FROM THE CHAIR
by Mitchell L. Bach

It is especially nice to be greeting you at a time when I am feeling especially good about our Committee’s accomplishments and future plans. I hope this report will help you feel the same way.

Spring Meeting in Seattle

I was extremely proud of our accomplishments at the Spring Meeting in Seattle. Program Chair Rick Lambert did a great job with the “Annual Review of Developments in Business and Corporate Litigation” program. We attracted a huge audience, literally standing room only. Chairs had to be brought in from other rooms, and I saw other people either standing or sitting on the floor. As always, the live presentations were excellent. Although no “yellow pages” set of materials was distributed, the entire Recent Developments submission was contained on the CD-ROM, which was given to everyone who came to the Spring Meeting, making it easy to bring the materials back to our offices and share with our colleagues. The Business Law Section is about to publish our 2004 edition of the Annual Review of Developments in Business and Corporate Litigation, which I am certain will be another best-seller. This year, we had 22 chapters submitted by more than 50 authors, new records in both categories. Thanks to Heidi Staudenmaier for shepherding this massive effort. Most of all, thanks to all of you who authored and/or edited these remarkable written submissions, of which all of us should be proud.
The other programs also went well. Thanks to Bob Gegios for hanging in there, despite a number of last-minute panel changes. His program entitled “Bringing the Insurer to the Table in Business Litigation” was well received. Our Committee Forum consisting of a “Business and Technology Courts Update” was also well attended and got excellent reviews. Special thanks to Vice Chancellor Donald Parsons, Jr., the newest member of the Delaware Court of Chancery, who participated in that panel discussion, as well as Judge Thompson and Judge Berle, who returned to help us once again.

Finally, kudos to Sandra Sutton-Simanski who chaired her very first program entitled “Commercial Litigators are Business Lawyers Too,” which was presented as part of the Section’s Institute for the New Business Lawyer. Unfortunately, it was presented at the same time as our recent developments program, in another hotel, but still had a large and very appreciative audience.

**National Conference for the Minority Lawyer**

As I mentioned in my last report to you, the Section asked us to put together an encore presentation of our recent developments program at the National Conference for the Minority Lawyer, which is being held in San Francisco at Hotel Nikko on June 17 and 18, 2004. Committee member Hilary Ware is acting as Program Chair and Moderator. Hilary has assembled an excellent panel consisting of George H. Brown, of Heller Ehrman in San Francisco (securities litigation); Neel Chatterjee, of Orrick Herrington in Menlo Park, California (intellectual property litigation); Linda Foy, of Howard Rice in San Francisco (labor and employment litigation); and Peter Munoz, of Reed Smith in San Francisco (bankruptcy litigation). That segment of the National Conference is scheduled for Thursday, June 17, 2004, from 10:45 a.m. to 12:15 p.m. Thanks again, Hilary.

**Annual Meeting in Atlanta**

Our Committee is presenting two programs at the Annual Meeting in Atlanta (August 5-11, 2004). Steve Poss, of Goodwin Procter in Boston, who is Chair of our Securities Litigation Subcommittee, is acting as Program Chair for a CLE program entitled “Securities Litigation in a New and More Dangerous World,” scheduled on Sunday, August 8, from 2:30 p.m. to 4:30 p.m. I am very pleased that this program is being co-sponsored by the Section’s Committee on Federal Regulation of Securities.

Bret Cohen, Chair of our Employment Litigation Subcommittee, is putting together a second CLE program entitled “Traps for the Unwary: Hot Topics in Employment Law for the Corporate Lawyer,” scheduled on Saturday, August 7, from 2:30 p.m. to 4:30 p.m. Congratulations to Bret on his recent bold move, joining Pat Clendenen at the Mintz Levin firm in Boston.

Our traditional Committee Forum is being organized by Robert Witte, the new Chair of our Appellate Litigation Subcommittee. This program, entitled “A Business Perspective: The Role of Amicus Briefing in Appellate Advocacy,” is scheduled on Monday, August 9, from 8:15 a.m. to 10:00 a.m.

In addition to our own programs, our Committee has been asked to co-sponsor two other programs at the Annual Meeting. Heidi Staudenmaier, Chair of our Publications Subcommittee, is organizing a program, sponsored by the “Business Lawyer Today” Editorial Board, entitled “How Business Lawyers SHOULD Write.” The program will be presented on Friday, August 6, from 10:30 a.m. to 12:30 p.m. (See additional information in this issue of *Network.* We also have been asked to co-sponsor a program with the Professional Conduct Committee entitled “Attorney-Client Privilege and Work Product Doctrine in the Post-Enron Era,” which is scheduled on Saturday, August 7, from 10:30 a.m. to 12:30 p.m.

