FROM THE CHAIR
By Leigh Walton

I trust that many of you are planning to attend (in person or by phone) the ABA Business Law Section’s Spring Meeting to be held in Las Vegas, March 22 - 24, 2012. I am fairly confident this is the Section’s first meeting in Vegas – so you don’t want to miss it. Our meetings will be held at Caesars Palace, located at 3570 Las Vegas Boulevard South.

The full Committee meeting will be held Saturday afternoon, beginning at 12:30 p.m. (Pacific Time). Most of our meetings will be available by conference telephone. The dial-in information for the full Committee meeting and the Committee Forum that follows is set forth below:

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 2527406387

Dial-in information for Subcommittee and Task Force meetings is included in this issue of Deal Points beginning on page 21.

Full Committee Meeting

We have an impressive array of presentations planned for our full Committee meeting. Perhaps I am most excited about our scheduled face off that will contrast Nevada and Delaware law.

Nevada, as the second most popular destination for out-of-state incorporations, is often referred to as the “Delaware of the West.”

The Silver State’s corporate laws are distinctive in meaningful ways, however, having been thoughtfully crafted by the Legislature with the advice of experienced Nevada practitioners and occasionally in direct resistance to certain Delaware law principles that some outside of Nevada consider axiomatic. Albert Kovacs and Jeffrey Rugg, Brownstein Hyatt Farber Schreck, LLP – Las Vegas, will highlight some of the most significant distinctions...
of Nevada corporate law and describe the structure and experience of Nevada’s court system with regard to business and securities claims. Chief Justice Myron T. Steele of the Delaware Supreme Court and Patricia Vella, Morris, Nichols, Arsh & Tunnell LLP – Wilmington, will discuss why more than 50% of all publicly traded companies in the United States, and 63% of the Fortune 500, have chosen Delaware as their legal home. These reasons include the reputation of the Delaware judiciary, the well-developed case law, the responsiveness of the Delaware legislature in amending the Delaware General Corporation Law, and the efficiency of the Delaware Secretary of State’s office. They will also provide valuable insights from the Delaware perspective comparing and contrasting the two corporate frameworks.

Additional highlights for the full Committee meeting include a presentation by Paul Koenig of Shareholder Representative Services entitled “Using the Power of Data to Mitigate Post-Closing Risks.” Rick Climan will present “Drafting Traps for the Unwary M&A Practitioner,” a practical review of mistakes often made by sometimes even seasoned deal lawyers. Stephen Kotran, Sullivan & Cromwell LLP, will present PLC’s annual reverse break-up fee study. Our International Subcommittee plans to provide several topics of current interest. For example, Glen West and Hermann Knott will lead a discussion comparing the damages and other remedies available in M&A transactions in the United States and in the civil law jurisdictions of Europe. Glen West is a partner in the Dallas office of Weil, Gotshal & Manges who is the author of several highly regarded articles on damages and other remedies in M&A transactions. Hermann Knott is a leading M&A practitioner in the Cologne office of Luther Rechtsanwaltsgesellschaft, one of Germany’s largest firms.

We have planned an Industry Sector Spotlight featuring, of course, the gaming industry. Robert Kim of Ballard Spahr will lead this discussion. Other program features remain in the works.

**Committee Forum**

Our Committee Forum for the Spring Meeting is entitled “A New Look at Earn-Out Provisions in M&A Agreements.” The program is presented by Byron F. Egan, Chair, Jackson Walker LLP; Emily Malone Colbert, Practical Law Company; Nathaniel L. Doliner, Carlton Fields; and Jeff Mordaunt, Stout Risius Ross, Inc. The panel will discuss whether there is a new normal in earnouts, where they often equal or exceed the minimum purchase price. The expert panel will consider whether earnouts are more prevalent in particular industries, as well as advances in drafting earnout provisions (focusing on whether there are new techniques employed to protect sellers). The panel will also discuss the recent case law developments. We intend to award CLE credit for participation in our Committee Forum.

**Thanks to Our Sponsors**

Many thanks to our sponsors for Vegas – all are perennial supporters of our Committee. Practical Law Company will sponsor our Committee Dinner at Pinot Brasserie on Saturday night. Shareholder Representative Services LLC is our cocktail and dessert sponsor on Saturday night. And Houlihan Lokey is sponsoring a cocktail reception hosted by our Diversity and Membership Subcommittees on Saturday at 4:00 p.m. We all appreciate the faithful support of our sponsors, which allows us to maximize the networking opportunities offered at our meetings.

**Programming at the Spring Meeting**

We have a variety of CLE programs in Las Vegas sponsored or co-sponsored by our Committee, including the following:

**Thursday, March 22, 2012**

Time: 10:30 a.m. – 12:30 p.m.
Program: Deal Trends, Current Terms, and Recent Developments in §363 Sales
Chairs: Henry P. Baer, Jr. and Peter Fishman

Time: 2:30 p.m. – 4:30 p.m.
Program: The Ins and Outs of Topping Bids: Maneuvering Through Deal Protection Terms
Chair: Rick Alexander

**Friday, March 23, 2012**

Time: 8:00 a.m. – 10:00 a.m.
Chair: Heather Sonnenberg
Saturday, March 24, 2012

Time: 10:30 a.m. – 12:30 p.m.
Program: Unique Legal and Practical Considerations in Private Equity Acquisitions of Small and Lower Middle Market Companies
Chair: Mark Danzi

Consider planning your schedule to attend these fine programs.

We look forward to many interesting and productive conversations at our Committee, Subcommittee, and Task Force meetings. And for those attending in person, we look forward to great networking opportunities, informative content, and good luck. Note that we planned the meeting to coincide with the NCAA regionals – I hope your team will still be in the tournament.

* * *

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Published by the American Bar Association Business Law Section Mergers and Acquisitions Committee
IN MEMORIAM

ROBERT T. HARPER
1954-2012

On February 27, 2012, the Mergers and Acquisitions Committee and its members lost a good friend and enthusiastic leader when Bob Harper lost a battle of over two years with cancer at the age of 57. Even through his last week he continued to teach his law school class, call and email clients and partners, plan presentations, and maintain his wonderful sense of humor, positive attitude, spirit and faith that let him beat cancer for far longer than expectations when first diagnosed.

One of Bob’s abiding sources of enjoyment and sense of accomplishment came from his work and friendships on the M&A committee. An early member of the Committee, Bob was one of the contributors and editors of both the original Model Stock Purchase Agreement and the Model Asset Purchase Agreement. He also co-chaired the task force that authored the recently published Revised Model Stock Purchase Agreement. Over the years, Bob played a key role in and chaired numerous CLE panels, including many appearances at the National Institute as well as chairing panels on the Model Stock Purchase Agreements and other M&A topics.

Diane Frankle and Murray Perleman (Bob’s co-chair on the RMSPA project) upon hearing of Bob’s death, independently identified Bob as a mensch in the very best sense of the word. To have sat through meetings chaired by Bob was an experience one does not easily forget. His good natured needle was always in play. He had an engaging and infectious manner (his obituary called it “vivacious”) that energized any team he led and injected camaraderie and just pure fun into the task.

