BLB&G

Bernstein Litowitz Berger & Grossmann LLP

Volume 3
First Quarter 2001

INSTITUTIONAL INVESTOR

Advocate

A SECURITIES FRAUD AND CORPORATE GOVERNANCE QUARTERLY

PUTTING YOUR MOUTH WHERE YOUR MONEY IS:

Institutional Investor Activism and the Experiences of the New York State Common Retirement Fund

by H. Carl McCall

Responsible investors know that corporate governance is the key to long-term profitability. A company can get lucky and have a good year. In a bull market, a company can simply ride the waves and have a great year. But to sustain long-term growth and profitability, a company needs first-rate governance where both management and policies are committed to enhancing shareholder value. Without that, a company cannot sustain success, and it is destined to disappoint its shareholders.

As Comptroller of the State of New York, I serve as sole Trustee of the state's Common Retirement Fund (CRF), the pension fund for all New York state and local government employees. With assets in excess of $120 billion and 880,000 active and retired members, the Fund is one of the largest pension funds in the world.

I take seriously my fiduciary responsibility to CRF members to protect and maximize the economic value of the Fund. To meet that responsibility, I make prudent, diversified investments. And I also establish corporate governance criteria to help ensure those investments are profitable.

There is no one right way to pursue good corporate governance. Each company is different, and different issues require different approaches. A review of CRF's recent activities illustrates the range of strategies available to investors.

Using the Proxy Process

The proxy process is critical to shareholders. In many instances, it is our only avenue for dialogue with a portfolio company. It is important for all

Continued on page 2

H. Carl McCall has been Comptroller of the State of New York since 1993 and, in that capacity, is responsible for governmental financial oversight and pension fund management for the State of New York, including serving as sole Trustee of the state's $120 billion Common Retirement Fund. Mr. McCall has had a distinguished career in public service. Among many other positions, he has served as President of the New York City Board of Education, as a three term New York State Senator, as Ambassador to the United Nations and as a Commissioner of the New York State Division of Human Rights and the Port Authority of New York and New Jersey.

Inside Look

For this issue of the *Advocate*, we are delighted that H. Carl McCall contributed *Putting Your Mouth Where Your Money Is: Institutional Investor Activism and the Experiences of the New York State Common Retirement Fund*. As most of our readers know, Carl McCall is the Comptroller of the State of New York and sole Trustee for the state's $120 billion Common Retirement Fund, one of the world's largest public pension funds. In addition to being a major institutional investor, the CRF served as one of the Lead Plaintiffs and achieved an unprecedented recovery of $3.2 billion in the *Cendant* case. Moreover the settlement imposed important corporate governance reforms at Cendant. The CRF is also sole Lead Plaintiff in the *Columbia/HCA Healthcare Derivative Litigation*, recently reinstated by the Sixth Circuit Court of Appeals.

In *Putting Your Mouth Where Your Money Is*, Mr. McCall emphasizes the importance for institutional investors in actively promoting responsible corporate governance. Drawing upon his own real-world strategies, Mr. McCall explains how investors can further long-term profitability by ensuring that management is committed to enhancing shareholder value and sustainable profits. These strategies include the effective use of the proxy process and ongoing dialogues with management to influence the company and to assure first-rate governance. If all else fails, as with Cendant, an institution can use litigation to both recover financial assets and enhance the company's long-term performance.

In *The Tide Turns: Institutional Investors Score Big In Delaware State Court*, Robert Gans reports on a recent important decision from the Chancery Court in Delaware. In *TCN Technology v. Intermedia Communications*, the Chancery Court appointed an institutional investor as Lead Plaintiff for a class of investors, even though the lead plaintiff provisions of the Reform Act did not apply. Rather than appoint the plaintiff who won the "race to the courthouse" and filed the first complaint, the Chancery Court properly recognized that an institutional investor had the largest stake in the litigation and was the most qualified party to represent the class of investors. This decision reflects the favorable trend to entrust important litigation to institutional investors and not to nominal plaintiffs with little at stake in the case.

