



# NETWORK

Elizabeth S. Stong – Chair  
Paul J. Masinter – Newsletter Chair  
Norman E. Siegel – Newsletter Vice-Chair

The Newsletter of the Business Law Section  
Committee on Business and Corporate Litigation  
Vol. 11 Issue 1  
Spring 2003

## FROM THE CHAIR

by Elizabeth S. Stong

Summer is upon us! In this Letter from the Chair, we will bring you up to date on the recent National Conference for the Minority Lawyer, held on June 5 and 6, 2003, in Philadelphia, and the Business and Corporate Litigation Committee's plans for the ABA Annual Meeting on August 8-12, 2003, in San Francisco, and also express some very heartfelt thanks for the wonderful opportunity to serve as Chair of this Committee for the last three years.

### National Conference for the Minority Lawyer - June 5-6, 2003 - Philadelphia

The Business and Corporate Litigation Committee played a significant role in the planning and program for the upcoming National Conference for the Minority Lawyer, on June 5-6, 2003, in Philadelphia. This Conference, which was sponsored jointly by the ABA's Business Law Section and Commission on Racial and Ethnic Diversity in the Profession, was attended by litigators, business lawyers, in-house counsel, and government lawyers, and presented programs addressing both recent developments and practical skills for lawyers in all of these practice settings. Keynote speakers included Robert J. Grey, Jr., the first minority lawyer elected to chair the ABA House of Delegates and the second African American to serve as President of the ABA beginning in August 2004. Notably, one of the most popular programs at the Conference was presented by our Committee, and took the form of a reprise of our Spring Meeting 2003 Review of Developments in Business and Corporate Litigation, moderated by Mitchell Bach and Jay Dubow. Panelists included

## CONTENTS

FROM THE CHAIR .....	1
<b>NATIONAL CONFERENCE FOR THE MINORITY LAWYER</b> .....	1
<b>ABA ANNUAL MEETING</b> .....	2
<b>THE COMMITTEE'S STAND ALONE MEETING HEADS DOWNTOWN!</b> .....	2
<b>LEADERSHIP TRANSITIONS AND SPECIAL THANKS</b> .....	3
<b>ABA ANNUAL MEETING SCHEDULE</b> .....	3
FEATURE ARTICLE	
<b>THE EXPANSION OF THE DELAWARE COURT OF CHANCERY'S JURISDICTION TO ADJUDICATE OR MEDIATE CERTAIN "TECHNOLOGY DISPUTES" AND MEDIATE OTHER MAJOR BUSINESS DISPUTES – AN EVOLUTION, NOT A REVOLUTION</b>	
by Michael Houghton, William M. Lafferty and Andrew H. Lippstone .....	5
SUBCOMMITTEE REPORTS	
Appellate Litigation .....	9
Bankruptcy Litigation .....	10
Business Courts.....	10
Corporate Counsel .....	11
Indemnification and Insurance.....	11
Intellectual Property.....	11
Pro Bono .....	11
Publications.....	12
ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION.....	12
AT ABA ANNUAL MEETING: "GET IT RIGHT: SUCCESSFUL STRATEGIES TO MAKE MENTORING WORK".....	13
AUTHOR! AUTHOR! - "BUSINESS LAW TODAY" ARTICLES REQUEST .....	13
ABA ANNUAL MEETING COMMITTEE DINNER RESERVATION FORM.....	14
SUBCOMMITTEE ROSTER.....	15
SECTION OF BUSINESS LAW APPLICATION FOR MEMBERSHIP.....	20

**Securities Arbitration**

Friday 8/8/2003 9:00AM - 10:00AM

Fairmont

International Room, Mezzanine Level

**Task Force on Litigation Reform and Rules Revision**

Sunday 8/10/2003 9:00AM - 10:00AM

Fairmont

International Room, Mezzanine Level

\* Ticket required

\*\* Closed meeting

---

**FEATURE ARTICLE****THE EXPANSION OF THE DELAWARE COURT OF CHANCERY'S JURISDICTION TO ADJUDICATE OR MEDIATE CERTAIN "TECHNOLOGY DISPUTES" AND MEDIATE OTHER MAJOR BUSINESS DISPUTES – AN EVOLUTION, NOT A REVOLUTION***by Michael Houghton, William M. Lafferty, and Andrew H. Lippstone*

Delaware has a long and rich history of being on the cutting edge of corporation law, and the Delaware Court of Chancery, with its national (and international) reputation for deciding major corporate law disputes, has played a significant role in developing and enhancing Delaware's reputation in the corporate law field. In keeping with that tradition, the Delaware General Assembly recently enacted legislation that expands the jurisdiction of the Court of Chancery over certain "technology disputes," and allows the Court to mediate certain major business disputes. This article describes the new initiatives and attempts to explain them in the context of the Court of Chancery's pre-existing jurisdiction.

