2014 Georgia
Corporation and Business Organization
Case Law Developments

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This paper is not intended as legal advice for any specific person or circumstance, but rather a general treatment of the topics discussed. The views and opinions expressed in this paper are those of the authors only and not Bryan Cave LLP.

LIST OF CASES

Arnsdorff v. Papermill Plaza, LLC, 326 Ga. App. 438, 756 S.E.2d 668 (2014) 4, 25

Buffa v. Yellowbook Sales & Distributing Co., Inc., 327 Ga. App. 639, 760 S.E.2d 644 (2014)......5, 17

Callaway v Garner, 327 Ga. App. 67, 755 S.E.2d 526 (2014)...3, 20

Clark v. PNC Bank, N.A., 2014 WL 359932 (N.D. Ga. Feb. 3, 2014) 5, 34

Considine v. Murphy, 327 Ga. App. 110, 755 S.E.2d 556 (2014) 9, 57

Courtland Hotel, LLC d/b/a Sheraton Atlanta Hotel v. Salzer, 330 Ga. App. 264, 767 S.E.2d 750 (2014)...3, 19

Del Lago Ventures, Inc. v. QuickTrip Corp., 330 Ga. App. 138, 764 S.E.2d 595 (2014)................3, 19

Department of Transportation v. McMeans, 294 Ga. 436, 754 S.E.2d 61 (2014)............................6, 37

Drumm Corp. v. Wright, 326 Ga. App. 41, 755 S.E.2d 850 (2014) 6, 43

Duncan v. Citimortgage, Inc., 2014 WL 172228 (N.D. Ga. Jan. 15, 2014) 5, 34

East Cobb Fastpitch, Inc. v. East Cobb Bullets Fastpitch, Inc., 2014 WL 3749216 (N.D. Ga. July 29, 2014) 5, 36

FDIC v. Loudermilk, 295 Ga. 579, 761 S.E.2d 332 (2014) 1, 10

FDIC v. Skow, 295 Ga. 747, 763 S.E.2d 879 (2014) 1, 10

First Benefits, Inc. v. Amalgamated Life Ins. Co., 2014 WL 6956693 (M.D. Ga. Dec. 8, 2014)......5, 29

Fitzpatrick v. Bank of New York Mellon, 580 Fed. Appx. 690 (11th Cir. 2014) 7, 47

Functional Products Trading, S.A. v. JITC, LLC, 2014 WL 3749213 (N.D. Ga. July 29, 2014)...6, 42

Georgia Casualty & Surety Company v. Excalibur Reinsurance Corp., 4 F. Supp. 3d 1362, (N.D. Ga. 2014)..6, 38

Georgia Department of Revenue v. Moore, 328 Ga. App. 350, 762 S.E.2d 184 (2014) 2, 15

Godwin v. Mizpah Farms, LLLP, 330 Ga. App. 31, 766 S.E.2d 497 (2014)....................................5, 30

Greenstein v. Bank of the Ozarks, 326 Ga. App. 648, 757 S.E.2d 254 (2014).................................7, 48

Gwinnett Community Bank v. Arlington Capital, LLC, 326 Ga. App 710, 757 S.E.2d 239 (2014) ..4, 25

Hanover Insurance Co. v. Hermosa Construction Group, LLC, ___ F. Supp. 3d ___, 2014 WL 5486602 (N.D. Ga. May 1, 2014) 3, 20

Hays v. Page Perry, LLC, 26 F. Supp. 3d 1131 (N.D. Ga. 2014) 9, 56

Hayek v. Chastain Park Condominium Association, Inc., 329 Ga. App. 164, 764 S.E.2d 183 (2014) 8, 51

In re Bilbo, 2014 WL 689097 (Bankr. N.D. Ga. Feb. 5, 2014) 6, 40

In re Gafford, 2014 WL 689074, (N.D. Ga. Feb. 4, 2014) 8, 52

In re Geer, 522 B.R. 365 (Bankr. N.D. Ga. 2014) 6, 41

In re Pervis, 512 B.R. 348, 2014 (Bankr. N. D. Ga. 2014) 8, 54

In re Shaw, 2014 WL 1401871 (Bankr. N.D. Ga. Apr. 2, 2014) 3, 16

In re Southern Home & Ranch Supply, Inc., 2014 WL 4071901 (Bankr. N.D. Ga. Aug. 11, 2014) .6, 40

Inland Atlantic Old National Phase I, LLC. v. 6425 Old National, LLC, 329 Ga. App. 671, 766 S.E.2d 86 (2014) 4, 27

Jackson v. Bank of America, NA, 578 Fed. Appx. 856 (11th Cir. 2014) 5, 34

Legacy Academy v. Mamilove, LLC, 328 Ga. App. 775, 761 S.E.2d 880 (2014) 5, 32

Maree v. ROMAR Joint Venture, 329 Ga. App. 282, 763 S.E.2d 899 (2014) 4, 28

Meyn America, LLC v. Tarheel Distributors, Inc., 36 F. Supp. 3d 1395 (M. D. Ga. 2014) 7, 44

Onebeacon Midwest Ins. Co. v. FDIC, 2014 WL 869286 (N.D. Ga. Mar. 5, 2014) 8, 53

Osborne v. Drayprop, LLC, 2014 WL 4926284 (S.D. Ga. Sep. 30, 2014) 4, 26

Patel v. Patel, 327 Ga. App. 733, 761 S.E.2d 129 (2014) 3, 18

Patel v. Patel, 2014 WL 5025821 (S.D. Ga. Oct. 7, 2014) 5, 35

Powder Springs Holdings, LLC v. RL BB ACQ II GA PSH, LLC, 325 Ga. App. 694, 754 S.E.2d 655 (2014) 6, 37

Progressive Electrical Services, Inc. v. Task Force Construction, Inc., 327 Ga. App. 608, 760 S.E.2d 621 (2014) 3, 17

Ralls Corporation v. Huerfano River Wind, LLC, 27 F. Supp. 3d 1303 (N.D. Ga. 2014) 7, 45

Rigby v. Flue-Cured Tobacco Cooperative Stabilization Corp., 327 Ga. App. 29, 755 S.E.2d 915 (2014)..4, 23

Roca Properties, LLC v. Dance Hotlanta, Inc., 327 Ga. App. 700, 761 S.E.2d 105 (2014)............5, 33

Rollins v. Rollins, 294 Ga. 711, 755 S.E.2d 727 (2014) 2, 13

Rollins v. Rollins, 329 Ga. App. 768, 766 S.E.2d 162 (2014) 2, 14

SEC v. Quest Energy Management Group, Inc., 768 F.3d 1106, (11th Cir. 2014) 9, 58

Simms v. Deutsche Bank National Trust Co., 2014 WL 273236 (N.D. Ga. Jan. 22, 2014) 7, 47

Smith v. Georgia Energy USA, LLC, 2014 WL 5643919 (S.D. Ga. Nov. 4, 2014)..........................6, 39

St. Paul Mercury Ins. Co. v. FDIC, 774 F.3d 702 (11th Cir. 2014) 8, 51

Stone v. Bank of New York Mellon, 2014 WL 61480 (N.D. Ga. Jan. 8, 2014).................................7, 47

Sullivan v. Sullivan, 295 Ga. 24, 757 S.E.2d 129 (2014)...3, 22

Target Corp. v. Amerson, 327 Ga. App. 110, 755 S.E.2d 556 (2014)..6, 40

Thomas v. State Bank & Trust Company, 330 Ga. App. 274, 765 S.E.2d 443 (2014) 8, 50

Thunderbolt Harbour Phase II Condominium Assoc., Inc. v. Ryan, 326 Ga. App. 580, 757 S.E.2d 189 (2014)...4, 23

Uhlig v. Darby Bank & Trust Co., 565 Fed. Appx. 883 (11th Cir. 2014) 4, 26

Wang v. Bank of America, N.A., 2014 WL 2883501 (N.D. Ga. June 24, 2014)...............................5, 34

Ware v. Multibank 2009-1 RES-ADC Venture, LLC, 327 Ga. App. 245, 758 S.E.2d 145 (2014) 7, 49

Websters Chalk Paint Powder, LLC v. Annie Sloan Interiors, Ltd., 2014 WL 4093669 (N.D. Ga. August 18, 2014)...7, 46

SUPERIOR COURT OF FULTON COUNTY – BUSINESS COURT

Fouse v. Dow, No. 2014-cv-242868 (Ga. Sup. Ct. Fulton Co. June 4, 2014....................................9, 60

Frazier v. Liotta, No. 2014-cv-244363 (Ga. Sup. Ct. Fulton Co. Aug. 28, 2014) 9, 59

Homeland Self Storage Management, LLC v. Pine Mountain Capital Partners, LLC, No. 2014-cv-246999 (Ga. Sup. Ct. Fulton Co. Nov. 21, 2014) 9, 61

Sullivan v. Torchia, No. 2013-cv-229283 (Ga. Sup. Ct. Fulton Co. Jul. 24, 2014)...........................9, 60

TABLE OF CONTENTS

I. INTRODUCTION 1

II. OVERVIEW 1

III. REVIEW OF DECISIONS 10

- A. DUTIES AND LIABILITIES OF CORPORATE DIRECTORS, OFFICERS AND EMPLOYEES 10
- B. CORPORATE STOCK AND DEBT – CONTRACTS AND VALUATION 20
- C. NONPROFIT ORGANIZATION DECISIONS 23
- D. LIMITED LIABILITY COMPANY DEVELOPMENTS 25
- E. PARTNERSHIP LAW DEVELOPMENTS 28
- F. TRANSACTIONAL CASES 32
- G. LITIGATION ISSUES 35
  - 1. Capacity to Sue and Standing 35
  - 2. Fraudulent Transfer Liability of Corporate Insiders, Alter Ego, Piercing the Corporate Veil and Other Forms of Secondary Liability 39
  - 3. Jurisdiction and Service of Process 43
  - 4. Evidence, Business Records Act 48
  - 5. Director and Officer Liability Insurance Decisions 51
  - 6. Nondischargeability of Breach of Fiduciary Duty Claims 54
  - 7. Professional Liability 56
  - 8. Corporate Receiverships 57
- H. SUPERIOR COURT OF FULTON COUNTY BUSINESS COURT DECISIONS 58

Annual Survey

2014 Georgia Corporation and Business Organization Case Law Developments

Thomas S. Richey and Michael P. Carey

I. INTRODUCTION

This survey catalogs case law developments dealing with Georgia corporate and business organization law issues handed down during 2014 by Georgia state and federal courts. Several of 2014's decisions have significant precedential value. Others address less momentous questions of law as to which there is little settled authority. Even those cases in which the courts applied well-settled principles are instructive for the types of claims and issues that are currently being litigated in corporate and business organization disputes and how the courts are dealing with them.

The decisions are organized first by entity type – those specific to business corporations, nonprofit corporations, limited liability companies and partnerships. The remaining sections of the survey deal with (1) transactional issues potentially applicable to all forms of business organizations, and (2) litigation issues, including secondary liability, jurisdiction and venue, evidence questions, and insurance issues.

II. OVERVIEW

A. DUTIES AND LIABILITIES OF CORPORATE DIRECTORS, OFFICERS AND EMPLOYEES.

The year 2014 brought a landmark decision by the Georgia Supreme Court recognizing the business judgment rule and explaining its impact on ordinary negligence claims against directors and officers that are premised on alleged violations of statutory standards of care. In *FDIC v. Loudermilk*, 295 Ga. 579, 761 S.E.2d 332 (2014), a unanimous Supreme Court held that the business judgment rule exists in Georgia and protects good faith decisions made by directors and officers from later challenges to the wisdom of those decisions. The Court explained, however, that the business judgment rule does not necessarily insulate directors and officers from liability for ordinary negligence where a lack of due care in the decision making process is alleged. Shortly after *Loudermilk* was decided, the Court reiterated its holding, once again unanimously, in *FDIC v. Skow*, 295 Ga. 747, 763 S.E.2d 879 (2014). In light of *Loudermilk* and *Skow*, it is now clear that claims alleging a lack of due care in the decision-making process may overcome the business judgment rule even if they sound in ordinary negligence, while claims that do nothing more than challenge the wisdom of a corporate decision or act can only overcome the business judgment rule upon a showing of fraud, bad faith or an abuse of discretion.

Both *Loudermilk* and *Skow* came to the Supreme Court on certified questions: *Loudermilk* from the Northern District of Georgia and *Skow* from the Eleventh Circuit. They are both cases brought by the FDIC as receiver for banks that failed during the financial crisis. The FDIC alleged that the defendants, who are former directors and officers of the failed banks, were negligent and grossly negligent and breached fiduciary duties to the banks. Specifically, the FDIC alleges that the defendants negligently approved loans that violated principles of sound lending as well as the bank's internal loan policies, in furtherance of an unsustainable aggressive growth strategy. The FDIC's ordinary negligence claims are based on a section of the Financial Institutions Code of Georgia, O.C.G.A. § 7-1-490, which provides that bank directors "shall discharge their duties in good faith and with that diligence, care, and skill which ordinarily prudent men would exercise under similar circumstances in like positions." Section 7-1-490 is substantially similar to the Georgia Business Corporations Code's standards of care applicable to directors and officers (O.C.G.A. §§ 14-2-830 and 14-2-842), as well as the standards applicable to Georgia nonprofit corporations and limited liability companies. Recognizing this, the Supreme Court made it clear that its holding applied broadly to claims involving corporate fiduciaries and was not confined to the banking context.

The Court did not decide whether the specific claims before it - i.e., the FDIC's allegations that the defendants negligently approved loans or that they sought to grow the banks too aggressively - could be brought as ordinary negligence claims. It will be up to lower courts to determine what sorts of negligence allegations are sufficiently process-oriented to be viable.

In another major decision dealing with a standard of care question, the Supreme Court decided in *Rollins v. Rollins*, 294 Ga. 711, 755 S.E.2d 727 (2014), that when trustees also serve as directors or managers of business entities in which the trusts hold minority interests, their conduct as corporate fiduciaries should be evaluated under corporate law principles rather than trust law principles. This suggests that persons acting in the dual role of trustee of a trust and director of a corporation can avail themselves of the business judgment rule when acting on behalf of the corporation. The *Rollins* case returned to the Court of Appeals, which then determined that it was unclear from the record whether the defendants' acts were undertaken as trustees or as managing partners of the family partnerships. *See Rollins v. Rollins*, 329 Ga. App. 768, 766 S.E.2d 162 (2014). Notably, since certain of the business entities were partnerships rather than corporations, the Court of Appeals briefly considered whether the principles that had just been announced by the Supreme Court in *Loudermilk* were applicable to managing partners in a partnership. The Court ultimately did not answer the question but instead remanded the case to the trial court to resolve the remaining questions of fact.

The courts heard a variety of other cases dealing with the conduct and liabilities of corporate directors and officers in 2014. In *Georgia Department of Revenue v. Moore*, 328 Ga. App. 350, 762 S.E.2d 184 (2014), the court addressed the nature of an officer's liability for the corporation's unpaid sales and use taxes as a "responsible person" under O.C.G.A. § 48-2-52, holding that liability was joint and several and that the Department of Revenue could therefore proceed against the officer for the entire unpaid amount. In another case involving tax liability, *In re Shaw*, 2014 WL 1401871 (Bankr. N.D. Ga. Apr. 2, 2014), the bankruptcy court held that a local branch manager who claimed not to be an officer of the corporation could nonetheless be individually liable for unpaid unemployment taxes under § 34-8-167(e), given evidence showing that the defendant was the person at the company who was responsible for filing returns and paying taxes.

There were multiple cases involving signatures of contracts by corporate representatives, and their meaning and effect. In *Buffa v. Yellowbook Sales & Distributing Co., Inc.,* 327 Ga. App. 639, 760 S.E.2d 644 (2014), the Court found that the defendant became personally obligated under a contract he claimed to have signed in his corporate capacity only, because the signature block under his signature read "Authorized Signature individually and for the Company." In *Progressive Electrical Services v. Task Force Construction*, 327 Ga. App. 608, 760 S.E.2d 621 (2014), the signature block did not indicate that the signer was bound individually, but the defendant was nonetheless held to be personally bound due to language in the agreement stating that every person signing the agreement on behalf of the corporation was also signing the agreement "in his or her personal and individual capacity." In *Patel v. Patel*, 327 Ga. App. 733, 761 S.E.2d 129 (2014), the Court of Appeals found that there was a question of fact as to whether the corporate officer signed an agreement in his individual or corporate capacity, since the document itself lacked a clear statement of his capacity, and in light of the general rule that a single signature may be in either an individual or representative capacity, but not both. In *Courtland Hotel, LLC d/b/a Sheraton Atlanta Hotel v. Salzer*, 330 Ga. App. 264, 767 S.E.2d 750 (2014), the Court of Appeals held that an agent sufficiently identified his corporate principal even though he used an acronym rather than the full corporate name, since under the circumstances, the acronym was a mere misnomer and did not substantially vary from the corporation's actual name. In *Del Lago Ventures, Inc. v. QuikTrip Corp.*, 330 Ga. App. 138, 764 S.E.2d 595 (2014), the fact that a corporation's sole owner signed his deceased mother's name to certain contracts did not void the contract because the owner subsequently ratified the contracts and clearly had authority to do so.

Finally, in *Hanover Insurance Co. v. Hermosa Construction Group, LLC*, ___ F. Supp. 3d ___, 2014 WL 5486602 (N.D. Ga. May 1, 2014), the district court applied the well-settled principle that an officer who personally participates in a tort may be personally liable to injured third parties without regard to alter ego principles.

B. CORPORATE STOCK AND DEBT – CONTRACTS AND VALUATION.

In *Callaway v. Garner*, 327 Ga. App. 67, 755 S.E.2d 526 (2014), the Georgia Court of Appeals affirmed an order granting specific performance of an oral stock purchase agreement, holding that a separate agreement allowing the purchaser time to sell off real estate to obtain funds for the purchase was an accommodation and not a condition precedent. The Court also held that the defendants had waived their right to enforce the notice provisions of the operative shareholders' agreement, and therefore could not void the sale on the grounds that it violated the agreement. In *Sullivan v. Sullivan*, 295 Ga. 24, 757 S.E.2d 129 (2014), the Georgia Supreme Court addressed questions of proof of the market value of stock in a closely-held corporation, holding that stock was not a marital asset because the party seeking an equitable division of its appreciation had failed to establish the value of the stock at the date of marriage or the amount of appreciation thereafter.

C. NONPROFIT ORGANIZATION DECISIONS.

There were two notable decisions involving nonprofit corporations in 2014. In *Thunderbolt Harbour Phase II Condominium Assoc., Inc. v. Ryan*, 326 Ga. App. 580, 757 S.E.2d 189 (2014), the Court of Appeals held that a homeowners' association's sole director and officer owed fiduciary duties to the association and its members. In *Rigby v. Flue-Cured Tobacco Cooperative Stabilization Corp.*, 327 Ga. App. 29, 755 S.E.2d 915 (2014), the Court of Appeals held that the bylaws of a North Carolina tobacco cooperative permitted the cooperative to purge its members from time to time without the need for a hearing. The Court, in ruling on a law choice issue, noted that under North Carolina law corporations owe fiduciary duties to their shareholders while in Georgia they do not.

D. LIMITED LIABILITY COMPANY DEVELOPMENTS.

In *Gwinnett Community Bank v. Arlington Capital, LLC*, 326 Ga. App. 710, 757 S.E.2d 239 (2014), the Court of Appeals held that evidence of a limited liability company's negative net worth, without more, was insufficient to show that the LLC was insolvent for purposes of determining whether its principal owed a fiduciary duty to creditors. In *Arnsdorff v. Papermill Plaza, LLC*, 326 Ga. App. 438, 756 S.E.2d 668 (2014), the Court of Appeals ruled that an LLC member was not entitled to commissions resulting from a lease entered into by the LLC, holding that the operative LLC agreement required the member to formulate a development plan as a condition to receiving payment and that this condition had never been satisfied.

There was the usual variety of decisions concerning individual liabilities of LLC members. In *Uhlig v. Darby Bank & Trust Co.*, 565 Fed. Appx. 883 (11th Cir. 2014), the Eleventh Circuit entered a *per curium* order affirming a 2013 trial court decision which held that LLC members were not liable for their alleged misrepresentations to a purchaser of a condominium unit because they were acting on behalf of the LLC. In a subsequent related decision, *Osborne v. Drayprop, LLC*, 2014 WL 4926284 (S.D. Ga. Sep. 30, 2014), the district court held that two individuals who were alleged to have been personally involved in the creation and distribution of sales materials for the condominium were not personally liable, again because they were acting on behalf of the entities they served. For reasons that are not explained, the courts did not address the well-established principle of Georgia law that a business entity insider who personally participates in an alleged fraud may be personally liable without regard to alter ego principles, *See, Hanover Insurance Co. v. Hermosa Construction Group, LLC, supra*.

In *Inland Atlantic Old National Phase I, LLC v. 6425 Old National, LLC*, 329 Ga. App. 671, 766 S.E.2d 86 (2014), the Court of Appeals held that an LLC member could owe fiduciary duties based on its management of the venture's affairs, even if the operating agreement expressly designated a different member as the managing member.

E. PARTNERSHIP LAW DEVELOPMENTS.

The Court of Appeals in *Maree v. ROMAR Joint Venture*, 329 Ga. App. 282, 763 S.E.2d 899 (2014) held that judicial dissolution of a joint venture pursuant to O.C.G.A. § 14-8-32 was appropriate in light of evidence showing a long history of stalemate and deadlock between the joint venturers. In *First Benefits, Inc. v. Amalgamated Life Ins. Co.*, 2014 WL 6956693 (M.D. Ga. Dec. 8, 2014), the district court held that there was sufficient evidence to create a jury question as to whether a partnership was formed, in the absence of a written partnership agreement, based on testimony that the parties had agreed to specific terms regarding the division of responsibilities and sharing of profits among them. In *Godwin v. Mizpah Farms, LLLP*, 330 Ga. App. 31, 766 S.E.2d 497 (2014), the Court of Appeals held that a partner's claim that he was fraudulently deprived of his interest in the limited partnership was barred by the statute of limitations; the documents that the plaintiff signed - which he had a duty to read - placed him on notice of the transfer of his interest. The Court applied a six-year statute of limitations for written agreements to both contract and tort claims. The Court also found that there was a question of fact as to whether the plaintiff remained a general partner, which would entitle him to file an application for dissolution.

F. TRANSACTIONAL CASES.

A divided seven-judge *en banc* Court of Appeals held in *Legacy Academy v. Mamilove, LLC*, 328 Ga. App. 775, 761 S.E.2d 880 (2014) that parties to a franchise agreement were entitled to rescind the agreement based on fraudulent oral misrepresentations that induced them to enter into the contract, even though the contract contained a specific disclaimer that the plaintiffs had not received any such representations, as well as containing a merger clause. The majority found that there was sufficient evidence that the plaintiffs were prevented from reading the contract. In *Roca Properties, LLC v. Dance Hotlanta, Inc.*, 327 Ga. App. 700, 761 S.E.2d 105 (2014), the Court of Appeals held that a factual dispute existed regarding whether the plaintiffs were fraudulently induced into purchasing a dance competition's assets. The Court resorted to parol evidence to resolve an issue regarding which assets were transferred.

