The Future of Corporate Law
by Leo Herzel

Predictions about corporation law are hazardous. They are entangled with predictions about business, finance, politics and developments in other countries. Adding to the complications, in this article I do not separate corporate law from the practice of corporate law. Very large portions of corporate law never appear in statutes or court opinions. Practicing corporate lawyers create and recreate them every day using experience, intuitive ideas of fairness, and guesswork about what judges, administrators and the marketplace are likely to accept. Moreover, I expect that many of my readers will be more interested in predictions about the practice of corporate law. Without any more preface, here are my predictions of the main developments in corporate law and corporate law practice in the 1990s.

International corporate transactions, already very important, will become more important. Mexico, Central and South America, Europe (particularly the E.C.) and Japan are likely to be especially significant. However, the lessons for U.S. corporate law from foreign law will continue to be difficult to decipher or to apply.

There will be fewer voluntary or involuntary domestic mergers and acquisitions. Most domestic mergers and acquisitions are likely to be in the same or closely related industries. In the U.S., conglomerate acquisitions have in general been failures. Financial markets and boards of directors in the U.S. are likely to remember this for as long as five to ten years. Antitrust law enforcement in the U.S. with regard to mergers and acquisitions in the same or closely related industries is likely to remain relaxed because of the concern of politicians about very large, successful competitors in Japan and Europe. The number of foreign acquisitions in the U.S. will increase. Most of these will be voluntary, not hostile takeovers. Many of them will be by foreign conglomerates. Surprising as it may appear, Europe and Japan do not seem to have learned the lessons of failed conglomeration from the U.S. yet.

Institutional stockholders who now own approximately 50 percent of the stock of large U.S. public companies will continue to increase their stock ownership absolutely and relatively. And they will continue to try to define what they can and should do with their power. There are many legal and practical obstacles to the effective use of that power and these are unlikely to go away. From the standpoint of the U.S. economy, the big danger is that institutions will try to do too much, in particular, that they will yield to pressures from their constituents and politicians and contribute to politicizing the U.S. economy.

As always, there will be pressure for more federal regulation of corporations. However, concern about international competitiveness may act as a moderating factor. U.S. law and enforcement policies will continue to be too late and too punitive with regard to legal-ethical transgressions by large companies, particularly investment banks and other financial companies. The reasons for this are deeply embedded in U.S. society and are unlikely to change soon.

Delaware will continue to dominate state corporation law. Large states appear unable to separate corporation law from politics sufficiently to become effective competitors. It is probably too late for small states to duplicate the economies of scale which Delaware has with its chancery court system and corporate bar.

As the takeover market declines in importance, more attention will be paid to making boards of directors more effective. Boards perform quite well during crisis but their day-to-day performance is generally considered mediocre. There is no widely agreed upon solution to this important problem.

Derivative and class stockholder litigation will continue without much change. Arguments about conflict of interest and effectiveness will remain unresolved and legislative and judicial reforms will be minor. Litigation among large corporations will continue at high levels despite organized efforts for reduction by using alternative dispute resolution techniques. The high propensity to litigate reflects the combativeness and divisions in American society.

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often specialization will be a race to stay ahead, not a static condition. For example, financial instruments issued by companies to obtain financing and to hedge risks will become even more complex. Specialist lawyers who can make important contributions to the design of these instruments will be treasured. Once designed, however, even the most exotic of these instruments will soon become mundane commodities requiring only routine law work by lawyers or paralegals.

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Federal income tax law will retain the system of separate taxation of corporations and stockholders without offsetting deductions or credits, which contributes to so many inefficiencies in U.S. corporations and capital markets. Lower capital gain rates will return and corporate tax law practice will benefit from the inevitable increase in legal complexity.

There will continue to be large losses of value in corporate bankruptcy reorganizations caused by cooperation and agency problems among creditors, equity holders, and debtor managements and, to a lesser degree, the large fees paid to investment bankers, lawyers, accountants, and other expert participants in the process. Reorganization outside bankruptcy will continue to be very difficult because of cooperation and agency problems which are even more acute than those in bankruptcy. A bad tax rule which includes taxable gross income gains from the discharge or cancellation of indebtedness will continue to contribute to the difficulties of accomplishing corporate reorganizations outside bankruptcy. “Prepackaged” bankruptcies, where the debtor and sufficient creditors (two-thirds in amount and more than half in number) agree on a reorganization plan immediately before bankruptcy, will probably increase in number and will solve some of these problems.

Corporate law practice in the 1990s will be highly competitive, as it was in the 1980s. One of the main reasons for this is that the old social compact among large general law firms to substitute leisure for income broke down completely in the 1980s. It appears highly unlikely that it will be revived. Another important reason is the sharp increase in the importance of inside general counsels during the last 25 years, which is unlikely to be reversed in the 1990s.

Happily, the immediate practical implications for law students and young lawyers of these portentous pronouncements about the future are quite modest.

Learn two foreign languages. The sooner the better. It is much easier when you are young and have more time. Spanish would be my first choice.

Specialize as soon as possible. Very able general lawyers will still be eagerly sought after. Mainly, however, they will be older lawyers who are senior partners in large corporate law firms or general counsels of large companies. The best way to increase the probability of becoming a top general lawyer is to begin early as a successful specialist. Furthermore, specialists find it much easier to change jobs or professions.

On the other hand, specialties frequently decline suddenly, for example, antitrust litigation in the 1980s and mergers and acquisitions at the end of the 1980s; or they may disappear completely when, for example, the law changes or a large client shrinks or leaves. In that case one must quickly change to another specialty or change jobs.

In large corporate law firms, young lawyers must be prepared to work very hard. The forces that have increased the competitiveness of corporate law practice in the last 25 years are unlikely to be reversed.

Most important, stay clear of the ethically dubious. The stakes will be higher than ever in the 1990s.

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