FROM THE CHAIR
By Joel I. Greenberg

Welcome to New York. Our Committee’s next meeting will be held in conjunction with the American Bar Association’s Annual Meeting in New York City from Friday, August 8, 2008 through Sunday, August 10, 2008, at the Grand Hyatt Hotel. The full Committee meeting will be held Sunday afternoon, starting at 1:30 p.m.

The Committee dinner will be held Saturday night at Sparks Steak House, 210 East 46th Street (just east of Third Avenue), with cocktails beginning at 6:30 p.m. and dinner at 7:30 p.m. It’s about a five minute walk from the Grand Hyatt. Registration for the dinner is through the Annual Meeting registration process.

Our Committee will be presenting several programs at the Annual Meeting. On August 8, at 10:30 a.m., Bob Harper and Scott Whittaker will chair a program on “Drafting Deal Documents so Litigators and Judges Interpret Them the Way You Intend,” which will examine judicial decisions interpreting commonly-used contract provisions. We are pleased to have Justice Karla Moskowitz join the panel to provide a judicial perspective. Justice Moskowitz serves on the Appellate Division, First Department, in New York, and previously served in the Commercial Division of New York State Supreme Court in New York County. On Saturday, August 9, George Taylor will chair a program on “Due Diligence in the Digital Age: Analysis of Tools, Ancient and Modern, for Investigating Your Target and Closing Your Deal.” The program will focus on changes to the due diligence and closing

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processes that have occurred in recent years with particular emphasis on the use of “virtual due diligence rooms” or extranets for storage and exchange of due diligence materials. On Friday, August 8, at 10:30 a.m., Nat Doliner will participate in the program primarily sponsored by the Taxation Committee and co-sponsored by our Committee on “Structuring the M&A Deal – Tax and Legal Considerations.”

Our Committee’s growth in membership continues unabated; last week our membership rolls passed 3,000. Our membership comes from 38 countries on five continents: Argentina, Australia, Belgium, Bermuda, Brazil, Canada, China, Colombia, Denmark, Estonia, Finland, Hong Kong, Iceland, India, Indonesia, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Peru, Poland, Portugal, Scotland, Singapore, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, Trinidad and Tobago, Turkey, United Arab Emirates, United Kingdom, and the United States. This dramatic growth is evidence of the value of the products, projects and substantive discussions that our Committee and its various subcommittees, task forces and working groups provide to our members.

The Business Law Section held its first Global Business Law Conference on May 29 and 30, at the Westin Grand hotel in Frankfurt, Germany. We were well represented, presenting two programs, and co-sponsoring a third. The conference was sufficiently successful that the Business Law Section is already planning a second Global Business Law Conference to be held in Hong Kong next June. I will provide further details as the planning progresses.

Our Fall meeting will be held at the Four Seasons Resort Aviara in north San Diego, California on October 17 and 18, 2008.

I look forward to seeing you in New York.

FEATURE ARTICLE

Negotiate With Care: Recent Delaware Developments Relating To Indemnification and Advancement

By John F. Grossbauer and Michael K. Reilly

In the first half of 2008, the Delaware Court of Chancery rendered a number of decisions addressing the indemnification and advancement rights of officers and directors under Delaware law. Two of those decisions—Schoon v. Troy Corporation and Jackson Walker L.L.P. v. Spira Footwear, Inc.—are particularly noteworthy from the perspective of a M&A lawyer. In Schoon, the Court found that a bylaw amendment eviscerated a former director’s right to mandatory advancement with respect to a proceeding commenced after the effectiveness of such amendment. In Jackson Walker, the Court determined that a law firm acting as local litigation counsel for a corporation was an agent of the corporation and thus was entitled to mandatory advancement of expenses under the corporation’s bylaws in connection with a suit brought by the corporation against the law firm. Each of those decisions has a direct bearing upon the negotiation of indemnification provisions in acquisition agreements and leads to certain practical lessons that should be considered by counsel when negotiating such provisions.

1 John F. Grossbauer and Michael K. Reilly are partners in the law firm of Potter Anderson & Corroon LLP. The views expressed are those of the authors and may not be representative of those of the firm or its clients.
Indemnification Provisions Generally.

Merger agreements typically provide for the continuation, following the effective time of a merger, of indemnification and advancement rights of those persons who were serving as officers and directors of a selling corporation immediately prior to the effective time of the merger. Although the protections in such provisions vary widely depending upon the outcome of the negotiations, the typical provision generally provides that the rights to indemnification and advancement under the seller’s certificate of incorporation, bylaws or indemnification agreements will survive the merger and be observed by the surviving corporation, to the fullest extent permitted by Delaware law, for an agreed period of time (often six years) following the effective time of the merger. In addition, such provisions often provide that the surviving corporation will maintain in effect, for the benefit of the officers and directors of the selling corporation, the existing directors’ and officers’ liability insurance policy or an equivalent replacement policy, in each case often capped at a premium in the range of 150-300% of the current premium, with respect to acts or omissions occurring prior to the effective time of the merger.

A selling corporation may also seek to negotiate for additional protections, including (i) a specific prohibition, for a period of six years following the consummation of the merger, of any amendment of the surviving corporation’s constituent documents that would have an adverse effect on the indemnification and advancement rights of a seller’s current or former officers and directors, or (ii) a primary obligation by the parent buyer, in a triangular merger, to provide direct contractual indemnification and advancement rights to the seller’s officers and directors with respect to acts or omissions occurring prior to the effective time of the merger. It is with respect to these additional protections that the recent Delaware case law has a direct bearing.

Recent Delaware Developments.

Schoon v. Troy Corporation.

In Schoon, Vice Chancellor Lamb considered, among other things, the advancement rights of William J. Bohnen (“Bohnen”), a former director of Troy Corporation (“Troy”). Bohnen was the board nominee of Steel Investment Company (“Steel”) from 1988 until February 2005, at which time Richard W. Schoon (“Schoon”) replaced Bohnen. In 2004, Steel decided to sell its interest in Troy and agreed to make incentive payments to Bohnen and Schoon if they could effectuate the sale by December 2005.

In order to value its stake in Troy, Steel made a books and records demand on Troy. After replacing Bohnen as a director, Schoon made a separate demand, alleging that his purpose was to “fulfill [his] fiduciary duties as a director of Troy.” Steel and Schoon deemed Troy’s response to their demands unsatisfactory and proceeded to file separate actions under Section 220 of the General Corporation Law of the State of Delaware, which the Court later consolidated (the “Section 220 Action”). Although Troy initially attempted to interject fiduciary duty claims against both Schoon and Bohnen in the Section 220 Action, the Court denied that attempt, which encouraged Troy to bring the fiduciary duty claims in a separate action (the “Fiduciary Duty Action”).