There also were several cases addressing the transfer of assets, rights and liabilities by operation of law under O.C.G.A. § 14-2-1106 following a merger. This issue has seen a significant amount of litigation in recent years due to the rise in foreclosures as well as the many bank failures and consolidations that occurred during the financial crisis. This year's decisions did not break any new ground; the settled rule under § 14-2-1106 is that the successor entity has the authority to foreclose on a property without the need for a formal assignment from the original holder of the security deed. *See Clark v. PNC Bank, N.A.*, 2014 WL 359932 (N.D. Ga. Feb. 3, 2014); *Jackson v. Bank of America, NA*, 578 Fed. Appx. 856 (11th Cir. 2014); *Wang v. Bank of America, N.A.*, 2014 WL 2883501 (N.D. Ga. June 24, 2014); *Duncan v. Citimortgage, Inc.*, 2014 WL 172228 (N.D. Ga. Jan. 15, 2014).

G. LITIGATION ISSUES.

1. Standing and Capacity to Sue

In *Patel v. Patel*, 2014 WL 5025821 (S.D. Ga. Oct. 7, 2014) (unrelated to the *Patel v. Patel* case discussed in Part A), the district court held that a fifty percent shareholder's claims against the company's former CEO and other shareholders were derivative and could not have been brought by the plaintiff directly. Two cases discussed a corporation's capacity to sue. In *East Cobb Fastpitch, Inc. v. East Cobb Bullets Fastpitch, Inc.*, 2014 WL 3749216 (N.D. Ga. July 29, 2014), the district court rejected a defendant's challenge to the plaintiff's standing based on alter ego principles, holding that a non-profit corporation's power to sue under O.C.G.A. § 14-3-302(1) is not lost by its failure to adopt bylaws or appoint a board of directors. In *Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC*, 325 Ga. App. 694, 754 S.E.2d 655 (2014), the Court of Appeals held that a foreign LLC was entitled to institute legal proceedings in a Georgia court without a certificate of authority to do business in Georgia, noting that foreign companies that do not transact any business in Georgia are exempt from the requirements of O.C.G.A. § 14-11-711(a).

The Georgia Supreme Court held in *Department of Transportation v. McMeans*, 294 Ga. 436, 754 S.E.2d 61 (2014) that where a corporation owned a business operated on property subject to a condemnation action, the corporation, and not its sole shareholder, was the proper party to assert a claim for business losses resulting from the condemnation. Finally, in *Georgia Casualty & Surety Company v. Excalibur Reinsurance Corp.*, 4 F. Supp. 3d 1362 (N.D. Ga. 2014), the district court addressed a dispute over the location of a corporation's principal office, holding that it was the office where the corporation performs its executive functions for choice of law purposes.

2. Fraudulent Transfer Liability of Corporate Insiders, Alter Ego, Piercing the Corporate Veil and Other Forms of Secondary Liability

In *Smith v. Georgia Energy USA, LLC*, 2014 WL 5643919 (S.D. Ga. Nov. 4, 2014), a class action involving claims of fraud and violations of the Uniform Deceptive Trade Practices Act, the court rejected the plaintiffs' attempt to pierce the corporate veil as to the two shareholders of the family-run businesses alleged to have engaged in the wrongful acts, holding that while the businesses may have been run informally and sloppily, there was no evidence that the defendants abused the corporate form. A pair of cases dealt with the definition of an "insider" for purposes of the Uniform Fraudulent Transfer Act. In *Target Corp. v. Amerson*, 327 Ga. App. 110, 755 S.E.2d 556 (2014), the Court of Appeals held that a mid-level employee of a Fortune 500 corporation was not an insider under O.C.G.A. § 18-2-71(7)(A) because she was not a "director, officer, or person in control" of the corporation. In *In re Southern Home & Ranch Supply, Inc.*, 2014 WL 4071901 (Bankr. N.D. Ga. Aug. 11, 2014), the bankruptcy court held that a company wholly owned by a director and 20% owner of the debtor was an "affiliate" of the debtor and therefore an insider under O.C.G.A. § 18-2-71(7)(D).

The rule against "reverse veil piercing," in which creditors seek to reach a corporation's assets in order to satisfy the debts of a corporate insider, was reaffirmed in *In re Bilbo*, 2014 WL 689097 (Bankr. N.D. Ga. Feb. 5, 2014) and *In re Geer*, 522 B.R. 365 (Bankr. N.D. Ga. 2014). Finally, in *Functional Products Trading, S.A. v. JITC, LLC*, 2014 WL 3749213 (N.D. Ga. July 29, 2014), the district court allowed the plaintiff to pierce the veil on the basis of its allegations in the complaint, in a case where the defendants defaulted as a sanction for their failure to comply with discovery orders.

3. Jurisdiction and Service of Process

In *Drumm Corp. v. Wright*, 326 Ga. App. 41, 755 S.E.2d 850 (2014), the Court of Appeals held that an out-of-state company that indirectly owns a Georgia business and pays taxes on its behalf does not "conduct business" in Georgia for purposes of Georgia's long-arm statute, O.C.G.A. § 9-10-91. In three cases, the courts rejected arguments based on the "fiduciary shield" doctrine, which has no application in Georgia. In *Meyn America, LLC v. Tarheel Distributors, Inc.* 36 F. Supp. 3d 1395 (M.D. Ga. 2014), the district court held that an officer of a foreign LLC was subject to personal jurisdiction in Georgia due to his alleged personal involvement in the decisions to misappropriate trade secrets belonging to a Georgia LLC. In *Ralls Corporation v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303 (N.D. Ga. 2014), the district court found that the plaintiff's complaint alleged sufficient facts to support the exercise of personal jurisdiction over out-of-state defendants based on their travel to Georgia to conduct business with the plaintiff. In *Websters Chalk Paint Powder, LLC v. Annie Sloan Interiors, Ltd.*, 2014 WL 4093669 (N.D. Ga. Aug. 18, 2014), the district court again rejected an argument invoking the fiduciary shield doctrine, but nonetheless concluded that the out-of-state corporate representative had not personally participated in any conduct in Georgia that could subject her to personal jurisdiction, nor did veil-piercing principles support jurisdiction.

There also were multiple cases, all involving foreclosures, in which the courts considered the rules for service of process on a corporation. In *Simms v. Deutsche Bank National Trust Co.*, 2014 WL 273236 (N.D. Ga. Jan. 22, 2014), the district court held that a plaintiff's attempt to serve a summons and complaint on a corporation by certified mail, without obtaining a waiver of personal service, is insufficient under Federal Rule 4 and O.C.G.A. § 9-11-4. In *Fitzpatrick v. Bank of New York Mellon*, 580 Fed. Appx. 690 (11th Cir. 2014), the Eleventh Circuit held that the plaintiff's attempt to obtain a waiver of personal service from a law firm was insufficient because it was sent to the firm itself rather than its agent, and because only one copy of the waiver form was provided. In *Stone v. Bank of New York Mellon*, 2014 WL 61480 (N.D. Ga. Jan. 8, 2014), the court held that service of process against a foreign corporation was insufficient; the plaintiff had served a copy of the summons and complaint on the Georgia Secretary of State, but did not deliver a copy to an officer of the defendant as directed in O.C.G.A. § 14-2-1520(b)-(c).

4. Evidence, Business Records Act

There were some interesting decisions in 2014 addressing whether a bank had satisfied its burden to show that it was the holder of a note it sought to enforce. All of these cases involved promissory notes originally held by banks that failed during the financial crisis. In *Greenstein v. Bank of the Ozarks*, 326 Ga. App. 648, 757 S.E.2d 254 (2014), a divided Court of Appeals, sitting *en banc*, held that the plaintiff bank failed to show sufficient evidence that it was the holder of a note it claimed to have obtained through a purchase and assumption agreement with the FDIC. The problem was that prior to its closure, the original holder of the note changed its name and merged into the bank that was eventually closed. While the plaintiff's evidence was sufficient to show that it had obtained the note from the FDIC, it was not sufficient to establish these earlier developments. The dissenting judges took the view that the plaintiff had succeeded in interest to the business records of the failed bank, and therefore should not have been required to produce a witness with personal knowledge of the name change and merger. In *Ware v. Multibank 2009-1 RES-ADC Venture, LLC*, 327 Ga. App. 245, 758 S.E.2d 145 (2014), a panel of the Court of Appeals held that the plaintiff's business records were sufficiently authenticated and that they demonstrated that the plaintiff had received the notes in question from the FDIC as receiver for the original holder. Finally, in *Thomas v. State Bank & Trust Company,* 330 Ga. App. 274, 765 S.E.2d 443 (2014), another Court of Appeals panel followed *Greenstein* in holding that the plaintiff failed to prove that assets of the failed bank were transferred to the plaintiff. In *Thomas,* the plaintiff sought to show that the notes were transferred via its purchase and assumption agreement with the FDIC, but the court held that this agreement specified that the actual transfer of the notes would be accomplished through a deed or bill of sale (and no such deed or bill had been produced).

In a final notable case involving the introduction of business records as evidence, the Court of Appeals in *Hayek v. Chastain Park Condominium Association, Inc.*, 329 Ga. App. 164, 764 S.E.2d 183 (2014) discussed the admissibility of an account ledger submitted by a property manager in a case to recover unpaid condominium association fees. The property manager's affidavit failed to comply with the requirements of either the old or new evidence code. While the court criticized the introduction of the ledger as failing to meet the requirements of O.C.G.A. § 24-8-803(6), it went on to consider the ledger in its review on the merits.

5. Director and Officer Liability Insurance Decisions

The Eleventh Circuit issued a significant opinion concerning the application of an "insured vs. insured" exclusion to a lawsuit brought by the FDIC as receiver for a failed bank. In *St. Paul Mercury Ins. Co. v. FDIC*, 774 F.3d 702 (11th Cir. 2014), the Eleventh Circuit held that a policy exclusion for claims "brought or maintained by or on behalf of any Insured or Company" was ambiguous when applied to the FDIC as receiver, and reversed a 2013 Northern District of Georgia opinion which held that the FDIC's claims fell within the exclusion. The decision resolves a conflict between the district court's opinion and an earlier Northern District decision which had found nearly identical language to be ambiguous in the context of another suit brought by the FDIC as receiver for another failed bank. In fact, the Eleventh Circuit found the conflict between the two district court decisions to be compelling evidence that the language was ambiguous.

In other decisions involving D&O liability insurance, the Northern District of Georgia in *In re Gafford*, 2014 WL 689074 (N.D. Ga. Feb. 4, 2014), lifted a bankruptcy stay to allow the FDIC to pursue claims against a former officer of a failed bank where the sole source of recovery would be the applicable D&O policy. And in *Onebeacon Midwest Ins. Co. v. FDIC*, 2014 WL 869286 (N.D. Ga. Mar. 5, 2014), the district court denied a motion to reconsider its earlier order dismissing an insurance carrier's declaratory judgment action against the FDIC on the grounds that the action was barred by FIRREA's anti-injunction provision.

6. Non-dischargeability of Breach of Fiduciary Duty Claims

In *In re Pervis*, 512 B.R. 348 (Bankr. N.D. Ga. 2014), the bankruptcy court held, following a trial, that a debtor's liability for misappropriation of corporate opportunities was non-dischargeable in bankruptcy. The opinion contained a detailed analysis and application of the rules governing corporate opportunity disputes. The court also ruled that a non-compete provision in the shareholders' agreement for the debtor's business was unenforceable under Georgia law.

7. Professional Liability

In *Hays v. Page Perry, LLC*, 26 F. Supp. 3d 1131 (N.D. Ga. 2014), the district court held that a corporation's outside law firm did not have a duty to report the client's wrongdoing to regulators, and that the firm's principals were not liable to the corporation for alleged malpractice absent any evidence that they directly provided services to the corporation or that they supervised any of the work that was done.

8. Corporate Receiverships

In *Considine v. Murphy*, 327 Ga. App. 110, 755 S.E.2d 556 (2014), a shareholder challenged the appointment of a corporation as a receiver, contending that under O.C.G.A. § 9-8-1, corporations may not serve as receivers and that O.C.G.A. § 14-2-1432 did not apply because she had not sought dissolution of the corporation. The court did not decide these issues because it found that the shareholder had waived her challenge when she previously had agreed to the appointment in a consent order. In *SEC v. Quest Energy Management Group, Inc.*, 768 F.3d 1106 (11th Cir. 2014), the Eleventh Circuit held, in a case of first impression, that corporate officers enjoined from acting on behalf of a corporation could not appeal the injunction in the corporation's name without leave of court or a stay of the injunction, since the appeal itself violated the injunction.

H. **SUPERIOR COURT OF FULTON COUNTY BUSINESS COURT DECISIONS**.

In *Frazier v. Liotta*, No. 2014-cv-244363 (Ga. Sup. Ct. Fulton Co. Aug. 28, 2014), the court held that breach of fiduciary duty, misappropriation of corporate opportunity and other claims brought by a member of an LLC against the only other member could be brought directly rather than derivatively, since all interested parties were before the court and the reasons for the general rule requiring a derivative suit did not apply. The court dismissed claims for breach of the LLC's operating agreement given the broad discretion it granted to defendants as manager and majority owner. In *Sullivan v. Torchia*, No. 2013-cv-229283 (Ga. Sup. Ct. Fulton Co. Jul. 24, 2014), the court denied a motion for summary judgment asserting that a corporation's chief executive officer had no ownership interest in the subject corporation; the court held that the absence of any stock certificates was not dispositive and that there was evidence that the plaintiff had formed a partnership with the defendants which entitled him to a share of the corporate profits. In *Fouse v. Dow*, No. 2014-cv-242868 (Ga. Sup. Ct. Fulton Co. June 4, 2014), the court addressed a dispute between the two shareholders of corporate entities over the method of valuation to be used in a buyout following the termination of one of the shareholders. The court interpreted the shareholders' agreement to require the value of the departing shareholder's shares to be calculated according to an agreed-to formula based on annual net earnings, over the departing shareholder's objections that the formula did not apply to the sale of shares on termination of a shareholder's employment and that the shares were worth far more than that. Finally, in *Homeland Self Storage Management, LLC v. Pine Mountain Capital Partners, LLC,* No. 2014-cv-246999 (Ga. Sup. Ct. Fulton Co. Nov. 21, 2014), the court denied a motion to dismiss fraud and breach of fiduciary duty claims brought against a former chief financial officer of an LLC. Notably, the court held that the plaintiffs' allegations were sufficient to overcome the business judgment rule under the recent *Loudermilk* decision because the allegations could support a finding of bad faith or a breach of the duties of care and loyalty.

III. REVIEW OF DECISIONS

A. DUTIES AND LIABILITIES OF CORPORATE DIRECTORS, OFFICERS AND EMPLOYEES.

***FDIC v. Loudermilk*, 295 Ga. 579, 761 S.E.2d 332 (2014) and *FDIC v. Skow*, 295 Ga. 747, 763 S.E.2d 879 (2014) — Georgia Supreme Court recognizes vitality of Business Judgment Rule in Georgia, but holds that the rule may not foreclose all ordinary negligence claims against directors and officers.**

In a landmark ruling, a unanimous Georgia Supreme Court confirmed that Georgia recognizes a "business judgment rule" protecting the good faith decisions of bank directors, and by implication, all directors and officers of Georgia corporations. The Court also recognized an important limitation to the business judgment rule, however, holding that it does not necessarily insulate directors and officers from liability for ordinary negligence where a lack of due care in the decision making process is alleged. The Court's ruling significantly clarifies Georgia's business judgment rule, though it will still be up to later decisions to determine what sorts of negligence allegations will fall outside of the rule's reach.

The *Loudermilk* case came to the Supreme Court via certified questions from Judge Thrash of the Northern District of Georgia in a case brought by the FDIC against former officers and directors of the failed Buckhead Community Bank. We summarized Judge Thrash's decision in last year's survey. The FDIC, in its capacity as receiver for the Bank, sued the defendants to recover for nearly $22 million in losses allegedly sustained by the Bank as a result of numerous bad loans. The FDIC alleged that the Bank pursued an unsustainable aggressive growth strategy, pursuant to which the defendants approved the bad loans. Its claims were based on theories of negligence, gross negligence and breach of fiduciary duty. The defendants claimed, *inter alia*, that the FDIC's negligence claims were foreclosed as a matter of law by the business judgment rule. In response, the FDIC asserted that the business judgment rule did not apply to bank directors or officers because the Banking Code's standard of care, O.C.G.A. § 7-1-490. While the FDIC did not expressly take issue with the business judgment rule as it pertains to other Georgia corporations, its position could be interpreted as suggesting that there was no business judgment rule at all, since the Corporations Code contains provisions substantially identical to O.C.G.A. § 7-1-490. In his certification order, Judge Thrash expressed the view that perhaps bank directors *should* be treated differently because of the central role that banks play in the economy. Judge Thrash certified the following question: "Does the business judgment rule in Georgia preclude as a matter of law a claim for ordinary negligence against the officers and directors of a bank in a lawsuit brought by the FDIC as receiver for the bank?"

While this was happening, the Eleventh Circuit was considering the same issues and the same competing arguments in *FDIC v. Skow*. In *Skow*, Judge Jones of the Northern District dismissed the FDIC's ordinary negligence claims, holding that they were foreclosed by the business judgment rule. The FDIC took an interlocutory appeal to the Eleventh Circuit. In its own certification order, the Eleventh Circuit expressed skepticism that the business judgment rule could apply to the defendants in light of the statutory language, but it chose to ask the Georgia Supreme Court rather than decide the question. The Eleventh Circuit certified two questions that were largely similar to Judge Thrash's question.

The Georgia Superior Court's opinion first explored the history of the business judgment rule in Georgia. While the Court had never before addressed the business judgment rule by name, it nonetheless found that its earlier decisions embraced a rule protecting good faith decisions made by corporate directors and officers. The Court highlighted one line of decades-old cases which the FDIC had relied upon to argue that bank directors are subject to an ordinary negligence standard. *See McEwen v. Kelly*, 140 Ga. 720, 723 (1913); *Woodward v. Stewart*, 149 Ga. 620, 628 (1919); *Shannon v. Mobley*, 166 Ga. 430, 432-33 (1928); *Mobley v. Russell*, 174 Ga. 843, 844-45 (1932). The Court observed that these decisions should be read as imposing a duty of ordinary care "with respect to the way in which business decisions are made, not the wisdom of the decisions," and therefore were consistent with a business judgment rule. The Court also recognized a separate line of cases, which the defendants had relied upon, reflecting "a strong judicial reluctance to question the business judgments of business people." *See Tallant v. Exec. Equities, Inc.*, 232 Ga. 807, 810 (1974); *Regenstein v. J. Regenstein Co.*, 213 Ga. 157, 159-60 (1957); *Smith v. Albright-England Co.*, 171 Ga. 544, 545 (1930). Reconciling these two lines of cases, the Court held:

"We conclude that the business judgment rule is a settled part of our common law in Georgia, and it generally precludes claims against officers and directors for their business decisions that sound in ordinary negligence, except to the extent that those decisions are shown to have been made without deliberation, without the requisite diligence to ascertain and assess the facts and circumstances upon which the decisions are based, or in bad faith. Put another way, the business judgment rule at common law forecloses claims against officers and directors that sound in ordinary negligence when the alleged negligence concerns only the wisdom of their judgment, but it does not absolutely foreclose such claims to the extent that a business decision did not involve "judgment" because it was made in a way that did not comport with the duty to exercise good faith and ordinary care."

761 S.E.2d at 338.

Significantly, the Court also held that Georgia's business judgment rule applies to corporate officers as well as directors, and that the rule does not distinguish between banks and other corporations. To reach this conclusion, the Court looked to the history of O.C.G.A. § 7-1-490, the statutory standard of conduct for bank directors. The Court found that the standard of care expressed in Section 7-1-490 did not appear to differ from the common law standard described in *Woodward* and other decisions which preceded the adoption of the statute. The Court also observed that when Section 7-1-490 was adopted in 1974, the pertinent language was taken verbatim from the 1968 Corporations Code's standard of care for directors and officers (i.e., the precursor to today's O.C.G.A. § 14-2-830 and § 14-2-842). The Court further explained that the 1968 Corporations Code deliberately adopted New York's standard of care because it was viewed as the most consistent with Georgia's common law regarding the duties of directors and officers. Thus, the Court concluded, Section 7-1-490 (and by implication, O.C.G.A. § 14-2-830 and § 14-2-842) cannot be read as superseding the common law business judgment rule.

The Court then turned to the specific dispute that had prompted the appeal: whether the business judgment rule forecloses ordinary negligence claims against directors and officers, as the defendants contended. Calling the defendants' position "a different sort of business judgment rule" from the rule recognized by the Court elsewhere in its opinion, the Court declined to hold that the business judgment rule establishes gross negligence as the floor for director and officer liability in all cases. The defendants relied principally on two recent decisions by the Georgia Court of Appeals which held that the rule "forecloses liability in officers and directors for ordinary negligence in discharging their duties." *Flexible Products Co. v. Ervast*, 284 Ga. App. 178, 182 (2007); *Brock Built, LLC v. Blake*, 300 Ga. App. 815, 822 (2009). The FDIC urged that these decisions could not be reconciled with Section 7-1-490, which clearly holds bank directors to an ordinary negligence standard. The Court found the two Court of Appeals decisions to be inconsistent with not only Section 7-1-490 but also the corresponding provisions of the Corporations Code, and thus overruled them. In the Court's view, an absolute rule establishing gross negligence as the floor for liability (such as that adopted by the Court of Appeals) fails to recognize that Georgia law treats due care in the decision-making process differently from the wisdom of the decisions themselves.

While the Court did not address how the case before it should be decided, it is clear that a complaint which alleges nothing more than that a business decision was negligent should fail as a matter of law, while a complaint alleging facts showing negligence in the decision-making process may survive a motion to dismiss. Still, it is hard to tell where that line will be drawn. The older common law cases cited by the Court typically dealt with the complete abdication of duties by the corporate directors; they were largely concerned with ensuring that directors do not act as mere "dummies" and "figureheads." In closer cases going forward, defendants will argue that "process due care" claims should only survive a motion to dismiss where there is something akin to abdication. Plaintiffs will just as surely argue that any negligence that arguably relates to process, such as the failure to consider a particular fact or report, will be sufficient to support a claim.

