Our Committee’s Fall 2006 stand-alone meeting will be held from Thursday afternoon, October 19, through Sunday morning, October 22, at the Adolphus Hotel in Dallas, Texas. Thursday afternoon, all day Friday, Saturday morning and Sunday morning will be devoted to separate subcommittee, task force and working group meetings. The full Committee meeting will be held Saturday afternoon, starting at 1:30 p.m., and the Committee Forum will follow at 3:30 p.m.

We have a full and interesting agenda for the Committee meeting, with discussions of (i) the use of ERISA to provide employees with standing to enforce “social” provisions of merger agreements, (ii) tortious interference with exclusivity agreements, (iii) recent Delaware case law developments, (iv) the Department of Justice’s inquiry into private equity firms’ bidding practices, and (v) assuming the SEC cooperates with prompt publication of the results of its meeting this Wednesday, the amendment of Rule 14d-10 to exclude compensatory arrangements from the best price rule. The meeting will conclude with a presentation on the current state of the M&A market by Rick Lacher of Houlihan Lokey Howard & Zukin.

Immediately following the full Committee meeting, the Committee Forum will feature a presentation on fairness opinions by Rick Lacher, Henry Lesser, Mark Morton and Yvette Austin Smith.

For the first time, we are going to attempt to make the full Committee meeting and Committee Forum available to members who cannot attend in

(continued on next page)
person through a conference telephone call and posting of materials on the Committee’s website. The ABA informs me that it will probably not be possible to provide similar access in the Spring or Summer meetings, but if it works out well we will try to provide a similar opportunity at future standalone meetings.

We have scheduled two dinners for the full Committee: The City Club of Dallas on Friday night and Sammy’s Bar-B-Que on Saturday night. For those arriving on Thursday, we have a selection of reservations at four Dallas restaurants. Thanks to Bruce Cheatham, Wilson Chu, Byron Egan, Larry Glasgow and Jim Griffin for making those arrangements and to Bowne & Co. and Fulbright & Jaworski for sponsoring the Friday and Saturday night dinners, respectively.

My first effort at this column would not be complete without acknowledging Rick Climan’s contributions as Chair of the Committee over the past four years. During that period, the Committee has seen dramatic growth, both in membership — although the Committee is more than 20 years old, most of its members have joined during Rick’s tenure — and in the breadth of its activities. Among the Committee’s accomplishments are the publication of new Committee products, an annual review of judicial developments in The Business Lawyer and the start of work on new products. We have also begun to bring the Committee’s work product to the academic world through the presentation of mock negotiations at Stanford and Columbia. Of at least equal significance are the energy and the relentless drive for quality and substantive content in the Committee’s efforts that have marked Rick’s tenure. It is both gratifying and a bit daunting for me to succeed him, and I know that all of you join me in thanking Rick, both for his contributions over the last four years and for his contributions to come as a continuing active member of our Committee.

FEATURE ARTICLE

PNB HOLDING: “MAJORITY-OF-THE-MINORITY” CLARIFIED

By Michael K. Reilly and Roxanne L. Houtman

In a recent decision, captioned In re PNB Holding Co. Shareholders Litigation, the Delaware Court of Chancery provided important guidance with respect to, among other things, the possibility of using (and the proper standard for calculating) a fully-informed, non-coerced vote of a majority of disinterested stockholders (a “majority-of-the-minority”) in order to invoke the substantive protections of the business judgment rule outside of the context in which a controlling stockholder is on both sides of a merger transaction.

The PNB Holding Facts

The case involved PNB Holding Company, a Delaware corporation and bank holding company (the “Company”), headquartered in Livingston County, Illinois. Although initially a community bank confined to the town of Pontiac, the Company embarked on an expansion plan in the mid-1990s. After suffering initial setbacks, the Company eventually established a foothold in a nearby growing county and began to reap rewards from its expansion. Following that success, the Company’s

1 Michael K. Reilly and Roxanne L. Houtman practice law 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.

board considered other strategic alternatives, including the possibility of merging with a similar sized bank, acquiring smaller banks, converting to an S corporation, or continuing to operate under its current business plan.

Eventually, the Company’s board decided to convert the Company to an S corporation. Because the Company had too many stockholders to qualify as an S corporation, however, the Company needed to engage in a transaction to reduce the number of stockholders. To accomplish that goal, the Company’s board formed an S Corporation Conversion Committee (the “Committee”), which retained Prairie Capital Services, Inc. (“Prairie Capital”), an independent investment banker, to determine the “fair value” of the Company’s capital stock.  

Based on Prairie Capital’s advice, the Committee recommended, and the Company’s board ultimately approved, a merger transaction to cash out a sufficient number of stockholders, at a price of $41.00 per share, in order to permit the Company to qualify as an S corporation (the “Merger”). Any stockholder who owned at least 2,000 shares of stock and was one of the largest 68 stockholders, as of May 2, 2003, would remain a stockholder of the Company, while all other stockholders would be cashed out. Importantly, all of the directors held a sufficient number of shares (either personally or through trusts) such that they would remain stockholders of the Company following the Merger.

The Merger was approved by 92.6% of the shares that were voted in person or by proxy at the meeting. Only 48.8% of the departing stockholders, however, voted in favor of the Merger. Of the balance of the stockholders who were not eligible to remain as stockholders of the Company, 37.3% failed to return a proxy, 6.2% perfected a demand for appraisal rights, 4.3% voted against the Merger, and 3.4% abstained. Following consummation of the Merger, the number of stockholders of record was reduced from approximately 360 to 69. All of the Company’s executive officers and directors, and certain of their family members, remained stockholders in the Company.

The PNB Holding Decision

Several stockholders dissented from the Merger and perfected their appraisal rights, while several other stockholders accepted the Merger consideration, but commenced an action in the Delaware Court of Chancery alleging that the Company’s directors breached their fiduciary duties by approving a merger that was unfair to the minority stockholders. The actions were consolidated into an equitable/appraisal action, “rest[ing] on the notion that the $41.00 per share paid in the Merger was unfair.”

