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SURVEY ARTICLES

Business Associations

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This Article surveys noteworthy cases that the Georgia Court of Appeals, the Georgia Supreme Court, the United States district courts in Georgia, and the Eleventh Circuit Court of Appeals decided during the survey period. This Article also reviews important acts of the Georgia General Assembly concerning corporation, partnership, securities, and banking law.

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I. CORPORATIONS

A. Piercing the Corporate Veil

During the survey period, many of the cases decided by the Georgia Supreme Court, the Georgia Court of Appeals, and the United States district courts in Georgia relating to corporations concerned the familiar corporate law doctrine of piercing the corporate veil. In most of these cases, the courts relied on and applied the standards developed by the supreme court's 1991 decision in *Hickman v. Hyzer*, a decision reviewed in last year's survey article. In *Hickman* the court set forth a test to be applied in cases that concern piercing by reason of allegations of corporate undercapitalization. The court held "that for undercapitalization of a corporation to justify piercing the corporate veil, it must be coupled with evidence of an intent at the time of the capitalization to improperly avoid future debts of the corporation."

In *Marett v. Professional Insurance Careers, Inc.*, the Georgia Court of Appeals reversed the lower court, which had denied defendant's motions for directed verdict and for judgment notwithstanding the verdict, finding sufficient evidence to warrant piercing the corporate veil. The court of appeals held that there was no issue of fact for the jury to decide with respect to piercing, and therefore, the question of defendant's piercing liability never should have been submitted to the jury. The court applied the test from *Hickman* by stating that "undercapitalization of a corporation will justify piercing the corporate veil only when 'coupled with evidence of an intent at the time of the capitalization to improperly avoid future debts of the corporation.'" In applying this test, the court determined that appellee presented no evidence of fraud at trial, nor evidence of disregard for the corporate form, otherwise known as the "alter ego" test, through commingling of corporate and personal assets. The court concluded that, "[l]ike the corporation in *Hickman*, [appellant's] company was shown to be nothing more than an unsuccessful business

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4. Id.
6. Id. at 182, 410 S.E.2d at 376.
7. Id. at 181, 410 S.E.2d at 376.
8. Id., 410 S.E.2d at 375 (quoting 261 Ga. at 40, 401 S.E.2d at 740).
9. Id. at 180-81, 410 S.E.2d at 375.
venture” and that appellant was entitled to a directed verdict on the piercing issue.¹⁰

In 1987, appellant Marett, along with his two codefendants, formed a holding company, NTFI Holdings, Inc. (“NTFI”), ostensibly for the purpose of acquiring National Trust Fire Insurance Company (“NTFIC”) through the purchase of its stock. Appellee, Professional Insurance Careers, Inc. (“PIC”), solicited NTFI and Marett’s business and offered its services in locating a chief executive officer for NTFIC. Lee Richards, PIC’s president, testified at trial that he had referred a candidate to Marett in 1987 who NTFIC employed in the following year, a point disputed by Marett at trial. Also, Richards testified that invoices sent to Marett for a fee of forty-five thousand dollars for procuring the executive candidate went unpaid. At trial, the parties disputed exactly who was PIC’s client. Marett testified that NTFI acquired NTFIC by using financing that left the insurance company with a negative net worth; however, he stated that his plan required additional investors to contribute five million dollars in capital for the company to begin writing insurance policies. Because of an inability to obtain such additional capital NTFI eventually sold the insurance company. Also, Marett testified that he was a principal in twenty-seven corporations and partnerships that operated from the same office and that he frequently wrote employee paychecks from one company’s account which the other entities reimbursed.¹¹

The court of appeals agreed with Marett, holding that the trial court had erred by submitting to the jury the issue of whether the evidence authorized piercing the corporate veil of NTFIC.¹² The court used the often quoted language of Trans-American Communications v. Nolle¹³ in discussing the alter ego test.¹⁴ The court explained that in order to pierce the corporate veil and disregard the corporate entity, the evidence must show that a shareholder’s

“disregard of the corporate entity made it a mere instrumentality for the transaction of [its] own affairs; that there [was] such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and [that] to adhere to the doctrine of corporate entity would promote injustice or protect fraud.”¹⁵

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¹⁰. Id. at 181, 410 S.E.2d at 376.
¹¹. Id. at 178-80, 410 S.E.2d at 374-75.
¹². Id. at 182, 410 S.E.2d at 376.
¹⁴. 201 Ga. App. at 180-81, 410 S.E.2d at 375.
¹⁵. Id. (quoting 134 Ga. App. at 460, 214 S.E.2d at 717).
The court found no evidence of commingling of personal and corporate assets or disregard for the corporate form. However, the court noted that there appeared to be some evidence of commingling of assets of various corporations owned by Marett. The court pointed out that Marett had admitted that NTFI had not been capitalized sufficiently to begin operating as an insurance company. The court quoted Hickman, noting its requirement of "'intent at the time of the capitalization to improperly avoid future [corporate] debts'" to justify piercing. Without evidence of fraudulent intent on the part of Marett, at the time of the capitalization of NTFIC, the court concluded that NTFIC [like the corporation in Hickman, . . . was shown to be nothing more than an unsuccessful business venture, "not a case of wrongdoing, fraud and bad faith on the part of a corporate [officer and that t]he . . . record [did] not create an issue of fact for the jury regarding piercing the corporate veil."

In Hartkopf v. Heinrich Ad. Berkemann, the court of appeals applied the Hickman test relating to possible undercapitalization and the alter ego test to determine if it should pierce the corporate veil. In Hartkopf the court affirmed the lower court's denial of Heinrich Ad. Berkemann's ("HAB") motion for summary judgment to pierce the corporate veil of Hermes Enterprises, Inc. ("HEI") and find its shareholders liable for HEI's debts to HAB. As in Marett, the court applied the Hickman test and held that even if a corporation is found to be undercapitalized, when there is no evidence of fraudulent intent at the time of its capitalization and insufficient evidence of fraud or misuse of corporate assets, piercing the corporate veil will not be authorized.

In Lawton v. Temple-Warren Ford, Inc., the court of appeals applied the Hickman test again. However, the court noted that corporate undercapitalization analyzed in Hickman is only one rationale for piercing the

16. Id. at 181, 410 S.E.2d at 375.
17. Id., 410 S.E.2d at 376. See also Lawson v. Athens Auto Supply & Elec., 200 Ga. App. 609, 409 S.E.2d 90 (1991) (in which sole shareholder of corporations commingled and confused corporations' funds and made several personal loans from the corporations to himself that, as inferred from the evidence, went unrepaid, authorized piercing of the corporate veil).
18. 201 Ga. App. at 181, 410 S.E.2d at 375.
20. Id., 410 S.E.2d at 376 (quoting 261 Ga. at 41, 401 S.E.2d at 740).
22. Id. at 357, 408 S.E.2d at 453.
23. Id. at 358, 408 S.E.2d at 453-54.
24. Id. at 357, 408 S.E.2d at 453.
26. Id. at 222, 416 S.E.2d at 528.
Citing *Marett*, the court stated that the alter ego test discussed in *Marett* provided another rationale for piercing.\(^{28}\) Also, the court cited *Commonwealth Financial Corp. v. Sherrill*,\(^{29}\) noting that the separateness of the corporate entity also will be disregarded if a party has overextended its privilege in the use of a corporate form to perpetrate fraud or avoid tort responsibility.\(^{30}\) However, the court held that there was no evidence in the present case to warrant piercing defendant's corporate veil under any of these rationales, thus affirming the trial court's motion for summary judgment in favor of defendant on this issue.\(^{31}\)