Long-time readers of the *Advocate* know that Steven Singer has been the regular author of *Eye on the Issues* for more than a year. That space is now Steve Mellen's, who will continue to provide cutting-edge legislative and regulatory updates, as well as to report on notable decisions from courts throughout the country. Among other hot topics that Steve Mellen addresses in this issue, TIAA-CREF recently won a major shareholder vote by directly submitting its own proposal to the shareholders of ICN Pharmaceuticals.

As always, we hope that you find the *Advocate* to be a valuable and informative tool for keeping abreast of securities and corporate law issues. We enjoy bringing it to you. Please do not hesitate to contact us with any comments, questions or feedback.

PUTTING YOUR MOUTH WHERE YOUR MONEY IS: INSTITUTIONAL INVESTOR ACTIVISM

Continued from page 1.

shareholders to exercise their voting rights in a timely and thoughtful fashion.

■ ***Each year, CRF votes proxies of 1,300 companies.*** Our voting guidelines support resolutions that promote shareholder value and shareholder rights. While our staff considers every proxy on a case-by-case basis, CRF has voted against resolutions that create excessive executive compensation, dual class stock structures, stock option repricings, poison pills and golden parachutes.

■ ***I also sponsor shareholder resolutions.*** Some of these resolutions address issues of social concern, including tobacco sales to youth and fair employment practices in Northern Ireland. In all cases, I believe that social issues have a direct impact on a company's economic performance.

Dialogues with companies

CRF is a major investor in corporate America. When the Fund talks, companies listen. Knowing this, I try to use my influence to bring about reforms that will improve long-term performance. In letters, telephone calls and meetings, I regularly communicate with corporate management and other institutional shareholders to promote good corporate governance at portfolio companies. My goal is to develop a partnership with these companies, so that we might work together in pursuit of our mutual goal to achieve long-term, sustainable profits.

■ ***CRF conducts a semi-annual performance review that identifies the poor performing companies in its portfolio.*** Staff communicates directly with the companies to review their plans for turn-around and encourage changes in corporate governance that might improve performance. If a company fails to respond, CRF withholds support from the Board of Directors at the next annual meeting. CRF has withheld sup-

port from the boards of 30 companies in the past five years.

■ ***I also communicate directly with corporate management when companies take actions that jeopardize shareholder value.*** Recently, I contacted Michael Armstrong, Chairman of AT&T, to discuss his announced plan to split the company into four separate companies. AT&T's stock price has been depressed for a long time, and I was not convinced that Armstrong's plan was in the best interests of shareholders. Following my conversation with him, I arranged for a larger meeting between him and members of the Council of Institutional Investors. At that forum, institutional shareholders had an opportunity to ask questions and better understand the future of their investment.

"When the Fund talks, companies listen. Knowing this, I try to use my influence to bring about reforms that will improve long-term performance."

■ ***Earlier this year, I sent letters to the Chairmen of Mattel and Coca-Cola criticizing their decisions to award lucrative severance packages to ousted chief executive officers.*** I am greatly concerned about the effect that excessive executive compensation has on shareholder value. Such extraordinary recompense is particularly outrageous when executives have performed poorly, causing shareholders to suffer. Although my letters did not produce a change in the severance packages, the boards of both Mattel and Coca-Cola reacted to widespread public criticism by demonstrating a heightened commitment to searching for more appropriate executives and rewarding them on a more reasonable, performance-based formula.

■ ***I am sharply critical of companies that have discriminatory policies or practices. Companies will thrive only when they promote a culture of equality, tolerance and fairness.*** Anything less is not only unjust; it is unwise, as it poses a significant threat to a company's reputation and long-term value. Accordingly, when I learned that executives at Texaco had made racist comments and tampered with evidence in a racial discrimination lawsuit, I expressed my concern to the Chairman, Peter Bijur. Texaco's subsequent settlement of the lawsuit and its implementation of a comprehensive diversity plan strengthened the company and benefitted shareholders. Coca-Cola also faced a racial discrimination suit. I wrote to the Chairman and met with senior executives to discuss my concerns and urge them to settle. Earlier this year, they announced a legal settlement and a diversity plan. I have no doubt that Coca-Cola will be a better company because of these steps.

