FROM THE CHAIR
By Joel I. Greenberg

Our Committee’s next meeting will be held in conjunction with the ABA’s Annual Meeting in San Francisco from Friday, August 10, 2007 through Sunday, August 12, 2007, at The Fairmont Hotel San Francisco and the Intercontinental Mark Hopkins Hotel San Francisco. We will have programs and separate subcommittee, task force and working group meetings from Friday morning through early Sunday afternoon. The full Committee meeting will be held Sunday afternoon, starting at 2:00 p.m., and the Committee Forum on successor liability will follow at 4:00 p.m. The Programs Subcommittee report (which begins on page 17 of this issue of Deal Points) includes a description of the Committee Forum and the programs that the Committee is sponsoring at the Annual Meeting.

The Committee dinner will be held Saturday night at the Stanford Court Hotel, 905 California Street (on Nob Hill, less than one block from the Fairmont and Mark Hopkins), with cocktails in the Vista Terrace beginning at 7:00 p.m. and dinner in the India Suite at 8:00 p.m. Thanks to Houlihan Lokey Howard & Zukin for its sponsorship of this event.

This has been an interesting year for mergers and acquisition practitioners. In the first half of the year, the best debt financing environment in history (from the borrowers’ perspective) fueled a record level of mergers and acquisition activity. Then just a few weeks ago, the disruption in the sub-prime mortgage market infected the acquisition finance market, resulting in a drastic reduction in the

(continued on next page)
availability of new financing. At least $30 billion of domestic mergers and acquisition financing cannot be remarkeeted by the lenders who committed it and their willingness to make new commitments while carrying these loans has been substantially reduced. These developments make the presentation at our full Committee meeting on the current state of the mergers and acquisition market from an investment banking perspective particularly interesting and timely. Our agenda will also include a Delaware law update, focusing on recent decisions concerning the sales process, and a presentation by the M&A Jurisprudence Subcommittee on recent decisions relating to earn-outs and construction of survival provisions in acquisition agreements (those cases are described in the subcommittee report beginning on page 11 of this issue of Deal Points).

We will not be able to offer the remote access to our full Committee meeting and Committee Forum at the Annual Meeting that we so successfully employed at the stand-alone meeting last Fall. However, we will post all of the written presentations on our Committee’s website and are continuing to work with the ABA staff to provide remote access in the future.

Our stand-alone meeting in the Fall is scheduled for the Broadmoor Hotel in Colorado Springs, Colorado, on Friday, October 12, 2007 and Saturday, October 13, 2007. Our longest running CLE program, the National Institute on Negotiating Business Acquisitions, will return to New Orleans this year. It will be held at the Windsor Court Hotel on Thursday, November 1, 2007 and Friday, November 2, 2007. The Spring meeting will be held in conjunction with the Business Law Section’s Spring Meeting from Thursday, April 10, 2008 through Sunday, April 13, 2008 in Dallas, Texas. The ABA’s 2008 Annual Meeting will be held in New York City in August, 2008.

I look forward to seeing you in San Francisco.

FEATURE ARTICLE

GO-SHOPS: MARKET CHECK MAGIC OR MIRAGE?

By Mark A. Morton and Roxanne L. Houtman

A “go-shop” is a provision in a merger agreement that permits a target company, after executing a merger agreement, to continue to actively solicit bids and negotiate with other potential bidders for a defined period of time. Where a target has engaged in a fulsome pre-signing market canvass, a go-shop has little or no utility. However, where a target has not undertaken any form of pre-signing market canvass before signing up a deal (typically either because the buyer professed an unwillingness to bid if the target commenced a market canvass or because the target was concerned that an auction process would result in employee and/or customer defections), a go-shop theoretically should produce the best possible transaction for the target.

Mark A. Morton is a partner and Roxanne L. Houtman is an associate at Potter Anderson & Corroon LLP in Wilmington, Delaware. Portions of this article are drawn from materials prepared by other attorneys with Potter Anderson & Corroon LLP. The views expressed herein are those of the authors and may not be representative of the firm or its clients.

The authors have surveyed each of the reported transactions in the past four years (through March 2007) that included a no-shop provision – the results of which can be found on the Committee’s website at the following address: http://www.abanet.org/dch/committee.cfm?com=CL560000. Nearly all of the thirty (30) transactions analyzed in the survey involved targets that did not engage in a market canvass before entering into a merger agreement with a private equity buyer.
company and its stockholders. While the authors are not aware of any empirical analysis of go-shops, our practical experience suggests that while go-shops may be beneficial in some circumstances, they may serve as mere window dressing in other cases. If so, then judicial skepticism of the benefit of a go-shop is warranted in the latter cases.

Running the Sales Process

In considering a transaction involving a change of control, directors of Delaware corporations are charged with obtaining the best transaction reasonably available for the corporation and its stockholders. The phrase “Revlon duties” refers to (i) the standard of review that a Delaware court will utilize in reviewing transactions involving a sale, break-up or change of control of a corporation and (ii) the contextually-specific obligations that are imposed on a board of directors in such transactions. While there is no “blueprint” for running a sales process, the board of directors of a target company generally may satisfy its fiduciary duties to obtain the best transaction reasonably available under the circumstances for the corporation and its stockholders by engaging in one of the following types of transactions: (i) a transaction with the highest bidder after a full public auction of the target company, i.e. a pre-agreement market check, (ii) a transaction with the highest bidder after a more limited pre-agreement market check in which multiple potential bidders are contacted and participate in the bidding, (iii) a transaction with a single bidder where the target board has reliable evidence demonstrating that the board has obtained the best transaction reasonably available, or (iv) a transaction with a single bidder where the target board, due to the absence of reliable evidence that the board has obtained the best transaction reasonably available, bargains for a post-signing market check.4

The Post-Signing Market Check

During the late 1980s, Delaware courts considered whether target company directors who had forsaken an open auction process in favor of negotiating with a single bidder had satisfied their heightened duties in a sale of control when they agreed to a transaction with a post-signing market check. A post-signing market check, it was argued, was effective because it established a “floor” for the transaction and, by providing for a limited period of time after the announcement of the transaction for a competing bidder to emerge, allowed a transaction’s reasonableness to be tested.