With respect to the equitable claim, the Court first considered the plaintiffs’ contentions that the Merger was subject to the entire fairness standard of review. The plaintiffs argued that the Company’s board should be “considered as a monolith and that given the board’s voting power and board control, the Merger should be analyzed as if it were a squeeze-out merger proposed by a controlling stockholder.” In Kahn v. Lynch Communications Systems, Inc., the Delaware Supreme Court held that the entire fairness standard

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3 Prairie Capital determined that the fair value of the Company’s outstanding shares was $40.74 per share.
4 The merger consideration represented a 12% premium over the Company’s book value and a 6% premium over market value.
5 2006 WL 2403999, at *8.
6 Some of the stockholders who accepted the Merger consideration also voted in favor of the Merger.
7 2006 WL 2403999, at *8.
8 Id.
9 638 A.2d 1110 (Del. 1994).
of review applied \textit{ab initio} in certain special circumstances, \textit{e.g.}, a negotiated going private transaction with a controlling stockholder or a merger of two companies under the common control of one controlling stockholder. In those circumstances in which a controlling stockholder is on both sides of a negotiated transaction, the Delaware Supreme Court has found that the approval of the transaction by disinterested directors (\textit{e.g.}, by a special committee) or by a majority of disinterested stockholders would only shift the burden of proving entire fairness, but would not invoke the substantive protections of the business judgment rule.

In considering the plaintiffs’ argument that the Merger should be subject to the rule of \textit{Kahn v. Lynch}, the Court found that the officers and directors were not a “controlling stockholder group.”\textsuperscript{10} The Court noted that, under Delaware law, a controlling stockholder exists either where the stockholder (i) owns more than 50% of the voting power of the corporation, or (ii) exercises control over the business and affairs of the corporation.\textsuperscript{11} Taken as a whole, the officers and directors owned only 33.5% of the voting power of the corporation. Furthermore, the evidence failed to show that the officers, directors, and their respective families operated as a unified controlling bloc.\textsuperscript{12} Rather, Vice Chancellor Leo Strine, Jr. observed that there were no voting agreements in place between any of the members of the purportedly controlling block (consisting of directors, officers, spouses, children and parents), and that each individual “had the right to, and every incentive to, act in his or her own self-interest as a stockholder.”\textsuperscript{13} Importantly, of the approximately 20 people that comprised the “supposed controlling stockholder group,” the largest block held by any one holder was 10.6%.\textsuperscript{14} Thus, the Court reasoned as follows:

Glomming share-owning directors together into one undifferentiated mass with a single hypothetical brain would result in an unprincipled Frankensteinian version of the already debatable 800-pound gorilla theory of the controlling stockholder that animates the \textit{Lynch} line of reasoning.\textsuperscript{15}

The Court, therefore, held that the facts of \textit{PNB Holding} did not fit within the \textit{Kahn v. Lynch} line of jurisprudence.

Although concluding that the defendant directors were not controlling stockholders, the Court concluded that the defendant directors were subject to a conflict of interest that was sufficient to invoke the application of the entire fairness standard of review. Each of the defendant directors personally benefited to the extent that departing stockholders were underpaid.\textsuperscript{16} Furthermore, each of the defendant directors had a material interest in the Merger, which had the effect of yielding an economic benefit that was not shared equally by all

\textsuperscript{10} 2006 WL 2403999, at *10.
\textsuperscript{11} The Court noted that this “second test exists to allow the law to impose fiduciary obligations on stockholders who, although lacking a clear majority, have such formidable voting and managerial power that they, as a practical matter, are no differently situated than if they had majority voting control.” \textit{Id.} at *9.
\textsuperscript{12} Plaintiffs maintained that the allegedly controlling group consisted of 20 individuals, all of whom were officers or directors of the Company, or were related to the officers or directors of the Company.
\textsuperscript{13} 2006 WL 2403999, at *10.
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} The Vice Chancellor noted that “the sixty-eight remaining stockholders of [the Company] would gain the advantages of being stockholders in an S corporation. Any upside in [the Company’s] future would belong to [the remaining stockholders], exclusive of their departing brethren.” \textit{Id.} at *11 (internal citation omitted).
of the stockholders of the corporation. In addition, and unlike in the context of determining whether a controlling stockholder group existed, the Court found that the family ties between the directors and the non-director stockholders were relevant. Importantly, several of the directors apparently transferred shares of the Company’s stock to family members in order to ensure that they remained stockholders of the Company after the Merger. The Court found that fact to be “indicative of the importance they ascribed to continued ownership in” the Company.

Having found that the Merger was subject to the entire fairness standard of review, the Vice Chancellor addressed the potential “cleansing” effect of approval by (i) independent and disinterested directors (e.g., a fully-functioning special committee), or (ii) a fully-informed, non-coerced vote of a “majority-of-the-minority.” With respect to the former, Vice Chancellor Strine stated as follows:

In my view, the rule of Lynch would not preclude business judgment rule protection for a merger of this kind so long as the transaction was approved by a board majority consisting of directors who would be cashed-out or a special committee of such directors negotiated and approved the transaction.

Although the defendant directors created the Committee to investigate the feasibility of the conversion of the Company to an S corporation, the Committee was not comprised of disinterested directors. As a result, the Committee did not operate to invoke the substantive protections of the business judgment rule.

The Court also noted that the substantive protections of the business judgment rule could be invoked if the Merger was approved by a “majority-of-the-minority.” The Court found, however, that the Company failed, as a mathematical matter, to obtain the approval of a vote of a “majority-of-the-minority.” In that regard, the Court rejected the defendant directors’ contention that only those stockholders who returned a proxy should be included in calculating whether a transaction had been approved by an informed, non-coerced “majority-of-the-minority.” Clarifying a previously unresolved aspect of Delaware law, the Court held that Delaware law requires a vote of a majority of all of the minority shares entitled to vote.

