FROM THE CHAIR

by Mitchell L. Bach

I was thinking about wishing you all a Happy New Year, but most of you will not receive this until mid-March. In any event, I wish all of you the very best for 2004. Please let me take a couple minutes of your time to update you on Committee activities.

December Meeting in New York City

I have gotten very favorable reports from many of those who attended our meeting in New York on December 4 and 5, 2003. Martin Grant did a wonderful job organizing the opening reception at the Federal Reserve Bank, and the dinner at the City Hall restaurant was terrific. My thanks again to Pete Walsh, Bill Johnston, Bill Zewadski and Bruce Jamieson for putting together a really excellent CLE program. All of us extend our sincere appreciation to Justice Myron Steele, Vice Chancellor Leo Strine and Judge Elizabeth Stong, our quite authentic Judicial Panel for the Delaware portion of the program. Finally, I want to express my thanks again to Kurt Heyman, Caryn Mazin and Paul Rowe who put so much time and effort into this.

We managed to conduct the entire CLE program during an early heavy snowstorm in New York City. Some of you have told me that you might be interested in scheduling the meeting in another city (Philadelphia comes to mind). I would appreciate your thoughts regarding the meeting location, and the Committee leadership will discuss this in Seattle.
Spring Meeting in Seattle

We are expecting a good turnout at the Section of Business Law Spring Meeting in Seattle, from April 1 through April 4, 2004. If you have not already done so, please make your travel and accommodation arrangements as soon as possible.

Our Committee Forum, on Friday, April 2, 2004, from 8:15 a.m. to 10:00 a.m., will be entitled “Business and Technology Courts Update.” An expert panel will discuss the latest developments regarding the formation of business courts and specialized commercial litigation programs throughout the United States. At this writing, the panel consists of The Honorable Alvin W. Thompson, U.S. District Judge in Connecticut; Vice Chancellor Donald Parsons, the newest member of the Delaware Court of Chancery; Eric J. Orinsky, Esquire, of the Saul Ewing firm in Baltimore, Maryland; The Honorable Elihu M. Berle, Superior Court of California; and William R. Denny, Esquire, of Potter Anderson & Corroon, LLP in Wilmington, Delaware.

As all of you know, our Recent Developments program is in high gear. Under Heidi Staudenmaier’s firm direction, all 22 chapters have been submitted, by more than 50 authors. The live program entitled “Annual Review of Developments in Business and Corporate Litigation” is scheduled for Thursday, April 1, 2004 from 2:00 p.m. through 5:00 p.m. If you can’t wait until then or you are unable to attend in Seattle, a 90-minute version of this program is being presented live by TeleConference and Live Audio Webcast, on March 24, 2004, from 1:00 p.m. to 2:30 p.m., Eastern Standard Time. (See the flyer in this issue of Network, or register on-line at www.abanet.org/cle/programs/t04ard1.html.) Congratulations to Program Chair Rick Lambert and all involved.

Bob Gegios has put together another interesting CLE program entitled “Bringing the Insurer to the Table in Business Litigation”, which is scheduled on Thursday, April 1, 2004, from 9:00 a.m. to 11:00 a.m. Joining Bob on the panel will be David A. Gauntlett, of Gauntlett & Associates; Jacquelyn A. Beatty, of Karr Tuttle Campbell, PSC in Seattle; and Reginald Davis, of Yahoo! I hope that you will arrive in Seattle early enough to attend this program early Thursday morning.

Last, but not least, the Section is presenting an Institute for the New Business Lawyer during the Spring Meeting, on April 1, 2004. Our Committee will be presenting a program as part this Institute, entitled “Commercial Litigators are Business Lawyers Too”. My thanks to one of our newest members, Sandra J. Sutton-Semanski of Maurice & Needleman in Bridgewater, New Jersey, who is quarterbacking this effort on behalf of the Committee.

National Conference for the Minority Lawyer

Once again, the Section has asked us to do an encore presentation of our Recent Development program at the National Conference for the Minority Lawyer, which will be held in San Francisco, on June 17 and 18, 2004. Committee member Hilary Ware, of Heller Ehrman in San Francisco, has put together a great panel for this program. Thanks again, Hilary.

