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Business Associations

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This Article surveys recent developments in Georgia's corporate, securities, partnership, and banking law. It covers noteworthy cases decided during the survey period by the Georgia appellate courts, United States district courts located in Georgia, and the Eleventh Circuit Court of Appeals. Also included in this Article are highlights of recent revisions to the Official Code of Georgia Annotated ("O.C.G.A.").

I. CORPORATIONS

A. Piercing the Corporate Veil

Georgia courts may permit "piercing the corporate veil" to hold individual shareholders, officers, or agents liable for corporate debts when those individuals have so disregarded the corporate structure that allowing the corporate veil to shield them from liability would create an injustice or perpetuate a fraud. A corporation is a legal entity separate from its shareholders, officers, and agents, which effectively shields the assets of these individuals from the liabilities of the corporation. In essence, the owners and managers of a corporation act as mere agents
on behalf of the corporation. However, the courts have been increasingly willing to look beyond form and at substance in determining whether the corporate entity and attendant liability shield for its owners has been so abused that the only way to avoid injustice is to hold the agents of the corporation liable for its debts. For example, Georgia courts have pierced the corporate veil in cases in which the corporation's agents have commingled corporate funds with personal funds or among related corporate entities and accounts.

In spite of a wealth of case law addressing veil-piercing claims, the Georgia courts have not woven a consistent thread of cases applying the various veil-piercing theories to disparate factual situations. The courts have used a variety of theories to justify piercing the corporate veil, including alter ego, apparent or ostensible agency, fraud, abuse, and joint venturer. As a result, appellate review appears confused, and consequently, the parties involved in such cases do not have a consistent guide in the case law to reasonably predict the outcome of these claims.

Courts generally frame the issue of piercing the corporate veil as whether the corporation is the alter ego or business conduit of the shareholders. The main inquiry is not the composition of corporate ownership or control because, under Georgia law, a corporation and its shareholders or officers are separate entities even if wholly-owned and controlled by a sole shareholder. To state a claim to pierce the corporate veil in Georgia, the plaintiff must show the following: (1) that the shareholder's disregard of the corporate entity made it a mere instrumentality for the transaction of the shareholder's own affairs; (2) that there is such unity of interest and ownership that the separate personalities of the corporate form and the shareholder or officer cease to exist; and (3) that to adhere to the doctrine of a separate corporate

2. See generally Jerome L. Kaplan et al., Kaplan's Nadler, Georgia Corporations, Limited Partnerships and Limited Liability Companies § 3-14 (1999).
entity would promote injustice or protect fraud. To submit the issue to a jury, courts require evidence that the corporate arrangement is a sham used "to defeat justice, to perpetrate a fraud, or to evade statutory, contractual or tort responsibility."

1. Georgia Court of Appeals Pierces the Corporate Veil of Closely-Held Corporations to Hold Officers Liable for Corporate Debts When Closely-Held Corporations Were Stripped of Assets to Avoid Liability. In Speir v. Krieger, plaintiff filed suit against McFrugal Auto Rental, Inc. ("McFrugal") after a car rented from McFrugal ran into plaintiff's vehicle, causing injuries to plaintiff. Plaintiff subsequently discovered that, contrary to state law, McFrugal did not carry third-party liability insurance on its rental vehicles even though McFrugal sold such insurance to its customers. On December 18, 1995, the trial court awarded plaintiff $7248 in compensatory damages and $250,000 in punitive damages on a fraud claim. Prior to the verdict, McFrugal's Chief Executive Officer and one of its two shareholders, Roveto, sold the assets of McFrugal and another related closely-held entity, McFrugal Holding Company ("McFrugal Holding"), to a new corporation, McRent-A-Car, Inc. ("McRent"). McRent was formed for the purpose of acquiring the assets of the two closely-held corporations (together, "McFrugal Companies"). This transaction left the McFrugal Companies insolvent.

After receiving the verdict, plaintiff filed suit in equity against the McFrugal Companies seeking to pierce the corporate veil between the entities and to hold their shareholders liable on the ground that Roveto commingled the assets between the entities to avoid payment of the judgment. On January 22, 1997, the trial court entered a judgment holding the McFrugal Companies liable for the earlier verdict. Plaintiff then filed another suit in equity against the two corporate officers of the McFrugal Companies, Speir and Roveto, to hold them personally liable for the outstanding judgment. The parties filed cross-motions for summary judgment, and the trial court, finding no issues of material fact, granted plaintiff's motion. Only Speir appealed.

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8. See cases cited supra notes 6-7.
11. Id. at 393, 509 S.E.2d at 686.
12. Id. at 393-94, 509 S.E.2d at 686-87.
On appeal Speir contended that the trial court's ruling only pierced the corporate veil between McFrugal and McFrugal Holding and, therefore, created a single entity from which plaintiff must seek recovery. The court of appeals disagreed, stating that "[t]he improper commingling of two independent corporations so as to render them 'one entity' does not create a separate corporation entirely liable for plaintiff's damages and conveniently shielding the operation officers therefrom." Furthermore, the court noted, "[i]t does not follow that operating two separate corporations illegally creates one legal corporation." To agree with plaintiff's logic would force the court to support the notion that Speir and Roveto could, in effect, illegally commingle the assets of McFrugal and McFrugal Holding to avoid a judgment creditor, then strip the assets out of those corporations and shield those assets by organizing a new corporation. This provided an example of corporate form taking precedence over substance, and, as a result, the court upheld the judgment against the insolvent corporations' officers.

Speir also contended that, even if the McFrugal Companies' corporate officers could be held personally liable, he was not a corporate officer during the time of the alleged misuse of the corporate form. Speir, who held the positions of corporate secretary and registered agent, claimed that he resigned from his official duties with the McFrugal Companies at a board of directors meeting in December 1994 and submitted an affidavit to that effect. Plaintiff countered with certified copies of the corporate registry for the McFrugal Companies. The corporate registry is filed with the Secretary of State and is required to be updated annually; the failure to notify the Secretary of State within sixty days that a corporation's registered agent has resigned subjects the corporation to administrative dissolution. The certified documents submitted by plaintiff indicated that, as of September 11, 1996, Speir was still registered as the corporate secretary and registered agent of McFrugal.

Finally, Speir argued that he was not a party to the previous lawsuits between plaintiff and the McFrugal Companies, and, therefore, the prior judgments could not be enforced against him. Speir asserted that no

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13. Id. at 394, 509 S.E.2d at 687.
14. Id. at 397, 509 S.E.2d at 689.
15. Id.
16. Id.
17. Id.
18. Id.
evidence in the record demonstrated that he directly participated in any of the illegal activities. Rejecting this argument, the court distinguished the rule in Cherry v. Ward, which was the principal case that Speir relied upon. Cherry stands for the proposition that

"[n] officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor, [and] an officer of a corporation who takes no part in the commission of a tort committed by the corporation is not personally liable unless he specifically directed the particular act to be done or participated or co-operated therein."

The court found that Cherry may be relied upon only in cases in which the evidence is insufficient to pierce the corporate veil but that personal liability can still attach if the officer personally committed a tortious act or personally directed that one be committed. The court reasoned that Speir's argument ignored the result of the successful veil-piercing claim achieved by plaintiff—that is, by finding that the corporate veil ceased to exist, Speir's privity of interest with McFrugal and his identity as an operating officer and stockholder of McFrugal were exposed. To support its analysis, the court quoted the following:

"[T]he trend is becoming more and more pronounced that the jurisdiction of all the states, including Georgia, are breaking down the impregnability of this fiction of the separateness of the corporation and its members. More sympathetically and more frequently are the courts coming to realize the fallacy of this fiction so that the law of corporations is developing along the lines that a corporation cannot be considered without taking into account its life-blood, its activities supplied by, interwoven with, and related to the individuals who constitute its members, shareholders and stockholders."

The dissent, written by Judge Blackburn, diverged from the majority opinion on the ground that the majority would wrongfully permit a corporate officer to be held liable for actions of a corporation without requiring (1) that the corporate officer be a party to the suit, and (2)

22. Id. at 400, 509 S.E.2d at 691.
24. 235 Ga. App. at 400, 509 S.E.2d at 691.
26. 235 Ga. App. at 400, 509 S.E.2d at 691.
27. Id.
28. Id. at 399, 509 S.E.2d at 690-91 (quoting JEROME L. KAPLAN ET AL., GEORGIA CORPORATIONS, LIMITED PARTNERSHIPS AND LIMITED LIABILITY COMPANIES § 3-14 (1998)) (alteration by court).
evidence that directly ties the officer to the commission of the tort.  

As to the first point, Judge Blackburn suggested that "[n]o matter how egregious the facts, a party must still be afforded notice and the opportunity to defend actions brought against them individually." Judge Blackburn noted that the first judgment at the trial court level, holding that the two corporations were operated as one entity, did not name Speir as a party. The second judgment, holding the corporate officers personally liable for the prior judgment, did not rest upon any evidence linking Speir to any tortious activity.