Appellant Lawton purchased a truck from appellee Temple-Warren Ford, Inc. ("Temple-Warren"). Lawton claimed that Temple-Warren sales personnel represented the truck to him as a 1984 model truck. The truck was in fact a 1984 "glider kit," a truck whose engine, transmission, and rear wheels were taken from an older model. Lawton sued Temple-Warren alleging fraud in the sale of the truck, and later amended his complaint to add as defendants the company's two shareholders. The defendant shareholders' affidavits and depositions contained statements averring that neither of them had participated in the sale of the truck to Lawton, nor were they aware that Lawton had not been fully informed about the rebuilding of the truck. The court of appeals found these statements to be uncontroverted. Additionally, in his deposition one of the shareholders stated that despite a one million dollar initial capitalization of the corporation, he felt the corporation had been undercapitalized from its inception because the company's growth exceeded his expectations. Lawton asserted that this statement acted as an admission of undercapitalization of the corporation.\(^{32}\)

The court of appeals, applying the *Hickman* test to the facts of this case, held that even if a shareholder admitted the undercapitalization of the corporation, such admission did not justify piercing the corporate veil.\(^{33}\) The court stated that any proof of undercapitalization "'must be coupled with evidence of an intent at the time of the capitalization to improperly avoid future debts of the corporation.'"\(^{34}\) The court found no evidence at the time of Temple-Warren's capitalization of this type of intent nor evidence of any attempts to avoid future debts of the corporea-
The court stated that the Hickman test provided only one rationale for piercing the corporate veil, and addressed Lawton's assertion that fraud by the shareholders justified a disregard of the corporate entity. The court stated that "the separateness of the corporate entity will be disregarded to remedy injustices which arise where a party has overextended his privilege in the use of a corporate entity in order to perpetrate fraud or to avoid tort responsibility." After analyzing the record of the case and finding no evidence of the shareholders' involvement in the sale of the truck to Lawton or that they had any knowledge of the information conveyed to Lawton during the sale negotiations, the court found the evidence insufficient to support a finding that the shareholders hid behind the corporate entity to insulate themselves from fraud. The court did not find evidence of an attempt to improperly avoid future debts of the corporation, even though one of the shareholders had removed "two hundred fifty thousand dollars of the dealership's capital to cover problems in another business he was operating." Thus, the court affirmed the trial court's grant of defendants' motion for summary judgment, disallowing piercing of the corporate veil.

In Summit-Top Development, Inc. v. Williamson Construction, Inc., the court of appeals applied the more traditional rationales for piercing the corporate veil and affirmed the lower court's verdict against the principal shareholders of Summit-Top Development, Inc. ("Summit-Top"). The court applied the alter ego and evasion of liability rationales to the facts of this case. The court found that defendants had historically used the corporate form to evade business obligations and affirmed the trial court's decision holding the defendant shareholders personally liable for Summit-Top's obligation to the plaintiff.

In March 1988, Summit-Top retained Williamson Construction, Inc. ("Williamson") to perform certain pipe installation and other work on a subdivision being developed by Summit-Top. Williamson billed Summit-Top on a monthly basis for work performed. Summit-Top paid the invoices on this basis until a dispute arose over an invoice in September 1988. Summit-Top and Williamson failed to resolve the dispute and Williamson eventually ceased work on the subdivision project and brought an
action against Summit-Top and its principal shareholders to recover the outstanding balance. The trial court returned a verdict in favor of Williamson against Summit-Top and its principal shareholders, finding that the shareholders had abused the corporate form, and were therefore, personally liable for the corporation's debt to Williamson. On appeal, the shareholders argued that the evidence failed to establish that they had abused the corporate form. Williamson contended that the shareholders, in addition to the present case, had used corporations to avoid legitimate claims of subcontractors on previous projects. The court of appeals agreed with Williamson.

The court reviewed the various veil-piercing principles and stated that the corporate form will be disregarded as a mere alter ego of a person if it is shown that it has "'been used as a subterfuge so that to observe it would work an injustice.'" The court determined that the corporation must be shown to be "'a mere instrumentality for the transaction of [the shareholders'] own affairs; that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist.' " Applying these rationales to the present case, the court found that the principal shareholders had been involved in several similar projects that had "left in their wake numerous unpaid contractors and subcontractors whose recourse appears to be enforcement of materialmen's liens against insolvent corporations." Also, the court found that the principal shareholders' own testimony evinced "a pattern of practice wherein the corporate entity is a mere instrumentality to evade contractual responsibility and that [Williamson] is now a victim of that course of conduct." The court concluded that the evidence supported the verdict against the principal shareholders personally.

During the survey period, the Georgia courts focused too frequently on the undercapitalization test set forth in Hickman. This test is difficult to apply in the business context of minimum capitalization and interferes with traditional analysis of piercing issues. Summit Top allowed a pattern of practice in past corporations to find the shareholders liable for their actions in a new corporate entity. This decision, which includes minimal factual information, extends veil piercing rationale in a troubling manner.

45. Id. at 460-64, 416 S.E.2d at 890-92.
46. Id. at 463-64, 416 S.E.2d at 892.
47. Id. at 463, 416 S.E.2d at 892 (quoting Amason v. Whitehead, 186 Ga. App. 320, 321-22, 367 S.E.2d 107, 108 (1988)).
49. Id.
50. Id. at 464, 416 S.E.2d at 892.
51. Id.
B. Tortious Interference

In *Rome Industries, Inc. v. Jonsson*, the court of appeals addressed a case of first impression. Defendant in a breach of contract suit filed a counterclaim against plaintiff, alleging tortious interference with the fiduciary relationship between plaintiff corporation and its president. The court held that the relationship between a corporation and its president is essentially a contractual one, and therefore, any action on the part of a third party to induce an executive to breach that contractual duty is actionable as tortious interference with contractual relations.

Tow Tractors, Inc. ("TTI") filed a breach of contract action against Rome Industries, Inc. ("Rome") that arose out of a series of business transactions between TTI and Rome. Rome counterclaimed against TTI, adding appellee Jonsson and others as defendants in the counterclaim. Rome alleged that defendants interfered with the fiduciary relationship between Rome’s president and Rome by inducing the president to breach his fiduciary duty to the corporation. The trial court granted summary judgment in favor of the counterclaim defendants on the ground that the allegations did not state a claim under Georgia law.

On appeal, the court stated that although no precedent concerning a claim for tortious interference with a fiduciary relationship between a corporation and one of its officers existed, the court would analogize this case to cases concerning claims of tortious interference with employment relationships, long recognized as actionable under Georgia law. The court stated that the fiduciary relationship that exists between a corporation and its officers is one that arises out of a contractual or employment relationship between the parties, and "Georgia has long recognized the tort of wrongful interference with employment relationships." The court noted that such actions usually arise from an alleged inducement of an employee to break his employment contract with his employer, and it saw no reason why liability should be limited to only those cases concerning a total breach of an employment contract. The court pointed out that:

"[o]ne under a duty to render a performance has a property interest in the contract in that he has the right to render the required performance free from unjustified and unprivileged intentional invasions that retard

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53. Id. at 683, 415 S.E.2d at 652.
54. Id. at 682-83, 415 S.E.2d at 651-52.
55. Id. at 683, 415 S.E.2d at 652.
56. Id. at 682-83, 415 S.E.2d at 651-52.
57. Id. at 683, 415 S.E.2d at 652.
58. Id.
59. Id.
performance or make the performance more difficult or expensive. Interference of that type constitutes an actionable tort which embraces within its scope all intentional invasions of contractual relations, including any act . . . interfering with the performance itself, regardless of whether breach of contract is induced."60

Thus, tortious interference with employment relations includes not only inducement to breach a contract but also inducement to breach a duty owed to an employer under the contract. The court reversed the trial court's granting of summary judgment to appellees and held that a claim of tortious interference with fiduciary relationship between a corporation and its executive does state a claim under Georgia law.61 Georgia practitioners should hope that this type of tortious interference claim is not regularly pleaded.