The Delaware courts first considered the post-signing market check in the case of In re Fort Howard Corp. S’holders Litig.6 In Fort Howard, plaintiffs, stockholders of Fort Howard Corporation, the target company, sought a preliminary injunction against the closing of a tender offer for up to all of the outstanding shares

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4 A transaction that follows a full auction or involves multiple bidders may warrant more restrictive deal protections, such as a higher termination fee, a matching right and a more limited no shop provision, because the market has been canvassed for potential bidders. By contrast, when a target board lacks sufficiently reliable evidence to permit it to conclude that a transaction with a single bidder is the best transaction reasonably available, the use of a post-signing market check (coupled with modest deal protection provisions) will permit interested competing bidders to emerge, thus ensuring that the target company obtains the best transaction reasonably available under the circumstances. See Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286-87 (Del. 1989).


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3 See Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (finding that once directors have decided to sell control of the company “[t]he directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company”).
of the company. The tender offer was the first step of a two-step leveraged management buyout transaction. The stockholders alleged, among other things, that the Fort Howard directors favored the management-led buyers and did not seek the best transaction reasonably available under the circumstances.

The transaction at issue in *Fort Howard* included a number of features that came to define the post-signing market check. In particular, the Fort Howard board approved a transaction with a single bidder, but provided a mechanism by which competing bidders could later emerge. The transaction contained: (i) a “window-shop” provision allowing the company to receive and consider alternative proposals but not actively to solicit such proposals; (ii) a press release stating that Fort Howard had the right to consider alternative proposals and would consider alternative proposals; (iii) a window of forty (40) calendar days between the announcement of the transaction and the anticipated closing of the tender offer; and (iv) a modest termination fee (in this case, amounting to 1.9% of the equity value of the transaction).  

The Court of Chancery concluded that the rationale for adopting this approach – “for permitting the negotiations with the management affiliated buyout group to be completed before turning to the market in any respect – made sense.” The Court of Chancery noted that “[t]o start a bidding contest before it was known that an all cash bid for all shares, could and would be made, would increase the risk of a possible takeover attempt at less than a ‘fair’ price or for less than all shares.” The Court also determined that the “alternative ‘market check’ that was achieved was not so hobbled by lock-ups, termination fees or topping fees; so constrained in time or so administered (with respect to access to pertinent information or manner of announcing ‘window shopping’ rights) as to permit the inference that this alternative was a sham designed from the outset to be ineffective or minimally effective.” Rather, it found the device “reasonably calculated to (and did) effectively probe the market for alternative possible transactions.” Having reached the conclusion that the Fort Howard board acted in a good faith pursuit of company and stockholder interests by structuring the transaction in this manner, the Court concluded that the board had not violated its *Revlon* duties.

Following *Fort Howard*, a board may satisfy its *Revlon* duties – to pursue stockholder interests upon sale of the company, in good faith and advisedly – even when involved with only a single bidder, provided that the procedure it adopts to structure a transaction and the negotiations surrounding that transaction are “sufficient to inform the exercise of judgment that the board [will have] made in entering the merger agreement.”

### The Post-Signing Market Check Redux

In recent years, the Delaware courts have revisited – and, some would argue, liberalized – the characteristics of an adequate post-signing market check. In *In re Pennaco Energy Inc.* and *In re MONY Group Inc.*, the Court of Chancery

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7 Id. at *6-8.
8 Id. at *13.
9 Id.
10 Id.
11 Id.
13 787 A.2d 691 (Del. Ch. 2001).
14 852 A.2d 9 (Del. Ch. 2004).
approved post-signing market checks that differ in several important respects from the post-signing market checks previously approved by the Court of Chancery. First, in both Pennaco and MONY, the target company board of directors agreed to a termination fee that, by the standards generally applied in similar circumstances in the past, was significantly higher (3.0% and 3.3%, respectively) than might have been expected in the context of a sale of control to a single bidder in the absence of a market canvass. In prior decisions, the Court of Chancery approved post-signing market checks with termination fees ranging from 1.9% to 2.2% of the equity value of the deal. The Court of Chancery has only approved termination fees in the context of post-agreement market checks exceeding this minimal percentage when the market has been canvassed prior to the deal. Citing precedent decided in the context of stock-for-stock mergers or liquidated damages

provisions, the Court of Chancery approved the higher termination fees in Pennaco and MONY, without any analysis as to whether a higher termination fee of this size was reasonable in comparison to the fees previously approved by the Court of Chancery in earlier decisions involving single bidders and post-agreement market checks. In addition, the fact that the press releases issued by the Pennaco and MONY boards both failed to explicitly invite competing proposals did not cause the Court any pause.

Before the Pennaco and MONY decisions, most practitioners were of the view that a target that had not engaged in a prior canvass of the market could nevertheless negotiate with a single bidder and agree to be acquired by that bidder, provided that the transaction included a post-agreement market check, a press release inviting competing bids, and a modest termination fee (approximately 2% or less of the equity value). Practitioners also understood that other deal protections, such as a matching right, should be kept to a minimum. However, in Pennaco and MONY, the Delaware courts seemed to relax each of those requirements: it permitted a higher termination fee (closer to the amount generally seen in fully shopped transactions), a press release that failed to invite competing bids (presumably less of an issue in today’s market, which more efficiently reports such information from publicly available filings), and matching rights (which,

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15 Compare Pennaco, 787 A.2d at 707 (approving a termination fee amounting to 3% of the equity value in the context of a transaction involving a third party single bidder and a post-agreement market check); and MONY, 852 A.2d at 18 (approving a termination fee amounting to 3.3% of the equity value in the context of a transaction involving a third party single bidder and a post-agreement market check); with Kohls, 765 A.2d at 1285 (refusing to enjoin a transaction involving a termination fee amounting to 2.2% of the equity value of the transaction); and Fort Howard, 1988 WL 83147, at *13 (refusing to enjoin a transaction involving a termination fee amounting to 1.9% of the equity value of the transaction); and Braunshweiger, 1989 WL 128571, at *7 (refusing to enjoin a transaction involving a termination fee amounting to 1.9% of the equity value of the transaction); and Roberts, 1990 WL 118356, at *9 (refusing to enjoin a transaction involving a termination fee amounting to 2% of the equity value of the transaction).

