FROM THE CHAIR

As the end of a cold and snowy January finally approaches, I am cheered by the thought that I will soon be in sunny southern California. Based on the registrations to date for the meeting at the Montage, we are expecting our largest audience for a standalone meeting. I hope to see you later Friday and Saturday in Laguna Beach. Safe travels!

As in prior years, our subcommittees and task forces will meet throughout the day on Friday and then Saturday morning, followed by our full Committee meeting Saturday afternoon. A complete schedule is set forth at the end of Deal Points. If you will not be able to attend in person, please consider joining us by phone. You can find the dial-in information for each task force, subcommittee and the full Committee meeting in this issue.

A special note of thanks to Paul Koening and Chris Longley of Shareholder Representative Services for their sponsorship of Friday’s dinner at the Mongage. I am also pleased to report that Andrew Capitman of Duff & Phelps is sponsoring Friday’s cocktail hour. We should have a great evening! On behalf of the Committee, THANK YOU!

Full Committee Meeting

Our full Committee will meet on Sunday from 3:00 to 5:30 apm. During the meeting, in addition to task force and subcommittee reports (a number of which are substantive in nature), we will have several short substantive presentations on a number of topics, including presentations led by Melanie Aitken (Canadian antitrust), Rick Climan (statute of limitations for breaches of representations and warranties) and Andrew Capitman (dividend recaps).

Task Force and Subcommittee Meetings

Nearly all of our Task Forces and Subcommittees will meet this week and a number of them will host substantive programs and/or discussions. For example, during the Market Trends meeting, they will report on three studies
that they have released (Strategic Buyer/Public Target, Private Target, and Canadian Public Target). During the meeting of the Acquisition of Public Companies Subcommittee, that subcommittee and the Joint Task Force on M&A Litigation will jointly host a presentation on “Practical Things Deal Lawyers Need to Know About M&A Litigation.” In addition, the Private Equity M&A Subcommittee will host several presentations, including one by Steven Davidoff, also known as The New York Times’ Deal Professor. If you have time, please consider attending these presentations, as well as the many other programs and discussions that will occur during our meetings.

Planning for Los Angeles

Please mark your calendar now for our Spring meeting in Los Angeles, California, from Thursday, April 10th, through Sunday, April 13th. Registration is live and rooms are going fast, so sign up now! The Committee will sponsor two programs during the meetings in Los Angeles, including one on stockholder activism in M&A (our new judicial advisor, Chancellor Leo Strine, is a panelist) and one that our newest initiative, Women in M&A, will host. Both promise to be outstanding programs!

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I am pleased to report that Chancellor Leo Strine (soon to be Chief Justice Leo Strine) is joining our Committee as our new judicial advisor. The Chancellor’s pending confirmation hearing will keep him from attending our meetings this week, but we look forward to a long association with him.

Finally, a few words about our most recent judicial advisor, Myron Steele, the former Chief Justice of the Supreme Court of Delaware. As you will see when you read this issue of Deal Points, we have dedicated the issue to him. For the past decade, Myron was a steadfast participant of, and contributor to, our Committee. In this issue, many of his colleagues offer their thoughts and thanks for his long service to this Committee and the State of Delaware. All of the generous remarks are richly deserved. I have taught with Myron for many years and, most recently, was able to start calling him my partner. But, like, most of you, what I value most is the opportunity to call him my friend. We all are looking forward to your continued involvement in the work of this Committee!

If you have any questions concerning our upcoming meetings, please reach out to me. I look forward seeing all of you.

Mark Morton
Chair

FROM THE CO-EDITORS

During his tenure as Chief Justice, Myron Steele was a tremendous asset to our committee. As such, he was also a tremendous “defender of the franchise”, to use a bit of Delaware parlance. Putting that aside, he was and is, simply, a gentleman, and a good friend to us both and many on this committee. We dedicate this issue of Deal Points to Chief Justice Steele and his tenure as judge, Chief Justice, committee liaison and friend. Fortunately for us all, the party is not over yet as we look forward to many more years of the Chief Justice’s involvement in the Mergers and Acquisitions Committee.

Eric S. Klinger-Wilensky
Ryan D. Thomas
Co-Editors
As the predecessor to Chief Justice Steele, and one who usually was on the same page with him in concert and sequentially, I have the temerity to suggest that I may have a unique perspective on his legacy. We were judicial colleagues in the finest sense of the word throughout my twelve-year term (1992-2004) on the Supreme Court while he served on the Superior Court, the Court of Chancery, and the Supreme Court.

Simply to list his four important positions in the Delaware judiciary (Superior Court Resident Judge, Vice Chancellor, Supreme Court Justice, and Chief Justice of Delaware) reveals not only his breadth of knowledge and experience but also his notable public service. Notice that I used the term “Chief Justice of Delaware.”

In Delaware the Chief Justice of the Supreme Court, although “first among equals,” has essentially the same jurisprudential responsibilities as the other four justices in deciding the myriad cases (over 700 per year) that come before the Supreme Court, and which the Court decides with remarkable speed and scholarship. But the Chief Justice also has enormous—and sometimes exhausting—administrative responsibilities under the Delaware Constitution, which provides that the “Chief Justice of the Supreme Court … shall have general administrative and supervisory powers over all the courts…”

Beyond those demanding judicial and constitutional duties of deciding cases and administering and supervising the judicial branch, the portfolio of the Chief Justice of Delaware also includes an implied obligation to be an “ambassador at large” by reaching out nationally and globally to shine a spotlight on the preeminence of Delaware’s courts, especially with respect to corporate law. As ambassador, Myron Steele is a well-traveled and eloquent speaker and writer. Indeed, I need mention only his many substantive contributions as an active member of the Mergers & Acquisitions Committee of the ABA Section of Business Law.

He has carried out all of his duties—jurisprudential, administrative, supervisory, and ambassadorial—superbly. I do not have the time here to recite the details of those many responsibilities. For now, I will focus on only one example of his corporate jurisprudence. Others will likely discuss some of his significant decisions for the Court, but I would like to focus on one of the dissent— which he and I shared, in an important corporate case—and why that dissent itself was a contribution to Delaware’s unique role in the global corporate pantheon.

That case, of course, is Omnicare. In that case, the 3-2 majority of the Supreme Court surprisingly reversed a well-reasoned opinion of the Court of Chancery and enjoined an intensively negotiated merger, primarily on the ground that there should have been a “fiduciary out,” even though the merger was the “only game in town” to save the company. Why do I emphasize our joint, and his separate, dissent in that case? Because our views in dissent have stood the test of time over the ten intervening years in two important ways: (1) I believe that the prevailing view in the national M&A community is that we were right in 2003 and (2) although there was reason to worry about the majority opinion at the time, deal-making dynamics have evolved to work around it, as we predicted they would.

At the time, then-Justice Steele worried in his separate dissent:

I am concerned that the majority decision will remove the certainty that adds value to any rational business plan. . . . Instead of thoughtful, retrospective, restrained flexibility focused on the circumstances existing at the time of the decision, have we now moved to a bright line regulatory alternative?

But we expressed hope in our joint dissent that the sky was not falling, necessarily:

It is regrettable that the Court is split in this important case. One hopes that the Majority rule announced here—though clearly erroneous in our view—will be interpreted narrowly and will be seen as sui generis. . . . [If] the holding is confined to these unique facts, negotiators may be able to navigate around this new hazard.

Indeed, dealmakers have not found the majority opinion

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2 Id. at 950 (Steele, J., dissenting).
3 Id. at 946 (Veasey, C.J. and Steele, J., dissenting).
to be an insurmountable obstacle in M&A deals. I had the honor recently to be invited to speak on a panel at a symposium of the University of Iowa College of Law on the tenth anniversary of *Omnicare*. I followed my oral presentation with an article published in the Journal of Corporation Law, reaffirming what Myron Steele and I had said and predicted in our dissents ten years earlier. I indicated that *Omnicare* “is an aberration in two important respects:

First, its unique facts are not likely to be repeated. . . . The Delaware Supreme Court, if confronted again by such facts, could well overrule the majority opinion in *Omnicare*. Dealmakers are not likely to take that risk, however. There is no need for dealmakers to replicate this “perfect storm” because there are workable alternatives, and the court is unlikely to expand the *Omnicare* doctrine, in my view. . . .

