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# Articles

## Business Associations

by Paul A. Quirós\*  
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This Article analyzes cases in the areas of corporate, partnership, securities, and banking law decided during the survey period by the Georgia Court of Appeals, the Georgia Supreme Court, the United States district courts in Georgia and the United States Court of Appeals for the Eleventh Circuit. Additionally, the Article highlights certain enactments by the Georgia General Assembly revising the Georgia Corporate Code.

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## I. CORPORATIONS

A. *Piercing the Corporate Veil*

The concept of piercing the corporate veil to hold shareholders personally liable for the debts of a corporation has been used by the Georgia courts in an attempt to avoid injustices. Unfortunately, the variety of fact situations coupled with legal principles used in these cases, which are undefined and often not applied, has encouraged disappointed trial court contestants to appeal hoping for a more favorable review. The unprincipled results of these cases cry out for guidance in this area.<sup>1</sup>

The Georgia courts generally frame the issue as whether the corporation is the alter ego or business conduit of its owner.<sup>2</sup> To establish this, the courts require a showing that the shareholder's disregard of the corporate entity made it a mere instrumentality for the transfer of its own affairs; that there is such unity of interest and ownership that the separate personality of the corporation and the owner no longer exist; and that to adhere to the doctrine of a separate corporate entity would promote injustice or protect fraud.<sup>3</sup> This determination is a jury question in Georgia.<sup>4</sup> For the issue to be submitted to a jury, Georgia courts require evidence that the corporate arrangement is a sham used to defeat justice, to perpetuate fraud, or to evade statutory, contractual, or tort responsibility.<sup>5</sup>

In *Brown v. Rentz*,<sup>6</sup> the court of appeals addressed claims of negligent construction and negligent misrepresentation in the sale of a residence.<sup>7</sup> The Browns brought these claims against Rentz Builders, Inc., Lonnie Rentz, the sole shareholder, director and president of Rentz Builders, and Linda Rentz, its corporate secretary and listing and selling agent for the house in question.<sup>8</sup> The trial court granted summary judgment to both Lonnie and Linda Rentz, individually, and the Browns appealed.<sup>9</sup>

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1. See Paul A. Quirós & Donna Ruth Jones, *Business Associations*, 40 MERCER L. REV. 61, 68 (1988).

2. *Amason v. Whitehead*, 186 Ga. App. 320, 367 S.E.2d 107 (1988); *Hickman v. Hyzer*, 261 Ga. 38, 401 S.E.2d 738 (1991); *Derbyshire v. United Builders Supplies*, 194 Ga. App. 840, 392 S.E.2d 37 (1990).

3. *Id.*

4. *Id.*

5. *Id.*

6. 212 Ga. App. 275, 441 S.E.2d 876 (1994).

7. *Id.* at 275, 441 S.E.2d at 877.

8. *Id.*

9. *Id.*

The Browns contended that the house they purchased from Rentz Builders had structural problems, including a leaking roof and a flooded basement. Lonnie Rentz responded to their complaints by sending subcontractors to attempt to repair these problems, but the Browns eventually hired other contractors to repair the defects.<sup>10</sup>

The Browns argued that the Rentzes made knowing and false misrepresentations that Rentz Builders had constructed the house properly, using materials of good quality. Rentz Builders had no assets by this time, and Lonnie Rentz continued his construction activities in another corporate entity.<sup>11</sup>

The trial court stated that the Browns failed to present evidence that either Lonnie or Linda Rentz, in their individual capacities, participated in the sale or disregarded the corporate entity of Rentz Builders in the transaction.<sup>12</sup> On appeal, the Browns argued that the individual defendants disregarded the corporate entity with respect to the construction and sale of the house, which would allow the court to pierce the corporate veil and hold individual defendants liable.<sup>13</sup>

The court of appeals decided that Linda Rentz should be protected by the "inherent purpose of incorporation [of] insulation from liability."<sup>14</sup> The court of appeals reiterated its piercing analysis by stating that a corporation is an entity distinct from its shareholders, and to pierce the corporate veil, there must be some abuse of the corporate form.<sup>15</sup> Sole ownership and control of a corporation is not a factor in the piercing analysis unless the separate personalities of the sole shareholder and the corporation cease to exist.<sup>16</sup> Linda Rentz chose paint colors, hung wallpaper, and paid bills relating to the construction of the house. The court of appeals refused to find that this minimal role indicated either commingling of corporate and personal funds or disregard of the corporate form so as to allow piercing.<sup>17</sup>

The court of appeals next addressed the role of Lonnie Rentz. Although it disallowed piercing of the corporate veil because Rentz did not construct the house in his individual capacity, it held Lonnie Rentz personally liable, as a corporate officer, for either participating in the

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 276, 441 S.E.2d at 877.

14. *Id.*

15. *Id.*, 441 S.E.2d at 877-78 (quoting *Derbyshire v. United Builders Supplies*, 194 Ga. App. 840, 844, 392 S.E.2d 37(1990)).

16. *Id.*, 441 S.E.2d at 877.

