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**BUSINESS LAW SECTION**

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**N e w s l e t t e r**

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**Robert J. Pile, Chair**

**October 2004**

**Elizabeth H. Noe, Editor**

**CHAIRMAN'S REPORT**

*By Robert J. Pile*

*Sutherland Asbill & Brennan LLP*

It is a pleasure to greet you as Chairman of the Business Law Section. Based on the latest numbers, our Section is the fifth largest of the State's 37 Bar sections, with almost 1,500 members. We also are known as one of the most active in the Bar. The good stead in which our Section finds itself is a credit to the leaders who have preceded me.

Our Section's principal charges are to prepare and advise on legislation, and to conduct lawyer training programs. An ancillary benefit of these endeavors is the pleasure of working with business lawyers from other law firms and in-house legal departments – professionals with whom we might not otherwise come into contact solely through our daily work. It is the substantive work we do that drives the Section; but it is the "fellowship" that is most often cited by Bar leaders as the reason for their sustained service.

Our Section has been active in sponsoring CLE programs over the past year. We sponsored seven programs, the largest of which were the annual Business Law Institute (our signature event) and our programs on Secured Lending, Securities Litigation and Basic Securities Law. We again had over 150 participants for the Business Law Institute, more than doubling our latest numbers since moving the event from Sea Island to Atlanta. That being said, we are cognizant of the desire on the part of many to have the event again in Sea Island (and many of your Section leaders share that sentiment), so we are contemplating a gala return to Sea Island for the 25<sup>th</sup> anniversary of the Section. More on that later.

The 2004 Business Law Institute is scheduled for October 21 and 22, and Dave Stockton has put together an outstanding faculty and program. Section members should by now have received an abundance of registration material.

Our Section also has been active on the legislative front. In the post-Enron world, business-related bills promoted by bar groups like ours have become subject to much greater scrutiny (and skepticism). This makes it increasingly difficult for our Section to suggest changes to our state statutes, even if the substance is, at least in the eyes of a business lawyer, non-controversial. Tom McNeill and the Corporate Code Revision Committee labored over amendments to the Georgia Business Corporation Code and the Georgia Nonprofit Corporation Code and were successful in their work with the Georgia legislature to get a bill enacted in the 2004 legislative session. That bill is summarized in a prior issue of this newsletter, which can be accessed on our Section's web site at [www.gabar.org](http://www.gabar.org).

The Corporate Code Revision Committee, as well as several of our other committees, are actively considering potential changes to our state laws, some of which may be proposed for the 2005 and 2006 legislative sessions. No technical fix is too small and no substantive change is too large to merit consideration, so if you have a suggestion for a way in which our statutes may be improved, please pass it along to the appropriate committee chair.

Our Section's committees are the heart and soul of our Section, because that's where the bulk of the "real work" is done. We are fortunate to have dedicated and hard-working committee chairs and committee members, all of whom do an extraordinary job. Their work may involve: analyzing and implementing changes to Georgia law; staffing CLEs; comparing approaches to legal issues; or a variety of other things. In the immortal words of Woody Allen, "ninety percent of success is showing up," so please consider showing up and participating in our committee work. Being involved in the Section will enrich your practice.

A list of our committee chairs, and their contact information, is included elsewhere in this newsletter. I hope you will not hesitate to contact any of them, or me, with suggestions, questions or to get involved.

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## ZUBULAKE COURT ISSUES OPINION ON DUTIES OF COUNSEL AND LITIGANTS TO PRESERVE AND PRODUCE E- MAILS

*By Stuart H. Thomsen and Thomas W. Curvin*

*Sutherland Asbill & Brennan LLP, Atlanta*

In late July, Judge Scheindlin of the Southern District of New York issued a decision addressing the rapidly evolving issues surrounding the preservation and production of emails and other electronic documentation, particularly the obligation of parties and counsel with respect to the preservation of such information once litigation is anticipated. While Judge Scheindlin's opinion will surely not be the last word on the subject and other judges will likely develop varying views, her opinion nevertheless provides one of the most detailed discussions of these issues to date and is likely to be the subject of much attention and discussion.

Judge Scheindlin issued her opinion in the course of ruling on a motion for sanctions relating to the deletion of some emails and the late production and discovery of others. As a general matter, Judge Scheindlin notes that counsel has a continuing duty to ensure that relevant information is not lost, a duty that does not end with the issuance of a "litigation hold" at the outset. She also observed that relevant records are sometimes lost because of a failure of communication by counsel and a resulting lack of understanding on the part of the key employees and information technology personnel as to the scope of their duty to preserve and produce records. With these concerns in mind, Judge Scheindlin identified the following steps as ones that she expects counsel to take:

1) *"Litigation Hold"*: When litigation commences or is reasonably anticipated, a party should suspend its

routine document retention policy and counsel should issue a "litigation hold"<sup>1</sup> to ensure preservation of relevant documents. The litigation hold should be periodically reissued in order to notify new employees and remind existing employees. Counsel should oversee compliance with the litigation hold, monitoring the party's efforts to maintain and produce relevant documents "so that all sources of discoverable information are identified and searched."

