FROM THE CHAIR

by Mitchell L. Bach

Although this is our Fall edition, I am confronted with the realization that we are not going to beat the Winter Solstice this time. By the time you see this, it will be closer to Christmas and the New Year than Halloween and Thanksgiving. Given the frenetic pace of our lives and the enormous burdens all of us carry, it is somewhat surprising that we get the Network published at all. Frankly, we probably wouldn't be able to, were it not for the efforts of Paul Masinter of the Stone Pigman firm in New Orleans. Paul has shouldered the responsibility of managing our Committee newsletter for many years. This contribution to our Committee has been remarkable and indispensable. All of us owe Paul our gratitude for getting this job done, once again. Thanks, Paul.

As I look back on 2004, it has been a very good year for our Committee. This year has seen enormous growth, some dramatic changes and vital contributions by a number Committee leaders. I would like to take this opportunity to look back on this year’s benchmarks, to thank a number of people for their assistance and support of our Committee and to look ahead to 2005.

More Than 400 New Members

Since our last edition of Network, we have added more than 400 new members to our ranks. We have grown from about 1,200 members to more than 1,600 members, an increase of nearly 40% since the Summer! This growth spurt is attributable, in large part, to the Section of Business Law’s spreading

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the word about our Committee to other Section members, through its wide-reaching list-serve. I try to welcome each new member with an individual email, but I have fallen behind in the past few months. I welcome all of you now, and I invite you to get involved in our Committee’s exciting work.

The Fall Meeting Was A Great Success

Our Fall Meeting in November was a great success. As most of you know, for the first time, we combined our meeting with that of the Committee on Federal Regulation of Securities, in Washington D.C. This enabled us to have our own event, a great Committee dinner on Thursday night, and some excellent CLE programs on Friday which set attendance records, due to the joint participation of the two Committees. Kudos and thanks to Bill Johnston and Pete Walsh for organizing these programs so well. Both of these fine Wilmington attorneys have been Committee stalwarts for many years. Pete is the Committee’s Vice-Chair and Programs Chair, and Bill is Chair of our Subcommittee on Indemnification and Insurance. They have done some heavy lifting this year and have helped me immeasurably. I am truly grateful to them both.

I have witnessed and participated in many CLE programs over the years; but none better than the corporate governance program Co-Chaired by Bill and Pete which was presented at the November Fall Meeting. The panel they brought together was truly amazing: Alan L. Beller, Director, Division of Corporate Finance, U.S. Securities and Exchange Commission; Charles M. Elson, Professor and Edgar S. Woolard, Jr., Chair, Center for Corporate Governance, College of Business & Economics, University of Delaware; John C. Richter, Chief of Staff, Criminal Division, U.S. Department of Justice; James B. Ropp, Delaware Securities Commissioner; and moderated by the Honorable Elizabeth S. Stong, U.S. Bankruptcy Court for the Eastern District of New York, and immediate past Chair of our Committee. Last, but certainly not least, was the Honorable Myron T. Steele, Chief Justice of the Delaware Supreme Court. I

want to thank all of these esteemed panelists for making our Fall Meeting very memorable and rewarding. I especially want to thank Justice Steele who attended all our meetings this year, and has solidified the unique and special relationship between our Committee and the judiciary.

Spring 2005 Meeting Plans

It is time to look forward to 2005. Our next Committee meeting will be held during the Business Law Section’s Spring Meeting in Nashville, from March 31 through April 3, 2005. Once again, we are planning two CLE programs and a Committee Forum. Rick Lambert again will be Chair of our Annual Review of Developments in Business Litigation program, and Pat Clendenen will be Chair of a program entitled “Non-Federal Question Class Actions: Recent Developments and Strategies”. The Committee Forum will be entitled “Arbitration – the Good, the Bad and the Ugly”, organized and Chaired by Paul Masinter. I hope to see many of you in Nashville and that you will be able to attend.

Heidi Staudenmaier already has begun organizing the preparation and submission of the voluminous written materials for the Recent Developments program. At last count, we had over 60 authors working on 22 chapters! These written materials for the Spring Meeting program will be published again in book form. Heidi deserves all of our thanks and appreciation for this enormous effort which has become the hallmark of our Committee.

