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, 2008 and May 31, 2009 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.[1] In addition, this Article provides an overview of important enactments during the 2009 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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1. For analysis of Georgia business associations law during the prior survey period, see Paul A. Quirós et al., *Business Associations, Annual Survey of Georgia Law*, 60 MERCER L. REV. 35 (2008).

I. ISSUES OF FIRST IMPRESSION

A. Court of Appeals Deems ESOP Participants "Beneficial Owners" for Purposes of Exercising Shareholder Rights

In *Kelley Manufacturing Co. v. Martin*,[2] the Georgia Court of Appeals examined an issue of first impression in Georgia—whether employee stock ownership plan (ESOP) participants should be considered "beneficial owners" of shares of stock of a Georgia corporation and should be entitled to exercise common law and statutory rights conferred by virtue of that status.[3] Kelley Manufacturing Company (KMC), a Georgia corporation, established an ESOP in 1990. KMC made annual cash contributions to the ESOP on behalf of KMC employees. In turn, the ESOP invested the cash contributions in KMC stock. Based on these investments, the ESOP was KMC's sole shareholder of record.[4]

Lanier Carson, the long-standing chief executive at KMC and trustee of the ESOP, retired in October 2006. James Martin succeeded Carson and assumed the roles of chairman of the board, chief executive officer, and co-trustee of the ESOP. Also following Carson's retirement, Timothy Maxwell was named president of KMC and co-trustee of the ESOP along with Martin.[5]

The tenures of the new executives were short-lived. In March 2007 KMC terminated Maxwell and Martin based on Carson's vote of 135 employees' proxies and powers of attorney, all of which purportedly authorized Carson to fire Maxwell and Martin and remove them from their co-trustee positions with the ESOP. Under the purported instructions of those same documents, Carson was voted sole trustee of the ESOP and chairman of the KMC board of directors.[6]

Following termination, Martin and Maxwell retained their outstanding ownership interests in the ESOP. In May 2007 Martin and Maxwell sent a letter to KMC requesting inspection of various corporate records, including copies of the proxies and powers of attorney substantiating their firings and a list of KMC shareholders at that time. Although KMC provided some of the documents requested, it refused to allow access to the shareholder list, the proxies, and the powers of attorney.[7]

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2. 296 Ga. App. 236, 674 S.E.2d 92 (2009).
3. *Id.* at 239, 674 S.E.2d at 95.
4. *Id.* at 237, 674 S.E.2d at 94.
5. *Id.*
6. *Id.* at 237–38, 674 S.E.2d at 94.
7. *Id.* at 238, 674 S.E.2d at 94.

A lawsuit followed wherein Martin and Maxwell petitioned under O.C.G.A. §§ 14-2-1602 to -1604[8] for inspection of corporate records.[9] KMC moved for judgment on the pleadings, arguing that Maxwell and Martin did not have standing to pursue inspection of KMC's documents because under the Georgia Business Corporations Code (the GBCC)[10] they were not "shareholders."[11] In denying KMC's motion, the trial court determined that the ESOP participants were beneficial owners of KMC's stock and, thus, were entitled to exercise shareholder inspection rights.[12]

In affirming the trial court's decision, the court of appeals first noted that the GBCC defines a "shareholder" as either a record owner or a beneficial owner of shares of stock.[13] Further, the court of appeals observed that the Georgia books and records inspection statute[14] provides that, for purposes of inspection, a "shareholder" includes any "'beneficial owner whose shares are held [either] in a voting trust or by a nominee on his behalf.'"[15]

Acknowledging that the ESOP was the record owner of the shares and that no nominee or voting trust was on file with KMC regarding those shares, the court of appeals rested its decision on case law from several other jurisdictions.[16] In those cases, the courts held that, "although the ESOP participants did not meet the technical definitions of shareholders in the relevant statutes, they were 'equitable owners' entitled to pursue their claims."[17] Concluding that those cases were well-reasoned, the court of appeals held that Maxwell and Martin had standing to pursue relief under O.C.G.A. §§ 14-2-1602 to -1604.[18]

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8. O.C.G.A. §§ 14-2-1602 to -1604 (2003 & Supp. 2009).
9. *Kelley Mfg. Co.*, 296 Ga. App. at 238, 674 S.E.2d at 94.
10. O.C.G.A. §§ 14-2-101 to -1703 (2003 & Supp. 2009).
11. *Kelley Mfg. Co.*, 296 Ga. App. at 238–39, 674 S.E.2d at 95.
12. *Id.* at 239, 674 S.E.2d at 95.
13. *Id.* (citing O.C.G.A. § 14-2-140(27) (Supp. 2009)).
14. O.C.G.A. § 14-2-1602 (2003 & Supp. 2009).
15. *Kelley Mfg. Co.*, 296 Ga. App. at 239, 674 S.E.2d at 95 (quoting O.C.G.A. § 14-2-1602(g)).
16. *Id.*
17. *Id.* (citing Housman v. Albright, 857 N.E.2d 724, 729–30 (Ill. App. Ct. 2006); Elish v. Wilson, 434 S.E.2d 411, 418 (W. Va. 1993)).
18. *Id.* KMC also argued that Maxwell and Martin were not entitled to the books and records they sought because their request was not for a "proper purpose." *Id.* at 240, 674 S.E.2d at 96. The court of appeals quickly disposed of this argument, noting that Maxwell and Martin had satisfied their burden of showing a proper purpose because the documents at issue were relevant to monitoring proper corporate governance, determining if mismanagement or breaches of fiduciary duty were occurring, and protecting their substantial economic investment in KMC (as well as the investment of the other