2) *Communication with "Key Players"*: In order to make sure the preservation duty is effectively communicated, understood, and implemented, counsel should communicate directly with the "key players" in the litigation to explain the duty and to learn how and where those persons maintain their records. By way of illustration, the court explained that where some employees may store e-mails electronically and others print and save them as hard copies, it would not be possible to know whether all potential sources of relevant

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<sup>1</sup> In one of her prior decisions, Judge Scheindlin stated that, as a general rule, the "litigation hold" would not apply to "inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). However, "[I]f a company can identify where particular employee documents are stored on the backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes." *Id.* (emphasis in original).

information had been inspected without talking to employees. Key players should be reminded periodically of their duty to preserve relevant records. Judge Scheindlin defined “key players” to be “the people identified in a party’s initial disclosure and any subsequent supplementation thereto,” citing Fed. R. Civ. P. 26(a)(1)(A).

- 3) *Communication with Technology Personnel:* Counsel should “become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture,” which will “invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm’s recycling policy.” Counsel should further communicate with the information technology personnel to ensure that all back-up tapes that the party is required to retain are identified, stored in a safe place, and segregated from other tapes that might be recycled.
- 4) *Instruction to Produce Electronic Copies:* In addition to making sure that employees preserve relevant electronic records, counsel should also make sure that all employees produce electronic copies of their relevant active files where required in discovery.

Judge Scheindlin recognized that requirements imposed on counsel must be reasonable and that appropriate steps will vary depending on the circumstances. For example, she explained that “[t]o the extent that it may not be feasible for counsel to speak with every key player, given the size of a

company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each ‘hit.’” She added that “[i]t might be advisable to solicit a list of search terms from the opposing party for this purpose, so that it could not later complain about which terms were used.”

In ruling on the sanctions motion, Judge Scheindlin found that while counsel came very close to taking the precautions she had outlined, there were some specific failings that resulted in deletion of some e-mails she found to be relevant to the litigation. Specifically, she found that:

Counsel failed to adequately communicate with one of the “key players” with respect to where she stored her records and consequently failed to produce all of her relevant files.

Counsel erred by failing to ask one of the “key players” to produce her files although counsel had told her to maintain her files.

Counsel failed to take steps to preserve relevant back-up tapes which were destroyed after litigation was reasonably anticipated. While counsel had informed employees to retain their e-mail soon after litigation was anticipated, counsel did not inform its client to preserve backup tapes until after receipt of a document request specifically requesting relevant e-mails from backup tapes.

Judge Scheindlin also found, however, that while further steps by counsel would have mitigated some of the damage resulting from the deletion of e-mails, the deletions were contrary to explicit instructions and thus willful. Based on these findings, she ordered as sanctions (i) an adverse inference jury instruction as to certain deleted e-mails; (ii) the costs

of depositions or re-depositions required by the late production of certain e-mails; and (iii) the costs associated with the sanctions motion.

As Judge Scheindlin recognized, the subject of electronic discovery is “rapidly evolving,” with many more opinions to be issued and guidance coming from other sources as well. For example, some federal courts have already adopted local rules addressing the subject, and the Advisory Committee on Civil Rules has recently approved for publication and comment proposed amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information. Even in the absence of more definitive guidance, however, it is clear that electronic discovery is and will be a significant issue in many cases, and the earlier and the more thoroughly a party addresses that issue, the better protected the party will be against claims that relevant electronic evidence has not been properly preserved.

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**KNOW WHEN TO HOLD ‘EM,  
KNOW WHEN TO FOLD ‘EM:  
SURVEY OF SHAREHOLDER’S  
RIGHTS TO INSPECT  
CORPORATE RECORDS**

*By Brian D. Bodker, Kara T. Hinrichs and Heath B. Turner  
Bodker, Ramsey, Andrews, Winograd & Wildstein, P.C.*

Shareholders request corporate records for a number of reasons and in various circumstances. A shareholder may desire corporate information in an effort to genuinely assess the value of his/her investment. Other times, however, a shareholder may be motivated by a less scrupulous purpose, such as an intent to gain a competitive advantage against the corporation or simply to create a nuisance. Whether your client is a shareholder or a corporation involved in a corporate records request, it is wise to keep in mind the shareholder’s purpose, whether stated or not, behind a corporate records request, as it

will significantly impact the efficacy of your representation.

