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June 2, 1986

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By Hand

Charles S. Crompton, Jr., Esquire
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Dear Charlie:

To start with the bottom line, I will withdraw my legislative opposition to the Corporation Law Section proposed change to the General Corporation Law. What follows is a brief expression of why.

* * *

To review, I thought (and think) the proposed amendment to Section 102(b)(7) allowing directors to be immunized from the financial consequences of their gross negligence is dead wrong. I expressed that view, and the reasons for it, to the Council and the Section. The debate was fair and open. The vote favored the amendment by a wide margin. At both the Council and Section I went to pains to express the depth of my principled opposition to suffering the elimination of liability for violation of the duty of due care. It should not have been surprising to anyone, then, that I should have decided to make that opposition known to the General Assembly. Having made that decision, I proceeded to lay the groundwork for the fight in Dover.

In the weeks since then many of my friends have called and visited to persuade me to call off the fight. Most recent, and most moving, was the meeting with the small delegation of highly qualified lawyers you brought to my office last Thursday. Two arguments were advanced in

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that meeting. One of these has led me to think it is better to back off. The other, had I paid any attention to it, would have had the opposite result.

The first and compelling argument is that changes to our General Corporation Law have an unbroken tradition of unanimous support by the Bar. Where there have been differences, they have been ironed out by the Council and, before that, by the General Corporation Law Committee. The result has been that the General Assembly has come to have confidence in the strength of our recommendations as representing the consensus of those professionals most familiar with the needs of Delaware corporations and their stockholders. To politicize that process might have the virtue of fostering democracy in its pure sense. But, in years to come, it could prove worse in its practical results than the passage of a single piece of corporate legislation, even if that legislation is itself unwise. That possibility, which had not been ignored when I first determined to go to Dover to do battle, has become more apparent to me since. The General Assembly has been preoccupied by proposed changes to the tort law stemming from the current insurance crunch. It is a hot issue. Business and insurance interests favor the changes. The Bar opposes them. Lobbying against the Bar's corporation law proposal, which rests directors' immunity from liability for gross negligence largely on the unavailability of D&O insurance, would necessarily advance the contention that the Bar's positions are inconsistent. That stance fits my in-principle opposition to the corporation law amendment. But, seeing now how it is likely to play out in Committee and (if the amendment got that far) on the floor, it does appear that the long-term harm outweighs the gain.

The second argument advanced to persuade me that it would be unwise to press forward in Dover took the form of a prediction that I would suffer financially were I to argue against the proposed legislation. I heard that thought expressed only once as a reason to abandon my opposition. I found it offensive, as I hope did you. The submission of it, however, obliges me simply to say that if I gave any weight at all to that threat the effect would have been a fight to the finish.

* * *

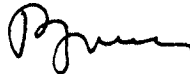
A final point. The knowledge that there will no longer be opposition does not mean that the amendment to Section 102 has to be pushed by the Bar at this legislative session. Indeed it may make the Bar feel

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more free to act with less speed. Even those who favor the change to Section 102 do so with varying degrees of misgiving. It might be that now would be a good time to think again.

Sincerely,



Bruce M. Stargatt

BMS:jv

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