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Commercial Law

Robert A. Weber Jr.

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by Robert A. Weber, Jr.*

This year's survey article attempts a synthesis of case law subdivided according to various aspects of a commercial practice. Topics discussed include banking/lender issues, collections, sales of businesses, pitfalls on the front end of a commercial transaction, and a miscellaneous catchall for cases that stubbornly defy categorization.

I. BANK/LENDER ISSUES

A. *Account Management*

Several cases addressed account management issues during the survey period. In *Emmett v. Regions Bank*,[1] the court of appeals confronted a fact scenario that is sadly all too familiar. Husband and wife had a joint savings account and two certificates of deposit ("CDs") titled jointly in their names. In June 1996, wife was admitted to a nursing home. On June 17, 1996, husband and his daughter from a previous marriage went to defendant bank and transferred the funds from the savings account and CDs into the joint names of husband and daughter. Four days later, daughter transferred these funds into her name alone, and husband died shortly thereafter on June 24, 1996. Wife died on August 26, 1996, and the executors of the estates of husband and wife sued defendant bank, claiming it had improperly permitted these transactions.[2]

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* Associate in the firm of Smith, Gilliam, Williams & Miles, Gainesville, Georgia. Mercer University (B.A., 1991; J.D., cum laude, 1994). Member, Mercer Law Review (1992-1994); Editor in Chief (1993-1994). Member, State Bar of Georgia. Law Clerk to the Honorable Wilbur D. Owens, Jr., United States District Judge for the Middle District of Georgia (1994-1996).

As with last year's article, many thanks to my wife, Laurie, for all her support.

1. 238 Ga. App. 455, 518 S.E.2d 472 (1999).
2. *Id.* at 455-56, 518 S.E.2d at 473-74.

In particular, plaintiff executors challenged whether the transaction was authorized. In response to plaintiffs' request for production, defendant showed it could not locate or did not have certain requested items, such as the memorandum showing the savings account withdrawal. Defendant did submit, however, affidavits of its vice president concerning the history of both the savings account and CDs; an affidavit by a teller that the CDs were jointly owned by husband and wife; and an affidavit by the teller who conducted the June 17, 1996 transaction.[3]

Plaintiff asserted the trial court erred in several respects in granting summary judgment to defendant. First, plaintiff argued the affidavits of defendants' employees should have been stricken because the best evidence was the CDs and debit memos showing the withdrawals.[4] The appellate court found the best evidence rule did not apply as the written documents in question were merely collateral or incidental to the issue of authorization.[5]

Second, plaintiff cited several statutes regarding records retention by financial institutions, apparently suggesting that defendant would be estopped from submitting affidavits because of its inability to produce these records. Plaintiff cited section 7-1-910 of the Official Code of Georgia Annotated ("O.C.G.A."),[6] which requires banks to retain certain documents.[7] The court held this code section was not applicable to the transaction at issue as it pertains only to current transactions.[8] However, O.C.G.A. section 7-1-63(c) specifically permits introduction of legible products of computer operations, which the bank submitted, as a record of a transaction.[9] The federal statutes cited by plaintiff were also inapplicable. The court found that "12 U.S.C. § 1829b, which provides that where the Secretary of the United States Treasury determines that maintaining records is useful for criminal, tax, or regulatory proceedings, he shall prescribe regulations to carry out those purposes," is silent on financial institution retention of CDs or withdrawal slips.[10] Another federal statute cited by plaintiff, 12 U.S.C. § 1730d,[11] had been repealed.[12]

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3. *Id.* at 459, 518 S.E.2d at 476.
4. *Id.* at 457, 518 S.E.2d at 475.
5. *Id.* at 458, 518 S.E.2d at 475.
6. O.C.G.A. § 7-1-910 (1997).
7. 238 Ga. App. at 458, 518 S.E.2d at 475.
8. *Id.* (construing O.C.G.A. § 7-1-910).
9. *Id.*, 518 S.E.2d at 475-76 (construing O.C.G.A. § 7-1-63(c) (1997)).
10. *Id.*, 518 S.E.2d at 476 (construing 12 U.S.C. § 1829b (1994)).
11. 12 U.S.C. § 1730(d) (1994).
12. 238 Ga. App. at 458, 518 S.E.2d at 476.

Lastly, plaintiff argued the evidence was insufficient to warrant summary judgment in favor of defendant.[13] In light of the affidavits from bank personnel, the terms of the bank's customer service agreement, and the provisions of O.C.G.A. section 7-1-816, the court affirmed the grant of summary judgment.[14] The customer service agreement provided that each party listed on a multiparty account can conduct transactions with respect to the account. Even assuming that agreement did not exist, O.C.G.A. section 7-1-816 contains substantially the same authorization.[15]

The court of appeals decision in *Wachovia Bank of Georgia, N.A. v. Reynolds*[16] will have a tremendous impact on the procedures financial institutions employ in opening accounts. In *Reynolds* plaintiff opened a CD for her brother at defendant bank. Plaintiff instructed defendant that the CD was being purchased by her as attorney-in-fact for her brother and that everything pertaining to the CD was to be sent to her address. Although defendant did not obtain a copy of the power of attorney, it issued plaintiff a deposit slip identifying "Bernard S. Bailey, Jr. [brother] by Frances B. Reynolds, P.O.A. [plaintiff]" as the customer. Nevertheless, defendant bank opened the CD in brother's name alone and sent him all correspondence relating to the CD. Brother subsequently withdrew the funds in cash, and the cash was stolen from him. Plaintiff sued bank on the basis it had negligently established, handled, and redeemed the CD.[17] A jury found for plaintiff in the amount of the funds the bank permitted brother to withdraw and also awarded attorney fees to plaintiff on the basis of bad faith under O.C.G.A. section 13-6-11.[18]

The general rule regarding a bank's duty to its customer in the context of establishing a CD account, quoted by the court, is set forth in *Tucker Federal Savings & Loan Ass'n v. Rawlins*[19] as follows:

> [A]ny financial institution which receives money from its customer in exchange for certificate(s) of deposit has a duty to issue and/or change the certificate in a manner that complies with the wishes of the customer, so long as the wishes of the customer are not contrary to any applicable law, and that the financial institution may be liable to the

13. *Id.* at 459, 518 S.E.2d at 476.
14. *Id.* at 459-60, 518 S.E.2d at 476.
15. *Id.*
16. 244 Ga. App. 1, 533 S.E.2d 743 (2000).
17. *Id.* at 1-2, 533 S.E.2d at 744.
18. *Id.* at 2, 533 S.E.2d at 744 (applying O.C.G.A. § 13-6-11 (Supp. 2000)).
19. 209 Ga. App. 649, 434 S.E.2d 94 (1993).