Bob contributed to many communities beyond the ABA and the memorial presentations following his death paid high tribute to the diversity, depth, and passion he brought to anything he pursued.
Bob taught three courses annually as an adjunct at the University of Pittsburgh School of Law, including the basic corporate business organizations course, and helped establish the Health Law Certificate Program. In 2011, Bob was honored by the students with its annual “Excellence in Teaching Award,” a distinction never before awarded an adjunct.

A few of Bob’s other significant activities included the following:

- Chairman of the Board of the Pittsburgh Theological Seminary
- Member of the University of Pittsburgh School of Law Board of Visitors
- Elder and Clerk of Sessions of his church
- Chairman and Member of the Board of Advisors, Duke University Libraries
- Chairman of the St. Clair Hospital Capital Campaign
- Member of the Board of Directors of Pittsburgh Symphony Society and Pittsburgh Ballet Theater
- Member of the Board of Trustees of Duke University
- President of Duke University Alumni Association

Beyond these institutional roles, Bob found time to be a highly productive partner and leader of his original firm, Klett Rooney Lieber & Schorling, and after its merger, Buchanan Ingersoll & Rooney PC, having served on all key committees and as a Chair of its Healthcare Section.

Anyone who knew Bob also was aware of his passionate avocation as a leading F. Scott Fitzgerald scholar and collector. He also studied and gathered serious collections on a number of other authors, including James Gould Cozzens, Arthur Train, and William Styron. He had recently renewed his passion for the trumpet, carrying one of his 36 trumpets to ABA meetings with (perhaps fortunately) his electronic silencer where he would practice late into the night in his hotel room following the meetings.

Bob was the master of schtick, a word used many times at the memorial services, and loved to remind us that “it was all about Bob.” One of his favorite lines after engaging in conversation with a new acquaintance was “but enough about me, lets talk about you....what do you think of me.” But, we knew that Bob certainly did think about others, was a great friend to many, and any of us who worked and played with Bob will never forget him.

Tom Thompson
Buchanan Ingersoll & Rooney PC
By Yvette R. Austin Smith

The courts are showing an increasing propensity to scrutinize the substantive analysis of fairness opinions and the disclosures of that analysis. This article discusses how, by staying abreast of guidance provided by the courts in M&A litigation, financial advisors can play a role in helping companies meet this scrutiny in a less expensive and time-intensive manner.

Fairness opinions, and the valuation analysis underlying them, are once again coming under increased judicial scrutiny. This is due to a recent wave of high-profile M&A litigation that extends beyond post-closing accounting disputes and appraisal actions. In recent cases, plaintiffs have alleged breaches of fiduciary duty and, ultimately, questioned the fairness of the transactions. In many instances, the litigation continues after the deal closes. Further, as many of these transactions involved controlling shareholders, the judicial review has been conducted with the highest degree of scrutiny. The collective guidance that has emerged from such cases impacts practice and disclosure regarding fairness opinions. This article summarizes the updated guidance, in three specific areas, to financial advisors, fiduciaries, and legal counsel.

Is the Board Book a “Fair Summary”?

*Pure Resources* established *dictum* (at least in Delaware) that shareholders are entitled to disclosure of a “fair summary” of the financial analysis upon which a fairness opinion is premised. In a January 2011 preliminary injunction ruling in *Steinhardt v. Howard-Anderson (Occam Networks)* and a September 2011 settlement hearing in *Turberg v. ArcSight, Inc.*, the Delaware Court of Chancery suggested that a “fair summary” should reflect a summary of the financial advisor’s fairness presentation to the board of directors. In fact, in *Occam Networks*, Vice Chancellor Laster appears to have opened the door for a comparison of disclosures to not only the final board presentation but also earlier versions of the presentation given to the board. This has direct implications for the content of these so-called board books.

Consider the following example. To facilitate a robust dialogue with the directors, the financial advisor may be inclined to include various scenario and sensitivity analyses. For example, a target company’s current projections may indicate an expected revenue growth rate of 5%. However, to better understand the sensitivity of the value of the target company to this growth rate, the banker may wish to show (or a target board member may ask): What is the impact on the target’s value if the growth rate is 7%? In an ideal world, the board book may include a chart of target company values that vary by growth rate. To extend the example, the hypothetical 7% growth rate may be taken from alternative management projections that were internally prepared for the same type of sensitivity analysis. If a “fair summary” is to include the hypothetical 7% growth rate and/or the alternative projections, then careful thought must be given to how the sensitivity analysis is conducted and presented to the board.

It is important that financial advisors maintain the appropriate independence in conducting the fairness analysis. However, the presentation of the analysis in the board book—both the final and the earlier drafts—should be the result of meaningful dialogue between financial advisors.
Disclosure of Free Cash Flows

In October 2011, both a Delaware Court of Chancery order and the ultimate outcome in Gaines v. Narachi may have shifted practice in favor of disclosure of free cash flows. Vice Chancellor Noble, after granting the plaintiff’s motion for reargument, scheduled a preliminary injunction hearing on AMAG Pharmaceuticals’ proposed acquisition of Allos Therapeutics. Reargument was granted solely on the issue of whether AMAG should have disclosed the free cash flow projections used by its financial advisor to value AMAG’s stock (in a stock for stock acquisition). However, prior to the preliminary injunction hearing, AMAG voluntarily disclosed the free cash flow projections. Shortly thereafter, AMAG shareholders voted to reject the proposed transaction and the litigation was dismissed.

Gaines v. Narachi came on the heels of a trio of 2010 Delaware Court of Chancery cases that addressed the disclosure of free cash flows. Read together, these three cases created ambiguity regarding the necessity to disclose free cash flow projections by premising the requirement on a peculiar distinction. In Maric Capital Master Fund Ltd. v. PLATO Learning, Inc., the Court enjoined a transaction pending proxy disclosure of the free cash flow projections provided to the company’s financial advisor. However, in a ruling on an order to expedite, the Court found in Steamfitters Local Union 447 v. Walter that the disclosure of free cash flow projections was unnecessary. Again, in connection with a plaintiff’s motion to expedite proceedings, the Court found in Scully v. Nighthawk Radiology Holdings, Inc. that disclosure of the projected free cash flows was unnecessary. Viewed together, the Court’s decisions appear to pivot on whether the company “provided” free cash flow projections to the financial advisors. In both Walter and Scully, the Court declined to require disclosure because a free cash flow “number” or “line item” was not provided to the financial advisor.

