FROM THE CHAIR

By Joel I. Greenberg

Our Committee’s next meeting will be held in conjunction with the Business Law Section’s Spring meeting in Dallas from Thursday, April 9, 2008 through Saturday, April 11, 2008, at the Hilton Anatole Hotel. We will present one program on Thursday afternoon, with the remaining programs and subcommittee, task force and working group meetings from Friday morning through early Saturday afternoon. The full Committee meeting will be held Saturday afternoon, starting at 12:30 p.m., and the Committee Forum on cross-border due diligence will follow at 3:00 p.m. The Programs Subcommittee report, which begins on page 25 of this issue of Deal Points, includes a description of the Committee Forum and the programs that our Committee is sponsoring at the meeting.

The Committee dinner will be held Saturday night at Nana Restaurant, on the 27th Floor of the Hilton Anatole, with cocktails beginning at 6:30 p.m. and dinner at 7:30 p.m. Registration for the dinner is through the Section meeting registration process. Thanks to our Dallas members for arranging this event.

These are interesting times for mergers and acquisition practitioners. Reflecting that environment, the Private Equity M&A Subcommittee will be discussing busted deals at its meeting and will present highlights of that

(continued on next page)
discussion at the full Committee meeting. The agenda for the full Committee meeting will also include some observations by Vice Chancellor Strine on remedies in mergers and acquisitions litigation (recorded earlier this year at the Annual Securities Regulation Institute in San Diego), a presentation on “sandbagging” provisions (or as I like to refer to them when representing a buyer, “benefit of the bargain” provisions) by the M&A Market Trends Subcommittee, and a discussion of some interesting aspects of the JPMorgan Chase – Bear Stearns transaction. We will also have a Delaware law update and a presentation by the Annual Survey Working Group of the M&A Jurisprudence Subcommittee on the Genesco and United Rentals decisions (those cases are described in the M&A Jurisprudence Subcommittee report beginning on page 18 of this issue of Deal Points).

The Business Law Section will hold its first Global Business Law Conference on Thursday, May 29, 2008 and Friday May 30, 2008, at the Westin Grand hotel in Frankfurt, Germany. It is not practical to have our normal full agenda of meetings in Frankfurt, but we will be well represented, presenting two programs, co-sponsoring a third and holding a few subcommittee meetings. I encourage you to consider attending the conference.

The 2008 Annual Meeting of the American Bar Association will be held in New York City from August 7, 2008 through August 12, 2008. The Business Law Section meetings will be from Friday, August 8, 2008 through Monday, August 11, 2008 at the Grand Hyatt Hotel (42nd Street, just to the east of Grand Central Station). The meetings of our Committee and its subcommittees, task forces and working groups will be held from Friday, August 8 through Sunday, August 10, 2008.

I look forward to seeing you in Dallas.

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**FEATURE ARTICLES**

### New Fairness Opinion Rule Now in Effect

Jeffrey S. Tarbell

“We believe there is inherent bias when a contingent fee structure is used in rendering any opinion. There is a very large incentive for an investment bank to find that a transaction is fair, regardless of the circumstances, when the bank will receive the bulk of its fee only if the transaction is successful.”

-- CalPERS comment letter on NASD proposed rule 2290

“We are totally conflicted — get used to it.”

-- Robert Kindler, vice chairman of investment banking at Morgan Stanley

**Introduction**

On October 11, 2007, the SEC approved FINRA’s proposed fairness opinion rule, which sets forth new procedural and disclosure requirements by FINRA members issuing fairness opinions that will be provided or described to public shareholders. The new rule became effective December 8, 2007, following three years of proposals, revisions, and abundant commentary. The primary goal of Rule 2290 is to provide public shareholders

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1 Jeffrey S. Tarbell is a senior vice president of Houlihan Lokey. He has nearly 20 years of experience providing financial advisory services to public and private clients. He can be reached at JTarbell@HL.com. The opinions expressed herein are those of the author and not necessarily those of Houlihan Lokey.

with additional information about the potential conflicts of interest between fairness opinion providers and recipient companies. Rule 2290 is intended to complement existing SEC disclosure rules relating to fairness opinions.

FINRA (Financial Industry Regulatory Authority), formed in 2007 by the merger of the National Association of Securities Dealers (NASD) and some regulatory functions of the New York Stock Exchange, is a self regulatory organization for its member investment banking firms. Rule 2290 requires certain disclosures in fairness opinions when a member firm knows, or has reason to know, at the time a fairness opinion is issued, that the opinion will be provided or described to the client’s public shareholders. FINRA’s regulatory authority does not extend to nonmember firms, and the new disclosure obligations do not apply to fairness opinions that will not be provided or described to the client’s public shareholders.

A Primer on Fairness Opinions

A fairness opinion is a statement of a financial advisor’s opinion as to the fairness, from a financial point of view, of the consideration paid or received in a corporate transaction. While not formally required by rule or statute, fairness opinions have become a standard element of public corporate control transactions since 1985, when the Delaware Supreme Court held that a board of directors breached its duty of care by approving a merger without adequate information on the transaction, referring specifically to the board’s failure to obtain a fairness opinion, among other things. From the perspective of boards of directors and other corporate fiduciaries, fairness opinions serve a number of useful purposes.

From a procedural standpoint, a fairness opinion provides evidence that the board sought professional advice regarding the financial aspects of a proposed transaction. From a legal standpoint, a fairness opinion provides evidence that the board gathered all reasonably available information and exercised reasonable business judgment in its evaluation of a proposed transaction. Under the business judgment rule, courts generally will not second-guess the decisions of a board of directors (or find liability for honest mistakes) provided that such directors have acted (i) on an informed basis, (ii) in good faith, (iii) in a manner they reasonably believe to be in the best interest of the company, and (iv) without fraud or self-dealing.

Background of the Rule

Rule 2290’s origins can be traced to the Spring of 2003. Wall Street was still reeling from major corporate and accounting scandals, and the Sarbanes-Oxley Act was focusing corporate America’s attention on conflicts of interest. Following his investigation into the integrity of equity research analysts, then–New York Attorney General Elliott Spitzer suggested that the target of his next inquiry might be Wall Street’s fairness opinion practices. His premise was that a fairness opinion might not be reliable if issued by an investment bank that stood to receive a large success fee upon completion of the deal. Spitzer’s attention to fairness opinions was soon preempted by the emerging mutual fund timing scandal. However, over the following 12 months, the issue garnered traction in the press and, ultimately, spurred the NASD into action.

In June 2004, the NASD reportedly sent letters of inquiry to several investment banks requesting information on the firms’ fairness

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3 Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
opinion practices for the prior three years. Not surprisingly, the requests apparently focused on services rendered, fee structures, and any legal actions regarding transactions with respect to which fairness opinions were rendered. The NASD reportedly requested additional information in September 2004, focusing on transactions where the member firm issued a fairness opinion and provided financing to any party to the transaction. Finally, in November 2004, the NASD issued a notice to member firms, and request for comments, regarding a potential new rule on fairness opinions. In its notice, the NASD identified the following concerns:

- investment banks rendering a fairness opinion may be inclined to opine favorably if a transaction is endorsed by company management;
- the potential for conflict is strong when the financial advisor will receive financial advisory fees upon successful completion of the transaction; and
- proxy disclosures may not be sufficient to inform investors about the subjective nature of fairness opinions and the potential biases.

The NASD received comments from several interested parties, including academics, bar associations, institutional investors, and investment banks. Not surprisingly, the institutional investors demanded more disclosure, tougher rules, and elimination of conflicts of interest. At the other end of the spectrum, firms in the financial services industry generally embraced enhanced disclosure, but resisted efforts to define a “conflict.”

In June 2005, the NASD filed its initial proposed rule with the SEC. Several amendments were filed during the following two years, with the SEC granting accelerated effectiveness to the fourth amendment in October 2007.