> customer or a third-party beneficiary for mishandling the transaction, including improperly advising the customer how the certificate should be established or changed to comply with the wishes of the customer.[20]

Defendant's primary argument on appeal was that "its duty of care extended to [brother] alone as its sole depositor-customer and the principal for whom [plaintiff] acted as agent in establishing his CD account."[21] Defendant supported this argument through reference to the law of agency, which provides that a "'principal may follow his money.'"[22] Nevertheless, the court concluded plaintiff was in fact a customer because her name as power of attorney was listed on the "customer line" on the initial deposit slip.[23] At this point, the court expanded its definition of "customer," stating that even if the bank's arguments on agency were accepted, "where one acts for another by power of attorney suggesting possible incapacity or *other special circumstances*, as here, a bank's customer must be deemed inclusive of the depositor and the attorney-in-fact who acts as the depositor/principal's agent."[24] Upon deciding plaintiff was in fact a customer, the court concluded there was sufficient evidence, including testimony by a bank employee that defendant bank failed to follow its own procedures in setting up the CD and by a banking expert that defendant violated reasonable banking practices, to support the jury's verdict.[25]

In the absence of clarification from the supreme court on this holding, the account opening process just became a little more involved. Aside from having to inquire carefully whether an account is being opened for the benefit of an incompetent, banks will need to ensure no other "special circumstances" exist that might establish a legal obligation on their part to some other individual. One cannot possibly begin to imagine the numerous "special circumstances" that, upon being suggested to a bank official opening an account for a power of attorney, might impose additional legal obligations upon the bank.

The court also affirmed the award of attorney fees under O.C.G.A. section 13-6-11.[26] In particular, the court found the bank had demonstrated bad faith by failing to adhere to reasonable banking practices,

20. *Id.* at 651, 434 S.E.2d at 96.
21. 244 Ga. App. at 2, 533 S.E.2d at 744.
22. *Id.* at 3 n.3, 533 S.E.2d at 745 n.3 (quoting O.C.G.A. § 10-6-27 (1994)).
23. *Id.* at 3, 533 S.E.2d at 745.
24. *Id.* (emphasis added).
25. *Id.* at 4, 533 S.E.2d at 745-46.
26. O.C.G.A. § 13-6-11 (Supp. 2000).

failing to maintain a signature card, and not sending correspondence regarding the CD to plaintiff as specifically requested.[27]

The holding in *Family Partners Worldwide, Inc. v. SunTrust Bank, Atlanta*,[28] in contrast to *Reynolds*, imposes a less stringent standard upon banks in opening accounts in the corporate depositor context. In *Family Partners Worldwide*, the chief executive officer ("CEO") of a corporation, unbeknownst to its directors, set up a separate corporate account for purposes of embezzling funds. Upon learning of the embezzlement, the corporation sued the bank on the basis of conversion. The corporation relied on the fact that the bank neither sought nor obtained a corporate resolution or certificate of authority from the CEO upon setting up the embezzlement account.[29]

The court began its analysis by citing O.C.G.A. section 7-1-325(a), which provides that "whenever an agent deposits money in a bank to the credit of his principal, the bank 'shall be authorized to pay the amount of such deposit, or any part thereof, upon the order of such agent [properly signed] without being accountable in any way to the principal.'"[30] Ignoring questions of actual or apparent agency, the court proceeded to determine whether the CEO had inherent agency power, which exists when "'the power of an agent . . . is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.'"[31] Based on the following factors, the court concluded the CEO had inherent authority to open the account and conduct transactions: (1) the CEO exercised undisputed, complete executive power to run the daily affairs of the corporation; (2) he had implied authority to execute contracts on behalf of the corporation with access to the corporate seal; (3) he possessed complete authority to "oversee and supervise the financial end" of the corporation; (4) he had authority to conduct transactions in other accounts at other banks; and (5) he had implied authority to incur and pay for reasonable business expenses.[32]

Interestingly, plaintiff corporation contended defendant bank could not rely on the CEO's inherent authority because the corporation failed to

27. 244 Ga. App. at 4-5, 533 S.E.2d at 746.
28. 242 Ga. App. 618, 530 S.E.2d 742 (2000).
29. *Id.* at 618, 530 S.E.2d at 743.
30. *Id.* (quoting O.C.G.A. § 7-1-352(a) (1997)).
31. *Id.* at 619, 530 S.E.2d at 743 (quoting Trust Co. of Ga. v. Nationwide Moving & Storage Co., 235 Ga. 224, 232, 219 S.E.2d 162, 165 (1975)).
32. *Id.* at 619-20, 530 S.E.2d at 743-44.

follow its internal procedures by requiring a corporate resolution.[33] In contrast to the holding in *Reynolds*, in which the defendant bank was chastised for failure to follow its own operating procedures, the court in *Family Partners Worldwide* found that "'a bank's failure to follow its own internal operating procedures [regarding opening accounts] cannot give rise to legal liability' for embezzlements from that account."[34] Therefore, summary judgment in favor of the bank was appropriate.[35] The lesson for financial institutions from this survey period caselaw is, thus, as follows: If failure to adhere to internal operating procedures can be even remotely linked to a loss sustained by a customer (and good luck in determining who exactly the customer is under *Reynolds*), the law applied will depend on which appellate panel is drawn.

B. Bank as Lender

In addition to issues of account management, several survey period decisions addressed situations involving banks as lenders. A very common scenario is the residential construction loan arrangement, evidenced by a note, security deed, and construction loan agreement. Plaintiff in *Russell v. Barnett Banks, Inc.*[36] was such a borrower. Under the terms of plaintiff's construction loan agreement, defendant bank was to make periodic disbursements to plaintiff's builder upon satisfactory inspection by the bank. Throughout construction, plaintiff signed several modifications to the security deed, increasing the principal amount of the loan for which the security deed was given.[37]

When the bank sought to foreclose on the basis of nonpayment, plaintiff defended on the basis that the bank breached a fiduciary duty to him by making disbursements for faulty construction.[38] As an initial matter, the court noted that no confidential relationship exists between a lender and borrower, as their interests oppose one another.[39] The court then applied principles applicable to cases in which a borrower sues the lender for failure to notify of faulty construction.[40] Accordingly, in the absence of "some clear promise of the lender to perform certain

