Business Associations

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INTRODUCTION

This Article surveys noteworthy cases in the areas of corporate, limited liability company, partnership, agency, and joint venture law decided between June 1, 2007 and May 31, 2008 by the Georgia Supreme Court, the Georgia Court of Appeals, the United States Court of Appeals for the Eleventh Circuit, and the United States district courts located in Georgia. In addition, this Article provides an overview of enactments at the 2008 Session of the Georgia General Assembly to the Official Code of Georgia Annotated (O.C.G.A.) with respect to banking, finance, commerce, corporation, partnership, and business associations statutes.

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I. CORPORATIONS

A. Fiduciary Duties

1. Newly Recognized Action for Aiding and Abetting Breach of Fiduciary Duty Interpreted, Its Logic Expanded to Other Tortious Conduct. In *In re Friedman's, Inc.*,[1] the United States Bankruptcy Court for the Southern District of Georgia applied and expounded upon Georgia's recent recognition in *Insight Technology, Inc. v. Freightcheck, LLC*[2] of a cause of action for aiding and abetting a breach of fiduciary duty.[3] Among other claims related to the insolvency of a prominent jewelry store chain, the trustee of the creditors' committee (the Trustee) claimed that the company's financial advisor and its controlling shareholder (collectively, the Defendants) aided and abetted fraud upon Friedman's, Inc. (Friedman's) by making false and misleading statements. The Trustee claimed the statements were made to induce Friedman's directors to approve a self-interested restructuring transaction that favored an affiliate of the controlling shareholder. The Defendants also allegedly caused Friedman's to pay incorrect invoices for services performed by the financial advisor and purportedly facilitated the payment of bonus compensation based upon false financial statements.[4]

The district court held that although no Georgia court previously had recognized a claim for aiding and abetting fraud, the implicit logic of the decision in *Insight Technology* meant that such a cause of action was cognizable under Georgia law.[5] While the district court reasoned that it was "no great step" to conclude that pursuant to *Insight Technology*,

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1. 385 B.R. 381 (Bankr. S.D. Ga. 2008).

2. 280 Ga. App. 19, 633 S.E.2d 373 (2006).

3. *In re Friedman's*, 385 B.R. at 431. The decision in *Insight Technology* involved allegations that the president of Insight Technology, Inc. and a majority shareholder of one of its competitors misappropriated the company's software, pricing, and other business information for use by the competitor while the president was still an officer of the company. 280 Ga. at 19, 633 S.E.2d at 375. The Georgia Court of Appeals held that the allegations adequately stated a claim for aiding and abetting a breach of fiduciary duty under Georgia law. *Id.* at 26, 633 S.E.2d at 379. The court further explained that proof of the following elements comprise such a claim:

> (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 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.

Id. at 25-26, 633 S.E.2d at 379. *See also* Paul A. Quirós, et al., *Business Associations*, 59 MERCER L. REV. 35, 37-39 (2007) (discussing the holding and the implications of the decision in *Insight Technology*).

4. *In re Friedman's*, 385 B.R. at 420-21.

5. *Id.* at 431.

aiding and abetting fraud constitutes an "'actionable wrong' within the language of O.C.G.A. § 51-12-30,"[6] the Trustee's complaint included only conclusory allegations bereft of factual support.[7] Consequently, the Trustee's claims against the Defendants for aiding and abetting fraud were dismissed.[8]

The Trustee also claimed that the Defendants aided and abetted breaches of fiduciary duty committed by several Friedman's officer-directors by facilitating forgivable loans to the officer-directors from a Friedman's affiliated entity in exchange for the officer-directors' support of the self-interested restructuring transaction.[9] Examining these allegations, the district court held that it was fair to assume the controlling shareholder knowingly procured a breach of fiduciary duty by the officer-directors under the standards set forth in *Insight Technology*.[10] The court determined that the controlling shareholder appointed the officer-directors and thus knew of their fiduciary obligations to Friedman's.[11] Regarding the forgivable loan claim, the Trustee's complaint sufficiently alleged that the controlling shareholder acted with malice towards Friedman's by facilitating the forgivable loans to the officer-directors from the Friedman's affiliate, which induced those individuals to support the self-dealing restructuring.[12]

Friedman's is noteworthy because it not only signals a willingness by courts interpreting Georgia law to apply new theories of recovery to rectify corporate malfeasance, but it also demonstrates that the logical underpinnings of such theories may be extrapolated into other areas of Georgia jurisprudence. Undoubtedly, in the coming years Georgia courts will continue to hone and define the factual circumstances under which a claim for aiding and abetting a breach of fiduciary duty may be brought pursuant to the framework articulated in *Insight Technology*.

2. Reliance on Accounting Experts by CFO Insufficient to Invoke Protections of the Business Judgment Rule. In *TSG Water Resources, Inc. v. D'Alba & Donovan Certified Public Accountants, P.C.*,[13] the United States Court of Appeals for the Eleventh Circuit examined the extent under Georgia law to which a corporate officer's reliance on the expert advice of an accounting firm served to insulate

6. O.C.G.A. § 51-12-30 (2000).
7. *In re Friedman's*, 385 B.R. at 431.
8. *Id.*
9. *Id.* at 434-35, 438.
10. *Id.* at 439.
11. *Id.*
12. *Id.* at 440.
13. 260 Fed. App'x 191 (11th Cir. 2007) (per curiam).

that officer from liability under the business judgment rule.[14] TSG Water Resources, Inc. (TSG) alleged that its former chief financial officer (the CFO) oversaw a number of accounting errors that were not disclosed to TSG's board of directors and that resulted in a material overstatement of the company's finances for its 2000 fiscal year. The plaintiff claimed (1) that the CFO knew of these errors prior to an important meeting in which board members and other investors decided to inject an additional $1,450,000 of equity into TSG, (2) that the decision to inject the new capital was based in large part on the favorable projections in the misstated financial information, and (3) that notwithstanding the CFO's knowledge of the misstatements, he remained silent throughout this meeting.[15]

Noting the absence in the record of any evidence of self-dealing by the CFO, the district court entered summary judgment in his favor. Relying on the business judgment rule, the district court held that the CFO's discretionary decision to rely upon the financial information prepared by an outside accounting firm was sufficient to show that the CFO had acted in an informed and deliberate manner in discharging his fiduciary obligations to TSG.[16] The court of appeals reversed, observing that the protections of the business judgment rule are unavailable to an officer engaged in fraud, bad faith, or an abuse of discretion.[17] While consultation with outside experts "'weigh[ed] in favor of finding that [a corporate fiduciary] did not abuse [its] discretion,'" reliance on the experts alone was not dispositive on the CFO's liability.[18]

In the view of the court of appeals, the CFO's silence at the crucial board meeting coupled with his alleged knowledge that the erroneous financial information was used specifically to facilitate the board's decision to seek additional capital were sufficient to demonstrate the existence of a genuine issue of material fact regarding whether the CFO abused his discretion or acted in bad faith.[19] The decision in *TSG* illustrates the often overlooked legal principle that expert advice is not a panacea for an officer or director in the face of a fiduciary duty lawsuit, especially when evidence exists that the officer or director knew of facts tending to undermine the foundational premises of the advice.

