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2006 ANNUAL REVIEW OF CASE LAW DEVELOPMENTS IN GEORGIA CORPORATE AND BUSINESS ORGANIZATION LAW

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This article summarizes the decisions of state and federal courts handed down during 2006 regarding matters of Georgia corporate and business organization law.

Corporate and business organization issues arose in a variety of contexts in 2006 – business acquisitions, shareholder suits, statutory schemes such as CERCLA and RICO, and professional liability litigation. The decisions handed down last year concern business and nonprofit corporations, limited liability companies, partnerships and joint ventures. Some decisions deal with matters of first impression or resolve issues long in question, while others confirm the application of settled principles of law. The Georgia courts broke new ground on aiding and abetting breaches of fiduciary duty, claims for wrongful deprivation of an equity interest in a corporation, LLC disassociation proceedings, and common law liability for violations of the Georgia Securities Act of 1973 after the statute of limitations has expired on statutory claims. Other decisions dealt with such issues as third party beneficiary rights in the sale of a business, exclusivity of dissenters' rights, direct versus derivative actions, piercing the corporate veil and associational standing of nonprofit corporations. We consider it useful to survey all the cases that have come to our attention, because it provides a more complete picture of the state of the law and an opportunity to assess how the courts are viewing and handling matters of corporate and business organization law. To summarize these developments briefly:

A. Business Corporations. In Insight Technology, Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373 (2006), the Georgia Court of Appeals partially resolved the long-standing question of whether Georgia recognizes claims for aiding and abetting a breach of fiduciary duty by holding that secondary actors may be held liable when they "procure" the fiduciary's wrongdoing. The Court of Appeals in Haskins. v. Haskins, 278 Ga. App. 514, 629 S.E.2d 504 (2006), reaffirmed the exclusivity of the dissenting shareholder provisions of the Georgia Business Corporation Code. In Monterrey Mexican Restaurant of Wise, Inc. v. Leon, ___ S.E.2d ___, 2006 WL 3333769 (Ga. App., Nov. 17, 2006), the Court of Appeals recognized a new claim for wrongful deprivation of an interest in a corporation where the plaintiff could not recover for conversion because the corporation failed to issue a certificate for the plaintiff's shares. In Kent v. A.O. White, Jr., 279 Ga. App. 563, 631 S.E.2d 782 (2006), the Georgia Court of Appeals held that a professional corporation does not cease to exist as a corporation upon conversion to a business corporation. The Georgia Supreme Court held in Chattowah Open Land Trust, Inc. v. Jones, 281 Ga. 97, 636 S.E.2d 523 (2006) that corporate powers do not include the power to serve as a fiduciary; only individuals and entities with authorization from the Georgia Department of Banking and Finance can serve as fiduciaries. In Williams General Corp. v. Stone, 280 Ga. 631, 632 S.E.2d 376 (2006), the Georgia Supreme Court held a corporation is a "person" under Georgia's Racketeer Influenced and Corrupt Organizations Act and that a corporation can be found to have conspired with its officers and be held liable under RICO for treble damages.

B. Nonprofit Corporations. In Bolden v. Barton, 280 Ga. 702, 632 S.E.2d 148 (2006), the Georgia Supreme Court held that a court has jurisdiction to determine church membership when ordering a vote by such members to settle a controversy regarding the church's property. Atlanta Taxicab Co. Owners Ass'n, Inc. v. City of Atlanta, ___ Ga. ___, 638 S.E.2d 307, (2006) and Ouachita Watch League v. Jacobs, 463 F.3d 1163 (11th Cir. 2006), review the rules for associational standing through which a nonprofit corporation or association can sue on behalf of its members.

C. Limited Liability Companies. In Sayers v. Artistic Kitchen Design LLC, 280 Ga. App. 223, 633 S.E.2d 619 (2006), the Georgia Court of Appeals, in a matter of first impression, treating the statutory procedures for judicial "disassociation" as a form of termination, held that under O.C.G.A. § 14-11-601.1(b)(4)(D) of the Georgia Limited Liability Company Act, an LLC member would not be disassociated from the LLC merely by filing a petition for the disassociation of another member. In Patel v. Patel, 280 Ga. 292, 627 S.E.2d 21 (2006), the Georgia Supreme Court confirmed its reluctance to place business organizations into receivership absent extraordinary circumstances by applying that rule in the limited liability company context. Limited liability company issues were also addressed in several of the other specific areas of business organization litigation discussed below.

D. Partnerships. In Nationwide Mortgage Services, Inc. v. Troy Langley Construction, Inc., 280 Ga. App. 539, 634 S.E. 2d 502 (2006), the Court of Appeals held that a partnership agreement did not become invalid merely because one of its partners was a yet unformed LLC; instead, the individuals signing a partnership agreement on behalf of the unformed LLC become partners in their individual capacities. In Yun v. Um, 277 Ga. App. 477, 627 S.E.2d 49 (2006), the Court of Appeals overturned a trial court's finding that a partnership existed between two persons operating a business where the record indicated that only the plaintiff had an ownership interest in the business, he assumed all its liabilities, there was no written partnership agreement, and no evidence that the business was operated as a partnership. The Court of Appeals in Kellett v. Kumar, 281 Ga. App. 120, 635 S.E.2d 310 (2006) upheld a jury verdict awarding a minority limited partner $1.6 million in damages for the wrongful withdrawal and substitution of a corporate general partner and merging the partnership into a publicly-held corporation without the minority's consent.

E. Joint Ventures. In two decisions regarding joint ventures, Kitchens v. Brusman, 280 Ga. App. 163, 633 S.E.2d 585 (2006), the Georgia Court of Appeals reaffirmed that a joint venture is only created where two or more parties combine their property, labor, or both, in a for-profit, joint enterprise, where all parties have mutual control and Hillis v. Equifax Consumer Services, Inc., 237 F.R.D. 491 (N.D. Ga. 2006), the federal district court held that "the essential elements of a joint venture are (1) a pooling of action; (2) a joint undertaking for profit; and (3) rights of mutual control," found a joint venture on the facts, and confirmed that the acts of one "joint adventurer" are binding on the other.

F. Derivative and Individual Shareholder Actions. The Court in Southwest Health and Wellness LLC v. Work, ___ S.E. 2d ___, 2006 WL 3422970, (Ga. App., Nov. 29, 2006), held that the claims of minority members of an LLC for breach of the LLC's operating agreement, fraud, misuse of corporate assets, unjust enrichment and "violations of the Patriot Act" were all derivative claims. Litigation fees and expenses were awarded under O.C.G.A. § 14-2-746 in Hantz v. Belyew, 2006 WL 3266508 (N.D. Ga., Nov. 8, 2006) against plaintiffs who sought to assert direct or derivative claims after their equity interests were extinguished in a bankruptcy reorganization. Argentum International, LLC v. Woods, 280 Ga. App. 440, 634 S.E.2d 195 (2006) sustained as direct claims for common law fraud brought by equity investors and debenture holders who alleged that they were misled both to purchase and then to retain securities in a limited liability company, rejecting arguments that investors failed to perform due diligence. In Douglas v. Bigley, 278 Ga. App. 117, 628 S.E.2d 199 (2006), the Court of Appeals considered common law claims of breach of fiduciary duty, fraud and illegality of contracts based on alleged securities laws violations, holding that the failure to register securities under the Georgia Securities Act of 1973 could support claims of breach of fiduciary duty and fraud, but did not render the contracts illegal and unenforceable. In Davis v. Johnson, 280 Ga. App. 318, 634 S.E.2d 108 (2006), the Court of Appeals upheld a jury verdict finding no securities fraud under the Georgia Securities Act of 1973, but reversed the jury's award of attorney fees based on a finding that the plaintiffs should not have discovered alleged securities fraud during the limitations period.

G. Alter Ego Liability; Piercing the Corporate Veil. In Milk v. Total Pay and HR Solutions, Inc., 280 Ga. App. 449, 634 S.E.2d 208 (2006), the Georgia Court of Appeals outlined the difficulty of holding an individual LLC member responsible for the debts of an LLC. Accord DaimlerChrysler Financial Services Americas LLC v. Nathan Mobley Chrysler, Dodge, Jeep, Inc., 2006 WL 3762087 (S.D. Ga., Dec. 20, 2006) (corporation held not alter ego of owner where misappropriated inventory proceeds were used to pay corporate, not personal liabilities). The Georgia Supreme Court in Solomon v. Barnett, 281 Ga. 130, 636 S.E.2d 541 (2006) held that reinstatement of administratively dissolved corporations, though usually retroactive in effect, may not protect from alter ego liability if subject to equitable estoppel. In Atlanta Gas Light Co. v. UGI Utilities, Inc., 463 F.3d 1201 (11th Cir. 2006), the Eleventh Circuit Court of Appeals held that the corporate veil can be pierced to hold a parent corporation liable for a subsidiary's liability in contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and addressed the circumstances under which the parent can be held liable under CERCLA as an operator of the subsidiary's facility. By contrast, in Dearth v. Collins, 441 F.3d 931 (11th Cir. 2006), cert. denied, ___ U.S. ___, 127 S. Ct. 153 (2006), the Eleventh Circuit held the alter ego doctrine inapplicable in Title VII of the Civil Rights Act of 1964. Finally, in Pate v. Pate, 280 Ga. 796, 631 S.E.2d 103 (2006), the Supreme Court affirmed a ruling that income assigned by a divorced husband to his wholly-owned professional corporation could be reached to enforce child support payments, but rejected the husband's argument that the ruling represented impermissible reverse piercing of the corporate veil.

H. Transactional Cases. The Georgia Court of Appeals in Kaesemeyer v. Angiogenix, Inc., 278 Ga. App. 434, 629 S.E.2d 22 (2006), held that a non-party to an asset purchase agreement lacked standing as a third party beneficiary to assert a breach of contract claim against parties to the agreement, citing the "clear, unambiguous language" of the agreement. Similarly, in Hilliard v. SunTrust Bank, et al., 277 Ga. App. 544, 627 S.E.2d 77 (2006), the Georgia Court of Appeals held that a potential, but not intended, beneficiary of a limited partnership agreement lacks standing to enforce the agreement. In Lovell v. Thomas, 279 Ga. App. 696, 632 S.E.2d 456 (2006), the Georgia Court of Appeals upheld a secured lender's rights to collect attorney's fees incurred in redeeming and selling re-pledged securities. Goobich v. Waters, 2006 WL 3095394 (Ga. App., Nov. 1, 2006) held that a binding letter of intent was enforceable notwithstanding the fact that it was subject to execution of final documents. In another sale of business dispute, Park v. Fortune Partner, Inc., 279 Ga. App. 268, 630 S.E.2d 871 (2006), promissory notes given by the purchasers were enforced on finding that objections to title were waived by a resale of the business.

I. Professional Liability in the Sale of Businesses and Corporate Transactions. In 2006, the Georgia Court of Appeals decided three cases involving claims against attorneys in sale of business and corporate transactions. First, in Cleveland Campers, Inc. v. R. Thad McCormack, P.C., 280 Ga. App. 900, 635 S.E. 2d 274 (2006), the Court affirmed the trial court's ruling that no attorney-client relationship existed between sellers of a business and the attorney for the buyers, holding that legal advice or assistance must be sought from an attorney in order for an attorney-client relationship to exist. Second, in All Business Corporation v. Choi, 280 Ga. App. 618, 634 S.E.2d 400 (2006), the Court held that an attorney acting as an escrow agent in the sale of a business does not owe a third party secured creditor any duty with regard to the proceeds of sale when the attorney has no actual or constructive notice of the creditor's lien on a debtor's property. Third, Graivier v. Dreger & McClelland, 280 Ga. App. 74, 633 S.E.2d 406 (2006) upheld claims for attorney malpractice against a lawyer serving as counsel for two LLC members in drafting the LLC agreement.

J. Representation of Business Entities by Counsel in Litigation. In Winzer v. EHCA Dunwoody, LLC, 277 Ga. App. 710, 627 S.E.2d 426 (2006), the Georgia Court of Appeals extended the Supreme Court's holding in Eckles v. Atlanta Technology Group, 267 Ga. 801, 485 S.E.2d 22 (1997), and held that limited liability companies, like corporations, cannot appear pro se before a court of record, but must be represented by a licensed attorney. Five months later, the Court of Appeals in Sterling, Winchester & Long, LLC v. Loyd, 280 Ga. App. 416, 634 S.E.2d 188 (2006) reaffirmed its holding in Winzer. In Largo Villas Homeowners' Association v. Bunce, 279 Ga. App. 524, 631 S.E.2d 731 (2006), the Court of Appeals ruled that the failure by a pro se corporate litigant to hire counsel within the time ordered by the court must be willful to entitle the other party to sanctions.

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A. Business Corporations.

