

California's Statutory Efforts to Achieve Board Diversity

By Lauren Molinaro

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Women—Black and Latina women in particular—remain vastly underrepresented in corporate boardrooms. While studies repeatedly show that an increase in board diversity leads to better business outcomes, progress has been frustratingly slow: As of 2020, women account for around 20% of corporate board rooms, and only 5% of CEOs are women. People of color represent only around 15% of directors on Fortune 500 boards. A lack of diversity at the board level affects corporate governance, as the board establishes a corporation's vision and mission. Research has shown that diversity of thought and perspective leads to better investment returns, better business strategies, and stronger organizations overall. Companies with diverse boards may have profits 43% higher than those that do not, and compared to individual decision makers, diverse teams make better decisions 87% of the time. In recent years, state lawmakers have increasingly focused on improving workplace diversity through legislation that encourages or requires diversity on corporate boards.

A number of state laws require corporations to disclose the total number of directors on their board and total number of female directors and/or individuals from "underrepresented communities" in their Annual Reports. These "show or tell" laws are built to withstand legal challenges by requiring transparency rather than mandating specific quotas. Only two states—Washington and California—have enacted laws mandating the number of women and individuals from "underrepresented communities" on the boards of directors of publicly traded corporations based in their respective states. The futures of such mandate laws remain up in the air following a pair of recent legal defeats in California state courts.

In 2018, California lawmakers enacted SB 826, requiring publicly held companies with executive offices in California to include minimum numbers of women on their boards of directors by the close of 2019, no matter where they are incorporated. The California Secretary of State has the authority to impose fines up to \$300,000 per violation for noncompliance.

In 2020, lawmakers approved a similar bill, AB 979, requiring

covered California corporations to have a minimum of one director from an underrepresented community by the close of 2021. The bill defines a director from an "underrepresented community" as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native; or who self-identifies as gay, lesbian, bisexual or transgender." Additional requirements apply by the close of 2022, depending on the size of the board.

In April and May, two California state judges struck down the laws in separate decisions, finding SB 826 and AB 979 to violate the Equal Protection Clause of the California Constitution.

To withstand constitutional scrutiny, a statute employing racial and other classifications must be narrowly tailored to address a specifically identified harm that the state has a compelling interest in remediating. In California, if the state wants to create classifications based on sex, it must also have a compelling interest and its action must be necessary to achieve that purpose. In striking down the laws, both courts found SB 826 and AB 979 unconstitutional on their faces. Both laws unconstitutionally treated similarly situated individuals—qualified potential corporate board members—differently based on their racial, sexual orientation, and gender identity groups, requiring that a specific number of board seats be reserved for members of a group, thereby excluding members of other groups from those seats.

The courts found the state failed to show a compelling government interest by failing to produce evidence of specific past discrimination in board selection. In doing so, the courts stressed that while rectifying specific and intentional discrimination can be a compelling government interest, remedying generalized, non-specific allegations



Lauren Molinaro, Associate

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of discrimination is not. For example, the state cited only statistics about the number of women on corporate boards as compared to men but failed to identify specific instances of women being discriminated against by a specific corporation in the corporation's board process. The courts also concluded that the state failed to show the statute was narrowly tailored to address the perceived discrimination in light of available gender-neutral alternatives, such as amending existing anti-discrimination laws or enacting a new anti-discrimination law focusing on the board selection process. The courts did not criticize the goal of the California legislature in enacting the statute, but the specific means it had taken to serve the state's commitment to equal treatment and opportunity.

It now appears that California's statutory efforts to achieve board diversity through mandated seats for women and individuals from underrepresented communities is on hold. Despite the setback, public pressure on companies to advance board diversity remains strong. At least a dozen other states have drafted or passed board diversity legislation. As mentioned above, the vast majority of these laws differ drastically from California's in that they do not mandate a specific number of individuals on any corporate board, but merely require disclosure, which the California state courts' rulings seemingly deem permissible. While a similar law in Washington requires a specific percentage of female board members, no penalties are given for compliance failures. The California rulings also have no effect on a rule adopted by Nasdaq and approved by the Securities and Exchange Commission (SEC) requiring most companies listed on the Nasdaq to have at least two self-identified "diverse" board members or explain in writing why they do not. Nasdaq has emphasized that the rule establishes a disclosure-based framework, and not a mandate or quota. Nasdaq's Listing Rules currently face a challenge in the Fifth Circuit, where the Court will review the SEC's approval of these rules and determine whether they violate the Equal Protection Clause of the U.S. Constitution.