. . . .

Second, the art of dealmaking has indeed moved on, and negotiators have been “able to navigate around this new hazard.” Dealmakers have continued to develop new structures for protecting deals while not implicating the exact concerns the *Omnicare* majority opinion identified. . . .

I would not say that *Omnicare* is in the category of “no harm, no foul.” The majority opinion was a well-written decision of our respected court, and remains the law of Delaware (for now) on its unique facts. Myron Steele and I happened to think that it was wrong. Many other scholars agree. That is not to disparage our esteemed colleagues in the majority, but I hope that our dissent provided a palliative and a perspective that has helped to cabin the initial concern for the implications of the majority opinion and to right the ship of Delaware jurisprudence.

It has been a great pleasure and honor for me to have served with Myron Steele. I am delighted to join in the well-deserved tributes to his distinguished career and to wish him all the best in his retirement.

*By: Leo E. Strine*

My friend and colleague, former Chief Justice Steele, always liked to comment on the length of my decisions.


In his honor, therefore, I shall be brief. Myron T. Steele brought a passion to his judicial service that manifested his deep commitment to his state and doing justice. Recognizing the centrality of business law to the well-being of our state and the importance of the courts to ensuring that the investors and managers of business enterprises got timely and sensible decisions that also established a predictable, efficient, and fair path forward for businesses planning future transactions, Chief Justice Steele made it his regular duty to engage with the diverse constituents of our entity laws, hear their views, and understand their perspectives. He did that to make sure that when he had to decide a sophisticated business case, he had a firm grasp of the commercial context and the general perspectives of key market participants.

In order to foster predictability, his jurisprudence emphasized the importance of respecting bargains struck by sophisticated parties with equal bargaining power, so that the wealth-creating potential of business entities for society could be maximized. Chief Justice Steele always kept in mind that without the ability to rely on contractual terms when they were disputed, parties in commerce would be more reluctant to engage in valuable transactions, a result that would not engender either greater fairness or great societal wealth. Likewise, whether the defendant in a case was a criminal defendant or a corporate director, Chief Justice Steele’s keen sense of equity led him to always make sure he assessed the case from the perspective of the defendant in real time, who had to make decisions without the benefit of hindsight but with all the limitations that come when flawed humans must make important decisions based on limited information and under real world time pressures. The sound policy wisdom of the business judgment rule never had a more vigilant guardian than Chief Justice Steele.

Finally, Chief Justice Steele’s sense of duty translated directly into a diligent work ethic and commitment to quality. His provocative and well-reasoned decisions in many diverse areas are well regarded for their high quality, inventive turns of phrase, and common sense. And working members of our judiciary and constituents of our business laws know that he also sweat the administrative and day-to-day details vital to any well-functioning organization. I was proud to serve as his colleague on Chancery and to serve as one of his foot soldiers when he was Chief Justice. I will miss him.
By: Rick Climan

My four-year term as Chair of our Committee (2002-2006) is now something of a distant memory. During that period we established many exciting new subcommittees and task forces, and the Committee’s membership grew dramatically. But, by far, my most significant accomplishment as Chair was convincing Myron to become the Committee’s official judicial liaison. For the past decade, we have all greatly benefited from Myron’s willingness to share his wisdom and insights on M&A-related matters with our Committee, and I very much hope he will continue to do so for decades to come.

Thank you, Mr. Chief Justice!

By: Joel Greenberg

This issue of Deal Points is an appropriate forum to acknowledge and celebrate the distinguished judicial career of the Honorable Myron T. Steele (or, as he likes to be called, “Marn”), who retired as Chief Justice of the Delaware Supreme Court on November 30, 2012. Appropriate because this is the first issue of the newsletter of the ABA Mergers & Acquisitions Committee to be published since Marn’s retirement and he has been a true friend of the M&A Committee and its members for many years.

Merriam-Webster defines friend as “one that gives assistance or that favors or promotes something” and that is an apt description of Marn’s relationship with the M&A Committee. He attends our meetings, participates in our discussions and speaks in our programs. He also sponsors and participates in our annual Wilmington meetings with the Delaware judiciary, which in recent years have been enlivened by crab dinners at Sambo’s Tavern and a reception at his home in Dover. The significance of Delaware law to all mergers and acquisitions lawyers makes it difficult to overstate the value of Marn’s participation and the insights that he has shared with us over the years (and the crabs at Sambo’s are really good too).

Another definition of friend is “a person who you like and enjoy being with” and for me and many others in the M&A Committee who have had the opportunity to get to know Marn that is an equally apt definition. I have enjoyed and learned from the time I have been able to spend with him over the last 15+ years.

Deal Points is not the right forum for a comprehensive analysis of Marn’s jurisprudence, nor am I, as a non-Delaware lawyer, the right person to provide one. I would, however, like to note one aspect of that jurisprudence that may provide some insight into his view of the transactional bar – his approach to contract construction. From his decision as a Vice Chancellor in the Computer Associates stock option litigation – Sanders v. Wang (Del. Ch. 1999) – to his decision as Chief Justice of the Supreme Court in the Bridge Medical earn-out litigation – Amerisourcebergen Corp. v. LaPoint (Del. 2008) – Marn has been a consistent adherent to the view that if the language of a contract is unambiguous it should be enforced as written and that it is not the role of the courts to speculate about whether the drafters may have overlooked something or intended a different result in a particular situation. There are many reasons to take this approach – including predictability of outcome and avoidance of the need to resolve factual issues concerning intent – but I like to think that it also reflects some respect for transactional lawyers -- a belief that when we manage to draft an unambiguous contract it is likely to reflect what we and our clients intended.

It has been a distinct pleasure and honor for me to have known Marn and I am delighted to join with others in celebrating his distinguished career and wishing him all the best as he begins the next phase of his career as a partner of Potter Anderson Corroon LLP. I also hope and trust that he will continue to find time to be a friend to the M&A Committee and its members.

By: Leigh Walton

It is with distinct honor that I write this short message congratulating the Chief Justice on his remarkable contribution to corporate law in America. His leadership has kept Delaware at the forefront of corporate governance, providing continued predictable and sophisticated analysis of complex mergers and acquisitions issues. It is not an overstatement to say that the robust deal flow in the US is attributable in some significant measure to the well-developed Delaware corporate law that guides the negotiation and consummation of transactions in this country.
I also write to thank the Chief Justice for his immense contributions to the M&AC. When devising the agenda for our full Committee meetings, I tried to schedule presentations that were both timely and authoritative. Naturally I turned to Chief Justice Steele early in the design process for each meeting.

During my term as Chair, the Chief Justice spoke on issues ranging from changes in proxy access and constituent directors, fiduciary duties related to risk management, the impact of forum selection clauses in bylaws and charters, defending poison pills, the distinctions between Delaware and Nevada law, M&A sales processes involving financial and strategic buyers, fiduciary duties in limited liability companies and the continued utility of staggered boards as a tool for board supremacy and “shareholder” rights.

I do not believe that the CJ missed a meeting during my term. We are indebted to him for his volunteer service. Best wishes as you enter private practice.

**TASK FORCE REPORTS**

**Joint Task Force on Governance Issues in Business Combinations**

Our Task Force is preparing a handbook covering the governance issues that arise in business combination transactions. We have drafts of many chapters and detailed outlines of many more, so we are making great progress, but there is always room for more help both in drafting and in the editorial process.

Our Task Force meetings are now devoted to discussing current governance issues and the practical concerns that are arising for us as practitioners in understanding and implementing key decisions. Please join us to learn or to offer your experiences - it all goes into the mix!

At the San Francisco meeting, a highlight was a discussion led by Danielle Gibbs of Young Conaway of the recent opinion by Chancellor Strine in *In Re MFW Shareholders Litigation* (Del. Ch. May 29, 2013), which held that a controlling stockholder who conditions an offer for a controlled target from the beginning of a process on both the approval of an independent special committee and a majority of the unaffiliated stockholders may be entitled to the business judgment review standard, subject to judicial review of the independence and proper empowerment of the special committee and the disclosure to the unaffiliated stockholders. The Task Force discussed the likely impact of this case on deal-making.