Look for more details soon regarding these programs, as well as our Committee dinner and pro bono project in Atlanta. A tentative schedule of Committee meetings and programs is included immediately following my From the Chair article. For planning purposes, please note that our Committee dinner will be on Saturday night, August 7, most likely
at Azio, an excellent Italian restaurant. Before you make travel plans, please note that our Committee also will be co-sponsoring a program being organized by the National Conference of State Trial Judges entitled “What Judges Should Know About Business Valuation and Corporate Commercial Litigation.” This program, which should be of interest to all commercial litigators, as well as judges who hear business cases, will be held on Thursday, August 5, at Georgia State University, 140 Decatur Street, Atlanta, GA. I am assured that this is within walking distance of all ABA hotels. A copy of the tentative agenda for that program appears in this issue of Network, and I encourage all of you who are attending the Annual Meeting to arrive in Atlanta a day earlier and participate in this excellent program. As you can see, the panel members are all nationally-known, leading authorities in their respective fields.

Fall Committee Meeting

Our Committee leadership decided in Seattle to form an ad hoc committee to consider the location and format of our traditional stand-alone Fall Meeting. I had recommended considering a location change because decent hotels in New York City were getting hard to find during the Holiday Season, costs in New York were getting very high, and attendance was declining in the last several years.

Bill Johnston has done a great job as chair of this ad hoc committee. As a result of their efforts, and with the assistance of the ABA staff, an exciting opportunity has been presented which the ad hoc committee has recommended. Although the plans have not been finalized, the present consensus of our Committee leadership is that we should take advantage of this exciting opportunity to coordinate our meeting with the meeting of the Section’s Federal Regulation of Securities Committee which is conducted around the same time.

The Federal Regulation Committee’s meeting is already scheduled in Washington, D.C. on November 19 and 20, 2004. That meeting is held at a great new hotel, the Ritz Carlton, in the Northwest section of Washington, near Georgetown. We tentatively are planning to have our traditional Thursday night dinner in D.C. on November 18, and have our Committee’s CLE program at that same hotel on Friday morning, November 19. With plenty of advance publicity, our program is sure to draw Federal Regulation Committee members. Moreover, our members will be free to participate in the terrific Federal Regulation Committee programming that weekend and attend the Federal Regulation Committee luncheon on Friday. A block of rooms would be available at the Ritz Carlton at a great price.

As noted earlier in this report, we are already co-sponsoring a program with the Federal Regulation Committee at the Annual Meeting in Atlanta. Their Chair, Dixie Johnson, and I have been looking for other ways of working together and strengthening the relationships among our respective members; and Dixie is very supportive and enthusiastic about our two committees coordinating our Fall meetings in this way. Before we finalize these plans, if anyone has a problem with this recommendation from the ad hoc committee, please let me know quickly. I thank Bill Johnston, all the committee members and the ABA staff (especially Sarah Bolm and Diane Babal) for their efforts.

Welcome again, all you new members! As always, I welcome input, thoughts and suggestions from all Committee members. Please contact me by telephone, email or snail mail at Eckert Seamans Cherin & Mellott, LLC, 1515 Market St., Philadelphia, PA 19102, 215-851-8466 (phone); 215-851-8383 (fax); mitchell.bach@escm.com.

ABA SECTION OF BUSINESS LAW
ANNUAL MEETING
AUGUST 6-9, 2004
TENTATIVE SCHEDULE OF COMMITTEE MEETINGS AND PROGRAMS

Business and Corporate Litigation
Bankruptcy Litigation Joint Meeting
Saturday 8/7/2004 12:30PM – 2:00PM
Atlanta Hilton
Carter Room, Third Floor
Administrative Subcommittees and Subcommittee Chairs and Vice Chairs
Saturday 8/7/2004 5:00 PM – 6:00PM
Atlanta Hilton Clayton Room, Second Floor

Alternative Dispute Resolution
Sunday 8/8/2004 11:00AM – 12:00PM
Atlanta Hilton Henry Room, Second Floor

Antitrust and Trade Litigation
Sunday 8/8/2004 10:00AM – 11:00AM
Atlanta Hilton Henry Room, Second Floor