However, legislation is only one of the driving forces behind diversifying corporate boardrooms. As shareholders elect the board, institutional shareholders have shown a willingness to utilize their leverage to apply pressure to influence companies to improve diversity at the board level. A lack of diversity at the board level is considered a risk for institutional investors. Stakeholders may act against companies lacking board diversity by voting against or withholding votes from existing directors or otherwise exerting public pressure. Institutional investors have made bold public statements on their commitments to pressure companies to increase board diversity and be more transparent on their current diversity practices. Large investors like Blackrock, State Street, and Vanguard have publicly expressed a desire to see corporate boards diversify their ranks and have advocated for board diversity through their proxy voting policies.

Concurrently, shareholder groups, employees, and consumers

have also been challenging the lack of diversity on corporate boards. Amid escalating battles over diversity, activist shareholders are demanding change. Shareholder derivative lawsuits have recently begun targeting major public and private companies. Alleging that boards have breached their fiduciary duties in creating an "old boys' club" corporate culture, these activist shareholder lawsuits unequivocally focus on the board's apparent disinterest in promoting diversity. Through litigation and subsequent settlements, companies have been forced to overhaul their policies, procedures, and oversight functions as well as change the composition of their boards.

Even if legislation to diversify boardrooms remains in question, investors may wield their power and influence to continue to pressure companies to make progress. Investors may emphasize that companies that fail to address this important issue do so at their own peril. In response, companies may choose to adopt corporate governance codes or strategic plans to diversify, such as engaging in outreach to non-traditional avenues of board recruitment, for example. While efforts to diversify boards are long overdue, the gains being made, however slow, are bound to have a positive impact on company culture, corporate performance, and shareholder value. ■

Delaware to Expand Liability Protections to Senior Officers

By Gustavo F. Bruckner
and Carolyn Fontana

On June 14, 2022, the Delaware Legislature passed legislation that would allow Delaware corporations to adopt exculpation clauses limiting or eliminating the monetary liability of certain officers of corporations. If approved by Delaware Governor John Carney, the proposed changes to the Delaware General Corporation Law (DGCL) would expand liability protections to officers that are similar to those currently granted to directors. This proposed expansion has caused concern in some corners that the amendment will encourage bad behavior by company officers who will now have a shield protecting them.

Under Delaware law, directors and officers owe certain fiduciary duties to their corporations and stockholders, including duties of care and loyalty. Section 102(b)(7) of the DGCL authorizes Delaware corporations to include in their certificates of incorporation "[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director," otherwise known as an exculpatory clause. Under current law, such exculpatory clauses cannot eliminate or limit the liability of a director for any breach of the duty of loyalty, for any acts or omissions not

in good faith or which involve intentional misconduct or a knowing violation of law, for unlawful payment of dividends or unlawful stock repurchases, or where a director receives an improper personal benefit.

These liability protections for breaches of the duty of loyalty and the duty of care given to directors are not currently afforded to officers. Rather, officers currently face potential personal liability for both duty of care and duty of loyalty claims. Duty of care claims can include, for example, alleged disclosure violations. Duty of loyalty claims, meanwhile, often occur when a director profits at the expense of the corporation.

If the proposed changes were enacted, the liability shield for senior officers would expand, thus eliminating or limiting their personal liability in stockholder actions seeking damages for alleged duty of care breaches, but not breaches of the duty of loyalty. The senior officers covered by the new changes are chief executive officers, presidents, chief financial, operating, and legal officers, controllers, treasurers, and chief accounting officers, as well as any other persons identified as “named executive officers” in the corporation’s most recent SEC filings. These senior officers would remain at risk for derivative suits for loyalty breaches pursued in the company’s name and for the company’s benefit.

