DEAL POINTS
The Newsletter of the Committee on Mergers and Acquisitions

FROM THE CHAIR
By Joel I. Greenberg

Our Committee’s next meeting will be held in conjunction with the American Bar Association’s Business Law Section Spring Meeting in Vancouver, B.C., from Friday, April 17, 2009 through Saturday, April 18, 2009, at the Vancouver Convention & Exhibition Centre. The full Committee meeting will be held Saturday afternoon, starting at 12:30 p.m., with the Committee forum following at the end of the meeting. Most of our meetings will be available by conference telephone. The dial-in information for the full Committee meeting and Committee forum is as follows:

U.S., Domestic: (800) 530-9010
International: +1 (212) 896-6027
Pass Code: 7135871

Dial-in information for subcommittee and task force meetings is being circulated by the respective Chairs.

The Committee dinner is scheduled for Saturday evening at Cioppino’s at 1133 & 1129 Hamilton Street, Vancouver, with cocktails beginning at 6:30 p.m. and dinner at 7:30 p.m. Thanks to the generous support of American Appraisal, we were able to provide this dinner for only US$80 per person.

At this meeting, our Committee will sponsor three very timely programs and will co-sponsor a program at the Business Bankruptcy Luncheon. “Canadian and European M&A Market Trends” (Thursday, April 16, 2:30 p.m. – 4:30 p.m.) is the latest in our popular Deal Points series and presents the highlights of the

(continued on next page)
two recently released Deal Points studies covering Canada and Continental Europe. “Practical Impacts on M&A of U.S. and International Accounting Principles Convergence – What You Need To Know Now About IFRS and FASB 141R” (Saturday, April 18, 8:00 a.m. - 10:00 a.m.) will cover differences in approach of current US GAAP and International Financial Reporting Standards to common M&A issues, and the impact of those differences on transaction structures. The Committee forum will be “Selected Issues in M&A Under Delaware Law – A Mock Negotiation and Discussion” (Saturday, April 18, 3:00 p.m. – 4:00 p.m.), a mock negotiation and discussion of negotiating points in M&A transactions often faced by deal attorneys in their daily practice. Our Committee will be co-sponsoring a program on “Cross-Border Distressed Acquisitions: Latest Trends and Developments” (Thursday, April 16, 12:30 p.m. - 2:30 p.m.) at the Business Bankruptcy Committee Luncheon. Additional information on these programs can be found in the report of the Programs Subcommittee.

(continued in next column)

In Memoriam

Alison J. Youngman

On March 8, 2009, the members of our Committee lost a good friend and colleague when Alison J. Youngman lost her battle with lung cancer at the far too early age of 60. She was an active contributor to our Committee and co-chaired the task force that produced the Model Joint Venture Agreement with Commentary. She will be missed by all of us who knew her.
An M&A Lawyer’s Guide to the DGCL Amendments

By Michael B. Tumas, John F. Grossbauer and Michael K. Reilly

The recently approved amendments to the General Corporation Law of the State of Delaware (the “DGCL”) have garnered significant public interest. Much of that interest has focused on certain amendments relating to proxy access and proxy expense reimbursement. Although those particular amendments have received much of the attention, M&A counsel should be mindful of the impact of two other amendments on the negotiation of M&A transactions. One amendment addresses the problem of “empty voting” and permits a board of directors of a Delaware corporation to provide separate record dates for determining stockholders entitled to notice of and to vote at stockholder meetings, including meetings convened to vote on the approval and adoption of a merger agreement. Another amendment implicates the negotiation of indemnification and advancement rights of a target corporation’s former officers and directors by expressly providing that pre-existing indemnification and advancement rights provided in a corporation’s governing documents cannot be impaired by later amendments to those documents.

“Empty Voting” Amendments

For M&A counsel, the most salient issue to be addressed in the 2009 amendments has its origins in the concern over the effects of “empty voting.” Empty voting most commonly occurs when a stockholder: (i) sells its shares during the period of time after the record date, (ii) acquires voting rights to a significant block of publicly traded stock without acquiring a comparable economic interest in the company prior to the date of a stockholder meeting, or (iii) simultaneously takes a short position that offsets the stockholder’s economic interest in the company. By divorcing voting power from economic interest, empty voting potentially disrupts the presumed tendency of stockholders to vote in a manner that maximizes their ownership interests in the company.

Hedge funds and other large stockholders that are successful in borrowing a significant number of shares and/or shorting the underlying stock may acquire enough voting power to swing a stockholder vote in their favor without having to take a comparable economic stake in the corporation. Under such circumstances, a significant number of shares could be voted in a manner that is inconsistent with the best interests of the corporation or its economic owners. For example, a hedge fund could borrow a large number of shares prior to the record date for the vote on a proposed merger, vote against the merger and sell the shares short, resulting in a profit derived from the knowledge that the proposed merger would be defeated.

One of the factors contributing to empty voting is the relatively long period of time between the record date and the date of a

1 Michael B. Tumas, John F. Grossbauer and Michael K. Reilly are partners in the Wilmington, Delaware 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.

2 The Governor of the State of Delaware has signed the amendments into law. The amendments will become effective on August 1, 2009.
stockholder meeting. The amendments to Section 213(a) of the DGCL, which outlines the process by which corporations may determine stockholders of record for purposes of stockholder meetings, provide a partial answer to this issue by permitting a board of directors to fix a record date for voting separate from the record date for notice of the stockholder meeting. In this way, a board may fix a record date for voting, at the time it fixes the record date for notice, that is closer to the meeting date, and presumably more reflective of the stockholder base, than a record date that is as many as 60 days prior to the meeting date.

The need to provide for notice well ahead of a meeting frequently occurs in the case of votes to approve mergers and other similar matters requiring a longer solicitation period. This has sometimes led to difficulty in obtaining required majority votes in cases in which a large number of shares changes hands following a record date because the holders of sold shares often fail to vote, and purchases in the public markets do not automatically carry with them associated authority to direct the voting of shares acquired after the record date. Revised Section 213(a) of the DGCL provides no limit on how close the voting record date may be to the meeting date. For public companies, this will need to be determined in consultation with non-Delaware actors such as transfer agents, stock exchanges and proxy voting services.

For M&A counsel, the changes permitting the separation of the record dates for purposes of voting and notice are significant. In connection with an M&A transaction, counsel will need to consider whether a board of directors should set a record date for the vote on a merger, at the time it sets the record date for the notice, so that it occurs closer to the time of the meeting. In general, setting the record date closer to the time of the meeting should have a positive effect on the outcome of the vote, as the stockholders of record closer to the date of the vote should have an economic incentive to vote in favor of the merger. It is conceivable, however, that there could be particular circumstances in which a merger could be defeated as a result of a change in circumstance between the time of the notice of the meeting and the time of the vote. As a result, any decision to bifurcate the record dates should be done on a case-by-case basis depending on the particular circumstances.

