FROM THE CHAIR
By Nat Doliner

I am pleased to announce that our Committee’s stand-alone meeting next Fall will take place in Paris on Friday and Saturday, October 19 and 20, 2001. On Thursday, October 18, the Committee will present an international institute on negotiating business acquisitions. This is an historic event for our Committee. Please stay tuned for information that will be coming to you through listserv and in the mail about hotel rooms and other details.

We had a fabulous stand-alone meeting in Montreal last September, with the highest attendance ever. It was a spectacular weekend with lots of great task force meetings, an excellent Committee Forum at our Committee meeting, and wonderful dinners and social events.

The Spring meeting of the ABA Business Law Section will take place in Philadelphia March 22-25, 2001. We thank our Philadelphia planning committee, Vince Garrity, Joe Connolly, Bob Harper, Tom Thompson and Carmen Romano for planning the Committee’s cocktail reception and dinner on Thursday night, March 22. We are also grateful to their firms, Duane, Morris & Hecksher, Eckert Seamans, Cherin & Mellott, Klett Lieber, Rooney & Schorling, Buchanan Ingersoll and Dechert, for sponsoring the cocktail reception. The price of the dinner is $100 per person.
The ABA Annual meeting will take place in Chicago, August 2-8, 2001. Our Committee’s meetings will take place primarily on August 4 and 5, 2001.

Rick Climan (Palo Alto and San Francisco, California), Joel Greenberg (New York, New York), Nelea Absher (Louisville, Kentucky), Wilson Chu (Dallas, Texas) and Mike Flowers (Columbus, Ohio) represented our Committee at the annual meeting of the American Corporate Counsel Association in October. They were on a panel that engaged in a mock negotiation with respect to the Model Stock Purchase Agreement. There were more than 400 attendees at this program, and it was extremely well received.

Our 5th Annual National Institute on Negotiating Business Acquisitions in Boca Raton, Florida, in November, co-sponsored with the ABA Tax Section, was a great success. This was probably our best institute ever. The panelists were: Vincent Garrity (Philadelphia, Pennsylvania), Nelea Absher, David Albin (Stamford, Connecticut), Chancellor William Chandler (Wilmington, Delaware), Rick Climan, Elizabeth Dellinger (Cleveland, Ohio), Robert Dickie (Weston, Massachusetts), Byron Egan (Dallas, Texas), Anne Foster (Wilmington, Delaware), Diane Frankle (Palo Alto, California), Edmond Gabbay (New York, New York), Joel Greenberg, Samuel Gunther (New York, New York), Robert Harper (Pittsburgh, Pennsylvania), Jon Hirschoff (New Haven, Connecticut), David Katz (New York, New York), Rudolph Ramelli (New Orleans, Louisiana), H. Lawrence Tafe (Boston, Massachusetts), Leigh Walton (Nashville, Tennessee), Mark Whitener (Washington, DC) and me.

Wilson Chu, Alison Youngman (Toronto, Canada) and I spoke at the ABA National Institute on International Ventures for the New and Old Economy in San Francisco, which was a very successful institute. The Institute was co-sponsored by the International Business Committee of the Business Law Section and the International Law Section.

I am pleased to announce that David Gemunder (Tampa) is our Committee’s second Business Law Fellow from the Young Lawyers Division of the ABA. David has been a very productive member of our Committee and we are delighted that he has become a Fellow. Cheryl Walker (St. Louis) is our other Fellow. The Fellows program is designed to help lawyers from the Young Lawyers Division become active members of the Business Law Section.

FEATURE ARTICLE

What is the Appropriate Standard of Review for Deal Protection Measures?

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In the past year, numerous decisions by the Delaware Court of Chancery have prompted a renewed focus on the fiduciary responsibilities of corporate directors when approving various deal protection measures in the merger context. Although a number of commentators have speculated on some of the ramifications of those decisions for deal protection measures, scant commentary has been offered on a threshold issue that was raised (and resolved with differing results) by several of the decisions: What standard
of judicial review is applicable in the event that a stockholder challenges deal protection devices such as no-solicitation/no-talk clauses, termination fees, and stock option agreements?2

The Current Split of Authority

The Court of Chancery addressed this issue most recently in McMillan v. Intercargo Corp.,3 a case involving the acquisition of Intercargo by XL America for $12 per share. The plaintiffs alleged, among other things, that the directors had not satisfied their so-called Revlon duties4 to obtain the best price reasonably available and that the termination fee set forth in the merger agreement was both preclusive and coercive.5 In the course of granting the defendants' motion for judgment on the pleadings,6 Vice Chancellor Strine expressed his view that deal protection devices, to the extent they look and function like defensive measures (such as poison pills) should be subject to the Unocal7 enhanced scrutiny standard of judicial review.8 In a revealing footnote, Vice Chancellor Strine observed:

