation Y on an interim basis to list financial activities permissible for a financial holding company under the GLB Act. It also adopted procedures a financial holding company must follow to engage in certain financial activities and those activities complimentary to such financial activities.[125] The FRB amended Regulation H to deal with state member banks and financial subsidiaries.[126] The FRB published an interim rule establishing procedures for bank holding companies and foreign banks operating branches, agencies or commercial lending companies in the United States to elect to become financial holding companies.[127] Additionally, the FRB and the Secretary of the Treasury jointly adopted an interim rule governing merchant banking investments made by financial holding companies.[128] The FRB concluded its March activity by proposing a supplement to its interim rule on merchant banking investments to amend the consolidated capital guidelines for investments made, directly or indirectly, by a bank holding company in non-financial entities under the merchant banking authority.[129]

In August, 2000, the FRB proposed a rule which would authorize financial holding companies to act as finders to the extent of such defined activity under the terms of Regulation Y.[130] The FRB, the OCC, the FDIC and the OTS also published a joint notice of proposed rule making dealing with consumer protections for depository institution sales of insurance.[131]

The OCC, FRB, FDIC and OTS also issued their joint final rule dealing with privacy policies and use of customer information.[132] There has been a further joint notice of proposed rule making to establish standards to safeguard customer information.[133]

XIV. Electronic Signatures and Disclosures

As previously noted, the Electronic Signatures in Global and National Commerce Act (ESIGN) was signed by the President on June 30, 2000.[134] The provisions of this act generally became effective October 1, 2000.[135] ESIGN contains detailed provisions dealing with consumer consent to the use of electronic transactions and communications, the means of obtaining that consent and the contents of the consent notice.[136] It further deals with record retention, notary signatures and insurance.[137] This obviously impacted prior agency work in this area and revisions to old proposals and new proposed rules were required.[138]

123. 64 Fed. Reg. 46560 (Aug. 26, 1999).

124. 65 Fed. Reg. 3157 (Jan. 20, 2000); 65 Fed. Reg. 12905 (Mar. 10, 2000).

125. 65 Fed. Reg. 14433 (Mar. 17, 2000).

126. 65 Fed. Reg. 14810 (Mar. 20, 2000).

127. 65 Fed. Reg. 15053 (Mar. 21, 2000).

128. 65 Fed. Reg. 16460 (Mar. 28, 2000).

129. 65 Fed. Reg. 16480 (Mar. 28, 2000).

130. 65 Fed. Reg. 47696 (Aug. 3, 2000).

131. 65 Fed. Reg. 50882 (Aug. 21, 2000).

132. 65 Fed. Reg. 35162 (June 1, 2000).

133. 65 Fed. Reg. 39472 (June 26, 2000), with comments due on or before August 25, 2000.

134. Pub. L. No. 106-229, 114 Stat. 464 (ESIGN). *See supra* note 31.

135. ESIGN § 202.

136. ESIGN § 101. *See* Robert A. Cook, Timothy P. Meredith and Elizabeth C. Yen, *The Electronic Signatures in Global and National Commerce Act—A Review of the Act's Consumer Disclosure Requirements*, in this issue.

137. *Id.*

138. *Id.*

Recent Developments in Corporation Law and Practice

(Continued from page 290)

the public."[29] The following procedures are suggested by the Commission:

1. Issue a press release, distributed through regular channels, containing the information;
2. Provide adequate notice, by a press release and/or website posting, of a scheduled conference call to discuss the announced results, giving investors both the time and date of the conference call, and instructions on how to access the call; and
3. Hold the conference call in an open manner, permitting investors to listen in (although not necessarily to ask ques-

29. 17 CFR § 243.101(e)(2).

(Continued on page 329)

served within 90 days of delivery of the referee's deed.[4]

Finally, if insurance proceeds are at issue, the lender or servicer should be careful never to bid above the perceived value of the property. In many states (and certainly in New York) the deficiency formula credits the borrower with the greater of the amount bid at the sale, or the value of the property on that day.[5] Hence, every dollar bid above the value of the property diminishes, and ultimately extinguishes, the deficiency which can be claimed—even if in actuality the property is not worth the amount of the debt. To the extent that certain investors may obligate a servicer to bid the full debt, the consequences of that need to be understood.

