FROM THE CHAIR
By Joel I. Greenberg

Our Committee’s next meeting will be held at the Four Seasons Resort Aviara in Carlsbad, California on Friday, October 17, 2008 and Saturday, October 18, 2008. The full Committee meeting will be held Saturday afternoon, starting at 2:30 p.m. (P.D.T.), followed by the Committee Forum at 4:30 p.m.

The weather forecast for Aviara this Friday is excellent: sunny with a high temperature of 82°F/27°C. Saturday will be a little cooler, 73°F/22°C, with intermittent clouds.

We will hold Committee dinners at the resort on both Friday and Saturday. Thanks to Yvette Austin Smith and her firm, CRA International, Inc., for their sponsorship of the Saturday dinner.

As is our custom, the focus of the Fall meeting will be working sessions of our subcommittees, task forces and working groups. The schedule has been designed to minimize conflicts and we have arranged dial-in conference telephone access for every meeting.

The subject of the Committee forum – “Private Equity in the Financial Institutions Sector” – could not be more timely. John Hughes, co-chair of the Private Equity M&A Subcommittee, and John Butler, a Principal in the Investment Banking/Financial Institutions Group at Piper Jaffray & Co., will discuss the current M&A market environment in general and the market for M&A and private equity transactions in the Financial Institutions sector.

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in particular. Dial-in conference telephone access will be available at (888) 283-1624 or +1 (212) 271-4742; the code is 8342840. The same numbers and code can be used to dial-in to the full Committee meeting.

The Business Law Section’s second Global Business Law Conference will be held at the Conrad Hotel at Pacific Place in Hong Kong from Wednesday evening, June 10, 2009 through Friday, June 12, 2009. We are currently planning to present three Committee programs at the Conference. Closer to home, the Committee will be presenting the 13th Annual National Institute on Negotiating Business Acquisitions on Thursday, November 6, 2008 through Friday, November 7, 2008 at the Four Seasons Hotel in Las Vegas, Nevada.

Our Spring meeting will be held at the Business Law Section’s meeting in Vancouver, British Columbia, from Friday, April 17, 2009 through Saturday, April 18, 2009. The 2009 ABA Annual Meeting will be in Chicago, Illinois and the Business Law Section’s segment of that meeting will be from Thursday, July 30, 2009 through Tuesday, August 4, 2009. The following year, the Section Spring meeting will be in Denver, Colorado from Thursday, April 22, 2010 through Saturday, April 24, 2010 and the Section will meet at the ABA Annual Meeting in San Francisco, California from Thursday, August 5, 2010 through Tuesday, August 10, 2010. The dates and location for our Committee’s 2009 Fall Stand-Alone meeting have not yet been settled.

I look forward to seeing you at the Four Seasons Resort Aviara.
obtained in that market or any market since then.”

Nonetheless, the Court held that the director defendants had not carried their burden of proving entitlement to summary judgment on two of plaintiff’s claims: (i) that the directors had breached their fiduciary duties under Revlon by not engaging in a reasonable sales process; and (ii) that the merger agreement’s deal protection provisions were unreasonable under Unocal. The Court also explained that it could not rule out the possibility, in the context of a motion for summary judgment, that any such breaches could have constituted “a breach of the good faith component of the duty of loyalty.” As a result, the Court declined to grant summary judgment in favor of the director defendants on the basis of a Section 102(b)(7) exculpatory provision in Lyondell’s certificate of incorporation, which exculpated the directors from personal liability for breaches of fiduciary duty amounting solely to violations of the duty of care.

The outcry from the corporate bar was immediate and intense, and Lyondell has become one of the more controversial decisions of the Delaware Court of Chancery in recent memory. This article advances the admittedly minority view that the negative reaction is largely overblown. While the decision offers some helpful lessons for corporate practitioners, we posit that an opinion denying a motion for summary judgment (like an opinion denying a motion to dismiss at the pleading stage) is seldom the harbinger of a monumental shift in Delaware corporate law, particularly when premised on a finding that there are genuine disputes of material fact that need to be sorted out at trial or on a more developed record. Lyondell does not appear to be an exception to that general rule.

The Court of Chancery’s Decision in Ryan v. Lyondell

When the potential transaction with Basell first materialized, Lyondell was a financially strong company that had not been actively evaluating strategic transactions. In the Spring of 2007, a Basell affiliate filed a Schedule 13D with the Securities and Exchange Commission, announcing that it had acquired the right to purchase an approximately 8% equity stake in Lyondell from Lyondell’s largest stockholder and that Basell was interested in discussing potential transactions with Lyondell. The Lyondell board did not take any responsive action.

Lyondell’s CEO, Dan Smith, thereafter conducted some preliminary negotiations with Basell’s CEO, but the Lyondell board was largely unaware of those discussions. In the course of subsequent meetings between Smith and the President of Basell’s parent company, Leonard Blavatnik, Mr. Blavatnik made an offer for Bassell to acquire Lyondell in an all-cash transaction for $48 per share (a price previously suggested by Smith in the preliminary negotiations). The offer was subject to Lyondell’s signing a merger agreement within one week and agreeing to a $400 million termination fee. Basell’s offer represented a substantial premium – 45% over the closing price for Lyondell shares the last trading day before the Schedule 13D filing.

During a 50-minute meeting on July 10, 2007, Smith presented the Basell offer to the Lyondell board and the board engaged in preliminary discussions. The board met again on July 11 after Blavatnik indicated that Basell would need a firm indication of interest by that date. According to the minutes of that 45-minute meeting, “the [b]oard claims to have

4 Id. at *48.
thoroughly considered the several aspects of the Basell Proposal, including: comparing the benefits to the Lyondell stockholders of the Basell transaction with those of remaining independent, the valuation of certain Lyondell assets, the process likely to be involved in a transaction with Basell, engaging the services of an investment bank to serve as a financial advisor for the Basell Proposal, and the impact of Basell’s possible acquisition of Huntsman [another specialty chemical company] on its ability also to acquire Lyondell at some later date.5

After the July 11 board meeting, Smith advised Basell that Lyondell was favorably inclined to pursue the transaction. Lyondell hired Deutsche Bank Securities, Inc. to serve as its financial advisor, and Deutsche Bank “work[ed] feverishly”6 over the course of several days to prepare its fairness opinion, while representatives of Lyondell and Basell negotiated a merger agreement and facilitated Basell’s due diligence process. The Lyondell board did not seek to play an active role in the negotiations. The Lyondell board met again on July 12 for its previously scheduled regular meeting to discuss the routine business of Lyondell. That meeting included an executive session during which the board discussed the merits of Basell’s proposal without members of Lyondell management, other than Smith, present.