In SunAmerica Financial, Inc. v. 260 Peachtree Street, Inc.,62 the court of appeals again confronted a case of first impression in the area of tortious interference with contractual relations.63 In SunAmerica the court addressed the question of whether the parent of a wholly-owned subsidiary can be deemed a third party, as a matter of law, capable of tortiously interfering with the contractual relations between such subsidiary and another party.64 The court concluded that circumstances could arise under which the parent could be deemed to have interests so different from the subsidiary that it could be deemed to be a third party capable of tortiously interfering with that subsidiary's contract with another.65

Appellee, 260 Peachtree Street, Inc. ("Peachtree"), was successor in interest as lessor under a lease to which appellant, SunAmerica Financial, Inc. ("SAF"), had succeeded as lessee by assignment. SAF was a wholly-owned subsidiary of SunAmerica Corporation ("SAC"), which in turn was a wholly-owned subsidiary of Broad, Inc. ("Broad"). Contemporaneous with SAF's succession to the lessee's interest under the lease, SAC executed an unconditional guarantee of payment and lease obligation performance. Soon thereafter, SAF moved its operations and vacated the leased premises. SAF continued to pay rent under the lease while attempting to sublease the premises. The attempted subletting proved unsuccessful due to the presence of asbestos within the premises. Subsequently, a dispute arose due to a planned renovation of the premises by SAF and a request that Peachtree remove all of the asbestos on the prem-

60. Id. at 684, 415 S.E.2d at 652 (quoting Perry & Co. v. New South Ins., 182 Ga. App. 84, 89, 354 S.E.2d 852, 857 (1987)).
61. Id.
63. Id. at 797, 415 S.E.2d at 684.
64. Id. at 797-98, 415 S.E.2d at 684.
65. Id. at 798, 415 S.E.2d at 684.
ises. Ultimately Peachtree received notification from a senior vice president of Broad, who was also a director of SAF, that they would withhold further rental payments because of Peachtree's failure to fulfill its lease obligations. Peachtree brought an action seeking payment of rents due under the lease from SAF and from the guarantor of the lease, SAC, as well as a claim against Broad for tortious interference with the lease contract between SAF and Peachtree. Broad moved to dismiss on the grounds of failure to state a claim, asserting that a parent corporation cannot tortiously interfere with contractual obligations between one of its subsidiaries and another party. The trial court granted Broad's motion to dismiss and Peachtree appealed the issue as cross-appellant to SAF's appeal on other grounds.

The court of appeals declined to accept the trial court's conclusion that "'a parent and its wholly-owned subsidiary have "a complete unity of interest,"' and, therefore cannot tortiously interfere with the wholly-owned subsidiary's contractual relations." Rather, the court noted that while "'a third person must have maliciously and without lawful justification induced [a] breach of an existing contract or caused the termination of a recognized contractual relation'" for there to be tortious interference with a contract, the court could not conclude that the parent of a wholly-owned subsidiary "cannot be deemed, as a matter of law, a third party capable of tortiously interfering with the contracts of said subsidiaries." The court found precedent for the proposition that a parent corporation, acting through its officers, directors, or agents, normally does not stand in the position of third-party stranger to a contract between one of its subsidiaries and another party in order for there to be tortious interference with that contractual relationship. However, the court noted that there can arise circumstances under which the interests of the corporation and its wholly-owned subsidiary may differ. Therefore, the court was reluctant to establish a bright line test that would eliminate parent corporations as possible tortfeasors in dealing with their wholly-owned subsidiaries' contractual relations with others. The court held that

the better rule appears to be that of giving a qualified privilege to the parent corporation, permitting it to interfere with a wholly-owned subsidiary's, or the latter's wholly-owned subsidiary's, contractual relations with another party when the contract threatens a present economic in-

66. Id. at 790-92, 415 S.E.2d at 678-80.
67. Id. at 797, 415 S.E.2d at 683-84 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)).
68. Id. at 797-98, 415 S.E.2d at 684.
69. Id. at 798, 415 S.E.2d at 684.
70. Id.
71. Id.
terest of said subsidiary, absent clear evidence that the parent employed wrongful means or acted with improper purpose.\textsuperscript{72}

In examining the record, the court found genuine issues of material fact existed concerning whether Broad or its officers had acted as officers of Broad or simply agents of SAF, whether Broad employed wrongful means, and whether Broad had an improper purpose in its termination of the lease.\textsuperscript{73} Reversing the trial court’s judgment, the appeals court stated that, generally, issues regarding wrongful means used or improper purposes acted upon normally present questions of fact for a jury to decide; however, when evidence shows clearly that a jury could reasonably draw only one conclusion, the case may be decided as a matter of law.\textsuperscript{74}

This novel case illustrates that attorneys representing corporations and their wholly-owned subsidiaries should advise their clients to act scrupulously and correspond at the proper level and not allow the parent to act for a wholly-owned subsidiary that may have interests diverse from those of the parent.

In a case that pre-dated SunAmerica, the United States District Court for the Middle District of Georgia applied a bright line test for tortious interference by a parent corporation. In Anderson Chemical Co. v. Portals Water Treatment, Inc.,\textsuperscript{75} the court concluded that no action for tortious interference with contract against the parent of a wholly-owned subsidiary can be maintained in cases when the parent is charged with interfering with its subsidiary’s agreement with another party.\textsuperscript{76}

In November 1987, Portals Water Treatment, Inc. (“Portals”) and Anderson Chemical Company, Inc. (“Anderson”) entered into an alleged nonbinding letter of intent. Plaintiff, Anderson, argued the binding nature of the contract, whereby Portals was to purchase Anderson. The parties did not agree upon or execute a purchase agreement and Portals’ parent company, Portals Holdings, PLC of the United Kingdom (“PHPLC”), did not exercise its right to approve the transaction. In early 1988, Portals informed Anderson that it had decided not to consummate the purchase. Anderson, its subsidiaries and stockholders filed suit against PHPLC and its United States subsidiaries, Wright Chemical Company and Portals, alleging, inter alia, breach of contract and tortious interference with contractual and current and prospective business relations by PHPLC.\textsuperscript{77}

The court determined that the November writing did not constitute an enforceable contract, and thus, Anderson’s claim for tortious interference

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{76} Id. at 1584.
\textsuperscript{77} Id. at 1577.
With contractual rights had no merit. With respect to the claim of tortious interference with business relations, the court held that PHPLC could not have tortiously interfered with a contract that was subject to PHPLC's approval. Additionally, the court stated that "tortious interference claims require the action of a third party, and this requirement cannot be satisfied by the action of [a] wholly-owned subsidiary and its parent." Subsequently, the court granted defendants' motion for summary judgment on all claims. This case stated the law concerning tortious interference by a parent corporation with its subsidiary before the SunAmerica case.

C. Fiduciary Duty of Directors

In Gardiner v. McDaniel, the court of appeals clarified that the fiduciary duty owed to a corporation and its shareholders by a director does not apply to personal transactions between a director and the corporation's president. The court held that when a corporate director and the corporation's president enter into an agreement that concerns the purchase and sale of the corporation's shares, absent a special relationship of trust or confidence between the two, the president may not assert the director's fiduciary duty to the corporation and its shareholders as a defense to a breach of the agreement. Plaintiff acted as a director and owned shares in a closely held corporation. Defendant served as the president and owned shares of the corporation. Defendant executed a promissory note to plaintiff in return for all of plaintiff's shares. After defendant defaulted on the note, plaintiff filed suit to collect the unpaid accelerated amount due under the note. Defendant raised the defense of fraudulent misrepresentation, claiming that plaintiff misrepresented the note to defendant as a corporate obligation rather than a personal one in violation of plaintiff's fiduciary duty to defendant as a director. Defendant claimed that plaintiff's position as a director and defendant's position as a shareholder relieved defendant of his "obligation to exercise ordinary diligence to verify the terms of the