Indemnification and Advancement Rights

The amendments also include a revision to Section 145(f) of the DGCL that adopts a

3 The changes in Section 213 necessitate conforming changes to a number of other sections to include the concept of different record dates for determining entitlement to notice and to exercise voting rights. These include Sections 211, 219, 222, 228, 262 and 275 of the DGCL.

4 The amendments to Section 213(a) of the DGCL also add language applying the separation of notice and voting record dates to adjourned meetings.

5 Not only late arriving offers from competing bidders, but also other late breaking news relating to the value of the target corporation (or other information) could lead to a rejection of a merger transaction. For example, a different result on a merger vote would have been likely in the merger involving Transkaryotic Therapies, Inc. See In re Transkaryotic Therapies, Inc., 954 A.2d 346 (Del. Ch. 2006) and In re Appraisal of Transkaryotic Therapies, Inc., 2007 Del. Ch. LEXIS 57 (Del. Ch. Feb. 9, 2007). After the record date but prior to the vote on the merger, the target corporation learned of extraordinarily positive results for one of its pharmaceutical products. The merger was approved by a slim margin. If the record date for the vote occurred after the announcement of the late breaking news, the approval of the merger would have been placed in doubt.
default rule that is contrary to that articulated by the Court of Chancery in Schoon v. Troy Corp.\(^6\) In connection with M&A transactions, the revision is significant for purposes of negotiating indemnification and advancement rights of former officers and directors of target corporations.

In Schoon, the Court of Chancery held that a board of directors can amend a corporation’s bylaws to eliminate indemnification or advancement rights for claims relating to actions taken prior to such amendment, provided that no claim has actually been made against the indemnitees before the amendment is adopted. In Schoon, William J. Bohnen (“Bohnen”), a former director of Troy Corporation (“Troy”), pursued claims for advancement in connection with defending threatened and pending fiduciary duty claims asserted by Troy. Bohnen was the director-nominee of Steel Investment Company (“Steel”) from 1988 until February 2005, at which time Richard W. Schoon (“Schoon”) replaced Bohnen. In September 2005, Steel and Schoon sued Troy for access to certain books and records under Section 220 of the DGCL. Shortly thereafter, in November 2005, Troy’s board of directors amended the bylaws to remove the word “former” from its definition of the directors entitled to advancement.\(^7\) In early 2006, Troy initiated fiduciary duty claims against Bohnen and Schoon, alleging that the former and current directors provided proprietary information to Steel in contravention of their fiduciary obligations to Troy.

While the proceedings were pending, Bohnen and Schoon formally demanded advancement of their fees and expenses in defending the fiduciary duty claims. The Court of Chancery determined that, as a former director, Bohnen was not entitled to advancement under the amended bylaws. 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.\(^8\) The Court of Chancery rejected this argument and found that the right to advancement vests upon the triggering of the corporation’s obligations. Thus, even though the alleged breaches occurred before the bylaw amendments, because Bohnen 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 him prior to the amendments), his rights under the pre-amendment bylaws had not been triggered.\(^9\)

Schoon heightened the concerns with respect to the protection of the indemnification

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\(^6\) 948 A.2d 1157 (Del. Ch. 2008).

\(^7\) Id. at 1161.

\(^8\) Id. at 1165. In support of his argument, Bohnen cited Salaman v. National Media Corp., 1992 Del. Super. LEXIS 564 (Del. Super. Oct. 8, 1992), wherein the Superior Court granted advancement rights to a director for fees incurred in connection with defending a breach of fiduciary duty claim. In that case, after advancing the plaintiff a portion of his fees, the defendant corporation amended its bylaws to repeal the basis for the claimed right and then refused any further advancement. The Salaman Court rejected the corporation’s argument that it could amend the bylaws to deny Salaman his preexisting right to advancement, holding that the corporation could not “unilaterally rescind a vested contract right upon which Salaman relied.” Id. at *17. In the instant case, however, 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.” Schoon, 948 A.2d at 1166 (emphasis added).

\(^9\) Id. at 1166.
and advancement rights of a target corporation’s officers and directors following the effective time of a merger. The amendment to Section 145(f) of the DGCL adopts a statutory rule that alleviates those concerns. Specifically, pursuant to revised Section 145(f) of the DGCL, a corporation cannot eliminate or impair an indemnitee’s right to indemnification or advancement of expenses granted under a provision in the corporation’s certificate of incorporation or bylaws through an amendment to such provision adopted after the occurrence of the act or omission to which the indemnification or advancement of expenses relates.

Such an amendment eliminating indemnification or advancement rights may be permitted, however, if the provision in the certificate of incorporation or bylaw in effect at the time of the act or omission includes language expressly authorizing such elimination or limitation. It remains important, therefore, for counsel in M&A transactions to carefully scrutinize the existing governing documents of the target corporation and to negotiate the relevant provisions of the merger agreement in light of the particular context.

Other Amendments

The other amendments to the DGCL, although significant and generating intense interest, are of less significance in the context of negotiated M&A transactions. Those amendments create new Sections 112 and 113 of the DGCL that expressly permit Delaware corporations to adopt bylaws implementing proxy access and requiring reimbursement of stockholder proxy expenses in certain circumstances, as well as a new provision permitting judicial removal of directors under specified circumstances.

Access to Proxy Solicitation Materials

The amendments create new Section 112 of the DGCL expressly authorizing a Delaware corporation to adopt a bylaw that grants stockholders the right to include within the corporation’s proxy solicitation materials stockholders’ nominees for the election of directors, subject to any lawful conditions the bylaws may impose. The subject of “proxy access” had been a significant one, and it promises to continue to be so in the current environment. At issue is whether companies may be required to include in company proxy materials nominees for director proposed by stockholders in addition to nominees proposed by the company. Activist investor groups have long argued that stockholders should be permitted to nominate directors without having to mount a costly proxy battle.

The Securities and Exchange Commission (the “SEC”) will be revisiting the issue of proxy access in the near future, and it is possible that the SEC will reverse its long-standing policy of permitting companies to exclude from its proxy materials stockholder proposals seeking the adoption of proxy access rules. If the SEC revises its position and permits proxy access stockholder proposals to be included in a company’s proxy materials, Section 112 will facilitate the adoption and implementation of proxy access rules by Delaware corporations.

Section 112 of the DGCL removes any uncertainty regarding the ability of Delaware corporations to effect proxy access through adoption of a bylaw. In particular, the bylaws of a Delaware corporation may require that if the corporation solicits proxies with respect to an election of directors, the corporation may be required to include in its proxy materials one or more nominees submitted by stockholders, subject to certain limitations and conditions. The amendment clarifies that corporations may
impose reasonable restrictions on the stockholders’ right to access company proxy materials and identifies a non-exclusive list of restrictions that are deemed to be reasonable.\textsuperscript{10}

The adoption of Section 112 of the DGCL thus would provide a more certain path for corporations and stockholders desiring to implement proxy access to balance the often disruptive nature of proxy contests with the desire to provide significant stockholders an avenue for effecting changes to the composition of the board of directors.

