Message from the Chair

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Mitchell L. Bach

It is hard to believe that our great meeting in Chicago was two months ago, and that our Fall Meeting in Washington, D.C. is only one month away. It has been an exciting time for our Committee, as our busy professional lives race on.

Once again, our upcoming Fall Meeting in Washington, D.C., on November 17 and 18, is being planned and coordinated with our good friends from the Committee on Federal Regulation of Securities and its outstanding Chair, Dixie Johnson. Last year’s combined meeting was a great success, and Dixie and I are looking forward to another terrific event. Taking full advantage of our synergies and areas of common interest, this year’s Fall Meeting will feature CLE programs of interest to all of our members, and some programming which will be developed and presented jointly by both Committees.

We have planned our wonderful Committee Dinner in Georgetown, just a short distance from our Fall Meeting headquarters at the lovely Ritz Carlton Hotel.

More...

Ruling Clarifies Mere Negotiations and Intentions Do Not Amount to Part Performance Sufficient to Support an Enforceable Oral Contract

William J. Kelleher

In a decision released on June 7, 2005, the Connecticut Supreme Court made it easier for companies to negotiate deals on a non-binding basis without concern for liability if the deal is not finalized and ultimately executed, in particular when the terms of the proposed deal change over time. The Statute of Frauds requires that certain agreements must be in writing and signed by the party to be charged. Most experienced businesses commit agreements and the key terms thereof to writing. Although the doctrine of “part performance” is generally recognized as an exception to the Statute of Frauds sufficient to enforce an oral agreement, the Court clarified Connecticut law and emphasized that the part performance must be actual performance of acts and not mere “testimonial evidence as to intent . . . [as] probative evidence” to support the existence of an oral contract. *Glazer et al. v. Dress Barn, Inc.*, 274 Conn. 33, 873 A.2d 929, 953 (2005).

THE CASE

Dress Barn involved the proposed purchase by national apparel retailer Dress Barn of plaintiff Bedford Fair Industries, a direct mail marketer of clothing that used seasonal catalogues.

More...
Subcommittee Updates

Antitrust and Trade Litigation Subcommittee
*By Robert L. Gegios*

The Antitrust and Trade Litigation Subcommittee presented “Practical Rules for Dealing with Experts in Business Cases” at the ABA Annual Meeting in Chicago. Our guest speaker was James Langenfeld of LECG in Chicago. Dr. Langenfeld, an internationally-recognized economist who has testified in many high-profile cases and government proceedings, shared insights that he has gained from his years of working with both outside and in-house counsel. Dr. Langenfeld’s exploration of the do’s and don’ts of dealing with experts in today’s litigation settings was both timely and very well received by those in attendance.

Our membership continues to grow. In that regard, we look forward to hearing from those interested in joining our subcommittee or becoming more active participants in the subcommittee’s work as we plan our activities for the Spring Meeting in Tampa next year.

Appellate Subcommittee
*Kendyl Hanks Darby, Robert Witte*

At the ABA Annual Meeting in Chicago, the Appellate Subcommittee presented an energetic and highly successful panel entitled *What Is A BAP and Why Did I Go There?* David R. Weinstein, (Weinstein, Eisen & Weiss LLP of Los Angeles), moderated a panel consisting of Erithe Smith, a bankruptcy judge in Los Angeles who also sits on the Bankruptcy Appellate Panel for the Ninth Circuit; and two other bankruptcy litigators from diverse areas of the country, Robin Phelan (Haynes & Boone, Dallas) and Trish Redmond (Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., of Miami).

The discussion covered not only bankruptcy appellate panels, but the gamut of bankruptcy appellate practice, including the idiosyncracies of the three-tier bankruptcy appellate system, the oddities of the option to take appeals to the BAP or the district court (where BAPs exist), and the challenge of predicting outcomes in light of the uncertainties surrounding *stare decisis* concepts in bankruptcy appeals.

The program was well attended and its success was reflected in the continuing, lively participation by the audience.