These proposed changes arose due to criticism over the difference in liability faced by directors and officers. That is, stockholder plaintiffs have increasingly asserted breach of fiduciary duty claims against officers rather than directors, despite officers and directors owing the same fiduciary duties of loyalty. As a result of these claims, Delaware courts have denied motions to dismiss brought by officers, while granting those same motions with respect to the company’s directors.

Proponents of the amendment include firms representing corporations whose officers may now be protected with this liability shield. These firms further argue that these officer duty of care claims are merely new litigation tactics by shareholder plaintiffs’ lawyers to garner potentially lucrative fee awards in cases where these proponents believe any damages case should be dismissed.

Plaintiffs firms have voiced strong opposition to these proposed changes, arguing that they are at best unwarranted. In addition to their lack of necessity, they argue that the changes also needlessly exculpate a range of careless or reckless behavior for which an officer should face potential liability. Without the risk of facing potential liability, senior officers lack a personal motive to act with due care, undermining their crucial role as gatekeepers for the company by preventing corporate misconduct from occurring under their watch.

The changes have also been criticized as creating a solution for a problem that does not exist. More specifically,



Gustavo F. Bruckner, Partner

opponents argue that the drafters conflate the necessary protections for directors with those for officers, as directors face problems with potential liability that officers of the corporation do not face. This can be seen when looking at the origins of director protections, which were expanded in the 1980s following the Delaware Supreme Court’s 1986 decision in *Smith v. Van Gorkom*. *Van Gorkom* identified two problems created by holding directors personally liable for negligence: (1) decreasing the pool of qualified people willing to serve as directors of Delaware corporations out of fear of personal liability for corporate actions, and (2) drastically increasing the cost of director and officer liability insurance. To prevent these problems, Delaware enacted strong director liability protections. Delaware, as the state of incorporation of most corporations in the United States, maintains some of the strongest liability protections in the country, although states like New York have strong director liability protections.

Later, in 2009, the Delaware Supreme Court clarified the duties of officers in *Gantler v. Stephens*, explaining that officers owe the same fiduciary duties as directors, but do not have comparable exculpatory clauses to protect them from personal liability. This distinction comes from the fact that officers do not face the same problems as certain directors when it comes to personal liability. That is, the changes put in place after *Van Gorkom* were created to allow independent directors who are not employees of the company to serve on the board of that company without any concern of potential liability for breaches of their duty of care. Officers, on the other hand, don’t have this problem because they lack independence and are actively involved in the day-to-day operations of the corporation.

In addition to the issues regarding differences between officers and directors, opponents of the proposed expansion

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of liability protections raise the question of why officers can be liable in some situations but not others. For example, a CEO of a corporation making millions of dollars a year could, conceivably, be potentially liable to a customer if they acted negligently and injured that customer. At the same time, if these proposed changes go through, that same CEO would not be liable for acting grossly negligently with respect to stockholders in connection with a sale of company assets.

Moreover, opponents argue, claims of gross negligence are already rare, with only a few cases in recent years permitting a duty of care claim to move forward against a corporate officer, and those cases involved unique situations in which the plaintiffs had the burden to prove their claims. So, the argument that officer duty of care claims are merely litigation tactics for getting higher fee awards is unfounded, they contend, as the claims are few and those which have survived a motion to dismiss have been properly pleaded by stockholder plaintiffs trying to remedy bad business behavior.

These proposed changes, if approved by Governor Carney during the current legislative session, will present significant challenges for shareholder plaintiffs trying to sue officers for allegedly careless behavior. Meanwhile, the changes could also save companies from having to defend claims that they believe have no merit and thus should not warrant damages. Now that the legislation has passed both the Delaware Senate and General Assembly, there is pressure on the Governor to sign it this year, before the legislative session ends. Bills left on the table unsigned when a session concludes must start the process anew. ■

Pomerantz Achieves \$20 Million Settlement Over Allegedly Bad iPhone Update

By the Editors

On May 3, 2022, after six years of hard-fought litigation, Pomerantz and co-counsel achieved a significant victory on behalf of consumers by securing a \$20 million settlement, pending final approval of the court, in a consumer class action against Apple, Inc., on behalf of iPhone owners. The motion to settle, filed in U.S. District Court for the Eastern District of New York and unopposed by Apple, would entitle the class members to a recovery of between \$15 to \$150 per device owned, depending on how many class members file claims. The named plaintiffs consider this a successful result, as the secondary market price of the phones, according to Apple, is not more than that.