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4 The General Corporation Law of the State of Delaware generally provides that obligations (e.g., indemnification and advancement obligations) will vest in a corporation surviving a merger. See 8 Del. C. §§ 145(h), 259.

5 Schoon, 2008 WL 2267034, at *1.
Before Troy asserted the fiduciary duty claims, its board of directors amended Troy’s bylaws to remove the word “former” from the definition of the directors entitled to advancement of expenses. It also added language that attempted to limit the right to advancement by providing that Troy would not indemnify or advance expenses to any person in connection with any proceeding (other than any counterclaim, cross-claim, or third-party claim brought in such proceeding) that was initiated against Troy by such person unless the proceeding had been authorized by the board of directors.

While the proceedings were pending, Bohnen and Schoon formally demanded advancement of their expenses in defending the fiduciary duty claims, both in connection with Troy’s attempt to assert the claims in the Section 220 Action and later in the Fiduciary Duty Action. After making several requests, Bohnen and Schoon filed suit in the Court of Chancery seeking advancement of their expenses. Troy contended that only Schoon was entitled to any advancement, and further argued that Schoon’s expenses should be reduced by 80% because his invoice included costs incurred in connection with the legal fees of defendants who were not entitled to indemnification or advancement from Troy.

The Court determined that, as a former director, Bohnen was not entitled to advancement under Troy’s amended bylaws. In reaching that conclusion, the Court rejected several arguments asserted by Bohnen.

First, Bohnen argued that his rights in the pre-amendment bylaws, which granted former directors the right to advancement, vested before the adoption of the amendment. For that proposition, Bohnen cited Salaman v. National Media Corp. In Salaman, a corporation, after advancing to a director a portion of the fees incurred in defending a fiduciary duty claim, amended its bylaws to repeal the basis for the claimed right to advancement and then refused any further advancement. The Court held that the director’s contract rights, embodied in the pre-amendment bylaws, vested when the defendant’s obligations were triggered—the date of the filing of the pending action. In rejecting Bohnen’s reliance on Salaman, Vice Chancellor Lamb noted that Bohnen “fail[ed] to acknowledge that the court only upheld Salaman’s right to advancement because he was named as a defendant before the bylaw was amended.”

Thus, even though the alleged breaches occurred before the bylaw amendments limiting advancement rights, Bohnen’s rights under the pre-amendment bylaws had not been triggered because he was not named as a defendant until after the Troy board amended the bylaws (nor was there any evidence that Troy was even contemplating claims against Bohnen prior to the amendments).

Alternatively, Bohnen argued that even if his rights to advancement were to be determined under the amended bylaws, language in those bylaws clearly provided that “rights conferred . . . shall continue as to a person who has ceased to be a director.” The Court also rejected this argument. The language was better understood, the Court explained, as ensuring that a director whose advancement rights are triggered while in office will not lose such rights by ceasing to serve as a director. Bohnen’s rights were never triggered, and therefore such language was not applicable. Further, the provision Bohnen referenced was contained in a section entitled “Non-exclusivity

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6 Salaman v. National Media Corp.

7 Schoon, 2008 WL 2267034, at *5.

8 Id. at *6.
and Survival of Indemnification” and related to indemnification only.9 Noting that Delaware case law has “consistently held that advancement and indemnification, although obviously related, are ‘distinct types of legal rights,’” the Court held that “the language of the bylaws deliberately and unambiguously provides for unequal treatment of current and former directors in receiving advancement.”10 As such, Bohnen was not entitled to advancement under Troy’s bylaws.

**Jackson Walker L.L.P. v. Spira Footwear, Inc.**

In *Jackson Walker*, the central issue was whether, based upon its status as former outside litigation counsel for Spira Footwear, Inc. (“Spira”), Jackson Walker L.L.P. (“Jackson Walker”) qualified as an “agent” eligible for mandatory advancement under Spira’s bylaws and Section 145 of the General Corporation Law of the State of Delaware (“Section 145”). The Court concluded that Jackson Walker was an “agent” and was therefore entitled to the advancement of its reasonable expenses incurred in an action brought against Jackson Walker by Spira.11

The circumstances out of which the action arose involved a dispute between Andrew Krafsur (“Andrew”), then CEO of Spira and owner of 22% of Spira’s outstanding shares, and his brother David Krafsur (“David”), who along with Francis LeVert (“LeVert”) controlled a majority of Spira’s outstanding shares. After relations soured between Andrew and David, Spira initiated litigation against David and LeVert for breaches of fiduciary duty. David and LeVert responded in kind by terminating Andrew from his position as CEO of Spira and causing Spira to dismiss the action against them. David and LeVert also filed a separate action in Texas state court (the “El Paso Action”) seeking to have the Court invalidate a stockholders agreement that had been entered into between the three stockholders.

Spira, now under the control of David and LeVert, retained Jackson Walker as its counsel for the El Paso Action. Thereafter, Jackson Walker filed a Plea of Intervention on Spira’s behalf in the El Paso Action, seeking a declaratory judgment that the stockholders agreement was unenforceable and that various actions subsequently taken by David and LeVert were proper. Thereafter, a settlement was reached in the El Paso Action under which Andrew purchased David and LeVert’s controlling interest in Spira. Upon regaining control of Spira, Andrew ordered Jackson Walker to cease all work for Spira and then amended Spira’s plea in the El Paso Action, adding Jackson Walker as a defendant. The amended plea claimed Jackson Walker had breached its fiduciary duties by wrongfully filing the Plea in Intervention on behalf of Spira, which allegedly was “blatantly designed to further the interests of . . . David Krafsur and Francis LeVert to the detriment of Spira.”12

Jackson Walker responded by filing an advancement action in the Delaware Court of Chancery.

The Court began its analysis by noting that a corporation’s bylaws are contractual in nature and advancement rights are thereby conferred by contract, with Section 145 providing the statutory framework for when and how a corporation may provide such rights to its officers, directors, employees or agents.