Equally important, Vice Chancellor Strine indicated that, outside of the Kahn v. Lynch context, the approval of a majority of the disinterested stockholders may be sufficient to invoke the protections of the business judgment rule, even if the challenged transaction is not subject to a non-waivable “majority-of-the-minority” condition. The Vice Chancellor stated as follows:

Under Delaware law, however, the mere fact that an interested transaction was not made expressly subject to a non-waivable majority-of-the-minority vote condition has not made the attainment of so-called ‘ratification effect’ impossible. Rather, outside the Lynch context, proof that an informed, non-coerced majority of the disinterested stockholders approved an interested transaction has the effect of

17 Following the reclassification, the defendant directors would be entitled to approximately 42% of the annual dividends. Id. at *13.

18 Id.

19 Id. at *14 n.69.

20 The Court reasoned that such a standard is in line with the vote required to approve a merger under Delaware law. Id. at *15 (“a vote of a ‘majority of the outstanding stock of the corporation entitled to vote’ is required for merger approval, and a failure to cast a ballot is a de facto no vote”) (citing 8 Del. C. § 251)). The Court also commented that a contrary holding required “an untenable assumption that those who did not return a proxy were members of a ‘silent affirmative majority of the minority.’” Id.
invoking business judgment rule protection for the transaction and, as a practical matter, insulating the transaction from revocation and its proponents from liability.\textsuperscript{21}

The Court of Chancery ultimately concluded that the defendant directors failed to prove the entire fairness of the Merger. The Court awarded the appraisal claimants $52.34 per share and the claimants (who did not vote in favor of the Merger) damages in the amount of $11.34 per share (an amount representing the difference between the Merger consideration and the fair value). Claimants who voted in favor of the Merger were barred from recovery under the doctrine of acquiescence.\textsuperscript{22} Claimants who accepted the Merger consideration but did not approve the Merger were not similarly barred.

**Lessons from PNB Holding**

The *PNB Holding* decision contains several lessons for M&A practitioners, including the following:

- **Existence of a Controlling Stockholder.** The Court refused to find that a disparate group of directors who had a material conflict of interest with respect to the transaction should be grouped together as a controlling stockholder group. Moreover, the Court expressed skepticism with respect to the argument that family relations should always give rise to a conclusion that individuals should be deemed to be acting as a unified group with respect to their equity interests in a corporation.\textsuperscript{23}

- **Invoking Business Judgment Rule Protection.** Outside of the *Kahn v. Lynch* context, a fully-informed vote of a “majority-of-the-minority,” as a factual matter, and regardless of whether the merger transaction was conditioned on that vote, can invoke the protections of the business judgment rule and avoid entire fairness review. Similarly, the Court suggested that the negotiation and recommendation of a transaction by a committee of disinterested and independent directors should invoke the protections of the business judgment rule outside of the *Kahn v. Lynch* context.\textsuperscript{24}

- **Majority of the Outstanding Minority.** For the first time, the Court directly answered the oft-debated question of whether a vote of a “majority-of-the-minority” should be a vote of a majority of

\textsuperscript{21} Id. at *14 (internal citations omitted). Note, however, that the Vice Chancellor also recognized that with respect to going private transactions with controlling stockholders, there may be compelling justifications for requiring that a transaction be subject to an express, non-waivable condition that the “majority-of-the-minority” approve the transaction.


\textsuperscript{23} The Court noted, in particular, that “the idea that children and parents always see eye-to-eye is not a premise of our law. One can have a healthy family relationship and still feel free to vote one’s stock differently than a parent. Absent some reason to believe that the vote would work a serious injury on the close relative – for example, a vote that would ask a child to unseat her CEO father in favor of another director candidate, knowing that the loss of his seat would mean the loss of his job – the mere fact that relatives both own stock means little. Rather, what is critical is whether there is a reason to believe that the familial relationship, coupled with other important facts, is so thick that the stockholders should be treated as essentially a voting group.” Id. at *11 (citation omitted).

\textsuperscript{24} *See also In re Western Nat’l Corp. S’holders Litig.*, 2000 WL 710192 (Del. Ch. May 22, 2000) (finding that the business judgment rule standard of review applied to a transaction approved by a well-functioning independent special committee in the absence of a controlling stockholder.
the outstanding voting power of the minority stockholders or merely a majority of voting power of the votes cast by the minority stockholders. The Court found that a vote of a “majority-of-the-minority” is effective to invoke the substantive protections of the business judgment rule (at least in the context at issue) only if the challenged transaction is approved by a majority of the outstanding voting power of the minority stockholders. In addition, the transaction need not be subject to a nonwaivable “majority-of-the-minority” condition in order to invoke the substantive protections of the business judgment rule.

- **Adding Directors to Constitute a Special Committee.** Because all of the directors had a material conflict of interest with respect to the Merger, it appeared to have been impossible for the Company to have formed a committee of independent directors that could have operated to invoke the substantive protections of the business judgment rule. The Court suggested, however, that additional directors could have been added to the Company’s board in order to form a special committee to protect the interests of the minority stockholders.25

- **Business Judgment in the Kahn v. Lynch Context.** Vice Chancellor Strine questioned the well-settled rule of Kahn v. Lynch. The Vice Chancellor expressed his view that the business judgment rule protections should be available, even in the Kahn v. Lynch context, if the transaction is approved both by a fully-functioning special committee comprised of independent and disinterested directors and by a vote of a fully-informed, non-coerced “majority-of-the-minority.” The Court suggested, however, that in that context (and in contrast to a transaction not subject to Kahn v. Lynch) the transaction should be specifically conditioned upon the vote of a “majority-of-the-minority.” In *dicta*, the Vice Chancellor suggested that “the special rule of Lynch for mergers with controlling stockholders should, if anything, be curtailed to promote the use of special committees and majority-of-the-minority votes in effecting going private mergers so as to most effectively protect minority stockholders, by giving the proponents of such transactions the certainty of business judgment rule protection if they use that deal structure.”27