**New Disclosure Requirements**

Rule 2290(a) requires the member firm to disclose the following information within the fairness opinion.7

**Disclosure Regarding Contingent Compensation.** Rule 2290(a)(1) requires the member firm to disclose whether the firm has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation that is contingent upon the successful completion of the transaction, for rendering the fairness opinion, and/or serving as an advisor. Disclosure regarding contingent compensation is not required to be quantitative. Only descriptive information is required. In addition, FINRA explained that it does not believe a conflict exists simply because of the existence of a contingent fee arrangement. Rather, disclosure of the fee arrangement will enable shareholders to reach their own conclusion regarding the existence of a conflict.

**Disclosure of Other Compensation.** Rule 2290(a)(2) requires the member firm to disclose whether it will receive any other significant payment or compensation contingent upon the successful completion of the transaction. This rule is essentially a “catch-all” designed to prevent circumvention of Rule 2290(a)(1). This requirement would require disclosure of significant payments or compensation from related transactions (e.g., financings) if such fees are contingent upon the completion of the transaction for which the

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fairness opinion was issued. FINRA does not define “significant,” but it states that such payment or contingent compensation is one that a reasonable person would have an interest in knowing about in order to assess whether the member firm issuing the fairness opinion has a potential conflict of interest.

**Disclosure of Material Relationships.** Rule 2290(a)(3) requires the member firm to disclose any material relationships that existed during the past two years (or that are mutually understood to be contemplated) in which any compensation was received (or is intended to be received) as a result of the relationship between the member firm and any party to the transaction that is the subject of the fairness opinion. This disclosure requirement pertains not just to material relationships between the member firm and its client, but to such relationships between the member firm and all parties to the transaction. For example, in the case of a takeover, a member issuing a fairness opinion to the target’s board of directors would also have to disclose any material relationships it had with the acquiror. However, Rule 2290 does not require disclosure of such relationships with affiliates of the member firm’s client or other parties to the transaction, or between the member firm and affiliates of its client or of other parties to the transaction.

**Disclosure Regarding Verification of Information.** Rule 2290(a)(4) requires the member firm to disclose whether it has independently verified any of the information that was provided to it by its client and formed a substantial basis for the fairness opinion. When no such information has been verified, a blanket statement to that effect is sufficient. However, information provided by the member firm’s client that was independently verified must be described in the fairness opinion. Historically, issuers of fairness opinions have disclaimed any responsibility for independently verifying any information, and blanket statements to this effect are expected to continue to be the norm in fairness opinions subject to Rule 2290.

**Disclosure of Fairness Committee.** Rule 2290(a)(5) requires the member firm to disclose whether the fairness opinion was approved or issued by a fairness committee. While many, if not most, financial advisors—particularly larger firms—have historically required that all fairness opinions be approved by such a committee, specific policies and practices vary from firm to firm, and disclosure about the use of such committees was rare. The rule does not require the use of a fairness committee—which might be an issue for some very small firms with insufficient personnel—it merely requires disclosure as to whether the fairness opinion was approved by such a committee.

**Disclosure of Insider Compensation.** Rule 2290(a)(6) requires the member firm to disclose whether the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to insiders, relative to the compensation to the client’s public shareholders. Transaction-related compensation to insiders, such as severance, noncompete payments, and retention bonuses, are not uncommon and, in some cases, may lead to claims that such additional compensation diverts funds that should be paid to the public shareholders. Historically, fairness opinion providers have treated decisions about the appropriateness of such payments as outside of their core competencies and more properly within the purview of compensation consultants. Consequently fairness opinion providers have treated such payments as existing liabilities of the transaction participants rather than the proper subject of a fairness opinion. As a consequence, it is expected that most, if not all, member firms will disclose in their fairness opinions that the opinion does not address such payment.
New Procedural Requirements

NASD Rule 2290(b) requires that any member firm issuing a fairness opinion must have written procedures for approval of a fairness opinion. These procedures must address, among other things, the types of transactions and the circumstances in which the firm will use a fairness committee to approve or issue a fairness opinion. In those transactions in which the member uses a fairness committee, the firm must have procedures for (i) selecting personnel to be on the fairness committee, (ii) determining the necessary qualifications of persons serving on the fairness committee, and (iii) promoting a balanced review by the fairness committee, which shall include the review and approval by people who do not serve on the deal team. FINRA notes that whether a person is considered part of a deal team will depend on the nature and substance of that person’s contacts and the advice rendered to the issuer.

Firms are also required to have a process to determine whether the valuation analyses used in the fairness opinion are appropriate. Rule 2290 does not go so far as to mandate the use of specific valuation analyses or methodologies (although, as hereinafter discussed, some commentators called for such requirements).

Too Watered Down?

The final approved version of Rule 2290 is less burdensome to member firms than the originally proposed rule. Some commentators have complained that the final rule largely overlaps the SEC’s current disclosure rules regarding fairness opinions. For example, in its initial Notice to Members, the NASD proposed a requirement that fairness opinions contain “clear and complete descriptions of any significant conflicts of interest in issuing the opinion.” By contrast, the final rule requires firms to disclose only any “material relationships” with its client and other transaction participants.

Also, the original rule proposal filed with the SEC required member firms to have procedures to evaluate how the amount and nature of the compensation from the transaction underlying the fairness opinion benefit any individual officers, directors or employees, or class of such persons, relative to the benefits to shareholders of the company, are factors in reaching a fairness determination. By contrast, rather than have procedures, the final rule requires only that member firms disclose whether the fairness opinion expresses any opinion about the fairness of insider compensation relative to the public shareholders’ compensation.

The following were some of the other rules proposed by commentators or listed in the initial rule proposal filed with the SEC that were not ultimately adopted in the final rule:

- a requirement for independent fairness opinions from firms not otherwise involved in the transaction;
- specifically prescribed procedures, including mandated valuation methodologies;
- for each category of data provided by the issuer with respect to transaction participants, disclosure of whether the member firm has independently verified the data provided by the issuer; and
- mandated disclosure of the fairness opinion fee payable to the member firm.

8 NASD Notice to Members 04-83, November 2004.
impact of rule 2290

as readers may have surmised by now, the disclosures required by Rule 2290 are largely redundant with the disclosures already required of issuers by SEC Regulation M-A, among others. There are, however, important differences. For example, under Rule 2290, member firms must ensure that the required disclosures are included in fairness opinions when issued, while the SEC rules require that the issuer or other filing party include the required disclosures in the proxy statement or other similar filing made with the SEC, often several weeks after the delivery of the fairness opinion. This represents a shift of responsibility and the regulatory agency responsible for the enforcement of the relevant rules.

Perhaps the most significant difference between the two rules relates to the material relationships required to be disclosed. While Rule 2290 requires disclosure of material relationships directly between the member firm and its client and other transaction participants (but not their respective affiliates), the SEC disclosure rules require disclosure of material relationships between the member firm, its client, and their respective affiliates (but not other transaction participants or their affiliates).

Additional disclosure will be needed with regard to whether the fairness opinion expresses an opinion about the fairness of the compensation accruing to insiders relative to the compensation to the company’s public shareholders. The requirement that fairness opinions disclose whether the opinion was approved or issued by a fairness committee of the member firm is also a novel disclosure requirement.

In terms of its impact on the board’s deliberation process, Rule 2290 should provide boards with some additional visibility into the relationships between their company and/or any other party to the transaction and the member firm issuing the fairness opinion. Although, as a matter of good business practice, most financial advisors try to identify such relationships at the beginning of an engagement to avoid awkward surprises, the prospect of disclosures regarding these relationships in the fairness opinion itself may cause some boards to focus greater attention on this potential issue and consider the propriety of seeking a second opinion from an independent fairness opinion provider.

In terms of its impact on public shareholders, it is important to note that neither FINRA nor SEC rules require that a fairness opinion include sufficient information for the public shareholder to “recreate” the underlying financial analysis. This issue was recently addressed by the Delaware Court of Chancery, where the court held that “disclosure that does not include all financial data needed to make an independent determination of fair value is not per se misleading or omitting a material fact.”