Appellate Litigation
Monday 8/9/2004 9:00AM – 11:00AM
Atlanta Hilton Forsythe Room, Second Floor

Business Courts
Monday 8/9/2004 10:00AM – 11:00AM
Atlanta Hilton Carter Room, Third Floor

Business Torts
Sunday 8/8/2004 8:00AM – 9:00AM
Atlanta Hilton Henry Room, Second Floor

Class and Derivative Actions
Monday 8/9/2004 10:00AM – 11:00AM
Atlanta Hilton Henry Room, Second Floor

Committee Forum: A Business Perspective: The Role of Amicus Briefing in Appellate Advocacy
Monday 8/9/2004 8:15AM - 10:00AM
Atlanta Hilton Monroe Room, Third Floor

Corporate Counseling & Litigation and Indemnification & Insurance Joint Meeting
Sunday 8/8/2004 10:00AM – 11:30AM
Atlanta Hilton Grand Salon A, Second Floor

Business and Corporate Litigation
Criminal and Enforcement Litigation, Financial Institution Litigation and Securities Litigation Joint Meeting
Monday 8/9/2004 10:30AM – 11:30AM
Atlanta Hilton Madison Room, Third Floor

Employment Litigation
Monday 8/9/2004 11:00AM – 12:00PM
Atlanta Hilton Henry Room, Second Floor

Environmental Litigation
Sunday 8/8/2004 11:00AM - 12:00PM
Atlanta Hilton Forsythe Room, Second Floor

ERISA and Pension Litigation
Monday 8/9/2004 11:00AM - 12:00PM
Atlanta Hilton Forsythe Room, Second Floor

Intellectual Property Litigation
Sunday 8/8/2004 2:00PM - 3:00PM Atlanta Hilton Henry Room, Second Floor

Partnerships and Alternative Business Entities
Sunday 8/8/2004 1:00PM - 2:00PM Atlanta Hilton Henry Room, Second Floor

Program: Pro Bono
Sunday 8/8/2004 10:00AM - 11:00AM
Atlanta Hilton Forsythe Room, Second Floor

Program: Program: Securities Litigation in a New and More Dangerous World
Sunday 8/8/2004 2:30PM - 4:30PM Atlanta Hilton DeKalb/Paulding Rooms, Second Floor

Program: Program: Traps for the Unwary: Hot Topics in Employment Law for the Corporate Lawyer
Saturday 8/7/2004 2:30PM - 4:30PM Atlanta Hilton Newton/Rockdale Rooms, Second Floor
BUSINESS LAW TODAY SPONSORS WRITING PROGRAM AT ABA ANNUAL MEETING IN ATLANTA

The "Business Law Today" Editorial Board will sponsor a program titled "How Business Lawyers SHOULD Write" at the Annual Meeting in Atlanta on Friday, August 6, from 10:30 a.m. to 12:30 p.m. The program will be held in the Paulding Room, Second Floor, of the Atlanta Hilton (headquarters of the Business Law Section). The Business & Corporate Litigation Committee is co-sponsoring the program, along with the Business Law Education Committee, the Young Lawyers Division Business Law Committee, and SCRIBES - The American Society of Writers on Legal Subjects.

The program will feature several nationally reknowned writing instructors and transactional attorneys. The panelists will discuss the do's and don'ts of careful document drafting skills, including "tips from the trenches" by the practicing attorney panelists. This program is a MUST for all business lawyers who want to improve or further hone their document drafting skills.

For more information on the program, contact BLT Editor-in-Chief Heidi McNeil Staudenmaier, who is chairing the program (602-382-6366 or hstaudenmaier@swlaw.com).

FEATURE ARTICLES

RECENT DELAWARE SUPREME COURT DECISION CLARIFIES DEFINITION OF INDEPENDENCE OF DIRECTORS

by Francis G.X. Pileggi and Bernard G. Conaway

The independence of a member of the board of directors of a company has always been an important issue under Delaware law, but the issue has gained increasing national importance based on the recent requirements for New York Stock Exchange and Nasdaq-listed companies, as well as the recent Sarbanes-Oxley Act. In addition to the fact that most NYSE companies are incorporated in Delaware, the issue is critical for purposes of filing a derivative action against a corporation because as a practical matter, if a majority of the board is deemed independent, and presuit demand is required, claims against a corporation may never go to trial.

