FROM THE CHAIR

By Richard E. Climan

Our Committee will meet in Chicago on Sunday, August 7, in conjunction with the ABA’s Annual Meeting. The Committee meeting (which will feature several substantive presentations, as well as reports from our subcommittees, task forces and working groups) will be preceded by separate subcommittee, task force and working group meetings on Friday afternoon, throughout the day Saturday and on Sunday morning. Our Committee reception and dinner will take place on Saturday at Spiaggia.

Immediately following our full Committee meeting on August 7, Lorna Telfer will chair a Committee Forum program entitled Dual Class Share Structures in Merger Transactions: Double Trouble or an Effective Alignment of Interests? Our Committee is sponsoring two other educational programs in Chicago: Ethical Issues in M&A Transactions and Executing Multinational Acquisitions: Trends and Techniques in Getting the Far Flung Deal Done. You can find descriptions of these programs in the report by Neal Brockmeyer, co-chair of our Programs Subcommittee, elsewhere in this issue of Deal Points.

We had a successful and well-attended stand-alone meeting in New Orlean s in late October 2004. Special thanks to Scott Whittaker for his efforts in organizing the Committee receptions and dinners we enjoyed there, and for his fearlessness in leading an...
adventurous group of Committee members to see Kermit Ruffins perform at the Blue Nile on Halloween eve.

We had a similarly successful and well-attended meeting in Nashville this past April. Leigh Walton, a Committee Vice Chair, organized a memorable reception (attended by Garth Brooks) and dinner at The Hermitage Hotel.

In November 2004, our Committee sponsored the Ninth Annual National Institute on Negotiating Business Acquisitions in Dallas. Participating Committee members included David Albin, Wilson Chu, Nat Doliner, Byron Egan, Joel Greenberg, David Katz, Mark Morton, Leigh Walton and Alison Youngman. Our Tenth Annual National Institute on Negotiating Business Acquisitions will be presented in New Orleans on November 10 and 11. The National Institute continues to serve as an excellent showcase for the work of our Committee.

The Task Force on Acquisitions of Public Companies met in Wilmington in February and sponsored a lively discussion with judges from the Delaware Supreme Court and the Delaware Court of Chancery.

As reported elsewhere in this issue of Deal Points, the Subcommittee on Judicial Developments has been renamed and reconfigured. It is now called the Subcommittee on M&A Jurisprudence, and is chaired by Scott Whittaker. This subcommittee has two working groups: the Annual Survey Working Group, headed by Jon Hirschoff, and the Judicial Interpretations Working Group, headed by Jim Melville. The inaugural meeting of the Judicial Interpretations Working Group was held in Nashville, and attracted a sizable crowd. I will be announcing additional Committee leadership changes at the full Committee meeting in Chicago.

As I prepare to enter my final year as Committee Chair, I continue to welcome your input and feedback on our Committee and its structure and activities. Please call or e-mail me with your observations and suggestions.

FEATURE ARTICLES

When Is a Delaware Merger Also a California Merger? California’s Quasi-California Corporation Statute in the Wake of Delaware’s Examen Decision

By Henry Lesser, Brad Rock and Eric Wang

Introduction

Since the mid-1970s, the California General Corporation Law has contained an unusual provision that purports to require non-exempt corporations (but not other kinds of entities like LLPs) with a specified nexus to California to comply with a large number of California’s statutory corporate law provisions even though these “quasi-California” corporations are organized under the laws of another state, or even another country. Indeed, this provision—Section 2115—goes so far as to provide that it operates “to the exclusion of the law of the jurisdiction in which [the company] is incorporated.” Even publicly-traded companies can fall within Section 2115’s net unless their shares are listed on the New York Stock Exchange or the American Stock Exchange or quoted on the NASDAQ National Market System.

Section 2115 can produce outcomes disconcertingly contrary to the corporate law of the corporation’s jurisdiction of incorporation. For

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1 Henry Lesser, Brad Rock and Eric Wang are partners in the law firm of DLA Piper Rudnick Gray Cary US LLP. The views expressed are solely those of the authors and do not necessarily represent the views of the firm or its clients.
instance, a corporation formed under the law of a state like Delaware that does not compel cumulative voting in the election of directors (and has not opted to provide for cumulative voting in its charter documents where the state of incorporation would permit that optional choice) is nevertheless, under Section 2115, required to allow shareholders to cumulate their votes if the corporation meets the Section 2115 tests. This was precisely the situation addressed by an intermediate California appeal court in 1982 in Wilson, where the court held that Section 2115 did not violate the United States constitution in applying mandatory cumulative voting to a Utah corporation.²

In the context of a merger in which a quasi-California corporation is one of the merging entities, Section 2115 can produce equally contradictory results. For instance, unless a Delaware corporation’s certificate of incorporation otherwise provides (as it is permitted to do), its merger with another corporation requires the adoption of the merger agreement by a majority of the outstanding shares of the Delaware corporation entitled to vote; preferred shares have no separate class vote absent express provision otherwise. In contrast, one of the statutory provisions made applicable to quasi-California corporations by Section 2115 generally requires the principal terms of a reorganization to be approved by the outstanding shares of each class, and, where that provision applies, Section 2115 will afford a mandatory class vote to preferred shares.

This was exactly the situation that the Delaware Supreme Court recently addressed, and decided against the preferred having a class vote, in Examen.³ In this overview we will briefly review the applicability of Section 2115, the basic holding in Examen and its implications for corporate practice.

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As previously noted, corporations which are listed on the New York Stock Exchange or the American Stock Exchange or quoted on the NASDAQ National Market System are exempt from Section 2115. In addition, wholly-owned subsidiaries of an exempt corporation are also exempt.