The decision in *Kelley Manufacturing* has implications beyond the specific setting of the lawsuit. Although the books and records provisions of the GBCC were at issue in this case, the broad language used by the court of appeals in referring to the status and rights of ESOP participants as beneficial owners (for example, that ESOP participants are "entitled to exercise shareholders' rights, including inspection of . . . records"[19]) indicates that Georgia courts may be willing to consider ESOP participants as shareholders for other purposes, such as derivative lawsuits. Indeed, the Illinois and West Virginia decisions cited by the court of appeals both involved shareholder derivative actions.[20] Practitioners should be aware of the *Kelley Manufacturing* decision going forward because its reasoning expands the class of persons traditionally thought to enjoy shareholder rights under Georgia corporate law.

B. Court of Appeals Opines on the Scope of Fiduciary Duties Applicable to Georgia Limited Liability Companies

In *ULQ, LLC v. Meder*,[21] the Georgia Court of Appeals commented on several salient topics concerning fiduciary duties in the context of a Georgia limited liability company (LLC).[22] In *Meder* four individuals formed ULQ, a Georgia LLC, to operate a debt collection agency. Terrance Meder and two others each contributed $75,000 to ULQ. In return, each received ten percent of ULQ's ownership interests. The fourth investor (the managing member) contributed $350,000 to ULQ's capital in exchange for the remaining seventy percent ownership interests.[23]

In connection with ULQ's formation, the members executed an operating agreement providing that the managing member would act as the sole member of ULQ's board of managers, a body which exercised all managerial power over the entity's business and affairs.[24] Additionally, the agreement expressly provided the board with authority to terminate ULQ officers, stating:

> Any officer may be removed as such, either with or without cause, by the Board of Managers whenever in [its] judgment the best interests of [ULQ] will be served thereby; provided, however, that such removal

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shareholders). *Id.* at 241, 674 S.E.2d at 96.

19. *Id.* at 239, 674 S.E.2d at 95.
20. *See id.* (citing *Housman*, 857 N.E.2d at 726; *Elish*, 434 S.E.2d at 413).
21. 293 Ga. App. 176, 666 S.E.2d 713 (2008).
22. *See id.* at 180, 666 S.E.2d at 718.
23. *Id.* at 176–77, 666 S.E.2d at 715.
24. *Id.*

> shall be without prejudice to the contract rights, if any, of the Officer so removed.[25]

In the event that ULQ terminated a member's employment, the agreement provided for call rights whereby ULQ could purchase the terminated member's interest at a specified price. During 2003 that price was equivalent to the value of the member's capital account.[26]

In November 2003 the managing member terminated Meder as an officer and employee for alleged abuse of ULQ employees. Thereafter, ULQ exercised its right to purchase Meder's interests. The call price was zero dollars, as ULQ's prior operating losses had exhausted the entire value of Meder's capital account.[27]

Meder then filed suit, alleging that ULQ's actions breached the agreement and breached fiduciary duties owed by ULQ to him as a member. ULQ counterclaimed for, among other things, Meder's breach of fiduciary duty on the ground that he contacted clients during the period between his termination and the purchase of his membership interests and instructed them to withhold business from ULQ.[28] The trial court denied ULQ's motion for summary judgment, holding that the agreement contained an implied duty of good faith and that a factual determination was necessary as to whether the managing member properly discharged that duty in terminating Meder. Additionally, the trial court granted Meder's motion for summary judgment, citing a lack of competent evidence that Meder had made any inappropriate comments to ULQ clients.[29]

The court of appeals first considered whether the managing member was constrained by an implied duty of good faith when the managing member determined that Meder's dismissal was in the best interests of ULQ.[30] The court noted that well-settled Georgia law requires a discretionary decision pursuant to a contract to be made in good faith

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25. *Id.* at 177, 666 S.E.2d at 715.

26. *Id.*, 666 S.E.2d at 716.

27. *Id.*

28. *Id.* ULQ also counterclaimed against Meder for breach of contract on the basis that the agreement required a member owning an economic interest in ULQ not to "interfere with the business relationship of [ULQ] and any of its existing or prospective customers, or attempt to induce, or encourage, any existing customer to terminate its relationship with [ULQ]." *Id.* at 182, 666 S.E.2d at 719 (internal quotation marks omitted). Because ULQ's evidence showed that Meder misinformed one prospective customer that "ULQ was experiencing extreme financial difficulties that had resulted in Meder's termination," the court of appeals reversed the trial court's entry of summary judgment against ULQ on its breach of contract claim. *Id.* at 183, 666 S.E.2d at 720.

29. *Id.* at 177–78, 666 S.E.2d at 716.