Proxy Reimbursement Bylaws

The other new election-related statute is Section 113 of the DGCL, which effectively codifies the Delaware Supreme Court’s decision in \textit{CA, Inc. v. AFSCME Employees Pension Plan}.\textsuperscript{11} In \textit{CA, Inc.}, the Delaware Supreme Court answered certified questions of Delaware law from the SEC, as permitted under a recent amendment to the Constitution of the State of Delaware.\textsuperscript{12} In an \textit{en banc} opinion, the Delaware Supreme Court held that a proposed bylaw that would have required \textit{CA, Inc.} to reimburse the reasonable expenses of stockholders that were successful in short-slate director election contests was a proper subject for stockholder action, but as drafted, would violate Delaware common law by infringing upon the directors’ ability to fully discharge their fiduciary duties. In particular, the Court found that, notwithstanding the fact that the proposed bylaw would specifically require and direct the board to expend corporate funds, the context of the bylaw at issue was largely procedural in nature. The Court reasoned that stockholders of Delaware corporations have the right to participate in the nomination process and thus, “the shareholders are entitled to facilitate the exercise of that right by proposing a bylaw that would encourage candidates other than board-sponsored nominees to stand for election.”\textsuperscript{13}

\textsuperscript{10} One condition specified in Section 112 of the DGCL would permit the bylaws to establish minimum ownership requirements for stockholders to become eligible to include nominees in company proxy materials, measured both by amount and duration of ownership. The bylaws may establish this minimum ownership threshold by defining beneficial ownership to include ownership of options or other rights relating to stock, including derivative rights. Because Section 112 of the DGCL is intended to apply to stockholder nominations of short slates of directors and not as a vehicle for effecting changes of control through the corporation’s own proxy materials, the new section also expressly permits the bylaws to condition eligibility for inclusion of nominees in company proxy materials to nominations for a limited number of seats that may be contested and to preclude entirely inclusion of nominations by persons who own or propose to acquire (such as through a tender offer) more than a specified percentage of the corporation’s stock. The bylaws also may require the nominating stockholder to submit specified information such as information concerning the ownership of the corporation’s stock by the stockholder and the stockholder’s nominees. The bylaws also may condition eligibility to require inclusion of nominees in the corporation’s proxy materials on the nominating stockholder’s execution of an undertaking to indemnify the corporation for any loss resulting from any false or misleading information submitted by the stockholder and included in such proxy materials, or on “any other lawful condition.”

\textsuperscript{11} 953 A.2d 227 (Del. 2008).

\textsuperscript{12} DEL. CONST. Art. IV, Sec 11(8) (amended 2007) (authorizing the Delaware Supreme Court to hear and determine questions of law certified to it by (in addition to the tribunals already specified therein) the SEC).

\textsuperscript{13} 953 A.2d at 237.
Nevertheless, the Court ultimately determined that the proposed bylaw was inconsistent with Delaware law because, if adopted, the bylaw would require the board of directors to expend corporate funds without regard to their fiduciary obligations. Importantly, the Court noted that the bylaw was unenforceable as drafted “because the bylaw contain[ed] no language or provision that would reserve to CA Inc.’s directors their full power to exercise their fiduciary duty to decide whether or not it would be appropriate, in a specific case, to award reimbursement at all.” Justice Jacobs, writing for the Court, suggested that under at least one set of circumstances, the board of directors could be obligated to reimburse proponents that were successful, even if the proxy contest in question was driven by interests that conflicted with those of the corporation. Accordingly, the Court concluded that the fact that the proposed bylaw would require the board to expend corporate funds without regard to their fiduciary duties violated Delaware law and rendered the bylaw unenforceable as drafted.

Consistent with the Supreme Court’s decision in CA, Inc., new Section 113 of the DGCL would provide a statutory framework for the development of bylaw provisions that mandate reimbursement of reasonable expenses incurred by stockholders who achieve a defined level of success in a proxy contest. Specifically, Section 113(a) of the DGCL permits Delaware corporations to adopt a bylaw providing for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors, subject to such procedures or conditions as the bylaw may prescribe. Section 113 identifies a non-exclusive list of such conditions, including:

(i) conditioning eligibility for reimbursement on the number or proportion of persons nominated by the stockholder; (ii) conditioning eligibility on whether the stockholder previously sought reimbursement for similar expenses; (iii) limiting the amount of reimbursement (which may be based upon the proportion of votes cast in favor of such nominee or the amount expended by the corporation in soliciting proxies); (iv) limiting elections of directors by cumulative voting; or (v) any other lawful condition. The restrictions thus permit corporations to limit the reimbursement to “short-slate” contests, to define what level of “success” must be achieved in order to qualify for reimbursement, and otherwise to tailor their bylaws to their specific situation.

Judicial Removal of Directors

Section 225 of the DGCL, which affords directors, stockholders and corporations the right to a judicial determination of entitlement to office or the outcome of a stockholder vote, will be amended to add a new subsection (c) authorizing the Court of Chancery to remove a director in certain narrow circumstances upon the application of a corporation or derivatively by a stockholder on behalf of a corporation. The new subsection (c) authorizes the Court of Chancery to remove a director who has been convicted of a felony or found by a court to have committed a breach of the duty of loyalty if the Court of Chancery determines that the director did not act in good faith in performing the acts underlying the conviction or judgment.

16 Section 113 of the DGCL does not, however, include an express requirement that any proxy reimbursement bylaw contain a fiduciary out. It remains to be seen whether, notwithstanding the express statutory authority for a proxy reimbursement bylaw provided by Section 113 of the DGCL, Delaware courts will read a fiduciary out requirement into such a bylaw.

14 Id. at 240.
15 Id.
and that the removal of the director is necessary to avoid irreparable harm to the corporation. New Section 225(c) of the DGCL is purposely drafted very narrowly, and expressly requires that an action thereunder be brought “subsequent” to the one in which the underlying judgment is made. This amendment is similar to, though more circumscribed than, the judicial removal of directors provision in the Model Business Corporation Act,\textsuperscript{17} which has been enacted by several states.

\textbf{Conclusion}

When the amendments become effective on August 1, 2009, M&A counsel negotiating merger transactions should carefully consider, in the context of the particular M&A transaction at issue, the impact of the amendments relating to “empty voting” and indemnification and advancement rights of former officers and directors of a target corporation. The other amendments, although of less significance in the context of the negotiation of M&A transactions, are important and demonstrate Delaware’s preference for enabling legislation (as opposed to statutory mandates) and maintaining maximum flexibility for Delaware corporations.