16 See, e.g., In re KDI Corp. Shareholders Litig., 1988 WL 116448, *3 (Del. Ch. Nov. 1, 1988) (refusing to enjoin a transaction involving a three month pre-agreement market check and a post-agreement market check and containing a termination fee amounting to 4.3% of the equity value); In re Formica Corp. Shareholders Litigation, 1989 WL 25812 (Del. Ch. Mar 22, 1989) (approving a transaction involving an active pre-agreement market check and a post-agreement market check and containing a termination fee amounting to 4.5% of the equity value).


18 Pennaco, 787 A.2d at 703 (noting that the target company filed a form 8-K and attached the merger agreement which “gave the marketplace knowledge of Pennaco’s ability to speak with rival bidders and the standard nature of the termination fee”); MONY, 852 A.2d at 18 (noting that the transaction was announced on September 17, 2003).
while generally permissible, may discourage competing bids).

**Emergence of Go-Shop Provisions**

After the *Pennaco* and *MONY* decisions, post-agreement market checks began fading into the background and a new approach – the go-shop provision – started to take hold. A typical go-shop provision\(^\text{19}\) permits a target company to solicit proposals and enter into discussions or negotiations with other potential bidders during a limited period of time (typically 30-50 days) following the execution of the merger agreement.\(^\text{20}\) The target company is permitted to exchange confidential information with a potential bidder, subject to the execution of a confidentiality agreement with terms and conditions substantially the same as the terms and conditions of the confidentiality agreement executed by the initial bidder. Any non-public information provided or made available to a competing bidder typically must also be provided or made available to the initial bidder.

Increasingly, go-shops also provide for a bifurcated termination fee – a lower fee payable if the target terminates for a competing bidder who is identified during the go-shop period and a traditional termination fee if the target terminates for a competing bidder who is identified after the go-shop period ends. For example, while only 67% of the 2006 go-shop transactions surveyed by the authors also included a bifurcated termination fee, every 2007 go-shop transaction included a bifurcated termination fee. Moreover, the termination fees during the go-shop period are, on average, between one-third and two-thirds of the full termination fee payable after the go-shop ends.

**The Intended Benefits of Go-Shops**

The target’s desire for a bifurcated fee with a significantly lower termination fee payable during the go-shop should not be surprising – it enhances the effectiveness of the target’s go-shop by making the potential competing bidder’s “entry costs” lower than would exist with a traditional no-shop provision and corresponding full termination fee. If the reduced termination fee generates more interest in the target company than a traditional no-shop provision, then a superior offer may be more likely to emerge during the go-shop period.

By virtue of its ability to canvass the market following the execution of a definitive agreement, the board of directors may be in a better position to gauge the level of interest of other potential bidders, using the agreed upon purchase price as a floor. As a result, the target company’s board of directors should have a greater level of comfort that they have satisfied their fiduciary obligations to the company and its stockholders, including their duty under *Revlon* to secure the best transaction reasonably available. (If a superior offer fails to materialize during the go-shop period, the board of directors presumably would point to such failure as evidence that it has obtained the highest possible value for the company.) Moreover, as noted above, a go-shop also permits the target company to agree to be acquired without having to conduct a full auction or pre-agreement market check, thus avoiding a number of undesirable consequences.\(^\text{21}\)

\(^{19}\) Examples of thirty (30) go-shop provisions (through March 2007) are set forth in the document entitled “Transactions Containing Go-Shop Provisions,” a copy of which may be found on the Committee’s website at the following address: http://www.abanet.org/dch/committee.cfm?com=CL560000.

\(^{20}\) The length of the go-shop period has increased over time. The average go-shop period for transactions announced through the beginning of March 2007 was 42 days. By comparison, for all transactions prior to 2007 that had a go-shop, the average go-shop period was 33 days.

\(^{21}\) In general, auctions and pre-agreement market checks give rise to a certain amount of uncertainty. For example, there is a risk that if the company conducts an open auction
A go-shop provision may also hold some appeal for potential bidders. For example, by agreeing to include a go-shop provision, a bidder avoids engaging in a potentially costly auction process. In addition, target companies generally have been willing to provide the initial bidder with the right to match any competing bid that is made during the go-shop period.22 Finally, since a go-shop actively encourages jumping bids, the transaction (assuming it is not jumped) may be more defensible than a transaction that is simply subject to a traditional no-shop provision.23

Go-Shop Provisions: Effective Tools or Window Dressing?

Although private equity firms are increasingly turning towards the exclusive negotiation/go-shop model, target companies have become increasingly effective at negotiating more meaningful go-shop provisions, securing longer solicitation periods and, more often than not, lower termination fees for termination of transactions during the go-shop period. The question remains, however, whether the go-shop provision is effective, as an alternative to the traditional pre-agreement market check, or is it merely window dressing?

Our review of go-shop transactions since 2004 reveals that the risk that the deal will be jumped is remarkably low. When balanced against increased deal certainty, that risk may be viewed as insignificant given the potential benefits. In fact, only one transaction covered by our survey (Triad Hospitals) was successfully jumped during its go-shop period24 and that jumping bidder was a strategic buyer. We are unaware of any successful jumping bid by a private equity bidder during a go-shop period, which lends credence to the argument that private equity firms are generally unwilling to submit jumping bids once another private equity buyer has signed up the deal. More generally, however, one may ask whether practitioners, buyers and sellers – and more importantly, the courts – should be willing to draw any favorable inference from the existence of a go-shop if the reality is that competing bidders (of all kinds) are extraordinarily unlikely to submit a superior offer during a go-shop period. Put another way, why should one assume that a go-shop will serve to

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22 Interestingly, the merger agreement in one recent transaction (Triad Hospitals) denied the initial buyer a matching right during the go-shop period. While that limitation remains novel, one might expect targets to start negotiating for such a limitation. Since go-shops are generally used when a target has not been fully shopped, a target might reasonably argue that a matching right, if included, would unfairly give the initial bidder a “leg up” that would chill the interests of other potential competing bidders.