**CONCLUSION**

The PNB Holding decision confirms that the substantive protections of the business judgment rule can be invoked, outside of the Kahn v. Lynch context, if a transaction is approved by independent and disinterested directors (e.g., by a fully-functioning special committee) or by fully-informed, non-coerced “majority-of-the-minority” stockholder approval. In addition, the Court found that, outside of the Kahn v. Lynch context, a transaction need not be conditioned upon a vote of a “majority-of-the-minority” in order for such a vote to be obtained and for the substantive protections of the business judgment rule to be invoked thereby. Finally, the Court answered the oft-debated question of how to calculate a vote of a “majority-of-the-minority” and concluded that such a vote (at least in the context before it) must be a vote of a majority of the outstanding voting power of the minority stockholders.

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25 *Id.* at *14 (“But the PNB board all suffered the same conflict and made no attempt to add directors representing the stockholders to be cashed-out.”).

26 See also In re Cox Communications, Inc. S’holders Litig., 879 A.2d 604 (Del. Ch. 2005).

27 *Id.* at *14 n.69.
M&A “Nugget” – Stapled Financing

Recently, Wilson Chu, Rick Climan and Joel Greenberg participated in a webcast for DealLawyers.com in which they presented a series of M&A “nuggets.” An edited transcript of one of the “nuggets” presented by Joel Greenberg is set forth below.

Stapled financing is a technique sometimes used in an auction of a company. The investment banker conducting the auction offers prospective buyers – often private equity funds – a package of financing that they can use to consummate the acquisition.

There are a lot of positive things about stapled financing but there are some negative things as well. The positive elements from the sellers’ side is that it expedites the process and adds certainty; when bids are received, since there is already a – at least partial – financing package which the sellers can confidently expect to be available for closing.

From the perspective of the investment bank handling the auction, stapled financing provides a very sizable fee opportunity. Typically, in a private equity acquisition, the financing fees payable by the buyer will exceed by a considerable margin the M&A advisory fee payable by the target company.

From the buyer’s perspective, stapled financing simplifies the process of trying to consummate an acquisition because financing is supplied that it can either accept or try to improve.

So those are all positives. What’s the negative? The biggest negative is that the investment bank conducting the auction is subject to a series of conflicts of interest – both internal and with respect to its obligations to its initial client, the seller. The internal conflicts relate to the fact that the investment bank’s M&A fee may be dependent on the availability of the financing that it offers. It could be very hard for the lending side of the bank to exercise dispassionate judgment not to fund under its financing commitment if the consequence is losing not only the financing fee but also the M&A fee.

From the sellers’ side, there is a concern that stapled financing may give the target company’s investment bank an incentive to recommend that a deal be done even if it’s not a particularly good one because the bank has both an M&A fee and a financing fee at stake. There is also a concern that the bank in its advisory role may favor a buyer (for example, a private equity buyer) that the bank expects to use the financing (as contrasted to a strategic buyer that won’t need the financing).

One way in which these potential conflicts become judicially cognizable is when bank fairness opinions are involved because it is not at all unusual for a sell-side investment banker to give the board of the target company an opinion that the consideration to be received in the acquisition by the target company’s stockholders is fair from a financial point of view.

I’m not aware of a case that directly addresses that conflict in the context of stapled financing, but in the Toys “R” Us decision last year, the Delaware Court of Chancery gave us a preview of its views on the subject. In the course of discussing the Toys “R” Us auction process and ultimately validating what the board had done, Vice Chancellor Strine took the occasion to criticize the sell-side investment bank for having provided financing to the buyer in the transaction and suggested that doing so compromised the fairness opinion that the board had relied upon.

One interesting aspect of the Toys “R” Us situation was that, at the time the opinion was delivered, there was no contemplation that the sell-side banker would provide financing. That’s something that came up after the deal was accepted by the board and after the opinion was delivered — but before the closing of the transaction.

And even in that case, Vice Chancellor Strine said that the mere fact that the banker accepted the financing fee compromised the independence of the banker – or at least
compromised the appearance of independence – in rendering the fairness opinion. One could argue that if independence was compromised in that situation, a stapled financing arrangement in which the ability to earn the financing fee was known at the time the opinion was delivered would receive an even less favorable reception. However, in a footnote to his *Toys “R” Us* opinion and in subsequent public remarks, Vice Chancellor Strine recognized that stapled financing may provide benefits to the target that a board could conclude outweighed the potential conflict. He noted that such a role could be “wholly consistent with the best interests of the primary client company.”

One product of this debate is that some bankers who do not want to give up their stapled financing role have been suggesting to their sell-side clients that they permit stapled financing but hire an independent banker to render a fairness opinion. Although it’s clumsy (since the new banker has to get into the process and review the transaction that the sell-side banker has already recommended), this structure does have the virtue of creating a relatively unconflicted fairness opinion.

Considering the robust discussion and the excellent quality of Mike’s draft, we agreed that a Spring or Summer 2007 program on exclusivity letters would be a good idea. The Chairs will contact the Programs Subcommittee to schedule this program.

We have had a goal for some time to add more substantive content to our Task Force discussions relative to public company M&A practice. For example, in addition to our regular meeting in Wilmington focused on Delaware issues, and our August discussion of recent trends in MAC clauses, we had a review of the best price rule amendments at our Wilmington meeting in February 2006. In the interest of continuing this trend of presentations particularly focused on public company M&A, we have invited Dennis Berman of the *Wall Street Journal*, who spoke at the Committee meeting in Honolulu, to visit us during our Spring meeting in Washington, D.C. We have also invited Dan Burch of Mackenzie Partners to the Spring meeting. Dan will discuss the role of hedge funds and the advisory groups like ISS to the stockholder approval process. We expect this segment of the March Task Force meeting to take about 60 minutes. We have warned Dennis and Dan to expect a lot of questions since we will be in a much smaller venue than the full Committee meeting. Please feel free to suggest other topics for discussion at the Summer 2007 meeting and beyond.

