FROM THE CHAIR

by Mitchell L. Bach

Annual Meeting in Atlanta

I have to admit, part of me was dreading the August Annual Meeting in steamy Atlanta. My family absolutely refused to join me, remembering all too well how hot and uncomfortable it was several years ago. So I braved the cruel journey alone.

What a pleasant surprise! Shortly after my arrival, a cold front passed through the Atlanta area, and we were blessed with unusually cool, beautiful summer weather. We had great Committee attendance; and our programs were excellent, well-attended and very well-received. Most important for me, this meeting afforded an occasion to reconnect with many old friends, to make some new ones and to strengthen some of my strongest and most treasured professional relationships.

The backbone of our Committee is found in our twenty-seven subcommittees and our subcommittee leadership. I first became involved in our Committee by crashing the leadership meeting of subcommittee chairs, many Annual Meetings ago, in New York City. I left that meeting with an opportunity to co-chair the fledgling Intellectual Property Litigation Subcommittee. I also look back at that meeting with the realization and appreciation that I then became part of a wonderful network of extraordinary attorneys around the country.

Shortly before the recent Annual Meeting in Atlanta, the Section’s leaders announced a new
policy regarding "Term Limits for Chairs of Subcommittees, Task Forces and Other Entities within Certain Large Committees of the ABA Section of Business Law." The policy applies only to committees that have more than 600 members; and that includes us, because we have grown to twice that size. The new rule is that subcommittee and task force chairs may not serve more than three years. However, no changes have to be made until the Annual Meeting in 2005.

So, aside from the weather, I had faced the Atlanta meeting with some apprehension about the prospect of discussing this new rule with our subcommittee and task force leaders. Some of these people already have held their positions for more than three years. Although I recognize the importance and wisdom of providing for leadership succession and opportunities for "new blood," I am admittedly ambivalent about having to implement and enforce the new Section policy.

There is always some uncertainty involved with these kind of changes. Our existing leaders are primarily responsible for our Committee's success. How will these changes affect the Committee's future? Will the existing leaders remain involved in the Committee? How will these changes affect long-term professional and personal relationships which have evolved over the years?

I left Atlanta with high degree of optimism regarding these issues. Existing chairs reassured me of their desire to remain involved and to assist me in finding new leaders. Plans already are being developed for leadership succession in many of our subcommittees. The future of our Committee looks very bright to me; and, I believe the new Section policy will make our Committee better and even more successful.

One thing is for certain. There will be many openings in leadership positions. There is no better way for you to become active in our Committee. If you are already a member of one or more subcommittees, get involved and let me or the existing leaders know about your interest. If you are not a subcommittee member, take a look at the list and join one. It is very easy; just go to the Section website http://www.abanet.org/buslaw/committees — and join a subcommittee instantly with a few clicks of your mouse.

Almost everything our Committee does depends on our subcommittees. Our CLE programs are planned and organized by subcommittee leaders. Our Recent Developments program at the Spring Meeting and the remarkable publication, *Annual Review of Developments in Business and Corporate Litigation* (the 2004 edition was printed just before the Annual Meeting in Atlanta, and was recognized by the Section as one of its premier publications and a best-seller), are entirely dependent on the hard work of more than 70 authors in all of our subcommittees. I believe that we have an active subcommittee in virtually every substantive aspect of commercial litigation. If you have any ideas about new subcommittees or want to get involved in an existing subcommittee, please let us know.

**Annual Meeting Pictures**

The following are some photographs from the Committee's administrative meeting at the ABA Annual Meeting. Thank you Bill Zewadski (Co-Chair of the Bankruptcy Litigation Subcommittee) for the great pictures.
Fall Meeting in Washington, D.C.

As I announced previously, our traditional stand-alone Fall Meeting will be held in Washington, D.C., on November 18 and 19, 2004. Although the plans have not been finalized, we have decided 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 scheduled for November 19 and 20, 2004. We shall be at the same 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 to conduct 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 members. Moreover, our members will be free to participate in the terrific Federal Regulation programming that weekend and attend the Federal Regulation luncheon on Friday. A block of rooms will be available at the Ritz Carlton at a great price. Watch the Committee list-serve for announcements about all Fall Meeting events.

Welcome again, all you new members! As always, I invite 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); mbach@eckertseamans.com.