17. *Id.*, 441 S.E.2d at 879 (quoting *Fuda v. Kroen*, 204 Ga. App. 836, 837-9, 420 S.E.2d 767 (1992)).

corporation's commission of a tort or directing its activities with respect to a tort.<sup>18</sup> The court of appeals noted that Lonnie Rentz supervised the subcontractors, performed certain small tasks on the house during its construction, personally responded to the Browns' complaints, and performed some of the repair work.<sup>19</sup> The court of appeals decided that, given these facts and his status as an officer of the corporation, a jury could also find Lonnie Rentz personally liable for the negligent construction "because he specifically directed the manner in which the house was constructed or participated or cooperated in its negligent construction."<sup>20</sup>

In her concurrence, Presiding Judge Beasley stated that the majority reached the right result with respect to Lonnie Rentz but for reasons that the Browns did not raise in their complaint.<sup>21</sup> The Browns argued that the corporate veil should be pierced because Lonnie Rentz was involved in the construction of the house, and Judge Beasley believed that some evidence existed that the corporation served as his alter ego and business conduit.<sup>22</sup>

The decision in this case reflects the court of appeal's continued reluctance to pierce the corporate veil in negligent construction cases. Instead, the court searched for another cause of action to reach the same result of imposing personal liability on a corporate shareholder and officer. The court's analysis represents this reluctance, and Judge Beasley noted that the court stepped in to recharacterize the plaintiffs' arguments to reach a just result while refusing to subject the facts to a piercing analysis.<sup>23</sup> This case continues the Georgia courts' retrenchment from the decision in *Hickman v. Hyzer*<sup>24</sup> and indicates an increasingly favorable reception to pleadings that include alternative causes of action that avoid a piercing analysis.<sup>25</sup>

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18. *Id.*, 441 S.E.2d at 878 (quoting *Cherry v. Ward*, 204 Ga. App. 833, 834, 420 S.E.2d 763 (1992)).

19. *Id.*

20. *Id.* at 277, 441 S.E.2d at 878 (quoting *Cherry v. Ward*, 204 Ga. App. 833, 834, 420 S.E.2d 763 (1992)).

21. *Id.* at 277-78, 441 S.E.2d at 878-79.

22. *Id.*

23. *Id.*

24. 261 Ga. 38, 41, 401 S.E.2d 738, 740 (1991), *vacated by Hyzer v. Hickman*, 200 Ga. App. 478, 409 S.E.2d 93 (1991). See also Paul A. Quirós & Lynn Schutte Scott, *Business Associations*, 45 MERCER L. REV. 53, 55 (1993); Paul A. Quirós & Lynn Scott Magruder, *Business Associations*, 44 MERCER L. REV. 67, 68 (1992); and Paul A. Quirós & Lynn Scott Magruder, *Business Associations*, 43 MERCER L. REV. 85, 86 (1991).

25. In *Cherry v. Ward*, 204 Ga. App. 833, 420 S.E.2d 763 (1992), the court of appeals reached a similar result in a negligent construction case. See Paul A. Quirós & Lynn Schutte Scott, *Business Associations*, 45 MERCER L. REV. 53, 55 (1993).

In *Matter of Adventure Bound Sports*,<sup>26</sup> the United States District Court for the Southern District of Georgia allowed piercing of the corporate veil based on commingling of assets and the failure of a shareholder to operate the corporate entity as separate from himself.<sup>27</sup> This case involved two experienced scuba divers who died in an accident off the Savannah coast.<sup>28</sup> The captain of the boat decided to dive with the customers and left the diving instructor in charge of the boat.<sup>29</sup> Due to a miscalculation by the diving instructor, the boat drifted out of position and the divers were caught in the idling engine.<sup>30</sup> Andre Smith, the sole shareholder and officer of Adventure Bound Sports, Inc. ("Adventure Bound"), knew that the captain and diving instructor sometimes reversed roles on diving expeditions.<sup>31</sup> The district court found that Smith operated Adventure Bound as a sole proprietorship, indicated by his commingling of personal and corporate funds and his failing to distinguish Adventure Bound as a corporate entity in his banking relationships.<sup>32</sup> Additionally, the accident occurred in June 1989 and Adventure Bound had been administratively dissolved in March 1988.<sup>33</sup> Smith applied for reinstatement of the corporate status of Adventure Bound in November 1989.<sup>34</sup> The district court found that Smith reinstated the corporate entity solely to avoid liability for the accident.<sup>35</sup>

The district court pierced the corporate veil and held Smith personally liable based on evidence that Smith abused the corporate form by disregarding the separateness of the corporation through his commingling of assets<sup>36</sup> and using the corporate entity to evade tort liability.<sup>37</sup> This case presents facts flagrant enough to allow the court to apply a piercing analysis without the need to explore other options.<sup>38</sup>

In *Fulton Paper Co. v. Reeves*,<sup>39</sup> the court of appeals determined that the administrative dissolution of a corporation did not allow piercing of

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26. 837 F. Supp. 1244 (S.D. Ga. 1993).

27. *Id.* at 1256.

28. *Id.* at 1246.

29. *Id.* at 1246-47.

30. *Id.*

31. *Id.* at 1248.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1256.

36. *Id.* (quoting *Earnest v. Merck*, 183 Ga. App. 271, 358 S.E.2d 661, 663 (1987)).

37. *Id.* (quoting *Kelly v. Austell Bldg. Supply, Inc.*, 164 Ga. App. 322, 297 S.E.2d 292, 297 (1982)).

