Abraham L. Pomerantz
(1903-1982)

DEDICATION TO ABRAHAM L. POMERANTZ

*Milton S. Gould**

The following are remarks made on the occasion of the first in a series of lectures dedicated to the memory of the late Abraham L. Pomerantz.

I am not going to bore you with a recital of the accomplishments of Abe Pomerantz. Everybody knows what he accomplished. I do want to speak briefly about one aspect of his professional life. In my mind, Abe deserves to be remembered as one of the great heroes of what I call the Fifty Years War. This war began in the early Thirties, during the Depression, when judges and lawyers were confronted with the task of policing a new legal and social tension: the strained relationships between American business and the American public. In that troubled time the leaders of American business were regarded with suspicion and hostility, which became a kind of war between the businessmen and the public. It was a time of great change in our country when "all things sacred throughout the nation were either demolished or profaned." The nation faced a narrow choice: either "to produce a great age or to see the collapse of our upward striving." We did not collapse, and somehow the judges, the lawyers, and the legislators fashioned legal answers to the questions asked by a public understandably enraged by the selfishness, over-exploitation, and worse that had pushed us into the Depression.

It was in that war that Abe Pomerantz became a hero, and his name became a synonym for the successful prosecution of the plaintiff's derivative suit. When Abe started in that contest, the derivative cause of action was in comparative desuetude. Historically, the cause of action itself was nothing new. In 1828, Lord Lyndhurst decreed, in *Hichens v. Congreve*, that out of two hundred shareholders in an iron company, five so-called malcontents could maintain an action to force directors to restore some errant withdrawals. By 1855, the United States Su-

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preme Court had given its imprimatur to the equity jurisdiction to entertain such suits. The cause of action really began to take its modern shape in 1882, when the Supreme Court laid down the requirements of contemporary ownership, prior demand on the directors, and the identification of those rights that may be properly exercised by the corporation. In that era of laissez-faire (which we today euphemistically call "business judgment"), the Court apologized to the businessman by observing that the derivative suit lent itself to a serious abuse, namely, it could be brought "expressly to annoy and vex the company." Early in the struggle, Roscoe Pound told a Harvard audience that stockholders' suits for mismanagement "have been abused quite as much as the powers of directors they had intended to restrain." The great man was articulating a general attitude.

In that pre-Pomerantz age, the institution of derivative suits was widely thought to be an evil that required a drastic solution. One of the leading partners in Davis Polk, addressing a large group at the New York Bar Association in 1942, spoke for the *respectable* bar when he referred to "the hypertrophy to which the stockholders action has come." He called for a solution to the evil "which, while leaving a free judicial review for corporation transactions" would still preserve management and directors from harassment and expense. This statement reflects the same old preoccupation with promoting the peaceful repose of the businessman. The author of those words did have a suggested solution. He thought we should establish the principle, by rule or statute, that a derivative suit should be maintained only by the holders of at least 5% of the outstanding stock of the target company, and then only with the consent of a majority of stock outstanding at a special meeting called for that purpose.

You get an idea of what men like Pomerantz faced from what Dean Rostow of the Yale Law School wrote more than 25 years ago. He recognized that there was a "general and indiscriminate hostility to the derivative suit," that was too often expressed as a personal hostility to the lawyers who brought those suits. Rostow wrote in 1959 in his book *The Corporation in Modern Society*:

> [O]ne would expect those concerned for the integrity and future of private business institutions to applaud the intrepid souls who ferret out corporate wrongdoing, and risk their own time and money against a contingency of being rewarded, if in the end sin is found to have flourished. Not at all. Such men are not treated as honored members of the system of private enterprise, but as its scavengers and pariahs. Their lawyers rarely become presidents of bar associations, or trustees of charitable bodies. They receive no honorary degrees. At best they are viewed as necessary evils, the Robin Hoods of the business world, for whom a patronizing word may sometimes be said, when they succeed in revealing some particularly horrendous act.