9 Id.

10 Id. (citing Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co., 853 A.2d 124, 128 (Del. Ch. 2004)).


12 Id. at *2.
Spira’s mandatory advancement provision read as follows: “[E]xpenses . . . incurred in defending a civil or criminal action, suit or proceeding shall be paid by the Corporation in advance of the final disposition . . . on behalf of the Director, officer, employee or agent.” In addition, Spira’s bylaws provided for mandatory indemnification rights to the fullest extent permitted by law, stating that Spira was obligated to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding “by reason of the fact” that such person was a director, officer employee or agent of Spira. Thus, to qualify for advancement, Jackson Walker was required to prove to the Court that it was a party to the El Paso Action by reason of the fact that it was an agent of Spira. With there being no dispute that Jackson Walker was a party to the El Paso Action through its role as outside counsel for Spira, the sole question was whether Jackson Walker was an “agent” within the meaning of Spira’s bylaws by virtue of its role as outside counsel. Framing its analysis around the decision in Fasciana v. Electronic Data Systems Corp., the Court found that a person serves as an agent only when such person acts on behalf of another in relations with third parties. The Court determined that the alleged wrongs for which Spira had brought suit against Jackson Walker were all instances in which Jackson Walker acted on Spira’s behalf in relations with third parties. Noting that attorneys have the ability to bind their clients in dealings with a court and opposing parties, the Court concluded that Jackson Walker was “act[jing] as an arm of the corporation vis-a-vis the outside world.”

Importantly, the Court noted that the case before it did not involve a situation in which the lawyers were being sued for legal malpractice. The Court suggested that a lawyer sued for legal malpractice likely would not be before the Court by reason of the fact that the lawyer was an agent of the corporation, but more likely by reason of the fact that the lawyer was an independent contractor. As such, the Court suggested that a lawyer would not be able to seek and obtain indemnification and advancement for a malpractice claim.

**Practical Implications for M&A Transactions.**

When negotiating merger agreements, counsel should be mindful of the Court of Chancery’s recent indemnification and advancement decisions. Those recent decisions hold lessons for both sellers and buyers.

From the perspective of a seller, the recent case law heightens the concerns with respect to the protection of the indemnification and advancement rights of a seller’s officers and directors following the effective time of a merger. Although seller’s counsel often diligently negotiates for provisions that restrict the ability of a surviving corporation to amend the indemnification provisions in its constituent documents following the effective time of a merger, the Court of Chancery’s recent decisions highlight the importance of obtaining maximum protection for the seller’s directors and officers.

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13 Id. at *4.
14 Id.
15 829 A.2d 160 (Del. Ch. 2003).
16 The *Fasciana* Court had concluded that “agent” under Section 145 does not include a lawyer who acts as legal advisor to a corporate client but does not take any actions on the corporate client’s behalf in relation to third parties. The *Fasciana* Court did, however, carve out an exception for attorneys who act as agents when communicating on a corporation’s behalf with a corporation’s customers.

17 2008 WL 2487256, at *6 (quoting *Fasciana*, 829 A.2d at 163). The Court of Chancery reached a similar conclusion in another recent case. See *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *17 n.65 (Del. Ch. May 23, 2008) (finding that lawyers entrusted with broad managerial and financial authority over the corporation were agents under Section 145).
18 2008 WL 2487256, at *8.
merger, the buyer often successfully argues that such provisions unduly restrict the surviving corporation going forward and otherwise are not advisable to the extent such restrictions purport to restrict the surviving corporation’s board of directors from acting in accordance with its fiduciary duties following the merger. In the past, sellers were often more willing to relinquish requests for such a provision because it was thought (based on the contractual nature of indemnification provisions and the reading many corporate practitioners had given to the Salaman v. National Media Corp. decision) that the former officers and directors would still retain their right to indemnification and advancement for any acts or omissions occurring during the time that they were in office, and that any later amendment of the surviving corporation’s constituent documents would have no effect on that vested right.

The Court of Chancery’s decision in Schoon has now changed that dynamic. Rather than resting upon the belief that the former officers and directors will be protected regardless of any amendment of the surviving corporation’s constituent documents following the effective time of the merger, seller’s counsel should now negotiate diligently to ensure that the seller’s officers and directors are protected and retain their rights to indemnification and advancement.19 As a result, seller’s counsel could insist on a contractual provision preventing the surviving corporation from amending its constituent documents for a specified period of time following the effective time of the merger to the extent such an amendment would adversely affect the indemnification and advancement rights of the seller’s officers and directors.

Seller’s counsel should also pay particular attention to the indemnification and advancement provisions that will be in the constituent documents of the surviving corporation immediately following the merger. Those provisions should provide state of the art protection for the current and former officers and directors of the surviving corporation. In addition, those provisions should include a properly drafted savings clause that makes it clear, among other things, that the right to indemnification and advancement is a vested contract right and that the amendment of those provisions will not adversely affect the rights of any current or former officers and directors with respect to acts or omission prior to the amendment, regardless of whether any proceeding is commenced against those persons before or after any amendment to those provisions.20

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19 The Delaware courts generally have not been critical of targets’ efforts to negotiate for merger agreement provisions bestowing indemnification rights upon former directors. Globis Partners, L.P. v. Plumtree Software, Inc., 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) (finding that the receipt of indemnification benefits by target directors in a merger did not make the directors interested in the merger because there was no basis “for inferring the receipt of indemnification benefits is material, or likely to taint the Individual Defendants’ judgment”); see also In re Sea-Land Corp. S’holders Litig., 642 A.2d 792, 804 (Del. Ch. 1993) (“Normally, the receipt of indemnification is not deemed to taint related director actions with a presumption of self-interest. That is because indemnification has become commonplace in corporate affairs . . . and because indemnification does not increase a director’s wealth.”) (citations omitted). But cf. Louisiana Municipal Police Employees’ Retirement System v. Crawford, 918 A.2d 1172, 1180 n.8 (Del. Ch. 2007) (raising some question with respect to an acquiror’s agreement to provide indemnification (which arguably extended beyond the restrictions of Section 145) to former directors and officers of a target corporation that were at risk for claims relating to options backdating).

20 The Schoon decision also highlights the general need for corporations to revisit their indemnification and advancement provisions to ensure that their officers and directors have adequate protection and are sufficiently incentivized to serve. Although it is possible to provide additional protection by including a properly drafted
Out of an abundance of caution, seller’s counsel also may request, in the context of triangular mergers, that the buyer parent agree in the merger agreement or in separate indemnification agreements to provide the seller’s officers and directors with indemnification and advancement for their acts or omissions while serving the selling corporation. Such an agreement would provide the officers and directors with a contractual right to indemnification that arguably would not be subject to the limitations of, and the standards of conduct set forth in, Section 145, but would be subject only to the limits of public policy.\(^1\) To the extent that the directors or officers are not parties to the agreement, as would be the case in a typical merger agreement, the agreement should expressly provide that the directors and officers are intended third party beneficiaries to the agreement.