38. *Id.*

39. 212 Ga. App. 314, 441 S.E.2d 881 (1994).

the corporate veil.<sup>40</sup> Reeves served as president of May Fresh Services, Inc., a Georgia corporation which was administratively dissolved in January 1992.<sup>41</sup> Subsequent to the dissolution, May Fresh could continue to exist solely to wind-up and liquidate its business.<sup>42</sup> Reeves, however, continued business as usual on behalf of May Fresh and purchased paper goods from Fulton Paper Company on the May Fresh account.<sup>43</sup> The court of appeals found these activities inconsistent with the wind-up of May Fresh's business.<sup>44</sup> Fulton Paper brought suit for payment against Reeves doing business as May Fresh, and Reeves denied personal liability.<sup>45</sup> In August 1992, May Fresh applied for reinstatement of its corporate status pursuant to Section 14-2-1422 of the Official Code of Georgia Annotated ("O.C.G.A.").<sup>46</sup> The trial court refused to find Reeves personally liable for May Fresh's debts and determined that reinstatement required the treatment of May Fresh as an existing corporation for purposes of the lawsuit.<sup>47</sup> Proper reinstatement related back to the effective date of administrative dissolution as if it had never occurred.<sup>48</sup>

The court of appeals affirmed but based its decision on the continuation of corporate existence after administrative dissolution.<sup>49</sup> The court of appeals refused to impose personal liability on Reeves through an agency<sup>50</sup>, ultra vires<sup>51</sup>, or piercing<sup>52</sup> analysis. The court of appeals found that Fulton Paper dealt with May Fresh as a corporate entity at all times; consequently, there was no abuse of form to allow application of a piercing analysis.<sup>53</sup>

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40. *Id.* at 317, 441 S.E.2d at 884.

41. *Id.* at 315, 441 S.E.2d at 883.

42. *Id.*

43. *Id.*, 441 S.E.2d at 883-84.

44. *Id.* at 316, 441 S.E.2d at 884.

45. *Id.*

46. *Id.* (citing O.C.G.A. § 14-2-1422 (1982)).

47. *Id.*

48. *Id.*

49. *Id.* (citing O.C.G.A. § 14-2-1421(c) (1982)).

50. *Id.* at 317, 441 S.E.2d at 884 (citing O.C.G.A. § 10-6-89 (1982); *Don Swann Sales Corp. v. Echols*, 160 Ga. App. 539, 287 S.E.2d 577 (1981)).

51. *Id.* at 317, 441 S.E.2d at 884 (citing O.C.G.A. § 14-2-304 (1982)).

52. *Id.* at 318, 441 S.E.2d at 885 (citing *Amason v. Whitehead*, 186 Ga. App. 320, 367 S.E.2d 107 (1988)).

53. *Id.* at 317-18, 441 S.E.2d at 885.

### B. Administrative Dissolution Issues

In two cases, the courts reviewed issues regarding the rights of corporations to maintain lawsuits after dissolution.<sup>54</sup> In *Gas Pump, Inc. v. General Cinema Beverages*,<sup>55</sup> the Eleventh Circuit determined that an administratively dissolved corporation could not maintain a federal antitrust lawsuit or assign its claim to the sole shareholder after its two year period for reinstatement had expired.<sup>56</sup> In March 1991, Gas Pump alleged illegal price fixing by General Cinema Beverages and another bottling company. Gas Pump was administratively dissolved in May 1988 for failure to pay fees and file required reports.<sup>57</sup> In a case of first impression, the Eleventh Circuit certified to the supreme court the question of whether an administratively dissolved corporation continues its existence after dissolution to allow it to maintain a federal antitrust lawsuit.<sup>58</sup> The supreme court noted that such a corporation continues its existence to liquidate and wind-up its affairs and has a two year period to seek reinstatement.<sup>59</sup> The supreme court rejected Gas Pump's argument that a corporation can continue indefinitely to wind-up its affairs.<sup>60</sup> The supreme court read sections of the O.C.G.A. together<sup>61</sup> to determine that an administratively dissolved corporation can continue its activities to wind-up and liquidate its business during the two year period in which it can seek reinstatement, after which time the failure to seek reinstatement prevents the initiation of any activity, including maintaining a lawsuit.<sup>62</sup>

In *Tillett Bros. Construction Co. v. Department of Transportation*,<sup>63</sup> the court of appeals held that a Tennessee corporation, which had its certificate of authority to transact business in Georgia revoked in 1989, could maintain a lawsuit filed in 1991 as a renewal of a lawsuit originally filed in 1985.<sup>64</sup> The Department of Transportation ("DOT") argued that no order had been entered in the 1985 case and therefore

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54. *Gas Pump, Inc. v. General Cinema Beverages*, 12 F.3d 181 (11th Cir. 1994); *Tillett Bros. Constr. Co. v. Department of Transp.*, 210 Ga. App. 84, 435 S.E.2d 241 (1993).

55. 12 F.3d 181 (11th Cir. 1994).

56. *Id.* at 183.

57. *Id.* at 182.

58. *Id.* at 184 (citing O.C.G.A. § 14-2-1421(c) (1982)).

59. *Id.* (citing O.C.G.A. § 14-2-1422(a) (1982)).

60. *Id.* at 183-84.

61. *Id.* at 184 (comparing O.C.G.A. § 14-2-1421 (1982), § 14-2-1422 (1982), and O.C.G.A. § 14-2-1405 (1982)).

62. *Id.*

63. 210 Ga. App. 84, 435 S.E.2d 241 (1993).