We also discussed the common issues raised in Chapter 6 (Unsolicited Approaches and Pressures to Sell and Deciding to Explore a Sale), and former Chapters 15 (Post-Announcement Developments) and 21 (Special Issues in Hostile Transactions and in Dealing with Activists) with authors Tatjana Paterno and Ryan Thomas of Bass Berry, and Rolin Bissell of Young Conaway. We are combining Chapters 15 and 21 into a new chapter (Special Situations Post-Announcement: Deal Derailers—Jumping Bids, Stockholder Opposition and Material Adverse Changes), and we highlighted the drafting issues arising from the need to deal with similar issues from different perspectives. This is an issue that will arise several times as we move closer to completion and we are making great progress.

At our meeting in Washington DC in November, Richard De Rose led a discussion on some interesting issues in his chapters on the engagement of financial advisors and the auction process. In particular, Richard led a very interesting discussion on how bankers and boards are dealing with conflicts of interest in the engagement process. We also talked briefly about the use and practice surrounding second banker opinions. Richard then talked about the auction process chapter, including issues with single bidder situations.

Lewis Lazarus discussed a few key issues from his chapter on the formation of special committees and we talked about the impact that some of the recent decisions like *MFW* would have on his chapter. Ron Janis discussed some key governance issues arising in deals governed by state law beyond Delaware.

Nate Cartmell led a discussion of the recent *Trados* decision and current practice in sale of private companies with a dual class structure where no consideration going to the common. We discussed various ways to deal with the conflicts arising in that situation and agreed that it would be a key issue for Nate’s chapter on governance issues specific to private company transactions.
We look forward to seeing everyone at our meeting. Our agenda will be circulated to Task Force members prior to the meeting.

Laguna Meeting Information

Friday, Jan. 31, 2014  2:00 PM – 3:30 PM
Grand Ballroom

(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code:  5842737852

Diane Frankle
Michael Halloran
Larry Hamermesh
Patricia Vella
Co-Chairs

Task Force on Financial Advisor Disclosures

The Financial Advisor Task Force will meet in January at with the Mergers and Acquisition Committee Meeting in Laguna Beach, CA. The agenda for the Task Force meeting will include an update on M&A and financial advisor case law, a revival of the international financial advisor survey and a planning session for the 2014 Business Law Section Spring Meeting (April 10 – 12, 2014).

The Financial Advisor Task Force would also like to take a moment to both thank and congratulate Chief Justice Myron Steele! We look forward to “CJ’s” continued support and guidance as he transitions to his new role at Potter Anderson & Corroon.

If you are interested in becoming more involved in the Task Force or have an idea for a future meeting, please contact either of the Task Force chairs.

Laguna Meeting Information

Saturday, Feb. 1, 2014  11:00 AM – 12:00 PM
Gallery I & II

(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code:  7184872096

Stephen M. Kotran
Yvette R. Austin Smith
Co-Chairs

Task Force on Legal Project Management

The Task Force on Legal Project Management (LPM) held a very well attended in-person session in conjunction with the August Annual ABA meeting in San Francisco, with many first time participants on hand.

The session featured reports from several Task Force working groups, most of which have held subsequent telephonic meetings as they develop and refine various LPM–related materials. The active working groups include the following.

• **Scoping**: This group is developing: (a) a draft outline for an attorney-client conversation regarding scooping and allocation of responsibilities, (b) a formal attorney-client scooping letter, and (c) an outline for an attorney-client conversation regarding deal management protocols. The group is also exploring “RACI” charts and timelines in order to track the progress of various aspects of a deal.

• **Deal Lawyers’ Compact**: This project involves establishing rules of engagement between opposing deal counsel in order to reduce deal friction and streamline the deal making process. The group has contacted representatives of the Association of Corporate Counsel for their input.

• **Deal Issues Checklist**: This project involves developing a list of deal issues derived from the M&A Committee’s Deal Points studies. Typically, issues such as indemnification baskets and caps are not reflected in a letter of intent, but are instead negotiated piecemeal or through the exchange of draft after draft of the acquisition documents.

• **Coding**: In addition to the ABA’s existing coding guidelines which are largely litigation-oriented and somewhat dated, various e-billing software vendors as well as individual clients have developed and sometimes imposed a hodge podge of suggested M&A-related coding requirements. This working group’s objective to develop a sensible set of uniform billing codes that will be widely adopted in connection with M&A transactions.

• **APA and SPA checklists**: This working group is seeking to develop checklists to be used in the context of a stock acquisition and an asset
acquisition and tied to the ABA’s model agreement. Checklists have been widely adapted in a number of professions - from architecture to medicine. Checklists help ensure that nothing falls through the cracks and are particularly useful to young lawyers and practitioners who do not handle M&A deals regularly.

Our next in person meeting will be held at the Montage Resort in Laguna Beach, California in conjunction with the M&A Committee’s stand alone meeting. We will be circulating in advance of the meeting selected drafts developed by various LPM working groups for your review, comment and discussion at the meeting.

If you have interest in legal project management or in joining any of the LPM working groups, you would be most welcome.

Hope to see you in Laguna Beach.

Laguna Meeting Information

Saturday, Feb. 1, 2014  1:00 PM – 2:00 PM
Gallery I & II

(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 7184872096

Byron Kalogerou
Den White
Co-Chairs
Aileen Leventon
Project Manager

Task Force on the Revised Model Asset Purchase Agreement

At the ABA Annual Meeting in San Francisco, the Task Force on the Revised Model Asset Purchase Agreement (MAPA2) continued its tradition of having an engaging discussion and a productive meeting.

The nine small groups of the Task Force have made good progress drafting specific sections of the updated model asset purchase agreement. At the Annual Meeting, we received progress reports from a representative of a number of the groups and discussed including in the new model agreement provisions for an electronic closing, to better reflect current practice. New members to the Task Force were welcomed and each of them has been assigned to a working group.

At the Stand-alone meeting in Laguna Beach, we look forward to other groups presenting their proposed updates to the MAPA provisions on which they are focused and to start discussion about drafting commentary for the revised agreement.

We hope you can join us.

Laguna Meeting Information

Saturday, Feb. 18, 2014  8:30 AM – 9:30 AM
Gallery I & II

(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 7184872096

John Clifford
Ed Deibert
Co-Chairs

Task Force on Two-Step Auctions

We’ve made a lot of progress on our seller-friendly form of tender offer agreement. At the San Francisco meeting we reviewed some of the conditions and covenants, and we’re now getting input from the Federal Regulation of Securities Committee. We’re well on our way to finishing the model agreement!

There are still a few places where we need some initial drafting (such as a form of tender offer support agreement), and at the meeting we’ll be setting up responsibilities for final revisions to other sections, so if you’d like to get involved or provide more comments let Rick or Mike know or come to the meeting.
We look forward to seeing you in sunny Laguna Beach!

Laguna Meeting Information

Saturday, Feb. 1, 2014  2:00 PM – 3:00 PM
Grand Ballroom
(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 5842737852

Rick Alexander
Mike O'Bryan
Co-Chairs

SUBCOMMITTEE REPORTS

Acquisitions of Public Companies
Subcommittee

Our Subcommittee had a great meeting in August during the ABA Annual Meeting in San Francisco. We began the weekend with our traditional Subcommittee Dinner – this time held at Farallon. We were fortunate to have one of the largest turnouts we have had in a long time. Based on the bill for the dinner, we must have all had a good time.

Once again, the ABA was kind enough to give us a large room with a spectacular view of San Francisco and the Bay for our Subcommittee meeting on Saturday. Despite the distractions of the great views from the room (and the boats from the America’s Cup), we had a good discussion on a number of issues. Jen DiNucci first updated the Subcommittee on our meeting in Wilmington with the Delaware judiciary, including a number of interesting deal-related issues that were discussed during that meeting. Jennifer Muller then reviewed with our Subcommittee the results of Houlihan Lokey’s Termination Fee study. Finally, Rick Alexander reviewed with the Subcommittee a number of recent Delaware cases impacting public company acquisitions. We had an excellent discussion.

For our Subcommittee meeting in Laguna Beach, we are combining our Subcommittee meeting with our colleagues from the Joint Task Force on M&A Litigation to jointly host a presentation on “Practical Things Deal Lawyers Need to Know About M&A Litigation.” We are fortunate to have with us three Delaware litigators (Don Wolfe and Mike Pittenger from Potter Anderson and Kevin Coen from Morris Nichols). The program will focus on practical, litigation-related issues that we as deal lawyers should be cognizant of in the context of an acquisition of a public company (given the resulting litigation arising out of those transactions). They’ll discuss things like “privilege,” “what documents should be retained,” “can you throw away drafts of the merger agreement,” “emails – good or bad?” and similar subject matters. We know this will be an interactive and informative discussion.