FEATURE ARTICLE

BALANCED PROTECTION OF DIRECTORS AND OFFICERS: NOW MORE IMPORTANT THAN EVER

by William D. Johnston and Janet R. McFadden

If anything became crystal clear during the joint meeting in Atlanta of the Indemnification and Insurance Subcommittee and the Corporate Counseling and Litigation Subcommittee, it was that the "three-legged stool" of director protection—and, more broadly, the balanced protection of directors and officers—is now more important than ever, if corporations are to attract and retain top-quality persons as directors and officers while at the same time guarding the interests of the corporation and its shareholders.

The three "legs" of the "stool" take the shape of (i) director exculpation from liability, to the extent permitted by 8 Del. C. § 102(b)(7), (ii) advance and end-of-the-matter indemnification of directors and officers, and (iii) adequate director and officer liability insurance coverage, where indemnification cannot or will not be provided.
With regard to director exculpation, discussion during the joint meeting centered on the very real prospect of a director being held personally liable for damages resulting from conduct falling outside the scope of Section 102(b)(7) exculpation. Thus, we noted the "conscious inaction" standard articulated by the Court of Chancery in In re The Walt Disney Co. Deriv. Litig., Cons. C.A. No. 15452, 825 A.2d 275, 2003 Del. Ch. LEXIS 52 (Del. Ch. May 23, 2003) (Chandler, C.), and the Delaware Supreme Court's apparent endorsement of that standard in Emerald Partners v. Berlin, No. 295-2003, 2003 Del. LEXIS 639 (Del. Dec. 23, 2003) (Berger, J.)(ORDER). We also noted the recent post-trial decision of Delaware Supreme Court Justice Jack B. Jacobs (in a case he tried as a Vice Chancellor prior to appointment to the Supreme Court) in which the Court analyzed the joint and several liability (or not) of each director, after concluding that a merger was the result of unfair dealing. In re Emerging Communications, Inc. Shareholders Litig., Cons. C.A. No. 16415, 2004 Del. Ch. LEXIS 70 at *103, *137-55 (Del. Ch. May 3, 2004, revised May 12, 2004) (Jacobs, J.).

In connection with advancement and indemnification, we noted that most advancement cases continue to be addressed through cross-motions for partial summary judgment directed to the issue of entitlement to advancement, holding in abeyance the issue of the "reasonableness" of the amounts to be advanced. See, e.g., Weaver v. ZeniMax Media, Inc., C.A. No. 20439-NC, 2004 Del. Ch. LEXIS 10 (Del. Ch. Jan. 30, 2004) (Noble, V.C.) (on cross-motions for summary judgment, finding entitlement to partial advancement and proportionate fees-on-fees, and finding entitlement to fees-on-fees unless precluded by the bylaws or other governing documents); Senior Tour Players 207 Management Co. LLC v. Golftown 207 Holding Co. LLC, C.A. No. 20116, 2004 Del. Ch. LEXIS 22 (Del. Ch. Mar. 10, 2004) (Lamb, V.C.) (on plaintiff's summary judgment motion, Court finds entitlement to advancement pursuant to the terms of the LLC operating agreement and further finds entitlement to fees-on-fees). But we also noted one case which the Court of Chancery determined should go to trial on the basis of an "unclean hands" defense. Tafeen v. Homestore, Inc., C.A. No. 023-N, 2004 Del. Ch. LEXIS 38 (Del. Ch. Mar. 16, 2004, revised Mar. 22, 2004) (Chandler, C.) (on cross-motions for summary judgment, Court concludes there are genuine issues of material fact regarding the defendant company's "unclean hands" defense grounded in the assertion that the plaintiff former officer sheltered assets prior to tendering an undertaking or otherwise promising to repay amounts advanced). Also in connection with advancement, we noted a recent case in which the Court of Chancery found a motion to expedite the case "superfluous" because of the inherently "summary" nature of an advancement determination proceeding. Brown v. Rite-Aid Corp., C.A. No. 094-N, 2004 Del. Ch. LEXIS 29 (Del. Ch. Mar. 29, 2004) (Chandler, C.) (denying advancement claimant's motion to expedite in the absence of unique circumstances such as the insolvency of the putative indemnitee or the inability to retain counsel without advancement).

