**From the Chair**

**Mitchell L. Bach**

When I was appointed as Chair of the Committee on Business and Corporate Litigation in August of 2003, I understood that my term would be three years, ending in August of 2006. Accordingly, I expected that a new Chair would take my place, at the conclusion of the recent Annual Meeting in Hawaii.

So, I would understand if you may be wondering why you are hearing from me yet again. The fact of the matter is that outgoing Section Chair Alvin Thompson and incoming Chair Linda Hayman have asked me to stick around one more year.

While I look forward to passing the baton to my successor, I am grateful for this unexpected opportunity to serve you for twelve more months. Although we have accomplished much together, I feel that there is some unfinished business.

Our Committee has grown quite a bit during the past three years. I know of no larger professional group in the commercial litigation area. My sense, however, is that we have grown mainly by word of mouth, and not because of organized outreach or recruitment of new members. I would like to be able to devote more time to this in the coming year, and I am hopeful that such an effort will help us grow even more and attract more women and minority members.

During the past three years, we have experienced a significant influx of young lawyers, both as new members and in leadership positions. Having just turned sixty, I am far more conscious of this phenomenon, and I welcome it. It seems to me that we could be doing a better job of mentoring our younger members and giving them guidance and the benefit of our experience. I would like to see an organized effort in this regard.

At the Annual Meeting in Hawaii, I was asked to assume another leadership position which, I believe, will benefit our Committee. I have been appointed as Co-Chair of the Ad Hoc Committee on Judges Initiative of the Section of Business Law. Working with Co-Chair Judge Ben Tennille of the North Carolina Business Court, the mission of the Ad Hoc Committee on Judges Initiative is to provide current and prospective judicial members of the Section with a forum to interact with other judges and exchange ideas on topics of mutual interest, opportunities for education, and the ability to participate in Section activities. Our Committee has always enjoyed a wonderful relationship with members of the judiciary, and it is my hope and expectation that we shall be able to get more judges involved in Committee programs and activities.

The next meeting of the Committee will be in Washington, D.C., on Friday, December 1, and Saturday, December 2, 2006. Once again, Our Fall Meeting will be coordinated with the Committee on Federal Regulation of Securities. All of you will be receiving very soon the meeting details, including the information on our traditional Committee Dinner on Thursday, November 30th.

Finally, if you have ideas or suggestions for the Committee during the coming year, please do not hesitate to contact me. You can reach me by email at mbach@eckertseamans.com or by phone at 215-851-8466 (office) or 215-429-0100 (cell).

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Mitchell L. Bach  
Chair, Committee on Business and Corporate Litigation
Featured Article

Deepening Insolvency as a Cause of Action \(\Rightarrow\) DOA in Delaware

Bernard G. Conaway, Esquire, Fox Rothschild LLP

The Delaware Court of Chancellors issued a clear renunciation of an independent cause of action based upon the theory of deepening insolvency. In Trenwick America Litigation Trust v. Ernst & Young, A2d Id. at 28-29.

More...

Subcommittee Updates

Subcommittee on Appellate Litigation

Kendyl Hanks and Robert Witte, Co-Chairs

Despite the call of the ocean, the Appellate subcommittee had a productive meeting at the annual meeting in Hawaii. New members Victoria Dorfman, Robert Biasotti and Charles Tucker joined Co-Chairs Kendyl Hanks and Robert Witte in planning appellate programming for future meetings. In light of the two upcoming meetings in Washington, D.C., we hope to present a panel on Supreme Court practice, focusing on recent developments out of the Supreme Court that are of interest to the Business Law audience. We are also developing a second program idea for a panel of in-house counsel, appellate practitioners and judges to discuss the circumstances in which appellate counsel are a valuable asset to a case.

We are in the process of determining when we will have the opportunity to present one or both of these programs. We also discussed opportunities to co-sponsor programs with the Council of Appellate Lawyers and other appellate organizations within the ABA at future meetings, which we hope will increase the subcommittee's exposure to a broader audience.

If you have any questions or suggestions, or you would like to find out more about the Appellate Subcommittee, please do not hesitate to contact us.

Subcommittee on Bankruptcy

William K. Zewadski

Our former Chair and now Bankruptcy Judge Elizabeth Stong and Bill Zewadski, Tampa, will again present “Bankruptcy for Breakfast,” a fast-moving overview of developments in bankruptcy at the Fall Meeting of the Committee in Washington D.C. on December 1. Michael Rubenstein, Houston, and Phil Warden, San Francisco, are to be co-chairs of the Bankruptcy Litigation Subcommittee on the retirement of Bill Zewadski after many years as co-chair. They will be planning the
program for the NCBJ meeting in San Francisco the first weekend in November.