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\textbf{TASK FORCE REPORTS}
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\textbf{Task Force on Acquisitions of Public Companies}

The Task Force held meetings in San Diego, California in October 2008 and in Wilmington, Delaware in February 2009. Our Editorial Board has also held numerous telephone conferences. We are pushing forward with the Model Agreement and we look forward to seeing all of you in Vancouver for our Task Force meeting.

\textbf{San Diego – October 2008}

We decided that the model agreement will not provide for a fiduciary termination right. We will, however, make it clear in the commentary that the buyer might include this provision in its first draft in some cases. We concluded that, if a buyer was dealing with a target where 30\% of the target’s shares were to be covered by voting agreements in a stock-for-stock deal, the buyer would maintain a “force the vote” posture in the first draft.

We also decided to retain a standard in the conditions of “in all material respects” for the truth of representations condition, and to change the materiality qualifiers in the representations to “material” as opposed to MAE qualifiers.

\textbf{Editorial Board Projects}

The Editorial Board has completed its work on the conditions section, which involved a several month effort, with numerous conference calls, to review and revise the entire conditions section. The Editorial Board published a new Model Agreement showing cumulative changes and has established a set of documents on the Brown Foreman secure website.

\textbf{Wilmington Meeting – February 2009}

We reprised our annual stand-alone Task Force meeting in Wilmington, Delaware, thanks to Mark Morton, Rick Alexander and Steve Bigler, who always work so hard to make us feel welcome, and to provide a stimulating and thought provoking day with our friends from the Delaware bench. We were joined on Saturday morning by Chief Justice Myron Steele, Justice Henry Ridgely, Justice Jack

\footnote{MODEL BUSINESS CORPORATION ACT, § 8.09.}
Jacobs, Vice Chancellors Stephen Lamb and John Noble, and Judge Thomas Ambro from the Third Circuit, for our annual dialogue with the judiciary concerning various issues arising in the context of deal negotiations.

This year we changed the format a bit – instead of one factual hypothetical, we dealt with a number of deal provisions and the negotiation of those provisions. We had a lively discussion of the various issues raised by Rick Alexander’s excellent outline. Thanks especially to the Chief Justice, and all the members of the judiciary, who spent their Saturday morning with us!

We also made good progress on the termination section. One issue we wrestled with is the various issues raised by having the target representing more than 20% of the stock of the buyer post-closing. This structure, while common back in days of pooling when we began this project, is today not as common as in the 90s. This structure drives some difficult issues, like whether the buyer should have the right to change its recommendation, whether the target should have a right to terminate in that event, and the termination fee payable on a change in buyer’s recommendation.

We reached a consensus that we would revise the fact pattern to assume an issuance of 10% of the buyer stock, no vote by buyer and, as a result, no right to change recommendation. Jim Walther is reviewing the agreement to make suggestions for changes based on the change in fact pattern. We will discuss this change in Vancouver, and we are considering a possible appendix showing the provisions one might consider if one did have a parent issuing more than 20% of its stock in the merger. We are considering a separate project to address changes which would be required for a cash transaction.

We look forward to seeing all of you at our Task Force dinner in Vancouver, and our Task Force meeting on Friday, April 17, 2009, from 12:00 p.m. until 2:30 p.m., in Room 301, Level Three of the Vancouver Convention & Exhibition Centre. We are also holding an Editorial Board meeting on Saturday, April 18, 2009, from 9:00 a.m. until 11:00 a.m., in Room 224, Level Two of the Vancouver Convention & Exhibition Centre. All Task Force members are welcome to attend our Editorial Board meeting.

Diane Holt Frankle
Stephen H. Knee
Co-Chairs

Task Force on Distressed M&A

The inaugural meeting of the Task Force on Distressed M&A will be held on Friday, April 17, 2009, from 8:30 a.m. until 9:30 a.m. The “DM&A” Task Force will focus on the unique issues associated with distressed deals in today’s turbulent economic times. David Hallett, Managing Director of Lazard Middle Market, will discuss the state of today’s distressed U.S. M&A markets. Rick Eng, Vice President of Brookfield Asset Management, a leading private equity fund in Vancouver, will discuss how deals are getting done, where opportunities reside and unique cross-border distressed M&A considerations. In addition, Lorna Telfer and Craig Menden will join William Epstein of American Appraisal in providing an abbreviated discussion on “Negotiating Solvency Provisions: State of the Art in a State of Uncertainty – The Financial Advisor’s Perspective.” We hope to see everyone there!

Hendrik Jordaan
Chair
Task Force on the Model Stock Purchase Agreement

The Editorial Committee continues to work on a draft of the Revised Model Stock Purchase Agreement. Additional drafting assignments have been made as a result of discussions at the October 2008 meeting. Also, the Editorial Committee has included members of the ABA’s AICPA Task Force in its recent meetings. The AICPA participants are reviewing and updating the financial matters contained in the provisions of the Revised Model Stock Purchase Agreement.

We look forward to seeing you in Vancouver.

Robert T. Harper
Chair

SUBCOMMITTEE REPORTS

International M&A Subcommittee

The International M&A Subcommittee met in San Diego in connection with the Committee’s Fall stand-alone meeting. At the meeting, we discussed the following topics:

Impact of Current Market Turmoil on World M&A

The meeting began with a wide-ranging group discussion on the subject of the impact of current market turmoil on world M&A.

FDI Restrictions Project

Frank Picciola led a discussion based on this current project. He will circulate a list of the 14 jurisdictions currently covered by the project and of the other key jurisdictions not currently covered.

Post-Closing Dispute Resolution Project

In the absence of Katrien Vorlat and Guy Harles, Jim Walther gave a short update on the post-closing dispute resolution techniques project.

Future Projects and Programs

There was then a discussion of possible future Subcommittee projects and programs, including the following:

- Possible mock negotiation program based on the Subcommittee’s International Appendix to the Model Stock Purchase Agreement techniques, with materials from the M&A Market Trends Subcommittee and the Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee (Ed Kerwin, John Leopold, Reid Feldman, Freek Jonkhart, and Xavier Ruiz). This was identified as a possible program for the Annual Meeting.

- Post-contract dispute resolution techniques. This was identified as a possible program for the Annual Meeting.

- International convergence of accounting standards relevant to M&A (Jim Walther). This topic has been scheduled as a program at the Spring Meeting.

- Use of offshore entities in M&A structuring, including relevant merger mechanics, fiduciary duties, and relevant tax treaties (Wilson Chu). This topic has been scheduled as a Subcommittee presentation at the Spring Meeting.

- IP reps and warranties in international M&A (Peter Haver). This was identified
as a possible Subcommittee presentation for a future meeting.

