

**PRACTICE POINTS**

- "Daubert": More Important Than You Think in Business Litigation.
- Deepening Insolvency as a Cause of Action—DOA in Delaware.
- Is the World Really an Oyster: Current Issues in Trade Finance.
- Is Open Source Incompatible with Intellectual Property?
- Practice and Perils of Opinions on Alternative Entities.
- M&A Agreement Can Constitute an Amendment of an ERISA Plan.
- M&A Nugget: Stapled Financing.
- PNB Holding: "Majority-of-the-Minority" Clarified.

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to view last month's issue.



**2007 Spring Meeting**  
March 15, 2006 - March 18, 2006  
Washington, DC  
Format: Live/In-Person

**BUSINESS LAW CLE CONNECTION**

**The Risks of E-Mail Communication**

Teleconference  
11/02/2006  
Multi-site

For complete program details,  
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To register, call 1-800-285-2221

**ERISA Litigation**

Live/In-Person  
11/09/2006 - 11/10/2006  
Chicago, IL

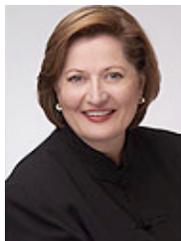
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**Section of Business Law - 2006 Committee on Partnerships & Unincorporated Business Organizations**

Live/In-Person  
11/10/2006 - 11/11/2006  
Washington, DC

For complete program details,

**Message from the Chair, Linda C. Hayman**



The Section of Business Law has a long history of making positive contributions to national debates on complex and difficult issues. Recently, the scope of federal preemption of state laws has become such a subject. The issue is of particular importance to members of Section committees, including Banking Law, Consumer Financial Services, Federal Regulation of Securities and State Regulation of Securities.

The case of *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), in which the Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") did not preempt certain state law claims against a manufacturer, prompted another ABA Section to ask the House of Delegates to revise existing ABA policy on federal preemption. In *Bates*, the Supreme Court stated that in areas of traditional state regulation, it would assume that a federal statute has not supplanted state law unless Congress has made such intention clear and manifest. While the *Bates* case was decided in the context of federal preemption of state tort law and breach of warranty litigation against a manufacturer, the issues for the Section of Business Law reach well beyond the facts addressed in *Bates*.

For example, many consumer financial services products (for example, credit cards and mortgage loans) can be offered more widely and more efficiently on an interstate basis. Federal banks rely on federal preemption of state laws to offer such products. The issuance and distribution of securities are also dependent upon federal preemption of state law. As recently as 1996, Congress passed legislation that adjusted the jurisdiction of the U.S. Securities and Exchange Commission and the various state securities regulators over the regulation of investment advisers, and the review and substantive comment of investment company prospectuses.

To respond to this development, the Section has created a new Ad Hoc Committee on Federal Preemption of State Law. Lynne Barr and Myles Lynk have agreed to serve as co-chairs. Other members of the committee include Michael Flynn, Dixie Johnson, Donald Lampe, Jeffrey Langer, Ellen Lieberman, Martin Lybecker and James Scott.

The Ad Hoc Committee on Federal Preemption of State Law will be a clearinghouse for the Section's considerable store of knowledge on this important topic. The first task of the new ad hoc committee will be to communicate with all of our committee chairs to determine the impact of this issue throughout the Section. Members of the ad hoc committee will then be preparing white papers. If you are interested in the work of this committee, please [click here](#) to subscribe to the special listserv that has been established for the group.

Other sections of the ABA, including the Tort Trial and Insurance Practice Section ("TIPS") and the Section of Administrative Law and Regulatory Practice, also have an obvious interest in the subject of federal preemption. TIPS and Administrative Law have agreed to form a task force to explore this issue to determine whether new ABA policy in this area is appropriate and if so, what that policy should be. Our Section is eager to work with TIPS and Administrative Law in this endeavor, and I have charged the new ad hoc committee with representing the Section in this process.

Linda C. Hayman  
Chair, Section of Business Law

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**Business and Corporate Litigation**

"Daubert": More Important Than You Think in Business Litigation. Review some of the most recent cases involving the admissibility of expert witness testimony in business disputes, especially the testimony of financial experts.

[More](#)

Presented by the Committee on [Business and Corporate Litigation](#) at the 2006 ABA Annual Meeting.

[Click Here](#)

### Compensation for Executives and Directors

**Live/In-Person**  
11/13/2006 - 11/14/2006  
New York, NY

For complete program details,  
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### 2007 Proxy Season Checklist

**Teleconference**  
11/14/2006 - 11/14/2006  
Multi-site

For complete program details,  
[Click Here](#)  
To register, call 1-800-285-2221

### Section of Business Law - 2006 Fall Committee Meetings

**Live/In-Person**  
11/30/2006 - 12/02/2006  
Washington, DC

For complete program details,  
[Click Here](#)

### Voice over the Internet Protocol: What You and Your Clients Need to Know About the New Technology

**Teleconference**  
11/30/2006 - 11/30/2006  
Multi-site

For complete program details,  
[Click Here](#)  
To register, call 1-800-285-2221

### When Letter-of-Credit Law and the Bankruptcy Code Meet: What Attorneys Need to Know

**Teleconference**  
12/13/2006 - 12/13/2006  
Multi-site

For complete program details,  
[Click Here](#)  
To register, call 1-800-285-2221

For information on future programs, check out the [Section Meetings Calendar](#).

For more information on upcoming Committee Meetings contact [ruppr@staff.abanet.org](mailto:ruppr@staff.abanet.org).