In Dallas, we will turn to Henry Lesser’s revisions to Sections 3.2 and 4.6 of the Model Agreement relating to the buyer’s need to get a vote of its stockholders and to Joel Greenberg’s and Leigh Walton’s draft representations and warranties. We also will discuss Byron Egan’s revised discussion of the miscellaneous provisions of third party beneficiaries and Keith Flaim’s commentary about the right of a target board to withdraw its recommendation. In addition, we will have a first look at the revised commentary for the termination sections, including Delaware counsel’s input. Mark Morton will lead a discussion on the Delaware components of the revised commentary.
After the Honolulu meeting, the Co-Chairs established a 12 member Editorial Board to move the Model Agreement to publication as quickly as possible. The Editorial Board members are: Frederick Alexander, Stephen Bigler, Bruce Cheatham, Bryan Davis, Keith Flaum, Drew Fuller, Hal Leibowitz, James Melville, Mark Morton, Michael O’Bryan, Jim Walther, and Leigh Walton. Diane Frankle will chair the Editorial Board and Steve Knee, Rick Climan, and Joel Greenberg will serve as *ex officio* members.

The Editorial Board has held two conference calls so far, primarily focused on style issues and setting tasks for completion. The Board will be meeting in person in Dallas. Our priority is to finalize the draft Model Agreement in areas where major drafting has been completed. The Task Force will continue its review of significant drafting projects in support of the Model Agreement and Ancillary Agreement. We will bring any interesting or controversial drafting or substantive issues to the Task Force for discussion by the broader group – for example, the termination commentary and the revisions to the covenant on board recommendations.

Because we are now pushing to publish in early 2008, Task Force members should complete current projects as promptly as possible. The Editorial Board will also be generating many discrete drafting assignments suitable for Task Force members. Please contact Diane Frankle or any Editorial Board member if you are interested in taking on a new project.

Finally, our annual sojourn to Wilmington, Delaware will occur on February 2-3, 2007. Please plan to attend – more details will be forthcoming at the Dallas meeting. Thanks to Mark Morton for getting us onto the calendar of the Delaware Judiciary.

Diane Holt Frankle
Stephen H. Knee
Co-Chairs

**Task Force on Joint Ventures**

As you all know, the ABA has published the Model Joint Venture Agreement. Therefore the primary work of the Task Force has been completed.

On the internationalizing front, the questionnaire has been finalized and we are in the process of compiling the names of foreign attorneys to assist. It is anticipated that the questionnaire will be mailed out shortly. As a result, there will not be a meeting of the Task Force in Dallas, although a small group will continue to work to monitor the responses and to follow-up with the respondents. Ultimately an editorial group will be assembled to review the final work product. If you have any questions on this component of the Task Force work, please contact Alison Youngman directly.

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

**Task Force on the Model Stock Purchase Agreement**

The Editorial Committee is continuing its work on the text of the Revised Model Stock Purchase Agreement. The Editorial Committee recently held a stand-alone meeting in Boston, and has also conducted monthly conference calls to work on the document. Once the text has been finalized, the Editorial Committee will turn its attention to Commentary and will be coordinating its efforts with the M&A Jurisprudence Subcommittee. At that juncture, additional drafting assignments should become available for Task Force members.

Robert T. Harper
Chair
International M&A Subcommittee

The International M&A Subcommittee met from 8 a.m. to 10 a.m. on Friday, August 4, 2006, in Honolulu, Hawaii. The meeting was very well attended despite the early hour and exotic location.

After introductory remarks, the meeting began with a discussion of our current projects. Daniel Rosenberg reported that the international asset purchase transaction questionnaire project had been successfully completed with the publication of the project team’s work product by the ABA under the title “International Stock Purchase Acquisitions – Summaries of International Law.” The publication presents responses from experienced M&A lawyers in 33 countries to a questionnaire covering essential topics in order to gain a basic understanding of the structuring and completion of transactions in each jurisdiction.

Wilson Chu reported that the due diligence project is also moving along and in the late stages of preparation for publication by the ABA.

Links to further information on all of our Subcommittee’s published work products (including details of member discounts) are available on the Subcommittee’s webpage at the following address:
http://www.abanet.org/dch/committee.cfm?com=C0560016

Stan Freedman reported on the status of our project to prepare a model form of agreement for cross border asset purchase transactions (with commentary). An initial working draft of the entire model agreement will be available for distribution in advance of our Dallas meeting in October. The plan is for small working groups to be selected (i) to review separate segments of the initial working draft, (ii) to consider whether changes to the draft should be proposed for discussion by the entire Subcommittee, and (iii) to discuss the key issues presented by each segment. Those working groups will present their analyses and questions for discussion at subsequent Subcommittee meetings. The working groups will then prepare any additional changes to the draft agreement that they believe to be appropriate, together with a draft commentary on the issues relevant to their segment of the agreement, based on the group discussion.

Subcommittee member Shivpriya Nanda then gave a very informative presentation on the current state of M&A practice and activity in India. A copy of her detailed presentation is available through the Subcommittee’s webpage.

Jim Walther reported that he was moderating a panel presentation sponsored by the Subcommittee on the subject of M&A in China the following day. The program materials (together with materials from many of our Subcommittee’s earlier programs) are available through the Subcommittee’s webpage.

We then discussed proposed new projects for the Subcommittee. Jorge Yanez discussed his proposals regarding expansion of the Subcommittee’s website to facilitate communication amongst our Subcommittee members and to make the website more useful for locating lawyers qualified to advise on business transactions in particular jurisdictions. Diane Frankle suggested that the subject of post-merger integration would be of great interest to M&A practitioners in the cross-border context.

