FROM THE CHAIR

by Mitchell L. Bach

The main purpose of this report is to invite you to attend the Committee’s stand-alone meeting in New York City, on December 4 and 5, 2003, and to give you a glimpse of the plans which are shaping up for that meeting. I also want to bring you up to date regarding other Committee activities.

Fall Meeting in New York City

As I reported to you in the Summer edition of Network, the annual Fall meeting of the Business and Corporate Litigation Committee will take place in New York City, on December 4 and 5, 2003. For the first time, we are moving the meeting Downtown, in the heart of New York’s Financial District. You will be receiving a mailing shortly containing all the details and sign-up information.

In the early evening on Thursday, December 4th, Committee member Martin Grant is organizing a unique reception at the Federal Reserve Bank offices at 33 Liberty Street, which is conveniently located approximately three blocks from the Millennium Hilton Hotel, where we shall be headquartered. A terrific dinner is planned in the Wall Street area following the reception.

Approximately five hours of continuing legal education programs are scheduled for Friday, December 5th. We shall start out with our traditional “Bankruptcy Update” by Bill Zewadski, who promises some surprises.
The centerpiece of our CLE program will be the Delaware portion being organized by Pete Walsh and Bill Johnston, entitled “Good Faith in the Spotlight.” The Delaware Court of Chancery’s recent decision in *In re: Walt Disney Co. Derivative Litigation* highlights the ongoing debate about what constitutes good faith conduct by a director of a Delaware corporation. It is commonly recognized that directors must act honestly and in good faith. But what does this really mean? The consequences of a judicial finding that a director has not acted in good faith are grave, because he or she may lose the exculpatory protection authorized by Section 102(b)(7) of the Delaware General Corporation Law and/or the ability to be indemnified by the Company or covered by any applicable director and officer insurance. We will be joined by members of the Delaware judiciary in exploring this topic in the context of a mock argument, followed by a discussion of the events and case law which have brought the issue of good faith into the spotlight.

We shall conclude with an encore presentation being organized by Bruce Jameson on electronic discovery. Bruce chaired an excellent program at the Annual Meeting in San Francisco, entitled “Land Mine or Treasure Trove? Managing and Planning for Electronic Discovery,” which was very well received. There have been a number of interesting new developments in this area which should be of interest to all of our members.

Finally, immediately following the CLE programming, Martin Grant has organized a private tour of the Federal Reserve Bank’s gold vault, exclusively for Committee members. You will not want to miss this golden opportunity.

The Business and Corporate Litigation Committee Meeting will be held at the Millennium Hilton, New York. We have reserved a limited number of rooms at the Millennium Hilton. You can call the hotel directly at (212) 312-2010 to make room reservations. The room rate is $279 single/double per night. If you have any questions, please contact the ABA’s Donna Nesbit at (312) 988-5587. I urge you to make reservations as early as possible.

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**Business and Technology Court Presentation**

I am extremely pleased to report that our Committee has been asked to co-sponsor an important Symposium, on Friday, November 7, 2003, at the University of Maryland School of Law entitled “Taking Care of Business: Business And Technology Courts In The 21st Century.” The Business Law Program of the University of Maryland School of Law, in cooperation with our Business and Corporate Litigation Committee, will host this Business Law Symposium at the school’s newly dedicated state-of-the-art building in Baltimore, the Nathan Patz Law Center. This Symposium will focus on the widespread emergence of specialized business courts in the United States, particularly recent developments in several jurisdictions. This one-day Symposium will assemble the leading judges, academics and practicing lawyers who are involved in this important movement. Registration information has been distributed to Committee members on the list-serve. If, for some reason, you did not receive this information and are interested in attending, please feel free to contact me.

**New Contact Information**

As many of you know, I recently moved my law practice to the Philadelphia office of Eckert Seamans Cherin & Mellott, LLC. Please update my contact information as follows:

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If any of you would like to become more involved in Committee activities or if you have any suggestions or questions, please do not hesitate to contact me.
The importance of understanding the Foreign Corrupt Practices Act ("FCPA") has grown in recent years as several corporations have faced investigations by the Justice Department and SEC regarding bribes paid to foreign officials. These investigations have led to large fines and imprisonment for the company officials involved in violating the FCPA. Obviously, executives and managers of companies doing business overseas need to be aware of the FCPA's rules. The FCPA prohibits corporations from paying bribes to foreign officials to secure business opportunities. The FCPA also contains accounting provisions that apply to all corporations under the jurisdiction of the SEC. The following article provides a brief overview of the FCPA and reviews some recent news on the federal government's enforcement of the FCPA.