The Court's decision may significantly reduce the usefulness of a motion to dismiss as a vehicle to dispose of dubious claims, because it is not especially difficult to couch any complaint about the wisdom of a business decision in terms that raise a question of negligence in the decision making process. The Court implied that any concern about a proliferation of lawsuits is best directed to the General Assembly and not the courts. However, the Court also offered two observations that might give comfort to some corporate defendants. First, the Court indicated that the statutory standard of care does not actually hold directors and officers to a "prudent man" standard; rather, it measures their conduct against that of "ordinarily prudent officers and directors of a similarly situated bank." This distinction recognizes the fact that bank directors do not and cannot devote all of their time to the bank's affairs and therefore cannot be expected to grasp all of the details of managing the bank as if they did. This strongly suggests that the liability of outside directors, at the very least, must be evaluated in light of this fact. Second, the Court noted that bank directors have a statutory right to rely upon certain information, such as reports of officers and legal counsel. While the Court did not specifically address this, corporate directors enjoy a similar right, which should be understood as being separate from and in addition to the protections of the business judgment rule.

In September, the Court issued a short opinion in *Skow*, once again unanimous, in which it reaffirmed its earlier opinion in *Loudermilk*. The *Skow* opinion addressed no new matters but did stress one point it originally raised in *Loudermilk*—its view that the level of diligence required of a bank director under O.C.G.A. § 7-1-490 is that "as would be exercised by 'ordinarily prudent' officers and directors of a similarly situated bank," as opposed to the level of diligence that would be expected of a person caring for the person's own property.

Both cases now return to the federal courts for further proceedings.

***Rollins v. Rollins*, 294 Ga. 711, 755 S.E.2d 727 (2014) — Trustees serving as directors of entities held within trusts determined to be subject to corporate standard of conduct, not trust standard, with respect to actions as directors.**

Reversing a 2013 Court of Appeals decision which we highlighted in last year's survey, the Georgia Supreme Court held that the trustees of certain family trusts, who also served as directors of entities in which the trusts held minority interests, were subject to the more deferential standards applicable to corporate directors while performing their corporate duties. The Court also held that the trust beneficiaries were not entitled to an accounting of the corporate entities, again reversing the Court of Appeals on this point.

The plaintiffs were beneficiaries of irrevocable trusts established by their grandfather in 1968. The defendants, who are the settlor's sons and a friend, serve as trustees. The settlor had created a number of family entities to hold assets within the trusts. The plaintiffs were beneficiaries of trusts which held minority interests in certain of these entities. The trustees were able to control the entities through other trusts, personal and entity relationships.

In 2010, the plaintiffs brought suit alleging breach of trust and breach of fiduciary duty and seeking a judicial accounting of the family entities. The beneficiaries alleged that after the settlor's death, the trustees changed "the structure, leadership, holdings, and distribution methods" used in the family entities that were held within the trusts in order to shift power and funds away from the beneficiaries and towards the trustees.

The trial court refused to order an accounting of the family entities, holding that the beneficiaries received "complete relief" on their accounting request because the trustees had provided the beneficiaries with a report on the trust assets after the complaint was filed. That report did not include an accounting of the family entities themselves. The Court of Appeals held that this was error, citing New York authority as well as O.C.G.A. § 53-12-243(a) in holding that the trustees were required to provide the entity-level information given that there was no dispute that they had the ability to do so. The Court of Appeals also held that the trustees could not avail themselves as the business judgment rule and other protections applicable to corporate directors, although it found that issues of fact remained as to whether the defendants breached their duties.

The Supreme Court's discussion of the proper standard of care began with an acknowledgment that the question it was dealing with is a difficult one. The Court found its answer in the "cardinal rule" of trust law that the settlor's intention is paramount. Reviewing the settlor's acts for evidence of his intent, the Court found that he "took great pains to ensure that the trustees could not take actions at the family entity level solely to benefit plaintiffs as [] beneficiaries — unless those actions were also in the interests of the other shareholders." This, in the Court's view, indicated that the settlor "did not intend for the trustees to be held to trustee level fiduciary standards when performing their corporate duties." The Court also found it significant that the trusts hold only a minority interest in the corporate entities, and specified this fact in its holding. This ruling seems to imply that a corporate director who also is a trustee could be held to trust standards where a trust is the majority owner.

On the accounting issue, the Court relied on O.C.G.A. § 53-12-6(a) in holding that an appellate court reviewing a trial court's decision to require (or, as here, to not require) an accounting must consider whether the trial court properly exercised its equitable discretion. The Court of Appeals' opinion suggested that it had failed to give any consideration to the broad discretion given to the trial court. The Supreme Court thus vacated the Court of Appeals' ruling and remanded with instructions to the Court of Appeals to take the discretion of the trial court into account.

***Rollins v. Rollins*, 329 Ga. App. 768, 766 S.E.2d 162 (2014) - Upon remand, Court of Appeals finds that questions of fact preclude summary judgment.**

The dispute returned to the Court of Appeals, which held that even in light of the Supreme Court's directive to apply the corporate fiduciary standard to the defendants' actions as directors of the family entities, questions of fact precluded summary judgment in favor of the defendants.

Upon remand, the defendants argued that their actions at the entity level were undertaken in good faith and in the best interests of the entities, and that the business judgment rule therefore shielded them from liability. The Court of Appeals first identified an issue that had not been previously addressed: whether there was any relevance to the fact that the family entities were structured as *partnerships*, not corporations. The plaintiffs called into question whether the principles of the business judgment rule, as had just been articulated by the Georgia Supreme Court in *FDIC v. Loudermilk*, were applicable to general partnerships. *Loudermilk*, the Court found, was silent as to whether the business judgment rule applies outside of the corporate setting. The Court cited a federal appellate decision holding that the business judgment rule is unique to the corporate setting and therefore does not apply to partnerships. *See Henkels & McCoy, Inc. v. Adochio*, 138 F.3d 491 (3d Cir. 1998). But the Court also acknowledged that the duties owed by corporate fiduciaries and partners are often similar, which might counsel in favor of extending the business judgment rule to partnerships.

Ultimately, the Court did not decide whether the business judgment rule because, in its view, a question of fact remained as to whether the defendants' acts complained of by the plaintiffs were undertaken as trustees or as managing partners. To wit, the plaintiffs contended that the defendants unilaterally amended the Rollins Investment Fund ("RIF") partnership agreement in a manner that consolidated their control and that permitted them to make distributions at their discretion rather than by a full vote of the partnership. The Court found that the defendants executed the amended RIF partnership agreement in their individual capacities and on behalf of the family trusts using signature lines that identified them as trustees. The Court concluded that "it is impossible for this Court to discern from the record before us in what capacity - trustee or managing partner (or both) - that [defendants] were acting when they made the unilateral RIF amendment at issue." The court also found evidence that the plaintiffs did not participate in the amendment despite language in the original agreement requiring that all partners consent to any amendments, and that the defendants may have failed to disclose material information about the amendment, all of which could evidence bad faith. In a separate claim, the plaintiffs argued that the defendants set up a "fake distribution scheme" in which they conditioned distributions upon the plaintiffs' adherence to a code of conduct. The Court found that the documentation describing the distribution program, as well as other correspondence from the defendants to the plaintiffs relating to their distributions, identified the defendants as "trustees," thus making it plausible that the plaintiffs "were misled into accepting the strictures of the code of conduct by [defendants'] presentation of themselves as 'trustees.'" As to both the amendment and the code of conduct claims, the Court found that a factual dispute thus existed as to whether the defendants were acting as trustees or in a different fiduciary capacity.

Finally, the Court of Appeals remanded the plaintiffs' request for an accounting to the trial court, with instructions to reconsider its previous denial of an accounting in light of the unresolved questions of fact identified in its opinion.

***Georgia Department of Revenue v. Moore*, 328 Ga. App. 350, 762 S.E.2d 184 (2014) – Corporate officer of corporation, not majority shareholder, held to be responsible person for purposes of Georgia withholding tax.**

In this tax dispute, the Court of Appeals held that the Department of Revenue may proceed individually against one of multiple potentially responsible officers in a dispute over unpaid business sales and use taxes and is not required to join all other responsible officers who may be liable for the unpaid taxes. Under O.C.G.A. § 48-2-52, a "responsible person," such as an officer who has control over the corporation's tax collections, who willfully fails to collect or remit taxes is personally liable for payment of the tax. In this case, the Department of Revenue had previously obtained full payment of its assessed taxes from the corporation's majority owner. The Department of Revenue voluntarily refunded a portion of the payment to the majority owner pursuant to a refund action brought by the majority owner. The Department of Revenue then sought to recover the amount of that refund from the defendant Moore, a corporate officer. There was no dispute that both Moore and the majority owners were "responsible persons." Moore claimed that he was a necessary party to the majority owner's refund action and that the failure to include him in that action precluded the Department of Revenue from proceeding against him afterwards.

The Court of Appeals disagreed, looking to the federal courts' treatment of similar tax disputes involving corporate officers. The court found that under federal law, a corporate officer's liability for the company's unpaid taxes is joint and several. The court seems to have implied from this that O.C.G.A. § 48-2-52 also provides for joint and several liability. The general rule under both Georgia and federal law is that jointly and severally liable persons are not necessary parties to lawsuits involving each other. Instead, a plaintiff may elect to proceed against any one defendant. Having found that the proceeding involving the majority owner involved joint and several liability, the court concluded that Moore was not a necessary party to that proceeding, meaning that the Department of Revenue could proceed against him to recover the remainder of its assessment.

***In re Shaw*, 2014 WL 1401871 (Bankr. N.D. Ga. Apr. 2, 2014) – bankruptcy debtor, as office manager, held to be responsible person liable for unpaid taxes whether or not serving as a corporate officer.**

In this case, the bankruptcy court found that the debtor was personally liable to the Georgia Department of Labor for his company's unpaid unemployment taxes under O.C.G.A. § 34-8-167(e) regardless of whether the debtor actually served as an officer of the company, finding that the evidence showed that the debtor was the person responsible for filing returns and paying the unemployment taxes. The decision hinged on language specific to the unemployment tax statute. The court ultimately found that the debt was dischargeable, however.

The debtor was hired by American Power Inc. Staffing as its Atlanta office manager in 2006 and remained at the company until 2009. During that time, he reported directly to the owner of the company. His duties included bookkeeping and accounting, issuing payroll and vendor checks, and preparing tax returns and reports. The Department of Labor contended that the debtor signed checks and tax returns in the capacity of Chief Financial Officer. The court rejected this contention, finding that the debtor signed checks and returns as "Office Mgr." or without any title at all, and that the act of signing a corporate tax return or signing a corporate check does not prove one's status as an officer. (The court also found that reports filed with the Secretary of State were conflicting as to the debtor's role in the company and noted that such reports are not self-authenticating).

The court nonetheless found that, regardless of whether the debtor was an officer as a matter of fact, he was individually liable for the tax under O.C.G.A. § 34-8-167(e). That section imposes liability not only upon officers but also any "other person having charge of the affairs of a corporate or association employing unit who is required to file returns or pay the contributions required by this chapter." The court found that the evidence was sufficient to show that the debtor was responsible for filing returns and causing American Power to pay the unemployment taxes. The debtor argued that the owner of the company (and not he) was responsible for filing returns and paying taxes, claiming that everything he did was subject to the owner's review. The court was unpersuaded by this, finding that there was no evidence that the owner (who lived overseas) ever prevented the debtor from paying taxes.

Having found that the debtor was liable for the tax, the court then determined that it was nonetheless a dischargeable debt. The court found that the unemployment taxes at issue did not constitute a "tax required to be collected or withheld" within the meaning of section 507(a)(8)(C) of the Bankruptcy Code.

***Buffa v. Yellowbook Sales & Distributing Co., Inc.*, 327 Ga. App. 639, 760 S.E.2d 644 (2014) and *Progressive Electrical Services, Inc. v. Task Force Construction, Inc.*, 327 Ga. App. 608, 760 S.E.2d 621 (2014) – Contract provisions enforced that imposed personal liability on officer signing in representative capacity.**

Buffa v. Yellowbook illustrates the significance of contract language—even that contained in a signature block—in determining whether a contract binds a corporate representative in his individual capacity. In an action to recover amounts due under several advertising contracts from an LLC and its principal, the Court of Appeals held that the contracts bound the individual defendant personally. Buffa, the individual defendant, argued that he was not a party to the contracts because he only signed them in his representative capacity. The Court of Appeals found that the contract's language was clearly to the contrary. Specifically, the language above and below the signature blocks containing Buffa's signature specified that "[t]his is an advertising contract between Yellow Book and [printed company name] and [signature]," and beneath the signature it read "Authorized Signature individually and for the Company." A separate clause referenced in the signature block indicated that the signer "personally and individually" undertook and assumed the obligations specified under the contract. Having found that the clear language of the contracts identified Buffa as a party to them, the court's inquiry was complete.

In *Progressive Electrical Services v. Task Force Construction,* like *Buffa v. Yellowbook,* individual liability under a contract turned on wording in the contract, rather than the capacity in which the contract was signed. The individual defendant, Bush, was the president of the corporate defendant, Progressive. The plaintiff, TFC, brought an action under a subcontract agreement relating to the construction of a community center, which Bush signed on behalf of Progressive. The agreement stated, under the heading "Signing Individual," that "[e]ach and every individual" signing on behalf of Progressive was also signing the agreement "in his or her personal and individual capacity" and that such persons agreed to be bound by each of Progressive's obligations. A dispute arose over payments due to a third party vendor for the purchase of materials in connection with the project. That dispute was settled, pursuant to which TFC made a payment of over $118,000. The contract between Progressive and TFC contained an indemnification provision, which TFC sought to enforce against both Progressive and Bush in the instant lawsuit. The trial court awarded damages against the two defendants jointly and severally. On appeal, Bush claimed that it was error to find him personally liable.

In the agreement at issue here, the signature block indicated Bush's title as president of Progressive, and nothing else. As Bush pointed out, the signature block did not indicate that Bush was signing as an individual guarantor. The court recognized that as a rule, "a single signature in a representative capacity generally does not bind the signing party individually." Here, however, the court found the clause labeled "Signing Individual" to be controlling. The court also rejected Bush's argument that imposing individual liability on him as a guarantor would violate the statute of frauds. In the court's view, the signature provision "does not have the characteristics of a guaranty provision" because Bush did not merely agree to pay Progressive's debts; rather, by signing the agreement he individually agreed to take on all of Progressive's obligations under the contract. The court thus affirmed the trial court's decision.

***Patel v. Patel*, 327 Ga. App. 733, 761 S.E.2d 129 (2014) – Question of fact found where corporate officer, who was a co-defendant with the corporation, signed settlement agreement without designating his corporate capacity.**

This was yet another dispute over the capacity in which a corporate officer signed an agreement. Here, however, the officer claimed that he signed the contract in his personal capacity, and the court found that it could not determine the issue as a matter of law given the disputed questions of fact.

Appellant Girish Patel ("Girish"), the president of a hotel franchisee called Kakas, Inc., signed a settlement agreement with the Appellees which was the subject of the lawsuit. The settlement agreement resulted from a mediation intended to resolve a lawsuit filed by the Appellees. It provided that Girish would transfer two properties to one of the Appellees and would lease him a third with an option to purchase the properties under certain conditions. When the Appellees sought to close on the contemplated transactions, Girish requested a jury trial on the underlying disputes rather than go forward with the transactions. Appellees then sought enforcement of the settlement agreement. The trial court ruled in favor of the appellees, finding that Girish, as the chief executive officer and sole owner of Kakas, could effectuate the transactions, and that the settlement agreement was "definite, unambiguous, and enforceable."

On appeal, the Court of Appeals reversed. Girish argued that he signed the agreement in his individual capacity and that he individually did not hold title to the properties. The agreement contained a single signature that did not indicate whether Patel was signing in his individual or corporate capacity or both. The court cited the general rule that "a single signature denotes that the person is signing in either an individual or representative capacity, but not both." The lack of a clear statement of Girish's capacity, together with Girish's affidavit testimony that he signed the agreement individually and not on behalf of Kakas, convinced the court that there was a question of fact. The court also took issue with some of the trial court's findings. For instance, the trial court found that Girish was the sole owner of Kakas, but the Court of Appeals found no record evidence of the ownership of the corporation, only that Girish was the president. In addition, the deed for one of the hotel properties involved in the settlement was in the name of a separate corporation and there was no record evidence that Girish was an officer or an owner of that corporation.

The court also found that there was a question of fact as to whether the attorney representing Girish in the settlement had the authority to bind Kakas. (Girish and Kakas were represented by new counsel in the appeal.) The court noted that while an attorney has apparent authority to enter into a settlement agreement on behalf of the client, there was a question of fact as to whether the attorney was acting on behalf of anyone other than Girish, since only Girish was identified in the agreement.

***Courtland Hotel, LLC d/b/a Sheraton Atlanta Hotel v. Salzer,* 330 Ga. App. 264, 767 S.E.2d 750 (2014) - Abbreviation of corporate name held to be mere misnomer for purposes of determining liability of agent.**

The Georgia Court of Appeals held that an agent sufficiently identified his corporate principal in a contract with a third party, and thus avoided individual liability under the contract, despite the fact that he used an acronym rather than the full corporate name. The agent was retained by Convention Organizing and Leadership Team, Inc. to book hotel rooms in connection with a convention. The agent entered into a contract with the hotel identifying his principal as "C.O.L.T., Inc." The agent signed the contract in the capacity of "Meeting Coordinator/Acting Chairman," but it was undisputed that he was not a shareholder, director or officer of the company. The case turned on whether the acronym C.O.L.T., Inc. was a mere misnomer and was sufficient to identify the entity that was to be bound under the contract. Under well-settled law, an undertaking by an agent on behalf of a fictitious or nonexistent entity becomes the individual obligation of the agent. The Court reviewed prior caselaw which established that the mere fact that a corporation is misidentified by name will not necessarily result in the imposition of personal liability against the agent. Rather, the party seeking to hold the agent liable must show a more substantial variance between the disclosed name and the corporation's actual name. Here, the Court found that the acronym did not differ substantially from the company's full name. The Court also examined parol evidence showing that the agent had represented other clients in prior dealings with the hotel, strongly suggesting that the hotel was aware that the agent was not acting on his own behalf. The Court thus affirmed the trial court's grant of summary judgment in favor of the agent, holding that the parties did not intend for him to be personally liable under the contract.

***Del Lago Ventures, Inc. v. QuikTrip Corp.*, 330 Ga. App. 138, 764 S.E.2d 595 (2014) - Corporation's sole owner did not void contract by signing deceased former officer's name to it, since owner had authority to bind corporation.**

This case was a contract dispute involving competing purchasers of a parcel of land. The defendant, QuikTrip, entered into a contract in January, 2010 to purchase various parcels of land from an individual, Bar Lev, and a company named Kofer Properties ("Kofer") which was wholly owned by Lev. The parties later entered into amendments that extended QuikTrip's inspection period before it had to consummate the purchase. Lev signed the amendments in his own name individually and as Secretary of Kofer. He also signed for his mother, who was identified as the Chief Executive Officer and Chief Financial Officer of Kofer, and who passed away in 2010. In September, 2011, Lev assumed the offices of Chief Executive Officer, Chief Financial Officer and agent of Kofer, and signed a fourth amendment to the contract which ratified and confirmed the original contract and all previous amendments. Meanwhile, Lev and Kofer separately negotiated a backup contract with Del Lago permitting Del Lago to purchase the property in the event that QuikTrip terminated its agreement.

Del Lago filed the instant suit claiming that QuikTrip terminated its contract, thus triggering Del Lago's rights under the backup contract, when its real estate manager delivered a termination letter to Lev. QuikTrip claimed that the letter was a negotiating ploy and that it did not effectuate a real termination because it did not satisfy the contract's notice requirements. As to that issue, the Court ruled that there was a genuine issue of fact as to whether the delivery of the letter constituted a termination under the contract. As an alternative argument, Del Lago claimed that the contract between QuikTrip and Lev/Kofer was void due to Lev's "forgery" of his mother's signature. This raised the issue of whether Lev's signatures were truly effective to bind Kofer to the QuikTrip contract. The Court held that in light of Lev's subsequent ratification of the earlier amendments that he had signed for his mother, at a time in which he was clearly the company's chief executive officer, coupled with the fact that Lev was Kofer's sole owner, left no doubt that Lev had the authority to bind Kofer. The court thus found that summary judgment in favor of QuikTrip was appropriate as to Del Lago's effort to void the contract.

***Hanover Insurance Co. v. Hermosa Construction Group, LLC,* __ F. Supp. 3d ___, 2014 WL 5486602 (N.D. Ga. May 1, 2014) - Former controller and CFO/COO held personally liable for company's conversion of funds based on personal participation in tort.**

The plaintiff, a commercial surety, sued a construction company alleging, *inter alia,* that the company converted funds that were required to be turned over to the plaintiff under the terms of a contract between the two. The funds at issue were federal government payments received by the construction company that were to be placed into a disbursement account controlled by the plaintiff so that they could be disbursed to subcontractors. In addition to the company, the plaintiff sued one of the company's officers seeking to hold the officer individually liable for the company's conversion. The plaintiff sought summary judgment against the officer, and the district court granted the motion. Evidence showed that the officer, who served as controller for four months and then became the company's chief executive officer and chief operating officer for the next five months, was directly involved in the company's financial planning, record keeping and reporting functions, had direct access to relevant financial information, was aware of the company's receipt of federal funds and its agreement with the plaintiff with respect to how the funds were to be treated, and participated in company decisions in which the company effectively diverted funds from the plaintiff. The court held that this was sufficient evidence of personal involvement in the conversion to warrant imposing individual liability on the officer.

B. CORPORATE STOCK AND DEBT – CONTRACTS AND VALUATION.

***Callaway v Garner*, 327 Ga. App. 67, 755 S.E.2d 526 (2014) – Oral stock purchase agreement held specifically enforceable, agreement regarding funding of purchase held to be an accommodation, not a condition precedent, and other shareholders held to have waived rights to notice and first refusal provisions of shareholders agreement.**

The Georgia Court of Appeals affirmed a trial court order granting specific performance of an oral stock purchase agreement, holding that the evidence presented at the bench trial was sufficient to support the court's findings.

The critical question in the case was whether a term of the parties' agreement relating to the timing of payment was a condition precedent. The plaintiff, Garner, served as the chief operating officer and president of a family-owned spring water bottling business for many years, and held a significant amount of its stock. The defendant was the estate of the patriarch of the Callaway family, who founded the company with Garner. Mr. Callaway and members of his family owned a majority interest in the company and comprised the company's board of directors. Garner had a falling out with Mr. Callaway's son and expressed his desire to sell his shares. Multiple attempts to negotiate a sale between Garner and the Callaway family ensued, with the parties taking vastly opposed positions as to the value of the stock. Eventually, at a meeting attended by Garner and his valuation consultants, Mr. Callaway, and his son (who had assumed considerable control over the business and assumed the title of "family representative"), Mr. Callaway orally offered to buy Garner's stock for $1.2 million. The evidence at trial indicated that after Garner accepted the offer, Mr. Callaway represented that he could pay $750,000 of the purchase price up front but would need to sell some real estate in order to pay the balance of $450,000. The next day, Mr. Callaway's son sent Garner a letter stating that "[t]he price will be…$1,200,000 to be paid as follows: $750,000 cash at closing[,] $400,000 [an error that was later corrected] to be paid as soon as real estate…is sold and the proceeds are available to complete the purchase." After a bench trial, the trial court ordered specific performance and awarded pre-judgment interest and attorney's fees.