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33. *Id.* at 620, 530 S.E.2d at 744.
34. *Id.* (citing Apcoa, Inc. v. Fidelity Nat'l Bank, 703 F. Supp. 1553, 1558 (N.D. Ga. 1988), *aff'd*, 906 F.2d 610 (11th Cir. 1990)).
35. *Id.*
36. 241 Ga. App. 672, 527 S.E.2d 25 (1999).
37. *Id.* at 673, 527 S.E.2d at 26.
38. *Id.*
39. *Id.* at 674, 527 S.E.2d at 27.
40. *Id.*

protective functions [and] a clear and distinct participation in the activity which resulted in the damage" to borrower, a lender will not be subject to claims for breach of a fiduciary duty.[41]

Perhaps a more significant portion of the decision in *Russell* is the court's alternative rationale for rejecting plaintiff's claims. As noted, plaintiff signed several modification agreements of the security deed as the principal amount of the construction loan increased. Each modification agreement contained the following clause: "'There are no defenses, set-offs, counter claims, cross-actions or equities to or against enforcement of loan documents executed in connection with the loan.'"[42] In light of this language, plaintiff was estopped to contend otherwise.[43] Counsel, then, should ensure that clients' standard form of modification agreement contains this language. If plaintiff in *Russell* had survived summary judgment by establishing a "clear promise," by providing, for example, evidence that a loan officer gave assurances because of the inspections being performed, this clause would have nevertheless insulated the lender.

Often a bank or other entity extending credit will obtain a guarantee for that debt. Subsequent conduct of the lender, however, that increases the risk of the guarantor or exposes him to greater liability, shall operate to discharge the guarantor.[44] In *Builders Development Corp. v. Hughes Supply, Inc.*,[45] guarantor contended that plaintiff's extension of credit beyond the limit requested by the principal debtor, a corporation solely owned by the guarantor, was conduct that would operate to discharge him.[46]

The basis for the court's rejection of the guarantor's contention is instructive to any attorney drafting a guarantee. In particular, the guarantee in *Builders Development* stated it applied to "all sales made by Seller to Purchaser," provided that guarantor's liability was "UNLIMITED," and was to remain effective until the guarantor gave written notice to cease further extensions of credit.[47] In light of these factors, the court affirmed the guarantor's liability.[48]

Various documents memorializing a loan transaction—generally the note, security instrument (whether security deed or security agreement),

41. *Id.* (citing Decoudreaux v. Mutual Fed. Sav., 216 Ga. App. 503, 504-05, 455 S.E.2d 88, 90 (1995)).
42. *Id.* at 675, 527 S.E.2d at 27.
43. *Id.*
44. O.C.G.A. § 10-7-22 (1994).
45. 242 Ga. App. 244, 529 S.E.2d 388 (2000).
46. *Id.* at 244-45, 529 S.E.2d at 389.
47. *Id.* at 245, 529 S.E.2d at 389.
48. *Id.* at 246, 529 S.E.2d at 389.

and loan agreement—can have ramifications beyond the immediate parties of borrower and lender. In drafting these documents, one should be careful lest an inadvertent phrase increases the universe of persons to whom the lender shall be obligated, i.e., creation of a third-party beneficiary. The decision in *Scott v. Mamari Corp.*[49] is instructive on avoiding the third-party beneficiary situation in drafting loan documentation.

In *Scott* defendant bank financed a real estate development with a line of credit to the developer, which signed a note for the letter of credit. The amount of the letter of credit was initially based upon the estimated cost submitted to the developer by plaintiff construction company, which was paid from the initial letter of credit on the first two of three invoices plaintiff construction company submitted for work performed. When project costs increased because of amounts needed for plaintiff construction company to complete its work, developer obtained an increase in the letter of credit sufficient to cover plaintiff's additional cost and executed a second note for these additional amounts. Subsequently, defendant bank assigned its interests, including the loans, to defendant Mamari ("Assignee") pursuant to a written agreement that provided defendant bank would remain responsible for funding any draws made under the extension of the letter of credit evidenced by the second note. Defendant bank honored its commitment when the developer submitted a draw request, under the extended letter of credit, that payment be made directly to the developer. The request falsely represented that plaintiff had been paid in full. When the developer failed to pay plaintiff, plaintiff sued defendant bank and Assignee, contending it was a third-party beneficiary of both the note to the bank and the agreement between the bank and Assignee.[50]

The court first considered plaintiff's status as a third-party beneficiary under the notes.[51] The character of the notes primarily precluded any finding that plaintiff was a third-party beneficiary thereunder. The notes represented promises by the developer to the bank and imposed no obligation on the bank to act in any way.[52] The court looked solely to the four corners of the notes and loan agreement in concluding plaintiff was not a third-party beneficiary.[53] Therefore, even though the basis for the amount of the second note was plaintiff's estimated cost of completion and previous payments were made jointly payable to plaintiff

49. 242 Ga. App. 455, 530 S.E.2d 208 (2000).
50. *Id.* at 455-56, 530 S.E.2d at 210.
51. *Id.* at 457, 530 S.E.2d at 211.
52. *Id.*
53. *Id.*

and developer (both of which were considerations extraneous to the note and loan agreement), these factors were insufficient to create a third-party beneficiary obligation. The same was true regarding plaintiff's assertions that all parties "knew" the purpose of the second note was to cover plaintiff's expenses.[54]

As for the bank's agreement with Assignee, pursuant to which the bank remained responsible for funding additional draws under the second note, the court noted that plaintiff was not mentioned anywhere in this agreement.[55] Further, the agreement did not restrict the developer's use of any funds to be advanced under the second note, nor did the agreement obligate the bank to disburse funds directly to plaintiff or jointly to plaintiff and the developer.[56] By employing sufficiently general language in its documentation, the bank did not except itself from the general rule that a "construction lender has no duty 'to protect the subcontractors from the risk of doing business with its borrower . . . (or) to supervise the borrower's disbursements of the advances and control the funds for the benefit of the subcontractors.'"[57]

To conclude this topic, we turn to the ongoing saga of the Sea Island Cotton Trading Company of Statesboro, Georgia. In *Strozzo v. Sea Island Bank*,[58] the issue was whether the guarantor of a note, which was given to induce issuance of a letter of credit, could peremptorily enjoin the bank issuing the letter of credit from paying under its terms. Hampton County Warehouse, Inc. operated a bonded warehouse in South Carolina for handling agricultural goods; its Georgia counterpart, Statesboro Warehouse, Inc., operated similarly in Georgia. Both were owned by David Prosser. As a condition to obtaining licenses to operate, both warehouses were required to obtain letters of credit payable to the commissioners of agriculture of their respective states. Sea Island Bank, in exchange for notes given by Prosser, issued letters of credit to the South Carolina Department of Agriculture and the Georgia Department of Agriculture for Hampton and Statesboro warehouses, respectively. Prosser's notes to Sea Island Bank were guaranteed by plaintiff, Dominic Strozzo.[59]

