



California Corporate & Securities Law

There's Something About Section 800 And ISS Adds Panelist

By Keith Paul Bishop on January 24, 2012

What's So Different About Section 800?

California Corporations Code Section 800 governs derivative lawsuits. Yesterday, I wrote about the fact that the California legislature has made Section 800 expressly applicable to foreign corporations (as defined in Section 171). Is this an academic point or can it matter?

One key difference may be that Section 800(c) allows the corporation or any defendant who is or was a director or officer to ask that the court order the plaintiff to furnish a bond of up to \$50,000. After a motion for security has been filed, then the suit is stayed until 10 days after the motion has been decided.

Another key, yet subtle, difference can be found in Section 800(b)(2) which requires that a plaintiff allege with particularity its efforts to secure action from the board of directors or the reasons why it did not make the effort. For those familiar with Delaware Court of Chancery Rule 23.1 or Federal Rule of Civil Procedure Rule 23.1, this is known as the requirement to plead either that a demand was made or demand futility. California adds something more, however. I've copied Section 800(b)(2) and highlighted the additional California requirement below:

The plaintiff alleges in the complaint with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file.

In *Re v. Weksel*, 130 A.D.2d 640 (1987), the Appellate Division of the New York Supreme Court applied the same language in former Section 15702(a)(2) (governing derivative suits by domestic or foreign limited partnerships) to dismiss a plaintiffs' suit:

Although the complaint alleges why the plaintiffs believe that a demand upon the general partner would be futile, *it does not state that the limited partnership or the general partner were informed in writing concerning the ultimate facts of each action or that a true copy of the complaint was delivered to either the limited partnership or the general partner, as California law requires* (see, Cal Corp Code

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§ 15702 [a] [2]). Therefore, the plaintiffs' first cause of action must be dismissed as against the appellants.

Id. at 641-42 (emphasis added).

ISS Expands Political Spending Webinar Panel

In [Has ISS Moved From Advice to Advocacy?](#), I wrote about an upcoming webinar announced by ISS on shareholder proposals with respect to disclosure of political spending. There will undoubtedly be a large number of programs devoted to this topic this year. Thus, there is nothing unusual about ISS deciding to host a webinar on the topic. However, I found it extremely unsettling that every one of ISS' panelists is associated with an organization that has actively supported political spending disclosure proposals.

After my blog was posted, ISS added a panelist – Andrew J. Pincus, a partner at Mayer Brown. While this may be a step in the direction of balance, it hardly achieves equipoise. Assuming that Mr. Pincus' views differ from those of the previously announced panelists, he will be outnumbered three to one.

More importantly, adding a panelist to achieve the appearance, if not the reality, of even-handedness does not answer the more fundamental questions that attend ISS' decision to adopt a one-size-fits-all approach to political spending disclosures.

Speaking Reminder:

I'll be speaking tomorrow on the pros and cons of incorporating Nevada. Registration information is available [here](#).

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