Shareholders of a Georgia for-profit corporation have only limited rights to access information about the company. The corporation is required to produce only certain types of records and only under particular sets of circumstances. This restriction on access to records protects a company from revealing confidential information, as shareholders do not automatically have an obligation of confidentiality to the company. In addition, it helps the company avoid the burden of producing records when the request is vexatious or arising out of idle curiosity, or when complying with the request would lead to legal difficulties with federal agencies or give an unfair advantage to the petitioning shareholder. See *Riser v. Genuine Parts Co.*, 150 Ga. App. 502, 505, 258 S.E.2d 184 (1979).

The information that a shareholder has a statutory right to obtain falls into two general categories: that which must be made available upon the shareholder’s request without regard to the shareholder’s purpose, and that which must be made available only if the shareholder has a proper purpose and legitimate interest in obtaining the information requested.

Information Available Upon Request. Corporate records that must always be made available to a shareholder upon request are those of a non-sensitive nature, including: articles of incorporation; bylaws; resolutions increasing or decreasing the number of directors; classification of directors; names and residence addresses of the directors; resolutions creating classes of shares and establishing relative rights, preferences and limitations; shareholder meeting minutes and consents for the past three years; all written communications to shareholders within the past three years, including all financial statements for the past three years produced pursuant to O.C.G.A. § 14-2-1620; list of names and business addresses of current directors and officers; and records of the most recent annual registration filed

with the Secretary of State. §§ 14-2-1602(a), 14-2-1602(b).

A shareholder has the right to inspect and copy this information at the corporation's principal office during regular business hours if the shareholder provides the corporation written notice of his or her demand at least five days before the desired inspection date. § 14-2-1602(b). In addition, a corporation must furnish, upon written demand from a shareholder, its latest prepared annual financial statements, which may be consolidated or combined statements of the corporation and one or more of its subsidiaries or affiliates, in reasonable detail as appropriate, that include a balance sheet as of the end of the fiscal year and statement of operations for that year. § 14-2-1620(a). If annual financial statements are reported upon by a public accountant, the accountant's report must accompany them. If not, the statements must be accompanied by the statement of the president or the person responsible for the corporation's financial accounting records. § 14-2-1620(b).

Information Available for Proper Purpose. A shareholder must satisfy additional requirements to obtain records that are of a more sensitive nature, more burdensome to produce, or are of a type more likely to be misused by the shareholder. A shareholder has the right to inspect and copy this information only if: (i) the demand is made in good faith and for a proper purpose that is reasonably relevant to the shareholder's legitimate interest as a shareholder; (ii) the shareholder describes with reasonable particularity the purpose and the records to be inspected; (iii) the records are directly connected with the stated purpose; *and* (iv) the records are to be used only for the stated purpose. § 14-2-1602(d). Such records include: minutes of board meetings; records of any actions by a committee acting on behalf of the board; minutes of shareholder meetings; records of actions of shareholders or the board without a meeting not subject to § 14-2-1602(a); accounting records of the corporation; and the record of shareholders. § 14-2-1602(c). A shareholder must be provided an

opportunity to inspect and copy records described in § 14-2-1602(c) during business hours at a reasonable location specified by the corporation only upon meeting the above requirements and if the shareholder provides the corporation with written notice of the demand at least five days before the intended inspection date. § 14-2-1602(c). As a practical matter, a shareholder's agent or attorney has the same inspection and copying rights as the shareholder. § 14-2-1603(a).

A corporation may not abolish or limit shareholder's inspection rights granted by § 14-2-1602 in its bylaws or articles, except to limit inspection rights granted under § 14-2-1602(c) to those shareholders owning two percent or more of the outstanding shares. § 14-2-1602(e).

A corporation may impose reasonable charges for copying. § 14-2-1603(c).

Common Law Rights. There are also shareholder inspection rights provided by common law, and they are subject to a court's determination of the reasonableness of the request with regard to the records requested and the purpose for which they were requested. In Georgia, a corporation must make records available under this common law right when a shareholder requests corporate records "in good faith for a specific and honest purpose, and not to gratify curiosity, or for speculating or for vexatious purposes, and provided further that the purpose of the stockholder desiring to make the examination is germane to his interest as a stockholder, proper and lawful in character, and not inimical to the interests of the corporation itself, and the inspection is to be made during reasonable business hours." Winter et. al. v. Southern Securities Co. et. al., 155 Ga. 590, 118 S.E. 214 (1923) (syllabus by the Court).

Information Obtainable through Discovery. Shareholder inspection rights provide an efficient method by which a shareholder can gain access to information regarding his or her investment, but, as is now apparent, this efficiency is tempered with limitations on the scope of the right. Therefore, as

counsel we should always be mindful that the shareholder is less limited as to what he or she may discover during the litigation process. If there is considerable motivation to obtain corporate information, a shareholder may determine that litigation is appropriate and may be provided significantly greater access to corporate information through discovery.