John Leopold suggested that our Subcommittee should undertake, or participate in, a study of current M&A trends in cross-border transactions similar to the very successful project on M&A trends in domestic U.S. transactions led by Wilson Chu. In this connection, there was discussion of the means of obtaining examples of transaction agreements and the feasibility of soliciting examples from members’ law firms, as well as other sources.

Other suggestions for programs included: (i) a suggestion by Gys Rooyens for a project, or
perhaps a program, on differing pension and retirement plan requirements in various jurisdictions; (ii) suggestions by Peter Haver and Sajai Singh regarding the subject of tax treaties and other international taxation subjects relevant to cross-border M&A; (iii) a suggestion by Rick Silberstein for a program on international LBO/MBO transactions; and (iv) a suggestion by Sajai Singh for a program on outsourcing in India.

Guy Harles then presented the initial thoughts that he and Katrien Vorlat have developed for the new project tentatively agreed upon by our Subcommittee at our Tampa meeting on the subject of dispute resolution in the M&A context. Due to time constraints, however, we were not able to conduct a full discussion on this topic. Guy and Katrien will resume the discussion at the Spring meeting in Washington, D.C.

The meeting concluded with a general discussion by Subcommittee members regarding legal developments in their jurisdictions relevant to M&A practice and particular issues they have encountered.

Our next meeting will be held on Friday, October 20, from 9 a.m. to 11 a.m., in Dallas. Our meeting will include a presentation on M&A developments in Germany by Robert Wethmar, as well as a discussion of recent developments in cross-border M&A transactions. We expect to have conference telephone arrangements for those who will not be able to attend in person.

Daniel Rosenberg
James R. Walther
Co-Chairs

Membership Subcommittee

The Committee now boasts over 2,000 members from 37 countries and 50 states. We have over 235 in-house lawyers and 157 associate (non-lawyer) members. We have almost tripled in size over the past four years. In short, our growth and size supports the view that the Committee is one of the most desirable committees within the ABA.

We have recently seen significant interest from various legal and non-legal professionals within the deal community who are interested in joining our Committee. These data points suggest that we can expect to see continued growth in membership. Exciting times are ahead!

Our sincere thanks to Wilson Chu who chaired the Membership Subcommittee along its path of unprecedented growth. Anyone who knows or has worked with Wilson understands why the Membership Subcommittee performed as well as it did under his reign. I look forward to serving the Membership Subcommittee in its continued development.

Hendrik Jordaan
Chair

M&A Jurisprudence Subcommittee

The M&A Jurisprudence Subcommittee has two working groups. The Annual Survey Working Group identifies and reports to the Committee on recent decisions of importance in the M&A area, and prepares the Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions, which is published annually in The Business Lawyer. The Judicial Interpretations Working Group examines 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 on Friday, October 20, from 1:00 p.m. until 2:00 p.m., in Dallas, and the Judicial Interpretations Working Group will meet immediately thereafter, from 2:00 p.m. until 3:00 p.m.

Annual Survey Working Group

The fourth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions appeared in the February 2006 issue of The Business Lawyer. Our working group has begun to write-up, and is continuing to collect for
consideration, 2006 cases for inclusion in our 2006 annual survey. We are asking all members of the Committee to send to 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 jhirschoff@fdh.com. You may fax cases to Scott at (504) 596-0836 or to Jon at (203) 325-5001. 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 (i) 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), (ii) 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), (iii) pertain to a successor liability issue, or (iv) decide a breach of fiduciary duty claim. We are currently excluding cases dealing with federal law, securities law, tax law, and antitrust law. But 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 Dallas Committee Meeting**

**Halliburton Company Benefits Committee v. Graves, 2006 WL 2499142 (5th Cir. August 30, 2006).**

In the Summer 2005 issue of *Deal Points*, we reported on the District Court opinion in *Halliburton Company Benefits Committee v. Graves, 2004 WL 2938645 (S.D. Tex. Dec. 20, 2004). See also Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions, 61 BUS. LAW. 987, 988 (2006). That opinion, in which 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 retirees, was recently affirmed by the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit opinion has such important implications for M&A practice that it merits discussion at the Committee meeting in Dallas.

Halliburton Company agreed, in a 1998 merger agreement governing the merger of Dresser Industries, Inc. into a wholly owned subsidiary of Halliburton, to maintain the Dresser retiree medical plan except to the extent modifications were consistent with changes in medical plans provided by Halliburton and its subsidiaries to active employees.

Five years after the merger, Halliburton, acting through its plan administrator, amended three subplans of the Dresser retiree medical program, with the goal of achieving parity for all Halliburton and Dresser retirees. The amendments were not consistent with changes in plans for active employees, as contemplated by the merger agreement. The Halliburton Benefits Committee then initiated a declaratory judgment action seeking declarations that the amendments were permissible and did not violate the merger agreement or the Halliburton welfare benefits plan or ERISA, and that the merger agreement did not limit Halliburton’s right to amend or terminate the Dresser retiree medical program. Dresser retirees filed counterclaims and third party claims.

An issue central to both the district court and the Fifth Circuit opinions was whether the merger agreement could operate as an amendment of the Dresser plan. The Fifth Circuit held that under ERISA, an amendment to an ERISA plan need not be labeled as such, and that any act directed to a provision of an ERISA plan may be deemed to constitute a plan amendment. Thus the merger agreement could amend the Dresser plan, as
long as it complied with any procedures for amendment specified in the Dresser plan.

As to conformance with specified procedures for amendment, Halliburton argued that the plan provided that it could be amended by “written instrument signed by the Vice President, Human Resources,” and that since the merger agreement was not signed by that officer, it did not comply with the plan’s specified procedures for amendment. The Fifth Circuit gave that argument short shrift, pointing out that the merger agreement was signed by Dresser’s Chief Executive Officer and Chairman, and approved by the Dresser Board of Directors. The fact that authority to amend had been delegated to the Vice President, Human Resources, did not mean that the company, acting through a more senior officer and the directors, could not amend the plan without the signature of that officer.