I extend to all of you my best wishes for the New Year. Please contact me if you have any questions or suggestions about the Committee or would like to become more involved. You can contact me at Eckert Seamans Cherin & Mellott, LLC, 1515 Market Street, 9th Floor, Philadelphia, PA 19102, (215) 851-8466 (phone); (215) 851-8383 (fax); (215) 429-0100 (cell); mbach@eckertseamans.com (email).
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BUSINESS LAW SECTION APPOINTS FELLOWS AND AMBASSADORS

by Patrick T. Clendenen

Following an extensive nomination and selection process, the Business Law Section has appointed its Fellows and Ambassadors classes for 2004-2006. The Business & Corporate Litigation Committee is pleased, for the seventh-straight year, to have one of the Fellows and, for the first time, to have one of the Ambassadors appointed to its group.

Matthew T. Reinhard, a Senior Associate with Miller & Chevalier, Chartered, in Washington, D.C. is amongst the five new Fellows. Matthew received his law degree from the University of Iowa College of Law and clerked for the Honorable Carolyn Dineen-King, Chief Judge of the United States Court of Appeals for the Fifth Circuit. His practice is in the areas of complex business litigation and white-collar crime. He has been active in the ABA Young Lawyers Division and this year serves as the Vice Chair of the YLD Continuing Legal Education and Professional Development Team. Please extend him a warm welcome to the Committee.

Gabriel “Gabe” Galanda, an Associate in the Seattle, Washington office of Williams, Kastner & Gibbs PLLC, is amongst the five new Ambassadors. Gabe received his law degree from the University of Arizona College of Law and interned for the Office of Senator Patty Murray (D-WA), the Honorable Frank Zapata, United States District Court for the District of Arizona, and the Office of the Prosecutor, Tohono O’Odham Nation in Sells, Arizona. His practice focuses on complex, multi-party tort and commercial litigation and Indian law. He has been active in the Business Law Section’s Gaming Law Committee and presently serves as its Membership Subcommittee Chair. He has also been active in the Washington State Bar Association’s Indian Law Section and presently serves as its Chair. Please extend him a warm welcome to the Committee.

Patrick T. Clendenen was in the 2000-2002 class of Fellows, and he now Co-Chairs the Fellows and Ambassadors Program with the Honorable Thomas L. Ambro, a Judge in the United States Court of Appeals for the Third Circuit and a former Chair of the Business Law Section, and W. Muzette Hill, Associate General Counsel at Ford Motor Credit Company.

The goal of the Fellows and Ambassadors program is to give active members of the Young Lawyers Division and leading lawyers of color an opportunity to become involved in the substantive work of the Business Law Section, to develop future leaders of the Section, and to enhance knowledge of the work of the Section among members of the Young Lawyers Division and the wider profession. The Fellowship and Ambassador appointment is for two years. To be considered for selection, a person must, among other things, be a member of the Section of Business Law who demonstrates significant interest and achievement in an area of business law that coincides with the work of a substantive Section Committee.

If you have any questions about the Fellows and Ambassadors program or would like additional information concerning nominations for the 2005-2007 Fellows and Ambassadors classes, please contact Fellows and Ambassadors Program Co-Chairs Patrick T. Clendenen (617) 348-1827 or pclendenen@mintz.com, Thomas L. Ambro ((302) 573-6500 or chambers_of_judge_thomas_ambro@ca3.gov), or W. Muzette Hill ((313) 322-7635 or mhill25@ford.com). Complete information on the Fellows and Ambassadors program and applications may be obtained from http://www.abanet.org/buslaw/home.shtml.
FEATURE ARTICLES

AMERICAN DISCOVERY IN FOREIGN LAWSUITS: ARE THE FLOODGATES NOW OPEN?

by Stuart M. Riback

It is by now almost a cliché that the American legal system permits far more extensive pretrial discovery than almost any other country’s legal system. As a result, parties embroiled in litigation overseas may sometimes be tempted to try to use the United States legal system to obtain discovery that otherwise might be unavailable to them. Litigants in foreign countries sometimes may need or want to seek evidence in the United States to assist them in pursuing their cases in foreign courts, even apart from the more liberal discovery rules. Earlier this year, the United States Supreme Court resolved a circuit split concerning the circumstances under which an overseas litigant could invoke the assistance of United States courts to obtain discovery. In Intel Corp. v. Advanced Micro Devices, Inc., __ U.S. __, 124 S.Ct. 2466 (2004), the Supreme Court construed the operative federal statute, 28 USC § 1782, as conferring broad discretion on district judges to permit foreign litigants to obtain discovery in the United States, subject to various statutory and prudential strictures. This article analyzes Intel and the impact it has had in the lower courts since it was decided.