Under a "duck" approach to the law, "deal protection" terms self-evidently designed to deter and make more expensive alternative transactions would be considered defensive and reviewed under the [Unocal] standard. The word "protect" bears a close relationship to the word "from." Provisions of this obviously defensive nature (e.g., no-shops, no-talks, termination fees triggered by the consummation of an alternative transaction, and stock options with the primary purpose of destroying pooling treatment for other bidders) primarily "protect" the deal and the parties thereto from the possibility that a rival transaction will displace the deal. Such deal protection provisions accomplish this purpose by making it more difficult and expensive to consummate a competing transaction and by providing compensation to the odd company out if such an alternative deal nonetheless occurs. Of course, the mere fact that the court calls a "duck" a "duck" does not mean that such defensive provisions will not be upheld so long as they are not draconian.9

Although one may be tempted to read Vice Chancellor Strine's comments in Intercargo narrowly because the case involved a change of control, it is worth noting that he articulated the same view last Fall in a case involving a strategic, non-change-of-control merger. In that case, Ace Ltd. v. Capital Re Corp.,10 Capital Re initially agreed to merge with Ace in a stock-for-stock merger. The parties entered into a merger agreement that included a host of deal protection devices, including a "no-talk" provision. When Capital Re sought to terminate the merger agreement in favor of an alternative deal, Ace sought to enjoin the termination, arguing that Capital Re had violated the "no-talk" provision. Vice Chancellor Strine ultimately concluded that Capital Re had not violated the "no-talk" provision as he interpreted it. In doing so, he expressed the view that "when corporate boards assent to provisions in merger agreements that have the primary purpose of acting as a defensive barrier to other transactions not sought out by the board, some of the policy concerns that animate the Unocal standard of review might be implicated."11

Only two days after the release of Vice Chancellor Strine's opinion in Ace, Vice Chancellor Steele weighed in with his own approach to the standard of review question in In re IXC Communications, Inc. Shareholders Litigation.12 In IXC, the plaintiff stockholders sought to preliminarily enjoin the pending stockholder vote on a proposed merger of IXC with Cincinnati Bell, Inc., as well as certain provisions of the merger agreement. Rejecting plaintiffs' challenges to the termination fee, stock options, and no-shop clause, Vice Chancellor Steele held that the business judgment rule, not enhanced judicial scrutiny under Unocal, was applicable because those deal protection devices were not defensive mechanisms instituted in response to a perceived threat from a potential acquiror making a competing bid.13 More recently,
Vice Chancellor Steele reiterated that holding in *State of Wisconsin Investment Board v. Bartlett.*

Vice Chancellors Strine and Steele have approached the standard of review issue from different perspectives. Vice Chancellor Steele's approach seems to be more traditional and deferential, viewing the business judgment rule much like a default standard that applies in the absence of authority definitively holding that a different standard of review should be applicable in particular circumstances. Accordingly, he held in *IXC Communications* and *Bartlett* that *Unocal* review was not applicable because the boards of directors in those cases assented on a "clear day" (i.e., when there was no known competing bidder) to the inclusion of deal protection devices in the context of strategic mergers. Vice Chancellor Strine, on the other hand, appears to advocate *Unocal* review of deal protection measures whenever the primary purpose of those measures is to protect the deal by deterring alternative transactions. In Vice Chancellor Strine's view, the *Unocal* standard of review may be applicable to deal protection measures regardless of whether a competing bidder is known at the time the board approves a merger agreement and regardless of whether the deal is a strategic one or one contemplating a change of control.

**A Return To The Time Decision?**

Although neither Vice Chancellor Strine nor Vice Chancellor Steele has cited the Court of Chancery's decision in *Paramount Communications Inc. v. Time Inc.*, in support of his position on the issue of the appropriate standard of review for deal protection devices, each position finds some support in that decision. In *Time*, Time Inc. and Warner Communications Inc. initially agreed to a strategic merger involving those companies in which the holders of Warner common stock would receive common stock of Time. The merger agreement included a no-shop clause. In addition, the parties entered into a share exchange agreement that gave each party the option to trigger an exchange of shares under certain circumstances. Management of Time also obtained "dry-up" agreements from various banks promising not to finance any attempt to take over Time. Shortly after Time and Warner agreed to merge, Paramount mounted a late effort to derail the proposed transaction in favor of its own cash bid for Time. In response to Paramount's bid, Time and Warner agreed to restructure their proposed transaction to provide for an initial tender offer by Time for 51 percent of Warner, followed by a merger.