■ ***I am also an active member of the Executive Monitoring Committee that addresses issues related to the restitution of assets lost by Holocaust victims and survivors.*** Created in 1997 by New York City Comptroller Alan Hevesi, the Committee includes public pension fund trustees from all over the country. Our efforts have contributed to successful negotiations, including those with Swiss banks and the Austrian government. At times, we have leveraged our position as shareholders to encourage portfolio companies to participate in settlement talks. I believe this is an appropriate role to play. Companies that act responsibly and take steps to bring about some measure of justice will be better equipped to handle the economic and social challenges of the future.

Responsible investors are active investors. We know that corporate governance is a fundamental component of corporate performance. It may not guarantee good performance, but bad corporate governance will certainly foretell bad performance.

Litigation

When all other efforts have failed, when shareholder resolutions have been ignored and communication has broken down, CRF considers litigation. To date, we have been Lead Plaintiff in four class action suits. In these suits, we seek recovery of financial assets and corporate governance changes that will enhance the company's long-term performance. Our greatest success was the $3.2 billion settlement with Cendant Corporation and Ernst & Young, Cendant's former auditors. Not only was it the largest securities settlement in history, it also incorporated important corporate governance provisions, including complete independent membership on the audit, nominating and compensation committees; a majority of independent members on the board; annual elections of all board members; and shareholder approval of stock option repricing. The financial settlement provides shareholders with some immediate compensation, and the corporate governance provisions help to ensure that shareholders will be rewarded going forward.

Continued on page 8.

THE TIDE TURNS:
Institutional Investors Score Big in Delaware State Court

By Robert S. Gans

Several months ago, we noted an emerging trend among state courts to appoint significant institutional investors to direct class actions challenging directors' breaches of their fiduciary duties to shareholders, despite the fact that the lead plaintiff provisions of the Private Securities Litigation Reform Act of 1995 (the "Reform Act") do not technically apply to such litigation. (See "An End To Mickey Mouse Corporate Governance: Institutional Investors Lead The Way", Vol. 2, Second Quarter, 2000.) In that article, we noted three recent instances in which institutional shareholders had assumed control over significant shareholder litigation in state court with great success, supplanting the traditional "race to the courthouse" in which the attorney who files the first complaint within hours of the announcement of a corporate transaction is rewarded with the position of lead counsel. Nevertheless, none of these cases resulted in the adoption of a formal rule akin to the Reform Act's presumption that the person or group of persons with "the largest financial interest in the relief sought by the class" should be appointed lead plaintiff in federal securities fraud class actions.

Now, for the first time, the Delaware Chancery Court has taken this critical step, adopting a framework for appointment of lead plaintiff that both incorporates and builds upon the dictates of the Reform Act. Indeed, it is likely that Chancellor William Chandler's recent decision in *TCW Technology Limited Partnership v. Intermedia Communications* will serve as a model for courts throughout the nation, not only for its preference in favor of sophisticated institutional investors, but also for the thoughtful manner in which it avoids the problem of aggregation (i.e., law firms soliciting hundreds of unrelated nominal shareholders into a "lead plaintiff group" that the firm later claims to be the presumptive lead plaintiff) that has resulted from an overly mechanical application of the Reform Act.

The case arose from Intermedia's announcement on September 1, 2000, that it would be acquired by Worldcom, Inc. for a substantial premium, despite the fact that Intermedia's stock price had declined by more than 13% over the prior year. The reason for Worldcom's "generosity" lay in Intermedia's 62% ownership interest in publicly traded Digex, Inc., a managed web hosting business whose stock price had increased from $32.50 to $84 per share in the year preceding the merger announcement. Ordinarily, Digex shareholders would expect to receive a significant sum for their shares of this valuable company. By structuring the sale as part of the merger between Intermedia and Worldcom, however, Intermedia was able to pocket a handsome profit based on the value of its Digex stake, while the minority public Digex shareholders themselves were essentially left in the cold.