Background

Section 1782 is the latest version in a series of federal statutes dating back to before the Civil War that deal with ways to obtain evidence in the United States to assist foreign tribunals. It provides, in relevant part, as follows:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

On the face of it, this statute potentially allows wide discovery in the United States for use in foreign proceedings. Although the district court may order discovery where requested by letters rogatory or other formal request, it also may order discovery if “any interested person” asks for it. The discovery can be “for use in a proceeding” without any requirement in the words of the statute that the proceeding actually be pending at the time of the request for discovery. The “default setting” for the procedures governing the discovery is the Federal Rules of Civil Procedure, which means there does not appear to be any requirement in the statutory language that the evidence the foreign litigant is seeking in the United States must be discoverable in the foreign forum. And the scope and form that the American discovery should take is left totally up to the district judge’s discretion.

The Intel case

In Intel, the Supreme Court held that § 1782 means exactly what it says: the district court has very broad discretion to allow discovery in the United...
States in connection with foreign legal proceedings. The Court rejected any rigid rules to narrow the scope of the discretion permitted by the statute. In *Intel*, AMD had filed a complaint in Europe with the European Commission’s Directorate-General for Competition (“D-G”), claiming that Intel was engaging in various kinds of anticompetitive activity. The D-G enforces the European antitrust laws; it has the power to investigate and punish violations, and its decisions are reviewable in the European court system. In those proceedings, complainants like AMD have certain rights, including the right to seek judicial review of certain decisions of the D-G. In the *Intel* case, AMD suggested to the D-G that, in the course of its investigation, the D-G should seek certain documents produced in litigation against Intel in the United States. The D-G declined to do so.

AMD decided that if the D-G wouldn’t ask for the documents, AMD would. AMD sued in the United States under §1782, claiming that it was an “interested person” entitled to seek discovery in the United States in aid of the antitrust proceeding in Europe. The district court refused to permit the discovery AMD was seeking, on grounds that §1782 did not authorize the discovery. The Ninth Circuit reversed, holding that the statute did authorize the discovery. It instructed the district court on remand to exercise its discretion as to whether to permit the discovery AMD was seeking. The Supreme Court granted certiorari.

Before the Supreme Court were a number of issues. First, whether a person seeking discovery under §1782 could seek only discovery that would be permitted in the foreign jurisdiction. The circuits had split on that issue. The Supreme Court also addressed whether there had to be an actual legal proceeding pending before §1782 could be invoked (circuits had split on this issue as well), as well as what kinds of foreign tribunal proceedings could be the subject of proper §1782 applications, and whether a complainant in an administrative proceeding could be an “interested person” entitled to invoke §1782. On each of these issues the Supreme Court came down in favor of permitting the district court discretion to allow discovery.

1. The Supreme Court held that a complainant to the D-G was an “interested person” who could seek discovery under §1782, because under European law the complainant had the right to provide information to the D-G and to seek court review of the D-G’s decisions. This is significant, because a complainant before the D-G is not technically a “party” to or “litigant” in a D-G enforcement action as that term is typically used in American parlance. But §1782 does not empower only “parties” or “litigants” to seek discovery under it: it empowers “any interested person.” Under *Intel*, a complainant in an administrative antitrust investigation is “interested” enough to have standing under §1782.

2. The Court held that a D-G investigation is a “proceeding” for which discovery could be sought under §1782 even though the investigation itself is not a contested dispute. The Court noted that §1782 does not require as a precondition to obtaining discovery that a judicial (or quasi-judicial) dispute actually be pending in a foreign tribunal at the time of the request. In fact, an actual dispute in a tribunal need not even be imminent. In so holding, the Supreme Court rejected the rule previously adopted in the Second Circuit. So long as the proceeding for which the evidence was sought was in “reasonable contemplation,” an interested person could seek discovery under §1782. (This followed the standard previously used in the District of Columbia and Eleventh Circuits.)

3. The Court rejected Intel’s contention that AMD could not seek discovery in the United States that it could not obtain under the discovery rules of the foreign forum. Intel had argued that allowing discovery in the United States for a foreign proceeding in which such discovery would not be permitted would be an affront to the foreign country, inconsistent with concepts of international comity. But the Court could not see how a rule that allowed but did not require a district court to permit discovery would be an insult to another country. A
district court could resolve any conflicts between a foreign nation’s policies and American discovery procedures on a case by case basis, taking into account the specific issues and policies implicated in the particular case. If discovery would be adverse to another country’s sovereign concerns, a district court could fashion an order with appropriate protections as necessary. Similarly, any concerns about the fairness of giving only one side discovery in the United States could be handled the same way: if need be, the district court could condition the § 1782 discovery on reciprocal discovery.