Having noted this very dangerous relationship between insurance proceeds and a deficiency, it should be observed that there is a recent case (in New York) which offers an exception to the rule that neglect to pursue a deficiency bars a claim to insurance proceeds. This exception arises where the mortgage itself provides that the proceeds from a fire insurance policy are first to be applied in reduction of the mortgage debt, with only the balance to be paid to the mortgagor. If that provision appears, the lender's claim to proceeds is a contractual right, unaffected by non-pursuit of a deficiency.[6] Whether your mortgage contains such a provision may be an imponderable, but it's worth looking for. Indeed, it is something that mortgage drafters should address with dispatch.

In the end, these nuances can be challenging, and the practical effects are critical. It's worth knowing about them.

4. In New York, the governing statute is Real Property Actions and Proceedings Law (RPAPL) § 1371. But how to measure that 90 days can become a daunting exercise. Examples and decisions are discussed at 3 BERGMAN ON NEW YORK MORTGAGE FORECLOSURES § 34.03[2] (Matthew Bender & Co., Inc. 2000).

5. RPAPL § 1371.

6. TIG Insurance Company v. Wilshire Credit Corp., A.D.2d , 703 N.Y.S.2d 501 (2d Dept. 2000).

Recent Developments in Corporation Law and Practice

(Continued from page 301)

tions) either by telephonic means or through Internet webcasting.[30]

G. Relationship to Other Securities Acts Provisions

The Commission has taken a series of steps to make Regulation FD fit in with other provisions of the 1933 and 1934 Acts. The new rules are stated to be disclosure rules under sections 13(a) and 15(d) of the Securities Exchange Act of 1934 and not antifraud or insider trading rules under section 10(b) and Rule 10b-5 of that Act.[31] Rule 102 expressly provides that no failure to make a disclosure required under Regulation FD shall be deemed to be a violation of Rule 10b-5.[32] However, liability under Rule 10b-5 may still exist for selective disclosures otherwise prohibited under existing case law, such as tipper liability, or for violation of a duty to update or correct, or for false or misleading information or material nondisclosure in the Regulation FD disclosure, or for entanglement with or adoption of analysts' forecasts.[33] The issuer will be subject to an S.E.C. enforcement action for failure to comply with Regulation FD, either an administrative action seeking a cease-and-desist order or a civil action seeking an injunction and/or civil money penalties.[34] As already stated,[35] the rules are not applicable to disclosures made in connection with a securities offering registered under the Securities Act of 1933, other than certain traditional shelf offerings under Rule 415 such as dividend or interest reinvestment plans or employee benefit plans.[36] Failure to comply with the rules will not affect an issuer's ability to use short-form registration Forms S-2, S-3, or S-8 under the 1933 Act, nor affect the ability of holders of restricted stock and affiliates to use Rule 144 under the Act.[37]

H. Public Reaction to Regulation FD

In the short term, companies are reacting very cautiously to Regulation FD. In particular, the Commission has for all practical purposes abolished the one-on-one issuer communication with securities analysts. In an unambiguous statement, the Commission made it clear that no selective earnings guidance of any kind may be given to analysts.[38] The result is a drying up of company information,[39] more stock price volatility as analysts' forecasts conflict with reported earnings results,[40] and overcrowded and lengthy issuer conference calls with analysts.[41]

II. State Law Developments

A. Introduction

In 1986, the Oklahoma legislature decided to replace the existing Oklahoma statutory provisions

(Continued on page 335)

30. 65 F.R. at 51724.

31. 65 F.R. at 51726.

32. 17 CFR § 243.102.

33. 65 F.R. at 51726.

34. *Id.*

35. *See supra* note 16 and accompanying text.

36. 65 F.R. at 51725.

37. *Id. See* 17 CFR § 243.103.

38. "If the issuer official communicates selectively to the analyst nonpublic information that the company's anticipated earnings will be higher than, lower than, or even the same as what analysts have been forecasting, the issuer likely will have violated Regulation FD. This is true whether the information about earnings is communicated expressly or through indirect 'guidance,' the meaning of which is apparent though implied." 65 F.R. at 51721.

39. *See* Lee Clifford, *The SEC Wants To Open the Info Vault*, Fortune, Nov. 13, 2000 at 434.