- Possible program on preliminary agreements (Jean Paul Chabaneix and Christiaan de Brauw).
- Director liability issues when appointing buyer directors to local target boards (Xavier Ruiz).
- Use of organizational structures such as the European SE (Christiaan de Brauw and possibly Reid Feldman).
- Post-closing adjustments, lock box structures, etc. (Freek Jonkhart).
- Employment and pensions issues in international M&A (Joe Stegbauer).
- Cross-border acquisitions of insolvent companies (Stan Freedman).
- Compliance programs to deal with Siemens issues when selling foreign subsidiaries (Jim Doub).
- Privacy issues in international M&A (Joe Stegbauer).

Publications

Wilson Chu gave a brief update on sales of the Subcommittee’s publications. The International M&A Due Diligence publication is now available online on an individual chapter basis at $50 per chapter.

Current Developments Discussion

The meeting concluded with our customary general discussion by Subcommittee members regarding legal developments in their jurisdictions relevant to M&A practice and particular issues they have recently encountered. Issues raised included:

- Mireille Fontaine summarised a number of recent Canadian developments, such as the latest proposals under the Investment Canada Act, developments relating to the Toronto Stock Exchange, and some changes to privacy law in Quebec.
- William Rosenberg and John Leopold referred to the recent use of the guidelines in relation to state-owned enterprises in Canada.
- Jim Walther summarized U.S. changes to the rules limiting the use of net operating losses, including certain changes that applied specifically to banks.
- Andrew Saul reported that financial assistance had been abolished for U.K. private companies with effect from October 1, 2008.

Future Meetings

The Subcommittee’s next meeting will be held in connection with the Business Law Section’s Spring Meeting in Vancouver on Friday, April 17, 2009, from 2:30 p.m. until 4:30 p.m., in Room 301, Level Three of the Vancouver Convention & Exhibition Centre.

Subcommittee Website

The Subcommittee’s website may be accessed at the following address:

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

The website contains the following information:

- A summary by Katrien Vorlat and Guy Harles of the preliminary results of their survey on post-closing dispute resolution techniques.
• Details of the Subcommittee’s publications.
• As usual, details of future meetings, work-in-progress and past program materials.

We look forward to seeing you in Vancouver.

Daniel Rosenberg
James R. Walther
Co-Chairs

Membership Subcommittee

Notwithstanding difficult financial times, our Committee passed the 3,500 member threshold! Our membership now represents 43 countries and 49 states.

The M&A Market Trends Subcommittee currently has 1,049 members followed by the Private Equity M&A Subcommittee with 863 members. Interestingly, we saw significant increases in the number of in-house counsel members (currently 642) and the “associate” (non-lawyer) members (currently 778). I am also glad to report that our diversity based on gender has increased to 33% female and 58% male (9% not specified). Global M&A activity may have slowed, but practitioners around the globe continue to join our Committee.

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 and reports to the Committee on 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 work product of the Judicial Interpretations Working Group consists of memoranda summarizing our findings regarding these acquisition agreement provisions and M&A issues. The memoranda are posted in an extranet library, to which only M&A Jurisprudence Subcommittee members have access currently, but which we expect to eventually make available to all members of our Committee.

The Annual Survey Working Group will meet in Vancouver on Friday, April 17, 2009, from 10:30 a.m. until 11:30 a.m., in Room 214, Level Two of the Vancouver Convention & Exhibition Centre. The Judicial Interpretations Working Group will meet immediately after, from 11:30 a.m. until 1:00 p.m.

Annual Survey Working Group

The sixth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions was published in the February 2009 issue of The Business Lawyer. Our working group is collecting 2009 cases for consideration for inclusion in our 2009 annual survey, and we thank all Committee members who have suggested cases. In Vancouver, we will discuss those cases, and any additional cases presented at the meeting. We will thereafter begin the summarization process.

We will discuss the Koch v. Amoco case, which is summarized below, and the recent decisions of the Delaware Supreme
Court in *LaPoint v. AmerisourceBergen* and *Lyondell v. Ryan*. The cases to be discussed in Vancouver also include *Harrison v. Proctor & Gamble*, Civil Action No. 7:06-CV-121-O ECF, 2009 BL 24193 (N.D. Tex. Feb. 9, 2009) (malpractice claim for alleged negligent negotiation of an earnout).

We are asking all members of our Committee to send us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by email either to Scott Whittaker at swhittaker@stonepigman.com or to Jon Hirschoff at jhirschoff@fdh.com. You may fax cases to Scott at (504) 596-0836 or to Jon at (203) 325-5001. Please state in your email or on the fax cover sheet why you believe the case merits inclusion in the survey.

The first criterion for inclusion is that the decision must involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control. The second criterion is that the decision must (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement, or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim. We are currently excluding cases dealing with federal law, securities law, tax law, and antitrust law. But if you feel a case dealing with an M&A transaction is particularly significant please send it, even if it does not meet the foregoing criteria.

To join our Working Group, please email Jon Hirschoff (jhirschoff@fdh.com) and Scott Whittaker (swhittaker@stonepigman.com) or simply attend the Working Group meeting in Vancouver.

**Decision to be Discussed at the Vancouver Meeting**

*Koch Business Holdings, LLC v. Amoco Pipeline Holding Company*, 554 F.3d 1334 (11th Cir. 2009).

*Koch Business Holdings, LLC v. Amoco Pipeline Holding Company* involved the interpretation of the provisions of a stock purchase agreement, pertaining to a post-closing contingent payment. The payment was based in part on the amount accrued by the target company to a litigation reserve “for the fourth quarter” of 2002. The target company made an accrual to its litigation reserve during December 2002, but then in January 2003 increased the amount of that fourth quarter accrual, as allowed by GAAP, so that the financial statements of the company for the fourth quarter of 2002 reflected the increased amount. The dispute centered on whether the amount added to the reserve in January 2003 was properly treated as a fourth quarter accrual pursuant to the stock purchase agreement for purposes of calculating the contingent payment. The District Court granted summary judgment for the buyer, holding that the increased amount should be included under the plain wording of the agreement. The 11th Circuit reversed and ordered the District Court to award summary judgment to the seller, holding that the agreement reflected an unambiguous intent of the parties to include only amounts accrued to the litigation reserve by December 31, 2002.

Amoco Pipeline Holding Company (“Amoco”) entered into negotiations in 2002 with Buckeye Partners, L.P. (“Buckeye”) for Buckeye to purchase Amoco’s stock (approximately 18% of the shares outstanding) in Colonial Pipeline Company (“Colonial”). Koch Business Holdings LLC (“Koch”),
another Colonial stockholder, held a right of first refusal with respect to sales of stock by Amoco.