The parties disagreed as to the significance of the payment terms. Garner claimed that he agreed to the payment terms as an accommodation to Mr. Callaway but did not agree that the sale would be conditioned on his ability to sell the real estate. The Callaway family claimed that the sale of real estate was indeed intended to be a condition precedent. The Court of Appeals found that the trial court had sufficient evidence before it to find in favor of Garner. First, some testimony indicated that the discussion of payment terms did not occur until after the parties agreed to the sale price and a binding handshake agreement had been reached. Although the testimony was conflicting on this point, the applicable appellate standard only requires that some evidence support the trial court's findings. Second, the letter confirming the terms of the sale did not use the term "condition precedent" even though previous correspondence between the parties during sale negotiations had discussed potential conditions precedent, indicating that on this occasion the parties did not view the sale of real estate as a condition precedent. Third, there was evidence in the form of communications among the Callaways suggesting that they understood the deal to be binding and not conditional.

Mr. Callaway's estate also contended that the stock purchase agreement was void and ineffective because it violated the company's operative shareholders' agreement, which under the circumstances required notice to the company and the other shareholders, who could then exercise an option right to purchase the shares. While it was undisputed that notice was not given in the manner contemplated in the shareholders' agreement, the trial court nonetheless found that the other shareholders (namely, the Callaway family) had actual notice of the sale and waived any rights they may have had by failing to invoke them. The Court of Appeals again found that there was sufficient evidence to support the trial court's decision. First, evidence showed that the Callaway family received prior written notice about the meeting where Mr. Callaway made the offer and that Mr. Callaway's son represented their interests at that meeting. Second, correspondence among the Callaway family indicated that they were made aware of the agreement reached at the meeting. Third, evidence showed that the Callaway family sought to pursue an alternative deal with Garner outside of the framework of the shareholders' agreement rather than to assert their option rights under the agreement. This, in the court's view, was sufficient to show the family's intent to relinquish their option rights. The Court of Appeals affirmed the trial court's award of pre-judgment interest based on prior Georgia authority involving specific performance in stock purchase cases. The Court reversed the award of attorney's fees because the bad faith on which the trial court based its order was committed by the family, not by Mr. Callaway. Because one of the three-judge panel concurred in the judgment only, the decision is physical precedent only, not binding precedent. Ga. Ct. App. Rule 33(a).

***Sullivan v. Sullivan*, 295 Ga. 24, 757 S.E.2d 129 (2014) – Corporate stock held not to be marital asset because wife failed to establish value of stock at date of marriage and appreciation in value was not attributable to the spouses' individual or joint efforts.**

In this divorce proceeding, the Georgia Supreme Court addressed questions of proof of the market value of stock in a closely-held corporation. Prior to marriage, the husband purchased 150 shares of stock in Envirotech, an environmental services company, at $1.00 per share, and made a capital contribution of $35,000. A year after his marriage in 2001, the husband sold 50 of his shares for a total purchase price of $11,800. The husband retained the rest, which represented a 10% interest in the company. In the divorce proceeding, the wife produced evidence that value of the stock at the time of trial had risen to $780,000. She sought an equitable division of the appreciation of the value of the stock from the date of the marriage to the date of divorce. Under Georgia law, a spouse, in this case the wife, may be entitled to equitable division of the appreciation of the husband's interest in a closely-held corporation, provided that the appreciation is not solely the result of market forces, but rather reflects a contribution to value either by wife's efforts directly or indirectly where the husband's efforts contribute to value and the wife supports his career. The party seeking the equitable division bears the burden to establish the true market value at the time of marriage and the time of divorce. The court stated in passing that there are three principal methods for determining value of closely-held corporate stock – income or capitalized earnings method, the market approach method, and the cost approach method.[1]

Here, the wife contended that the trial court erred in finding that there was no evidence of the amount of appreciation, arguing that the evidence was sufficient to conduct a "source of funds" analysis. First, she argued that the value of the husband's stock at the time of the marriage could be inferred from his basis in the 100 shares, appreciated at a five percent interest rate. The Court disagreed, holding that "there is no evidence that an individual's basis in a stock share of a closely-held corporation necessarily reflects that share's market worth on any given date." In the Court's view, the trial court correctly declined to consider the husband's basis as evidence of market value. Second, the wife contended that the market value of the shares as of the date of marriage in 2001 could be inferred from the amount that the husband received for selling 50 shares in 2002. In response to this, the husband had argued that the 2002 sale was motivated by the need to pay marital debts and to free up shares for a new shareholder. The Court concluded that there was no evidence at trial indicating that the price the husband received was indicative of the stock's market value. Citing *Barton v. Barton*, 281 Ga. 565 (2007), the Court found that buy-sell agreements relating to stock in closely held corporations "do not

[1] The court observed the wife's expert in valuing the stock at the date of divorce "did not acknowledge any discounts in the stock value due to marketability or Husband's minority status," implying that those discounts may have been appropriate.

necessarily reflect true market value" and concluded that such evidence, without more, was insufficient to establish the stock's market value in 2001.

C. NONPROFIT ORGANIZATION DECISIONS.

***Thunderbolt Harbour Phase II Condominium Assoc., Inc. v. Ryan*, 326 Ga. App. 580, 757 S.E.2d 189 (2014) – Sole director and officer of homeowners' association held to have fiduciary duties to association and its members.**

In this case, the Court of Appeals overturned a trial court decision which had found as a matter of law that the sole officer and director of a homeowners' association did not owe the association a fiduciary duty to maintain the common areas in good repair. The dispute involved a condominium expansion project for which the defendant was the developer and general contractor. The defendant formed the homeowners' association upon completion of the project in 2003 and served as its sole officer and director until 2006. During that time, the defendant sold all of the project's units, maintained insurance for the homeowners' association, assessed fees and maintained the homeowners' association bank account. Four years later, the homeowners' association filed a lawsuit against the defendant, claiming he breached a fiduciary duty to the homeowners' association by failing to inspect, maintain and repair construction defects and to sue subcontractors in connection with these defects. The defendant maintained, and the trial court agreed, that it had no fiduciary duty to turn over the common areas in good repair. The Court of Appeals held that it was error to make this finding as a matter of law. The court relied on O.C.G.A. § 23-2-58, which defines a confidential or fiduciary relationship under Georgia law, and which states that such a relationship may be created by "the facts of a particular case." The court concluded that under the facts alleged, a jury could find that the claimed repair issues fell within the defendant's "fiduciary duties as a corporate officer to protect corporate property." Citing the fact that the defendant had authority to act on behalf of the homeowners' association, the court also found that its ruling was supported by agency principles. The Court did not refer to O.C.G.A. § 14-3-830 or § 14-3-842, which set forth the duties of directors and officers of Georgia non-profit corporations.

***Rigby v. Flue-Cured Tobacco Cooperative Stabilization Corp.*, 327 Ga. App. 29, 755 S.E.2d 915 (2014) - Foreign nonprofit corporation's articles and bylaws construed to determine the plaintiffs' status as members, their stock ownership did not depend on the issuance of share certificates and claims for an accounting denied because inspection rights constituted an adequate remedy at law.**

A group of Georgia tobacco farmers sold their tobacco to the defendant, a North Carolina-based flue-cured tobacco cooperative, from time to time over a period of several decades. Through these sales, they became members of the cooperative and were issued common stock. The most recent of the plaintiffs to have received stock did so in 1993, and evidence showed that most of the plaintiffs had stopped doing business with the cooperative by 2001 or shortly thereafter. Among other things, the cooperative administered a federal subsidy program until that program was discontinued in 2004. At that time, in connection with a shift in the cooperative's business plan, the cooperative informed flue-cured tobacco farmers by letter that only farmers who signed on to its new exclusive marketing agreement would remain members of the cooperative for 2005. In effect, failure to sign on to the new agreement would result in being purged from the membership, although this would not preclude farmers from "rejoining" the cooperative in future years by signing an exclusive agreement.

The plaintiffs filed suit against the cooperative in 2007, claiming that they were entitled to an accounting of its capital account and contributions made by the plaintiffs, certain distributions, and specific performance to reinstate them as members by issuing their stock certificates. The plaintiffs also claimed that the cooperative breached contractual duties by denying them the opportunity to enter into exclusive marketing agreements and for failing to pay certain dividends, and that it breached fiduciary duties. Finally, the plaintiffs sought a declaration as to their membership status in the cooperative.

The trial court found that the plaintiffs were no longer members of the cooperative, and the Court of Appeals agreed. The court found that the cooperative's bylaws unambiguously allowed the cooperative to purge inactive members from its membership rolls without a hearing, which the cooperative did in 2003.

The Court of Appeals also affirmed the trial court's denial of specific performance to issue stock certificates to the plaintiffs. Here, the court found that the cooperative was under no apparent obligation to issue stock certificates, noting that there was no dispute that the plaintiffs actually were issued the stock. Settled Georgia law holds that "one who has subscribed and paid for corporate stock is entitled to all the rights and responsibilities of ownership, whether the stock certificates have been issued to him or not."

Turning to the request for an accounting, the court found that O.C.G.A. § 14-3-1604 did not authorize court-ordered inspection of the cooperative's records because the cooperative is a foreign corporation organized under North Carolina law. An equitable claim for accounting was also unavailable under the circumstances, because North Carolina's statutory scheme for the inspection of books and records allows members to petition for a court-ordered inspection, and is therefore an adequate remedy at law.

The court then addressed the claim by two of the plaintiffs that they were denied the opportunity to sell tobacco to the cooperative following the 2004 letter announcing the exclusive marketing program. The two plaintiffs alleged that they received the letter and communicated their interest in the program, but the Court of Appeals agreed with the trial court that this was insufficient, because it was undisputed that neither plaintiff signed the exclusive marketing agreement.

A final note of interest involved the court's treatment of the plaintiffs' breach of fiduciary duty claims. The plaintiffs claimed that the cooperative breached fiduciary duties owed to them by revoking their membership, withholding distributions, preventing them from accessing books and records, and failing to provide them with contracts. The Court of Appeals applied the *lex loci delicti* rule and concluded that "if a breach of fiduciary duty was committed, it was committed in North Carolina." Interestingly, this may have proven to be outcome determinative in this case. While noting that Georgia law provides that a corporation does not have a fiduciary relationship with its stockholders, *see ULQ, LLC v. Meder*, 293 Ga. App. 176, 180-81 (2008), the Court of Appeals here found North Carolina authority suggesting that such a duty may exist under North Carolina law as to non-profit farming cooperatives. The Court therefore concluded that it was error for the trial court to hold that the cooperative owed the plaintiffs no fiduciary duty as a matter of law.

D. LIMITED LIABILITY COMPANY DEVELOPMENTS.

***Gwinnett Community Bank v. Arlington Capital, LLC*, 326 Ga. App. 710, 757 S.E.2d 239 (2014) - Evidence of LLC's negative net worth held insufficient to show that LLC was insolvent for purposes of creating a fiduciary relationship between its directors and creditors.**

The plaintiff, Gwinnett Community Bank ("GCB"), sued an LLC and its principal to recover amounts owed on a promissory note. The LLC was the debtor and the principal was a guarantor. In addition to its claims on the note, GCB asserted fraud and breach of fiduciary duty claims against the defendants, based on allegations that the principal transferred approximately $6 million in LLC and personal real estate assets to the principal's family members or other entities he controlled in 2007 and 2008, and failed to disclose asset transfers in connection with the annual renewals of the note in those years. A divided Court of Appeals affirmed the trial court's grant of summary judgment to the defendants on the fraud claim, finding that the principal was not obligated to disclose the 2007 transfer because the property in question was never listed as collateral, and that the 2008 financial statement was accurate as of the effective date specified in the statement.[2]

While the Court was divided on the fraud question, there was no dissent from the ruling that the principal owed no fiduciary duty to GCB. It is well-settled that borrowers do not owe fiduciary duties to their lenders. GCB's argument was based on the principle of corporate law that a corporation's directors owe a limited fiduciary duty to creditors once the corporation becomes insolvent, requiring them to refrain from taking actions that would grant them a preference over other creditors, *see, e.g., Ware v. Rankin*, 97 Ga. App. 837, 838 (1958). GCB contended that the principal's transfers of assets for allegedly inadequate consideration violated his fiduciary duties to GCB. Without deciding any other issue (including whether the rule in *Ware* applies with equal force in the context of LLCs), the Court found that GCB had failed to show evidence that the LLC was insolvent at the time of the transfers. In the Court's view, GCB's evidence showed only that the LLC had a negative net worth at the end of 2008, which the Court deemed to be insufficient.

***Arnsdorff v. Papermill Plaza, LLC*, 326 Ga. App. 438, 756 S.E.2d 668 (2014) – LLC's obligations to pay lease commission held to be contingent on unsatisfied provisions in LLC operating agreement requiring a redevelopment plan.**

In this case, the Court of Appeals held that under a provision of an LLC's operating agreement, an alleged member of an LLC was not entitled to commissions resulting from a lease

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[2] The case was decided by a seven-judge *en banc* court, with two judges concurring in the majority opinion, one judge concurring in the judgment only and a three-judge dissent on the graud count, so the decision is physical precedent only under Ga. Ct. App. Rule 33(a) as to the fraud ruling.

entered into by the LLC. The plaintiff claimed to be the successor in interest to Papermill Partners, one of the two original members of the LLC, which was formed to redevelop a shopping center. Per the LLC's operating agreement, the other member was the managing member. The operating agreement provided that Papermill Partners was to "develop a detailed plan for the redevelopment of the Property," which plan was subject to the final approval of the managing member. The agreement went on to state that "once adopted," the LLC would engage Papermill Partners to implement the plan. It was undisputed that the development plan contemplated in the operating agreement was never created, approved or adopted, and the Court of Appeals found no evidence that any redevelopment pursuant to the plan ever commenced or that Papermill Partners was engaged to coordinate leasing. The court held that the operating agreement expressed a clear intent that the LLC's obligations to engage and pay Papermill Partners was contingent upon the approval and adoption of a development plan. While the trial court had ruled against the plaintiff on a separate basis not specified in the opinion, the Court of Appeals affirmed under the "right for any reason" doctrine.

***Uhlig v. Darby Bank & Trust Co.*, 565 Fed. Appx. 883 (11th Cir. 2014) – LLC members held not liable for their alleged misrepresentations because they acted on behalf of the LLC.**

The Eleventh Circuit entered a *per curiam* order affirming the district court's grant of summary judgment in favor of two LLC members on third-party claims that they misrepresented the condition of a condominium building to a purchaser. The court of appeals affirmed on the basis of the district court's decision which it attached. In granting the defendants' summary judgment motion, the court had found that the plaintiff was required "to show that Brown and Croll acted as individuals, not as members of Drayprop," citing and quoting O.C.G.A. § 14-11-1107(j), which states that "[a] member of a limited liability company is not a proper party to a proceeding . . . against a limited liability company, solely by reason of being a member of the limited liability company." *See Uhlig v. Drayprop, LLC*, 2013 WL 5532883 (S.D. Ga. Oct. 4, 2013). For the reasons discussed in last year's Survey, we consider this analysis to be incorrect because, despite § 14-11-1107(j), LLC members are legally responsible for their own tortious conduct regardless of whether they commit it on behalf of the company or not.

***Osborne v. Drayprop, LLC*, 2014 WL 4926284 (S.D. Ga. Sep. 30, 2014) - Principals involved in building renovation held not personally liable for fraud and breach of contract.**

In a subsequent decision related to *Uhlig v. Darby Bank & Trust Co.*, the district court granted summary judgment to two principals involved in the renovation of a condominium building and sale of units inside the renovated building, holding that there was no evidence that they were acting on their own behalf as opposed to on behalf of the corporate entities they served. The plaintiffs claimed that they purchased a condominium unit on the basis of sales materials and oral representations relating to the timing and details of renovations to the building. They brought claims against numerous defendants for fraud, negligent misrepresentation and breach of contract. Among the defendants were the condominium's developer Drayprop, LLC and the entity in charge of the renovations, Marley Management. Also named as defendants were two individuals described as "part-owners of companies that held financial interests in Defendant Drayprop and Defendant Marley." The plaintiffs claimed that the two individuals actually made the misrepresentations that induced them to purchase the unit, and also that they breached contracts between them and the plaintiffs.

The district court found that the plaintiffs had failed to come forward with any evidence that the two individuals ever acted as individuals rather than as the alter egos of Drayprop and Marley. The court applied the rule that "a member of a limited liability company is not a proper party to a proceeding…against a limited liability company, solely by reason of being a member of the limited liability company." Interestingly, the court's analysis focused on this principle, as well as the elements of an alter ego claim (which it found were not satisfied), even though the plaintiffs had argued that the two individuals were involved in the creation and distribution of sales materials for the condominium, that one of the individuals made direct representations to the plaintiffs regarding the absence of asbestos that were allegedly false, and that the individuals executed loan documents. The court did not acknowledge that principle of Georgia law that a corporate insider who personally participates in a tort can be personally liable without regard to alter ego principles. (Worth noting in this regard, the court went on to evaluate the merits of the fraud and misrepresentation claims as brought against Drayprop, found them to be without merit, and granted Drayprop's motion for summary judgment as to these claims. The court also granted summary judgment to the defendants as to the contract claims, finding that none of the defendants were parties to the sale of the condominium unit to the plaintiffs.)

***Inland Atlantic Old National Phase I, LLC v. 6425 Old National, LLC,* 329 Ga. App. 671, 766 S.E.2d 86 (2014) - LLC member may owe fiduciary duties based on management of the venture's affairs, even if not expressly designated as a manager in the operating agreement.**

This was a dispute between members of a joint venture structured as an LLC. The joint venture was formed in 2007 by a group referred to as "Inland Atlantic," the defendant 6425 Old National, LLC ("Old National"), and a third party. The purpose of the joint venture was to develop a shopping center in south Fulton County. The joint venture agreement specifically provided that the business and affairs of the venture would be managed by Inland Atlantic. However, it also provided that Old Atlantic would be responsible for certain tasks relating to the development of the site, such as supervising the work of the site development contractor.

In 2011, the parties agreed that development was ready to go forward, and thus entered into a buyout agreement and simultaneous Site Development Agreement. Under the Buyout Agreement, Inland Atlantic bought out Old National's interest in the joint venture (which appears to have actually been held by Old National's sole owner, a fact that does not appear to have affected the Court of Appeals' decision). Under the Site Development Agreement, Old National agreed to supervise and manage the first phase of the site development. The Site Development Agreement was conditioned on the parties' entering into the Buyout Agreement, and the Buyout Agreement was conditioned on the hiring of a contractor selected by Old National. Issues arose regarding the work performed by the contractor as well as Old National's supervision of that work, and Old National was not selected to supervise and manage the second phase of development. Old National sued Inland Atlantic for breach of the Site Development Agreement, and Inland Atlantic counterclaimed for breach of the Site Development Agreement as well as breach of fiduciary duty, fraud and negligent misrepresentation. The breach of fiduciary duty claim was premised on Old National's duties to members of the joint venture as the "designated site work partner."

The Court of Appeals held that even though the joint venture agreement had designated Inland Atlantic as the managing member of the venture, there was a question of fact as to whether Old National was actually managing some of the joint venture's affairs, particularly with regard to site development. Under O.C.G.A. § 14-11-305(1), members and managers of LLCs owe a duty of care to the LLC that is akin to the duties owed by corporate officers and directors under O.C.G.A. §§ 14-2-830 and 14-2-842. The Court of Appeals recognized past precedent holding that "[i]f a member is not managing the affairs of the company, then no such duty attaches." *ULQ, LLC v. Meder*, 293 Ga. App. 176, 184 (2008). Here, however, the fact that Inland Atlantic was designated as manager was not dispositive in the court's view, because the agreement had specifically delegated certain duties and responsibilities to Old National. This precluded summary judgment in Old National's favor on Inland Atlantic's breach of fiduciary duty claim. The court further found that Old National may have assumed a duty to disclose material information regarding the contractor's financial condition and ability to complete the first phase of development.

E. PARTNERSHIP LAW DEVELOPMENTS.

***Maree v. ROMAR Joint Venture*, 329 Ga. App. 282, 763 S.E.2d 899 (2014) – Equitable dissolution of partnership.**

Bank of America, in its capacity as trustee of a trust acting as the Managing Joint Venturer of the ROMAR Joint Venture, brought suit on behalf of the Joint Venture to dissolve the Joint Venture due to management deadlock. One of the seven joint venturers opposed the dissolution and filed counterclaims against the Managing Joint Venturer.

The parties filed cross motions for summary judgment, and the trial court granted dissolution of the Joint Venture, holding that judicial dissolution was proper under the Georgia Partnership Code, O.C.G.A. § 14-8-32, because the circumstances rendered dissolution equitable.

On appeal, the opposing joint venturer argued that partnership law did not apply to the Joint Venture. However, the Court of Appeals held that this argument was waived because it was not asserted in the trial court. The Court of Appeals reviewed the long history of the Joint Venture, which had been established in 1971 through a joint venture agreement by two friends, to hold and manage real property. Over time, the ownership of the Joint Venture had passed on to various relatives and trusts, with the current ownership comprised of seven joint venturers. At the time of the appeal, the Joint Venture held two pieces of real property that were leased to commercial tenants. Over many years, the joint venturers had alternately agreed to dissolve the joint venture or appoint a new manager, but were never able to get the necessary agreement to do so. Additionally, there was significant hostility between the opposing joint venturer and the Managing Joint Venturer. The opposing joint venturer argued that there was no management deadlock, and thus dissolution was not permitted, because the Managing Joint Venturer was able to continue managing the properties and distributing profits to the joint venturers. The court noted that all of the parties agreed that there was a long history of stalemate and contention between the parties, and that the Partnership Code section on judicial dissolution of a partnership, O.C.G.A. § 14-8-32(a), allows a court to order dissolution where the circumstances render dissolution equitable. The Court of Appeals affirmed the trial court's decision, holding that the trial court did not abuse its discretion in granting the equitable remedy of dissolution.

Additionally, the Court of Appeals held that dissolution was proper under the terms of the Joint Venture Agreement, which stated that dissolution would be caused by management deadlock such that "no action can be approved nor taken for lack of the agreement of a number of the Joint Venturers entitled to vote upon the action sufficient to approve any of the proposed courses of action." The court held that the record supported a finding of deadlock under the Joint Venture Agreement because although all of the joint venturers "have at times sought either dissolution or liquidation or the appointment of a new manager, the parties have not been able to effectuate either alternating course of action." Accordingly, the court held that the Joint Venture's management was deadlocked and it should be dissolved under the Joint Venture Agreement.