In its suit to enjoin the Time-Warner merger, Paramount argued, among other things, that enhanced scrutiny under *Unocal* was the appropriate standard of review for evaluating the decision of the Time directors to enter into the restructured transaction with Warner. Time, in response, argued that judicial review of the revised transaction should involve "the same business judgment form of review as would have been utilized in a challenge to the authorization of the original merger agreement." Rejecting Time's argument, the Court of Chancery concluded that the *Unocal* "form of review applies, at the least, to all actions taken after a hostile takeover attempt has emerged that are found to be defensive in nature." The court amplified this point in a footnote by adding:

When I say at the least, I refer to the fact that the *Unocal* form of analysis will also be utilized when a preemptive defensive measure is deployed, where the principle purpose of the action (and not simply a collateral, practical effect) is defensive in a change of control sense.

Ultimately, the court concluded that Time's response was reasonable in relation to the specific threat posed to the Warner merger by the Paramount offer.
A close reading of the Court of Chancery's opinion in *Time* with respect to the circumstances in which *Unocal* review is appropriate would appear to offer support for a proponent of Vice Chancellor Strine's position. Specifically, where a corporation agrees on a "clear day" to include a "preemptive" deal protection device, the principle purpose of which is defensive in nature, the Court of Chancery's decision in *Time* can be read to suggest that the appropriate standard of review should be *Unocal*.

The rationale underlying *Unocal* is not necessarily applicable with respect to all mergers.

On the other hand, the Court of Chancery's *Time* decision expressly held only that *Unocal* was the appropriate standard of review for evaluating Time's defensive response (i.e., the decision to restructure the original transaction). The Court did not address whether the original deal protection devices, which included the no-shop clause, the share exchange agreement, and the dry-up agreements, would have been subject to review under *Unocal*. In fact, a proponent of Vice Chancellor Steele's position could argue that the Court of Chancery's opinion in *Time* appears to suggest that the business judgment rule attached to Time's original decision to approve a merger transaction that include deal protection measures.

**Grappling with Other Existing Precedent**

One analytical obstacle to applying *Unocal* review to all deal protection devices in the merger context (Vice Chancellor Strine's approach) is that the rationale underlying *Unocal* is not necessarily applicable with respect to all mergers. Enhanced scrutiny is required under *Unocal* when a board has implemented defensive measures in response to a threat to its control over corporate policy and effectiveness. The Delaware courts justify application of enhanced scrutiny as a "threshold" level of analysis in such circumstances because of the "omnipresent specter" that directors may be acting primarily out of their own interest to retain the powers and perquisites of their office, rather than in the best interests of the corporation and its stockholders. If a merger agreement contemplates that a majority of one constituent corporation's board of directors will not serve as directors of the surviving corporation, the articulated rationale underlying *Unocal* enhanced scrutiny review does not apply to deal protection provisions approved by that board, for such provisions cannot have been motivated by the desire of a majority of the board to retain office. In that respect, a "duck" approach—applying enhanced scrutiny to deal protection measures in one context just because those measures look (facially) like the deal protection measures to which the court applies scrutiny in a quite different context—does not provide an entirely satisfying rationale for extending the reach of *Unocal*.

That is not to say, of course, that application of *Unocal*-type enhanced scrutiny to all deal protection measures might not be justifiable on some other basis. Indeed, in his *Ace* opinion, Vice Chancellor Strine may have sewn the seeds of a rationale for so extending *Unocal*. The Vice Chancellor not only noted that deal protection devices might implicate "some of the policy concerns that animate the *Unocal* standard of review," but also emphasized throughout the opinion the "special importance" of the fiduciary duties of care and loyalty in circumstances in which a board of directors is making a decision concerning stockholder ownership rights, in contrast to an "enterprise" decision, such as what product to manufacture.

Vice Chancellor Steele's approach also arguably involves some analytical leaps of faith. In *IXC*, Vice Chancellor Steele cited the Delaware Supreme Court's decision in *In re Santa Fe Pacific Shareholders Litigation* in support of the
The proposition that *Unocal* enhanced scrutiny review applies to deal protection measures in merger agreements only if there exists a perceived threat from a known competing bidder at the Time the merger agreement is approved.25 *Santa Fe Pacific*, however, involved a strategic merger between Santa Fe Pacific and Burlington Northern, Inc. in connection with which the companies had implemented a number of defensive measure (e.g., a poison pill and a joint tender offer) and deal protection measures (a termination fee) in response to competing offers for Santa Fe Pacific from Union Pacific Corporation. The Supreme Court held that *Unocal* enhanced judicial scrutiny was applicable to the shareholder plaintiffs' challenges to those measures.26 The Supreme Court, however, did not address whether *Unocal* or the business judgment rule should properly apply if defensive and deal protection measures are implemented in connection with a strategic merger at a time when no competing bidder is on the scene.

A board is best advised to assume that its decision to adopt deal protection provisions may be reviewed under the *Unocal* standard.