Finally, we would be remiss in not taking a few moments to thank Chief Justice Steele for his friendship and many contributions to not only the M&A Committee as a whole, but this Subcommittee in particular. We cannot begin to count the various ways he has contributed to this Subcommittee – including his efforts in arranging our annual trip to Delaware, his willingness to sacrifice his personal time to participate in our meetings and CLE panels sponsored by this Subcommittee, as well as sharing his judicial insight on areas impacting our various M&A practices. His contributions have, without a doubt, been instrumental in making the M&A Committee, and this Subcommittee in particular, what it is today. We are truly honored to call him a friend of the M&A Committee. We congratulate him on his “retirement” from the bench, and look forward to many more years working together with him as a practicing member of the M&A bar once again.
International M&A Subcommittee

The International M&A Subcommittee met from 10:30 a.m. to 12:00 p.m. on Sunday, August 11, 2013, in connection with the ABA Annual Meeting in San Francisco, CA.

Introductions

The new co-chairs of the Subcommittee, Keith Flaum, Freek Jonkhart and Franziska Ruf, introduced themselves to the Subcommittee members and briefly described their general vision of the Subcommittee for the upcoming three-year term.

Status of Current Projects

Public Company Takeovers Project

Daniel Rosenberg of Speechly Bircham, London, and Franziska Ruf of Davies Ward Phillips & Vineberg, Montréal, gave a short summary of the current state of play on the Subcommittee’s Public Company Takeovers Project they are leading. The questionnaire has been completed by lawyers in almost all of what are now 18 jurisdictions and the editorial team, which in addition to Franziska and Daniel comprises Diane Frankle of Kaye Scholer, Silicon Valley, Sophie Lamonde of Stikeman Elliott, Montréal, Rick Silverstein of Gómez-Acebo & Pombo, Spain, and Patricia Vella of Morris Nichols Arsht & Tunnell, Delaware, are commencing review of the submissions received from the various jurisdictions.

International JV Agreement Project

Freek Jonkhart of Loyens & Loeff, Rotterdam, announced that the publication of the Subcommittee’s International JV Project he had been leading with Mireille Fontaine of Gowlings, Montréal, had been released as planned in August of 2013. A special thanks to the many contributors to this project and congratulations to Freek, Mireille and the entire editorial team for getting this project to publication.

Representation and Warranty Insurance

Kimmo Mettälä of Krogerus, Finland, and Jörg Lips of CMS Hasche Sigle, Germany, gave a presentation on the increased use of representation and warranty insurance, particularly in Europe, and the various advantages of this product.

Good Faith Clauses Not Just For Show

A panel chaired by Joel Greenberg of Kaye Scholer, New York, reviewed the enforceability of promises to negotiate in good faith and the binding effect of letters of intent and MOU’s against the background of the Delaware Supreme Court decision in SIGA Technologies vs. PharmAthene. Chief Justice Myron T. Steele, who rendered this decision, provided his comments on the subject and Jie Chen of JunHe, China, and Stephan R. Goethel of Taylor Wessing, Germany, shared their views on the topic from their respective national perspectives.

Subcommittee Website

Our website at http://apps.americanbar.org/dch/committee.cfm?com=CL560002 contains:

- Presentation notes of Joel Greenberg, Jie Chen and Stephan R. Goethel on Preliminary Agreements – United States, China and Germany.
- Details of the Subcommittee’s publications, future meetings, other work-in-progress and other past program materials.
We are pleased to report that our total Committee membership as of December 3, 2013 is 4,452, which is an increase of 2% over the numbers from the annual meeting in August. While it is a small increase overall, we are still pleased that the numbers grew and we will continue to focus on programs and events that keep our members engaged and attract new ones.

Our membership is comprised of residents of 49 states which has remained constant for the past couple of years. Our members hail from 50 countries across the world and while that is one less than in July, we feel that we will continue to see that number grow as our committee increases its efforts in international matters.

The increases in our numbers remained constant across the working groups, with the most notable jumps occurring with in-house counsel (+7.3%) and associate (non-lawyer) members (+2.3%). The number of Canadian members continues to increase and rose from 211 to 215, another 2% increase which was consistent from the last report.

A successful partnership has been established with the Association for Corporate Growth (ACG), and the ACG San Francisco chapter partnered with us for a networking reception during our annual meeting to bring our organization and theirs together to expand awareness and attract new members. The Diversity Subcommittee has been very active creating opportunities for young lawyers and other minority members of the Bar to join and get to know our Committee.

A word on our Subcommittees: The M&A Trends Subcommittee is still our largest group with 1,527 members which is slightly down from July (+0.04%), with the private equity subcommittee right on its heels with 1,424 members (up from 1,411 – a 1% increase). The International M&A subcommittee remains close to the 1,000 mark with 982 members. Two other committees who saw their numbers jump were the Financial Advisor Task Force having a 31% increase (22% in July) and Governance Issues in Business Combinations Task Force seeing a 10% increase (20% in July). Here are some of the other subcommittees numbers:

- Acquisitions of Public Companies 877 (down from 889)
- M&A Jurisprudence 765 (down from 772)
- Joint Ventures 775 (down from 799)
- Dictionary of M&A Terms 663 (down from 675)

We thank you for your involvement and look forward to seeing you all in Laguna Beach.

Mireille Fontaine Tatjana Paterno Tracy Washburn Co-Chairs

M&A Jurisprudence Subcommittee

The M&A Jurisprudence Subcommittee is currently comprised of two working groups and three project groups. These groups are working on interesting projects that will continue our mission of providing valuable, useful and practical tools to educate and assist members of the M&A Committee in their practices. If you are not already a member of the M&A Jurisprudence Subcommittee, we invite you to join us, either in person or by phone, on January 31 to learn more and get involved.

This section of Deal Points usually includes a description of the various projects that the M&A Jurisprudence Subcommittee is working on, as well as a summary of a recent decision that we will discuss at our upcoming Full Committee meeting. We are breaking with tradition,
However, for this issue, in order to join in the tribute to Myron Steele, newly-retired Chief Justice of the Delaware Supreme Court. Not only has Chief Justice Steele been a great jurist, educator and ambassador for the Delaware corporate law and legal system; he has also been a great member and friend of the M&A Committee. We join the rest of the M&A Committee in thanking Chief Justice Steele for his many contributions to our Committee, and wishing him heartfelt best wishes as he embarks on the next phase of his career.

For this tribute issue of Deal Points, we thought it would be fitting to recount the opinions of the Delaware Supreme Court that Chief Justice Steele authored, or on which he wrote an important concurring or dissenting opinion, and that the M&A Jurisprudence Subcommittee included in our Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions. Our Subcommittee has published the Annual Survey in The Business Lawyer each year since 2002. The Annual Survey is not a compendium of all judicial decisions pertaining to the M&A area; rather, it is a selection of recent decisions that the members of the M&A Jurisprudence Subcommittee determine rise to a level of importance that practitioners in the M&A area should be informed about them. The opinions that Chief Justice Steele authored that were included in the Annual Survey are as follows:


In Cerberus International, Ltd. v. Apollo Management, L.P., the Delaware Supreme Court held that the Court of Chancery had improperly granted summary judgment against plaintiffs seeking reformation of a merger agreement. Notwithstanding the unambiguous consideration provisions of the merger agreement, the Supreme Court held that plaintiffs had submitted sufficient evidence to establish triable issues of material fact on their claim that the consideration provisions should be reformed on the basis of mistake.

The merger agreement concerned the acquisition of Mobile Technology, Inc. (“MTI”) by Apollo Management, L.P. The plaintiffs were former stockholders of MTI who had been cashed out in the merger. MTI and Apollo had reached an apparent understanding early in the negotiations that Apollo would acquire MTI for $65 million and also pay an additional $3 million from proceeds from the exercise of outstanding options and warrants. Those understandings had been confirmed in two letters from MTI’s CEO to Apollo early in the negotiations, and Apollo’s CEO had responded to the first letter with a handwritten notation that “[t]his looks fine.”