In view of the very wide latitude the Supreme Court found district courts have under § 1782, the Court listed some prudential considerations for district courts to consider when presented with applications under § 1782. First, the Court cautioned that § 1782 is less likely to be needed or appropriate where the person from whom discovery is sought is a participant in the foreign proceeding. If the discovery in the United States is sought from a person who is a litigant in the foreign action, the foreign court is more likely to be able to supervise discovery properly. Conversely, nonparty discovery in the United States is more likely to be appropriate under § 1782 because the nonparty may not be subject to jurisdiction in the foreign proceeding.

Second, the district court should consider factors that bear on the need or appropriateness of the discovery. In particular,
a court presented with a §1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U. S. federal-court judicial assistance. . . . Further, . . . a district court could consider whether the §1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. Also, unduly intrusive or burdensome requests may be rejected or trimmed.

Intel, 124 S. Ct. at 2483. Notably, though, the European Commission filed an amicus curiae brief advising the Supreme Court that in that case it does not need or want the district court’s help – yet the Court did not indicate that this was dispositive of the issue even as to the European Commission, much less for other international tribunals. Id. at 2484.

All in all, therefore, this is a remarkably permissive holding. It leaves the district courts with almost total discretion to allow American-style discovery to “assist” foreign litigations, subject only to some fairly nebulous guidelines. One would think this would open the floodgates for foreign litigants seeking an advantage in foreign courts to obtain discovery in the United States that they otherwise could not get. So far – in the several months since Intel was decided -- that has not happened. But the cases that have been decided since Intel might indicate that an upswing in § 1782 applications might be on the way. To some extent discerning a pattern is like reading tea leaves because only four cases have been reported so far: one appellate case and three district court cases. The Second Circuit held that a direct statement from a foreign government that discovery would be harmful was a sound basis for denying discovery. But all the district courts since Intel have reacted to objections to §1782 applications for discovery much the way they react to any dispute over discovery: they err on the side of allowing discovery, subject to conditions calculated to prevent abuse. And in two of the three cases the district court chose not to use the prudential rules suggested by the Supreme Court to limit discovery.

**Sovereign rights as a basis for limiting discovery**

Schmitz v. Bernstein Liebhard & Lifshitz, 376 F.3d 79 (2d Cir. 2004), decided less than a month after Intel, shows some of the considerations that could lead to denying an application for §1782 discovery. The plaintiffs in that case, together with many others, had sued Deutsche Telekom (“DT”) in Germany for what would be called in the United States securities fraud. There were class actions pending in the United States as well based on the same facts. In addition, the public prosecutor in
Bonn, Germany was conducting a criminal investigation with respect to the same transactions.

In the American securities fraud class action, DT was instructed to turn over certain documents to the plaintiffs, subject to a protective order under which the documents could be used solely in the class action and for no other purpose. The German plaintiffs then came to the United States and applied to the district court for an order under § 1782 compelling the attorneys for the class action plaintiffs and DT’s attorneys in the class action to turn over to the German plaintiffs the DT documents that had been produced in the class action.

DT’s attorneys filed with the district court letters from the German prosecutors and the German federal government, which advised the district court that in their view, making the documents available to the German plaintiffs would interfere with German rules on access to evidence and would jeopardize German sovereign rights. The judge in the German case sent letters stating that, while he would entertain any evidence presented, he would take no position on whether the documents should be produced. DT’s attorneys added further that the German plaintiffs had already once asked for access to the documents in Germany and been denied, though the German authorities did say that access might be granted at some future date. Based on the position of the German government and prosecutorial authorities, the district court denied the § 1782 application.

On appeal the Second Circuit affirmed. The Second Circuit noted that § 1782 had two purposes: to assist courts and litigants, and to encourage other countries to provide similar assistance to American courts and litigants. Here, though, the German justice system did not think the requested discovery was helpful or conducive to comity, so the aims of the statute would not have been met. The Second Circuit also observed that the factors Intel said district courts should weigh included the receptivity of the foreign government to the district court’s assistance, as well as the posture of proceedings in the foreign forum. Here, there were sufficient indicators that the applicant was trying to end-run the German justice system to warrant upholding the denial of § 1782 discovery.