40. *See* Mark Kessel, *Manager's Journal: How to Survive the Disclosure Minefield*, Wall St. J., Oct. 23, 2000 at A38; Robert McGough & Cassell Bryan-Low, *Analysts' Earnings Estimates are Diverging, And SEC Disclosure Rule May Be the Reason*, Wall St. J. Nov. 2, 2000 at C2.

41. *See* Jeff D. Opdyke & Emily Nelson, *Conference-Call Crunch: New SEC Rule Turns Analysts' Rite Into a Hectic Affair*, Wall St. J. Oct. 31, 2000 at C1.

1. It cannot restructure the debt on the car and allow them to keep the car.

2. It cannot keep the home mortgagee from foreclosing on the mortgage while the people catch up.

Debt counseling may not be useful for Couples 3 and 4 and may actually be harmful since not only can it not restructure the house or car debt, but, in the case of Couple 4, every dollar that is spent on paying unsecured debt increases the risk that they will lose their house and their car. These are the Couples that are most problematic for debt counseling agencies. On the other hand, restrictions on cramdown of auto loans and home mortgage debt, and Chapter 7 filings, in the 2001 Bankruptcy Code may increase the attractiveness of debt counseling as an alternative to bankruptcy.

If the mission of the debt counseling agency is to direct as much of the customers' money as possible to the unsecured creditors, or to avoid bankruptcy at all costs, or to obtain as much revenue as possible from their Debt Management Plan, their advice will be to enter into a Debt Management Plan, even if this is not in the best interests of the debtors. But there may be more cases today than in the past where debt counseling on a DMP represent the consumer's best option. In order to avoid abuses, and resolve these issues on a consistent basis, it would be helpful for debt counseling agencies to develop statistical models that direct their counselors to explain bankruptcy and the limitations and advantages of bankruptcy and debt counseling for people in circumstances such as those of Couple 4. The counselors should be educated regarding bankruptcy and the agency should develop materials on bankruptcy to give to their clients. Genus and many other debt counseling agencies are unwilling to take any of these steps and thus may be doing their "clients" a disservice. The final decision should always be made by the client, but hopefully on the basis of full information.

Recent Developments in Corporation Law and Practice

(Continued from page 329)

for corporations with most of the Delaware General Corporation Law, although making certain stylistic changes and substantive omissions and additions.[42] The Oklahoma statute has been periodically amended since its adoption to keep it reasonably current with later Delaware amendments. The Oklahoma Business Corporation Act Committee selected Delaware because of its national influence and unparalleled case law.[43] Since 1986, commentators have questioned whether the legislature's desired goal of following Delaware's lead in corporate law matters has been adequately respected by the Oklahoma courts.[44] Recent corporate law decisions of the Oklahoma Supreme Court do not provide an easy answer to this question, and these issues may have implications in other states as well.

B. *Sutter v. Sutter Ranching Corp.*[45]

In its most recent decision, the Oklahoma Supreme Court decided as a question of first impression that a supermajority vote requirement in a ranching corporation's amended and restated certificate of incorporation requiring a 75 percent shareholder vote for dissolution of the corporation[46] and a related shareholders' agreement granting rights of first refusal and valuation procedures did not bar a minority 33 1/3 percent shareholder from seeking discretionary judicial dissolution under a special statute applicable to farming or ranching business corporation.[47]

The question is whether or not the decision is one which a Delaware court would reach on the same facts. On the one hand, the court does not cite any Delaware cases at all, although it cites Oklahoma and Idaho, Indiana, Iowa, Massachusetts, Minnesota, North Dakota, and Utah corporate law decisions for various propositions. On the other hand, Delaware has no statute like the Oklahoma farming corporation dissolution statute, and that illustrates one of the problems. Oklahoma law is similar to Delaware, but not the same. The interpretation given to the Delaware statutes at the time of their adoption by Oklahoma should be controlling.[48] But there is really no argument about the meaning of the supermajority provisions of the statute. They do authorize the certificate of incorporation to require a 75 percent shareholder vote for dissolution. That provision was undoubtedly put in for the benefit of shareholders such as the plaintiff, who only held 33 1/3 percent of the stock and did not want the other shareholders to dissolve the corporation without his consent. In the absence of such a provision, a majority of the Board of Directors and shareholders could vote to dissolve the corporation.[49]

Since, like many states, Delaware does not have a general minority shareholder dissolution for good cause statute,[50] there is no answer to the question of what a Delaware court would decide on these facts. Delaware does allow the shareholders of a close corporation to put in the certificate a provision allowing dissolution at the request of any share-

(Continued on page 350)

42. For an account of the adoption of Delaware law, *see generally*, Irving L. Faught, Oklahoma Business Organizations: Formation and Representation ch. 1 (2000).