**The Examens Decision**

The issue in *Examen* was whether VantagePoint, a venture capital firm that owned 83% of Examens’s preferred stock but none of its common, was entitled to a class vote on the pending merger in which Examens was to be acquired by Reed Elsevier. By its express terms, the preferred was entitled to vote the number of common shares into which it was convertible but those as-converted shares voted as a single class with the common. On that basis, VantagePoint controlled approximately 13.5% of the total vote of the merger. However, if the preferred voted as a single class VantagePoint could block the merger.

To date there has been no judicial finding that Examens was in fact a quasi-California corporation. Indeed, five days after Examens filed in Delaware for a declaration that California law did not apply to the voting rights of its stockholders, VantagePoint sued in California Superior Court seeking a declaration that Examens was a quasi-California corporation under Section 2115 and required, under that Section, to disclose that fact to its stockholders. However, at Examens’s request, the California court stayed the action pending the Delaware Chancery Court’s ruling.

The Delaware Chancery Court granted the declarative relief requested by Examens. It held that, since the company was incorporated in Delaware, only Delaware law applied to its internal affairs, including the voting rights of the preferred. The Court rejected VantagePoint’s argument that the class voting provisions of California law were “additive” and could apply side-by-side with the Delaware provision for all outstanding shares to vote as a single class. The Court found an irreconcilable conflict between the two sets of voting requirements and held that this conflict had to be resolved in favor of the exclusive application of Delaware law.

The Delaware Supreme Court affirmed this judgment. Like the Chancery Court, the Supreme Court relied on the internal affairs doctrine as applicable to matters pertaining to the relationship among a Delaware corporation and its officers, directors and stockholders. The Supreme Court reasoned that the principle that a corporation’s internal affairs should be governed only by one single uniform set of legal requirements was grounded not only in choice of law rules but constitutional principles (except in the rarest situations such as when the law of the state of incorporation was inconsistent with national policy on foreign or interstate commerce).

Of particular importance to an assessment of *Examen*’s implications is the Delaware Supreme Court’s conclusion that the California courts themselves would today reject Wilson as superseded by subsequent U.S. Supreme Court decisions recognizing the internal affairs doctrine as constitutionally mandated.

**Where Does That Leave Section 2115?**

It is important to note that VantagePoint’s California lawsuit is still pending and VantagePoint is apparently still seeking a California judicial determination that Examens was a quasi-California corporation. On the day after it had ruled on the substantive Section 2115 issue, the Delaware Chancery Court granted Examens’s application for a temporary restraining order and preliminary injunction against litigation in any other court concerning the subject matter of the Delaware law.

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action, including the already-pending filed California action. Subsequently, after the merger had closed, the Delaware Chancery Court denied VantagePoint’s request to dissolve that order and extended it pending a hearing on Examen’s motion to make the injunction permanent. Recently, however, the Delaware Chancery Court denied Examen’s application for a permanent injunction and granted VantagePoint’s request to dissolve the temporary restraining order that had prevented VantagePoint from proceeding further in the California action. As a result, there remains the intriguing possibility that VantagePoint could still obtain a ruling from a California court that, as a matter of California law, it was wrongfully deprived of a class vote on the merger.

While the “full faith and credit” clause of the United States Constitution may require the California courts to give effect to the Delaware Chancery Court’s order enjoining further litigation in California on the Section 2115 issues, it is a separate question whether they are required to respect a Delaware judicial declaration as to the substantive effect of Section 2115. But, whatever the outcome of final litigation on the complex constitutional issues might be in this particular case and even if the Delaware decision is binding in California as between the parties in the case, Section 2115 is still on the books in California, the Delaware Supreme Court’s prediction of how a California court would rule remains just that – a prediction (albeit from one of the most influential Courts in the country on matters of corporate law) – and we still face the ever-present possibility that a corporation which meets the Section 2115 tests could be held by a California court to have violated California law if it bases its decisions regarding its internal affairs (whether as to cumulative voting, appraisal or voting rights in a merger, or any of the numerous other matters Section 2115 covers) solely on the law of its state of incorporation.

Indeed, the ultimate disposition of the Examen litigation may ultimately prove to have turned on the fact that Examen sued in Delaware before VantagePoint sued in Delaware, in which case Section 2115 issues may spawn a “race to the courthouse” in future cases, exacerbating the potential for uncertainty over which set of corporate provisions applies to the internal affairs of a quasi-California corporation.

So where does that leave quasi-California corporations? Should they continue to treat themselves as burdened by dueling sets of legal requirements despite a strong ruling by one of the nation’s most influential courts? Should they follow Examen’s lead and file for declaratory relief, but this time in California to test the Delaware prediction that Section 2115 would be held inapplicable? Is there a middle ground, where they can safely reject those California rules that are directly contrary to the law of their state of incorporation but not those that are arguably “additive?” If so, how do they safely identify that middle ground?

The answer is: we don’t really know and every situation is different but, pending the California Supreme Court definitive ruling that is so clearly needed, companies should not view Examen as a reliable basis for treating Section 2115 as dead. So long as corporations with meaningful connections to California, and no NYSE or NASDAQ NMS listing, prefer to incorporate in other states, they will continue to wrestle with the vagaries of Section 2115.

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8 U.S. CONST. Art. IV, §1.
A Note of Caution: Adopting a Rights Plan Against a Controlling Stockholder

By Mark A. Morton and Michael K. Reilly

Introduction

Stockholder rights plans are widely regarded as one of the most effective defensive measures available to a board of directors of a Delaware corporation. Indeed, rights plans may operate not only to prevent transactions at the corporate level, but also to prevent upstream transactions involving a controlling stockholder. It is precisely that latter operation that has been the subject of recent debate – i.e., to what extent may a board of directors adopt a rights plan to prevent the corporation's controlling stockholder from alienating its shares or, if the controlling stockholder is an entity, selling itself to a third party. The Court of Chancery was presented with that issue in Hollinger International, Inc. v. Black, and ultimately determined that, under the unique facts of that case, the adoption of a rights plan against a controlling stockholder “was a proper exercise of statutory authority that was consistent with the [independent directors’] fiduciary duty to protect the corporation.”