B. Board of Directors Entitled to Final and Conclusive Decision-Making Authority Under Stock Option Plan If Decisions Are Made in Good Faith

In *Planning Technologies, Inc. v. Korman*,[20] the Georgia Court of Appeals examined an issue of first impression in Georgia—the scope of a board of directors' discretionary authority to make factual determina-

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14. *See id.* at 197-99.
15. *Id.* at 197-98.
16. *Id.* at 196-97.
17. *Id.* at 197 (citing Cottle v. Storer Commc'n, Inc., 849 F.2d 570, 575 (11th Cir. 1988)).
18. *Id.* at 198 (quoting *Cottle*, 849 F.2d at 578).
19. *Id.* at 198-99.
20. 290 Ga. App. 715, 660 S.E.2d 39 (2008).

tions under broadly drafted provisions of a corporate stock option plan.[21] Planning Technologies, Inc.'s (PTI) 1998 Stock Option Plan (the Plan) provided its board with "full power to . . . construe and interpret the Plan and any agreement or instrument entered into under the Plan."[22] Moreover, the board's decisions were to be "final, conclusive, and binding" on PTI and any Plan participants.[23]

The plaintiff's option award agreement (the Agreement) included a vesting acceleration clause whereby all of his outstanding options would become fully exercisable upon a "change in control," which the Plan defined as a "reorganization, merger, consolidation . . . sale or disposition of all or substantially all of the assets of [PTI] or similar corporate transaction."[24] Additionally, the Agreement stated that any dispute relating to its construction or interpretation would be determined by the board, and this determination would be "final, binding and conclusive on [the plaintiff] and [PTI] for all purposes."[25]

On March 31, 2000, PTI issued a sizeable amount of common stock to an investor in exchange for cash and other assets (the Transaction). Both prior to and following the closing, PTI's board determined that the Transaction did not constitute a change in control for purposes of the Plan and the Agreement. As such, PTI refused to issue shares to the plaintiff when he attempted to exercise his options shortly following the Transaction.[26]

The trial court ruled that the Transaction was a "change in control" that accelerated the vesting of the plaintiff's options and entered partial summary judgment in his favor.[27] The court of appeals disagreed, holding that the unambiguous language of the Agreement and the Plan clearly granted the PTI board expansive decision-making authority over all factual determinations under those contracts—including whether the transaction represented a "change in control."[28]

More notably, the court of appeals in *Korman* specifically rejected PTI's contention that the terms of the Plan and the Agreement granted unfettered power to the board.[29] Following precedent in other jurisdictions, the court held that even if a corporate stock option plan or option

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21. *See id.* at 715-16, 660 S.E.2d at 40-41.
22. *Id.*, 660 S.E.2d at 41 (ellipsis in original) (internal quotation marks omitted).
23. *Id.* at 716, 660 S.E.2d at 41.
24. *Id.* (alteration in original) (internal quotation marks omitted).
25. *Id.* at 716-17, 660 S.E.2d at 41 (second alteration in original) (internal quotation marks omitted).
26. *Id.* at 717, 660 S.E.2d at 41-42.
27. *Id.* at 717-18, 660 S.E.2d at 42.
28. *Id.* at 719, 660 S.E.2d at 42-43.
29. *Id.*, 660 S.E.2d at 43.

agreement provides that a board of directors has final and conclusive decision-making authority, it still must exercise "good faith and honest judgment."[30]

Although the court of appeals did not specifically address what actions by the PTI board would satisfy this deferential yet fact-specific standard, it did offer guidance to lead the trial court's inquiry on remand.[31] In the view of the court in *Korman*, a board's decision that displays a "total absence of any factual evidence to support it" necessarily creates an inference of bad faith or dishonest judgment.[32] Additionally, the court of appeals noted that the challenged board determination could fail the good faith and honest judgment requirement if it was made "for arbitrary or capricious reasons, was based on an improper pecuniary motive, or was predicated on dishonesty or illegality."[33] The lessons of the decision in *Korman* for corporate practitioners are evident: regardless of the breadth of a board's discretionary authority under a stock option plan, Georgia courts nevertheless will employ a standard of review capable of flushing out and remediating self-interested or bad faith decisions.

C. Georgia Court of Appeals Adopts "Middle Ground" Test for Judicial Approval of Derivative Suit Settlements

For the twenty years since its codification, O.C.G.A. § 14-2-745[34] stood uninterpreted by a Georgia appellate court. However, in 2008, the Georgia Court of Appeals decision in *Stephens v. McGarrity*[35] ended that period of uncertainty by addressing the analysis a trial judge must employ when determining whether to approve a settlement agreement in a shareholder derivative action.[36]

In *Stephens* a minority shareholder of Northlake Foods, Inc. (Northlake) brought derivative and direct claims against the controlling shareholder and several of his affiliated entities seeking to recover over $14,000,000 that Northlake had loaned indefinitely to those affiliates. Approximately one year following the institution of the lawsuit, the parties sought approval of a settlement agreement that provided (1) payment by the controlling shareholder of $2,937,000 (the Settlement Amount) in notes and cash to Northlake, (2) payment by Northlake of $2,540,000 of the settlement amount to the minority shareholder (including $1,700,000 for the minority shareholder's percentage share of the debt owed to Northlake), and (3) payment by Northlake of the remaining $397,000 of the Settlement Amount to Northlake senior management. In return, Northlake would release the controlling

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30. *Id.*
31. *See id.* at 720, 660 S.E.2d at 43-44.
32. *Id.*, 660 S.E.2d at 43.
33. *Id.* (citing Hunting Aircraft, Inc. v. Peachtree City Airport Auth., 281 Ga. App. 450, 452, 636 S.E.2d 139, 141 (2006)).
34. O.C.G.A. § 14-2-745 (2003).
35. 290 Ga. App. 755, 660 S.E.2d 770 (2008).
36. *See id.* at 759-64, 660 S.E.2d at 774-77.

shareholder and his affiliates from any and all relevant claims.[37] After receiving notice of the proposed settlement, Richard Stephens, another minority shareholder of Northlake, objected to its terms and moved to intervene.[38]