**I. The New Legislation.**

On May 30, 2003, Delaware Governor Ruth Ann Minner signed into law Senate Bill 58, which permits the Delaware Court of Chancery, upon the consent of the parties, to (1) adjudicate or mediate certain so-called "technology disputes" (new 10 *Del. C.* § 346), and (2) mediate certain business disputes (new 10 *Del. C.* § 347). The legislation was developed by a working group of practitioners which included one of the authors of this article, Mike Houghton, along with members of the Court of Chancery and was developed, in part, to respond to a growing trend among the states to provide sophisticated judicial forums in which parties can efficiently mediate or litigate complex business disputes. As noted in the synopsis of the bill, these new provisions provide "additional benefits for businesses choosing to domicile in Delaware," and were devised to "keep Delaware ahead-of-the-curve in meeting the evolving needs of businesses, thus strengthening the ability of the State to convince such businesses to incorporate and locate operations" in Delaware.

**A. The "Technology Dispute" Provisions.**

The new Title 10, Section 346 of the Delaware Code (titled "Technology Disputes") confers upon the Court of Chancery the jurisdiction to adjudicate or mediate certain "technology disputes" as defined in the statute. The term "technology dispute" is broadly defined in Section 346(c) to mean "a dispute arising out of an agreement" that primarily relates to:

- the purchase or lease of computer hardware;
- the development, use, licensing or transfer of computer software;
- information, biological, pharmaceutical, agricultural or other technology of a complex or scientific nature "that has commercial value," or the intellectual property rights pertaining thereto;

- the creation or operation of Internet web sites; or
- rights or electronic access to electronic, digital, or similar information, or support or maintenance of the above.

Section 346(d) mandates that the “Court shall interpret the term ‘technology dispute’ liberally so as to effectuate the intent of this section to provide an expeditious and expert forum for the handling of technology disputes involving parties who have agreed to resolve their disputes in the Court of Chancery, whether the parties are seeking to have the Court of Chancery (i) mediate the dispute only, (ii) mediate the dispute initially, and if that fails, adjudicate the dispute, or (iii) adjudicate the dispute.” The definition of “technology dispute,” however, specifically excludes any dispute “arising out of an agreement (i) that is primarily a financing transaction, or (ii) merely because the parties’ agreement is formed by, or contemplates that communications about the transaction will be by, the transmission of electronic, digital or similar information.”

As is the case with the new mediation provisions in 10 *Del. C.* § 347 discussed below, in order for a “technology dispute” to be eligible to be filed in the Court of Chancery, the following minimum requirements must be satisfied:

- the parties must consent to jurisdiction by stipulation or agreement;
- at least one party must be a “business entity” as defined in Section 346(b) (*i.e.*, a corporation, statutory trust, business trust or association, real estate investment trust, common-law trust, or any other unincorporated business — including partnerships, limited liability partnerships, limited liability limited partnerships, or limited liability companies); and

- at least one party must be a business entity formed under Delaware law, or must have its principal place of business in Delaware.

Further, where only money damages are involved in a “technology dispute,” the Court will have jurisdiction only when the amount in controversy is at least \$1 million (or such greater amount as the Court of Chancery determines by rule). Consistent with long-standing precedent in the Court of Chancery, neither punitive damages nor a jury trial are available in a “technology dispute” heard pursuant to Section 346. Finally, Section 346 does not limit the existing jurisdiction of the Court of Chancery or any other Delaware court.

Section 346(d) specifically provides that the Court of Chancery “shall adopt rules to facilitate the efficient processing of technology disputes, including rules to govern the filing of mediation only technology disputes, and to set filing fees and other cost schedules for the processing of technology disputes.” The Court of Chancery recently appointed a committee (comprised of practitioners and members of the Court) to develop and recommend a comprehensive set of rules to govern the adjudication or mediation of disputes under the new provisions. The rules committee expects to propose such rules for adoption by the Court as early as the fall of 2003.

#### **B. The Mediation Provisions.**

New Section 347 of Title 10 of the Delaware Code (titled “Mediation Proceedings For Business Disputes”) provides the Court of Chancery with jurisdiction to mediate high-stakes business disputes, thereby allowing it to apply its well-honed expertise in complex business disputes to mediations.<sup>1</sup> By rule, the Court may define those types of cases eligible for submission as business disputes. However, the legislation provides that in order for such a dispute to be eligible for mediation in the Court of Chancery, the following minimum requirements must be met:

- the parties must consent to jurisdiction by stipulation or agreement;
- at least one party must be a “business entity” (as defined in Section 346 above);
- at least one party must be a business entity formed under Delaware law, or must have its principal place of business in Delaware; and
- no party is a consumer, as that term is defined in 10 *Del. C.* § 2731, with respect to the business dispute.