Subcommittee on Business Courts
Lee Applebaum

The Subcommittee on Business Courts has provided support materials for business court efforts in Florida, Maine and Ohio. We have continued to work to include Subcommittee members as authors on the Business Courts Chapter in the "Annual Developments in Business and Corporate Litigation" book. The 2006 publication included the most diverse participation in our 3 years of publication.

Subcommittee on Business Torts
Paul J. Masinter

At the Annual Meeting in Hawaii, the Co-Chair Paul J. Masinter, was renamed Chair of the Subcommittee. Dale M. Weppner was renamed as Vice-Chair. Rick Lambert, who has acted as Co-Chair of the Subcommittee, is moving on to a new position as Co-Chair of the Programs Subcommittee. Congratulations to Rick for a job well done on the Business Torts Subcommittee (as well as on the formation of his new law firm, Sessions Lambert Selwyn, LLP, in Dallas, Texas.

At the Annual Meeting, your Chair and Co-Chair participated in a panel for a program entitled "Daubert: More Important Than You Think In Business Litigation." Despite a very early time slot — 7:00 a.m. on Friday, August 4, the program was well attended, and by all accounts, well received. Participating also on the program's panel were The Honorable Sabrina S. McKenna, of the Circuit Court of the First Circuit for the State of Hawaii, Carmelita M. Bertaut of Stone Pigman Waller Wittmann L.L.C. (in New Orleans), Daniel G. Lentz of Ernst & Young, (in Washington, D.C.) and Aron Levko of PricewaterhouseCoopers (in Chicago).

The Subcommittee hopes to sponsor other programs in the near future and looks forward to the continued participation of its members in its activities. Should you have any suggestions on programs or otherwise on the Subcommittee's activities, please contact me at pmasinter@stonepigman.com or 504-593-0882; or Dale Weppner at dweppner@dmfirm.com or 314-726-1000.

Subcommittee on Publications
Gabriel S. Galanda

Annual Review of Developments in Business and Corporate Litigation

We with the Annual Review have had our fill of mai tais and are already off an running into 2007. As for the 2006 edition of Annual Review, it will soon be available at your local Barnes & Noble or ABA Bookstore. Be on the look out.

Twenty-seven sets of incredible lawyer-authors are (or soon will be) signed on for the upcoming year's publication fun. Because the 2007 Spring Meeting will take place earlier than usual, we have accelerated our deadlines for next year's publication. Kindly note the following dates and deadlines:

- **September 15, 2006:** By this date, all authors' participation on the 2007 Annual Review, as well as any new chapters, will be confirmed. Got an idea for a new chapter? If so, email Mitch ASAP.
- **October 13, 2006:** By this date, all assigned authors will be emailed a template for their chapter.
- **January 16, 2007:** Chapters are due. "No ifs, ands or buts about it" [smile]. Please observe that this year's deadline falls just two weeks after the holidays.
• March 15-18, 2007: Spring Meeting in Washington, D.C.. The ever popular program will take place on March 15.

Should you have any questions or ideas regarding the 2007 Annual Review, please do not hesitate to contact me at (206) 628-2780 or ggalanda@wkg.com. Mr. Galanda is an attorney in Seattle with Williams, Kastner & Gibbs, PLLC.

Subcommittee on Tribal Court Litigation
Gabriel S. Galanda

The Tribal Court Litigation Subcommittee, chaired by Heidi Staudenmaier, already has its eye on the 2007 Spring Meeting in Washington, D.C. – the "hub" of federal Indian law.

We would love to collaborate with you or your subcommittee on a program or forum that will help educate Section members about the prevalence of Indian law in mainstream corporate practice.

The body of tribal, state and federal law known as "Indian law" is the foundation for every transaction in Indian Country. Fuelled by a $20 billion Indian gaming industry, Indian law now intersects virtually every arena of commercial law – tax, finance, merger and acquisition, antitrust, debt collection, real estate, environmental, land use, employment, and of course litigation.

Consider recent and upcoming Section teleconference CLE offerings: BLT Live’s "Lending in Indian Country – Model Tribal Secured Transaction Code" (December 2005), and The ABA Forum on Construction Industry's "Construction on Tribal Lands" (September 26, 2006). See www.abanet.org/cle/programs/t06ctr1.html. The Forum on Franchising, Conference for the Minority Lawyer and BLT (in print), are just a few of the other ABA family members that have focused significant attention on Indian commercial issues in recent months and years.