In October 2020, Pomerantz successfully fought to have the court certify two classes of iPhone users:



Michael Grunfeld, Partner

All individuals and entities in New York (Class One) or New Jersey (Class Two) who currently own or have owned an iPhone 4S that was updated to any version of iOS 9 from any version of iOS 7 or iOS 8.

Then, in February 2021, Plaintiffs defeated Apple’s Rule 23(f) Petition seeking permission from the U.S. Court of Appeals for the Second Circuit to appeal the district court’s class certification decision.

Plaintiffs alleged that Apple misrepresented iOS 9 by telling consumers that the software update would enhance the performance of their devices, when this was not in fact the case. After the update, Plaintiffs’ devices slowed down significantly. According to Plaintiffs’ Amended Complaint:

The update significantly slowed down their iPhones and interfered with the normal usage of the device, leaving Plaintiffs with a difficult choice: use a slow and buggy device that disrupts everyday life or spend hundreds of dollars to buy a new phone. Apple explicitly represented to the public that iOS 9 is compatible with and supports the iPhone 4s. This is also obvious from the fact that Apple made the software available for the iPhone 4s, but not for older versions of the iPhone.

Discovery spanned four years and included over 15 depositions, the review of over 48,000 documents – totaling over 539,000 pages – and the submission of expert reports totaling over 770 pages.

“This case involved the application of sophisticated legal issues to a highly complex technological consumer product,” said Pomerantz Partner Michael Grunfeld, who led the litigation. “We are pleased that we were able to achieve this favorable result for the Class by prevailing at every stage of the litigation before reaching this settlement near the close of discovery in the merits phase of the litigation.” ■



Managing Partner, Jeremy A. Lieberman, with President Bill Clinton

Pomerantz's 2022 Corporate Governance Roundtable

By Kaylan Perez

“Pomerantz delivered an outstanding roundtable with experts presenting on a variety of corporate governance topics. I really appreciated the opportunity to meet fiduciaries and compare viewpoints.”

Megan Peitzmeier, Senior Staff Attorney, Colorado PERA

On June 14, Pomerantz hosted its 2022 Corporate Governance Roundtable in the Waldorf Astoria Hotel in Beverly Hills, California. The Firm's Roundtables provide institutional investors from around the globe the opportunity to discuss topics that affect the value of the funds they represent and network with peers in an informal, educational setting.

This year, around 100 attendees traveled to the Roundtable from across the United States, the United Kingdom, France, Italy, and Israel. The theme was the collective power to make change through ESG (environmental, social, and governance), corporate culture and board diversity. Presenters were international experts in the fields of corporate governance, securities litigation, fiduciary duty, ESG priorities, forced arbitration, and board diversity.

According to Pomerantz Partner Jennifer Pafiti, who organized the event, “After having to reschedule numerous times over the past two years due to varying COVID and travel restrictions, the Roundtable coalesced as a highly energized day during which general counsel and corporate governance professionals from some of the largest financial houses around the globe finally had the opportunity to attend in person. Peers came together

to learn best practices, with a particular focus on ESG issues, and to share ideas that can really add value to their funds. It was certainly worth the wait!”

Special guest speaker, President Bill Clinton, was interviewed by Pomerantz's Managing Partner, Jeremy Lieberman, on President Clinton's time in office, geopolitical issues, and the current global economy.

The panels covered topics of critical importance to the institutional investing community, including “Inside the Boardroom.” The speakers on this panel inspired a lively discussion on how best to engage to address diversity, equity and inclusion (DEI), the conclusion of which was that DEI in the boardroom still has a long way to go.

“Covid-19 and the Litigation Pandemic” addressed ways in which the pandemic has triggered new corporate misconduct, and described cases that are directly derived from companies making misstatements to investors specifically concerning COVID-19.