In addition to the benefits accruing to boards and shareholders, another potential beneficiary of Rule 2290 is the plaintiff’s bar. Armed with more information about the fairness opinion process, as well as a sort of “compliance checklist” in the form of the new rule, litigators are likely to challenge the propriety of analysis and disclosure in fairness opinions. 2007 saw no shortage of cases involving challenges to fairness opinion disclosure, including Ortsman, Caremark, 11

and Netsmart.\textsuperscript{13} While each of these cases focused on adequacy of disclosure regarding fairness opinions under Delaware law, the next round of such cases may attempt to leverage new claims from the disclosure requirements imposed on the member firms under Rule 2290.

With regard to transaction attorneys, it is important for counsel to be familiar with the disclosure and procedural requirements of Rule 2290. Even though the accountability for compliance falls on the member firm, the issuer will be poorly served if a fairness opinion provided or described to its public shareholders does not comply with Rule 2290.

**Summary and Conclusion**

Rule 2290 will provide increased transparency into fairness opinion practices and relationships between fairness opinion providers and transaction participants. Complying with the new rule should not be particularly burdensome to member firms. Critics continue to argue for standardizing the fairness opinion process. Calls for reform range from requiring the opinion to state whether a materially better price could have been obtained to establishing a standards-setting body that would dictate the valuation methods used in fairness opinions.\textsuperscript{14} However, fairness opinion providers continue to resist efforts to establish required standards and methodologies. The underlying analyses are tailored to the facts and circumstances of each particular transaction, and judgment is necessary to select appropriate companies and transactions for comparative purposes and to select appropriate discount rates and terminal multiple or growth rates when performing a discounted cash-flow analysis. As a consequence, subjectivity is unavoidable and, perhaps, even beneficial to the fairness opinion process. Issuers choose legal counsel from among hundreds of seemingly qualified law firms based on the perceived quality of the advice they will receive. A board of directors selecting a fairness opinion provider faces an analogous situation. The perceived quality of the provider’s analysis and advice should be critical to the choice.

## The Disclosure of Projections Under Delaware Law

By Michael B. Tumas and Michael K. Reilly\textsuperscript{1}

Over the past year, the Delaware Court of Chancery issued three decisions and one bench ruling that have fueled the debate concerning whether certain “soft information,” particularly financial projections, must be disclosed as a matter of Delaware law when a corporation is seeking stockholder approval of a merger transaction.\textsuperscript{2} Those decisions indicate

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\textsuperscript{1} Michael B. Tumas and Michael K. Reilly are partners in the law firm of Potter Anderson & Corroon LLP. The authors would like to express their appreciation to Pamela L. Millard, a third year law student at Georgetown University Law Center, for her assistance with this article. The views expressed are those of the authors and may not be representative of those of the firm or its clients.


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\textsuperscript{13} In re Netsmart Technologies, Inc. S’holders Litig., 924 A.2d 171 (Del. Ch. 2007).

that a context-specific analysis, and not a rote legal standard, is necessary to determine whether projections are material, and thus must be disclosed, in a specific case under Delaware law. In employing such an analysis, the Court consistently applied the “fair summary” standard articulated in *In re Pure Resources, Inc.* and considered similar factors when determining whether the projections were material, including (i) the reliability of the projections, (ii) the transaction structure, (iii) the utility of the projections, (iv) the target’s particular circumstances, (v) whether the projections were relied upon by the financial advisor and the target board, and shared with the bidder, and (vi) the presence of any partial or incomplete disclosure.

**Disclosure Under Pure Resources.**

It is settled Delaware law that directors have a duty to disclose to stockholders all material information in their possession when seeking stockholder approval of a merger transaction. Information is material “if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote.” For information to be material, it not only must be helpful, but also must “significantly alter[] the ‘total mix’ of information made available.” The Delaware courts have not stated definitively whether “soft information,” including pro forma statements underlying financial projections, and even raw data used by directors and their financial advisors, represents material information that must be disclosed to stockholders.

The Court of Chancery took a step in that direction in *Pure Resources*. At issue in *Pure Resources* was a target corporation’s failure to disclose any of the substantive portions of the work performed by the target’s financial advisor in a Schedule 14d-9, issued in response to a tender offer by a controlling stockholder.

In finding a reasonable probability of success on the disclosure claims, the Court stated that it was time to end the “ongoing debate” as to whether Delaware courts should require the “informative, succinct disclosure of investment banker analyses in circumstances in which the bankers’ views about value have been cited as justifying the recommendation of the board.” The Court noted that the question as to whether such information should be disclosed under Delaware law.

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3 808 A.2d 421 (Del. Ch. 2002).

4 This article is limited to the disclosure requirements of Delaware law and does not address the separate disclosure requirements of the federal securities laws.


7 *Netsmart*, 924 A.2d at 199 (quoting *Zirn v. VLI Corp.*, 621 A.2d 773, 778-79 (Del. 1993)).

8 See, e.g., *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977) (finding that management “was in possession of two estimates from responsible sources using a ‘floor’ approach defining value in terms of its lowest worth, and the other a more ‘optimistic’ or ceiling approach defining value in terms of highest worth it is our opinion that complete candor required disclosure of both estimates”); *Louden*, 700 A.2d at 145 (“Speculation is not an appropriate subject for a proxy disclosure.”); *In re PNB Holding Co. S’holders Litig.*, 2006 WL 2403999, at *16, Strine, V.C. (Del. Ch. Aug. 18, 2006) (finding that certain outdated projections were no longer reliable and therefore did not need to be disclosed).

9 The target corporation argued that the Schedule 14d-9 contained historical financial information and certain projections of future results, and any additional information would not be material.

10 *Pure Resources*, 808 A.2d at 449.
disclosed had often been answered in an “intellectually unsatisfying manner” in order to avoid “stepping on the SEC’s toes” and encouraging “prolix disclosures.” In an effort to rectify that problem, the Court promulgated a “firm statement that stockholders are entitled to a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely.”

The Court determined that a “minority stockholder engaging in the before-the-fact decision whether to tender would find it material to know” three primary pieces of information in any “fair summary” of the substantive work performed by the financial advisor: (i) the basic valuation exercises undertaken by the financial advisor, (ii) the key assumptions relied upon by the financial advisor in performing the valuation exercises, and (iii) the range of values that were generated thereby. Although Pure Resources set forth the “fair summary” standard, it remained unclear whether financial projections, or other raw data, must be included in that summary.

Following Pure Resources, the Court refused to require the disclosure of certain “soft information” in three notable decisions. In In re PNB Holding Co. Shareholders Litigation, however, the Court indicated that reliable projections relied upon by a target corporation’s financial advisor and board likely would need to be disclosed in connection with a cash-out merger transaction. Although the projections at issue in PNB Holding were outdated and unreliable, and therefore did not need to be disclosed, the Court stated as follows:

In the context of a cash-out merger, reliable management projections of the company’s future prospects are of obvious materiality to the electorate. After all, the key issue for the stockholders is whether accepting the merger price is a good deal in comparison with remaining a shareholder and receiving the future expected returns of the company.

The Court cautioned, however, that not all projections need be disclosed in such circumstances and noted that “our law has refused to deem projections material unless the

fairness of the merger it was putting before the stockholders…. [by] setting forth a fair summary of the valuation work [the financial advisor] in fact performed,” including “certain input factors, … such as discount rates and the costs of capital and equity used to derive them”; PNB Holding, 2006 WL 2403999, at *16 (finding that certain outdated projections were no longer reliable and therefore did not need to be disclosed); In re General Motors (Hughes) S’holder Litig., 2005 WL 1089021, at *16, Chandler, C. (Del. Ch. May 4, 2005) (refusing to require the disclosure of raw data behind a financial advisor’s analyses and finding that “[a] disclosure that does not include all financial data needed to make an independent determination of fair value is not … per se misleading or omitting a material fact”), aff’d, 897 A.2d 162 (Del. 2006).


circumstances of their preparation support the conclusion that they are reliable enough to aid the stockholders in making an informed judgment.”17 Indeed, the Court noted that it was only in a minority of cases that the Court had found the disclosure of projections to be required and that in many cases projections were “too unreliable to warrant disclosure.”18

Recent Guidance from the Court: Netsmart, CheckFree, Globis Partners and BEA Systems.