78. Id. at 1579.
79. Id. at 1584.
80. Id.
81. Id.
83. Id. at 664, 415 S.E.2d at 304.
84. Id.
85. Id. at 663, 415 S.E.2d at 303.
note that he signed.\textsuperscript{86} The court granted plaintiff's motion for summary judgment and defendant appealed.\textsuperscript{87}

In affirming the trial court's grant of plaintiff's motion for summary judgment, the court of appeals held that plaintiff owed its fiduciary duty as a director to the shareholders.\textsuperscript{88} The court also explained that in this transaction plaintiff acted simply as a seller of his shares in the corporation, not as a director.\textsuperscript{89} The court further explained that sellers and purchasers of property are presumed to be dealing at arm's length, and noted that the alleged fraud did not relate to the value of the shares, but whether the note was a personal obligation.\textsuperscript{90} The court explained that under these circumstances, absent a special relationship of trust or confidence, defendant could not be relieved of his duty to exercise ordinary diligence on his own behalf.\textsuperscript{91}

D. Successor Liability

In Cilurso v. Premier Crown Corp.,\textsuperscript{92} the United States District Court for the Middle District of Georgia examined a tort claim against a corporate defendant that had acquired all of the assets of another corporation whose product had given rise to the tort claim.\textsuperscript{93} The court refused to extend Georgia law on successor liability beyond the parameters established by the Georgia Supreme Court.\textsuperscript{94} The court held that enjoyment of the good will and identity of the product manufactured by the company whose assets the defendant corporation purchased did not give rise to successor liability under Georgia law.\textsuperscript{95}

In 1978, Sirchie Finger Print Laboratories, Inc. ("Sirchie") purchased the assets of defendant Premier Safety Equipment Company ("PSE") under an agreement expressly excluding any assumption of PSE's liabilities. PSE manufactured, among other things, police motorcycle helmets under the Premier brand label. Later that year, defendant Premier Crown Corporation ("PCC"), a newly formed corporation, acquired all of Sirchie's interest in PSE. Neither Sirchie nor PCC ever manufactured a safety helmet under the Premier brand label. In 1983, officer Anthony Cilurso of the Warner Robins Police Department was killed while on duty.

\textsuperscript{86} Id. at 663-64, 415 S.E.2d at 304.
\textsuperscript{87} Id. at 663, 415 S.E.2d at 303.
\textsuperscript{88} Id. at 664, 415 S.E.2d at 304.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{93} Id. at 373.
\textsuperscript{94} Id. at 374.
\textsuperscript{95} Id.
when his Premier brand helmet came off during a motorcycle accident. Cilurso's estate brought an action against Sirchie and PCC alleging liability as successors to PSE. Defendants Sirchie and PCC moved for summary judgment.6

The court explained that in Georgia a corporation purchasing another corporation does not assume that corporation's liabilities, "unless: (1) there is an agreement to assume liabilities; (2) the transaction is, in fact, a merger; (3) the transaction is a fraudulent attempt to avoid liabilities; or, (4) the purchaser is a mere continuation of the predecessor corporation."97 The court found that plaintiff's allegations did not suggest fraud or a merger of the entities and that Sirchie's purchase agreement expressly excluded any assumption of PSE's liabilities.98 The court stated that in a continuation argument Georgia law requires "some identity of ownership between the asset purchaser and the seller."99 The court found no evidence to support such an allegation and, to the contrary, pointed out that plaintiffs had "named and served the principal officer of the defunct PSE as a party defendant."100 In granting defendants' motion for summary judgment, the court stated that plaintiffs' central arguments that successor liability should be applied, because PCC enjoyed PSE's good will and identity of the manufactured product, were "confus[ions of] arguments advocating the expansion of Georgia law for a successor liability theory."101

E. Legislative Changes

The General Assembly enacted only two significant pieces of legislation affecting corporations in 1992. House Bill 1649, which became effective on July 1, 1992, is codified as the new Chapter 11 of Title 14 of the Official Code of Georgia Annotated ("O.C.G.A.").102 The new legislation creates requirements and rights for a new statutory entity, the "foreign limited liability company" ("LLC").103 Like shareholders of corporations and limited partners of limited partnerships, LLC members enjoy limited liability. The LLC avoids the need for a general partner while maintaining the tax advantages of a "pass through" entity. Furthermore, the LLC is not

96. Id. at 373.
97. Id. (citing Bullington v. Union Tool Corp., 254 Ga. 283, 284, 328 S.E.2d 726, 727 (1985)).
98. Id. at 373-74.
99. Id. at 374.
100. Id.
101. Id.
103. Id. § 14-11-1.
constrained by the shareholder and capital structure limitations imposed on Subchapter S corporations.

There are two significant features to the new statute. First, LLCs transacting business in Georgia must obtain a certificate of authority from the Secretary of State's office and appoint a registered agent for service of process. 104 Second, the laws of the foreign jurisdiction under which the LLC organized must "govern its organization[,] . . . internal affairs[,] . . . liability of its managers, members, and other owners, regardless of whether [or not the LLC] procured or should have procured a certificate [from the Secretary of State under the new Chapter 11]." 105 Foreign limited liability companies are defined under the new law as "a limited liability company formed under the laws of a jurisdiction other than this state." 106 The law also provides some exceptions to what constitutes transacting business in the state. 107

The provisions for appointment, resignation, change of registered agent or office, failure to appoint a registered agent, requirements for annual reporting to the Secretary of State, and consequences for failing to obtain a certificate of authority parallel the corresponding provisions in the corporate code and limited partnership code. 108

House Bill 1612 amends O.C.G.A. section 14-2-151 109 by extending to documents executed by a corporation's president or vice-president and attested by a secretary or assistant secretary without a corporate seal the same right of third parties to rely on the validity and due authorization of the instrument, as was afforded to the same documents that included a corporate seal. 110 The same bill also deleted from O.C.G.A. section 14-5-7(a) 111 the requirement of a corporate seal on documents conveying title to real property for entitlement to a presumption of authority. 112

II. BANKS

In Milligan v. Gilmore Meyer, Inc., 113 the United States District Court for the Southern District of Georgia analyzed the application of the doctrine developed by the Supreme Court in D'Oench, Duhme & Co. v.
FDIC\textsuperscript{114} to a rather complex real estate transaction and later foreclosure action by the Resolution Trust Corporation ("RTC").\textsuperscript{115} Plaintiffs, in an attempt to stop the RTC from foreclosing on their property, claimed perfect equity and title to the property superior to the RTC's recorded note and deed to secure debt based on an unrecorded real estate purchase agreement.\textsuperscript{116} The court explained that "[t]he \textit{D'Oench, Duhme} doctrine is a 'common law rule of estoppel precluding a borrower from asserting against the [Federal Deposit Insurance Corporation ("FDIC")]) defenses based upon secret or unrecorded side agreements that alter[] the terms of [a] facially unqualified obligation.'\textsuperscript{117} The court held that the \textit{D'Oench, Duhme} doctrine conclusively barred plaintiffs from asserting any defenses to the RTC's position as holder in due course of the note and their foreclosure action thereunder.\textsuperscript{118}

A real estate agent approached plaintiffs, Barbara and Gordon Milligan (the "Milligans"), and Gordon Milligan's mother in 1987 about selling their adjoining residential properties in Savannah, Georgia to the broker's client Gilmore Meyer Incorporated ("GMI"). For tax reasons, the Milligans entered into an agreement whereby they would sell their property and Milligan's mother's property to GMI in return for cash and a residence that GMI agreed to purchase and build for the Milligans, with the cash going to Milligan's mother. After selecting a lot in a subdivision in Savannah, the Milligans and GMI closed on the purchase of their residence and surrounding property. At closing, the Milligans entered into a separate real estate contract with GMI, which they never recorded, to acquire the new subdivision lot on which GMI agreed to construct their new home. The contract stated that GMI had good and marketable title to the new lot and that the Milligans had paid GMI for the new lot and a to-be-