30. *Id.* at 178, 666 S.E.2d at 716.

unless the express terms of such contract grant the party "absolute or uncontrolled discretion in making [such] a decision."[31] Because no language in the agreement designated the managing member's discretion as absolute or uncontrolled and because Meder offered evidence that he was not abusive to ULQ employees, the court of appeals upheld the trial court's denial of ULQ's motion for summary judgment on this issue.[32] Both circumstantial and direct evidence suggested that the managing member's true motive for the termination was to purchase Meder's interest for nothing at a time when the company was poised for financial growth.[33] Thus, a jury would have a factual basis to find that the managing member breached its duty of good faith by terminating Meder for the purpose of pecuniary gain.[34]

Second, the court of appeals evaluated whether ULQ as an entity owed a fiduciary duty to Meder as a member.[35] Noting a managing member controls an LLC—rather than vice versa—the court of appeals observed that to hold an LLC responsible for the breach of a managing member's duties would make little analytical sense.[36] Moreover, finding such liability "would shift the cost of that breach to the [LLC] (and indirectly to its members), thereby shifting the cost to the very parties harmed by the breach."[37] Based on this rationale, as well as decisions in other jurisdictions applying the same analytical construct to fiduciary duty lawsuits against corporations when the underlying wrongdoing was perpetrated by a corporate officer or director, the court of appeals held that a Georgia LLC "owes no fiduciary duty to its members, either directly or vicariously, for actions taken by its manager."[38] As such, the trial court should have granted ULQ's motion for summary judgment on Meder's claim, and the court of appeals reversed that decision accordingly.[39]

Finally, the court of appeals examined ULQ's assertion that as a member of ULQ, Meder owed it a fiduciary duty of loyalty and his

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31. *Id.* at 179, 666 S.E.2d at 717 (citing Hunting Aircraft, Inc. v. Peachtree City Airport Auth., 281 Ga. App. 450, 453, 636 S.E.2d 139, 141–42 (2006)).

32. *Id.* at 179–80, 666 S.E.2d at 717–18.

33. *Id.*, 666 S.E.2d at 717.

34. *Id.* at 180, 666 S.E.2d at 717–18.

35. *Id.*, 666 S.E.2d at 718.

36. *Id.* (citing Arnold v. Soc'y for Sav. Bancorp, Inc., 678 A.2d 533, 540 (Del. 1996)).

37. *Id.* at 181, 666 S.E.2d at 718.

38. *Id.* (citing Onex Food Servs. v. Greiser, Nos. 93 Civ. 0278 (DC), 94 Civ. 3063 (DC), 1996 WL 103975, at *7 (S.D.N.Y. Mar. 11, 1996); Johnston v. Wilbourn, 760 F. Supp. 578, 590 (S.D. Miss. 1991); Burcham v. Unison Bancorp, Inc., 77 P.3d 130, 147 (Kan. 2003)).

39. *Id.*, 666 S.E.2d at 719.

alleged interference in customer relationships breached that duty.[40] Referencing O.C.G.A. § 14-11-305,[41] the court of appeals noted that unless provided for in an LLC's operating agreement or its articles of organization,

> a person who is a member of a limited liability company in which management is vested in one or more managers, and who is not a manager, shall have no duties to the limited liability company or to the other members solely by reason of acting in his or her capacity as a member.[42]

Although Meder was a member of ULQ, the agreement vested complete management authority in the managing member.[43] Because Meder had no authority to manage the affairs of ULQ, O.C.G.A. § 14-11-305 insulated Meder from any liability premised on a breach of fiduciary duty theory.[44] In holding that non-managing members owe no fiduciary duties to an LLC or its members, the court of appeals emphasized that parties are free to impose such duties in an operating agreement or articles of organization.[45] Pursuant to this reasoning, the court of appeals affirmed the trial court's entry of summary judgment against ULQ on its breach of fiduciary duty claim against Meder.[46]

The decision in *Meder* is significant for a number of reasons. First, it clarifies that a member of a manager-managed Georgia LLC cannot be held liable on a fiduciary duty theory unless such member is exercising managerial authority or the LLC's governing documents provide that such liability may attach.[47] While this issue holds less significance for a "default" LLC under Georgia law (that is, when all members of the LLC have managerial authority over the entity), practitioners certainly should consider the import of the court's decision in *Meder* when drafting an operating agreement for a manager-managed LLC, especially one whose members are to be involved intimately in the LLC's day-to-day operations. Second, practitioners should bear in mind that if the implied duty of good faith is to be read into discretionary decisions made under an operating agreement, careful drafting is necessary to ensure that the

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40. *Id.* at 184, 666 S.E.2d at 720.
41. O.C.G.A. § 14-11-305 (2003).
42. *ULQ*, 293 Ga. App. at 184, 666 S.E.2d at 720 (internal quotation marks omitted) (quoting O.C.G.A. § 14-11-305).
43. *Id.* at 176, 666 S.E.2d at 715.
44. *Id.* at 185, 666 S.E.2d at 721.
45. *Id.*
46. *Id.*
47. *Id.* at 184–85, 666 S.E.2d at 720–21.

authority granted to the deciding party is "absolute or uncontrolled."[48] Finally, when considering the initiation of a lawsuit for breach of fiduciary duty in the LLC context, a practitioner should remember to sue the party who perpetrated the breach, rather than the LLC alone. Indeed, had Meder alleged a breach of fiduciary duty against the managing member rather than ULQ, the outcome on that portion of Meder's case may have been decidedly different.[49]

II. CORPORATE SEPARATENESS

A. Assignee of Asset Purchase Agreement Prohibited from Enforcing Restrictive Covenants

In *Accurate Printers, Inc. v. Stark*,[50] the Georgia Court of Appeals considered whether a non-party to a corporate asset purchase agreement (APA) was entitled by virtue of its status as assignee to enforce certain restrictive covenants contained therein.[51] The case involved Accurate Printers, Inc. (API), a Georgia corporation wholly owned by Steve Young and involved in the printing business, and Oxford Printing, Inc., a corporation wholly owned by Kenneth Stark. To expand his printing operations, Young acquired ownership of Oxford's assets and equipment by virtue of an asset purchase agreement between Oxford, Stark, and himself.[52]

