From the Chair

Mitchell L. Bach

This has been another terrific year for our Committee. As the New Year begins, I thought I should report on recent Committee activities and give you a preview of what to look forward to in 2007. So get those new calendars ready.

Our recent Fall Meeting in Washington, D.C., which was planned and coordinated with our good friends from the Committee on Federal Regulation of Securities, was another great success. Our Committee Dinner on November 30th at Sam & Harry's received rave reviews. Thanks again to Rolin Bissell who put together a fascinating CLE program and panel presentation regarding institutional investor and stockholder interest in obtaining greater influence over the corporate governance and management of the companies in which they invest, and the ongoing struggle between stockholders and directors for primacy. Thanks also to Judge Elizabeth S. Stong and Bill Zewadski who presided over the traditional and now legendary annual update on bankruptcy law and litigation for our early risers on December 1st.

We shall be back in Washington, D.C. again for the Section of Business Law Spring Meeting, scheduled for March 15 through March 18, 2007. The Section's Spring Meeting is the networking event of the year for the business lawyer. You can attend 60+ CLE programs and over 200 committee meetings covering the latest developments in all aspects of business law. Our own Committee's calendar for the Spring Meeting is already quite full:

On Thursday, March 15th, our Subcommittee on Business Courts will be presenting a program entitled "An Introduction to Business Courts", as part of the Section's Institute for the Young Business Lawyer.

Our famous "Annual Review of Developments in Business and Corporate Litigation" will be presented on Thursday, March 15th, from 2:00 to 5:00 PM. Thanks to Gabe Galanda who is coordinating the massive project, now nearing completion, for the preparation of the Annual Review written materials; and to Rick Lambert who is again coordinating the Annual Review panel presentations at the Spring Meeting.

On Friday, March 16th, from 3:00 to 5:00 PM, our new Subcommittee on International Litigation will be presenting an interesting program on "Discovery in Transnational Litigation". Thanks to Stuart Riback and Peter Lukasiewicz for conceiving of and putting this program together.

Finally, our Committee Forum on Friday, March 16th, will be "Significant U.S. Supreme Court Developments Every Business Lawyer Should Know About", also is scheduled for Friday March 16th, from 8:15 to 10:00 AM. Thanks to Kendyl Hanks and Robert Witte for their work in organizing that program.

For those of you making travel plans early, our Committee Dinner will be on the evening of Thursday, March 15th, at a great D.C. restaurant which has not yet been finalized. Be sure to take advantage of Early Bird Registration discounts which will end on
Enforcing Foreign Non-Monetary Awards in Canada

Todd J. Burke

The Supreme Court of Canada has opened the door to the recognition and enforcement of foreign non-money judgments in Canada. Prior to the Court’s decision in Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, Canadian common law limited the recognition and enforcement of foreign orders to final money judgments. This rule would preclude the enforcement of American equitable orders in Canada. These orders may now be recognized and enforced provided they meet the criteria outlined by the Court in the Pro Swing decision. These criteria should be instructive to American counsel when contemplating the recognition and enforcement of orders in Canada.

Pro Swing Inc. is a manufacturer of customized golf clubs and golf club heads and the holder of the U.S trademark for Trident. In April of 1998, Pro Swing filed a complaint for trademark infringement against, amongst others, Elta Golf Inc., a company based in Ontario, Canada. That complaint was filed in the United States Court for the Northern District of Ohio, Eastern Division. As a result of the complaint, a settlement was entered into between Pro Swing and Elta. Under that agreement, Elta stated that it had only three golf clubs or golf club heads bearing the offending trademarks, that it had discontinued marketing or using golf clubs or heads bearing those trademarks, that it would deliver up the offending items and that it would not purchase, sell or use golf club equipment bearing those trademarks in the future. This agreement was made a consent decree of the Ohio Court in July of 1998.

In December of 2002, Pro Swing filed a motion for contempt of court in Ohio on the basis that Elta had violated the settlement agreement and, in turn, the consent decree. The Ohio Court, after reviewing supporting evidence, issued a contempt order on February 25, 2003. In June of 2003, Pro Swing moved before the Ontario Superior Court of Justice to have the consent decree and contempt order recognized in Canada. Elta resisted recognition on
the basis that the order was not a final judgment in personam for a fixed sum of money and that the contempt order should not be recognized and enforced because of its quasi-criminal nature. The motions court judge recognized the consent decree and found that the contempt order was restitutionary and not quasi-criminal in nature. The Ontario Court of Appeal reversed the motions court judge’s finding on the basis that the decree and order were not sufficiently certain to be enforced and that Pro Swing could have alternatively taken an action in Ontario to enforce the settlement decree or obtain information that would have advanced its position in the Ohio Court.