Task Force on Litigation Reform and Rules Revision

Mike Flynn has been extremely busy during the past several weeks. As Task Force Chair, Mike has coordinated the preparation of comments with respect to the November 2003 Draft Amendments to Electronic Discovery Standards which were recently submitted to the Business Law Section. We also reviewed and submitted reports regarding proposed amendments to the Standards Relating to Court Organization and Court Use of Electronic Filing Processes; and a report and recommendation to the ABA House of Delegates regarding the Uniform Apportionment of Tort Responsibility Act.

Our busy Task Force will meet again at the forthcoming Spring Meeting.

As you can see, we have started the year in full swing. As always, I welcome your input, thoughts and suggestions. Please contact me by telephone, email or snail mail at Eckert Seamans Cherin & Mellott, LLC., 1515 Market Street, 9th Floor,
ABA SECTION OF BUSINESS LAW
SPRING MEETING
APRIL 1-4, 2004
SEATTLE, WASHINGTON
TENTATIVE ALPHABETICAL SCHEDULE OF
MEETINGS OF THE COMMITTEES AND
SUBCOMMITTEES

Business and Corporate Litigation
Administrative Committees,
Subcommittee Chairs and Task Force
Chairs
Friday 4/2/2004 5:00PM - 6:00PM
Westin Seattle
Vashon I, Third Floor

Alternative Dispute Resolution
Friday 4/2/2004 11:00AM - 12:00PM
Westin Seattle
Olympic Room, Mezzanine Level

Antitrust and Trade Litigation
Friday 4/2/2004 1:00PM - 2:30PM
Westin Seattle
Adams Room, Mezzanine Level

Appellate Litigation
Thursday 4/1/2004 1:00PM - 2:00PM
Westin Seattle
Glacier Peak Room, Mezzanine Level

Business and Corporate Litigation
Friday 4/2/2004 8:00AM - 8:15AM
Westin Seattle
Cascade B, Mezzanine Level

Business Courts
Thursday 4/1/2004 9:00AM - 10:00AM
Westin Seattle
Stuart Room, Mezzanine Level

Business Torts
Thursday 4/1/2004 1:00PM - 2:00PM
Westin Seattle
Stuart Room, Mezzanine Level

Class and Derivative Actions
Thursday 4/1/2004 9:00AM - 10:30AM
Westin Seattle
Adams Room, Mezzanine Level

Committee Forum: Business and Technology Courts Update
Friday 4/2/2004 8:15AM - 10:00AM
Westin Seattle
Cascade B, Mezzanine Level

Criminal and Enforcement Litigation
Friday 4/2/2004 11:00AM - 12:00PM
Westin Seattle
Glacier Peak Room, Mezzanine Level

Employment Litigation
Friday 4/2/2004 4:00PM - 5:00PM
Westin Seattle
Stuart Room, Mezzanine Level

Environmental Litigation
Saturday 4/3/2004 10:00AM - 11:00AM
Westin Seattle
Glacier Peak Room, Mezzanine Level

ERISA and Pension Litigation
Friday 4/2/2004 4:00PM - 5:00PM
Westin Seattle
Olympic Room, Mezzanine Level

Financial Institution Litigation
Thursday 4/1/2004 10:00AM - 11:00AM
Westin Seattle
Stuart Room, Mezzanine Level

Intellectual Property Litigation
Saturday 4/3/2004 10:00AM - 11:30AM
Westin Seattle
Stuart Room, Mezzanine Level

Joint Meeting: Bankruptcy Litigation
Thursday 4/1/2004 1:00PM - 2:30PM
Sheraton Seattle
Cedar Room, Second Floor

Joint Meeting: Indemnification & Insurance and Corporate Counseling & Litigation
Friday 4/2/2004 1:00PM - 2:00PM
Westin Seattle
Stuart Room, Mezzanine Level
FEATURE ARTICLE

CIRCUITS SPLIT OVER CLEAN WATER ACT JURISDICTION

by Daria B. Diaz

On December 16, 2003, the United States Fifth Circuit Court of Appeals in United States v. Needham, 354 F.3d 340 (5th Cir. 2003), expressly rejected the narrow interpretation of Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 121 S. Ct. 675 (2001) ("SWANCC"), adopted by the Fourth and Sixth Circuits. The Fifth Circuit rejected the government's definition of "navigable waters," which included "all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" Noting that the Fourth and Sixth Circuits appear to have agreed with the government's expansive definition, the Fifth Circuit expressly refused to adopt such a broad reading stating:

In our view, this definition is unsustainable under SWANCC. The CWA [Clean Water Act] and OPA [Oil Pollution Act] are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. [Citation omitted.] Consequently, in this circuit the United States may not simply impose regulations over puddles, roadside ditches and the like; under SWANCC, "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water." (Emphasis added.)