Now, for the first time, the Delaware Chancery Court has taken the critical step of adopting a framework for appointment of lead plaintiff that both incorporates and builds upon the dictates of the Reform Act.

Predictably, in the days following the merger announcement, approximately a dozen class action lawsuits were filed in the Delaware Chancery Court, alleging that Intermedia had breached its fiduciary duties to the Digex minority by structuring the transaction in a way that deprived them of the profits to be obtained from the sale of Digex. As is typical in such cases, the majority of these complaints were filed by traditional class action firms on behalf of plaintiffs with only nominal holdings of Digex common stock. In the past, the first of these firms to file a complaint would have been appointed lead counsel, gaining control over this significant litigation

Continued on page 7

Quarterly Quote

"Markets exist by the grace of investors. If investors lose faith in the integrity of our market, if they believe they are not receiving high-quality information, or that their interests are being placed secondary for any reason, they will go elsewhere..."

Departing Chairman of the Securities and Exchange Commission, Arthur Levitt, in a recent speech

Eye On The Issues

LEGISLATIVE/REGULATORY UPDATES AND RECENT DECISIONS OF INTEREST

By Steven E. Mellen

Nasdaq Examines Rules Regarding Shareholder Approval of Option Plans. When should public companies be required to obtain shareholder approval before adopting new option plans? Currently, no vote is necessary where the plan is "broad-based"— that is, where the impact of the plan is primarily upon rank-and-file employees, rather than upon officers and directors. However, in response to concerns from institutional investors who believe this vague guideline gives companies room to adopt plans which significantly dilute shareholder equity, the Nasdaq has been seeking comments on a new system that would require shareholder approval for a far greater number of option plans, with an eye towards keeping highly dilutive plans from being implemented without a shareholder vote. ***Council Research Service Alerts, December 14, 2000.***

SEC Chairman Levitt's Place in History. Recently retired SEC Chairman Arthur Levitt will be remembered for advancing the cause of investor protection in many ways, among them toughening corporate disclosure requirements, promoting the writing of prospectuses in "plain English" instead of legalese, and making the stock markets more open and fair to all. Among his leading priorities, however, was to force auditors to take greater responsibility for ensuring the accuracy of public companies' financials. Although strides have been made in this area — among them the SEC's recent pronouncements requiring greater independence between accounting firms' auditing arms and their underwriting businesses — Levitt blames auditor resistance to SEC oversight for many of the problems which still exist in this area. "They've embraced a fortress mentality that has not served them well," Levitt says. "The cases that have come and undoubtedly will come from the commission highlight the need for an oversight process that puts the public interest first." With the SEC coming under new leadership under the Bush administration, it remains to be seen what further progress will be made towards ensuring auditor accountability. ***Barron's, January 29, 2001.***

Don't Give Up on Shareholder Proposals Just Yet. Our last *Eye on the Issues* described how some institutional investors, frustrated with efforts to improve corporate governance through shareholder proposals, are pursuing a more direct route by submitting their own slates of directors to challenge the incumbent board. Now comes word that the old-fashioned approach may still have some life after all. TIAA-CREF recently won a majority shareholder vote on a proposal to the shareholders of ICN Pharmaceuticals, calling for a substantial majority of the board to be completely independent and for the key board committees to consist solely of independent directors. According to the Investor Responsibility Research Center, this is only the second time ever that such a shareholder resolution has been approved. Further successes of this type could certainly give institutional shareholders a powerful weapon in effecting corporate reform. ***Council Research Service Alerts, January 12, 2001.***

