

THE RECORDER

132ND YEAR NO. 66

www.callaw.com

FRIDAY, APRIL 4, 2008

ALM

Shielding the Green

Bill would let corporate directors consider more 'constituencies'



JASON DOY

COMPETITIVE EDGE: S.F. lawyer Jonathan Storper wants state law to explicitly embrace eco-friendly business decisions.

By Petra Pasternak
RECORDER STAFF WRITER

Despite its reputation for being a leader in green policies, there is at least one area in which California lags behind 31 other states.

San Francisco lawyer Jonathan Storper says that some socially conscious entrepreneurs are hesitant to incorporate here because the state does not afford the same explicit protection for their directors as, for example, New York, Pennsylvania or Ohio. Statutes in those states say that when making business decisions, directors can take into account the interests of employees, or the community at large, not just shareholders.

Storper, a partner at Hanson Bridgett, says he has yet to hear of any breach of fiduciary duty lawsuits over a company's eco-friendly or socially responsible practices, but he says that questions related to director liability arise more and more often in his practice.

"We're seeing a real fear amongst our clients," he said, "and we're not able to give them assurances that such a shareholder lawsuit would not be successful in California at this point."

Most of that client concern comes from investment funds and companies that are considered emerging and mission-driven, which comprise about 40 percent of his practice, said Storper, who heads his firm's corporate, securities and tax group.

Concerned that California is losing a leg on competing states, he is pushing a bill, carried by Assemblyman Mark Leno, D-San Francisco, that would expand the list of constituencies a director may consider to include not just a company's shareholders, but also the environment, the community and its employees. The bill is up for consideration today by the corporations committee of the State Bar's business law section. Storper hopes the bill can pass the Assembly by the end of June; the judiciary committee is expected to consider it

in late April.

But passage is far from a cinch: A similar bill was killed in the state Assembly in 2004.

The corporations committee of the State Bar's business law section offered numerous counter-arguments at the time, charging, for instance, that the 2004 bill would decrease accountability by allowing corporate directors to invoke almost any reason for their business moves, and that it could compromise shareholder profit.

But Storper and other proponents insist a new era has dawned. "The world has changed in a way that customers and shareholders are actually demanding that businesses be more socially responsible," Storper said, "but the statutes potentially don't support that idea as frankly as they could."

He also notes that the new bill, AB 2944, is narrower than its predecessor. The 2004 iteration listed not only the community and employees but also customers, suppliers, creditors, the national and state economy and other interests.

Leno said Thursday he's not aware of any formal opposition. "Sometimes it takes the right time for an idea to arrive," Leno said. "We are confident that it's a very reasonable idea."

SENDING CLIENTS ELSEWHERE

Jones Day partner R. Todd Johnson thinks it's reasonable, too. Current law in California has caused him to advise at least one client to incorporate in another state.

Johnson is the partner-in-charge of Jones Day's Silicon Valley office, and focuses his practice on renewable energy companies as well as companies seeking to have an impact on sustainable growth and energy efficiency.

One such client, a founder of a small Bay Area startup, who asked to remain anonymous because the company is still in research and development mode, said it took him by surprise that he could not set up an organization in California that states in its mission its intent

to consider interests of stakeholders other than its shareholders. "Everyone in Silicon Valley goes straight to Delaware, the most shareholder-friendly state in the country, but the most hostile to stakeholders," he said.

He said that he wanted to create a corporation with a "very clear double bottom line," one that included both a social and a financial mission.

He said that many lawyers representing venture capitalists have balked at the idea that a for-profit corporation add the interests of other stakeholders. "The first rule of investment is that you have got to focus on the investor returns, and that's fine — venture investors are putting a lot of money on very high-risk investments," the founder said. But, he added, "We don't want to be this big faceless Delaware company that only responds to shareholders."

Johnson, who recommended that the client incorporate in New York, has reviewed which states' corporate laws have adopted particularly inclusive constituency provisions.

Many states enacted constituency statutes in the 1980s, Johnson said, at the height of the hostile takeover fever, which saw companies shutting down lower-profit branches and factories and moving labor abroad. Legislatures reacted to the loss of jobs and a tax base by giving directors the explicit right to consider interests other than shareholders.

For companies "not satisfied just doing it part way," Johnson said, he now recommends states like New York, Ohio or Pennsylvania, where there are well-developed corporate laws and sophisticated courts. "They're not scary jurisdictions."

Green matters are of concern to big corporations, too, Johnson noted.

Target Corp., for example, publicizes that it gives 5 percent of its income to community programs. Wal-Mart Stores Inc. is pushing its broad "Sustainability 360" initiative, through which it has pledged to reduce packaging throughout its supply chain, and meet other goals.

Johnson said he's cautiously optimistic that AB 2944 will pass. "I don't think that a bill like this passes without strong support from the business community, which it didn't have in 2004 and I think it will in 2008."

Jay Coen Gilbert, one of the co-founders of B Lab, a nonprofit that certifies and promotes companies that meet standards for environmental and social performance, said there is a growing business community in California, across industries, that views sustainability and corporate citizenship as a competitive advantage.

Without the specifics outlined in AB 2944, Gilbert said, California will be a less attractive place for them.

"In California, there is no underlying case law," Gilbert said. "It's more uncertain how the courts would rule."

Reporter Petra Pasternak's e-mail address is ppasternak@alm.com.



HansonBridgett

Inspired

HansonBridgett.com