In Beam v. Stewart, 845 A.2d 1040 (Del. 2004), the Delaware Supreme Court on March 31,
2004 analyzed whether presuit demand needed to have been made on the board of directors of Martha Stewart Living Omnimedia, Inc., or whether a majority of the members of that board were independent, and therefore, requiring a presuit demand prior to filing a derivative action against the company.

The sole issue on appeal before the Delaware Supreme Court was the Chancery Court’s decision to dismiss the plaintiff’s derivative claim under CHANCERY COURT RULE 23.1.¹ That Rule requires, among other things, that a plaintiff asserting a derivative complaint make a presuit demand upon the corporation. This demand requirement, however, is excused if the plaintiff properly alleges that such demand would be futile. Futility occurs when a director is unable to act objectively relative to a presuit demand because the director is not independent. To show a lack of independence, the complaint must allege facts that create a reasonable doubt that a director is so beholden to an interested director that the director’s discretion would be sterilized.²

In affirming the Chancery Court, the Delaware Supreme Court, upon de novo review, addressed the issue of the “quantum of doubt about a director’s independence that is ‘reasonable’ in order to excuse a presuit demand.” To complete this analysis the Supreme Court reviewed the plaintiff’s demand allegations relative to each MSO director.

The case stemmed from Martha Stewart’s much publicized trouble with ImClone. Martha Stewart, at all relevant times, was MSO’s chairman and CEO. Stewart effectively controlled 94% of the shareholder votes. In her complaint, the plaintiff alleged, among other things, that Martha Stewart breached her fiduciary duties of loyalty and due care to MSO by illegally selling ImClone stock and that she further aggravated that problem by mishandling the ensuing media attention that followed. All of this, according to Beam, jeopardized MSO’s financial future. The plaintiff named all six MSO directors, including Stewart, as co-defendants. The plaintiff alleged, as to those directors, that each lacked independence from Stewart such that they were incapable of making an objective business decision regarding a corporate claim against Stewart for breach of her fiduciary duties arising out of the ImClone debacle. To this end, the plaintiff asserted that presuit demand was, therefore, futile.

To prevail, the plaintiff was obligated to plead facts sufficient to give rise to a reasonable doubt that at least one-half of the MSO board lacked independence from Stewart.³ Because two directors, including Stewart herself, were admittedly not independent for presuit demand purposes, all the plaintiff needed to do to carry their burden was to establish that one other director was likewise disabled. To that end, the plaintiff alleged that each of the other directors had a longstanding personal and/or business relationship with Stewart. The plaintiff asserted that these relationships gave rise to a reasonable doubt as to their independence from Stewart. The plaintiff supported the allegations with a detailed background report on each director’s longstanding, personal relationship with Stewart including attending social events and weddings as well as business dealings.

The Delaware Supreme Court acknowledged that in some cases a personal or business relationship between directors might adequately support a reasonable doubt analysis sufficient to excuse pre-suit demand. The court noted, however, that “to render [a director] unable to consider [a presuit] demand, a relationship [between the directors] must be of a bias-producing nature. Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director’s independence.” Despite the fact that Stewart controlled 94% of the voting, and presumably controlled who served on the board as a consequence, and despite the longstanding personal relationships with Stewart, the Delaware Supreme Court concluded that the plaintiff nonetheless failed to overcome the presumption supporting the directors’ judgment. (See generally, exemptions from recent stock exchange rules requiring independent boards if more than 50% of shares are controlled by one person.)
The *Beam* opinion makes clear that to excuse demand the plaintiff faces several significant hurdles. First, the case law presumes that the directors were “faithful to their fiduciary duties” to the corporation. 4. Second, the plaintiff bears the burden to overcome that presumption. 5. Third, in most derivative actions the plaintiff is not entitled to discovery to support their derivative claim. 6. In *dicta*, the Delaware Supreme Court went on to note that the plaintiff made their task more difficult, and presumably less likely to succeed, because “tools at hand” were not used to obtain more details prior to filing suit. The court pointed out that, had the plaintiff first instituted an action under 8 Del. C. § 220 to seek review of the corporate books and records, the plaintiff might have uncovered useful information to support their derivative claim.

In the last part of the decision the court addressed the recent Delaware Court of Chancery opinion of *In Re: Oracle Corp. Derivative Litigation*, 824 A.2d 917 (Del. Ch. 2003). In *Oracle*, an exhaustive analysis concluded that certain directors were not independent. See also, F.G.X. Pileggi, “Recent Delaware Decisions Clarify Definition of ‘Independent Director,’” Delaware Corporate Litigation Reporter (August 4, 2003) (discussing details of the *Oracle* decision).