After first reversing the trial court's denial of Stephens's motion to intervene, the court of appeals examined whether the court below erred in approving the settlement over Stephens's objection.[39] Although no Georgia law existed on the issue, the court of appeals reasoned that because the practical result of approving the parties' settlement was an order of dismissal, the test governing O.C.G.A. § 14-2-744(a)[40]—pertaining to *dismissal* of a derivative action—should apply with equal force to O.C.G.A. § 14-2-745—pertaining to *settlement* of a derivative proceeding.[41]

O.C.G.A. § 14-2-744(a) provides that a trial court "may dismiss" a derivative action if it finds that an independent body or individual "has made a determination in good faith after conducting a reasonable investigation . . . that the maintenance of the derivative suit is not in the best interests of the corporation."[42] Following the annotated comments to the statute, the court in *Stephens* recognized that the dismissal statute represented a compromise between the differing approaches employed by New York and Delaware courts.[43] The former approach is limited to a judicial analysis of "the independence and good faith of the [litigation] committee and the thoroughness of its investigation," and it places the burden of proof on the plaintiff to challenge these criteria.[44] In contrast, Delaware law requires the corporation to prove the independence and good faith of the litigation committee and allows the trial court to apply its own business judgment regarding whether the committee made a reasonable determination in abandoning the lawsuit.[45]

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37. *Id.* at 755-56, 660 S.E.2d at 771-72. The court in *Stephens* also noted an additional aspect of the settlement only vaguely alluded to in the Settlement Agreement: the potential sale by Northlake to the controlling shareholder of an office building for approximately eight million dollars, which the parties asserted (without citation to the record) was in excess of the building's appraised value. *Id*. at 756, 660 S.E.2d at 772.

38. *Id.* at 757, 660 S.E.2d at 772.

39. *Id.* at 759, 660 S.E.2d at 774.

40. O.C.G.A. § 14-2-744(a) (2003).

41. *Stephens*, 290 Ga. App. at 760-61, 660 S.E.2d at 774-75.

42. O.C.G.A. § 14-2-744(a).

43. *Stephens*, 290 Ga. App. at 760, 660 S.E.2d at 774 (citing O.C.G.A. § 14-2-744 cmt.).

44. *Id.*

45. *Id.*

Heeding the dismissal statute's comment that "'[c]onsideration of whether the conclusion to dismiss was reasonably based [represents] a middle ground between deference to the investigators and total displacement of their function,'"[46] the court in *Stephens* determined that the Settlement Agreement was a wholly unreasonable resolution of Northlake's claims.[47] The Settlement Agreement required the surrender of potentially viable causes of action for corporate waste and breach of fiduciary duty in exchange for inadequate consideration.[48] Indeed, the settlement proceeds would be divided between one minority shareholder and members of "senior management" instead of benefiting all of Northlake's shareholders in proportion to their ownership.[49] Thus, the court of appeals reversed the trial court's decision approving the settlement proposal.[50] In the wake of *Stephens*, it is clear that Georgia courts will employ some formulation of a reasonableness analysis in deciding whether a derivative settlement merits judicial approval. However, the true scope and parameters of this reasonableness inquiry remain largely undefined, as the indisputable self-dealing aspects of the proposed settlement in this case presented a straightforward fact pattern for the court of appeals.

D. Piercing the Corporate Veil

1. Court Evaluates Corporate Defendant's Recent History of Inequitable Conduct in Addressing Merits of Veil-Piercing Claim. In *Horton Homes, Inc. v. Bandy*,[51] the United States District Court for the Middle District of Alabama[52] questioned the propriety of a Georgia corporation's reliance on the protections of the corporate separateness doctrine when it acted to thwart satisfaction of a judgment against its wholly owned subsidiary in a prior case with similar factual allegations.[53] Horton Homes, Inc. (Horton) manufactured prefabricated homes, which it distributed to various retailers for final sale to consumers. William Shaner purchased one of these homes pursuant to a retail installment sale contract with H&S Homes, LLC (H&S), a Georgia entity and a wholly owned subsidiary of Horton. The contract contained a term requiring arbitration of any claim arising out of or relating to the contract, but Horton itself was not a signatory.[54]

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46. *Id.* at 760-61, 660 S.E.2d at 775 (quoting O.C.G.A. § 14-2-744 cmt.).
47. *See id.* at 762-64, 660 S.E.2d at 775-77.
48. *See id.*
49. *Id.* at 763, 660 S.E.2d at 776.
50. *Id.* at 764, 660 S.E.2d at 777.
51. No. 2:07-cv-506-MEF, 2007 WL 4571251 (M.D. Ala. Dec. 26, 2007).
52. Although cognizant that the scope of this Article normally is confined to cases decided by federal and state courts sitting in the geographic confines of Georgia, the Authors nevertheless chose to include discussion of this decision in *Bandy* due to its focus on Georgia veil-piercing jurisprudence. *See id.* at *3-*4.
53. *See id.* at *2-*4.
54. *Id.* at *1.

Several years after his purchase, Shaner instituted arbitration against both H&S and Horton, and the eventual result was a damage award of $487,500 against both entities. Immediately following the arbitrator's decision, Horton filed a declaratory judgment and preliminary injunction action in the Middle District of Alabama seeking to vacate the arbitration award on the ground that Horton was not a proper party to the arbitration and to enjoin Shaner from further action against Horton on claims relating to the purchase of his home.[55]

For the preliminary injunction to issue, Horton had to show a substantial likelihood of success on its legal argument that Shaner could not sustain a veil-piercing claim.[56] The court in *Bandy* noted that the corporate offices of the two entities were in the same building, that they shared mutual officers and directors, and that H&S "held itself out to the public as being Horton."[57]

Ultimately, the court in *Bandy* denied the requested injunction mainly due to its concern that inequity might arise if Horton and H&S were recognized as separate entities.[58] The court focused on a 2005 lawsuit brought by a consumer in Alabama that resulted in an arbitration award of $500,000 against H&S.[59] After H&S exhausted its appeal process in the 2005 action, Horton filed suit against H&S in Putnam County, Georgia to collect on debts H&S owed to Horton, which had been providing its financing. H&S did not defend the action and permitted entry of a $22,000,000 default judgment against it. Several months later, H&S successfully thwarted the Alabama consumer's attempt to enforce her arbitration judgment in Putnam County Superior Court based on the grounds that H&S had insufficient assets to satisfy the judgment.[60]

Without question, the facts underlying the decision in *Bandy* provide a textbook case of abuse of the corporate form. If its decision to deny Horton's preliminary injunction motion is any indication of how the court in *Bandy* will ultimately decide the merits of the plaintiff's veil-piercing claim, it appears that Horton may face joint and several liability along with its subsidiary for the arbitration award because of prior instances of inequitable conduct in exercising control over that entity.