The Needham decision constitutes a departure from the circuit courts applying the SWANCC decision narrowly. For example, in United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003),
the Fourth Circuit reversed the district court and ruled that the Corps possessed jurisdiction over wetlands bordering a "roadside ditch" that took a "winding, thirty-two mile path to the Chesapeake Bay." The court further recognized and accepted the Corps' definition of "tributary" to include "the entire tributary system," including roadside ditches.  Id. at 710. Likewise, the Sixth Circuit recently read SWANCC narrowly.  See, United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003). In Rapanos, the Sixth Circuit reversed the district court and adopted the reasoning of the Fourth Circuit in the Deaton case. The Sixth Circuit ruled that SWANCC was a narrow holding that merely invalidated the Corps of Engineers’ use of the Migratory Bird Rule as a basis for defining jurisdictional wetlands under the Clean Water Act.  Id. at 452. The wetlands on Rapanos’s land were eleven to twenty miles from the nearest navigable-in-fact waterway and connected to a one hundred year-old man-made drain, which flowed into a nonnavigable creek that flowed into a navigable river.  Citing United States v. Riverside Bayview Homes,474 U.S. 121, 133, 106 S. Ct. 455 (1985), the court ruled "[b]ecause the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction."  Id. at 453.

Given the split in the circuits regarding the proper interpretation and application of SWANCC, the issue of what will qualify as wetlands for purposes of Clean Water Act jurisdiction will not be resolved unless and until the Supreme Court revisits this issue and clarifies its ruling in SWANCC. In the meantime, this is an area that continues to be rife with uncertainty.

Daria B. Diaz is Special Counsel at Stone Pigman Walther Wittmann L.L.C. in New Orleans, Louisiana. Ms. Diaz can be reached at ddia@stonepigman.com.

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**SUBCOMMITTEE REPORTS**

**BANKRUPTCY LITIGATION SUBCOMMITTEE**

by William K. Zewadski

The next meeting of the Bankruptcy Litigation Subcommittee will occur at the Section’s Spring Meeting in Seattle on April 1, 2004 at 1 p.m. There will be three notable presentations as well as litigation and legislative updates. We will be honored to have two bankruptcy judges speak to our group: The Honorable Philip Brandt of Seattle and The Honorable Rodney May of Tampa, together with Albert Manwaring of Wilmington, will speak about as aspect of the Netscape bankruptcy.

The meeting will again be a joint meeting with the Creditors’ Rights Committee. Please make a special effort to attend.

In addition to three programs of this type each year, our subcommittee supplies the pertinent chapter to the ABA Committee on Business and Corporate Litigation’s annual review of business litigation developments. It also participates in more general programs put on by the section and committee, such as Bill Zewadski’s participation in the Committee’s two day program in San Francisco, "When the Going Gets Tough: Advising a Company in Crisis."

We hope that all will attend our next meeting in Seattle in April if possible. At that time several late-breaking topics of interest will be discussed. Your input on topics of interest would be appreciated. After that, a further meeting is planned for the ABA Annual Meeting in Atlanta in August 2004 and the Nashville meeting of the National Conference of Bankruptcy Judges, October 10-13. 2004.
Joining the Bankruptcy Litigation subcommittee is as simple as being a member of the ABA and emailing to co-chairs Philip Warden, San Francisco, or William Zewadski, Tampa, with a note of your interest in joining. Send your email to z@trenam.com.

CORPORATE COUNSELING AND LITIGATION SUBCOMMITTEE
by Peter J. Walsh, Jr.