However, this may be a difference without a distinction. It is the exceedingly rare instance (at least in public company transactions) in which management does not provide projections to the financial advisor issuing the fairness opinion. Management projections often provide the basis for the calculation of value using a discounted cash flow methodology. At a minimum, management projections generally take the form of an income (or profit and loss) statement, from which EBITDA is easily calculated. To calculate free cash flows, one needs to deduct projected expenses for working capital investment and capital expenditures. In most instances, these projected expenses are also obtained from management, either directly or through conversation and due diligence. Management may provide actual numbers for projected working capital investments and capital expenditures, or management may provide assumptions, such as a percentage of projected revenue, that can be utilized to estimate these outflows. While the fairly standard calculation of free cash flow can be performed by either the financial advisor or management, in many instances financial advisors actually prefer to perform the calculation, utilizing management projections and subject to management’s confirmation. This ensures that the financial advisor understands and can examine the assumptions underlying the free cash flow calculation. Thus, management frequently provides the financial advisor with the components to calculate free cash flow even if the financial advisor is performing the actual calculation.

What about instances where management does not provide projected working capital investments and capital expenditures? Although such instances are infrequent, this may have been the case in Walter. In Walter, the financial advisor appears to have omitted a discounted free cash flow methodology and, instead,
relied upon valuation multiples (for example, revenue or EBITDA multiples) to estimate the value of the company. However, the determination of an appropriate valuation multiple (or range of multiples) contains an implicit assumption as to the company’s working capital investments and capital expenditures. All else being equal, if the company’s working capital investments and capital expenditures are consistent with industry levels, this would argue for applying valuation multiples that are consistent with an industry average. Alternatively, if a company is more (or less) efficient than the industry, this would argue for a higher (or lower) valuation multiple than the industry average. Thus, to make a determination as to the appropriate valuation multiple, the financial advisor must have a basis for assessing the company’s ability to produce future free cash flow, not just revenue or EBITDA.

The question as to whether free cash flows should be disclosed is for the courts to decide. However, to premise a disclosure requirement on whether free cash flow projections were “provided to the financial advisor” creates an artificial distinction that is susceptible to manipulation.

Updated Fairness Opinions

It is standard practice for both the financial advisor retention letter and the fairness opinion letter to disclaim the advisor’s responsibility for updating the fairness opinion following the issuance date of the opinion. This practice was reinforced by the 2008 Seventh Circuit opinion in HA 2003 Liquidating Trust v. Credit Suisse Securities (USA) LLC, in which the Court found that the financial advisor was not grossly negligent in failing to update or withdraw its fairness opinion. In reaching its decision, the Court relied heavily upon the explicit language disclaiming such responsibility in the financial advisor’s retention letter. However, questions involving the necessity for (and risk of) updated fairness opinions have resurfaced following the Delaware Court of Chancery’s October 2011 opinion in In re Southern Peru Copper Corporation Shareholder Derivative Litigation.

In Southern Peru Copper, the company’s special committee approved the contested transaction on October 21, 2004. The approved deal structure consisted of a fixed exchange ratio whereby shares of the target company would be exchanged for a fixed number of Southern Peru Copper shares. The target company was privately held; Southern Peru Copper (the acquirer) was a publicly traded company. More than five months later, on April 1, 2005, the transaction closed following an affirmative shareholder vote. In the intervening five-month period, the share price of Southern Peru Copper (i.e., the acquisition currency) increased approximately 21%, as Southern Peru Copper was able to execute well in a rising commodities market. The Court criticized the special committee for failing to revisit its recommendation of the transaction in light of this effective increase in acquisition price. Notably, the Court was fairly strident in its criticism notwithstanding that the special committee could not terminate the merger or avoid a shareholder vote upon a change of its recommendation.

Following Southern Peru Copper, financial advisors are left to ponder circumstances under which they may be asked to provide an updated fairness opinion. Specific transactions require specific recommendations. However, the following comments may serve as general guidance.

First, and as a continuation of current practice, retention and opinion letters should continue to explicitly memorialize the obligation of the financial advisor as it pertains to updated or withdrawn fairness opinions. In some instances, financial advisors should consider whether reputational risk would attach to a situation in which it cannot withdraw its fairness opinion following a change in circumstances subsequent to the date of the opinion.

Second, the financial advisor should begin an early dialogue with the board regarding potential variability in the relative value between deal consideration and the acquired interests (e.g., the “give” and the “get” in the

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13 517 F.3d 454 (7th Cir. 2008).
14 30 A.3d 60 (Del. Ch. 2011).
15 It should be noted that the court was already critical of the price at which the transaction was approved by the special committee.
16 Due to a third-party voting agreement, one of the target company’s significant shareholders was contractually obligated to vote against the transaction if the special committee withdrew its recommendation for the transaction. However, given the composition of the shareholder base and the language of the acquisition agreement, this negative vote would not have been sufficient (in isolation) to counter the affirmative vote of the controlling shareholder that was in favor of the transaction.
language of Southern Peru Copper) if there is an interval of time between signing and closing. This variability may arise due to a fixed exchange ratio (as in Southern Peru Copper) or due to a dramatic change in the public markets (as in Credit Suisse). In the former, the value of the acquisition currency could increase (or decrease). In the latter, the value of the company to be acquired, as implied by market multiples, could increase (or decrease). There may also be idiosyncratic factors that could subsequently impact the fairness of a specific deal: loss of a key contract and legal/regulatory developments are two such examples. In addition, the decision regarding an updated fairness opinion should be made in tandem with a consideration of representations and warranties, material adverse change clauses, and superior proposal clauses that are reflected in the transaction agreement.

Third, if the company requests an updated fairness opinion, the financial advisor and the company, in consultation with legal counsel, should agree on the “trigger” for an updated opinion and the scope of such an opinion. Are there any specific events that could be identified prior to the issuance of the first opinion that will trigger the updated fairness opinion? Alternatively, is the need for the updated opinion solely at the request of the board or special committee? As it pertains to scope, will the updated opinion be limited in scope to the reconsideration of one or two new facts (e.g., higher or lower projected revenue), or will the updated opinion be based on analysis that begins from scratch? From the financial advisor’s point of view, the answers to such questions have direct implications with respect to legal liability and engagement fee.

Conclusion

The courts are showing an increasing propensity to scrutinize the substantive analysis of fairness opinions and the disclosures of that analysis. By staying abreast of guidance provided by the courts in M&A litigation, financial advisors can play a role in helping companies meet this scrutiny in a less expensive and time-intensive manner.

* * *

Observations From a Shareholder Rep

By Paul Koenig

SRS is engaged on a high volume of M&A transactions. We tend to be brought in on deals that have long or complicated post-closing processes or when the stakes are high with earnouts or escrows. On small, simpler deals, the parties may look for a volunteer representative or a lower-cost service provider. Based on our experience, attorneys frequently want to know what we see and which issues create problems. We have, or will be, discussing many of these issues at the recent ABA M&A committee meetings at Laguna Beach and in Las Vegas, but below is a summary of some of our findings.