From the perspective of a buyer, the case law also holds important lessons. The Court’s conclusions in *Jackson Walker* should stand as a warning to buyers that a surviving corporation’s indemnification and advancement obligations could be broader than anticipated. Buyer’s counsel should determine during due diligence whether the seller’s constituent documents contain broad mandatory indemnification and advancement for persons such as employees and agents and, if so, assess the risks of such broad rights. If mandatory indemnification and advancement of such persons is required, the surviving corporation may have the obligation to provide indemnification and advancement to persons such as lawyers, accountants, and other professionals, as well as non-professionals, that, prior to *Jackson Walker*, many corporate practitioners might not have considered to be agents of the corporation for purposes of Section 145. For example, accounting scandals, stock option backdating and other conduct giving rise to restatements of financial reports may lead to claims against agents of a corporation that survive the acquisition of a corporation, and a subsequent obligation on the part of the surviving corporation to advance expenses to, and possibly indemnify, agents in connection with such events. As such, the buyer should be aware of the increased risks that such provisions may impose on the surviving corporation in the future.

The *Jackson Walker* case also raises an interesting question with respect to the breadth of a financial advisor’s contractual indemnification rights. Although financial advisors, as a matter of course, require corporations to sign engagement letters that provide for a broad obligation on the part of the corporation to indemnify the financial advisor in connection with its services and typically provide in such engagement letters that the financial advisor is acting as an independent contractor and not an agent of the corporation, the possibility that the financial advisor could be deemed to be an agent of the corporation

\(^{21}\) Although a corporation’s grant of additional indemnification rights pursuant to Section 145(f) must be consistent with Delaware public policy and the substantive limitations of Section 145, *Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 91 (2d Cir. 1996), the agreement by the parent acquiror arguably would be to provide contractual indemnification and advancement protection to an individual pursuant to the terms of such contractual provision and not necessarily “by reason of the fact” that the individual served as an officer, director, employee or agent of the parent corporation or at the request of the parent corporation as an officer, director, employee or agent of any other entity. See, e.g., *Crawford*, 918 A.2d at 1180 n.8 (noting that a merger agreement provision requiring the indemnification of former directors of a target corporation to the fullest extent permitted by law “arguably arises under contract law and outside the restrictions of statutory corporate law”).
(when the financial advisor is acting on behalf of the corporation in relations with third parties) and thus subject to the limitations and requisite standards of conduct for indemnification set forth in Section 145 could provide a corporation with a potential argument to limit its indemnification obligations to financial advisors in certain circumstances. If a financial advisor is deemed to be an agent of the corporation, the financial advisor (as an agent) may not be entitled under Section 145 to indemnification if it did not act in good faith and in a manner the financial advisor reasonably believed to be in or not opposed to the best interests of the corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe its conduct was unlawful. Although an argument could be made that the contractual indemnification provisions set forth in a financial advisor’s engagement letter should provide broader indemnification, a corporation could argue that it will simply not have the corporate power to indemnify the financial advisor (as an agent) if the advisor does not meet the requisite standards of conduct set forth in Section 145.

22 The circumstances in which a financial advisor might be deemed to be acting as an agent of a corporation would be limited in a manner similar to that discussed in Jackson Walker with respect to outside litigation counsel. On the reasoning articulated in Jackson Walker, one could argue that in circumstances in which a financial advisor was acting on behalf of the corporation in relations with a third party (and not merely when a financial advisor was providing advice to a corporation and/or rendering a fairness opinion) the financial advisor potentially would be acting as an agent for purposes of Section 145.

23 8 Del. C. § 145 (a), (b).

24 Waltuch, 88 F.3d at 91 (“There would be no point to the carefully crafted provisions of Section 145 spelling out the permissible scope of indemnification under Delaware law if subsection (f) allowed indemnification in additional circumstances without regard to these limits.

Conclusion.

Recent Delaware case law highlights the importance of closely considering provisions in acquisition agreements that provide for indemnification and advancement rights of a seller’s officers and directors. Those decisions provide practical lessons that should be considered by counsel when negotiating such provisions.

**TASK FORCE REPORTS**

**Task Force on Acquisitions of Public Companies**

Our Spring meeting was held in Dallas, Texas in April and those of us able to make it to the meeting (34 of us in person and 4 on the phone) had a lively discussion of the revised meeting covenants, led by Keith Flaum and Jim Griffin. We also had our Task Force Dinner at Bob’s Steak & Chop House, where we toasted Jim Griffin in absentia for arranging a wonderful dinner for all of us.

Our Task Force also put on a program in Dallas (our first in several years) entitled “Where Do We Start – Negotiating Confidentiality Agreements, Standstills and Exclusivity Letters in the Current Deal Environment.” Panelists were Jim Walther, Lorna Telfer, Michael O’Brien, Bruce Cheatham, Steve Bigler and Diane Frankle. We had a good crowd for an 8:00 a.m. Saturday program and an entertaining discussion of the various issues in these key agreements. Thanks to all who participated.

At our meeting in New York City in August we will be discussing the termination

The exception would swallow the rule.”) (citation omitted).
sections as well as Section 1. Our meeting is being held on Saturday, August 9, from 2:30 p.m. until 5:30 p.m., at the Grand Hyatt, Regency Room, Mezzanine Level. We also have an Editorial Board session on Sunday, August 10, from 11:30 a.m. until 1:30 p.m., at the Grand Hyatt, Chrysler Room, Mezzanine Level. You are welcome to attend if you want to take on additional projects.

Our Task Force dinner will be held on Friday, August 9, at Michael’s Restaurant, 24 W. 55th Street, New York, NY 10019. The reception will begin at 6:30 p.m. and dinner will follow at 7:30 p.m. The telephone number for Michael’s Restaurant is 212-767-0555. Many thanks to Joel Greenberg for arranging this dinner for our Task Force!

As a further special treat, Yvette Austin Smith has arranged for those of us who are interested to visit a classic cigar club near the restaurant – Grand Havana Room (formerly Top of the 6s), located at 666 5th Avenue, 39th floor. Yvette is arranging this excursion and you should contact Yvette directly if you think you might be interested so that she can have a rough count for the after-dinner crowd.