When the Corporation Fails to Produce Records. A corporation may have legitimate reason for denying a shareholder an opportunity to inspect corporate records. The shareholder may be involved with a competing company and intend to use the records request to mine sensitive information. A shareholder may be requesting information for a proper purpose, but that information is confidential, and the shareholder may have no duty to retain the confidentiality of the information. Regardless why a corporation would choose to withhold requested information, if the corporation does not comply with an inspection request, the shareholder may apply to the superior court of the county where the corporation's registered office is located and the court may summarily order inspection of these documents. §§ 14-2-1604(a), 14-2-1604(b). Furthermore, the court will expedite applications for orders to permit inspection pursuant to §§ 14-2-1602(c) and 14-2-1602(d) (with respect to requests for records containing more sensitive information). § 14-2-1604(b). If the court orders an inspection, it must also order the corporation to pay the shareholder's costs incurred to obtain the order, unless the corporation proves that it refused the inspection in good faith due to a reasonable basis for doubt about the shareholder's inspection right to the requested records under the circumstances. § 14-2-1604(c).

When reviewing a shareholder's application regarding a corporation's refusal to provide records to a requesting shareholder, trial courts have broad discretion in weighing the § 14-2-1604(d) factors such as whether the shareholder's request was for a proper purpose, the relationship between the shareholder's stated purpose for the request and the

records requested, and the likelihood that the shareholder will misuse the information if produced. G.I.R. Systems, Inc. v. Lance, 228 Ga. App. 329, 330, 491 S.E.2d 530 (1997). For example, when a shareholder requested records relating to the investment of the amount which the corporation had contributed to its employee pension plan, the purpose was considered proper in that it was relevant to the shareholder's interest as a shareholder and former employee. Riser v. Genuine Parts Co., 150 Ga. App. 502, 504, 258 S.E.2d 184 (1979). Similarly, it is a proper purpose to examine records relating to share valuation when a shareholder is exiting the corporation. G.I.R. Systems, Inc., 228 Ga. App. 329. On the other hand, shareholders typically have difficulty demonstrating a proper purpose for demanding tax returns or worksheets. Master Mortg. Corp. v. Craven, 127 Ga. App. 367, 372, 193 S.E.2d 567 (1972). Courts also consider whether the information and records requested are of a confidential nature or may constitute corporate trade secrets. See Riser, at 504. The corporation's burden to produce the requested records is also taken into consideration. Master Mortg. Corp., 127 Ga. App. at 370.

A shareholder requesting information, as well as a corporation that intends to produce or withhold records, should consider those factors utilized by courts to analyze § 14-2-1604(b) applications, long before an application is filed with the court. In order to craft the most effective records request, a shareholder should tailor his/her initial request with these considerations in mind. Similarly, a corporation preparing to respond to a shareholder's request for inspection should present or refuse records based on these considerations, in hopes that a court, if required to assess the corporation's denial of presentation of requested records, will view the corporation's actions as reasonable under the circumstances.

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**REPORT FROM CHAIR OF  
CORPORATE CODE REVISIONS  
COMMITTEE**

*By Tom McNeill*

*Powell, Goldstein, Frazer and Murphy LLP*

The Corporate Code Revision Committee is responsible for ensuring the Georgia Business Corporation Code and the Georgia Nonprofit Corporation Code are up-to-date and consistent with the latest developments in corporate statutes. As you know, during the last legislative session, our Section shepherded through the Georgia legislature a bill which made significant updating changes to the Nonprofit Code and quite a few updating changes to the Corporate Code, particularly in the area of electronic transmissions. A summary of those changes was in the last newsletter; we would be happy to provide you with either a summary or a copy of the Bill.

The Committee is beginning to formulate its next round of initiatives and has formed three subcommittees to focus those efforts. The first is a subcommittee looking at director liability and indemnification issues, chaired by John Latham. The second is a subcommittee looking at updating issues based upon recent Model Act and Delaware law changes, chaired by Bruce Wanamaker. The third is a subcommittee looking at the interface between the

Corporate Code and the LLP and LLC Codes in a joint effort with the Partnership Committee. That subcommittee is headed up by Bob Bryant. Each subcommittee is just beginning its work, so if you have interest in participating in any of our activities, we would welcome your participation. Please don't hesitate to contact either me or any of the subcommittee chairmen.

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**SECTION COMMITTEES**

Corporate Code	Tom McNeill
Partnerships and LLC's	Mike Wasserman
UCC	Ed Snow
Securities	Walter Jospin
Publications	Elizabeth Noe

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**SHARE YOUR KNOWLEDGE –  
GET PUBLISHED**

We are accepting submissions for publication in this newsletter. Contact Elizabeth Noe by e-mail at ([elizabethnoe@paulhastings.com](mailto:elizabethnoe@paulhastings.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.

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**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.