1. Breach of Fiduciary Duty – Secondary Liability: *Insight Technology, Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373 (2006)*

Insight Technology, Inc. v. FreightCheck, LLC addressed a long-standing question of whether plaintiffs in Georgia are allowed to pursue claims for aiding and abetting a breach of fiduciary duty. The Insight Technology decision is significant because it provides the clearest precedent to date that, in the context of breaches of fiduciary duties by corporate officers and directors, secondary actors may be held liable under some circumstances for their participation in the fiduciary's wrongdoing.

Aiding and abetting is one of the well-established means through which a person may become a party to a crime,[1] requiring both wrongful intent and assistance or "helping" in the criminal activity. See Glenn v. State, 278 Ga. 291, 294, 602 S.E.2d 577, 580 (2004). There is no statutory provision that attaches civil liability to "aiding and abetting," however. In Insight Technology, rather than resolving the question of whether knowing assistance can result in tort liability, the Georgia Court of Appeals resorted to a different theory of secondary civil liability, namely "procuring" a wrongful act, for which there is express statutory authority under O.C.G.A. § 51-12-30:

> In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury.

The Court of Appeals held that regardless of whether denominated "aiding and abetting a breach of fiduciary duty," "procuring a breach of fiduciary duty," or "tortious interference with a fiduciary relationship," Georgia law authorizes a plaintiff to recover for such a claim upon proof of the following elements: (1) through improper action or wrongful conduct and without privilege, the defendant acted to procure a breach of the primary wrongdoer's fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure; (3) the defendant's

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[1] O.C.G.A. § 16-2-20 provides:
(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.
(b) A person is concerned in the commission of a crime only if he:
(1) Directly commits the crime;
(2) Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity;
(3) Intentionally aids or abets in the commission of the crime; or
(4) Intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

wrongful conduct procured a breach of the primary wrongdoer's fiduciary duty; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Insight Technology, Inc. ("Insight"), an internet-based freight load matching service incorporated in Delaware,[2] filed suit against the defendants for breach of fiduciary duty, misappropriation of trade secrets, misappropriation of corporate opportunities, and fraud. Insight alleged that its former president, Darren Brewer, during his employment with Insight, embarked upon a competing venture with the majority shareholder and "managing member" of an Insight competitor, GetLoaded.com, LLC. Brewer and Patrick Hull, GetLoaded's majority shareholder, both created limited liability companies in which they were the sole members. The co-defendants' corporations then became 50% members in FreightCheck LLC ("FreightCheck") and used that company to compete with Insight. Brewer attempted to continue his employment at Insight, while building up its newly-created competitor, FreightCheck. Evidence showed that Brewer managed Insight and FreightCheck simultaneously, had Insight employees perform work for FreightCheck and eventually hired those employees at FreightCheck.

The plaintiff alleged, among other things, that Hull, GetLoaded and FreightCheck aided and abetted a breach of fiduciary duty. The trial court granted those defendants' motions for summary judgment as to all claims.

On appeal, the Court of Appeals addressed Insight's contention that Georgia law provides for a claim of aiding and abetting a breach of fiduciary duty. Noting that prior Georgia decisions had declined to recognize such a theory of tort liability, see, e.g., Monroe v. Board of Regents of University System of Georgia, 268 Ga. App. 659, 664-665(2), 602 S.E.2d 219 (2004),[3] the Court stated that it had to "look beyond the designation" given to the claim by the plaintiff and determine whether Insight's complaint stated a claim which is allowable under Georgia law." Citing Rome Industries, Inc. v. Jonsson, 202 Ga. App. 682, 415 S.E.2d 651 (1992), the Court noted that it had explicitly acknowledged a cause of action for procuring a breach of fiduciary duty based on O.C.G.A. § 51-12-30. The Court ultimately held that Insight had adduced evidence from which a jury could infer that Hull, acting as agent of both FreightCheck and GetLoaded, tortiously procured Brewer's breach of his fiduciary duty, damaging Insight.

Insight Technology appears to be the first case to attempt to reconcile Georgia's existing case law that had declined to recognize a cause of action for "aiding and abetting" a breach of fiduciary duty, with the cited authorities supporting a cause of action for "procuring" certain torts. While the decision is undoubtedly important in litigation challenging the actions of secondary actors in the corporate management context (including attorneys, accountants and other professionals), the impact of the ruling may be tempered somewhat by the high standards of proof enumerated in the opinion, particularly as to the defendant's state of mind[4] and role in causing the breach of fiduciary duty to occur[5] that a plaintiff must show in order to prevail on such a claim.[6]

2. Exclusivity of Dissenting Shareholder Proceedings: *Haskins. v. Haskins, 278 Ga. App. 514, 629 S.E.2d 504 (2006)*

In Haskins v. Haskins, the Georgia Court of Appeals upheld the exclusivity of the dissenting shareholder provisions of the Georgia Business Corporation Code and dismissed alleged derivative and direct claims asserted by a minority shareholder complaining of a bank holding company's reverse stock split. Drewey E. Haskins III ("Haskins III") brought claims against Joseph M. Haskins and Catoosa Bancshares, Inc. ("CBI"), among others, for damage to CBI, damage caused to him by the managing shareholders' breach of their fiduciary duty, and for conversion. Haskins III, a shareholder of CBI, asserted both direct claims and claims brought derivatively on behalf of CBI. Prior to the events giving rise to the suit, Haskins III was involved in litigation in

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2 The Court did not consider whether the issue should be governed by Delaware law. Delaware does recognize a claim for aiding and abetting a breach of fiduciary duty. See Malpiede v. Townson, 780 A.2d 1075, 1096 (Del. 2001).

3 See also Time Warner Entertainment Co., L.P. v. Six Flags Over Georgia, LLC, 245 Ga. App. 334, 342, 537 S.E.2d 397, 407 (2000), vacated on other grounds, 534 U.S. 801 (2001); Munford v. Valuation Research Corp., 98 F.3d 604, 613 (11th Cir.1996) (discussing extent to which aiding and abetting has been recognized as a basis of tort liability under Georgia law in contexts other than fiduciary breaches).

4 In this context, however, ". . . the term "malicious" or "maliciously" means any unauthorized interference, or any interference without legal justification or excuse. Personal ill will or animosity is not essential." Luke v. Du Pree, 158 Ga. 590, 124 S.E. 13, 16 (1924) (discussing the requirements for civil tort liability for conspiracy).

5 To explain the concept of "procurement," and apparently to distinguish it from aiding and abetting, the Court quoted from Melton v. Helms, 83 Ga. App. 71, 73(1), 62 S.E.2d 663 (1950):

> The word "procure" as ... used [in OCGA § 51-12-30] does not require the lending of assistance in the actual perpetration of the wrong done by another; but if one, acting only through advice, counsel, persuasion, or command, succeeds in procuring any person to commit an actionable wrong, the procurer becomes liable for the injury, either single or jointly, with the actual perpetrator.

(Citations and punctuation omitted.) This definition should give corporate counsel some concern because "advice" and "counsel" are the lawyer's stock in trade. Thus, while Insight Technology has only adopted a limited form of secondary liability, it may prove to be one that increases the exposure lawyers have to secondary liability in breach of fiduciary duty cases against their clients.

6 The Court in Insight Technology noted that Georgia also recognizes claims for "conspiracy" to breach a fiduciary duty, but affirmed the dismissal of the conspiracy claim before it because it merely duplicated the breach of fiduciary duty claim.

Tennessee with his brother, Joseph Haskins, over the disposition of shares of stock left to Joseph Haskins by their father pursuant to his will.

While the Tennessee action was still pending, the CBI Board of Directors amended the articles of incorporation to force a 4,000 to one reverse stock split. Rather than issue fractional shares, a payment of $467 would be made for each old share of CBI stock. After receiving notice of the reverse stock split, Haskins III filed suit to enjoin the split. The trial court first issued a temporary restraining order, but later dissolved the order. Immediately thereafter, the reverse stock split was approved. Its effect was to make Joseph Haskins the only CBI shareholder, with Haskins III reduced to owning a fractional share that was subject to redemption for cash. Notice of the reverse split was sent to Haskins III under O.C.G.A. § 14-2-1322 along with an offer to pay $427 for each old share he owned. Haskins III rejected the offer and sought to determine the fair market value of his shares under O.C.G.A. § 14-2-1330. CBI paid over $2.5 million into the registry of the court, which Haskins III later withdrew as payment in full for his shares of stock. At that time, the defendants moved for summary judgment, contending that Haskins III's surrender of his shares in exchange for the $2.5 million eliminated his standing to bring a derivative action and that any special injury that Haskins III suffered must be addressed in a dissenting shareholder proceeding. The trial court granted the defendants' motion for summary judgment and Haskins III appealed.

The Court of Appeals affirmed the summary judgment for defendants and held that Haskins III lacked standing to bring a derivative action and that his direct claims regarding the reverse stock split were nothing more that a dispute over the price of his stock. The Court held that Haskins III's surrender of his old shares to CBI clearly removed his standing to sue derivatively because he could no longer comply with the "commenced or maintained" requirement contained in O.C.G.A. § 14-2-741 that the derivative plaintiff be a shareholder when the litigation was commenced and throughout the pendency of the litigation. Turning to Haskins III's direct action, the Court cited Georgia Supreme Court precedent holding that the appraisal process provided for in "O.C.G.A. 14-2-1302(b) is the exclusive remedy when the dispute is essentially about the price of the stock" and that the case could only be maintained as a direct action if the case was more than a dispute over the stock price. Examining Haskins III's complaint for special injuries, the Court found that Haskins III's allegation that his brother's self-dealing and breach of fiduciary duty would have affected the value of CBI stock in general and not just shares held by Haskins III. Accordingly, the Court affirmed the trial court's grant of summary judgment on Haskins III's direct action as well.

3. **Wrongful Deprivation of Uncertificated Interest in a Corporation:** ***Monterrey Mexican Restaurant of Wise, Inc. v. Leon, ___ S.E.2d ___, 2006 WL 3333769 (Ga. App., Nov. 17, 2006)***

In Monterrey Mexican Restaurant of Wise, Inc. v. Leon, ___ S.E.2d ___, 2006 WL 3333769 (Ga. App., Nov. 17, 2006), the Georgia Court of Appeals held that a claim for conversion does not lie under Georgia law when shareholders, who have not been issued certificates for their shares, are wrongfully deprived of their interests in a corporation. Monterrey Restaurant of Wise, Inc. was formed as a Georgia corporation by three men in 1995 to operate a restaurant in Wise, Georgia. Each of the men was to receive 1,000 shares, but no corporate records, including any stock certificates, were ever executed to reflect this arrangement.

In 1998, the plaintiff left the corporation and the corporation's bookkeeper was instructed that he no longer owned any stock in Monterrey. The bookkeeper changed the corporate records to that effect. When the plaintiff learned that he was no longer listed as a shareholder, he sued the corporation and the remaining two shareholders for, among other things, conversion of his stock. The trial court ruled in the plaintiff's favor on the conversion claim. The Georgia Court of Appeals disagreed, holding that there could be no valid claim for conversion because there were no tangible stock certificates showing the plaintiff's interest in the corporation. In so holding, the Court affirmed its prior rulings that "conversion is not available as a cause of action with respect to intangible property representing an interest in a business," citing Southern Cellular Telephone v. Banks, 208 Ga. App. 286, 431 S.E.2d 115 (1993). The Court held as a matter of first impression, however, that because the evidence reflected that Hector did in fact own an interest, he had a valid claim for "tortious deprivation of an interest in a corporation," expressly recognizing a claim under Section 242(2) of the Restatement (Second) of Torts:

> One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted.

Because this right of action depends upon the fact that the intangible rights involved Monterrey Mexican Restaurant are "of the kind customarily merged in a document" which can be converted, decision leaves unresolved the question whether and when there can be tortious deprivation of uncertificated interests in limited liability companies or limited partnerships. O.C.G.A. § 14-11-501, for instance, states that articles of organization and operating agreements "may" provide that a limited liability company interest "may" be evidenced by a certificate. Notably, Article 8 of the Uniform Commercial Code provides that an interest in a limited liability company or limited partnership is not a "security" within the meaning of the UCC unless it is publicly traded, it is a share in a mutual fund, or unless "its terms expressly provide that it is a security governed by this article." O.C.G.A. § 11-8-103(c).

Among other rulings, the Court in Monterrey Mexican Restaurant also held that the plaintiff's claims were not barred by the now repealed statute of frauds in UCC Article 8, former O.C.G.A. § 11-8-319, because the plaintiff's claims were based on ownership of shares in the corporation, not a contract to purchase shares. It also held one of the remaining shareholders to be liable for breach of fiduciary duty because, despite his ownership of only a third of the company's stock, he "acted as the controlling shareholder," as well as owing fiduciary duties as president and a director of the company.