When a farmer deposits an agricultural commodity such as cotton with a warehouse like Hampton and Statesboro, he is supposed to receive a

54. *Id.* at 457-58, 530 S.E.2d at 211.
55. *Id.* at 458, 530 S.E.2d at 211.
56. *Id.*
57. *Id.* at 457 n.1, 530 S.E.2d at 211 n.1 (quoting Light v. Equitable Mortgage Resources, 191 Ga. App. 816, 817, 383 S.E.2d 142, 143 (1989)).
58. 240 Ga. App. 183, 521 S.E.2d 392 (1999).
59. *Id.* at 183-85, 521 S.E.2d at 393-94.

warehouse receipt, which is a negotiable instrument under Article 7 of the Georgia Uniform Commercial Code ("U.C.C.").[60] However, at the time the events of *Strozzo* were unfolding, cotton trading had recently converted to usage of electronic warehouse receipts ("EWRs"), a form of negotiable instrument that exists only in the ether of computer circuitry and binary code. Suffice it to say the farmers who had placed their cotton with Hampton and Statesboro did not receive warehouse receipts for the cotton. Hampton and Statesboro generated EWRs, the newly created form of electronic negotiable instrument representing a right to that cotton, which they transferred to Prosser's other company, Sea Island Cotton Trading Co. Sea Island Cotton Trading Co. sold and transferred the EWRs. Then Hampton, Statesboro, Prosser, and Sea Island Cotton Trading Co. filed bankruptcy. The farmers were not paid.[61] Under these facts, the reason for requiring a bond becomes painfully obvious.

Both the Georgia and South Carolina Departments of Agriculture called on Sea Island Bank to honor their respective letters of credit. At this point, Strozzo, the guarantor of Prosser's notes to Sea Island Bank, which had been given in exchange for issuance of the letters of credit, filed suit seeking an injunction to prohibit Sea Island Bank from paying under the letters of credit.[62]

The court of appeals affirmed the trial court's dismissal of Strozzo's injunction action.[63] The court characterized the injunction action as an attempt by Strozzo, as guarantor, to use his defense to the guarantee as the basis for an injunction against transfer under the letter of credit and thereby prevent the subsequent suit against him under the guarantee.[64] This injunction was, in effect, an attempt "to use his legal defense in equity to avoid a suit in law."[65] The court found this tactic impermissible: "There is no equity jurisdiction where there is an adequate legal remedy, i.e., a legal defense to a suit in law."[66] Therefore, it was appropriate to require Sea Island Bank to honor the transfers requested under the letters of credit.[67]

60. O.C.G.A. §§ 11-7-101 to -603 (1994 & Supp. 1999).
61. 240 Ga. App. at 185, 521 S.E.2d at 394.
62. *Id.*, 521 S.E.2d at 395.
63. *Id.* at 189, 521 S.E.2d at 397.
64. *Id.* at 186, 521 S.E.2d at 395.
65. *Id.*
66. *Id.*
67. *Id.* at 188, 521 S.E.2d at 396.

II. COLLECTIONS

A. Deficiency

A few survey decisions addressed the issue of a creditor's entitlement to collect the deficiency upon repossession and sale of collateral. In *Jamsky v. HPSC, Inc.*,[68] the court of appeals validated a provision in a finance lease that permitted the lessor to collect liquidated damages on default by lessee.[69] The provisions of Article 2A of the Georgia U.C.C. apply to finance leases, including those sections that prescribe the damages a lessor is entitled to receive upon default.[70] Like most U.C.C. provisions, however, the rules concerning damages upon default are subject to contrary agreement between the parties.[71] In *Jamsky* the finance lease agreement provided lessor with one or more of the following remedies upon default:

> (a) We may cancel or terminate this Lease and/or any or all other agreements that we have entered into with you;
> (b) We may require you to immediately pay us, as compensation for loss of our bargain and not as a penalty, a sum equal to (i) the present value of all unpaid Lease Payments for the remainder of the term plus the present value of our anticipated residual interest in the Equipment, each discounted at a rate per year equal to the discount rate of the Federal Bank of Boston on the date payment is demanded plus 1%, plus (ii) all other amounts due or that become due under this Lease;
> (c) We may require you to deliver the Equipment to us as set forth in Section 3;
> (d) We or our agent may peacefully repossess the Equipment without court order and you will not make any claims against us for damages or trespass or any other reason; and
> (e) We may exercise any other right or remedy available at law or in equity.[72]

In assessing the validity of the emphasized liquidated damages clause, the court found that it "establish[ed] a reasonable estimate of probable loss" because it "require[d] the reduction of the accelerated rent to present value" and that the net proceeds were to be applied to the amount owed by lessee.[73] Accordingly, those drafting finance leases

68. 238 Ga. App. 447, 519 S.E.2d 246 (1999).
69. *Id.* at 449, 519 S.E.2d at 247.
70. O.C.G.A. §§ 11-2A-101 to -532 (1994 & Supp. 1999).
71. 238 Ga. App. at 448, 519 S.E.2d at 246-47.
72. *Id.* at 448-49, 519 S.E.2d at 247.
73. *Id.* at 449, 519 S.E.2d at 247.

could utilize a similar provision with a reasonable degree of certainty that it will be upheld in the face of any challenge by a defaulting lessee.

The court in *Ali v. World Omni Financial Corp.*[74] reviewed the manner in which a debtor's equity in collateral is determined, and the decision reminded creditors of the benefit of giving proper notice of resale upon repossession.[75] The debtor purchased a vehicle by obtaining financing from the creditor, who repossessed the car upon payment default. When the debtor was not given notice of the vehicle's resale as required under the finance agreement, the debtor sued claiming as actual damages the vehicle's market value.[76] The court first stated the method for calculating the debtor's equity in the vehicle: Deduct the balance due on the purchase price from the market value of the collateral.[77] Because the debtor produced no evidence as to the vehicle's market value, summary judgment in the creditor's favor was appropriate.[78] However, the creditor's failure to give the contractually required notice of resale to the debtor precluded the creditor from seeking a deficiency.[79]

B. *Open Account*

The survey period also produced decisions on open account. In *Kent v. Brown*,[80] defendant attorney engaged the services of plaintiff, an expert in vehicle collision analysis, in relation to a personal injury suit being handled by defendant. Defendant's client received an adverse verdict in the personal injury case, and defendant refused to pay plaintiff for his services. Plaintiff sued on account and obtained a jury verdict for the value of services rendered.[81]