On the subject of indemnification, we observed the recent post-trial dismissal of an indemnification claim based upon the 3-year statute of limitations for asserting such a claim. Scharf v. Edgcomb Corp., C.A. No. 15224-NC, 2004 Del. Ch. LEXIS 34 (Del. Ch. Mar. 24, 2004) (Noble, V.C.). We also noted a recent decision which, in the corporate dissolution context, characterized indemnification claims as "present contingent contractual claims" for which reasonable provision must be made. In re Delta Holdings, Inc., C.A. No. 18604, 2004 Del. Ch. LEXIS 104 (Del. Ch. July 26, 2004) (Chandler, C.).

With regard to directors and officers liability insurance, it was reported that the "market" continues to harden with lower limits, higher deductibles, greater frequency of insurers including "imputation" and "non-severability" clauses, and enhanced underwriting scrutiny. At the same time it was reported, on the better-news side, that there still are some new, smaller carriers writing insurance for small to mid-cap companies which present "clean risk."

Directors and officers liability insurance case law updates included numerous rescission cases.

* * *

All of which is to re-enforce the continuing, critical importance, in this post-Enron environment, of the "three-legged stool.'


Bill Johnston practices in the Wilmington, Delaware office of Young Conaway Stargatt & Taylor, LLP and serves as chair of the Indemnification and Insurance Subcommittee. Janet McFadden practices in the Washington, D.C. office of Drinker, Biddle & Reath, LLP and serves as vice chair of the Subcommittee.

SUBCOMMITTEE REPORTS

APPELLATE SUBCOMMITTEE

by Robert Witte

The Appellate Subcommittee focuses on appellate issues as they pertain to business clients and in-house counsel. As opposed to focusing on issues of appellate procedure (of interest to appellate practitioners), we identify substantive and procedural issues of particular interest to businesses—both clients and in-house attorneys.

At the ABA Annual Meeting in Atlanta, we presented a panel discussion entitled A Business Perspective: The Role of Amicus Briefing in Appellate Advocacy. The panelists included Michael Briggs, Chief Legal Officer, America's Community Bankers; Justice Craig Enoch, Texas Supreme Court (Retired), Winstead Sechrest & Minick P.C.; Justice Carol W. Hunstein, Georgia Supreme Court; Robert Kopp, Director, Appellate Staff, Civil Division, U.S. Department of Justice; and George J. Walsh III, Partner in Charge, New York, Thompson Hine. The panel provided an insightful discussion of when and how a business client should consider an amicus filing.

In the future, we hope to present additional CLEs and panels to the Section, by which we will introduce the area of appellate litigation to business lawyers. Potential areas to address might include, but are not limited to: the impact of high-stakes/highly public appeals on business interests; the cost-benefit analysis of appealing a case (future case law, etc); the value of hiring specialized appellate practitioners to handle your appeal; and knowing when not to appeal.
BANKRUPTCY LITIGATION SUBCOMMITTEE

by William K. Zewadski

The Bankruptcy Litigation Subcommittee again met jointly with the Creditors’ Rights Subcommittee at the ABA Annual Meeting. A full room of attendees to our first subcommittee lunch heard an excellent panel, chaired by the Section’s Creditors’ Rights Committee Vice Chair Carolyn P. Richter of Atlanta, speak on securitization issues in loans and leases. In addition, Miami attorney James H. Fierberg gave an update on the amazing and continuing saga of the Lawrence offshore-planning contempt ruling and the recent two orders entered in that case by the district court and bankruptcy judge at the end of June 2004, just weeks before the program.

Our next meeting will be in Nashville for the National Conference of Bankruptcy Judges, where the program will include Bankruptcy Judge Michael Williamson who will speak on evidence issues in bankruptcy litigation. Our meeting will occur at October 11, 2004, at 7:45 AM.

We put on three programs a year, with the following ones at the Spring Meeting and at the ABA Annual Meeting. The subcommittee may also participate in the Washington DC program of the Corporate Litigation meeting to be held November 18 and 19, 2004, replacing the meeting held in recent years in December in New York City.

Joining the Bankruptcy Litigation subcommittee is as simple as being a member of the ABA and emailing to co-chair, William Zewadski, Tampa, of your interest in joining. Send your email to z@trenam.com. Please think of other attorneys you know who might be interested in joining and let them know how easy it is to do so.

CORPORATE COUNSELING AND LITIGATION SUBCOMMITTEE

by Peter J. Walsh, Jr.