At one point during the negotiations, Smith requested (i) an increase in Basell’s offer price; (ii) a “go-shop” provision in the merger agreement to allow the board to seek other potential buyers for a period of forty-five days; (iii) a break-up fee of 1% during the go-shop period; and (iv) a reduction in the $400 million break-up fee after the go-shop period ended. Those requests were rejected by Basell, other than an agreement to reduce the termination fee to $385 million.

According to the Court, at a Lyondell board meeting on July 16:

After listening to the presentations of management and its legal and financial advisors and fully appreciating that Blavatnik was driving a very hard bargain vis-a-vis their fiduciary obligations in a sale scenario, the Board deliberated on the Merger. Thereafter, the Board voted unanimously to approve and recommend the Merger to the Lyondell stockholders. Basell’s offer presented an opportunity for the stockholders to earn a substantial premium over the market price of Lyondell shares and, in the view of the Board, was simply too good not to pass along for their consideration.7

At a subsequent special meeting of stockholders held to vote on the merger agreement, the merger received near-unanimous stockholder approval.

Relatively soon after plaintiff filed suit in Delaware challenging the transaction, the defendants moved for summary judgment, relying primarily upon an evidentiary record that had been developed in connection with related preliminary injunction proceedings in Texas. The merger closed on December 20, 2007 prior to issuance of the Court of Chancery’s opinion.

For purposes of the summary judgment motion, the Court emphasized that it was not permitted to weigh the evidence and was required to draw all reasonable inferences in

5 Id. at *26.
6 Id. at *29.
7 Id. at *34.
favor of plaintiff. With regard to the plaintiff’s Revlon claim, the Court held that the defendants could not satisfy their summary judgment burden in view of numerous factors from which the Court could draw a reasonable inference that the directors had violated their Revlon duties. Those factors included: (i) the entire deal was negotiated, considered, and agreed to in less than seven days, raising concerns about how hard the board really thought about the transaction and how carefully it sifted through the available market evidence; (ii) the board met to discuss the buyer’s proposal for a total of no more than six or seven hours, suggesting the board did not carefully consider all of the alternatives available; (iii) after being put on notice by Basell’s 13D filing, the board did not take any action (e.g., retaining an investment banker; asking management to prepare projections and valuations; conducting a formal market check) in anticipation of a possible proposal from Basell or another suitor; (iv) the board did not actually negotiate with Basell or actively participate in the sale process but accepted a deal already fully-negotiated by its CEO without its knowledge; and (v) the board did not conduct even a discrete and targeted market check to pitch a sale of the entire Company or the possibility of breaking it up into more valuable parts.

The Court acknowledged that “Revlon does not demand a perfect process” and that a board “has considerable latitude in structuring the sale process, provided that it acts with demonstrable diligence in the pursuit of the best transaction reasonably available.” The Court also acknowledged that there was some evidence in the record to suggest that the board had a sufficient body of reliable evidence from which to judge the adequacy of the Basell proposal, including detailed financial analyses of Lyondell and the Basell proposal from both management and Deutsche Bank. Nonetheless, the Court explained that “it is difficult for the Court to conclude on this record, after giving Ryan the benefit of all reasonable inferences, that the process employed by the Board was a ‘reasonable’ effort to create value for the Lyondell shareholders under these circumstances.”

With respect to plaintiff’s challenges to the deal protection measures in the merger agreement, the Court held that the summary judgment record before it did not allow it to rule that the board’s full complement of deal protections were reasonable and proportionate under the circumstances. The Court explained that “[o]n summary judgment, without undisputed and sufficient evidence of either a proactive market check or that the Board, in fact, ‘knew’ that it had secured the best deal reasonably available to the stockholders, one cannot exclude the inference that the deal protections agreed to by the Board served no purpose other than to squelch even the remotest possibility of a competing bid that might have increased the price for the stockholders.”

The Court did offer, however, that “[r]easonable deal protections can serve numerous important purposes, including the fostering of deal certainty for both the target and the acquirer. Furthermore, deal protections can provide a rational economic incentive for a bidder to offer ‘top dollar’ for a target company—a benefit that is consistent with the target board’s Revlon objective—because it can be reasonably confident that its efforts will not be thwarted by a marginally more attractive jumping bid.”
superiority of the price but, nonetheless, it provided Basell a full complement of deal protections. Maybe the price was the “blowout” the Defendants proclaim it to have been – it certainly was a “fair” price – and maybe the deal protection measures were reasonable and proportionate to the risks that the deal would not materialize otherwise, but those conclusions cannot be reached on the current record on summary judgment where the Court is precluded from choosing between plausible inferences.

Although the Court found that defendants were not entitled to summary judgment on the Revlon and Unocal claims, the Court did grant the motion for summary judgment in defendants’ favor on plaintiff’s “structural loyalty” claims because the undisputed evidence showed that the members of the board were not motivated by self-interest to approve the merger and that the ten non-management directors were independent.12

Notwithstanding the holding that a majority of the board was disinterested and independent, the Court declined on the basis of the limited summary judgment record to view the Revlon and deal protection claims solely as violations of the duty of care, thereby denying a defense under Lyondell’s Section 102(b)(7) exculpatory charter provision, which eliminated the directors’ liability for damages for breaches of the duty of care. For purposes of summary judgment, the Court could not rule out the possibility that the board’s failure to engage in a more proactive sale process may have constituted “a breach of the good faith component of the duty of loyalty” because the directors might have failed to act in the face of a known duty to act. The Court explained that the board “appears never to have engaged fully in the process to begin with, despite Revlon’s mandate.” The Court further explained:

The record, as it presently stands, does not, as a matter of undisputed material fact, demonstrate the Lyondell directors’ good faith discharge of their Revlon duties – a known set of “duties” requiring certain conduct or impeccable knowledge of the market in the face of Basell’s offer to acquire the Company. Perhaps with a more fully developed record or after trial, the Court will be satisfied that the Board’s efforts were done with sufficient good faith to absolve the directors of liability for money damages for any potential procedural shortcomings. With a record that does not clearly show the Board’s good faith discharge of its Revlon duties, however, whether the members of the Board are entitled to seek shelter under the Company’s exculpatory charter provision for procedural shortcomings amounting to a violation of their known fiduciary obligations in a sale scenario presents a question of fact that cannot now be resolved on summary judgment.13

13 Id. at *87-88 (emphasis added). In addition, the Court granted summary judgment in favor of defendants on plaintiff’s disclosure claims, finding that the proxy materials disclosed, in a full and accurate manner, most of the material information to which the stockholders were entitled. While there existed one potentially material defect in the disclosure, it amounted, at worst, to a violation of the duty of care, for which the defendant directors could not be held liable for damages by reason of the Section 102(b)(7) exculpatory provision in Lyondell’s certificate of incorporation.