Defendant appealed on numerous grounds, including that several charges given by the trial court with regard to the law of suits on open account were invalid.[82] In rejecting all of defendant's contentions, the court validated, in light of the evidence adduced at trial, use of the jury charges employed.[83] Most notably, the court of appeals found the following was a correct statement of the law as applied to a suit on open account: "'If an account is rendered to the debtor on a valid contract and

74. 240 Ga. App. 9, 522 S.E.2d 525 (1999).
75. *Id.* at 9, 522 S.E.2d at 525-26.
76. *Id.*
77. *Id.*, 522 S.E.2d at 526.
78. *Id.*
79. *Id.* at 9-10, 522 S.E.2d at 526.
80. 238 Ga. App. 607, 518 S.E.2d 737 (1999).
81. *Id.* at 607, 518 S.E.2d at 739.
82. *Id.* at 609, 518 S.E.2d at 740.
83. *Id.* at 610-11, 518 S.E.2d at 741.

he fails to object to it, a jury may be authorized to infer that the failure of the debtor to raise an objection was an implied agreement that the account was correct.'"[84] Use of a charge like this will certainly be useful to account creditors in the common situation in which an account debtor simply ignores, without response, repeated invoicing by the account creditor. The court in *Kent* also upheld the following charge: "If one engages another to do work and you find it has been done or performed and you find that the parties agreed to consideration or compensation for that work, then the party engaging the work is, in all [sic], liable for the agreed consideration or compensation.'"[85] The court also upheld the use of other, related charges that an account creditor will likely desire to employ.[86] Counsel should refer to a full text of the opinion in *Kent* in preparing requests to charge in a trial on open account.

The decision in *Mountain Bound, Inc. v. Alliant Food Service, Inc.*[87] highlights the pitfalls of failing to attach business records to an affidavit in support of a suit on open account and the importance of attaching the correct records. At issue in *Mountain Bound* was whether plaintiff supplier had actually delivered goods to defendant.[88] The record revealed an individual claiming to be defendant's president had submitted an affidavit to the effect that "[t]he goods were not delivered to or accepted by [defendant]."[89] To rebut this assertion, plaintiff submitted the affidavit of its credit manager, which recited that attached to it were true and accurate copies of the business records memorializing the transaction, as well as true and accurate copies showing proof of delivery.[90] However, the only document attached to the credit manager's affidavit was "a computer printout of certain billings, payments, and credits."[91] This document was not proof of delivery, but only of billing.[92] Therefore, a jury question arose as to whether the credit manager's affidavit was sufficient to overcome the averments that defendant had not received the goods.[93] This decision thus serves as a reminder that counsel should emphasize to clients the necessity of

84. *Id.* at 611, 518 S.E.2d at 741.
85. *Id.* at 610, 518 S.E.2d at 741.
86. *Id.* at 611-13, 518 S.E.2d at 742-43.
87. 242 Ga. App. 557, 530 S.E.2d 272 (2000).
88. *Id.* at 557, 530 S.E.2d at 274.
89. *Id.* at 557-58, 530 S.E.2d at 274.
90. *Id.* at 560, 530 S.E.2d at 276.
91. *Id.*
92. *Id.*
93. *Id.* at 561, 530 S.E.2d at 276.

obtaining and retaining invoices, signed by an account debtor, that evidence delivery.

C. Miscellaneous

Garnishment issues also received treatment during the survey period. The decision in *ISP Alliance, Inc. v. Physiotherapy Associates*[94] serves to assuage some uneasiness a creditor may feel in filing a garnishment. Defendant garnishor obtained a money judgment against an individual and filed a garnishment against the individual's employer, America Net. A default judgment was entered against the employer in favor of defendant when the employer failed to answer. Defendant then filed a garnishment against the bank accounts of plaintiff corporation, which was doing business as America Net. Garnishee bank froze plaintiff's accounts and paid the garnished amount into the registry of the court in which the garnishment action had been filed.[95]

Plaintiff sought to recover against defendant garnishor for conversion of funds based on the freezing of its assets.[96] The court rejected this on the basis that plaintiff had failed to state a claim.[97] "As a matter of law, no conversion occurred in this case. The freezing of [plaintiff's] assets was precipitated by operation of the garnishment statute, not [defendant's] own doing."[98] A garnishing creditor, therefore, has one less concern when proceeding with collection through garnishment of a bank account because, as a matter of law, it will not be liable for conversion.

During the survey period, the court of appeals also discussed the character of evidence that the maker of a promissory note must adduce to be entitled to receive a setoff for the amount due under the note. In *Bradford v. City of Albany*,[99] payee had provided the maker-contractor with funds for work on a city project and received in exchange a promissory note for the amount of funds advanced. After terminating the maker-contractor, payee sued on the note. The maker-contractor set up a defense of setoff as to the value of materials left on the construction site.[100]

In support of his setoff defense, the maker-contractor testified he used the loan funds to acquire various fixtures that remained on the

94. 238 Ga. App. 436, 519 S.E.2d 241 (1999).
95. *Id.* at 436-37, 519 S.E.2d at 242.
96. *Id.*
97. *Id.* at 437, 519 S.E.2d at 242.
98. *Id.*
99. 242 Ga. App. 477, 529 S.E.2d 906 (2000).
100. *Id.* at 477, 529 S.E.2d at 906.

construction site after his termination. However, his testimony was only about the aggregate price paid for these items and contained no basis for his conclusion. Because this evidence was merely an opinion, offered without any basis for the reasoning behind the valuation and without demonstrating an opportunity to form a correct opinion concerning the valuation, it was without probative value.[101] Thus, the trial court was correct in directing a verdict in payee's favor on the setoff defense.[102]

As a final note on collection matters, the decision in *Vandegriff v. Hamilton*[103] reviews the manner in which a holder of a security deed may proceed in collection of the underlying debt. Plaintiff advanced funds to defendants and in exchange took a promissory note collateralized by a deed to secure debt. In plaintiff's suit on the note, defendants admitted execution of the note. Defendants further stipulated that they made no payment on the note and that they received proper notice of default.[104]

Defendant contended, however, that plaintiff had orally agreed to accept a deed to the property subject to the security deed in full satisfaction of the note.[105] The court rejected this contention as a defense to an action on the note: "A creditor who holds a promissory note secured by a deed may sue upon the note, demand a deed to the secured property, or pursue both remedies until the debt is satisfied."[106] Therefore, plaintiff was "entitled to elect his remedy to cure the default."[107] Although the opinion is silent on the issue, plaintiff had apparently not received a deed to the property. If a debtor is going to give a deed in satisfaction of a note, counsel should certainly reduce the agreement to writing and include a recital that the deed is to be given in full satisfaction of any and all claims between the parties.

III. PITFALLS ON THE FRONT END

Several survey period decisions underscore the need for attention to detail in document preparation for commercial dealings, while at the same time recognizing absolute perfection will not always be required.