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55. *Id.*
56. *Id.* at *2.
57. *Id.* at *3.
58. *See id.* at *4.
59. *Id.*
60. *Id.*

2. Theory of Outsider Reverse Veil Piercing Again Rejected by Georgia Courts. The Georgia Court of Appeals case of *Lollis v. Turner*[61] addressed an attempt by Edith Turner to recover against Chlois Lollis, the Clerk of Cook County Superior Court, for actions that allegedly prevented Turner from collecting a judgment against a third party, Bill Donald. Turner obtained a $26,860 default judgment in Florida against Donald in 1999 after he failed to repay a loan, which she thereafter domesticated in Cook County. In 2001 Donald began making payments to the Cook County court registry on account of an unrelated lawsuit instituted by Golf Cars by Legend, Inc. (Legend), a Georgia corporation where he served as president. Rather than moving to intervene in that case, Turner obtained another default judgment against Donald.[62] The corresponding order directed Lollis, as clerk of court, to notify Turner of any pending distribution of funds contained in the court registry which "belong to, may belong to, or are claimed to be [the property of] Donald."[63]

Notwithstanding the court's order, Lollis subsequently released to Legend all funds paid into the court registry by Donald without notifying Turner. After learning of the disbursement, Turner filed a complaint alleging that Lollis's negligence resulted in the outstanding judgment against Donald remaining unsatisfied.[64] The trial court denied Lollis's motion for summary judgment, finding that issues of material fact existed on proximate causation because Turner may have "been able to pierce the corporate veil of [Legend] to collect the money owed to her by Donald."[65]

Unsurprisingly, the court of appeals reversed the trial court's determination, roundly rejecting—as the Georgia Supreme Court had in *Acree v. McMahan*[66] four years before—the "outsider reverse veil-piercing" theory advanced by Turner.[67] Georgia law does not allow a plaintiff "'to satisfy the debts of an individual out of [a] corporation's assets,'" and since Donald was not entitled to be paid individually from any of the funds disbursed as a result of Legend's lawsuit, the court of appeals held that causation was absent from Turner's negligence claim.[68]

The decision in *Turner* illustrates that Georgia courts will not countenance a plaintiff friendly deviation from the traditional underpinnings of the veil-piercing doctrine. Notably, Georgia remains among a small minority of jurisdictions that refuse to recognize reverse veil

61. 288 Ga. App. 419, 654 S.E.2d 229 (2007).
62. *Id.* at 419-20, 654 S.E.2d at 230.
63. *Id.* at 420, 654 S.E.2d at 230-31 (internal quotation marks omitted).
64. *Id.* at 420-21, 654 S.E.2d at 231.
65. *Id.* at 422, 654 S.E.2d at 231-32.
66. 276 Ga. 880, 585 S.E.2d 873 (2003).
67. *Lollis*, 288 Ga. App. at 422, 654 S.E.2d at 232.
68. *Id.* (emphasis omitted) (quoting *Acree*, 276 Ga. at 881, 585 S.E.2d at 874).

piercing,[69] as the vast majority of states that have considered the theory have chosen to apply it.[70]

II. LIMITED LIABILITY COMPANIES

Several recent cases decided by the Georgia Court of Appeals highlight the care and contingency planning legal practitioners must employ when drafting documentation governing the allocation of authority between a limited liability company's various constituencies. As legal entities whose internal relationships are regulated primarily by contract, these decisions illustrate the careful analysis required to capture precisely the parties' business understandings *ex ante* if future disputes are to be avoided.

In *Old National Villages, LLC v. Lenox Pines, LLC*,[71] the court of appeals considered a motion by Old National's sole member to set aside a consent judgment entered against it for the sole member's failure to receive notice of the complaint or approve the consent judgment on Old National's behalf.[72] Old National was organized to invest in real property, with Valerie Smith as its sole member and the lone signor on its bank account.[73] However, the entity's operating agreement (the Agreement) granted the general manager, David Smith (who was also Valerie's husband), "full, exclusive, and complete discretion, power, and authority . . . to manage, control, administer, and operate the business and affairs of [Old National],"[74] and provided that David could not be removed as general manager by Valerie until "[a]ll loans provided by [David] or any affiliate of [David] or any company managed by [David]" were repaid in full.[75] Importantly, the Agreement enumerated specific

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69. *See, e.g.*, *In re* Hamilton, 186 B.R. 991 (Bankr. D. Colo. 1995) (applying Colorado law).

70. *See, e.g.*, United States v. Newman, 100 Fed. App'x 958 (5th Cir. 2004) (applying Louisiana law); Am. Fuel Corp. v. Utah Energy Dev. Co., 122 F.3d 130 (2d Cir. 1997) (applying New York law); *In re* Mass, 178 B.R. 626 (M.D. Pa. 1995) (applying Pennsylvania law); Select Creations, Inc. v. Paliafito Am., Inc., 852 F. Supp. 740 (E.D. Wis. 1994) (applying Tennessee law); Zahra Spiritual Trust v. United States, 910 F.2d 240 (5th Cir. 1990) (applying Texas law); Boatmen's Nat'l Bank of St. Louis v. Smith, 706 F. Supp. 30 (N.D. Ill. 1989) (applying Illinois law); C.F. Trust, Inc. v. First Flight L.P., 580 S.E.2d 806 (Va. 2003); Litchfield Asset Mgmt. Corp. v. Howell, 799 A.2d 298 (Conn. App. 2002); Estudios, Proyectos e Inversiones de Centro America, S.A. v. Swiss Bank Corp. S.A., 507 So. 2d 1119 (Fla. Dist. Ct. App. 1987).

71. 290 Ga. App. 517, 659 S.E.2d 891 (2008).

72. *Id.* at 517, 659 S.E.2d at 891.

73. *Id.* at 518, 659 S.E.2d at 891-92.

74. *Id.*, 659 S.E.2d at 892 (internal quotation marks omitted).