64. *Id.* at 85, 435 S.E.2d at 244.

the renewal action was not filed within the allowed period. The court of appeals determined that the trial judge in the original case had entered an order placing the case on an inactive list and that the renewal action was timely filed.<sup>65</sup> DOT argued that Tillett Brothers Construction Company had no certificate of authority to transact business in 1991 when it filed the renewal action because of the revocation in 1989.<sup>66</sup> The court of appeals determined that Tillett Brothers possessed a valid certificate at all times when it transacted business in Georgia and in 1985, when it filed the original lawsuit, to allow it to maintain the present action after revocation of the certificate.<sup>67</sup> DOT argued that, although Tillett Brothers existed as a Tennessee corporation at the time the events subject to the lawsuit occurred, it did not exist as an active corporation when it filed the lawsuit. The court of appeals assumed that Tillett Brothers had been dissolved under Tennessee law and reasoned that both Georgia and Tennessee statutes<sup>68</sup> allowed continuance of existence to wind-up and liquidate a corporation's affairs, which included, in this case, pursuing the present lawsuit.<sup>69</sup>

These cases serve as a reminder that corporations and their attorneys must pay close attention to annual filing and fee requirements in order to continue uninterrupted corporate existence and the benefits and protections thereof.

### C. Guaranty Issues

In *Davis v. Concord Commercial Corp.*,<sup>70</sup> the court of appeals held that a successor corporation is entitled to enforce a personal guaranty of a corporate debt.<sup>71</sup> Davis, acting as president of Benafuels, Inc., guaranteed its debt to Ingersoll-Rand Financial Corporation ("IRFC"). The guaranty agreement covered all payments of Benafuel's liabilities to IRFC whether created directly or otherwise acquired by IRFC. The agreement expressly included IRFC's successors and assigns. Davis could terminate his responsibility for Benafuels liabilities to IRFC by giving written notice.<sup>72</sup>

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65. *Id.* at 84, 435 S.E.2d at 243.

66. *Id.* at 86, 435 S.E.2d at 244.

67. *Id.* (citing O.C.G.A. § 14-2-1502 (1982)).

68. *Id.* at 87, 435 S.E.2d at 245 (citing O.C.G.A. § 14-2-1421 (1982) and Tenn. Code Ann. § 48-24-105 (1988)).

69. *Id.* at 88, 435 S.E.2d at 245.

70. 209 Ga. App. 595, 434 S.E.2d 571 (1993).

71. *Id.* at 597, 434 S.E.2d at 573.

72. *Id.* at 595, 434 S.E.2d at 572.

Concord Commercial Corporation ("CCC") acquired all of the stock of IRFC and sued Davis on the guaranty after nonpayment of the debts by Benafuels. Davis argued that IRFC had assigned the assets subject to the guaranty to a subsidiary; therefore, IRFC was not a creditor of Benafuels.<sup>73</sup> The court of appeals found that IRFC acquired a debt obligation of Benafuels through IRFC's sole ownership of the subsidiary and became a creditor by assignment or otherwise as allowed under the terms of the guaranty.<sup>74</sup> CCC succeeded to all interests of IRFC through acquisition of its stock, including the right to enforce the guaranty.<sup>75</sup>

In *Morris & Manning Insurance Agency, Inc. v. Morris*,<sup>76</sup> the court of appeals held that a guaranty of a corporate obligation could not be voided by arguing that the transaction subject to the guaranty rendered the corporation insolvent in violation of the O.C.G.A.<sup>77</sup> Morris agreed to sell his majority interest in the corporation to the other two shareholders, Manning and Nozick. Manning, Nozick, and their wives personally guaranteed the payment of a corporate promissory note for the stock.<sup>78</sup> Manning insisted that the transaction be structured before redeeming Morris' stock by the corporation. Morris' attorney warned him that the stock redemption would be valid only if the transaction did not render the corporation insolvent.<sup>79</sup>

In March 1991, the corporation ceased payments to Morris even though Manning and Nozick continued to draw substantial salaries and pay all other corporate debts. Morris sued on the personal guaranties, and defendants argued that the guaranties were unenforceable because the stock redemption had rendered the corporation insolvent and the parties could void them.<sup>80</sup>

The court of appeals found that its decision in *Hullender v. Acts II, Inc.*,<sup>81</sup> controlled, precluding defendants' arguments. The court of appeals concluded that even if a corporation is rendered insolvent by a transaction, allowing the transaction to be voided, a guarantor "is not entitled to invoke the illegality of the obligation underlying the

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73. *Id.* at 596-97, 434 S.E.2d at 573.

74. *Id.* at 596, 434 S.E.2d at 573.

75. *Id.*

76. 211 Ga. App. 433, 439 S.E.2d 660 (1993).

77. *Id.* at 436, 439 S.E.2d at 662.

78. *Id.* at 434, 439 S.E.2d at 661.

79. *Id.* See also O.C.G.A. § 14-2-640 (1982).

80. 211 Ga. App. at 435, 439 S.E.2d at 661.

81. 153 Ga. App. 119, 264 S.E.2d 486 (1980).