101. *Id.* at 478, 529 S.E.2d at 907.
102. *Id.*
103. 238 Ga. App. 603, 519 S.E.2d 702 (1999).
104. *Id.* at 603, 519 S.E.2d at 702-03.
105. *Id.* at 604, 519 S.E.2d at 703.
106. *Id.*
107. *Id.*

In *Cohen v. Sandy Springs Crossing Associates, L.P.*,[108] the court of appeals recognized the latter proposition.[109] Lessor faxed a guarantee to defendant, pursuant to which defendant guarantor would guarantee lease payments to be made by lessee. In blank spaces on the guarantee referring to the dates of both the lease and guarantee, the guarantor wrote, "August 15, 1994."[110] The guarantor signed the guarantee and returned it to the lessor. The lease was not signed, however, until September 1, 1994. This was the only lease ever executed between lessor and lessee, and the guarantor deposed that this was in fact the lease he intended to guarantee.[111]

In lessor's subsequent action against defendant guarantor to recover lease payments, the guarantor relied on *Avec Corp. v. Schmidt*,[112] in which the court of appeals invalidated a guarantee that referred to a lease dated prior to the lease actually signed.[113] The court in *Cohen* distinguished *Avec Corp.* by reference to other cases in which guarantees had been upheld in similar scenarios.[114] The compelling circumstances in *Cohen* were that this was the only lease ever entered between lessor and lessee and that "the guarantor recognized his obligations under the lease by curing the tenant's default in lease payments."[115] The court's opinion in *Cohen* further emphasizes the significance of consistency between the various documents executed in a lease guarantee scenario. In describing *Avec Corp.*, the court specifically noted that the lease and guarantee involved in that case were "internally inconsistent."[116] Consistency between the lease and guarantee in *Cohen*, other than the dates, was certainly a principal consideration for the court's conclusion that the guarantee was valid.[117]

In *Roden Electrical Supply, Inc. v. Faulkner*,[118] the court demonstrated that while a discrepancy in dates is not always fatal, failure to identify the principal debtor with precision in a guarantee is.[119] At

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108. 238 Ga. App. 711, 520 S.E.2d 17 (1999).
109. *Id.* at 713, 520 S.E.2d at 19.
110. *Id.* at 711, 520 S.E.2d at 18.
111. *Id.*
112. 207 Ga.App. 374, 427 S.E.2d 850 (1993).
113. *Id.* at 376, 427 S.E.2d at 851.
114. 238 Ga. App. at 712, 520 S.E.2d at 18 (citing Town Ctr. Assoc. v. Workman, 227 Ga. App. 55, 487 S.E.2d 624 (1997) and Arnold v. Indcon, L.P., 219 Ga. App. 813, 466 S.E.2d 684 (1996)).
115. 238 Ga. App. at 712-13, 520 S.E.2d at 19.
116. *Id.* at 712, 520 S.E.2d at 18.
117. *Id.* at 713, 520 S.E.2d at 19.
118. 240 Ga. App. 556, 524 S.E.2d 247 (1999).
119. *Id.* at 557, 524 S.E.2d at 248.

issue in *Faulkner* was a two-page credit application and guarantee that purchaser had executed to obtain goods on credit from plaintiff supplier. The first page listed purchaser as the "billable party." Page two, which contained the language of personal guarantee and signature of the purported guarantor, identified the principal debtor for whom the guarantee was given as the "above business." When plaintiff sued defendant-putative guarantor, he defended on the basis that the guarantee was invalid for failure to comply with the statute of frauds by not identifying the principal debtor.[120] Notwithstanding the cross reference on page two to the "above business," the court invalidated the guarantee.[121] Form documentation should thus be reviewed to identify a credit applicant as "principal debtor," and any guarantee language should refer specifically by name to the debtor for whom the guarantee is given.

The decision in *United Companies Lending Corp. v. Coates*[122] demonstrates the importance of ensuring that debtors to whom credit is extended have authority to incur the debt. Grandmother devised real property consisting of a home and lot to defendants, her two minor grandchildren. Defendant's mother was appointed guardian and received letters of guardianship. The guardian obtained a loan from plaintiff and in exchange gave a promissory note in her individual capacity. The guardian purported to secure the note by giving a security deed to the minors' real property. Although the guardian executed an affidavit stating she had authority to do so, she in fact never received probate court approval. The loan proceeds were used to satisfy an outstanding lien on the property, to pay creditors of the guardian, and to pay for certain improvements to the property. However, the record suggested the prior lien on the property was similarly incurred without authority by the guardian, and the record was also devoid as to whether any improvements had in fact been made to the property and, if so, what the value of these improvements was.[123] After the guardian filed Chapter 13 bankruptcy, plaintiff lender sued the minors, "seeking imposition of an equitable trust on property owned by the minors, a declaration that it is subrogated to the position of a prior first lien holder, and restitution of money that unjustly enriched the minors."[124] The court initially rejected any contention that the security deed could

120. *Id.* at 556, 524 S.E.2d at 247.
121. *Id.*, 524 S.E.2d at 248.
122. 238 Ga. App. 716, 520 S.E.2d 236 (1999).
123. *Id.* at 717-19, 520 S.E.2d at 237-39.
124. *Id.* at 716, 520 S.E.2d at 237.

be enforced against the minors in light of O.C.G.A. section 29-2-20, which provides as follows:

> The guardian may not borrow money and bind his ward therefor nor bind his ward's property or create any lien thereon by any contract other than those specially allowed by law; provided however, that, upon application in showing the need by evidence, the probate court or the superior court may authorize a guardian to borrow money to renovate or to make improvements upon property of his ward, or for purposes set out in Code Sections 29-2-3 and 29-2-4.[125]

Nor were equitable principles of equitable trust and subrogation available to plaintiff as these would be contrary to "the spirit and letter" of O.C.G.A. § 29-2-20.[126]

The court similarly rejected unjust enrichment as a theory of recovery.[127] To recover for unjust enrichment, a party must show the benefit conferred was with the "'consent and approval'" of the party receiving the benefit.[128] As the minors had not consented, this theory failed. And even assuming the viability of an unjust enrichment cause of action, plaintiff failed to establish any benefit to the minors. Although the record was unclear, it appeared the prior lien, which was discharged with loan proceeds, had similarly been invalidly obtained by the guardian and did not predate the devise of the property to the minors. Likewise, plaintiff failed to adduce evidence as to the existence or value of improvements to the property.[129]