Over the past year, the Court had the opportunity to address more pointedly the issue of the disclosure of financial projections. Certain lessons can be drawn from those cases to assist practitioners in deciding whether projections should be disclosed in a particular situation.19

In Netsmart, Vice Chancellor Strine issued a limited injunction delaying a stockholder vote on a going private transaction. The Court considered, among other things, two claims relating to the omission of projections in the disclosures. Vice Chancellor Strine first declined to hold the omission of preliminary “stay the course” financial projections material since the final proxy statement included updated numbers that “were more current and more bullish,” and therefore more reliable.20 On the second disclosure claim, however, the Court cited the “fair summary” doctrine and found that the corporation was required to disclose final revenue and earnings projections relied upon by its financial advisor and its board.21

With respect to the second disclosure claim, the Court found it important that earlier versions of the projections had been disclosed in the proxy statement, but that the final projections underlying the financial advisor’s fairness opinion had never been disclosed. The Court therefore concluded that “[o]nce a board broaches a topic in its disclosures, a duty attaches to provide information that is ‘materially complete and unbiased by the omission of material facts.’”22 Although the bidders may not have received certain years of those final projections, the Court still found those projections to be material since the stockholders, “unlike the bidders, have been presented with [the financial advisor’s] fairness opinion and are being asked to make an important voting decision to which [the corporation’s] future prospects are directly relevant.”23 Thus, Vice Chancellor Strine reaffirmed the views he expressed in Pure Resources that in the context of a cash-out merger, where investors forsake a future financial interest in the corporation, the stakes for the stockholders are higher, and the need for the disclosure of reliable projections is

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18 PNB Holding, 2006 WL 2403999, at *17.


20 Netsmart, 924 A.2d at 200.

21 Id. at 203-4.

22 Id. at 203 (quoting Pure Resources, 808 A.2d at 448).

23 Id. at 202.
therefore heightened. The Court explained as follows:

Indeed, projections of this sort are probably among the most highly-prized disclosures by investors. Investors can come up with their own estimates of discount rates or (as already discussed) market multiples. What they cannot hope to do is replicate management’s inside view of the company’s prospects.

Eight months after Netsmart, Chancellor Chandler decided CheckFree and rejected a similar claim. At issue in CheckFree was the omission of certain projections in a target corporation’s disclosures relating to a merger transaction. Plaintiff stockholders moved to enjoin the merger, arguing, among other things, that the target corporation’s proxy statement failed to disclose underlying financial projections used by its financial advisor to render its fairness opinion.

In denying the injunction, Chancellor Chandler focused first on whether the board’s failure to provide cash flow projections shared with the buyer and relied upon by the target corporation’s financial advisor represented a material omission. While the plaintiff cited disclosure decisions pertaining to appraisal actions for the proposition that directors were required to disclose “all of the data underlying” the financial advisor’s fairness opinion, Chancellor Chandler refused to recognize a per se rule requiring the disclosure of such data in every case. Deciding instead that stockholders must show that additional disclosures would “alter the total mix of information” available to stockholders, the Court determined that the correct legal standard remained the “fair summary” standard articulated in Pure Resources. In holding that the proxy statement satisfied the Pure Resources standard, the Court noted that the proxy statement:

. . . details the various sources upon which [the financial advisor] relied in coming to its conclusions, explains some of the assumptions and calculations management made to come to its estimate, notes exactly the comparable transactions and companies [the financial advisor] used, and describes or otherwise discloses management’s estimated earnings and estimated EBITDA for 2007 and 2008 and a range of earnings derived from management estimates for 2009 . . . . [I]n tandem with conveying its estimates, management discussed the particular risks it foresaw that might undercut those estimates.

The Court then distinguished Netsmart, noting that the proxy statement at issue in that case contained a partial disclosure and therefore further disclosure was required. Perhaps more important, the proxy statement at issue in CheckFree warned that the financial advisor had interviewed members of the target corporation’s management team in order to understand the risk factors that threatened the

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24 Id. at 203. The Court noted that the disclosure of projections in a cash-out merger was especially important where “most of the key managers seek to remain as executives and will receive options in the company once it goes private.” Id.

25 Id.

26 CheckFree Corp, 2007 WL 3262188, at *2.

27 Id.

28 Id.

29 Id.

30 Id. at 2-3.

31 Id. at *3.
accuracy of the projections. The Court reasoned that “[t]hese raw, admittedly incomplete projections are not material and may, in fact, be misleading.”

A few weeks after Chancellor Chandler issued his opinion in CheckFree, Vice Chancellor Parsons weighed in on the disclosure debate. In Globis Partners, L.P. v. Plumtree Software, Inc., a plaintiff stockholder alleged that the absence of “meaningful projections” of the target corporation’s future performance was a material omission. Finding that the omission of projections is material only if the projections are reliable, the Court rejected the disclosure claim because the plaintiff did not allege that the target corporation “had reliable projections or any other facts that reasonably would call into question the veracity or adequacy of this aspect of [the] disclosure.” Instead, the plaintiff merely focused on challenging the financial advisor’s judgment that the projections were unreliable and unhelpful. The Court found that “[s]uch criticisms do not constitute a sufficient basis for a breach of disclosure claim.”

Most recently, in a bench ruling, the Court denied a motion to enjoin a stockholder vote despite allegations of the material omission of certain underlying financial data. The financial data at issue in BEA Systems included, among other things, projections that the financial advisor had used to prepare a preliminary discounted cash flow analysis prior to the emergence of the acquiror, certain synergy estimates, and low and high case sensitivity analyses. The Court refused to find such information material because it was not reliable, could mislead stockholders rather than inform them in this specific case, and had not been relied upon by the financial advisor and the board. Importantly, the Court stated that “the fact that something is included in materials that are presented to a board of directors does not, ipso facto, make that something material.”

**Practical Implications: Is the Disclosure of Projections Required?**

Netsmart, CheckFree, Globis Partners and BEA Systems lead to one unified conclusion—that a context-specific analysis is required to determine whether projections must be disclosed in a particular situation. The following lessons can be drawn from those decisions:

- **The Pure Resources “Fair Summary” Requirement.** Pure Resources continues to be the starting point for determining whether projections must be disclosed. A “fair summary” of the substantive work performed by a financial advisor must be disclosed, including (i) the basic valuation exercises, (ii) the key assumptions, and (iii) the range of values generated. Although Pure Resources provides some guidance,
there is no “checklist” of the types of information underlying the financial advisors opinion that must be disclosed. Whether the “fair summary” requirement has been satisfied in a particular situation, therefore, must be decided on a case-by-case basis.

- **Materiality Remains the Touchstone.** Only projections that are material, not those that are merely helpful, must be disclosed. Indeed, the Court has stated that “[a] disclosure that does not include all financial data needed to make an independent determination of fair value is not … *per se* misleading or omitting a material fact.”

- **Reliability is Key.** The recent case law is clear that projections are not material unless they are reliable. As demonstrated in all three cases, projections that are unreliable or misleading need not be disclosed. If projections are reliable, however, the materiality of those projections is significantly heightened at least in the context of cash-out or going private merger transactions.

- **The Transaction Structure.** The materiality of projections is heightened in cash-out merger transactions, where the stockholders are being asked to evaluate whether to accept the merger consideration or to continue as stockholders of the corporation. The materiality of projections is heightened uniquely in going private transactions, and particularly where “key managers seek to remain as executives and will receive options in the company once it goes private.” Although not addressed in the recent cases, it follows that the materiality of a buyer’s projections is heightened in stock-for-stock merger transactions, in which the target corporation’s stockholders must evaluate the “price” to be paid in the form of the buyer’s shares.

- **Utility of Projections.** If projections are reliable, disclosure may not be required if the projections are of questionable utility to the stockholders. For example, the Court in *Netsmart* found that certain “stay the course” projections were not material because they were in fact more pessimistic and therefore actually demonstrated that the merger consideration was “fairer” than the proxy statement implied.