An Overview of the FCPA

When Congress approved the FCPA, the United States became the first nation to pass a law preventing the bribery of foreign officials. Barbara Crutchfield George, On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Domestic and International Efforts Toward the Reduction of Business Corruption, 32 Vand. J. Transnat'l L. 1, 5 (1999). The FCPA was passed in 1977 as the aftermath of the Watergate scandal continued to affect Washington. During the inquiry into the financing of President Nixon's 1972 reelection campaign, investigators learned that many large American corporations were making illegal campaign contributions. The investigators soon learned that these contributions were not unusual but were, in fact, part of a larger practice of offering gifts and kickbacks to foreign government officials. Id. In addition, Eli Black, the chairman of United Brands (now Chiquita Brands International), committed suicide when the company became involved in a bribery scandal in Honduras. Chiquita Brands International, 2000 Corporate Responsibility Report 93. In response to widespread concern over such corporate corruption, Congress passed the FCPA to stop the bribery of foreign officials by American companies.

The FCPA contains both anti-bribery rules and corporate accounting rules that make bribery payments easier to detect. George, 32 Vand. J. Transnat'l L. at 6. The anti-bribery restrictions are codified into three statutes, all containing similar provisions. The first set of provisions applies to issuers of securities and reporting firms under the jurisdiction of the SEC. Id.; 15 U.S.C. § 78dd-1(a) (2000). The second set of provisions applies to any other "domestic concern," which is defined as a citizen, resident, or national of the United States, or any business organization that is incorporated in the U.S. or has its principal place of business here, exclusive of corporations under the jurisdiction of the SEC. 15 U.S.C. § 78dd-2 (2000). Amendments to the FCPA in 1998 added a third set of provisions that apply to foreign nationals and foreign business organizations who do business in the United States. 15 U.S.C. § 78dd-3 (2000). Each set of provisions prevents individuals or organizations from "corruptly" making payments to a foreign official, political party, or candidate for the purpose of influencing that official or inducing the official to use his or her influence to assist the payor. 15 U.S.C. § 78dd-1 to -2 (2000). Although the term "corruptly" is not defined in the Act, the standard reflects an intent to cover quid pro quo arrangements. Jennifer Dawn Taylor, Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?, 61 La. L. Rev. 861, 872 (2001). The government must also prove that the conduct was done "knowingly" by showing that the person was "aware" of the illegal conduct, that the person had a "firm belief" that such illegal conduct was occurring, or that there is a "high probability" of the existence of the illegal conduct. Id. at 872-73; 15 U.S.C. §§ 78dd-1(t)(2), 78dd-2(h)(3), 78dd-3(t)(3)
The FCPA contains an exception for routine governmental actions, such as small "grease" payments to a lower governmental official who has no decision-making authority to approve a transaction. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), and 78dd-3(b) (2000); George, 32 Vand. J. Transnat’l L. at 6 n. 21.

The accounting provisions must be followed by all corporations that issue securities requiring registration or the filing of reports with the SEC. 15 U.S.C.A. § 78m(b)(2) (West Supp. 2003) (reflecting 2002 amendments). Notably, a corporation does not have to be engaged in international business to fall under the jurisdiction of the FCPA accounting rules. George, 32 Vand. J. Transnat’l L. at 7. All corporations under SEC jurisdiction must keep records that accurately reflect their transactions and assets, and they must maintain a system of accounting controls to ensure that transactions are properly authorized and that accountability is maintained. Taylor, 61 La. L. Rev. at 863. Some commentators consider the FCPA accounting restrictions to be the broadest application of federal law to corporate management since the Securities Exchange Act of 1934. George, 32 Vand. J. Transnat’l L. at 7.

Penalties under the FCPA may include both fines and imprisonment. A corporation that violates the anti-bribery provisions of the FCPA can face fines of up to $2,000,000. 15 U.S.C. § 78dd-2(g) (2000); 15 U.S.C.A. § 78ff(c) (West Supp. 2003) (reflecting 2002 amendments). Corporate executives can be fined up to $100,000 and imprisoned for up to five years. Id. In addition, injunctive relief and civil penalties of up to $10,000 can be imposed by a suit brought by the SEC or the Attorney General. 15 U.S.C. §§ 78dd-2(d) and (g) (2000); 15 U.S.C.A. § 78ff(c) (West Supp. 2003). Willful violations of the accounting rules, like the other parts of the Securities Exchange Act, can result in up to $25,000,000 in fines for a corporation. 15 U.S.C.A. § 78ff(a) (West Supp. 2003).

