

# Delaware Sees Explosion of Statutory Business Trusts

By Elizabeth Bennett

Of the DLW

Since passing the Delaware Statutory Trust Act in 1988, Delaware has experienced an explosion of statutory business trusts, giving a timely flair to this year's Widener University School of Law visiting scholar lecture.

Professor Robert H. Sitkoff, John L. Gray professor of law at Harvard Law School, delivered the lecture titled "The Rise of the Statutory Business Trust" in downtown Wilmington on Oct. 5. This was the third year of the lecture series, presented by Widener and funded by The Delaware Counsel Group, a Wilmington-based law firm that advises national and international clients on Delaware corporate and alternative-entity law.

Ellisa Habbart, a co-founder of the Delaware Counsel Group, has worked with Sitkoff since 2003 on a commission charged with devising a uniform business trust entity act by the National Conference of Uniform Statutory Laws.

In addition to this work, Sitkoff is a co-author of "Wills, Trusts, and Estates," the leading American casebook on the subject.

Before the lecture, Cynthia Kane from the Delaware Secretary of State's Office warmed up the audience with some numbers.

Kane said Delaware has about 20,000 active statutory business trusts, up from 7,000 in 2000. They are the state's fastest growing entity, with average growth of 36 percent per year.

The second closest state is Massachusetts, where 88 statutory business trusts were formed last year, compared to Delaware's 3,904.

After a brief introduction by Habbart, Sitkoff took the microphone. A few highlights follow, including comments from Vice Chancellor Leo E. Strine Jr. of the Court of Chancery questioning whether this explosion of trusts is at all good for the state.

Kicking off the lecture, Sitkoff mentioned the curious fact that although three-quarters of mutual funds are structured as business trusts, and the mutual fund industry is worth roughly \$10 trillion dollars, systematic scholarly inquiry has yet to take place, something Sitkoff and his colleagues are seeking to remedy.

After a short lesson on the way trusts operate, Sitkoff got into their history, which he said is "a story in part of avoiding corporate regulation. ... It got so bad that we have antitrust law while other countries have competition law."

Think Standard Oil, Teddy Roosevelt and the Gilded Age.

"The fall of the common law trust coincides with the rise of the modern corporation," Sitkoff said.

Laws governing business trusts went

---

*'The trust can sue and be sued in its own name, an astonishing transformation,' Sitkoff said, adding that 'fourth-generation laws' made the business trust 'a full-on entity.'*

---

through a few generations, Sitkoff said, culminating in Delaware's act, passed in 1988.

"The trust can sue and be sued in its own name, an astonishing transformation," Sitkoff said, adding that such "fourth-generation laws" made the business trust "a full-on entity."

While a few states have copied the law,

"Delaware utterly dominates the statutory trust market," Sitkoff said.

The professor posited that the reason for this is human capital.

"They come to Delaware because there is a local lawyer and a banking infrastructure. ... In other words, the transactional lawyers' knowledge," Sitkoff said.

Next Sitkoff examined why a statutory business trust might be chosen from among all possible structures. He noted that a provision in the Delaware act "allows mutual funds to act with all the latitude that the law allows."

Among other things, he mentioned a growing body of Securities and Exchange Commission "no-action" letters, which basically tells the party who requests the letter in the absence of a on-point rule whether what they are doing is likely to run afoul of the SEC.

In short, Sitkoff thinks what's going on is regulatory arbitrage.

Given this theory, and considering statutory business trusts have the fewest mandatory rules of all business entities, Sitkoff asked, why aren't there even more?

Lecture continues on page 5

## PAIN MANAGEMENT & REHABILITATION GANESH BALU, M.D.

Worker's Comp. Injuries

Auto Accidents

Chronic Neck & Back Pain

Medications

X-Ray Guided Injections

Acupuncture

Massage Therapy

FREE  
CONSULTATIONS

Board Certified in  
Pain Management  
and

Physical Medicine & Rehabilitation

425 E. Main Street  
Ashley Plaza, Suite 4  
Middletown, DE 19709  
302-376-7655

742 S. Governor's Ave.  
Opp. Kent General Hosp.  
Dover, DE 19904  
302-734-7246

8957 Middleford Road  
Near Nanticoke Hosp.  
Seaford, DE 19973  
302-628-9100

## Lecture

*Continued from page 3*

Among the possible reasons he cited are continuing legal uncertainty, path dependency — the habit of sticking with the devil you know — as well as the fact that relatively few professionals know about these trusts.

Sickoff wrapped up his lecture by talking about the uniform act he and Habbart are working on. Although modeled on Delaware law, the commission is seeking to write in some improvement, including "more fulsome series provisions."

Habbart explained in a later interview that the concept of series — familiar to participants in mutual funds that offer a differentiated series of investment vehicles — has caused some problems among limited liability corporations.

"We're making sure we have that covered and have as many provisions as possible to prevent people using statutory trusts in a get-over fashion. The whole concept of the series needs a lot of work. That's what we're focusing on this year," Habbart said.

After the lecture was finished Strine addressed the audience, saying, "This is a subject about which I have profound misgivings."

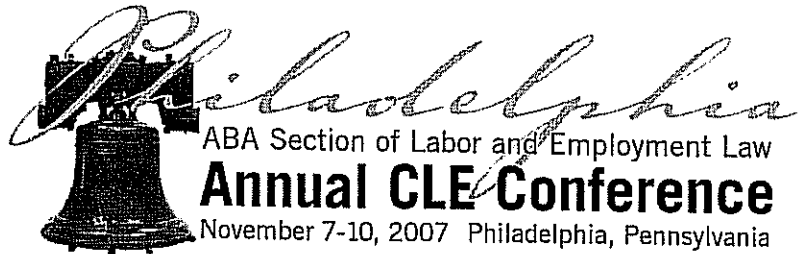
The vice chancellor noted that statutory business trusts pay no fees, but at the same time they are "using our good name."

Among a number of comments that arose during the discussion, Sickoff said he took Strine's comments about the Delaware brand as tantamount to "the same questions any business faces when going into a new line of business."

Later, Strine said he thought there were not enough constraints on statutory business trusts. The situation could come "dangerously close to making us look like we don't protect investors. I want to protect the center of the plate. ... We do see the employment. We do want our bar to grow, but we have to do it in such a way that it doesn't hurt our long-term interests."

Larry Hamermesh, a professor of law at Widener and director of its Institute of Delaware Corporate & Business Law who attended the lecture, said in a later interview that people naturally take their business where they can do it most effectively and cheaply.

"The problem or question is the cost of that in terms of the integrity of the whole system," he said. •



**We are pleased to announce our inaugural three-day conference featuring:**

- a Mock Employment Trial from opening statements to jury verdict;
- a Traditional Labor Law track, including live oral arguments before the National Labor Relations Board;
- Plenary Session reviewing recent Supreme Court developments in labor and employment law — opinions on some of the most difficult and pressing issues facing employment lawyers today;
- the participation of numerous federal and state trial court and appellate judges, who will bring you views from the bench on what works, what doesn't, and what they find most helpful in labor and employment law cases;
- the presence of high level and regional officials from the EEOC, NLRB, Department of Labor, and other agencies in our area of law to present their perspectives and enforcement priorities;
- the opportunity for attendees to earn up to one year of CLE credit, network with peers and enjoy social events all at a very attractive price.

**Complete program information available at [www.abanet.org/labor](http://www.abanet.org/labor)**



ABA Section of Labor and Employment Law  
321 N. Clark Street  
Chicago, IL 60610  
Email: [laboremp@abanet.org](mailto:laboremp@abanet.org)  
Phone: (312) 963-5313