- **The Target’s Unique Circumstances.** Any unique circumstances should be considered when determining whether projections are material. In *Netsmart*,

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41 *CheckFree*, 2007 WL 3262188, at *3; *Globis Partners*, 2007 WL 4292024, at *11.
42 *CheckFree*, 2007 326188, at *2 (quoting *Gen. Motors*, 2005 WL 1089021, at *16). *See also Globis Partners*, 2007 WL 4292024, at *11 (“The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis.”).
43 *Netsmart*, 924 A.2d at 201; *CheckFree*, 2007 WL 3262188, at *3; *PNB Holding*, 2006 WL 2403999, at *16; *BEA Systems*, Tr. at 90-93.
44 *Netsmart*, 924 A.2d at 201; *CheckFree*, 2007 WL 3262188, at *3; *Globis Partners*, 2007 WL 4292024, at *11.
45 *Netsmart*, 924 A.2d at 200, 203; *PNB Holding*, 2006 WL 2403999, at *16.
46 *Netsmart*, 924 A.2d at 203.
47 *Id.* at 200. The Court also questioned the reliability of the “stay the course” projections.
for example, the Court found that the projections were particularly important, and thus of heightened materiality, because the corporation’s unique market niche made a comparable company analysis less useful.  

- **Reliance By the Financial Advisor and Board; Shared with Bidders.** Projections relied upon by the target corporation’s financial advisor and board, as well as those shared with bidders, are more likely to be material and thus to require disclosure. Those facts standing alone do not necessitate disclosure, however, as the projections must still be reliable and otherwise material in the particular circumstances.

- **Partial Disclosure or Incomplete Disclosure.** The partial disclosure of financial projections that fail to offer the best estimate of a corporation’s future financial performance triggers a broader fiduciary obligation to supplement the proxy with materially complete information. Once a board “opens the door” to partial disclosure, more complete information may be necessary.

**Conclusion**

The Delaware courts have not articulated a rote legal standard or checklist providing clear guidance whether projections must be disclosed in a particular situation. Rather, a context-specific analysis is required to determine whether projections must be disclosed. Pending further guidance from the Delaware courts, practitioners should focus on whether the disclosure provides a “fair summary” of the substantive work performed by the corporation’s financial advisor and relied upon by the corporation’s board and whether that “fair summary” requires the disclosure of reliable projections in the specific circumstances at issue.

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48 Id. at 203.
49 *Pure Resources*, 808 A.2d at 450; *JCC Holding Co.*, 843 A.2d at 720.
50 *BEA Systems*, Tr. at 100.
51 *Netsmart*, 924 A.2d at 199-200; *Pure Resources*, 808 A.2d at 448.
Chief Justice Myron Steele at the Wilmington Club. On Saturday morning, we assembled at Richards Layton & Finger with Chief Justice Myron Steele, Justice Henry Ridgely, Vice Chancellor Stephen Lamb, and Vice Chancellor Donald Parsons, Jr. Our task force colleagues, Henry Lesser and Rick Alexander (for the buyer) and Jim Griffin and Steve Bigler (for the target) addressed the issues raised by Mark Morton’s hypothetical. Issues included the size of break-up fees, the change in recommendation provision, uses of standstills, the forthright negotiator principle, the interpretation of MAC clauses, and more.

Our collective thanks to Chief Justice Steele for a great dinner Friday evening, and to all the Delaware judges who took part in the dinner or the judicial forum. Also thanks to Mark Morton, Steve Bigler, Rick Alexander, Henry Lesser, and Jim Griffin for a great presentation of the issues! Our special thanks to Mark Morton, who organized our Wilmington visit this year and was a superior host!

In our Task Force meeting on Saturday afternoon on March 1, 2008, Phil Stamatakos led a discussion of the revised conditions section. We expect a close to final draft for our meeting in Dallas.

Our Task Force will meet Friday, April 11, in Dallas, from 12:00 p.m. until 2:30 p.m. We will discuss meeting covenants, with Keith Flaum and Jim Griffin leading the discussion.

Our Task Force dinner is Friday evening at Bob’s Steak and Chop House, courtesy of Jim Griffin. Cocktails begin at 6:30 p.m. with dinner at 7:30 p.m. Please let Jim and me know if you plan to attend the dinner and/or our Task Force meeting.

Most importantly, we have a great program planned for Dallas (our first in several years), scheduled for Saturday, April 12, from 8:00 a.m. until 10:00 a.m. The program is entitled “Where Do We Start? Negotiating Confidentiality Agreements, Standstills and Exclusivity Letters in the Current Deal Environment.” Panelists will be Task Force members Jim Walther, Lorna Telfer, Michael O’Bryan, Bruce Cheatham, Steve Bigler and Diane Frankle—we hope to see many of you in the audience!

Finally, please note that we have cancelled our Editorial Board meeting, which was scheduled for April 12, from 9:00 a.m. until 11:00 a.m., as it conflicted with our Task Force program.

We look forward to seeing you in Dallas!

Diane Holt Frankle
Stephen H. Knee
Co-Chairs

Task Force on the Model Stock Purchase Agreement

The Editorial Committee continues to focus its attention on the Commentary for the Revised Model Stock Purchase Agreement. The Committee is working with the Judicial Interpretations Working Group and drafting assignments have been made as a result of discussions at the meeting in Colorado, Springs. Revisions for Article 7 Commentary will be reviewed in depth at the Spring meeting.

We look forward to seeing you in Dallas.

Robert T. Harper
Chair
International M&A Subcommittee

The International M&A Subcommittee met in October 2007, in conjunction with the Committee’s Fall stand-alone meeting in Colorado Springs, Colorado.

International M&A Due Diligence Project

The meeting began with an update from Wilson Chu on sales of the Subcommittee’s International M&A Due Diligence Project. The Project had sales of over $45,000 since August 2007 and is on the way to being an ABA “bestseller.” The Project team is considering online sales on a country-by-country basis, so there may be opportunities for further jurisdictions to be covered before the work is fully republished.

Post-Closing Dispute Resolution Project

Although Katrien Vorlat and Guy Harles were not present, it was noted that they were looking for a native English speaker to join their editorial team.

Other Future Projects

We also held a discussion of possible future Subcommittee projects or mini-projects.

Frank Picciola suggested a possible mini-project on impediments to foreign investment into various jurisdictions (along the lines of the Exxon-Florio developments that Jim Walther had given at previous meetings).

Other possible mini-projects included international comparative studies of key anti-trust issues and thresholds of non-competes.

Future Program

It was noted that the Subcommittee traditionally sponsors a major program at the Spring meeting and a number of ideas were discussed for the forthcoming Spring meeting in Dallas.

Wilson Chu offered to chair a Committee Forum at the full Committee meeting based on our new International M&A Due Diligence work.

Peter Haver offered to chair a program on an introductory tax topic, looking at general principles applicable to cross-border M&A and perhaps focusing on a couple of key jurisdictions.

Frank Picciola raised the possibility of a mini-forum (within a Subcommittee meeting) on foreign investment impediments, perhaps linked to any mini-project undertaken by the Subcommittee on that topic.

Current Developments Discussion

The meeting concluded with our customary open discussion by Subcommittee members regarding legal developments in their jurisdictions relevant to M&A practice and particular issues they have recently encountered. Topics discussed included the recent changes in the U.S./Canadian Tax Protocol, forum selection issues, proposed changes to German company formation law, new anti-trust laws and procedures in Mexico, the U.K.’s forthcoming abolition of the “financial assistance” regime, changes to the U.K. law on directors’ duties and possible new restrictions on foreign investment into Canada.

The Subcommittee’s next meeting will be held at the Hilton Anatole Hotel in Dallas, Texas on Friday, April 11, from 8:00 a.m. until
10:00 a.m., in the Topaz Room (Tower, Lobby Level).