The dissent refuted the majority's conclusion that Speir did not resign his duties as a corporate officer in December 1994. Speir's testimony that he resigned by giving notice at a board of directors meeting complied with the version of O.C.G.A. section 14-2-843 then in effect, which provided that "[a]n officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is delivered unless the notice specifies a later effective date. A copy of the notice of resignation . . . may be filed with the Secretary of State." The dissent emphasized that, contrary to the majority's holding, a resignation may be effective regardless of whether notice is actually filed with the Secretary of State. As a result, the resignation allegedly tendered by Speir at the December 1994 meeting was effective, and the acts upon which the original action was based were committed well after Speir's resignation.

2. Corporation May Not Assert a Claim to Pierce its Own Corporate Veil in Bankruptcy Proceeding Under Georgia Law. The issue of whether a bankruptcy trustee of a corporate debtor under Chapter 7 has standing to assert a claim to pierce the corporate veil of the debtor to pay the debtor's debts was addressed by the United States Bankruptcy Court for the Northern District of Georgia in Ellenberg v. Waliagha (In re Mattress N' More, Inc.). There, the trustee filed suit against Amjad Waliagha and nineteen corporate entities ("entities"), each of which was wholly-owned by Waliagha. In

29. Id. at 403, 509 S.E.2d at 693 (Blackburn, J., dissenting).
30. Id.
31. Id.
32. Id.
33. Id.
34. Id. at 403-04, 509 S.E.2d at 693. (quoting O.C.G.A. § 14-2-843(a) (Supp. 1999)) (emphasis added by court).
35. Id. at 404, S.E.2d at 693.
36. Id.
the complaint, the trustee alleged that each of the entities had been operated by Waliagha in an abusive and fraudulent manner resulting in an injustice to its creditors. Mattress N' More, ("debtor") was one of entities and manufactured, ordered inventories, and made joint purchases of the other entities. The common expenses were not, however, allocated among the entities, which conducted operations as one entity to sell mattresses and related products. The trustee further alleged that (1) control over the entities was exercised in a central location; (2) Waliagha kept the entities' checkbooks in one location; (3) Waliagha signed all checks; (4) the entities failed to file corporate tax returns for 1996 and 1997; (5) Waliagha commingled entities' funds; and (6) none of the entities observed any corporate formalities. The trustee sought to hold each of the entities jointly and severally liable for $350,000, the total amount owed to the creditors.  

The entities responded that the trustee lacked standing to assert an alter ego claim under Georgia law; rather, any veil-piercing claim belonged to the individual creditors. The parties agreed that the trustee had no standing under section 544 of the Bankruptcy Code but disagreed over the trustee's standing under section 541 of the Bankruptcy Code, which defines the property of the estate in bankruptcy. In Butner v. United States, the United States Supreme Court held that property rights belonging to a debtor under state law become assets of the bankruptcy estate upon the filing of a bankruptcy petition. Federal circuit courts look to state law when analyzing standing under section 541 to pursue an alter ego claim. In its analysis, the bankruptcy court cited two cases by other bankruptcy courts in Georgia to support the rule that an alter ego claim under Georgia law is essentially a suit in equity and permits a debtor corporation to name its shareholders liable for the debts of the corporation. Thus, an alter ego claim is property of the bankruptcy estate under section 541 and may be properly asserted by the trustee. Defendants argued, however, that no Georgia state court had ever

38. Id. at 106.
39. Id. at 107; see also 11 U.S.C. § 541 (1994).
41. Id. at 54.
42. 231 B.R. at 107.
44. Id.
addressed the issue of whether an alter ego claim may be brought by the corporation to pierce its own corporate veil.45

The court concluded that the Georgia Supreme Court would "probably not allow a corporation to assert a claim to pierce its own corporate veil."46 To support this conclusion, the court relied exclusively on policy grounds and did not cite any primary Georgia authority.47 It would be "anomalous," the court suggested, to allow a corporation to assert a claim against itself to "destroy the very protection for which it was created."48 However, the court backtracked from its broad reasoning and stated that the trustee had standing to assert claims against the entities for improper transfers from the debtor and to sue any corporate agents for breach of fiduciary duty or negligence.49 In conclusion, the court suggested that it might, indeed, make sense for the trustee in bankruptcy to assert alter ego claims as a representative of the bankrupt estate.50

Because there is no statutory basis for such a veil-piercing theory in the Bankruptcy Code, the court pointed to Congress as the proper vehicle for striking a balance "between the goals of bankruptcy legislation and creditor's rights and the policies of economic expansion which lay behind the state law doctrines of limited liability."51

B. Liability for Preincorporation Debts of a Business

In Jamal v. Hussein ("Jamal II"),52 the court of appeals considered whether a partner can hold other partners in a common venture liable for loans made to an as-yet-to-be-formed corporation or, alternatively, whether the subsequently formed corporation automatically assumes liability for repayment of the loans. Plaintiff, Jamal, persuaded

45. Id.
46. Id.
47. Id. The court further stated "it is relatively difficult to pierce the corporate veil in Georgia." Id. (citing Stephen B. Presser, Piercing the Corporate Veil § 2.11, at 2-91 (1998)). However, given the numerous Georgia cases holding corporate agents liable for the debts of corporation, this broad assertion is somewhat dubious. See cases cited supra notes 2-7.
49. Id. The court noted that, to prevail on these claims, the trustee would have to bring the entities into bankruptcy court, at which point the trustee could move for substantive consolidation, with notice to all creditors of the named corporate defendants. Id. at 109 n.4.
50. Id. at 109-10.
51. Id. at 110.
defendants, Pirani and Hussein, to go into the convenience store business with him. Jamal reserved a name for the corporation, Ark International, Inc. ("Ark"), with the Secretary of State and borrowed $30,000 against his personal credit cards for the purchase of the first convenience store. He deposited the money into an account bearing the name of the as-yet-to-be-formed corporation. Meanwhile, Pirani negotiated for the purchase of the first store, which Hussein agreed to manage. After the purchase of the first store closed, Jamal made additional loans to fund the purchase of a second store. Approximately one month later, Ark was incorporated with each of the associates owning one-third of its shares. After a dispute erupted, Jamal sued his business associates, claiming that Pirani and Hussein were liable for Ark's preincorporation debts, which consisted of the loans, even though Jamal loaned the money to Ark and neither Pirani nor Hussein made any personal guarantees for repayment.  

The court affirmed the trial court's ruling that O.C.G.A. section 14-2-204, which creates joint and several liability for preincorporation debts, does not apply when the claimant knew the corporation did not exist at the time the loans were made. The court reasoned that Jamal could not have made the loans to a corporate entity that was not yet formed. Indeed, Jamal could not have been misled into believing that Pirani and Hussein were "purporting to act as or on behalf of" the yet-to-be-formed corporation because Jamal had adequate information to know the corporation had not yet been formed. There was no evidence to indicate that Jamal believed Ark had been incorporated when he made the loans. Rather, Jamal loaned the money to the partnership, which rendered O.C.G.A. section 14-2-204 inapplicable.

The court distinguished those cases in which section 14-2-204 provided a remedy because business associates took advantage of an aggrieved party when the claimant was ignorant of the fact that no corporation existed.

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54. This section provides, "All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting." O.C.G.A. § 14-2-204 (1994).
56. Id. at 781, 515 S.E.2d at 409.
57. Id., 515 S.E.2d at 410 (quoting O.C.G.A. § 14-2-204).
58. Id.
59. Id., 515 S.E.2d at 409.
The court next turned to the issue of whether a corporation succeeding a partnership becomes automatically liable for the debts of the partnership. The trial court granted summary judgment in favor of Pirani and Hussein on this issue, finding that the corporation had replaced the partnership and that, therefore, as a matter of law, Pirani and Hussein could not be held liable for the loan. However, the appellate court found that the terms surrounding the transfer of partnership assets and liabilities to the corporation were nebulous and, therefore, raised a question of fact. To illustrate, the court pointed to leases signed by Jamal, Pirani, and Hussein for land to be occupied by future stores. They never transferred the leases to the corporate books after the formation of Ark, and a transfer would not take effect unless they took affirmative steps for the corporation to assume the leases. In addition, there was conflicting testimony concerning whether Pirani and Hussein were liable for repayment of Jamal's loan. The court concluded that the jury must determine whether the parties intended for the liability created by the loan to migrate to the corporation or remain with the partnership.

C. Covenants Not to Compete

The increase of issues involving noncompetition and nonsolicitation agreements is in step with the increasing mobility of today's workforce. Now more than ever employees at all levels of the corporate hierarchy are subject to such agreements. Indeed, just as employment contracts

373 S.E.2d 855, 856 (1988)).
61. Id. at 781-82, 515 S.E.2d at 410.
62. Id. at 782-83, 515 S.E.2d at 411.
63. Id.
64. Id. at 781-82, 515 S.E.2d at 410.
65. Id. at 782, 515 S.E.2d at 410; see also Dickson-Carroll Co. v. United States Fidelity & Guar. Co., 58 Ga. App. 540, 541, 199 S.E. 322, 322 (1938) ("Where a partnership is succeeded by a corporation, the corporation is not liable for the debts of the partnership not assumed in a manner recognized by law.").
67. Id. at 782-83, 515 S.E.2d at 411. The court also concluded that a factual issue existed on plaintiff's piercing the corporate veil theory. Id. at 783, 515 S.E.2d at 411. Plaintiff claimed that after incorporation, Hussein and Jamal commingled Ark's assets with their own. Id. Because a factual issue existed as to whether Ark assumed the debts of the partnership, plaintiff's attempt to hold the other shareholders of the corporation liable remained viable. Id. The record revealed several evidentiary points creating a material issue of fact for the jury, including the facts that (1) there were no shareholder or director meetings; (2) no stock in the corporation was issued; (3) there may have been "transfers" of merchandise between corporate entities owned by the parties; and (4) cash payments flowed to Hussein and Pirani from corporate entities although no record of such payments existed. Id.
governing key employees are the norm, so are challenges to the provisions of those contracts. Georgia courts have responded to the growth in this substantive area with a straightforward analytical structure. Courts analyze three factors when determining the reasonableness of the challenged restrictions, including (1) duration, (2) territorial coverage, and (3) scope of the prohibited activity. The question of the reasonableness of the imposed restraint is a question of law for the court.