Members of the Corporate Counseling & Litigation Subcommittee participated in our December program in New York City which included a mock argument highlighting a director’s duty of good faith. Special thanks go out to our judicial participants – Justice Myron Steele, Judge Elizabeth Stong and Vice Chancellor Leo Strine – for making the program a great success.

The Subcommittee is looking forward to the Spring Meeting in Seattle. Once again, we will be holding a joint meeting with the Indemnification and Insurance Subcommittee. The meeting is scheduled for Friday, April 2, 2004, at 1 p.m. At that meeting we will be discussing the legislative developments and the latest significant rulings in corporate law. This meeting is open to all Spring Meeting attendees, and we strongly encourage newcomers. Our meetings provide a great opportunity to meet fellow corporate practitioners and discuss hot topics and developments in a relaxed and collegial atmosphere.

EMPLOYMENT LITIGATION SUBCOMMITTEE
By Bret A. Cohen

The Employment Litigation Subcommittee recently completed the summary of all significant employment law cases for the Annual Review of Developments in Business and Corporate Litigation. This publication will be available at the Spring Meeting in Seattle.

Also, this summary will be presented in conjunction with the developments of corporate and business litigation seminar, which will be lead by Rick L. Lambert, at the "Annual Review of Developments in Business and Corporate Litigation" program at the ABA Spring Meeting in Seattle, April 1-4, 2004.

The Employment Law Subcommittee is presently looking for attorneys interested in contributing to the next year’s Annual Review of Developments in Business and Corporate Litigation. Rather than have just one person provide the summaries for employment law throughout the United States, it was suggested that it would be better to give other persons an opportunity to contribute to this well-regarded publication. If you are interested in summarizing the significant employment cases from your jurisdiction, please send an email to Bret A. Cohen at bcohen@pepehazard.com.

INDEMNIFICATION AND INSURANCE SUBCOMMITTEE
by William D. Johnston

The next meeting of the Indemnification and Insurance Subcommittee will take place in Seattle during the Section’s Spring Meeting. We’ll again meet jointly with members of the Corporate Counseling and Litigation Subcommittee. As before, we’ll discuss legislative and case law developments in connection with director liability, advancement and indemnification, and director and officer liability insurance, review D&O insurance “market conditions,” and consider possible future programs and articles. First-time attendees are always welcome!

Our upcoming meeting will also be the occasion to thank Indemnification and Insurance vice chair Mike Gassmann for his distinguished service in that capacity, and to wish him well in retirement (at least from practice). For years, Mike has generously shared his scholarly and practical guidance in connection with D&O insurance, as to which (although he’d probably never admit it) he is an indisputable expert.
Also during the meeting, we'll welcome as our new vice chair Mike's colleague at Drinker Biddle and Reath, Janet McFadden. Janet is no stranger to our Committee, having long served as Mike's co-author in contributing importantly to the Annual Review of Developments in Business and Corporate Litigation, and having actively participated in committee and subcommittee meetings. Thank you, Janet!

We look forward to seeing you in Seattle!

MEMBERSHIP SUBCOMMITTEE
by Honorable Elizabeth S. Stong

The Membership Subcommittee is active in promoting committee member involvement in the full range of Committee and Section activities. To this end, Committee members are encouraged to sign up to be a Spring Meeting Host for the Business Law Section's Spring Meeting in Seattle, on April 1-4, 2004, and to bring a friend to the Seattle meeting! Many active Committee members had their first exposure to the Committee and Section as the result of a Committee member inviting them to attend a meeting, a program, or the Committee's dinner. Others were introduced to the Committee through the First Timer's Reception and Committee Round-Up. So as you are making your plans, think about whether there is a junior associate, a client, or an outside counsel who would enjoy coming to the Spring Meeting, and invite them! See you in Seattle.

PUBLICATIONS SUBCOMMITTEE
by Heidi M. Staudenmaier

The 2004 "Annual Review of Developments in Business and Corporate Litigation" program materials will be ready for distribution at the Spring Meeting in connection with the ever popular Annual Review Program. The 2004 publication will include two new chapters -- Business Courts and Appellate Law. Other topics covered in the 22-chapter publication include: ADR, Antitrust litigation, Bankruptcy litigation, Business torts litigation, Class Action law and Derivative Litigation, Corporate law, Criminal and Enforcement Litigation, Director Liability and Indemnification, Director's and Officer's Liability Insurance, Employment and Labor law, Environmental law, ERISA, Financial Institution Litigation, General partnership, joint ventures, limited partnership and limited liability companies, intellectual property law, pro bono and non-profits, securities litigation and arbitration. Over 50 authors are contributing to the effort.