There was no evidence in the summary judgment record that the parties had ever renegotiated those understandings. The final merger agreement, however, did not provide that the aggregate merger consideration would include proceeds from the exercise of options and warrants. It also calculated the per share merger consideration using an inflated number of shares that included the assumed exercise of options and warrants.

The Supreme Court reversed the grant of summary judgment in favor of Apollo. The Supreme Court explained that reformation of an unambiguous contract is appropriate in cases of mutual mistake — where both parties were mistaken as to material terms — and also in certain cases of unilateral mistake — where one party is mistaken as to material terms and the other party knows of the mistake but chooses to remain silent. Under either standard, a plaintiff is required to prove each element of its reformation case by clear and convincing evidence, including clear and convincing proof that the parties had come to a specific prior understanding of material terms that were not reflected in the final written agreement.

In his separate opinion, Justice Steele concurred with the majority opinion’s articulation of the law, but dissented from its conclusion to reverse the grant of summary judgment. According to Justice Steele, the majority opinion failed to give adequate consideration to the fact that that the merger agreement had been negotiated by two highly sophisticated parties and their equally sophisticated attorney representatives, and
that the heightened burden of “clear and convincing evidence” in a reformation claim was meant to “bolster the presumption that the best evidence of the intent of the parties is not extrinsic, but is the written instrument itself.” Given the unambiguous merger agreement, and the “dearth” of evidence imputing knowledge to Apollo, Justice Steele found the majority’s analysis of what a trier of fact could conclude to be “little more than sheer speculation, much less the requisite clear and convincing evidence.”


In Levco Alternative Fund Ltd. v. The Reader’s Digest Association, Inc., the Delaware Supreme Court addressed the proper role of an independent committee in the context of a recapitalization involving two classes of common stock. The Reader’s Digest Association, Inc. (“RDA”) had two classes of common stock: Class B Voting and Class A Nonvoting. The DeWitt Wallace-Reader’s Digest Fund and the Lila Wallace-Reader’s Digest Fund (the “Funds”) held fifty percent of the Class B stock.

RDA entered into a recapitalization agreement with the Funds providing for (a) the purchase by RDA from the Funds of 3,636,363 shares of Class B stock for approximately $100,000,000 cash (the “Repurchase”), (b) the recapitalization of each share of Class A stock into one share of a new common stock entitled to one vote per share (“Common Stock”) and (c) the recapitalization of each share of Class B stock not purchased into 1.24 shares of Common Stock. Holders of Class A Stock were not entitled to vote on the recapitalization.

Because two directors of RDA were also directors of the Funds, RDA’s board appointed a special committee of three other directors to “act as disinterested negotiators on behalf of the company and to negotiate, review and, if appropriate, recommend the recapitalization to the entire board of directors of the company.” The special committee negotiated with the Funds and recommended the recapitalization; it was not charged with representing or taking into account the separate interests of the holders of the Class A and Class B Stock, respectively. The committee’s financial advisors provided an opinion stating that the Repurchase and the recapitalization ratios, taken as a whole, were fair from a financial point of view to the holders of Class A and Class B Stock (other than the Funds), but also stating that it expressed no view as to the relative fairness of the recapitalization to the holders of Class A Stock as compared to the holders of Class B Stock. In an action by holders of Class A Stock to block the recapitalization, the Court of Chancery ruled that regardless of who had the burden of proof, the evidence did not indicate that the plaintiffs would ultimately demonstrate that the activities of the special committee did not result in a fair and genuinely negotiated price.

The Supreme Court reversed, rejecting the defendants’ argument that the special committee’s negotiations with the Funds discharged the directors’ fiduciary duties to the Class A stockholders. The Supreme Court’s opinion described the absence of a fairness opinion as to the treatment of the Class A stockholders as “significant” in the course of pointing out that the special committee did not focus on the specific impact on the Class A stockholders of the $100,000,000 payment.


In Omnicare, Inc. v. NCS Healthcare, Inc., the Delaware Supreme Court, in a divided 3-2 decision, reversed a decision by the Court of Chancery that had refused to enjoin a pending merger between NCS Healthcare, Inc. and Genesis Health Ventures, Inc. Because the deal protection measures at issue prevented the NCS directors from accepting a substantially superior proposal that had been made by another bidder, Omnicare, Inc., the majority found them to be impermissible.

The NCS/Genesis merger agreement provided that each outstanding share of NCS common stock would be converted into one-tenth of a share of Genesis stock, which at the time the merger was announced represented a deal value for the NCS stockholders of $1.60 per share. The merger agreement contained a “force the vote” provision, requiring the agreement to be submitted to a vote of NCS’s stockholders even if its board of directors later withdrew its recommendation of
the merger (which the NCS board later did). In addition, two NCS director-stockholders who collectively held a majority of the voting power but approximately 20% of the equity of NCS, agreed unconditionally to vote all of their shares in favor of the Genesis merger. The “force the vote” provision and the voting agreements, which together operated to ensure consummation of the Genesis merger, were not subject to fiduciary outs.

Prior to entering into the Genesis merger agreement, the NCS directors were aware that Omnicare was interested in acquiring NCS, and Omnicare had previously submitted proposals to acquire NCS in a pre-packaged bankruptcy transaction. NCS’s financial advisor had informed the NCS directors that Omnicare had the financial wherewithal to acquire NCS and had greater synergies with NCS than any other potential bidder. Nonetheless, the NCS directors entered into an exclusivity agreement with Genesis in early July 2002, approximately one month before the NCS board approved the Genesis merger.

When Omnicare learned from other sources that NCS was negotiating with Genesis and that the parties were close to a deal, it submitted an offer that would have paid NCS stockholders $3.00 cash per share, which was more than three times the value of the $0.90 per share stock proposal NCS was then negotiating with Genesis. Omnicare’s proposal was conditioned upon negotiation of a definitive merger agreement, obtaining required third party consents, and completing its due diligence. When NCS disclosed the Omnicare offer to Genesis, Genesis responded by enhancing the exchange ratio so that each NCS share would be exchanged for Genesis stock then valued at $1.60 per share. But Genesis also insisted that NCS approve and sign the merger agreement and approve and secure the voting agreements by midnight the next day, before the exclusivity agreement with Genesis was scheduled to expire. The NCS directors approved the Genesis merger agreement prior to the expiration of Genesis’s deadline.

Following the public announcement of the NCS/Genesis merger, Omnicare commenced a tender offer at a price of $3.50 per share of NCS common stock, subject to invalidation of the lock-up provisions in the Genesis merger agreement. Omnicare also sued NCS and Genesis in the Delaware Court of Chancery, as did various NCS stockholders. Several months later, the NCS board of directors withdrew its recommendation of the Genesis merger and NCS’s financial advisor withdrew its fairness opinion.

The Court of Chancery declined to enjoin the NCS/Genesis merger. In its decision, the Court of Chancery emphasized that NCS was a financially troubled company, and determined that (a) the NCS board was disinterested and independent of Genesis and was fully-informed, and (b) the NCS board had determined in good faith that it would be better for NCS and its stockholders to accept the fully-negotiated deal with Genesis than risk losing the Genesis offer and also risk that negotiations with Omnicare over the terms of a definitive merger agreement could fail.

On appeal, the Delaware Supreme Court majority held that the “force the vote” provision in the merger agreement and the voting agreements operated in tandem to irrevocably lock up the merger. Because the merger agreement did not contain a fiduciary out, the Supreme Court held that the Genesis merger agreement was both preclusive and coercive and, therefore, invalid under Unocal Corp. v. Mesa Petroleum Co. As an alternative basis for its conclusion, the majority held that under the circumstances the NCS board did not have authority under Delaware law to “lock up” the transaction completely because the defensive measures “completely prevented the board from discharging its fiduciary responsibilities to the minority stockholders when Omnicare presented its superior transaction.”