IV. SALES OF BUSINESSES

The decision in *Bell v. Sasser*[130] highlights the pitfalls that a seller may confront after a stock sale of a business unless the sale complies with the provisions of the Georgia Securities Act.[131] In *Bell* the two owners of a closely held corporation agreed to sell all of their shares in the corporation to another individual for $200,000. At closing, each seller endorsed and notarized the reverse side of his share certificate and appointed buyer as attorney-in-fact to transfer the shares on the books of the corporation, but left the name of the transferee blank. After closing, five persons in addition to buyer invested in the corporation; new

125. *Id.* at 717, 520 S.E.2d at 238 (quoting O.C.G.A. § 29-2-20 (1997)).
126. 238 Ga. App. at 718, 520 S.E.2d at 238.
127. *Id.* at 718-19, 520 S.E.2d at 238.
128. *Id.* at 719, 520 S.E.2d at 238 (quoting Clay v. Littlefield, 144 Ga. App. 88, 91, 240 S.E.2d 254, 257 (1977) (emphasis omitted)).
129. *Id.* at 719-20, 520 S.E.2d at 238-39.
130. 238 Ga. App. 843, 520 S.E.2d 287 (1999).
131. O.C.G.A. §§ 10-5-1 to -24 (1994 & Supp. 1999).

certificates for buyer and the other new investors were issued; and the seller's certificates were apparently retired. Buyer subsequently sued seller for recovery of the purchase price.[132]

Buyer's cause of action was premised on O.C.G.A. section 10-5-5,[133] which makes it unlawful to sell an unregistered security, and O.C.G.A. section 10-5-14,[134] which provides the buyer of an unregistered security with a cause of action to recover the purchase price from the seller. After a lengthy analysis holding that the stock certificates at issue were in fact "securities"[135] and rejecting seller's argument that this sale of securities was exempt from registration under O.C.G.A. section 10-5-9(12),[136] the court concluded summary judgment was improper because the amount buyer was able to recover was in dispute.[137]

The opinion completely ignored, however, the exemption from registration provided for in O.C.G.A. section 10-5-9(13),[138] which is the exemption most commonly used by small, closely held corporations in Georgia. The conspicuous absence of a discussion of this exemption can only lead one to conclude the requirements of the exemption had not been complied with. This inference emphasizes the significance for the commercial practitioner in assuring that, when representing a seller in a stock sale of a business, the transaction satisfies the easily met requirements of this exemption.

Under O.C.G.A. section 10-5-9(13), the registration requirement of O.C.G.A. section 10-5-5 does not apply to "[a]ny transaction involving the issuance or sale of securities of an issuer by . . . an affiliate of the issuer if all of the following conditions are met."[139] First, the number of persons in Georgia purchasing these securities must be equal to or less than fifteen.[140] Second, the securities cannot be offered through any form of public advertisement.[141] Third, the certificates representing these securities must bear a statutorily prescribed legend to the effect that they are being sold pursuant to an exemption from registration and may not be resold without an exemption or a registration statement being filed.[142] And, fourth, each purchaser must execute a statement

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132. 238 Ga. App. at 843-45, 520 S.E.2d at 290-91.
133. O.C.G.A. § 10-5-5 (1994 & Supp. 1999).
134. *Id.* § 10-5-14 (1994).
135. 238 Ga. App. at 845-46, 520 S.E.2d at 291-92.
136. *Id.* at 848, 520 S.E.2d at 293 (construing O.C.G.A. § 10-5-9 (1994 & Supp. 1999)).
137. *Id.* at 850, 520 S.E.2d at 294.
138. O.C.G.A. § 10-5-9(13) (2000).
139. *Id.*
140. *Id.* § 10-5-9(13)(A).
141. *Id.* § 10-5-9(13)(B).
142. *Id.* § 10-5-9(13)(C).

that the securities are being purchased for his or her personal investment.[143] In drafting the stock sale agreement for a closely held business entity and conducting the closing, counsel should ensure compliance with this exemption, if available.

The decision in *Bell* also demonstrates why specificity in a business sale agreement is important. The sale agreement in *Bell* provided sellers would remain individually responsible for "all expenses up to April 25, 1994."[144] After the sale was closed, questions arose as to whether this clause covered warranty claims arising from products manufactured before that date.[145] The court found this clause ambiguous on the issue of warranty claims so that a jury was entitled to consider conflicting parol evidence.[146]

In *Lostocco v. D'eramo*,[147] the court of appeals defined the term "federal taxes" in a settlement agreement providing for the stock sale of a business.[148] In settlement of litigation between the two shareholders of a corporation, plaintiff agreed to transfer all his stock in the company to defendant, and in exchange defendant agreed to indemnify plaintiff "from and against any liability for federal taxes arising out of [the corporation's] operations."[149] The indemnification agreement further provided that there was no "agreement between the parties with respect to any state withholding taxes, and the parties' respective rights or liabilities concerning any state withholding taxes shall be unaffected by this settlement agreement or the releases or covenants contained herein."[150]

As the court found the indemnification agreement's reference to "federal taxes" ambiguous, the question thus became whether this indemnity provision obligated defendant to pay "only federal corporate income taxes owed by the corporation or . . . withholding trust fund taxes as well as interest and penalties."[151] Because the agreement was ambiguous, the court proceeded to determine the parties' intent pursuant to the directive contained in O.C.G.A. section 13-2-3[152] and relied upon "[a]ll the attendant and surrounding circumstances" to do so in

143. *Id.* § 10-5-9(13)(D).
144. 238 Ga. App. at 852, 520 S.E.2d at 295.
145. *Id.*
146. *Id.*
147. 238 Ga. App. 269, 518 S.E.2d 690 (1999).
148. *Id.* at 275-76, 518 S.E.2d at 696.
149. *Id.* at 269, 518 S.E.2d at 691-92.
150. *Id.*, 518 S.E.2d at 692.
151. *Id.* at 275, 518 S.E.2d at 695.
152. O.C.G.A. § 13-2-3 (1982).

accordance with O.C.G.A. section 13-2-2(1).[153] The court reasoned that only by requiring defendant to pay withholding trust fund taxes and penalties will plaintiff receive the benefit of the bargain struck with defendant.[154] Defendant was thus required to pay the liability for federal trust fund taxes and penalties.[155] Therefore, any asset or stock purchase agreement, as well as any indemnification or settlement agreement, should specify whether the term "federal taxes" includes or excludes income taxes, trust fund taxes, penalties, interest, or any other conceivable form of federal tax liability.