**More...**

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**Subcommittee Updates**

**Subcommittee on Appellate Litigation**

*Kendyl Hanks*

At the Spring Meeting in Washington, D.C., the Appellate Subcommittee will be presenting a panel discussion on recent developments in the United States Supreme Court that are of interest to the Business Law audience. The panel is still being confirmed, but subcommittee Co-Chairs Kendyl Hanks and Robert Witte anticipate presenting a panel of highly regarded Supreme Court experts and, potentially, appellate justices who will discuss recent developments of which all business lawyers should be aware.

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 Kendyl at kendyl.hanks@haynesboone.com or Robert at rwitte@winstead.com.

**Subcommittee on Business Courts**

*Merrick Gross and Lee Applebaum*

The Subcommittee on Business Courts now has its largest membership since its creation, with 80 members. We are in the process of completing the “Business Courts” chapter for the 2007 Annual Developments book. This is the fourth year that we have contributed this chapter. We have expanded our authorship to lawyers from six different states who report on cases in their state’s business courts, with Lee Applebaum, Subcommittee vice-chair, maintaining the roles of writing the national overview and acting as chapter editor. Lee and Mitchell Bach, Committee Chair and former Subcommittee Chair, also made presentations and assisted in the organization of the second Annual Meeting of the American College of Business Court Judges, held November 15-17th in Washington, D.C.

We also provided information to Arizona’s Complex Civil Litigation Court Evaluation Committee for its report to the Arizona Supreme Court on continuing the Complex Civil Litigation Pilot Program in Maricopa County (Phoenix). The Committee recommends the Complex Litigation Program’s continuation, with the goal of making it permanent.

We are also pleased to report the creation of a new Business and Consumer docket in Maine, with both a specialized business court jurisdiction and specialized jurisdiction to address certain consumer-

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business litigation. More recently, Chief Judge Joseph P. Farina of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, entered an Administrative Order creating a Business Court division within the Court. The division, which will operate as a two year pilot program, will become operational the second or third week of January, 2007. The division will be presided over by the Honorable Gill Freeman. Subcommittee Chair Rick Gross was significantly involved with this effort.

The business court in Miami-Dade County, Florida will be the second in the State of Florida following the court that was created in the Ninth Judicial Circuit in and for Orange County, Florida (Orlando) about two years ago. A second division has been added to that court in addition to the division presided over by the Honorable Renee Roche. Chances appear good that a Business Court division Pilot Program will be started soon after the first of the year in 2007 in the Thirteenth Judicial Circuit in and for Hillsbourgh County, Florida (Tampa). Efforts are underway to create Business Courts in Broward County, Florida and Palm Beach County, Florida.

Subcommittee on Financial Institution Litigation

Elyse Rosen

The Financial Institution Litigation Subcommittee will be putting on a fascinating presentation at the Spring Meeting on civil fraud remedies by leading Canadian banking litigation practitioner Bruce Smith, of Gowling Lafleur Henderson LLP.

The presentation is entitled "Crossing International Boundaries - The Latest on Civil Fraud Remedies", and will be held on Thursday, March 15, 2007, at 10 a.m.

Mr. Smith will discuss creative tracing techniques and emerging trust remedies for locating, freezing, and recovering stolen monies from mixed bank accounts in foreign countries. His presentation should prove to be of interest not only to members of the Financial Institution Litigation Subcommittee, but to all those who act for clients who have been victims of civil fraud.

Subcommittee on In-House Litigation

Michael C. Flynn

This is a new subcommittee created to focus on the specialized issues facing in-house counsel who manage business and corporate litigation. In order to "kick-start" the subcommittee actively, we are presenting a panel to the Young Lawyers Division at the Business Law Section Spring Meeting. The topic will be "What Do They Want: What In-House Counsel Expect From Outside Counsel". Speakers will include, among others, Kendall Butterworth of BellSouth, Mari Leigh of Meckler, Bulger & Tilson, and Mike Flynn of World Savings Bank.