Halliburton also argued that the Dresser retirees could not enforce, as third party beneficiaries, the provision of the merger agreement that amended the Dresser plan, due to a provision in the merger agreement that Halliburton contended prohibited third party beneficiary enforcement. The court of appeals stated that this position “wrongfully equates a plan participant’s enforcement of a plan right under ERISA with a third party’s enforcement of a provision in a contract.” 29 U.S.C. sec. 1132(a)(1)(B) specifically permits a participant or beneficiary under ERISA to bring a civil action to enforce his rights under the plan or to clarify his rights to future benefits under the terms of the plan. Such enforcement, the court held, “falls exclusively in ERISA’s remedial scheme.”

Like Prouty v. Gores Technology Group, 18 Cal. Rptr. 3d 178 (Cal. Ct. App. 2004), discussed in our 2004 survey,  see 60 BUS. LAW. 843, 847-49 (2005), Halliburton raises the question whether employees (in Halliburton, retired employees) of the target company can claim benefits under an acquisition agreement. But unlike Prouty (which held that certain target company employees could enforce the acquisition agreement as third party beneficiaries), the Halliburton decisions suggest that to the extent employees are enforcing rights under ERISA, the ERISA remedial scheme is exclusive, so that the question whether the employees have third party beneficiary rights under the acquisition agreement becomes irrelevant. Thus, if an acquisition agreement can be read to create obligations of the buyer with respect to an ERISA plan of the target company, it will be difficult, and perhaps impossible, to avoid the possibility that employees of the target company can enforce the buyer’s obligations – not through third party enforcement of the acquisition agreement, but through the remedial scheme of ERISA. In light of Halliburton, M&A practitioners who are involved in drafting acquisition agreement provisions pertaining to the buyer’s post-closing handling of an ERISA plan of the target company might want to consider language to the effect that those provisions are not intended by the parties to constitute a plan amendment or to create any obligations of the buyer with respect to the target company ERISA plan.

**Judicial Interpretations Working Group**

The Judicial Interpretations Working Group met during the Committee’s August 2006 meeting in Honolulu, Hawaii. Attendees at that meeting discussed the status of the work of the teams that have been formed to research and prepare memoranda pertaining to the jurisprudence interpreting more than 20 different provisions of M&A agreements and ancillary documents. We discussed at length the memorandum prepared by Arman Kuyumjian and John Cermak on the potential liability of a third party bidder for tortious interference with acquisition agreements, exclusivity agreements and letters of intent. A report on that memorandum was presented by Arman and John at the Committee meeting in Honolulu. We also discussed potential new projects, including an initiative to create an area on the Committee website, where the memoranda created by members of the Judicial Interpretations
Working Group would be easily accessible to members of the Committee.

The next meeting of the Judicial Interpretations Working Group will be held on Friday, October 20, from 2:00 p.m. until 3:00 p.m., in Dallas. We have a number of new projects that we would like to start and invite new members to join us. To join, please email Jim Melville at jcm@kskpa.com with a copy to Scott Whittaker at swhittaker@stonepigman.com or simply come to our working group meeting in Dallas.

Scott T. Whittaker
Subcommittee Chair
Jon T. Hirschoff
Chair - Annual Survey Working Group
James C. Melville
Chair - Judicial Interpretations Working Group

M&A Market Trends Subcommittee

In Dallas, the M&A Market Trends Subcommittee will be kicking off its 2007 Private Target Deal Points Study. Wilson Chu and Larry Glasgow are co-chairing that study. We still have room for more volunteers to help us analyze acquisition agreements. Remember, those who provide meaningful contribution (which, based on our past study, translates into about 25 hours of work) to the study will be prominently acknowledged in the published study. Interested persons should contact Wilson Chu at Wilson.Chu@HaynesBoone.com or Larry Glasgow at lgglasgow@gardere.com.

We will also be launching a new European Deal Points Study to be chaired by Freek Jonkhart and vice-chaired by Reid Feldman. As with the U.S. Studies, the goal is to benchmark trends and practices in M&A deals involving European targets. Interested persons should contact Freek Jonkhart at freek.jonkhart@loyensloeff.com or Reid Feldman at rfeldman@kramerlevin.com.

At our Honolulu meeting, we also discussed collaborating with the newly-formed Private Equity M&A Subcommittee to benchmark deal terms of particular interest in buy-outs. We will be continuing our conversations with the Private Equity M&A Subcommittee in Dallas.

As always, suggestions are welcome, with roll-up-your-sleeves participation much more appreciated than drive-by flashes of brilliance.

Wilson Chu
Larry Glasgow
Co-Chairs

Private Equity M&A Subcommittee

The inaugural meeting of the Committee’s new Private Equity M&A Subcommittee was held in Honolulu, Hawaii on August 4, 2006. Attendance both in-person and by telephone was encouraging and we had a good cross-section of members from both the Committee and the Venture Capital & Private Equity Committee. In addition, the leadership of the Committee and its other subcommittees and task forces was well represented.

The first part of the meeting was devoted to an overview of the activities of the Committee so members of the Private Equity M&A Subcommittee who are new to the Committee could understand the range of its activities and the opportunities for their participation. The meeting then addressed a few of the projects being contemplated for the Subcommittee, including the possibility of contributing to the M&A Dictionary project and liaising with the M&A Market Trends Subcommittee. Finally, Henry Lesser led a discussion of recent developments in going private practice. Our next meeting will be held on Saturday, October 21, from 12 p.m. to 1 p.m., in Dallas.