24 In our survey, we note two other transactions in which successful jumping bids occurred, each of which is distinguishable from the Triad Hospitals transaction. In 2004, Hollywood Entertainment Corporation agreed to be acquired by Movie Gallery after initially executing a merger agreement with Carso Holdings Corporation. However, the go-shop provision in that transaction provided that Hollywood could solicit superior offers until the date of the stockholder meeting. In 2005, Maytag Corporation agreed to be acquired by Whirlpool after initially executing a merger agreement with a consortium of private equity bidders led by Ripplewood Holdings. In the Maytag transaction, Whirlpool submitted its bid after the expiration of the go-shop period.
canvass the market (and attain the best possible value for the target company and its stockholders) if no one ever makes a competing bid?

Additional reasons to question the effectiveness of a go-shop may exist when a private equity buyer has negotiated material terms of the transaction with the CEO or other key executives of a target company before the board of directors becomes involved. While a superior offer remains possible, will the fact that an agreement has been reached between the initial bidder and the CEO cause other potential bidders to be hesitant to bid because of the perception that management may be less willing to fairly negotiate with a third-party? In such cases, is it reasonable to expect that a go-shop provision adds anything meaningful? Will the go-shop serve to cleanse the process flaws? One recent Delaware decision suggests, rather firmly, answers to each of these questions.

In In re SS&C Technologies, Inc., Shareholders Litigation, the CEO of a Delaware corporation, with the assistance of investment bankers hired by the company, discussed a possible acquisition of the company with six private equity firms, subject to the CEO’s right to “make a significant investment in the acquisition entity.” The CEO presented the board of directors with the preferred bidder’s offer, which was subsequently negotiated and accepted by the special committee. When considering a proposed settlement of the litigation, Vice Chancellor Lamb observed that the CEO’s and board’s conduct raised a number of questions regarding “whether, given [the CEO’s] precommitment to a deal with [acquiror], the board of directors was ever in a position to objectively consider whether or not a sale of the enterprise should take place.” The Court also expressed its skepticism whether, given the CEO’s agreement to consummate a transaction with the initial bidder, the special committee was in a position to solicit competing bids, particularly from potential bidders that would not have been interested in retaining management. Where a CEO’s conduct corrupts the sales process, as it did in SS&C, it seems unlikely that the existence of a go-shop will provide any meaningful additional comfort to the Court.

Conclusion

Ultimately, the value of a go-shop provision is directly tied to the context in which the target board of directors determines to negotiate for it. Assuming the target company’s board of directors has a thorough knowledge of the market and a corresponding belief that the go-shop will make a material difference, a go-shop provision may be a valuable (and viable) alternative to the traditional post-agreement market check. However, where the sole purpose of a go-shop provision is to attempt to cleanse a transaction that has been tainted by the CEO’s role, practitioners and directors should draw little comfort from the use of a go-shop and should anticipate a skeptical judicial reception.

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25 911 A.2d 816 (Del. Ch. 2006).
26 911 A.2d at 818.
27 Id. at 820.
28 For example, if the target board concluded that a post-signing market check would be unlikely to stimulate a hostile bid for a poorly covered microcap company in the same way that it has worked to attract topping bids in large-cap strategic deals, then a go-shop provision may make a material difference in the effectiveness of the target board’s sales process. Cf. In re Netsmart Technologies, Inc. S’holders Litig., 2007 WL 926213 (Del. Ch. March 14, 2007) (target negotiated for, but failed to obtain, go-shop period, even though the target was a poorly covered microcap company and management had previously received little interest from potential acquirors).
29 Barkan, 567 A.2d at 1287 (“When, however, the directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market.”).
**TASK FORCE REPORTS**

**Task Force on Acquisitions of Public Companies**

We had a great meeting in Washington, D.C. in March! We enjoyed a fun dinner at Zola’s and had two meetings devoted to the meeting covenants and the termination sections and commentary. Among other weighty matters, we discussed the covenants revised by Michael O’Bryan and asked Jim Griffin to review the meeting covenants and discuss these further with Keith Flaum, the author of the meeting covenants sections. We discussed the termination sections in detail, and considered: (i) the advisability of including a bracketed fiduciary termination provision in the agreement or to leave in commentary; (ii) the workings of the fee tail provision; and (iii) the placement of the mechanics relating to a “match right” in the termination section vs. the no-shop covenant. The termination section working group is revising these sections for our further consideration at our next meeting.

Our next meeting will be held on Saturday, August 11, from 2:30 p.m. until 5:30 p.m., in the Crown Room, 24th Floor of The Fairmont San Francisco. Our Editorial Board meeting is being held on Sunday, August 12, from 12:00 p.m. until 2:00 p.m., in the California and Powell Rooms, California Street Level of the Intercontinental Mark Hopkins San Francisco. Note that we cannot be sure that the meeting room and/or time of the general session will stay the same, so please check your official schedule at the meeting. We will also distribute a call-in number for the meeting. We will be discussing the revised termination section, Section 1 of the model agreement and possibly the voting agreement in our general session and will discuss the conditions section and representations and warranties in the Editorial Board session. Regular task force members should feel free to attend the Editorial Board session on Sunday afternoon.

Courtesy of Ed Deibert and Dick Canady, we have a wonderful dinner arranged for Friday night, August 10, at 6:30 p.m., at Boulevard, a wonderful San Francisco institution. Boulevard is located at One Mission Street, San Francisco, CA, 94105. Ed and Dick have discussed a menu with the restaurant and believe dinner will be about $135/person – the final dollar amount will be determined after the dinner. Thanks to Ed and Dick for the great work in finding us a classic San Francisco restaurant.

We look forward to seeing many of you in San Francisco!

Diane Holt Frankle  
Stephen H. Knee  
Co-Chairs

**Task Force on Joint Ventures**

A small group of Task Force members has been assembled, under the leadership of Alison Youngman, to “internationalize” the Model Joint Venture Agreement. A questionnaire has been sent out to counsel in twenty countries and we have received about two-thirds of the responses. We are in the process of following up on the remaining responses. Thanks to all of the members of the Committee who are participating in this project.

Thomas B. Hyman, Jr.  
Alison J. Youngman  
Co-Chairs
Task Force on the Model Stock Purchase Agreement

The Editorial Committee of our Task Force has turned its attention to the Commentary for the Revised Model Stock Purchase Agreement. The Editorial Committee is now coordinating its efforts on the Commentary with the Judicial Interpretations Working Group. A joint meeting will be held with that working group at the meeting in San Francisco.

Topics for Commentary assignments have been developed. At this juncture, drafting assignments will be available for Task Force members, as well as members of the Judicial Interpretations Working Group.