***First Benefits, Inc. v. Amalgamated Life Ins. Co.*, 2014 WL 6956693 (M.D. Ga. Dec. 8, 2014) - District court addresses evidence of formation of partnership, proof of damages in partnership dispute.**

In this case, the district court held that the plaintiffs came forward with sufficient evidence to create a genuine issue of fact as to whether the parties formed a partnership, in the absence of a written partnership agreement. The plaintiffs were in the business of selling insurance products to workers. They entered into an agreement with the defendant, ALICO, to sell ALICO's insurance products as well as those of another carrier, Boston Mutual. According to the plaintiffs, the parties agreed to split the profits from sales of both ALICO and Boston Mutual products. Significantly, the plaintiffs produced testimony that prior to their relationship with ALICO, they kept all of the money they earned selling Boston Mutual products.

There was no formal written partnership agreement among the parties; instead, their agreement was formed via a letter and "multiple" subsequent conversations. The plaintiffs claimed that a partnership was formed and that the partnership agreement was breached by ALICO when it failed to perform one of its agreed-to roles, which was to set up enrollment sessions with companies or unions that the alleged partnership was targeting. The plaintiffs also claimed that ALICO began to work with a different enrollment company to service accounts that the plaintiffs allegedly brought to the partnership. Their claims included breach of partnership, breach of fiduciary duty, misappropriation of business opportunities and a request for an accounting.

ALICO argued in response that the terms of the parties' agreement were too indefinite to be enforced, and that there was no evidence that the parties formed a partnership. Plaintiffs proffered affidavit testimony from one of the plaintiff's principals which detailed specific terms that the parties agreed to, such as the accounts to be serviced, the manner in which profits would be split, and the roles that each party would play. The Court found that these details could be sufficient to render the contract enforceable. It also held that the plaintiffs had created a genuine issue of fact as to whether their business arrangement was a partnership. The Court cited the general maxim that an agreement to form a partnership can be either express or implied, and outlined various factors which indicate the existence of a partnership, including the existence of a common enterprise, sharing of risks, expenses and profits, a joint right of control over the business, and a joint ownership of capital. Under Georgia law, while no one of these factors is dispositive, evidence of profit sharing is considered to be *prima facie* evidence of a partnership. Here, the Court was persuaded that the plaintiffs' testimony that all parties received a percentage of profits from both ALICO and Boston Mutual sales could support a finding that the parties were sharing profits (and not, as ALICO had contended, operating under a commission model).

The court also addressed the plaintiffs' ability to ultimately prove damages. ALICO contended that the plaintiffs could not recover lost profit damages because those damages were too speculative as to their causation and amount. The court held that any ruling in favor of ALICO would be premature at this stage, nothing that the plaintiffs could eventually be entitled to a formal accounting of partnership affairs under O.C.G.A. § 14-8-22. To be entitled to an accounting under § 14-8-22, a plaintiff must show both the existence of a partnership and wrongful exclusion from the partnership business. The Court found that both of those issues remained in dispute.

***Godwin v. Mizpah Farms, LLLP*, 330 Ga. App. 31, 766 S.E.2d 497 (2014) - Court of Appeals addresses statute of limitations for claims seeking dissolution of partnership and statutory requirements for dissolution.**

The patriarch of a farming family sued a family limited partnership, his son and three grandchildren, claiming that he was tricked into signing the documents that formed the partnership and conveyed parcels of land from him to the partnership. The plaintiff and the individual defendants formed the partnership, Mizpah Farms, LLLP ("Mizpah Farms"), in 2000, ostensibly for estate planning reasons. The plaintiff executed the limited partnership agreement as the sole general partner and as a limited partner, and the individual defendants executed it as limited partners. In November, 2000, the plaintiff signed a deed conveying his interest in ten parcels of land to Mizpah Farms. On the same day, he executed an assignment transferring all of his "Limited Partnership Units and Partnership Rights" in Mizpah Farms to the individual defendants, as a gift. The plaintiff filed an application seeking to dissolve Mizpah Farms on December 17, 2010, claiming that he was tricked into signing these documents. On March 30, 2012, the plaintiff filed a second amended application which asserted claims against the individual defendants in addition to the claim for dissolution. Specifically, the plaintiff asserted claims for fraud, breach of fiduciary duty and breach of contract, alleging that (1) the individual defendants engaged in a fraudulent scheme to deprive him of his land, and (2) the individual defendants diverted partnership income and removed the plaintiff as general partner in breach of the LLLP agreement. The trial court entered summary judgment in favor of the defendants on the ground that all of the plaintiff's claims were barred by applicable statutes of limitation.

On appeal, the Court of Appeals first addressed the question of when the limitation periods began to run. The plaintiff argued that the limitation periods should be tolled under O.C.G.A. § 9-3-96 due to the fiduciary relationship between himself and his son. The Court cited the general principle that a statute of limitation begins to run on the date a cause of action accrues, which means the first date upon which the plaintiff could have successfully maintained the cause of action, and recognized that this could require an individual analysis of each claim asserted. With respect to the plaintiff's claims that he was fraudulently deprived of his land, the

Court found that the plaintiff could reasonably have discovered the transfer of his interest in the land by December 31, 2000, the effective date of the transfer. The Court found the plaintiff's claims that he was tricked into signing the documents to be unavailing, finding that the fact of the transfer was clear from the documents and that there was no evidence that he was prevented from reading them. Under Georgia law, a party signing a document is under a duty to read it.

With respect to the plaintiff's claims that he was deprived of partnership income and was wrongfully removed, the Court applied O.C.G.A. § 9-3-24, which imposes a six year limitations period for breach of a written contract. Since Georgia does not have a specific statute of limitations for breach of fiduciary duty claims, courts generally apply the most analogous statute, which the Court here found to be § 9-3-24 because the alleged acts would violate the LLLP agreement. The plaintiff again argued that the limitation periods were tolled by his fiduciary relationship with his son. The Court found that this fact alone did not toll the statute of limitations, and that the plaintiff was also required to prove fraudulent concealment preventing him from discovering his cause of action. Reviewing the record, the Court found that there was no evidence of fraudulent concealment, and that instead, the evidence showed that the plaintiff had signed tax returns and other documents which revealed Mizpah Farms' income, and that the parties' course of conduct suggested that they believed the plaintiff to be the general partner at all times until the litigation was filed. The Court therefore found the claims to be time barred to the extent that they accrued on or before December 17, 2004, six years before the initial petition was filed.

Turning to the request for dissolution, which was timely because it dealt with the affairs of the partnership going forward, the critical question was whether the plaintiff was still a partner as of the date of his initial filing, and thereby entitled to file an application for dissolution under O.C.G.A. § 14-9-802. The Court found that a material dispute of fact existed as to whether the plaintiff's transfer of his limited partnership units in December, 2000 also served as his withdrawal from the partnership. Its review of the record revealed that the plaintiff may have retained some general partnership units and that the parties all believed that he had remained a general partner until the lawsuit arose.

One interesting implication of the membership issue, not discussed in the Court's opinion, is whether it should have affected the Court's statute of limitations analysis. In a decision from last year, the Middle District of Georgia held that in disputes among partners, the statute of limitations does not begin to run until after the dissolution of the partnership. *See First Benefits, Inc. v. Amalgamated Life Insurance Co.*, 2013 WL 4011015 (M.D. Ga. Aug. 6, 2013). The district court in that case applied old and nearly forgotten Georgia Supreme Court opinions which in its view clearly held that the statute did not run until dissolution. Here, the Court of Appeals did not address the *First Benefits* decision and the older Supreme Court cases, or their potential application if it is found that the plaintiff was a partner at the time he brought the action.

F. TRANSACTIONAL CASES.

***Legacy Academy v. Mamilove, LLC*, 328 Ga. App. 775, 761 S.E.2d 880 (2014) – Rescission permitted despite disclaimer of receipt of any representations and a merger clause.**

In this case, a sharply divided seven-judge *en banc* Court of Appeals held that parties to a franchise agreement were entitled to rescind the contract based on fraudulent oral representations that induced them to enter into the contract, notwithstanding that the contract itself contained the plaintiffs' disclaimer that they had received such representations, as well as a merger clause. Finding an exception to the general rule that a party who fails to read a contract cannot later set up a fraud in the inducement claim based on representations that differ from the contract terms, the court's 4-3 majority opinion held that the evidence supported a finding that the plaintiffs were rushed and pressured into signing the contract before they could read it. The court thus upheld a jury award in favor of the plaintiffs.

The case involves the plaintiffs' purchase of a day care franchise. The plaintiffs claimed that during their initial discussions with the franchisors, they were provided with an income and expense statement that was purportedly based upon the actual income and expenses of other franchises that were already in operation. The plaintiffs showed evidence at trial, including the testimony of other franchisees, indicating that the financial information was not an accurate historical representation of actual income and expenses as had been represented. The plaintiffs claimed that they decided to open a franchise on the basis of the earnings representations. When the plaintiffs were presented with the 37-page franchise agreement and a related 17-page offering circular, they were told by the defendants that they had to sign the documents that day or risk losing the location where they had decided to open the franchise. The plaintiffs claimed that they thus signed the documents without having read them.

The franchise agreement contained a disclaimer stating that "[f]ranchisor expressly disclaims the making of, and Franchisee and each Owner acknowledge that it has not received from Franchisor or any party on behalf of Franchisor, any representation…as to the potential volume, profit, income or success of the business licensed under this Agreement…." The agreement also contained a more specific disclaimer to the effect that the defendants made no representation of expected earnings except as set forth in the circular. Finally, the agreement had a standard merger clause stating that it represented the "entire agreement of the parties with respect to the matters conned herein."

The defendants argued that this language foreclosed the plaintiffs' claims based on fraud in the inducement of the agreement, and moved for directed verdict in the trial court. The trial court denied the motion, and the jury found in favor of the plaintiffs. On appeal, the Court of Appeals' majority affirmed. The majority recognized that "[i]t is well-settled law in Georgia that a party who has the capacity and opportunity to read a written contract cannot afterwards set up fraud in the procurement of his signature to the instrument based on oral representations that differ from the terms of the contract…" It found, however, that an exception exists for fraud that "prevents the party from reading the contract." Reviewing the evidence, the majority found that the evidence was sufficient to support a finding that the defendants intentionally prevented the plaintiffs from reading the agreement before signing it, thus invoking the exception. Based on this finding, the entire agreement, including its merger clause, was no longer valid and enforceable against the plaintiffs.

The dissenting judges filed a separate opinion contending that the majority applied the exception to the rule too broadly. In the view of the dissent, the evidence showed only that the plaintiffs were "pressured" or "rushed" into signing the agreements, not that they were prevented from reading the documents before signing them. The dissenting judges would have found that the plaintiffs were thus bound by the terms of the franchise agreement, including its disclaimers and merger clause.

***Roca Properties, LLC v. Dance Hotlanta, Inc.*, 327 Ga. App. 700, 761 S.E.2d 105 (2014) – Factual dispute regarding alleged misrepresentations precluded summary judgment in sellers' suit to collect purchase price for sale of ballroom dance competition assets.**

In this case, the Georgia Court of Appeals held that issues of fact remained as to whether the purchasers of a ballroom dance competition in an asset sale were fraudulently induced by the sellers into making the purchase. Accordingly, the court held that it was improper for the trial court to award summary judgment in favor of the sellers in their action to recover the unpaid portion of the sale price.

The sellers were the founders and promoters of the Hotlanta Dance Challenge, a professional ballroom dance competition held in Atlanta each October. In 2006, the sellers founded a second dance competition, the Rising Star Ball, aimed at amateur dancers. The Rising Star Ball was held in a second ballroom in conjunction with the Hotlanta Dance Challenge. The two competitions were promoted through a single brochure but in separate sections. They awarded separate prizes, and the professional competition was sanctioned by a national dance organization while the amateur competition was not. The sellers formed several companies to conduct the professional competition, including one called Hotlanta Dance Challenge, Inc. ("HDC"). The sellers also registered an entity called "Rising Star Newcomers Ball, Inc." with the Georgia Secretary of State, but this entity never had an organizational meeting or issued any stock.

In 2010, the parties entered into negotiations for the sale of HDC's assets. The purchasers signed a letter of intent to purchase HDC's assets "as they relate solely to" the Hotlanta Dance Challenge, and did not mention the Rising Star Ball. During negotiations, the sellers provided the purchasers with information regarding the number of paid entries for the 2009 Hotlanta competition. The number, 7,195, included over 2,000 paid entries for the 2009 Rising Star Ball, without mentioning that it had included the Rising Star Ball. The sellers also provided handwritten notes purporting to relate to HDC's financial performance for 2009. The sellers claimed that the notes reflected estimates and projections (since actual numbers were allegedly not available), while the purchasers claimed that the numbers were represented to reflect HDC's actual financial performance. The purchasers claimed that the numbers reflected a profit that was significantly higher than what was reflected on the company's 2009 tax return, which they obtained after the sale closed.

The sellers filed suit after the purchasers failed to make payment on promissory notes that made up a portion of the payment price. The purchasers claimed that the sellers' inclusion of entry figures for the amateur competition artificially inflated the total number of paid entrants represented to them. The sellers' response was that the purchasers did, in fact, purchase both competitions. The trial court entered summary judgment in favor of the sellers on this point, but the Court of Appeals found that the purchasers had presented at least a question of fact as to whether the amateur competition was part of the sale. First, the court noted that the competitions were sufficiently distinct in terms of format and the way in which they were marketed to be considered two separate competitions. Second, the sale documents were, in the court's view, ambiguous regarding the conveyance of the amateur competition. Here, the court seems to have focused on the fact that the amateur competition was never mentioned by name in the schedule of assets, even though the definition of "Purchased Assets" was admittedly broad. Finally, because the court identified an ambiguity in the sale documents, it considered parol evidence, including statements by the purchasers during deal negotiations that they had no interest in hosting the amateur competition (and, in fact, they did not host one). The court was also clearly influenced by the fact that the purchasers entered into a separate non-compete arrangement with one of the sellers which contemplated that the seller would host his own amateur dance competition in Atlanta.

Regarding the financial information, the Court of Appeals again found that the purchasers had raised a question of fact regarding the purpose of the 2009 notes, thus precluding summary judgment in favor of the sellers. While statements relating to future events, such as projected future earnings, are generally not actionable, the handwritten notes in this case were not dated and did not clearly state their purpose. The court also found that the testimony regarding the meaning of the notes was conflicting, and that there was some evidence that the purchasers relied on the notes as representations of HDC's actual financial performance.

***Clark v. PNC Bank, N.A.*, 2014 WL 359932 (N.D. Ga. Feb. 3, 2014); *Jackson v. Bank of America, NA*, 578 Fed. Appx. 856 (11th Cir. 2014); *Wang v. Bank of America, N.A.*, 2014 WL 2883501 (N.D. Ga. June 24, 2014); *Duncan v. Citimortgage, Inc.*, 2014 WL 172228 (N.D. Ga. Jan. 15, 2014) – Per O.C.G.A. § 14-2-1106, a merger effectuates the transfer of assets, including loans, by operation of law, entitling the surviving corporation to foreclose on mortgages acquired in the merger.**

Continuing a recent trend, there have been a number of decisions, all arising from foreclosures, addressing the transfer of assets, rights and liabilities by operation of O.C.G.A. § 14-2-1106 as a result of a merger. All of the decisions followed the now well-settled rule that the successor entity has the authority to foreclose on a property without the need for a formal assignment from the original holder of the security deed. For instance, in *Clark v. PNC Bank, N.A.*, the wrongful foreclosure plaintiff initially executed a security deed in favor of National City Mortgage, which then merged into National City Bank. In 2009, National City Bank merged into PNC Bank, the defendant. The plaintiff claimed that PNC lacked standing to foreclose on his property without a recorded assignment of the security deed to PNC. But the court disagreed, holding that the merger itself was sufficient to cause the transfer of the deed.

The court noted that Georgia corporate law and federal banking law are in accord as to this principle, citing the Georgia Supreme Court's 2013 decision in *National City Mortgage Co. v. Tidwell*, 293 Ga. 697 (2013) and the National Banking Act, 12 U.S.C. § 215a(e).

Similarly, in *Jackson v. Bank of America, NA*, the Eleventh Circuit addressed O.C.G.A. § 14-2-1106 in the context of claims that a foreclosure sale was void because the identity of the foreclosing bank, Bank of America, did not appear in the public record before the sale. Here, the security deed was first executed in favor of Mortgage Electronic Registration Systems, Inc. and later was assigned to BAC Home Loans Service, LLP ("BAC"). BAC thereafter merged into Bank of America. The Eleventh Circuit held that as a result of the merger, the rights under the security deed "vested automatically" in Bank of America "without any conveyance, transfer or assignment." Like the district court in *Clark*, the Eleventh Circuit cited the Georgia Supreme Court's recent decision in *Tidwell*.

Wang v. Bank of America N.A. involved similar facts and produced the same result. The court held that the foreclosing bank, again Bank of America, automatically obtained all rights and interests of the previous holder of the security deed. The court again cited *Tidwell* as well as the National Banking Act.

Finally, in *Duncan v. Citimortgage, Inc.*, the court noted and applied the principle in passing before addressing and rejecting other contentions of the mortgagor.

G. LITIGATION ISSUES.

1. Capacity to Sue and Standing

***Patel v. Patel*, 2014 WL 5025821 (S.D. Ga. Oct. 7, 2014) - Fifty percent shareholder's claims against former CEO and other shareholders held to be derivative claims; corporation's assignment of claims to the plaintiff deemed collusive under federal diversity statute.**

This dispute is unrelated to the other case styled *Patel v. Patel* on page 18. Here, the plaintiff, a California resident, was a fifty percent shareholder of two Georgia corporations, GOPAL and NSP. The defendants, all Georgia residents, formerly owned the other fifty percent of GOPAL and NSP, and one of them was the former chief executive officer of both entities. In 2012, the defendants sold their shares to a new investor group (the "Purchasing Group"). The plaintiff alleged that the defendants, in the time prior to the sale, converted corporate funds for their own use and misrepresented the companies' financial condition to the plaintiff. The defendants moved to dismiss on the grounds that the court lacked subject matter jurisdiction under the federal diversity statute. The district court granted the motion to dismiss.

At issue was the two corporations' purported assignment to the plaintiff of any and all claims they may have had against the defendants. The assignment was executed in May, 2014, two months before the suit was filed. The plaintiff then filed his suit in federal court, individually and as assignee of GOPAL and NSP. Under 28 U.S.C. § 1359, an assignee can maintain a diversity action so long as the assignment was not made collusively in order to invoke federal jurisdiction. To decide whether the assignment was collusive, the district court needed to determine whether the plaintiff would have been the real party in interest, which in turn required it to determine whether the plaintiff's claim prior to the assignment would have been derivative or direct, a question of Georgia substantive law.

The court found that the claims were derivative and could not have been brought by the plaintiff directly, which combined with other factors rendered the assignment to be collusive. The court applied settled Georgia precedent under which claims of misappropriation and breach of fiduciary duty are generally presumed to be derivative claims belonging to the corporation. It found that neither of the recognized exceptions were applicable here. First, the court found that the plaintiff had failed to allege a special injury separate and independent from the injury sustained by the corporation. Citing *Grace Bros., Ltd. v. Farley Indus., Inc.*, 264 Ga. 817 (1994), the court reasoned that the plaintiff could not prevail without also showing an injury sustained by GOPAL and NSP. Second, the court found that the Georgia common law exception for suits by shareholders of closely held corporations under *Thomas v. Dickson*, 250 Ga. 772, 301 S.E.2d 49 (1983) was inapplicable because other parties, namely the Purchasing Group, could be prejudiced by a direct action. Under the closely held corporation exception, a plaintiff may proceed directly when the circumstances show that the reasons for the general rule requiring a derivative suit do not apply. The court reasoned that a recovery by the plaintiff would consist of funds owed to the corporation and that the Purchasing Group would be prejudiced if the plaintiff were allowed to recover these funds individually rather than on behalf of the corporation.

Applying the rest of the federal test for determining whether an assignment is collusive under 28 U.S.C. § 1359, the court found that the plaintiff could not have maintained a diversity action but for the assignment, that the assignment lacked a rational business purpose, and that the consideration received by the corporation was illusory, thus rendering the assignment to be collusive.

***East Cobb Fastpitch, Inc. v. East Cobb Bullets Fastpitch, Inc.*, 2014 WL 3749216 (N.D. Ga. July 29, 2014) – Nonprofit corporation held to have the power to sue despite failure to adopt bylaws or appoint a board of directors.**

In this trademark infringement dispute, the plaintiff was a non-profit competitive softball league founded in 1996 and incorporated in 2001. In 2013, the defendants, who were coaches in the league, formed a rival league. The plaintiff claimed that the defendants used its trademarks to promote their new league. The defendants moved for summary judgment, claiming that the plaintiff was not a valid legal entity and therefore could not bring suit. The court's opinion addresses some noteworthy points about a corporation's capacity to sue and be sued.

Under O.C.G.A. § 14-3-302(1), a non-profit corporation has the power to sue in its corporate name unless that power has been restricted in its articles of incorporation. The defendants acknowledged that the plaintiff was properly incorporated, put forth no evidence that its corporate existence had been terminated, and pointed to nothing in the plaintiff's articles of incorporation that restricted its ability to file the lawsuit. Instead, they contended that the plaintiff was not a valid legal entity because it had no formal Board of Directors and no official by-laws. The court indicated that it was aware of no authority holding that a corporation loses its capacity to sue by failing to observe these corporate formalities. The defendant also argued that the plaintiff was the alter ego of its founder. The Court of Appeals found that this was irrelevant to the question at hand: "although the alter ego doctrine may permit a party to hold an individual defendant liable for the activities of a corporation, there is no authority stating that the doctrine may be used to prevent a corporate entity from asserting its own claims." Finally, the court held that a genuine dispute existed as to whether the plaintiff's founder was authorized to file suit on behalf of the plaintiff, since testimony did not support the defendants' assertion that the plaintiff's founder had been terminated from his role with the plaintiff.

***Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC*, 325 Ga. App. 694, 754 S.E.2d 655 (2014) – Foreign LLC entitled to seek confirmation of nonjudicial foreclosure despite lack of certificate of authority to do business in Georgia.**

In this appeal from the confirmation of a non-judicial foreclosure sale, the Court of Appeals held that the seller, a Florida limited liability company, was not required to obtain a certificate of authority prior to initiating the proceedings.

Under O.C.G.A. § 14-11-702(a), a foreign limited liability company seeking to transact business in Georgia must obtain a certificate of authority from the Georgia Secretary of State, subject to exceptions listed in O.C.G.A. § 14-11-702(b). O.C.G.A. § 14-11-711(a) further provides that a foreign LLC transacting business in Georgia must obtain this certificate of authority prior to initiating any legal proceedings in a Georgia court. The seller argued that it did not transact any business in Georgia outside of the loan and foreclosure involved in the confirmation proceedings, thus bringing its activities within the exceptions listed in Section 702(b). In response, the appellants pointed out that the seller's confirmation petition alleged that it "does business in the state of Georgia" and argued that this statement was an admission *in judicio*. The Court of Appeals disagreed, holding that whether the seller transacts business in Georgia within the meaning of O.C.G.A. § 14-11-702 is not a statement of fact but rather a question for the court to decide. In the court's analysis, the activities undertaken by the seller did not render it to be transacting business in Georgia, since the seller's activities were confined to its conducting the foreclosure sale.