4. Professional Corporations – Conversion of Professional Corporations to Business Corporations: *Kent v. A.O. White, Jr., 279 Ga. App. 563, 631 S.E.2d 782 (2006)*

In Kent v. A.O. White, Jr., the Georgia Court of Appeals held that a professional corporation does not cease to exist as a corporation upon conversion to a business corporation. A.O. White, Jr., P.C., a consulting engineering firm, brought suit against the defendant, an attorney, for breach of contract, fraudulent transfers, punitive damages, and attorneys' fees following a dispute over the payment of an expert witness fee. The defendant was found liable and the trial court awarded damages. On appeal, the Court of Appeals affirmed liability, but reversed as to the amount of damages. Several rounds of appeals and remanded proceedings ensued. In this appeal, the defendant claimed that the trial court improperly allowed A.O. White, Jr., Inc. to be substituted for the original plaintiff A.O. White, Jr., P.C. following the death of A.O. White, the company's professional engineer. The defendant argued that at the time of White's death, A.O. White, P.C. ceased existence as a professional corporation and could not continue operations as a new business corporation, A.O. White, Inc., but instead could only continue in existence for the purpose of liquidation. The Court of Appeals found this ground for appeal to be without merit, citing to the Georgia Supreme Court's holding in Sherrer v. Hale, 248 Ga. 793, 285 S.E.2d 714 (1982), that "a professional corporation does not cease to be a corporation upon being converted . . . to a business corporation."

5. Corporate Powers do not Include the Power to Serve as a Fiduciary: *Chattowah Open Land Trust, Inc. v. Jones, 281 Ga. 97, 636 S.E.2d 523 (2006)*

The Chattowah Open Land Trust case involves the bequest of property "to Chattowah Open Land Trust, Inc., for qualified conservation purposes, as described in Section 170(h) of the Internal Revenue Code of 1986," with further statements of intent by the testatrix that she wanted to bequeath her property "to an organization which will maintain the property in perpetuity exclusively for conservation purposes." When the executors tendered a deed to Chattowah Open Land Trust as trustee of a charitable trust, Chattowah refused the deed, taking the position that the bequest was an outright conveyance of the property. The trial court held, and the Supreme Court affirmed, that the will created a trust, despite the lack of any specific reference to a "trust" or "trustee."

Because Chattowah had rejected the trust deed, the trial court also appointed the Cobb County Board of Commissioners to act as "successor trustee." On this point, the Supreme Court held that it was not error to deny Chattowah's arguments that it should be permitted to serve as trustee of the trust. The Court stated that "[i]t is undisputed that Chattowah does not have the power to act as a trustee in Georgia," 2006 WL 2930434 *3, noting that the evidence showed that Chattowah "had not received approval from the Georgia Department of Banking and Finance to act as a trust company. See O.C.G.A. § 7-1-392, et seq." 2006 WL 2930434 *3 and n.3. See also O.C.G.A. §§ 7-1-4(21) and -(40), 7-1-5, 7-1-310, 7-1-394(a)(7) and -(d). Thus, for a Georgia business corporation to serve as trustee, it must obtain trust powers under the Financial Institutions Code of Georgia and authorization by the Department of Banking and Finance.

6. Corporations in Georgia RICO Litigation: *Williams General Corp. v. Stone, 280 Ga. 631, 632 S.E.2d 376 (2006)*

In Williams General Corp. v. Stone, the Georgia Supreme Court clarified the definition of the word "person" under Georgia's Racketeer Influenced and Corrupt Organizations Act ("RICO") and held a corporation is indeed a RICO "person" and that a corporation can be found to have conspired with its officers and be held liable under RICO for treble damages.

Williams General Corp. brought claims against its former employee and his new employer (Stone and Stone Cold Chemical) for, among other claims, violation of and conspiracy to violate Georgia's RICO Act. The underlying question in the case was whether or not Stone Cold Chemical could be held liable for RICO violations. The answer to that question hinged on whether or not the word "person" as used in the RICO statutes included a corporation.

The case has a long procedural history. It had been before the Georgia Supreme Court twice previously. In this appeal, reversing the Court of Appeals, the Georgia Supreme Court found that the word "person" as used in the RICO statutes does include a corporate entity. The Court's decision was based on the fact that in the definitional section for the entire Georgia Code, O.C.G.A. § 1-3-3(14), and in O.C.G.A. § 16-1-3, the definitional section of Title 16, Georgia's criminal code, which includes the RICO statutes, the word "person" is defined expressly to include corporations.[7]

B. Nonprofit Corporations.

7. Subject Matter Jurisdiction and Religious Organizations: *Bolden v. Barton, 280 Ga. 702, 632 S.E.2d 148 (2006)*

In Bolden v. Barton, the Georgia Supreme Court held that a court has jurisdiction to determine church membership when ordering a vote by such members to settle a controversy regarding the church's property. The plaintiff, a church member, originally filed suit seeking removal of the acting pastor of Bethlehem Missionary Baptist Church, an unincorporated association. The trial court granted an injunction ordering the Church members to hold an election to determine whether the pastor should be removed. The defendant appealed and the Supreme Court reversed, stating that the trial court had no subject matter jurisdiction over the case. On remand, the plaintiff filed an amended complaint which alleged that there was a current dispute over who had the right to control the Church's property. The trial court held that the complaint, as amended, brought the matter properly within its subject matter jurisdiction and once again ordered the membership of the Church to hold an election to determine who would exercise control over the Church's property.

On appeal, the defendant argued that the relief granted by the trial court was outside of the court's subject matter jurisdiction, even after the filing of the amended complaint, because the trial court had determined and listed which individuals were qualified as members of the Church and therefore were eligible to vote in the Church election. Addressing this point, the Court noted that religious bodies are free to make their own decisions, without state interference, in matters of church government, faith and doctrine. However, when the property rights of a church are involved and the suit is brought on behalf of a majority of the congregation, courts of equity do have jurisdiction. The Court further held that the amended complaint was brought on behalf of the membership of the Church and the election was specifically ordered to resolve property issues. The Court held that the nature of the election necessitated the trial court's determination of who was a member, and thus was eligible to vote, and did not interfere with any aspect of the Church's doctrine or religious organization. To hold otherwise would effectively remove courts of equity from any involvement in a congregational dispute involving a church's property. Chief Justice Sears filed a concurring opinion in which she commented on the limited scope of the ruling: "[w]hile it is proper for courts to determine church membership for the limited purpose of determining eligibility to vote on a litigated property dispute, it is plainly improper for courts to resolve disputes over church membership in general."

8. Associational Standing: *Atlanta Taxicab Co. Owners Ass'n, Inc. v. City of Atlanta, ___ Ga. ___, 638 S.E.2d 307, (2006) and Ouachita Watch League v. Jacobs, 463 F.3d 1163 (11th Cir. 2006)*

In Atlanta Taxicab Co. Owners Ass'n, Inc. v. City of Atlanta, the Georgia Supreme Court held that the Atlanta Taxicab Company Owners Association, Inc., a Georgia nonprofit corporation, had associational standing to challenge the constitutionality of a city ordinance on behalf of its members. The Association filed suit against the City of Atlanta seeking damages and a declaration that various sections of the Atlanta City Code that regulate the taxicab industry imposed an unconstitutional residency requirement.[8]

The trial court determined that the Association had standing to challenge the residency requirement in accordance with Aldridge v. Ga. Hospitality & Travel Assn., 251 Ga. 234, 304 S.E.2d 708 (1983) (adopting a three-part test formulated in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 341, 97 S. Ct. 2434, 2440, 53 L.Ed.2d 383 (1976)). As stated in Aldridge, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 251 Ga. at 236(1). The Georgia Supreme Court found that (1) every member of the Association was affected by the residency requirement, and thus, each member could sue in his or her own right; (2) the removal of the impediment to sale or lease a CPNC to a non-resident of Georgia was relevant to the Association's purpose; and (3) since the residency requirement has a common adverse impact on the Association's collective membership, participation of the individual members was not required to determine the merits of the claim. Atlanta Taxicab Co. Owners Ass'n, Inc., 2006 WL 3438081 at *3. Further, the Court stated that "[s]tanding does not require a showing that any particular

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[7] Stone and Stone Cold Chemical argued that a "person" under the RICO statutes should not include a corporation because of limiting language in O.C.G.A. § 16-2-22, which addresses criminal responsibility for corporations. That Code section provides that corporate defendants should not be prosecuted unless the crime is defined by a statute that "clearly indicates a legislative purpose to impose liability on a corporation." The Court rejected this argument, however, because the RICO allegations in the Williams General case were civil, not criminal, and the Court found no precedent applying § 16-2-22 to civil suits.

[8] The Atlanta City Code requires that all taxi cab and limousine operators in the City qualify for and obtain a Certificate of Public Necessity and Convenience ("CPNC"). According to Section 162-62(a) of the City Code, a CPNC is transferable "pursuant to a purchase, gift bequest or acquisition of the stock or asset of a corporation…." To qualify for a CPNC, the City requires that the holder be a resident of Georgia for at least one year. The Association argued that this requirement violated the Commerce Clause because its members were unable to freely transfer their certificates.

individual member of the Association has already suffered an actual injury by being prevented from consummating the sale or lease of a CPNC to a non-resident." Id. Two justices dissented from the majority opinion, specifically finding that the Association failed to satisfy the "minimum constitutional standing requirements because the Association did not allege a single fact or 'concrete or particularized' injury that would establish standing to bring a Commerce Clause challenge." Id. at *11.

In Ouachita Watch League v. Jacobs, the Eleventh Circuit held that a coalition of environmental groups (collectively, "Ouachita") had associational standing to bring suit against the U.S. Forest Service on behalf of its members to challenge the Forest Service's amendments to certain forest plans as violating governing regional vegetation management impact statements ("VMEIS"), the National Environmental Policy Act, and the National Forest Management Act. The Forest Service argued that Ouachita lacked standing, a claim that it raised for the first time on appeal. The Court held otherwise, applying the rules for associational standing.[9] The Court noted, "[s]o long as one party has standing, other parties may remain in the suit without a standing injury." Id. All Ouachita needed to establish associational standing was one person in each of the three regions covered by the VMEISs who could establish standing. The Court found that Ouachita easily met this requirement; its declarations indicated that "many of its plaintiffs use and will continue to use the forests in the three regions covered by the VMEISs…for recreation and, in some cases, for their livelihoods." Id. at 1171.

C. Limited Liability Companies.

9. Limited Liability Companies – Disassociation: *Sayers v. Artistic Kitchen Design LLC, 280 Ga. App. 223, 633 S.E.2d 619 (2006)*

In Sayers v. Artistic Kitchen Design LLC, the Georgia Court of Appeals, in a matter of first impression, interpreted O.C.G.A. § 14-11-601.1(b)(4)(D) of the Georgia Limited Liability Company Act, holding that a member of an LLC could not be disassociated from the LLC merely by filing a petition for the disassociation of another member.

In the case, two families created an LLC, and later, one family, the Landaus, filed a petition for reorganization to divest the other family, the Sayerses, of their membership interest. The Landaus invoked O.C.G.A. § 14-11-601.1(b)(5) which results in disassociation if a petition for reorganization is brought against a member and is not dismissed within 120 days after commencement.

The Sayerses attempted to turn the proceeding on its head, arguing that the Landaus did not have standing to bring the petition for reorganization because when they filed their petition for reorganization, under Section 601.1(b)(4)(D), the Landaus themselves became disassociated from the LLC. The Court rejected this argument.

Section 14-11 601.1(b)(4)(D) states in relevant part that a person ceases to be a member when "the member…files a petition or answer seeking *for the member* any reorganization…." (emphasis supplied).[10] The Sayerses argued that because the Landaus filed the petition, they then ceased to be members. The Court determined that such a reading of § 14-11-601.1 would lead to an absurd result, because if the filing of a petition to attempt to remove another member meant that the filing member would itself become dissociated, the entire process would break down and the disassociation statute would be useless for members. Instead, the Court found that if a member files a petition for reorganization to remove itself, then it becomes disassociated, but if the member files a petition for reorganization to remove another member, the filing member is not dissociated merely upon filing of the petition.

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[9] The Court applied the same associational standing test that the Georgia Supreme Court utilized in Atlanta Taxicab Co. Owners Ass'n, Inc. v. City of Atlanta.

[10] Section 14-11-601.1(b)(4)(D) and -(5) provides:

"(b) A person ceases to be a member of a limited liability company upon the occurrence of any of the following events:

. . . .

(4) Subject to contrary provision in the articles of organization or a written operating agreement, or written consent of all other members at the time, the member

. . . .

(D) files a petition or answer seeking for the member any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation . . ."

(5) Subject to contrary provision in the articles of organization or a written operating agreement, or written consent of all other members at the time, if within 120 days after the commencement of any proceeding against the member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within 90 days after the appointment without his or her consent or acquiescence of a trustee, receiver, or liquidator of the member or of all or any substantial part of his or her properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any stay, the appointment is not vacated.

10. LLC Receiverships: *Patel v. Patel, 280 Ga. 292, 627 S.E.2d 21 (2006)*

In Patel v. Patel, the Georgia Supreme Court reinforced its reluctance to place companies under receivership absent extenuating circumstances. The plaintiff brought an action alleging fraud and conversion and seeking an injunction, an accounting, and other relief. The plaintiff alleged that an LLC member had signed over his membership interest to the plaintiff, but the members of the LLC denied the validity of the assignment and refused to allow the plaintiff to participate in the LLC.