Further details of all of the Subcommittee’s activities, including materials from Subcommittee programs and presentations, meeting reports and the Subcommittee’s work-in-progress, can be found on the Subcommittee’s website at the following address:

www.abanet.org/dch/committee.cfm?com=CL560016

Daniel Rosenberg
James R. Walther
Co-Chairs

Membership Subcommittee

We are now, officially, the largest committee in the Business Law Section! As of March 12, 2008, the Committee had over 2,700 members representing 41 countries. We have over 290 in-house counsel members. The M&A Market Trends Subcommittee continues to be our largest subcommittee with over 880 members, followed by the Private Equity M&A Subcommittee with about 690 members. Our “associate” (non-lawyer) members now total approximately 200. We anticipate that our international and associate membership, in particular, will continue to grow significantly.

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 Dallas on Friday, April 11, from 10:30 a.m. until 11:30 a.m., in the Steuben Room, Atrium I and II, on the Mezzanine Level of the Hilton Anatole Hotel. The Judicial Interpretations Working Group will meet immediately after, from 11:30 a.m. until 1:00 p.m.

Annual Survey Working Group

The sixth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions will be published in the February 2008 issue of The Business Lawyer. Our working group is already collecting 2008 cases for consideration for inclusion in our 2008 annual survey. We thank all Committee members who have suggested cases. We will discuss those cases in Dallas 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. 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.

**Decisions to be Discussed at the Dallas Committee Meeting**


In *United Rentals, Inc. v. Ram Holdings, Inc.*, the Delaware Court of Chancery resolved an ambiguity in a merger agreement by application of the forthright negotiator principle, resulting in denial of the target company’s demand for specific performance.

United Rentals, Inc. (“URI”) offered itself up for sale through a process that required potential acquirors to comment on a draft merger agreement that counsel for URI prepared. URI eventually entered into a merger agreement dated July 22, 2007 (the “Merger Agreement”) and related agreements with entities affiliated with Cerberus Capital Management, L.P. (“CCM”). The Merger Agreement contained an ambiguity that arose out of the inconsistency between Section 9.10, entitled “Specific Performance,” and Section 8.2(e), entitled “Termination, Amendment and Waiver.” Although Section 9.10 provided for specific performance, by its terms it was made “subject in all respects to Section 8.2(e).” The last sentence of Section 8.2(e) provided that “in no event shall [URI] seek equitable relief or seek to recover any money damages in excess of [a $100 million termination fee payable by CCM related entities.]”

By letter dated November 14, 2007, the CCM affiliate that was the acquiror under the Merger Agreement repudiated the Merger Agreement, and offered either to explore a transaction on revised terms, or to pay the stipulated termination fee. In a motion for summary judgment, URI sought an order specifically enforcing the terms of the Merger Agreement. The court denied the motion, although it found that the question was exceedingly close. (*United Rentals, Inc. v. RAM Holdings, Inc.*, C.A. No. 3360-CC, slip op. at 1 (Del. Ch. Dec. 13, 2007)). The Court then held a trial to ascertain the meaning of the Merger Agreement, at which it considered extrinsic evidence pertaining to the negotiation process. It concluded that such evidence was “too muddled” to find that it was the common understanding of the parties that the Merger Agreement was specifically enforceable. The Court stated that “the evidence presented at trial conveyed a deeply flawed negotiation in which both sides failed to clearly and consistently communicate their client’s positions,” and found that “even if [URI] believed the Agreement preserved a right to specific performance, its attorney . . . categorically failed to communicate that understanding . . . during the latter part of the negotiations.”

The Court’s resolution of the ambiguity in the Merger Agreement turned upon its finding, based on the evidence presented at trial, that the defendants understood the Merger Agreement to eliminate any right to specific performance, and that defendants communicated this understanding to URI in such a way that URI either knew or should have known of defendants’ understanding. Based upon this finding, the Court applied the
forthright negotiator principle, under which the Court considers the evidence of what one party subjectively believed the obligation to be, coupled with evidence that the other party knew or should have known of that belief. (Citing for this principle, U.S. West, Inc. v. Time Warner, Inc., C.A. No. 14555, 1996 WL 307445, at *11 (Del. Ch. June 6, 1996) and RESTATEMENT (SECOND) OF CONTRACTS SEC. 202(2) (1981)).

Thus the ambiguity was resolved in favor of the defendants, and URI’s application for specific performance was denied. The case serves as a useful reminder to M&A practitioners that when courts resort to extrinsic evidence of negotiations to resolve an ambiguity in a merger agreement, they are not limited to finding that in fact there was a meeting of the minds during the negotiations, but may resolve the ambiguity on the basis of one party’s understanding of the meaning of the agreement, as long as that understanding was communicated to, or should have been known by, the other party to the agreement.


In Genesco, Inc. v. The Finish Line, Inc., the Tennessee Court of Chancery ordered specific performance of a Merger Agreement (the “Merger Agreement”) in which Finish Line, Inc. (“Finish Line”) had agreed to acquire Genesco, Inc. (“Genesco”) for $1.5 billion dollars in a highly leveraged transaction in which UBS was to provide the financing.

In June of 2007, Finish Line outbid Foot Locker to acquire Genesco, and the Merger Agreement was signed on June 17, 2007. The Merger Agreement provided that if the transaction did not close by December 31, 2007, either party could terminate the transaction. Within two months after the Merger Agreement was signed, it became apparent that Genesco’s earnings would fall significantly short of projections. In September, Genesco’s stockholders voted to approve the merger, and Genesco demanded a closing. UBS refused to proceed, demanding more information on the drop in Genesco’s earnings. Genesco’s lawsuit seeking specific performance followed. Finish Line and UBS asserted three main defenses: (i) securities fraud, based on the allegation that, prior to the execution of the Merger Agreement, Genesco did not provide material information concerning its May 2007 performance or updated projections, (ii) fraudulent inducement, based on those same allegations, and (iii) that the decline in Genesco’s earnings constituted a “Material Adverse Effect” under the Merger Agreement, which gave Finish Line the right to terminate the Merger Agreement.

Chancellor Lyle found from the testimony of senior management of Genesco, David Friedland of Goldman Sachs (which represented Genesco), Alan Cohen of Finish Line and Mr. Winkler of UBS that the parties had the following motivations in negotiating the Merger Agreement:

1. It was critical to Genesco that the deal not be contingent on financing, and the merger was structured as a cash deal with speed and certainty of closing in mind.

2. Genesco insisted that Finish Line obtain a solvency opinion, which, together with UBS’s presence as lender to Finish Line, would assuage Genesco’s solvency concerns in this highly leveraged transaction.

3. Finish Line’s primary motivations were diversity, synergies resulting from reduced costs, and opportunities for growth, and its primary concern was that it might lose out to Foot Locker or one of the private equity firms that were also bidding for Genesco.

The Chancellor also found that due to changes in the credit markets, the deal turned into a “huge losing proposition” for UBS.
With respect to the defenses of fraudulent inducement and securities fraud, the Chancellor concluded that Genesco senior management did not make oral representations, as alleged by the defendants, that May and June performance was on track. Furthermore, the Chancellor found that Genesco’s failure to provide its May financial results was not fraudulent, because UBS, whom Finish Line was relying upon to investigate Genesco, asked for the May numbers before they had been finalized. In the Chancellor’s view, under the law and the Merger Agreement, Genesco would have been required to deliver the results only if UBS asked for them after they were final, but UBS failed to renew its request. The Chancellor also concluded that neither the law nor the Merger Agreement required Genesco or Goldman Sachs to voluntarily provide the May results.