12 Id. at *39-45.
In its conclusion, the Court of Chancery emphasized the limited and preliminary nature of its ruling:

The denial in part of the Lyondell Defendants’ motion is driven more by the constraints of a summary judgment process than it is by our corporate law. The price – $48 per share – was undeniably a fair one and may well have been the best that could reasonably have been obtained in that market or any market since then. When control of the corporation is at stake, however, directors of a Delaware corporation are expected to take context-appropriate steps to assure themselves and, thus, their shareholders that the price to be paid is the “best price reasonably available.” The Court cannot conclude on the limited record before it that, as a matter of undisputed material fact, the directors acted appropriately under the circumstances of this case. Whether that can be demonstrated for summary judgment purposes on a more complete record or at trial, of course, remains to be seen.14

In a subsequent decision denying defendants’ application to certify an interlocutory appeal to the Delaware Supreme Court, the Court of Chancery offered some helpful clarification regarding the nature and scope of its ruling. For example, the Court explained that:

A fair reading of the [initial] Opinion, ... plainly reveals that the Court’s concern about the application of a Section 102(b)(7) defense on this rudimentary summary judgment record is whether by taking no discernible action to prepare for a possible sale of the Company in light of the 13D filing, and then, later, by doing nothing (or virtually nothing) actively to confirm that Basell’s offer really was the “best” deal reasonably available, the Defendants may have exhibited a “conscious disregard” for their known fiduciary obligations in a sale scenario. Thus, the Court did not apply an inappropriate concept or definition of “bad faith” in this context under the controlling Delaware Supreme Court precedents…. It simply denied a motion for summary judgment on a sparse preliminary injunction record where the facts, unfortunately, suggest an inference of conscious board inaction in the face of a known duty to act.15

Notwithstanding the Court of Chancery’s declining to certify its decision for interlocutory appeal, the Delaware Supreme Court has accepted the appeal, and a decision on appeal is expected in the near future.

The Reaction to Lyondell

Almost immediately after the Court of Chancery’s decision denying summary judgment in Lyondell, the decision became the subject of strong negative reactions by corporate practitioners and commentators – in articles, law firm client memos, and particularly in the “blogosphere.” The primary criticism has involved the view that the decision improperly conflates lack of due care and bad faith and either misconstrues Delaware Supreme Court precedent16 or foretells a drastic shift in Delaware fiduciary duty law pursuant to which conduct previously viewed as involving only a

14 Id. at *110.
lack of due care is characterized as “so extreme” that it rises to the level of (a now significantly lower standard of) bad faith. It has been observed that “[t]he opinion upsets what most would say was settled Delaware law and, to the extent it is upheld, is likely to change the M&A deal process.” One commentator has even suggested that the decision shows that the only sure way for directors to avoid substantial risk of liability is to move away from using the corporate form for public companies, instead utilizing limited liability companies or other entity forms that allow managers to take greater advantage of contractual flexibility to limit or eliminate fiduciary duties.

It is not the purpose of this article to provide a detailed substantive analysis of the Revlon, Unocal, and good faith aspects of the Lyondell decision, and there is certainly merit to some of the concerns that have been expressed about Lyondell. We posit, however, that the reaction to Lyondell has been greatly exaggerated. The decision was not a merits decision but rather one denying a motion for summary judgment. It should not be viewed as more than that.

The Disney Litigation

The intense negative reaction to Lyondell is reminiscent of the criticism and ominous predictions about the direction of Delaware corporate law that followed the Court of Chancery’s 2003 opinion denying defendant’s motion to dismiss in the well-known Disney litigation, which also dealt with the obligation of fiduciaries to act in good faith.

The facts surrounding the Disney saga are by now fairly well-known. Briefly stated, the litigation involved a derivative suit against Disney’s directors and officers for damages allegedly arising out of the 1995 hiring and the 1996 termination of Michael Ovitz as Disney’s President. Ovitz was employed by Disney for little more than a year before he was terminated. The termination resulted in a non-fault termination payment to Ovitz of roughly $38 million in cash under the terms of his employment contract, as well as the immediate vesting of options to buy 3 million shares of Disney stock – termination benefits collectively valued at approximately $140 million. The shareholder plaintiffs alleged that Disney’s directors had breached their fiduciary duties both in approving Ovitz’s employment agreement and in later allowing the payment of the non-fault termination benefits.

In 2003, the Court of Chancery declined to dismiss an amended complaint filed by plaintiffs, finding that it adequately alleged facts sufficient to overcome the presumptions of the business judgment rule at the pleading stage by calling into question the good faith of Disney’s directors in making the challenged decisions. In that decision, Chancellor

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19 See In re The Walt Disney Co. Deriv. Litig., 825 A.2d 275 (Del. Ch. 2003) (hereinafter “Disney I”). The Disney I opinion focused on an amended complaint filed by plaintiffs after their initial complaint had been dismissed for failure to
Chandler had held that, if true, the allegations of the complaint “imply that the defendant directors knew that they were making material decisions without adequate information and without adequate deliberation, and that they simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss.”

If plaintiffs could make such a showing at trial, the Court held, the directors’ conduct would fall outside the scope of the Section 102(b)(7) exculpatory provision in Disney’s certificate of incorporation because such a provision does not apply to actions not in good faith or intentional misconduct.

After the Court of Chancery denied the motion to dismiss in Disney, many commentators speculated that the decision signified a fundamental shift in Delaware fiduciary duty law, that the distinction between lack of due care and bad faith had been hopelessly blurred, and that the risks of serving as a director of a Delaware corporation had been significantly heightened. Those “sky is falling” forecasts, however, proved to be inaccurate.

After the motion to dismiss was denied, the Disney litigation proceeded through discovery, culminating in a 37-day trial. After trial, Chancellor Chandler issued a 175 page post-trial opinion concluding that plaintiffs had failed to prove their claims. On appeal, the Delaware Supreme Court affirmed, finding that “the Chancellor’s factual findings and legal rulings were correct and not erroneous in any respect.”

With respect to the hiring of Ovitz and the approval of his employment agreement, the Supreme Court held that the Court of Chancery had a sufficient evidentiary basis from which to conclude, and had properly ruled, that the defendants had not breached their fiduciary duty of care and had not acted in bad faith.

As to the ensuing no-fault termination of Ovitz and the resulting termination benefits pursuant to his employment agreement, the Supreme Court affirmed the trial court’s holdings that the full board did not (and was not required to) approve Ovitz’s termination, that Michael Eisner, Disney’s CEO, had authorized the termination, and that neither Eisner nor Sanford Litvack, Disney’s General Counsel, had breached his duty of care or acted in bad faith in connection with the termination.