In connection with his lawsuit, the plaintiff sought the appointment of a receiver while the litigation was pending. The trial court denied the motion and the Supreme Court affirmed, stating that a receiver will be appointed only if it appears that the defendant is insolvent or if there is reason to believe that the defendants are mismanaging or wasting assets that are the subject of the litigation. The Court in the Patel case found that neither of those circumstances was present. The Court found that while the other members of the LLC refused to allow the plaintiff to participate in the LLC, receiverships are not intended to remedy issues of ownership. The Court rejected the plaintiff's argument that he should be regarded as a creditor, if not a shareholder of the business, holding that unsecured creditors are only entitled to obtain appointment of receivers in "extraordinary circumstances." Because the defendants were not proven to be insolvent or to be mismanaging, wasting or misappropriating the assets of the LLC in which the plaintiff claimed an equitable interest, the trial court properly refused to appoint a receiver.

D. Partnerships.

11. *Nationwide Mortgage Services, Inc. v. Troy Langley Construction, Inc., 280 Ga. App. 539, 634 S.E. 2d 502 (2006)*

In Nationwide Mortgage Services, Inc. v. Troy Langley Construction, Inc., the Georgia Court of Appeals held that an unformed LLC differs from a dissolved one, and individuals signing a partnership agreement on behalf of an unformed LLC become partners in their individual capacities. The Court further held that a partnership agreement does not become invalid merely by virtue of the fact that one of its identified partners is an unformed corporation, even where the agreement provides that the partnership is automatically dissolved by the dissolution of one of the corporate partners.

The case involved a suit by a demolition company, Troy Langley Construction, Inc. against a corporate property owner, Nationwide Mortgage Services, Inc., seeking payment for its work in demolishing apartment buildings on Nationwide's property. Nationwide counterclaimed that it never authorized the work. The work was authorized, instead, by the managing partner of a partnership whose existence, authority and rights to the property were in dispute.

The record revealed that Nationwide entered into a lease purchase agreement to sell the property to VentureCap Development, Inc., which planned to finance and develop the property. When VentureCap was unable to obtain financing, Nationwide's two sole officers and shareholders decided to form an LLC that would partner with VentureCap as a vehicle for obtaining the financing. They reserved a name for the LLC, Perry Limited, LLC, through the Secretary of State's office. However, the LLC was never formed. Despite this, the two officers, acting in their capacity as members of the unformed LLC, entered into a written partnership agreement with VentureCap. The corporate property owner was not a party to the partnership agreement and the property was never transferred to VentureCap or the partnership. However, VentureCap, purporting to be the owner of the property and the "primary managing partner" of the newly-formed partnership, contracted with the demolition company, which then demolished the existing apartments on the property.

A threshold issue was whether the corporate owner could be bound to the partnership agreement signed by its president on behalf of the unformed LLC. The Court held that it could not, stating that the owner "has its own legal identity distinct from [that of the officers]" and would not be bound by actions taken by its officers in their private capacities. The Court nonetheless found that even if the owner was not a party to the partnership agreement, factual issues remained as to whether the owner had authorized VentureCap to contract with the demolishing company. As to the partnership, the Court found that despite the officers' failure to form the LLC, the partnership agreement that they signed on behalf of the LLC with VentureCap was effective to create a partnership, but because they signed on behalf of a non-existing entity, the Court held that they were personally bound by the partnership agreement.

12. *Yun v. Um, et al., 277 Ga. App. 477, 627 S.E. 2d 49 (2006)*

In Yun v. Um, the Court of Appeals overturned a trial court's finding that a partnership existed between two persons operating a business where the record indicated that only the plaintiff had an ownership interest in the business, he assumed all the liabilities of the business, there was no written partnership agreement, and there was no evidence that the business was operated as a partnership under the meaning set forth in O.C.G.A. § 14-8-1 et seq. Yun, the owner of a liquor store sued Yi, the store manager, for breach of contract and conversion after Yi allegedly transferred funds from the store's business checking account after the store was sold. Yi claimed that the two were partners and that he was simply taking his 50% share of the sale proceeds. However, there was no partnership agreement. Yi's name did not appear on any of the documents relating to the purchase of the store. Notably, Yi had invested $100,000 of his funds, and was entitled to receive a certain portion of the profits in the course of the store's operations. The Court did not find this to be evidence of the existence of a partnership, but rather, only evidence of a debtor-creditor relationship. The Court focused instead on O.C.G.A. § 14-8-8, establishing standards for determining when property is partnership property. The Court concluded that the store was bought in Yun's individual name with his personal funds, not with any partnership funds. Furthermore, only Yun's name appeared on the sale documents and only Yun was liable for its debts, obligations and liabilities. Under these circumstances the trial court erred in finding that there was a partnership between Yun and Yi and that the liquor store was partnership property.

13. Limited Partnerships – Damages for Wrongful Substitution of General Partner: *Kellett v. Kumar, 281 Ga. App. 120, 635 S.E.2d 310 (2006)*

In Kellett v. Kumar, a former general partner and majority limited partner appealed a jury verdict awarding the minority limited partner $1.6 million in damages for wrongfully withdrawing and substituting a corporate general partner and merging the partnership into a publicly-held corporation without the consent of the plaintiff. In a previous, unpublished opinion, the Georgia Court of Appeals had affirmed a summary judgment ruling for the plaintiff that the partnership had been dissolved by the general partner's withdrawal and substitution. Among the issues in this appeal was the damages awarded, which the plaintiff's expert had calculated at $4.1 million by valuing the plaintiff's interest in the partnership on the date of dissolution and calculating the return that they could have received on it. The Court held that the jury's award of a lesser number unsupported by any specific testimony or documentary evidence was subject to challenge since it was within the range of the damages shown. The Court also upheld the trial court's admission of evidence of the defendant's involvement in similar litigation on the ground that it was relevant to demonstrate the defendant's course of conduct.

E. Joint Ventures.

14. No Joint Venture Where Mutual Control is Lacking: *Kitchens v. Brusman, 280 Ga. App. 163, 633 S.E.2d 585 (2006)*

In Kitchens v. Brusman, the Georgia Court of Appeals reaffirmed that a joint venture is only created where two or more parties combine their property, labor, or both, in a for-profit, joint enterprise, where all parties have mutual control. The plaintiff's wife visited Southern Regional Medical Center in October 1997 for a biopsy which was performed by a doctor employed by an entity referred to as "South Suburban." Pursuant to a contractual arrangement, South Suburban performed all pathological services for the hospital. The biopsy incorrectly determined that the tumor was not malignant. The plaintiff's wife was diagnosed with late stage cancer in October 1999, and she died a year later.

The plaintiff brought suit on his own behalf for the wrongful death of his wife and on behalf of his wife's estate for her pain and suffering, alleging that the doctor misdiagnosed his wife's original condition in 1997. The plaintiff included the hospital as a defendant alleging that the hospital and South Suburban operated the pathology lab as a joint venture and, therefore, the hospital was responsible for Dr. Brusman's actions. The trial court granted summary judgment to the defendants after determining that the plaintiff failed to file suit within the statute of limitations. On appeal, the Court reversed on the issue of statute of limitations, then considered the issue of whether the hospital and South Suburban operated the pathology lab as a joint venture. For the applicable principles, the Court cited to the Georgia Supreme Court's holding in Rossi v. Oxley, 269 Ga. 82, 83, 495 S.E.2d 39 (1998), which stated that "a joint venture arises where two or more parties combine their property or labor, or both, in a joint undertaking for profit, with rights of mutual control." The element of mutual control is essential to the existence of a joint venture.

Examining the facts of the case, the Court concluded that the hospital and South Suburban were not engaged in a joint venture because the contract between the two specifically provided "that the hospital did not have, and could not exercise, any control or direction over the manner in which independent-contractor pathologists provided pathology services." Furthermore, the contract provided that South Suburban was responsible for recruiting, contracting, scheduling, compensating and supervising all pathology services. Since the hospital had no control over the pathology lab, the Court held that the hospital and South Suburban were not operating as a joint venture and affirmed the trial court's grant of summary judgment for the hospital.

15. Joint Venture Test Met: *Hillis v. Equifax Consumer Services, Inc., 237 F.R.D. 491 (N.D. Ga. 2006)*

Hillis v. Equifax Consumer Services, Inc. was brought as a proposed class action alleging that a credit information and repair service, "Score Power," offered jointly by Equifax and Fair Isaac, Inc. violated the Credit Repair Organizations Act, 15 U.S.C. 1679 et seq. In a lengthy order denying both class certification and the plaintiff's motion for partial summary judgment, the Court briefly addressed and ruled on the plaintiff's contention that the relationship between Equifax and Fair Isaac was a joint venture.

The Court began by noting that in a joint venture the acts of one "joint adventurer" are binding on the other. The Court stated that "the essential elements of a joint venture are (1) a pooling of action; (2) a joint undertaking for profit; and (3) rights of mutual control." Id. at *19, citing Kissun v. Humana, Inc., 267 Ga. 419, 420, 479 S.E.2d 751 (1997). The Court examined the agreement between Equifax and Fair Isaac setting up the Score Power program (not set forth in the opinion) and found that all elements were present, including "some element of mutual control."

F. Derivative Actions and Individual Shareholder and Investor Claims.

16. Direct Versus Derivative Actions: ***Southwest Health and Wellness LLC, et al. v. Work, et al., ___ S.E. 2d ___, 2006 WL 3422970, (Ga. App., Nov. 29, 2006)***

In this case, minority members of Southwest Doctors Group, LLC ("SDG") directly sued the majority members of the limited liability company for, among other allegations, breach of SDG's operating agreement, fraud, misuse of corporate assets, unjust enrichment and "violations of the Patriot Act." The dispute centered on efforts by the majority members to obtain permanent financing for Southwest Hospital which SDG had purchased out of bankruptcy. The trial court entered a judgment on the pleadings, dismissing the complaint on the ground that claims should have been brought derivatively, not directly. The Court of Appeals affirmed.

The Court of Appeals acknowledged the general rule that a shareholder seeking to recover misappropriated corporate funds may bring only derivate actions, citing Matthews v. Tele-Systems, 240 Ga. App. 871, 525 S.E.2d 413 (1999) and Haskins v. Haskins, 278 Ga. App. 514, 629 S.E.2d 504 (2006). Shareholders may bring direct actions when they allege "more than a wrong done to the corporation, either a separate and distinct injury from that suffered by other shareholders or a wrong derived from a contract right existing independently of any right of the corporation," citing Dunn v. Ceccarelli, 227 Ga. App. 505, 489 S.E.2d 563 (1997) (physical precedent only) and Grace Brothers, Ltd. v. Farley Industries, 264 Ga. 817, 450 S.E.2d 814 (1995).

The plaintiffs alleged a variety of claims and injuries, which they argued all resulted from the defendants' "breach of a fiduciary duty to disclose." The Court found the plaintiffs' allegations insufficient to show a special injury, requiring factual allegations, not just generalized assertions:

> An examination of appellants' claims in the amended complaint reveals that it is replete with general allegations of injuries separate and apart from the other shareholders, but the allegations do not demonstrate how this is true.

Id. at *5 (emphasis added). Relying on In re Tri-Star Pictures, 634 A.2d 319 (Del. 1993), the appellants contended that allegations of usurpation of voting rights and dilution of shares constituted separate and distinct injuries entitling them to direct action. The Court distinguished Tri-Star, because the majority had diluted minority shareholders by increasing their own interest, whereas here "all the shareholders were diminished in proportion to their ownership by the selling of interests to new shareholders."[11]

The appellant also argued in alternative that even in the absence of a special injury, they could rely on the exception to derivative action requirements established under Georgia law for minority shareholders of close corporations, which was held applicable last year to LLCs in Stoker v. Bellemeade, LLC, 272 Ga. App. 817, 615 S.E.2d 1 (2005), rev'd in part on other grounds, and Bellemeade, LLC v. Stoker, 280 Ga. 635, 631 S.E.2d 693 (2006). The Court in Stoker relied on Thomas v. Dickson, 250 Ga. 772, 301 S.E.2d 49 (1983) as setting forth the conditions when close corporation minority shareholders can file direct actions, namely when a derivative action would not serve its purposes, i.e., would not be necessary to: (1) prevent multiple shareholder suits, (2) protect corporate creditors by ensuring that the recovery goes to the corporation; (3) protect the interest of all the shareholders by ensuring that recoveries by the individual shareholders do not prejudice other shareholders, and (4) compensate injured shareholders by increasing their share values. In this case, there were two shareholders who were not parties to the litigation and the record did not support appellant's allegation that "the two shareholders were given the opportunity to participate in these proceedings and chose not to." The Court also appeared to suggest that the plaintiffs might have been able to pursue a direct action if they had satisfied "at least one of the four criteria in Thomas," id. at *7, however, this language is dicta, since the Court found that the plaintiffs failed to satisfy any of the Thomas criteria, thus the close corporation exception did not apply.