In addition, in disputes involving only money damages, the Court will have jurisdiction to mediate disputes only when the amount in controversy is at least \$1 million, or such greater amount as the Court determines by rule. As in Section 346, no punitive damages are available in a mediation pursuant to Section 347. Consistent with the practice both in private mediations as well as under Court of Chancery Rule 174 (the Court’s existing voluntary mediation rule, which is described more fully below), proceedings under Section 347 shall be considered confidential and not of public record.

Section 347 specifically provides that the intent of the provision is “to encourage the Court of Chancery to include complex corporate and commercial disputes, including technology disputes, within the ambit of the business dispute mediation rules,” and that the “Court of Chancery should interpret its rule-making authority broadly to effectuate that intention.”

## II. The Evolution of the Court of Chancery’s Jurisdiction.

The Delaware Court of Chancery dates to 1792, but its roots go back even further – to the ecclesiastic courts of Norman England. As a historical court of equity, its original jurisdiction was limited to hearing actions involving equitable principles or remedies traditionally available in equity

– such as fiduciary obligations, rights of stockholders to sue derivatively, and the power of the Court to award injunctions, specific performance, and the like. However, with the adoption by Delaware of the 1899 General Corporation Law, the Court of Chancery’s jurisdiction was expanded to specifically cover some corporate matters, including certain matters involving corporate dissolution and insolvency.

By the early part of the twentieth century, the Court of Chancery had developed a reputation for expertise in corporate matters, in part due to the number of corporate disputes decided by the Court, and in large measure because there were no juries in Chancery and the judges were called upon to explain their rulings in written opinions. Moreover, as a traditional court of equity, the Court of Chancery does not have jurisdiction over criminal matters or tort actions seeking money damages – cases that tend to clog the dockets in other law courts. With the development of this well-honed body of decisional law, the Court’s reputation and expertise in corporate matters grew even more, causing the Delaware General Assembly to expand wisely, over time, the Court’s statutory jurisdiction over corporate matters even further. Today, the Court’s statutory jurisdiction covers many corporate matters, including actions (i) to interpret or enforce provisions of a certificate of incorporation or bylaws (8 *Del. C.* § 111), (ii) relating to director or officer indemnification or advancement of expenses (8 *Del. C.* § 145), (iii) to compel the holding of annual stockholders’ meetings (8 *Del. C.* § 211), (iv) to compel the production of corporate stocklists and other corporate books and records (8 *Del. C.* § 220), (v) to review the election of directors or the outcome of other stockholder votes (8 *Del. C.* § 225), (vi) seeking the appointment of a custodian due to stockholder or director deadlock (8 *Del. C.* § 226), and (vii) seeking appraisal of the fair value of corporate stock (8 *Del. C.* § 262), just to name a few.

Given the ever-evolving jurisdiction of the Court of Chancery and its reputation for deciding complex corporate and commercial law disputes quickly and fairly, it is not at all surprising that the Delaware General Assembly again seized the

initiative to enact the new Section 346 of Title 10 of the Delaware Code to further expand the jurisdiction of the Court to cover “technology disputes.” However, one might fairly ask the question – what experience does the Court of Chancery have in mediating corporate or commercial disputes? After all, it is a court generally charged with deciding cases once they have been commenced in the traditional fashion by the filing of a complaint. The answer may not be apparent to lawyers who do not practice actively in the Court of Chancery: Court of Chancery Rule 174 (titled “Voluntary Mediation in the Court of Chancery”).

Pursuant to Rule 174, which was adopted by the Court in 1998, the “Chancellor or Vice Chancellor presiding in a case, with the consent of the parties, may refer any case or issue in a case to any other judge or master sitting permanently in the Court of Chancery, who has no involvement in the case, or to a designated mediator for voluntary mediation.” The stated purpose of voluntary mediation under Rule 174 is “to provide the parties convenient access to dispute resolution proceedings that are fair, confidential, effective, inexpensive, and expeditious.” Under Rule 174, the parties to an action may consent to voluntary mediation at any stage of the proceeding, and such consent is required to be in a writing that identifies, among other things, the issues to be mediated (Rule 174(b)). Mediation conferences under Rule 174 are confidential, as are all communications made in, or in connection with, the mediation (unless the parties agree otherwise).

Importantly, Rule 174 provides that the mediator may be the Chancellor or a Vice Chancellor. This is significant for a number of reasons. First, by allowing a judge sitting on the Court where the case is pending to mediate the dispute, the parties are likely to have more confidence in the process, given that the judges on the Court are all well-versed in the applicable law and all have experience deciding complex cases. Second, the courthouse setting and the participation of a sitting judge bring a level of dignity and seriousness to the proceeding that may not be available in private mediations, and also

provides an opportunity to the parties to present their positions to a member of the judiciary who is, each day, still actively engaged in resolving complex legal issues. Finally, the participation of a sitting judge as a mediator – a judge who is not shy about expressing a candid opinion of the risks facing both sides in a dispute – may help to overcome the views of recalcitrant clients or attorneys who have over-optimistic views that their positions are undoubtedly correct.