We welcome your ideas about possibilities for such any programs, whether in D.C. next Spring or at a Section or ABA meeting thereafter. For information about the Tribal Court Litigation Subcommittee, or tribal business or litigation practice, please do not hesitate to contact Heidi at (602)382-6366 or staudenmaier@swlaw.com, or myself at (206) 628-2780 or ggalanda@wkg.com. Mr. Galanda is an attorney in Seattle with Williams, Kastner & Gibbs, PLLC.

2006 Fall Meeting

December 1st and 2nd, 2006
The Ritz-Carlton Washington DC Hotel
1150 22nd Street, NW
Washington, DC 20037
→ More Info...

CLE PROGRAM:
Institutional Investors: The Sleeping Giants or Shrugging Atlases of the Corporate Democracy Debate?
Committees on Business and Corporate Litigation and Federal Regulation of Securities

Description of program:
2006 saw yet another up-tick in stockholder interest in obtaining greater influence over the corporate governance and management of the companies in which they invest. Led by pension funds, hedge funds and stockholder empowerment groups, this activism took several forms, including proxy contests for board seats, lawsuits and
lobbying for greater stockholder access to the corporate proxy and pushing corporate law changes to ease the adoption of majority voting. Will these changes improve corporate performance and governance or do they merely create a new set of conflicts of interest, hamper boards of directors in decision making and make attracting qualified board members more difficult? A distinguished panel will provide insight and practical advice concerning the ongoing struggle between stockholders and directors for primacy.

Panelists:
- **Honorable Myron T. Steele**, Chief Justice, Delaware Supreme Court, Dover, DE
- **Trevor S. Norwith**, Wachtell Lipton Rosen & Katz, New York, NY

Chief Justice Steele and Mr. Norwith will be joined on the panel by leading practitioners, stockholder activists, academic commentators.

Moderators:
- **Rolin P. Bissell**
  Young Conaway Stargatt & Taylor, LLP, Wilmington, DE.

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**COMMITTEE DINNER:**
**November 30, 2006**

Sam & Harry's Washington
1200 19th Street, N.W.
Washington, D.C. 20036

Ticket Price - $110
Cocktails - 7:00 p.m.
Dinner - 8:00 p.m.

For more details and to rsvp, contact Ann V. Delaney, Secretary to Mitchell Bach
Phone: (215) 851-8455 or adelaney@eckertseamans.com

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2007 Section of Business Law Spring Meeting
**March 15 - 18, 2007**
**Washington, D.C.**

**Important Deadlines**
- **Hotel Registration** - February 19, 2007.
- **Meeting Registration** - February 23, 2007.

More Meeting Details...
Complete Leadership Roster...
Deepening Insolvency as a Cause of Action – DOA in Delaware

By: Bernard G. Conaway, Esquire
Fox Rothschild LLP*

The Delaware Court of Chancery issued a clear renunciation of an independent cause of action based upon the theory of deepening insolvency. In *Trenwick America Litigation Trust v. Ernst & Young*, ____ A.2d ____ , 2006 WL 2434228 (Del. Ch.), Vice Chancellor Leo Strine, Jr., in a colorfully worded opinion, noted that “Delaware law imposes no absolute obligation on the board of a company that is unable to pay its bills to cease operations and to liquidate. Even when the company is insolvent, the board may pursue, in good faith, strategies to maximize the value of the firm. . . . That the strategy results in continued insolvency . . . does not in itself give rise to a cause of action.” *Id.* at 28-29.

Deepening insolvency as a legal conception appears to have evolved in 1983 when the Seventh Circuit quipped, in dicta, that “the corporate body is ineluctably damaged by the deepening of its insolvency.1” As the Seventh Circuit described it, deepening insolvency arises from the “fraudulent prolongation of a corporation's life beyond insolvency.2” It was this unhealthy prolongation of the corporate body that apparently results in economic damage by increasing debt, i.e., deepening insolvency, and thereby undermining creditor value. With legs that a sprinter would envy, the Seventh Circuit’s dicta ran on with a life of its own. For obvious reasons deepening insolvency as a cause of action or theory of damages found its greatest theatre in the bankruptcy context.