Sandbagging

Discussions about sandbagging tend to get a lot of airtime at legal conferences, but the reality is that in our experience, this issue hardly ever comes up in discussions regarding the resolution of indemnification claims. There are a few possible explanations for this. First, we rarely see anti-sandbagging language included in agreements, so it would be unusual that this would be a defense to a claim. Second, most disclosure schedules are pretty exhaustive, so the number of facts that would fall within the coverage of a sandbagging provision (known to the buyer but not explicitly included in the disclosure schedule) is pretty low. Third, even where the contract is silent on sandbagging, discussions regarding what the buyer knew or did not know tend not to be the most powerful arguments. Rather, the discussions typically focus on the technical analysis of what are the facts and whether a representation or warranty has been breached. This does not mean that sandbagging terms are worthless. There are certainly unusual cases in which they could be the critical determinant of outcome. Also, the sandbagging terms can help the shareholder representative to calm down an emotional shareholder who is upset by a claim because he or she feels the buyer “knew about this.” We just don’t see them as relevant very often at the settlement or pre-litigation resolution stage.

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1 Paul Koenig is Managing Director at Shareholder Representative Services LLC.
Expense Funds

Most of the transactions on which we are engaged will include an expense fund. We are often asked how much we think the selling shareholders should set aside for this purpose. According to our data, the average size of an expense fund tends to be around 2 - 3% of the escrow amount. This percentage, however, will vary considerably with deal size (declining as a percentage with the increase in size of the escrow). Our general suggested guidelines are that $50,000 will only be enough to fund an initial letter and low-level negotiations from an attorney and $250,000 is generally sufficient to fund matters up to litigation, but that more will likely be required if a dispute progresses to material litigation or arbitration. On transactions with large earnouts or escrows, or on which there is known exposure to an issue, the former shareholders will sometimes set aside $1 million or more. In our experience, the risk of actual litigation remains pretty low. The majority of the claims we receive are either accepted or settled without the need for going to court. On the other hand, we do suggest that the selling shareholder may want to err on the side of caution and make sure they have plenty set aside to meet reasonably anticipated funding needs because it can be much harder to try to raise additional money from the stockholder group months or years after closing. Our general view is that they are better off having a sufficient expense fund and not needing it than needing it and not having it.

Conflict Waivers for Target’s Counsel

We see waivers from the buyer allowing the target company’s counsel to represent the selling stockholders after closing in roughly half of our transactions. If these waivers are included, we typically can and will engage that law firm when there is a post-closing claim that requires legal counsel. If a waiver is not given, our experience is that most buyers will not agree to it later, and we are usually forced to look to another law firm.

Patent Trolls

Unfortunately, we see a large volume of patent troll claims. The announcement of the M&A transaction will sometimes trigger claims of infringement that neither the buyer nor seller was aware of prior to closing. These are a significant systemic problem because neither party wants to see the escrow unnecessarily depleted, and patent matters tend to be very expensive to make go away. While the buyer and the shareholder representative usually work together against a third party on these matters, tricky issues can arise when the best resolution is for the buyer to enter into a global licensing agreement of all of the third party’s patents. When that happens, we have to try to determine how to allocate the associated cost between what needed to be paid due to the target company’s alleged infringement and what is attributable to the buyer’s ongoing business activities. Often, there is not an easy or obvious answer to that.

Financial Misstatement Calculation of Damages

We sometimes see claims in which the parties agree that there is a mistake in the financial statements that were delivered to the buyer. The disagreement may come, however, in the calculation of the resulting damages. The selling stockholders will often believe the indemnifiable amount should be the amount of the misstatement. Buyers, however, will sometimes allege that they paid a multiple of revenue or EBITDA, and the indemnifiable loss is the amount of the misstatement times that multiple. More information on this issue is included in our booklet, *Tales from the M&A Trenches*, but the takeaway for practitioners is that if the answer to this damages calculation question is not clear, the dispute is not likely to be resolved quickly or easily. The bid and the ask simply tend to be too far apart. We know that this is an issue the parties often choose to punt on at the drafting stage for good reason, but it can create significant problems later if this claim is made.

Taxes

Tax claims are common, but they tend to be claims based on issues other than income taxes that often get less focus or attention from the merger parties. For example, we see a significant amount of personal property tax audits or municipal tax claims. The tax issues that tend to be the most difficult, however, are sales and use tax claims. The analysis is complicated, and the number of relevant transactions can be enormous. Our suggestion is to focus closely on this issue with your client and to try to address this issue with the buyer before closing. It tends to be much easier to get consensus on the proper analysis then rather than waiting until after closing to determine that the parties have very different views on the amount of potential liability.

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Joint Task Force on Governance Issues in Business Combinations

The Joint Task Force on Governance Issues in Business Combinations held a meeting at Laguna Beach on Friday, February 3, 2012. We had good attendance (approximately 40, with both in person and telephonic participants). We spent most of our time discussing our Task Force project, which is the creation of a handbook for practitioners on advising directors on governance issues that arise in the context of acquisitions. We acknowledged that the handbook might be a bit too dense for directors, although we will strive for readability. We confirmed that, rather than a treatise, this would be a handbook providing practical guidance on likely scenarios. We reviewed the current draft of the outline of the handbook and participants made some helpful suggestions both adding to the list of topics and subtopics and suggesting ways to eliminate duplication and streamline the discussion. The Co-Chairs are revising the outline to reflect this additional input and will circulate a revised outline and assignment grid before our meeting in Las Vegas, scheduled for Friday, March 23, from 11:30 a.m. until 1:00 p.m. We also received additional volunteers for various chapters and subchapters, but there are still plenty of interesting chapters left up for grabs; please contact any of the four Co-Chairs if you are interested in working on one of the chapters or subchapters, or you want to be included in future emails about the project.

We briefly discussed outlines on two of the chapters, one on the fiduciary duties of directors generally (from John Houston and Jamie Snelson, Fredrikson & Byron, Minneapolis), and another on the board’s engagement of and management of financial advisors (from Richard DeRose, Houlihan Lokey). Based on our discussions of the tone and scope of the handbook, the authors were going to revise these outlines for our further discussion in Las Vegas. Mike Pittenger also provided an initial draft outline of the chapter on controlling stockholders, which he was also planning to revise in light of our discussions in Laguna Beach. We expect to have some additional outlines prepared for our discussion in Las Vegas.

One of the goals of our Task Force is to have good lively discussion about the various governance issues that arise in acquisitions and practical advice we can provide. We are looking forward to great discussions about these issues with all of you and look forward to seeing you in Las Vegas!

Diane Holt Frankle
Michael Halloran
Larry Hamermesh
Patricia O. Vella
Co-Chairs

Task Force on Legal Project Management

The Task Force on Legal Project Management (“LPM”) is being formed to focus on surveying legal project management in law firm practice and developing methods, practices, and tools that will enable our membership to more efficiently and effectively run transactions.

The recent stand-alone meeting in Laguna Beach featured a Committee Forum by Den White of Verrill Dana LLP, Byron S. Kalogerou of McDermott Will & Emery LLP, and Aileen Leventon, President of QLex Consulting, a firm that consults to both companies and law firms in this space.

The Forum panelists noted that corporate general counsel are, with increasing frequency, insisting that their lawyers – both in-house and their law firms – implement LPM tools and approaches to deliver greater value to clients. LPM is a means to ensure nothing is dropped and that responsibilities are clearly assigned and more closely coordinated. Consequently, LPM is a phenomenon that no transactional lawyer can afford to ignore and is directly responsive to the changing legal marketplace.