Together, the decisions of the Delaware Supreme Court and the Court of Chancery provided important clarification regarding the nature and scope of the obligation of corporate fiduciaries to act in good faith, while at the same time putting to rest the speculation that the concepts of grossly negligent conduct (lack of due care) and bad faith had become virtually indistinguishable. The dire predictions that followed the denial of the motion to dismiss proved to be much ado about nothing.
Understanding the Standards Applicable to Motions for Summary Judgment and Motions to Dismiss

That the post trial and appellate decisions in Disney turned out differently than many commentators had predicted after the Court of Chancery’s denial of the motion to dismiss is not surprising when one takes into account the stringent standards applicable to, and heavy burden a defendant must carry to succeed on, such a motion. A party moving to dismiss a complaint under Chancery Court Rule 12(b)(6) assumes the burden of proving that none of the facts alleged in the complaint, even if true, entitle the non-moving party to relief. In adjudicating such a motion, the Court of Chancery accepts as true all well pleaded allegations of facts, draws all reasonable inferences in favor of the non-moving party, cannot choose between two reasonable interpretations of ambiguous facts, and cannot grant dismissal unless it appears certain that the non-moving party would not be entitled to relief under any set of provable facts.

As the Court of Chancery described in Lyondell, a similarly heavy burden rests with a party seeking summary judgment:

In order to prevail, the moving party must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law…. In considering the summary judgment record, however, the Court is not permitted to weigh the evidence, and all reasonable inferences from the record presented must be drawn in favor of the non-moving party to determine the existence vel non of disputed material facts. “[I]f from the evidence produced there is a reasonable indication that a material fact is in dispute or if it appears desirable to inquire more thoroughly into the facts in order to clarify application of the law, summary judgment is not appropriate.”

Thus, decisions denying motions to dismiss and for summary judgment are necessarily preliminary and limited, particularly where they turn on the existence of disputed facts or reasonable inferences that can be drawn from those facts in favor of the non-moving party. Indeed, throughout its opinion in Lyondell, the Court emphasized the restrictive nature of the summary judgment standard and the preliminary and necessarily limited nature of its ruling. The Court even included a footnote indicating that, based on the record before it, “the better inference, especially considering the potential consequences from losing the Basell Proposal, likely favors the Lyondell Defendants.” The Court explained, however, that it was not permitted to “take the better inference on summary judgment to the

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29 Cohen, 99 A.2d at 394-95.
31 Id. at *71 n.92.
exclusion of a less compelling, but still reasonable, inference.”

The *Lyondell* decision, therefore, should be viewed in its proper procedural context, and when so viewed, we submit that the decision does not warrant the passionate critical reaction and dire predictions it has garnered. If the cautious tone of the opinion, the Court’s statement that the “better inference” seems to favor defendants, and the Vice Chancellor’s constant emphasis on the restrictive summary judgment standard are not enough to allay concerns that the opinion creates new law and will change the M&A deal process, the Court’s acknowledgement that its decision was “driven more by the constraints of a summary judgment process than it is by our corporate law” should suffice to dispel such concerns. So too should the Court’s subsequent decision on the application for interlocutory appeal, in which the Court observed, among other things, that:

[N]otwithstanding Defendants’ consternation over the outcome on their summary judgment motion, the reports of the death of *Section 102(b)(7)* (and the consequent possibility for the “resuscitation” of a *Van Gorkom-esque* liability crisis) in Delaware law are greatly exaggerated both with regard to the application of *Lyondell’s* exculpatory charter provision in this case, and certainly with regard to the application of a *Section 102(b)(7)* provision defense in any other case.

Thus, the *Lyondell* decision says far less about the future direction of Delaware corporate law than it does about the appropriateness of summary judgment on the limited and unique record presented to the Court in *Lyondell*. While the propriety of the Court’s denial of summary judgment on that record is a legitimate subject of debate, the frequently-articulated fears that the decision portends a change to Delaware corporate law or will effectively require significant changes in M&A best practices seem largely unjustified given the nature of the decision and its procedural context – a view buttressed by the example of the *Disney* litigation.

**Lessons Learned from Lyondell**

If the negative reaction to *Lyondell* is in many respects unwarranted, that is not meant to suggest that the opinion is unimportant or cannot offer helpful lessons to corporate practitioners. Perhaps the most obvious lesson, and one taught by many opinions before *Lyondell* but still too often overlooked, is that the best way for directors to maintain the ability to effectively argue for the early dismissal of

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32 *Id.*

33 *Id.* at *110.

34 2008 Del. Ch. LEXIS 125, at *34.

35 In two Court of Chancery decisions after *Lyondell* (one in the context of a motion to dismiss and one in the context of a motion for summary judgment), the Court granted judgment in favor of director defendants based on the companies’ *Section 102(b)(7)* exculpatory provisions, notwithstanding plaintiffs’ contentions that, on the preliminary record, the Court could not rule out that the directors’ had acted in bad faith. *See McPadden v. Sidhu*, 2008 Del. Ch. LEXIS 123 (Del. Ch. 2008); *In re Lear Corp. S’holder Litig.*, 2008 LEXIS 121 (Del. Ch. 2008). Indeed, in *McPadden*, the Court had concluded on the basis of the complaint, it appeared that the director-defendants’ actions in connection with a sales process “are properly characterized as either recklessly indifferent or unreasonable.” *McPadden*, 2008 Del. Ch. LEXIS 123, at *35. The *McPadden* and *Lear* decisions make clear that *Section 102(b)(7)* remains an important and viable protection for corporate directors and that on an appropriate record, it remains available as a basis for dismissal or summary judgment prior to trial.
stockholder litigation challenging a board’s decision to recommend a sale transaction is to employ well settled best practices. Those practices include:

- **Board’s role under Revlon.** A board of directors has ultimate responsibility for the direction of any sales process and should play an active role in structuring the process and supervising management and the corporation’s advisors in carrying out such a process. While management participation is generally important to an effective sales process, the CEO or other senior officers should not conduct critical negotiations before board involvement or without effective direction and oversight from the board. Allowing officers to negotiate material financial and structural terms of a transaction without effective board input will cause significant judicial skepticism, as it did in **Lyondell**.

- **Ensuring value maximization.** As part of a board’s proactive role in any sales process, directors should carefully consider whether a particular process or single bidder negotiation has been designed and carried out, and any proposed change of control transaction structured, so that under the particular circumstances the board has a reasonable basis to conclude that a proposed transaction offers the highest value reasonably attainable for stockholders. In **Lyondell**, the Court found insufficient evidence in the summary judgment record from which it could conclude unequivocally that the Lyondell board complied with its known obligation under **Revlon** to do so.