With respect to defensive measures more generally, it is well settled that *Unocal* is the appropriate standard of review when a board of directors implements such measures (such as a poison pill or advance notice bylaw) on a "clear day" in response to the general market threat of inadequate and coercive acquisition offers.27 Even Vice Chancellor Steele appears to agree that *Unocal* review is applicable to deal protection provisions if they are approved at a time when there is a known competing bidder. It does not necessarily follow, however, that the *Unocal* standard is inapplicable if the same type of deal protection measures are adopted on a "clear day." Regardless of whether a competing bidder has made itself known at or prior to the time a board approves deal protection devices in connection with a merger, such devices are nearly always designed to protect the merger from potential future competing transactions. That is a point that Vice Chancellor Strine stressed in his "duck" footnote in *Intercargo*.

Thus, although both Vice Chancellor Strine's and Vice Chancellor Steele's approaches find some support in existing case law (most notably, *Time*), neither approach is necessarily compelled by existing precedent. Definitive resolution of the issue, therefore, likely will require guidance from the Delaware Supreme Court. That Court will need to decide the threshold policy question whether to extend *Unocal*-type review beyond situations involving an "omnipresent specter" of director entrenchment (Vice Chancellor Strine's approach) or whether the business judgment rule and the principles of deference attendant thereto should govern situations in which deal protection measures are adopted on a "clear day" (Vice Chancellor Steele's approach). If the Court chooses the latter course, it also will need to articulate a rationale for why such "protective" measures should be considered under a different standard of review than "defensive" measures more generally.

The alternatives posed by Vice Chancellors Strine and Steele, of course, may not represent the only possible resolutions of the debate. Perhaps the Delaware courts ultimately will determine that *Unocal*-type review is neither applicable to deal protection measures in all circumstances nor inapplicable merely because such measures were implemented at a time when there was no known competing bidder. In keeping with the rationale underlying *Unocal* itself, the Delaware courts eventually may conclude that the applicable standard of review should turn on whether the particular circumstances give rise to the "omnipresent specter" that a majority of the board may be acting out of a desire to retain office rather than in the best interests of the corporation and its stockholders. At least in the context of mergers
not involving a change of control, a somewhat compelling argument can be made that if a majority of a board of directors will continue on the board of the surviving corporation, any deal protection measures approved by such a board should be reviewed under Unocal. But if a majority of directors will not serve on the board of the surviving corporation, perhaps the business judgment rule should apply and the courts should defer to the board's decision to implement deal protection measures.

Advising the Board

The debate concerning the appropriate standard of review that Delaware courts should apply to deal protection measures in the merger context where no competing bidder is present at the time those measures are implemented is likely to continue. Although this debate is academically interesting, its existence also presents a practical dilemma for counsel advising boards of directors considering merger transactions. For the present, a board is best advised to assume that its decision to adopt deal protection provisions (meaning provisions that have the primary purpose of protecting a transaction from the possibility of a rival transaction displacing the deal) may be reviewed under the Unocal standard, or principles akin to Unocal. Accordingly, the board approval process should include careful consideration of the potential impacts of, and alternatives to, the particular provisions under consideration. The board also should seek to ensure that those provisions do not preclude other potential bidders from at least expressing an interest in pursuing an alternative transaction with the corporation, and that such provisions do not coerce stockholders into voting in favor of the proposed merger for reasons unrelated to its merits.

Conclusion

The eventual outcome of the current debate may be affected by the recent confirmation of Vice Chancellor Steele as a member of the Delaware Supreme Court. As a Justice of the Supreme Court, he may not be presented so frequently with the opportunity to express and develop his views on the issues discussed herein. Indeed, because relatively few decisions of the Court of Chancery are appealed to the Delaware Supreme Court, Vice Chancellor Strine and the remaining members of the Court of Chancery are likely to have far more opportunities to carry forward the debate about the proper standard of review applicable to deal protection measures generally. It remains to be seen whether, given the opportunity in the appellate context to address the appropriate standard of review for deal protection measures, soon-to-be Justice Steele would be able to convince his Supreme Court colleagues that his deferential approach to the issue is more appropriate than the "duck" approach advocated by Vice Chancellor Strine.

Notes

* Mark A. Morton and John F. Grossbauer are partners, and Michael A. Pittenger is an associate, at Potter Anderson & Corroon LLP in Wilmington, DE. The views expressed herein are those of the authors and may not be representative of the views of the firm or its clients.


2 Compare Intercargo, id. and Ace Ltd., 747 A.2d at 108 with In re IXC Comm., id. and State of Wisconsin Investment Board, id.


5 The termination fee in question (excluding expenses) amounted to approximately 3.5 percent of the deal value.
In granting the motion for judgment on the pleadings, Vice Chancellor Strine held that the plaintiffs had not sufficiently pleaded facts supporting a claim for breach of the duty of loyalty and that the claims against the directors for monetary damages for breach of the duty of care were barred by an exculpatory charter provision authorized by Section 102(b)(7) of the Delaware General Corporation Law. *Intercargo, supra* note 1, Mem. Op. at 16-17, 30.