Steve Knee and I look forward to seeing you in New York City!

Diane Holt Frankle
Stephen H. Knee
Co-Chairs

Task Force on the Model Stock Purchase Agreement

The Editorial Committee of our Task Force 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 of the M&A Jurisprudence Subcommittee and drafting assignments have been made as a result of discussions at the Dallas meeting. Revisions for Article 11 Commentary will be reviewed in depth at our meeting in New York City.

We look forward to seeing you in New York City.

Robert T. Harper
Chair

SUBCOMMITTEE REPORTS

International M&A Subcommittee

The International M&A Subcommittee met in April in connection with the Business Law Section’s Spring meeting in Dallas, Texas.

Programs and Forums

The meeting began with a report on the excellent program sponsored by the Subcommittee the previous day entitled “International Tax for Dummies: What Transactional Lawyers Should Know about Tax Aspects of Out-Bound Acquisitions,” chaired by Peter Haver. This program was repeated, but moderated by noted German international tax authority and practitioner Dr. Dolf Weber, at the Business Law Section’s Global Business Law Conference, May 29-30, in Frankfurt, Germany. The program materials are on the Subcommittee’s website at the following address:

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

The Subcommittee presented the Committee Forum at the full Committee meeting the following day on the subject of “International M&A Due Diligence: Trends and
Effective Strategies.” This Committee Forum presentation was chaired by Wilson Chu (who had led the project to publish the Subcommittee’s recent publication with that title) and Daniel Rosenberg.

**Post-Closing Dispute Resolution Project**

Katrien Vorlat and Guy Harles gave a report on the current progress of this project.

**International Asset Purchase Agreement Project**

Frank Picciola and Nick Dietrich have agreed to take over leadership of the Subcommittee’s International Asset Purchase Agreement project. Frank and Nick plan to produce a draft of the Model Asset Purchase Agreement with all the US-specific provisions removed. Following review of that draft by the Subcommittee, they will ask Subcommittee members to produce schedules for the agreement that would include the additional provisions needed to deal with jurisdiction-specific issues. These would include substantive provisions (such as specific closing deliverables and specific provisions dealing with employees) and specific warranties, in each case covering issues not covered by the more general wording in the base agreement.

**Mini-Forum on Sovereign Wealth Funds**

Daniel Rosenberg, Reid Feldman, Frank Picciola and Jim Walther presented a mini-forum on sovereign wealth funds, including a summary of the reasons for their increasing significance and profile, the concerns relating to them and the approaches being taken in France, the EU, Canada and the US. This was followed by a more general discussion which included input from other jurisdictions represented around the table. The materials presented are on the Subcommittee’s website at the following address:

[www.abanet.org/dch/committee.cfm?com=CL560016](http://www.abanet.org/dch/committee.cfm?com=CL560016)

**Future Projects and Programs**

Following on from the mini-forum on sovereign wealth funds, it was agreed that Frank Picciola would lead a mini-project on impediments to foreign investment into various jurisdictions. Frank produced a draft form of questionnaire which would form the starting point for the project.

Peter Haver also suggested a possible future program on the different approaches to IP provisions in M&A documentation around the world.

Other possible programs discussed (after the meeting) were a suggestion from Jean Paul Chabaneix on issues raised where an acquisition target in one jurisdiction has subsidiaries in other jurisdictions around the world (where there are requirements or consequences in those jurisdictions) and a suggestion from Ed Kerwin for a program based on the Subcommittee’s International Stock Purchase Agreement Appendix.

**Publications**

Wilson Chu provided an update on sales of the Subcommittee’s publications. The International M&A Due Diligence publication had sold 610 copies since August 2007 and is becoming an ABA “bestseller.” The International Stock Purchase Agreement Appendix publication had also been very successful, having sold 409 copies since August 2007. Further details of the Subcommittee’s publications are on the Subcommittee’s website at the following address:

[www.abanet.org/dch/committee.cfm?com=CL560016](http://www.abanet.org/dch/committee.cfm?com=CL560016)

**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.

Global Business Law Conference

The Subcommittee held a dinner on May 29 in connection with the Business Law Section’s Global Business Law Conference in Frankfurt, Germany.

Annual Meeting

The Subcommittee’s next meeting will be held on Sunday, August 10, in conjunction with the ABA’s Annual Meeting at the Grand Hyatt in New York City. Our meeting will be held, from 9:00 a.m. until 11:30 a.m., in the Grand Hyatt, Manhattan Ballroom, Lobby Level. Conference telephone information will be sent to Subcommittee members and posted on the Subcommittee’s website prior to the meeting.

Daniel Rosenberg
James R. Walther
Co-Chairs

Membership Subcommittee

We continue to be the largest committee in the Business Law Section. As of July 17, 2008, our Committee had over 3,100 members representing 44 countries. We have over 310 in-house counsel members. The Private Equity M&A Subcommittee is our largest subcommittee with over 1,250 members, followed by the M&A Market Trends Subcommittee with approximately 1,050 members. Our “associate” (non-lawyer) members now total approximately 230. 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 New York City on Friday, August 8, from 12:30 p.m. until 2:00 p.m., in the Grand Hyatt. The Judicial Interpretations Working Group will meet immediately thereafter, from 2:00 p.m. until 4:30 p.m.

Annual Survey Working Group

The sixth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions was published in the February 2008 issue of The Business Lawyer. Our working group is 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 New York City 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 swhattaker@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. To join our working group, please email Jon Hirschoff with a copy to Scott Whittaker, or simply come to the working group meeting in New York City.

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.

Decision to be Discussed at the New York City Committee Meeting


*Innophos, Inc. v. Rhodia, S.A.* involved the interpretation of the term “Taxes” as used in an acquisition agreement, in connection with a claim for post-closing indemnification by the buyer.

On August 16, 2004, Bain Capital announced the completion of its acquisition of the North American specialty phosphates business of Rhodia. The acquisition occurred pursuant to an Agreement of Purchase and Sale among various Rhodia selling entities and Bain’s acquisition vehicle, Phosphates Acquisition, Inc. (the “Buyer”), dated as of June 10, 2004 (the “Agreement”). The purchase price was approximately $530 million. After the closing, Phosphates Acquisition, Inc. was renamed Innophus, Inc.