75. *Id.* (first alteration in original) (internal quotation marks omitted).

actions David could not take without Valerie's consent. Settling litigation was not among them.[76]

In 2004 Lenox Pines, a limited liability company managed by David and established to make investments on behalf of a trust, loaned Old National $1,400,000 to purchase real estate. Several years later, Old National sold the property at a profit, and Valerie soon informed David that she wanted a divorce. Over the subsequent six months, Valerie made a number of withdrawals from Old National's bank account without David's consent, in violation of the Agreement. When Valerie refused to authorize repayment of the Lenox Pines loan, David caused Lenox Pines to sue Old National and served process on Old National's registered agent. On the same day that the registered agent acknowledged service, David, acting as general manager of Old National, filed a confession of judgment, which the trial court immediately signed. Lenox Pines then garnished Old National's bank account to satisfy the consent judgment.[77]

When Valerie learned of David's actions, she moved to set aside the judgment because she, as the sole member of Old National, did not receive notice of the lawsuit. The trial court denied Valerie's motion.[78] The court of appeals affirmed, holding that an order setting aside the judgment not only would undermine the authority granted to the general manager in the Agreement, it would "undermine the foundation of the well-established law"[79] that "'a member of a limited liability company . . . is considered separate from the company and is not a proper party to a proceeding by or against a limited liability company, solely by reason of being a member of the limited liability company.'"[80]

The practical lesson from *Old National* is straightforward: limited liability companies are creatures of contract, and if the members of a manager-managed limited liability company wish to prohibit certain fundamental actions by the general manager, care must be taken in drafting the terms of the operating agreement to limit the general manager's discretion.

Megel v. Donaldson[81] involved a dispute between the parties to a development agreement (the Development Agreement) governing the operation of Senoia Manor, LLC (Senoia), a Georgia limited liability company organized to develop an assisted-living facility for senior citizens.[82] The plaintiffs, in exchange for a thirty percent interest in Senoia, contributed $250,000 and agreed that this capital could be "used as needed, estimated as approximately $15,000 to $20,000 per month, for [salaries, overhead, and soft costs] during development, construction and

76. *Id.*
77. *Id.* at 518-19, 659 S.E.2d at 891-92.
78. *Id.* at 519, 659 S.E.2d at 892.
79. *Id.* at 520, 659 S.E.2d at 892.
80. *Id.* (quoting Yukon Partners, Inc. v. Lodge Keeper Group, Inc., 258 Ga. App. 1, 6, 572 S.E.2d 647, 651 (2002)).
81. 288 Ga. App. 510, 654 S.E.2d 656 (2007).
82. *See id.* at 511, 654 S.E.2d at 659.

stabilization [of the project]."[83] The defendants, John and Faye Donaldson (the Donaldsons), were to act as developers for the assisted-living facility project. In exchange for providing surveys, negotiating land contracts, and shouldering the engineering effort, the Donaldsons received a seventy percent membership interest in Senoia.[84]

The project failed in its initial stages because local authorities refused to change the single-family zoning restrictions that applied to the facility's intended location. Thereafter, the plaintiffs brought a variety of claims against the Donaldsons, including a count based upon breach of the Donaldsons' fiduciary duty to Senoia as corporate officers and its majority owners, all of which essentially alleged that the Donaldsons misused and improperly appropriated the plaintiffs' capital contribution to pay for their own living expenses.[85]

Acknowledging that the "responsibilities of the parties were defined explicitly" in the Development Agreement, the court of appeals held there was no basis to sustain a breach of fiduciary duty claim because the majority members simply expended funds for "salaries (general or normal household living expenses)" as provided by the terms of the contract.[86] Moreover, the court reasoned that the Donaldsons' investment of the funds they received from Senoia in another project was valid, as the Development Agreement "placed no restriction on [the Donaldsons'] use of [their] salar[ies]."[87] As was the case in *Old National*, the decision in *Megel* highlights the care necessary in drafting provisions to ensure the parties receive the benefits of their bargain. Indeed, detailed provisions in the Development Agreement concerning the Donaldsons' permitted use of Senoia's funds may have precluded the *Megel* litigation.

Although it involved a corporation, the case of *Simpson v. Pendergast*[88] also illustrates the unintended consequences of imprecise drafting in an agreement designed to regulate relationships among owners of a Georgia business entity. In *Simpson* the four shareholders of Historic Motorsports Holdings, Ltd. (HMH) executed a shareholders' agreement providing for the method by which each could dispose of his HMH shares to the other shareholders.[89] Section Five of the shareholders' agreement stated that upon receipt of an "Offer" from one

83. *Id.* at 512, 654 S.E.2d at 659.
84. *Id.* at 511, 654 S.E.2d at 659.
85. *Id.*
86. *Id.* at 516, 654 S.E.2d at 662 (internal quotation marks omitted).
87. *Id.*
88. 290 Ga. App. 293, 659 S.E.2d 716 (2008).
89. *Id.* at 294, 659 S.E.2d at 718.

shareholder—defined as "'a written notice . . . specifying the purchase price and other terms and conditions'" upon which the shareholder was willing to sell his shares—the other shareholders would be required either to purchase the shares pursuant to the Offer or to sell their shares to the offering shareholder on the same terms and conditions contained in the Offer.[90] Moreover, failure by the offeree shareholders to elect the purchase option within sixty days of the Offer was "'conclusively deemed to be an election'" by the offeree shareholders to sell their own shares.[91]

Pendergast sent notice to the other three shareholders proposing to sell his shares but conditioned the sale on his release from certain noncompetition covenants contained in the shareholders' agreement and a pro rata distribution of HMH's taxable income prior to the sale. Simpson took the position that Pendergast's offer was invalid due to these enumerated conditions and failed to exercise his purchase option within sixty days. Pendergast subsequently sued Simpson for specific performance, arguing that he was entitled to purchase Simpson's shares on the same terms dictated in his offer. The trial court agreed and ordered Simpson to tender his HMH shares to Pendergast.[92]

The court of appeals considered whether Pendergast's distribution and release conditions rendered his offer nonbinding on Simpson under the terms of the shareholders' agreement.[93] The court of appeals held that the plain language of the shareholders' agreement contemplated that an offer was to include not only a "purchase price" provision, but also other "terms and conditions."[94] Because the shareholders' agreement contained no language "permitting a shareholder to disregard a 'conditional offer,'" Simpson was not entitled to avoid his contractual obligation to either purchase Pendergast's shares or sell his own shares to Pendergast.[95]

Certain generalities in documents, of course, are inevitable when neither the parties nor their counsel can foresee every potential permutation of a given issue. When those generalities are necessary or advisable, a practitioner should strive to inform his or her client that the nuances of such "catch all" language may lead to future disputes. Moreover, as the case of *Pendergast* pointedly demonstrates, when the plain language of a contract does not provide certainty regarding the

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90. *Id.*

91. *Id.*, 659 S.E.2d at 718-19.

92. *Id.* at 295, 659 S.E.2d at 719.

93. *See id.* at 296-98, 659 S.E.2d at 719-21.

94. *Id.* at 296, 659 S.E.2d at 720.