Chief Justice Veasey and Justice Steele wrote separate dissents. Both believed that the NCS board was disinterested and independent and acted with due care and in good faith – observations with which the majority did not necessarily disagree. The dissenters articulated their view that it was “unwise” to have a bright-line rule prohibiting absolute lock ups because in some circumstances an absolute lock up might be the only way to secure a transaction that is in the best interests of the stockholders. The dissenters would have affirmed on the basis that the NCS board’s decision was protected by the business judgment rule. Both Chief Justice Veasey and Justice Steele expressed a hope that the majority’s decision would “be interpreted narrowly and will be seen as sui generis.”
The *Omnicare* decision was initially seen as having important ramifications with regard to corporate directors’ exercise of their fiduciary duties in approving deal protection measures in the merger context, and suggesting that practitioners should approach very cautiously any deal protection measures that would combine a “force the vote” provision with voting agreements irrevocably locking up over 50% of the stockholder vote. Since the time of its issuance, however, the hope of the dissenters has largely been realized, as Delaware courts have refused to apply the *Omnicare* reasoning in a number of situations where plaintiffs sought to dismantle deal protection measures on the basis of the *Omnicare* decision.  

4. **Lillis v. AT&T Corp.,** 953 A.2d 241, 244 (Del. 2008) (Steele, J.).

In *Lillis v. AT&T Corp.*, the Delaware courts interpreted the terms of a stock option plan to determine whether the option holders received the contractually required value for their options in connection with a cash merger. The options at issue were originally issued by MediaOne Group, Inc. (“MediaOne”), under a 1994 options grant plan (the “1994 Plan”). The key provision of the 1994 Plan at issue in the case was an anti-destruction clause that required that the options be adjusted in mergers and other transactions and that the option holder’s “economic position” would not be any worse as a result of such an adjustment. MediaOne merged with AT&T Corporation (“AT&T”) in 2000 and a heavily negotiated point in the merger was that the disputed options would continue to be governed by the 1994 Plan. In 2001, AT&T spun off AT&T Wireless (“Wireless”). AT&T and Wireless split responsibility for AT&T’s employee benefits and signed several agreements governing that split, including the Employee Benefits Plan and the Wireless Adjustment Plan. In the spin-off, the option holders who had originally been granted options by MediaOne (the “MediaOne Option Holders”) received both AT&T and Wireless options. The Wireless options were later cashed out when Cingular Wireless LLC (“Cingular”) acquired Wireless in a 2004 cash merger.

The Cingular-Wireless merger cashed out the Wireless option holders at the intrinsic value of the options (the cash merger price minus the strike price) as opposed to at the full economic value of the options (the intrinsic value plus the time value). This meant that any underwater options were effectively cancelled for no consideration. A group of MediaOne Option Holders brought suit alleging that they were improperly deprived of the time value of their options. These option holders sued Wireless alleging that the terms of the 1994 Plan required that the option holders receive the full economic value of their options.

The post-trial Court of Chancery decision focused on interpreting the 1994 Plan’s anti-destruction clause. Although the court observed that it is generally the case that anti-destruction clauses in stock option plans allow options to be cashed out at their intrinsic value as part of a cash merger, it noted that “option agreements like the 1994 Plan and the related option grant agreements are no more or less than contracts that must be construed in accordance with normal rules of contract interpretation.” The court then found that the term “economic position” rendered the anti-destruction clause ambiguous as to whether it entitled the option holders to receive the intrinsic value or the full economic value of the options.

The court looked to three items of extrinsic evidence to interpret the meaning of the anti-destruction clause and found that it meant the full economic value of the options. First, the court looked to the parties’ course of conduct and found that all the adjustments to the options in previous transactions had preserved the full economic value of the options. Next, the court noted that the options represented a significant portion of the plaintiffs’ compensation from MediaOne and that fact made “it more likely that the terms of the 1994 Plan and the related agreements were designed to be more than usually protective of the economic interests of the option holders.” Finally, the court gave “great weight” to AT&T’s initial litigation stance that Wireless was contractually obligated to preserve the full economic value of the
options under the agreements executed as part of Wireless’s spin-off from AT&T, the Employee Benefits Plan and the Wireless Adjustment Plan.

AT&T appealed the post-trial decision to the Delaware Supreme Court. The Supreme Court affirmed the Court of Chancery’s determination that the anti-destruction clause was ambiguous. The Supreme Court disagreed, however, with the Court of Chancery’s analysis of the extrinsic evidence. For starters, the Supreme Court questioned the Court of Chancery’s consideration of the parties’ course of conduct in preserving the full economic value of the options in previous transactions because those transactions were stock-for-stock transactions that “did not necessarily evidence what the parties intended to occur in a cash out merger.” It also found that the only comparable transaction was the MediaOne-AT&T merger where stock and option holders could elect to receive either cash or stock and noted that the “option holders who might have chosen the cash out would have received intrinsic value only.” Thus, the Supreme Court remanded to the Court of Chancery “to address fully the significance of (i) the distinction between a stock merger and a cash out merger; and, (ii) the $85 cash election in the AT&T-MediaOne transaction, in deciding what the contracting parties intended by their use of the term ‘economic position.’” Moreover, the Supreme Court ordered that on remand the Court of Chancery “should afford no weight to AT&T’s supposed admissions,” evidence that the Court of Chancery had heavily relied on in its post-trial decision.

On remand, the Court of Chancery reconsidered the extrinsic evidence in accordance with the Supreme Court’s instructions and found that the proper interpretation of the anti-destruction clause “permit[ted] the adjustment of options in a cash merger into the right to receive only the amount of cash paid for the underlying stock.” The Court of Chancery pointed out that its post-trial decision “primarily hinged” on AT&T’s admissions and that without that evidence, the plaintiffs were unable to demonstrate that the anti-destruction clause required deviation from the general rule that anti-destruction clauses “‘are interpreted to tie the interests of option holders to the interests of the holders of the securities into which they are exercisable.’”

5. **Arkansas Teacher Retirement System v. Caiafa, 996 A.2d 321, 322 (Del. 2010) (Steele, J.).**

In Arkansas Teacher Retirement System v. Caiafa, the Delaware Supreme Court affirmed the Court of Chancery’s approval of a settlement relating to claims involving the merger of Countrywide Financial Corporation (“Countrywide”) with Bank of America (“BOA”), but noted in dicta that although the plaintiffs in a separate derivative action lost standing as a result of the merger, the Countrywide directors’ conduct may have justified a separate direct claim of fraud that would have survived the merger.

In the summer of 2007, several stockholders of Countrywide, including Arkansas Teacher Retirement System (“TRS”), filed a derivative suit against the Countrywide directors in a federal district court in California alleging that certain board members breached their fiduciary duties by abandoning prudent lending practices, engaging in illegal insider sales and manipulating the company for personal gain. While the derivative suit was pending, the Countrywide board approved a stock-for-stock merger with BOA in which Countrywide stockholders received BOA stock.

Several Countrywide stockholders also filed a class action suit in Delaware alleging that Countrywide directors had violated their fiduciary duties. These stockholders eventually negotiated a settlement with the Countrywide directors under which virtually all claims surrounding the merger would be released. After the merger closed, TRS’s derivative suit pending in federal court was dismissed because TRS no longer owned shares of Countrywide stock.

TRS objected to the settlement, arguing that it was fundamentally unfair because it had allowed BOA to close its acquisition of Countrywide, thereby extinguishing TRS’s standing to pursue derivative claims it believed could have amounted to as much as $2 billion. The court noted that the extinguishment of standing was a function of Delaware corporate law, not the settlement agreement.
The court also explained, however, that where the merger eliminating a derivative plaintiff’s ownership of shares, has been “perpetrated merely to deprive shareholders of the standing to bring a derivative action” the case is excepted from Delaware’s derivative standing rule. The court noted that TRS had not presented evidence that the merger was a pretext, recognizing that while it could not conclude that the directors of Countrywide were oblivious to the additional benefit of the merger of avoiding derivative liability, avoiding liability was neither the only nor the principal reason for supporting the transaction.

TRS also argued that the Countrywide directors were directly liable for breach of fiduciary duty for (i) failing to value the derivative claims at the time the merger was negotiated and (ii) failing to preserve such value, either by extracting additional consideration from BOA or by assigning the derivative claims to a litigation trust that could pursue the claims for the benefit of Countrywide’s stockholders. The court rejected these claims, noting that TRS did not show that the consideration paid by BOA was unfair, there was no basis to believe BOA could have been persuaded to pay more for Countrywide because of the derivative claims, and there was no basis to require the board to separately value the derivative claims or set them aside to preserve their value.