It is worth noting that "blue pencilling" of the offending restrictive covenants is prohibited under Georgia law, even if the contract includes a severability clause. A covenant not to compete or a nonsolicitation agreement must stand on its own or fail in its entirety; thus it is advisable to scrutinize these clauses and reference the prevailing law prior to committing to specific language.

In Reardigan v. Shaw Industries, Inc., a predecessor to Shaw Industries ("Shaw") hired Reardigan in 1990 to sell carpet and floor coverings in the Atlanta metropolitan area. Reardigan met with developers and construction contractors on a regular basis for the purpose of submitting competitive bids for supplying flooring to various projects. Two years later, Reardigan signed a noncompetition agreement that provided as follows:

"You covenant and agree that during your employment . . . and for a period ending on December 31st of the calendar year following the calendar year in which your employment terminates, you will not, on your own behalf or in the service or on behalf of others, compete with [employer] anywhere within the Atlanta Metropolitan Statistical Area ("AMSA") . . . by engaging or attempting to engage in the business of buying, selling and installing carpet and other floor coverings for residential or commercial uses, in circumstances where your responsi-


72. Id. at 142, 518 S.E.2d at 145.
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Reardigan also signed the following nonsolicitation agreement:

"You covenant and agree that during your employment with [employer] and for a period ending on December 31st of the calendar year following the calendar year in which your employment terminates, you will not, anywhere within the [AMSA], on your own behalf or in the service or on behalf of others, call on, solicit or take away as a client or customer or attempt to call on, solicit or take away as a client or customer any individual, partnership, corporation or association that was a client or customer of [employer] and was serviced by you or under your supervision during your employment with [employer]."74

Reardigan resigned from Shaw on June 26, 1998, and took a job with a direct competitor, which resulted in the lawsuit.75 The trial court granted injunctive relief to the employer, finding that the restrictions were reasonable.76 On appeal the court noted that it "may consider the nature and extent of the business, the situation of the parties, and all other relevant circumstances."77

Reardigan claimed that the duration of both covenants was unreasonable because the length of the imposed restriction varied depending on the date of termination of employment.78 The court held, however, that the restrictions were ascertainable immediately upon the employee’s termination and that they contemplated a definite end, December 31 of the second calendar year after termination.79 Moreover, the maximum possible length of the duration, two years, fell within the duration held permissible by Georgia courts.80 For these reasons, the court held that the contract was reasonable with respect to duration.81

Next, the court analyzed whether the territorial coverage was too broad.82 The court considered the radius within which certain counties lie as relevant to the reasonableness inquiry.83 The court noted that

73. Id.
74. Id. at 143, 518 S.E.2d at 145-46.
75. Id., 518 S.E.2d at 146.
76. Id. at 142, 518 S.E.2d at 145.
77. Id. at 143, 518 S.E.2d at 146 (citing W. R. Grace & Co., Dearborn Div. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992)).
78. Id.
79. Id.
80. Id.
81. Id. at 144, 518 S.E.2d at 146.
82. Id.
83. Id. (citing Pittman, 210 Ga. App. 769, 437 S.E.2d 622).
Generally, in construing territorial limitations in employment contracts, trial courts must look at the reasonableness of the restriction in light of the surrounding facts and circumstances. A restriction relating to the area in which the employee is employed, as opposed to the territory in which he actively solicits business, will usually be enforced because "a court will accept as prima facie valid a covenant related to the territory where the employee was employed as a legitimate protection of the employer's investment in customer relations and good will."

The eighteen counties within the AMSA, with the exception of a small portion of one county, lay well within a fifty-mile radius of the employer's business. Evidence at trial tended to show that Reardigan submitted successful bids in eight of the eighteen counties within the AMSA; however, Reardigan solicited business in all eighteen counties.

The court found that because of the nature of Reardigan's work, his employment territory included the location of the actual projects for which he solicited, not merely the corporate offices of the general contractors at which he made sales calls. "In contrast to the regional salesperson assigned to call on customers in a particular territory, Reardigan relied upon his relationships with contractors and developers to obtain subcontracts for the installation of carpet." The evidence showed that those contractors and developers worked throughout the AMSA.

Finally, Reardigan contended that the territorial restriction was impermissibly vague because the AMSA section at issue had changed since he executed his employment contract containing the restrictive

85. Id., 518 S.E.2d at 147.
86. Id. (quoting Rollins Protective Servs. Co., 249 Ga. at 140, 287 S.E.2d at 549). The supreme court in Rollins Protective Services Co. further stated, "[A] court will enforce an agreement prohibiting an employee from pirating his former employer's customers served by the employee, during the employment, at the employer's direct or indirect expense. Conversely, a court will not accept as prima facie valid a covenant related to the territory where the employer does business where the only justification is that the employer wants to avoid competition by the employee in that area."
249 Ga. at 140, 287 S.E.2d at 549 (quoting Howard Schultz & Assocs. of the Southeast, Inc. v. Broniec, 239 Ga. 181, 184, 236 S.E.2d 265, 268 (1977)).
87. 238 Ga. App. at 144, 518 S.E.2d at 146.
88. Id., 518 S.E.2d at 147.
89. Id. at 144-45, 518 S.E.2d at 147.
90. Id. at 144, 518 S.E.2d at 146.
91. Id., 518 S.E.2d at 147.
covenants. The court stated that the definiteness of a territorial restriction is determined by looking at the time of execution, not at the time of breach. Thus, although the United States Office of Management and Budget later redefined the AMSA, Reardigan knew exactly what the territory entailed at the time of execution and had the ability to ascertain if the AMSA changed in the interim.

In Keeley v. Cardiovascular Surgical Associates, P.C., Cardiovascular Surgical Associates ("CSA") hired Dr. Samuel Keeley as a heart surgeon. As part of his employment agreement, Keeley signed the following noncompetition covenant: "In the event either of us terminate your employment or dissolve the partnership, a restrictive covenant would operate to prohibit your establishing a competing cardiovascular surgery practice within a 75 mile radius of Albany, Georgia for a period of two years following the date of termination or dissolution." Several months after hiring Keeley, CSA discovered Keeley was abusing drugs. Keeley subsequently entered a substance abuse treatment program, but CSA terminated his employment shortly thereafter in January 1998. Five months later, Keeley announced his intention to open a competing cardiovascular surgical practice in Albany and filed for a declaratory judgment to have the noncompetition covenant declared unenforceable. CSA counterclaimed to enjoin Keeley from violating the covenant. The trial court found for CSA and enjoined Keeley from operating a competing practice until January 2000, two years after his termination. Keeley appealed.

The court of appeals first addressed Keeley's claim that the trial court erred in finding that CSA's business interests would be protected by enforcement of the covenant not to compete because the two current shareholders of CSA were no longer directly employed by CSA. Rather, they operated as separate professional corporations and performed surgeries on CSA's patients. The court of appeals upheld the trial court's finding that CSA was in the business of providing medical services and had developed a significant network of referring physicians and patients throughout the protected territory. Further, the court concluded that competition by Keeley would reduce the number of

92. Id. at 145, 518 S.E.2d at 147.
93. Id.
94. Id.
96. Id. at 26, 510 S.E.2d at 882.
97. Id.
98. Id. at 28, 510 S.E.2d at 883-84.
99. Id. at 29, 510 S.E.2d at 884.
procedures by CSA and its patient and referral base, thereby reducing its income and weakening its reputation.\footnote{100}

The court next addressed Keeley's claim that the covenant was impermissibly vague in its description of the geographic territory because one allegedly could not discern whether the seventy-five-mile radius was to be measured, from the Albany city limits or from downtown Albany.\footnote{101} In finding the covenant immune from a challenge of vagueness, the court summarily declared the geographic restriction enforceable on the following ground: “The use of the word ‘radius’ presupposes a circle, the center of which is the center of [Albany]. It takes no considerable construction to place the center of that circle in the middle of downtown [Albany], giving a clear starting place for measuring the area’ of restriction.”\footnote{102}

Keeley also claimed that the restricted area was too large and overprotected the legitimate business interests of CSA and that no Georgia court had upheld a physician’s covenant covering that many square miles.\footnote{103} The court reasoned that the covenant was part of a larger agreement whereby Keeley was to become an equal owner of CSA within eighteen months, and therefore, it was subject to a “middle level” of “reduced scrutiny” given to professional contracts (in which case the parties are considered to have equal bargaining power) as opposed to the “strict level” of scrutiny applicable to a standard, stand-alone employment agreement.\footnote{104} Accordingly, the court upheld the reasonableness of the noncompete provision.\footnote{105}

In \textit{Wolff v. Protege Systems, Inc.},\footnote{106} Protege sought injunctive relief against Wolff, a former employee of Protege, and DP Solutions, Wolff's present employer, to stop Wolff from allegedly violating covenants not to compete and from disclosing confidential information. The parties provided consulting and support services to business customers using a unique computer software package developed by Synon, Inc.\footnote{107} While at Protege, Wolff signed an employment agreement which provided that, for one year after the date of termination, Wolff could not

\begin{footnotes}
\item[100] \textit{Id.}
\item[101] \textit{Id.}
\item[103] \textit{Id.}, 510 S.E.2d at 885.
\item[104] \textit{Id.} at 30-31, 510 S.E.2d at 885.
\item[105] \textit{Id.}
\item[107] \textit{Id.} at 251, 506 S.E.2d at 431.
\end{footnotes}
“directly or indirectly, own, manage, operate, join, control, undertake planning for or organization of any business activity competitive with the business of Protege, or combine or conspire with other employees of Protege for the purpose of organizing any such competitive business activity, or be employed in any manner with any business of the type and character of business engaged in by Protege at the time of such termination.”