The “Corporate Governance Developments” panelists engendered vibrant

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From left to right: Master of Ceremonies, Dr. Daniel Summerfield, Partner, Jennifer Pafiti interviewing WNBA star, Candace Parker, Pomerantz Roundtable, June 14, 2022



debate among the Roundtable attendees as they explored the global trends in corporate governance and the emerging issues governance professionals will face in the coming year.

Forced arbitration and its negative implications for institutional investors was discussed during one session. The panel of lawyers reported on the Council of Institutional Investors' and Colorado Public Employees' Retirement Association's historic decision to intervene in the *Johnson & Johnson* action to protect shareholders' rights against the business community's push for forced arbitration.

Robert Jackson, Jr., a former Commissioner of the U.S. Securities and Exchange Commission, spoke on "Fiduciary Duty and ESG Priorities in 2022." The discussion highlighted the limitations of the SEC to deter bad governance in companies, leaving the responsibility to institutional investors to incorporate high standards of ESG performance into their investment analysis and decision-making.

Counsel to a \$1.6-trillion European asset management company presented "Securities Litigation Update: Engagement & Litigation." This session explored institutional investors' attitudes towards litigation, engagement and other tools used to hold corporations accountable.

At the event's dinner, attendees heard from the most decorated WNBA player in history, Candace Parker. Candace shared her inspirational

journey and achievements and described how she balances a career as a professional athlete with being a full-time mother and businesswoman.

In keeping with the Firm's continued commitment to provide educational platforms for institutional investors, and in response to the phenomenal feedback from this year's event, Pomerantz looks forward to hosting the next Roundtable.

"The Roundtable was the perfect size, setting and agenda to ensure that I maximized my time out of the office and completely committed to understanding the corporate governance landscape through the U.S. legal lens. The mix of case studies, frameworks, state, and international perspectives was genuinely insightful to understand the practical cross-roads between business, ESG, and law. Each individual session was high quality in its own right, but it was the sum of the parts that left a lasting impression on me."

Amy D'Eugenio, Director of Business and Client Development for Federated Hermes EOS

If you or your team are interested in attending the next Roundtable event, please register your interest at: PomerantzRoundtable@pomlaw.com.

We extend a hearty thank-you to all our panelists and attendees for making the Roundtable such a success – from all the team at Pomerantz. ■



Jeremy A. Lieberman



Jennifer Pafiti



Kaylan Perez



Janalee Spencer

NOTABLE DATES ON THE POMERANTZ HORIZON

IF YOU WILL BE ATTENDING ANY OF THESE EVENTS AND WOULD LIKE TO MEET WITH US, SEND US A MESSAGE AT: EVENTS@POMLAW.COM.

KAYLAN PEREZ will attend the **NCPERS Public Pension Funding Forum** in Los Angeles, CA from August 21-23. At the same time, **JANALEE SPENCER** will attend the **TEXPERS 2022 Summer Education Forum** in El Paso, TX.

JANALEE will also attend the **IBEW Member Development Conference** in San Antonio, TX from August 30 to September 1.

KAYLAN will attend the **NAST 2022 Annual Conference** in Philadelphia, PA from September 18-21.

JEREMY LIEBERMAN and **JENNIFER PAFITI** will attend the **CII Fall 2022 Conference** in Boston, MA from September 21-23, and will host a breakfast for attendees on September 22.

Both **JENNIFER** and **JANALEE** will attend the **2022 TLFRA Education Conference** in Austin, TX from October 1-4.

From October 12-14, **JENNIFER** will attend the **Assogestioni Auxiliary Corporate Governance Conference** in Rome, Italy.

From October 23-26, **JANALEE** will attend the **NCPERS Public Safety Conference** in Nashville, TN and from November 8-11, she will attend the **SACRS Fall Conference** in Long Beach, CA.

Q&A

Tamar A. Weinrib



Pomerantz Partner Tamar Weinrib's expert, innovative lawyering has secured court decisions in favor of investors that will form the bedrock of securities litigation for decades to come.

MONITOR: What led you to a career in law?

