The State Bar of Georgia

BUSINESS LAW SECTION

Newsletter

Dana Smith Kull, Chair	March 2002	Robert J. Pile, Editor

CHAIRMAN'S REPORT

By Dana Smith Kull

The Section's annual Institute last October was well attended. The number of registrants was approximately double the average of the past several years at Sea Island. This fact and the responses to the program survey have persuaded the Executive Committee to schedule the 2002 Institute in Atlanta as well. We would love to return to Sea Island, so if you feel strongly that at least every third or fourth year the program should be there, let us know!

As you may recall, the annual meeting of the Section has traditionally been held at the Institute. This year, the membership acted at the annual meeting to change the time of the annual meeting to the third Thursday in May. Three years ago, the Section changed its fiscal year from the calendar year to July 1-June 30 to harmonize with the rest of the Bar. It made sense to reschedule the annual meeting for a date closer to the end of the new fiscal year. You will be receiving a notice of the annual meeting time and location – the date will be May 16, 2002 – not later than 30 days prior to the meeting date. I hope you will attend.

The Section is working with committees and individual Senators and Representatives during the current legislative session for passage of HB 1253 (Revised Article 5 of the UCC (letters of credit) and corrections to last year's Revised Article 9), refinements to the LLC statute, and HB 84, the Uniform Fraudulent Transfers Act. Representatives Robert Reichert and Tom Bordeaux and Senator Michael Meyer von Bremen deserve special thanks. Boller, Sewell & Segars, the Bar's lobbyists, are doing their usual good work, especially Tom Boller and Mark Middleton on the bills of particular interest to this Section.

Other noteworthy projects of the Section are the revitalized opinion project, under the leadership of Carolyn Alford (see separate article in this newsletter), and the development of a short program format for discussion of timely issues and to promote Section participation under the direction of Bob Pile's Publications Committee.

Please let us hear from you. Check the Section website for news and announcements and use it to let us know what you're thinking and what you would like to see your Section doing.

NEWSLETTER HIGHLIGHTS

SEC ANNOUNCES NEW POLICY ON COOPERATION

By Walter E. Jospin, Robert Plotkin, and James W Maxson
Paul, Hastings, Janofsky & Walker LLP, Atlanta

Recent speeches by Harvey Pitt, the new chairman of the U.S. Securities and Exchange Commission ("SEC" or "Commission"), and by other top Commission officials seem to buttress the observations of several commentators that there is a "new dawn at the SEC" and "a work with us attitude." One practitioner has even stated – most likely with some irony – that the agency has become "kinder and gentler."

Don't count on it. The SEC will continue to be very aggressive in prosecuting insider trading, financial fraud and other illegal actions. The staff has emphasized that its enforcement program has evolved to "real time" – presumably meaning that its enforcement cases will be brought sooner rather than later, and that its investigations will not linger for years.

There has been, however, a very clear message from the Commission that, under certain circumstances, it will use its prosecutorial discretion not to bring an enforcement action against a public company* that cooperates with the SEC after the company has discovered wrongdoing.

Consider the following scenario:

A public company has just learned that a Senior Vice President of Sales has been "cooking the books" for over a year. Specifically, she has been submitting false sales invoices and thereby inflating revenue by a "material" amount. The company's law firm promptly conducts a thorough internal investigation and determines that, even though the Company's internal accounting controls were "state of the art," the Sr. VP, acting alone, conceived and perpetrated her scheme without the knowledge of her supervisors.

The company, of course, must restate its earnings and amend its periodic reports filed with the SEC. The company is now faced with a difficult issue: should the company, with its SEC counsel, go to the Commission and explain what has occurred and subject itself to a possible enforcement action, or does the company simply restate earnings, amend periodic reports, and respond to the SEC if and when it seeks information?

In years past, many companies were probably very tempted to undertake the latter approach in the face of this dilemma, because it was unclear whether any benefit would be gained by voluntary self-disclosure to the SEC. However, the SEC recently sent what is being seen as a potentially encouraging message to public companies. The SEC, in a recent Report of Investigation, set forth an analysis that, under certain circumstances, might permit a company to avoid an enforcement action or sanction when it discovers misconduct and makes voluntary and complete disclosure to the SEC.