17. Derivative Actions – Award of Litigation Fees and Expenses Against Derivative Plaintiffs under O.C.G.A. § 14-2-746: ***Hantz v. Belyew, 2006 WL 3266508 (N.D. Ga., Nov. 8, 2006)***

In Hantz v. Belyew, the United States District Court for the Northern District of Georgia ruled on and granted motions under O.C.G.A. § 14-2-746 to recover attorney's fees and expenses by defendants who had succeeded earlier in obtaining dismissal of a derivative action. The plaintiffs were shareholders of a Florida corporation which had gone through a bankruptcy reorganization. In dismissing the complaint, the District Court had held, among other things, that the plaintiffs' claims were derivative and because their

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[11] The Supreme Court of Delaware abolished the "special injury rule" as not a helpful tool in "analytical distinction between direct and derivative actions." Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1035 (Del. 2004).

stock holdings had been extinguished in the bankruptcy, the plaintiffs failed to meet the requirement of continuous ownership necessary to maintain a derivative action. It rejected the plaintiffs' argument that, as in merger disputes, the involuntary nature of the termination of minority shareholders' interest should excuse the fact that they were no longer shareholders. These rulings were affirmed on appeal.[12] On remand, the District Court held that prevailing defendants were not required to demonstrate that the plaintiffs had pursued their claims in bad faith or with an improper motive. Section 14-2-746 authorizes an award of litigation costs not only where the claims are pursued "for an improper purpose," but also where they are pursued "without reasonable cause." The Court did not explain why § 14-2-746, as provision of the Georgia Business Corporation Code, governed the rights to attorney's fees and litigation costs, when Florida law governed the plaintiffs' standing to sue on behalf of the Florida corporation in which they had been shareholders.

18. Common Law Claims for Investor Fraud; Rescission Offers; Direct versus Derivative Claims; Holding Claims: *Argentum International, LLC v. Woods, 280 Ga. App. 440, 634 S.E.2d 195 (2006)*

The Argentum International, LLC v. Woods case involved claims for fraud brought by equity investors and debenture holders who purchased securities in a limited liability company formed to own and exploit a patent for a silver nylon wound dressing. A business plan used to sell the securities represented that the company owned the patent. The investors claimed that while the company's securities were being sold, the inventor decided to transfer the patent out of the company. His intentions and efforts were not disclosed to investors, even though the company made a repurchase offer, accompanied by a private placement memorandum, in order to cure federal and state securities laws violations involved in the issuance of the debentures. The inventor made repeated assurances that promises in the business plan would be honored and the investors did not accept the debenture repurchase offer or rescind their equity purchases.

Appealing from an adverse jury verdict, the defendants contended, among other things, that the debenture holders could only sue under their contracts, that the equity investors' fraud and conspiracy claims were derivative in nature, and that the investors had failed to perform due diligence. Rejecting each of these claims, the Court of Appeals found that the investors had presented evidence supporting the conclusion that the investors "were fraudulently induced into making and keeping their investments." The Court held that the debenture holders under general fraud principles could affirm their debentures and still sue for fraud. The equity investors' claims, the Court ruled, were "different from and more than the wrong to the corporation," (quoting from William Goldberg & Co. v. Cohen, 219 Ga. App. 628, 68, 466 S.E.2d 872 (1995)) and were hence direct, not derivative in nature. The Court also found sufficient evidence of due diligence by some investors and their inability through due diligence to discover the fraud to entitle all investors to reach the jury. It also held that the inventor as a member of the board of managers owed fiduciary duties that relieved the equity investors from exercising due diligence. As to a co-defendant who joined the company after the plaintiffs purchased their securities and who contended that he had made no representations to the plaintiffs, the Court stated that "[A]nyone, after a conspiracy is formed, who knows of its existence and purposes and joins therein, becomes as much a party thereto as if he had been an original member," quoting Grainger v. Jackson, 122 Ga. App. 12, 128, 176 S.E.2d 279 (1970).[13] The Argentum International case is notable for recognizing – although not expressly noting – a holding claim, i.e., a claim for fraudulently inducing investors to retain securities.[14]

19. Common Law Claims for Securities Law Violations: *Douglas v. Bigley, 278 Ga. App. 117, 628 S.E.2d 199 (2006)*

In Douglas v. Bigley, the Georgia Court of Appeals considered common law claims of breach of fiduciary duty, fraud and illegality of contracts, holding that in the context of a confidential relationship, the failure to register securities under Georgia's securities laws could support claims of breach of fiduciary duty and fraud, but, curiously, did not render the contracts illegal and unenforceable.

The plaintiff, Angela Bigley, alleged that she was induced to invest in contracts to fund personal injury cases by the defendant Michael Douglas, whom she considered to be a close friend. Douglas, a principal of Future Litigation Funding of Georgia, Inc. ("FLF"), claimed to have the ability to select cases likely to be profitable. Evidence introduced at trial showed that the defendants

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[12] Hantz v. Belyew, 194 Fed. Appx. 897, 2006 WL 2613447 (11^{th} Cir., Sept. 12, 2006) (unpublished). The Court of Appeals relied on both Florida law and F. R. Civ. P. 23.1, noting that the plaintiffs had not asserted their rights for a year prior to confirmation of the plan of reorganization and stating: "If this issue turned on voluntariness, plaintiffs' analogy might be apt, but involuntariness alone cannot justify an exception to Fed. R. Civ. P. 23.1. Rule 23.1 follows the principle that '[o]nly a shareholder, by virtue of his proprietary interest in the corporate enterprise' has sufficient interest in the well-being of the corporation to sue on it behalf [citing Shilling v. Belcher, 582 F.2d 995, at 999 (5^{th} Cir. 1978)] . . . . Plaintiffs who lose their shares involuntarily have no greater interests in the continued well-being of a corporation than plaintiffs who willing sell their shares. Neither class of plaintiff retains a proprietary interest in the corporate enterprise." 194 Fed. Appx. at 899; 2006 WL 3266508 at *2.

[13] The Court, however, does not identify any conspirators other than the inventor and co-defendant and does not explain how the conspiracy pre-existed the co-defendant's joining the company.

[14] Earlier in the year, the United States Supreme Court in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, ___ U.S. ___, 126 S. Ct. 1503 (2006) held that class actions asserting such so-called "holding claims" under state law are preempted by the Securities Litigation Uniform Standards Act of 1998. SLUSA would not, of course, preempt individual holding claims or claims not involving publicly-traded securities.

controlled the selection of cases in which to invest and managed the way in which the plaintiff's funds were spent, while giving only minimal information to the plaintiff about the cases. In response to Bigley's inquiries, Douglas assured her that the litigation funding investments were legal.

After becoming dissatisfied with her investments and concerned again about their legality, Bigley contacted the Georgia Secretary of State. The Secretary of State found violations of the registration requirements of the Georgia Securities Act and issued a cease and desist order. The order was prospective only; it did not address the plaintiff's contracts or require the defendant to do anything with respect to them.

Bigley sued defendants for breach of fiduciary duty, fraud and breach of contract and the jury found the defendants liable on all three claims.[15] The Court of Appeals held that the evidence, the relationship between the parties and the plaintiff's dependence on the defendants' selection and management of cases, supported a finding that the defendants owed fiduciary duties to the plaintiff. It also found that the evidence supported the plaintiff's breach of fiduciary duty and fraud claims, because the plaintiff was assured of the legality of the contracts, but was able to show that the litigation funding company violated the registration requirements of the Georgia securities laws and charged usurious interest rates on some of the funding agreements. While misrepresentations of law are generally not actionable, that rule is relaxed in the fiduciary context. On the other hand, the Court overturned the verdict for breach of contract, finding that the defendants adequately disclosed – and the plaintiff understood – the risks involved in investing in litigation. More importantly, the Court held that the contracts were not unenforceable and subject to rescission, despite the violations of the securities and usury laws.

The Court's treatment of the securities registration violations should be of significance to both litigators and corporate lawyers. Ms. Bigley contended that she was entitled to rescind her litigation funding contracts, because they were securities illegally sold in violation of the Georgia Securities Act.[16] The Court of Appeals rejected this argument holding that the defense of illegality did not apply because the object of the contracts was not illegal and could be accomplished without a violation of law, the securities could have been sold legally, if they had been registered, and the failure to register could have been remedied.[17]

20. Claims and Attorney's Fees Under the Georgia Securities Act: *Davis v. Johnson*, *280 Ga. App. 318, 634 S.E.2d 108 (2006)*

In Davis v. Johnson, the Georgia Court of Appeals, interpreting a verdict, held that the jury's finding that the plaintiffs should not have discovered alleged securities fraud during the limitations period could not support an award of attorney fees under the Georgia Securities Act of 1973 where the jury also found no securities fraud.

The plaintiffs brought securities fraud, common law fraud, breach of fiduciary duty and breach of contract claims arising from the defendants' acquisition of the plaintiffs' trucking company. In the deal, the plaintiffs received cash and restricted stock in Transit Group, Inc. ("TGI"), the acquiring corporation, with the number of shares of stock tied to the price of TGI's NASDAQ-traded shares. The plaintiffs filed suit after TGI filed for bankruptcy. The plaintiffs alleged that the defendants fraudulently concealed other, differently-priced, pre-acquisition restricted stock transactions that, had they been disclosed, would have caused the plaintiffs to forego the transaction. The plaintiffs sought attorney fees on two bases: O.C.G.A. § 10-5-14(a), which allows a plaintiff to recover attorney fees on a finding of securities fraud, and O.C.G.A. § 13-6-11, Georgia's "bad faith" attorney fee statute. The defendants argued that the plaintiffs were sophisticated business people, were advised by counsel, and had been put on notice of the other restricted stock transactions through both specific disclosures and publicly-available SEC filings.

At trial, the jury returned a verdict finding that the defendants were not liable on any of the plaintiffs' substantive claims, including their securities fraud claim, but awarded the plaintiffs attorney's fees. The Georgia Court of Appeals denied the plaintiffs' appeal finding that there was sufficient evidence of notice of the other transactions in TGI restricted shares to support the defense verdict.

The jury had awarded the plaintiffs attorney's fees, finding that the plaintiffs should not have discovered the alleged securities fraud during the limitations period. The plaintiffs contended that the jury's negative answer on the securities fraud discovery question

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[15] The plaintiff apparently did not assert claims under the non-registration or anti-fraud provisions of the Georgia Securities Act itself, presumably because the statute of limitations had run.

[16] The only securities laws violation discussed was the failure to register. There was no mention of violation of the antifraud provisions of the Georgia Securities Act.

[17] "The Secretary of State, however, did not declare FLF's investment contracts illegal. On the contrary, it found violations that could be remedied by properly registering the contracts with the State. Such violations do not bring the investment contracts within OCGA § 13-8-1. . . . The alleged illegalities cited by Bigley were incidental to the purpose of the investment contracts; those contracts did not *require* a securities violation" 278 Ga. App. at 124, 628 S.E.2d at 207 (emphasis in original).

implied that there had been a violation. The Court rejected this argument, holding that it was plainly contradicted by the jury's finding that the defendants were not liable for securities fraud, and that it was illogical to conclude that the jury could have based its award of attorney fees on the securities fraud claim it rejected.

G. Alter Ego Liability; Piercing the Corporate Veil.

21. LLC Member Liability: *Milk v. Total Pay and HR Solutions, Inc., 280 Ga. App. 449, 634 S.E.2d 208 (2006)*

In Milk v. Total Pay and HR Solutions, Inc., the Georgia Court of Appeals outlined the difficulty of holding individual LLC members responsible for the debts of an LLC. Total Pay and HR Solutions, Inc. ("Total Pay"), a payroll process service company, sued an LLC and its sole managing member for payments owed. In the trial court, the LLC consented to a default judgment against it and the trial court entered summary judgment against the managing member. The court reversed summary judgment against the managing member finding that there was insufficient evidence that the managing member could be held personally liable for the debts of the LLC.

The Court provided several reasons for its conclusion. First, the contract entered between the LLC and Total Pay was not signed by the managing member in any capacity, either individually or as managing member. The Court stated that "great caution" should be exercised by the Court before disregarding a corporate entity. Second, the Court found that without a joint interest between the LLC and member, no admission of the LLC could be used against the member. Total Pay claimed that because the LLC dissolved before its operating agreement was executed, the managing member could be held personally liable for the debts of the LLC. During the LLC's deposition, it admitted that the LLC was dissolved before its operating agreement was executed. The managing member, however, testified that the LLC had not yet been dissolved and produced a copy of the operating agreement. In any case, an LLC is formed when its articles are filed with the Secretary of State, not when an operating agreement is signed. Third, the Court found no evidence to support the plaintiff's claims that the managing member had undercapitalized the LLC and thus should not be protected by the corporate veil. The Court stated that the veil would not be pierced because of undercapitalization unless evidence existed showing that the member intended to undercapitalize the LLC to avoid future debts at the time the capitalization occurred. Here, there was no such evidence. Finally, the Court summarily rejected the plaintiff's claims that the managing member should be held personally liable for the LLC's debts because he participated in fraud committed by the LLC. The Court noted that if a member participates or cooperates in a tort committed by an LLC or directs such acts by an LLC, then the member can be held personally liable, but found that there was an issue of fact on that point.