43. *Id.*

44. *Id.*

45. 2000 OK 84, 14 P.3d 58 (Okla. 2000).

46. Such supermajority provisions are authorized by 18 Okla. Stat. § 1006(B)(4) (1999), which allows the certificate of incorporation to contain:

> Provisions requiring, for any corporate action, the vote of a larger portion of the stock or of any class or series thereof, or of any other securities having voting power, or a larger number of the directors, than is required by the provisions of the Oklahoma General Corporation Act.

47. The special statute is found at 18 Okla. Stat. § 953(D) (1999), which provides that:

> Upon the petition to a court of competent jurisdiction by shareholders holding twenty-five percent (25%) or more of the shares in a farming or ranching business corporation the court in its discretion, for good cause shown, may order the corporation dissolved and the assets of such corporation divided in kind pro rata to the shareholders or liquidated and the proceeds of such liquidation divided pro rata to the shareholders all according to the procedures specified for the dissolution and liquidation of business corporations under the Oklahoma General Corporation Act.

48. *See* Price v. Southwestern Bell Tel. Co., 812 P.2d 1355, 1358 (Okla. 1991); Woolf v. Universal Fidelity Life Ins. Co., 849 P.2d 1093, 1094 (Okla. Ct. App. 1992).

49. 18 Okla. Stat. § 1096 (2000).

50. A number of states do have such a provision, such as New York, *see* N.Y. Bus. Corp. L. §§ 1104, 1104-a, 1111, and 1118 (1986 & McKinney Supp. 2000). *See generally*, Model Bus. Corp. Act § 14.30 (1984) and statutory references.

credit card issuers who left Texas in 1985 are not likely to return to Texas.

Section 303.101 also permits use of the Quarterly Celing on open-end accounts authorized under section 346.003 as an alternative. The Quarterly Ceiling could go as high as 24 percent.

The keys to understanding the relationship of open-end credit under the various chapters of Title 4 of the Texas Finance Code are found in section 303.202 and section 346.004 of the Texas Finance Code. Pursuant to section 303.202, any open-end credit extended primarily for personal, family, or household use (which does not meet the definition of a "retail charge agreement" set out in section 345.001(4)) must be governed by Chapter 346 of the Texas Finance Code unless the creditor exercises in writing its option under section 346.004 to be governed by section 342.455. Retail charge agreements are governed by Chapter 345. Commercial open-end credit of any type can be governed by Subchapter B of Chapter 303 if the lender so elects under section 346.004.

The question is often raised as to why the creditor should opt out of Chapter 346 for commercial open-end credit. There are really two answers. First, real estate collateral is prohibited in Chapter 346. Secondly, the penalty provisions of Chapter 349 apply to credit extended under Chapter 346. Most creditors would probably prefer that the Chapter 305 penalties apply to a commercial transaction since Chapter 305 requires notice and a right to cure for any contracting or charging usury violation.

IV. Relationship of Penalty Provisions in Chapter 305 and 349 of the Texas Finance Code to 12 U.S.C. Sections 85 and 86 and Other Federal Law

Chapter 305 and 349 of the Texas Finance Code now have cure provisions, caps on class action liability and pre-suit notice and opportunity to cure provisions. Can a national bank choose that state law rather than federal penalties? The OCC has long recognized the "most favored lender" doctrine which says a national bank can take advantage of any state law that would apply to any state regulated lender.

V. Credit Card Surcharge Litigation

Texas is one of about 12 states that has a statute banning a surcharge for using a credit card. Section 339.001 was originally passed in 1985 when the Truth-in-Lending ban on surcharges expired. There has been a lot of litigation in Texas but the question of damages has not been addressed by a Texas appellate court.

VI. Prospects for 2001 Legislation

It does not appear likely that the Texas Finance Code will be amended in 2001 in any major way. No major amendments have been introduced as of March 12, 2001.