On April 19, 2005, the Delaware Supreme Court affirmed the Court of Chancery's decision with no additional substantive analysis. Nevertheless, the Delaware Supreme Court cautioned in a footnote that its decision to uphold the adoption of the rights plan should be understood as limited to the “specific, rather extreme, circumstances” presented in Hollinger. Accordingly, corporate practitioners should be mindful that Delaware courts likely will find the adoption of a rights plan against a controlling stockholder to be reasonable only in limited circumstances.

The Court of Chancery Decision

Hollinger, Inc. (the “Parent”) owned 30.3% of the equity and 72.8% of the voting control of Hollinger International, Inc. (“International”). The Parent, in turn, was 72% owned by Ravelston, Co., which was effectively controlled by Lord Conrad Black (“Black”).

In May 2003, one of International’s largest stockholders wrote to the board demanding an investigation into certain non-competition payments made to Black and other International executives in connection with asset sales in 2000. The International board established a special committee to investigate the non-competition payments and soon discovered that the payments may have been made without approval of the International board or any of its independent directors, notwithstanding disclosures indicating that such approval had been obtained.

Under scrutiny for his receipt of those payments, Black entered into an agreement with International (the “Restructuring Proposal”). Pursuant to the Restructuring Proposal, Black agreed: (i) to return the non-competition payments; (ii) to cooperate with the SEC in investigations regarding the payments; and (iii) to remain on the International board as Chairman and to devote his time and effort to the pursuit of a “Strategic Process” whereby International would be open to acquisition, sale of assets, or any other transaction designed to benefit the interests of all of its stockholders ratably. As part of the Restructuring Proposal, Black also agreed not to cause the Parent

9 Mark A. Morton is a partner and Michael K. Reilly is an associate in the Wilmington, Delaware law firm of Potter Anderson & Corroon LLP. The views expressed are solely those of the authors and do not necessarily represent the views of the firm or its clients.
10 844 A.2d 1022 (Del. Ch. 2004).
11 Id. at 1090.
13 Id., slip op. at 16 n.16.
to enter into any transactions that would negatively affect the Strategic Process.

Almost immediately after entering into the Restructuring Proposal, Black began negotiating with David and Frederick Barclay (the “Barclays”) for the sale of all of the outstanding stock of the Parent. The Barclays were interested in purchasing one of International’s assets, the Daily Telegraph, and initially approached Black to pursue such a transaction. Black had rebuffed their earlier expressions of interest, but once the Restructuring Proposal was in place, he invited negotiations. In the course of those negotiations, Black provided the Barclays with confidential information about International that was only available to Black because of his involvement in the Strategic Process.

Upon learning of Black’s activities, the International board undertook steps to implement a rights plan to prevent a sale of control of International. The rights plan would be triggered by, among other things, the sale of the Parent to a third party. Before the rights plan could be put in place, Black caused the Parent to execute written consents to amend International’s bylaws and, among other things, essentially strip the International board of authority to implement a rights plan. The board, believing those bylaw amendments to be invalid, proceeded with implementation of the rights plan. Thereafter, Black announced the transaction with the Barclays that would give the Barclays a controlling interest in International.

International brought suit against Black, seeking: (i) a determination that the bylaw amendments were illegal and inequitable; (ii) a determination that the rights plan was valid; and (iii) a preliminary injunction preventing Black from entering into a transaction with entities owned by the Barclays. In a post-trial opinion, Vice Chancellor Strine held that the bylaw amendments were proper under the General Corporation Law of the State of Delaware (the “General Corporation Law”), but were nonetheless invalid because they were made in bad faith and for an inequitable purpose. The Court also found that the rights plan was properly adopted and that International was entitled to a preliminary injunction preventing Black from entering into the contemplated transaction with the Barclays.

In considering whether the rights plan adopted by the International board was proper, the Court of Chancery analyzed both the statutory validity of the rights plan and its reasonableness under Unocal. Finding the rights plan to be valid, the Court stated that “the mere fact that a rights plan inhibits the ability of an intermediate holding company to sell itself does not make that rights plan statutorily impossible, or even inequitable in all circumstances.”

In considering whether the International Board had satisfied its duties under Unocal, the Court found both a threat and a proportionate response to that threat. The Court determined that International faced a threat from harm that the Barclays transaction posed to the ability of International to complete the contractually bargained for strategic process. Although a parent typically owes no contractual or fiduciary obligation to permit a subsidiary to explore alternative transactions, the Court found that this situation was “importantly distinct from the usual situation when a controlling stockholder closes down a subsidiary’s exploration of alternatives.” Unlike the typical situation, International secured a binding commitment from its controlling stockholder to lead a Strategic Process to seek a transaction at the International level that would provide an “equal and ratable” benefit to all of International’s stockholders. Accordingly, the Court determined that the independent directors made a reasonable determination that the

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14 Hollinger, 844 A.2d at 1084.
15 Id. at 1085.
16 Id.
transaction with the Barclays “thwarted the Strategic Process, denie[d] International the bargained-for benefits of the Restructuring Proposal, and [was] a serious threat to International….” 17