See *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1372 n.9 (Del. 1995) (noting that enhanced scrutiny review under *Unocal* applies "whenever the record reflects that a board of directors took defensive measures in response to a 'perceived threat to corporate policy and effectiveness which touches upon issues of control'")(quoting *Stroud v. Grace*, 606 A.2d 75, 82 (Del. 1992) and *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1144 (Del. 1990)). In contrast to judicial review under the business judgment rule, which affords great deference to business judgments of directors, enhanced judicial scrutiny under *Unocal* allows a court to engage in a threshold examination of the substantive reasonableness of board decisions. See *In re Gaylord Container Corp. Shareholder Litig.*, C.A. No. 14616, Strine, V.C. (Del. Ch. Jan 26, 2000), Mem. Op at 27.

9  *Intercargo, supra* note 1, Mem. Op. at 29 n.62 (emphasis in original). The Vice Chancellor observed that the termination fee and no-shop provisions at issue in *Intercargo* were "rather ordinary," although he characterized the 3.5 percent break up fee as being "at the high end of what our courts have approved." *Id.*, Mem. Op. at 27.

10 747 A.2d 95 (Del. Ch. 1999).

11  *Id.* at 108.


13 *In re IXC, supra* note 1, Mem. Op. at 23 (citing *In re Santa Fe Pacific Shareholders Litig.*, 669 A.2d 59, 71 (Del. 1995)).


16 *Id.*, 1989 WL 79880, at *27

17 *Id.* (emphasis added).

18 *Id.*, 1989 WL 79880, at *27, n.21 (emphasis added).

19 See *id.*, 1989 WL 79880, at *27 ("Powerful circumstances in this case include the fact that the original Time-Warner agreement was, or appears at this stage to have been, chiefly motivated by strategic business concerns; that it was an arm's-length transaction; and, that while its likely effect on reducing vulnerability to unsolicited takeovers may not have been an altogether collateral fact, such effect does not appear to be predominating"). On appeal, the Delaware Supreme Court affirmed the Court of Chancery's decision in *Time*, but may have misread the trial court opinion, suggesting that the Chancellor had concluded that *Unocal* review applied to the deal protection provisions of the original merger agreement. In referring to the lock-up agreement, no-shop clause, and "dry-up" agreements that were implemented in connection with the original merger agreement, the Supreme Court stated "as the Chancellor said, such devices are properly subject to a *Unocal* analysis." *Time*, 571 A.2d at 1151. The Supreme Court further noted that "*Unocal* alone applies to determine whether the business judgment rule attaches to the revised merger agreement." *Id.* Although the Chancellor clearly reached the latter conclusion, his opinion did not squarely address whether *Unocal* would have been the appropriate standard for evaluating the deal protection devices that were associated with the original transaction. As noted, the decision arguably could be read to suggest that the business judgment rule might have been applicable with respect to those devices.

20 In *Gaylord Container*, Vice Chancellor Strine questioned the continuing utility of characterizing *Unocal* as a "threshold" standard for determining whether the business judgment rule or the entire fairness standard of review should apply to particular board decisions. He observed that, as a practical matter, subsequent review under either of those standards will rarely, if ever, yield a conclusion different than that reached under the threshold *Unocal* analysis. *Gaylord Container, supra* note 8, Mem. Op. at 26-33.


22 See *Hills Stores Co. v. Bozic*, C.A. Nos. 14527, 14460, 14787, Strine, V.C. (Del. Ch. Feb. 22, 2000), Mem. Op. at 38 (noting that in applying *Unocal* standard, a court considers whether a majority of the board of directors has an "interest" in the sense of a motivation to secure continuation of the incumbent board's control over the corporation).


24 669 A.2d 59 (Del. 1995).

25 See *IXC, supra* note 1, Mem. Op. at 23 (citing *Santa Fe Pacific*, 669 A.2d at 71).
26 Santa Fe Pacific, 669 A.2d at 71-72.


28 In the context of mergers involving changes of control, existing precedent mandates that deal protection measures be reviewed under a slightly different form of enhanced scrutiny review in accordance with Revlon, Inc., supra note 4, and its progeny. One benefit of Vice Chancellor Strine's approach would be the consistency of having one standard of review –Unocal-like enhanced scrutiny—apply to deal protection measures in all contexts, in contrast to the existing state of the law in which one of three standards of review (the business judgment rule, Unocal, or Revlon) might be applicable depending on the specific facts and circumstances.