22. Alter Ego Not Found Where Misappropriated Trust Assets Were Used to Pay Corporate Liabilities: *DaimlerChrysler Financial Services Americas LLC v. Nathan Mobley Chrysler, Dodge, Jeep, Inc., 2006 WL 3762087 (S.D. Ga., Dec. 20, 2006)*

In this case, DaimlerChrysler sued a dealership for diverting trust funds from the sale of inventory under a floor plan financing arrangement. It sought to hold the dealership's owner personally liable for the dealership's breach of trust, arguing that he had abused the corporate form. The Court stated that the standard for determining that a corporation is the alter ego of its shareholders or officers is "difficult to meet" and that the courts must proceed with great caution in disregarding the corporate entity. The court found that the Dealership's use of trust funds to pay other company obligations was insufficient by itself to warrant piercing the corporate veil, noting the there was no evidence that the owner used the funds to satisfy his personal debts.

23. Corporate Reinstatement May Not Protect from Alter Ego Liability if Subject to Equitable Estoppel: *Solomon v. Barnett, 281 Ga. 130, 636 S.E.2d 541 (2006)*

This is a long-running appellate case involving the effect of corporate reinstatement of three administratively dissolved corporations in Delaware and Georgia on the personal liability of the principal who purported to enter into agreements and transact business in the names and on behalf of the dissolved corporations. The plaintiff sought to pierce the corporate veil of the corporations. The defendant reinstated the corporations, arguing that the reinstatement related back under 8 Del. Code § 312(e) and Fulton Paper Co. v. Reeves, 212 Ga. App. 314, 441 S.E.2d 881 (1994), and shielded him from personal liability. The Court of Appeals and Supreme Court both considered the defense of reinstatement to be open to attack under principles of equitable estoppel, compare Solomon v. Barnett, 269 Ga. App. 779, 605 S.E.2d 599 (2004) with Solomon v. Barnett, 281 Ga. 10, 636 S.E.2d 541 (2006). The two appellate courts do not mention the particular factual contentions that the plaintiff argued gave rise to estoppel, but it took a couple of trips between the two courts to sort out which party had the burden on summary judgment, given numerous issues of fact reportedly in the record.

24. Alter Ego Doctrine Potentially Applicable in CERCLA Cases: ***Atlanta Gas Light Co. v. UGI Utilities, Inc.**, **463 F.3d 1201 (11th Cir. 2006)***

In Atlanta Gas Light Co. v. UGI Utilities, Inc., the Eleventh Circuit Court of Appeals held that a parent corporation could be held liable for a subsidiary's liability in contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), if the corporate veil can be pierced. Applying the principles established by the U.S. Supreme Court in United States v. Bestfoods, 524 U.S. 51, 118 S. Ct. 1876, 141 L.Ed.2d 43 (1998), the Court of Appeals stated that to hold a parent company liable under CERCLA as an operator, the plaintiff must prove that the parent as operator must have managed, directed, or conducted operations specifically related to pollution. The Court distinguished between managing the affairs of the subsidiary and managing the facility that produced the CERCLA violations. Overlapping officers and directors and the existence of a management contract are not sufficient to impose CERCLA operator liability on a parent corporation. In fact, under Bestfoods, so long as corporate formalities are being observed, parent company officers and directors who also serve at the subsidiary level are presumed to be acting in their capacity as subsidiary officers and directors when handling management responsibilities for the subsidiary.

25. Alter Ego Doctrine Inapplicable in Title VII Litigation: ***Dearth v. Collins, 441 F.3d 931 (11th Cir. 2006), cert. denied, ___ U.S. ___, 127 St. Ct. 153 (2006)***

In Dearth v. Collins, the Eleventh Circuit held as a matter of first impression in this Circuit that alter ego theories of liability are unavailable in a case under Title VII of the Civil Rights Act of 1964. The plaintiff sued her employer for sexual harassment and added the employer's president, director and sole shareholder as a defendant. Given prior 11th Circuit rulings that Title VII liability is restricted to the "employer," as well as 7th Circuit authority, Worth v. Tyer, 276 F.3d 249, 262 (7th Cir. 2001), the Court held that plaintiffs may not use the alter ego theory to impose liability on individuals who are not employers. The Court went on to hold that the plaintiff did not offer evidence that would have justified alter ego liability under Georgia law, citing McLean v. Continental Wingate Co., 212 Ga. App. 356, 359, 442 S.E.2d 276, 279 (1994) and stating the rule as follows:

> The corporate veil occasionally can be pierced by operation of the alter ego doctrine, but the alter ego doctrine applies only if three requirements are met. Specifically,
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> > "[t]o establish the alter ego doctrine it must be shown [1] that the stockholders' disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; [2] that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and [3] to adhere to the doctrine of corporate entity would promote injustice or protect fraud."
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> McLean v. Cont'l Wingate Co., 212 Ga. App. 356, 359, 442 S.E.2d 276, 279 (1994) (quoting *935 Custom Lighting & Decorating, Ltd. v. Hampshire Co., 204 Ga. App. 293, 295-96, 418 S.E.2d 811, 814 (1992)). To justify piercing the corporate veil, " 'the plaintiff must show [that] the owner abused the corporate form by disregarding the separateness of legal entities by commingling [funds] on an interchangeable or joint basis or confusing the otherwise separate properties, records, or control.'" Rasheed v. Klopp Enterprises., Inc., 276 Ga. App. 91, 95 n. 4, 622 S.E.2d 442, 446 n. 4 (2005) (citation omitted).

26. Reverse Piercing of Corporate Veil in a Professional Corporation: ***Pate v. Pate, 280 Ga. 796, 631 S.E.2d 103 (2006)***

In Pate v. Pate, the Supreme Court determined that child support payments could be paid out of income assigned by a divorced husband to a wholly-owned professional corporation formed by the husband. In the process the Court considered, but rejected, the appellant-husband's argument that the trial court's ruling represented impermissible reverse piercing of the corporate veil. This action was brought by the wife against the former husband for breach of their divorce settlement agreement, which had provided that the husband would pay to the wife 25% of his monthly gross income until their children reached age 21. The husband, a doctor, formed a professional corporation to which he assigned all sums received by him in connection with his services. The corporation paid wages not only to the husband, but to his new wife as well. The husband then calculated his child support obligations based on the wages he received from the corporation as reflected on his W-2, rather than the gross income assigned to the corporation. The trial court found the husband to be in violation of the divorce settlement agreement, and the Court of Appeals affirmed. The Supreme Court found that for child support purposes, gross income includes all income received from the professional corporation, less reasonable expenses, and is not limited to wages noted on the W-2 form. In its holding, the Court rejected an argument that the case was controlled by Acree v. McMahan, 276 Ga. 880, 585 S.E.2d 873 (2003), in which the Supreme Court had declined to adopt the doctrine of "reverse veil piercing" as a new theory of liability. The Court found Acree inapplicable and held the trial court's decision was authorized under O.C.G.A. § 19-6-35(b), which enables a child support recipient to use fraudulent conveyance laws to void certain transactions designed to circumvent child support obligations.

H. <u>Transactional Decisions</u>.

27. Third Party Standing to Enforce Asset Purchase Agreement: *Kaesemeyer v. Angiogenix, Inc., 278 Ga. App. 434, 629 S.E.2d 22 (2006)*

In Kaesemeyer v. Angiogenix, Inc., the Georgia Court of Appeals held that a non-party to an asset purchase agreement lacked standing to bring a breach of contract claim against the parties to that agreement, citing the "clear, unambiguous language" of that agreement. In so doing, the Court affirmed the trial court's grant of summary judgment in favor of the defendants in a breach of contract claim brought by a research scientist and principal of a corporation whose assets and liabilities the defendant purchased.

The plaintiff was the principal of co-defendant NitrOSystems. NitrOSystems executed a conditional promissory note to pay the plaintiff for his work in developing pharmaceutical patents. The note contained a condition that it would become due and payable one year from the date of the U.S. Food and Drug Administration's ("FDA") approval of a certain pharmaceutical compound described in the note. In 2002, the defendant Angiogenix, Inc. ("Angiogenix") entered into an agreement to purchase certain assets and liabilities from NitrOSystems. The promissory note between NitrOSystems and the plaintiff was listed as an assumed liability in the schedules accompanying the asset purchase agreement. However, the agreement provided, in relevant part, that "no other person shall have any right, benefit or obligation under this Agreement as a third party beneficiary or otherwise."

In 2003, when an unrelated pharmaceutical company (Merck & Co., Inc.) obtained FDA approval to add new labeling information to its product (Zocor), even though Angiogenix was not involved in or affected by the approval of that product, the plaintiff took the position that his right to payment had been triggered and thereby sought payment from Angiogenix, under the NitrOSystems asset purchase agreement. Angiogenix refused to pay on the ground that the condition precedent for payment of the note had not occurred. The plaintiff sued both Angiogenix and NitrOSystems for breach of contract. The plaintiff admitted that the condition precedent as described in the original promissory note had not occurred, but he nonetheless argued that the schedule to the asset purchase agreement, which described the condition precedent differently than did the original note, modified the note.

On appeal, the Court rejected the plaintiff's argument that the incorporation of his promissory note into the asset purchase agreement conferred third-party beneficiary rights on him. The Court found that the explicit language in the agreement foreclosing the possibility of any third-party beneficiary rights "clearly and unambiguously" expressed the intent of the contracting parties and deprived the plaintiff of standing. The Court noted that the agreement contained a merger clause, which foreclosed parol evidence varying the agreement. The Court also held that even if it were assumed that the plaintiff did have standing as a third-party beneficiary to the asset purchase agreement, and even if it were assumed that the asset purchase agreement modified the original promissory note, the facts in the record indicated that the condition precedent triggering Angiogenix's obligation to pay on the promissory note had not occurred.

28. Third-Party Beneficiary Rights under Limited Partnership Agreement: *Hilliard v. SunTrust Bank, et al., 277 Ga. App. 544, 627 S.E.2d 77 (2006)*

In Hilliard v. SunTrust Bank, the Georgia Court of Appeals held that a potential, but not intended, beneficiary of a partnership agreement lacks standing to enforce the agreement. The case was a declaratory action in which the plaintiff, a beneficiary of her father's estate, sought to enforce restrictions on the transfer of partnership interests contained in a limited partnership agreement to which her father had been a party. In 1991 the testator executed his will leaving all his property to a trust for the benefit of the daughter. A 1997 codicil, however, directed that the testator's interests in three restaurant businesses should go to his siblings at his death. The daughter sued seeking a declaration that this provision of the codicil was void on the ground that it conflicted with a series of pre-existing agreements between the testator and his siblings, which required that on a partner's death his interest in the businesses would be purchased by the general partner. The Court did not address the daughter's assertion on its merits, however, because it found that the daughter lacked standing to enforce these agreements. The Court cited the principle that "[i]n order for a third party to have standing to enforce a contract as its beneficiary, 'it must clearly appear from the contract that it was intended for his benefit. The mere fact that he would benefit from performance of the agreement isn't alone sufficient.'" The Court noted that the plaintiff's potential interest derived from her father and his breach of the agreements divested her of that interest. The Court held that she thus lacked standing to assert claims under the limited partnership agreement.

29. Secured Transactions – Right to Attorney's Fees in Foreclosure on Stock: *Lovell v. Thomas, 279 Ga. App. 696, 632 S.E.2d 456 (2006)*

In Lovell v. Thomas, the Georgia Court of Appeals construed a set of integrated loan documents providing for recovery of attorney's fees in the event of collection of the debt, held that the lender was not required under O.C.G.A. § 13-1-11 to file suit and was not required under the loan documents to show that redeeming re-pledged collateral securing the debt involved "some kind of lawyer activity" in order to establish his entitlement to attorneys' fees. The Court also held that the issue of whether a borrower received notice of a lender's intention to seek attorney fees is a question for the jury, where the borrower rebuts the presumption that the notice was received.

The case involved a default on a loan secured by shares of stock. The lender (Lovell) obtained a loan from a commercial bank (Regions Bank) and then re-lent the funds to the borrowers (the Thomases), who used the funds to purchase the stock. The borrowers pledged their stock to the lender who re-pledged it to the bank. Upon default, the lender redeemed the stock from the bank and sold it, and retained the portion consisting of principal, interest, late fees and nearly $100,000 in "expenses and attorneys fees." The borrower contended that the lender was not entitled to retain attorney fees because (1) the promissory note required him to institute legal proceedings before becoming entitled to fees; and (2) he failed to substantially comply with the notice requirements of O.C.G.A. § 13-1-11, which governs the collection of attorney fees in enforcement of debts. The trial court held that the lender was entitled to attorney's fees only if the act of redeeming the collateral involved "some kind of lawyer activity, such as a foreclosure or some other act than as provided in the Security Agreement itself."