On appeal, the Delaware Supreme Court affirmed, finding that the Court of Chancery appropriately denied TRS’s objections “because Delaware corporate fiduciary law does not require directors to value or preserve piecemeal assets in a merger setting.” The Delaware Supreme Court, however, noted that the conduct TRS alleged Countrywide directors had engaged in was “wholly inappropriate for Delaware corporate directors.” The Delaware Supreme Court reasoned that TRS had pleaded facts supporting a colorable claim of pre-merger fraud, and that it was plausible that when the allegedly fraudulent pre-merger conduct of the Countrywide directors pushed Countrywide to the brink of bankruptcy, the directors looked to BOA as a “fiduciary White Knight” that could acquire Countrywide and absolve them from derivative liability. The Delaware Supreme Court reasoned that it would not matter whether this “plausible scenario” was a “single, cohesive plan” of the directors or a “snowballing pattern of fraudulent conduct and conscious neglect.” Either way, if TRS had successfully pleaded its fraud claim, TRS could have maintained a post-merger claim and potentially recovered monetary damages from the former Countrywide directors.


In Auriga Capital Corporation v. Gatz Properties, LLC, the Delaware Court of Chancery held that the manager of an LLC, who controlled a majority of the LLC’s membership interests, had breached his fiduciary 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 Delaware Supreme Court upheld the Chancery decision, on the grounds that the language of the LLC agreement, when “[v]iewed functionally,” imposed fiduciary duties on the manager and made the transaction subject to entire fairness review.

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

In March 1998, the LLC subleased the course to American Golf Corporation 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.” 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 [the LLC]...” Among other things, Gatz failed to search for a buyer, and, when a potential buyer presented itself in 2007 (“RDC”), Gatz discouraged it. Starting in 2008, Gatz made several offers to buy out the minority, without disclosing to them RDC’s willingness to consider a higher bid. The minority members refused. In 2009, Gatz conducted what the court characterized as a “sham” auction. Ultimately, Gatz was the only bidder, offering to pay $50,000 and to assume the LLC’s debts, on which Gatz was already the guarantor.

8 40 A.3d 839 (Del. Ch. 2012).
The court acknowledged that the Delaware LLC Act “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, the LLC’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 requiring arm’s length terms for self-dealing transactions, which the court noted was “akin to entire fairness review.”

The court found that Gatz breached his duties in several ways, including: (a) failing to take any steps to address the expected loss of American Golf as an operator; (b) turning away a responsible bidder which could have paid a higher price; (c) 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 (d) buying the LLC at an auction conducted on terms designed to deter any third-party buyer and deliver the LLC to Gatz at a distress sale price.

The court found that, had Gatz dealt with RDC “with integrity” in 2007 when RDC was displaying its interest, it “seems probable” that the LLC 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, and Gatz’s own unwillingness to sell his interests at that price. The court accordingly awarded that amount as damages.

The Delaware Supreme Court affirmed the Chancery decision, based on the Supreme Court’s interpretation of the LLC agreement. The Court first found that, based on language in the LLC agreement, the manager owed fiduciary duties to the other members of the LLC. The Supreme Court focused on the provision of the LLC agreement, cited in the Chancery opinion, requiring that agreements between the manager and the LLC be “[no] less favorable to the Company than the terms and conditions of similar agreement which could then be entered into with arms-length third parties...,” and found that such provision effectively imposed such fiduciary duties on the manager and subjected the transaction to entire fairness review. Although the LLC agreement did not specifically refer to fiduciary duties, the Court noted that “[t]o impose fiduciary standards of conduct as a contractual matter, there is no requirement in Delaware that an LLC agreement use magic words, such as ‘entire fairness’ or ‘fiduciary duties.’” The Supreme Court refrained, however, from addressing whether fiduciary duties would be owed by a LLC manager absent the kind of contractual language included in the LLC Agreement.

Gatz illustrates the potential for a fiduciary of a company to violate its duties if it fails to take steps to properly manage the company, particularly if seen as part of a plan to acquire the remainder of the company. It also contributes to, but does not resolve, the debate over whether a LLC manager owes fiduciary duties to other members absent language in the LLC operating agreement.


The Delaware Supreme Court held in **SIGA Technologies, Inc. v. PharmAthene, Inc.** that a failure to negotiate in good faith despite an express agreement to do so may lead to expectation damages reflecting the counterparty’s lost profits.

SIGA approached PharmAthene to discuss a potential collaboration to help SIGA develop a promising drug. SIGA and PharmAthene negotiated, but did not sign, a License Agreement Term Sheet (the “LATS”) with respect to the drug. The LATS included a footer bearing the words “Non Binding Terms.”

PharmAthene then suggested that the parties merge rather than enter into a licensing arrangement. SIGA agreed, but requested that PharmAthene provide bridge financing during merger negotiations. PharmAthene agreed to do so, on the condition that SIGA enter into a licensing arrangement with PharmAthene if the merger negotiations failed. The parties entered into a Bridge
Loan Agreement governed by New York law and a Merger Agreement governed by Delaware law. Each of the Bridge Loan Agreement and the Merger Agreement included an obligation to “negotiate in good faith with the intention of executing a definitive License Agreement in accordance with the terms set forth in the [LATS].”

Development of the drug exceeded expectations, and SIGA began to experience what the court described as “seller’s remorse.” SIGA and PharmAthene failed to complete the merger within the time period specified by the Merger Agreement, and SIGA terminated the Merger Agreement. PharmAthene proposed a license agreement based on the LATS. SIGA countered with terms drastically more favorable to SIGA. PharmAthene filed suit.

The chancery court found SIGA liable both for breach of its obligation to negotiate in good faith and under the doctrine of promissory estoppel. The chancery court awarded PharmAthene an equitable payment stream for PharmAthene’s “lost expectancy,” including payment of 50 percent of the net profits in excess of $40 million generated by the drug for the next ten years. SIGA appealed to the Delaware Supreme Court.

The Delaware Supreme Court held that, under Delaware law, “an express contractual obligation to negotiate in good faith is binding.” The court further held that, although the LATS stated it was non-binding, SIGA and PharmAthene had created an enforceable obligation by agreeing in the Bridge Loan Agreement and the Merger Agreement to negotiate a license in good faith in accordance with the term sheet if the merger fell through. The court also noted the Chancery Court’s finding that the incorporation of the LATS into the Bridge Loan and Merger Agreements reflected an intent of the parties to “negotiate toward a license agreement with economic terms substantially similar to the terms of the LATS,” rather than to treat the LATS as a “jumping off point,” as SIGA characterized it. SIGA breached this obligation by insisting on different terms in bad faith.

The Supreme Court noted a split of authority as to the availability of “expectancy” or “benefit-of-the-bargain” damages. While some jurisdictions declined to award expectation damages due to the difficulty of determining the amount of such damages, others allowed such damages where the defendant had acted in bad faith and such damages were foreseeable. The court then held that expectation damages can be awarded for breach of an agreement to negotiate in good faith if the plaintiff proves: (a) that the parties would have reached an agreement but for the defendant’s bad faith, and (b) the amount of such damages with “reasonable certainty.” The court remanded the case for further consideration of damages.

Other Important Decisions Authored by Chief Justice Steele

Of course, Chief Justice Steele authored many more important decisions during his tenure on the Delaware judiciary. Some of those decisions include:

In re IXC Commc’ns, Inc. v. Cincinnati Bell, Inc., C.A. 17324, 1999 WL 1009174 (Del. Ch. Oct. 27, 1999) (Steele, V.C.);

Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963, 968 (Del. Ch. 2000) (Steele, V.C.);

Golden Telecom, Inc. v. Global GT LP, 11 A.3d 214, 215 (Del. 2010) (Steele, C.J.); and


These, and many other well-reasoned opinions authored by Chief Justice Steele, have served not only to adjudicate the applicable matters, but also to enlighten M&A practitioners throughout the world, advance M&A practice, and create what will surely be an enduring legacy to a great jurist – Myron Steele. Congratulations on your Retirement!