**Broad discovery in the district courts**

1. **Application of Guy**

Every district court case decided since Intel has demonstrated a marked disinclination to deny discovery. In August, the Southern District of New York refused to limit discovery sought by the receivers of an English estate. *Application of Guy*, 2004 WL 1857580 (August 19, 2004). In that case the respondents, who were not parties to the English proceeding, had voluntarily turned over assets and information to the receivers, but did not want to testify at deposition or produce certain other documents. The court refused to credit their argument that the § 1782 discovery should be denied because the discovered information might subject the respondents to possible liability, and the Court specifically noted that it made no difference to the § 1782 inquiry that the information sought might not be admissible in England.

Nor would the court place limitations on the scope of the discovery the receivers could seek. The respondents argued that the receivers should not be permitted to inquire into such things as events that occurred before the decedent’s death, or matters “personal” to the respondents, or into wrongdoing by the respondents unless first supported by some evidence of wrongdoing (this last limitation was similar to what the court understood English law to require). None of these were deemed appropriate limitations. Basically, the district court treated the § 1782 discovery as if it were normal discovery in a civil action and applied similar concepts of relevance. In the end, because the respondents were in the United States, the receivers were able to obtain broader discovery to support their action in England than they would have been able to obtain if the respondents had been in England.

2. **Procter & Gamble**

The district court in *Application of the Procter & Gamble Company*, 334 F. Supp.2d 1112 (E.D. Wis. 2004) denied the § 1782 application in a similar fashion.
2004) (“P&G”), also treated § 1782 as a general enabler of discovery, and applied normal American discovery rules to determine the scope of § 1782 discovery. It refused to add additional restrictions, even though the parties to the § 1782 proceeding were also parties in the overseas cases and subject to court oversight in those cases. P&G arose from a group of patent infringement actions that Kimberly-Clark (“KC”) brought against P&G in five countries to redress alleged infringement of KC’s disposable diaper patent. P&G’s defense was based on res judicata in one country and invalidity of KC’s patent in all five. It sought discovery from KC in the United States to help establish its defenses in the UK, France, Netherlands, Germany and Japan.

Relying on Intel, KC argued that because it and P&G were parties in each of the five foreign actions, there was no reason to use § 1782 discovery. Instead, discovery in each of the five cases should be supervised by the five courts in accordance with each country’s respective procedures and laws, because those courts were in a better position to know what is relevant in each of those cases than a district court in the United States. It sought discovery from KC in the United States to help establish its defenses in the UK, France, Netherlands, Germany and Japan.

The district court waved away all the objections. First, it preferred having discovery done once rather than five times. To the extent there were relevancy issues, they could be addressed as they came up. Second, it made no difference that the discovery in the United States would be broader than the discovery permitted in some of the foreign countries, because Intel specifically excluded such a limit. To the extent the discovery undermined a particular country’s specific policies, discovery could be limited, but KC had shown no such issue. Nor could the discovery be viewed as unduly burdensome merely because it was broader than would be permitted in other countries.

Most interestingly, the court was not concerned about the danger of KC’s confidential information being disclosed – even though there were doubts as to whether French or German courts would respect confidentiality agreements. The court was convinced it had adequate tools available under Rule 26 of the Federal Rules of Civil Procedure to provide whatever protection was necessary.

3. Application of Servicio Pan Americano de Proteccion

The most striking discovery order since Intel is the Southern District of New York’s decision on December 6, 2004 in Application of Servicio Pan Americano de Proteccion, 2004 WL 2793192 (S.D.N.Y. Dec. 6, 2004). In that case, HSBC Bank sued Pan Americano in Venezuela for the loss of $5.6 million in American funds that Pan Americano was hired to transport from HSBC to several banks in Venezuela. HSBC’s suit was dismissed without prejudice, refiled in a different form in a different Venezuelan court and dismissed again on procedural grounds.

While this was going on in Venezuela, Pan Americano sought an order under § 1782 in the United States so that it could discover any insurance claims HSBC made in connection with the loss. Under Venezuelan law HSBC could not sue for its loss to the extent it recovered for the loss from its insurance. But under Venezuelan civil procedure rules, Pan Americano could not obtain the documents reflecting insurance coverage, claims and payment unless it had evidence that specific documents existed. The party seeking discovery had to have knowledge of a document in order to compel it to be produced. That meant Pan Americano could not establish its defense in Venezuela under Venezuelan procedural rules. So it came to the United States.