The Corporate Counseling & Litigation Subcommittee met jointly once again with the Indemnification and Insurance Subcommittee at the ABA Annual Meeting. We enjoyed a substantive and enlightening discussion of recent developments bearing upon director indemnification and insurance, including most notably several recent Delaware cases addressing the advancement of fees and expenses to corporate officers and directors. We also received a report on trends in the directors and officers liability insurance market. In addition, we discussed the subcommittee’s role in developing and promoting a corporate governance program for the Committee’s Fall Meeting in Washington, D.C. That meeting should prove to be exceedingly informative and well-attended, as the Committee meeting will coincide with the meeting of the Federal Regulation Committee Section.

We are pleased to announce that effective immediately the new Chair of the Corporate Counseling & Litigation Subcommittee will be Anne C. Foster of Richards, Layton & Finger. The new Vice Chair will be Kurt Heyman of The Bayard Firm. Congratulations, and best of luck. We look forward to seeing you in Washington.

INDEMNIFICATION AND INSURANCE SUBCOMMITTEE

by William D. Johnston

During the Annual Meeting in Atlanta, members of the Indemnification and Insurance Subcommittee met jointly with members of the Corporate Counseling and Litigation Subcommittee. We discussed case law developments and (in connection with directors and officers liability insurance) "market" conditions. The discussion is summarized elsewhere in this issue of Network. We were delighted that The Honorable Alvin W.
Thompson, Vice Chair of the Business Law Section, was able to attend and participate in the meeting.

We will next meet as a subcommittee during the Section’s Spring 2005 meeting in Nashville. In the meantime, subcommittee members will assist in planning the upcoming Fall meeting of the Committee in Washington, D.C. and again will serve as co-authors in preparing the Annual Review of Developments in Business and Corporate Litigation (to be presented in Nashville). We also will renew efforts, through the ABA, to establish and maintain an effective e-mail listserve for subcommittee members.

New members of the subcommittee are always welcome. Vice Chair Janet McFadden and I hope to see you in Washington and in Nashville!

MEMBERSHIP SUBCOMMITTEE
by Honorable Elizabeth S. Stong

The Membership Subcommittee works to increase the opportunities for interested members of the Section to become active in the work of the Committee. Many new members were introduced to the Committee through activities at the ABA Annual Meeting, including the Committee’s hand’s-on public service project on Saturday afternoon at Tyler Place, a community center in downtown Atlanta, and the Committee’s terrific dinner on Saturday evening at Azio. Other new members benefited from the Committee’s full range of program offerings. Work is under way for the Committee’s stand-alone meeting, which will be held at a new time – November 18 and 19—and place—the Ritz Carlton Hotel in Washington, DC. This will allow Committee members to participate in activities of the Federal Regulation Committee, which meets in Washington, DC at the same hotel on November 19 and 20. 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.

PRO BONO SUBCOMMITTEE
by Patrick T. Clendenen

At the recently concluded ABA Annual Meeting in Atlanta, the BCL’s Pro Bono Subcommittee and the BLS’s Pro Bono Committee held their Fourth Annual “Hands-On” Public Service Project at the Tyler Place Community Development Center. The event was co-organized and co-sponsored by the ABA Business Law Section’s Pro Bono Committee, the National Association of Women Judges, the ABA Young Lawyers Division, and the State Bar of Georgia’s ABC Committee.

The Tyler Place Community Development Center (TPCDC) is located in the Vine City section of downtown Atlanta, a traditionally poor inner city neighborhood that was recently ravaged by floods in 2003. TPCDC provides mixed income housing, promotes economic development, and encourages community empowerment through a variety of community and governmental partnerships. TPCDC, for example, organizes and leads community activities aimed at supporting and improving education, cultural enrichment, recreation, and other services.

A hardy group of about twenty lawyers and judges spent their Saturday afternoon clearing three large vacant lots in the neighborhood and planting a garden. All had a wonderful time. Participants included Mitchell Bach, BCL Chair; Kathleen Hopkins, BLS Pro Bono Committee Chair; Guy Lescault, ABC Project Director, Georgia Legal Services; Donna and Jason Kirkham, Kristen Wilhelm, Carey DeDeya, and Knox Dobbins, of Sutherland Asbill & Brennan LLP; Mike and Clint Monahan, of the State Bar of Georgia; David Levesque, Kendrick Long, Lenardo Major, Betsy Downey, Carrie Salvany, Heather Jefferson, and Suzanne Gilbert, of the ABAYLD; and Jim Holzman, Kendall Butterworth, Dale
Weppner, and Patrick Clendenen, of the Business Law Section.