A cursory reading of the *Oracle* decision, which included an exhaustive analysis of the factors involving the independence of a director, and the more recent *Beam* decision by the Delaware Supreme Court, could leave one with a question about how to reconcile the conclusions of the two decisions on the issue of independence. The Delaware Supreme Court addresses that issue by clearly stating at page 23 that: “We need not decide whether the substantive standard of independence in an SLC (Special Litigation Committee) case (such as *Oracle*), differs from that in a presuit demand case.” Nonetheless, the Delaware Supreme Court went on to add that unlike the demand-excusals context (in a derivative case involving Rule 23.1), where the board is presumed to be independent, the SLC “has the burden of establishing its own independence by a yardstick that must be ‘like Caesar’s wife-above reproach.’ Moreover, unlike the presuit demand context, the SLC analysis contemplates not only a shift in the burden of persuasion, but also the availability of discovery into various issues, including independence.” Id. The court noted that this procedural distinction relating to the completely different burdens of proof and the availability of discovery may be outcome determinative. The court also distinguished the *Oracle* decision and the case before it, based on the specific facts of the *Oracle* case.

The importance of the *Oracle* and the *Beam* decisions, each of which includes thorough analysis and great detail, does not lend itself to a glib summary or comparison. For purposes of the limited space available here, suffice it to say that the specific factual analysis that applies to an inquiry into the independence of a board member, and the procedural posture of such an analysis, will often be the prevailing considerations regarding the ability to present substantive derivative claims for judicial review.

Francis G.X. Pileggi is a partner in the Wilmington, Delaware office of Fox Rothschild LLP and Bernard George Conaway is a special counsel in that office of the firm. The e-mail address for Francis is: fpileggi@foxrothschild.com and the e-mail address for Bernard is:bconaway@foxrothschild.com.

1. The Chancery Court decision dismissed several of the plaintiff’s claims. The only issue upon which the plaintiff’s appeal, however, was the Chancery Court’s decision to dismiss the derivative claim.


5. *Levine v. Smith*, 591 A.2d 199, 205-06 (Del.1991); *Grobow v. Perot*, 539 A.2d 180, 187-89 (Del.1988). To excuse presuit demand in this case, the plaintiff had the burden to plead particularized facts that create a
reasonable doubt sufficient to rebut the presumption that the directors were independent of the defendant Martha Stewart.


KENTUCKY SUPREME COURT ADOPTS SEPARABILITY DOCTRINE FOR AGREEMENTS TO ARBITRATE

by Douglas C. Ballantine & Steven C. Hall

In a unanimous decision, the Kentucky Supreme Court has decided that an arbitrator, rather than a court, should decide a claim that a party was fraudulently induced to enter into a contract containing an arbitration clause. The Court held that the savings clause contained in the Kentucky Arbitration Act applied only when an allegation of fraud went to the making of the arbitration agreement itself, rather than the underlying contract generally. In this decision, Louisville Peterbilt v. Cox, _____ S.W.3d ____ (Ky. 2004), the Kentucky Supreme Court adopted the separability doctrine of Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 394 (1967), thus enhancing the certainty and enforceability of arbitration agreements.

Under federal and state law, subject to quite narrow exceptions, agreements to arbitrate disputes that may arise out of a particular agreement are enforceable. These policies are set forth in the Federal Arbitration Act as well as the Kentucky Arbitration Act. The Federal Arbitration Act directs that all arbitration agreements shall be enforced in contracts where those contracts involve interstate commerce. The Kentucky Arbitration Act applies to those contracts that do not involve interstate commerce.

In Louisville Peterbilt, the plaintiff sued a truck dealership following the sale of a used truck, alleging that the salesman told him that the truck had a full engine warranty, when actually the warranty was limited to major engine components. Thus, the plaintiff claimed that he had been fraudulently induced to buy the truck. The dealership denied that the salesman had misrepresented the extent of the warranty. Kentucky's Supreme Court held that the claim of fraud must be decided by arbitration.

Before Louisville Peterbilt, the enforceability of arbitration clauses within Kentucky intrastate contracts, that is, those governed only by the Kentucky Arbitration Act, was uncertain. The Kentucky Arbitration Act (itself an enactment of the Uniform Arbitration Act (1956)) provides that written agreements to submit a dispute to arbitration shall be valid, “save upon such grounds as exist at law or equity for the revocation of any contract.” KRS § 417.050; UAA (1956) § 1. This language is commonly referred to as the “savings clause.”