[promissory] note and thereby avoid liability as a personal guarantor.<sup>82</sup> The court of appeals did not concede the insolvency of the corporation in this case, but applied *Hullender* to decide that those who caused and benefitted from the wrong could not then argue its illegality as a defense.<sup>83</sup>

#### D. Advancement of Directors' Expenses

In *Service Corp. International v. H.M. Patterson & Son, Inc.*, the supreme court addressed the advancement of directors' expenses in a shareholder derivative suit.<sup>84</sup> Service Corporation International ("SCI") brought suit against Patterson, its directors, and its officers claiming fraud, mismanagement, and usurpation of corporate opportunity.<sup>85</sup> SCI later attempted to prevent Patterson from advancing funds to its directors for expenses incurred in the lawsuit because the directors had not complied with the provisions of the O.C.G.A.<sup>86</sup> The applicable provisions allow advancement if a director furnishes the corporation with a written affirmation of the director's good faith belief that he has met the required standards of conduct in his actions, and the director provides a written undertaking to repay the advances if it is ultimately determined that he could not be indemnified.<sup>87</sup> SCI argued that the O.C.G.A.'s director conflict of interest requirements, mandating that an interested director transaction be fair to the shareholders, should also be applied to advancement decisions.<sup>88</sup> The supreme court refused to countenance this argument because the advancement provisions recognize the inherent self-interest of a corporation's directors and therefore do not require a fairness determination by the board of directors or shareholders to allow advancement of expenses.<sup>89</sup>

The supreme court refused to allow comments to the O.C.G.A. to require a decision that the advancement of expenses section be read in

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82. 211 Ga. App. at 436, 439 S.E.2d at 662 (citing *Hullender v. Acts II*, 153 Ga. App. 119, 122, 264 S.E.2d 486, 488 (1980)).

83. *Id.*

84. 263 Ga. 412, 434 S.E.2d 455 (1993).

85. *Id.* at 412, 439 S.E.2d at 456.

86. *Id.* (citing O.C.G.A. § 14-2-853(a) (1982)).

87. *Id.* at 413, 434 S.E.2d at 456 (quoting O.C.G.A. § 14-2-853(a) (1982)). The standards of conduct are acting in a manner believed in good faith to be in, or not opposed to, the best interests of the corporation. O.C.G.A. § 14-2-851(a) (1982).

88. 263 Ga. at 414, 434 S.E.2d at 457 (citing O.C.G.A. §§ 14-2-860 to -864 (1982)).

89. *Id.* at 415, 434 S.E.2d at 458 (citing Comment to O.C.G.A. § 14-2-861 (1982)). The court noted that it did not agree that Comments control interpretations given to provisions of the O.C.G.A. or precludes its rules of statutory construction. *Id.*

conjunction with the conflict of interest section.<sup>90</sup> The supreme court correctly recognized that the advancement of expenses to directors represents an inherent conflict of interest, which is addressed by the undertaking to repay advances if required.<sup>91</sup> In *McKoon v. Jones*,<sup>92</sup> the supreme court also refused to find comments to the O.C.G.A. controlling even if the comments have some binding authority.<sup>93</sup>

### *E. Shareholder Derivative Action*

Several years ago, the United States District Court for the Northern District of Georgia applying Georgia law considered the role of an independent litigation committee of the board of directors of the Southern Company in *Peller v. Southern Co.*<sup>94</sup> This litigation committee determined that the demand in question should be dismissed. Peller argued that the committee was not independent due to structural bias involving its similar background with the directors whose actions the committee reviewed.<sup>95</sup> The district court decided to adopt the test set forth by the Delaware Supreme Court in *Zapata v. Maldonado*<sup>96</sup> governing an independent litigation committee's decision.<sup>97</sup> This procedure requires an examination of the independence and good faith of the committee and the reasonableness of its investigation.<sup>98</sup>

In another shareholder derivative action involving Southern, the Eleventh Circuit considered two issues on appeal in *Stepak v. Addison*.<sup>99</sup> Pursuant to Delaware law, Stepak made a demand on the board of directors that the company bring suit for breach of fiduciary duties by certain directors and officers of Southern which allegedly caused company losses. The board refused Stepak's demand, and Stepak and another shareholder filed a shareholder derivative suit alleging that the board had wrongfully refused Stepak's demand.<sup>100</sup> The district court dismissed the complaint and the Eleventh Circuit reversed the district

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90. *Id.*

91. *Id.*

92. 214 Ga. App. 40, 447 S.E.2d 50 (1994).

93. *Id.* at 41, 447 S.E.2d at 51.

94. 707 F. Supp. 525 (N.D. Ga. 1988). For a thorough discussion of this case see Paul A. Quirós & Michael L. Chapman, 41 MERCER L. REV. 45 (1989).

95. 707 F. Supp. at 527-28.

96. 430 A.2d 779 (Del. 1981).

97. *Id.* at 788.

98. 20 F.3d 398 (11th Cir. 1994).

99. *Id.* at 400.

100. *Id.* at 401.

court's decision concerning Stepak but affirmed the dismissal concerning the other shareholder, Mondschein.<sup>101</sup>

The court of appeals found Stepak alleged facts creating a reasonable doubt that the outside directors, who considered his demand, had conducted a reasonable investigation or acted in good faith by refusing his demand as required by *Zapata*.<sup>102</sup> Stepak alleged that Southern improperly deducted certain items as expenses that should have been treated as inventory and that certain misleading information had been contained in filings with the Securities and Exchange Commission.<sup>103</sup>