The APA contained certain restrictive covenants whereby Oxford and Stark agreed (1) not to compete with Young within a 125-mile radius of Young's current place of business for a five-year period and (2) not to solicit any of Young's customers within a 125-mile radius of Young's current place of business for a five-year period. Following the transaction, Stark came to work for Young and API to assist with business integration. However, that employment relationship deteriorated rapidly, and API soon terminated Stark's employment.[53] Stark thereafter joined Baxter Printing Co. and "[competed] with API, solicited API's customers, [and] disclosed API's proprietary information."[54]

API then filed suit against Stark, alleging, among other things, that Stark had breached the restrictive covenants. During trial the court granted Stark's motion for a directed verdict on API's claim based on

48. *See id.* at 179, 666 S.E.2d at 717.
49. *See id.* at 181, 666 S.E.2d at 718–19.
50. 295 Ga. App. 172, 671 S.E.2d 228 (2008).
51. *Id.* at 175, 671 S.E.2d at 231.
52. *Id.* at 173, 671 S.E.2d at 230.
53. *Id.* at 173–74, 671 S.E.2d at 230.
54. *Id.* at 174, 671 S.E.2d at 230.

breach of the restrictive covenants because API was not a party to the APA, and Young's subsequent assignment of the restrictive covenants to API was invalid. Thereafter, API appealed the trial court's decision.[55]

The court of appeals affirmed the trial court's directed verdict.[56] Although Young was the owner of API, he chose to enter into the APA in his individual capacity.[57] Relying on the separateness doctrine, which states that "'each corporation is a separate entity, distinct and apart from its stockholders,'"[58] the court of appeals held that "API was not a party to the [r]estrictive [c]ovenant, and thus, it was not entitled to pursue a claim for its breach."[59] Moreover, Young's purported assignment of the restrictive covenants to API was invalid as to Oxford and Stark because the terms of the APA prohibited assignment of those rights unless Oxford and Stark provided their prior written consent.[60] As API failed to proffer any evidence of such written consent, API lacked an essential element of its claim for breach—privity of contract.[61]

While the decision in *Accurate Printers* does not inject any revolutionary concepts into the doctrine of corporate separateness under Georgia law, it does offer important guidance to practitioners when advising corporate clients and shareholders in the acquisition context. Practitioners should carefully structure an acquisition agreement to provide for signatory provisions and assignment provisions that comport with the parties' understanding of exactly who is intended to benefit from the particular rights and remedies included in such agreement. Failure to draft an acquisition agreement in a manner that comports with such understanding leaves open the possibility that one of the parties may be deprived of the benefit of its bargain under certain future circumstances.

B. Court of Appeals Disapproves of Corporation's Attempt to Pierce Its Own Corporate Veil to Advance Claims of Tortious Interference

In *All Star, Inc. v. Fellows*,[62] a Georgia corporation, All Star, Inc., placed amusement game machines in various Georgia retail locations. Because All Star's sole owner, Larry Simmons, anticipated that state legislation would soon prohibit All Star's business, Simmons sought to expand that business into neighboring states. To accomplish this task,

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55. *Id.* at 174–75, 671 S.E.2d at 231.
56. *Id.* at 175, 671 S.E.2d at 231.
57. *Id.*
58. *Id.* (quoting Levy v. Reiner, 290 Ga. App. 471, 473, 659 S.E.2d 848, 851 (2008)).
59. *Id.*
60. *Id.* at 175–76, 671 S.E.2d at 231–33.
61. *Id.* at 175–77, 671 S.E.2d at 231–33.
62. 297 Ga. App. 142, 676 S.E.2d 808 (2009).

Simmons financed the start-up of an Alabama corporation, D.R. Awtrey & Associates, Inc., doing business as Alabama Amusements (Amusements). One of Simmons's former business associates, David Awtrey, was the sole owner of Amusements and served as its president. Awtrey ran Amusements' day-to-day operations, soliciting businesses for the placement of games, placing the gaming equipment, and collecting money generated thereby. Another colleague, Shawn Fellows, handled various business matters for Amusements. Notably, All Star's revenue was commingled with that of Amusements; expenses incurred by Amusements were paid with All Star's funds, and All Star included Awtrey on its list of covered individuals in its health insurance plan.[63]

Within a year, Awtrey was no longer Amusements' president, and Simmons owned one hundred percent of the corporation. Dissatisfied that Amusements was not paying them appropriate commissions, Awtrey and Fellows established a separate company to engage in a similar business. In the process, the duo secured the business of three clients with whom Awtrey had placed games while working for Amusements.[64] Upon learning of the establishment of the competing business, All Star initiated suit, alleging that Fellows and Awtrey had committed tortious interference with All Star's business relationships.[65]

At trial, the defense argued that an essential element of All Star's claim, the existence of a business relationship between All Star and the three allegedly stolen customers in Alabama, was lacking. According to the defense, the undisputed evidence showed that All Star and Amusements were separate corporations and that the three customers in question were former customers of Amusements only.[66] The defense maintained that All Star was "attempting to pierce its own corporate veil to claim another corporation's customers and thus make out its claim."[67] The trial court agreed with this assessment of the merits and entered directed verdicts in favor of the defendants on the tortious interference claim.[68]