The noncompete provision further provided that the agreement “shall be bound by the following geographical territory; Clayton, Cobb, Dekalb and Fulton Counties located in the state of Georgia” and “shall not restrict or prohibit the employee from engaging in providing computer related software applications not used, offered, and/or developed by Protege, so long as the customer and the employee’s place of business are located entirely outside the area.”

The trial court enjoined Wolff from actively soliciting business from Protege’s customers. On appeal the court found that the noncompete provision purported to prevent Wolff from obtaining employment from any competitor in any capacity, which is precisely the type of covenant Georgia courts have held to be overbroad, unreasonable, and prohibited by the Georgia Constitution. In addition, the court found the restriction unenforceable because it overly restricted Wolff’s ability to conduct business (even outside the restricted territory) in the realm of Synon software, which is “used” by Protege.

The agreement at issue also contained the following “nonsolicitation of customers” provision:

“During the term of this agreement, and for a period of one year immediately following the termination of his/her employment with Protege, the employee shall not . . . call on, solicit, or take away, or attempt to call, solicit, or attempt to take away any of the customers of Protege [on whom the employee called or with whom he/she became acquainted while employed at Protege], either for himself or for any other person, firm or corporation.”

Even though Wolff only did business with eight of Protege’s fifteen customers, Protege sought to restrict Wolff from doing business with any

108. Id. at 252, 506 S.E.2d at 432.
109. Id. at 252-53, 506 S.E.2d at 432 (emphasis added by court).
110. Id. at 252, 506 S.E.2d at 432.
111. Id. (citing National Settlement Assocs. of Ga., Inc. v. Creel, 256 Ga. 329, 332, 349 S.E.2d 177, 180 (1986); McNease v. National Motor Club of Am., Inc., 238 Ga. 53, 56, 231 S.E.2d 58, 60 (1976); see also GA. CONST. art. IV, § 4, para. 1.
113. Id. at 253, 506 S.E.2d at 432 (alteration by court).
The court reasoned that if this covenant had been “restricted to customers Wolff 'called on' while at Protege, it might have been reasonable.” However, as drafted the covenant impermissibly prohibited Wolff from soliciting or calling on any customer of Protege, “regardless of whether he had a business relationship with those customers while employed at Protege, so long as he 'became acquainted with' them while at Protege.”

D. Legislative Changes

The 1999 session of the Georgia General Assembly passed several amendments to the Georgia Business Corporation Code and the Georgia Limited Liability Company Act, the most notable of which are summarized below.

1. Electronic Filing. The legislature amended O.C.G.A. section 14-2-120 to provide for the electronic filing of documents relative to business corporations with the Secretary of State. O.C.G.A. section 14-2-127 establishes the evidentiary value of an electronically filed document.

2. Electronic Proxies. The legislature amended O.C.G.A. section 14-2-722 to provide that shareholders may by means of an electronic transmission appoint proxies to vote for them.

3. Publication of Notice to Change Name. The legislature amended O.C.G.A. section 14-2-1006.1 to allow corporations more time to deliver notice of intent to change the corporate name to the publisher of a certain newspaper in the county where the corporation’s registered office is located. Corporations now have until “the next business day following the delivery of the articles of amendment and certificate as provided in subsection (a) of this Code section.” The former version of O.C.G.A. section 14-2-1006.1 required notice to be delivered to the publisher prior to the filing of the articles of amendment.

114. Id., 506 S.E.2d at 432-33.
115. Id., 506 S.E.2d at 433.
116. Id.
118. Id. §§ 14-11-100 to -1109.
119. Id. § 14-2-120(i).
120. Id. § 14-2-127.
121. Id. § 14-2-1006.1(b).
122. Id. § 14-2-1006.1(b).
123. Id.
4. **Mergers.** The legislature amended O.C.G.A. section 14-2-1104 to allow a parent corporation to merge with a subsidiary corporation without shareholder approval under certain conditions.\(^\text{124}\)

5. **Beneficial Owner.** The legislature amended the definition of the term "beneficial owner" to exclude from the definition an owner of equity securities which (i) have been tendered pursuant to a tender or exchange offer made by such person or such person's affiliates or associates until such tendered stock is accepted for purchase or exchange or (ii) such person or such person's affiliates or associates have the right to vote pursuant to any agreement, arrangement, or understanding if the agreement, arrangement, or understanding to vote such stock arises solely from a revocable proxy or consent solicitation made to ten or more persons.\(^\text{125}\)

6. **Foreign Corporations.** The legislature added a paragraph to O.C.G.A. section 14-2-1501 to change the provisions relating to the activities of a foreign corporation that do not constitute "transacting business."\(^\text{126}\) Serving as a manager of a limited liability company is an activity that does not constitute "transacting business" under the Code.\(^\text{127}\)

7. **Limited Liability Companies.** The legislature amended O.C.G.A. section 14-11-405 (effective for LLCs formed on or after July 1, 1999) to provide that "a member with respect to which an event of dissociation occurs is not entitled to receive any payment by reason of such event and will become an assignee as to such limited liability company interest."\(^\text{128}\) The legislature also amended O.C.G.A. section 14-11-610 to require a dissolved limited liability company to deliver to the Secretary of State a certificate of dissolution containing certain information provided for therein.\(^\text{129}\)

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\(^{124}\) Id. § 14-2-1104(a)-(b).

\(^{125}\) Id. § 14-2-1110(4)(C).

\(^{126}\) Id. § 14-2-1501(b)(14).

\(^{127}\) Id.

\(^{128}\) Id. § 14-11-405(b).

\(^{129}\) Id. § 14-11-610.
II. SECURITIES

A. United States District Courts in Georgia Address Heightened Pleading Standard Governing State of Mind Required to Establish Scienter in Section 10(b) Actions

Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") makes it unlawful for any person to use, in connection with the sale of any security, any deceptive device.\textsuperscript{130} Rule 10(b)-5, promulgated by the Securities and Exchange Commission ("SEC") pursuant to Section 10(b), prohibits the making of any untrue statement of material fact or the omission of a material fact that would render statements misleading.\textsuperscript{131} To state a claim under Rule 10(b)-5, a plaintiff must allege that the defendant made a misstatement or omission of material fact with scienter and in connection with the purchase or sale of securities, that the plaintiff relied upon the misstatement or omission, and that this reliance proximately caused the plaintiff's injuries.\textsuperscript{132} The Private Securities Litigation Reform Act of 1995 ("PSLRA")\textsuperscript{133} revised the pleading standards for alleging fraud in securities class action lawsuits.\textsuperscript{134}

\textsuperscript{130} 15 U.S.C. § 78j(b) (1994).
\textsuperscript{131} 17 C.F.R. § 240.10b-5 (1999). Rule 10b-5 provides the following:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

\textit{Id.}

\textsuperscript{132} Robbins v. Koger Properties, Inc., 116 F.3d 1441, 1447 (11th Cir. 1997).
\textsuperscript{134} Specifically, the PSLRA provides the following:

In any private action arising under this chapter in which the plaintiff alleges that the defendant-

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding
In *Sturm v. Marriott Marquis Corp.*, a group of 720 limited partners in a hotel partnership ("Marquis Limited Partnership I") sued the general partner, the Marriott Marquis Corporation, for federal securities fraud, state law breach of fiduciary duty, and breach of contract relating to the merger of the Marquis Limited Partnership I into a new limited partnership ("Marquis Limited Partnership II"). Judge Thrash ruled, among other things, that the limited partners failed to meet the heightened pleading standard for scienter under the PSLRA.

The Host Marriott Corporation ("Marriott") formed numerous limited partnerships during the late 1980s to acquire, own, and operate hotel properties around the world. Marriott formed the Marquis Limited Partnership I in 1985 to acquire an eighty percent interest in the Ivy Street Hotel Limited Partnership, which developed and owned the Atlanta Marriott Marquis Hotel, a 1671 room luxury hotel ("Hotel") in downtown Atlanta, Georgia. The Marquis Limited Partnership I eventually sold 530 Class A partnership interests for $100,000 each ("Class A Units") to 720 investors ("Limited Partners") and a number of Class B partnership interests with no value ("Class B Units"). The Limited Partners, all unsophisticated investors, owned ninety-nine percent of the Class A Units. The Marriott Marquis Corporation ("General Partner") owned one percent of the Class A Units and one-hundred percent of the Class B Units.