The subcommittee also recently presented a discussion on amicus briefs in appeals and plans to present a program at the annual meeting in Hawaii in 2006. We are always looking for new participants—so sign up online, or contact the Subcommittee Co-Chairs, Robert Witte of Winstead, Sechrest & Minick, P.C., e-mail: rwitte@winstead.com; and Kendyl Hanks Darby of Haynes and Boone, e-mail: kendyl.darby@haynesboone.com for more information.
Bankruptcy Litigation Subcommittee  
*William Zewadski*

We will again join the ABA’s Creditor’s Rights Committee to present a joint program at the National Bankruptcy Judges’ Conference, in San Antonio, on November 3 at 7:30 A.M. Our own Bankruptcy Judge Elizabeth Strong will join in a discussion led by Bill Zewadski on the new business provisions under BAPCPA, the expansive new bankruptcy law. There will also be a discussion of the recent and sharply conflicting rulings from Arizona and Florida on the scope of the homestead limitations in the new law, which became effective on its passage on April 20, 2005.

A reprise of the presentation of new business bankruptcy developments will be included in ”Bankruptcy for Breakfast” at the Ritz Carlton in Washington D.C., beginning at 7:30 A.M. on November 18 at our Fall Section Meeting, again led by Bill Zewadski and Bankruptcy Judge Elizabeth Strong.

Business Courts Subcommittee  
*Merrick L. Gross*

This year, Business Courts Subcommittee will strive to further its goal of keeping up a national list of contacts on business court developments, and staying current on the growth of business courts around the country. The subcommittee will also continue to prepare a an annual developments update on business courts. To do this, the subcommittee hopes to expand its membership, including getting business court judges around the country to participate in the subcommittee’s activities.

The committee has also submitted CLE program proposal for the Section Spring Meeting - “Business Courts: Are They Working and Why” which it hopes is accepted. The program would consist of a panel discussion involving one or three state court judges who preside over business court cases in jurisdictions around the country, and one or two attorneys who have been active in the creation of business courts around the country. In the 75 - 90 minutes we envision the program taking, the panel will be posed various questions regarding how these business courts are working, the benefits of litigating matters in the business courts and issues/problems that still have to be fixed.

Corporate Counseling and Litigation Subcommittee  
*Anne Foster*

At our August subcommittee meeting in Chicago, we combined once again with the Insurance and Indemnification Subcommittee, and we all welcomed Janet McFadden as the new chair of that subcommittee. Our subcommittees had an interesting discussion of the impact of issues concerning advancement and indemnification on corporation litigation matters and in day-to-day counseling of corporate clients. We discussed ideas for programming for the upcoming November Business and Corporate Litigation Committee meeting and for the Section meeting next spring in Tampa. We hope to see as many of you as possible at the committee meeting on November 17-18, 2005 in Washington, D.C. As always, we welcome new members to join the subcommittee.
Criminal and Enforcement Litigation Subcommittee and Securities Litigation Subcommittee

Jay Dubow

I am the outgoing co-chair of the Criminal and Enforcement Litigation Subcommittee and the incoming co-chair of the Securities Litigation Subcommittee. Here is a report for both.

As with other recent meetings, the Criminal and Enforcement Litigation, Securities Litigation and Financial Institutions Litigation Subcommittees held a combined meeting at the Annual Meeting in Chicago. We were fortunate to have as our guest, Merri Jo Gillette, who is the District Administrator of the SEC’s Midwest Regional Office, located in Chicago. Merri Jo first gave us a brief overview of recent cases of interest that had been handled by her office and a description of the work done by the staff of her office. After that, Merri Jo graciously answered many questions posed by attendees relating to both substantive and procedural aspects relating to SEC investigations. The meeting was well attended and we will plan for future joint meetings with appropriate guest speakers.

Indemnification and Insurance Subcommittee

Janet R. McFadden, Michael A. Pittenger

At the Annual Meeting in Chicago, we once again had a productive and informative joint meeting with members of the Corporate Counseling and Litigation Subcommittee. Members of the two subcommittees and guests had a lively discussion of trends and developments in the D&O insurance and indemnification contexts. We also discussed possible future programming opportunities and topics.

The Annual Meeting also marked the end of Bill Johnston’s eight year tenure as Chair of the Indemnification and Insurance Subcommittee. We would like to express our appreciation to Bill for his many years of active service. Under Bill’s leadership, Subcommittee meetings were always dynamic and informative, and Bill never failed to circulate comprehensive, written updates regarding recent case law and other developments. Although he did not coin the term, thanks to Bill, the Subcommittee members will never be at a loss to explain the importance of the “three-legged stool.” We wish Bill the very best in his continuing roles with the Committee on Corporate and Business Litigation and know that the Committee will continue to benefit from Bill’s outstanding leadership and valuable insights.