While the SEC Enforcement Staff has, from time-to-time in the past, used its prosecutorial discretion to reward cooperation by not bringing an enforcement action against an entity or individual, the recent Report of Investigation is the first official SEC articulation of its policy with respect to cooperation.

In Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Release No. 44969, dated October 23, 2001, the SEC signaled that it is willing to reward cooperation for self-disclosure of misconduct. This reward can range "from the extraordinary step of taking no enforcement action to

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* For purposes of this article, we consider a public company to be an entity, including foreign private issuers, domiciled anywhere in the world whose securities are registered with the SEC and traded in the United States.

bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents [used] to announce and resolve enforcement actions." While the boundaries of the SEC's policy shift in the Report of Investigation can only be fleshed out as the SEC continues to apply those factors and decide what, if any, enforcement is appropriate in specific cases it considers, it is safe to say that the policy shift will only apply in limited circumstances.

The Report of Investigation

In the Report of Investigation, the SEC chose not to take any action against Seaboard Corporation, a subsidiary of which had a controller who had underreported the subsidiary's expenses from 1995 to early 2000. Upon discovering the wrongdoing, the corporation immediately investigated the situation and terminated the employee as well as her two supervisors. The SEC, relying on a number of factors, declared in its Report of Investigation that "we are not taking action against the parent company, given the nature of the conduct and the company's responses."

Two Basic Questions

The analysis employed by the SEC breaks down into two questions. First, "what is the nature of the conduct that has been brought to the SEC's attention?" And, second, "how did the company respond once it learned of the misconduct?" Though the SEC does not specifically say so in its Report of Investigation, it appears to be enunciating a sliding scale analysis in which the egregiousness of the conduct will be weighed against the alacrity and effectiveness of the company's response once the misconduct is discovered.

One: Nature of the Conduct

In its Report of Investigation, the SEC noted several factors it will consider in making its determination of the nature of the conduct. For instance, the SEC specifically mentioned the following factors:

- What is the nature of the misconduct involved? Did the misconduct result from inadvertence, honest mistake, simple negligence, reckless or deliberate indifference to indicia of wrongful conduct or willful misconduct? Were the company's auditors misled?

- How did the misconduct arise? Is it the result of pressure placed on employees to achieve specific results, or a tone of lawlessness set by those in control of the company? What compliance procedures were in place?

- Where in the organization did the misconduct occur? How high up in the chain of command was knowledge or participation in the misconduct? Did senior personnel participate in or turn a blind eye toward obvious indicia of misconduct? How systemic was the behavior? What compliance procedures were in place to prevent the misconduct now uncovered?

- How long did the misconduct last? Was it a one quarter or one-time event or did it last several years? In the case of a public company, did the misconduct occur before the company went public? Did it facilitate the company's ability to go public?

- How much harm did the misconduct inflict upon investors and other corporate constituencies? Did the price of the company's stock drop significantly upon its discovery and disclosure?

- How was the misconduct detected and who uncovered it?

While the SEC specifically stated in its Report of Investigation that the factors listed above are not exhaustive, these are helpful guidelines to use in determining how egregious the SEC might consider wrongful conduct to be.

Two: Company's Response to Discovery of Wrongdoing

Just as important as the nature of the conduct discovered, the SEC will look very closely at the company's response to the discovery of the wrongful conduct. In making its determination whether the company's response was effective and timely, the SEC noted the following factors:

- How long after discovery of the misconduct did it take to implement an effective response?

- What steps did the company take upon learning of the misconduct? Did the company immediately stop the misconduct? Are persons responsible for any misconduct still with the company? If so, are they still in the same positions?

- Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators?

- Did the company cooperate completely with appropriate regulatory and law enforcement bodies? Did the company identify what additional related misconduct is likely to have occurred?

- What processes did the company follow to resolve these issues and to investigate the nature of the misconduct?

- Did the company commit to learn the truth fully and expeditiously? Did it do it through a thorough review of the nature, extent, origins and consequences of the conduct and related behavior?