On appeal, the Court, applying general principles of contract construction, held that the five documents comprising the parties' agreement – the loan agreement, promissory note, a guaranty, and two stock pledge agreements – must be read together. Interpreted as a whole, the documents did not support the borrowers' argument that the loan agreement was superseded by the other four documents. Thus, as provided in the loan agreement, the Court held that the lender did not have to file suit before he was entitled to collect attorney fees, even if other documents had requirements that differed. The Court also reversed the trial court's ruling that the lender was not entitled to attorney fees merely for redeeming the collateral. The lender redeemed the collateral only after the borrowers defaulted, and as the Court noted, the trial transcript showed that attorneys "played a role" in selling the collateral and paying off the debt. The Court remanded for a determination by the jury whether the lender had provided the borrowers with notice of his intent to collect attorney fees, as required by O.C.G.A. § 13-1-11, since the borrowers testified that they had not received the notice.

30. **Enforceability of Letter of Intent to Purchase a Corporation:** ***Goobich v. Waters, 2006 WL 3095394 (Ga. App., Nov. 1, 2006)***

Goobich v. Waters involved a suit by a proposed purchaser for specific performance of an agreement to sell Outdoor Environments, Inc., a nursery business. The purchaser and the sellers had executed a non-binding letter of intent that they converted, by later addendum, into a binding contract, subject to the preparation and execution of a definitive agreement. The Court of Appeals reversed the trial court's summary judgment for the sellers, finding that the letter of intent contained all essential terms. It held that the future obligation to execute closing documents was not a condition precedent to the existence of a valid contract, but only to the duty of the parties to render performance.

31. **Sale of Business Dispute:** ***Park v. Fortune Partner, Inc., 279 Ga. App. 268, 630 S.E.2d 871 (2006)***

This suit represents an effort by sellers of a dry cleaning business to collect on promissory notes received in the transaction from the purchasers. Much of the litigation centered upon a "sham" management agreement that the parties entered into when it was discovered that the sale would violate a contract that the seller had with the original owner of the business. The Georgia Court of Appeals rejected the purchasers' contentions that the management agreement represented a novation of the promissory notes. The Court found that the defendants, by operating the business, making payments on the notes and then re-selling the business to yet another owner, had waived their claims regarding the management agreement, questions of title and other aspects of the sellers' performance. The Court reversed the trial court's $200,000 reduction in the purchasers' obligations because of the sellers' alleged "unclean hands." The Court of Appeals held that equitable defense was inapplicable to a claim at law on the promissory notes.

I. Professional Liability in Business Organization Cases.

32. **Professional liability in the Sale of Businesses and Corporate Transactions:** ***Cleveland Campers, Inc. v. R. Thad McCormack, P.C., 280 Ga. App. 900, 635 S.E. 2d 274 (2006)***

In Cleveland Campers, Inc. v. R. Thad McCormack, P.C., the Georgia Court of Appeals affirmed the trial court's ruling that no attorney-client relationship existed between sellers of a business and the attorney for the buyers, holding that legal advice or assistance must be sought from an attorney in order for an attorney-client relationship to exist. In 2000, the plaintiffs sold their business. The Court found that the defendant never told the plaintiffs that he was representing them in the transaction, although he also never said that he was representing only the buyers. The Court held that there was no evidence of an attorney-client relationship between the plaintiffs and the defendant. The Court found no evidence that the plaintiffs sought legal advice or assistance from the defendant or that the defendant offered any legal advice. Further, the Court noted that the plaintiffs never communicated to the defendant that they would rely on him for legal advice related to the transaction, and additionally, they did not pay him any legal fees. Quoting Guillebeau v. Jenkins, 182 Ga. App. 225, 231(1), 355 S.E.2d 453 (1987), the Court held that "[a]n attorney-client relationship cannot be created unilaterally in the mind of a would-be client; a reasonable belief is required." The Court went on to distinguish this case from three prior cases in which it had found the existence of attorney-client relationships, noting that the plaintiffs in the other three cases had sought legal advice or assistance from the defendant attorneys and that those attorneys had offered legal advice in return.

33. *All Business Corporation v. Choi, 280 Ga. App. 618, 634 S.E.2d 400 (2006)*

In All Business Corporation v. Choi, the Georgia Court of Appeals held that an attorney acting as an escrow agent in the sale of a business does not owe a third-party secured creditor any duty with regard to the proceeds of sale when the attorney has no actual or constructive notice of the creditor's lien on a debtor's property. The Court held that even where the attorney is in possession of funds, the attorney does not owe a fiduciary duty to an unforeseeable third party, nor does he commit conversion if he lacks actual or constructive knowledge of a third party's alleged entitlement to proceeds in the attorney's possession.

The defendant-attorney served as the escrow agent in the sale of a business, CCO Check Cashing.[18] Prior to the sale, the plaintiff, a finance company that had made loans to the seller, attempted to perfect a security interest in the assets of CCO, but incorrectly listed the name of the debtor and the business. The CCO sale agreement stated that the buyer and seller expressly understood that the defendant would not conduct a general docket or UCC search of the business. The agreement also provided that the parties acknowledged that the defendant was only acting as an escrow agent in the sale and not representing either party, and was making no representations regarding the advisability of the transaction. Evidence showed that the defendant actually did conduct a UCC record search which did not turn up the erroneously-filed financing statement, and asked the seller if there were any liens on the business, to which the seller responded that there were none. When the defendant learned of the plaintiffs' security interest, he offered the remaining proceeds to plaintiff's principal, who rejected the offer. The defendant later received a fax from plaintiff's legal counsel demanding immediate possession of the funds representing the proceeds of the sale of the business. By this time, the defendant had already disbursed the sale proceeds to the seller.

On appeal, the Court found no evidence that the defendant owed a duty to the plaintiff to discover the security interest prior to the closing. The Court also addressed other theories of recovery. The Court stated that an action for breach of trust cannot lie absent evidence of a fiduciary duty. The Court found that no fiduciary relationship existed, noting that the defendant did not undertake to provide information to either party to the sale concerning the status of any liens on the business. In addressing the plaintiff's conversion claim, the Court expressed skepticism about whether the security interest was properly perfected due to errors that prevented the defendant from having constructive notice of the lien and determined that the defendant was unaware of the plaintiff's security interest. The Court held that the defendant's lack of both actual and constructive knowledge of the lien prevented the plaintiff from recovering against him on a theory of conversion.

34. **Attorney Malpractice in Drafting LLC Agreement:** *Graivier v. Dreger & McClelland, 280 Ga. App. 74, 633 S.E.2d 406 (2006)*

In Graivier v. Dreger & McClelland, a plastic surgeon, his professional corporation and his wife, who was an officer in the professional corporation, sued the attorney who drafted an operating agreement for an LLC formed with an oral surgeon to manage a surgical facility. The attorney had represented both the plastic surgeon's professional corporation and the oral surgeon in preparing the agreement. The plaintiff claimed that the two surgeons had agreed to bill and collect the fees from their own respective practices separately, and that the LLC's revenues were to be limited to fees paid by third parties who used the facility. The oral surgeon later took the position that the LLC was entitled to receive the fees from the members' practices as well as revenues from third-party users. The dispute between the surgeons over the fee provisions in the LLC agreement led to litigation, in which the plastic surgeon ultimately prevailed. There were other disputes between the two doctors, litigation and a bankruptcy proceeding relating to a reciprocal buy-out provision. The plaintiff sued for all the costs and losses incurred in his disputes with his LLC co-member, the oral surgeon. The trial court granted a summary judgment for the law firm. The Georgia Court of Appeals reversed on the plaintiff's claim for alleged malpractice in drafting the fee provision of the LLC operating agreement, holding that there was an issue of fact as to the attorney's negligence in drafting the agreement, that the client's failure to review the agreement and find the error did not bar his claim as a matter of law and that he could recover damages for the costs incurred in the litigation with the oral surgeon over the fee provision. The Court affirmed summary judgment against the plaintiff on his claims for the losses and expenses incurred in other disputes with the oral surgeon, finding them too remote, speculative and not proximately caused by the alleged malpractice. The Court also rejected on proximate cause grounds the plaintiff's claims that the attorney had an undisclosed conflict of interest, because he had a pre-existing personal and professional relationship with the oral surgeon and sided with and testified on behalf of the oral surgeon throughout the underlying litigation. Finally, the Court rejected a malpractice claim by the plaintiff's wife, holding that the attorney did not have an attorney-client relationship with her and that she had no right to rely on his advice, distinguishing cases in which the attorney's representation concerned transactions between officers or shareholders and the corporate client.

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[18] Apparently the transaction took the form of an asset sale.

J. Business Organization Representation in Court.

35. Representation of LLCs by Counsel Required in Litigation: *Winzer et al. v. EHCA Dunwoody, LLC, 277 Ga. App. 710, 627 S.E.2d 426 (2006)*

In Winzer v. EHCA Dunwoody, LLC, the Georgia Court of Appeals extended the Supreme Court's holding in Eckles v. Atlanta Technology Group, 267 Ga. 801, 485 S.E.2d 22 (1997), and held that limited liability companies, like corporations, cannot appear pro se before a court of record, but must be represented by a licensed attorney.

EHCA Dunwoody, LLC, brought suit against Northside Medical Care Center, LLC, a medical practice organized as a limited liability company, for unpaid rent. Although the defendant was represented by two separate attorneys prior to trial, both attorneys withdrew and the defendant was represented by one of its members at a bench trial in DeKalb County State Court. After the trial court ruled in favor of the plaintiff, a member of the defendant LLC filed a notice of appeal with the Georgia Court of Appeals. The Court of Appeals declined to hear the appeal because the member was not an attorney. The trial court granted a motion to dismiss the appeal. An attorney then filed a notice of appearance for the defendant and appealed the dismissal.

The Court of Appeals affirmed the dismissal and specifically extended the Supreme Court of Georgia's earlier holding in Eckles, which was limited to corporations, to make clear that LLCs must be represented by counsel in Georgia courts of record. The Court reasoned that there are many similarities between limited liability companies and corporations, most notably, that LLC members are insulated from personal liability for the LLC's actions just as shareholders are insulated from a corporation's liabilities. Accordingly, allowing an LLC member to represent the LLC in a court of record would be tantamount to allowing a layman to engage in the unlicensed practice of law.

36. Accord: *Sterling, Winchester & Long, LLC v. Loyd, 280 Ga. App. 416, 634 S.E.2d 188 (2006)*

In Sterling, Winchester & Long, LLC v. Loyd, the Georgia Court of Appeals reaffirmed its holding of five months earlier in Winzer that a limited liability company must be represented by an attorney in a court of record. The plaintiff brought suit against Sterling, Winchester & Long, LLC, and the LLC answered by filing a pro se answer. The Court granted the plaintiff's motion to strike the LLC's answer and entered default judgment for the plaintiff. Citing its recent decision in Winzer v. EHCA Dunwoody, LLC, 627 S.E.2d 426, 277 Ga. App. 710 (2006), the Court held that LLCs must be represented by a licensed attorney in a court of record and affirmed.

37. Willfulness Standard for pro se Corporate Litigant's Delay in Appearing Through Counsel: *Largo Villas Homeowners' Association v. Bunce, 279 Ga. App. 524, 631 S.E.2d 731 (2006)*

In Largo Villas Homeowners' Association v. Bunce, the Georgia Court of Appeals again visited the issue of business entity pro se representation, ruling that the failure by a pro se corporate litigant to hire counsel within the time ordered by the court must be willful.

The Largo Villas Homeowners' Association sued an association member, Bunce, for $522.50 in unpaid monthly dues and late fees. It filed the suit in magistrate court where it was not required to be represented by counsel.[19] The defendant counterclaimed and filed a motion seeking to have the case transferred to Superior Court on the grounds that both parties were seeking equitable relief. The magistrate court granted the motion. The defendant then filed a motion in superior court requiring the plaintiff to be represented by counsel. The superior court granted the defendant's motion and held that the plaintiff must have counsel file a notice of appearance within thirty (30) days. The plaintiff failed to file its notice of appearance of counsel within the court's deadline, and four days later the defendant moved to strike the plaintiff's complaint and its answer to defendant's counterclaim and for default judgment. Counsel for the plaintiff filed a notice of appearance two days later. The superior court held that the plaintiff had failed to prove "excusable neglect," the standard for opening a default under Rule 55 of the Civil Practice Act, O.C.G.A. § 9-11-55, and granted the defendant's motion to strike the plaintiff's pleadings.

The Court of Appeals reversed, finding that the demanding "excusable neglect" standard was inapplicable and inappropriate. A decision to strike the plaintiff's pleadings is a drastic sanction that is only warranted if the plaintiff's refusal to comply is "willful." Accordingly, the Court held that a hearing, with notice, should be held to determine whether the plaintiff's failure to comply with an order to appear with counsel was willful, since willfulness was not obvious and undeniable in this case.