Tribal Court Litigation Subcommittee

Gabriel S. Galanda

At the Annual Meeting in Chicago the Tribal Court Litigation Subcommittee conducted its inaugural program, Getting Commercial in Indian Country: High-Stakes Tribal Contractual & Litigation Considerations and co-sponsored a second program with the Gaming Law Committee, Emergent Regulatory & Policy Issues Surrounding the $18.5 Billion Indian Gaming Industry.

The Getting Commercial program featured a slate of prominent Native American jurists and Indian law attorneys:

- Hon. Elbridge Coochise, a Hopi tribal member, retired Tribal court judge and Vice President of the National
Native American Indian Court Judges Association;

- **Heidi McNeil Staudenmaier**, a senior partner with Snell & Wilmer, LLP’s Phoenix office and Partner Coordinator of the firm’s Indian and Gaming Law Practice Group, and Chair of the Tribal Court Litigation Subcommittee;

- **Amy Locklear**, a Lumbee tribal member and associate with the Phoenix law firm of Rothstein, Donatelli, Hughes, Dahlstrom & Shoenberg, LLP; and

- **Yours Truly**, a descendant of the Nomlaki and Concow Tribes and enrolled member of the Round Valley Indian Confederation in Northern California, and associate with Williams Kastner & Gibbs, PLLC in Seattle.

More...
FROM THE CHAIR

BY MITCHELL L. BACH

It is hard to believe that our great meeting in Chicago was two months ago, and that our Fall Meeting in Washington, D.C. is only one month away. It has been an exciting time for our Committee, as our busy professional lives race on.

Once again, our upcoming Fall Meeting in Washington, D.C., on November 17 and 18, is being planned and coordinated with our good friends from the Committee on Federal Regulation of Securities and its outstanding Chair, Dixie Johnson. Last year’s combined meeting was a great success, and Dixie and I are looking forward to another terrific event. Taking full advantage of our synergies and areas of common interest, this year’s Fall Meeting will feature CLE programs of interest to all of our members, and some programming which will be developed and presented jointly by both Committees.

We have planned our wonderful Committee Dinner in Georgetown, just a short distance from our Fall Meeting headquarters at the lovely Ritz Carlton Hotel. I am pleased to say that we have been able to make arrangements at one of my favorite spots, the Sequoia Restaurant, 3000 K Street, NW, Washington, DC. If you have never been there, you are in for a treat. Registration forms for the Committee Dinner will be sent to you separately, and one is included in this issue of Network.

The Business and Corporate Litigation CLE programs on Friday morning will feature a panel presentation entitled “Indemnifying and Insuring Management in Crisis”, a very timely program which will examine some of the cutting-edge advancement, indemnification, and insurance issues that may arise when an officer or director contracts for such protection but later becomes the focus of civil and criminal proceedings. As has become customary, our CLE program will kick off earlier with “Bankruptcy for Breakfast”, an annual update on bankruptcy law and litigation, including observations from a sitting Bankruptcy Judge whom some of you may know.

On Friday afternoon, the two Committees will present an updated version of the “Federalization of Corporate Governance” program which was so well received last year. We expect panel participation by a representative of the SEC, a representative of the Department of Justice, a distinguished jurist, a law professor and two practicing attorneys who will take an informed and practical look at the ever-unfolding interplay of federal and state regulation of corporate governance
and recent developments in this fascinating area. Thanks to Pete Walsh and Bill Johnston for putting together another excellent CLE program, and taking it to the next level, in conjunction with the Committee on Federal Regulation of Securities.

The two Committees will sponsor a joint Networking Reception on Friday evening, from 6:30 p.m. to 7:30 p.m. I strongly encourage members of our Committee to consider staying over in this wonderful hotel on Friday night, and taking full advantage of the excellent Federal Regulation of Securities programming on Saturday.

The brochures for the Fall Meeting are now being printed and should be mailed to you soon. You can register for the meeting on-line at this address: http://www.abanet.org/buslaw/r/fall05.html

To make your hotel reservations, please contact the hotel directly at the telephone number listed below and refer to the ABA Section of Business Law Fall CLE Meeting:

Ritz-Carlton Washington D.C. Hotel  
1150 22nd Street, N.W.  
Washington, DC 20037  
Toll Free: 800-558-9994

You also may make your reservations online at www.ritzcarlton.com. Select “Locations”, and then “Washington DC”; select “reservation” and then follow through the steps using the group code: “FRSFRSA”. The cut-off date for hotel reservations is Wednesday, October 26, 2005. Accommodations at the group rate will be assured until 5:00 p.m. (CST) on the cut-off date as long as space is available within the group block.