The court of appeals agreed with the trial court, noting that "'[g]reat caution should be exercised . . . in disregarding the [separate existence of a] corporate entity'"[69] and that "'the mere existence of some

63. *Id.* at 144–45, 676 S.E.2d at 811–12.
64. *Id.* at 145–46, 676 S.E.2d at 812.
65. *Id.* at 142, 676 S.E.2d at 809.
66. *Id.* at 146, 676 S.E.2d at 812.
67. *Id.*
68. *Id.* at 147, 676 S.E.2d at 812–13.
69. *Id.* at 148, 676 S.E.2d at 813 (quoting Hickman v. Hyzer, 261 Ga. 38, 39, 401 S.E.2d 738, 739 (1991)).

unspecified "affiliation" is not sufficient to pierce the corporate veil.'"[70] In holding for the defendants, the court of appeals noted that "[a]lthough All Star showed instances in which it disregarded its corporate separateness from . . . Amusements, such acts can serve as no justification for the court also to disregard it for All Star's benefit."[71] Essentially, the court of appeals followed the well-established precept that veil piercing is to be used by third parties to prevent instances of injustice and inequity, not as a tool to reward a corporation for its own failure to adhere to corporate formalities.[72]

As the *All Star* case illustrates, practitioners always should bear in mind the equitable underpinnings of the veil-piercing doctrine when seeking to invoke it for a client's benefit. Because of those equitable considerations, any attempt on behalf of a corporate or individual shareholder to erase the common law distinction between the shareholder and the legal entity it has created will be viewed suspiciously by a Georgia court.

C. Failure to Adhere to Corporate Formalities Yields Potential Personal Liability for Shareholder

At issue in *Walker v. ACE Auto Sales & Leasing, Inc.*[73] were certain loans provided by the plaintiffs, Raymond Walker and Jack Boatright, to ACE Auto Sales & Leasing, Inc., a Georgia corporation. This arrangement involved unwritten agreements between the plaintiffs and Leonard Mason, who acted as a purported agent or employee of ACE. From time to time, the plaintiffs would loan Leonard Mason funds for the purchase of automobiles from wholesale used car auctions. Although the parties did not agree when the loans would be due, they acknowledged that repayment would include both principal and ten percent interest. The plaintiffs retained physical possession of the certificates of title for the vehicles as security for the loans.[74]

Following an alleged default by ACE on loans then outstanding, the plaintiffs brought suit against ACE, Leonard Mason, and Deborah Mason.[75] The evidence submitted showed that Deborah Mason was the sole shareholder, officer, and director of ACE. Despite the fact that she was the only person with actual or apparent authority to bind the

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70. *Id.* (quoting Yukon Partners v. Lodge Keeper Group, 258 Ga. App. 1, 6, 572 S.E.2d 647, 651 (2002)).

71. *Id.*

72. *See id.*

73. 294 Ga. App. 267, 668 S.E.2d 877 (2008).

74. *Id.* at 267, 668 S.E.2d at 878.

75. *Id.*

company, Deborah Mason never worked in the business. Her role was limited to signing tax returns and maintaining licenses, bonding, and insurance. Although Leonard Mason was not an employee of ACE and had no official connection to ACE, he was in charge of its day-to-day business operations. In addition, while Leonard Mason was aware that the plaintiffs kept the certificates of title as security for the loans ACE used to purchase those vehicles, he stated that he would frequently sell the cars without repaying the plaintiffs from the proceeds or even notifying them of the sales. When this occurred, Leonard Mason admitted that he knew purchasers of those cars often attempted to procure replacement titles in an effort to circumvent the plaintiffs' security interest.[76]

The trial court granted summary judgment to the Masons on the ground that the plaintiffs were unable to provide sufficient evidence to pierce ACE's corporate veil.[77] The court of appeals disagreed and reversed.[78] Noting that the issue of piercing the corporate veil is typically a jury question, "especially where there is evidence that 'the corporate arrangement was a sham, used to defeat justice'" or evade contractual responsibility, the court of appeals held that, based on the plaintiffs' evidence, a reasonable juror could have concluded that ACE was a mere instrumentality of the Masons used to perpetrate fraud upon the plaintiffs.[79]

Given the plaintiffs' evidence in *Walker*, it appears quite probable that the Masons will be held personally liable for the debts of ACE. When advising clients on the formation of a corporation and the structure of its operations, practitioners should carefully explain that the corporate form will not necessarily shield the individual owners from liability in all instances, especially when the owners have caused the entity to engage in objectively suspect behavior.

III. FIDUCIARY DUTIES

In *Hilb, Rogal & Hamilton Co. of Atlanta v. Holley*,[80] a Georgia corporation, Hilb, Rogal & Hamilton Company of Atlanta, Inc. (HRH), brought (among other claims) a breach of fiduciary duty action against Hugh Holley, one of HRH's former officers. A large insurance brokerage, HRH purchased Holley's independent insurance brokerage in August

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76. *Id.* at 269–70, 668 S.E.2d at 879.
77. *Id.* at 269, 668 S.E.2d at 879.
78. *Id.* at 270, 668 S.E.2d at 879.
79. *Id.* at 269–70, 668 S.E.2d at 879 (quoting Derbyshire v. United Builders Supplies, Inc., 194 Ga. App. 840, 844, 392 S.E.2d 37, 40 (1990)).
80. 295 Ga. App. 54, 670 S.E.2d 874 (2008).