We look forward to seeing you in San Francisco.

Robert T. Harper  
Chair

SUBCOMMITTEE REPORTS

International M&A Subcommittee

The International M&A Subcommittee met on March 16, 2007 at the Renaissance Hotel in Washington, D.C.

Jorge Yanez gave an informative presentation on important issues to be aware of in M&A transactions in Mexico. A copy of the outline prepared by Jorge for his presentation (“What to Look for in an Acquisition of a Mexican Target”) has been posted on the Subcommittee’s website at the following address: http://www.abanet.org/dch/committee.cfm?com=CL560016.

The Subcommittee then turned to a discussion of possible future programs. Among others, Brian Rose suggested a program on the extraterritorial effect of U.S. and other nations’ laws on cross border M&A transactions. Freek Jonkhart suggested a program on the subject of shareholder activism in non-U.S. jurisdictions. Possible programs on the Subcommittee’s recently completed International Stock Purchase Agreement Project and on international tax principles applicable to cross border M&A transactions were also discussed.

Katrien Vorlat and Guy Harles then presented their preliminary thoughts on the post-closing dispute resolution project that the Subcommittee had decided to pursue at prior meetings. Guy provided a brief summary of views on the advantages and disadvantages of arbitration in the M&A context. Katrien then discussed the idea of preparing a questionnaire that would be circulated to practitioners in various jurisdictions eliciting their views on the types of post-closing dispute resolution mechanisms used in their jurisdictions and the relative merits and frequency of use of litigation and alternative dispute resolution mechanisms. After discussion of the general topic and the specific proposal by the members present at the meeting, it was decided that Katrien and Guy would move forward with the questionnaire.

Subcommittee Co-Chair Stan Freedman then led a discussion of the status and direction of the Subcommittee’s project to produce an annotated model asset purchase agreement for cross border transactions.

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. Among others:

Nicholas Dietrich of Gowlings, Canada, discussed a recent noteworthy Canadian court decision on enforcement of standstill agreements.
Alfredo L. Rovira of Brons & Salas, Argentina, described new Argentine regulations restricting the forms of equity funds.

Mireille Fontaine of McCarthy Tétrault, Canada, described the highlights of the recent Canadian budget that may affect international M&A transactions.

Philip Risbjørn of Bech-Bruun, Denmark, described recent Danish tax proposals aimed at limiting private equity investments.

Richard Silberstein of Gómez-Acebo & Pombo, Spain, described the Endesa takeover battle in Spain.

Daniel K. Gamulka of Gross, Kleinheider, Hodak, Halevy, Greenberg & Co., Israel, gave an update on Israeli M&A.


Brief summaries of these topics were sent to Subcommittee members following the meeting and have been posted on the Subcommittee’s website.

Our next meeting will be held in connection with the ABA Annual Meeting in San Francisco. Our meeting is scheduled for Sunday, August 12, from 9:30 a.m. until 12:00 p.m., in the Vanderbilt Room, Terrace Level of The Fairmont San Francisco. We will have conference telephone arrangements for those not able to attend in person.

Daniel Rosenberg
James R. Walther
Co-Chairs

Membership Subcommittee

As of July 31, 2007, the Committee has over 2,375 members representing 37 countries. We have over 220 in-house counsel members and over 30 associate (non-lawyer) members. The M&A Market Trends Subcommittee is our largest subcommittee with over 630 members. We continue to significantly increase in size.

We also continue to see 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.

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 in San Francisco on Friday, August 10, from 12:30 p.m. until 2:00 p.m., in the Fountain Room, Lobby Level of The Fairmont San Francisco. The Judicial Interpretations Working Group will meet immediately after, from 2:00 p.m. until 4:30 p.m., in the California Room, Mezzanine Level of The Fairmont San Francisco.
Annual Survey Working Group

The fifth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions was published in the February 2007 issue of The Business Lawyer. Our working group has been collecting 2007 cases for consideration for inclusion in our 2007 annual survey. We thank all Committee members who have suggested cases. We will discuss those cases in San Francisco and thereafter begin the summarization process. We are asking all members of the Committee 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 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 (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. 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.

Decisions to be Discussed at the San Francisco Committee Meeting

LaPoint v. AmerisourceBergen Corp., 2007 WL 1309398 (Del. Ch. May 1, 2007).

In LaPoint, Chancellor Chandler ruled that shareholders who sold their medical software company could proceed to trial on their claims that the acquiror breached the merger agreement by preventing the target company from reaching financial targets that would have triggered earnout payments to the plaintiffs. Chancellor Chandler also granted summary judgment in favor of the plaintiffs with respect to certain disputes between the parties pertaining to the proper interpretation of the earnout provisions.

The transaction involved the 2002 acquisition of Bridge Medical, Inc. (“Bridge”) by AmerisourceBergen Corp. (“ABC”). Under the terms of the Merger Agreement, ABC paid the Bridge shareholders an initial payment of $27,000,000.00, and further agreed to make earnout payments to Bridge shareholders, contingent upon certain EBITA targets being met in 2003 and 2004. The maximum earnout payments could have been as much as $55,000,000.00. The plaintiffs’ allegations of breach of contract were based on the following provisions of the Merger Agreement.

[ABC] agrees to (and shall cause each of its subsidiaries to) exclusively and actively promote [Bridge’s] current line of products and services for point of care medication safety. [ABC] shall not (and shall cause each of its subsidiaries to not) promote, market or acquire any products, services or companies that compete either directly or indirectly with [Bridge’s] current line of products and services. * * *

[ABC] will act in good faith during the Earnout Period and will not undertake any actions during the Earnout Period any
purpose of which is to impede the ability of the [Bridge] Stockholders to earn the Earnout Payments.

The plaintiffs alleged that ABC violated these provisions by bidding on certain contracts jointly with competitors of Bridge, rather than including Bridge’s product in the bids, and by refusing to allow a strategic alliance between Bridge and another company, Cerner Software, under which Cerner would have acted as a reseller for Bridge products.