\textsuperscript{114} 315 U.S. 447 (1942). Explaining the doctrine, the court in \textit{Milligan} pointed to a recent Eleventh Circuit Court of Appeals decision in which that court described the events that gave rise to \textit{D'Oench}. 775 F. Supp. at 404. In \textit{Vernon v. Resolution Trust Corp.}, 907 F.2d 1101 (11th Cir. 1990), the Eleventh Circuit, in describing the facts of \textit{D'Oench}, stated that a bank obtained a promissory note from another party while promising them not to enforce the note and to refund any interest charged on the note to hide a defaulted loan on its books. \textit{Id.} at 1104. After the bank failed, the FDIC attempted to collect on the note while the notemaker claimed he owed nothing to the bank. \textit{Id.} The Eleventh Circuit noted the Supreme Court's conclusion "that there exists 'a federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans.'" \textit{Id.} (quoting \textit{D'Oench, Duhme}, 315 U.S. at 457). The Court held the notemaker liable on the note because to allow him to escape liability would violate public policy. \textit{Id.}

\textsuperscript{115} 775 F. Supp. at 405.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.} at 403-04 (quoting \textit{Campbell Leasing, Inc. v. Federal Deposit Ins. Corp.}, 901 F.2d 1244, 1248 (5th Cir. 1990)).

\textsuperscript{118} \textit{Id.} at 404-05, 410.
constructed home. In fact, GMI did not have legal title to the new lot, but rather had an executory purchase contract for it. GMI never actually acquired legal title to the new lot. A related company, Preston Gilmore Construction Company, Inc. ("PGCCI"), actually purchased the new lot from its owner and obtained legal title to it. Immediately thereafter, PGCCI obtained a construction loan to build the home on the new lot by signing a promissory note and giving a deed to secure debt on the new lot to NCF Mortgage Company ("NCF"), a subsidiary of North Carolina Savings & Loan Association, F.A. ("NCSLA"). NCF recorded this deed in the clerk of the superior court’s office in the county in which the lot was situated.118

After taking possession of the new residence in 1989, the Milligans discovered that they did not have a recorded title to the property. The Milligans then brought suit for specific performance and damages against PGCCI, GMI, and the individual owners of GMI in September 1989. RTC was appointed Conservator for NCSLA in March 1990. In June of that year, NCF assigned the deed to secure debt and accompanying note to NCSLA who then recorded the assignment. Soon thereafter, PGCCI defaulted on the note and RTC, as Conservator for NCSLA, commenced foreclosure proceedings on the deed to secure debt in August 1990. Following RTC’s foreclosure action that same month, the Milligans amended their complaint adding RTC, NCSLA and NCF as defendants in an attempt to prevent RTC from foreclosing on the deed to secure debt. The lower court granted the Milligans a temporary restraining order.120

RTC became Receiver for NCSLA in September of 1990 and removed the case to the United States District Court for the Southern District of Georgia pursuant to provisions in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").121 RTC filed a motion for summary judgment citing, inter alia, the D’Oench, Duhme doctrine of federal common law.122

After discussing the requirements for granting a summary judgment, the court analyzed the preclusive effect of the D’Oench, Duhme doctrine to plaintiffs’ claims against RTC.123 As mentioned previously, the court noted that the D’Oench, Duhme doctrine precludes defendants from asserting defenses against the FDIC based upon unrecorded collateral or side agreements.124 The court further explained that the doctrine was initially limited to the FDIC, but now it is settled law that the Federal Sav-

118. Id. at 401-02.
120. Id. at 402.
122. 775 F. Supp. at 402.
123. Id. at 403-04.
124. Id.
ings and Loan Insurance Corporation ("FSLIC") may assert the doctrine as receiver for failed savings and loans and that the RTC, as FSLIC's corporate successor, may do likewise.\(^1\) The court also noted that the doctrine initially applied only to cases factually similar to *D'Oench, Duhme*, however, the doctrine has since been "expanded in the federal common law well beyond that narrow factual setting . . . and now applies to virtually all cases where a federal depository institution is confronted with an agreement not documented in the institution's records."\(^12\) The court noted that the federal courts protect federal insurers by according them a holder in due course status under federal common law, even though they may not technically qualify as such under state law.\(^13\) Also, the court pointed out that the *D'Oench, Duhme* doctrine has been "partially codified" in 12 U.S.C. section 1823(e),\(^14\) which, since FIRREA's enactment, applies to RTC.\(^15\)

Plaintiffs' premised their claims against RTC on assertions of "perfect equity" in their new residence through the sales contract with GMI and "estoppel by deed."\(^16\) The court stated that both parties wasted their efforts by espousing alternate sides of these assertions and related arguments.\(^17\) The court pointed out that, even assuming plaintiffs' assertions to be true and their legal conclusions to be correct, under federal common law and the *D'Oench, Duhme* doctrine, plaintiffs' claims must fail.\(^18\) As noted previously, RTC obtained holder in due course status under federal common law with regard to the note and its accompanying security

\(^{125}\) Id. at 404.

\(^{126}\) Id. (quoting Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1510 (11th Cir. 1991)).

\(^{127}\) Id.


\(^{129}\) 775 F. Supp. at 405. The court noted that section 1823(e) states that:

No agreement which tends to diminish or defeat the interest of the Corporation [FDIC] in any asset acquired by it . . . either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—

1. shall be in writing,

2. was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

3. was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

4. has been, continuously, from the time of its execution, and [sic] official record of the depository institution.

\(^{130}\) 12 U.S.C. § 1823(e); 775 F. Supp. at 405.

\(^{131}\) Id. at 406.

\(^{132}\) Id.
The court examined the status of a holder in due course under Georgia law and concluded that plaintiffs could not defeat the RTC’s status. The court noted that, under Georgia law, one may defeat a holder in due course’s claim to an instrument only by showing the existence of at least one of five defenses to the holder’s claim provided by statute. Although two of the five defenses were potentially applicable to plaintiffs’ claims, the court determined that by their definitions and given the allegations, these defenses were not available to plaintiffs. The court analyzed a fraud in factum defense and a null or void instrument defense to RTC’s holder in due course status and found that, based on the evidence, the note was, at best, a voidable note rather than a void one. Furthermore, there potentially existed only fraud in the inducement, not fraud in the factum, in plaintiffs’ execution of the note. Therefore, the court held, plaintiffs could not assert any defenses to the RTC’s status as holder in due course of the note under Georgia law.

Finding all of plaintiffs’ potential defenses to RTC’s holder in due course status under the note to have failed at law, the court granted summary judgment in favor of RTC. The court noted that the “result [was] harsh. Nevertheless, [a]s pitiful as the [p]laintiff’s situation may be, a more compelling consideration, in view of the monstrous national debt burden imposed by the spate of recent bank failures, is the sanctity and uniform application of the D’Oench doctrine and [12 U.S.C. § 1823(e)].”

133. See supra note 118.
134. 775 F. Supp. at 406.
135. Id. The court stated that under Georgia law, a holder in due course takes an instrument free from:

(1) All claims to it on the part of any person; and

(2) All defenses of any party to the instrument with whom the holder has not dealt except:

(a) Infancy . . .,

(b) Such other incapacity, or duress, or illegality of the transaction as renders the obligation of the party a nullity; and

(c) Such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or essential terms; and

(d) Discharge in insolvency proceedings; and

(e) Any other discharge of which the holder has notice when he takes the instrument.

Id. (quoting O.C.G.A. § 11-3-305 (1982)).
136. Id. at 406-07.
137. Id. at 408.
138. Id. at 407.
139. Id. at 409.
140. Id. at 410.
141. Id.
During the survey period the district courts, the court of appeals, and the supreme court decided several cases dealing with partnership law. Although no new and startling developments occurred during the survey period, several cases are worth noting in this Article.