TASK FORCE REPORTS

Acquisitions Of Public Companies Task Force

We had a great meeting at Franziska Ruf’s offices at Stikeman, Elliott in Montreal on Friday September 22, 2000. Present were Stephen Knee (Co-chair), Nelea Absher, Rick Alexander, Chris Bartoli, David Bronner, Richard Canady, Rick Climan, Joel Greenberg, Curt Hearn, Edward Kerwin, Peter Koerber, David Katz (by phone), Patrick Leddy, Bill McGrath, Jim Melville, Mark Morton, Eileen Nugent (by phone), Carl Ravinsky and Franziska Ruf. Thanks to Franziska for great facilities and support. After introductions, we finished our discussion of Section 4.3 (No Shop) and Sections 5.2 and 5.3 (Company Stockholders Meeting and Parent Stockholders Meeting).

Next Draft. The conditions, representations and warranties and exchange working groups are working hard between meetings to produce new drafts of those documents. If you have comments on Article I, please send them to Mark Morton.

We also had a productive stand-alone meeting in San Diego at Gray Cary’s offices in January. In attendance were Stephen Knee (Co-chair), Diane Frankie (Co-chair), Steve Bigler, David Bronner, Rick Climan, Keith Flaum, Drew Fuller, Joel Greenberg, Curt Hearn, Henry Lesser, Bill McGrath, Jim Melville, Art Miller, and Jon Perry. Rick Alexander, Bryan Davis and Sam Thompson joined by teleconference.

Our next meeting will be at the Spring Meeting of the ABA Business Law Section in Philadelphia. The meeting will be on Friday, March 23, commencing at [9:00 a.m.]. Courtesy of Arthur Miller, we will be meeting at the offices of Blank Rome Comisky & McCauley, LLP, One Logan Square, Philadelphia, PA 19118. Arthur Miller will be organizing a Task Force dinner in Philadelphia; details will follow. We will also meet at the Summer Meeting of the ABA in Chicago, and David Bronner has offered to host that meeting in the offices of Katten Muchin & Zavis; details will follow prior to the summer meeting. Thanks to all our Task Force members who host these meetings!

Next Stand-Alone Meeting. We will be meeting in New York on Saturday, January 12, 2002, at the offices of Kaye, Scholer, Fierman, Hays & Handler, LLP (courtesy of Joel Greenberg). Thanks to Joel for offering his offices again!

We are also considering a stand-alone meeting in November 2001 to continue our work on the Model Agreement. We concluded that there will be no teleconference calls until the March meeting; we are evaluating the desirability of these calls for future months.

The Task Force is co-sponsoring a program at the Spring Meeting with the Committee on Federal Regulation of Securities Subcommittee on
Business Contributions and Proxy Statement on “Marketable Securities: Currency in Business Combinations.” Task Force members David Katz and Rick Climan will participate in a five-person panel, and David will serve as Program Chair. This program is being held 10:30 a.m. – 12:30 p.m. on Saturday, March 24, and will cover issues on exchange ratios, exchange offers, fairness opinions, projections used by investment bankers and mixed consideration deals (including issues relating to elections by holders between cash and stock and tax issues).

We discussed current trends in SEC comments, including comments on exchange ratios, state law rights other than appraisal rights and tender offer and going private transactions.

Diane Frankle reported on a petition for writ of mandamus pending in the Federal Circuit seeking to overturn a federal district court order requiring the production of legal advisory memos and oral summaries of legal advice on the assignability of contracts. The district court found a waiver of the privilege based on the disclosure in the proxy statement that the merger agreement addressed intellectual property rights in the merger, and the fact that the merger agreement attached as an exhibit had a representation that the party asserting privilege had rights in its intellectual property. The petitioner was inquiring as to the ABA’s interest in filing an amicus curiae brief in favor of the maintenance of the privilege; the ABA was not able to determine as a policy matter that a brief could be filed. Eileen Nugent will be reporting on the status of this issue at the Committee’s Spring Meeting.

The Task Force spent the remainder of the meeting reviewing the revised covenant section of the Model Agreement and related conditions. The Task Force discussed key issues relating to the covenants on regulatory approval, options and restricted stock (the latter moved from Article 1), employee benefits, director’s indemnification and rights agreements, as well as points to be covered in commentary. We discussed the covenant on receipt of comfort letters at length and Henry Lesser is canvassing Task Force members and other sources for advice on current practice. The sub task force on covenants (Peter Koerber, Curt Hearn, Arthur Miller, Bill McGrath and Drew Fuller) will revise the covenants sections for the Spring Meeting.

Also in March, we will discuss the approach to commentary for the no shop and meeting covenants and termination and break-up fees (Keith Flaum, Darrel Rice, Bryan Davis, Jim Melville on transaction and negotiation issues and Mark Morton, Rick Alexander and Steve Bigler on Delaware fiduciary duty issues). We are inviting Chancellor Chandler to our Philadelphia meeting. We expect that a lively discussion will be had! Time permitting, we will discuss Joel Greenberg’s revised representations and warranties (these were sent in the materials for the January 2001 meeting), the revised conditions section (Diane Frankle and Keith Flaum) and Sam Thompson’s issue list, which will be sent out prior to the meeting. Of course, topics which we don’t cover in March will roll over into the Summer Meeting.