The Hotel failed to perform as expected. The Limited Partners enjoyed certain tax losses but received less cash distributions than anticipated. Although operations improved in the 1990s, the Hotel's $217 million mortgage was coming due and the Hotel needed significant renovations. To facilitate the refinancing of the mortgage and to avoid foreclosure, Marriott formed the Marquis Limited Partnership II and became the general partner. Seeking limited partners for the Marquis

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the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

15 U.S.C. § 78u-4(b)(1). Congress passed the PSLRA of 1995 ("PSLRA") to deter alleged abuses by the plaintiffs' bar involving cases brought under the Securities Act of 1933 and the Securities Exchange Act of 1934. Supporters of the PSLRA hoped its passage would discourage "strike-suits" or claims action against a corporation and its officers and directors because of a drop in the corporation's stock price. The hope of the PSLRA's supporters has not been realized; in the three full years since its passage, the number of securities cases filed in federal district courts has increased 134%, from 102 filings in 1996 to 239 filings in 1998. Gary Lockwood, *Seeking Cover in the Age of Litigation*, BUS. L. TODAY, Sept./Oct. 1999, at 12.

136. Id. at 1362.
137. Id.
138. Id.
Limited Partnership II, Marriott mailed a Consent Solicitation and Prospectus ("Prospectus") to the Limited Partners of the Marquis Limited Partnership I. The Prospectus, which contained various disclosures, sought approval from the Limited Partners for a one-for-one exchange of all Class A Units of the Marquis Limited Partnership I for Class A Units of the Marquis Limited Partnership II, a merger that would result in the Limited Partners holding ninety-nine percent of the Class A Units. Marriott proposed the restructuring because of its belief that not enough of the Limited Partners would agree simply to amend the Marquis Limited Partnership I agreement. A majority of the Limited Partners voted to approve the merger, and the Marquis Limited Partnership I dissolved.

The Prospectus disclosed several changes to the rights of the Limited Partners, including: (1) that holders of Class A Units would be entitled to a subordinated five percent return on their investment paid at the sole discretion of Marriott, as opposed to a ten percent priority return on their investment under the Marquis Limited Partnership I; (2) that holders of Class B Units would be entitled to a 13.5% preferred, cumulative, and compounded return, as opposed to no priority returns under the Marquis Limited Partnership I; (3) that Marriott's parent corporation's twenty-year non-interest-bearing loan to the Ivy Street Limited Partnership was converted into a fifteen-year loan with a nine percent interest rate for the first five years and that repayment of the loan was given priority over rental payments to the Limited Partners; and (4) that Marriott's parent corporation was released from its guarantee of up to $50 million on the original mortgage. The Marquis Limited Partnership II agreement also gave Marriott voting rights and the ability to sell the Hotel without the consent of the holders of Class A Units.

Plaintiffs contended that the merger was unfair because (1) no independent entity represented the Limited Partners' interests in the restructuring; (2) there was no appraisal right of the Hotel; (3) there were no arms-length transactions on behalf of the Limited Partners; (4) alternatives to the restructuring were not offered; and (5) the terms of the restructuring unfairly benefited Marriott, the general partner. The complaint alleged that defendants were liable under Section 10(b) for making false statements and concealing material facts in connection with the restructuring. Defendants contended that the restructuring was necessary to prevent a foreclosure on the Hotel and that the terms

139. Id. at 1362-63.
140. Id. at 1363-64.
of the merger and its financial consequences were fully disclosed to the Limited Partners.\footnote{141}

The court ruled on defendants' motion to dismiss under the new pleading requirements of the PSLRA.\footnote{142} The PSLRA requires that a securities-fraud plaintiff "specify each statement alleged to have been misleading" and "the reason or reasons why the statement is misleading."\footnote{143} Allegations regarding statements or omissions made on information and belief must be framed in the complaint with sufficient particularity.\footnote{144} The complaint must "with respect to each act or omission alleged to violate [the PSLRA], state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."\footnote{145} Under these rules, the court found that plaintiffs' allegations concerning defendants' failure to disclose the true value to the Hotel and failure to disclose the resale value of the Class A Units satisfied the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure.\footnote{146} Next, the court found that the failure to disclose the true value of the Hotel was material because information included in the Prospectus estimated the value to be approximately $250 million, whereas plaintiffs estimated it to be in the neighborhood of $300 million, and a reasonable investor would have considered the difference important in making its investment decision.\footnote{147}

Before the passage of the PSLRA, a showing of "severe recklessness" satisfied the scienter requirement of Rule 10b-5 in the Eleventh Circuit.\footnote{148} However, the Eleventh Circuit had no special pleading requirement for Rule 10b-5 actions.\footnote{149} The PSLRA has established that a claimant must show a "strong inference" that the defendant acted with the required fraudulent state of mind for each statement or

\footnote{141} Id. at 1364. Defendants included Marriott, Marriott's parent corporation, and members of Marriott's Board of Directors.
\footnote{142} Id. at 1365.
\footnote{144} Id.
\footnote{145} Id. § 78u-4(b)(2).
\footnote{146} 26 F. Supp. 2d at 1365-66. Rule 9(b) requires that "in all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b).
\footnote{147} 26 F. Supp. 2d at 1366.
\footnote{148} See McDonald v. Alan Bush Brokerage Co., 863 F.2d 809, 814 (11th Cir. 1989). The court in McDonald defined "severe recklessness" as "not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." Id.
\footnote{149} 26 F. Supp. 2d at 1367.
omission of fact.\textsuperscript{150} This standard did not, however, change the required state of mind with respect to an allegation of securities fraud.\textsuperscript{151}

Prior to the passage of the PSLRA, several courts adopted a pleading standard crafted by the Second Circuit that allowed a claimant to allege facts (1) that showed the defendant had both the motive and opportunity to commit fraud or (2) that constituted strong circumstantial evidence of conscious misbehavior or recklessness.\textsuperscript{152} This standard arguably lowered the threshold of specific facts required to be pleaded by Rule 9(b). Other courts adopted a more demanding standard by holding that the "motive and opportunity" prong of the Second Circuit's standard no longer sufficed to raise a "strong inference" of scienter, as required by the PSLRA.\textsuperscript{153} Thus, a conflict has arisen among the circuit courts regarding the scienter pleading standard.\textsuperscript{154}

The court in \textit{Sturm} took issue with the Second Circuit's "motive and opportunity" standard by stating that "allowing private securities class actions to proceed to discovery upon bare allegations of motive and opportunity would upset the delicate balance of providing a remedy for genuine fraud while preventing abusive strike suits that the [PSLRA] sought to achieve."\textsuperscript{155} A showing of motive and opportunity would be insufficient to state a claim for securities fraud under the Eleventh Circuit's "severe recklessness" standard.\textsuperscript{156} On the other hand, the court noted that the PSLRA does not require a showing of actual knowledge or intentional misconduct at the pleading stage; hence, a showing of recklessness is sufficient.\textsuperscript{157} "[A] plaintiff can properly plead scienter by alleging facts constituting strong circumstantial evidence of severe recklessness or conscious misbehavior."\textsuperscript{158}

Applying the law to the facts of the case, the court concluded that the complaint would have survived under the mere "motive and opportunity" standard, but the heightened pleading standard of the PSLRA proved

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\begin{itemize}
\item \textsuperscript{150} 15 U.S.C. § 78u-4(b)(2).
\item \textsuperscript{151} 26 F. Supp. 2d at 1368 (noting that the Conference Committee Report on the PSLRA "chose not to include in the pleading standard certain language relating to motive, opportunity, or recklessness").
\item \textsuperscript{152} See \textit{Shields v. Citytrust Bancorp, Inc.}, 25 F.3d 1124, 1128 (2d Cir. 1994).
\item \textsuperscript{154} This conflict was first noted during the survey period by Judge Thrash in \textit{In re Miller Indus., Inc. Securities Litigation}, 12 F. Supp. 2d 1323, 1332 (N.D. Ga. 1998).
\item \textsuperscript{155} 26 F. Supp. 2d at 1369.
\item \textsuperscript{156} \textit{Id}.
\item \textsuperscript{157} \textit{Id}.
\item \textsuperscript{158} \textit{Id}.
\end{itemize}
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“fatal” to the Rule 10b-5 claim.\textsuperscript{159} Although the complaint alleged that the true value of the Hotel exceeded $300 million, claimants failed to allege that Marriott and the individual defendants knew the alleged true value and recklessly misrepresented the value of the Hotel in the Prospectus.\textsuperscript{160} This conclusion was supported by the repeated disclosure of the conflicts of interest between Marriott and the Limited Partners in the Prospectus.\textsuperscript{161}