In *Antonic Rigging & Erecting of Missouri, Inc. v. Foundry East Ltd. Partnership*, the United States District Court for the Southern District of Georgia reviewed certain aspects of limited partnership law to determine contribution issues relating to subscription agreements, when a limited partner becomes liable as a general partner, and basic contract law.

A Georgia limited partnership was formed with NAPPCO, Inc. ("NAPPCO") as general partner, and Mayflower Group, Ltd. ("Mayflower Group"), Mayflower Foundry ("Mayflower Foundry"), and NAPPCO as the limited partners. The partnership obtained industrial revenue bonds from Warren County to develop a steel fitting and pipe foundry in Warrington, Georgia. The partnership agreement set forth the capital contributions of the partners as follows: NAPPCO—twenty thousand dollars for its general partner interest and nine hundred eighty thousand dollars for its limited partner interest, Mayflower Foundry—eight hundred thousand dollars, and Mayflower Group—twenty thousand dollars. Additionally, the partners signed a subscription agreement that set forth certain additional capital contributions up to an additional three million dollars. Antonic began contract negotiations with the representatives of the general partner before the formation of the partnership. The partnership encountered financial difficulties and Antonic sued for breach of contract under three separate agreements. The majority of the contract negotiations occurred between representatives of Antonic and representatives of NAPPCO. NAPPCO began experiencing financial difficulties and eventually resigned as general partner. A new general partner, AMT Foundry, Inc. ("AMT"), became the substitute general partner and specifically did not assume the obligations of the prior general partner. The Mayflower entities eventually owned one hundred percent of the issued and outstanding shares of AMT. The partnership owed Antonic a substantial amount of money and Antonic also sought a termination fee, late charges, cancellation charges and penalties for bad faith litigation, and attorney fees. Both sides moved for summary judgment.

Antonic tried to establish Mayflower's liability by alleging that Mayflower agreed pursuant to the subscription agreement to supply addi-
tional capital, and that Mayflower had failed to make its initial capital contribution, in violation of the Georgia Revised Uniform Limited Partnership Act ("GRULPA"). The court determined that there was a genuine issue of material fact concerning the initial capital contribution that allowed Antonic to survive the partnership's summary judgment motion. With respect to the additional capital contribution issue, the trial court needed to address whether the subscription agreement created a binding obligation on the part of Mayflower to make additional capital contributions or obtain other funding for the partnership. Although the subscription agreement contained a section whereby Mayflower agreed to contribute or arrange for additional capital, the subscription agreement also stated that if Mayflower failed to satisfy its obligations, NAPPCO could arrange for such contribution or loan, the Mayflower entities' percentage of distributions would be reduced, and the Mayflower entities would not be liable for any damages other than such reduction for failing to meet any obligations set forth in the subscription agreement. The court determined that the clear language of the subscription agreement stated "that the sole remedy for failure . . . to contribute or obtain a loan [was] the restructuring of limited partnership units or distribution rights." The court refused to find the subscription agreement created an enforceable agreement by the Mayflower entities to contribute the additional capital to the partnership.

Antonic argued that assuming the limited partners were not liable to each other, the subscription agreement did not bar Antonic as a creditor from pursuing the limited partners. The court determined that GRULPA allows limited partnerships to be structured to prevent creditors from recovering based on a limited partner's failure to meet its contribution obligation. The court quoted O.C.G.A. section 14-9-502(c), which states that "[u]nless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution to the capital of the partnership may be reduced or eliminated only by consent of all of [the] parties." The court examined the legislative history of this section and determined that the legislature intended it to apply to creditors who

146. 773 F. Supp. at 427.
147. Id. at 427-28.
148. Id. at 428.
149. Id.
150. Id.
151. Id.
152. Id. at 428-29 (citing O.C.G.A. § 14-9-502 (1989)).
154. 773 F. Supp. at 428-29 (quoting O.C.G.A. § 14-9-502(c)).
relied on limited partners’ contribution obligations. The court compared this section to Georgia law before its enactment, which specifically made a limited partner liable to the partnership for any unpaid contribution. The former code section, 14-9A-48(c), stated that a waiver by the general partners did not affect the rights of the creditor of the partnership, which extended credit after the filing of the partnership’s certificate and before a cancellation or amendment of the certificate.

The court discussed the differences between GRULPA and the Revised Uniform Limited Partnership Act (“RULPA”), which has been adopted in many jurisdictions. The court determined that the Georgia legislators specifically intended to limit a creditor’s recovery based on contribution obligations and that the subscription agreement contained the consent of the parties to reduce or eliminate such contributions as allowed in GRULPA.

Next, Antonic argued that certain actions by the Mayflower entities would allow such entities to be held responsible as general partners for the obligations of the partnership. Antonic alleged that Mayflower participated in the management and control of the partnership. The court rejected Antonic’s argument because O.C.G.A. section 14-9-503 specifically states that “[a] limited partner is not liable for the obligations of a limited partnership by reason of being a limited partner and does not become so by participating in the management or control of the business.” The court discussed the change in GRULPA from prior Georgia law and RULPA. The court discussed the Georgia legislators’ explicit rejection of the control rule and that this rejection addressed criticisms of many commentators concerning the uncertainty of the application of the control rule.

The court found, however, that even under GRULPA a limited partner could be found liable as a general partner through estoppel, fraud, or gen-

155. Id.
156. Id. (comparing GRULPA to its predecessor O.C.G.A. § 14-9A-48(c) (1952)).
157. Id. at 429 (citing O.C.G.A. § 14-9A-48 (1952)).
158. 6 U.L.A. 500 (West Supp. 1991) (providing that a creditor extending credit or relying on a contribution obligation can enforce that obligation).
160. Id. at 430.
161. Id.
162. Id.
166. Id. at 431 (citing Joseph J. Basile, Limited Liability for Limited Partners; An Argument for the Abolition of the Control Rule, 38 VAND. L. REV. 1199 (1985)).
eral equitable grounds under a "veil piercing" theory if the limited partner's participation and control misled third parties into believing that the limited partner acted as a general partner. The court analyzed each of these three exceptions. The court determined that a general partnership by estoppel may exist if a creditor relied on the actions of a limited partner holding itself out as a general partner or on that limited partner's consent to representations made by another person that the limited partner is a general partner. Also, the court stated that creditor reliance is not necessary if the limited partner makes or consents to any type of public representation that the limited partner is a general partner. The court refused to find general partnership by estoppel based on the facts in this case.

The Mayflower entities wholly owned and controlled AMT, the substitute general partner, and the court conceded that this ownership might give rise to an inference that could be seen as abusing the corporate entity. However, the court found no evidence that the Mayflower entities planned to perpetuate fraud in this situation. The court did not find that the Mayflower entities formed AMT to avoid legal liability to Antonic and refused to pierce the corporate veil to find the Mayflower entities liable.

This case set forth several partnership theories of liability and seemed to indicate that the court would protect a limited partner's limited liability to creditors of a limited partnership. This decision illustrates that GRULPA's abrogation of the control rule may not be a bullet proof protection for limited partners. However, the decision reiterated GRULPA's basis in the rights of partners to contract the various aspects of their partnerships. Plaintiffs failed to make an argument concerning the unity of the general and limited partner interests as a veil piercing rationale which may have been a persuasive argument.