Recent FCPA Enforcement Actions

Increasingly, American corporations are facing inquiries by the federal government into their practices abroad. In 1998, New Jersey-based Saybolt North America and its CEO, Daniel Mead, were convicted of violating the anti-bribery provisions of the FCPA. Stichting Ter Behartiging van de Belangen van Oudaandeelhouders in Het Kapitaal van Saybolt International B.V. v. Schreiber, 327 F.3d 173, 176-78 (2d Cir. 2003) (describing facts of Saybolt and Mead’s criminal prosecution). Saybolt North America had paid $50,000 to a Panamanian official to secure property for the construction of a laboratory and office complex for Saybolt International, its parent company based in the Netherlands. Saybolt North America’s attorney allegedly told the American board of directors that it could circumvent the FCPA if the money was paid by the Dutch parent, even though American employees arranged for the bribe. Federal prosecutors disagreed and brought charges against the company and Mead under the FCPA. Ultimately, the corporation pled guilty. Mead was convicted at trial and sentenced to a $20,000 fine and four months of imprisonment. Id.

In January 2002, BellSouth paid $150,000 to settle a civil suit brought by the SEC alleging that it had violated the accounting provisions of the FCPA. Press Release, SEC, SEC Settles Case Against BellSouth Corporation (Jan. 15, 2002). The SEC complaint had alleged that BellSouth failed to accurately track payments made by its Latin American subsidiaries that implicated possible FCPA violations. Id. Later in 2002, two Kansas City executives of Owl Securities & Investments were sentenced to probation and required to lecture community groups about corporate fraud for participating in a scheme to bribe Costa Rican officials in violation of the FCPA. Matt Campbell, Two Must Tell Others About Fraud and Its Evils, Kansas City Star, July 10, 2002, at B1. Another Kansas City man was sentenced to $60,000 and thirty months in federal prison for his role in the scheme. Mark Morris, KC Man Sentenced for Bribery Scheme, Kansas City
Star, Nov. 13, 2002, at C1. On December 10, 2002, the SEC announced that it had imposed a cease-and-desist order and obtained a $500,000 fine against Syncor International. Syncor Int'l Corp., Exchange Act Release No. 46,979, 2002 WL 31757634 (S.E.C. Release No.) (Dec. 10, 2002). Through its subsidiaries, Syncor employees had been paying foreign doctors, including doctors at some state-run hospitals, to retain business and referrals with those hospitals. The payments were made in Taiwan, Mexico, Belgium, Luxembourg, and France. Some of the payments were authorized by the company's board chairman, who lived in California, and were given to the foreign doctors through hand-delivered envelopes. Charges were also brought against subsidiary Syncor Taiwan, and the trial judge in that case imposed the maximum $2 million fine upon the corporation. Press Release, Department of Justice, Syncor Taiwan, Inc. Pleads Guilty to Violating the Foreign Corrupt Practices Act (Dec. 10, 2002) (on file with author).

The government has continued aggressive enforcement in 2003. In January, the SEC announced a cease-and-desist order against American Rice, Inc. for making bribery payments to Haitian officials to reduce import taxes. American Rice, Inc., Administrative Proceeding File No. 3-11024 (SEC Jan. 30, 2003), available at http://www.sec.gov/litigation/admin/34-47286.htm (last visited Oct. 17, 2003). On March 30, 2003, James Giffen, an American advisor to President Nazarbayev of Kazakhstan, was arrested for allegedly funneling $60 million in oil commissions into Swiss bank accounts for the President and other Kazakh officials. Christopher Pala, Oil Scandal Hits Kazakhstan, Wash. Times, May 17, 2003, at A8. News reports allege that Mr. Giffen received $138 million in bonuses and commissions from major oil companies, of which he passed $77 million on to Kazakh officials. The investigation leading up to his arrest appears to be the largest investigation ever under the FCPA. According to the news reports, targets of the same investigation, perhaps still underway, include Mobil Oil Co., now a unit of Exxon Mobil. Daphne Eviatar, Crackdown on Kickbacks, Corp. Counsel, Aug. 1, 2003, at http://www.law.com/jsp/cc/pubarticleCC.jsp?id=1056140009682 (last visited Oct. 17, 2003). Former Mobil executive J. Bryan Williams has already pled guilty to evading taxes on $7 million, $2 million of which involved illegal kickbacks from business in Kazakhstan. Id. Finally, Houston-based oil-field services firm Baker Hughes is currently under investigation by the SEC and the Justice Department after an employee alleged that he was fired for refusing to bribe a Nigerian official. Nelson Antosh, Settlement Closes Baker Hughes Suit, Houston Chronicle, Oct. 7, 2003, at Business 1.