In addition, the Court found that the rights plan was a proportionate response to that threat because “there are circumstances when a subsidiary has a legitimate right to contest a parent’s sale of its control position” and that such circumstances were present in the case. 18 In reaching that conclusion, the Court stated that, “in the ordinary case,” a plaintiff would have a decisive argument that a rights plan was not a proportionate response to the threat of a parent selling itself. 19 Indeed, the Court found that “the replacement of a subsidiary’s controlling corporate stockholder with another through a transaction at the parent level should pose no cognizable threat to the subsidiary.” 20 Rather, the Court indicated that a parent “has a legitimate right to sell itself absent breaking some recognized duty to the subsidiary” and there is “utility to respecting this freedom.” 21

The Court noted, however, that the law has recognized situations in which a subsidiary will have a legitimate right to contest a parent’s control of its control position. 22 The Court pointed out that former Chancellor Allen was “open to the possibility that … extraordinary scenarios might justify subsidiary resistance to a controlling stockholder that wrongly endangers the corporation’s best interests, even by taking action to dilute the controlling stockholder’s control position.” 23 Such an extraordinary scenario “might be justified when a ‘controlling shareholder … was in the process or threatening to violate his fiduciary duties to the corporation.” 24

The Court argued that, if dilution was warranted in certain circumstances, it was certainly the case that circumstances could exist where the adoption of a rights plan against a controlling stockholder would be a proportionate response to a cognizable threat. Applying this reasoning to the facts before it, the Court determined that the rights plan was a proportionate response to the threat. In particular, the Court noted that the “most direct way that International can protect itself and pursue the Strategic Process Black promised to support is by using the Rights Plan.” 25 The Court found it persuasive that the International Board would still need to respect the Parent's rights, even with the rights plan in place, and would need to pursue a strategic transaction that was amendable to the Parent, because of the Parent's ability to veto any strategic transaction. The Court also was persuaded by the fact that the rights plan would necessarily be limited in its duration because the justification for the rights plan was the Strategic Process. The Court noted that “[o]nce the board has completed the Strategic Process and developed its preferred option, the further use of the Rights Plan would be suspect, absent further misconduct justifying its continued use.”

The Delaware Supreme Court Decision

With no further substantive analysis, the Delaware Supreme Court affirmed the Court of Chancery's decision. 26 The Delaware Supreme Court cautioned in a footnote, however, that its

17 Id. at 1086.
18 Id. at 1087.
19 Id. at 1087.
20 Id.
21 Id.
22 The Court stated that the “classic example is if the controlling stockholder is going to sell to a known looter.” Id.
23 Id.
24 Id. (quoting Mendel v. Carroll, 651 A.2d 297, 306 (Del. Ch. 1994)).
25 Id. at 1088.
26 Hollinger, slip op. at 16.
affirmance was limited to the specific facts set forth in *Hollinger*. In particular, the Court noted as follows:

> [O]ur upholding the adoption of the Rights Plan should be understood as limited to the specific, rather extreme, circumstances of this case. It should not be viewed as creating any broad exception to the transaction paradigm in which rights plans are normally designed to operate: settings involving a change of control transaction at the level of the corporate entity whose board of directors adopts the rights plan.27

Given this cautionary note in *Hollinger*, it is clear that a rights plan adopted specifically to thwart a change of control transaction at the controlling stockholder level, and not necessarily relating to a change of control at the level of the corporate entity, will be carefully scrutinized by a Delaware court. Although the Court stated that “rather extreme” circumstances were at issue in *Hollinger*, it is unclear what other set of facts would also be viewed as sufficiently extreme to support the adoption of a rights plan against a controlling stockholder.

The reasoning of the Court of Chancery’s decision might provide some insight into the types of circumstances that are sufficiently extreme. In particular, the Court seemingly recognized that a rights plan might be appropriate where a controlling stockholder was in the process of violating, or threatening to violate, its contractual obligations to a corporation in connection with a strategic process. It is possible that a rights plan also may be appropriate where a breach of a contractual obligation is not at issue.

For example, the recent litigation involving Printcafe Software, Inc. (“Printcafe”) and its most formidable stockholder, Creo, Inc. (“Creo”), might provide an example of extreme circumstances supporting the adoption a rights plan against a controlling stockholder.28 In that case, a committee of the Printcafe board adopted a rights plan against Creo, an entity that owned approximately 45% of Printcafe’s shares at the time of the Court’s decision, after learning that Creo intended to purchase a sufficient block of shares to become a majority stockholder of Printcafe, and thereafter offer to purchase all of the outstanding shares of Printcafe for $1.30 per share. The committee decided to adopt the rights plan because, immediately after Creo’s offer became public, a third party offered to purchase all of the outstanding shares of capital stock of Printcafe for $2.60 per share. After negotiating and agreeing to a deal with the third party, the committee believed it imperative that Creo be prevented from consummating its acquisition of voting control and thus obtaining the right to block the more lucrative third party offer.

After the committee’s adoption of the rights plan, Creo commenced an action in the Court of Chancery seeking a temporary restraining order, among other things, to enjoin Printcafe from enforcing the rights plan. As legal support for this requested relief, Creo alleged that the Printcafe board had violated its fiduciary responsibilities, that it had adopted an unprecedented rights plan that was invalid as a matter of law, and that it had tortuously interfered with Creo’s contractual right and obligation to purchase the critical block of Printcafe shares which would give it absolute control of Printcafe. After expedited briefing and argument, the Court declined to grant injunctive relief on the grounds that Creo had failed to demonstrate that it would suffer imminent irreparable harm if it were unable to complete its sale contract to acquire control of Printcafe and that the balancing of the equities tipped strongly in favor

27 *Hollinger*, slip op. at 16 n.16.

of allowing the highly fluid bidding process to proceed without judicial intervention. Although the Court’s decision did not address the merits, the Court’s willingness to refuse to grant the temporary restraining order may signal recognition that the circumstances facing Printcafe were sufficiently extreme to justify the adoption of a rights plan against a formidable stockholder.29

Conclusion

The Delaware Supreme Court has indicated that rights plans adopted against a controlling stockholder will be closely scrutinized and upheld only in limited circumstances. For that reason, a board of directors (or committee of the board) should proceed with caution when considering whether to adopt rights plans against controlling stockholders.