I look forward to seeing you soon, and I hope to see many of you in November, in Washington, D.C.
In a decision released on June 7, 2005, the Connecticut Supreme Court made it easier for companies to negotiate deals on a non-binding basis without concern for liability if the deal is not finalized and ultimately executed, in particular when the terms of the proposed deal change over time. The Statute of Frauds requires that certain agreements must be in writing and signed by the party to be charged. Most experienced businesses commit agreements and the key terms thereof to writing. Although the doctrine of “part performance” is generally recognized as an exception to the Statute of Frauds sufficient to enforce an oral agreement, the Court clarified Connecticut law and emphasized that the part performance must be actual performance of acts and not mere “testimonial evidence as to intent . . . [as] probative evidence” to support the existence of an oral contract. *Glazer et al. v. Dress Barn, Inc.*, 274 Conn. 33, 873 A.2d 929, 953 (2005).

**THE CASE**

*Dress Barn* involved the proposed purchase by national apparel retailer Dress Barn of plaintiff Bedford Fair Industries, a direct mail marketer of clothing that used seasonal catalogues. *Id.* at 934-35. At the time of the parties’ initial contacts, Bedford Fair had started a program of deferred billing which, while well-liked by customers because they received merchandise immediately, resulted in decreased cash flow with payment delayed for two months. *Id.* at 935. Bedford Fair was already fully extended on its existing line of credit and needed financing for part of the year to get through the summer months of decreased cash flow, or it faced bankruptcy. *Id.* at 936-37. As part of the overall purchase of Bedford Fair, the parties signed a non-binding letter of intent for the purchase that was contingent on Dress Barn’s due diligence. *Id.* at 937.

In the course of the parties’ negotiations over several months, during which the terms of the deal evolved, Dress Barn committed verbally to provide financing to Bedford Fair to assist it through the period of decreased cash flow that resulted from the deferred billing program. *Id.* at 938. Issues then arose during Dress Barn’s due diligence that caused it to revise the terms of the purchase and lower the purchase price. *Id.* After the purchase and financing fell through, thus leaving Bedford Fair in a precarious financial condition, it filed for bankruptcy and together with its principal sued Dress Barn for breach of contract, Connecticut Unfair Trade Practice Act violations and negligent misrepresentation, among other claims. *Id.* at 939-40. After trial, the jury returned a verdict of $30 million in compensatory damages for the plaintiffs and the trial judge later awarded the plaintiffs slightly more than $2 million in attorneys’ fees and expenses. *Id.* at 940-41; *Glazer et al. v. Dress Barn, Inc.*, 2003 WL 21716468 (Conn. Super. July 7, 2003) (granting plaintiff’s motion for award of attorneys’ fees, expenses and interest). Dress Barn appealed on the grounds, among others, that the trial court improperly charged the jury as to the Statute of Frauds and that there was insufficient evidence to support the verdict. *Id.* at 941.

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* Bill Kelleher is an associate in the Business Litigation and Trial and Appellate Advocacy Sections in the Stamford, Connecticut office of Robinson & Cole LLP.
THE COURT’S DECISION

The Connecticut Supreme Court reversed the record $30 million jury verdict in favor of the plaintiff and the award of legal fees and costs, and entered a directed verdict for Dress Barn. The Court first emphasized that the contract in dispute was the agreement to provide Bedford Fair with financing, not the agreement to purchase the company. Id. at 941-942 n.14. After recounting the lengthy negotiations between the parties, the Court held that the jury charge on the Statute of Frauds was improper, but that there was, in any event, insufficient evidence of part performance. Id. at 942-51. Therefore, the Court took the unusual step of declining to grant a new trial.

The Court acknowledged that its case law in this area, which over the years primarily involved real estate contracts, was in need of clarification. Id. at 947. The Court examined its own earlier rulings and explained that there was no case where it had held that a party was precluded from asserting the Statute of Frauds defense without a finding that there was evidence of part performance (as opposed to mere detrimental reliance). Id. at 949-950. The Court thus found that the jury charge was mistaken because it permitted the jury to find Dress Barn liable for breach of the financing agreement without finding the elements of part performance evidencing the existence of the contract in the first place, namely (1) statements or acts that lead a party to act to his detriment in reliance on the contract, (2) knowledge or assent to the party’s action in reliance on the contract, and (3) acts that unmistakably point to the contract. Id. at 950.