### BEST OF BUSINESS LAW BOOKS

**Reorganizing Failing Businesses, Revised Edition A Comprehensive Review and Analysis of Financial Restructuring and Business Reorganization**

By Weil Gotshal & Manges LLP  
ABA Section of Business Law  
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## Business and Corporate Litigation

**Deepening Insolvency as a Cause of Action—DOA in Delaware.** The Delaware Court of Chancery has issued a clear renunciation of an independent cause of action based upon the theory of deepening insolvency.

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From [Network](#), the newsletter of the Committee on [Business and Corporate Litigation](#), Fall 2006.

## Commercial Financial Services

**Is the World Really an Oyster: Current Issues in Trade Finance.** Trade Finance—the financing of the importing and exporting of goods to and from the United States—involves a consideration of: (1) various bodies of law that affect sellers', buyers' and secured parties' interests in goods that are moving between foreign ports and the United States; and (2) the types of available commercial finance for these transactions.

--> [More](#)

Presented by the Committees on [Commercial Financial Services](#) and [International Business Law](#) at the 2006 ABA Annual Meeting.

## Cyberspace Law

**Is Open Source Incompatible with Intellectual Property?** Proponents of open source software and other business models that seek to provide public domain access to creative works are often critical of strong intellectual property protection—especially as to legislation that recognizes the right of copyright owners to utilize digital rights management technologies, judicial interpretations of copyright law that restrict file sharing, liability for contributory infringement of copyright, and patentability of computer software and business methods.

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From [CIPerati](#), the newsletter of the Committee on [Cyberspace Law's](#) Subcommittee on [Intellectual Property](#).

## Legal Opinions

**Practice and Perils of Opinions on Alternative Entities.** Learn about the difficult issues involved in issuing opinion letters as to alternative entities, especially as to limited liability companies.

--> [More](#)

From [Legal Opinions](#), the newsletter of the Committee on [Legal Opinions](#), September 2006.

## Negotiated Acquisitions

**M&A Agreement Can Constitute an Amendment of an ERISA Plan.** Halliburton Company agreed, in a 1998 merger agreement governing the merger of Dresser Industries, Inc. into a wholly owned subsidiary of Halliburton, to maintain the Dresser retiree medical plan except to the extent modifications were consistent with changes in medical plans provided by Halliburton and its subsidiaries to active employees. Five years after the merger, Halliburton, acting through its plan administrator, amended three subplans of the Dresser retiree medical program with the goal of achieving parity for all Halliburton and Dresser retirees. The amendments were not consistent with changes in plans for active employees, as contemplated by the merger agreement. The Fifth Circuit Court of Appeal enforced the provision of the merger agreement that obliged the buyer to continue the Dresser's benefit programs for its retirees.

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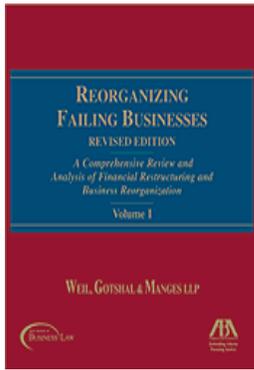
From [Deal Points](#), the newsletter of the Committee on [Negotiated Acquisitions](#), Fall 2006.

## Negotiated Acquisitions

**M&A Nugget: Stapled Financing.** Stapled financing is a technique sometimes used in an auction of a company. The investment banker conducting the auction offers prospective buyers - often private equity funds - a package of financing that they can use to consummate the acquisition. There are a number of positive aspects about stapled financing, but some negative aspects as well.

--> [More](#)

From [Deal Points](#), the newsletter of the Committee on [Negotiated Acquisitions](#), Fall 2006.



The following excerpt is taken from **Reorganizing Failing Businesses, Revised Edition A Comprehensive Review and Analysis of Financial Restructuring and Business Reorganization** by **Weil Gotshal & Manges LLP**, Copyright 2006 by the ABA Section of Business Law. Reprinted here with permission. The material contained herein represents the opinions of the authors and editors and should not be construed to be the action of either the American Bar Association or the Section of Business Law unless adopted pursuant to the bylaws of the Association. Nothing contained herein is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. To request reprint permission, contact the Manager, Copyrights and Licensing, at (312) 988-6102.

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## Negotiated Acquisitions

**PNB Holding: "Majority-of-the-Minority" Clarified.** In a recent decision, captioned *In re PNB Holding Co. Shareholders Litigation*, 2006 WL 2403999 (Del. Ch. Aug. 18, 2006), the Delaware Court of Chancery provided important guidance with respect to, among other things, the possibility of using (and the proper standard for calculating) a fully-informed, non-coerced vote of a majority of disinterested stockholders (a "majority-of-the-minority") in order to invoke the substantive protections of the business judgment rule in a case where there is no controlling stockholder on both sides of a merger transaction.

[More](#)

From [Deal Points](#), the newsletter of the Committee on [Negotiated Acquisitions](#), Fall 2006.

## Committee Spotlight

To learn more about or join the committees that contributed to this month's practice points, just click on the committee name below.

- [Business and Corporate Litigation](#)
- [Commercial Financial Services](#)
- [Cyberspace Law](#)
- [International Business Law](#)
- [Legal Opinions](#)
- [Negotiated Acquisitions](#)

*Section members are eligible to join the Section's committees at no additional cost. Become involved or simply stay in the information flow. It's FREE!*

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## The Section of Business Law of the American Bar Association

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