95. *Id.* at 297, 659 S.E.2d at 720. Although the court of appeals upheld the trial court's decision on enforceability of the offer to purchase provisions, it remanded for further factual findings on whether an order of specific performance would be "'unfair, unjust, or against good conscience.'" *Id.* at 298, 659 S.E.2d at 721 (quoting Henry v. Blakenship, 275 Ga. App. 658, 662, 621 S.E.2d 601, 606 (2005)). The court recognized that such an order would affect nonparty HMH's substantive rights by requiring a distribution of its taxable income and a surrender of its ability to enforce the noncompete covenant against the selling shareholder. *See id.*

legal outcome of a client's action (or inaction) in a particular set of circumstances, the client should promptly consult its legal advisor to devise a calculated response that will best serve its goals and interests.

III. PARTNERSHIP AND AGENCY

A. Georgia Court of Appeals Decision Casts Doubt on Continuing Validity of "Special Injury" Test Used to Determine Derivative or Direct Action

In *Hendry v. Wells*,[96] the Class B limited partners (the Plaintiffs) in a real estate investment partnership brought suit against the general partners (the Defendants). The Plaintiffs alleged that they were wrongly induced to invest in the partnership because sales materials associated with Wells Real Estate Fund I (the Company), a Georgia limited partnership, misrepresented the terms of the partnership agreement (the Agreement) governing distribution of the Company's profits and proceeds. The Agreement provided that Class A holders were to receive a preference in cash available for distribution, while Class B holders had first right to allocations of the Company's net tax losses and deductions.[97] Sales materials associated with the initial investment stated that net proceeds from the sale of the Company's property holdings would be distributed based on a limited partner's "original capital investment."[98] Crucially, these materials did not accurately reflect that the Agreement provided for the distribution of net sale proceeds to each limited partner "in accordance with the positive balance in his Capital Account as of the date of distribution."[99] From the Plaintiffs' point of view, this distinction was critical because Class B holders, pursuant to the terms of the Agreement, were to have their capital accounts reduced over the life of the Company by any allocations of tax losses.[100]

In connection with a winding up of the Company's business, the Defendants attempted to amend the Agreement to reconcile its provisions with representations made in the sales materials. To do so, however, the consent of each Class A limited partner was required. Several months after a campaign began to solicit these consents, the Defendants announced that the net sale proceeds would be determined according to the Agreement's terms because a number of Class A holders

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96. 286 Ga. App. 774, 650 S.E.2d 338 (2008).
97. *Id.* at 774-76, 650 S.E.2d at 340-41.
98. *Id.* at 777, 650 S.E.2d at 342.
99. *Id.* (internal quotation marks omitted).
100. *Id.*

would not approve the proposed amendments. Thereafter, the Plaintiffs brought several claims for breach of fiduciary duty against the Defendants, which the trial court dismissed on the grounds that such claims were derivative in nature and that the Plaintiffs lacked standing to bring them.[101]

The Georgia Court of Appeals preceded its analysis by noting that while the Georgia Supreme Court's 1994 ruling in *Grace Brothers, Ltd. v. Farley Industries*[102]—holding that a shareholder can maintain a direct action against a corporation if she alleges a "special injury"[103]—technically was binding precedent, the 2004 Delaware case of *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[104] had discarded the "special injury" test in favor of one hinging solely on two questions: "'(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?'"[105] And although the court of appeals stated that the supreme court had not yet addressed or adopted the *Tooley* framework for determining whether a shareholder's lawsuit must be brought directly or derivatively,[106] it nevertheless appeared to apply the two-prong test currently employed in Delaware to settle such a determination.[107]

The Plaintiffs' first relevant count alleged that the Defendants breached their duties by blocking the settlement of an earlier lawsuit brought to address how the Company's net sale proceeds were to be paid. The settlement would have caused the Class B partners to receive $5,000,000 to which the Class A partners otherwise would have been entitled.[108] The court of appeals reversed the trial court's ruling that this was a derivative claim, holding that the alleged injury was related to a portion of the Company's profits and that the injury fell solely on the Class B partners because the rejected settlement represented a reallocation of the $5,000,000 among the limited partners themselves rather than a loss of the funds by the Company as a whole.[109]

In the second relevant count of the Plaintiffs' complaint, the Defendants were alleged to have made misrepresentations that induced the Class B partners into voting their shares in favor of an amendment to the Agreement some years earlier, which allowed the Defendants to delay discovery of the discrepancy between the agreement and the sales materials.[110] Once again, the court of appeals analyzed the Plaintiffs' cause of action pursuant to the injury/benefit framework set forth in

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101. *Id.* at 779, 781, 650 S.E.2d at 343, 345.
102. 264 Ga. 817, 450 S.E.2d 814 (1994).
103. *Id.* at 819, 450 S.E.2d at 816.
104. 845 A.2d 1031 (Del. 2004).
105. *Hendry*, 286 Ga. App. at 782 n.5, 650 S.E.2d at 345 n.5 (quoting *Tooley*, 845 A.2d at 1033).
106. *Id.*
107. *See id.* at 782-87, 650 S.E.2d at 345-48.
108. *Id.* at 785, 650 S.E.2d at 347.
109. *Id.* at 785-86, 650 S.E.2d at 347.
110. *Id.* at 786, 650 S.E.2d at 347-48.

Tooley.[111] Ultimately, the court in *Hendry* held that the right to vote on the amendment was a personal right and that the Class B partners suffered injury from the general partners' breach of duty, which was not suffered proportionately by the Class A partners.[112] Thus, the court of appeals reversed the trial court's ruling and allowed the Plaintiffs to pursue this claim against the general partners directly.[113] The decision in *Hendry* is noteworthy because it implicitly rejects the nuanced special injury test purportedly employed in Georgia in favor of the more predictable, formulaic approach now used in Delaware to distinguish between direct and derivative causes of action.

B. Lax Oversight and Potential Self-Dealing by Employee Charged with Discretionary Functions Results in Imposition of Liability for Breach of Fiduciary Duty

In *GIW Industries, Inc. v. JerPeg Contracting, Inc.*,[114] the United States District Court for the Southern District of Georgia addressed the circumstances under which an agency relationship may be implied between a Georgia business entity and one of its employees.[115] GIW Industries, Inc. (GIW) hired Alvin Quackenbush as a plant engineer for several of its manufacturing facilities. Quackenbush's employment responsibilities included oversight of various capital projects at the facilities as well as preparation and negotiation of the bid documentation and contracts to carry out such projects. During his time with GIW, Quackenbush contracted with JerPeg Contracting, Inc. (JerPeg), an entity owned and controlled by several of his personal acquaintances, to perform certain facility improvements for GIW.[116]

Over the course of several years, JerPeg performed services for GIW that differed both in scope and substance from the work set forth in the corresponding purchase orders. Quackenbush caused GIW not only to pay for these nonconforming services but also to satisfy invoices received from JerPeg for work that it never actually performed or completed.[117] After Quackenbush abruptly resigned, GIW attempted to reconcile JerPeg's work with relevant purchase orders and contracts but was unable to do so without difficulty because Quackenbush had removed all hard and soft copies of correspondence relating to the JerPeg relation-