***Department of Transportation v. McMeans*, 294 Ga. 436, 754 S.E.2d 61 (2014) – Corporate property owner, not its sole shareholder, had right to recover for property value in condemnation, but shareholder was entitled to assert claims for other business losses.**

In this case, the Georgia Supreme Court applied the settled principle of Georgia law that corporations are separate legal entities from their constituent individuals in holding that the corporation, rather than its sole owner, was the proper party to assert claims for business losses resulting from a condemnation. In 2010, the Department of Transportation initiated condemnation proceedings for property owned by the appellee, McMeans. In addition to the real property at issue, McMeans was the sole owner of McMeans Leasing, Inc. ("MLI"), which did business on the property. The condemnation petition named both McMeans and MLI as defendants. In November, 2010, McMeans filed an answer in which he admitted to being the owner of the property and claimed damages of $1.3 million. A month later, *MLI* filed an amendment to the answer indicating that the answer had been for MLI and effectively seeking to substitute itself for McMeans, while McMeans simultaneously filed a new answer alleging damages of $1.3 million as a result of lost uses of the property, interruption in his business income, loss of business, and other damages to his business in addition to the value of the real estate. In February, 2011, McMeans filed an amendment to his answer in which he added a separate claim for business loss. The DOT moved to strike the December and February pleadings, and the trial court granted the motion. Both McMeans and MLI appealed. MLI's appeal was dismissed by the Court of Appeals on jurisdictional ground and did not reach the Georgia Supreme Court. McMeans' appeal dealt with the trial court's decision to strike his February amendment. The Court of Appeals reversed, finding that business losses can be recovered as a separate element of loss in a condemnation proceeding "when the business belongs to the landowner and there is a total taking of the business."

The Supreme Court held that the trial court did not err, and thus, it reversed the Court of Appeals. The critical point, as far as the Supreme Court was concerned, was that McMeans and MLI are separate legal entities. The Court issued a reminder that even when a corporation is owned by one person, "great caution should be taken by courts in disregarding the corporate entity." That principle, applied to the facts here, meant that MLI and not McMeans was the proper party to assert any claim for business losses resulting from the corporation. Since McMeans' amendment to his answer purported to bring a claim for business losses incurred by MLI, the Court held that it was not error for the trial court to strike the amendment.

***Georgia Casualty & Surety Company v. Excalibur Reinsurance Corp.*, 4 F. Supp. 3d 1362 (N.D. Ga. 2014) – Definition of "Principal Office" in O.C.G.A. § 14-2-140(22) used to interpret arbitration agreement.**

This was a contract dispute in which the plaintiff brought a federal court complaint seeking to enforce arbitration clauses in the parties' contracts. In granting the defendant's motion to dismiss the complaint, the court addressed a dispute over the location of the plaintiff's principal office. The operative arbitration provision stated that the applicable law would be that of "the state in which [plaintiff] has its principal office." The plaintiff had its principal office in Georgia when the parties entered into the contract, but it later was acquired, and most of its executive functions were moved to Missouri. Its most recent registration statement indicated that its "Statutory Home Office" was in Georgia but that its "Main Administrative Office," "Mail Address," and "Primary Location of Books and Records" were in Missouri. The plaintiff's underwriting, claims and loss control and marketing functions remained in Georgia.

The court found that the plaintiff's principal office was in Missouri. Finding that the contract itself did not define "principal office," the court looked to O.C.G.A. § 14-2-140(22), which defines the term as "the office in or out of this state so designated in the annual registration where the principal executive offices of a domestic or foreign corporation are located." In the court's opinion, that best described the Missouri office since that was "where plaintiff performs its executive functions."

2. Fraudulent Transfer Liability of Corporate Insiders, Alter Ego, Piercing the Corporate Veil and Other Forms of Secondary Liability

***Smith v. Georgia Energy USA, LLC*, 2014 WL 5643919 (S.D. Ga. Nov. 4, 2014) - Owners of business who did not participate in management of business held not liable for fraud and not subject to alter ego liability.**

This was a class action based on fraud and violations of Georgia's Uniform Deceptive Trade Practices Act, in which the plaintiffs claimed that the prior owners and managers of three service stations fraudulently calibrated the gasoline pumps to deliver less fuel. During the relevant time period, the stations were owned by corporations that were wholly owned by the two daughters of their original proprietor, Cisco. After transferring ownership of the businesses to his daughters, Cisco remained as chief executive officer and chief financial officer of the businesses, and he continued to manage the businesses. The daughters, on the other hand, took no active part in the day to day management of the businesses and claimed that they were not involved in any significant corporate decisions. Cisco negotiated the sale of the stations in 2006 to a third party. The daughters received the proceeds of the sale and used some of those proceeds to pay off corporate debts, but they were not personally involved in negotiating the sale price.

The district court granted the daughters' motion for summary judgment as to the claims against them. While a corporate shareholder who takes part in the commission of a tort by the corporation may be personally liable to injured third parties, the court found no evidence of personal participation in this case. The plaintiffs' evidence showed only that Cisco as well as low-level service station employees were aware of and involved in the alleged pump-rigging scheme. In the court's view, this evidence did not rebut the daughters' testimony that they had no involvement in the alleged scheme or in the management of the businesses generally. The court also cited past decisions holding that liability for active participation could not be premised on allegations of mere nonfeasance.

The plaintiffs also sought to hold the daughters individually liable under alter ego principles. The court again held in favor of the daughters, finding that while veil-piercing claims are typically fact-intensive, there was not sufficient evidence in this case to create a genuine issue of fact. The facts that the daughters were generally unaware of the companies' bookkeeping and accounting records, did not hold formal meetings and did not keep minutes were insufficient, in the court's view, to support piercing the veil, particularly since the evidence showed that they had entrusted these tasks to their father. The court also found no evidence of commingling personal and corporate assets on the daughters' part, noting that their receipt of corporate profits from the sale of the stations is not the same as commingling. While the companies' observance of corporate formalities may have been "sloppy," as the court put it, this alone is insufficient to supporting piercing the corporate veil absent further evidence that the defendants abused the corporate form and made it a "mere instrumentality" for the conduct of their own affairs.

***Target Corp. v. Amerson*, 327 Ga. App. 110, 755 S.E.2d 556 (2014); and *In re Southern Home & Ranch Supply, Inc.*, 2014 WL 4071901 (Bankr. N.D. Ga. Aug. 11, 2014) – Decisions regarding corporate insiders for purpose of Georgia Uniform Fraudulent Transfers Act.**

In these two cases, the courts addressed the provisions of the Georgia Uniform Fraudulent Transfers Act ("UFTA") dealing with transfers to insiders and affiliates. Under the UFTA, certain transfers may be set aside if made "with actual intent to hinder, delay, or defraud any creditor of the debtor." The statute lists certain "badges of fraud" that courts may consider in making their determination. One of these badges of fraud is whether the transfer "was to an insider." *See* O.C.G.A. § 18-2-74(b)(1).

In *Target Corp. v. Amerson*, the Court of Appeals held that a debtor's conveyance of her residence to her employer pursuant to a corporate relocation program was not fraudulent as to her creditors. In so holding, the court concluded that Target, the debtor's employer, was not an "insider" under the UFTA's definition. The plaintiffs in *Target Corp.* were judgment creditors of the employee. In early 2009, the employee relocated to North Carolina to open a new Target distribution center there. Pursuant to Target's relocation program, the company's relocation agent purchased the employee's Georgia home after it failed to sell for a period of time. Upon attempting to sell the property, Target learned of the plaintiffs' judgment lien. Target thus filed a petition to quiet title on the property, and the plaintiffs filed a lawsuit naming Target and the employee as defendants. The plaintiffs claimed, *inter alia*, that the employee fraudulently transferred the property to Target for the purpose of avoiding the judgment, and they asked for the sale to be set aside.

The Court of Appeals noted that O.C.G.A. § 18-2-71(7)(A) defines "insider" as including the debtor's relatives, partners or partnerships, or "[a] corporation of which the debtor is a director, officer, or person in control." Here, the debtor was merely an employee and not a director, officer or person in control of Target. The plaintiffs cited numerous other badges of fraud, which the Court of Appeals also rejected, concluding that the "undisputed evidence" showed that the employee conveyed the property to Target for purposes of her relocation and not out of "some nefarious intent to defeat [the plaintiffs'] right to collect" their judgment.

In *In re Southern Home*, the bankruptcy court addressed the UFTA only briefly, finding that a company wholly owned by a director and 20% owner of the debtor was an "affiliate" of the debtor and therefore an insider under O.C.G.A. § 18-2-71(7)(D). Indeed, as the court recognized, the UFTA defines "affiliate" to include a corporation 20% or more of whose outstanding voting stock is owned by a person who also directly or indirectly owns 20% or more of the debtor's stock. *See* O.C.G.A. § 18-2-71(1)(B).

***In re Bilbo*, 2014 WL 689097 (Bankr. N.D. Ga. Feb. 5, 2014) – Reverse piercing of corporate veil and other attempts to impose debtor's liability on his corporation rejected.**

In this adversary proceeding, the bankruptcy court addressed claims that the debtor's trustee was entitled to avoid over $50,000 in payments made by the debtor to the defendant corporation. It was alleged that the debtor owned a business incorporated as "Bilbo's Bar-B-

Que, Inc.," which the bankruptcy trustee termed as a sole proprietorship. The alleged preferential payments were made via checks identifying the drawer as "Bilbo's BBQ" and endorsed by the debtor. The trustee filed a complaint seeking to set aside the transfers under the Bankruptcy Code and for attorneys' fees. The defendant moved to dismiss for failure to state a claim.

The trustee advanced three theories why the transfers were avoidable notwithstanding that they appeared to involve the transfer of corporate property rather than that of the debtor. First, the trustee argued that the debtor treated his company as a sole proprietorship without observing corporate formalities. The court recognized this to be a "reverse veil piercing" theory, which has been soundly rejected in Georgia in nearly all situations. In a reverse piercing claim, the plaintiff seeks to pierce the veil to satisfy the debts of an individual out of the corporation's assets. The court followed the many cases refusing to recognize a reverse veil-piercing theory. Second, the trustee argued that the name "Bilbo's BBQ" which appeared on the checks was a fictitious trade name and that the court should thus treat the liabilities of Bilbo's BBQ as that of the debtor. In fact, Bilbo's BBQ was the trade name used for the business, though it was not registered. The trustee found support for his position from a 1990 Georgia Court of Appeals opinion holding that "[a]n undertaking by an individual in a fictitious or trade name is an obligation of the individual." *Jones v. Burlington Indus.*, 196 Ga. App. 834 (1990). The court, however, found *Jones* to be distinguishable because all that had happened here was that the trade name Bilbo's BBQ left some words off of the corporate name. The court found this to be an "irrelevant misnomer" that did not cause any confusion to persons dealing with the corporation as to the identity of the business. Third and finally, the trustee argued that the fact that Bilbo's Bar-B-Que, Inc. was incorporated did not mean that all of the debtor's business activities must be treated as acts of the corporation. The court rejected this theory as well, finding that there were no allegations from which it could be inferred that "'Bilbo's BBQ's' business activities are anything more than that of the corporation's." The court thus granted the motion to dismiss for failure to state a claim.

***In re Geer,* 522 B.R. 365 (Bankr. N.D. Ga. 2014) - Bankruptcy Court denies creditors' attempt to reach assets of debtor's corporation, citing rule against reverse veil piercing.**

In this adversary proceeding, the bankruptcy court applied Georgia's now well-settled prohibition against "reverse veil piercing," that is, piercing the corporate veil so as to allow creditors to reach a corporation's assets in order to satisfy the debts of a corporate insider. Here, the debtor formed an entity called Red Barchetta, LLC ("RB"), a Delaware corporation, through which he provided consulting services. RB was owned 2 percent by the debtor and 98 percent by a family trust set up for the benefit of the debtor's immediate family members. The record indicated that RB was validly incorporated, had a separate bank account and filed its own tax returns, but there was also evidence that the debtor regularly used RB funds to pay personal expenses for himself and his family.

The plaintiff, who was a former business partner of the debtor, argued first that the debtor created RB and conducted business under the corporate name with the intent to hinder, delay or defraud creditors, which under the bankruptcy laws would provide a basis for denying a discharge to the debtor. The court reviewed the record and concluded that there was insufficient evidence of any such intent on the debtor's part. It observed that there is nothing unusual about professionals, including consultants, conducting business under a corporate name, and that many legitimate reasons exist for doing so. The court further noted that the debtor's regular practice of transferring funds from RB to himself was not evidence of an intent to hinder, delay or defraud his creditors; quite to the contrary, when funds were transferred from RB to the debtor, they became available for creditors to reach.

The plaintiff next argued that the court should disregard RB's corporate status and treat RB and the debtor as one. The court recognized this to be a request for reverse veil piercing. In its ordinary form, veil piercing permits creditors of a corporation to reach a shareholder, officer or other principal's assets by proving that the principal disregarded the corporate entity and made it a mere instrumentality for the transaction of the principal's own affairs. The court observed that Georgia law treats veil piercing as a remedy, not an independent cause of action, and that the Georgia appellate courts have rejected efforts to extend this remedy to creditors seeking to satisfy an individual's debts from a corporation's assets. *See Acree v. McMahon*, 276 Ga. 880, 881 (2003). Subsequent cases have made it clear that the *Acree* rule applies even in the case of a single shareholder corporation. *See Holiday Hospitality Franchising, Inc. v. Noons*, 324 Ga. App. 70 (2013). The court found these authorities to be controlling and declined to treat RB's transfers to be those of the debtor.

Finally, the plaintiff challenged the sufficiency of the debtor's disclosures with respect to transfers from RB, based on the same premise that RB and the debtor should be treated as one and the same. The court, reiterating its earlier findings, held that any failure to identify RB's transfers was not made knowingly and with intent to deceive.

***Functional Products Trading, S.A. v. JITC, LLC*, 2014 WL 3749213 (N.D. Ga. July 29, 2014) – Veil piercing allowed in default judgment context.**

The plaintiff brought a civil RICO and fraud action against an LLC and its principal. After the individual defendant failed to appear for his deposition in violation of a court order, the court struck the defendants' answer and the clerk entered a default. The plaintiff then moved for default judgment on its claims. Its motion sought, *inter alia*, to pierce the corporate veil and hold the principal personally liable to it. While the motion for default judgment was unopposed, the plaintiff still bore the burden of proving its entitlement to pierce the veil. The court recognized that veil piercing principles are as equally applicable to LLCs as they are to corporations. The plaintiff must show that the individual disregarded the LLC entity, that the unity of interest and ownership is such that the separate personalities of the individual and LLC do not exist, and that continuing to treat the LLC as a separate entity would promote injustice or protect fraud.

Here, the plaintiff's burden was complicated by the fact that the individual defendant had avoided his deposition (which was the circumstance that led to the default). The analysis thus centered on the sufficiency of the pleadings under the federal pleading standards laid out in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The plaintiff's operative complaint alleged that the LLC was substantially undercapitalized, financially unstable and insolvent; that the individual defendant looted the LLC by transferring funds to himself and other insiders, and that the LLC and individual defendant acted in the nature of a RICO enterprise, with common ownership and management and rapid movement of funds between the two. The court agreed with and adopted a magistrate's report and recommendation finding that the plaintiff's allegations were "barely but just sufficient enough" to permit the entry of summary judgment. The magistrate found (and the district court in adopting the magistrate's report agreed) that the plaintiff was entitled to some leeway for two reasons. First, the defendants answered the complaint rather than move to dismiss it under *Iqbal* and *Twombly*, indicating to the magistrate that they understood the nature of the claims brought against them. Second, the defendants' failure to comply with discovery orders left the plaintiff unable to discover evidence that might have supported allegations that were made upon information and belief, given that those allegations related to matters that were peculiarly within the possession and control of the defendants. The court's order thus recognized that under federal pleading standards, certain allegations in support of an alter ego claim can be pled upon information and belief.

3. Jurisdiction and Service of Process

***Drumm Corp. v. Wright*, 326 Ga. App. 41, 755 S.E.2d 850 (2014) – Remote parent corporation held not to be subject to personal jurisdiction in Georgia, where it paid taxes on behalf of Georgia corporation but did not conduct business here.**

In this interlocutory appeal, the Georgia Court of Appeals held that an out-of-state company that indirectly owns a Georgia nursing home was not subject to personal jurisdiction in Georgia for tort claims arising from the death of a resident of the home. The defendant in question, Drumm, was a Delaware entity with its principal place of business in California. Its business was to invest in healthcare companies. Drumm was the parent company of GGNSC Holdings, LLC, which in turn was the parent company of Golden Gate National Senior Care LLC, which in turn was the parent company of GGNSC Equity Holdings LLC, which in turn was the parent company of the entity operating the nursing home. Drumm was one of many entities named in the lawsuit, which was filed by the decedent's widow. Drumm moved to dismiss the lawsuit for lack of personal jurisdiction, attaching to its motion an affidavit laying out the complicated ownership structure described above. The affidavit also addressed facts typically relevant to a motion to dismiss for lack of personal jurisdiction: that Drumm never owned, leased or possessed real property in Georgia, that it had no office, telephone number or bank account in Georgia, that it had no employees or agents in Georgia, and that it did not own or operate any Georgia nursing home facilities, and that it did not own, operate or otherwise control the nursing home involved in the lawsuit. Drumm acknowledged, however, that it files Georgia franchise tax returns on behalf of certain subsidiaries and pays a franchise tax.

The district court denied the motion to dismiss, but the Court of Appeals held that this was error in light of the facts presented in the affidavit, which were not rebutted by any evidence from the plaintiff. The plaintiff claimed that Drumm transacted business in Georgia, one of the possible bases for personal jurisdiction under Georgia's long arm statute, O.C.G.A. § 9-10-91. Georgia courts have construed the long arm statute as reaching to the maximum extent permitted by federal due process concerns. Under the well-established test, jurisdiction exists if (1) the nonresident defendant has purposefully done some act or consummated some transaction in Georgia, (2) the cause of action arises from or is connected with such act or transaction, and (3) the exercise of jurisdiction by a Georgia court does not offend notions of traditional fairness and substantial justice.

Here, the court found that facts submitted in Drumm's affidavit supported a finding that Drumm did not transact business in Georgia. The court's analysis focused on two facts identified by the plaintiff as supporting the exercise of jurisdiction. The first was Drumm's admission that it pays franchise taxes in Georgia. The court found no controlling Georgia case, so it looked to cases from other states, which generally held that the filing of state tax returns by a parent company on behalf of its subsidiaries was not sufficient by itself to constitute minimum contacts with that state. The second significant fact consisted of deposition testimony by the affiant in a West Virginia civil suit indicating that Drumm's vice presidents were "somewhat involved" in "healthcare operations" and that Drumm's board reviewed operating budgets of the subsidiaries. The court found that this testimony did not necessarily mean that Drumm controlled its subsidiaries. The court found that the Drumm executives' "involvement" in healthcare operations was explained by other testimony indicating that some of the officers are also employed by the subsidiaries. It also found that Drumm's review of operating budgets did not rise to the level of control absent some showing that Drumm provided input or approved the budgets. Rather, in the court's view, the conduct was "consistent with the parent's investor status."

***Meyn America, LLC v. Tarheel Distributors, Inc.*, 36 F. Supp. 3d 1395 (M. D. Ga. 2014) – LLC officer held subject to jurisdiction where he made decisions that resulted in hiring a former employee of plaintiff and misappropriating trade secrets; fiduciary shield defense rejected as not recognized in Georgia.**

In this trade secret dispute, the district court found that the plaintiff alleged sufficient facts to support the exercise of personal jurisdiction over a North Carolina corporation's president. The plaintiff was a Georgia LLC which manufactures, sells and services poultry processing machines. The trade secret claims were based generally on allegations that the defendants (the North Carolina company and its president) misappropriated trade secrets that it obtained after hiring a former employee of the plaintiff.

The individual defendant moved to dismiss for lack of personal jurisdiction and for failure to state a claim. As in *Drumm Corp. v. Wright*, the jurisdictional analysis centered on O.C.G.A. § 9-10-91(1), under which a Georgia court may exercise personal jurisdiction over a defendant who transacts business in the state. The district court followed well-settled Georgia law rejecting the "fiduciary shield" doctrine, which would prohibit a court from exercising personal jurisdiction over an individual based solely upon acts undertaken by that person in a corporate capacity.[3] Instead, the individual defendant's contacts with Georgia were relevant regardless of the capacity in which they were undertaken.

[3] See *Amerireach.com, LLC v. Walker*, 290 Ga. 261, 266 (2011) (holding that the fiduciary shield doctrine conflicts with the plain language of O.C.G.A. § 9-10-91. As the district court pointed out, this is not the same as saying that a corporation's contacts are imputed to the individual defendant. Rather, a corporate officer's contacts with the forum state must be assessed individually.

The court denied the individual defendant's motion, finding that the plaintiff's complaint alleged sufficient facts supporting jurisdiction over the defendant. Specifically, the complaint alleged that the individual defendant was personally involved in the decisions to hire the plaintiff's former employee (who was residing in Georgia), to receive and use the trade secrets allegedly stolen from the plaintiff, and to sell in Georgia products derived from the trade secrets. The court concluded that these allegations, taken as true, supported an inference that the individual defendant was a "primary participant" in the alleged wrongdoing.

The court's decision illustrates the substantial overlap between the jurisdictional analysis and a merits analysis in the context of a claim seeking to hold a corporate officer permanently liable. Indeed, the court employed roughly the same analysis in rejecting the individual defendant's argument that he could not be held individually liable for torts committed by his company. The court found that the complaint sufficiently alleged the individual defendant's direct participation in a scheme to use trade secrets taken from the plaintiff. Under settled Georgia law, an officer who personally participates in a tort committed by the corporation may be personally liable to the injured party without regard to veil piercing principles.

The court also rejected the defendants' motion to dismiss the complaint for failure to state a claim under the Georgia Trade Secrets Act, but granted the motion as to the plaintiff's various common law claims, holding that they were preempted by the GTSA.