Viewed in the context of the historical jurisdiction of the Court of Chancery, the new initiatives recently enacted by the Delaware General Assembly, while novel, are by no means revolutionary. Rather, they are a logical extension of the Court of Chancery’s jurisdiction to include “technology disputes” and the mediation of major business disputes.

### III. A Hypothetical Application of the New Legislation.

An example of how Section 346 may be employed can be demonstrated through the hypothetical example of UltraGame, a Delaware limited liability company that has developed cutting-edge technology for use in interactive video games. Assume that UltraGame enters into an intricate license agreement with PlayBox Software, a California company and the world’s largest manufacturer of home video game software. That license agreement includes a provision whereby PlayBox generally consents to personal jurisdiction in Delaware, as well as a provision under which the parties agree that any dispute arising under the agreement “shall be subject to mediation in the Court of Chancery of the State of Delaware, and the parties hereby agree to submit to the jurisdiction of the Court of Chancery for the purposes of enforcing any agreement reached during mediation.” Further assume that such provision also states that if mediation is unsuccessful, the parties agree to resolve the dispute in the Court of Chancery and consent to personal jurisdiction in the Court of Chancery for purposes of adjudicating “any dispute arising out of or relating to this agreement.”

The license agreement contains a complex formula for determining UltraGame's royalties, which becomes a source of dispute when PlayBox (in the eyes of UltraGame) fails to pay UltraGame \$1.2 million the latter believes it is owed under the license agreement. UltraGame promptly seeks redress under the new mediation provision in the Delaware Court of Chancery – which would, under the terms of 10 *Del. C.* §§ 346 and 347, have the authority to mediate the dispute because (1) UltraGame is a Delaware entity; (2) the conflict falls under the broad definition of "technology dispute"; and (3) the amount in controversy exceeds \$1 million.

Having the dispute mediated in the Court of Chancery has obvious benefits for both parties. Mediation is much faster than litigation; the dispute is likely to be fully resolved in a matter of months. And given the complexity of the license agreement, the monetary costs of litigating the dispute may well approach cost-prohibitive levels, particularly when one considers that the entire amount of potential damages in dispute is only \$1.2 million. In addition, because mediation is a more consensual and therefore less confrontational forum for resolving disputes than a lawsuit, the parties may be able to resolve their dispute in a more businesslike and amicable fashion, such that they could potentially preserve what may be a mutually beneficial contractual relationship. Finally, because their dispute will be adjudicated by a jurist with world-class expertise in resolving complex business disputes, the parties can proceed with the knowledge that their conflict will be handled fairly, expeditiously, and above all, competently.

If the mediation does not resolve the dispute between UltraGame and PlayBox, Section 346 grants the Delaware Court of Chancery the authority to adjudicate the dispute, even if money damages were the only remedy sought, because the amount in controversy exceeds \$1 million. The section of the license agreement providing that disputes will be litigated in the Delaware Court of Chancery will, under Section 346, be given full force and effect – a result that will undoubtedly be heartening to parties who

want to avail themselves of the expertise of the nation's preeminent business court.

#### IV. Conclusion.

Delaware's recently-enacted technology dispute and mediation provisions provide a new type of service to Delaware entities, at a time when businesses are more interested than ever in cost-effective and confidential methods to resolve litigable controversies consensually. While to some extent Sections 346 and 347 represent new ground for the Delaware Court of Chancery, those changes represent a logical progression for a Court long known for its flexibility and ability to meet the evolving demands of modern businesses. Businesses can expect that the Court will bring the same expertise to these new technology and business cases which it has consistently demonstrated in the corporate arena.

**Michael Houghton and William M. Lafferty** are partners of Morris, Nichols, Arsht & Tunnell in Wilmington, Delaware. **Andrew H. Lippstone** is an associate with the firm.

<sup>1</sup> Persons other than members of the Court of Chancery may be authorized by rule to act as mediators.

---

## SUBCOMMITTEE REPORTS

### APPELLATE LITIGATION SUBCOMITTEE

*by LaRonda D. Barnes*

The Appellate Litigation Subcommittee will present a mini-program entitled "Certiorari: Enhancing Your Chances of Getting the Grant" at the ABA Annual Meeting on Monday, August 11 from 9 a.m. to 11 a.m. in the Fairmont Hotel's California Room (Mezzanine Level). The subcommittee welcomes all federal and state appellate litigators, appellate court personnel, and any other individuals