In *Stedry v. Mitchell*, the court of appeals determined that the trial court could have found from the evidence presented that the promises of a management company and a secretary of one of the defendants, as

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167. *Id.*
168. *Id.* at 431-33.
170. 773 F. Supp. at 431.
171. *Id.* at 432.
172. *Id.*
173. *Id.* (citing Hickman v. Hyzer, 261 Ga. 38, 39, 401 S.E.2d 738, 739-40 (1991)).
174. *Id.* at 432-33.
agents for the partnership, illustrated the personal liability of the defendants as general partners.\textsuperscript{176} This case concerned a general partnership formed with the purpose of owning and operating certain apartments. The statement of partnership allowed Southern Diversified Properties, Inc. ("Southern") to manage and control the business and assets of the partnership and exclusively operate the apartment complex owned by the partnership. Defendants failed to provide evidence at trial that the partnership owned the property and title remained in defendants' names. Southern employed its subsidiary, Apartment Management Company ("AMC"), to manage the apartment complex. Subsequently, Southern terminated AMC, one of the defendants, as the manager of the partnership's property. However, AMC's personal secretary became actively involved with the property.\textsuperscript{177} This involvement allowed the court to find that AMC and the secretary acted as agents of the partnership and defendants as general partners were liable for such actions.\textsuperscript{178}

In Wilensky v. Blalock,\textsuperscript{179} the supreme court found that a partnership existed between certain parties, and thus, as partners, they owed each other a duty to act in utmost good faith toward each other.\textsuperscript{180} This case concerned certain parties who were partners in various enterprises and made money from originating mortgages. One of the partners, Arford, took actions to dissolve the partnership and a third party, Wilensky, encouraged Arford to terminate the partnership and retain the assets of the partnership. Wilensky further encouraged Arford to retain the partnership's business relationship with the mortgage servicer, Gulf States Mortgage Company, Inc. ("Gulf States"). The jury found the existence of a partnership and rejected Arford's defense of lack of a partnership. Arford then argued that he had no liability for the termination of the partnership because such a partnership relationship could be terminated at will. The court of appeals decided that Arford focused too narrowly on the inquiry into contractual obligation and stated that the obligations of partners reaches beyond the moment of termination in certain situations.\textsuperscript{181} The supreme court agreed with the court of appeals that the partnership agreement, as a matter of law, required partners to act in utmost good faith toward each other.\textsuperscript{182} The supreme court determined that the court of appeals' analysis of a California case, which stated that a

\begin{itemize}
  \item \textsuperscript{176} Id. at 684, 411 S.E.2d at 737.
  \item \textsuperscript{177} Id. at 682-83, 411 S.E.2d at 736-37.
  \item \textsuperscript{178} Id. at 683, 411 S.E.2d at 737.
  \item \textsuperscript{179} 262 Ga. 95, 414 S.E.2d 1 (1992).
  \item \textsuperscript{180} Id. at 98, 414 S.E.2d at 4.
  \item \textsuperscript{181} Id. at 95-97, 414 S.E.2d at 2-3.
  \item \textsuperscript{182} Id. at 98, 414 S.E.2d at 4 (citing Arford v. Blalock, 199 Ga. App. 434, 437, 405 S.E.2d 698, 702 (1991)).
\end{itemize}
"partner's exercise of the right to terminate the partnership, if done in bad faith for the purpose of appropriating to that partner's benefit the prosperity of the partnership, would be a violation the partnership agreement and would constitute wrongful dissolution of the partnership." The supreme court found the holding in the California case consistent with Georgia law. The supreme court stated that a partner's right to dissolve a partnership, if done in bad faith and in violation of the partner's fiduciary duty to the other partners by attempting to appropriate partnership assets without adequate compensation to the other partners, would constitute a wrongful dissolution. Also, the court determined that the partner wrongfully dissolving the partnership would be liable under the Uniform Partnership Act, setting forth the rights of parties upon wrongful dissolution as a violation of the implied agreement not to exclude wrongfully the other partner from a partnership business opportunity. Although the contract in this case provided for a right to terminate at will, it did not allow a partner during the course of termination to retain the assets and business opportunities of the partnership for himself. The supreme court noted that Arford excluded Blalock from the place of business of the partnership and retained the material assets and continuing income from the mortgage origination business, which constituted a breach of such implied duties contained in the oral partnership agreement and this breach caused damages to Blalock.

This case illustrates the supreme court's inclination to find an oral partnership in situations of a continuing business relationship and to imply a duty of good faith in dealings between the partners of such a partnership. Most partnership agreements may be terminated upon the agreement of the parties and such a termination requires some sort of accounting between the partners, rather than allowing one partner to retain the assets and opportunities of the partnership. These protections should be important in business relationships for which a written partnership agreement does not specifically provide.

In *Borgh v. Gentry*, the Eleventh Circuit Court of Appeals examined accounting and breach of contract issues in a general partnership situation. Borgh and Gentry formed a general partnership in 1985 to engage...
in a dog racing operation. The partnership agreement required Borgh to pay Gentry one hundred fifty thousand dollars, consisting of forty five thousand dollars for the purchase of greyhounds and one hundred five thousand dollars for the operation and management of the dog racing venture. Gentry acted as the managing partner and all profits and losses went into the partnership with each partner agreeing to contribute additional sums of money if necessary for the operation of the partnership. The partnership agreement provided that each partner would receive thirty-five percent of the purse winnings from race track bookings and provided for the division of the balance after the payment of all partnership expenses. After the partnership became unprofitable, Borgh began removing dogs from the operations and used them for his personal bookings. Also, Borgh filed an action for accounting and dissolution of the partnership. Gentry agreed to such dissolution and counterclaimed for a breach of fiduciary duty and breach of contract. Borgh argued that the lower court improperly denied him the right to trial by jury based on the breach of contract claim. The court reversed the lower court and determined that although accounting is an equitable claim, breach of contract is a legal issue for the jury. The court of appeals agreed with the lower court’s finding that Borgh’s removal of the dogs interfered with the partnership’s operations, thereby requiring Gentry to spend approximately fifty thousand dollars to replace the missing dogs. Although the court affirmed the district court’s findings relating to the accounting issues, the case was remanded for a jury trial on the contract issue.

In another case decided during the survey period, Henderson v. Cherry, Bekaert & Hollin, the court discussed the proper service of process on a partnership. The court found that although the service was made upon a manager of the partnership and not a partner, service made on an agent in a position to afford reasonable assurance that the agent will provide notice to principals of the partnership that process has been served acts as adequate service of process on the partnership.

In Williams v. Tritt, the supreme court determined that the Georgia Uniform Partnership Act provides a right for a general partner to a formal accounting of partnership affairs upon the wrongful exclusion of

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192. Id. at 1310-11.
193. Id. at 1311 (citing Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 1308 (1991)).
194. Id. at 1312.
195. Id.
196. 932 F.2d 1410 (11th Cir. 1991).
197. Id. at 1410-11.
198. Id. at 1412.
the partner from the partnership business.\textsuperscript{201} The court found that a partner's direct derivation of benefits from the conduction of the partnership's business without the other partner's consent allowed a right to accounting.\textsuperscript{202}

Although the cases decided in the partnership area during the survey period did not provide any new and startling guidance for practitioners, the cases illustrated the court's concern with the fair and just relationship between partners of a general partnership and the protections afforded to limited partners in a statutorily created limited partnership context.

IV. Securities

The state and federal courts examined issues relating to the application of Rule 10b-5 of the Securities Exchange Act of 1934 (the "Exchange Act"),\textsuperscript{203} as amended, and its Georgia equivalent,\textsuperscript{204} the definition of a security,\textsuperscript{205} reasonable reliance,\textsuperscript{206} and the validity of an arbitration contract.\textsuperscript{207}

In Abrams & Wofsy v. Renaissance Investment Corp.,\textsuperscript{208} the United States District Court for the Northern District of Georgia examined the adequacy of the disclosure in private placement memoranda used to sell limited partnership units in three limited partnerships for which Renaissance served as the general partner.\textsuperscript{209} Renaissance had extreme financial problems that ultimately led to foreclosure by the lenders upon each partnership's property and the loss of the limited partners' investment. Alleging violations of Rule 10b-5 of the Exchange Act\textsuperscript{210} for material omissions in the disclosure materials, the limited partners sued, individually, two officers of Renaissance.\textsuperscript{211}

\begin{itemize}
  \item 201. 262 Ga. at 174, 415 S.E.2d at 286 (citing O.C.G.A. § 14-8-21 (1989) (accounting right under partnership agreement); O.C.G.A. § 14-8-22 (1989) (accounting right when circumstances render it just and reasonable)).
  \item 202. Id.
  \item 209. Id. ¶ 92,028.
  \item 211. 1992 Fed. Sec. L. Rep. ¶ 92,029.
\end{itemize}
The court discussed the standard of review and found that each of the officers violated Rule 10b-5. The court found that Chisholm, vice president of administration for Renaissance, openly admitted her failure to disclose relevant information obviously important to investors. The court found that Chisholm knowingly omitted a material fact on which plaintiffs relied that proximately caused their losses.