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111. *See id.*
112. *Id.*, 650 S.E.2d at 348.
113. *Id.*
114. 530 F. Supp. 2d 1323 (S.D. Ga. 2008).
115. *See id.* at 1326.
116. *Id.* at 1326-27.
117. *Id.* at 1327-28.

ship from GIW's files. Moreover, during relevant time periods, substantial unexplained cash deposits were made into Quackenbush's personal bank account.[118]

In addition to fraud and breach of contract claims against both Quackenbush and JerPeg, GIW alleged that its former employee breached his fiduciary duties of good faith and loyalty by paying with GIW's funds for work that he knew, or should have known, was rendered improperly or was incomplete. Quackenbush moved for summary judgment on the breach of fiduciary duty claim, contending that his relationship with GIW was that of employer-employee and did not rise to a fiduciary level.[119]

The district court noted that while Georgia law typically does not imply fiduciary duties between an employer and an employee, the facts of a particular case may establish the existence of fiduciary obligations among the parties.[120] In this case, the evidence was sufficient to show that GIW had delegated to Quackenbush "a discretionary power to act [and] manage an affair" on its behalf.[121] Quackenbush was not only "intimately involved" with the negotiation of JerPeg purchase orders, but he was also charged with supervising, inspecting, and paying for JerPeg's contract work.[122] Thus, the district court denied Quackenbush's motion for summary judgment on the breach of fiduciary duty claims.[123] Although it involved relatively settled points of Georgia law, *GIW Industries* is significant because it illustrates that a Georgia court may be apt to find the existence of an agency relationship when an employee personally benefits from discretionary actions that result in a sizable monetary loss to his employer.

C. Eleventh Circuit Decision Shows Reluctance of Courts to Imply Existence of Common Law Partnership

Optimum Technologies, Inc. v. Henkel Consumer Adhesives, Inc.[124] involved a defunct business deal whereby a consumer goods distributor, Henkel Consumer Adhesives, Inc. (HCA) agreed to market and distribute two-sided carpet adhesive tape manufactured by a closely held Georgia corporation, Optimum Technologies, Inc. (Optimum).[125] Pursuant to this arrangement, which was based on a "handshake" and never was reduced to writing, HCA agreed to leverage its existing relationships with several large retailers to place the adhesive tape product on the retailers' shelves.[126] After several uneventful years of this business relationship, HCA began internally developing its own adhesive carpet

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118. *Id.* at 1331-32.
119. *Id.* at 1333.
120. *Id.* (citing Atlanta Mkt. Ctr. Mgmt. Co. v. McLane, 269 Ga. 604, 607, 503 S.E.2d 278, 281-82 (1998)).
121. *Id.* at 1334.
122. *Id.*
123. *Id.*
124. 496 F.3d 1231 (11th Cir. 2007).
125. *Id.* at 1235-36.
126. *Id.* at 1236.

tape, one that it hoped would eventually replace Optimum's product, which HCA was distributing at the time.[127]

HCA never alerted Optimum to its plans for this competing product.[128] Once the HCA adhesive tape was ready for market, however, HCA told its main retailers that it was introducing a new "rug gripper product" and would no longer be selling the "old version."[129] Yet again, Optimum was not informed of this development, and HCA terminated its distributor relationship with Optimum shortly thereafter.[130]

Contending that the manufacturer-distributor relationship between the parties rose to the level of either a joint venture or a common law partnership, Optimum argued that by designing a competing adhesive product while hiding the very existence of the product's development, HCA breached its duties of loyalty and full disclosure.[131] The United States Court of Appeals for the Eleventh Circuit noted that Georgia law does not favor the imposition of disclosure obligations on parties during the course of a business relationship.[132] The Eleventh Circuit reasoned that "merely calling the relationship a joint venture or partnership does not make it so" because the existence of a legal partnership hinges upon the rights and responsibilities assumed by the parties.[133] As Optimum presented no evidence that the parties "had an equal right to 'control' the putative business enterprise" or that HCA agreed to "split the profits of their business endeavor," no triable issue of fact existed on whether the parties' dealings were in the nature of a legal partnership or a joint venture.[134] Therefore, the court of appeals affirmed the district court's entry of summary judgment in favor of HCA on Optimum's breach of fiduciary duty claim.[135] Legal practitioners should heed the implicit warning of *Optimum Technologies*: Georgia courts understandably are hesitant to inject stringent duties of disclosure and loyalty into what simply amounts to a commonplace commercial relationship, and any party seeking such fiduciary protection should reduce the agreement to written form to confirm and document the business understanding.

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127. *Id.*
128. *Id.*
129. *Id.* at 1237.
130. *Id.*
131. *Id.* at 1249.
132. *Id.* (citing Williams v. Dresser Indus., Inc., 120 F.3d 1163, 1168 (11th Cir. 1997)).
133. *Id.*
134. *Id.*
135. *Id.* at 1249-50.

IV. AN UPDATE ON THE FULTON COUNTY SUPERIOR COURT'S BUSINESS CASE DIVISION[136]

In last year's article, the Authors briefly discussed the Fulton County Superior Court's Business Case Division and focused on the June 6, 2007 amendment to Rule 1004,[137] which allows cases to be transferred to the business court either by request of the superior court judge assigned to the case or by a motion of one or both of the parties.[138] This amendment significantly enlarged the jurisdiction of the business court, as prior to its effectiveness, cases could only be heard upon the mutual agreement of all parties.[139]

As litigants and practitioners become increasingly aware of the business court's ability to resolve litigation efficiently and insightfully, it is likely that the emerging trend of increased activity on the business court's docket will accelerate. Prior to the implementation of the amendments to Rule 1004, the business court had eighteen cases on its docket.[140] In September 2007, three months after the amendments to Rule 1004, the business court's case load spiked to forty-one cases.[141] As of June 30, 2008, just over one year since the expansion of its jurisdiction, the business court's docket sat at forty-nine cases.[142] From June 1, 2007 to May 31, 2008, the business court disposed of fourteen cases, including one by way of a jury trial.[143] In contrast, during the eighteen month period from January 2006 to June 30, 2007, the business court resolved just nine cases.[144] In light of this expansion, the business court is considering a further amendment to its procedural rules to add an active superior court judge.[145] This judicial officer would dedicate a significant percentage of his or her docket to business court disputes.[146]

Perhaps the most striking asset of the business court is its policy of promptly issuing written orders on litigants' motions. The business court typically provides a written order within thirty days of a motion hearing or the close of the record on a motion, whichever occurs

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136. While the Authors admit that certain aspects of the statistics in Part IV pertain to periods of time outside of the June 1, 2007 to May 31, 2008 focus of this Article, they believe inclusion of such statistics is essential to provide a more fulsome picture of the business court's recent activities.