Dale Weppner, of Danna McKitrick, P.C., Kendall Butterworth, BellSouth Corporation, and Hon. Jennifer Rymell, County Court, Fort Worth, TX, now comprise the leadership of the BCL’s Pro Bono Subcommittee. Please include this wonderful event in your ABA Annual Meeting plans for Chicago in 2005!

PUBLICATIONS SUBCOMMITTEE

by Heidi M. Staudenmaier

The 2004 Edition of the Annual Review of Developments in Business and Corporate Litigation has been published and is available for order through the ABA. KUDOS and thanks to the authors (more than 60) for their efforts on the 22 chapter book:

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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.

The following is the Preface to the 2004 edition of the Annual Review of Developments in Business and Corporate Litigation written by the Chair of our Committee, Mitchell L. Bach:

This extraordinary volume is the result of a remarkable effort by a large number of dedicated and talented people throughout the United States. It also is part of a success story which demonstrates the importance and the value of such a cooperative effort.

The Committee on Business and Corporate Litigation became part of the ABA's Section of Business Law in 1991. We have been fortunate to have had the strong and dynamic leadership of four former Chairs, Donald A. Scott, R. Franklin Balotti, James L. Holzman and The Honorable Elizabeth S. Stong. Our Committee has grown to more than 1200 members, and has become a respected home for commercial litigators from many jurisdictions.

A number of years ago, the Committee leadership decided to organize a CLE program on recent developments in various aspects of commercial litigation. The Committee structure was well suited for this, being comprised of approximately 27 subcommittees which specialize in virtually every substantive aspect of business
litigation. Each subcommittee became responsible for a section of the written materials which were distributed at the time of the CLE presentation.

This CLE program was well received, and we were asked to repeat it. Our Committee’s Recent Developments CLE program is now a permanent feature of the Section of Business Law’s Annual Spring Meeting. Our voluminous written materials have set high standards of excellence, and have been eagerly sought by participants each year, who brought (or shipped) these heavy volumes (affectionately known as “the yellow pages”) back to their law firms, companies, law schools and judicial chambers. This year, the materials were distributed to participants at the Spring Meeting on a floppy disk.

Approximately four years ago, the Section of Business Law decided to begin publishing these materials for wider circulation. You are holding in your hands the fourth such edition.

This year, we have 22 chapters (a new record) which summarize virtually every important court decision in commercial litigation during 2003. In view of the recent explosion of new and improved business courts and specialized commercial litigation programs, in many states, we also have added a chapter on this subject.

For many years, my wife, Cindy Elliott, and I co-chaired the Committee’s Intellectual Property Subcommittee, and we were responsible for the written materials regarding intellectual property litigation developments. We assembled capable volunteers in every federal circuit, many of whom are still contributing to this ongoing effort. I now have the honor of chairing the entire Committee on Business and Corporate Litigation, and I am extremely proud of these materials which our Committee has produced, once again. From this new perspective, I also have a far greater appreciation for the enormity and quality of this task.

More than 50 authors have contributed to this publication, and each has my special thanks for their prodigious efforts. Special thanks also are due to Heidi Staudenmaier, our amazing Publications Committee Chair, and her assistant Valerie Corral, of Snell & Wilmer L.L.P. in Phoenix, Arizona, who accomplished the extraordinary task of keeping all of our busy practitioner-authors on schedule and assembling the final product. Finally, sincere thanks are due to Whitney Ward of the ABA publications staff for her unstinting enthusiasm for and assistance with this publication.

We would welcome your ideas about how to improve these materials, or to increase their utility. We also invite your participation in our Committee and its subcommittees. For more information, please see our web page at http://www.abanet.org/buslaw/committees.

To order this publication, click http://www.abanet.org/buslaw/catalog/r5070397.html or call (800)-285-2221.

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

“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 Rew Goodenow directly at “Business Law Today,” Editor-in-Chief, Marshall Hill Cassas & deLipkau, Reno, Nevada 89505-2790 (775) 323-1601, (775) 348-7250 (fax), rgoodenow@mhcl-law.com.
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