Laguna Meeting Information

Friday, Jan. 31, 2014  8:00 AM – 9:00 AM
Gallery I & II

(866) 646-6488  (US and Canada)
(707) 287-9583  (International)
Conference Code: 7184872096

Scott T. Whittaker
Subcommittee Chair
Michael G. O’Bryan
Chair - Annual Survey Working Group
Jon T. Hirschoff
Chair - Judicial Interpretations Working Group
M&A MARKET TRENDS SUBCOMMITTEE

At our last meeting in San Francisco we reviewed the status of recent and pending publications; Jennifer Muller of Houlihan Lokey reviewed the state of the M&A market; Tracy Washburn and her colleagues from JPMorgan previewed JPMorgan’s 2013 M&A Holdback Report; and Kim Wethly of WilmerHale reviewed trends in the treatment of equity awards in M&A transactions.

Our next meeting will be held at the stand alone meeting in Laguna. The agenda includes:

- A review of recent and pending publications.
- An update on the state of the M&A market.
- Highlights from the 2013 U.S. Strategic Buyer/Public Target Deal Points Study.
- Highlights from the 2013 U.S. Private Target Deal Points Study.
- Highlights from the first ever Canadian Public Target Deal Points Study.

I look forward to seeing you in Laguna.

Laguna Meeting Information

Saturday, Feb. 1, 2014  9:30 AM – 11:00 AM

Grand Ballroom

(866) 646-6488  (US and Canada)
(707) 287-9583 (International)
Conference Code:  5842737852

Hal J. Leibowitz
Chair

PRIVATE EQUITY M&A SUBCOMMITTEE

The Private Equity M&A Subcommittee met in San Francisco, CA on Saturday, August 9, 2013 as part of the M&A Committee’s meetings being held there in conjunction with the ABA’s Annual Meeting. The Subcommittee discussed events and developments affecting the Private Equity markets during the past four months since the Subcommittee’s previous gathering. The Subcommittee also received presentations and materials from the following: (i) Chris Young, Managing Director, Head of Contested Situations at Credit Suisse, who spoke on the intersection of Private Equity, activism, and contested situations; and (ii) Mark Bradley, Co-Founder and Partner at Dean Bradley Osborne (and former Global Head of Financial Sponsors at Morgan Stanley), who spoke on the current Private Equity environment and on Private Equity firms that have become publicly traded entities. The Subcommittee meeting was well-attended, and the Subcommittee Chair thanks all participants and Subcommittee members for contributing to the session.

Given that this edition of Deal Points also honors Chief Justice Steele upon his stepping down from the bench, the Subcommittee also would like to thank the Chief Justice for his contributions to the Subcommittee’s goals and efforts over the years. As a regular attendee of the Subcommittee’s sessions, the Chief Justice gave freely of his time and offered the Subcommittee an invaluable perspective as part of its deliberations, whether that came in the form of joining in Subcommittee discussions from time-to-time, participating as a panelist with others in reviewing recent developments, or in presenting directly to the Subcommittee on selected topics of interest. The Subcommittee wishes the Chief Justice the best in his next chapter as he returns to private practice, and looks forward to continuing to see him and hear from him at future ABA and Subcommittee sessions.

Friday, Jan. 31, 2014         9:00 AM – 10:30 AM

Grand Ballroom

(866) 646-6488  (US and Canada)
(707) 287-9583 (International)
Conference Code:  5842737852

John K. Hughes
Chair

* * *
DEAL PEOPLE

US Federal regulations permit wing shooters to hunt only 47 days each year. Chances are, if you’re wing shooting in the early dawn near Wilmington, Delaware, you’ll be in the good company of Myron T. Steele.

Until November 30, 2013, Myron was the Chief Justice of the Supreme Court of Delaware, a position he served for 10 years. He served 15 years on the bench of Delaware courts prior to his appointment as Chief Justice, after an almost two decade career as a litigation attorney in Delaware. Myron recently joined Potter Anderson & Corroon LLP (Wilmington) as a partner.

Long before he began his illustrious legal career, Myron found a love for hunting. Childhood hunting for quail, rabbit and other critters in South Carolina laid the foundation for a life-long passion to arrive in a marshland before sunrise with his hunting partner Truculent Jeb (a Labrador retriever), watch and listen to the marsh come to life as the sun rises, and enjoy the peace and serenity of nature in that moment. All while enjoying the comradely of other hunters and working with Truculent Jeb. A great distance, mentally and otherwise, from the intensity of the courts.

And, it’s a passion that can be enjoyed in just a few hours, so that Myron still is at his desk by 9 AM.

But he can’t hunt every day, so when not hunting Myron pursues another passion: the sports teams – all of them – of his alma mater The University of Virginia. An avid fan, Myron supports the schools’ sports scholarship fund (since the early 1970s), has seasons tickets for both basketball and football, and every day checks the results of all of the Virginia Cavaliers teams.

A passion for the law and a passion for sport; great qualities for a Deal Person.

About Deal People – Deal People is a feature in Deal Points that highlights members of the Mergers and Acquisitions Committee and things that interest them, other than doing deals. Ideas for future features in Deal People are welcomed.

John F Clifford
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COMMITTEE MEETING MATERIALS

2014 ABA ANNUAL MEETING

AGENDA AND DIAL IN INFORMATION FOR STAND-ALONE MEETING

LAGUNA BEACH, CA

FEBRUARY 1-2, 2013

(PLEASE NOTE THAT TIMES LISTED ARE PACIFIC TIME)

Schedule, Location, Dial In Information

MEETING ROOM

Grand Ballroom

(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 5842737852

Gallery I & II

(866) 646-6488 (US and Canada)
(707) 287-9583 (International)
Conference Code: 7184872096

Friday, January 31, 2014

<table>
<thead>
<tr>
<th>Time</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:00 am – 5:00 pm</td>
<td>Grand Ballroom Foyer</td>
</tr>
<tr>
<td>Meeting Registration</td>
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<tr>
<td>8:00 am – 10 am</td>
<td>Outdoor Courtyard</td>
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<tr>
<td>Continental Breakfast (Registered Meeting Attendees)</td>
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<tr>
<td>8:00 am – 9:00 am</td>
<td>Gallery I &amp; II</td>
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<tr>
<td>Subcommittee on M&amp;A Jurisprudence</td>
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<tr>
<td>9:00 am – 10:30 am</td>
<td>Grand Ballroom</td>
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<tr>
<td>Private Equity Subcommittee</td>
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<tr>
<td>Time</td>
<td>Event</td>
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<tr>
<td>10:30 am – 12:00 pm</td>
<td>International M&amp;A Subcommittee</td>
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<tr>
<td>12:00 pm – 1:30 pm</td>
<td>Buffet Luncheon (Ticket Required)</td>
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<tr>
<td>2:00 pm – 3:00 pm</td>
<td>Joint Task Force on Governance Issues in Business Combinations</td>
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<tr>
<td>3:30 pm – 5:00 pm</td>
<td>Acquisitions of Public Companies Subcommittee</td>
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<tr>
<td>5:00 pm – 5:45 pm</td>
<td>Meeting of Committee Chair and Vice Chairs, Subcommittee and Task Force Chairs</td>
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<tr>
<td>7:00 pm – 8:00 pm</td>
<td>Committee Reception sponsored by Duff &amp; Phelps Corp. (Ticket Required)</td>
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<tr>
<td>8:00 pm – 10:00 pm</td>
<td>Committee Dinner sponsored by SRS®Acquiom (Ticket Required)</td>
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<tr>
<td>Saturday, February 1, 2014</td>
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<tr>
<td>8:00 am – 5:00 pm</td>
<td>Meeting Registration</td>
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<tr>
<td>8:00 am – 10 am</td>
<td>Continental Breakfast (Registered Meeting Attendees)</td>
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<tr>
<td>8:30 am – 9:30 am</td>
<td>Revised Model Asset Purchase Agreement</td>
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<tr>
<td>9:30 am – 11:00 am</td>
<td>Subcommittee on M&amp;A Market Trends</td>
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<tr>
<td>11:00 am – 12:00 pm</td>
<td>Task Force on Financial Advisors</td>
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<tr>
<td>12:00 pm – 1:00 pm</td>
<td>Buffet Luncheon (Ticket Required)</td>
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<tr>
<td>1:00 pm – 2:00 pm</td>
<td>Legal Project Management Task Force</td>
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<tr>
<td>2:00 pm – 3:00 pm</td>
<td>Task Force on Two-Step Auctions</td>
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<tr>
<td>3:00 pm – 5:30 pm</td>
<td>Mergers and Acquisitions Full Committee Meeting</td>
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