M&A “Nuggets”

Recently, Wilson Chu, Rick Climan and Joel Greenberg participated in a webcast for DealLawyers.com that included a presentation of M&A “nuggets.” An edited transcript of one of the “nuggets” presented by Joel Greenberg, addressing shell buyers in private equity acquisitions, is set forth below.

GREENBERG: Anyone who follows M&A statistics and market trends has noticed a steady increase in the participation of private equity buyers in the M&A marketplace. That’s not going to change for the foreseeable future since the last statistic that I saw on the subject shows that private equity firms have perhaps three-quarters of a trillion dollars of equity available to be spent on deals. And the managers of those firms don’t get the compensation they expect unless they spend the funds under management.

The typical private equity firm is a group of limited partnerships or limited liability companies with a common management organization, so that if you are selling a company to Bain Capital, you will really be selling it to Bain Capital Partners VI, Bain Capital Partners VII or a combination of funds.

However, if you look at the acquisition agreement that a private equity firm proffers at the start of negotiations, the buyer named in the agreement won’t be one of these partnerships or limited liability companies; it will be a newly incorporated vehicle called Target Acquisition Corp. or the like with no more than $10,000 of capital and perhaps an equity commitment and a debt commitment.

That’s a very interesting situation, because if the corporation signs the agreement as buyer and nobody else does, there is no party with assets that the sellers can hold accountable in the event of a breach. All of the careful attention given to closing conditions, including the definition of material adverse effect and the standard of materiality for the bring down of representations, may be meaningless because the only person that the sellers are in privity with is a shell with no assets.

If the sellers raise the issue, which of course they should consider, the private equity firm may say that its business reputation would prevent it

29 The threat of the loss of negotiating leverage under Delaware’s business combination statute, 8 Del. C. § 203 (“Section 203”), through the guise of a technical reading of that statute, and in an effort to thwart a corporation from pursuing other strategic alternatives, may also constitute extreme circumstances justifying the adoption of a rights plan against a controlling stockholder. In particular, one could conceive of a situation in which a controlling stockholder, who is also a director and officer of the corporation, asserts that it could transfer shares to a third party without that third party becoming an “interested stockholder” (as defined in Section 203) because of the parenthetical set forth in the exception in Section 203(a)(2). Similar to the situation in Hollinger, a breach (actual or threatened) of a director’s fiduciary obligations might be at issue, and therefore a rights plan might be justified. A less extreme solution may also be available, e.g., removing the controlling stockholder as an officer and thus foreclosing any argument that an exception under Section 203(a)(2) could be utilized.
from walking away from a deal based on the shell status of the buyer and that it would never do it. After all, they’re in the business of buying and selling companies and they can’t afford to undercut their credibility in that way. There is a lot of truth to that.

The problem is that in the close case the dynamics of the negotiation are going to be different if the buyer has no assets at risk. Assume that the parties get to the closing table and the buyer argues that there’s been a material adverse effect and the sellers argue there hasn’t been. And this often turns into a price negotiation. I don’t think it is possible in that situation to avoid some impact from the fact that the buyer is not responsible for damages because it has no assets. The cure from the sellers’ perspective is either to get a party with significant assets on the agreement directly or to get some sort of limited guarantee.

And I will tell you that depending on which private equity firm is involved, that may be a one minute negotiation or a three day negotiation in which the seller has to threaten to walk away. Some private equity firms take a very hard line on this issue.

The Staff suggested, however, that in some cases this response might trigger a request for the filing of the disclosure schedules. Joel Greenberg noted the requirement that if schedules are omitted from the merger agreement then the issuer must provide an undertaking to file on request. The Task Force discussed the issues of materiality and agreed that commentary on Titan would be included in the discussion of the disclosure schedules.

Phil Stamatakos then led a discussion of the conditions sections and he outlined plans for additional commentary. The Task Force agreed to a variety of revisions and additions. The more significant drafting policy decisions were that the Task Force agreed (i) to use the term “material adverse change” and “having the effect of a material adverse change,” and not use “material adverse effect,” (ii) that the discussion of the MAC, including the definition and carveouts, would be placed in the conditions section with a cross reference in the reps and warranties section, and (iii) that the discussion of the Omnicare and Orman decisions would be left in the voting agreement section.

At our meeting held on April 2, the Task Force discussed a request from Chancellor Chandler to have our stand alone meeting near his courthouse in southern Delaware. The Task Force discussed the planning, scheduling and logistical issues associated with such a meeting. Diane Frankle asked Mark Morton to report at our meeting in Chicago on the possibility of holding a Task Force meeting in May or September in southern Delaware. Since our annual Wilmington meeting may be held later than usual, the Chairs proposed to have an all day drafting session in January 2006. Drew Fuller offered to host this meeting at his offices in San Antonio.

Drew Fuller then led a discussion of the covenants sections, including the commentary for the introduction and Sections 4.1 and 4.2. The Task Force requested that all antitrust commentary on
gun jumping and related matters, like information sharing, be collected in one place with appropriate cross references. The Task Force also discussed the commentary to section 4.7 and agreed to a variety of revisions.

The Chairs noted that it was important to get content done as soon as possible for our next meeting in Chicago. Joel confirmed his intent to provide a significant portion of the commentary on the reps and warranties for the August meeting.