Colonial was a defendant in litigation commenced by the U.S. Department of Justice ("DOJ") on behalf of the U.S. Environmental Protection Agency relating to a pipeline leak. At the time of Amoco’s negotiations with Buckeye, Colonial and DOJ were engaged in settlement negotiations. Colonial estimated that its liability might be as high as $130 million, but believed that the case would settle for around $40 million.

The uncertainties of the environmental litigation made it difficult for Amoco and Buckeye to agree on a fixed price for the stock, because any settlement or judgment would be paid from profits normally set aside for dividends. During the first three quarters of 2002, Colonial’s board of directors accrued $15 million as a litigation reserve. It was Colonial’s practice to reduce its dividends in each quarter by an amount equal to the accrual to the litigation reserve taken in that quarter. The Board considered accruing an additional $10 million in the third quarter of 2002, but decided instead to wait until the fourth quarter and reconsider the accrual at that time.

It appears from the opinion that the record date for the fourth quarter dividend preceded the closing date for the purchase of Amoco’s stock. Thus any fourth quarter dividend reduction would be borne by Amoco, whereas any future dividend reduction related to the environmental litigation would be borne by the purchaser of the stock. Presumably with this in mind, Buckeye expressed concern that Colonial might ultimately settle the litigation for more than its litigation reserve, thus resulting in Buckeye bearing some of the burden of the settlement.

The Court of Appeals opinion states that, on October 1, 2002, Amoco’s counsel proposed that Amoco and Buckeye deal with the litigation uncertainty through a contingent post-closing payment. Under this proposal, as described in the opinion, Buckeye would pay $295 million at closing, plus an additional $5 million post-closing payment if either: (1) Colonial settled with DOJ for less than $40 million, or (2) “Colonial settled for between $40 million and $50 million and financed more than $10 million of the settlement by reducing the fourth quarter dividend by that amount” (the “Amoco Proposal”). Since it was already contemplated that the fourth quarter dividend would be reduced by $10 million in connection with the $10 million accrual considered for the third quarter, the Amoco Proposal presumably contemplated, for example, that if the litigation payment was $45 million, the contingent payment would only be due if the fourth quarter dividend was reduced by a total of $15 million.

Although the Amoco proposal was relatively straightforward, the contingent payment provisions of the stock purchase agreement entered into by Amoco and Buckeye on October 2, 2002 (the “SPA”) were more complicated.

As quoted in the opinion of the District Court in Koch Business Holdings LLC v. Amoco Pipeline Holding Company, 2007 WL 951533 (N.D. Ga. Mar. 27, 2007), the SPA (in Schedule 3A) required that the purchaser pay the contingent $5 million within two business days of satisfaction of the conditions described in either of clause (ii)(A) or (iii)(A), provided, that the purchaser’s obligation to make the contingent payment will terminate upon satisfaction of the conditions described in either of clause (ii)(B) or (iii)(B). Clauses (ii) and (iii) read as follows:

“(ii) If Colonial accrues as an additional [litigation] reserve [$10 million or less] for the [fourth] quarter, . . . which accrual results in a reduction of the [fourth quarter dividend] of an
amount of no less than such accrued amount and

(A) . . . the amount to be paid by Colonial in full satisfaction of [a] judgment or settlement is less than [$40 million] . . .; or

(B) . . . the amount to be paid by Colonial in full satisfaction of [a] judgment or settlement is equal to or greater than [$40 million].

(iii) If Colonial accrues as an additional [litigation] reserve [more than $10 million] for the [fourth] quarter, . . . which accrual results in a reduction of the [fourth quarter dividend] of an amount of no less than such accrued amount, and

(A) . . . the amount to be paid by Colonial in full satisfaction of [a] judgment or settlement is less than [$50 million] . . .; or

(B) . . . the amount to be paid by Colonial in full satisfaction of [a] judgment or settlement is equal to or greater than [$50 million].”

After Amoco and Buckeye agreed to the terms of the SPA, Amoco offered Koch its right of first refusal and, on October 21, 2002, Koch exercised its right of first refusal to purchase the Amoco stock on the terms set forth in the SPA. Koch’s purchase of the Amoco stock closed on December 16, 2002, after the record date for the fourth quarter dividend. At the December meeting of the Colonial Board, the litigation reserve was increased by $10 million, to $25 million, and the dividend was reduced by the amount of the increase.

On January 17, 2003, Colonial and the DOJ agreed to settle the litigation for $34 million. Because the litigation reserve at that point was only $25 million, Colonial’s board of directors, on January 17, 2003, increased the litigation reserve by $9 million. Pursuant to GAAP, the accrual was recorded on Colonial’s books as a contingent liability expense for the fourth quarter of 2002, because it occurred prior to publication of Colonial’s 2002 financial statements. The litigation was formally settled on April 1, 2003 for $34 million.

On April 21, 2003, Amoco sent Koch a demand for the $5 million contingent payment. Koch refused to pay, and sued in Kansas state court seeking a declaration that it was not required to make the payment. Amoco removed the case to federal court, and it was then transferred to the Northern District of Georgia.

Had the SPA simply provided, as did the Amoco Proposal, that the contingent payment was due if there was a settlement or final judgment requiring a payment of less than $40 million, Koch would have had no basis for refusing to pay the $5 million. But there was no such provision in the SPA. Since the 2002 dividends had all been paid by the end of that year, the amount by which the settlement exceeded the year-end litigation reserve ($9 million) presumably came, from a cash flow point of view, out of 2003 dividends, and thus reduced Koch’s dividends, regardless of whether the accrual was taken in the fourth quarter of 2002 or the first quarter of 2003.

Under the SPA, the question was whether (1) Colonial had accrued $10 million for the fourth quarter, in which case clause (ii) applied, and under clause (ii)(A) the contingent payment was clearly required, or instead (2) Colonial had accrued $19 million for the fourth quarter, in which case clause (iii) would apply, but only if such accrual resulted in a reduction of the fourth quarter dividend “of no less than such accrued amount.” Since the fourth quarter dividend was reduced by only $10 million, clearly less than $19 million, clause (iii) did not require the contingent payment.

The District Court, applying Delaware law, granted summary judgment for Koch, finding the SPA unambiguous. The District
Court agreed with Koch’s position that clause (iii) applied and that the payment was not required because the dividend reduction was less than the additional fourth quarter reserve.

The Court of Appeals also found the SPA unambiguous, but construed its meaning as the opposite of that arrived at by the District Court. It reversed and ordered the District Court to grant summary judgment for Amoco, holding that the parties did not intend to classify accruals occurring after December 31, 2002 as accruals for the fourth quarter. The Court of Appeals rejected Koch’s reliance on GAAP, stating that GAAP does not define legal default rules, and noting that the SPA did not specify that its terms would be interpreted according to GAAP. The Court said: “Although GAAP is potentially relevant to contract interpretation where there is ambiguity regarding intent, it is not relevant here, where the intent is clear on the face of the agreement.” The Court went on to say that Koch’s interpretation “makes no sense” because under that interpretation, the SPA would provide for the post-closing payment only if Colonial reduced the dividend already paid by the amount of the subsequent accrual.