The court of appeals decision in *Crews v. Roger Wahl, CPA, P.C.*[156] should be thoroughly reviewed by counsel for both buyer and seller in the context of the sale of an accounting practice. On August 16, 1993, purchaser, an accounting firm, purchased "[a]ll client files and contracts, both open and closed, all client lists, both open and closed, including all computer records (both hard copies and floppy disks) and computer software relating thereto and all information on the computer hardware relating thereto" from Roger Wahl, CPA, P.C.[157] The sale was precipitated by investigation of Roger Wahl, the sole shareholder of seller, for federal income tax evasion. On the afternoon after the sale closed, a representative of purchaser went to the Wahl firm and announced the transaction. David Crews, the other CPA at the Wahl firm, decided he would start his own accounting firm with other Wahl firm employees. Without objection from purchaser, Crews used the Wahl firm's customer list to send a mailing stating he had started a new firm.[158]

The Wahl firm, upon determining that certain computer hardware and software containing customer records was missing, filed a complaint against Crews and other employees, alleging conversion of client lists and computer backup tapes and software. Defendants argued, however, that because the client list was the property of the purchaser, defendants were entitled to a directed verdict on the claim.[159] But the court noted that Georgia law prohibits an accountant from transferring, without client consent, any statement, record, schedule, working paper, or memorandum relating to that client's affairs.[160] If the client list fell within the meaning of this statute, then it would have been the property

153. 238 Ga. App. 275-76, 518 S.E.2d at 696 (applying O.C.G.A. § 13-2-2 (1982)).
154. *Id.*
155. *Id.* at 276-77, 518 S.E.2d at 696.
156. 238 Ga. App. 892, 520 S.E.2d 727 (1999).
157. *Id.* at 895, 520 S.E.2d at 730.
158. *Id.* at 892-93, 520 S.E.2d at 729.
159. *Id.* at 895, 520 S.E.2d at 730.
160. *Id.* at 895-96, 520 S.E.2d at 730-31.

of the Wahl firm at the time it was used by defendants to send the mailing announcing the new firm. In a case of first impression in Georgia, the court held client lists do not fall within the meaning of the statutory prohibition, so there was no conversion by defendant.[161] However, because the backup computer tapes and software taken by defendants may have contained confidential client information, they were subject to O.C.G.A. section 43-3-32(a),[162] and the misappropriation of those materials could be the basis for a conversion claim.[163]

V. MISCELLANEOUS

Many interesting survey cases that did not neatly fall within any one of the foregoing headings nevertheless deserve brief mention.

The decision in *Atkinson v. Cook*[164] shows that when parties contractually agree on the procedures for providing notices under an agreement, courts will honor that agreement. In *Atkinson* the parties to an option contract for the purchase of real property agreed that, for the option to be exercised, the grantee of the option was required to give notice by registered mail of intent to exercise the option within a specified time frame.[165]

Although the court held that notice sent by regular U.S. mail only was not a valid exercise of this option, it qualified its holding by noting that there was no evidence that the grantor of the option "waived his right to demand strict compliance with the option contract's terms, or that he learned that the option had been purportedly exercised within the option period."[166] In particular, the court may have reached a different result if the grantor "had unequivocally accepted [grantee's] improper notice within the option period, or if he had proceeded to a closing of the contemplated transaction based on the improper notice."[167] A technique to avoid situations like this one may be to include a provision that strict compliance with the notice provision shall be required in all events and that no waiver shall be valid unless signed in writing by the party to whom notice is to be given.

Those attorneys who count real estate brokers among their friends and clients may want to advise them of the decision in *Brannen/Goddard*

161. *Id.* at 899, 520 S.E.2d at 733.
162. O.C.G.A. § 43-3-32 (1999).
163. 238 Ga. App. at 899, 520 S.E.2d at 733.
164. 271 Ga. 57, 518 S.E.2d 413 (1999).
165. *Id.* at 57, 518 S.E.2d at 414.
166. *Id.* at 59, 518 S.E.2d at 415.
167. *Id.* at 59 n.8, 518 S.E.2d at 415 n.8.

Co. v. PNC Realty Holding Co. of Georgia.[168] Plaintiff broker obtained a tenant for the owner of commercial property. A commission agreement between the broker and owner stated that the owner would pay commissions to the broker during the lease and during any modification, extension, or renewal of the lease by the tenant. A new lease agreement, subsequently entered between owner and tenant, contained a recital that the owner agreed to pay any commissions to the broker. The owner then transferred the property to defendant and, in a lease assignment agreement, assigned its interest in the lease to defendant. However, the lease assignment recited that defendant would not be responsible for any liability or obligation arising under the lease prior to the assignment.[169]

The broker sued defendant to recover commissions, but the court of appeals affirmed the trial court's grant of summary judgment to defendant.[170] In particular, the court held the original commission agreement, apparently a document separate from the initial lease itself, was a personal covenant not running with the land.[171] In addition, the lease assignment's exclusion of pre-assignment obligations was valid. This conclusion was not altered by the fact the renewed lease contained a provision obligating owner to pay commissions because this provision did not recite that commissions were in fact due and did not refer to obligations under the original, extraneous commission agreement.[172]

What can you advise a broker to do to insulate himself or herself from the result in *Brannen/Goddard Co.*? To the extent a broker has any input in drafting a lease agreement in which the broker is to continue to receive commissions throughout the lease term, he should request a provision that incorporates by reference both the terms of any extraneous listing agreement and the material provisions of the listing agreement, including any ongoing obligation for payment of commissions. A broker may also try to request a clause stating that commission obligations under the lease shall be binding on any subsequent assignee, notwithstanding language to the contrary in an assignment of the lease. Lastly, if the broker is adventurous, he may request a clause that the obligation to pay commissions is one that runs with the land.

Finally, a survey period decision that may be of interest to commercial practitioners whose practice includes residential home closings is *Haynes*

168. 238 Ga. App. 387, 519 S.E.2d 35 (1999).
169. *Id.* at 387-88, 519 S.E.2d at 35-36.
170. *Id.* at 390, 519 S.E.2d at 37.
171. *Id.* at 389, 519 S.E.2d at 36.
172. *Id.*, 519 S.E.2d at 36-37.

v. Fincher.[173] In *Haynes* the court considered the enforceability of an arbitration clause in a home warranty issued by plaintiff's home builder.[174] Plaintiff home buyers contended that, under O.C.G.A. section 9-9-2(c)(8),[175] their failure to initial the arbitration clause in the home warranty precluded its enforceability.[176] The court of appeals disagreed, stating that code provision only applies to home sale or loan contracts.[177]

173. 241 Ga. App. 179, 525 S.E.2d 405 (1999).
174. *Id.* at 179, 525 S.E.2d at 406.
175. O.C.G.A. § 9-9-2 (Supp. 1999).
176. 241 Ga. App. at 180, 525 S.E.2d at 407.
177. *Id.*