Sub Task Forces are encouraged to continue to work on projects between meetings; in particular, the covenants group, the no shop/termination commentary group, the conditions group, and the Articles 1 and 2 group have ongoing projects.

See you all in Philadelphia!

Diane Holt Frankle and Stephen H. Knee, Co-Chairs

International Transactions Task Force

The International Transactions Task Force met at the Stand Alone Meeting in Montreal.
We spent some time at our meeting dealing with the international overview of a private company acquisition, the project on which we have been working for the last 18 months. This project consists of an overview of the big picture issues in doing a private company stock acquisition in different jurisdictions around the world. The work product will be in the form of responses to a form questionnaire. Given that the form of the questionnaire has now been finalized, the task force is now ready to proceed to the next step which is to retain foreign correspondents and co-ordinate responses from each of the jurisdictions. We are in the process of forming an editorial committee for that purpose.

The principal focus of our meeting was on the committee's newest project which will be to do an international overview of a public company stock acquisition. This is intended to be similar but not as detailed as the existing private company stock questionnaire. The project will focus on friendly rather than hostile deals. The focus will also be on countries where there has been a significant amount of take-overs by U.S. acquirors. A draft of a questionnaire prepared by Daniel Rosenberg was reviewed at the meeting and comments provided. It was agreed that a new draft would be circulated for discussion at our spring meeting in Philadelphia.

On the program front, the task force will be looking to do a program for the annual meeting in Chicago. The thinking was that we would try to focus the program on the model asset purchase agreement and international overview which would be published some time before the annual meeting.

It was also announced at the meeting that Howard Barnhorst had been appointed Vice-Chair of the International Transactions Task Force.

Finally, with respect to the work product of the task force on international asset acquisitions, an update of the responses was in the process of being completed. We anticipate publication in the Spring of 2001.

John W. Leopold  
Guy-Martial A.X. Weijer  
Co-Chairs

Joint Venture Agreements Task Force

The Joint Venture Agreement Task Force met in Montreal on September 22, 2000 during which there was a discussion of commentary to several sections of the Joint Venture Agreement, including choice of entity, establishment of the partnership, management, dissolution, complex targets and indemnification.

The Editorial Committee continued this work in February 2001 and a revised agreement and commentary on Sections 1 - 4 will be circulated prior to the Philadelphia meeting. Our goal at the Philadelphia meeting is to get the Committee's sign-off on those so we can move forward towards completion of this project.

The Task Force will be meeting from 9:00 a.m. to 1:00 p.m. on Friday, March 23, 2001 and we look forward to seeing as many of you as possible in Philadelphia.

Alison Youngman and  
Stikeman Elliott, Co-Chairs

Asset Acquisitions Task Force

The Model Asset Purchase Agreement ("MAPA") prepared by the Asset Acquisition Agreement Task Force is in the final stages of the American Bar Association editorial process and is scheduled to be published prior to the ABA
Annual Meeting in July. While the Task Force has likely had its last formal meeting, a number of members of the Task Force continue to be involved in the process of bringing MAPA from a Committee product to an item with a Library of Congress Card Catalog Number.

Byron F. Egan and
Jackson Walker L.L.P. Co-Chairs

Manual on Acquisition Practice
and Process Task Force

Vince Garrity led a lively group of 18 Task Force Members at the Montreal meeting. The Task Force continued to refine a statement prepared by the Chairs of the overall scope, editorial direction and targeted audience for the Manual. Even the name of our Task Force is in limbo pending consideration of a catchier, more descriptive name for our project.

The Task Force continued the process of reviewing and discussing topic outlines prepared by Task Force members. To date, excellent outlines have been circulated by Henry Lesser ("Deal Counsel Relations with Other Special Counsel"), Jon Hirshoff ("Valuation Issues"), Robert Ouellette ("Post-Closing Issues"), Betsy Dellinger ("The Engagement"), Rob Copeland ("Ethical Issues in the Acquisition Process"), Norm Zilber ("Who is the Client?"), Dan Minkus ("Price Negotiation") and Ric Brown ("Letters of Intent"). A number of additional outlines are being prepared for the Philadelphia meeting in March.

The Task Force intends to continue to discuss, digest, argue about and refine these outlines until a fairly comprehensive list of the themes to be included in the Manual is on the table. The give and take at the meetings and the marked differences of approach between experienced transaction lawyers have been enlightening and highly entertaining.

Tom Van Dyke has introduced the Task Force to RecordsCenter.com which has agreed to develop and provide our Task Force with a dedicated website for use in its deliberations and as a demonstration of its utility in acquisition transactions.