In a case decided on the same day as \textit{Sturm, Carley Capital Group v. Deloitte & Touche, L.L.P.},\textsuperscript{162} the same court adopted and applied the same Rule 10b-5 pleading requirements in the context of a securities class action filed against an auditing firm in connection with ongoing litigation in \textit{In re 1996 Medaphis Corporation Securities Litigation}.\textsuperscript{163} Plaintiffs brought the class action on behalf of persons who purchased Medaphis Corporation (“Medaphis”) common stock, which lost considerable value during the class period. Plaintiffs claimed that Deloitte & Touche (“defendant”) artificially inflated the value of Medaphis common stock by making materially misleading public statements regarding revenue recognition and false reporting of expenses in connection with the 1995 financial statements and 1996 first quarter earnings reports. The alleged overstatement of Medaphis’s financial condition and manipulation of the stock price provided Medaphis with the opportunity to acquire other companies using its artificially inflated stock as currency.\textsuperscript{164}

The court found that “Plaintiffs ha[d] adequately alleged that the Defendant recklessly or consciously misrepresented the revenues, expenses, and earnings of Medaphis to keep the stock high for the acquisition of other companies.”\textsuperscript{165} The court noted that it would have been insufficient for plaintiffs merely to allege a misapplication of generally accepted accounting principles, but when this was coupled with such a “drastic overstatement of financial results,” a strong inference of scienter arose.\textsuperscript{166} Plaintiffs alleged numerous violations of accounting principles, which in the aggregate had a significant impact on Medaphis’s financial results.\textsuperscript{167} These allegations established “more than

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\item \textsuperscript{159} \textit{Id.} at 1370.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{27 F. Supp. 2d} 1324 (N.D. Ga. 1998).
\item \textsuperscript{163} \textit{Civil Action No. 1:96-CV-2088-TWT} (N.D. Ga. filed Aug. 19, 1996).
\item \textsuperscript{164} \textit{27 F. Supp. 2d} at 1331-32.
\item \textsuperscript{165} \textit{Id.} at 1339.
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.}
\end{itemize}
Another noteworthy issue addressed by the court concerned secondary liability under Section 10(b). Defendant contended that, in relation to the alleged overstated 1996 first quarter earnings in which Medaphis booked $12.5 million in revenue before it was earned, its involvement only amounted to aiding and abetting liability, which is not actionable under Rule 10b-5. The court considered the threshold required to show that a secondary actor’s conduct amounts to primary liability, an issue the Eleventh Circuit had yet to address. The court considered threshold standards from three different sources: In re Software Toolworks, Inc., Shapiro v. Cantor, and a proposal in an amicus curiae brief submitted by the SEC. The court adopted the SEC’s standard, which fell between the Ninth Circuit’s standard and the Second Circuit’s standard, and held that “a secondary actor can be primarily liable when it, acting alone or with others, creates a misrepresentation even if the misrepresentation is not publicly attributed to it.” Thus, because defendant specifically directed Medaphis to book $12.5 million of revenues on the last day of the first quarter of 1996 for an executed but unperformed contract, plaintiffs alleged more than mere aiding and abetting liability.

In Bryant v. Apple South, Inc., Chief Judge Fitzpatrick of the United States District Court for the Middle District of Georgia addressed Section 10b-5’s pleading requirements and reached a different conclusion regarding the applicability of the Second Circuit’s “motive and opportunity” standard in the wake of the PSLRA.

168. Id. at 1340.
169. Id. at 1333; see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 179-80 (1994) (finding that Section 10(b) does not reach those who aid and abet a violation of that statute because Congress never intended to impose secondary liability under it).
170. 27 F. Supp. 2d at 1334.
171. 50 F.3d 615, 628 n.3 (9th Cir. 1995) (noting that secondary third parties may be primarily liable for statements made by others in which the third party significantly participated).
172. 123 F.3d 717, 720 (2d Cir. 1997) (noting that secondary third parties may be primarily liable if they “make” a false or misleading statement).
173. The SEC argued “that an entity can be primarily liable when it, acting alone or with others, creates a misrepresentation.” 27 F. Supp. 2d at 1334.
174. Id.
175. Id.
177. Id. at 1379-81.
(collectively, "defendants"), alleging that defendants illegally inflated the price of Apple South stock by making false and misleading statements about its expansion strategy and business prospects to raise capital for further expansion.\(^\text{178}\)

The court concluded that the standards of motive and opportunity and recklessness had not been abolished by the PSLRA.\(^\text{179}\) "The Conference Committee, by stating in a footnote that it did not intend to codify the standard for motive, opportunity, or recklessness, failed to establish that Congress chose specifically to disapprove of these tests."\(^\text{180}\) Thus, in the Middle District of Georgia, a claimant may establish scienter in a securities fraud action by pointing to evidence of motive, opportunity, and recklessness.\(^\text{181}\) This finding establishes a clear disagreement among the federal district courts in Georgia regarding the threshold evidentiary showing required to establish scienter under Rule 10b-5.

With respect to establishing a "strong inference" that defendants acted with the required state of mind by illegally inflating the price of Apple South stock, plaintiffs offered the following evidence: (1) the receipt by Apple South's top executives of internal financial reports, and (2) insider stock sales.\(^\text{182}\) The court determined that the receipt by Apple South's executives of monthly financial reports that were prepared by Apple South's financial department and contained detailed information of material variances in actual versus forecasted results, together with a list of alleged misstatements, sufficiently established recklessness.\(^\text{183}\) Similarly, the court held that if plaintiffs could show that insider sales were "unusual" during the class period, a "strong inference" of scienter would be established.\(^\text{184}\) The evidence showed that three of the defendants sold a large percentage of their personal holdings in Apple South (in amounts equal to eighty-two percent, fifty-six percent, and forty percent of each defendant's holdings), which the court concluded to be sufficient to establish scienter.\(^\text{185}\)

B. Insider Trading

In *Clay v. Riverwood International Corp.*,\(^\text{186}\) the Eleventh Circuit addressed whether corporate insiders' exercise of stock appreciation
rights for cash from their employer implicates the insider trading laws of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5. This was an issue of first impression in the circuits. This narrow issue arose out of a claim by a purchaser of common stock in Riverwood International Corporation ("Riverwood") who claimed that certain executive officers of Riverwood engaged in illegal insider trading when they exercised stock appreciation rights ("SARs"). The purchaser claimed that the executive officers acted upon material, nonpublic information about a proposed leveraged buyout of Riverwood at an amount less than the then-current market value.

The Eleventh Circuit initially affirmed the district court's finding that SARs were not securities subject to "disclose or abstain" insider trading laws. Upon rehearing the circuit court modified its prior opinion by adopting the prior concurring opinion of Circuit Judge Carnes. That opinion held that plaintiff lacked standing to sue under Sections 10(b) and 20A(a) of the Exchange Act and under Rule 10b-5, thus resolving the insider trading claim on a much narrower ground than the majority of the previous opinion.

The concurring opinion found that Congress limited standing to purchasers or sellers of the same class of securities as the insider. Plaintiff purchased common stock in Riverwood, which was not the same class of security as defendants' SARs. Although Riverwood maintained a reserve of common stock from which to compensate the holders of SARs, it was only to guarantee payment of the SARs upon their exercise by defendants. The concurring opinion gave the following reasons as further support for its conclusion that the SARs were not of the same class as common stock: (1) the SARs did not give defendants any stock voting rights or the opportunity to purchase shares of Riverwood common stock, (2) the SARs could not be traded on public

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188. 157 F.3d at 1261.
189. Id. at 1262.
190. Id. at 1267.
191. 176 F.3d at 1381.
192. 157 F.3d at 1269-71 (Carnes, J., concurring).
193. Id. at 1270.
194. Id. at 1261. The SARs, which were part of each defendant's executive compensation package, entitled them to payment from Riverwood "equal to the difference between the SARs' grant value and the fair market value of Riverwood's stock at the time they exercised them." Id.
195. Id. at 1270.
C. Investors Cannot Rely on Equitable Tolling Provisions of O.C.G.A. Section 9-3-96 by Failing to Exercise Reasonable Diligence to Discover Fraud Before Investing

In Fuller v. Dreischarf, the Georgia Court of Appeals refused to allow an investor in a nonexistent international company to recover damages for consideration paid for a security sold in violation of the Georgia Securities Act of 1973 because the investor ("plaintiff") conducted no due diligence whatsoever before making the investment decision. Plaintiff and defendant were neighbors. Defendant solicited plaintiff to invest $10,000 in a venture called Irish American Technologies, Ltd. ("IATL"). Defendant subsequently notified plaintiff that the chairman of IATL vanished with the money. Plaintiff sued to recover his $10,000.

First, the court found that plaintiff's right to recover was barred by the two-year statute of limitations set forth in O.C.G.A. section 10-5-14(d) for state securities violations. Plaintiff contended that the limitations period was tolled by defendant's fraud. Plaintiff pointed to an investment relationship with defendant in which plaintiff would invest small amounts of money with a guaranteed return, which usually materialized. Defendant told plaintiff that IATL manufactured an antimicrobial hand cream, that the manufacturing facility and technology already existed, that some prototypes existed, and that defendant had personally seen the cream "in action." In this case, the court found that plaintiff failed to exercise even the most rudimentary due diligence.