The acquisition was structured as an acquisition of the assets (and certain liabilities) of Rhodia’s United States and Canadian businesses and of one of two businesses in Mexico, and of the stock of two Mexican subsidiaries that owned operating companies engaged in the other Mexican business. One of the Mexican subsidiaries acquired by the Buyer was the parent of a Mexican operating subsidiary named Rhodia Fosfatados de Mexico, S.A. de C.V (“Fosfatados”).

In early 2004, the Comision Nacional del Agua (“CNA”), an agency of the Mexican government, began an audit of the water usage of Fosfatados. In March 2004, CNA sent a letter to Fosfatados’s legal representative in Mexico advising it of the audit and requesting certain information and documentation regarding its use of “national surface or underground waters” pursuant to a concession granted to Fosfatados by the Government of Mexico. The letter alleged that Fosfatados had not fulfilled its fee obligations for the use or utilization of national waters. According to Innophos, the Rhodia sellers never advised the Buyer of the audit or the letter, and the Buyer was unaware of either.

Two months after the Closing, CNA assessed Innophos, identified in the opinions in this case as a successor in interest to Fosfatados, but presumably the same operating company renamed, over $130 million for water extraction fees for 1998-2002. The Buyer asserted an indemnification claim with respect to these fees, and the instant litigation ensued when that claim was rejected.
Under Article IX of the Agreement, the Buyer was entitled to indemnification for breaches of representations and warranties, breaches of covenants and retained liabilities. Claims for breaches of representations and warranties were subject to a basket of approximately $16 million and a cap of approximately $80 million. Retained liabilities were not subject to the basket or cap. But retained liabilities as defined in the Agreement included only liabilities of the Rhodia entities that sold assets, and the CNA claim in question was a claim against an operating entity owned by a Mexican subsidiary the stock of which was acquired in the transaction. Thus any claim for indemnification based on CNA’s $130 million assessment made under Article IX would be a claim for a breach of representations and warranties, and subject to the basket and the cap.

Article VII of the Agreement, however, provided in Section 7.01: “The Sellers agree to indemnify and hold harmless the Purchaser against (i) Taxes of the Mexican Subsidiaries with respect to any taxable period (or portion thereof) that ends on or before the Closing Date . . .” Claims for indemnification under Article VII were not subject to a cap or basket. Thus, if Innophos was to succeed in a claim for indemnification not subject to a cap or basket, it had to characterize the CNA assessment as an assessment of “Taxes.”

The Agreement’s definition of “Taxes” provided: “‘Tax’ or ‘Taxes’ means all (i) United States federal, state or local or non-United States taxes, assessments, charges, duties, levies or other similar governmental charges of any nature, including all income, gross receipts, employment, franchise, profits, capital gains, capital stock, transfer, sales, use, occupation, property, excise, severance, windfall profits, stamp, stamp duty reserve, license, payroll, withholding, ad valorem, value added, alternative minimum, environmental, customs, social security (or similar), unemployment, sick pay, disability, registration and other taxes, assessments, charges, duties, fees, levies or other similar governmental charges of any kind whatsoever, whether disputed or not, together with all estimated taxes, deficiency assessments, additions to tax, penalties and interest; (ii) any liability for the payment of any amount of a type described in clause (i) arising as a result of being or having been a member of any consolidated, combined, unitary or other group or being or having been included or required to be included in any Tax Return related thereto; and (iii) any liability for the payment of any amount of a type described in clause (i) or clause (ii) as a result of any obligation to indemnify or otherwise assume or succeed to the liability of any other Person.”

Innophos was granted partial summary judgment by the trial court, which found that the CNA assessment was a “Tax” as defined in the Agreement, and that to the extent that a guarantee was required to further contest the assessment, the defendants were obligated to provide it. At some point prior to the issuance of the Court of Appeals opinion in this case, the fees were apparently reduced to an amount between $20 million and $30 million.

Rhodia appealed the grant of partial summary judgment, which was affirmed by the Appellate Division, Judge McGuire dissenting, in Innophos, Inc. v. Rhodia, S.A., 38 A.D.3d 368, 2007 N.Y. Slip Op. 02466, 832 N.Y.S.2d 197 (N.Y. App. Div. 2007). The majority opinion based this result primarily on what it characterized as the sweeping language of the Agreement’s definition of Taxes. “It is virtually impossible for us to imagine how two sophisticated parties could have made the language any more sweeping than it is.”

Judge McGuire, in his dissent, found persuasive Rhodia’s argument that the
majority’s result effectively collapses the definition of Taxes into a single test, which would include governmental charges of any nature. He pointed out that none of the thirty examples of taxes used in the definition involved a charge by a governmental body for the use of a commodity. The CNA assessment was based upon the volume of water used at the phosphates plant. As he noted, Rhodia’s argument was that this was nothing more than a water bill. Judge McGuire thought it important that any claim for indemnification relating to Governmental Orders or Environmental Claims would have to be brought under Article IX of the Agreement, and concluded that the majority’s interpretation of “Taxes” in effect meant that the terms Governmental Orders and Environmental Claims would have to be construed to include only orders and claims not imposing or threatening a financial charge payable to a governmental body. Moreover, in his view the majority’s construction of the Agreement meant that if Rhodia purchased electric power from a government-owned utility, the payments for the power would be “Taxes.” With all of these considerations in mind, Judge McGuire thought that, at the very least, summary judgment was inappropriate because the scope of the defined term “Taxes” was sufficiently ambiguous so as to preclude acceptance of Innophos’s interpretation as a matter of law, and to require evidence as to the parties’ intentions to resolve the ambiguity.

The Court of Appeals unanimously affirmed. It found persuasive Innophos’s argument that the CNA fees were assessed by the Government of Mexico in its sovereign capacity, and, as such, they were similar to the examples of taxes contained in the definition, particularly with respect to severance taxes. The opinion pointed out that a severance tax is based on the volume of a natural resource exploited pursuant to a governmental concession. Both parties’ experts agreed that Mexico’s Constitution vests ownership over natural resources, including the water at issue, in the Mexican State. Thus in the Court’s view the water was a state-owned natural resource regulated by the government in its capacity as a sovereign. There was, the Court concluded, no ambiguity in the definition of “Taxes.”