As to the Material Adverse Effect dispute, the Merger Agreement defined that term as follows:

“Company Material Adverse Effect” shall mean any event, circumstance, change or effect that, individually or in the aggregate, is materially adverse to the business, condition (financial or otherwise), assets, liabilities or results of operations of the Company and the Company Subsidiaries, taken as a whole; provided, however, that none of the following shall constitute, or shall be considered in determining whether there has occurred, and no event, circumstance, change or effect resulting from or arising out of any of the following shall constitute, a Company Material Adverse Effect: (A) the announcement of the execution of this Agreement or the pendency of consummation of the Merger (including the threatened or actual impact on relationships of the Company and the Company Subsidiaries with customers, vendors, suppliers, distributors, landlords or employees (including the threatened or actual termination, suspension, modification or reduction of such relationships)); (B) changes in the national or world economy or financial markets as a whole or changes in general economic conditions that affect the industries in which the Company and the Company Subsidiaries conduct their business, so long as such changes or conditions do not adversely affect the Company and the Company Subsidiaries, taken as a whole, in a materially disproportionate manner relative to other similarly situated participants in the industries or markets in which they operate; (C) any change in applicable Law, rule or regulation or GAAP or interpretation thereof after the date hereof, so long as such changes do not adversely affect the Company and the Company Subsidiaries, taken as a whole, in a materially disproportionate manner relative to other similarly situated participants in the industries or markets in which they operate; (D) the failure, in and of itself, of the Company to meet any published or internally prepared estimates of revenues, earnings or other financial projections, performance measures or operating statistics; provided, however, that the facts and circumstances underlying any such failure may, except as may be provided in subsection (A), (B), (C), (E), (F) and (G) of this definition, be considered in determining whether a
Company Material Adverse Effect has occurred; (E) a decline in the price, or a change in the trading volume, of the Company Common Stock on the New York Stock Exchange ("NYSE") or the Chicago Stock Exchange ("CHX"); (F) compliance with the terms of, and taking any action required by, this Agreement, or taking or not taking any actions at the request of, or with the consent of, Parent; and (G) acts or omissions of Parent or Merger Sub after the date of this Agreement (other than actions or omissions specifically contemplated by this Agreement).

With respect to the claim that a Material Adverse Effect had occurred, the Chancellor concluded that “one fact” was dispositive of the issue. Based on expert testimony, she found that Genesco’s performance decline in 2007 was due to general economic conditions. Therefore, the exception set forth in subpart (B) above applied.

In determining whether specific performance was an appropriate remedy, the Chancellor observed that “even where fraud is not present, equity will not enforce an agreement that is unconscientious or will work a hardship.” With respect to unconscionability, Chancellor Lyle determined that it would not offend the conscience to order specific performance because there was no inequality in bargaining power or oppression, and the provisions contained in the Merger Agreement were “standard.” Finally, the Chancellor found that specific performance would not work a hardship because the merger had a reasonable chance of succeeding. As to this latter issue, she noted that proof of insolvency had not been presented to the Court, and that the issue had been carved out of the Tennessee litigation, to be decided in another action brought by UBS in New York, which would halt the merger if the combined companies would result in an insolvent entity.

On March 4, 2008, Finish Line announced that it had settled the Tennessee and New York litigation relating to the proposed Genesco acquisition. Pursuant to the settlement, the merger and the UBS commitment letter were terminated. Finish Line and UBS agreed to pay Genesco $175 million in cash and Finish Line agreed to issue to Genesco 6,518,971 shares of Finish Line Class A Common Stock. UBS agreed to furnish $136 million of the cash payment. The settlement agreement also contained reciprocal standstill provisions.

**Judicial Interpretations Working Group**

The Judicial Interpretations Working Group met during the Committee’s Fall stand-alone meeting in Colorado Springs. Attendees at that meeting discussed a paper prepared by Don Dalik on the full disclosure, or “Rule 10b-5” representation, and a paper by Anthony Milazzo and Karen Galpern on material adverse change provisions. The group also discussed the status of work of the teams that have been formed to research and prepare memoranda pertaining to the jurisprudence interpreting various provisions of acquisition agreements and ancillary documents.

The Dallas meeting of the Judicial Interpretations Working Group will be held on Friday, April 11, from 11:30 a.m. until 1:00 p.m., in the Steuben Room, Atrium I and II on the Mezzanine Level of the Hilton Anatole Hotel. We are planning to discuss two memoranda at that meeting: one by Gabriel Saltarelli and Mark Klein on financial statement representations, and another by Seth Freedman and Robert Dickey on no undisclosed liabilities representations. 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 the 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**

The M&A Market Trends Subcommittee (and the dozens and dozens of its members who worked tirelessly on the Deal Points Studies) are very excited to have published three M&A Deal Points Studies in 2007:

- the Private Target Deal Points Study;
- the Private Equity Buyer/Public Target Deal Points Study; and
- the Strategic Buyer/Public Target Deal Points Study.

We are also happy to have sponsored two very successful ABA teleconferences based on those studies and to have provided the basis for two articles in *The M&A Lawyer* (see the Nov./Dec. and Feb./Mar. editions). We are currently working on a number of things, including:

- our European Deal Points Study, which is being spear-headed by Freek Jonkhart and Reid Feldman as co-chairs;
- our Canadian Deal Points Study, which is being spear-headed by John Clifford as chair and Kevin Kyte and Mireille Fontaine as vice-chairs;
- supplements to the 2007 Private Target Deal Points Study (see below for a sneak preview); and

We have a full schedule for our meeting in Dallas. Our meeting will include the following:

- Jennifer Muller from Houlihan Lokey Howard & Zukin will be discussing the current state of the M&A market;
- members of the Subcommittee will be discussing the results of our analysis of sandbagging clauses; and
- Freek Jonkhart and Reid Feldman will be discussing some preliminary results from the European Study.

The following is a sneak preview of some of the data on sandbagging and non-reliance clauses from our upcoming indemnification supplement to the 2007 Private Target Deal Points Study.

**Sandbagging**

A “pro-sandbagging” clause is one that provides that the buyer’s right to indemnification or other remedy for a breach of a representation or warranty will not be affected by any investigation by, or knowledge of, the buyer with respect to the inaccuracy of such representation or warranty (sample language can be found in the ABA Model Stock Purchase Agreement). An “anti-sandbagging” clause states the opposite; in other words, if the buyer has knowledge of an inaccuracy of a representation, the buyer will have no right to indemnification for such inaccuracy. Our study of these clauses in agreements announced in 2006 reflected the following outcome, which is...
generally consistent with the outcome from our previous study.¹

In light of the Ziff Davis line of cases, those agreements that remain silent on the topic are viewed by many as being a win for the seller. Quick teaser: one might find that deals handled by our European counterparts turn out quite differently, which is probably not surprising to those of you doing international transactions.

Non-Reliance

In a “non-reliance” clause, the buyer acknowledges and agrees that in entering into the definitive agreement it is not relying on any representations or warranties or other statements not expressly set forth in the definitive agreement, and that the buyer will thus not have any right or remedy arising out of any representation or warranty or other statements not set forth in the definitive agreement.

In a relatively recent Delaware case, ABRY Partners, Vice Chancellor Strine underscored the effectiveness of a non-reliance clause in limiting a buyer’s remedies in the context of an acquisition of a privately-held company. The supplement shows express non-reliance clauses in 41% of the private target transactions.

Compare that with the results of the 2007 Public Target M&A Deal Points Study, which showed an express non-reliance clause in only 18% of those transactions.

In the recent Genesco case (involving a public target), the non-reliance clauses in the nondisclosure agreement and the merger agreement were critical elements in the Tennessee Court of Chancery’s determination that Finish Line and UBS had failed to prove that Genesco fraudulently induced Finish Line to enter into the merger agreement.

In light of ABRY Partners and Genesco, it will be interesting to see whether the non-reliance clause becomes a more common feature of acquisition agreements, both for

¹ The previous study showed “pro-sandbagging” clauses in 56% of the deals; however, the supplement may take a more nuanced approach in defining “pro-sandbagging” by excluding clauses that merely state that buyer’s post-closing indemnification rights are not affected by any investigation conducted by buyer, but that don’t refer specifically to the information actually obtained by buyer in any such investigation.
acquisitions of private targets and for acquisitions of public targets.

We look forward to seeing you in Dallas.

Keith A. Flaum  
Chair  
Hendrik Jordaan  
Jessica Pearlman  
Vice-Chairs

**Private Equity M&A Subcommittee**

The Private Equity M&A Subcommittee met in Colorado Springs, Colorado, on October 12, 2007, in conjunction with the Committee’s Fall stand-alone meeting. The Subcommittee meeting was well-attended.

During its two-hour session, the Subcommittee enjoyed a presentation from Dan Bumgardner, Managing Director in the Financial Sponsors Group with Wachovia Securities, Inc., who reviewed current issues and trends in private equity M&A from the investment banking perspective, and who also reviewed the impact of recent developments in the debt and equity markets on private equity marketplace transactions.