- Did the company promptly make available to the SEC staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law?

- Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information to the SEC not directly requested by the SEC and to which it might otherwise not have had access?

- Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct?

- Is the company the same company in which the misconduct occurred, or has it changed through a merger or bankruptcy reorganization?

It is clear that in order for a company to be eligible for lesser or no sanctions from the SEC, the company, upon the discovery of wrongdoing, will have to engage immediately in a thorough and detailed investigation of the misconduct and thereafter provide the complete results of that investigation to the SEC's staff.

The SEC also notes in its Report of Investigation that another factor that weighed in favor of its decision not to bring enforcement action against Seaboard was the company's decision not to invoke the attorney-client privilege, *vis-à-vis* the SEC, for numerous documents that were otherwise subject to that privilege.

A Very Difficult Decision

The decision to cooperate completely with the SEC, including the decision to turn over attorney-client privileged documents, while it might result in lesser or no sanctions from the SEC, has other perils. Turning over the results of an internal investigation could make them part of the public record, and these materials may be accessible to shareholders and attorneys for shareholders and others, and may serve as a blueprint for a flood of civil suits.

Exacerbating the risks of disclosing privileged documents to the SEC is the fact that the weight of case law appears to be strongly in favor of the waiver of the attorney-client privilege when documents are voluntarily disclosed to the SEC during the course of an investigation.

It is also possible that the SEC might turn these documents over to the prosecutors to pursue criminal charges against the corporation and the officers involved. In short, a corporation that does the "right thing" by making voluntary and full self-disclosure to the SEC may find itself in the midst of shareholders' suits with the attorneys on the other side possessing numerous attorney-client privileged documents.

In light of the serious risks involved in disclosing attorney-client privileged documents to the SEC, a company that discovers internal misconduct and conducts a prompt investigation with the assistance of counsel must treat as critical the question of whether to disclose any privileged documents.

Additionally, self-disclosure of misconduct creates the obvious risk of drawing unwanted attention to the company. A company should consult with its SEC counsel and ask: would the corporate misconduct in question otherwise hit the radar screen of the SEC's Division of Enforcement?

No Guarantees

While the SEC's Report of Investigation is an encouraging signal from the SEC, it is not the dawn of a new era of non-enforcement by the SEC, and the decision to make self-disclosure of misconduct to the SEC is one that should be considered very carefully. On the one hand, where the misconduct that is discovered is so minor that it can simply be dealt with without going to the SEC, there most likely would be no advantage to making full disclosure. On the other hand, if the misconduct is systemic and particularly egregious, it is unlikely that the SEC will decide not to prosecute even if the company makes complete disclosure. Thus, the effective window of opportunity to avoid prosecution presented by making full self-disclosure to the SEC of wrongdoing is limited. The wrongdoing must be sufficiently egregious to warrant bringing it to the SEC's attention, but not so egregious that the SEC will prosecute as a matter of principle.

Prophylactic Steps to Take Now

At a minimum, it would be useful for public companies to consider the following prophylactic steps, which should put them in a better position to avail themselves of the SEC's new policy if illegal activity is uncovered:

- Confirm that effective compliance programs are in place (insider trading, corporate disclosure, foreign payments, to name a few). The leading U.S. case in this area is In re Caremark International, Inc. Derivative Litigation, 698 A.2d 959 (Del. 1996)

- Make certain that the company's compliance officer is thoroughly trained and conducts periodic evaluations of the company's compliance programs.

- Confirm with senior management that, along with the outside auditors, the company's internal accounting controls are adequate.

- Confirm that the information on the company's website is consistent with its public disclosures.

- Keep in mind the importance of contacting SEC counsel as soon as misconduct is discovered.

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This article should in no way be relied upon or construed as legal advice. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought.