New SEC Rules for Fund Management. In one of the SEC's final acts under Chairman Levitt, the agency announced a new set of rules concerning the role of independent directors in overseeing mutual funds. The rules require most mutual funds to have a majority of independent directors as opposed to the 40% required under existing law and mandates fuller disclosure to shareholders regarding directors' identity, experience, and potential conflicts of interest. Of course, just as these improved regulations serve to protect investors in mutual funds, requiring similar commitments from public companies as a component of basic corporate governance can only serve to safeguard the interests of stockholders. ***Federal Securities Law Reports, January 10, 2001.***

Ripped from Today's Headlines. Outgoing chairman Levitt reportedly did not mince words when confronted with one of the hottest controversies of the day. When informed on the next-to-last day of President Clinton's term that the President was preparing a pardon for wealthy tax evader Marc Rich, Levitt responded: "The man's a fugitive! This looks terrible." While the merits of Rich's pardon are still being debated as the *Advocate* goes to press, one thing is for certain: there is virtual unanimity, even at the highest levels, that white-collar criminals, particularly fugitives, should not be exonerated for their crimes.

Huge Victory for Investors in the Sixth Circuit. On February 13, 2001, the Sixth Circuit Court of Appeals reversed the dismissal of the Columbia/HCA Healthcare Derivative Litigation arising out of the largest healthcare fraud in history. The suit, led by H. Carl McCall and the New York State Common Retirement Fund (as well as a dozen other large institutional investors), was brought in the name of the Company against its officers and directors for recklessly failing to discharge their responsibilities to the Company and its shareholders, thus allowing the systemic fraud to continue unabated. There will be more on this important decision in a later issue but, in short, the Sixth Circuit reversed the trial court and found that plaintiffs satisfied their burden of pleading that the directors lacked independence.

Informed Sources

INFORMED SOURCES features questions and answers that address issues presented by our readers. If you wish to submit a question, and we encourage you to do so, E-mail us at blbg@blbglaw.com, call us at 800-380-8496, or write to us at the firm address.

Q *How will the departure of former SEC Chairman Arthur Levitt affect the regulation of the securities markets and the enforcement of the federal securities law?*

A Former Securities and Exchange Commission Chairman Arthur Levitt is notable not only for being the longest serving SEC Chairman, having served in that role for nearly eight years, but he has been considered by many to be to have been the most activist Chairman in the SEC's history. For example, during his tenure, Chairman Levitt pushed through regulations requiring companies to disclose material information to analysts and the public at the same time and to write documents to investors in plain English. He also focused the SEC's attention on the dramatic rise in accounting fraud. It remains to be seen whether the new Chairman, yet to be named, will be as active.

The SEC will always play a pivotal role in securities law enforcement through its enforcement and regulatory initiatives. The Chairman sets the major policy direction and determines where the staff will focus its resources. The Chairman, though, has more limited input in the day-to-day functioning of the agency. By and large, the SEC's work is performed by career civil servants who, by statute, have limited interaction with the five Commissioners appointed by the President and Congress. The SEC staff has latitude in setting its priorities and allocating resources. This will be especially true during the transition from Chairman Levitt to his successor.

There will likely be few new initiatives coming forth from the SEC during the transition. This may leave a void in the SEC's enforcement efforts as the staff adjusts to new priorities. Furthermore, the new Chairman is likely to be less assertive in pursuing new initiatives until becoming settled in the job and establishing a relationship with Congress.

These considerations dictate that investors will have to take greater measures to protect themselves and be prepared to enforce their rights through private suits under the securities laws. The importance of private actions in deterring corporate wrongdoing by public companies, their officers and their advisers cannot be overestimated. The SEC Enforcement Division has only about 400 employees, including support staff, to bring enforcement actions against violators of the securities laws. With the exponential growth of debt and equity markets over the past decade, it is clear that the SEC can prosecute only a handful of meaningful fraud cases. The SEC, therefore, has long recognized that private actions and investor activism are essential tools for effective enforcement of the securities laws.