It is difficult not to draw the inference that the Court of Appeals based its holding not on the “plain language” of the SPA, but on the terms of the original Amoco Proposal. The Court may have thought it a waste of judicial resources to hold that the SPA was ambiguous and to send the case back for a trial in which evidence extraneous to the SPA, such as the Amoco Proposal, would be admitted as to the meaning of the SPA.

M&A practitioners can draw several lessons from these two opinions. First, avoid unnecessary complexity in drafting. Second, keep in mind the difference between reported income and uses of cash. The important issue that gave rise to the contingent payment provision was the allocation of the burden of an unexpectedly large settlement; that is, to the extent the burden was not borne by the seller through a fourth quarter 2002 dividend reduction, it would be borne by the purchaser through 2003 dividend reductions. Therefore, the contingent payment provision could have centered on the allocation of the dividend reduction burden, rather than focusing on the allocation of additional accruals between 2003 and the fourth quarter of 2002, which turned out to be the allocation on which the litigation centered. Third, practitioners should consider whether to specifically provide that GAAP should be controlling in the construction of accounting terms used in an acquisition agreement. As to this third lesson, we note that the outcome of this case may have been reversed had the acquisition agreement contained a provision such as Section 1.2(b) of the ABA Model Asset Purchase Agreement, which provides that “[u]nless otherwise specified herein, all accounting terms used herein shall be interpreted and all accounting determinations hereunder shall be made in accordance with GAAP.” We express no opinion as to whether that would have led to a fairer outcome.

Judicial Interpretations Working Group

The Judicial Interpretations Working Group met during our Committee’s stand-alone meeting in San Diego. During the meeting we had a spirited discussion of a paper on attorney-client privilege prepared by Brian North, Roy Shima, and Frederic Smith, and we reviewed 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. That paper has been added to the extranet library of judicial interpretations memoranda, to which Working Group members have access.
The Vancouver meeting of the Judicial Interpretations Working Group will be held on Friday, April 17, 2009, from 11:30 a.m. until 1:00 p.m., in Room 214, Level Two of the Vancouver Convention & Exhibition Centre. In commemoration of our visit to Canada we will discuss Don Dalik’s paper on the jurisprudence interpreting full disclosure or 10b-5 representations. Other topics to be discussed include the paper by Gabe Saltarelli and Mark Klein on judicial interpretations of financial statements representations.

To join our working group, please email Jim Melville (jcm@kskpa.com) and Scott Whittaker (swhattaker@stonepigman.com) or simply attend the Working Group meeting in Vancouver.

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 members of the M&A Market Trends Subcommittee have sure been busy since our meeting in San Diego.

- In November 2008, we released the 2008 Strategic Buyer/Public Target Deal Points Study – led by chair Jim Griffin.

- In December 2008, we released the first ever Continental European Private Target Deal Points Study, led by co-chairs Freek Jonkhart and Reid Feldman.

- In January 2009, The M&A Lawyer published an article written by Jim Griffin regarding the Public Target Study.

- In March 2009, the ABA hosted a teleconference, during which members of our Subcommittee discussed “M&A Negotiation Trends Involving Public Targets.”

- In Vancouver, the leaders of our Canadian Study and our Continental European Study will be presenting a program on those studies.

- Additional studies are underway, including the 2009 Private Target Study, the 2009 Public Target Study, and the 2009 Continental European Study!

All of the newly published studies have been posted on our Committee’s website. Thanks to all of the participants in those studies for their incredibly hard work!

We had a well-attended meeting in San Diego in October. At that meeting, 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, led a discussion of his preliminary findings.

The agenda for our Vancouver meeting, which is scheduled for Saturday, April 18, 2009, from 11:00 a.m. until 12:30 p.m., includes the following:

- Representatives of Duff & Phelps’ Los Angeles office will discuss the study recently released by Duff & Phelps on the increased use of fairness opinions in M&A and other transactions, with representatives of Potter Anderson & Corroon chiming in on Delaware cases relating to fairness opinions.
• Jim Griffin will be discussing selected findings from the 2008 Strategic Buyer/Public Target Study.

• Wilson Chu and Larry Glasgow will highlight a few key data points involving private target companies that have changed dramatically since the first private target study was published.

• For all of you Johnny Carson fans, our very own “Carnac the Magnificent” (Hendrik Jordaan) will lead a discussion of what will be market in 2009 – and perhaps beyond.

• We will be discussing next steps in kicking off our 2009 studies.

We look forward to seeing you in Vancouver.

Keith Flaum
Chair
Hendrick Jordaan
Jessica Pearlman
Co-Chairs

Private Equity M&A Subcommittee

The Private Equity M&A Subcommittee met in San Diego in October 2008 in conjunction with our Committee’s stand-alone meeting. Given that the Subcommittee Co-Chairs had arranged for John Butler of Piper Jaffrey & Co. to speak at the full Committee meeting on matters involving Private Equity in the financial services sector, there were no formal presentations at the Subcommittee meeting. At the Subcommittee meeting, however, members of the Subcommittee engaged in a discussion on a variety of Private Equity-related matters, including the current state of the private equity markets and recent developments and trends affecting the Private Equity M&A practice area. The discussions prompted a number of questions and follow-on discussions. The Subcommittee meeting was well-attended, and the Subcommittee Co-Chairs thank all participants for contributing to a substantive and informative session.

Henry Lesser
John Hughes
Co-Chairs

Programs Subcommittee

The 2009 Spring Meeting in Vancouver will feature three timely programs sponsored by our Committee. Those programs include the following:

Canadian and European M&A Market Trends

Thursday, April 16
2:30 p.m. - 4:30 p.m.

Co-chaired by John F. Clifford, Reid Feldman and Freek Jonkart, this program will present the highlights of the two recently released Deal Points studies covering Canada and Continental Europe. The panel will compare some key characteristics of M&A deals in those jurisdictions with U.S. deals. Topics covered will include classic reps and warranties, closing conditions and provisions relating to indemnification (including sandbagging/“benefit of the bargain” clauses, survival periods and baskets & caps). The program will conclude with a discussion of how current market conditions are affecting M&A deals in Canada, Europe, and the U.S. In addition to the Co-chairs, the program will be moderated by Wilson Chu and feature Mireille Fontaine, Kevin Kyte, Richard Silberstein, and Katrien Vorlat.
Practical Impacts on M&A of U.S. and International Accounting Principles Convergence – What You Need To Know Now About IFRS and FASB 141R

Saturday, April 18
8:00 a.m. - 10:00 a.m.