RECENT DEVELOPMENT

ADVISOR'S NON-CIRCUMVENTION PROVISION HELD UNENFORCEABLE IN GEORGIA

By Thomas G. Douglass, Jr.
Sutherland Asbill & Brennan LLP, Atlanta

In Swartz Investments, LLC v. Vion Pharmaceuticals, Inc., 556 S.E.2d 460, 252 Ga. App. 365 (2001), the Georgia Court of Appeals, in a case of first impression, held unenforceable a "non-circumvention" clause that prohibited a company from entering into future transactions with investors who had been introduced to the company by its investment advisor without the advisor's consent. The court determined that the non-circumvention clause should be reviewed under the strict level of scrutiny that is normally reserved for restrictive covenants made in the context of employment agreements. Although the outcome in Swartz may ultimately be limited to the particular facts and circumstances surrounding the non-circumvention clause at issue, the case nevertheless provides an important reminder that Georgia courts can find—and strike down—restrictive covenants well outside the context of agreements that traditionally raise enforceability concerns.

In June 1997, Vion Pharmaceuticals, Inc. ("Vion") and Swartz Investments, LLC ("Swartz") entered into a letter agreement in which Swartz agreed to assist Vion in a private placement of securities. Swartz would introduce Vion to suitable investors and provide assistance in negotiating and documenting the terms of the transaction, and in exchange Vion would pay Swartz a commission equal to five percent of the aggregate purchase price of the securities sold in the private placement. In addition, Vion agreed that it would pay Swartz a five percent commission if, during the one-year period following the transaction, Vion accepted any additional investments from investors who had been introduced to it by Swartz.

By late August 1997, Swartz and Vion had arranged for $4,850,000 in financing from several investors. At that time, Swartz and Vion entered into a Placement Agent Agreement, which superseded the earlier letter agreement and contained the non-circumvention clause at issue in the case:

> 7.1 *Non-Circumvention.* The persons or entities set forth on Exhibit B shall be considered, for purposes of this Agreement, the property of Agent. The Company on behalf of itself, its parent or its subsidiaries (collectively hereinafter referred to as "Company") agree not to circumvent, directly or indirectly, Agent's relationship with these investors, their parents or any of the investors' subsidiaries (collectively hereinafter referred to as "Investors") and Company will not directly or indirectly contact or negotiate with any of these Investors regarding an investment in the Company, or any other company, and will not enter into any agreement or transaction with Investors, or disclose the names of Investors, for a period of five (5) years from the date hereof without the prior written approval of Agent; provided, however, that notwithstanding the above, nothing contained in this Agreement shall prevent Company from, directly or indirectly, selling securities to the Investors through a public offering or from, directly or indirectly, contracting or negotiating

> with the Investors in satisfaction of Company's obligations under the Subscription Agreements entered into in connection herewith. In the event that the Company accepts an investment from an Investor or Investors (other than in a public offering) in a placement being arranged through an agent other than the Agent, during the period beginning on the date hereof and terminating on the first anniversary of the date of the Last Closing as described in the Subscription Agreement, the Company agrees to pay to the Agent a fee equal to five percent (5%) of all amounts invested by such Investor(s).

556 S.E.2d at 461.

In June 1998, Vion raised an additional $5,000,000 from the Investors without Swartz's involvement, and Swartz subsequently made a demand on Vion for its five percent commission pursuant to the non-circumvention clause in the Placement Agent Agreement. Vion acceded to this demand, paying Swartz $250,000. In June 1999, Vion raised approximately $4,000,000 from the Investors in another private placement, and Swartz again demanded a five percent commission. This time, however, Vion refused. Swartz then filed suit against Vion in Fulton County State Court alleging claims for breach of contract and quantum meruit. Vion, in turn, filed a counterclaim seeking to have the non-circumvention clause declared an unenforceable restrictive covenant, and further requesting return of the $250,000 it had paid to Swartz in 1998. Vion filed a motion seeking summary judgment on Swartz's claims and on its counterclaim. The trial court granted summary judgment for Vion with respect to Swartz's claims on the grounds that the non-circumvention clause was an unenforceable restrictive covenant, but denied Vion's motion for summary judgment on its counterclaim for return of the $250,000.[1]

The Georgia Court of Appeals affirmed the trial court's ruling, holding that the non-circumvention clause was a restrictive covenant and was unenforceable because it went beyond what was reasonably necessary to protect Swartz's interests. The court noted that the question whether a non-circumvention clause is a restrictive covenant was a matter of first impression in Georgia. As an initial matter, the court observed that several different types of contractual provisions have been held to be restrictive covenants under Georgia law, including covenants not to disclose or utilize confidential business information, covenants not to compete, and covenants not to solicit employees or customers. The court noted that "[a] characteristic shared by each of these provisions is a prohibition, or at the very least a limitation, placed by one party on the other party's future business activities." 556 S.E.2d at 462.

