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Annual Survey Working Group of the M&A Jurisprudence Subcommittee, Mergers and Acquisitions Committee, ABA Section of Business Law

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325 The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis
Joseph A. Grundfest and Kristen A. Savelle

Three hundred publicly traded entities have adopted intra-corporate forum selection ("ICFS") provisions either in their charters or as bylaw amendments, often without prior stockholder approval. These provisions have been adopted in response to a sharp increase in intra-corporate litigation outside the state of incorporation. The academic literature suggests that this increase is animated by economic incentives of the plaintiffs' bar that can be inimical to stockholder interests. ICFS provisions are an effective private ordering mechanism for addressing this trend in a manner that responsibly protects stockholder rights.

Plaintiffs have nonetheless brought suit in Delaware challenging the validity of ICFS provisions. We review the governing law and demonstrate that ICFS provisions are valid subject matter for charters and bylaws. Stockholders are also on notice that boards have the authority to amend bylaws without prior stockholder consent, and the "vested rights" theory is long repudiated. Assertions that stockholders cannot be bound by ICFS bylaw provisions adopted without prior stockholder consent are thus incorrect. Speculative claims that ICFS provisions might later be exercised in a manner that violates a fiduciary duty or causes injustice will also not cause them to be invalidated: charter and bylaw provisions are presumed to be validly adopted and hypothetical speculation regarding instances of potential future abuse are insufficient to invalidate the provisions as adopted. This presumption is particularly powerful in the case of ICFS provisions where boards retain the option not to enforce them if enforcement is later deemed inconsistent with fiduciary obligations.

ICFS provisions are also not self-enforcing. Foreign courts hearing petitions to enforce ICFS provisions will most frequently apply the rule established by the Supreme Court's *Bremen* decision to protect the interests of foreign-filing stockholders. Absent a finding that plaintiffs' rights under the chartering state's laws cannot be adequately protected by courts in the chartering state, ICFS provisions are likely to be enforced in the very large majority of circumstances.
From Regulation to Prosecution to Cooperation: Trends in Corporate White Collar Crime Enforcement and the Evolving Role of the White Collar Criminal Defense Attorney

Robert S. Bennett, Hilary Holt LoCicero, and Brooks M. Hanner

This article traces the steady growth of criminal law into fields that had previously been addressed by civil statutes, particularly in relation to the concept of corporate criminal liability. The article also describes the means through which the federal government has encouraged cooperation between corporations that are being investigated and their investigators. This fundamental shift in how corporate misconduct is treated by the federal government has reframed the role of a criminal defense attorney who defends corporations and executives. Any lawyer facing such a task must be willing to incorporate new strategies into daily practice while also evaluating the theoretical considerations governing what it means to “bet the company.”

Article 9 of the UCC: Reconciling Fundamental Property Principles and Plain Language

Thomas E. Plank

Article 9 of the Uniform Commercial Code, which governs (i) the grant of a security interest in personal property to secure payment or performance of an obligation—a “true security interest”—and (ii) the sale of receivables, incorporates the primary property law principle of nemo dat quod non habet—one cannot transfer an interest in property that one does not have—and its corollary—a transferee can receive what the transferor has and no more. For good policy reasons, however, Article 9 also enacts the innovative exception to nemo dat, the Filing Priority Principle codified in the “first-to-file-or-perfect rule,” that permits a secured party who first files a financing statement to obtain a superior security interest over a secured party who first obtains a security interest and would otherwise prevail under nemo dat. For true security interests, the plain language of Article 9 effectuates the policies of nemo dat and the Filing Priority Principle. For the sale of receivables under Article 9, however, the plain language of Article 9 precludes application of the Filing Priority Principle to many buyers of receivables, and this result has led some scholars and practitioners to advocate the application of the Filing Priority Principle to these buyers by implication despite the plain language of the statute. This article analyzes the interplay in Article 9 among nemo dat, the Filing Priority Principle, and the important policy of respecting the plain language of a statute and argues that when the plain language of the statute protects the interests of buyers of receivables under nemo dat, the Filing Priority Principle should not be implied as a matter of policy to defeat those interests, but when the language of the statute is ambiguous, the Filing Priority Principle should be applied to further the policy reasons for this exception to nemo dat.
Execution to Cooperation: Trends in Crime Enforcement and the Evolving Criminal Defense Attorney

Lo Cicero, and Brooks M. Hanner

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Reconciling Fundamental Property Language

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Credit Card Act Developments in 2012

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The Supreme Court Sets a Decade-Long Debate—2012
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Richard E. Gottlieb, Margaret J. Rhiew, and Brett J. Natarelli

Update on Tribal Loans to State Residents
Richard P. Eckman, Catherine M. Brennan, H. Blake Sims, and Justin B. Hosie

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