- **Periodic strategic review.** Directors should periodically review the corporation’s strategic position, the current M&A market, and the corporation’s readiness to deal with unsolicited bids, and should request presentations by legal and financial advisors in connection with such periodic review. This will help ensure that the board is in a position to react quickly to market developments or unsolicited offers and also that directors are well versed about the acquisition environment and their fiduciary responsibilities in conducting a sales process and approving a sale.

- **Proactive response to market developments.** Directors should respond proactively to market developments, like the Schedule 13D filing that played a significant role in the Court’s decision in **Lyondell**. Advance strategic planning, proactively responding to market developments, and ensuring that officers do not negotiate material terms with a prospective acquiror prior to any significant board involvement may help avoid a situation, such as that faced by the Lyondell board, in which a board is presented with a **fait accompli** that could have been prevented.

- **Single bidder strategy.** Directors should be particularly cautious when pursuing a single-bidder sale strategy. If directors possess a body of reliable evidence from which to evaluate the adequacy and fairness of a sale transaction in relation to potential alternative transactions, they may approve a sale without conducting a formal auction or a canvass of the market. The board should weigh the costs and benefits of such an approach, consider the sufficiency and reliability
of information available to the board, determine the appropriateness of any deal protection measures in view of the decision not to conduct a multi-bidder process, decide whether the overall approach is reasonably designed to maximize value under the circumstances, and carefully document the board’s process and deliberations concerning all those matters.

- **Deal protection.** Directors and their advisors should not assume there is a one-size-fits-all approach to deal protection measures (e.g., that a termination fee is *per se* reasonable if it falls within the 2-3% range). Reliance on such “rules of thumb” can be dangerous, and whether a package of deal protection measures is reasonable in a particular case is always a contextually-specific inquiry.

- **Allow adequate time.** Adequate time should be allotted at scheduled board meetings for consideration of material matters. In *Lyondell*, the Court was skeptical that the board could have fully and effectively considered all the matters it claimed to have considered in the course of a handful of relatively short meetings.

- **Documentation and minutes.** It is important to create a well-documented, contemporaneous record of careful board deliberation, both leading up to and throughout a sales process. In stockholder suits challenging board action, minutes are often some of the most significant evidence, as was the case in *Lyondell*, where the Court’s skepticism about the reliability of minutes appears to have been a contributing factor to the denial of summary judgment. Minutes should be sufficiently detailed so that it is later possible for the directors to establish, or a neutral fact-finder to determine, the substance of matters discussed, the scope of the board’s deliberations, the information and any advice upon which the directors relied, the basis for any determinations made, and the approximate length of time spent considering matters of importance.

None of the foregoing practices should come as a surprise to corporate practitioners. Yet to one degree or another, the summary judgment record in *Lyondell* reflected potential deficiencies with respect to each, all contributing to the Court’s conclusion that, on the record before it, there were material questions of fact precluding the grant of summary judgment. Had the record been different as to some or all of these areas, the decision may well have come out differently.

**Conclusion**

To best understand *Ryan v. Lyondell* and its impact, it is important to keep in mind its procedural posture – a motion for summary judgment. The ruling was necessarily preliminary in nature and was based on a limited summary judgment record. The Court itself emphasized that the outcome was driven more by the stringent summary judgment standards than by substantive corporate law. With that in mind, the “sky-is-falling” reaction to the decision seems largely unwarranted. While there is room for debate about whether the Court properly denied summary judgment on the record presented, the decision should not be read – as many commentators have read it – as signifying a monumental shift in Delaware corporate law or as requiring changes in well established best practices in the M&A context.
**TASK FORCE REPORTS**

**Task Force on Acquisitions of Public Companies**

We had a very productive set of meetings in New York City in August. At our Task Force meeting on Saturday, we tackled several issues in the Miscellaneous section relating to remedies, which were raised by Ryan Thomas’s drafts dealing with the *Consolidated Edison* case. We had a lively discussion about (i) what remedies might appropriately be available to a seller following a buyer’s breach of a merger agreement, (ii) the ability of a corporation to sue on behalf of the stockholders for any such remedy in the absence of language relating to that right in the “no third party beneficiary” clause, and (iii) what the agreement might say to clarify that right. We took a look at the InBev language in contrast to language proposed in the commentary by Ryan Thomas, and discussed related Delaware law issues. We asked Ryan to work with Byron Egan and Hal Leibowitz on a revised draft of his commentary reflecting the group’s collective comments, and we hope to review this draft at our Fall Task Force meeting.

We also considered Section 7.2 and whether it was appropriate to continue our current drafting position, in which parties are liable for any material breach, or to modify the provision to provide liability only for “intentional” or “willful” breaches. We noted the judicial guidance as to the meaning of intentional and willful breaches in the *Johnson & Johnson v. Guidant* case. Jim Melville has revised the Termination section and Commentary for our consideration.

We then turned to the revised draft of Section 1 and provided comments to Hal Leibowitz. We expect a revised draft of Section 1 before our Fall meeting.

At our Editorial Board meeting on Sunday we considered the status of the draft. Steve Knee agreed to take on the representations and warranties in Sections 2.7 and 2.8 to determine if these representations are appropriate in a public company merger agreement, and if so to prepare commentary. Steve also agreed to prepare commentary for Sections 2.26 (brokers) and 2.27 (full disclosure). We requested that the Termination and Meeting Covenants sections be revised before our Editorial Board Stand-Alone Meeting.

**Editorial Board Stand-Alone Meeting**

The Editorial Board met in Minneapolis on September 19-20 (thanks to Jim Melville for organizing this meeting) and we had drafting sessions on Friday afternoon and a full day session on Saturday. Jim Griffin, Lorna Telfer and Ed Deibert attended the Editorial Board meeting to assist in various drafting projects. Lorna Telfer reviewed the status of definitions and agreed to work on formatting issues and to keep our draft current on issues from the Style Guide.

We spent the entire meeting in Minneapolis revising and finalizing the Conditions Sections and related commentary, using the excellent revised draft provided by Phil Stamatakos. We are continuing to work on this draft as an Editorial Board, with a telephonic meeting scheduled for October 13, and we are making excellent progress. We will move thereafter to finalizing the Termination Section and the Meeting Covenants, as drafts were provided prior to our Minneapolis meeting. We will send those drafts to the entire Task Force prior to the Fall meeting and discuss...
the key issues in our Task Force meeting, before moving into an Editorial Board meeting to continue drafting. We also hope to review the final draft of Section 1 prior to our Fall Meeting. Work is also continuing on the Representations and Warranties.