Swartz contended that the non-circumvention clause was not a restrictive covenant, but rather was analogous to provisions in real estate or employment-placement contracts, which typically provide that the realtor or employment agency will be paid if the client enters into a transaction with someone found by the agent. The court disagreed, however, noting that such provisions merely protect the agent's right to be compensated for the transaction at issue; Swartz's non-circumvention clause, on the other hand, did not address Swartz's right to be compensated for the contemplated private placement, but rather sought "to limit Vion's right to engage in future transactions with [the Investors], even if completely unrelated to an investment in Vion, for five years." Id. Thus, the court concluded, the non-circumvention clause was a restrictive covenant.

[1] Vion initially appealed the denial of its summary judgment motion on its counterclaim, but later withdrew that appeal.

The court noted that under Georgia law, a restrictive covenant will be enforced only "if the restraint imposed is [reasonable], is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public." Id. (quoting W.R. Grace & Co. v. Mouyal, 422 S.E.2d 529, 262 Ga. 464 (1992)). The court further noted that Georgia courts generally divide restrictive covenants into three categories for purposes of judicial review: (1) covenants ancillary to an employment contract, which are subject to strict scrutiny and may not be judicially modified or "blue-penciled"; (2) covenants ancillary to the sale of a business, which are given more latitude and may be blue-penciled; and (3) covenants in professional partnership agreements, which receive an intermediate level of scrutiny. The court emphasized that in determining which level of scrutiny should be applied, the type of contract involved should not be determinative, but rather that a reviewing court should determine the appropriate standard of review by "look[ing] to the purposes behind the varying levels of scrutiny." Id. at 463. In this regard, the court identified two reasons that covenants in the employment context are given increased scrutiny: first, employment contracts generally involve parties with unequal bargaining power; and second, an employee usually receives no consideration separate from his or her employment in exchange for the restrictive covenant.

Turning to the non-circumvention clause at issue, the court concluded that the first factor was not implicated in this case because there was no issue of unequal bargaining power, as Swartz and Vion each had been represented by counsel in negotiating the Placement Agent Agreement. As to the second factor, however, the court noted that the Placement Agent Agreement imposed many additional duties on Vion as compared to the initial letter agreement (including the more extensive non-circumvention clause), whereas Swartz's obligations and compensation remained substantially the same, albeit stated in more detail. Thus, the court found that there was no evidence Vion had received any consideration for the more extensive non-circumvention clause, and therefore concluded that the clause in this case should be reviewed under the strictest level of scrutiny.

The court noted that the question whether a restrictive covenant is reasonable is to be decided by the court as a matter of law, considering "the nature and extent of the trade or business, the situation of the parties, and all other circumstances." Id. at 464 (citation omitted). The court further recited the familiar three-prong test of duration, territory and scope as a useful guide in making this determination. Once again turning to the non-circumvention clause at issue, the court conceded that Swartz had "a legitimate interest in protecting its relationship with its pool of investors," but nevertheless concluded that the scope of the restriction was broader than reasonably necessary to protect this interest because the non-circumvention clause prohibited Vion from entering into any agreement or transaction with an Investor without Swartz's consent, regardless of whether that agreement or transaction pertained to an investment in Vion. Id. Thus, the court held that the non-circumvention clause was unenforceable as a matter of law.