Conclusion

The recent increase in the number of investigations and indictments suggests that the federal government is renewing its focus on enforcement of the FCPA. Counsel for companies that do business overseas, especially in nations with widespread corruption, should ensure that overseas employees are properly trained to prevent violations. For example, Unocal Corp. now requires every employee to take an online training program, and there are workshops for employees working in countries such as Senegal, Indonesia, and Vietnam. Eviatar, supra. Another safeguard is to have overseas employees check with their attorneys before making “grease” payments to ensure that these payments are legal. Safeguards such as these are expensive and create delays. However, if a violation does occur, government may be more forgiving if a company has in place or implements a system of preventive measures. E.g., Press Release, SEC, SEC Settles Case Against BellSouth Corporation (Jan. 15, 2002) (noting that the SEC considered BellSouth’s termination of at fault employees and implementation of preventative programs when agreeing to settle charges). The costs that an FCPA violation would impose through attorneys’ fees, fines, possible jail time for the individuals involved as well as negative publicity may be far greater than the benefits of noncompliance.

Paul J. Masinter is a Member and J. Dalton Courson is an associate of Stone Pigman Walther Wittmann L.L.C. in New Orleans,
The Bankruptcy Litigation Subcommittee of the Committee met jointly with the Creditors’ Rights Subcommittee of the Commercial Financial Services Committee at the 2003 National Conference of Bankruptcy Judges in San Diego. We presented a program on October 16, 2003, with former committee chair and now bankruptcy judge, Elizabeth Stong, providing thoughts on the bankruptcy court from the prospective of a new judge. Bankruptcy Judge Stong sits in the Eastern District of New York and she explained the challenges of her new position. Likewise, Bankruptcy Judge Elizabeth L. Perris, Oregon, who also attended, shared her thoughts on docket management, particular problems that arise in the course of case administration and issues ranging from special procedures to stare decisis.

The Subcommittee’s next presentation will be by William Zewadski, co-chair, at the December meeting of the Business Law Section at the Millennium Hotel, New York City, December 5, at which he will present another installment in his annual update of bankruptcy developments.

Thereafter, the Subcommittee will next meet and present a program at the ABA Business Law Spring Meeting in Seattle, April 1 – 4, 2004, with a program at 1:00 p.m. on April 1, 2004, with Bankruptcy Judges Williamson and Brandt, participating with discussions of current topics of interest. This is a subcommittee meeting not to be missed!

To belong to the Bankruptcy Litigation subcommittee is as simple as being a member of the ABA and indicating your interest in joining the Subcommittee by an e-mail to Bill Zewadski at z@trenam.com.

The Corporate Counseling and Litigation Subcommittee held a meeting jointly with the Indemnification and Insurance Subcommittee at the ABA Annual Meeting. At the meeting, we discussed case law developments in 2002 and the first half of 2003, as well as recent amendments to the Delaware General Corporation Law. New members are always welcome.

Work has commenced in earnest on the 2004 “Annual Review of Developments”. The 2003 publication was comprised of 20 chapters of substantive legal case updates and developments in a wide variety of business and corporate litigation areas, ranging from corporate law, ERISA, criminal and enforcement litigation, intellectual property and securities litigation. For more information on how to order the 2003 Review, which is an excellent reference tool, please see details elsewhere in the Network.

The 2004 “Annual Review of Developments” is shaping up to be bigger and better than the previous publications. The Annual Review materials form the framework for the Business and Corporate Litigation Committee’s ever popular Spring Program.
If you are interested in assisting with the 2004 Annual Review materials, please contact Heidi Staudenmaier at (602) 382-6366 or hstaudenmaier@swlaw.com.