It is envisioned that the LPM Task Force will among other things:

• Develop “deliverables” such as an “intelligent engagement letter” and task-based checklists as companions to the Committee’s model agreements;
• Develop post-closing report methodologies and forms to promote continuous feedback and improvement;
• Survey LPM software tools, literature, and other resources; and
• Survey best LPM practices being adopted by firms around the world.
The Task Force will not be meeting in Las Vegas, but will be holding an organizational meeting at the Annual Meeting in Chicago in August. Details will be forthcoming in the next issue of *Deal Points*.

In the interim, if you are interested in joining the practicing lawyers and general counsel who have already expressed an interest in this exciting and path-breaking Task Force, please contact the co-chairs Den White (dwhite@verrilldana.com) or Byron Kalogerou (bkalogerou@mwe.com).

Den White
Byron Kalogerou
Co-Chairs

**Task Force on the Revised Model Asset Purchase Agreement**

The Task Force on the Revised Model Asset Purchase Agreement had its kick-off meeting at the Committee’s stand-alone meeting in Laguna Beach. There is a great deal of enthusiasm for this project, evidenced by the number of people in attendance.

At our first meeting, there was a good discussion about the following topics: (i) what the task force should use as its precedent for drafting the MAPA; (ii) the fact pattern; (iii) the style guide; and (iv) plans for moving forward. After some discussion, consensus was reached to use the recently published Revised Model Stock Purchase Agreement as a starting point, with reference back to the original MAPA. A few working groups were also established to review and update the fact pattern and produce a comprehensive style guide for drafting of the RMAPA.

Also, John Clifford agreed in Laguna Beach to serve as a vice-chair for the task force. I’m very excited to have him join the leadership of the task force.

We will be continuing our organizational efforts in Las Vegas where we are scheduled to meet on Saturday, March 24, from 10:30 a.m. until 12:00 p.m. We expect to discuss the fact pattern in more depth as well as to seek volunteers to join working groups to draft the various sections of the agreement. If you are unable to attend in Las Vegas, but are still interested in helping out, please feel free to contact me at edward.deibert@aporter.com. Otherwise, I look forward to seeing you in Las Vegas.

Ed Diebert
Chair

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**Acquisitions of Public Companies Subcommittee**

We had two excellent presentations during our stand-alone meeting in Laguna Niguel in February. The first was from Jim Moloney of Gibson, Dunn & Crutcher, who reviewed with us “What Public Company M&A Lawyers Need to Know about Reg M-A.” Yvette Austin Smith of Stout Risius Ross, Co-Chair of our Task Force on Financial Advisor Disclosures, and Steve Bigler of Richards, Layton & Finger then lead an informative discussion concerning the financial analysis performed by investment bankers in sell-side assignments, and what things target counsel should be on the look-out for in representing target boards in connection with that analysis. We also heard from the leaders of our various Task Forces – Financial Advisor Disclosures, Governance Issues in Business Combinations, and the Two-Step Auctions – as to the status of their projects.

The Acquisitions of Public Companies Subcommittee meeting to be held during the Spring Meeting in Las Vegas is scheduled for Friday, March 23, from 1:00 p.m. until 2:30 p.m. At this meeting, Rick Alexander of Morris, Nichols, Arsht & Tunnell will be leading a discussion on three recent decisions from the Court of Chancery impacting public company acquisitions – the *Compellent* decision from Vice Chancellor Laster, the *El Paso* decision (and transcript) from Chancellor Strine, and the *Delphi* decision from Vice Chancellor Glasscock. Rick Climan and Mark Morton, both of whom were involved in the Compellent transaction, will also be providing commentary from their perspectives as deal counsel in that transaction.

Our Subcommittee dinner is being held on Friday, March 23, at Bouchon (in the Venetian hotel). Cocktails begin at 7:00 p.m. with dinner at 7:30 p.m. If you have not rsvp’d and would like to attend, please contact me at jgriffin@dl.com and Fariza James at fjames@dl.com.

I look forward to seeing everyone in Las Vegas!

Jim Griffin
Chair
International M&A Subcommittee

The International M&A Subcommittee met in connection with the stand-alone meeting of our Committee in Laguna Beach.

Public Company Takeovers Project

Daniel Rosenberg of Speechly Bircham, London, summarized the current state of play on the Subcommittee’s Public Company Takeovers Project he is leading with Franziska Ruf of Davies Ward Phillips & Vineberg, Montréal.


Daniel Rosenberg also reported on the successful Global Business Law Forum that the Business Law Section held in London in September 2011 with substantial participation by members of the Subcommittee. Daniel was co-chair of the event, together with former Section Chair Charlie McCallum.

International JV Agreement Project

Freek Jonkhart of Loyens & Loeff NV, Rotterdam, and Mireille Fontaine of Gowling, Montréal, summarised the progress of the Subcommittee’s International JV Project. They have received material from contributors in some 38 countries and expect to have a total of 40 countries represented. They also reported that they are well into the editorial process on the contributions received and believe they are close to being able to publish the work. Freek and Mireille thanked the editorial team for their efforts on the work.

Cultural Issues in International Joint Ventures

Rick Silberstein of Gómez-Acebo & Pombo, Barcelona, Jeff LaBine of Miller Canfield, Ann Arbor, Jorge Yáñez of Barrera, Siqueiros y Torres Landa, Mexico City, and Vishal Gandhi of Gandhi & Associates Mumbai, gave a panel discussion on Cultural Issues in International Joint Ventures, which was followed by a Q&A session.

Restrictions on Foreign Investment in Germany

Bernd Thalmann of Arnecke Siebold, Frankfurt, gave a presentation on Restrictions on Foreign Investment in Germany, which was followed by a Q&A session.

Programs and Projects

The following subjects were proposed as possible topics:

- Nat Doliner suggested a program on International Financial Reporting Standards in the M&A context, perhaps in conjunction with the Section’s Law & Accounting Committee (where Randy Clement has expertise in this area). Jack Berk has expressed an interest in participating.
- Hermann Knott of Luther, Cologne, suggested a program on how damages for breach of representations and warranties in M&A contracts are assessed differently in different jurisdictions around the world.
- Hermann Knott also suggested a Subcommittee presentation or general program on employment law impacts on M&A transactions before, during, and after the deal is done (a topic proposed by Katrien Vorlat at earlier meetings).
- Daniel Rosenberg referred to the previously proposed possibility of a program on cross-border distressed company acquisitions as a joint presentation of IMAS and the Task Force on Distressed M&A.
- Freek Jonkhart suggested a program comparing the content and use of MAC clauses in different jurisdictions.
- Freek also suggested a program on the issues that would arise in the event of a Euro break-up.
- Jim Walther suggested a program updating on CIFIUS and/or FCPA issues.

Other suggestions remaining on the agenda from earlier meetings were the following:

- The use of representations and warranties insurance in M&A transactions.
- Director liability issues after the deal is done: You’re not in Kansas (London, Toronto) any more.
- Changes in the UK Takeover Code/comparison with developing US (and other) takeover practice.
- Developments in Global M&A: Does Anybody Remember the Crisis and What Did We Learn?
Use of new supranational corporate entities in M&A (Societas Europaea, etc.).