Recent Developments in Corporation Law and Practice

(Continued from page 335)

holder,[51] but that is not the question here, and in any event Oklahoma did not adopt the Delaware close corporation provisions. Delaware also allows a 50 percent shareholder of a joint venture corporation to petition for deadlock dissolution,[52] but that is only if the certificate or a written shareholders' agreement does not prohibit such action. Delaware does allow any shareholder to petition for the appointment of a receiver or custodian upon a showing of deadlock or other cause,[53] and this provision may be analogous. The question then is whether a shareholder may waive such a statutory protection where the statute is silent. That is questionable. If the benefits of the Oklahoma statute represent the state's public policy and cannot be waived in this fashion, the result reached by the Court seems correct as to the supermajority clause in the certificate.

Whether or not the shareholders' agreement should bar the statutory remedy of dissolution for good cause is another question. The Court states that the agreement does not address the question of dissolution, but it would seem that dissolution is a "voluntary or involuntary disposition of shares," which cannot be made except in accordance with the rights of first refusal and valuation provisions of the agreement. At the least, it should be considered whether "good cause" for dissolution may exist if the effect is inconsistent with a carefully-drawn shareholders' agreement. Courts have been reluctant to order judicial dissolution under similar circumstances when an alternative remedy such as a mandatory buyout is fairer.[54]

C. *Cities Service Co. v. Gulf Oil Corp.*[55]

This case dealt with the consequences of a 1982 termination by Gulf Oil Corporation (now Chevron USA Inc.) of a merger agreement between Gulf and Cities Service Company (now Oxy USA Inc.) entered into only seven weeks earlier.[56] Applying nonmutual collateral estoppel, the Oklahoma Supreme Court held that Gulf was precluded from justifying its termination by claiming that a Federal Trade Commission action allowed it to withdraw[57] and further held that Gulf was precluded from claiming that an overstatement of estimated oil reserves by Cities allowed it to withdraw.[58] This left only the question of damages for breach.

As to that point, the damages claim turned on the fact that shortly before the agreement was ter-

(Continued on page 364)

51. Del. Code. Ann., tit. 8 § 355.

52. Del. Code Ann., tit. 8 § 273.

53. Del. Code Ann., tit. 8 § 226.

54. *See e.g. In re* Wiedy's Furniture Clearance Center Co., Inc., 487 N.Y.S.2d 901 (N.Y. App. Div. 1985).

55. 1999 OK 14, 980 P.2d 116 (Okla. 1999).

56. 980 P.2d at 120.

57. 980 P.2d at 130.

58. 980 P.2d at 133.

Recent Developments in Corporation Law and Practice

(Continued from page 350)

minated Cities had purchased for its treasury 4.1 million shares of its own stock held by Mesa Petroleum for $225.5 million.[59] The trial court instructed the jury that if it found that the stock was acquired in reliance on the merger agreement, damages would equal the sum of the repurchase price paid by Cities and the legal fees Cities expended in reliance on the merger agreement.[60] The trial court limited the time frame for computing damages to a period ending August 13, 1982, one week after Gulf's termination, thereby preventing Gulf from introducing evidence of Cities' agreement to merge with Oxy USA later that same month.[61] The jury found that the Mesa stock repurchase was made in reliance on the merger agreement and entered judgment for Cities in the amount of $229.6 million, plus interest under Delaware law, which was applicable to the contract.[62] The Supreme Court upheld the judgment in all respects.[63]

Again, the Court did not cite any Delaware cases, although as stated, Delaware law governed the contract. While the decision presents questions of law that are not exclusively corporate law issues, such as contract law or the law of evidence, the central issue of damages is a corporate law question. The purchase of its own shares by a corporation is authorized by statute,[64] and case law in Delaware as well as nationwide supports the view that there is nothing per se suspect or damaging to the corporation in the purchase of its own shares.[65] To say that a corporation is damaged in the purchase of its own shares by the amount of the full purchase price unless a reduction in that price is proven by way of defense is incomprehensible. There are many reasons why a corporation might purchase its own shares, and it would be just as sensible to say that the corporation is benefitted by the full purchase price as to say that it is damaged. One might as well say that the purchase price of a car or any other commodity is presumptively proof of damages in that amount, which is clearly not the law.[66] The case should have been remanded for a new trial on the issue of damages, at least.