137. Fulton County Super. Ct. R. 1004, *available at* http://www.fultoncourt.org/superior court/pdf/business_court.pdf.

138. *Id. See* Paul A. Quirós et al., *Business Associations*, 59 MERCER L. REV. 35, 49-51 (2007).

139. Quirós et al., *supra* note 138, at 50.

140. *Id.* at 51.

141. *Id.*

142. E-mail from Anne Nees, Staff Attorney, Georgia Business Court, to Will Smoak, Associate, King & Spalding LLP (July 18, 2008, 16:43 EST) (on file with Authors).

143. *Id.*

144. Quirós et al., *supra* note 138, at 51.

145. E-mail from Nees to Smoak, *supra* note 142.

146. *Id.*

later.[147] Moreover, if a motion is to be decided on the briefs without oral argument, the business court will rule within forty-five days of the parties' completion of briefing submissions.[148] In the first six months of 2008, the business court has entertained over sixty motion hearings and ruled on well over one hundred motions.[149] In summary, the jurisdictional changes noted above and the business court's track record to date represent important steps to establishing a special forum that should favor a more consistent and precise administration of justice for appropriate business disputes.

V. LEGISLATION

During the 2008 session of the Georgia General Assembly (the 2008 Session), a number of revisions were made to the O.C.G.A., including revisions to Title 7, regarding banking and finance,[150] Title 10, regarding commerce and trade,[151] and Title 14, regarding corporations and business associations.[152]

In the wake of mounting foreclosures related to the credit crisis, Title 7 was amended to add O.C.G.A. § 7-1-1003.5,[153] which provides the authorizing language and delegation of authority for the Georgia Department of Banking and Finance to develop, implement, and participate in the creation of a nationwide automated licensing system for mortgage brokers and mortgage lenders.[154]

With respect to Title 10, O.C.G.A. §§ 10-1-913, 10-1-914, and 10-1-915[155] were implemented to specify procedures required of consumer credit reporting agencies to allow consumers to place, remove, or lift temporarily a security freeze on their credit accounts.[156] These statutes represent an effort to counteract and combat identity theft and

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147. *Id*.
148. *Id*.
149. *Id*.
150. *See* Ga. H.R. Bill 921, § 1, Reg. Sess. (2008) (codified as amended at O.C.G.A. § 7-1-1003.5 (2004 & Supp. 2008)).
151. *See* Ga. H.R. Bill 470, § 1, Reg. Sess. (2008) (codified as amended at O.C.G.A. §§ 10-1-780 to -797 (2000)); Ga. H.R. Bill 130, § 1, Reg. Sess. (2008) (codified as amended at O.C.G.A. §§ 10-1-913 to -915 (2000 & Supp. 2008)); Ga. S. Bill 358, Reg. Sess (2008) (codified as amended at O.C.G.A. §§ 10-5-1 to -90 (2000)).
152. *See* Ga. S. Bill 436, Reg. Sess. (2008) (codified as amended at O.C.G.A. §§ 14-2-122, -728, -807, -810, -1020, -1021, -1422, 14-3-122, -1422, 14-8-57, 14-9-1101, 14-11-603 and 14-11-1101 (2003 & Supp. 2008)).
153. O.C.G.A. § 7-1-1003.5 (2003 & Supp. 2008).
154. *Id.*
155. O.C.G.A. §§ 10-1-913 to -915 (2003 & Supp. 2008).
156. *Id.*

consumer fraud and provide a penalty for noncompliance by reporting agencies of up to $100 per violation, per consumer.[157]

Senate Bill 358[158] overhauled the statutory regime in Georgia pertaining to securities regulation, repealing Chapter 5 of Title 10 of the O.C.G.A. in its entirety and replacing it with the "Georgia Uniform Securities Act of 2008."[159] This new statutory regime represents a further effort by the Georgia General Assembly to minimize duplication of regulatory resources at the federal and state levels and to blend these respective resources in a manner that more efficiently protects investors.[160] Notably, the Georgia Uniform Securities Act of 2008 expands the enforcement authority at the state level with respect to stop orders, criminal prosecutions, and civil proceedings, especially pertaining to the qualification and licensure of securities professionals and broker-dealers.[161] Moreover, the legislation eliminated the "registration by notification" concept retained by its statutory predecessor.[162]

Title 14 of the O.C.G.A. was amended in several important respects during the 2008 Session. Under O.C.G.A. § 14-2-728,[163] the board of directors of a Georgia corporation whose shares are either listed on a national exchange or are regularly traded in a market maintained by a national securities association now may adopt a so-called "majority voting bylaw" to provide for majority voting in director elections.[164] Corollary provisions, O.C.G.A. § 14-2-1020[165] and § 14-2-1021,[166] allow a corporation's shareholders to repeal (but not to amend) such a bylaw if one is adopted by the board of directors.[167] In the wake of the corporate scandals of the early 2000s, activist shareholders have pressed boards of directors of publicly traded corporations to adopt majority voting bylaws to improve director accountability and promote shareholder democracy. By amending these O.G.G.A. provisions, Georgia is following an emerging national trend whereby state legislatures are changing corporate statutes to enable boards of directors to satisfy or preempt these shareholder requests.

Finally, O.C.G.A. § 14-2-1422[168] amends the corporate administrative reinstatement statute to provide that reinstatement may only occur within five years of the date of administrative dissolution, that the Georgia Secretary of State must reserve the corporation's name for this

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157. *Id.*

158. Ga. S. Bill 358, Reg. Sess. (2008) (codified as amended at O.C.G.A. §§ 10-5-1 to -90).

159. *See id.*

160. For an overview of the Uniform Securities Act of 2002, see http://www.uniformsecuritesact.org.

161. Ga. S. Bill 358.

162. *Id*.

163. O.C.G.A. § 14-2-728 (2003 & Supp. 2008).

164. *Id.*

165. O.C.G.A. § 14-2-1020 (2003 & Supp. 2008).

166. O.C.G.A. § 14-2-1021 (2003 & Supp. 2008).

167. O.C.G.A. §§ 14-2-1020 to -1021.

168. O.C.G.A. § 14-2-1422 (2003 & Supp. 2008).

period of time, and that certain specified persons must execute the reinstatement application.[169]

169. *Id.* Amendments to O.C.G.A. § 14-3-1422 and § 14-11-603 provide for similar administrative dissolution procedures for nonprofit corporations and limited liability companies, respectively. O.C.G.A. §§ 14-3-1422, 14-11-603 (2003 & Supp. 2008).