This program, chaired by Jim Walther, will feature a panel of experienced M&A lawyers and accounting advisers, who will cover differences in approach of current US GAAP and International Financial Reporting Standards to common M&A issues, and the impacts of those differences on transaction structures and feasibility, together with the specific new U.S. M&A accounting requirements of FASB 141R. In addition to Jim Walther, the panel will include Cameron G. Belsher, Timothy R. Lashua, Robert Marsh, and Michael G. O'Bryan.

Selected Issues in M&A Under Delaware Law – A Mock Negotiation and Discussion

Saturday, April 18
3:00 p.m. to 4:00 p.m.

In conjunction with our full Committee meeting on Saturday, Mark Morton will chair a special program forum in the format of a mock negotiation of “live” negotiating points in M&A transactions often faced by deal attorneys in their daily practice. Utilizing materials developed by Rick Alexander and Eric Wilensky, an all-star panel consisting of Mark and Rick, Joel Greenberg, James Walther, Mark Gentile and the Honorable Myron T. Steele, Chief Justice of the Supreme Court of the State of Delaware, will present the negotiating positions of each side, provide sample provisions from actual transactions, and outline discussion points and summaries of relevant Delaware jurisprudence.

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Our Committee is also co-sponsoring the following program at the Business Bankruptcy Committee Luncheon:

Cross-Border Distressed Acquisitions: Latest Trends and Developments

Thursday, April 16
12:30 p.m. - 2:30 p.m.

Robert R. Ouellette of our Committee is joining a program Co-Chaired by Susan M. Freeman and Michael H. Reed. Along with Rob, panelists include: Chief Justice Donald I. Brenner, Linc A. Rogers, and Sheryl E. Seigel. This is a separately ticketed luncheon program.

Future Programs

The Programs Subcommittee is developing its slate for the 2009 Annual Meeting and Fall stand-alone meeting. 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

The ABA has now officially rolled out “Legally Minded,” a networking tool for lawyers that is open to both ABA members and non-members alike. The idea is to provide a Facebook-like social networking site for the legal community. Legally Minded will supplement the existing websites and email distribution lists that are used by members of the ABA and will also be a means by which to encourage non-members to join. To take a tour and get started, please use the following link:

http://www.legallyminded.com/default.aspx
The Spring Meeting in Vancouver will include more opportunities for members to participate in meetings via conference call. Dial-in numbers have been furnished to all the subcommittee and taskforce chairs. Please contact your chair directly for information about participating by phone.

As you are aware from prior reports, the ABA’s Fusetalk program, which provided for online chatting in closed groups, did not receive wide acceptance and has been discontinued. In lieu of that program, the ABA is implementing a Sharepoint-based system that will allow groups to share documents and to collaborate on drafting projects. The new system is in beta testing now and should be rolled out by the end of the summer. This service will be particularly useful to those of us engaged in joint drafting projects and will replace the ad hoc document-sharing systems that have been set up by a number of our groups.

Our Committee’s website continues to be one of the most visited in the Business Law Section, and occasionally (primarily when new Deal Points Studies are released) is the number one site in the whole of the American Bar Association. While our Committee has one of the strongest web presences, we have barely scratched the surface of uses to which we can put the web. Our web tools make it very easy to post materials, and our groups have yet to take full advantage of the various website features. To that end, I would encourage our various subcommittees and task forces to give thought to what materials they are generating that might be posted on the website for other members to review. This is a great way to promote membership and encourage participation.

George M. Taylor, III
Chair

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**COMMITTEE MEETING MATERIALS**

**2009 SPRING MEETING**
**VANCOUVER**
**APRIL 16-18**

**SCHEDULE OF MEETINGS AND OTHER ACTIVITIES**

**Thursday, April 16th**

Program: Canadian and European M&A Market Trends
2:30 p.m. – 4:30 p.m.
Room 110, Level One
Vancouver Convention & Exhibition Centre

**Friday, April 17th**

Editorial Committee of the Task Force on the Model Stock Purchase Agreement
7:30 a.m. – 10:00 a.m.
Room 214, Level Two
Vancouver Convention & Exhibition Centre

Task Force on Distressed M&A
8:30 a.m. – 9:30 a.m.
Room 201, Level Two
Vancouver Convention & Exhibition Centre

Annual Survey Working Group of the M&A Jurisprudence Subcommittee
10:30 a.m. – 11:30 a.m.
Room 214, Level Two
Vancouver Convention & Exhibition Centre
Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee
11:30 a.m. – 1:00 p.m.
Room 214, Level Two
Vancouver Convention & Exhibition Centre

Task Force on Acquisitions of Public Companies
12:00 p.m. – 2:30 p.m.
Room 301, Level Three
Vancouver Convention & Exhibition Centre

Task Force on the Dictionary of M&A Terms
1:00 p.m. – 3:00 p.m.
Room 214, Level Two
Vancouver Convention & Exhibition Centre

International M&A Subcommittee
2:30 p.m. – 4:30 p.m.
Room 301, Level Three
Vancouver Convention & Exhibition Centre

Meeting of Committee Chair and Vice Chairs, Subcommittee, Task Force and Working Group Chairs
4:30 p.m. – 5:30 p.m.
Room 301, Level Three
Vancouver Convention & Exhibition Centre

Saturday, April 18th

Editorial Committee of the Task Force on the Model Stock Purchase Agreement
8:00 a.m. – 10:00 a.m.
Room 215 & 216, Level Two
Vancouver Convention & Exhibition Centre

Editorial Working Group of the Task Force on Acquisitions of Public Companies
9:00 a.m. – 11:00 a.m.
Room 224, Level Two
Vancouver Convention & Exhibition Centre

Program: Practical Impacts on M&A of U.S. and International Accounting Principles Convergence – What You Need To Know About IFRS and FASB 141R
8:00 a.m. – 10:00 a.m.
Room 208 & 209, Level Two
Vancouver Convention & Exhibition Centre

Private Equity M&A Subcommittee
10:30 a.m. – 12:30 p.m.
Room 119 & 120, Level One
Vancouver Convention and Exhibition Centre

M&A Market Trends Subcommittee
11:00 a.m. – 12:30 p.m.
Room 118, Level One
Vancouver Convention & Exhibition Centre

Full Committee Meeting
12:30 p.m. – 3:00 p.m.
Ballroom A, Level One
Vancouver Convention & Exhibition Centre

Committee Forum:
Selected Issues Under Delaware Law – A Mock Negotiation and Discussion
3:00 p.m. – 4:00 p.m.
Ballroom A, Level One
Vancouver Convention & Exhibition Centre

Committee Reception and Dinner
6:30 p.m. Reception/7:30 p.m. Dinner
Cioppino’s Mediterranean Grill & Enoteca
1133 & 1129 Hamilton Street, Vancouver
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.