Following the Spring Meeting, the program materials will be published as the 2004 Edition of the Annual Review of Developments in Business and Corporate Litigation and available for order through the ABA.

SECURITIES LITIGATION
by Steve Poss

The Securities Litigation Subcommittee played an active role at the 2003 ABA 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 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/buslaw/blt/guidelines.html, or Heidi M. Staudenmaier directly at “Business Law Today,” Editor-in-Chief, Snell & Wilmer, Phoenix, (602) 382-6366, hstaudenmaier@swlaw.com.

The Business and Corporate Litigation Committee newsletter is published four times a year by the American Bar Association, Section of Business Law, Business and Corporate Litigation Committee. The views expressed in the Business and Corporate Litigation Committee newsletter are the authors' only and not necessarily those of the American Bar Association, the Section of Business Law or the Business and Corporate Litigation Committee. If you wish to comment on the contents, please write to the Business and Corporate Litigation Committee, Section of Business Law, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611. © 2004 by the American Bar Association.
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*********************************************************
Date: Thursday, April 1, 2004
Place: BRASA RESTAURANT
2107 Third Avenue
Seattle, Washington 98101
www.brasa.com
Time: 7:30 p.m.
Menu will be distributed at the dinner, offering choices of 3 appetizers, 2 salads, 4 entrees and two desserts -- Price will include wine, beer and non-alcoholic drinks. All cocktails will be cash bar.

DINNER FEE

____ Tickets  @ $100.00 each = $___________

Please indicate any special dietary needs:______________________________

Payment Method:
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Please return this form and your payment no later than March 12, 2004 5:00 p.m. CST to:
Marcia Yarbrough
American Bar Association · Section of Business Law
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Phone: (312) 988-5653 · Fax: (312) 988-5578

(Faxed reservations must include credit card payment.)

Refund policy: Requests for ticketed events will be granted only if the request is received in writing prior to Friday, March 12. No refunds will be granted after that date.
The American Bar Association Section of Business Law and The Center for Continuing Legal Education Present a 90-Minute TeleConference and Live Audio Webcast

Annual Review of Developments in Business and Corporate Litigation

Wednesday, March 24, 2004
1:00-2:30 pm Eastern • 12:00-1:30 pm Central • 11:00 am–12:30 pm Mountain • 10:00-11:30 am Pacific

This is your opportunity to get insights from the highly acclaimed authors of the Annual Review of Developments in Business and Corporate Litigation. The authors will concisely summarize the important developments in the 2004 edition of the book. The topics will be divided into three panel discussions: Corporate Management, Corporate Crisis and Corporate Governance. This program will be a valuable resource for your law practice, especially when responding to issues that cross over specialties or when asked about current developments in these vital areas of corporate litigation.

Join Our Expert Faculty:

Moderator
Rick L. Lambert, Godwin Gruber, LLP, Dallas, TX

Panel 1 – Corporate Management:
Bret Allen Cohen, Pepe & Hazard, LLP, Boston, MA
Andrew F. Halaby, Snell & Wilmer, Phoenix, AZ
Abigail Pessen, Mediation Services, New York, NY
Marsha G. Rydberg, The Rydberg Law Firm, PA, Tampa, FL

Panel 2 – Corporate Crisis:
Jay A. Dubow, Wolf, Block, Schorr & Solis-Cohen, LLP, Philadelphia, PA
R. Lisa Klein Wager, Goodwin Procter, LLP, Boston, MA
William Knight Zewadski, Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, PA, Tampa, FL

Panel 3 – Corporate Governance:
Justice Jack Jacobs, Supreme Court of Delaware, Dover, DE
William D. Johnston, Young, Conway, Stargatt & Taylor, Wilmington, DE
Janine M. Solomone, Potter, Anderson & Corroon, LLP, Wilmington, DE

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