A brief factual setting helps put the Court’s opinion into a useful context.3 The plaintiff asserted fiduciary breaches by corporate directors and their professionals on behalf of Trenwick’s creditors and the bankrupt estate. Those fiduciary breaches, for the most part, flowed from Trenwick’s acquisition of two publicly held corporations.4 In retrospect those acquisitions proved to be Trenwick’s financial undoing. The plaintiff’s attempted to assert that the acquisitions were flawed, the board knew they were flawed and that the board conspired to keep the company afloat too long thereby allowing bond holders to assert their rights to Trenwick’s assets.5 This, the plaintiff asserted, gave rise to their deepening insolvency claim.

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1 *Schacht v. Brown*, 711 F.2d 1343, 1350 (7th Cir 1983)(in dicta). In *Bloor v. Dansker*, 523 F.Supp. 533, 541 (S.D.N.Y. 1980) the plaintiff seems to have asserted what could be described as a deepening insolvency cause of action. Despite the *Bloor* court’s earlier confrontation with the nascent theory, it was the *Schacht* court that coined the term that is now used to connote the deepening insolvency theory.

2 *Schacht, supra* at

3 Boiling down the facts in this case is particularly risky because, as the Court lamented, the complaint was so poorly drafted that in many instances the Court had to “divine” what the plaintiff actually asserted. *Trenwick, supra* at 2.

4 “The two transactions at issue in this case involved the acquisition of publicly-traded entities and were approved by a vote of the holding company's stockholders. The holding company's stockholder base was diverse and the company had nothing close to a controlling stockholder.” *Trenwick, supra* at 1. The nature of the two acquisitions and specifically the fact that both were approved by their respective shareholders was a significant consideration that dramatically undermined the plaintiff’s claims.

5 The Court was very critical of the complaint, the allegations and theories of recovery. As the Court notes early on in the opinion, the allegations were conclusory, essentially baseless insults made against the directors.

*Mr. Conaway is a partner in the Wilmington, Delaware office of Fox Rothschild LLP. His e-mail address is: bconaway@foxrothschild.com.*
On some level it must have sounded good to the creditors and their lawyers. The Court, however, was wholly unimpressed. In a quote that is likely to be repeated, Vice Chancellor Strine said: “[U]nder Delaware law, “deepening insolvency” is no more of a cause of action when a firm is insolvent than a cause of action for “shallowing profitability” would be when a firm is solvent.”6 Read in the proper context, the Trenwick opinion is nothing more than an affirmation of the Delaware Court’s veneration of the business judgment rule. As Trenwick reminds the business judgment “rule precisely exists to ensure that directors and managers acting in good faith may pursue risky strategies that seem to promise great profit.”7 It is within this intellectual framework that the opinion repeatedly relates the plaintiff’s sketchy allegations against the traditional articulation of fiduciary breaches and duties imposed upon directors. In every instance, the plaintiff came up woefully short.

The Trenwick decision is notable for several reasons. Importantly, it is the first opinion of a Delaware state court to both confront and reject deepening insolvency as a cause of action.8 This is important because a number of commentators, based upon Chancellor Allen’s 1991 decision in Credit Lyonnaise v Pathe Communications, 1991 WL 277613 at p. 34 (Del.Ch.), 17 DEL. J. CORP. L. 1099, concluded that Delaware courts would recognize a claim based upon deepening insolvency. Federal courts likewise predicted that the Supreme Court of Delaware would recognize such a cause of action. In re Exide v Credit Suisse First Boston, 299 B.R. 732 (Bankr. D. Del. 2003); In re Scott Acq. Corp., 344 B.R. 283 (Bankr. D. Del.); Stanziale v. Pepper Hamilton, LLP, (In re Student Fin. Corp.), 335 B.R. 539, 548 (D. Del. 2005) (all three courts reluctantly followed the lead of Third Circuit to conclude that Delaware would recognize a deepening insolvency cause of action).9

Second, the Trenwick opinion is notable if only because of Delaware’s role and law on corporate governance. Trenwick re-affirmed the central primacy of a director’s fiduciary responsibility and in doing so re-cemented the concrete of the business judgment rule under Delaware law. This decision thereby effectively removes director uncertainty that might have existed within the context of corporate insolvency.

Finally, this article is a very sanitized rendition of Trenwick. The opinion is blunt and reads like an accounting of the Chicago fire – multiple failures compounded by other multiple failures. Virtually no aspect of the plaintiff’s case was spared from scathing assault. It is a must read for all practitioners and stands as an unfortunate example of how not to plead a case.10

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6 Trenwick, supra at 4.


10 For additional comment and reading on the issue of deepening insolvency and related articles see: www.delawarelitigation.com.
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