The court determined that, in the absence of a confidential relationship, "[t]he fraud which tolls a statute of limitation must be such actual fraud as could not have been discovered by the exercise of ordinary diligence." In this case, the court found that plaintiff failed to exercise even the most rudimentary due diligence. In support of its finding, the court noted that (1) plaintiff accepted everything defendant told him without inquiring with a licensed broker about the validity of

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196. Id. at 1271.
199. 238 Ga. App. at 20, 517 S.E.2d at 91.
200. Id. at 18, 517 S.E.2d at 90.
201. Id. at 18-19, 517 S.E.2d at 90.
202. Id. at 19, 517 S.E.2d at 91.
203. Id. at 20, 517 S.E.2d at 91 (quoting Bahadori v. National Union Fire Ins. Co., 270 Ga. 203, 205, 507 S.E.2d 467, 470 (1998)).
204. Id.
IATL or the investment, (2) plaintiff failed to confirm IATL's ownership of an alleged patent, (3) plaintiff did not request any prospectus materials, and (4) plaintiff never received a stock certificate.

III. PARTNERSHIPS

A. Supreme Court Determines That a Partnership Interest Is a Chose In Action Under Georgia Law

In Prodigy Centers/Atlanta v. T-C Associates, the Eleventh Circuit certified to the Georgia Supreme Court the question of whether a partnership interest in the form of monies owned to a partnership was a chose in action under Georgia law. T-C Associates ("TCA") obtained a judgment in January 1992 against Prodigy Childhood Development Centers ("PCDC") but neglected to perfect the judgment until May 1994. After perfecting the judgment lien, TCA applied for a court order to garnish PCDC's interests in two limited partnerships to satisfy the unpaid judgment. Between the time TCA obtained the judgment against PCDC and the time it perfected the judgment, the Internal Revenue Service ("IRS") filed a federal tax lien against PCDC. After the case was removed to federal court, the IRS moved for summary judgment, claiming that its tax lien had been filed before TCA had perfected its judgment and that the partnership interests were a chose in action to which TCA's judgment could not attach without a collateral order. TCA filed a cross-motion for summary judgment on the ground that its January 1992 judgment was issued before the federal tax lien was filed. The district court granted TCA's motion, concluding that the proceeds payable to PCDC did not represent PCDC's interest in the partnerships.

Upon review the Georgia Supreme Court agreed with the IRS's definition of a chose in action. A chose in action includes "the right of

205. Id.
207. 127 F.3d 1021, 1022 (11th Cir. 1997).
208. Georgia law provides that "[a] chose in action is personality to which the owner has a right of possession in the future or a right of immediate possession which is being wrongfully withheld." O.C.G.A. § 44-12-20 (1982). Choses in action are not subject to seizure and sale under a judgment lien; rather, some other additional collateral proceeding is necessary to fix the lien of such judgments. Prodigy Ctrs./Atlanta, 269 Ga. at 523 n.3, 501 S.E.2d at 211 n.3 (citing Fidelity & Deposit Co. of Baltimore v. Exchange Bank of Macon, 100 Ga. 619, 625, 28 S.E. 393, 395 (1897)).
209. 269 Ga. at 522-23, 501 S.E.2d at 210-11.
a creditor to be paid on a debt owed by a debtor.”

A partnership interest in a limited partnership is personal property, and partners in a limited partnership have a contractual or statutory right to their share of monies produced by the limited partnership. Although neither the partnership agreements nor the partnership certificates of formation were in the record, the court reasoned that the mere existence of the funds owing to PCDC and the limited partnerships’ interpleader action “make it clear that payments have been made by the limited partnerships as a result of PCDC being a partner in the limited partnerships.” Thus, the funds sought by TCA were monies to which PCDC had a statutory or contractual right of possession and “[a]s proceeds from a contract performance or as a creditor’s right to be paid, the . . . funds constituted a chose in action.”

B. Covenants Not to Compete

The court of appeals addressed the validity of a noncompete agreement in the limited partnership context in Russell Daniel Irrigation Co. v. Coram. John Coram worked for Russell Daniel Irrigation Company, (“RDIC”) for several years before being offered part ownership in the company in the form of a limited partnership interest. RDIC required Coram to sign a limited partnership agreement, that contained a noncompete provision. RDIC also required Coram and the other limited partners to sign stand-alone employment agreements containing a different covenant not to compete. Five years after the execution of these noncompete agreements, Coram began working for a competitor. Coram subsequently sued RDIC for monies owed under the partnership agreement, and RDIC counterclaimed for damages for breach of contract

210. Id. at 524, 501 S.E.2d at 212 (citing Paulsen St. Investors v. EBCO Gen. Agencies, 224 Ga. App. 507, 509, 481 S.E.2d 246, 249 (1997)).

211. Id. at 525, 501 S.E.2d at 212; O.C.G.A. §§ 14-9-701, -9A-49 (1994).

212. 269 Ga. at 526, 501 S.E.2d at 213.

213. Id.

214. Id.


216. The covenant not to compete found in the employment agreement provided as follows:

“Employee will not, for a period of two (2) years following the termination of employment, personally engage in any activity which is directly competitive with any activity engaged in by [RDIC] at its Athens, Havana, Tifton location[s] at the time of his termination. The limitation on directly competitive activities shall apply only in the following counties: [13 counties listed] and it is expressly acknowledged and agreed by both parties that the Employee solicited and did business on behalf of the Employer in each of the above-named counties.”

Id. at 760, 516 S.E.2d at 806 (second and third alterations by court).
based on both noncompete agreements. The trial court granted summary judgment to Coram on the counterclaims, and RDIC appealed the ruling with respect to the enforceability of the noncompete covenant found in the stand-alone employment agreement.\textsuperscript{217} The court first reviewed the varying degrees of scrutiny that covenants not to compete receive. "Strict scrutiny applies to covenants ancillary to employment agreements, whereas a much lesser degree of scrutiny applies to covenants ancillary to the sale of a business; a middle level of scrutiny applies to covenants found in professional partnership agreements."\textsuperscript{218} RDIC claimed that Coram's employment agreement fell within the middle level of scrutiny because he received valuable consideration (in the form of a partnership interest) on the same date he executed the employment agreement.\textsuperscript{219} The court rejected this argument for two reasons. First, the court noted that the existence of two separate covenants not to compete warranted the application of two different analytical standards even though Coram executed both covenants as part of the same transaction.\textsuperscript{220} A noncompete covenant found in the sale of a business or purchase of partnership agreements "are generally afforded greater degrees of latitude" because more valuable consideration is being offered in exchange for the promise not to compete.\textsuperscript{221} Moreover, the value of the partners' profits would be significantly diminished unless protected by a covenant not to compete.\textsuperscript{222} When a partnership requires a partner to enter into a separate employment agreement with an additional covenant not to compete, "the consideration received for that covenant is usually less (generally employment benefits such as salary and insurance coverage), subjecting it to a stricter level of scrutiny."\textsuperscript{223} 

Second, the court found that although Coram had worked for RDIC for nine years and was negotiating for an ownership interest in the partnership, the circumstances suggested that Coram did not have equal bargaining power to RDIC or even a professional negotiating a partnership agreement.\textsuperscript{224} The court distinguished Coram's situation from

\begin{itemize}
  \item \textsuperscript{217} Id.
  \item \textsuperscript{218} Id. at 758-59, 516 S.E.2d at 805 (citing Habif, Arogeti & Wynne, P.C. v. Baggett, 231 Ga. App. 289, 289-91, 498 S.E.2d 346, 349-50 (1998)).
  \item \textsuperscript{219} Id. at 759, 516 S.E.2d at 805.
  \item \textsuperscript{220} Id.
  \item \textsuperscript{221} Id.
  \item \textsuperscript{222} Id.
  \item \textsuperscript{223} Id.
  \item \textsuperscript{224} Id., 516 S.E.2d at 805-06. The court characterized Coram's bargaining power as that of a "mere employee." Id.
\end{itemize}
other cases in which courts applied the middle level of scrutiny to situations in which, for example, the bargaining power of “professionals . . . who either were already partners at the time of negotiation or were in such demand that they were being recruited to join the partnership or professional corporation as an owner.”

Being a “mere employee,” Coram was in a position to be “stigmatized” or singled out as a nonteam-player if he rejected RDIC’s offer.

Thus, the court applied strict scrutiny to the noncompete covenant found in the employment agreement. The court found the covenant to be overbroad and indefinite and, therefore, unenforceable. The scope of prohibited conduct would effectively prevent Coram “from obtaining employment with any competitor in any capacity,” which runs counter to established case law and the Georgia Constitution. The court pointed out that only in cases in which the employee is the “heart and soul” of a business and is “involved in every facet of the business” may a covenant permissibly prohibit an employee from competing in a specified area of business. Even then the prohibition may only govern a “very restricted territory and for a short period of time.” The court also concluded that the covenant was too indefinite as to duration.

IV. BANKING

A. Jointly Titled Municipal Bond is Not a Contract of Deposit with Financial Institution Under O.C.G.A. Section 7-1-13(a)

In Urban v. Lemley, the Georgia Court of Appeals addressed whether survivorship rights apply to municipal bonds held in joint bank accounts. Jessie Beck died in December 1993. Julian Head died in February 1994. At the time of Beck’s death, Beck and Head were joint owners of a tax-free municipal bond issued by the Macon-Bibb County Hospital Authority. The bond was titled jointly in Beck’s and Head’s names with the right of survivorship. Upon Beck’s death, the bond had not yet matured but was ultimately redeemed after the death of Head.