ABC moved for summary judgment on the breach of contract claims primarily on the basis that the plaintiffs could not show any causation between the complained of actions and any damages suffered by the plaintiffs. With respect to the joint bidding allegations, ABC argued that because ABC failed to receive any of the four contracts that were the subject of the bids the plaintiffs complained of, the plaintiffs were not damaged. ABC produced evidence to the effect that, even if the Bridge product had been included in the bids, ABC would have nevertheless failed to win the bid process. In deciding this issue in favor of the plaintiffs, the Court stated:

First, the fact that none of the four transactions specifically mentioned by plaintiffs were likely to result in a sale to Bridge is not fatal to plaintiffs’ claims. ABC was under an affirmative duty both to promote Bridge products and to refrain from promoting those of creditors [sic]. A reasonable trier of fact could conclude from these allegations that ABC’s alleged lack of commitment indeed led to a loss of unspecified sales that, in turn, resulted in a lower-than-optimal earnout payment. In essence, if ABC altered its strategy to the detriment of Bridge, and thus refused to Bridge some of the strategic support that was a critical element of the transaction, it is reasonable to expect that this caused plaintiffs’ damages.

With respect to the strategic alliance with Cerner, ABC argued that because it was not obligated by the Merger Agreement to enter into any transaction, its failure to conclude the Cerner transaction could not have damaged plaintiffs. Under the Cerner alliance, which was heavily negotiated between ABC and Cerner, ABC would have agreed to purchase Cerner products, and Cerner would have agreed to purchase Bridge products for resale to its customers. It was undisputed that the Cerner alliance would have resulted in plaintiffs’ receiving the maximum earnout payments, without Bridge having to make any sales. In rejecting ABC’s motion for summary judgment on this claim, Chancellor Chandler stated:

Although defendant correctly states that nothing in the Merger Agreement required defendant to enter into any transaction, ABC was under an obligation to refrain from action that would prevent plaintiffs from earning the earnout payments. Plaintiffs have put forward evidence that suggests that ABC’s rejection of the proposed transaction, which was extensively negotiated between the parties, was simply a desire to avoid the earnout payments.

The evidence cited by Chancellor Chandler included an allegation that ABC’s COO offered plaintiffs $5,000,000.00 to waive any earnout payments that would be triggered by the Cerner transaction. The Chancellor further quoted from an incriminating internal email sent by another ABC employee, which stated as follows:

With all this accounting detail, [the attached email] has Terry Kinninger’s fingerprints all over it... Anyway, as I indicated today, I also could make and justify a similar case that a larger earnout payment works for us - but it still doesn’t alleviate the fact that Bridge shareholders are taking our money because of value that ABC and Cerner will (be responsible) to
create, which I can assume is where the rub will be.

I’m planning to shut the deal down tomorrow unless I’m told otherwise. Another day, another time.

With respect to this email, the Court stated that “[r]ead in the light most favorable to plaintiffs, this email suggests that ABC ‘shut down’ an otherwise advantageous deal.” After the earnout period, ABC sold Bridge to Cerner.

The Chancellor also granted summary judgment for the plaintiffs with respect to two issues of contract interpretation, one of which bears discussion here. That issue pertained to whether the plaintiffs timely objected to ABC’s calculation of EBITA for the year 2003. With respect to this issue, the Merger Agreement provided:

[ABC’]s Earnout Calculations will be deemed to be accepted by [Plaintiffs] and shall be conclusive for purposes of determining the final amount of the related Earnout Payment, if any, except to the extent, if any, that [Plaintiffs] shall have delivered to [ABC] no less than twenty (20) Business Days immediately following the applicable Earnout Payment Date a statement describing the objections of [Plaintiffs] thereto . . . .

The plaintiffs gave notice of their objection to the 2003 EBITDA calculations twenty-six days after receipt of ABC’s calculation. ABC claimed that the objection was untimely, arguing that the term “no less than” was really intended to mean “no more than,” because otherwise the Merger Agreement would not have provided any outside date for objection. The plaintiffs relied on the plain wording of the Merger Agreement that the objection must be given “no less than” twenty business days after receipt of the calculations. In granting summary judgment for the plaintiffs on this issue, the Court stated that “‘no less than’ is a time of mathematical precision, and it is difficult to imagine how ‘more’ somehow means ‘less.’” As to ABC’s claim with respect to the outside date for providing objections, the Court resorted to the principle that “[w]here a contract is silent on the time given to a party to perform a condition, then this Court will assume that the parties contemplated a reasonable time.” The Court held that “it is inconceivable that a twenty-six business day delay is unreasonable or imposed any hardship upon defendant.” The Court further stated that:

Defendant is a major international corporation and was assisted by qualified and professional counsel at the time it entered into the merger agreement. In many areas, it now appears that the merger agreement was unhappily drafted. Nevertheless, defendant faces no significant prejudice as a result of plaintiffs’ actions, and there is no call for this Court to negate the clear language of the agreement. Plaintiffs are entitled to summary judgment on this issue.

This case illustrates the importance of clear drafting in connection with contingent earnout payments, as well as the risks that an acquiror faces in making post-closing decisions that could impact the ability of the acquired company to meet earnout targets. This case also illustrates the reluctance of the courts to reform the plain language of a contract entered into between sophisticated parties, even in instances where that language is an obvious mistake. There is still no substitute for careful proofreading!


In Herring the United States Court of Appeals for the Ninth Circuit reversed a decision of the U.S. District Court for the Southern District of California, Herring v. Teradyne, Inc., 256 F. Supp.2d 1118 (S.D. Cal. 2002), finding that a survival clause in a merger agreement had the
effect of reducing the statute of limitations applicable to the merger agreement from four years to one year.

The language of the merger agreement interpreted by the District Court read as follows:

The covenants, agreements, representations and warranties of the parties hereto contained in this Agreement or in any certificate or other writing delivered pursuant hereto or in connection herewith shall survive the Closing until the first anniversary of the Closing Date [except for certain enumerated sections which were to survive either indefinitely, or until the expiration of the applicable statutory period of limitations, or for other periods specified elsewhere in the agreement]. No claim for indemnity under this Agreement with respect to any breach of any representations, warranties and/or covenants of Company and/or Seller shall be made after the applicable period specified in the preceding sentence and all such claims shall be made in accordance with the applicable provisions of the Escrow Agreement.