The role that private enforcement actions play in ensuring fair and orderly markets can be illustrated by one of Chairman Levitt's final initiatives: the independence and integrity of the accounting profession and its role in auditing the financial statements of public companies. The Commission promulgated proposed regulations aimed at eliminating conflicts of interests that arise when accountants perform consulting and other services for companies whose financial statements they audit. The accounting profession opposed the regulations and caused them to be enacted in a significantly weaker form than was originally proposed.

Chairman Levitt's departure from the SEC will likely mean that the agency's focus on new initiatives to reform the securities markets may slow during the transition and into the new leadership. President Bush has not indicated any priority to strong regulation of the securities markets and, more specifically, to active enforcement of the securities laws.

INSTITUTIONAL INVESTORS SCORE BIG IN DELAWARE

Continued from page 4.

despite its client's marginal interest in the company, while significant shareholders watched from the sidelines.

This case, however, did not follow the typical pattern. Approximately three weeks after the initial complaints were filed, TCW Technology Limited Partnership, which holds over one million shares of Digex stock, filed its own class action complaint challenging the merger. TCW also immediately moved for a preliminary injunction to prevent the merger from taking place, and was successful in obtaining an expedited discovery and hearing schedule from the Court. Incredibly, none of the dozen other plaintiffs who commenced actions in the three weeks prior to TCW requested similar relief, or took any meaningful steps to prosecute the litigation. On the heels of this success, TCW moved for appointment as lead plaintiff.

The *Intermedia* lead plaintiff decision marks a substantial victory for institutional investors who have long been excluded from important shareholder class litigation. Chancellor Chandler begins by pronouncing a death sentence on the "race to the courthouse," stating that while "it might be thought, based on myths, fables, or mere urban legends, that the first to file a lawsuit … wins some advantage in the race to represent the shareholder class, that assumption . . . has neither empirical nor logical support." Indeed, the Chancellor roundly criticized the practice of filing complaints within "minutes or hours after a transaction is announced," characterizing such pleadings as "remarkable, but only because of the speed with which they are filed in reaction to an announced transaction."

> *"It might be thought, based on myths, fables, or mere urban legends, that the first to file a lawsuit…wins some advantage in the race to represent the shareholder class, that assumption… has neither empirical nor logical support."*

The Court then proceeded to delineate the factors to be considered when appointing a lead plaintiff. First, the Chancellor borrowed from the lead plaintiff provisions of the Reform Act, holding that the Court should give weight to the shareholder with the most significant stake in the outcome of the litigation. Nevertheless, the Court recognized that a formal presumption in favor of the largest shareholder should not be "mechanically applied" in every case. Thus, the Chancellor avoided the problems encountered in many federal courts that have appointed lead plaintiffs based solely upon their damages, without regard to their commitment to the litigation or ability to fulfill their fiduciary duties to absent class members. Instead, the Court held that two other factors also should be considered in appointing a lead plaintiff: (i) "the quality of the pleading that appears best able to represent the interests of the shareholder class"; and (ii) whether the proposed lead plaintiff "has prosecuted its lawsuit with greater energy, enthusiasm or vigor than have other similarly situated litigants." While the drafters of the Reform Act certainly envisioned that the court-appointed lead plaintiff would have these characteristics, the scheme adopted by Chancellor Chandler marks a significant advance by expressly vesting the trial judge with authority to consider these factors in each case.

With this framework in place, the decision to appoint TCW as lead plaintiff became a foregone conclusion. As would be expected from a responsible, sophisticated class representative, TCW did not rush to the courthouse door, but instead filed a detailed, carefully drafted complaint, which it followed

continued on page 8.

BLB&G
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

Bernstein Litowitz Berger & Grossmann LLP prosecutes class and private actions, nationwide, on behalf of institutions and individuals. Founded in 1983, the firm's practice concentrates in the litigation of securities fraud; corporate governance; antitrust; employment discrimination; and consumer fraud actions. The firm also handles, on behalf of major institutional clients and lenders, more general complex commercial litigation. The firm's client base in securities fraud and corporate governance litigation includes large public pension funds and other institutional investors.