The court of appeals applied Delaware law to this issue because Southern is a Delaware corporation.<sup>104</sup> Georgia courts and federal district courts applying Georgia law often look to Delaware law on shareholder derivative issues;<sup>105</sup> therefore, the authors decided to include the court's analysis in this article. Delaware law requires a shareholder to demand the board to act, and the courts will not disturb a board's rejection of a demand unless such rejection is wrongful.<sup>106</sup> A court will find a wrongful refusal when the refusal did not constitute the board's valid exercise of its business judgment.<sup>107</sup> The business judgment rule protects a board's decisions by presuming that they are made independently, in good faith, and on an informed basis.<sup>108</sup> To overcome this presumption, a shareholder must allege facts to question that the refusal was made in good faith, on an informed basis, and in the company's best interests.<sup>109</sup>

The court of appeals focused on the reasonableness of the board's investigation and noted the directors' duty to properly inform themselves before making a business decision.<sup>110</sup> Stepak alleged that the directors "were merely passive recipients of the product of an 'investigation' orchestrated by Southern's [general] counsel," which also defended the officers and directors in criminal investigations involving the same allegations as the present lawsuit, representing an unreasonable conflict of interest in the conduct and subject matter of the investigation.<sup>111</sup>

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101. *Id.* at 411.

102. *Id.* at 402 (citing *Zapata Corp. v. Maldonado*, 430 A.2d at 784-86).

103. *Id.* at 400.

104. *Id.* at 402.

105. *See Peller v. Southern Co.*, 707 F. Supp. at 525.

106. 20 F.3d at 403 (citing *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984)).

107. *Id.*

108. *Id.* at 403 (citing *Levine v. Smith*, 591 A.2d 194, 211 (Del. 1991)).

109. *Id.* (citing *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985)).

110. *Id.* (quoting paragraph 97 of Stepak's complaint).

111. *Id.* at 403-04.

The court of appeals first considered whether a law firm's domination of a board's consideration of a shareholder demand raises a reasonable doubt that the board failed to properly inform itself before rejecting the demand since the firm represented the directors in criminal proceedings based on the same subject matter.<sup>112</sup> The court of appeals decided that such domination would raise a reasonable doubt and concluded that Stepak's complaint alleged facts sufficient to indicate such domination.<sup>113</sup> The court of appeals analogized the facts in this case to instances involving successive dual representation and determined that a law firm's representation of "alleged wrongdoers in criminal investigations is clearly incompatible with its simultaneous handling of a reasonable and neutral investigation of their conduct on behalf of the corporation."<sup>114</sup> The court of appeals also noted that certain confidentiality duties of the law firm to the criminal defendants would render the law firm not independent with respect to the same subject matter of the criminal investigations and a conflict of interest therefore existed.<sup>115</sup> The court stated that it might have been proper for the law firm to participate in the investigation, but it was improper for the firm to conduct the investigation.<sup>116</sup> These considerations led the court to find that Stepak raised a reasonable doubt that the board's rejection of his demand was based on an informed decision protected by the business judgment rule; consequently, the court concluded his complaint was entitled to survive a motion to dismiss on a wrongful refusal argument.<sup>117</sup> The board did not meet its affirmative duty under Delaware law to conduct a reasonable investigation before rejecting a shareholder's demand.<sup>118</sup> The court of appeals addressed the second issue by determining that Mondschein's failure to make a demand on the board, as required by Delaware law, could not be excused as futile.<sup>119</sup> The court of appeals affirmed the district court's analysis that plaintiffs cannot attempt to "cover all of the bases" by having one shareholder make a demand and another allege the futility of such a demand.<sup>120</sup>

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112. *Id.*

113. *Id.* at 404.

114. *Id.* at 405.

115. *Id.* at 409-10.

116. *Id.* at 410.

117. *Id.* at 407.

118. *Id.* at 410 (citing *Levine v. Smith*, 591 A.2d 174, 213 (Del. 1991)).

119. *Id.* at 411.

120. *Id.* at 412 (citing *Boeing Co. v. Shrontz*, No. 11273, 1992 WL 81228 (Del. Ch. April 20, 1992)).

## II. PARTNERSHIPS

A. *Existence of Partnerships*

In *Clark v. Schwartz*,<sup>121</sup> the court of appeals determined that a partnership did not exist because plaintiff presented no evidence indicating a meeting of the minds with respect to one essential term of the partnership agreement.<sup>122</sup> Schwartz argued that he had entered into a partnership for the practice of law with Clark & Smith, P.C. and sought judgment for the value of his partnership interest. The court of appeals overturned a jury verdict in favor of Schwartz by determining as a matter of law that no partnership existed between the parties.<sup>123</sup> The court noted that a partnership arises from a contract, which can be express or implied,<sup>124</sup> but that a contract is not enforceable without a meeting of minds on its essential terms.<sup>125</sup> In this case, the parties failed to agree on Schwartz's exact percentage of interest in the law firm.<sup>126</sup> The court stated that evidence failed to support an equal division because Clark & Smith, P.C. retained a disproportionate share, and this essential ownership percentage could not be determined from the evidence.<sup>127</sup>

In this case, the court recognized that partnerships are creatures of contract law and the required elements of contract law must be addressed either in the partnership agreement or the arrangements among the parties to be able to value a partnership interest.<sup>128</sup> However, as discussed below, when examining the relationship between parties with a profit motive but without a formal structure, the courts are often willing to find that a partnership exists.

In *Stewart Title Guaranty Co. v. Coburn*,<sup>129</sup> the court of appeals determined that a partnership might have existed in a scheme to profit from the sale of a house.<sup>130</sup> Coburn purchased a house and lot and executed a note to Great Western Mortgage Company. Coburn sold the

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121. 210 Ga. App. 678, 436 S.E.2d 759 (1993).