Herring involved breach of contract and other claims by sellers of two businesses against the buyer, based primarily on the “no material adverse change” and “no failure to disclose” representations contained in the merger agreement, which representations were subject to the one year survival period. The buyer contended that the first sentence of the language quoted above created a one-year statute of limitations applicable to contract claims based on the merger agreement. The plaintiffs argued, in effect, that such a result would require something more explicit, similar to the second sentence, but requiring that indemnification lawsuits must be brought within the survival period set forth in the first sentence. Note that the second sentence limited the period for notifying the other party of a claim, not the period within which a lawsuit would be required to be filed.

In its opinion, after a review of numerous cases cited by parties on both sides, the District Court stated that neither it nor the parties had found binding precedent, but that:

[T]he treatises presented to the Court indicate that where an agreement does not provide that representations and warranties survive the closing, they extinguish on the closing date . . . . It follows then that where an agreement provides that representations and warranties “survive”, a party can sue for breaches of the representations and warranties, but only during the time period the contract states those representations and warranties survive. Therefore, if they survive indefinitely, then the state’s four-year statute of limitations would apply from the date of the breach. But if [they] survive for a fixed period of time, it follows that once that time period has elapsed, a party cannot sue for breach of the representations and warranties, absent circumstances surrounding the negotiations that would counsel against such an interpretation . . . .

In its July 13 opinion reversing the District Court’s holding, the Court of Appeals stated: “Parties may contractually reduce the statute of limitations, but any reduction is construed with strictness against the party seeking to enforce it . . . . Here, we find no clear and unequivocal language in the survival clauses that permits the conclusion that the parties have unambiguously expressed a desire to reduce the statute of limitations.”

The holding of the District Court presents an interesting, and to many M&A practitioners surprising, interpretation of a “standard” survival provision of the type found in most acquisition agreements. Our Subcommittee will embark upon
a review of the cases mentioned in the District Court opinion, particularly those cited by the defendants, to determine how much support those cases provide for the result reached by the District Court.

**Judicial Interpretations Working Group**

The Judicial Interpretations Working Group met during the Committee’s March 2007 meeting in Washington D.C. 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 twenty different provisions of M&A agreements and ancillary documents, and in particular to Memorandum prepared by Donald Dalik pertaining to Judicial Interpretations of Full Disclosure (“10b-5”) representations.

Our San Francisco meeting will be a joint meeting with the Editorial Working Group of the Task Force on the Model Stock Purchase Agreement. In addition to discussing the Herring case summarized above, much of our meeting will be devoted to discussing sections of the Model Stock Purchase Agreement where the commentary requires updating, with particular emphasis on jurisprudential developments that have occurred since the Model Stock Purchase Agreement with Commentary was published over a decade ago. We expect to identify a number of new commentary drafting projects for our Working Group at this meeting, which will provide an opportunity for many new Committee members to become involved in this important project. Therefore, we invite new members to join us in San Francisco.

The San Francisco meeting of the Judicial Interpretations Working Group will be on Friday, August 10, from 2:00 p.m. until 4:30 p.m., in the California Room, Mezzanine Level, of The Fairmont San Francisco. To join our Working Group, 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 San Francisco.

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**

At the San Francisco meeting, the Subcommittee will be releasing the 2007 version (analyzing deals completed in 2006) of our Private Target Deal Points Study. In addition to the familiar standards of baskets, caps, etc, we are covering purchase price adjustments and earnouts (and, in supplements to follow, non-reliance, pervasive qualifiers (e.g., MAE and knowledge), no-shop, and termination provisions). Highlights of the 2007 Private Target Study will be presented in a program scheduled for Friday, August 10, from 10:30 a.m. until 12:30 p.m., at The Fairmont San Francisco.

For the 2007 study, we have a working group of 61 lawyers from 51 law firms. As with our previous studies, such a large and diverse group of deal lawyers further distinguishes the Subcommittee’s work from the several proprietary (single-firm) studies that, with their virtually unavoidable institutional biases, have sprung up on the heels of the Subcommittee’s offerings. (As some would say: The only time you’d want to cite a proprietary study, instead of our Subcommittee’s studies, is when you want to use it against the firm that produced it!)

Speaking of nipping-at-our-heels, Keith Flaum is putting the finishing touches on the Subcommittee’s inaugural Public Target LBO Study. Keith will be previewing some of his
group’s findings in San Francisco as well. Keith is also putting the finishing touches on the 2007 Strategic Buyer/Public Target Study, which should be released in September.

After the San Francisco meeting, Larry and I will be rolling off as the Subcommittee’s co-chairs. Since accepting Rick Climan’s invitation to be founding co-chairs in 2004, our Subcommittee membership has grown from 3 (me, Larry and Keith) to 614.

More important than high membership, we take pride in having one of the hardest working subcommittees – as evidenced by the over 100 lawyers actively working on our five studies: Private Target, Public Target, Public Target LBO, European, and Canadian.

Above all, Larry and I are proud to have played a small part in establishing the Subcommittee’s work product (consistent with the Committee’s reputation and track record) as the “Gold Standard” of benchmark studies of negotiating trends in M&A deal points – in the U.S. and abroad.

Larry and I look forward to continuing our work as project co-chairs of the Private Target Study and to working with Keith as he leads the Subcommittee onward and upward!

Wilson Chu
Larry Glasgow
Co-Chairs

Private Equity M&A Subcommittee

The Private Equity M&A Subcommittee met in Washington, D.C. on March 17, 2007. The meeting was well-attended in person and by telephone. The meeting was devoted to three presentations. First, David Roberts, Director with Houlihan, Lokey Howard & Zukin, presented on issues and trends in private equity M&A from the investment banking perspective. Next, Robert Schlossberg, chair of the M&A Committee of the ABA Antitrust Section and Editor of the second edition of that Section’s treatise on U.S. antitrust law as applied to mergers and acquisitions, presented on antitrust issues in private equity investing, including pending litigation and governmental reviews relating to private equity groups. Finally, Subcommittee member Mireille Fontaine and her partner Ian Palm presented on recent Canadian legal and tax developments affecting private equity. All three presentations prompted questions and discussion. The subcommittee co-chairs thank the presenters for contributing to a very substantive and lively meeting.