Subcommittee on Intellectual Property Litigation

Andy Halaby

The IP Subcommittee of the Committee on Business and Corporate Litigation will be co-sponsoring a Committee Forum on "Up to the Minute IP for the Business Lawyer: Recent Court
Decisions* with the Intellectual Property Committee at the Spring Meeting. The Committee Forum presently is scheduled for Friday, March 16, 2006 at 8:00 a.m. Our distinguished panelists will include Committee member Howard J. Susser of Burns & Levinson L.L.P. in Boston, Wendy S. Neal of Snell & Wilmer L.L.P. in Phoenix, and Stuart T.F. Haung of Steptoe & Johnson LLP in Washington. We hope to see you there!

**Subcommittee on International Litigation**

*Peter Lukasiewicz*

In its inaugural year of existence, the International Litigation Subcommittee, chaired by Peter Lukasiewicz of the Toronto office of Gowling Lafleur Henderson LLP, is seeking new members.

The subcommittee is preparing a new chapter for the 2007 edition of the Annual Review, which will focus on recent conflict of laws issues. In addition, Peter will be attending the Spring Meeting in Washington D.C. in March, where he will be speaking at the Annual Review of Developments in the Law panel presentation. Peter will also be participating in a second panel discussion on the topic of “Discovery in Transnational Litigation”, which is scheduled to take place on Friday, March 16, 2007 at 3:00 pm. Potential members of the International Litigation Subcommittee are invited to join us at the subcommittee meeting that will take place during the Spring Meeting.

All those interested in joining this new subcommittee are encouraged to contact Peter at peter.lukasiewicz@gowlings.com.

**Subcommittee on Publications - 2007 Annual Review of Developments in Business and Corporate Litigation**

*Gabriel S. Galanda*

Twenty-four sets of authors – or should I say twenty-four sets of associates? – are currently burning the candle at both ends to meet the submission deadline for the 2007 Annual Review.

We are excited to be adding a new, 24th chapter, International Litigation, thanks to Peter Lukasiewicz of the Gowlings firm in Toronto, Canada. Peter is the Chair of the new International Litigation Subcommittee.

In 2006, the Annual Review ventured across tribal reservation boundaries with the addition of a Tribal Court Litigation chapter. In 2007, we venture across international lines. If any of you have cases pending in outer space, contact Committee Chairman Mitch Bach about the possibility of an Extraterrestrial Litigation chapter in 2008.

With 100% of our team miraculously having met each of our first several deadlines, we expect everyone will be submitting their chapters by Friday, January 26, 2007. And, Rick Lambert will once again be chairing the popular Annual Review program at the Washington, D.C. Spring Meeting on Thursday, March 15, from 2:30 p.m. to 4:30 p.m.

Should you have any questions or ideas regarding Annual Review, please do not hesitate to contact me at (206) 628-2780 or ggalanda@wkq.com.
Mr. Galanda is an Indian law and gaming attorney in Seattle with Williams Kastner & Gibbs, PLLC. Mr. Galanda is a descendant of the Nomlaki and Concow Tribes, and an enrolled member of the Round Valley Indian Confederation in Northern California.

Subcommittee on Securities Litigation

By Jay Dubow

The Securities Litigation Subcommittee's meeting during the Spring Meeting in Washington, D.C. will be a joint meeting with the Criminal and Enforcement Litigation Subcommittee on Friday, March 16, 2007 from 11:00 a.m. to 12:00 p.m. We are pleased to announce that Joan McKown, Chief Counsel of the Securities and Exchange Commission's Division of Enforcement will be our special guest for this joint subcommittee meeting. Ms. McKown will describe current initiatives and developments in the Division as well as answer questions concerning substantive and procedural issues relating to the Division of Enforcement. This will be an excellent opportunity to ask a senior Division of Enforcement official questions in an informal setting and we hope that you will be able to attend this meeting.

Subcommittee on Tribal Court Litigation

By Gabriel S. Galanda

The Tribal Court Litigation Subcommittee rolls on! The Subcommittee will be co-sponsoring three programs at the Washington, D.C. Spring Meeting.