The Editorial Board has posted materials regarding the Model Agreement to the Burr & Forman extranet and we encourage members of the Editorial Board to use the extranet for access to current documents. Thanks to George Taylor for his help and that of his firm in providing access to the extranet as we move to completion of the draft Agreement.

**Fall Meeting**

Our Fall Task Force meeting will be held on Saturday, October 18, at 9:00 a.m. until 10:00 a.m., at the Four Seasons Aviara. We will discuss the key issues raised in the Termination and Meeting Covenants Sections, and we will also review the final draft of the Exchange Ratio Article (Yvette Austin Smith to lead discussion), Section 1 (Exchange) and the Voting Agreement (Bryan Davis to lead discussion). One likely highlight of this meeting will be a reprise on the issue of how to present the “fiduciary termination right.”

Our Editorial Board will meet on Saturday, October 18, from 10:00 a.m. until 1:00 p.m. Task Force members who are interested in an active role in the drafting process are welcome to participate.

We will not have a Task Force dinner at the Fall meeting because there will be two Committee dinners.

**Wilmington Meeting**

Mark Morton has coordinated with the members of the Delaware judiciary and we have scheduled our annual pilgrimage to Delaware for February 6-7, 2009. As usual, we will be having a dinner Friday evening and a meeting with the Delaware judiciary on Saturday, from 9:00 a.m. until 12:00 p.m., where we will discuss a hypothetical. There will be a dinner Saturday evening for those remaining in town. We have been advised that Chief Justice Steele, Justices Jacobs and Ridgely, and Vice Chancellors Parsons, Lamb and Noble will attend. We will provide more details closer to the date, but feel free to make reservations at the Hotel DuPont.

As you can tell there is a lot of activity on our Model Agreement and the Ancillary Documents and much of the work needs to proceed “off-line” with subcommittees. If you have an interest in helping on the ongoing work, please see me or Steve Knee at the Fall meeting.

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. Articles 3 and 4 will be the next sections for revision. Drafting assignments have been made as a result of discussions at the New York meeting. Revisions for Article 12 Commentary will be reviewed in depth at our meeting in California.

We look forward to seeing you at the Four Seasons Aviara.

Robert T. Harper
Chair
International M&A Subcommittee

The International M&A Subcommittee met in August 2008 in connection with the ABA Annual Meeting at the Grand Hyatt in New York.

Presentation on M&A in Brazil

The meeting began with an excellent presentation by Walter Stuber on the subject of M&A in Brazil.

Post-Closing Dispute Resolution Project

Katrien Vorlat and Guy Harles then led an interesting discussion summarizing the preliminary results of their survey on post-closing dispute resolution techniques.

FDI Restrictions Project

Frank Picciola gave an overview of current progress on this project, including a short summary on sample materials produced by him and relating to Canada. He is now looking for volunteers to assist with other jurisdictions and with editing the project.

Future Projects and Programs

Jean Paul Chabaneix proposed a program on preliminary agreements.

John Leopold proposed a program based on the Subcommittee’s International Appendix to the Model Stock Purchase Agreement (along the lines of an idea originally suggested by Ed Kerwin at the Dallas meeting) but with the added suggestion of utilizing mock negotiation techniques and including materials from the M&A Market Trends Subcommittee and Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee as to where parties and the courts ended up in practice.

It was noted that the International Law Committee was considering a program in Vancouver on dispute resolution techniques. Guy Harles and Katrien Vorlat confirmed that they would be happy to represent our Subcommittee in co-sponsoring such a program.

Jim Walther raised the idea of a project on the international convergence of accounting standards relevant to M&A work. He also suggested a project on the use of new organizational structures for cross-border M&A such as the EU’s Societas Europas.

Freek Jonkhart suggested a program on post-closing adjustments, lock box structures, etc.

Wilson Chu proposed a program on the use of offshore entities in M&A structuring to cover issues such as merger procedures, fiduciary duties, and relevant tax treaties.

Publications

Wilson Chu gave a brief update on sales of the Subcommittee’s publications. The International M&A Due Diligence publication had, as of June 2008, sold 626 copies since August 2007 and will shortly be available online on an individual chapter basis.

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. Points discussed included:

- Saul Feilbogen talked about recent relaxations in Argentinean exchange control rules.
Saul Feilbogen also mentioned that Argentina had recently seen the advent of practitioner meetings with members of the judiciary, in order to prevent judges from becoming too isolated from complex technical issues which can arise in practice and which otherwise can drive parties to arbitration to settle disputes.

Rick Silberstein described a practical issue arising in Spain, where it was taking three to four months for new entities to obtain a tax ID number.

Nicholas Dietrich mentioned that the U.S. Treasury had released a Technical Explanation of the proposed Fifth Protocol to amend the Canada-U.S. Tax Convention but that this had not properly explained the application of the Protocol to certain hybrid entities (such as unlimited liability companies) commonly used in structuring U.S. investments into Canada. This could lead to an increase in structuring these investments through other jurisdictions and so the position should be kept under review.

Nicholas Dietrich also mentioned that a review in Canada of the anti-trust laws had just been completed and had proposed a series of policy recommendations aimed at making Canada a more attractive destination for investment. These included proposals to increase the review thresholds to $1 billion in enterprise value and to shift the onus to the government to show why a foreign investment is not in the national interest, as well as to update and modernize competition law in line with best practices internationally.

Subcommittee Website

The Subcommittee’s website (which can be found at the following address: www.abanet.org/dch/committee.cfm?com=CL560016) contains the following items:

- The notes of the presentation by Walter Stuber on M&A in Brazil.
- A summary by Katrien Vorlat and Guy Harles of the preliminary results of their survey on post-closing dispute resolution techniques.
- The Canadian materials presented by Frank Picciola in the context of the FDI restrictions project.
- Details of the various Subcommittee’s publications.
- A summary of the points raised in the open discussion session.
- As usual, details of future meetings, work-in-progress, and past program materials.

We look forward to seeing you at the Four Seasons Aviara.

Daniel Rosenberg
James R. Walther
Co-Chairs
Membership Subcommittee

We continue to grow notwithstanding the turbulent financial markets! The Committee has over 3,115 members representing 42 countries.

The M&A Market Trends Subcommittee is currently the largest subcommittee with over 1,120 members followed by the Private Equity M&A Subcommittee with 888 members. We have over 335 in-house counsel members. Our “associate” (non-lawyer) members total 250. 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 San Diego, Friday, October 17, from 1:30 p.m. until 3:00 p.m., in the Avocet Room of the Four Seasons Resort Aviara. The Judicial Interpretations Working Group will meet immediately thereafter, from 3:00 p.m. until 5:30 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 busy summarizing the decisions that have been selected for inclusion in our 2008 annual survey. In San Diego, we will discuss those decisions and any others that are brought to our attention as candidates for inclusion. To join our working group, please email Jon Hirschoff with a copy to Scott Whittaker, or simply come to the working group meeting at the Four Seasons Aviara.