Tom Thompson and
Vince Garrity, Co-Chairs

Stock Purchase Agreement
Task Force

Our Task Force is continuing to focus on updating the Model Stock Purchase Agreement from three perspectives. One Working Group is preparing a revised version of the Model Stock Purchase Agreement, while another Working Group will be updating the Ancillary Documents. The Third Working Group will prepare a Seller’s Response document which will analyze the purchaser’s initial draft from various seller perspectives. The Task Force has had three organizational meetings and you are invited to join one of its Working Groups: (1) Revisions to the Model Stock Purchase Agreement (Samuel Friedman, Chair); (2) Revisions to the Ancillary Documents (Murray Perelman and Cynthia Coffee, Co-Chairs); and (3) Seller’s Response Document (David Albin, Chair).

Our Task Force meeting in Philadelphia will be held on Saturday, March 24, 2001 from 9:00 a.m. until noon. During the first two hours of the meeting we hope to complete our review of the Model Stock Purchase Agreement and make initial drafting assignments. The last hour of the meeting will be devoted to stand alone meetings of each Working Group.
Anyone interested in joining our Task Force is encouraged to contact Bob Harper at rtharper@kolettrooney.com, rtharper@klettrooney.com, or by telephone at 412/392-2015.

Robert T. Harper, Chair

SUBCOMMITTEE REPORTS

Committee Forum Subcommittee

A Committee Forum was held during the meeting in Montreal in September 2000. At that Committee Forum, Rick Climan (a partner in the Palo Alto, California office of Cooley Godward LLP), Joel Greenberg (a partner in the New York office of Kaye, Scholer, Fierman, Hays & Handler, LLP) and Keith Flaum (a partner in the Palo Alto, California office of Cooley Godward LLP), held a mock negotiation of the “break-up” fee provisions of a public company merger agreement.

A Committee Forum will be held during the spring meeting in Philadelphia on Friday, March 23, 2001, at 3:00 p.m. At that Committee Forum, Elizabeth Dellinger (a partner in the Cleveland, Ohio office of Baker & Hostetler LLP), George Taylor (a partner in the Birmingham, Alabama office of Burr & Forman) and Scott Irwin (a partner in the Cleveland, Ohio office of Baker & Hostetler LLP), will discuss issues unique to acquisitions of financially troubled companies, including fraudulent conveyance and successor liability issues and issues regarding due diligence and indemnification.

Keith Flaum, Chair

Programs Subcommittee

The Committee will be participating in a smorgasbord of programs at the Spring Meeting of the Business Law Section, to be held in Philadelphia. On Thursday, March 22, 2001, from 2:00 to 5:00 p.m., the Committee, together with the Committees on Dispute Resolution and International Business Law, present “ADR Counseling, Negotiating and Drafting for Merger Acquisition, Joint Venture, License and Similar Transaction Agreements: A Short Course: What You Need to Know and How To Do It.” George M. Taylor, III is co-chair of this program which will be a crash course on alternatives to form selection clauses in transactional documents. On Saturday, March 24, 2001, Byron Egan and Larry Tafe, continue the MAPA road show, with their typically strong supporting cast, including Vince Garrity, David Albin, Neal Breckmeyer, Bob Harper and Jon Hirschoff. Meeting attendees will stir from their beds for the 8:00 to 10:00 a.m. presentation “Asset Acquisitions: Getting What You Want.” Also on Saturday, from 10:30 a.m. to 12:30 p.m., the Committee, though the Acquisition of Public Companies Task Force, is co-sponsoring a program, with the Federal Regulation of Securities Committee, “Marketable Securities: Currency in Public Company Mergers.” David Katz, the program chair, and Rick Climan will participate in this program with other transactional and tax lawyers and an investment banker. The panel will discuss the use of stock and other securities as currency in public company mergers. In addition to structuring issues, they will discuss the impact these provisions can have on the duty of the board of directors.

Looking ahead to the Annual Meeting in Chicago from August 3 to 7, the International Transactions Task Force is working with the International Business Law Committee on a program “40 Tips for Structuring European M&A Transactions”. Daniel Rosenberg and Guy Harles are spearheading this effort. The Byron and Larry show continues with another program to be
presented by the Asset Acquisitions Task Force, focusing on the anticipated publication of MAPA. The Joint Venture Agreements Task Force anticipate presenting a program which, although not finalized, would address choice of entity and structuring issues in joint ventures as well as fiduciary duties.

We continue to look for program ideas for future meetings, as well as speakers for scheduled programs. Please contact me at (615) 742-4529 or at dmckenzie@sherrardroe.com if you have any ideas for programs or if you would be interested in participating as a speaker.

Donald I.N. McKenzie, Chair
The Negotiated Acquisitions Committee Newsletter is published approximately three times a year by the American Bar Association, Section of Business Law, Negotiated Acquisitions Committee. The views expressed in the Negotiated Acquisitions Committee Newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Negotiated Acquisitions Committee. If you wish to comment on the contents, please write to the Negotiated Acquisitions Committee, Section of Business Law, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois, 60611.