122. *Id.* at 679, 436 S.E.2d at 760.

123. *Id.*

124. *Id.* (citing *Huggins v. Huggins*, 117 Ga. 151, 155, 49 S.E. 759 (1903)).

125. *Id.* (citing O.C.G.A. § 13-3-2 (1982); *Reichard v. Reichard*, 262 Ga. 561, 564, 423 S.E.2d 241 (1992)).

126. *Id.*

127. *Id.*

128. *Id.*

129. 211 Ga. App. 357, 439 S.E.2d 69 (1993).

130. *Id.* at 358, 439 S.E.2d at 70.

property to a corporate entity which immediately sold it to another individual.<sup>131</sup> This individual gave a note to Fulton Federal Savings and Loan Association, and Stewart Title certified the priority of this note. Coburn failed to pay off the Great Western note, and the ultimate purchaser defaulted on its note to Fulton Federal.<sup>132</sup> Stewart Title purchased the Great Western note giving Fulton Federal first priority.<sup>133</sup> Fulton Federal foreclosed on the property and sold it. Stewart Title proceeded to sue Coburn and Willard on the Great Western note. Willard had shared in the proceeds of the original sale of the property and had arranged for the Coburn loan from Great Western.<sup>134</sup> The court of appeals decided that although Willard did not execute the Great Western note, its execution furthered the goals of a partnership between Coburn and Willard.<sup>135</sup> The court of appeals reasoned that Coburn executed the note as an agent of the partnership and Willard as a partner could be liable for the loan.<sup>136</sup>

#### A. *Violation of Limited Partnership Agreement*

In *Moore v. Barge*,<sup>137</sup> the court of appeals found violations of limited partnership agreements which interfered with the compensation terms of an employment contract by misallocating partnership funds.<sup>138</sup> Moore had an oral employment agreement with Charter Properties, Inc. from which he received a salary and equity interest (usually ten percent) in certain limited partnerships formed by Barge, Wagener, and Lesley, the owners of Charter (together "Barge"). Moore argued that in violation of the limited partnership agreements, Barge paid itself fees for undocumented services, took larger cash distributions than allowed by their percentage interests, made interest free loans to entities owned by Barge, and paid Charter Properties undocumented fees.<sup>139</sup> The court of appeals stated that sufficient evidence existed to create a question of fact concerning the direct causal connection between alleged violations of the limited partnership agreements and Moore's claim of tortious interference with his employment contract to remand the case to the trial court.<sup>140</sup>

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131. *Id.* at 357, 439 S.E.2d at 69.

132. *Id.*

133. *Id.* at 357-58, 439 S.E.2d at 70.

134. *Id.* at 359, 439 S.E.2d at 71.

135. *Id.* at 360, 439 S.E.2d at 71.

136. *Id.* (citing O.C.G.A. § 14-8-9 (1982)).

137. 210 Ga. App. 552, 436 S.E.2d 746 (1993).

138. *Id.* at 556, 436 S.E.2d at 750.

139. *Id.*

140. *Id.*

Moore claimed a unique method to value his limited partnership interests: interference with his rights to compensation under his employment agreement based on his limited partnership interests, rather than the usual suit for an accounting of the limited partnership.

### III. BANKS AND BANKING

#### A. Letter of Credit Issues

In an unusual geographical case, the court of appeals addressed letter of credit issues in *Banca Nazionale Del Lavoro v. SMS Hasenclever, GmbH*.<sup>141</sup> SMS Hasenclever, GmbH ("SMS") filed suit against Banca Nazionale Del Lavoro ("BNL") alleging that BNL wrongfully dishonored letters of credit issued by the Central Bank of Iraq ("CBI") for which BNL issued confirmation certificates.<sup>142</sup> SMS agreed to sell certain machines to an Iraqi company, and BNL agreed to pay SMS sixty percent of the value of the machinery upon receiving documentation proving its shipment to Iraq, ten percent upon receiving documentation proving its arrival, and ten percent upon receiving documentation proving its acceptance.<sup>143</sup>

SMS presented shipping documents to BNL which contained anti-Israeli certifications.<sup>144</sup> BNL responded that such language was contrary to United States export laws and requested SMS to present new documents. SMS could not comply and BNL refused to pay.<sup>145</sup> The court of appeals stated that on a letter of credit, a confirming bank is directly obligated to the extent of its confirmation as if it were the issuer of the letter of credit.<sup>146</sup> SMS complied with the terms of its agreements, but BNL argued that the anti-Israeli language might violate a federal statute and impair its right to collect from CBI.<sup>147</sup> The court determined that BNL's future problems concerning reimbursement from CBI failed to negate its direct obligation on the letter of credit as the confirming bank.<sup>148</sup>

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141. 211 Ga. App. 360, 439 S.E.2d 502 (1993).

142. *Id.* (citing O.C.G.A. § 11-5-107 (1994)).

143. *Id.* at 361, 439 S.E.2d at 502. The court did not address the payment of the remaining twenty percent. *Id.*

144. *Id.*

145. *Id.*, 439 S.E.2d at 503.

146. *Id.* at 362, 439 S.E.2d at 503 (citing O.C.G.A. § 11-5-107 (1994)).