Return of nationalization risk in cross-border M&A.

International comparison of disclosure requirements and restrictions on “stake-building.”

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. Points raised included the following:

• Nick Dietrich of Gowling, Toronto, described a recent Canadian Supreme Court case holding that the proposed form of federal Canadian Securities Act was found unconstitutional by the Supreme Court of Canada as improperly encroaching on the reserved powers of Canadian provinces.

• Jorge Yáñez described regulations which were published and became effective in December 2011 which deepen the scope of the Mexican Federal Law to Protect Personal Data Held by Private Parties and shed light on some of the unclear provisions of the law.

• Jorge Yáñez also described the recent denial of approval by the Mexican Federal Competition Commission COFECO to the Televisa-Iusacell merger.

• Jim Walther referred to the increasing level of activity where CIFIUS was involved.

• Daniel Rosenberg referred to recent developments in Europe on privacy, including on the use of cookies.

Next Meeting

The Subcommittee’s next meeting will be held in connection with the Spring Meeting of the Business Law Section at Caesars Palace in Las Vegas. The International M&A Subcommittee will meet on Friday, March 23, from 2:30 p.m. until 4:30 p.m. The agenda for the meeting, and conference call information for those who cannot attend in person, will be circulated before the meeting.

Subcommittee Website

Our website can be accessed at http://apps.americanbar.org/dch/committee.cfm?com=CL560016. The website contains the following:

• Presentation notes of Bernd Thalmann on Restrictions on Foreign Investment in Germany.

• Notes from the general discussion session including:
  • a note by Nick Dietrich expanding on his comments on the constitutionality of the new Canadian Securities Act.
  • a note by Jorge Yáñez expanding on his comments on the Regulations on the Mexican Federal Law to Protect Personal Data Held by Private Parties.
  • a note by Daniel Rosenberg expanding on his comments on privacy in Europe.

• The latest materials from the Subcommittee’s Foreign Direct Investment Project and International Dispute Resolution Project.

• Details of the Subcommittee’s publications, future meetings, other work-in-progress and other past program materials.

We look forward to seeing you in Las Vegas.

Daniel P. Rosenberg
James R. Walther
Co-Chairs

Membership Subcommittee

We are pleased to report that our total Committee membership, as of January 6, 2012, is at 4,159 compared to our number of 4,054, as of January 10, 2011. This is again an increase of 3%. An amazing jump in less than a year. Our focus has and will remain on programs and events that will keep you, our members, engaged and which will hopefully attract new ones.

Since July 2011, our membership has gone down from 49 to 48 states but from 51 to 55 countries so a 7% increase. The ABA is on a “global” trend! We are also glad to report a 1% increase in our in-house counsel members from 386 to 389 as well as a 5% increase in our “associate” members (non-lawyers) which went from 339 to 355. We focused on those members as we believe they add positively to our Committee and we remain engaged in seeing these numbers continue to rise! Canadian members have also increased from 186 to 190, up 2%!

As you know, the Membership Subcommittee has been formally expanding its ties with the Association for
Corporate Growth (ACG) and the Diversity Subcommittee has been very active creating opportunities for young lawyers and minority members of the Bar to join and get to know our Committee. Efforts have paid off as we have seen an increase in the membership of women members, always top of mind for the Membership Subcommittee. Let’s not forget also the growth in members of various ethnicities, certainly stemming from all the work done by our Diversity Subcommittee.

As for our Subcommittees: The M&A Market Trends Subcommittee is still our largest group with 1,494 members. But almost all our subcommittees have seen an increase in membership since July 2011! Here is a list of some of the other larger subcommittee and task forces:

- Private Equity M&A 1,319
- International M&A 847
- Acquisitions of Public Companies 831

We cannot stop our efforts to attract new members and are working at new events, associations, and programming to keep you interested and involved. Please share your ideas with us. Indeed, join the Membership Subcommittee — our members are also going up with 177 members. Get involved to involve others!

The Programs Subcommittee also will welcome all new ideas. It is with that in mind that three new task forces have been created since July 2011:

- “Joint Task Force on Governance Issues in Business Combinations” numbers 35 members;
- “Task Force on New Projects” numbers 43 members; and
- “Task Force on Financial Advisor Disclosures” numbers 27 members.

It shows that we not only attract new members but that our members want to participate in new projects that will be for our benefit.

Thank you for your involvement and dedication. We appreciate it tremendously.

Tracy Washburn
Ryan Thomas
Mireille Fontaine
Vice Chairs

**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 on-line library, called the M&A Lawyers’ Library, which members of our Committee can access from the Committee’s home page on the ABA website at the following address: http://apps.americanbar.org/dch/committee.cfm?com=CL560000.

The Annual Survey Working Group will meet in Las Vegas on Friday, March 23, from 10:30 a.m. until 11:30 a.m., in Neopolitan I and II, Promenade Level, Caesars Palace. The Judicial Interpretations Working Group will meet immediately thereafter, from 11:30 a.m. until 1:00 p.m., in the same room. Dial-in information for both meetings: U.S. and Canada: (866) 646-6488; International: (707) 287-9583; passcode 6513805024.

**Annual Survey Working Group**

The ninth Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions will be published in the February 2012 issue of *The Business Lawyer*. We thank all Committee members who participated in that effort. At the Committee meeting in Las Vegas we will discuss *Auriga Capital Corporation v. Gatz Properties, LLC*, summarized below, and other cases of sufficient interest identified during our working group meeting. At the Working Group meeting we will continue our efforts to select cases for inclusion in the 2012 annual survey.

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 Jon Hirschoff at jhirshoFF@fdh.com or to Mike O’Bryan at mobryan@mofo.com. Please state in your email 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 exclusively 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 at jhirschoff@fdh.com with a copy to Mike O’Bryan at mobryan@mofo.com, or simply attend the working group meeting in Las Vegas.

**Decision to be Discussed at the Las Vegas Committee Meeting**

*Delaware Court Affirms LLC Manager Fiduciary Duties, Holds Manager Liable for Failure to Manage Proactively*

In *Auriga Capital Corporation v. Gatz Properties, LLC,* the Delaware Court of Chancery held that the manager of a limited liability company owes fiduciary duties of loyalty and care to the LLC’s members, unless modified by contract. The Court found after trial that the manager of an LLC, who controlled a majority of the LLC’s membership interests, had breached his duties to the minority members by failing to cause the LLC to explore its strategic alternatives at an appropriate time, so that he could buy out the remaining interests at a “fire sale” price. The Court awarded damages based on the value and alternatives that the Court believed the LLC could have secured several years earlier, had the manager acted “properly” at such time.