**SECURITIES LITIGATION**  
*by Steve Poss*

The Securities Litigation Subcommittee played an active role at the Annual Meeting. The Subcommittee held a combined meeting with the Criminal and Enforcement Litigation and Financial Institutions Subcommittees. The combined subcommittee meeting featured a roundtable discussion with the top securities fraud enforcement attorneys at the U.S. Attorney’s office in San Francisco and the SEC’s San Francisco office. Of particular interest in the discussion was an explanation of SEC Enforcement’s new focus on liability of aiders and abettors of securities law violations. In addition, Steve Poss, Co-Chair of the Subcommittee, participated as a faculty member in the four-hour, two-day “Corporate Crisis” program at the Annual Meeting. Steve addressed topics including the respective roles of the in-house general counsel, the special committee of independent directors, and special counsel to the special committee in responding to claims made by a whistleblower of securities fraud at a public company.

The Subcommittee welcomes new members and in particular is seeking volunteers to work on the Subcommittee’s “Annual Review of Developments in Securities Litigation.” Anyone wishing to join or to participate in the Subcommittee’s activities should contact Co-Chairs Lisa K. Wager (lwager@morganlewis.com), Steve Poss (sposs@goodwinprocter.com), or James Hawkins (jhawkins@fdh.com).

**ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION**

The 2003 Edition of the *Annual Review of Developments in Business and Corporate Litigation*, a time-saving guide summarizing legal developments on business and corporate litigation issues, is available. By the Committee, the Annual Review brings together thorough summaries of recent cases, legislation, trends and developments in business litigation topics. Experts with in-depth litigation experiences address key concerns such as “What issues did the Supreme Court address in deciding a key securities arbitration case last year?” and “What are the latest developments in intellectual property law?” Other topics addressed in the 2003 Annual Review include Antitrust Litigation, Criminal and Enforcement Litigation, ERISA, and Securities Arbitration. This reference will keep you current with annual updates. A necessary reference for every business litigator.

To order this publication, click [http://www.abanet.org/buslaw/catalog/r5070397.html](http://www.abanet.org/buslaw/catalog/r5070397.html) or call (800)-285-2221. 2002, 7 x 10, 904 pages, Paperback: $99.95 (Section member price); $119.95 (Regular price); Product Code: 5070397.

Overnight delivery is available for an additional cost when orders are placed before 2:00 p.m. Central Standard Time. Please ask the service representative for details when you place your order.

**AUTHOR! AUTHOR! – “BUSINESS LAW TODAY” ARTICLES REQUEST**  
*by Francis G.X. Pileggi*

“Business Law Today” is the national magazine of the Section of Business Law of the American Bar Association. The magazine is published six times a year as a membership benefit for approximately 60,000 Section members. “Business Law Today” is a magazine, not a law review. We are looking for articles that are enjoyable to read. We publish basic articles directed to business lawyers unfamiliar with a substantive area as well as articles on technical legal issues, but the presentation should be direct and comprehensible.

Articles run around 2,000 to 3,000 words. Manuscripts must not have been published previously. However, seminar materials that have
been revamped into simple, readable articles are acceptable. Additionally, any articles previously published in an ABA newsletter (such as Network) or firm newsletters are acceptable. The complete author guidelines are available through the Section's Website, www.abanet.org/buslawblt/guidelines.html, or Heidi M. Staudenmaier directly at “Business Law Today,” Editor-in-Chief, Snell & Wilmer, Phoenix, (602) 382-6366, hstaudenmaier@swlaw.com.
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<th>Pro Bono</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antitrust &amp; Trade Litigation</td>
<td>Employment Litigation</td>
<td>Securities Arbitration</td>
</tr>
<tr>
<td>Appellate Litigation</td>
<td>Environmental Litigation</td>
<td>Securities Litigation</td>
</tr>
<tr>
<td>Bankruptcy Litigation</td>
<td>ERISA &amp; Pension Litigation</td>
<td>Membership</td>
</tr>
<tr>
<td>Business Courts</td>
<td>Financial Institution Litigation</td>
<td>Newsletter</td>
</tr>
<tr>
<td>Business Torts</td>
<td>Indemnification &amp; Insurance</td>
<td>Programs</td>
</tr>
<tr>
<td>Class &amp; Derivative Actions</td>
<td>Intellectual Property</td>
<td>Publications</td>
</tr>
<tr>
<td>Corporate Counseling &amp; Litigation</td>
<td>Partnerships &amp; Alternative Business</td>
<td>Small Firms</td>
</tr>
<tr>
<td></td>
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