The district court allowed the discovery. Two aspects of its reasoning are particularly noteworthy. First, the court felt that even though both Pan Americano and HSBC were before the Venezuelan courts, and subject to the Venezuelan courts’ supervision of discovery, the very unavailability of the insurance-related documents under Venezuelan procedural rules was a factor in favor of allowing the § 1782 discovery. The court seemed to apply a “need” standard: since Pan Americano said it needs
the HSBC insurance documents to establish its defense and cannot get those documents elsewhere, the discovery is appropriate. So, far from saying that liberal American discovery rules cannot be used to get around more restrictive foreign rules (as often was the case before *Intel*), this case viewed the foreign restrictions as all the more reason to allow the discovery. Before *Intel* this approach might not have been used.

Second, the court did not view Pan Americano’s request for § 1782 discovery as an attempt to circumvent the Venezuelan courts. In the court’s view, the evidence would be helpful to the Venezuelan courts, and it was only “for purely technical reasons” that the discovery could not be ordered in the Venezuelan action. So perceived need seemed to trump other concerns. The court noted but gave no apparent content to the Supreme Court’s suggestion in *Intel* that § 1782 discovery is less appropriate when sought by and from parties already before the foreign tribunal. After all, if a claim of need, coupled with a showing of unavailability in the foreign forum, is alone enough to permit § 1782 discovery, what possible effect could the Supreme Court’s prudential limitation have?

**Conclusion**

It remains to be seen whether *Intel* will herald an upsurge in § 1782 requests. Given the attitude of the district courts so far, it would appear that overseas litigants may have now been given a potentially powerful tool to obtain discovery that ordinarily would be unavailable to them. It may be that with further experience the courts will develop additional guidelines to steer the district courts’ discretion. Indeed the Supreme Court in *Intel* hinted that such rules may be developed as the courts gain additional experience in implementing § 1782. *Intel*, 124 S.Ct. at 2483. For now, though, the district courts’ doors are open.

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1. *In re Ishihara Chemical Co.*, 251 F.3d 120 (2d Cir. 2001).
2. *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F. 2d 686, 691 (D.C. Cir. 1989); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F. 2d 1151, 1155, and n. 9 (11th Cir. 1988).

**Stuart M. Riback** is a member of the New York law firm Siller Wilk LLP. His practice focuses on financial, commercial, creditors’ rights and intellectual property litigation.

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**SUBCOMMITTEE REPORTS**

**BANKRUPTCY LITIGATION SUBCOMMITTEE**

by William K. Zewadski

Recent meetings of the Bankruptcy Litigation Subcommittee have been especially well attended.

The Subcommittee again met jointly with the Creditors’ Rights Subcommittee at the annual meeting of the ABA in Atlanta, August 2004. A full room of attendees to our first subcommittee lunch heard an excellent panel, chaired by 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.

The October 11, 2004 joint meeting in Nashville for the National Conference of Bankruptcy Judges included Bankruptcy Judge Michael Williamson speaking on evidence issues in bankruptcy litigation.

The Co-Chair, William Zewadski, and Bankruptcy Judge Elizabeth Stong began the
November 19, 2004 Fall Meeting of the full committee in Washington DC with the latest installment of “Bankruptcy for Breakfast,” including “The Top Ten Tips for Corporate Counsel” and “The Top Ten Developments in Bankruptcy Litigation for 2004."

The Subcommittee puts on three programs at its meetings each year, including the Section’s Spring Meeting and the Annual Meetings of the ABA and the National Conference of Bankruptcy Judges. The next program will be in Nashville during the Spring Meeting, with the Subcommittee’s program at 1:00 PM on Thursday, March 31, 2005 on current topics of interest - some of which have not even occurred as of the date of this report! New rulings from the Supreme Court on bankruptcy topics have already occurred in 2004 and more will occur by the meeting, so be sure to stop by!

In addition, the subcommittee is responsible for the Bankruptcy Litigation updates chapter for the 2005 edition of the Annual Review of Developments in Business and Corporate Litigation, now headed for its fifth incarnation, and that chapter is now being drafted. There is as yet no clear indication that the long-awaited bankruptcy reform legislation will be passed, but the Subcommittee will update its analysis of its many changes if it becomes a reality. The earlier versions had a six month delay before most of its provisions became effective, so there will likely be ample time to understand its new surprises before it takes effect, should it pass.