1997. Holley thereafter assumed employment with HRH as a vice president. This relationship continued until February 2003 when Holley abruptly resigned from HRH and started working for another insurance brokerage the next business day.[81] The trial evidence showed that during the two months before his resignation, Holley (1) "sought and obtained approval from an existing or potential [HRH] client to appoint him as the client's contact at the competitor's brokerage," (2) provided insurance policy pricing and other HRH proprietary information to the competitor, and (3) alerted the competitor to a potential broker acquisition prospect.[82] The jury returned a verdict against Holley on the breach of fiduciary duty claim and awarded money damages in an amount equivalent to the last two months of Holley's salary at HRH.[83] Holley then appealed.[84]

Following established principles of Georgia common law, the Georgia Court of Appeals upheld the jury's verdict.[85] Because Holley had discretionary authority to solicit business on behalf of HRH and to bind HRH to contractual obligations, Holley in fact owed a fiduciary duty of loyalty to HRH as an officer and was not exempt from such duty as a mere employee.[86] The court of appeals then described the timing flaw that befell Holley during his attempt to transition to a competitor:

> [A] corporate officer does not breach fiduciary duties owed to the corporation simply by making plans to start a competing company while still employed by the corporation. Even before termination of employment, an officer is entitled to make arrangements to compete. . . . *But during the term of employment with the corporation, the officer may not solicit customers for a competing company or otherwise engage in direct competition with the corporation's business*.[87]

Because the actions Holley took during the two months prior to his departure constituted customer solicitation and direct competition with HRH's business, Holley breached his fiduciary duty of loyalty.[88]

Holley reaffirms a principle of Georgia law embodied in a number of previous cases that officers and directors owe identical fiduciary duties

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81. *Id.* at 55, 670 S.E.2d at 875.
82. *Id.* at 59, 670 S.E.2d at 878.
83. *Id.*
84. *Id.* at 54, 670 S.E.2d at 875.
85. *Id.* at 58–59, 670 S.E.2d at 877–78.
86. *Id.* at 58, 670 S.E.2d at 877.
87. *Id.* (alterations in original) (internal quotation marks omitted) (quoting Gresham & Assocs., Inc. v. Strianese, 265 Ga. App. 559, 560–61, 595 S.E.2d 82, 84–85 (2004)).
88. *Id.* at 58–59, 670 S.E.2d at 877–78.

to the corporations they serve.[89] Interestingly, it was only earlier this year that a state court in Delaware—often considered the epicenter of corporate law jurisprudence in the United States—explicitly held this same principle to be applicable in the context of a Delaware corporation.[90]

Practitioners may find the decision in *Holley* helpful in several respects. First, the case provides insight for a practitioner's counseling of a client who serves as an officer of a Georgia corporation as to the scope of actions that the client may or may not take prior to leaving a current employer. In this setting, of course, practitioners should also request from the client any employment agreements or noncompetition agreements that are in effect between the client and the corporation because such agreements may contain provisions that materially restrict the client's proposed course of action. Second, a practitioner who is considering disassociation from membership or partnership at a law firm should bear in mind that the holding in *Holley* is not limited solely to the corporate context.

IV. AN UPDATE ON THE FULTON COUNTY SUPERIOR COURT'S BUSINESS CASE DIVISION[91]

Consistent with past iterations of this Article, the Authors wish to provide a brief discussion on the Fulton County Superior Court's Business Case Division (Business Court). As litigants and practitioners have become more aware of the Business Court's ability to resolve litigation with accuracy and efficiency, the Business Court has experienced increased activity on its docket. For example, in May 2007, prior to an amendment to Fulton County Superior Court Rule 1004,[92] which expanded the Business Court's jurisdiction, eighteen cases sat on its docket.[93] That number has steadily increased over the past two years,

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89. *See, e.g.*, Am. Bldgs. Co. v. Pascoe Bldg. Sys., Inc., 260 Ga. 346, 349, 392 S.E.2d 860, 864 (1990) (applying the fiduciary duty of loyalty to corporate officers); *Gresham*, 265 Ga. App. at 560, 595 S.E.2d at 84 (same); E.D. Lacey Mills, Inc. v. Keith, 183 Ga. App. 357, 362–63, 359 S.E.2d 148, 155 (1987) (same).

90. *See* Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009).

91. While the Authors acknowledge that certain statistics in Part IV pertain to periods of time outside of the June 1, 2008 to May 31, 2009 scope of this Article, they believe the inclusion of such information is essential to provide a more complete picture of the Business Court's recent activities.

92. FULTON COUNTY SUPER. CT. R. 1004, *available at* http://www.fultoncourt.org/sca200807/documents-and-forms/doc_download/6-business-court-rules.html.