Our Task Force dinner in Chicago will be held from 8:00 p.m. to 10:00 p.m. on Friday evening, August 5th, at Phil Stefani’s 437 Rush.

Diane Holt Frankle
Stephen H. Knee
Co-Chairs

Task Force on International Acquisition Transactions

The Task Force on International Acquisition Transactions met for three hours in Nashville. The focus of the meeting was on the current project of the Task Force, which is to create a new version of the Model Asset Purchase Agreement that can be used in jurisdictions outside the United States. We had agreed previously that internationalizing the agreement would consist, on the one hand, of genericising the language and, on the other hand, including by way of schedule the representations, warranties and covenants for given countries that would need to supplement or supersede the terms of the main body of the agreement. Our experience to date has been that most of the work would be in genericising the language and that there should not be many representations, warranties and covenants that would need to be covered by way of schedule. At the meeting, we focused on our continuing review of the representations and warranties.

One of the recurring issues for our discussion is how to deal with changes to the agreement that would be different from the approach taken on the Model Asset Purchase Agreement. Byron Egan, Vince Garrity and Jon Hirschoff have provided guidance and input on these issues based on their involvement in the Model Asset Purchase Agreement project. We have agreed that some of the positions taken in the Model Asset Purchase Agreement may not be appropriate for this agreement given the international nature of the project and that some of the positions taken may not lend themselves to a cross-border acquisition. At the meeting, we reviewed and commented on the mark-ups provided of sections 3.1, 3.2 and 3.3.

At our meeting in Chicago, we intend to review sections 3.4, 3.5, 3.6, 3.10, 3.11, 3.12, 3.13, 3.15, 3.16, 3.17, 3.18, 3.19 and 3.20. In addition, Alfredo Rovira will provide an overview at the meeting of the M&A practice in Latin America on financial statements.

On the publications front, we have two projects slated for publication later this year: the private company stock acquisition overview and the cross-border due diligence international overview.

On the program front, the Task Force, as has been its custom, will be putting on a program at the ABA annual meeting in Chicago. The program, which is chaired by Wilson Chu, is entitled Executing Multinational Acquisitions: Trends and Techniques in Getting the Far Flung Deal Done.

John W. Leopold
Chair

Task Force on Joint Ventures

The Model Joint Venture Agreement has been substantially completed and currently is in the process of undergoing “leadership review” prior to going to print.
Two additional projects are underway. The first, under the leadership of Alison Youngman, is the preparation of an International Joint Venture Questionnaire. A revised draft will be circulated to the Task Force before the Chicago meeting. In Chicago, we will be meeting to discuss and hopefully finalize that draft from 8:00 to 10:00 a.m. in the Astor Room, East Mezzanine of the Drake Hotel on Sunday, August 7, 2005. After that meeting, we will be sending out the questionnaire to various lawyers around the world for completion.

The second project, under the leadership of Tom Hyman, is the preparation of an annotated LLC supplement to the Model Joint Venture Agreement. This work is currently underway with a very small group of Task Force members with a view to having some material to present to the Task Force at the stand-alone meeting in Las Vegas in October.

Thomas B. Hyman, Jr.
Alison J. Youngman
Co-Chairs

Task Force on the Manual of Acquisition Practice and Process

The M&A PROCESS: A Practical Guide for the Business Lawyer has gone to press and is expected to be available for purchase from the ABA at the Annual Meeting. For those of you who have not followed its development, the Guide provides an introduction to the lawyer embarking on his or her first acquisition and focuses on the acquisition process. The Guide includes the following chapters:

- Context of Mergers and Acquisitions Transactions
- Managing the Client Relationship and Other Ethical Issues
- Dealing with Other Constituencies
- Planning for a Sale
- Embarking on the Sale Process
- Understanding Accounting Principles, Financial Statements and Business Valuation
- Negotiating the Deal
- Pacing the Deal and Negotiation Impediments
- Conducting Due Diligence
- Preparing the Acquisition Agreement and Related Documents
- Getting from Agreement to Closing
- Coping with the Troubled Deal
- Closing the Deal
- Handling Post Closing Matters
- Glossary and Bibliography

In addition to our Reporter Rob Ouellette and the Editorial Committee, which consisted of Neal Brockmeyer, Bob Copeland, Bill Payne and Murray Perelman, the following task force members have contributed thoughtful chapters and subchapters, which have become the core of this Guide, or have provided helpful comments and support throughout the project: David L. Albin, Howard J. Barnhorst, II, Brian Belanger, David L. Benson, Eric V. Brown, Jr., Charles H. Brownman, Henri M. Bybelezer, John F. Clifford, Gordon E. Cooper, Cecilia Ann Cordova, John F. Corrigan, Mark A. Danzi, Byron F. Egan, David C. Gavsie, Jon T. Hirschoff, Michael S. Jordan, Josef Keglewitsch, Lori L. Lasher, Theodore W. Lenz, Daniel H. Minkus, Brian S. North, Ralston W. Steenrod, George Malcolm Taylor, Thomas W. Van Dyke, Dennis J. White, Arthur J. Wright and Norman A. Zilber.

Joel Greenberg also assisted greatly by reading the complete manuscript as part of the
“leadership review” process and providing very helpful comments.

Thomas M. Thompson  
Vincent F. Garrity, Jr.   
Co-Chairs

Task Force on the Model Stock Purchase Agreement

As you will recall from our meeting in Nashville, the Task Force as a whole will begin to focus its efforts on commentary and will coordinate its work with the work of the M&A Jurisprudence Subcommittee. At the same time, the Editorial Working Group will be meeting separately to finalize various sections of the agreement. The Task Force will meet on Saturday, August 6th from 11:00 a.m. to 1:00 p.m. in the Walton Room, Lower Level of the Drake Hotel. At that meeting, we will focus our attention on the new provisions of commentary which Hendrik Jordaan has received since our meeting in Nashville.