D. *Internat'l Brotherhood of Teamsters Genl. Fund v. Fleming*[67]

In 1997, a federal district court judge in Oklahoma City ruled in a suit by the Teamsters union that the Fleming Companies, Inc., an Oklahoma corporation, had to include in the proxy statement for its 1997 annual meeting of shareholders a proposed shareholders resolution submitted by the Teamsters.[68] The resolution would amend Fleming's bylaws to require Fleming's Board of Directors to redeem the company's shareholders' rights plan and not to adopt any other shareholders' rights plan without shareholder approval.[69] A shareholders' rights plan (usually referred to as a "poison pill") is an antitakeover device under which rights are issued to purchase stock of the company, or of a company by which the adopting company is acquired.[70] When originally issued, the rights are not exercisable, and they are typically redeemable at a nominal value by the issuing company.[71] The rights become exercisable upon the occurrence of a triggering device such as a hostile tender offer for control or the acquisition of a large block of the company's stock by a potential tender offeror.[72] The purpose of the rights plan is to deter hostile takeovers by giving the target Board of Directors time to formulate alternatives.[73] The propriety of rights plans has been upheld by the Delaware courts.[74] Fleming appealed the decision to the Court of Appeals for the Tenth Circuit, which certified the question to the Oklahoma Supreme Court. The Court held that the proposed bylaw amendment was proper under Oklahoma law.[75]

It has already been explained elsewhere why the decision is not one which a Delaware court would likely reach on the same facts,[76] and that explanation will not be repeated here. The present question is whether the decision adequately respects the decision of the legislature to follow Delaware corporate law. Because of the specific language of the statute, which requires that restrictions on the Board's authority to issue rights to purchase stock must be contained in the certificate of incorporation,[77] not the bylaws, and that the power of the Board to manage the affairs of the corporation is subject only to restrictions in the certificate of incorporation,[78] not the bylaws, and that the bylaws must not be inconsistent with the certificate of incorporation,[79] which in Fleming's case granted the Board the right to issue blank check preferred stock used in the rights plan, the decision is not consonant with established principles of Delaware law.

The question is what should be done about this. The intention of the Oklahoma Business Corporation Act Committee and the legislature was to create a hospitable forum for large and small corporations in Oklahoma, and if the Oklahoma Supreme Court's decisions are not consistent with that intention, the legislature will have to amend the statute. This actually is done frequently enough in Delaware itself when decisions of the Delaware Supreme Court or Chancery Court in the corporation law area are not acceptable to the state legislature. Of course, then the Oklahoma statute will not be the same as the Delaware statute, but that is unavoidable. It is an issue that crosses the lines of substantive law areas to confront interested parties in, *e.g.*, consumer and commercial law as well as other fields. The lesson seems clear: If state law is to remain viable, state courts and legislatures will need to pay more attention to uniformity, clarity and consistency.

[Norwood P. Beveridge is Professor of Law and Associate Dean at Oklahoma City University School of Law.]

59. *Id.* at n. 74.

60. 980 P.2d at 122.

61. *Id.*, at 122 and 135 n. 83.

62. *Id.*, at 122.

63. *Id.*, at 136-37.

64. Del. Code Ann., tit. 8 § 160.

65. *See generally*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Ernest L. Folk, III, *et al.*, 1 Folk on the Delaware General Corporation Law § 160.5 (1998).

66. *See* Restatement (Second) of Contracts § 349 (1981) and examples there cited.

67. 1999 OK 3, 975 P.2d 907 (Okla. 1999).

68. *See* discussion of the case in Norwood P. Beveridge, *Recent Developments in Corporate Law and Practice*, 24 Okla. City U. L. Rev. 133, 149-50 (1999).

69. 975 P.2d at 909 n. 3.

70. *See* Beveridge, 24 Okla. City U. L. Rev. at 144-46.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See* Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985).

75. 975 P.2d at 908.

76. *See* Charles F. Richards, Jr. & Robert J. Stearn, Jr., *Shareholder By-Laws Requiring Boards of Directors To Dismantle Rights Plans Are Unlikely To Survive Scrutiny Under Delaware Law*, 54 Bus. Law. 607 (1999).

77. 18 Okla. Stat. § 1038 (1999).

78. 18 Okla. Stat. § 1027 (1999).

79. 18 Okla. Stat. § 1013(B) (1999).