Henry Lesser
John Hughes
Co-Chairs

Programs Subcommittee

At the 2007 Annual Meeting in San Francisco the Committee will sponsor two programs and a Committee Forum:

M&A Market Trends and Developments: Highlights from the 2007 Deal Points Studies on Private Targets, Public Targets, and Private Equity-Backed Going Private Acquisitions is scheduled for Friday, August 10, from 10:30 a.m. to 12:30 p.m., and will address (i) what is “market?” – based on analysis of M&A deals completed in 2006 and 2005; (ii) new deal issues, including no-shops, purchase price adjustments, earn-outs, and caps; and (iii) a first-time study of financial-sponsored going private acquisitions. The program is co-chaired by Wilson Chu, Keith A. Flaum and Lawrence E. Glasgow, and features a panel consisting of Mark Danzi, Dennis Barsky, Stuart Johnson, John Corrigan, Hendrik Jordaan, Carl Sanchez, Steve Tonsfeldt, David Fisher, Michael Hollingsworth and Michael Kendall.
Traps for the Unwary: Understanding the Unintended Consequences of Boilerplate Provisions in M&A Agreements is scheduled for Saturday, August 11, from 10:30 a.m. to 12:30 p.m. Chaired by Robert T. Harper, the panel will also consist of William B. Payne, David I. Albin, Martha Anderson, Tina L. Stark and Dennis J. White. This program will review sample boilerplate provisions from the latest draft of the Revised Model Stock Purchase Agreement and explore the unintended consequences of such provisions from the perspective of both the buyer and seller.

The Increasing Uncertainties of Successor Liability – Are they Insurable? is scheduled as a Committee Forum for Sunday, August 12, from 4:00 p.m. to 5:00 p.m., following the full Committee meeting. The panel will consist of Chair Jon T. Hirschoff; Mary McDougall Duffy, Managing Director of Aon Private Equity & Transaction Solutions, Aon Financial Services Group, Inc.; Jeffrey M. Brown, Vice President of Chubb Group of Insurance Companies; Vincent F. Garrity, Jr.; and Christine M. Leas. The panel will briefly address the range of risks that even liabilities not assured in an asset purchase will eventually attach to a buyer under various successor liability theories and then turn to possible insurance solutions to these risks.

At the Committee’s Fall stand-alone meeting, Mark Morton is organizing a Committee Forum on SPAC transactions. It is not too early to propose programs for the 2008 meetings. Please send your ideas to Tom Thompson at thomas.thompson@bipc.com or Bob Copeland at RCopeland@duanemorris.com.

Technology Subcommittee

Committee members are now making use of two extranet sites for sharing of information and communicating among members. The Editorial Group of the Task Force on the Model Stock Purchase Agreement was the first to make extensive use of the extranet, and now the M&A Jurisprudence Subcommittee has initiated a site and is uploading information for access by its members. The extranet is available for use by any of our other groups as a central means for filing and organizing subcommittee and task force materials and as a means of communicating with group members.

Our Committee website continues to be a center for recent development materials on the topic of M&A law. Papers from our various forums have been posted, along with the popular “Deal Points” studies. In addition, we have added a separate section on which to post papers and articles written by our Committee members (see “Reports and Papers of Members” on the main web page). Submittals for the website should be forwarded to the Technology Chair.

We are planning again to “webcast” the plenary session of our Fall stand-alone meeting, including the CLE session. This year’s Committee meeting will be held in Colorado Springs on October 12 through 14. The plenary session will take place on Saturday, October 13. Dial-in information will be distributed in mid-September. Written materials to be distributed during the session will be posted to our Committee website in advance of the meeting.

Please visit the Committee’s website frequently. The address of the website is: http://www.abanet.org/dch/committee.cfm?com=CL560000. Use your ABA membership number or email address as your username and your last name as your password.

George M. Taylor, III
Chair
Friday, August 10


10:30 a.m. - 12:30 p.m.
The Fairmont San Francisco
Terrace Room, Terrace Level

Annual Survey Working Group of the M&A Jurisprudence Subcommittee

12:30 p.m. - 2:00 p.m.
The Fairmont San Francisco
Fountain Room, Lobby Level

Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee

2:00 p.m. - 4:30 p.m.
The Fairmont San Francisco
California Room, Mezzanine Level

Saturday, August 11

Editorial Working Group of the Task Force on the Model Stock Purchase Agreement

8:00 a.m. - 10:00 a.m.
The Fairmont San Francisco
California Room, Mezzanine Level

M&A Market Trends Subcommittee

10:00 a.m. - 12:30 p.m.
The Fairmont San Francisco
California Room, Mezzanine Level

Program – Traps for the Unwary: Understanding the Unintended Consequences of Boilerplate Provisions in M&A Agreements

10:30 a.m. - 12:30 p.m.
The Fairmont San Francisco
Pavilion Room, Lobby Level

Task Force on Model Stock Purchase Agreement

11:00 a.m. – 1:00 p.m.
The Fairmont San Francisco
Crown Room, 24th Floor

Meeting of Committee Chair and Vice Chairs, Subcommittee, Task Force and Working Group Chairs

1:00 p.m. – 2:30 p.m.
The Fairmont San Francisco
International Room, Mezzanine Level
Task Force on Acquisitions of Public Companies

2:30 p.m. - 5:30 p.m.
The Fairmont San Francisco
Crown Room, 24th Floor

Committee Reception and Dinner

Cocktails at 7:00 p.m., Vista Terrace
Dinner at 8:00 p.m., India Suite
Stanford Court Hotel

Sunday, August 12

International M&A Subcommittee

9:30 a.m. - 12:00 p.m.
The Fairmont San Francisco
Vanderbilt Room, Terrace Level

Task Force on the Dictionary of M&A Terms

9:30 a.m. - 12:00 p.m.
Intercontinental Mark Hopkins San Francisco
California and Powell Rooms,
California Street Level

Editorial Working Group of the Task Force on Acquisitions of Public Companies

12:00 p.m. - 2:00 p.m.
Intercontinental Mark Hopkins San Francisco
California and Powell Rooms,
California Street Level

Full Committee Meeting

2:00 p.m. - 4:00 p.m.
The Fairmont San Francisco
Grand Ballroom, Grand Ballroom Level

Committee Forum: The Increasing Uncertainties of Successor Liability – Are they Insurable?

4:00 p.m. - 5:00 p.m.
The Fairmont San Francisco
Grand Ballroom, Grand Ballroom Level