***Ralls Corporation v. Huerfano River Wind, LLC,* 27 F. Supp. 3d 1303 (N.D. Ga. 2014) – Personal jurisdiction found where out-of-state defendants induced Georgia lender to finance a wind farm development in third state; fiduciary shield argument rejected.**

In another decision involving the exercise of personal jurisdiction over corporate representatives in their individual capacities, the district court held that the plaintiff's complaint alleged sufficient facts to support a finding of jurisdiction. The plaintiff, Ralls Corporation, entered into a complex set of transactions relating to the construction of a wind farm in Colorado. The defendants included U.S. Innovative Renewable Energy, LLC ("USIRE"), a Delaware LLC, its sole member Jerry Zhang, and Jerry's wife Lucy Zhang. The plaintiff alleged that the transactions at issue were entered into as a result of negotiations between itself, USIRE and the Zhangs. The actual entity that Ralls eventually contracted with was Huerfano River Wind, LLC, ("HRW") a Colorado LLC allegedly purchased by USIRE to effectuate the deal. The lawsuit involved two loan transactions entered into by Ralls: a loan agreement in which Ralls loaned HRW over $13.4 million, and a promissory note executed by HRW. The plaintiff alleged that HRW was in default and asserted contract claims against that entity. The lawsuit also named USIRE and the Zhangs, asserting alter-ego liability, conversion, unjust enrichment, fraudulent transfer liability, and civil conspiracy against all or some of those defendants.

USIRE and the Zhangs moved to dismiss for lack of personal jurisdiction. Their motion was unsupported by evidence, so the court's inquiry was confined to determining whether the complaint alleged facts that would bring those defendants within the ambit of O.C.G.A. § 9-10-91. As in *Drumm Corp.* and *Meyn America*, the question was whether the defendants transacted business in Georgia. It was alleged that during negotiations with Ralls, the Zhangs made several trips to Georgia and also communicated with Ralls' representatives and attorneys in Georgia.

The defendants argued that these contacts were not sufficient. The court rejected this argument insofar as it sought to invoke the "fiduciary shield" doctrine. As discussed in regard to the *Meyn America* case above, Georgia courts have rejected the fiduciary shield doctrine.

The defendants also argued, however, that the plaintiff's claims did not arise out of the defendants' contacts with Georgia during negotiations of the deal. Under Georgia's personal jurisdiction test, a defendant's transaction of business in Georgia only justifies the exercise of jurisdiction if the plaintiff's claims arise out of that transaction of business. Here, the defendants argued that all of their contacts with Ralls in Georgia occurred prior to the execution of the relevant agreements, while the claims all dealt with conduct occurring after execution. Since the agreements dealt with a wind farm to be constructed out of state, it was argued that Ralls' claims did not relate to events or omissions that would occur in Georgia. The district apparently considered it to be a close question, but held that the complaint sufficiently related the defendants' contacts with Georgia to their claims. Of particular importance to the court was the fact that the complaint did allege *some* contacts between USIRE and the Zhangs and Georgia following the execution of the agreements (such as e-mails between the parties and meetings in Georgia) which indicated that the defendants remained involved in the management of the wind farm. The court also found that the execution of the loan documents (and, by implication, the negotiations in Georgia) were alleged to be a "but for" cause of some of Ralls' claims. The court thus denied the motion to dismiss for lack of personal jurisdiction.

The defendants also moved the court to dismiss for failure to state a claim. Of note was the district court's consideration of the plaintiff's alter ego claim, which was brought against defendants USIRE and Jerry Zhang. First, the court explained that traditional conflict of laws rules apply to alter ego claims, rejecting the defendants' suggestion that the court must adhere to the internal affairs doctrine (i.e., by applying Delaware law to govern the veil piercing of USIRE, a Delaware entity and Colorado law for HRW). Second, assuming Georgia law to apply, the court found that the plaintiff's allegations were sufficient to support a plausible alter ego claim. Specifically, the complaint alleged that Jerry Zhang exercised complete dominion and control over USIRE and the Colorado entity, that he caused the breaches in question, that he caused the Colorado entity to assume liabilities that it was undercapitalized to meet, that he failed to observe corporate formalities, and that he "has not claimed that USIRE (and not HRW) owns the wind farm."

***Websters Chalk Paint Powder, LLC v. Annie Sloan Interiors, Ltd.*, 2014 WL 4093669 (N.D. Ga. Aug. 18, 2014) – Personal jurisdiction not found over corporations founder and officer, the court rejecting both defendant's fiduciary shield argument and plaintiff's argument for jurisdiction on veil-piercing principles.**

This was another case addressing the court's personal jurisdiction over a corporate representative. Here, the court found that the complaint failed to allege sufficient facts demonstrating that the court could exercise personal jurisdiction over the individual defendant.

The individual defendant, Lisa Rickert, was the founder and an officer of corporate defendant JDD, a Louisiana corporation based in New Orleans. The lawsuit was brought by a Georgia LLC who alleged that the defendants, including Rickert, violated their trademarks.

Rickert moved to dismiss, arguing that the court lacked jurisdiction because any acts attributed to her were conducted in her capacity as a corporate officer.

The court rejected this argument insofar as it implicated the fiduciary shield doctrine, which Georgia courts have rejected, as described in the cases above. But the court nonetheless held that the complaint failed to allege facts showing that Rickert personally participated in conduct in Georgia. The court observed that "[o]n its face, the Amended Complaint does not distinguish between the actions of Rickert or [the corporate defendants]. There are no facts in the Complaint that suggest Rickert personally participated in a business transaction in Georgia."

The court also considered and rejected an argument that Rickert was subject to personal jurisdiction under veil piercing principles. This argument was apparently based on the fact that one of the defendants' websites referred to Rickert "in the first person" in place of the corporation when describing the business—an allegation that clearly did not suffice to pierce the corporate veil.

The court also found that it lacked personal jurisdiction over a United Kingdom corporation and dismissed the claims against the remaining defendants on the merits.

***Simms v. Deutsche Bank National Trust Co.*, 2014 WL 273236 (N.D. Ga. January 22, 2014); *Fitzpatrick v. Bank of New York Mellon*, 580 Fed. Appx. 690 (11th Cir. 2014); *Stone v. Bank of New York Mellon*, 2014 WL 61480 (N.D. Ga. Jan. 8, 2014) – Requirements for valid service of process on corporations.**

In these three federal cases, all of which involved wrongful foreclosure claims, the courts held that the plaintiffs failed to properly serve process on corporate defendants under Federal Rule of Civil Procedure 4, which incorporates Georgia law principles regarding service on a corporation.

In *Simms*, the plaintiff attempted to serve corporate and individual plaintiffs by certified mail. There was no indication that the plaintiff ever sent any of the defendants a request for waiver of service as contemplated under Federal Rule 4 or O.C.G.A. § 9-11-4(d). The court held that service was thus insufficient as to all of the defendants. Specifically with regard to the corporate defendants, O.C.G.A. § 9-11-4(e)(1) provides that a plaintiff serves process on a corporation or limited liability company by delivering a copy of the summons and complaint "to the president or other officer of the corporation, secretary, cashier, managing agent, or other agent thereof." The court applied settled authority holding that the delivery of a summons and complaint to the corporation by mail, without obtaining a waiver of personal service, is insufficient. The court thus dismissed the action.

In *Fitzpatrick*, a *pro se* plaintiff attempted to obtain a waiver of personal service from a limited liability company (specifically, a law firm). The plaintiff's request for waiver of service, however, was addressed to the firm itself rather than to its authorized agent. The district court held that service was insufficient under Federal Rule 4, and the Eleventh Circuit affirmed on appeal. The court held that Federal Rule of Civil Procedure 4(d), which it found to be comparable to O.C.G.A. § 9-11-4(d)(3), requires the waiver request to be delivered to an *agent* of the LLC authorized to receive service of process. A waiver request directed to the LLC itself does not satisfy this requirement. The plaintiff's request also was defective in that it enclosed only one copy of the waiver form, whereas the rule requires that two copies be provided.

Finally, in *Stone*, a *pro se* plaintiff had obtained a default against a corporate defendant, but the corporation later successfully moved to set the default aside on the grounds that service of process was insufficient. Nearly a year later, the court dismissed the action without prejudice for want of prosecution. The plaintiff then filed an application to appeal *in forma pauperis*. Under the relevant legal standard, the plaintiff was required to show that an appeal would be non-frivolous as to the issue appealed. The court reexamined its earlier decision finding that service was insufficient, and held that an appeal of that decision would be frivolous. Since the corporate defendant was a foreign corporation whose registration to transact business in Georgia had been withdrawn by the time of the lawsuit, the plaintiff was required to follow O.C.G.A. § 14-2-1520(b)-(c). That statute requires the plaintiff to serve a copy of the summons and complaint on the Georgia Secretary of State, and to deliver a copy of the process "to the chief executive officer, chief financial officer, the secretary of the foreign corporation, or a person holding a comparable position." The plaintiff in this case served the Secretary of State, but did not offer any evidence that she mailed a copy of the summons and complaint to any officer of PMSI.

4. Evidence, Business Records Act

***Greenstein v. Bank of the Ozarks*, 326 Ga. App. 648, 757 S.E.2d 254 (2014) – Failure to establish original lending bank's name change results in ruling that bank acquiring loan upon bank closure did not demonstrate it was real party in interest.**

In this and a subsequent case, *Ware v. Multibank* (see discussion below), the Georgia Court of Appeals addressed the evidence necessary to establish that a bank is the holder of a note, an issue that has become rather complicated in light of recent bank failures, mergers and acquisitions in the wake of the Great Recession. In *Greenstein*, a seven-judge *en banc* decision, a divided court ruled that the plaintiff bank failed to demonstrate that it was the real party in interest entitled to enforce certain notes and guaranties.

The case involved two promissory notes executed in 2006 and 2008, respectively, both of which were governed by Georgia law. There was no dispute that the plaintiff bank was the real party in interest as to the 2008 note. The 2006 note was executed in favor of Farmers and Merchants Community Bank and related to a loan secured by real property in Tennessee. The plaintiff bank foreclosed on the Tennessee property through a non-judicial foreclosure process, then brought an action in Georgia to recover the deficiency, and moved for summary judgment. The trial court granted summary judgment in favor of the bank.

On appeal, as to the 2006 note, defendants argued that the bank had not established through admissible evidence that it was the successor in interest to Farmers & Merchants Community Bank. The bank had submitted an affidavit from one of its special asset managers testifying that Farmers and Merchants Community Bank had changed its name to First Choice Community Bank 1874 in 2007, that this entity then merged into First Choice Community Bank in 2010, that it was thereafter closed and the FDIC was appointed its receiver, and that the FDIC transferred First Choice's assets to the plaintiff bank through a purchase and assumption agreement (which was attached as an exhibit). The defendants challenged the admissibility of the affidavit.

The 4-3 majority held that the testimony was admissible only insofar as it addressed the closure of First Choice, the appointment of the FDIC, and the sale of its assets to the plaintiff. The court held that the purchase and assumption agreement was admissible as a business record under O.C.G.A. § 24-8-803 (6) and that the affiant established a foundation for its admission. But the majority viewed the rest of the testimony, dealing with the name change from Farmers and Merchants Community Bank to First Choice and the subsequent merger, to be inadmissible for lack of a proper foundation. The affidavit did not indicate that the affiant had personal knowledge of the name change and merger, and was unaccompanied by any business records addressing these matters. There was no indication that the affiant was associated with Farmers and Merchants or First Choice or that he was otherwise personally involved in the name change or merger. Since the bank presented no other evidence of the name change and merger, the majority concluded that the plaintiff had failed to meet its burden to prove that it was the real party in interest.

The three dissenting judges found that the bank's affidavit was sufficient because the plaintiff succeeded in interest to the business records of First Choice, thus making the affiant competent to testify about the information contained in the plaintiff's records. The dissent took issue with what it viewed as an opportunistic attempt by the defense to interpose an objection to the evidence even though the record reflected no real question that the name change and merger took place.

With regard to the 2008 note, the defendants did not challenge the plaintiff's standing, but argued that the parties' choice of Georgia law to govern the notes required the bank to comply with Georgia's statutory confirmation procedures following foreclosure. The court disagreed, unanimously holding that O.C.G.A. § 44-14-161(a) is not applicable where the property foreclosed upon is located outside of Georgia.

***Ware v. Multibank 2009-1 RES-ADC Venture, LLC,* 327 Ga. App. 245, 758 S.E.2d 145 (2014) – Business records foundation regarding transferred failed bank loan held adequate.**

In *Ware v. Multibank*, decided a month after *Greenstein*, the Court of Appeals held that the plaintiff bank's business records evidence was sufficient to establish the plaintiff's right to enforce promissory notes against the defendant. The defendant executed three promissory notes in favor of Omni National Bank in 2006 and 2007. Omni was closed in March, 2009, and the FDIC was appointed as its receiver. In February 2010, the FDIC assigned the notes in question to the plaintiff through various allonges and assignments.

In the trial court, the bank moved for summary judgment, submitting an affidavit of an attorney who served as attorney-in-fact for the entity serving as the plaintiff's manager. The affiant described her personal access to and knowledge of the plaintiff's records, which included the FDIC's transfer of Omni's records to the plaintiff. The affiant testified about and purported to authenticate various documents, including the notes and corresponding documents, the assignments and allonges that transferred the notes from the FDIC to the plaintiff, and the payment histories for the notes. The defendant argued that because the affiant did not have a proper foundation for her testimony because she was never employed by Omni. The court rejected this, holding that "[w]e have consistently rejected similar arguments in the past." The court then cited O.C.G.A. § 24-8-603 (6) and found that the documents were properly authenticated. The court also found without merit the defendant's efforts to question the trustworthiness of Omni's records by pointing to the prosecution of certain former Omni executives over allegations of fraud, finding that the defendant failed to relate these generalized allegations to his specific loans. The court did find the plaintiff's evidence to be deficient in one respect. It held that the affiant's failure to attach documents relating to the amount owed on one of the notes precluded summary judgment as to that note.

Interestingly, the panel that ruled unanimously in favor of the plaintiff in this case included one judge from the *Greenstein* majority and one dissenting judge. The factual difference between the two cases seems to be that in *Greenstein*, the plaintiff was required to prove an extra link in the chain of custody as a result of the name change and merger involving the original lender. Yet the problem was essentially the same — the fact that the affiant had no personal involvement in any events prior to the transfer of the loans to the plaintiff.

***Thomas v. State Bank & Trust Company*, 330 Ga. App. 274, 765 S.E.2d 443 (2014) - Purchase and Assumption Agreement with FDIC held insufficient to prove that assets of failed bank were transferred to successor bank.**

In a third case dealing with the transfer of notes held by a failed bank, the Court of Appeals followed *Greenstein* in holding that the plaintiff bank had failed to prove that it was the current holder of the subject notes and guaranty.

In this case, the defendants obtained a loan in 2009 from The Buckhead Community Bank, which failed later that year. The FDIC entered into a Purchase and Assumption Agreement with the plaintiff, State Bank & Trust, pursuant to which the plaintiff agreed to purchase certain assets and assume certain liabilities of the Buckhead Community Bank. According to the plaintiff, the defendants' notes and guaranty were conveyed to it via the Purchase and Assumption Agreement, which stated that the FDIC "hereby sells, assigns, transfers, conveys, and delivers to [plaintiff], all right, title, and interest of the [FDIC] in and to all of the assets…of the Failed Bank…." Reversing the trial court, which had entered summary judgment in favor of the plaintiff, the Court of Appeals held that the plain language of the agreement only conveyed the FDIC's right, title and interest in the assets of the failed bank, but did not convey the assets themselves to the plaintiff. The agreement also did not identify any specific assets transferred. Perhaps most significantly, the Purchase and Assumption Agreement elsewhere provided, in bold print and capital letters, that the conveyance of assets purchased by the plaintiff under the agreement "shall be made, as necessary, by receiver's deed or receiver's bill of sale[.]" The plaintiff did not introduce any deed or bill of sale into evidence, but instead, relied on an affidavit of one of its employees who had been appointed as an attorney-in-fact by the FDIC. The affiant stated that the assets of the Buckhead Community Bank were transferred to the plaintiff by the Purchase and Assumption Agreement. As was the case in *Greenstein*, however, the Court of Appeals found that the affiant lacked the personal knowledge to testify as to this fact. In this case, the affiant had not been appointed as attorney-in-fact until nearly a year after the agreement was executed.

The Court of Appeals cited *Bobick v. Community & Southern Bank*, 321 Ga. App. 855 (2013) as providing useful guidance. In that case, the plaintiff introduced its purchase and assumption agreement with the FDIC as well as the assignment agreement in which the FDIC actually assigned the subject promissory notes, thus "reflecting a complete chain of assignment for the promissory note at issue[.]" A plaintiff who fails to submit competent evidence of the actual transfer has not demonstrated a complete chain of assignment.

***Hayek v. Chastain Park Condominium Association, Inc.*, 329 Ga. App. 164, 764 S.E.2d 183 (2014) – New Georgia Evidence Code requirements discussed for business records exception to hearsay rule.**

The Court of Appeals reversed the trial court's grant of summary judgment on a condominium association's claim for past due assessments and award of attorney fees. In support of its motion for summary judgment, the condominium association submitted a property manager's affidavit. He based his statements on amounts owed on an account ledger. The Court of Appeals concluded that the damages sought were "insufficiently certain" to support summary judgment. The court noted in passing that the affidavit testimony failed to meet the requirements of O.C.G.A. § 24-8-803 (6) exception to hearsay rule for business records because the affidavit "did not state that the [account ledger] entries were made at or near the time of the described events or that the entries were made by, or from information transmitted by, a person with personal knowledge and a business duty to report," as the new evidence code now requires. Without holding the ledger inadmissible, however, the court proceeded to analyze the entries, finding that it was unable to determine how payments had been applied and how the allegedly unpaid balance was derived. It concluded that given the inconsistencies and the uncertainty regarding the amount of unpaid assessments, it also could not determine whether the claimed attorney fees were reasonable.

5. Director and Officer Liability Insurance Decisions

***St. Paul Mercury Ins. Co. v. FDIC*, 774 F.3d 702 (11th Cir. 2014) - Insured vs. insured exclusion in D&O policy held ambiguous.**

As we reported in last year's survey, the FDIC's litigation against former directors and officers of failed banks has spawned a number of coverage disputes involving the scope of "insured vs. insured" exclusions in D&O insurance policies. As generally understood, an insured vs. insured provision excludes coverage for claims by one insured against another, including suits by the insured company against its officers and directors.

This case arose from the failure of Community Bank & Trust in 2010. The FDIC was appointed as receiver for the bank, and later filed suit against two former officers alleging that their tortious conduct caused the bank to suffer losses in excess of $15 million. The bank's D&O policy provided, in relevant part, that the insurer shall not be liable for claims "brought or maintained by or on behalf of any Insured or Company," subject to certain exceptions or "carve-outs." The term "Company," as used in the policy, referred to the bank and its parent company. In September, 2012, the insurer filed a lawsuit in the Northern District of Georgia seeking a declaration that coverage of the FDIC's claims was barred by, *inter alia*, the insured vs. insured exclusion. The district court found that the insured vs. insured exclusion was not ambiguous and that the FDIC had stepped into the shoes of the bank, meaning that any exclusion that would have applied to the bank also applied to the FDIC. *St. Paul Mercury Ins. Co. v. Miller*, 968 F. Supp. 2d 1236, (N.D. Ga. 2013). By contrast, only a few months earlier, a different Northern District of Georgia judge held that an exclusion for claims "by, on behalf of, or at the behest of the Company" *was* ambiguous when applied to the FDIC as receiver in a substantially similar suit against former directors and officers of a different failed bank. *Progressive Casualty Ins. Co. v. FDIC*, 926 F. Supp. 2d 1337 (N.D. Ga. 2013) (holding that the FDIC's unique role and multiple interests distinguish it from other parties who might step into the shoes of a company).

The FDIC appealed the *Miller* ruling to the Eleventh Circuit, which held that the exclusion was ambiguous and reversed on that basis. The court noted that under Georgia law, "[t]here is a low threshold for establishing ambiguity in an insurance policy." Ambiguity is generally found when a provision is susceptible to two or more constructions. In addition, under Georgia law ambiguities in an insurance contract are construed against the insurance company and in favor of the insured. Applying those principles to the case at bar, the court found that the "most compelling argument" in favor of ambiguity was "that courts who have addressed similarly worded insured v. insured exclusions have reached different results." The court specifically cited *Progressive*, as well as numerous decisions from other jurisdictions which clearly demonstrated a split in authority as to the interpretation of similar insured vs. insured clauses. The court concluded: "If the courts cannot with any degree of assurance, or unanimity, interpret exclusion provisions of this kind, that fact alone weighs heavily against the insurer because the fine print of the policy, where ambiguous, is construed in favor of the insured."

***In re Gafford*, 2014 WL 689074, (N.D. Ga. Feb. 4, 2014) – Bankruptcy stay lifted for FDIC to pursue officer liability claims against debtor with recovery limited to insurance coverage.**

In this bankruptcy adversary proceeding involving a former chief executive officer of a failed Georgia community bank, the bankruptcy court granted the FDIC's motion to modify the debtor's discharge injunction to allow the FDIC to name the debtor in a contemplated lawsuit arising from the failure of the bank, thus allowing it to proceed against the debtor's D&O insurance carrier, St. Paul Mercury Insurance Company. The debtor filed a Chapter 7 bankruptcy petition in 2011 and was discharged in 2012. The FDIC, as receiver for the failed McIntosh Commercial Bank, claimed that it planned to file suit against the debtor and other former officers and directors of the bank. The debtor was an insured under a D&O policy that the FDIC contended would provide coverage for damages recoverable against the debtor. Under the policy, the insureds bore the duty to defend against claims. It was undisputed that the debtor, having been discharged, no longer could be personally liable for an adverse judgment or for defense costs in connection with the FDIC's contemplated lawsuit.

The FDIC argued that the debtor was a necessary party to the contemplated lawsuit because otherwise, the remaining defendants would be able to present an "empty chair" by blaming any wrongdoing on the absent debtor, which would place the FDIC at a tactical disadvantage. In response, the debtor and the insurance carrier argued that the FDIC's requested relief would infringe upon the debtor's "fresh start" contemplated under the bankruptcy laws. The bankruptcy court sided with the FDIC. It based its decision largely on an Illinois district court decision and an Eleventh Circuit decision that the court found to be highly instructive because of similar facts. In the Illinois case, the court had considered similar concerns about an "empty chair" defense to be persuasive in allowing the FDIC to proceed against the debtor nominally.

The debtor and insurance carrier argued that even if the debtor has no personal monetary liability to the FDIC, allowing the FDIC to proceed against the debtor nominally would raise the specter of a potential coverage dispute between the debtor and the carrier. The carrier argued that its only obligation at the moment was to advance defense costs, which the debtor agreed under the policy to repay if it was later established that the defense costs were not covered. The court turned to *In re Jet Florida Sys., Inc.*, 883 F.2d 970 (11th Cir. 1989), in which the Eleventh Circuit rejected a similar argument on the grounds that it could not determine whether the debtor or the insurer would ultimately be responsible for defense costs. Attempting to distinguish *In re Jet Florida*, the carrier pointed out in that in the recent case *St. Paul Mercury Ins. Co. v. Miller*, 968 F. Supp. 2d 1236 (N.D. Ga. 2013), a Georgia federal district court held that coverage under a presumably similar D&O policy fell within the policy's "insured vs. insured" exclusion. (As discussed on page 51 above, this decision was subsequently overturned by the Eleventh Circuit). The carrier argued that there was far more than a speculative possibility that a future coverage dispute would be decided in its favor. But the court found that *In re Jet Florida* still controlled: "While the *Miller* decision appears to be similar to the issue here, the underlying coverage issue is not before the Court, and the Court cannot 'predict' the potential outcome of future litigation." The court also found that the debtor's "fresh start" would not be adversely affected by a potential coverage dispute, because any claims against the debtor for defense costs were discharged in the bankruptcy.