Again reviewing its prior cases concerning land contracts, the Connecticut Supreme Court stated that acts constituting part performance are those “that unmistakably point to a contract as the only reasonable explanation for their having been undertaken.” Id. at 952. Turning to the facts of the negotiations with Dress Barn, the Court rejected Bedford Fair’s position that testimony by its officials that it would not have offered the deferred billing program at the critical time it did unless it secured the financing, demonstrated the required part performance. Id. at 952-53. The Court held that this testimony did not provide competent proof “that the acts are ‘explainable upon no other theory’ than that there was a financing contract,” mainly because Bedford Fair had offered deferred billing at various other times. Id. at 953. In that context, the testimony regarding Dress Barn’s mere statements of intent as to the financing were not enough to support a finding of an oral contract. Accordingly, the Court held that Bedford Fair had failed to prove that it had an enforceable contract for the financing. Id.

BUSINESS AND NEGOTIATION CONSIDERATIONS

Although sophisticated businesses generally record agreements and the terms thereof in writing, the Dress Barn decision is a reminder of the pitfalls, and perhaps the benefits, of not doing so. On the one hand, it clarifies and emphasizes that actual part performance is a pre-requisite for holding a party responsible for an oral agreement. While not possible in every situation of evolving negotiations, the case teaches that a party to a contract should “put it in writing” and it shows the sometimes harsh results that may follow when there is no writing. On the other hand, it provides companies with the ability, where appropriate, to more freely negotiate the terms of a deal without committing to a writing and the possibility of contractual liability.
Overall, *Dress Barn* is an important decision for companies that are considering not only mergers and acquisitions, but any significant business endeavor or corporate agreement, no matter which side of the proposed deal a company sits on. Business managers and corporate counsel in Connecticut or those who are negotiating agreements governed by Connecticut law should consider the implications of the *Dress Barn* ruling before beginning negotiations on any deal and memorializing its terms.
Tribal Court Litigation Subcommittee Hosts
Smashingly Successful Inaugural Program
By Gabriel S. Galanda

At the Annual Meeting in Chicago the Tribal Court Litigation Subcommittee conducted its inaugural program, *Getting Commercial in Indian Country: High-Stakes Tribal Contractual & Litigation Considerations* and co-sponsored a second program with the Gaming Law Committee, *Emergent Regulatory & Policy Issues Surrounding the $18.5 Billion Indian Gaming Industry*.

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- **Hon. Elbridge Coochise**, a Hopi tribal member, retired Tribal court judge and Vice President of the National Native American Indian Court Judges Association;
- **Heidi McNeil Staudenmaier**, a senior partner with Snell & Wilmer, LLP’s Phoenix office and Partner Coordinator of the firm’s Indian and Gaming Law Practice Group, and Chair of the Tribal Court Litigation Subcommittee;
- **Amy Locklear**, a Lumbee tribal member and associate with the Phoenix law firm of Rothstein, Donatelli, Hughes, Dahlstrom & Shoenberg, LLP; and
- **Yours Truly**, a descendant of the Nomlaki and Concow Tribes and enrolled member of the Round Valley Indian Confederation in Northern California, and associate with Williams Kastner & Gibbs, PLLC in Seattle.

The panelists answered the following questions, apparently to the satisfaction of the many folks in attendance who stuck around for the entire program and/or remarked about the quality of the program: What incentives are there for corporations to do business on the reservation? What need Big Business understand about federal Indian jurisdiction before dealing or litigating in Indian Country? What are the unique aspects of tribal court adjudication?

The Subcommittee’s next moves: preparing a tribal litigation chapter for the next edition of the Committee’s *Annual Review of Developments in Business and Corporate Litigation*, and proposing that the Section co-sponsor a program for the Presidential CLE Centre at the 2006 Annual Meeting in Honolulu entitled *Sovereign Rights of Native Hawaiians*. For information about the Subcommittee, or tribal business or litigation practice, please do not hesitate to contact Heidi at (602)382-6366 or hstaudenmaier@swlaw.com, or myself at (206) 628-2780 or ggalanda@wkg.com.

*Mr. Galanda is a Business Law Section Ambassador, Vice Chair of the Tribal Court Litigation Subcommittee, and the Gaming Law Committee’s Membership Subcommittee Chair.*
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