Judicial Interpretations Working Group

The Judicial Interpretations Working Group met during the Committee’s April meeting in Dallas. Attendees at that meeting discussed two memoranda: one by Gabriel Saltarelli and Mark Klein on financial statement representations, and another by Seth Freedman and Robert Dickey on undisclosed liabilities representations. 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 New York City meeting of the Judicial Interpretations Working Group will be held on Friday, August 8, from 2:00 p.m. until 4:30 p.m., at the Grand Hyatt. 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 New York City.

Scott T. Whittaker
Subcommittee Chair

Jon T. Hirschoff
Chair, Annual Survey Working Group

James C. Melville
Chair, Judicial Interpretation Working Group
M&A Market Trends Subcommittee

The M&A Market Trends Subcommittee had a great meeting in Dallas, Texas last April. At the Dallas meeting, Jennifer Muller from Houlihan Lokey Howard & Zukin discussed the current state of the M&A market (bottom line: deals are still getting done – they just have several fewer zeros at the end) and members of the Subcommittee discussed the results of our analysis of sandbagging and non-reliance clauses. On May 30, members of the Subcommittee gave a panel presentation on “M&A Negotiation Trends and Practices in U.S. and E.U. Private Target, Public Target and LBO Deals” at the Business Law Section’s first Global Business Law Conference in Frankfurt, Germany.

We are currently working on a number of things, including:

- our European Deal Points Study, led by co-chairs Freek Jonkhart and Reid Feldman;
- our Canadian Deal Points Study, led by chair John Clifford and co-vice chairs Kevin Kyte and Mireille Fontaine;
- supplements to the 2007 Private Target Deal Points Study;
- our next version of the Strategic Buyer/Public Target Deal Points Study, led by chair Jim Griffin; and
- our next version of the Private Equity Buyer/Public Target Deal Points Study, led by chair Jay Bothwick.

Thanks Jim and Jay for spear-heading the next round of our public company studies!

At our New York City meeting in August (which will be held on Saturday, August 9, from 10:00 a.m. until 11:30 a.m.):

- Freek and Reid will be discussing some preliminary results from the European Deal Points Study;
- John, Mireille and Kevin will be discussing some preliminary results from the Canadian Deal Points Study;
- Gerald J. Mehm, Senior Managing Director and Senior Vice President, Financial Valuation Group, of American Appraisal Associates, together with members of our Subcommittee, will be discussing how recent accounting changes, including FAS 5 and FAS 141(R), will impact M&A deals and the related data points that are tracked by our Subcommittee; and
- members of the Subcommittee will be discussing the results of our analysis of MAE and knowledge qualifiers in the private company context.

We look forward to seeing you in New York City.

Keith Flaum
Chair

Hendrick Jordaan
Jessica Pearlman
Co-Chairs

Private Equity M&A Subcommittee

The Private Equity M&A Subcommittee met in Dallas, Texas on April 12 in conjunction with the Spring meeting of the Business Law Section. The Subcommittee meeting was well-attended in person and by phone.
During its two-hour session, the Subcommittee was honored to have Brian Breheny, Deputy Director of the Division of Corporate Finance at the SEC, and formerly Head of the Office of M&A at the SEC, attend and engage in a wide-ranging discussion on a number of current private equity and general M&A-related topics and issues involving the SEC and of interest to practitioners (subject to the standard caveat that he was not speaking for the SEC).

The meeting also included a panel discussion in which Mark Morton and R.J. Scaggs, both Delaware counsel, discussed with the Subcommittee Co-Chairs their transactional and litigation perspectives, respectively, on certain recent developments and trends affecting private equity M&A practice under Delaware law, and Brian was kind enough to provide his own insights. The panel also discussed recent legal developments related to certain failed or restructured transactions in the private equity marketplace, and the impact of certain contractual provisions in those transactions from both the transactional and litigation perspective. The 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.

Unitced States SEC
951 E Street, N.W.
Washington, D.C. 20549
(202) 551-1500

Henry Lesser
John Hughes
Co-Chairs

Drafting Deal Documents so Litigators and Judges Interpret Them the Way You Intend

Friday, August 8
10:30 a.m. - 12:30 p.m.

This program, co-chaired and co-moderated by Robert Harper and Scott Whittaker, will examine judicial decisions interpreting commonly used contract provisions in ways that have surprised deal lawyers. Speakers include Diane Holt Frankle, Jeffrey Fuisz, Justice Karla Moskowitz, New York Appellate Division, First Department, New York, NY, Jessica Pearlman, and Murray Perelman. The panelists will also explain ways that transactional lawyers can draft documents that are less likely to be misconstrued by litigators and judges and finally, will cover clauses on limitations on remedies, “non-binding” letters of intent, and no third party beneficiaries provisions among others. The panel will deliver the experience and insights of deal lawyers, litigators and the bench.

Due Diligence in the Digital Age: Analysis of Tools, Ancient and Modern, for Investigating Your Target and Closing Your Deal

Saturday, August 9
10:30 a.m. - 12:30 p.m.

This program is chaired and moderated by George Taylor. In addition, to George, the panel will include Brandon Farley, Rashida La Lande and Alison Youngman. The program will focus on changes to the due diligence and closing process that have occurred in recent years based on the advent of new technologies. Particular emphasis will be placed on the use of “virtual due diligence rooms” or extranets for storage and exchange of due diligence materials. The panel will examine issues such as administration, confidentiality, post-closing preservation of evidence, and structure of due diligence extranets. Speakers will also discuss written terms of use for due diligence rooms.

Program Subcommittee

The 2008 Annual Meeting in New York City will feature Committee sponsored programs on both Friday and Saturday mornings and a panel presentation on Delaware M&A developments during our full Committee meeting on Sunday.
and options for the restriction of information contained on the sites. A consistent focus will be the demarcation of roles between lawyers, client representatives and other client advisors and the advantages to both lawyer and client of various approaches to the use of this technology. The panel will also consider issues involved in non-physical closings (i.e., closings where signatures are exchanged by means other than the presentation of original signatures), such as problems of enforceability, timing of the closing, and issues of proof.

**Delaware M&A Developments**

**Sunday, August 10**

**Full Committee Meeting**

Due to a late cancellation, we will not have a formal CLE-qualified Committee Forum following the full Committee meeting. Fortunately, Mark Morton (with very little advance notice) has pulled together a panel and an excellent series of presentations on significant Delaware developments of interest to all M&A lawyers to be presented at our full Committee meeting on Sunday.