In 2001, the Kentucky Court of Appeals held that an arbitration agreement may be avoided simply by alleging a fraudulent inducement to enter into the contract. Marks v. Bean, 57 S.W.3d 303 (Ky. App. 2001). The vast majority of states to consider the savings clause have held that arbitration may be avoided only if the alleged fraud relates specifically to the arbitration agreement, as opposed to the contract as a whole. The Marks v. Bean decision held the opposite. In that case, the Court considered whether the parties were obligated to arbitrate in a dispute arising out of a sale of a house. The purchasers, seeking to avoid the arbitration clause, asserted that the sellers had failed to disclose and in so doing had concealed problems with the brick veneer of the house. On the basis of that concealment, the purchasers alleged that they had been fraudulently induced to enter into the contract. The purchasers, seeking to avoid the arbitration clause, asserted that the sellers had failed to disclose and in so doing had concealed problems with the brick veneer of the house. On the basis of that concealment, the purchasers alleged that they had been fraudulently induced to enter into the contract. They were successful in this argument notwithstanding the fact that the rule in nearly all other states that have examined the question, and the rule under the Federal Arbitration Act, is that the language “save upon such grounds as exist at law for the revocation of any contract” must relate specifically to the agreement to arbitrate, and not to the contract as a whole. For example, the United States Supreme Court, in Prima Paint Corp. v. Flood & Conklin Mfging. Co., 388 U.S. 394 (1967), the Court interpreted the
equivalent language in the Federal Arbitration Act using what has been called the “separability doctrine.” Under this doctrine, an otherwise valid arbitration clause is separated from the contract within which it is contained. Thus, the arbitrator can determine whether the contract as a whole is valid. In essence, the arbitration clause stands separate and apart from the agreement to which it related. It is this separability doctrine of *Prima Paint* that was rejected by the Kentucky Court of Appeals in *Marks v. Bean*.

The Kentucky Supreme Court expressly overruled *Marks v. Bean* in *Louisville Peterbilt*. It observed that *Marks v. Bean* allowed “any party seeking to avoid the agreement to arbitrate [to] simply plead fraudulent inducement in the underlying contract ... in order to insure that a court and not an arbitrator heard its claim.” The Court’s ruling recognized that an arbitration agreement would be effectively stripped of meaning if it were that easy to avoid arbitration. It also recognized that arbitrators are capable of fairly deciding issues such as fraudulent inducement.

With this decision, an even smaller minority of the states do not apply the separability doctrine to their arbitration acts. See Uniform Arbitration Act (2000), § 6 Comment 4.

By holding that the arbitration agreement is separate from the contract as a whole in such disputes, the Kentucky Supreme Court endorsed the expeditious and inexpensive resolution of disputes that often arise from contracts that contain valid agreements to arbitrate.

**Douglas C. Ballantine** and **Steven C. Hall** are partners at Ogden Newell & Welch PLLC in Louisville, Kentucky. The authors were counsel to Louisville Peterbilt in this action.

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**SUBCOMMITTEE REPORTS**

**ALTERNATIVE DISPUTE RESOLUTION SUBCOMMITTEE**

*by Abigail Pessen*

The Alternative Dispute Resolution (“ADR”) Subcommittee got a boost at the Seattle meeting when Subcommittee Vice Chancellor Donald Parsons, Jr. showcased the Delaware Court of Chancery's new mediation initiative at our "Annual Review of Developments in Business and Corporate Litigation" program. The initiative offers mediation to resolve any complex business dispute in the land, at any stage. Details are available at the Court’s website.

The ADR Subcommittee had a lively meeting. A lawyer from France offered us some interesting insights into why mediation is not as popular in France as it is in the U.S. For one thing, he said, the French love to fight and stick to their principles. Another reason is that litigation in France is not as costly and draining as it is here, and therefore not so dire an alternative to settling. That said, mediation is on the rise in France, particularly to resolve family and “quality of life” disputes.