- "2007 Annual Review of Developments in Business and Corporate Litigation: Tribal Court Litigation," Thursday, March 15, 2007, from 2:30 p.m. to 4:30 p.m.;
- "Commercial Financing in Indian Country in the Era of Tribal Gaming," Friday, March 16, from 10:30 a.m. to 12:30 p.m., chaired by yours truly; and
- "Hot Topics in Federal Indian Gaming Law & Policy," Friday, from 2:30 p.m. to 4:30 p.m., chaired by Subcommittee Chair Heidi Staudenmaier.

The Tribal Court Litigation Subcommittee welcomes your ideas about possibilities for collaboration with your subcommittee or groups within the Committee, Section or ABA. 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 an Indian law and gaming attorney in Seattle with Williams Kastner & Gibbs, PLLC. Mr. Galanda is a descendant of the Nomlaki and Concow Tribes, and an enrolled member of the Round Valley Indian Confederation in Northern California.

Subcommittee on Women Business and Corporate Advocates

By Melanie Damian

At the Section's Spring Meeting in Washington, D.C., the Women Business and Corporate Advocates will be hosting a reception celebrating women in the profession on Friday March 16, 2007. The Reception will be sponsored by Mintz Levin and will be open to Section and non Section professionals. The location and time...
are still being confirmed. Please look for details at the meeting.

If you have any questions or suggestions, or you would like to find out more about the Women Business Advocates Subcommittee, please do not hesitate to contact Melanie Damian at mdamian@dvlplp.com.

**Task Force on Litigation Reform and Rules Changes**

*Michael C. Flynn*

The Task Force is continuing its ongoing work of reviewing and commenting on proposed legislation, regulations and rules that could impact business and corporate litigation. Bill Johnston is leading the Task Force's work on the Model Code of Judicial Conduct. The Task Force is also currently examining the National commission on Uniform State Laws draft of a uniform e-discovery act.

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**Roster**

**Committee Leadership Roster**

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[Complete Roster...](#)

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**2007 Spring Meeting**

2007 ABA Section of Business Law Spring Meeting  
March 15 - 18, 2007  
Washington, D.C.  
[Meeting Website](#)

**Important Deadlines**

- **Hotel Registration** - February 19, 2007.
- **Meeting Registration** - February 23, 2007.
ENFORCING FOREIGN NON-MONETARY AWARDS IN CANADA

Todd J. Burke

The Supreme Court of Canada has opened the door to the recognition and enforcement of foreign non-money judgments in Canada. Prior to the Court’s decision in Pro Swing Inc. v Elta Golf Inc., 2006 SCC 52, Canadian common law limited the recognition and enforcement of foreign orders to final money judgments. This rule would preclude the enforcement of American equitable orders in Canada. These orders may now be recognized and enforced provided they meet the criteria outlined by the Court in the Pro Swing decision. These criteria should be instructive to American counsel when contemplating the recognition and enforcement of orders in Canada.

Pro Swing Inc. is a manufacturer of customized golf clubs and golf club heads and the holder of the U.S trademark for Trident. In April of 1998, Pro Swing filed a complaint for trademark infringement against, amongst others, Elta Golf Inc., a company based in Ontario, Canada. That complaint was filed in the United States Court for the Northern District of Ohio, Eastern Division. As a result of the complaint, a settlement was entered into between Pro Swing and Elta. Under that agreement, Elta stated that it had only three golf clubs or golf club heads bearing the offending trademarks, that it had discontinued marketing or using golf clubs or heads bearing those trademarks, that it would deliver up the offending items and that it would not purchase, sell or use golf club equipment bearing those trademarks in the future. This agreement was made a consent decree of the Ohio Court in July of 1998.

In December of 2002, Pro Swing filed a motion for contempt of court in Ohio on the basis that Elta had violated the settlement agreement and, in turn, the consent decree. The Ohio Court, after reviewing supporting evidence, issued a contempt order on February 25, 2003. In June of 2003, Pro Swing moved before the Ontario Superior Court of Justice to have the consent decree and contempt order recognized in Canada. Elta resisted recognition on the basis that the order was not a final judgment in personam for a fixed sum of money and that the contempt order should not be recognized and enforced because of its quasi-criminal nature. The motions court judge recognized the consent decree and found that the contempt order was restitutionary and not quasi-criminal in nature. The Ontario Court of Appeal reversed the motions court judge’s finding on the basis that the decree and order were not sufficiently certain to be enforced and that Pro Swing could have alternatively taken an action in Ontario to enforce the settlement decree or obtain information that would have advanced its position in the Ohio Court.