Practical Lessons and Reminders

1. Types of Provisions Considered Restrictive Covenants. The most obvious lesson to be drawn from Swartz, and also the one that deserves the most emphasis, is that restrictive covenant analysis is not necessarily limited to its usual realm of confidentiality, non-competition and non-solicitation agreements; rather, any contractual provision that places limitations on a party's future business conduct or transactional freedom may be subject to enhanced judicial scrutiny. Although the non-circumvention clause in Swartz was arguably analogous to a confidentiality agreement in that it sought to protect Swartz's proprietary information (*i.e.*, its pool of investors), the court did not rely upon such an analogy in concluding that the provision was a restrictive covenant. Instead, the court examined whether the contractual restrictions limited Vion's business activities beyond the transaction contemplated by the agreement. Thus, Swartz serves as a reminder that simply because an agreement does not touch upon the usual topics that raise enforceability concerns (*i.e.*, confidentiality, non-competes, non-solicits, etc.), it should not be assumed that restrictions in that agreement on a party's future business activities will necessarily be free from enhanced judicial scrutiny.

2. Separate Consideration for Restrictions. The Swartz court identified two factors of importance in determining whether a restrictive covenant warrants strict scrutiny: whether the parties had relatively equal bargaining power and whether the clause in question was supported by independent consideration. Although the court found no inequality of bargaining power between Swartz and Vion, it nevertheless held that the non-circumvention clause should be subject to strict scrutiny solely because the court found no evidence of independent consideration to support the restrictive covenant. Thus, it may be possible to avoid strict scrutiny, and perhaps also allow for the possibility of having an overly broad covenant blue-penciled, by providing separate consideration for the restrictive covenant and expressly referring to that consideration in the agreement.

3. Scope of Restrictions. The crux of the court's problem with Swartz's non-circumvention clause was its overly broad scope—*i.e.*, that Vion was restricted from entering into *any* transaction or agreement with the Investors, regardless of whether or not the agreement related to an investment in Vion. This amply illustrates the importance of precision in drafting restrictive covenants—that is, one should resist the temptation to rely upon broad or blanket limitations (*e.g.*, a prohibition against entering into "any transaction or agreement" with specified persons), but rather one should tailor the restrictions to the interest sought to be protected. Indeed, it is possible that the non-circumvention clause in Swartz might have been upheld had Vion been precluded from entering into any transaction or agreement with the Investors related to an investment in Vion, rather than simply any transaction or agreement.[2]

4. Severability of Provisions. Finally, although not addressed in Swartz, the case also highlights the importance of including a boilerplate severability clause in all agreements containing restrictive covenants, as under Georgia law, the invalidity of a restrictive covenant may invalidate the entire contract if the covenant may not be blue-penciled and the contract does not contain a severability clause. See, e.g., Capricorn Systems, Inc. v. Pednekar, 546 S.E.2d 554, 558-59, 248 Ga. App. 424 (2001). Thus, if the agreement in question contains one or more provisions that conceivably could be construed as restrictive covenants, the addition of such familiar boilerplate language can serve as a vital backstop to save the remainder of the agreement should any of those provisions be held unenforceable.

REPORT FROM THE CORPORATE CODE COMMITTEE

By Thomas R. McNeill, Chair
Powell Goldstein Frazer & Murphy LLP, Atlanta

At the last meeting of the Corporate Code Revision Committee, at the suggestion of Jim Smith of Troutman Sanders, LLP, the Committee discussed the effect of Section 14-2-1104 of the Georgia Business Corporation Code. Specifically, it was noted that Section 14-2-1104(d) could be read to require, within ten days after the corporate action is taken, the mailing of a notice to all of the shareholders of a publicly-held parent company in the

[2] The Swartz court did not address the durational aspect of the non-circumvention clause, presumably because it found the scope of the restrictions so plainly unreasonable. Furthermore, the court noted that territorial restrictions are not usually relevant in cases such as this where the covenant limits dealings with specific persons with whom the restricted party had dealt.

event that such parent company merges one of its ninety percent (90%) owned subsidiaries into the parent (or vice versa), unless such shareholders have waived this requirement in writing and in advance.

The Committee concluded that this reading of Section 14-2-1104(d), though plausible, likely does not reflect the intent of the Georgia legislature. As such, in addition to other revisions to the Georgia Corporate Code to be recommended to the Georgia Legislature, the Committee is considering certain revisions to Section 14-2-1104 to limit any such notice only to the shareholders of a subsidiary in a parent/subsidiary merger.