The Subcommittee also discussed recent legal developments related to certain then-current transactions in the private equity marketplace, and the impact of certain contractual provisions from both the transactional and litigation perspective in such transactions. The presentation and discussions prompted a number of questions and follow-on discussions. The subcommittee co-chairs thank all participants for contributing to a substantive and informative session.

Henry Lesser  
John Hughes  
Co-Chairs

**Programs Subcommittee**

At our Spring meeting in Dallas, the Committee will present a full schedule of valuable and entertaining programs and a Committee Forum.

**Committee Programs**

Our Committee is the primary sponsor of the following two programs:

**International Tax for Dummies: What Transactional Lawyers Should Know about Tax Aspects of Out-Bound and In-Bound Acquisitions**

Thursday, April 10, 2008  
2:30 p.m. - 4:30 p.m.

Peter Haver and our International M&A Subcommittee have developed an excellent program to introduce deal lawyers to the tax basics of cross-border acquisitions. Leading international tax professor and long-time contributor to our Committee, Samuel C. Thompson, Jr., will introduce the pertinent U.S. tax law and OECD tax treaty principles relevant to the structuring of a U.S. entity’s purchase of a foreign target. U.S. in-house and outside counsel will elaborate on the U.S. tax law considerations. Foreign tax counsel will review the impact of the tax law in the target’s jurisdiction, in particular, in China, the EU and Mexico. Panelists include Program Moderator, Peter Haver, Carol Ann Johnson, Jaime Espinosa de los Monteros Flores, Edward C. Osterbert, Albert S. Golbert, and Willem P. Bongaert.

**Where Should We Start? Negotiating Confidentiality Agreements, Standstills, and Exclusivity Letters in the Current Deal Environment**

Saturday, April 12, 2008  
8:00 a.m. - 10:00 a.m.
This program is a result of the efforts of our Task Force on Acquisitions of Public Companies. A leading panel of deal lawyers, including Moderator Diane Holt Frankle, C. Stephen Bigler, Bruce A. Cheatham, Michael O’Bryan, Lorna J. Telfer, and James R. Walther, will address the key issues in negotiating confidentiality and standstill agreements and exclusivity letters, including mock negotiation of the most common issues. Special attention will be given to recent Delaware decisions, including the *Topps* decision. The program is co-sponsored by the Corporate Counsel Committee.

**Committee Forum**

A timely Committee Forum will follow the full Committee meeting:

**Cross-Border Due Diligence: Trends and Effective Strategies**

Saturday, April 12, 2008  
3:00 p.m. - 4:00 p.m.

A panel of experienced M&A lawyers from Asia, Europe, and South America, including Chair Wilson Chu, Daniel Rosenberg, Klaes Edhäll, Jonathan Zhou, Joao Ricardo de Azevedo Ribeiro, and Mario Jorge Yanez Vega will highlight the “International Mergers & Acquisitions Due Diligence Project,” published by the International M&A Subcommittee. The panel will compare and contrast key challenges in conducting effective M&A due diligence, with a focus on duties to disclose and investigate, legal restrictions on M&A related disclosures that involve national security, economic espionage, customer privacy, and antitrust regulation issues; and the impact of buyer’s knowledge on post-closing indemnification and other remedies.

**Committee Co-Sponsored Programs**

In addition, the Committee is also co-sponsoring and providing key speakers on several other programs that will be of interest to many of our members:

**Anatomy of a Middle Market Private Equity Deal**

Thursday, April 10, 2008  
8:00 a.m. - 10:00 a.m.

This program, which is primarily sponsored by the Middle Market and Small Business Committee, is being supported and co-sponsored by our Committee and in particular the Private Equity M&A Subcommittee. Gregory Giammittorio, who is chair of the Middle Market and Small Business Committee, will be joined by Eric McCrath. John Hughes, Co-Chair of the Private Equity M&A Subcommittee, is speaking on the panel as well. The panel will look at a middle market transaction from the perspective of the target and its management team as well as from the perspective of the private equity fund sponsor. This program will include three or four deal attorneys, an investment banker and a member of a private equity firm dealing with these types of transactions.

**Mergers of Nonprofit Corporations—From Large Hospitals, Foundations and Institutions to Small Community-Based Organizations**

Friday, April 11, 2008  
2:30 p.m. - 4:30 p.m.

This program is aimed at the issues arising from the merger of nonprofit entities and is primarily sponsored by the ABA’s Pro Bono Committee. Our Committee and the Nonprofit Committee are co-sponsors. Robert T. Harper and Murray J. Perelman are featured on the panel, delivering the deal aspects of nonprofit entity acquisitions from a deal lawyer perspective.

Thomas M. Thompson  
Chair
Technology Subcommittee

Our website continues to be one of the most visited sites on the ABA domain. The site has evolved into a good resource for the M&A practitioner, with papers from the last six meetings now included. Posting of materials is very easy, and we encourage our Subcommittees and Task Forces to make use of this service. Not only is it a convenient way for Committee members to communicate among themselves but it provides substantial value to our ABA colleagues who access the site.

The extranet site is also receiving a fairly heavy volume of traffic, primarily from those reviewing the source documents for the Deal Points Studies, but also those involved in the work of our subcommittees and task forces. We have recently added to the extranet all the acquisition agreements that were reviewed in connection with the Private Equity Buyer/Public Target Deal Points Study and the Strategic Buyer/Public Target Deal Points Study, bringing the total database to about 450 documents. These agreements are helpful resources, particularly relating to work in specialized industries, and are full-text searchable. Instructions for accessing the extranet are contained on the M&A Market Trends Subcommittee website.

George M. Taylor, III
Chair

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Friday, April 11, 2008

International M&A Subcommittee
8:00 a.m. – 10:00 a.m.
Hilton Anatole Hotel
Topaz, Tower, Lobby Level

Annual Survey Working Group of
the M&A Jurisprudence Subcommittee
10:30 a.m. – 11:30 a.m.
Hilton Anatole Hotel
Steuben, Atrium I & II, Mezzanine Level

Judicial Interpretations Working Group of
the M&A Jurisprudence Subcommittee
11:30 a.m. – 1:00 p.m.
Hilton Anatole Hotel
Steuben, Atrium I & II, Mezzanine Level

Task Force on Acquisitions of Public
Companies
12:00 p.m. – 2:30 p.m.
Hilton Anatole Hotel
Miro, Tower, Mezzanine Level

Task Force on the Dictionary of M&A
Terms
1:00 p.m. – 3:00 p.m.
Hilton Anatole Hotel
Ming, Tower, Mezzanine Level

Meeting of Committee Chair and Vice
Chairs, Subcommittee, Task Force and
Working Group Chairs
4:00 p.m. – 5:30 p.m.
Hilton Anatole Hotel
Topaz, Tower, Lobby Level

Saturday, April 12, 2008

Program: Where Should We Start?
Negotiating Confidentiality Agreements,
Standstills, and Exclusivity Letters in the
Current Deal Environment
8:00 a.m. – 10:00 a.m.
Hilton Anatole Hotel
Miro, Tower, Mezzanine Level

Editorial Committee on the Model Stock
Purchase Agreement (Session 2)
8:00 a.m. – 10:30 a.m.
Hilton Anatole Hotel
Obelisk A, Atrium I & II, Mezzanine Level

Private Equity M&A Subcommittee
10:30 a.m. – 12:30 p.m.
Hilton Anatole Hotel
Obelisk A, Atrium I & II, Mezzanine Level

M&A Market Trends Subcommittee
11:00 a.m. – 12:30 p.m.
Hilton Anatole Hotel
Coronado Ballroom B, West Wing

Full Committee Meeting
12:30 p.m. – 3:00 p.m.
Hilton Anatole Hotel
Monet Ballroom, Tower, Mezzanine Level

Committee Forum: Cross-Border Due
Diligence: Trends and Effective Strategies
3:00 p.m. – 4:00 p.m.
Hilton Anatole Hotel
Monet Ballroom, Tower, Mezzanine Level