BLB&G: INSTITUTIONAL INVESTOR ADVOCATE is published quarterly by Bernstein Litowitz Berger & Grossmann LLP, 1285 Avenue of the Americas, New York, NY 10019, 212-554-1400 or 800-380-8496. The materials in this newsletter have been prepared for information purposes only and are not intended to be, and should not be taken as, legal advice.

PUTTING YOUR MOUTH WHERE YOUR MONEY IS: INSTITUTIONAL INVESTOR ACTIVISM

Continued from page 3.

Responsible investors are active investors. We know that corporate governance is a fundamental component of corporate performance. It may not guarantee good performance, but bad corporate governance will certainly foretell bad performance. On behalf of all the members of CRF, I will continue to work with portfolio companies to protect and grow the assets of the Fund. I will be a partner with the corporate sector and will seek new ways to communicate and work together to benefit corporations, investors, and the retired employees of the State of New York.

Conclusion

I urge all institutional investors to be active investors. As demonstrated by the above examples, institutional investors — both large and small — can help to shape the conduct of corporate America. Whether by use of the proxy process, open communication with corporate executives or, when necessary, considering litigation, institutional investors can work to ensure that the companies in which they invest are managed properly and the interests of shareholders are adequately protected. Our fiduciary responsibility demands no less.

INSTITUTIONAL INVESTORS SCORE BIG IN DELAWARE

Continued from page 7.

with a motion for a preliminary injunction and expedited discovery schedule. In contrast, the other plaintiffs who filed their complaints within hours or days of the announcement of the transaction did nothing during the ensuing three weeks to prosecute their actions, leaving them in the position of merely supporting TCW's motion. In the end, the Court simply reaffirmed the leadership role that TCW already had assumed over the case by its responsible handling of the action.

The Intermedia *decision is good news for institutional investors who are tired of standing on the sidelines while important shareholder litigation is entrusted to nominal plaintiffs with only a marginal interest in the litigation.*

The *Intermedia* decision is good news for institutional investors who are tired of standing on the sidelines while important shareholder litigation is entrusted to nominal plaintiffs with only a marginal interest in the litigation. The logic of the opinion should be compelling to other state courts that, by their silence, have implicitly endorsed the "race to the courthouse" for want of a better alternative. Even more importantly, the decision might also have a significant impact in federal court, where certain courts have interpreted the Reform Act to require the appointment of the shareholder or group of shareholders with the largest measure of damages as lead plaintiff, regardless of the proposed lead plaintiffs' knowledge of the case, reasons for entering the action, or ability to prosecute the litigation. By reserving to itself the discretion to examine these factors, the *Intermedia* Court made clear that it would not permit creative lawyer solicitation efforts to subvert the goal of appointing the most qualified lead plaintiff. A broad application of the *Intermedia* rationale will therefore benefit all shareholders, by encouraging the most qualified party to serve as the fiduciary of absent class members. Chancellor Chandler understood what the drafters of the Reform Act had in mind all along.

Robert S. Gans can be reached at robert@blbglaw.com.

Contact Us

We at BLB&G welcome input from our readers. If you would like to comment on any of the articles in this newsletter, or have any suggestions for articles that may be of interest to you, please contact Editor David R. Stickney, at 858-793-0070 or by E-mail at davids@blbglaw.com. Questions for our INFORMED SOURCES question and answer column may also be submitted to David R. Stickney. If you would like more information about our practice, please visit our website at

www.blbglaw.com

Editor: David R. Stickney

Editorial Director: Alexander Coxe

Contributors: Max W. Berger, H. Carl McCall, Robert S. Gans and Steven E. Mellen

BLB&G
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

1285 Avenue of the Americas
New York, New York 10019

212-554-1400
800-380-8496

Fax: 212-554-1444
E-mail: blbg@blbglaw.com
Web Site: www.blbglaw.com