A panel consisting of Mark Morton, Steve Bigler, John Grossbauer, and Lisa Stark, along with Chief Justice Myron Steele of the Delaware Supreme Court, will discuss a number of recent Delaware developments. Chief Justice Myron Steele will join the panel to participate in a discussion of his Court’s decision in *AFSCME v. CA, Inc.* (considering the permissibility of a proposed shareholder bylaw providing for mandatory reimbursement of certain expenses for successful short slate proxy contests), as well as the process by which that Court now may agree to decide questions of law certified for review by the SEC. The other panelists will discuss the implications for M&A counsel of the Delaware Court of Chancery’s recent decisions in (i) *Ryan v. Lyondell Chemical Company* (denying defendants’ motion for summary judgment on plaintiff’s *Revlon* and deal protection claims), (ii) *Troy v. Schoon Corporation* (considering whether an indemnification bylaw that provides for mandatory advancement of a director’s expenses creates a “vested” right for that director), and (iii) *Optima International of Miami, Inc. v. WCI Steel, Inc.* (questioning the continuing vitality of *Omnicare*). In addition, the panelists also will update the Committee on the Delaware Court of Chancery litigation concerning the proposed Hexion/Huntsman deal.

The Program Subcommittee is developing its slate for the 2009 Spring and Annual Meetings. If any of you have program ideas, please contact Tom Thompson (thomas.thompson@bipc.com), Bob Copeland (RCopeland@duanemorris.com), or David Albin (dalbin@fdh.com).

Thomas Thompson  
Chair

**Technology Subcommittee**

The Deal Points Studies continue to be the stars of our website and attract much traffic. For that reason and because of the other content posted there, our website continues to be one of the most visited sites on the ABA domain. Each Subcommittee and Task Force is encouraged to take advantage of our website for posting of current information and for the sharing of documents. Documents can be posted in Excel, Word and Adobe formats and are generally available within 24 hours after submission to the undersigned at gtaylor@burr.com. Our extranet site, which contains the source documents for the Deal Points Studies, is also receiving substantial traffic. Several practitioners have written to compliment the usefulness of the full text search feature for those agreements.
One of the seminars sponsored by our Committee in New York City is entitled “Due Diligence in the Digital Age: Analysis of Tools, Ancient and Modern, for Investigating Your Target and Closing Your Deal” and focuses on the uses (and abuses) of extranet sites and virtual data rooms in the course of acquisition transactions. We continue to look for areas in which to educate attorneys on the use of technology in M&A practices and would appreciate any suggestions from Committee members on future programs that would be helpful.

There is much in the works at the ABA in terms of technology. A proposal is near final approval for a massive new communications and collaboration program for use by attorneys. The project has been generally described as “Facebook for Lawyers” and will include the ability to form groups, share documents, and collaborate online on drafting projects. In my (fairly new) role as Chair of the Technology Committee of the Business Law Section, I will be hearing more about it at the New York City meeting and will report to Committee members shortly. This new development promises to be a substantial advancement in communications tools for those of us working on drafting projects.

Gregory T. Taylor
Chair

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**COMMITTEE MEETING MATERIALS**

**COMMITTEE ON NEGOTIATED ACQUISITIONS**
**2008 SUMMER MEETING**
**NEW YORK CITY**
**AUGUST 8-10**

**SCHEDULE OF MEETINGS AND OTHER ACTIVITIES**

Below is the current schedule of our Committee’s meetings and other activities. Please note that this schedule is subject to change. Please refer to the materials you receive upon registration at the meeting for the most up-to-date schedule and for the exact location of each meeting or activity.

**Friday, August 8th**

**Program: Drafting Deal Documents so Litigators and Judges Interpret Them the Way You Intend**

10:30 a.m. – 12:30 p.m.
Empire State Ballroom E, Ballroom Level, Grand Hyatt

**Annual Survey Working Group of the M&A Jurisprudence Subcommittee**

12:30 p.m. – 2:00 p.m.
Chrysler Room, Mezzanine Level, Grand Hyatt
Private Equity M&A Subcommittee
2:00 p.m. – 4:00 p.m.
Empire State Ballroom C, Ballroom Level, Grand Hyatt

Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee
2:00 p.m. – 4:30 p.m.
Chrysler Room, Mezzanine Level, Grand Hyatt

Saturday, August 9th

Editorial Committee on the Model Stock Purchase Agreement
8:00 a.m. – 10:00 a.m.
Regency Room, Mezzanine Level, Grand Hyatt

M&A Market Trends Subcommittee
10:00 a.m. – 11:30 a.m.
Regency Room, Mezzanine Level, Grand Hyatt

Program: Due Diligence and Closings in the Digital Age – Analysis of Tools, Ancient and Modern, for Investigation of Your Target and Closing Your Deal
10:30 a.m. – 12:30 p.m.
Empire State Ballroom D, Ballroom Level, Grand Hyatt

Editorial Committee of the Task Force on the Model Stock Purchase Agreement
11:00 a.m. – 1:00 p.m.
Chrysler Room, Mezzanine Level, Grand Hyatt

Meeting of Committee Chair and Vice Chairs, Subcommittee, Task Force and Working Group Chairs
1:00 p.m. – 2:30 p.m.
Chrysler Room, Mezzanine Level, Grand Hyatt

Task Force on Acquisitions of Public Companies
2:30 p.m. – 5:30 p.m.
Regency Room, Mezzanine Level, Grand Hyatt

Committee Reception and Dinner
6:30 p.m. Reception/7:30 p.m. Dinner
Spark’s Steak House
210 East 46th Street
New York City

Sunday, August 10th

International M&A Subcommittee
9:00 a.m. – 11:30 a.m.
Manhattan Ballroom, Lobby Level, Grand Hyatt

Task Force on the Dictionary of M&A Terms
9:00 a.m. – 11:30 a.m.
Chrysler Room, Mezzanine Level, Grand Hyatt

Editorial Working Group of the Task Force on Acquisitions of Public Companies
11:30 a.m. – 1:30 p.m.
Chrysler Room, Mezzanine Level, Grand Hyatt

Full Committee Meeting
1:30 p.m. – 4:00 p.m.
Empire State Ballroom E, Ballroom Level, Grand Hyatt
American Bar Association, Section of Business Law, Committee on Negotiated Acquisitions. The views expressed in the Committee on Negotiated Acquisitions Newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Committee on Negotiated Acquisitions. If you wish to comment on the contents, please write to the Committee on Negotiated Acquisitions, Section of Business Law, American Bar Association, 321 N. Clark Street, Chicago, Illinois, 60610.