The ADR Subcommittee desperately needs new members. Mediation and arbitration play important roles in business and corporate litigation, and the Subcommittee is a natural place to discuss and improve business ADR. We would like to present programs on business ADR topics that would be helpful and interesting to Committee members, but we need a stronger base to work from. If you are interested in joining the Subcommittee, please send an email to Abigail@pessenadr.com.
BANKRUPTCY LITIGATION SUBCOMMITTEE
by William K. Zewadski

The Bankruptcy Litigation Subcommittee again met jointly with the Creditors’ Rights Subcommittee at the Spring meeting in Seattle. A full room of attendees heard Chief Judge Phil Brandt of Tacoma and Seattle describe the intricacies of practice and procedure before the Ninth Circuit Bankruptcy Appellate Panel, the busiest of all such tribunals. Bankruptcy Judge Rodney May of Tampa gave an enlightening discussion of the application of the Daubert principles to expert testimony in bankruptcy litigation, and Albert Manwaring of Wilmington, Delaware described important steps in the sale of intellectual property in the Napster bankruptcy.

Bill Zewadski gave the Bankruptcy Litigation Update as part of the Committee's "Annual Review of Developments in Business and Corporate Litigation" program, with a total of over 900 pages of materials for that program being included in the CD-ROM provided to all spring meeting attendees. Most attendees welcomed the convenience of simply being able to return to the office with a CD-ROM instead of the customary ton of program handouts in hardcopy. Materials from the Spring meeting generally (an amazing 159Mb of great stuff!) are available on the ABA website for business section members to access at http://www.abanet.org/buslaw/library/spr04.shtml.

A similar, but shorter, update of bankruptcy developments by Bill Zewadski was also part of an innovative ABA teleconference sponsored by the Committee and the ABA on March 24, with listeners from all over the country calling in to hear the recent developments overview.

Our next joint meeting will be held in Atlanta at the ABA Annual Meeting on August 5-11, 2004, and it is hoped all will look for the time in planning your meeting agenda. At that time several topics of interest and recent developments will be discussed. The next committee meeting thereafter will be at the National Conference of Bankruptcy Judges in Nashville, Tennessee, October 10-13, 2004. The usual Business Section stand alone meeting is presently not set, so you should look for future announcements about its time and place.

Joining the Bankruptcy Litigation Subcommittee is as simple as being a member of the ABA and emailing to co-chair, William Zewadski, Tampa, your interest in joining. Send your email to z@trenam.com.

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

Once again the Corporate Counseling & Litigation Subcommittee met jointly with the Indemnification and Insurance Subcommittee during the Spring meeting in Seattle. We were pleased to have in attendance Vice Chancellor Donald Parsons, Jr., the newest member of the Delaware Court of Chancery.

Members of the Subcommittee are looking forward to the Annual Meeting, when we will again conduct a joint meeting. The meeting is scheduled for Sunday, August 8, 2004, at 10:30 a.m. We will be discussing the most recent amendments to the Delaware General Corporation Law, as well as court rulings and developments of significance in the corporate and insurance fields. As always, our meetings are open to newcomers and provide a great opportunity to meet with fellow corporate practitioners.

INDEMNIFICATION AND INSURANCE SUBCOMMITTEE
by William D. Johnston

During the recent Spring Meeting in Seattle, members of the Indemnification and Insurance Subcommittee again met with members of the Corporate Counseling and Litigation Subcommittee.
As before, we discussed case law developments in connection with director liability, advancement, and indemnification. We also discussed market conditions in connection with director and officer liability insurance. We were honored that the newest member of the Delaware Court of Chancery, Vice Chancellor Donald F. Parsons, Jr., attended the joint meeting.

The Indemnification and Insurance Subcommittee will next meet during the Annual Meeting in Atlanta. New members (or visitors!) are always welcome. Vice Chair Janet McFadden and I hope to see you there!

MEMBERSHIP SUBCOMMITTEE
by Honorable Elizabeth S. Stong

The Membership Subcommittee works to increase the opportunities for interested members of the Business Law Section to become active in the work of the Business and Corporate Litigation Committee. Many new members were introduced to the Committee through activities at the Spring Meeting in Seattle, including the Committee Round-Up and First-Timer's Reception, where the Committee was represented by Committee Chair Mitchell Bach and Membership Subcommittee Chair Elizabeth Stong, and the Committee's outstanding CLE programming. New members are welcome to join the Committee, and current members are encouraged to become active in the programming, writing, and public service projects undertaken by the Committee. Questions? Ideas? Contact Membership Subcommittee Chair Elizabeth Stong at elizabeth_stong@nyeb.uscourts.gov.