***Onebeacon Midwest Ins. Co. v. FDIC*, 2014 WL 869286 (N.D. Ga. March 5, 2014) – Insurer's declaratory judgment action against FDIC barred by 12 U.S.C. § 1821(j).**

In this case, the district court denied a motion to reconsider its earlier order dismissing an insurance carrier's declaratory judgment action against the FDIC on the grounds that it was barred by the anti-injunction provision of FIRREA, 12 U.S.C. § 1821(j). We summarized the initial decision in our 2013 survey. The action involved a D&O policy issued to Habersham Bancorp, which subsequently was closed by the FDIC. The FDIC was appointed as Habersham's receiver, and thereafter sent a claim to its former directors and officers seeking compensation for losses stemming from alleged breaches of duties owed to the bank. OneBeacon, the plaintiff in this action, filed a declaratory judgment action asserting that coverage was barred. The FDIC moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), citing lack of subject matter jurisdiction due to FIRREA.

Following the court's order granting the motion to dismiss, the plaintiff sought to file an amended complaint that it argued cured the jurisdictional defects identified in the earlier order. Specifically, the proposed amended complaint purported to drop the FDIC as a party and instead proceed only against the individual directors and officers who were insureds under the policy, seeking a declaration that the directors and officers are not entitled to coverage or reimbursement of their defense costs.

The court applied the stringent standard for a motion for reconsideration in the Northern District of Georgia, in which such motions are granted only where there is newly-discovered evidence, an intervening development or change in controlling law, or the need to correct a clear error of law or fact. The court viewed the plaintiff's motion as essentially re-litigating matters that already were addressed in the earlier decision. Turning to the proposed amended complaint, the court found that they did not cure the jurisdictional problems posed by the initial complaint. The court reasoned that even if the FDIC were not a party to the litigation, it nonetheless had an interest in the policy as a potential tort claimant, and the plaintiff's suit thus operated as an action seeking to "restrain or affect" the FDIC's powers or functions.

The court reiterated that its decision did not leave the plaintiff without a remedy, because it could pursue a claim through FIRREA's administrative process.

6. Non-dischargeability of Breach of Fiduciary Duty Claims

***In re Pervis*, 512 B.R. 348 (Bankr. N.D. Ga. 2014) – Misappropriation of corporate opportunity held to be non-dischargeable in bankruptcy; non-compete in shareholders agreement ruled unenforceable.**

In this adversary proceeding, the bankruptcy court held a trial on claims brought against the debtor by a former business associate, Brenda Pauley, and Hot Shot Kids, Inc. ("HSK"), a talent agency they had formed together. The plaintiffs asserted claims that the debtor committed fraud, usurped corporate opportunities belonging to the agency, violated non-compete provisions in the agency's shareholder agreement, and misappropriated and converted funds. We addressed an earlier opinion in this case in our 2013 survey.

The dispute arose from a failed business relationship among three women who worked in the child and teen talent industry and who formed multiple businesses together, including HSK which was formed in 2002. Its business was to represent child stars in the entertainment business. As explained in the court's opinion, a talent agency can receive revenue through direct representation of a client and also in the form of commissions from the referral of talent to other agencies, which often happens when a local child star moves to California. In this case, Ms. Pauley and HSK claimed that the debtor misappropriated commissions, usurped corporate opportunities by referring talent in a manner that benefited her personally but not the plaintiffs, tortiously interfered with business opportunities, and paid for personal expenses out of agency funds.

The trial was fact-intensive and resulted in the debtor being held liable for some of the claimed amounts but not all. The court's detailed opinion is worthwhile reading for anyone interested in a roadmap for addressing the types of claims asserted in this case. Of particular note were two issues: the usurpation of corporate opportunities claim and the dispute over whether the debtor breached the non-compete provisions of HSK's shareholder agreement.

Usurpation of corporate opportunities. The plaintiffs alleged that the debtor misappropriated payments made by a California agency relating to clients who had a relationship with HSK before moving to California. Under Georgia law, a claim for usurpation of corporate opportunity may lie where the defendant appropriated an opportunity rightfully belonging to the plaintiff, and violated a fiduciary duty to the plaintiff. As the court explained, the applicable test for determining whether a corporate opportunity exists depends upon whether the defendant is a current or former officer or director. Where the defendant is a current officer, the relevant test is the "line of business test," which considers whether the activity is "intimately or closely associated with the existing or prospective activities of the corporation." Where the defendant is a former officer, the relevant test is the "interest or expectancy" test, in which a corporate opportunity may be found to result from a "beachhead" consisting of a legal or equitable interest or expectancy arising from a pre-existing relationship. This case nicely illustrates how these rules work in practice because the debtor resigned during the relevant period and the nature of the pre-existing relationship was different from one child star to the next. Among the facts that the court found significant in ruling on the matter — which it did on a case-by-case basis — were whether HSK could have financially undertaken the referrals, whether the child star had been a client of HSK when living in Georgia, whether the payments in question occurred pre- or post-resignation, and when the referral opportunity arose in relation to the debtor's resignation. The court held the debtor liable for both pre- and post-resignation misappropriation of corporate opportunities, as well as conversion and embezzlement of funds she received that should have been remitted to HSK and shared with Ms. Pauley. The resulting "debt" was determined to be non-dischargeable under 11 U.S.C. § 523(a)(2), -(4) and -(6). The debtor's liability for misappropriation of corporate opportunities was determined to be non-dischargeable under § 523(a)(6), because the court found her conduct to be both "willful" and "malicious" as those terms have been expansively interpreted by the courts.

Non-compete provisions in shareholder agreement. The operative shareholder agreement was executed in 2002. Under Georgia law existing at that time, which the court found to be controlling, restrictive covenants were highly disfavored and were enforceable "only if limited in time and territorial effect and…otherwise reasonable considering the business interests of the employer sought to be protected and the effect on the employee." The court found that the shareholder agreement's non-compete clause, which generally prohibited the debtor from competing with HSK for two years after her resignation, was unenforceable. The court found it particularly interesting that the prohibited activity, "representing clients or companies in the entertainment business," did not align with the shareholder agreement's description of HSK's business, which was "representation of children in the entertainment business." In fact, the language of the prohibition more closely described a second business that the women were involved in, and the court therefore read the shareholder agreement to prohibit the debtor from competing with that business, not HSK. The court also found that the duration of the non-compete clause was "open-ended" and that termination of the agreement was outside the debtor's control, which lent further support to finding the clause unenforceable.

7. Professional Liability

***Hays v. Page Perry, LLC*, 26 F. Supp. 3d 1131 (N.D. Ga. 2014) – Counsel held not to have a duty to report client wrongdoing to regulators; firm leaders not personally liable for alleged malpractice either as members or on claims of negligent supervision.**

In this case, the district court dismissed professional malpractice claims by a receiver for an investment advisory company against a law firm that represented the company, as well as claims that two of the firm's principals negligently supervised the attorneys involved in the representation. The decision rejected claims alleging that the firm and its lawyers breached a duty to report their client's wrongdoing to federal regulators.

The plaintiff was the SEC-appointed receiver for Lighthouse Financial Partners, LLC, an investment advisory company whose assets were frozen in connection with an SEC enforcement action against the company and its principal, Benjamin DeHaan. The defendant law firm represented Lighthouse from 2008 to 2012. During that time, the firm's attorneys were engaged to advise Lighthouse regarding registration, licensing and regulatory requirements, including those of the SEC and state securities regulators. One of the services provided by the firm was to undertake mock audits. A 2010 mock audit revealed an issue relating to Lighthouse's receipt of checks, which the attorney reported to DeHaan. The next year, a mock audit led the firm to discover that Lighthouse was not in compliance with custody requirements, which an attorney conveyed to DeHaan in a meeting. Lighthouse's records were thereafter audited by the Georgia Securities Commissioner, and the SEC served a subpoena on DeHaan. Two partners of the law firm represented DeHaan in a hearing before the SEC. In June, 2012, the firm withdrew as counsel. With DeHaan's consent, the firm reported his criminal conduct to the SEC, leading to the enforcement action and the appointment of the plaintiff as receiver.

The receiver sued the law firm, the attorney who performed the mock audits, the attorneys who represented DeHaan before the SEC, and two principals of the firm, which is a Georgia limited liability company. The defendants filed motions to dismiss for failure to state a claim under Federal Rule 12(b)(6).

The district court granted the motions, holding that the complaint stated no plausible claim that the defendants breached any duty to Lighthouse. The relevant rule in evaluating a Georgia attorney's duty to report violations of law is Rule 1.13(b) of the Georgia Rules of Professional Conduct. The court held that the plaintiff's allegations indicated that the defendants complied with Rule 1.13, which commands a lawyer to "proceed as is reasonably necessary in the best interest of the organization." The rule makes it clear that an attorney representing a corporation complies with Rule 1.13 by reporting the violation to the "highest authority that can act on behalf of the organization." The court found that the did so here by notifying DeHaan, Lighthouse's manager and majority owner. The receiver argued that the rule actually required the defendants to report the violation to the relevant regulatory authorities. The court found this argument to be "totally without merit," explaining that Rule 1.13's use of the words "of the organization" did not equate to a mandatory requirement to blow the whistle on their clients to outside regulators. (While the receiver essentially became the "highest authority" of Lighthouse as a result of the SEC's enforcement action, the court found this to be immaterial, because the relevant events occurred before the plaintiff was appointed.) The court also explained that while attorneys are permitted to report their clients' violation of law to outside regulators under some circumstances, a *mandatory* reporting rule would undermine the attorney-client relationship and have a chilling effect on clients seeking regulatory advice.

Turning to the allegations against the two attorneys not alleged to have performed any direct services for Lighthouse, the district court rejected the receiver's secondary liability theory as being inconsistent with Georgia LLC law. Under Georgia law, "a person who is a member, manager, agent, or employee of a limited liability company is *not* liable, solely by reason of being a member, manager, agent, or employee of the limited liability company…for the acts or omissions of any other member…." O.C.G.A. § 14-11-303. The receiver claimed that the two attorneys were liable independently of what § 14-11-303 says, under a theory of negligent supervision. But the court held that the plaintiff had not established that the two attorneys knew or reasonably should have known that those who committed the alleged malpractice had a tendency to engage in such behavior. The court held that the complaint had made "no plausible allegation" that the two attorneys actually supervised any of the work that the firm did for Lighthouse.

Finally, the receiver had asserted malpractice claims relating to the firm's representation of DeHaan before the SEC, alleging that representing DeHaan was a breach of the firm's duty to Lighthouse because DeHaan's interests were adverse to its interests. The court held that the receiver's complaint failed to draw any causal link between any claimed malpractice and any injury suffered by Lighthouse. It noted that DeHaan's wrongful conduct took place prior to the SEC hearing, and that the firm reported the wrongful conduct shortly thereafter.

8. Corporate Receiverships

***Considine v. Murphy*, 327 Ga. App. 110, 755 S.E.2d 556 (2014) – Plaintiff held to have waived challenge to receiver on ground that O.C.G.A. § 14-2-1432 does not authorize appointment of a corporate receiver where judicial dissolution not at issue; receiver thus held to be entitled to judicial immunity.**

This case raised the potentially interesting question of whether a corporation (as opposed to a natural person) may serve as a receiver under the general Georgia receivership statute, O.C.G.A. § 9-8-1 *et. seq.* The Court of Appeals found that it did not need to reach that question in this case, however, finding the complaining party had previously agreed to the appointment in a consent order and thus waived her right to object to the appointment afterwards. The ruling implies that even if the receivership statute does not contemplate the appointment of a corporation as receiver, the affected parties can provide for one by agreement.

The receivership arose from a lawsuit filed by the appellant, Considine, against her business partner in 2008. After the case was filed, the trial court entered a consent order directing the parties to select a receiver within 14 days of the order to oversee certain functions of the parties' business. The parties agreed to the selection of George Murphy and his accounting firm, Murphy & McInvale, P.C., and the trial court entered a consent order reflecting this agreement. Considine later filed a complaint for damages against the receiver, alleging gross negligence and breach of fiduciary duty. The receiver claimed official immunity, citing the principle that a receiver is an officer of the court. Considine argued in response that the Murphy & McInvale firm could not have been validly appointed as a receiver and therefore could not be entitled to official immunity. Considine argued that the trial court wrongly applied O.C.G.A. § 14-2-1432, which expressly contemplates that corporations can be receivers in the context of a judicial dissolution. Here, Considine argued the business in this case was not dissolving, and that the general receivership statute, O.C.G.A § 9-8-1 *et. seq.*, does not contemplate entities as receivers. The Court of Appeals declined to consider whether the trial court erred by applying the judicial dissolution statute, finding that Considine's voluntary act in agreeing to Murphy's appointment operated as a waiver of her right to challenge the validity of the appointment.

***SEC v. Quest Energy Management Group, Inc.*, 768 F.3d 1106 (11th Cir. 2014) – Corporate officers enjoined from acting on behalf of corporation held not to be entitled, in the corporation's name, to appeal the appointment of a receiver.**

This decision involves a case of first impression for the Eleventh Circuit. In a pending Ponzi scheme enforcement action, a court-appointed receiver determined that some of the investors' funds had been transferred to an oil and gas development company owned and operated by Paul and Jeff Downey, who were officers of the company. The receiver obtained an order expanding the receivership to include the Downeys' company. In its order, the district court granted the receiver power over any legal actions involving the company and enjoined the company's officers from taking any action on the company's behalf.

The Downeys appealed the receivership appointment in the name of the company. Although initially stating that they were not attempting to act as officers on behalf the company, the appeal continued in the company's name. When the receiver moved to dismiss the appeal, the Downeys argued that they did have the right to appeal on behalf of the company. The Court of Appeals noted that the Downeys were not proceeding in their individual capacities as shareholders of the company. It also pointed out that they need not have violated the injunction; they could have sought leave of court to appeal or requested a stay of the injunction order pending the appeal. Since they did not, the appeal violated the district court's injunction and its order conferring litigation powers on the receiver, and the Court of Appeals therefore granted the receiver's motion to dismiss.

H. FULTON COUNTY BUSINESS COURT DECISIONS

The Georgia State University College of Law maintains an archive of selected decisions of the Superior Court of Fulton County Business Case Division that can be accessed at http://digitalarchive.gsu.edu/col_businesscourt/. The Court has issued several decisions in 2014 bearing on Georgia corporations and business organizations law that have been posted to the website.

***Frazier v. Liotta*, No. 2014-cv-244363 (Ga. Super. Ct. Fulton Co. Aug, 28, 2014) (Order on Defendants' Motion to Dismiss, or in the Alternative for More Definite Statement).**

This is a dispute between two LLCs who formed a third LLC as a joint venture. Defendant PodPonics, LLC ("PodPonics") developed a system for growing lettuce in shipping containers. Plaintiffs, Building Technology Consulting LLC ("BTC") and a member of BTC, allege that they invented a "Grow Rack" system that they introduced to PodPonics. BTC and PodPonics thereafter formed a joint venture called HydroMod, LLC in which BTC owned 40%, PodPonics owned 60%, and a member of PodPonics, Liotta, would serve as the manager. Through the joint venture, PodPonics would utilize the Grow Rack system in selling PodPonics grow houses to third parties.

The plaintiffs alleged that Liotta and PodPonics squeezed them out of the joint venture by, among other things, registering a patent for the Grow Rack invention in PodPonics' name rather than HydroMod, and misappropriating a business opportunity with a customer developed by HydroMod. HydroMod was ultimately dissolved by Liotta, and its contracts were terminated. The plaintiffs asserted claims for breach of contract, breach of fiduciary duty, unjust enrichment, conversion, fraud and deceit, and tortious interference with contractual or business relations.

On the defendants' motion to dismiss, the threshold issue before the court was whether the plaintiffs' claims had to be brought as derivative claims on behalf of HydroMod or if they were properly brought as direct claims. The court recognized the general rule that claims for breach of fiduciary duty and misappropriation of corporate opportunities are derivative in character, and ordinarily must be brought in the name of the corporation. The court found, however, that the exception for closely-held corporations applied in this case, because the typical reasons for requiring a derivative suit did not apply. BTC and PodPonics, the only two owners of HydroMod, were before the court. In addition, HydroMod represented in its certificate of termination that it had no debts or liabilities, meaning that there were no potential creditors who might take an interest in the proceeding. Finally, because HydroMod was already dissolved, no other shareholder could be prejudiced by a ruling. The court concluded that the claims could proceed without the need to satisfy the requirements of a derivative action.

Turning to the merits, the Court dismissed certain of the plaintiffs' claims based on breach of HydroMod's operating agreement, noting that the agreement gave the defendants broad discretion in carrying out HydroMod's business. The defendants were not required, under the operating agreement, to call meetings, order an accounting, or carry on an exclusive business relationship with the plaintiffs, and their decision to terminate the business was permitted because it was approved by a majority vote. The plaintiffs' remaining contract claims as well as their unjust enrichment, breach of fiduciary duty, conversion and fraud claims were permitted to proceed, but their tortious interference with contract claim was dismissed. In denying the motion as to the plaintiffs' breach of fiduciary duty claim, the court recognized that Liotta, as manager of HydroMod, owed fiduciary duties, but stated that it was unclear what the scope of those duties would be under the specific facts of the case, since the complaint alleged the existence of many side agreements between the parties that might not give rise to fiduciary duties.

***Sullivan v. Torchia*, No. 2013-cv-229283 (Ga. Super. Ct. Fulton Co. Jul. 24, 2014) (Order on Defendants' Motion for Summary Judgment).**

On a motion for summary judgment, the court determined that there was a triable issue of fact as to whether the plaintiff held an ownership interest in a viatical settlement company. The plaintiff, who was the company's chief financial officer, claimed that he and the defendant agreed to be partners and joint owners of the company, and to split the company's profits equally. The plaintiff did not claim to be a shareholder of the company, but instead asserted that his agreement to share profits with the defendant was akin to a partnership. The defendant sought partial summary judgment on the grounds that the plaintiff had no ownership interest in the company, which would have disposed of several of his claims.

The court denied the motion. It found, first, that the fact that the plaintiff held no stock in the corporation was not dispositive. Under settled law, an ownership interest can exist in a corporation even though the owner does not hold stock certificates. Second, the court found that there was sufficient evidence that a partnership was formed between the plaintiff and the defendant. The plaintiff's testimony indicated that he and the defendant agreed to share profits, which is considered prima facie evidence of a partnership. Finally, the court declined to apply judicial estoppel to the plaintiff based on prior statements he made in unrelated court actions denying that he had an ownership interest in the company. While those statements were inconsistent with the positions taken by the plaintiff in the present suit, it turned out that the defendant had also made inconsistent statements regarding the plaintiff's ownership interest in prior court proceedings. The court decided not to apply judicial estoppel to either party, but instead to submit the issue of the plaintiff's ownership to the trier of fact.

***Fouse v. Dow*, No. 2014-cv-242868 (Ga. Super. Ct. Fulton Co. Jun. 4, 2014) (Order on Valuation of Shares Under Shareholder Agreements).**

In this dispute between two former business partners, the court determined the proper basis for calculating the value of the plaintiff's shares in two corporations through which he and the defendant provided personal training services. The plaintiff filed a lawsuit against the defendant and the corporations alleging misappropriation of corporate funds. The defendant then terminated the plaintiff as manager of the corporations, which triggered a mandatory buyout clause requiring the plaintiff to offer his shares for sale to the companies and/or their continuing shareholders. The plaintiff offered to sell his shares for $2 million. The defendant maintained that the operative shareholder agreements set forth a valuation formula based on a multiple of annual net earnings that resulted in a total sale value of just over $70,000. The defendant argued that the valuation formula was intended to apply whenever the shareholders could not agree on a sale price. To this, the plaintiff countered that the valuation formula was not intended to apply to forced sales caused by termination of a shareholder. The court sided with the defendant, noting that the plain language of the shareholder agreements provided that the annual net earnings formula would apply whenever the parties disagreed as to the value of the shares, regardless of the reason. The court also found that the agreement, while perhaps unfair to the plaintiff because it allowed the defendant to force a sale at a low price by terminating the plaintiff, was not unconscionable under Georgia law because there was no allegation of fraud and deceit, inadequate consideration, or great disparity of mental ability between the parties.

Since the corporation's actual annual net earnings were likely to be disputed, the court declined to make a final determination of value, and instead permitted discovery and an accounting mutually agreed to be the parties to go forward.

***Homeland Self Storage Management, LLC v. Pine Mountain Capital Partners, LLC*, No. 2014-cv-246999 (Ga. Super. Ct. Fulton Co. Nov. 21, 2014) (Order on Motion to Dismiss).**

The court denied a motion to dismiss and permitted fraud and breach of fiduciary duty claims to go forward against an LLC's former chief financial officer. The plaintiffs, the LLC and holding partnerships that own the LLC's assets, alleged that the defendant committed fraud and diverted LLC funds to two LLCs that were similarly named to the plaintiff LLC and another business owned by the plaintiff's principal owner. The defendant allegedly wrote checks in such a manner that they could be redirected to his own companies' accounts after they were signed by the plaintiff's principal owner. It was further alleged that the defendant forged signatures on other occasions.

In moving to dismiss the breach of fiduciary duty claim, the defendant sought refuge in the business judgment rule. The court, applying the Supreme Court's new *Loudermilk* decision, recognized that the plaintiff's allegations, if proven true, would support a showing of bad faith and/or a violation of the duties of care and loyalty, thus overcoming the business judgment rule for purposes of the motion to dismiss. The court also rejected the defendant's argument that the claimed damages for breach of fiduciary duty and fraud were speculative, holding that the certainty and credibility of the plaintiffs' damage claims should not be decided on a motion to dismiss.

The two LLCs that were allegedly formed by the defendant in connection with his alleged scheme were also named as defendants, and their motion to dismiss was also denied. The court pointed to allegations that the companies, by allowing the use of their bank accounts, assisted the individual defendant in his actions. The court also rejected the defendants' argument that the sole owner of a corporation cannot conspire with the corporation, expressing doubt about the validity of the defendants' premise in light of *White v. Shamrock Building Systems, Inc.*, 294 Ga. App. 340, 348 (2008). In *White*, the Georgia Court of Appeals recognized that a corporation is a distinct legal person and therefore separate from its agents, and held that a corporation could be liable for conspiring with its sole shareholder. This is a departure from the federal "intra-corporate conspiracy doctrine," which provides that a corporation and its owner cannot be co-conspirators. The court ultimately determined that it did not need to decide whether *White* was controlling, since the allegations could support a finding that the individual defendant acted outside the scope of his employment, and the intra-corporate conspiracy doctrine would therefore be inapplicable.