[19] See O.C.G.G. § 15-10-43(i) ("Nothing in this chapter shall be construed to prohibit an employee of any corporation or other legal entity from representing the corporation or legal entity before the magistrate court."); Eckles v. Atlanta Technology Group, 267 Ga. 801, 805, 485 S.E.2d 22 (1997) (Corporation not required to be represented by counsel in court that is not "of record," but is required to be represented by counsel when case is transferred to a court of record).

Notably, the plaintiff homeowners' association was originally formed as an unincorporated association. The Court of Appeals pointed out that the rule in Eckles v. Atlanta Technology Group, 267 Ga. 801, 485 S.E.2d 22 (1997), requiring corporations to be represented by an attorney, does not apply to unincorporated associations. Having apparently later incorporated, the plaintiff was required to be represented by counsel.

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A NOTE ON "NAME CHANGES" AND PERFECTION UNDER ARTICLE 9

by Edgar C. Snow, Jr. and Todd W. Beauchamp
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Most lawyers understand that a debtor's name change can affect perfection of a security interest under Revised Article 9 of the UCC ("R9"). However, what lawyers mean by "name change" may vary and has been the source of some confusion, at least for some courts.

If the debtor changes its name, say, from ABC Corp. to DEF Corp., the rule is easy: if the change is seriously misleading, then under R9-507(c) the financing statement must be amended to reflect the debtor's new name within 4 months of the name change:

> R9-507. Effect of certain events on effectiveness of financing statement.
> …
> (c) *Change in debtor's name*. If a debtor so changes its name that a filed financing statement becomes seriously misleading under Code Section 11-9-506:
> (1) The financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the change; and
> (2) The financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the change.

To reiterate: if not so amended, the financing statement is not effective as to collateral acquired by the debtor more than 4 months after the name change.

What if the debtor merges and its name is changed, such as where Little Co. merges with Big Co. and Big Co. is the surviving entity? R9 call this a "new debtor." The same rule for a regular name change applies here also, but with a twist. Under R9-203(d), a person becomes a "new debtor" bound by a security agreement executed by another if, by operation of law (a merger) or contract (an assumption), the original security agreement creates a security interest in the new debtor's property. If the filing against the original debtor is seriously misleading as to the new debtor's name, then an initial financing statement against the new debtor must be filed within 4 months after the date the new debtor became bound by the original security agreement. (See R9-508). If not, the financing statement is not effective as to collateral acquired by the new debtor more than 4 months after it becomes the new debtor.

What if collateral is transferred to another party who might just have a very similar name the debtor? *This is not a name change or a new debtor necessarily.* R9-507(a) provides the following with respect to such a transfer of collateral:

> R9-507. Effect of certain events on effectiveness of financing statement.
>
> (a) *Disposition*. A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.
> …

A mere transfer to an affiliate or other entity, even if they have a similar, but even, seriously misleading name, does not affect the effectiveness of the financing statement filed against the transferor and the transferred collateral (although it raises the "double debtor" issue governed by R9-325), *unless such transferee becomes a "new debtor" under R9-203*. There is no 4 month window in which to make any changes to the transferee's name, although, under R9-509(c) a secured party may want to file an initial financing statement against the transferee.

Sound confusing? It has been for some of the courts. Consider these two cases.

In the Georgia case *Planned Furniture Promotions v. Benjamin S. Youngblood, Inc.*, 374 F. Supp. 2d 1227 (M.D. Ga. 2005), the court held that after the debtor, an individual named "Benjamin S. Youngblood," incorporated his business under the name "Benjamin S. Youngblood, Inc.," the original financing statement filed against Benjamin S. Youngblood was not seriously misleading because of the debtor's "name change." The collateral in this case consisted of goods purchased with a term loan. Citing R9-506, the court said (emphasis added):

> "A search of the filing records under the name 'Benjamin S. Youngblood, Inc.' *would almost assuredly turn up* a financing statement filed under the name Benjamin Scott Youngblood. It is therefore reasonable to conclude that a *diligent creditor* searching the filing records under the name Benjamin S. Youngblood, Inc., would be put on notice to inquire into the interests of a debtor listed as

Benjamin Scott Youngblood. As a result, the name change cannot be considered seriously misleading."

There are several things wrong with this decision. First, although it cites R9, it uses Old Article 9 concepts such as the duty of a "diligent searcher". Second, it merely assumes that a search would reveal the debtor's name or at least put a UCC searcher on notice. Actual search results submitted as evidence would have been in order here. But the worst part of this decision is the failure of the court to recognize that *the debtor never changed his name*. His name is still Benjamin Scott Youngblood. There is considerable confusion about what it means for a sole proprietor to "incorporate his/her business"-- it certainly is not a name change. In fact, Benjamin Scott Youngblood and Benjamin Scott Youngblood, Inc., are two separate "persons" under the law (absent a piercing of the corporate veil, which was not considered here). It's not as if by filing articles of incorporation the filer's assets (including, without limitation, his/her toothbrush, television and toilet paper) automatically become assets of the new corporation.

The problem is that this is a disposition of collateral question case under R9-507(a). Either the goods were transferred to the new corporation or they weren't. If they weren't, then Benjamin Scott Youngblood, Inc., does not have title to such goods. There is no evidence in the record regarding whether a bill of sale was ever executed.

Another possibility is that this is a new debtor case under R9-508, but there is no evidence that Benjamin Scott Youngblood, Inc., acquired all or substantially all of Benjamin Scott Youngblood's assets and assumed all of his obligations under applicable law or that the security agreement was assumed under an assumption agreement.

A Florida case similar to Planned Furniture is *In re Summit Staffing Polk County, Inc.*, 305 B.R. (Bankr. M.D. Fla 2003). In this case, a financing statement was filed against "Randy Vincent" and an additional debtor "Summit Staffing," the trade name of Randy Vincent's sole proprietorship, in order to secure the lender's financing of the debtor's receivables. After the filing of the financing statement, Summit Staffing of Polk County, Inc., was incorporated and the lender financed the receivables of Summit Staffing of Polk County, Inc., as if it were Randy Vincent's sole proprietorship, apparently under the same financing contract, although Summit Staffing of Polk County, Inc., did not sign any agreement evidencing or assuming such an arrangement.

The *Summit Staffing* court did not make the "name change" mistake made by the *Planned Furniture* court, but instead mistakenly treated this case as a "new debtor" case under R9-508. The court said:

> "[T]he business changed its business structure from a sole proprietorship (Randy Vincent d/b/a Summit Staffing) to a corporation (Summit Staffing of Polk County, Inc.). The new corporation became generally obligated for the obligations of the sole proprietorship, including the obligation secured under the security agreement, and acquired or succeeded to all or substantially all of the assets of the sole proprietorship."

This makes it sound like a merger, rather than the creation of a new legal entity to which assets would be transferred.

Based upon the facts in the decision, however, it appears that this newly formed corporation generated receivables financed by the lender without the benefit of any assumption agreement or operation of law whereby the new corporation became a "new debtor." Therefore, there was no name change, there was no new debtor, there was apparently nothing transferred to another entity. It appears in this case that a lender simply financed another entity's receivables on an unsecured basis.

REPORT FROM CHAIR OF PARTNERSHIP COMMITTEE

by Cassady V. Brewer
Morris, Manning & Martin, LLP

Technical Corrections to Inter-Entity Conversion Statutes

We reported last year (see Business Law Section Newsletter July 2006) that, effective as of July 1, 2006, the Georgia Business Corporation Code, Limited Partnership Act, and Limited Liability Company Act were updated and amended to permit a broader range of inter-entity conversions of Georgia entities. As you may recall, those legislative changes amended the Business Corporation Code, the Limited Partnership Act, and the Limited Liability Company Act by adding four new Sections and making a clarifying change to the Limited Liability Company Act to address the following: (i) conversions of foreign corporations, Georgia and foreign limited partnerships, Georgia and foreign general partnerships, and Georgia and foreign limited liability companies into Georgia corporations; and (ii) conversions of Georgia corporations, Georgia limited partnerships, and Georgia limited liability companies into foreign corporations, foreign limited liability companies, and foreign limited partnerships.

In particular, new Section 14-2-1109.2 was added to the Business Corporation Code to address conversions of foreign corporations, Georgia and foreign limited partnerships, Georgia and foreign general partnerships, and Georgia and foreign limited liability companies into Georgia corporations. Further, new Sections 14-2-1109.3, 14-9-206.8, and 14-11-906 were added to the Business Corporation Code, the Limited Partnership Act, and the Limited Liability Company Act, respectively, to address conversions of Georgia corporations, Georgia limited partnerships, and Georgia limited liability companies into foreign corporations, foreign limited partnerships, and foreign limited liability companies, respectively.

It has come to the attention of some members of the Bar, however, that these latter provisions (O.C.G.A. §§ 14-2-1109.3, 14-9-206.8, and 14-11-906) all contain the same technical deficiency. Specifically, where a Georgia entity is converting to a foreign (e.g., Delaware) entity, the existing conversion process leaves no permanent record with the Georgia Secretary of State by which a converting Georgia entity may be traced to a successor foreign (e.g., Delaware) entity.

To correct this oversight, Bruce Wanamaker (Chair of the Corporate Code Committee) and Cass Brewer (Chair of the Partnerships and LLCs Committee) prepared technical corrections legislation that was submitted to the Georgia State Bar's Advisory Committee on Legislation in December of 2006 and that was approved by the Board of Governors in January of 2007. The technical corrections proposal amends the relevant statutes to require a "Certificate of Conversion" to be filed with the Georgia Secretary of State in order to evidence the Georgia entity's conversion. This legislative proposal also adds a conforming provision that permits a converting entity to file a copy of its Certificate of Conversion with the Clerk of the Superior Court of any county in which the converting entity owns real property.

In addition, the proposal amends the Georgia Business Corporation Code, the Limited Partnership Act, and the Limited Liability Company Act to authorize the Georgia Secretary of State to collect a $95 fee for the filing and administration of the Certificate of Conversion. This fee is consistent with the fee charged for similar filings with respect to conversions of Georgia entities into other entities formed under Georgia law. See, e.g., O.C.G.A. § 14-11-1101(a)(4) ($95 fee for filing a certificate of election to convert a Georgia corporation into a Georgia limited liability company).

Finally, the proposal makes certain other minor corrections to the legislation that was enacted last year.

If you are interested in the specific statutory language, you may access the actual Bill (SB 234) and track its progress through the General Assembly via either of the following web sites:
www.gabar.org/programs/legislative_program/legislative_tracking/ www.legis.state.ga.us/legis/2007_08/sum/sb234.htm

Comments concerning the proposal should be directed to Cass Brewer at cbrewer@mmmlaw.com.

REPORT FROM CHAIR OF SECURITIES COMMITTEE

by Jeffrey L. Schulte
Morris, Manning & Martin, LLP

The Securities Law Committee, in conjunction with the Institute of Continuing Legal Education in Georgia, is sponsoring the Advanced Securities Law seminar to be held at the Westin Hotel on Peachtree Road in Buckhead on March 30, 2007.

The program will begin at 8:15 a.m., when the registration desk opens, and will conclude at 4:30 p.m. In addition to the regular seminar sessions, the program will feature a presentation by Rob Palumbo, Managing Director of Accel-KKR, who will discuss mergers and acquisitions activity by private equity funds specializing in companies engaged in the technology business. Other topics to be addressed in the program include:

- Securities law issues that arise in connection with offering structures such as PIPE's, equity lines and special acquisition corporations. David Calhoun of Morris, Manning & Martin, LLP will present.

- The SEC's initiatives with respect to electronic proxy statements, presented by Stacy Ingram of McKenna Long & Aldridge, LLP.

- Issues that arise in connection with initial public offerings, leveraged recapitalizations and sales of portfolio companies owned by private equity funds. This discussion, with a focus on fiduciary issues in circumstances where a private equity fund has board representation, will be presented by David Stockton of Kilpatrick Stockton, LLP.

- A report on the first year's experience in dealing with the SEC's new disclosure rules relating to executive compensation, presented by Mike Stevens of Alston & Bird LLP.

- The collateral effects of the SEC's new compensation disclosure rules in areas such as disclosure controls, corporate governance, committee charters, and the selection and role of compensation consultants. Brink Dickerson of Troutman Sanders, LLP will present.

- A panel discussion on stock option backdating, a subject that continues to grow in significance. Bill Sullivan, of Paul Hastings' Los Angeles Office, will moderate the discussion, which will include Peter

Anderson of Sutherland Asbill & Brennan LLP and Howard Scheck, from Deloitte's D.C. office.

- Capital flows between the United States and China. John Ray, President of Heritage Capital Advisors, LLC will discuss this timely and important subject.

The seminar promises to be lively and informative.

Registration materials are available at http://www.iclega.org/programs/6534.html .

SHARE YOUR KNOWLEDGE – GET PUBLISHED

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

THANK YOU TO OUR SUPPORTERS

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