225. Id. at 760, 516 S.E.2d at 806.
226. Id.
227. Id.
228. Id. at 761, 516 S.E.2d at 806.
229. Id.
230. Id.
231. Id.
232. Id.
and Beck. Head's executrix, Lemley, sued Beck's estate, claiming that Head's estate solely owned the bond. Beck's executrix, Urban, sued Head's estate, claiming that Beck's estate solely owned the bond. On a motion for summary judgment, the trial court ruled in favor of Lemley on the issue of bond ownership.\textsuperscript{234}

The executrix of Beck's estate, Urban, attempted to defeat Head's right of survivorship with respect to the bond by suggesting that Beck did not intend for Head to have survivorship rights to the bond.\textsuperscript{235} The court noted, however, that "O.C.G.A § 7-1-813(a) applies only to '[s]ums remaining on deposit at the death of a party to a joint account.'\textsuperscript{236} Furthermore, a "joint account" is "'an account payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship.'\textsuperscript{237} Finally, an "account" is "'a contract of deposit of funds between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit, share account, and other like arrangements.'\textsuperscript{238}

Considering that a municipal bond is not a contract of deposit with a financial institution, but rather is a certificate of indebtedness, the court reasoned that it does not constitute a "joint account" as that term is defined in O.C.G.A. section 7-1-813.\textsuperscript{239} Thus, the court held that the survivorship rights codified in O.C.G.A. section 7-1-813 do not apply to municipal bonds held in joint bank accounts.\textsuperscript{240}

\textbf{B. Legislative Changes}

The 1999 session of the Georgia General Assembly passed several amendments to the Code as it relates to financial institutions,\textsuperscript{241} the most notable of which are summarized below.

\textbf{1. Leasing and Lending Restrictions.} The legislature amended O.C.G.A. section 7-1-282 to make leases of personal property held by a bank subject to the lending limitations of O.C.G.A. section 7-1-285 and to provide that such leasing shall constitute indebtedness under that section.\textsuperscript{242}

\textsuperscript{234} \textit{Id.} at 259, 501 S.E.2d at 530.
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} \textit{Id.} at 262, 501 S.E.2d at 532 (quoting O.C.G.A. § 7-1-813(a) (1997)).
\textsuperscript{237} \textit{Id.} (quoting O.C.G.A. § 7-1-810(4) (1997)).
\textsuperscript{238} \textit{Id.} (quoting O.C.G.A. § 7-1-810(1) (1997)).
\textsuperscript{239} \textit{Id.}
\textsuperscript{240} \textit{Id.}
\textsuperscript{242} Id. § 7-1-282.
2. Redemption of Shares by Banks. The legislature amended O.C.G.A. section 7-1-414 to allow a bank or trust company to acquire issued shares of its common stock, subject to approval by the state, a resolution by the board of directors, and approval by two-thirds of the shares entitled to vote.243

3. Mergers, Conversions, or Consolidations. The legislature amended O.C.G.A. section 7-1-556 to permit a bank or trust company to convert into, merge with, or consolidate with a federal savings institution.244

4. Bank Branches, Offices, Facilities, and Holding Companies. The legislature made significant revisions to O.C.G.A. sections 7-1-600 to -608 to conform provisions relating to, among other things, obsolete restrictions on branch offices outside of a county;245 to revise the application process for establishing branch offices;246 to change permissible activities of bank holding companies;247 and to conform branching provisions to federal law and prior changes in Georgia law.248

5. Interstate Banking. The legislature amended O.C.G.A. section 7-1-621 to liberalize the provisions relating to interstate acquisitions, mergers, and consolidations.249

V. AGENCY—APPARENT AUTHORITY

In Augusta Surgical Center, Inc. v. Walton & Heard Office Venture,250 the Georgia Court of Appeals ruled that a corporation was not bound by a contract for the purchase of real estate signed by an individual serving as the corporation’s officer.251 On May 5, 1995, R. Jeffrey Adkins, M.D., executed a sales contract to purchase an office building for $1,650,000 from sellers, Hamilton and Adams (“Sellers”). At the time of execution, Adkins was Secretary/Treasurer of Augusta

243. Id. § 7-1-414(c).
244. Id. § 7-1-556(a).
245. Id. § 7-1-601.
246. Id. § 7-1-602.
247. Id. § 7-1-606, -608.
248. Id. § 7-1-601.
249. Id. §§ 7-1-621 to -623, -628, -628.1, -628.3 to -628.6.
251. Id. at 285-87, 508 S.E.2d at 669-70.
BUSINESS ASSOCIATIONS

Surgical Center ("Augusta Surgical") and was under contract as the medical director of Surgicare of Augusta, Inc. ("Surgicare"). Adkins put down a $5000 personal check as earnest money. Sellers contended that Adkins acted individually and as agent for Augusta Surgical and Surgicare. One week after signing the contract, Adkins entered a substance abuse treatment program, and the Sellers were unable to locate him as the closing date approached. In the absence of Adkins, Hamilton negotiated with representatives of Surgicare's parent company and with officers of Surgicare.252

No written document provided authorization for Adkins to sign on behalf of any entity involved in the transaction. When the deal collapsed, the Sellers sued the purported purchasers, seeking specific performance or damages for breach of contract. Hamilton claimed that he and Adkins had been negotiating for months and understood that Adkins was operating on behalf of other parties. Adkins testified that he signed the contract only in his individual capacity. Surgicare and Augusta Surgical denied granting authority to Adkins to enter into the sales contract.253

The court held that the absence of a writing granting Adkins authority to enter into the sales contract was not dispositive of the issue of his authority.254 "[W]hile a written instrument may have been executed by an agent not having any authority in writing to do so or not having been ratified by an act of comparable dignity, the principal may nevertheless be estopped by his acts from denying the authority of his agent."255 In other words, if Surgicare or Augusta Surgical ratified Adkins's actions, it would be prevented from denying Adkins's authority to act on their behalf.

The Sellers claimed that Surgicare ratified the contract by agreeing on two occasions to extend the closing date and by deleting a financing term while still attempting to satisfy the extended closing date.256 These facts led the court to conclude that factual issues would need to be resolved by a jury as to whether Surgicare's conduct would have led a reasonable person to believe that Adkins had acted on Surgicare's behalf.257 As to Augusta Surgical, the court found that no apparent

252. Id. at 283-84, 508 S.E.2d at 668.
253. Id. at 285, 508 S.E.2d at 668.
254. Id. at 286, 508 S.E.2d at 669.
256. Id.
257. Id., 508 S.E.2d at 670.
authority could be found to bind it to the sales contract. No facts tied Augusta Surgical to the contract like those that attached Surgicare to it; in addition, Adkins did not sign the contract as an officer or "on behalf of" Augusta Surgical, nor did the Sellers offer evidence that Augusta Surgical clothed Adkins with apparent authority to bind it to the sales contract. "The officers [of a corporation] appointed by the directors are clothed with only such powers and authority as are expressly conferred upon them by the charter or the by-laws, or as may by implied by usage and acquiescence." Thus, the court held that Augusta Surgical was not liable for the sales contract.

VI. PROFESSIONAL ASSOCIATIONS—LIABILITY OF SIGNATORY

In Swiss Bank Corp. v. Thomas, Conner & McDonald, P.A., the Georgia Court of Appeals considered whether members of a professional corporation organized in Georgia could be held personally liable under a sublease purportedly entered into by the entity. The day after defendants formed Thomas, Conner & McDonald, ("Association"), the Association entered into an agreement with Swiss Bank to sublease office space. The terms of the sublease and the signature lines all referred to "Thomas, Conner & McDonald, P.A." However, defendants' signatures did not indicate that they were signing for the Association. The trial court denied Swiss Bank's motion for summary judgment, concluding that defendants were not personally liable for a sublease agreement entered into by each member of the Association. Swiss Bank appealed on the ground that defendants had personally participated in the sublease, which triggered liability under O.C.G.A. section 14-10-7(b).

The court of appeals affirmed the holding of the trial court, finding that defendants were acting in a representative capacity when they signed the sublease, even though none of them denoted that he was

258. Id. at 287, 508 S.E.2d at 670.
259. Id.
261. Id.
263. Id. at 890-91, 514 S.E.2d at 69. That statute provides the following: [M]embers or shareholders of any professional association organized pursuant to this chapter shall not be individually liable for the debts of, or claims against, the professional association unless such member or shareholder has personally participated in the transaction for which the debt or claim is made or out of which it arises. O.C.G.A. § 14-10-7(b) (Supp. 1999).
signing in a representative capacity.\textsuperscript{264} The court pointed to the following facts to support its conclusion: (1) the parties to the agreement knew the sublease was between plaintiff and the Association, (2) the sublease expressly stated that the sublease was between plaintiff and the Association, and (3) even if those parts of the agreement identifying the Association were vague, because Swiss Bank drafted the agreement, the agreement would be construed against it.\textsuperscript{265} Because associations, like corporations, can only operate by the actions of individuals, the court reasoned that O.C.G.A. section 14-10-7(b) would be meaningless if the individual signatories were held liable for every action taken for the Association.\textsuperscript{266}

\begin{flushright}
264. 236 Ga. App. at 892, 514 S.E.2d at 70.
265. Id.
266. Id.
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