Tamar Weinrib: From an early age I gravitated toward subjects that foretold a path to a legal career. One of my favorite high school subjects was Talmud. The Talmud is a compilation of oral Jewish laws that are annotated with intricate Rabbinic commentary and discussion covering wide ranging topics. It is without a doubt the first true education I received on legal argument and its foundation in ethics, logic and creativity. Studying the back and forth between Rabbis who held very divergent views on the same topic, the reasoning that led each of them to their views, and the arguments they crafted to persuade others, intrigued me. Though the Talmud dates back centuries, it very much resembles the way that a contemporary lawyer's mind works. That early study gave me deep respect for legal thought.

The Talmud exemplifies how Jewish law is a living and breathing entity, open to discussion, interpretation, argument, and refinement depending on the circumstances. It may seem like a strange apples-to-oranges comparison, but the same can be said for securities law. The way one applies the law changes significantly depending on the circumstances and facts of each case. No two cases are alike. Circumstances matter, and the facts matter. There is creativity involved in the way that you consider those elements and the right way to apply the law.

M: You mention creativity. How much does that play a role in your practice?

TW: Though I mentioned an early start in my journey toward the legal profession, in college I majored in advertising and minored in art history. To be a successful lawyer, and particularly a litigator, it's important to have both strong creative and persuasive writing skills, and also to stand in a courtroom and convince your "audience" to see your point of view. Majoring in advertising was solid training in advocacy and oral presentation. Successful advertising involves convincing a consumer to see your product the way you want them to see your product. To be an effective litigator, you have to be able to convince a judge to see the case the way that you want them to see the case.

M: What about the law continues to motivate you?

TW: I am constantly learning. Not just because the securities laws and

relevant case law are continuously evolving, but also because each case requires an education into how each defendant company's industry works. When I led our seminal case against Barclays regarding its "dark pool," I had to immediately learn about the intricacies of sophisticated, opaque trading platforms that I had never before encountered. We hired a wonderful expert on dark pools to work on the case with us, but there was a lot of self-education. The litigation process itself – research, investigation, reading documents in discovery, asking questions in depositions – all collectively provide a thorough education. It is critical when bringing cases like this to fully understand the underlying industry. I have brought numerous cases against pharmaceutical companies as well. There's a very intricate FDA approval and clinical testing process before a drug can come to market. So when the underlying claim concerns what a drug company said about the safety or efficacy of its product and how the product was faring during various phases of clinical testing, or, post approval, how it was faring in the market and whether there were reports of serious adverse events – you need to be deeply knowledgeable not just about how the FDA approval process works, but for each case, how the particular drug at issue works.

M: How much of that education occurs before a case is filed?

TW: At Pomerantz, we very carefully investigate our cases before we bring them. So there is a significant amount of research that occurs before the filing of a complaint. We only pursue cases we believe have merit and can only make that determination through "education." Then, as the case proceeds and we get into discovery, that unpeels the layers of the onion much further.

M: Are there specific challenges to being a woman in law?

TW: What I viewed as challenges when I first started out, I now view as advantages. Especially earlier in my career, I'd walk into a deposition knowing that, given my age and gender, an older male sitting across the table at first glance would have certain expectations and underestimate me. I thrived in challenging those expectations and proving them wrong, and I think that is to my advantage. People don't always expect a young female attorney to be assertive, to stand her ground or present her case with strength, and it gives me great pleasure to catch them off guard. There can be challenges specific to being a female attorney. But you have a choice – you can see them as challenges, or you can see them as opportunities to prove people wrong and blaze a path that people do not expect you to blaze. ■

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Pomerantz is acknowledged as a global leader in securities and corporate governance litigation. Pomerantz monitors the portfolios of some of the most influential institutional investors and financial institutions worldwide, monitoring assets in excess of \$8 trillion. Founded by Abraham L. Pomerantz, who was known as the “dean of the class action bar,” the Firm pioneered the field of securities class actions. For 85 years and counting, Pomerantz has continued the tradition that Abe Pomerantz established, fighting for the rights of victims of securities fraud, breaches of fiduciary duty, and corporate misconduct. Prior results, however, do not guarantee a similar outcome in future cases.

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