As always, we are asking all members of the Committee on Mergers and Acquisitions to send us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by email either to Scott Whittaker at swhittaker@stonepigman.com or to Jon Hirschoff at 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.

Decision to be Discussed at the Committee Meeting


Schrader-Bridgeport International, Inc. v. ArvinMeritor, Inc. involved, in the context of the defendant’s motion for judgment on the pleadings, the interpretation of the notice and time limit provisions contained in the indemnification article of a stock purchase agreement (the “SPA”).

In February of 1995, Arvin Industries (“Seller”) sold all of the capital stock of its subsidiary, Schrader Automotive Inc. (“Target”) to KSCH Holdings, Inc. (“Buyer”), pursuant to a Stock Purchase Agreements dated February 15, 1995 (the “SPA”). The plaintiff in this litigation is the successor by merger to the Buyer and the Target, and the defendant is the successor by merger to the Seller.

Under the SPA, Seller agreed to assume responsibility for the remediation of certain known environmental violations. Furthermore, in Section 8.1 of the SPA, Seller agreed to indemnify Buyer, Target and certain other indemnitees against Loss arising out of (i) those known environmental violations or (ii) out of environmental regulations in effect as of the closing date, if the Loss arose out of facts, conditions or events occurring or existing on or prior to the closing date and related to certain properties or to the operations of the Target and its subsidiaries.

In its complaint, filed on March 30, 2007, more than twelve years after the closing, the Buyer alleged that since the execution of the SPA, it had incurred $697,120 in costs and expenses remediating certain environmental contamination, that it anticipated incurring additional costs and expenses, and that those costs and expenses were Losses arising out of the known environmental violations and out of environmental regulations in effect on the closing date.

The commencement of litigation had been preceded by written correspondence from the plaintiff to the defendant, sent on February 28, 2006, demanding that the defendant assume sole responsibility for remediation of certain environmental contamination, including compliance with requirements of North Carolina law, and that the defendant indemnify and reimburse the plaintiff pursuant to the SPA. The defendant refused to indemnify the plaintiff and the litigation followed. It is not apparent, from the opinion or from the attached memorandum and recommendation of the U.S. Magistrate Judge, why the plaintiff waited eleven years to make its demand.

The defendant’s motion for judgment on the pleadings asserted that neither the filing of the action nor plaintiff’s notice to the defendant was timely under the SPA. The provisions of the SPA relevant to these issues were the following:

Section 8.3(a) Notice of Claim. If any matter shall arise which, in the opinion of the Indemnified Party, constitutes or may give rise to a Loss subject to indemnification by the Indemnifying Party . . . (an “Indemnity Claim”), the Indemnified party shall give prompt written notice (a “Notice of Claim”) of such Indemnity Claim to the Indemnifying Party setting forth the relevant facts and circumstances . . . in
reasonable detail and the amount of indemnity [sought]. The Indemnified Party’s failure to notify the Indemnifying Party of any such matter within the time frame specified shall not release the Indemnifying Party, in whole or in part, from its obligations hereunder except to the extent that the Indemnifying Party’s ability to defend such claim is prejudiced thereby. (Emphasis added).

Section 8.4(c) Time Limit for Indemnity Claims. Seller shall not have any liability for any Loss otherwise indemnifiable by Seller hereunder with respect to which a Notice of Claim has not been given to Seller prior to 30 months after the Closing Date, except with respect to . . . (iii) an Indemnity Claim . . . pertaining to environmental matters in the U.S., in which case the Notice of Claim must have been given no later than 60 days after the expiration of the applicable statute of limitations with respect to such matters . . . . (Emphasis added).

As to the defendant’s assertion that notice was not timely, both the District Court’s opinion and the Magistrate Judge’s recommendation read the words “within the time frame specified” in Section 8.3(c) to refer not to the word “prompt” in that section, but instead to the time limits in Section 8.4(c). This interpretation led the District Court and the Magistrate Judge to the somewhat disturbing conclusion that the time limits of Section 8.4(c) did not operate to cut off the defendant’s claims unless the defendant was prejudiced by the plaintiff’s failure to give notice within the time periods specified in Section 8.4(c). The District Court accepted the Magistrate Judge’s conclusion that the SPA was ambiguous as to what would trigger the “applicable statute of limitations,” and that even if the SPA was not ambiguous, whether the defendant was prejudiced by the lack of prompt notice was a factual issue which must be determined by a jury. Presumably the SPA would have been given a different interpretation had Section 8.3, instead of referring to a “time frame,” provided that failure to give prompt notice would not release the Indemnifying Party from its obligations except to the extent that its ability to defend was prejudiced.

With respect to the time limit issue itself, the central issue was the proper interpretation of the words “60 days after the expiration of the applicable statute of limitations with respect to such matters.” The parties agreed that the applicable statute of limitations was a matter of North Carolina law; however, they advanced very different positions as to when the statute began to run. Specifically:

1. The defendant argued that North Carolina’s three-year statute applicable to claims for environmental contamination applied, and began to run in March 1995, when the plaintiff began remediation, because all of the contaminants upon which plaintiff based its claim were disclosed and known when the SPA was executed.

2. The plaintiff argued:
   a. With respect to its breach of contract claim for the defendant’s failure to remediate the contamination, that the applicable statute of limitations was either North Carolina’s ten-year statute for claims arising from a sealed instrument, or the three-year statute for other breach of contract claims, in any case running from February, 2006, when the defendant refused to assume responsibility for the remediation.

   b. With respect to its indemnification claim, that the underlying claim for which it
sought indemnification was the State of North Carolina’s claim for remediation, as to which there is no applicable statute of limitations.

Not surprisingly, the court found this provision to be ambiguous, and therefore declined to resolve it in the context of a motion for judgment on the pleadings.

Given the frequency with which the phrase “applicable statute of limitations” is used in indemnification provisions of acquisition agreements, this case might cause M&A practitioners to note the number of different interpretations that phrase can have, and consider how that language might be clarified.

**Judicial Interpretations Working Group**

The Judicial Interpretations Working Group met during the Committee’s August meeting in New York. Attendees at that meeting discussed several memoranda, on the topics of (1) a Buyer’s right to “walk” as a result of an immaterial failure to satisfy a closing condition, (2) judicial interpretations of bring down conditions, and (3) judicial interpretations of standstill agreements and no-shop 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 other provisions of acquisition agreements and ancillary documents.

