

November 1, 2008

**Extract from Practice Points in eSource: The
Monthly Electronic Newsletter of the ABA
Section of Business Law citing Bigler and
Tillman's Void or Voidable? -- Curing Defects in
Stock Issuances Under Delaware Law**

Seth Barrett Tillman



eSource

The monthly electronic newsletter of the ABA Business Law Section

YOUR WORLD
IS OUR WORLD

November 2008 - Volume 7 - Number 1

Practice Points

1. [Nightmare on Main Street - What Keeps Lenders Up at Night?](#)
2. [Governance Challenges for Nonprofits Posed by the New IRS Form 990.](#)
3. [Seller Beware: Potential Pitfalls and Unintended Consequences of the 'Materiality Scrape'.](#)
4. [Void or Voidable? - Curing Defects in Stock Issuances Under Delaware Law.](#)
5. [BAP Opinion in Clear Channel Likely to Chill Credit Bids.](#)
6. [LLCs, LLPs, DSTs, LPs: Why and How are Alternative Entities Used in Cross-Border Transactions?](#)

Ethics Corner

- [Ethics Corner: Negotiation Ethics.](#)

Section News

- [Nominations Sought for Section Leadership Positions](#)
- [The Section is now accepting nominations for the Jean Allard Glass Cutter Award.](#)

Past Issues

[Click here](#) to view last month's issue.

Section Sponsored Events

Upcoming Committee Meetings

[Commercial Finance](#)
[November 12, 2008](#)
[San Francisco, CA](#)

[Banking Law](#)
[November 13-15, 2008](#)

Message from the Chair, Karl J. Ege



The first week in November finds the Nation with a new leader, an economy in recession, and our clients and profession facing a world-wide global economic slowdown. These events will have profound effects on our profession and Section of Business Law is planning programs and services that address these dramatic changes. I mentioned in my last message the creation of a Section Study Group on Financial Services Reform. At the meeting of the ABA Board of Governors last month, upon the recommendation of ABA President Tommy Wells, the Study Group was elevated to an ABA Presidential Task Force. This will enable the group to have the full resources of the American Bar Association at its disposal as it analyzes likely changes to the legal and regulatory governance and oversight structure of the financial marketplace and its participants. I will keep you apprised regularly on the work of the Task Force as it helps to reshape the regulatory landscape in a manner that will be in the best long-term interests of all participants in the financial marketplace.

Many of our Section committees are planning programs during the next two months that focus on the financial crisis and its impact on our members and their clients. Below, you will find a [sneak peak](#) at a paper to be presented at the [Committee on Commercial Finance Meeting](#) next week in San Francisco. At the [Fall Meeting in DC](#), the ABA Task Force on Financial Markets Regulatory Reform will host a program entitled "Meltdown! Perspectives on the Future of Financial Services Regulation" examining the questions of what caused the current crisis, what are the implications of the government response, how should the system change and will it do so. If you cannot attend this program in person on November 21, I strongly encourage you to take advantage of the [live broadcast](#) of the program available through ALI-ABA.

Given the current state of the economy and the stress that it places on all organizations, whether for-profit or non-profit, I thought it would be appropriate to share with you the state of your Section's finances. I am pleased to report that under Charlie McCallum's able leadership and our successful publications and CLE programs, the Section ended its 2007-08 fiscal year with an operating surplus. The Section currently enjoys reserves of over \$7.4 million, which represents the cumulative operating surpluses generated over the Section's 70-year history, as well as a prudent and disciplined investment program that has enabled our reserves to grow steadily over the years.

Each year your Section Officers and Council allocate 5% of the Section's reserves to the operating budget; this enables the Section to support its many outreach programs without increasing Section dues. We often allocate an additional portion of our reserves to the operating budget as a cushion against unexpected financial results.

The Section's 2008-09 budget reflects anticipated revenues and expenses of approximately \$7,600,000 as follows:

Revenues:

Member Dues	\$2,060,000	27.0%
Publications	1,700,000	22.3
Membership Services	600,000	7.9
Meetings	1,880,000	24.7
Committees	360,000	4.7
Transfer from Reserves	940,000	12.3

Baltimore, MD

LLCs, Partnerships and
Unincorporated Entities
November 14-15, 2008
Washington, DC



2008 Fall Meeting
November 21-22, 2008
Washington, DC

Save the Date



2009 Spring Meeting
April 16-18, 2009
Vancouver, BC



2nd Annual Global Business Law
Forum
June 10-12, 2009
Hong Kong, China



Deal or No Deal? Transacting in
Native America
December 10, 2008 | 1:00 - 2:00 PM
ET

Miscellaneous	<u>80,000</u>	<u>1.1</u>
Total Revenues	\$7,620,000	100.0%
Expenses:		
Staff	\$1,010,000	13.2%
Leadership Activities	280,000	3.7
Membership Services	1,710,000	22.5
Meetings	2,380,000	31.2
Committees	550,000	7.2
Publications	1,160,000	15.2
Outreach, Pro Bono and Special Programs	<u>530,000</u>	<u>7.0</u>
Total Expenses	\$7,620,000	100.0%

As you can see, we have been able to increase the programs and projects supported by our Section without an increase in member dues, primarily through our effective and highly-regarded publications and legal education programs. More than 80% of Section expenses are directed toward supporting you, our 60,000 members. We are committed to adhering to that model for the determinate future.