The ill-advised and self-defeating antagonism against stockholder derivative litigation reached its ridiculous climax in a phony report in 1944. In that year, the so-called Chamber of Commerce of the State of New York commissioned a study by a well-known New York lawyer, Franklin S. Wood, of Hawkins Delafield and Wood. The study was taken quite seriously by people who were deluded into thinking that it was conducted under the official auspices of the State of New York. In fact, the Chamber of Commerce was a purely private group representing the most reactionary anti-New Deal corporate and financial interests in New York City. I am sorry to say that my late friend, Mr. Wood, gave his friends what they wanted to hear; his study was no more than a brief for the fat cats of the time on the need for protecting them from public oversight. The "study" virtually ignored the abuses in corporate management.

As unfair and one-sided as it was, the study and the lobbying efforts of the Wall Street lawyers persuaded the Legislature of New York to enact its first statute requiring security for costs in the derivative litigation. When this happened, one of the professional sages, Professor George Hornstein, saw it as "the death knell of stockholder derivative suits in New York." To paraphrase Mr. Churchill: Some death! Some knell! It was a little band of lawyer-heroes, led by Abe Pomerantz that stemmed the tide of reaction and preserved the vitality of this useful tool.

As we all know, to our profit, Professor Hornstein's prediction did not come to pass. The stockholders' derivative action flourished under the leadership of men like Abe Pomerantz and Milton Paulson, and it continues to flourish. I think an enlightened view of its function and usefulness is that the cause of action has proved to be the most effective instrument we have in protecting corporate ownership from misconduct in corporate management. From those cases have evolved useful and honest concepts of fiduciary loyalty and the need for honest full disclosure. We would be blind not to recognize that the minatory effect

of these cases is enormous. The mere threat of such actions with the attendant personal liability of individual officers and directors is probably the most potent instrument in the corporate lawyers' arsenal for discouraging the managers who are tempted to violate the high standards of corporate morality imposed by the law. If the death knell predicted by Professor Hornstein has not rung, it is because the courts have so universally recognized the cause of action as a necessary policeman. The remedy has preserved its vitality and has survived every shabby attempt to smother it.

The stockholders of our country and the entire economic community owe a salute of gratitude to the courts, which have preserved this safeguard against wrongdoing. It is not for me to apportion the praise; but surely a large part of the accolade belongs to Abe Pomerantz who became the most jealous guardian of decency and propriety in this field. Certainly, he was the best known.

I suggest to this distinguished and specially informed audience that an acknowledgment of admiration and gratitude to Abe for his exploits in the field has been too long delayed. In the law we have no Nobel prizes or elevation to academic pantheons. I am unable to find in any legal organs an appropriate recognition that in the course of the Fifty Years War there was a little band of skilled and intrepid warriors of whom Abe Pomerantz was the leader. By their diligence and courage, their daring in taking great risks in worthy causes, and their skill and guts, they provided one of the most powerful forces at work in our system for maintaining corporate decency. Fifty years ago, they were pariahs and outcasts who were despised by the so-called respectable elements of the bar. Today, they are recognized as a vital and indispensible component of the American Bar. This gathering is a fitting tribute to Abe Pomerantz, who more than any other lawyer wrought this transformation.

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LECTURE

THE EVOLUTIONARY REVOLUTION IN PUBLIC ACCOUNTING

*John C. Burton**

Seers who attempt to divine the future — particularly the distant future — have both advantages and disadvantages. Their principal disadvantage is that it is virtually impossible for them to be right since the laws of probability work powerfully against them. On the other hand, they have the considerable advantage that they are virtually assured of being forgotten.

While this might be discouraging, it has not seemed to reduce the seer population to any discernible extent. In any rapidly changing environment, seer users continue to retain those who provide them with forecasts and prescriptions for avoiding the threats of the future while expediting the visions of previously unforeseen opportunity.

Accountants and lawyers are not immune from these tendencies, although historically they have been relatively effective in resisting change. The slogan of the accounting profession is "Pioneers are the ones with arrows in their backs," and this has served the profession well in the forty years since the end of World War II. In the past decade, however, signs of externally forced change have begun to appear with a related increase in

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