**Background**

In 1997, William Gatz (“Gatz”), through a holding company, and Auriga Capital Corporation formed Peconic Bay, LLC (“Peconic”) to build and operate a golf course on property owned by Gatz’s family and leased by them to Peconic for a term of 40 years (with options exercisable by Peconic to extend). Peconic’s operating agreement designated Gatz’s holding company as manager and created Class A and Class B membership interests. By 2001, Gatz, with his family, held controlling shares of the Class A and Class B interests. ²

Peconic was intended to function as a “passive black box entity” that would pass profits from the golf course to the members, with actual management of the course to be handled by a third-party operator. ³ In March 1998, Peconic subleased the course to American Golf Corporation (“American Golf”) for this purpose for a term of 35 years, with an option for American Golf to terminate after January 31, 2010.

American Golf, however, soon “evidenced a disinterest in the property.” ⁴ By 2005, Gatz knew that American Golf was likely to terminate the sublease in 2010. However, Gatz “failed to take any steps at all to find a new strategic option for [Peconic]...” ⁵ Among other things, Gatz failed to search for a buyer for Peconic. When one presented itself in 2007 in the form of RDC Golf Group, Inc. (“RDC”), Gatz discouraged it by refusing to provide due diligence materials or negotiate in good faith and telling it that its revenue projections for Peconic’s golf course were too high.

Starting in 2008, Gatz made several offers to buy out the minority, without disclosing RDC’s willingness to consider a higher bid. When the minority members refused, Gatz threatened to sue them under a provision of the operating agreement that allowed the holders of a majority of the LLC interests to vote out the minority so long as a fair price was paid, an approach Gatz described as an attempt to “play hardball” with the minority. ⁶

In 2009, Gatz conducted what the Court characterized as a “sham” auction, using an inexperienced auctioneer from a firm that focused on bankruptcy work, limited publicity, and a due diligence package provided to buyers just one month before the auction (and without contacting RDC). “Worst of all,” according to the Court,

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² *Id. at *5.*
³ *Id. (internal quotation marks omitted).*
⁴ *Id. at *1.*
⁵ *Id. at *1, 15.*
⁶ *Id. at *19 (internal quotation marks omitted).*
the auction materials indicated that Gatz, as a controlling interest holder, intended to bid and reserved the right to cancel the auction, discouraging other potential bidders. Ultimately, Gatz was the only bidder, offering to pay $50,000 and to assume Peconic’s debts. The Court concluded that the auction was “the culmination of Gatz’s bad faith efforts to squeeze out” Peconic’s minority members, and that “by failing for years to cause [Peconic] to explore its market alternatives, Gatz manufactured a situation of distress to allow himself to purchase [Peconic] at a fire sale price at a distress sale.”

**Court Analysis**

**The LLC Manager as a Fiduciary**

The Court acknowledged that the Delaware LLC Act, like the Delaware corporate code, “does not plainly state that the traditional fiduciary duties of loyalty and care apply by default as to managers or members of a limited liability company.” But, observing that the LLC Act mandates that “the rules of law and equity . . . shall govern” LLCs, and that LLC managers, who are “vested with discretionary authority to manage the business of the LLC,” qualify as fiduciaries under “traditional principles of equity,” the Court concluded that LLC managers owe enforceable fiduciary duties.

The Court stated that these duties can be modified, or even eliminated, by an LLC’s operating agreement. However, Peconic’s operating agreement did not include a provision limiting the manager’s duties to those set forth in the operating agreement. Instead, it had a provision establishing a standard and a process for self-dealing transactions, which the Court noted was “akin to entire fairness review.” It also had a provision exculpating the manager and others for certain actions other than gross negligence, willful misconduct, and willful misrepresentation, which, the Court pointed out, is both “stronger and weaker” than that allowed for corporations, since it leaves the manager potentially liable for gross negligence, rather than exculpating all violations of the duty of care, and exculpates the manager from breaches of the duty of loyalty, to the extent not committed in bad faith or through willful misconduct.

**An Affirmative Duty to Manage**

The Court found that Gatz breached his duties in several ways, which the Court summarized as:

- failing to take any steps for five years to address in good faith the expected loss of American Golf as an operator;
- turning away a responsible bidder which could have paid a price beneficial to [Peconic] and its investors in that capacity;
- using the leverage obtained by his own loyalty breaches to play “hardball” with the Minority Members by making unfair offers on the basis of misleading disclosures; and
- buying [Peconic] at an auction conducted on terms that were well-designed to deter any third-party buyer, and to deliver [Peconic] to Gatz at a distress sale price.

In general, the Court stated that an LLC manager’s fiduciary duty includes the duty to “address in good faith known, material risks that threaten the viability of the business.” According to the Court, “a responsible fiduciary” would have reviewed Peconic’s strategic alternatives, including whether to find a replacement operator, whether Peconic could operate the course itself, and whether another company might acquire Peconic or its assets, “right away” when it became apparent that American Golf would not renew its lease and while Peconic was “still in a position of strength.” However, there was no evidence that Gatz pursued any of these. Instead, he “sat back and waited” for the American Golf sublease to run, so that he could “gain leverage” to eliminate the minority holders.

The Court acknowledged that Gatz “of course, had no duty to sell his interests.” But the Court also noted that “the fact that [Gatz] was not a seller does not

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7 Id. at *24.
8 Id. at *8.
9 Id. (citing 6 Del. C. § 18-1104).
10 Id.
11 Id. at *9 (citing 6 Del. Code Sec. 18-1101(c)).
12 Id. at *11.
13 Id. at *13.
14 Id.
15 Id. at *14 (citing Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006)).
16 Id. at *15.
17 Id. at *15-16.
18 Id. at *28.
mean that he had a free license to mismanage Peconic so as to deliver it to himself for an unfair price.”

**Damages**

The Court found that, had Gatz dealt with RDC “with integrity” in 2007 when RDC was displaying its interest, it “seems probable” that Peconic could have been sold for a full return of the minority members’ invested capital plus 10%. Among other things, the Court noted RDC’s potential interest in discussing an acquisition at that price, which Gatz had rejected, and Gatz’s own unwillingness to sell his interests at that price. The Court accordingly awarded that amount as damages.

In supporting its award, the Court noted a discounted cash flow analysis presented by Peconic’s minority members that showed an even higher value for Peconic, and stated that “even as of the date of the [a]uction the fundamentals” of Peconic justified an offer above the amount of Peconic’s debt. The Court noted that the ambiguities as to “what a fully-negotiated third-party deal would have produced” were Gatz’s “own fault,” and accordingly should be construed against him.

**Judicial Interpretations Working Group**

After years of effort by members of the Judicial Interpretations Working Group, the M&A Lawyers’ Library went live prior to our August meeting in Toronto. The focus of our Working Group is now to add to the content of the library. To that end, at our meeting in Laguna Beach in February we discussed the memo on enforceability of pre-transaction letters of intent authored by Sarita Nair, which we plan to add to the library soon.

We welcome all interested Committee members to join our Working Group. The Judicial Interpretations Working Group is a good way to become involved in the Committee, especially for younger Committee members because extensive M&A transactional experience is not necessary. We have working group teams in various stages of preparation of memoranda regarding additional acquisition agreement provisions and M&A issues, and we have a virtually unlimited pool of topics to work on in the future.