The Fall meeting of the Judicial Interpretations Working Group will be held on Friday, October 17, from 3:00 p.m. until 5:30 p.m., at the Four Seasons Aviara. At that meeting we will be discussing a memo by Frederic Smith, Shima Roy and Brian North pertaining to the jurisprudence regarding attorney-client privilege and conflicts of interest in negotiated acquisitions.

To join our working group, please email Jim Melville (jcm@kskpa.com) and copy Scott Whittaker (swhittaker@stonepigman.com) or simply come to the working group meeting at the Four Seasons Aviara.

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 is very pleased to report that the first international M&A Deal Points Study has been completed and released to members of our Committee. Under the leadership of John Clifford, Chair, and Vice Chairs Mireille Fontaine and Kevin Kyte, a team of 29 Canadian and American attorneys reviewed the terms of recently completed Canadian private target deals and prepared a report that summarizes Canadian deal term practices and compares those trends to findings of our Subcommittee’s U.S. private target study. The Canadian report has been posted on the Committee’s website. Thanks to the Canadian team for all of their efforts.

The Subcommittee is currently working on a number of things, including:

- our European Deal Points Study, led by co-chairs Freek Jonkhart and Reid Feldman;
- 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.

We had a well-attended meeting in New York in August. At the New York meeting, Jerry Mehm from American Appraisal discussed the latest trends in accounting for contingent liabilities, which provoked a thoughtful discussion by the group. Members of the Subcommittee discussed the hot-off-the-presses “v2” of the 2007 Private Target Deal Points Study, including results of our analysis of pervasive qualifiers (such as materiality and knowledge) as well as data showing correlations between sandbagging and non-reliance clauses. John, Mireille, and Kevin discussed some preliminary results from the Canadian Study and how they match up to our U.S. data, and Freek provided an update on the European Study.

The agenda for our Fall meeting includes the following:

• Mark Danzi, who sliced the data from the 2007 Private Target Deal Points Study to determine the differences between the results for all sellers as compared with the results for financial sellers, will be leading a discussion of his findings; and

• we will be discussing next steps in kicking off our 2008 and 2009 studies.

We look forward to seeing you at the Four Seasons Aviara.

Keith Flaum
Chair

Hendrick Jordaan
Jessica Pearlman
Co-Chairs

Private Equity M&A Subcommittee

The Private Equity M&A Subcommittee met in New York City in August 2008 in conjunction with the ABA’s Annual Meeting. The Subcommittee meeting was well-attended in person and by phone.

During the two-hour session, Hamilton Crawford, Ray Kane and Scott Sergeant of Houlihan Lokey Howard & Zukin presented an overview of the current state of the private equity markets and participated in a related discussion of trends in PE deal terms. 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. Both segments of the program 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
Program Subcommittee

The 2008 Fall Stand-Alone Meeting will feature a Committee Forum on Saturday, October 18, from 4:30 p.m. until 5:30 p.m. John Hughes, Co-Chair of the Private Equity M&A Subcommittee, will be chairing and serving as moderator of this timely forum on private equity in the Financial Institutions sector. John M. Butler, Principal in the Investment Banking/Financial Institutions Group at investment banking firm Piper Jaffrey & Co., will address the current M&A market environment in general and the market for M&A and private equity transactions in the Financial Institutions sector in particular.

Future Programs

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@sheppardmullin.com) or David Albin (dalbin@fdh.com).

Thomas Thompson
Chair

Technology Subcommittee

Our plenary session at the Fall Stand-Alone meeting at the Four Seasons Aviara will once again be broadcast via conference call so that it can be heard by members who are unable to attend. Dial-in information will be distributed via email in advance of the meeting. We will post the written materials under the Programs Subcommittee tab on the website. For those who would like a sneak peak at the presentation, the bulk of the materials have already been posted there.

The ABA technology staff is hard at work on a number of technology enhancements that will improve the usefulness of communication tools made available to ABA members. The knowledge sharing platform, known generally as “Facebook for Lawyers,” is in the beta testing stage and should be rolled out by next summer. More importantly, the ABA is implementing collaboration software that will allow groups to share documents and to collaborate on drafting projects. The newest proposal is unlike the larger knowledge-sharing platform in that it will permit the establishment of closed groups with limited access for drafting projects. This system may well replace document sharing that has been accomplished in the past by various groups through the use of law firm extranets and will be a welcome addition to our ABA technology tools.

The website has received an upsurge in hits recently as a result of posting of the first international Deal Points Study, this one summarizing recent Canadian transactions. The success of our Committee’s website depends largely upon the furnishing of timely content by the members. Please consider the website as you and the various groups with which you work determine how to distribute content that you have generated that would be of use to our fellow practitioners.

Gregory T. Taylor
Chair
COMMITTEE MEETING MATERIALS

COMMITTEE ON MERGERS AND ACQUISITIONS
2008 FALL MEETING
CARLSBAD, CA
OCTOBER 17 - 18

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, October 17

Editorial Working Group for the Model Stock Purchase Agreement
8:00 a.m. – 11:00 a.m.

Private Equity M&A Subcommittee
11:00 a.m. – 1:00 p.m.

Lunch (ticket required)
12:30 p.m. – 2:00 p.m.

Annual Survey Working Group of the M&A Jurisprudence Subcommittee
1:30 p.m. – 3:00 p.m.

M&A Market Trends Subcommittee
3:00 p.m. – 4:30 p.m.

Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee
3:00 p.m. – 5:30 p.m.

Reception
6:00 p.m. – 7:00 p.m.

Dinner
7:00 p.m.

Saturday, October 18

International M&A Subcommittee
8:00 a.m. – 10:30 a.m.

Task Force on Acquisitions of Public Companies
9:00 a.m. – 10:00 a.m.

Editorial Working Group for the Task Force on Acquisitions of Public Companies
10:00 a.m. – 1:00 p.m.

Lunch (ticket required)
12:00 p.m. – 1:30 p.m.

Committee Leadership Meeting
1:30 p.m. – 2:30 p.m.

Full Committee Meeting
2:30 p.m. – 4:30 p.m.

Committee Forum
4:30 p.m. – 5:30 p.m.

Reception
6:30 p.m. – 7:30 p.m.

Dinner
7:30 p.m.
American Bar Association, Section of Business Law, Committee on Mergers and Acquisitions. The views expressed in the Committee on Mergers and Acquisitions Newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Committee on Mergers and Acquisitions. If you wish to comment on the contents, please write to the Committee on Mergers and Acquisitions, Section of Business Law, American Bar Association, 321 N. Clark Street, Chicago, Illinois, 60610.