Karl J. Ege
Chair, ABA Section of Business Law

Practice Points

1. Nightmare on Main Street - What Keeps Lenders Up at Night?

Lender liability and bankruptcy issues are of increasing interest to lenders in the current economic environment. This presentation addresses current lender concerns including (i) lender liability issues in the issuance of commitment letters, (ii) "traditional" lender liability claims - breach of commitment, fraud in the inducement, misrepresentation, lack of good faith and damage theories, (iii) intercreditor issues relating to DIP financing/cash collateral, asset sales, voting rights, and other matters, (iv) recharacterization or subordination of indebtedness, (v) cram-down of secured debt under a plan of reorganization (value, modification of terms), and (vi) disallowance of prepayment premiums.

Print Materials | E-mail to a Colleague

Presented by the Committee on Commercial Finance at the Committee Fall Meeting, November 12, 2008.

2. Governance Challenges for Nonprofits Posed by the New IRS Form 990.

The changes to IRS Form 990, the required annual reporting form for nonprofits, contain many new governance requirements that need to be tackled before the time for the next report needs to be filed. This short article gives a summary of the important changes and steps that need to be taken to ensure compliance.

Print Materials | E-mail to a Colleague

From the Subcommittee on Nonprofit Governance a Joint Subcommittee of the Committees on Nonprofit Organizations and Corporate Governance.

3. Seller Beware: Potential Pitfalls and Unintended Consequences of the 'Materiality Scrape'.

This article discusses the application and interpretation of the typical materiality scrape provision and the buyer's basic arguments in favor of the provision. The

Webcast/Teleconference
Multi-site



Section 403(b) Compliance Countdown

November 11, 2008 | 1:00–2:30 PM
ET

Webcast/Teleconference
Multi-site

Is the San Francisco Health Care Security Ordinance a Roadmap for States to Avoid ERISA

Preemption?

November 18, 2008 | 1:00–2:30 PM
ET

Webcast/Teleconference
Multi-site

Getting the Business Deal into the Contract - Choosing the Right Words

November 20, 2008 | 1:00–2:30 PM
ET

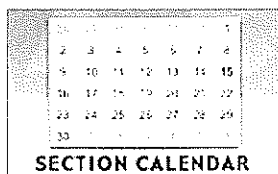
Webcast/Teleconference
Multi-site

Limited Liability Company Update: Issues to Think About in Uncertain Times

December 9, 2008 | 12:00–1:30 PM
ET

Webcast/Teleconference
Multi-site

For information on future programs,
check out the
Section Meetings Calendar.



For more information on upcoming
Committee Meetings contact
ruppr@staff.abanet.org.

article then proceeds to highlight several potential issues that sellers and their counsel should consider when reviewing and negotiating the provision.

[Print Materials](#) | [E-mail to a Colleague](#)

From the [newsletter](#) of the Committee on [Corporate Counsel](#), August 2008.

4. Void or Voidable? - Curing Defects in Stock Issuances Under Delaware Law

This article discusses omissions or procedural in Delaware corporations' stock records which raise questions as to the valid authorization of some of the outstanding stock and the Delaware Supreme Court cases in which the court has determined that failure to comply with such formalities renders the stock in question void, i.e., not curable by ratification. This article analyzes the cases and proposes that the Delaware courts apply the policy underlying Article 8 of the Delaware Uniform Commercial Code to validate stock in the hands of innocent purchasers for value in determining whether stock is void or voidable.

[Print Materials](#) | [E-mail to a Colleague](#)

From [The Business Lawyer](#), August 2008 - Volume 63 - Number 04.

5. BAP Opinion in Clear Channel Likely to Chill Credit Bids

This article discusses the recent BAP decision in *Clear Channel Outdoor, Inc. v. Nancy Knupfer*, 391 B.R. 25 (B.A.P. 9th Cir. 2008) where the court held that 11 U.S.C. § 363(f) required a sale price above the amount of debt absent consent. More disturbing, the panel held that a buyer who relied in good faith on the sale order had very limited protection and could have a junior lien reimposed on the property in the buyer's hands. This decision may significantly decrease buyers' willingness to rely on bankruptcy court orders.

[Print Materials](#) | [E-mail to a Colleague](#)

From the [Commercial Law Newsletter](#), newsletter of the Committees on [Commercial Finance](#) and [Uniform Commercial Code](#), October 2008.

6. LLCs, LLPs, DSTs, LPs: Why and How are Alternative Entities Used in Cross-Border Transactions?

Alternative entities are used instead of the corporate structure in an array of transactions ranging from private equity funds to property financings. The distinctions among such entities and the flexibility afforded to them must be understood in order to identify the issues that should be addressed in the transaction documents. The issues include applicable fiduciary duties, management consent issues and governing law provisions. This program addressed these issues so that practitioners can prepare transaction documents which accurately reflect the intent of the parties.

[Print Materials](#) | [E-mail to a Colleague](#)

Presented by the Committees on [LLCs, Partnerships and Unincorporated Entities](#) and [International Business Law](#) at the 2008 Global Business Law Conference, May 29-30, 2008.

Ethics Corner

Ethics Corner: Negotiation Ethics

You may not lie, and you may not assist your client's fraud.

[Print Materials](#) | [E-mail to a Colleague](#)

Presented by the Committee on [Professional Responsibility](#), William Freivogel, Chair.

Committee Spotlight

To learn more about or join the committees that contributed to this month's practice