93. *See* Paul A. Quirós et al., *Business Associations, Annual Survey of Georgia Law*, 59 MERCER L. REV. 35, 51 (2007).

and at the end of July 2009, there were forty pending cases.[94] Consistent with the increase in the number of its pending cases, the Business Court has experienced growth in the number of cases it resolves. During the eighteen-month period from January 1, 2006 to June 30, 2007, the Business Court resolved just nine cases.[95] From June 1, 2007 to May 31, 2008, this number grew to fourteen cases;[96] during the June 1, 2008 to May 31, 2009 period, the Business Court disposed of twenty cases, including two that involved trials.[97] All told, since its inception in October 2005, the Business Court has served over 225 business litigants.[98]

In light of this expansion in workload, the Georgia Supreme Court approved an amendment to Rule 1004 on May 6, 2009.[99] Pursuant to this amendment, an active Fulton County Superior Court judge, the Honorable Melvin K. Westmoreland, now serves on the Business Court and devotes a substantial portion of his docket to Business Court disputes.[100] Judge Westmoreland was appointed on July 1, 2009, and sits alongside the Business Court's senior members, Senior Judge Elizabeth E. Long and Senior Judge Alice D. Bonner.[101] The addition of Judge Westmoreland will allow the Business Court to expand and increase its operating efficiency without a commensurate increase in operating costs.[102] Furthermore, this appointment responds to concerns that only unelected, senior judges were hearing Business Court cases.[103]

Perhaps the Business Court's most striking asset 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 completion of the record on a motion, whichever occurs

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94. E-mail from Noelle Lagueux-Alvarez, Staff Attorney & Program Director, Georgia Business Court, to author Will Smoak (July 24, 2009, 12:59 EST) (on file with authors).

95. Quirós et al., *supra* note 93, at 51.

96. E-mail from Anne Nees, Staff Attorney, Georgia Business Court, to author Will Smoak (July 18, 2008, 16:43 EST) (on file with authors).

97. E-mail from Noelle Lagueux-Alvarez to Will Smoak, *supra* note 94.

98. *Id.*

99. *Id.*; *see* FULTON COUNTY SUPER. CT. R. 1004. In addition, Rule 1004 was amended to provide that a transfer fee of $1000 be assessed to all cases transferred from superior court to the Business Court upon motion by one or more of the parties, payable on a pro rata basis by the movant. FULTON COUNTY SUPER. CT. R. 1004(5). No fee is assessed, however, if the matter is transferred at the request of the superior court judge originally assigned to the case. *Id.*

100. E-mail from Noelle Lagueux-Alvarez to Will Smoak, *supra* note 94.

101. *Id.*

102. *Id.*

103. *Id.*

later.[104] Moreover, if a motion is to be decided on the briefs without oral argument, the Business Court strives to rule within forty-five days of the parties' completion of briefing.[105] In sum, the addition of another experienced jurist to the Business Court's ranks, along with the Business Court's impressive track record of quickly hearing and resolving cases, represent important steps toward solidifying the Business Court's reputation as a special forum designed to administer and resolve appropriate business disputes in a timely and insightful manner.

V. LEGISLATION

During the 2009 session of the Georgia General Assembly, a number of revisions were made to the O.C.G.A., including revisions to Title 7 with respect to banking and mortgage loan origination,[106] Title 10 with respect to electronic records and signatures,[107] and Title 14 with respect to limited liability companies.[108]

In the wake of a number of bank seizures by regulatory authorities in Georgia during 2008 and 2009, Title 7 was amended to (1) clarify that the definition of *net assets* as it relates to Georgia financial institutions excludes—for purposes of calculating "total assets"—"good will, core deposit intangibles, or other intangible assets related to the purchase, acquisition, or merger of a bank charter,"[109] (2) provide a carve-out to allow a Subchapter S bank to petition the Georgia Department of Banking and Finance (GDBF) for approval of dividends in an amount sufficient to cover the federal and state income tax liability of its shareholders, even if statutorily mandated levels of paid-in capital and retained earnings are not satisfied,[110] and (3) provide the GDBF with broad power and discretion to investigate violations of rules, regulations,

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104. E-mail from Anne Nees to Will Smoak, *supra* note 96.

105. *Id.*

106. Ga. H.R. Bill 141, Reg. Sess., 2009 Ga. Laws 86 (codified at O.C.G.A. §§ 7-1-4, -68, -91, -243, -285, -460, -651, -684.1, -686, -687.1, -689.2, -692, -703, -704, -707.2, -707.3 (2004 & Supp. 2009)); Ga. H.R. Bill 312, Reg. Sess., 2009 Ga. Laws 252 (amending O.C.G.A. §§ 7-1-1000 to -1021 (2004 & Supp. 2009)).

107. Ga. H.R. Bill 126, § 1, Reg. Sess., 2009 Ga. Laws 698, 699–708 (codified at O.C.G.A. §§ 10-12-1 to -20 (2009)).

108. Ga. H.R. Bill 308, Reg. Sess., 2009 Ga. Laws 108 (amending O.C.G.A. §§ 14-11-101, -203, -212, -303, -311, -408, -504, -505, -506, -602, -610, -901, -905 (2003 & Supp. 2009)).

109. Ga. H.R. Bill 141, § 1, 2009 Ga. Laws at 87 (amending O.C.G.A. § 7-1-4(24) (2004 & Supp. 2009)).

110. *Id.* § 6, 2009 Ga. Laws at 89 (amending O.C.G.A. § 7-1-460(a)(2) (2004 & Supp. 2009)).

statutes, and orders by granting it the ability to administer oaths, require the production of books and records, depose witnesses, and issue subpoenas for witnesses and documents.[111]

House Bill 312[112] overhauled the Georgia Residential Mortgage Act[113] to incorporate relevant provisions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act)[114] with respect to the licensure of mortgage loan originators.[115] The SAFE Act establishes uniform nationwide licensing standards for mortgage loan originators in order to safeguard consumers and reduce fraud through increased oversight and accountability.[116]