The Editorial Working Group will meet earlier in the morning, from 8:00 a.m. until 10:00 a.m., in the Astor Room, East Mezzanine at the Drake Hotel to review revised text and commentary to Articles 5 and 6. Time permitting, the Editorial Working Group will also review materials prepared with respect to Article 11 commentary.

I want to encourage those of you who wish to work on the commentary portion of the project to contact Hendrik Jordaan and advise him of your interest. I look forward to seeing you in Chicago.

Robert T. Harper  
Chair

SUBCOMMITTEE REPORTS

Membership Subcommittee

Committee membership continues to climb at an impressive pace. As of June 2005, membership stood at 1326, representing an increase of approximately 40% over the past two years.

Our records show that approximately 71% of our members are in private practice and approximately 11% are in-house. But these statistics should be taken with a grain of salt because there’s a large number (210) designated as “Other.” (What do you expect from a bunch of lawyers charged with the arduous task of categorizing themselves?)

The Committee’s coverage among America’s largest firms increased by more than 30% since March of 2004, with at least one member in over two-thirds (169) of the National Law Journal 250.

That’s pretty impressive coverage among the NLJ 250. The more important statistic, however, is that the “Big Firm” lawyers represent only about 38% of Committee membership. Being a Master-of-the-Obvious, it’s clear to me that the Committee is more “Main Street” than “Wall Street.” (Our Canadian colleagues lead all other non-U.S. countries at almost 5%, consisting of 61 members with 37 from Ontario and 22 from Quebec.)

But that does not mean that Wall Street’s influence on the Committee is A.W.O.L. To the contrary, New York still leads in membership with 130 members. California comes in second with 118 members, with Illinois (83) and Texas (78) rounding out the Committee’s “Big Four.”

I am pleased to announce that Hendrik Jordaan of Holme Roberts & Owen in Denver has
accepted our invitation to serve as Vice Chair of the Membership Subcommittee.

With Hendrik’s and your help, we look forward to continuing our march to remain one of the Section of Business Law’s largest and fastest growing Committees. We’ll continue our email and other recruitment efforts. But remember, there’s no better recruitment tool than personally reaching out to a colleague to tell her or him about the benefits you receive from your Committee participation.

Wilson Chu  
Chair

**M&A Jurisprudence Subcommittee**

The Subcommittee on Recent Judicial Developments has been reorganized as the M&A Jurisprudence Subcommittee, with Scott Whittaker as Chair. The Subcommittee has two working groups. One is the Annual Survey Working Group, headed by Jon Hirschoff. This group will continue the preparation and publication in *The Business Lawyer* of the Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions. The other group is the Judicial Interpretations Working Group, headed by Jim Melville. This group will examine judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking not only for recent M&A cases of special interest, but also examining the entire body of case law on the specified type of provision. The Annual Survey Working Group will meet in Chicago on Friday, August 5, from 12:30 p.m. until 2:00 p.m. in the Erie Room, West Mezzanine, of The Drake Hotel. The Judicial Interpretations Working Group will meet immediately after that, from 2:00 p.m. until 4:30 p.m. in the Drake Room, Upper Level, of The Drake Hotel.

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**Annual Survey Working Group**

The third Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions appeared in the February 2005 issue of *The Business Lawyer*. Our working group is now collecting 2005 cases for consideration for inclusion in our next annual survey, which is currently scheduled to appear in the February 2006 issue of *The Business Lawyer*. We are asking all members of the Committee on Negotiated Acquisitions to send us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by email either to Scott Whittaker at swhittaker@stonepigman.com or to Jon Hirschoff at jhirshoff@fdh.com. You may fax cases to Scott at (504) 596-0836 or to Jon at (203) 348-5777. Please state in your email or on the fax cover sheet why you believe the case merits inclusion in the survey.

The first criterion for inclusion is that the decision must involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control. The second criterion is that the decision must (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim. We are currently excluding cases dealing with federal law, securities law, tax law, and antitrust law. However, if you feel a case dealing with an M&A transaction is particularly significant, please send it even if it does not meet the foregoing criteria.
Decision to be Discussed at the Chicago Committee Meeting


In this case, decided on December 20, 2004, the United States District Court for the Southern District of Texas enforced a provision of a merger agreement that obliged the buyer to continue the acquired company’s benefit programs for its employees and retirees.

In the 1998 merger of Dresser Industries, Inc. into a wholly owned subsidiary of Halliburton Company, the merger agreement obliged Halliburton to continue Dresser’s benefit programs for its employees and retirees unless the benefits were similarly changed for Halliburton’s active employees. Halliburton maintained those programs for six years, and then attempted to reduce health benefits for Dresser retirees to the level of health benefits for Halliburton retirees. Halliburton sought a judicial declaration that it could change the benefits. Dresser retirees responded with a claim that Halliburton could not make the change. Like Prouty v. Gores Technology Group, 18 Cal. Rptr. 3d 178 (Cal. Ct. App. 2004), discussed in our 2004 survey at 60 Bus. Law. 847-49, Halliburton raises the question whether employees (in Halliburton, retired employees) of the target company can claim benefits under an acquisition agreement. The Halliburton court, which characterized the question as an issue of “standing,” resolved it in favor of the retirees on three grounds. First, the merger provision could be viewed as an amendment of the Dresser plan, and the law allows retirees to enforce or clarify their rights under a plan, and requires that any waivers must be explicit, voluntary and individual. Second, viewing the merger agreement as an extra-plan contract, the retirees were “genuine, express beneficiaries of the merger agreement.” Halliburton argued that a provision of the merger agreement allowing enforcement of the employee and retiree benefit provisions by a majority of the directors of Halliburton designated by Dresser acted as a no third party beneficiary clause, but the court concluded that this provision did not bar third party enforcement. Third, in any event, Halliburton brought the suit and had standing to seek a declaration of its obligations, and the retirees had “standing” to be defendants.