The Ontario Superior Court of Justice and the Court of Appeal both articulated the view that the traditional approach of recognizing and enforcing only final monetary judgments needed to be revisited. This was a sentiment endorsed by both the majority and minority in the Supreme Court of Canada decision. In doing so, all three levels of Courts recognized that the globalization of commerce mandated such a change to the common law. However, the majority decision exhibits a cautious approach towards the recognition and enforcement of such orders and found, in the circumstances, that the
foreign order should not be recognized and enforced in Canada. The dissent, written by the Chief Justice, takes a more liberal approach to the application of the legal test and would have recognized the Ohio order.

The majority decision, authored by Justice Deschamps, reviews the requirements of equitable orders in general including the necessity that the order be clear and specific. To be recognized and enforced in Canada the order or judgment must also be final. This is a cornerstone of comity in that the receiving Court should not be required to go behind the order in the absence of fraud or a denial of natural justice and will focus on the obligation created by the order itself.

The Supreme Court went on to address the other factors to be addressed when reviewing the foreign order. The Court states that judicial assistance will not be extended, “if the Canadian justice system would be used in a manner not available in strictly domestic litigation”. It is in this context that a court can address the issues of clarity and finality and allows the Court suitable discretion not to enforce should the principles of fairness dictate.

The majority also accepted the position that Canadian courts are not required to enforce civil contempt orders on the basis of their quasi-criminal nature citing the rule that Canadian courts “will not enforce a penal order, either directly or indirectly.” In the Court’s view the nature of the remedies available upon a finding of contempt (i.e. the possibility of imprisonment) takes a civil contempt order beyond being simply restitutionary.

Canadian courts will also review whether the remedy is appropriate. As part of that evaluation, the appropriate use of judicial resources is one factor to examine. The Supreme Court, like the appeal court, noted that Pro Swing had other remedies available to it in Ontario. In particular, the Court identified the availability of letters rogatory as a means of providing the Ohio Court with information it might have required to enforce the order. In evaluating the appropriate use of judicial resources the Court also examined “the importance of the case compared to the damage the plaintiff would suffer if his or her request was refused.” It was noted that the number of golf clubs involved and the prospect that Elta was insolvent were factors that militated against the enforcement of the order.

A Canadian court must also be sensitive to the interpretation of the foreign order in the context of Canadian law and ensure no conflict exists between the two. A situation may arise where the interpretation is not the same based on differing interpretations of the law. This is illustrated in the nature of a civil contempt order. In the United States, such an order is remedial only and is issued for the benefit of the complainant while in Canada such an order is quasi criminal and may result in imprisonment for the offending party.

The Canadian court will also be required to look at the specific language of the order to determine whether the parties contemplated extraterritorial enforcement. In the Pro Swing case the order was silent as to the scope of enforcement. Justice Deschamps
Commented, “In my view, in the absence of explicit terms making the settlement agreement a worldwide undertaking, the consent decree cannot be said to clearly apply worldwide.” This is an important consideration for U.S. lawyers drafting orders where the parties contemplate enforcement beyond American boundaries. The original motions judge and the minority of the Supreme Court of Canada was of the view that a review of the order made it clear that it was to have extraterritorial effect. Clearly, to avoid such a debate the intended territorial scope of the order should be made clear.

While the Court has delineated some considerations impacting upon the recognition and enforcement of foreign non-monetary judgments of a final nature it seems equally clear that the list of considerations is not closed and will depend upon the facts of each specific case. Efforts to enforce foreign non-monetary orders and judgments will be entertained and will likely become a more frequent occurrence in Canada. American counsel should, when framing these orders and judgments, consider the guidance provided in Pro Swing and advise their clients that while Canadian courts are now receptive to enforcement that enforcement is by no means guaranteed.

Todd Burke is a Partner with Gowling Lafleur Henderson based in Ottawa, Ontario and is the National Leader of the Commercial Litigation Practice Group. He can be reached at (613) 786-0226 or at Todd.Burke@gowlings.com.
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