Effective on January 1, 2010, mortgage loan originators must be registered with the Nationwide Mortgage Licensing System and Registry,[117] a database established by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators.[118] To register, a mortgage loan originator must submit information concerning identity, financial services-related employment history, personal financial history, and criminal history.[119] Additionally, the applicant must provide fingerprints to the Federal Bureau of Investigation for a background check.[120] A licensed mortgage loan originator must renew his or her registration annually prior to December 1 of each year.[121]

With respect to Title 10, House Bill 126[122] adopted the Uniform Electronic Transactions Act (UETA)[123] in Georgia.[124] The UETA permits parties to select the use of electronic records and electronic signatures for any transaction, except transactions subject to Georgia's

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111. *Id.* § 8, 2009 Ga. Laws at 89–91 (codified at O.C.G.A. § 7-1-684.1(c)–(h) (2004 & Supp. 2009)); *id.* § 15, 2009 Ga. Laws at 93–95 (codified at O.C.G.A. § 7-1-704(b), (e)–(i) (2004 & Supp. 2009)).

112. Ga. H.R. Bill 312, Reg. Sess., 2009 Ga. Laws 252 (amending O.C.G.A. §§ 7-1-1000 to -1021 (2004 & Supp. 2009)).

113. O.C.G.A. §§ 7-1-1000 to -1021 (2004 & Supp. 2009).

114. Pub. L. No. 110-289, 122 Stat. 2810 (to be codified at 12 U.S.C. §§ 5101–16).

115. Ga. H.R. Bill 312, 2009 Ga. Laws at 252.

116. *See* SAFE Act § 1501, 122 Stat. at 2810–11 (2008) (to be codified at 12 U.S.C. § 5101).

117. O.C.G.A. § 7-1-1001.1 (Supp. 2009).

118. O.C.G.A. § 7-1-1000(23) (Supp. 2009).

119. O.C.G.A. § 7-1-1004(j) (2004 & Supp. 2009).

120. O.C.G.A. § 7-1-1004(l) (Supp. 2009).

121. O.C.G.A. § 7-1-1005(a) (2004 & Supp. 2009).

122. Ga. H.R. Bill 126, Reg. Sess., 2009 Ga. Laws 698 (codified at O.C.G.A. §§ 10-12-1 to -20 (2009)).

123. O.C.G.A. §§ 10-12-1 to -20 (2009).

124. Ga. H.R. Bill 126, 2009 Ga. Laws 698.

Commercial Code[125] or the creation and execution of wills, codicils, or testamentary trusts.[126] The primary object of the UETA "is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures."[127] While it is not possible to cover every aspect of the UETA in a brief summary, some of the UETA's primary advantages include: (1) assurance that contracts and transactions are not refused enforcement because electronic media are used;[128] (2) permission for governmental agencies to implement an electronic recordkeeping system and convert its written records to electronic records;[129] and (3) validation of contracts formed by electronic agents (for example, computer programs implemented by a business owner to execute transactions in electronic form).[130]

Title 14 of the O.C.G.A. was amended in several important ways during the 2009 Session with respect to Georgia LLCs.[131] Under O.C.G.A. § 14-11-504,[132] unless otherwise provided in a written operating agreement or the articles of organization, a judgment creditor of a Georgia LLC has no right to interfere with management of the LLC, to force a dissolution of the LLC, or to seek a court order requiring a foreclosure sale of an LLC membership interest.[133] Under O.C.G.A. § 14-11-505,[134] a written operating agreement may assert that a person becomes a member of an LLC when (1) he or she signs the operating agreement or (2) he or she complies with the conditions for becoming a member set forth in the operating agreement and requests in writing that the records of the LLC reflect his or her admission as a member.[135] Moreover, O.C.G.A. § 14-11-506[136] now specifies that except as provided in a written operating agreement or the articles of organization, if the last remaining member of an LLC dies or is adjudged incompetent, that member's executor, administrator, or legal representative becomes a member of the LLC unless the LLC is given written

125. O.C.G.A. tit. 11 (1994 & Supp. 2009).

126. O.C.G.A. § 10-12-3.

127. National Conference of Commissioners on Uniform State Laws, Why States Should Adopt the Uniform Electronic Transactions Act, http://www.nccusl.org/Update/uniformact_why/uniformacts-why-ueta.asp (last visited Sept. 20, 2009).

128. *See* O.C.G.A. § 10-12-7(b).

129. *Id.* § 10-12-18.

130. *See id.* § 10-12-14.

131. *See* Ga. H.R. Bill 308, Reg. Sess., 2009 Ga. Laws 108 (amending scattered sections of O.C.G.A. ch. 14-11 (2003 & Supp. 2009)).

132. O.C.G.A. § 14-11-504 (2003 & Supp. 2009).

133. *Id.* § 14-11-504(b).

134. O.C.G.A. § 14-11-505 (2003 & Supp. 2009).

135. *Id.* § 14-11-505(d).

136. O.C.G.A. § 14-11-506 (2003 & Supp. 2009).

notice to the contrary within ninety days of such member's death or adjudged incompetency.[137] Finally, the definition of *operating agreement* in O.C.G.A. § 14-11-101[138] was amended to provide (1) that an LLC is not required to sign its own operating agreement for the document to be enforceable against it (unless the operating agreement itself requires otherwise) and (2) that an operating agreement expressly may grant enforceable rights to third parties who are not signatories to such document.[139]

137. *Id.*
138. O.C.G.A. § 14-11-101(18) (2003 & Supp. 2009).
139. *Id.*