The Court concluded: “The cost to Halliburton of this benefit is $93 million. This is about one-half of 1% of Halliburton’s revenue totaling $16.3 billion in 2003. This is a lot of money, but if Halliburton now considers it to be somehow too much, the solution is not to change the deal that it made in 1998. Halliburton agreed to this cost as part of its payment for Dresser.”

This case, like Prouty, reminds M&A practitioners that provisions intended to negate third party beneficiary rights must be carefully drafted. But the court’s first reason for concluding that the Dresser retirees had standing, namely that the merger agreement provision was a “plan amendment,” indicates that even had Halliburton included a perfect no third party beneficiary clause in the merger agreement, in these circumstances that clause would not have prevented the Dresser retirees from suing to enforce their rights under the merger agreement. This case also stands as a reminder to M&A practitioners that the input of employee benefits lawyers is frequently essential in business combinations.

Judicial Interpretations Working Group

The inaugural meeting of the Judicial Interpretations Working Group was held at the ABA Business Law Section Spring Meeting in Nashville. We were very pleased to have a standing room only crowd, plus participants by conference call. At that meeting, teams were formed to research and prepare memoranda pertaining to the jurisprudence interpreting twenty different provisions of M&A agreements and ancillary documents. We have many more projects we
would like to undertake, and we invite any additional members of the Negotiated Acquisitions Committee to participate in this new and exciting working group. To join, please send an email to Jim Melville at jcm@kskpa.com with a copy to Scott Whittaker at swhittaker@stonepigman.com or just come to our working group meeting in Chicago.

At our working group meeting in Chicago, we will discuss the work product of those teams that have made significant progress on their projects, form teams of new members, and discuss and assign new projects. At the full Committee meeting in Chicago, one working group team will discuss judicial decisions addressing the “bring down” condition.

Scott Whittaker
Subcommittee Chair

Jon T. Hirschoff
Annual Survey Working Group Head

James C. Melville
Judicial Interpretations Working Group Head

M&A Market Trends Subcommittee

The Subcommittee continues to make considerable progress. The Subcommittee’s two initial projects will include publishing studies containing statistical and other information regarding key negotiated deal points relating to acquisition agreements involving (i) public buyers/private targets and (ii) public buyers/public targets. To date, we have downloaded from LIVEDGAR, into a virtual data room ("VDR"), those reported deals that were completed in 2004 and our reviewers have reviewed (utilizing a passworded entry system via VDR) the 2004 deals online and have recorded their respective deal point data findings online. We are now in the process of (i) conducting quality control reviews and (ii) assimilating the statistical information into various graph formats. With any luck, the initial results of this year's studies will be available in the next month or two. In addition to the public/public study, Subcommittee Vice Chair Keith Flaum (flaumka@cooley.com) continues to lead the effort to beta test an “M&A Market Check Message Board” in which M&A professionals can post questions, canvass the market and engage in a dialogue regarding current M&A practice. Anyone interested in working on these studies can contact either of the Subcommittee Co-Chairs, Wilson Chu (Wilson.Chu@HaynesBoone.com) or Larry Glasgow (lglasgow@gardere.com).

Wilson Chu
Lawrence Glasgow
Co-Chairs

Programs Subcommittee

Immediately following our full Committee meeting on Sunday, August 7th, Lorna Telfer, Scott Falk and Jim Melville will present a Committee Forum entitled Dual Class Structures in Merger Transactions: Double Trouble or an Effective Alignment of Interests?

In addition, the Committee will be sponsoring two programs and co-sponsoring two other programs at the Annual Meeting in Chicago. On Friday, August 5th, from 10:30 a.m. to 12:30 p.m., the Committee will present Ethical Issues in M&A Transactions. David Albin will chair the program, and will be joined by Bob Copeland and Alison Youngman of our Committee, and Bill Freivogel of Aon Risk Services. The panel will identify and address some of the ethical issues we encounter, including the conduct of negotiations, the multijurisdictional aspects of the M&A practice and how to sort through conflict issues when representing various constituencies.

On Saturday, August 6th, from 10:30 a.m. to 12:30 p.m., Wilson Chu will chair a program on
Executing Multinational Acquisitions: Trends and Techniques in Getting the Far Flung Deal Done. A panel of M&A attorneys experienced with multinational transactions will discuss, in a mock all-hands meeting context, key aspects of managing the cross-border deal, including approaches to due diligence, finding/managing local counsel, use of U.S.-style M&A documents, the impact of U.S. practices and emerging trends and challenges. Joining Wilson will be Deborah Telman from the Boeing Company, John Clifford from Canada, Charles Law from China and Marcelo Bombau from Argentina.

Finally, the Committee will co-sponsor two programs on Friday, August 5th, from 2:30 p.m. to 4:30 p.m. The first program is entitled Antitrust for the Transactional Lawyer: What You Need to Know, From Due Diligence to Closing, and will be chaired by John Clifford, while the second program is entitled Going, Going, Gone: Private Equity Firms & Controlled Auctions, and will be co-chaired by Richard Clark and Henry Lesser.

Neal H. Brockmeyer
Co-Chair
American Bar Association, Section of Business Law, Committee on Negotiated Acquisitions. The views expressed in the Committee on Negotiated Acquisitions Newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Committee on Negotiated Acquisitions. If you wish to comment on the contents, please write to the Committee on Negotiated Acquisitions, Section of Business Law, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois, 60611.