SEYFARTH SHAW LLP ATTORNEYS

Quick Takes

April 2005

Do's and *Don't's* For Directors

This issue of *Quick Takes* deals with something that's not just a hot topic- it's a hot potato! Can you take the risk to agree to be a director of a business, a non-profit organization, or a local authority? After all, in the world of public business corporations, former board members of WorldCom just agreed to pay $24.7 million of their own money to settle a class action securities lawsuit. This payment was in addition to payments from insurers. The *Wall Street Journal* said that: "It is rare for board members to have to pay out of their own pockets in such lawsuits, and the WorldCom settlement … sent shock waves through corporate boardrooms."

The risks of joining a board are not limited to public companies, or even for-profit businesses. The securities laws provide liability rules for "control persons" even when private companies issue securities. Various other statutes have liability rules that can apply to directors, such as when an entity's operations contaminate property. The SEC can take enforcement actions against issuer officials related to the authorization of municipal bond disclosure documents. And these are just a few examples!

In light of all of this, should you be willing to become an independent director of a public company? One of my partners, who is a director of an NYSE company and an active member of the National Association of Corporate Directors, answers that question this way: "The bottom line, though, is that it is still alright to serve on a Board, provided you exercise good business judgment, are active, thorough and attentive, and seek out and base decisions on the advice of the outside experts. Do not be shy about retaining outside experts when you deem it to be appropriate. The Sarbanes-Oxley Act permits independent directors to hire outside experts at company expense. Also, you must insist that the company have best-in-class governance practices, that there is adequate D&O coverage, that the company's D&O policy is non-cancelable, and that the directors have separate Side A coverage so that a claim against the company and the bad officers or directors won't exhaust the limits available for the good guys on the Board".

Similar thinking applies to directors and members of public bodies, such as a local development authority. Georgia's Attorney General added some significant qualifications in 1995 in opining on certain exculpatory language in the statute governing the Georgia Housing and Finance Authority. He said that O.C.G.A. § 50-26-6 provided protection to a member of the Board from imposition of personal liability, within the parameters stated, but this was predicated on-
"Diligent, good faith supervision of the enterprise;" and
"Acting within the scope of his or her authority in carrying out the Authority's stated powers."

Georgia has a general statute, O.C.G.A. § 51-1-20, that provides immunity under certain

circumstances to a "person serving with or without compensation as a member, director, or trustee, or as an officer of the board without compensation, of any nonprofit hospital or association or of any nonprofit, charitable, or eleemosynary institution or organization or of any local governmental agency, board, authority, or entity." The statute is quoted in full below. It has provided protection to members of the Newnan-Coweta County Airport Authority despite allegations that the acts complained of may have been taken in violation of the Open Meetings Act, and to members of MARTA's Board of Ethics even though MARTA's Board of Directors may not have strictly followed their own guidelines for the appointment of members of the Board of Ethics.

Of course, contractual obligations that an entity is considering entering into is another matter, and its counsel should always carefully review documents that will affect the entity or its members, directors or officers.

What is involved in being a member or director of a business, a non-profit organization, or a local authority is in flux today. The issues I have touched on in this issue of *Quick Takes* are only the tip of the iceberg.

Still, it is possible to discern some "Do's and Don't' s for Directors". Here is my list-

***Do's** for Directors*

1. **Do** get insurance.
2. **Do** be diligent. Spend the time that the job requires.
3. **Do** be knowledgeable. Don't hesitate to seek the advice of experts such as accountants, financial advisors and attorneys when needed.
4. **Do** exercise good, independent business judgment.
5. **Do** follow the rules that the law provides for your entity.

***Don't' s** for Directors*

1. **Don't** approve or sign important documents without knowing what's in them.
2. If you don't understand something, **don't** hesitate to ask.
3. **Don't** ignore "red flags."
4. **Don't** abdicate your responsibilities.
5. It's good to be "*disinterested*" (*i.e.*, no conflicts of interest), but **don't** be *uninterested*!

I'm a big believer in insurance, so let me add a few parting words about it. In the private sector, with "Directors and Officers" insurance, **do** be sure in appropriate cases that it is in line with the recommendations quoted above. In the public sector, the insurance is not really "D&O", it is "POL"; *i.e.*, "Public Officials Liability" insurance. ACCG-IRMA (Association County Commissioners of Georgia-Interlocal Risk Management Agency), for example, has a program available to development authorities as well as counties. There can be some important differences with POL insurance, compared to D&O insurance. Sometimes a development authority will look to its parent government's policy for insurance coverage. However, issues can exist regarding what exposures are covered, and who is covered. The best way for a development authority to be sure that it and its members, officers and employees are all covered, is to get its own policy, and even then the coverage should be reviewed carefully. These are just some general observations; as always, particular advice should be obtained regarding particular situations.

If you have any questions or comments, please let me know.

Daniel M. McRae

April 25, 2005 interest rates on IDBs (variable rate demand bonds; AMT 7 day general markets; rates are market extracted and approximations):

Interest Rates:
tax-exempt 3.08%
taxable 3.08%

(Yes; they're the same today. This sometimes happens in the current interest rate environment.)

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General note: This issue of *Quick Takes* is a quick-reference guide for economic developers,

participants in the real estate and financial industries, and company and public body directors, executives and managers and their advisors. The information in this issue is general in nature. Various points that could be important in a particular case have been condensed or omitted in the interest of readability. Specific professional advice should be obtained before this information is applied to any particular case.

"O.C.G.A. § 51-1-20. (a) A person serving with or without compensation as a member, director, or trustee, or as an officer of the board without compensation, of any nonprofit hospital or association or of any nonprofit, charitable, or eleemosynary institution or organization or of any local governmental agency, board, authority, or entity shall be immune from civil liability for any act or any omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless the damage or injury was caused by the willful or wanton misconduct of such person.

(b) As used in this Code section, the term "compensation" shall not include reimbursement for reasonable expenses related to said services.

(c) This Code section shall not affect any immunity of any person arising from any source, whether or not such person may additionally be subject to and possess an immunity provided by this Code section. The immunity provided by this Code section shall be supplemental to any such existing immunity."

Also see O.C.G.A. § 51-1-20.1, related to the liability of a nonprofit association conducting or sponsoring safety or sports programs.

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