The court stated that the materiality of the omission of the financial difficulties of the general partner satisfied plaintiffs' reliance requirement. The relationship of plaintiffs' economic harm satisfied the loss causation requirement of a 10b-5 action because the general partner's financial condition acted as at least a "significant contributing cause" of their losses. The court stated that transaction causation is synonymous with reliance, and therefore, plaintiffs could recover against Chisholm.

The court's analysis of the actions of Charles M. Shirley, vice president of finance who helped prepare the misleading financial statements, mirrored the discussion above, except the court found that Shirley acted with severe recklessness rather than with knowledge. The court noted that the Eleventh Circuit has determined that severe recklessness satisfies the scienter requirement for Rule 10b-5 purposes. The court noted that its finding of the elements of Rule 10b-5 also satisfied plaintiffs' claims under the Georgia securities laws.

In Loyola Federal Savings & Loan Ass'n v. Fickling, the United States District Court for the Middle District of Georgia briefly addressed a Rule 10b-5 issue concerning the duty of a defendant with respect to allegations of omissions and affirmative misrepresentations. Also, the court noted that a direct duty to a party is not required to assert aider and abettor liability under Rule 10b-5. In a case concerning the guarantor of a loan, the evidence showed that representatives of defendant altered certain documents involved in a loan transaction after Fickling's

212. Id. ¶ 92,030, 92,034.
213. Id. ¶ 92,030.
214. Id. (citing Ross v. Bank South, N.A., 885 F.2d 723, 728 (11th Cir. 1989), cert. denied, 110 S. Ct. 1924 (1990)).
215. Id. ¶ 92,031.
216. Id. (quoting Bruschi v. Brown, 876 F.2d 1526 (11th Cir. 1989)).
217. Id.
218. Id. ¶ 92,032.
219. Id. (citing McDonald v. Alan Bush Brokerage Co., 863 F.2d 809, 814 (11th Cir. 1989)).
220. Id. ¶ 92,033.
222. Id. at 626 (citing Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1043 (11th Cir. 1986), cert. denied, 480 U.S. 946 (1987)).
223. Id. (citing Woods v. Barnett Bank, 765 F.2d 1004, 1009 (11th Cir.), reh'g denied, 772 F.2d 918 (1985)).
execution of such documents. Fickling alleged that these representatives committed securities fraud and the court refused to grant summary judgment to defendants on this issue.

In Cohen v. William Goldberg & Co., the court of appeals addressed the definition of a security under Georgia and federal securities laws. The sole stockholder of T-Shirtery, Inc. agreed to exchange his stock for stock in an acquiring corporation and to become an officer and director of the acquiror. Cohen alleged that the stock in the new corporation (the "WGC stock") met the definition of a security and afforded him protections under the state and federal securities laws. The court applied the test in Landreth Timber Co. v. Landreth and found that the WGC stock did not "bear[] such characteristics usually associated with common stock that a purchaser justifiably may assume that appropriate securities laws apply." The WGC stock certificates were to be legended to reference substantial restrictions on transferability and that the stock was not registered under the Georgia or federal securities laws, and thus could not be resold without such registration. Due to these impairments on negotiability, the court determined that the WGC stock did not fit within the statutory definition of a security.

The court next applied the economic reality test from Securities Exchange Commission v. W.J. Howey Co. to decide if the WGC Stock involved an investment in a common venture with the investor reasonably expecting profits derived from the efforts of others. The court decided that Cohen's status as an officer and director allowed him to control many decisions affecting the corporation's profits, and therefore, did not prove reliance on the efforts of others. The court refused to find that the WGC stock fit into the definition of a security.

In applying the Landreth test, the court failed to appreciate that stock is not required to meet all the Landreth characteristics to fit within the

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224. Id.
225. Id.
227. Id. at 179, 413 S.E.2d at 766.
228. Id. at 172, 413 S.E.2d at 761.
231. Id.
232. Id.
234. 202 Ga. App. at 179-80, 413 S.E.2d at 766 (citing Tech Resources v. Hubbard, 246 Ga. 583, 584, 272 S.E.2d 314, 316 (1980)).
235. Id. at 180, 413 S.E.2d at 766-67.
236. Id. at 179, 413 S.E.2d at 766.
definition of a "security." As noted in a previous article analyzing a similar case, although nonregistration of stock impairs its transferability, such stock can be transferred in a transaction exempt from the application of federal and state securities laws. Additionally, the anti-fraud provision of both the federal and state securities laws apply to unregistered stock and purchasers of unregistered stock are arguably more deserving of the protections of such laws than purchasers of registered stock with access to disclosure materials. The Howey investment contract analysis applied by the court in Cohen fails to recognize that Cohen's status as an officer and director became effective after his stock was exchanged for WGC stock and he had no control over WGC at the time he received the WGC stock. Cohen deserved disclosure to make the investment decision required in the exchange. Georgia practitioners may find it beneficial to bring securities laws claims in federal court rather than Georgia courts, which continue to dilute shareholder protections by their interpretations of federal standards.

In Hamilton v. Deloitte, Haskins & Sells, the court of appeals determined that a stock purchaser may not reasonably rely after receiving constructive notice of misrepresentations or omissions to a corporation's public filings with the SEC. Hamilton studied certain filings by Ocilla Industries, Inc. ("Ocilla") made on Form 10-Q and Form 10-K in his decision to purchase Ocilla stock. Hamilton sustained losses when stock prices fell after disclosure of certain improprieties of management and certain financial irregularities. The court found that Ocilla filed a current report of Form 8-K before Hamilton purchased his stock disclosing these problems and specifically stated that the financial statements would require substantial revision and should not be relied upon. The court found that the Form 8-K filing and accompanying press release, which acted as constructive notice to Hamilton and other investors, constituted the best method to inform the public of the issues. In view of this constructive notice, the court refused to view Hamilton's reliance as reasonable or justified.

In Chastain v. Robinson-Humphrey Co., the Eleventh Circuit Court of Appeals determined that in spite of the Federal Arbitration Act, the

239. Id. at 680, 417 S.E.2d at 714-15.
240. Id. at 679, 417 S.E.2d at 713-14.
241. Id. at 680-81, 417 S.E.2d at 714.
242. Id. at 681, 417 S.E.2d at 714-15.
243. Id., 417 S.E.2d at 715.
244. 957 F.2d 851 (11th Cir. 1992).
district courts are charged with the determination of the validity of a contract compelling arbitration with respect to a brokerage account. This case concerned certain account agreements containing arbitration clauses, which were admittedly not executed by Chastain. The court stated that the district court would not be addressing the merits of arbitrating the claims, but would be addressing the enforceability and validity of the contract compelling arbitration.

The court distinguished the Supreme Court's ruling in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, which addressed a fraudulent inducement to sign a contract containing arbitration clauses, rather than the validity of such a contract. The court did not address Robinson-Humphrey's defenses of authority to bind and ratification of the contracts, stating they could be raised before the district court.

As these cases illustrate, the Georgia courts are being asked to extend the protections of the Georgia and federal securities laws to varied stock-related transactions.

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246. 957 F.2d at 852-53.
247. *Id.* at 853.
248. *Id.*
250. 957 F.2d at 854.
251. *Id.* at 855-56.