Henry Lesser
Chair
Programs Subcommittee

The Committee Forum will be held on October 21, from 3:30 p.m. to 5:00 p.m., in Dallas, and will feature a panel on fairness opinions chaired by Mark Morton and featuring Henry Lesser, Rick Lacher and Yvette Austin Smith.

The panelists will discuss (i) proposed NASD Rule 2290 and its potential impact on fairness opinion practice and related disclosure, (ii) recent Delaware case law concerning “relative fairness” opinions and the emerging practice in this area, (iii) the practice regarding “second opinions,” “buy side” opinions and opinions in hedge fund and private equity transactions, and (iv) recent SEC staff review practice regarding fairness opinion disclosures.

Thomas M. Thompson
Chair

Technology Subcommittee

Our Committee website remains one of the most visited sites in the ABA’s Section of Business Law due in large measure to the maxim “content is king.” The Deal Points Studies continue to receive much attention as does the design of our various pages, which are being used as templates for other committees. Now that we have seen the impact that the posting of the Deal Points Studies has had both on our website and on interest in joining our Committee, we are looking for other subcommittees and task forces to furnish materials that we can post. If you have not visited the site lately, it can be found at the following address:

http://www.abanet.org/dch/committee.cfm?com=CL560000

To log onto the site, use your ABA membership number or email address as your username and your last name as your password.

Task force and subcommittee chairs are reminded that our Committee extranet is up and running and is available for use in the work of your groups. The extranet contains both a traditional site for the deposit of documents and a discussion area where a document can be displayed with running commentary from group members. In other developments, the ABA is retiring the Dynamic Homepage System, which has served as the content manager for the ABA web pages. The new system promises to be more robust than the old one and will contain many more features. We should be in a position to report on the new system and its potential for enhancing the work of the Committee at our D.C. meeting.

George M. Taylor, III
Chair

COMMITTEE MEETING MATERIALS

MEETING OF THE COMMITTEE ON NEGOTIATED ACQUISITIONS
Saturday, October 21, 2006
1:30 p.m. – 5:00 p.m.
AGENDA

1. WELCOME / INTRODUCTIONS

2. SUBCOMMITTEE AND TASK FORCE REPORTS

   • Subcommittees

     ○ International M&A
     (Daniel Rosenberg and Jim Walther)

     ○ M&A Jurisprudence
     (Jon Hirschoff and Jim Melville)

       – Annual Survey Working Group
4. **UPCOMING COMMITTEE MEETINGS**
   - 2007 Spring meeting (to be held in Washington, D.C., Mar. 15 - 18, 2007, in conjunction with the Spring Meeting of the ABA’s Section of Business Law)
   - 2007 Summer meeting (to be held in San Francisco, Aug. 9-12, 2007, in conjunction with the ABA’s Annual Meeting)

5. **RECENT JUDICIAL DEVELOPMENTS**
   (Jon Hirschoff)
   - *Halliburton Company Benefits Committee v. Graves* (5th Cir. August 30, 2006)

6. **DELaware DEVELOPMENTS**
   (Mark Morton)
   - *In re PNB Holding Co. Shareholders Litigation* (Del. Ch. August 18, 2006)

7. **RECENT SEC DEVELOPMENTS**
   (Henry Lesser)
   - Rule 14d-10 amendments

8. **OTHER RECENT DEVELOPMENTS**
   - Department of Justice investigation of private equity firms’ bidding practices

9. **REPORT BY JUDICIAL INTERPRETATIONS WORKING GROUP**
   - Tortious interference with exclusivity agreements (Arman Kuyumjian)

10. **CURRENT STATE OF THE M&A MARKET**
    (Rich Lacher)
11. **COMMITTEE FORUM – “FAIRNESS OPINIONS”** (Mark Morton, Rick Lacher, Henry Lesser and Yvette Austin Smith)

- Proposed NASD Rule 2290 and its potential impact on fairness opinion practice and related disclosure
- Recent Delaware case law concerning “relative fairness” opinions and the emerging practice in this area
- Practice regarding “second opinions,” “buy side” opinions and opinions in hedge fund and private equity transactions
- Recent SEC staff review practice regarding fairness opinion disclosures

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**COMMITTEE ON NEGOTIATED ACQUISITIONS**

**2006 FALL MEETING – DALLAS**

**OCTOBER 19-22, 2006**

**SCHEDULE OF MEETINGS AND OTHER ACTIVITIES**

*Unless otherwise noted, all meetings and programs will be held at the Adolphus Hotel*

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**Thursday, October 19th**

1:30 p.m. – 5:30 p.m. – Editorial Committee for the Revised Model Stock Purchase Agreement (to be held at Winstead, Sechrest)

**Friday, October 20th**

8:30 a.m. – 5:30 p.m. – Editorial Committee for the Revised Model Stock Purchase Agreement (to be held at Winstead, Sechrest)

9:00 a.m. – 11:00 a.m. – International M&A Subcommittee

11:00 a.m. – 12:30 p.m. – M&A Market Trends Subcommittee

1:00 p.m. – 2:00 p.m. – Annual Survey Working Group of the M&A Jurisprudence Subcommittee

2:00 p.m. – 3:00 p.m. – Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee

4:00 p.m. – 5:00 p.m. – Meeting of Committee Chair and Vice Chairs, and Subcommittee, Task Force and Working Group Chairs and Vice Chairs

7:00 p.m. – Committee Reception and Dinner – *City Club of Dallas*

**Saturday, October 21st**

9:00 a.m. – 12:00 p.m. – Task Force on Acquisitions of Public Companies

12:00 p.m. – 1:00 p.m. – Private Equity M&A Subcommittee

1:30 p.m. – 3:30 p.m. – **Full Committee Meeting**

3:30 p.m. – 5:00 p.m. – Committee Forum

7:00 p.m. – Committee Reception and Dinner – *Sammy’s Bar-B-Que*

**Sunday, October 22nd**

9:30 – 11:30 a.m. – Public Company Editorial Board (to be held at Winstead, Sechrest)