Joining the 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.

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CLASS AND DERIVATIVE ACTIONS SUBCOMMITTEE

by Patrick T. Clendenen

The Class and Derivative Actions Subcommittee is pleased to announce that it will host a program titled, ”Non-Federal Question Class Actions: Recent Developments and Strategies,” at the Spring Meeting. The program is scheduled for Thursday, March 31, 2005 at 9 AM. The program will focus on three major areas: recent developments and cases in non-federal question class actions; strategies for plaintiff and counsel selection, forum selection, and jurisdiction; and strategies for responses to class action complaints, including removal and certification practice. The program is organized by Patrick T. Clendenen, Co-Chair of the Subcommittee, and speakers include: Kevin McGinty, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (Boston); Joseph Ianno, Carlton Fields (West Palm Beach); Michael Flynn, Senior Vice President and Senior Counsel, World Savings (Oakland); and Marsha Rabiteau, Vice President and Assistant General Counsel, Hartford Financial Services Group (Hartford). Please be sure to add this program to your Spring Meeting plans.

INDEMNIFICATION AND INSURANCE SUBCOMMITTEE

by William D. Johnston

Members of the Indemnification and Insurance Subcommittee will meet jointly with members of the Corporate Counseling and Litigation Committee during the upcoming Spring Meeting in Nashville. The joint meeting will take place on Thursday, March 31, from 10:30 a.m. to noon. As before, discussion will include legislative and case law updates and (in connection with D&O liability insurance) a report on the latest “market” conditions. And we’ll discuss ideas for future programs.

This also is to encourage all Subcommittee members to attend the outstanding “Developments in
Business and Corporate Litigation” program, which will be presented in Nashville on Thursday from 2:00 p.m. to 5:00 p.m. and, as always, will include comprehensive materials authored by members of the Business and Corporate Litigation Committee.

New members of the Indemnification and Insurance Subcommittee are always welcome (as are visitors to any of our meetings). Hope to see you 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. This year, the Committee’s stand-alone, held in conjunction with meeting of the Committee on the Federal Regulation of Securities on November 19 and 20 in Washington, DC, provided terrific opportunities for Committee members to gather and discuss current issues at our early-morning Bankruptcy for Breakfast, our standing-room-only program on “Corporate Governance: Federalization and/or Federalism?,” and at our delightful and delicious Committee dinner at Cafe Milano in Georgetown.

There is no better way to get involved in the Business and Corporate Litigation Committee than to come to a program or join us for dinner -- so mark the dates for the Section Spring Meeting in Nashville, and whether you are a Committee regular or a newcomer, please join us! New members are especially welcome, and current member are encouraged to become in the programming, writing, and public service projects of the Committee. Questions? Ideas? Contact Membership Subcommittee Chair Elizabeth Stong at elizabeth_stong@nyeb.uscourts.gov. See you in Nashville!

**PUBLICATIONS SUBCOMMITTEE**

*by Heidi M. Staudenmaier*

The Publications Subcommittee is busily working on the 2005 edition of the *Annual Review of Developments in Business and Corporation Litigation* in anticipation of the ever-popular Annual Review Program at the Section's Spring Meeting. Over 60 authors contributed to the 22-chapter book in 2004. The specific chapters planned for 2005 include:

- Alternative Dispute Resolution Law
- Antitrust Litigation
- Appellate Law
- Bankruptcy Litigation
- Business Courts
- Business Torts Litigation
- Class Action Law
- Corporate Law
- Criminal and Enforcement Litigation
- Derivative Litigation
- Director Liability and Indemnification
- Directors' and Officers' Liability Insurance
- Employment Law
- Environmental Law
- ERISA
- Financial Institution Litigation
- General Partnerships, Joint Ventures, Limited Partnerships and Limited Liability Companies
- Intellectual Property Law
- Labor Law
- Pro Bono
- Securities Arbitration Law
Securities Litigation

If you are interested in assisting with a particular chapter, please contact Heidi McNeil Staudenmaier at hstaudenmaier@swlaw.com.

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.

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 & delLipkau, Reno, Nevada 89505-2790 (775) 323-1601, (775) 348-7250 (fax), rgoodenow@mhcl-law.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, 321 North Clark Street, Chicago, Illinois 60610. © 2004 by the American Bar Association.
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