PARTNERSHIPS AND ALTERNATIVE BUSINESS ENTITIES SUBCOMMITTEE
by Vernon Proctor

The Partnerships and Alternative Business Entities Subcommittee had a fruitful and stimulating session in Seattle at the Spring Meeting. The meeting was attended by a record number (11) of interested attorneys. The attendees discussed recent developments in Delaware alternate entity case law and legislation, including new statutory provisions that permit limited partnerships and limited liability companies to eliminate fiduciary duties by contract, while preserving the contractual duty of good faith and fair dealing. At the ABA Annual Meeting, Vernon Proctor will speak on a program panel sponsored by the Partnerships and Unincorporated Business Organizations Committee of the Section, tentatively titled "At the Courthouse Door," regarding some of the analytical and procedural respects in which courts approach alternate entity litigation differently from corporate litigation.

PUBLICATIONS SUBCOMMITTEE
by Heidi M. Staudenmaier

The 2004 "Annual Review of Developments in Business and Corporate Litigation" program materials were distributed in CD-ROM form at the Spring Meeting in connection with the ever popular annual review program. The 2004 publication includes 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 60 authors contributed to the effort.

The complete program materials are slated to be published as the 2004 Edition of the Annual Review of Developments in Business and Corporate Litigation and available for order through the ABA. KUDOs and thanks to the authors for their efforts.
ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION

The 2004 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 2004 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.

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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.
WHAT JUDGES SHOULD KNOW ABOUT BUSINESS VALUATION AND CORPORATE AND COMMERCIAL LITIGATION

National Conference of State Trial Judges
National Judicial College

Committee on Business and Corporate Litigation
ABA Section of Business Law

Thursday, August 5, 2004
2004 Annual Meeting
Atlanta, GA

Location: Georgia State University
The Urban Life Building
140 Decatur Street
Atlanta, GA (walking distance from ABA hotels)

Date: Thursday, August 5, 2004

9:00 - 9:10 Introduction

9:10 - 10:40 Business Valuation Disputes
Chancellor William B. Chandler - Delaware Chancery Court
George Hawkins - Banister Financial, Inc.

(1) What Judges Need to Know from Business Valuation Experts

10:40 - 11:00 Break

11:00 - 12:00 Current Trends in Corporate Governance for Judges
Justice Myron Steele - Delaware Supreme Court
Frank Balotti - Richards, Layton & Finger Wilmington, DE
Charles Elson - Weinberg Center for Corporate Governance

12:00 - 1:00 Lunch Presentation on Total Search
Lexis Nexis

1:00 - 2:30 Class Actions
Nick Pace, Rand Institute for Civil Justice, Santa Monica, CA
Hon. Ben Tennille - North Carolina Business Court

**Judicial Management of Class Actions**

Everette Doffermyre
Doffermyre, Shields, Canfield, Knowles & Devine, LLC
Atlanta, Georgia

**Plaintiff’s Perspective**

Tom Byrne
Sutherland Asbill & Brennan
Atlanta, Georgia

**Defendant’s Perspective**

2:30 - 2:45  Break

2:45 - 4:00  Managing Electronic Discovery
Greg Joseph – Co-Chairman, ABA Task Force on Electronic Discovery
Gregory P. Joseph Law Offices, LLC
New York, NY

(b)  The New Proposed ABA Guidelines

Gregory P. Schaffer, Director
Cybercrime Prevention & Response
Pricewaterhouse Coopers, LLP

(b)  Technical Issues in Electronic Discovery in Judge’s Terms

Lexis Nexis Reception

This seminar is designed to provide case management tools for judges and lawyers dealing with business valuation issues, digital discovery disputes and cutting edge corporate and class action litigation. The program focus is directed to emerging issues and complex litigation problems facing the judiciary today. The topics will be addressed by panels of judges, lawyers and experts, who will provide guidance on how novel questions in these developing areas of the law may be resolved. Attention will be given to procedures and approaches for resolving costly digital discovery disputes, resolving conflicting testimony of business valuation experts, addressing corporate governance issues after Enron, and dealing with the rising number of state class actions.
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Application for Membership

☐ I, ________________________________, hereby apply for membership in the ABA Section of Business Law (formerly Section of Corporation, Banking and Business Law) and enclose $55.00 as my annual membership dues for the year 2004-2005. I understand that Section dues include $20 for a basic subscription to The Business Lawyer for 1 year and $14 for a basic subscription to Business Law Today for 1 year; these subscription charges are not deductible from the dues, and additional subscriptions are not available at these rates. Membership in the American Bar Association is a prerequisite to enrollment in the Section of Business Law.

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