Until these revisions may be proposed to the Georgia legislature, the Committee wanted practitioners to be aware of this issue.

Additionally, our committee is continuing to welcome new members for our various projects. This year, we have formed committees that will evaluate the following topics:

Updating Amendments
Indemnification Amendments
Liaison Committee with respect to conforming LLC and LP Codes

Please contact Tom McNeill if you have any interest in participating. It's a great way to keep abreast of corporate law developments.

If you have any comments with respect to this proposal, or other matters for consideration by the Committee, please contact Tom McNeill at Powell, Goldstein, Frazer & Murphy LLP, 191 Peachtree Street, NE, 16th Floor, Atlanta, Georgia 30303, phone (404) 572-6681, fax (404) 572-6999, and email tmcneill@pgfm.com.

REPORT FROM THE LEGAL OPINION COMMITTEE

By Carolyn Z. Alford, Chair
King & Spalding, Atlanta

The Legal Opinion Committee for the Business Law Section has been reconstituted. Carolyn Z. Alford of King & Spalding follows in the footsteps of her partner Jeffrey M. Stein as the new chair of the Committee. Committee members now include Bobbi Acord of Parker, Hudson, Rainer & Dobbs LLP, Paul M. Cushing of Alston & Bird LLP, Hazen H. Dempster of Troutman Sanders LLP, Eric R. Fenichel of Sutherland Asbill & Brennan LLP, Hilary P. Jordan of Kilpartick Stockton LLP, Chris D. Molen of Paul, Hastings, Janofsky & Walker LLP and Dana Smith Kull of Hunton & Williams.

The new Legal Opinion Committee will focus on drafting and publishing model opinions for loan transactions, including opinions on the creation and perfection of security interests, usury issues and special qualifications for enforceability opinions. The adoption of Revised Article 9 of the Uniform Commercial Code in the State of Georgia makes the opinions on creation and perfection of security interests particularly timely. The Committee will build upon the work of the Legal Opinion Subcommittee of the UCC Committee from the early 1990s and expects to produce its report in the form of a supplement to the "Report on Legal Opinions to Third Parties in Corporate Transactions" published by the Legal Opinion Committee of the Corporate and Banking Law Section of the Georgia Bar in January 1992.

REPORT ON THE BUSINESS LAW INSTITUTE

On October 26, 2001, the Section held its Business Law Institute in Atlanta rather than its traditional venue of Sea Island. This was an experiment to address waning attendance at the Institute over recent years. The move to Atlanta was intended to make the Institute less expensive and more convenient for most members of the Section.

We had 126 attendees in Atlanta in 2001, versus 72 in Sea Island in 2000, a 75% increase in attendance. Based on this experience, the Executive Committee of the Section has determined to hold the Institute in Atlanta again in 2002. The Executive Committee will continue to consider a return to Sea Island in future years.

UPCOMING ICLE SEMINARS OF INTEREST

Business lawyers should be aware of the following programs of interest, sponsored by ICLE:

March 28, 2002 – Basic Securities Law – Marriott Marquis Hotel, Atlanta

April 26, 2002 – LBOs – Marriott Century Center Hotel, Atlanta

May 2, 2002 – LLCs and LLPs – Marriott Gwinnett Place Hotel, Atlanta

Upcoming ICLE programs can be conveniently viewed on ICLE's web page at www.iclega.org.

SHARE YOUR KNOWLEDGE – GET PUBLISHED

We are accepting submissions for publication in this newsletter. Contact Bob Pile (rjpile@sablaw.com) as soon as possible to reserve space and to obtain a copy of our submission guidelines. If you have encountered an interesting legal development or issue recently, please consider sharing your knowledge with your colleagues by submitting a piece for publication in this newsletter.

THANK YOU TO OUR SUPPORTERS

On behalf of the Section, we want to express our gratitude to **ICLE in Georgia, Bowne of Atlanta, Inc.** and the **Staff of the State Bar of Georgia** for their assistance in printing and mailing this newsletter, which reaches 1,500 members throughout Georgia and in other states. We depend on the assistance of these supporters to produce this newsletter and value their continued support.