As indicated above, the Las Vegas meeting of the Judicial Interpretations Working Group will be held on Friday, March 23, from 11:30 a.m. until 1:00 p.m., in Neopolitan I and II, Promenade Level at Caesars Palace, immediately following the Annual Survey Working Group meeting. We plan to discuss (i) the M&A Lawyers’ Library, (ii) the Memo on Fraud Claims and Non-Reliance and Exclusive Remedy Clauses, authored by Patrick Leddy, Joseph Kubarek, Nicholas Dietrich and Craig Menden, and (iii) the status of other memos in progress.

To join our working group, please email Scott Whittaker swhittaker@stonepigman.com, or simply attend the working group meeting in Las Vegas.

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19 Id.
20 Id. at *27.
21 Id. at *25.
• Rob DelPriore will provide our first “Tales from the Trenches” presentation on real world negotiations on diminution in value;

• Eric Wilensky and Iain Scott will conduct a mock negotiation of the target board’s right to change its recommendation, with data points from our 2011 Strategic Buyer/Public Target Deal Points Study; and

• Steve Kotran will discuss Practical Law Company’s reverse break-up fee study.

What happens in Vegas will be telecast; the dial-in number and passcode for the meeting for those of you who cannot attend in person is as follows:

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 2527406387

I look forward to seeing you in Las Vegas.

Jessica Pearlman
Chair

Private Equity M&A Subcommittee

The Private Equity M&A Subcommittee met in Laguna Beach on Friday, February 3, 2012, as part of our Committee’s 2012 stand-alone meeting. Presentation materials were available for Subcommittee members and the Subcommittee discussed events and developments affecting the Private Equity market during the past six months since the Subcommittee last gathered in Toronto. In addition, the following segments took place with the speakers referenced: (i) “The Current Private Equity and Leveraged Finance Market Environment,” with Richard Hardegree, Managing Director and Co-Head of Technology M&A, and Christina Park, Managing Director, Leveraged Finance, both from Barclays Capital; and (ii) “Review of Selected Data Points From Houlihan Lokey’s Recent Going Private Transaction Study,” with Richard DeRose, Managing Director, Mergers & Acquisitions, at Houlihan Lokey. The Subcommittee meeting was well-attended, and the Subcommittee Chair thanks all participants and Subcommittee members for contributing to the session.

John K. Hughes
Chair

ABA Annual Meeting
Business Law Section
Chicago Marriott Downtown
August 3-6, 2012

The ABA Annual Meeting will be held this year in Chicago, home of the American Bar Association and a robust legal community.

The ABA's sections, divisions, and other entities are developing more than 200 CLE programs that are relevant to our nation's lawyers. There will be abundant opportunities to network with lawyers and judges from around the world.

The Opening Assembly will be held Saturday, August 4, at the Chicago Symphony Center. The President’s Reception will immediately follow at the Art Institute of Chicago.

For up-to-date information about the meeting, please visit our continually updated website at www.ambar.org/annual.

Hotel Accommodations

All programs and meetings for the Business Law Section will be held at the Chicago Marriott Downtown.

The ABA has appointed Convention Data Services (CDS) as the official ABA housing company for the 2012 Annual Meeting in Chicago. CDS/Travel Planners will be the only source for ABA Meeting Registration and Official Housing.

To secure registration and hotel accommodations, all participants are required to register and pay the appropriate fees using one of the following methods:

Online: www.ambar.org/annual
Fax: (508) 743-9602
Mail: ABA/CDS/Travel Planners
Chicago 2012107
Waterhouse Road, Bourne, MA

Airline Travel

ABA Negotiated Airfare Discounts – available online. You can automatically obtain ABA negotiated airfare discounts for travel to the Annual Meeting.

Available Online: www.ambar.org/annual
Offline: (877) 222-4185
### Thursday, March 22, 2012

**Program: Deal Trends, Current Terms, and Recent Developments in § 363 Sales**  
10:30 a.m. – 12:30 p.m.  
Florentine IV, Promenade Level

**Program: The Ins and Outs of Topping Bids: Maneuvering Through Deal Protection Terms**  
2:30 p.m. – 4:30 p.m.  
Florentine IV, Promenade Level

### Friday, March 23, 2012

**M&A Market Trends Subcommittee**  
9:00 a.m. – 10:30 a.m.  
Romans II and IV, Promenade Level

- **U.S. and Canada:** (866) 646-6488  
- **International:** (707) 287-9583  
- **Passcode:** 2527406387

**Task Force on Distressed M&A**  
9:30 a.m. – 10:30 a.m.  
Florentine I, Promenade Level

- **U.S. and Canada:** (866) 646-6488  
- **International:** (707) 287-9583  
- **Passcode:** 3870540632

### Conference Code

- **Private Equity M&A Subcommittee:** 2527406387  
- **Annual Survey Working Group of the M&A Jurisprudence Subcommittee:** 2527406387  
- **Judicial Interpretations Working Group of the M&A Jurisprudence Subcommittee:** 6513805024  
- **Joint Task Force on Governance Issues in Business Combinations:** 4373590974  
- **Acquisitions of Public Companies Subcommittee:** 2527406387
International M&A Subcommittee
2:30 p.m. – 4:30 p.m.
Romans II and IV, Promenade Level

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 2527406387

Task Force on M&A Dictionary
3:00 p.m. – 4:00 p.m.
Trevi Room, Promenade Level

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 1145265056

Meeting of Committee Chair and Vice Chairs, Subcommittee, Task Force and Working Group Chairs
4:30 p.m. – 5:30 p.m.
Romans II and IV, Promenade Level

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Conference code: 2527406387

Task Force on Two-Step Auctions
9:30 a.m. – 10:30 a.m.
Octavius 21 & 22, Promenade Level

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 5170670679

Saturday, March 24, 2012

Task Force on the Revised Model Asset Purchase Agreement
10:30 a.m. – 12:00 p.m.
Octavius 5, Promenade Level

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 6989852466

Committee Forum
3:00 p.m. – 4:00 p.m.
Romans II and IV, Promenade Level

U.S. and Canada: (866) 646-6488
International: (707) 287-9583
Passcode: 2527406387

Committee Reception hosted by Diversity and Membership Subcommittees
4:00 p.m. – 5:30 p.m.
Octavius 21 and 22, Promenade Level

Sponsored by: Houlihan Lokey

Committee Dinner
Pinot Brasserie at The Venetian
3355 Las Vegas Blvd. South
Las Vegas, NV 89109
Phone: (702) 414-8888
Reception: 7:00 p.m.
Dinner: 8:00 p.m.

Dinner sponsored by: Practical Law Company
Reception and Dessert sponsored by: Shareholder Representative Services LLC
American Bar Association, Section of Business Law, Mergers and Acquisitions Committee. The views expressed in the Mergers and Acquisitions Committee Newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Mergers and Acquisitions Committee. If you wish to comment on the contents, please write to the Mergers and Acquisitions Committee, Section of Business Law, American Bar Association, 321 N. Clark Street, Chicago, Illinois, 60610.