147. *Id.*

148. *Id.*

### B. Duties of Banks

In *Russell Corp. v. BancBoston Financial Co.*,<sup>149</sup> the court of appeals refused to find a fiduciary relationship between the borrowers and the bank or support for claims of fraud, duress, coercion, or intentional interference with business relations.<sup>150</sup> Russell Corporation and Gulf South Petroleum, Inc. (together, the "Companies") established a revolving line of credit with BancBoston Financial, partially secured by inventory, account receivables, and certain real property. The Companies used advances from the line of credit to pay suppliers and acquire additional real property and routinely issued checks in excess of the amounts available under the line of credit.<sup>151</sup>

In December 1989, the Companies and BancBoston modified the line of credit to adjust amounts available thereunder contingent upon an appraisal of the Companies' real property holdings.<sup>152</sup> After receiving this appraisal, BancBoston decided that the Companies had exceeded their credit limit by over two million dollars and demanded immediate payment of the excess amount. The Companies did not pay and BancBoston declared the entire debt in default and began foreclosure proceedings.<sup>153</sup>

The court of appeals stated that the original agreement between the parties made all advances discretionary with BancBoston and all overadvances in excess of the borrowing base amount payable on demand.<sup>154</sup> The modification agreement reiterated that BancBoston had no obligation to fund or carry overadvances except under the agreed upon terms.<sup>155</sup> The court of appeals found no special circumstances imposing fiduciary duties upon BancBoston and no evidence of any improper conduct by BancBoston in its assertion of its contractual rights against the Companies.<sup>156</sup>

In *Tucker Federal Savings & Loan Ass'n v. Rawlins*, the court of appeals examined a bank's duties to its customers.<sup>157</sup> Elvin Rawlins purchased a \$100,000 certificate of deposit with his own funds from Tucker Federal Savings and Loan and asked to have his nephew,

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149. 209 Ga. App. 660, 434 S.E.2d 716 (1993).

150. *Id.* at 662-63, 434 S.E.2d at 718.

151. *Id.* at 660, 434 S.E.2d at 717.

152. *Id.* at 661, 434 S.E.2d at 717.

153. *Id.* at 660, 434 S.E.2d at 717.

154. *Id.*

155. *Id.* at 661, 434 S.E.2d at 717.

156. *Id.* at 662-63, 434 S.E.2d at 718.

157. 209 Ga. App. 649, 434 S.E.2d 94 (1993).

Campbell, added as a joint tenant. Rawlins and Campbell signed the signature card.<sup>158</sup> Several months later Rawlins returned to Tucker Federal with his brother and asked the same employee to remove Campbell's name and add his brother's name. Because of interest penalty issues, the employee suggested adding plaintiff's name as a joint tenant and told the brothers that only the holder of the certificate could withdraw funds, which would prevent Campbell from doing so.<sup>159</sup> Rawlins died and Campbell went to Tucker Federal to withdraw the funds. Campbell did not have the certificate in his possession, but the same employee allowed him to withdraw funds after signing an affidavit stating that he was a holder of a lost certificate.<sup>160</sup> Plaintiff failed to recover the funds from Campbell and sued Tucker Federal. The trial court found for plaintiff, and Tucker Federal appealed, arguing it had no duty to plaintiff because it disbursed the funds to the proper joint tenant.<sup>161</sup> Plaintiff argued that Tucker Federal failed to change properly the ownership of the certificate of deposit, give the brothers advice concerning how funds would be disbursed, and follow industry practice to require more than a lost certificate affidavit to obtain funds.<sup>162</sup>

The court of appeals discussed the noncontractual duties that a bank owes to both its customers and third party beneficiaries when handling certificates of deposit and found no Georgia case addressing the issue.<sup>163</sup> The court of appeals held that a bank receiving funds from a customer to purchase a certificate of deposit has a duty to issue and modify the certificate as the customer requests and may be liable to the customer or a third party beneficiary for mishandling the transaction.<sup>164</sup> The court of appeals also noted that banks must be knowledgeable concerning applicable laws and exercise ordinary care in such transactions.<sup>165</sup>

### C. Other Banking Issues

In *Bank of Spalding County v. Pound*,<sup>166</sup> the court of appeals found that a bank, aware of an assignment of funds subject to its right of set-

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158. *Id.* at 649, 434 S.E.2d at 95.

159. *Id.* at 650, 434 S.E.2d at 95.

160. *Id.*, 434 S.E.2d at 96.

161. *Id.*

162. *Id.*

163. *Id.* at 651, 434 S.E.2d at 96.

164. *Id.*

165. *Id.*

166. 213 Ga. App. 324, 444 S.E.2d 375 (1994).

off, could not assert that the assignee was subject to its set-off rights against the original debtor.<sup>167</sup> Pound sold its assets to Whitworth and Wright, Inc. ("W&W"), and W&W failed to continue making required installment payments to Pound. W&W later settled with Pound and transferred assets and bank accounts back to Pound and gave the bank notice of this assignment.<sup>168</sup> The bank improperly attempted to set-off W&W indebtedness against W&W funds that had been assigned to Pound. The court of appeals noted that the bank could not set-off the funds of one depositor against a debt owed by another depositor.<sup>169</sup>

The Georgia courts also addressed issues concerning an allowed set-off against the liability of a joint tenant on a certificate of deposit,<sup>170</sup> the lack of a confidential relationship between a bank and the guarantors of a note,<sup>171</sup> and the relationship between a borrower and a member of a bank's board of directors, who allegedly embezzled the borrower's funds while representing a third party.<sup>172</sup> In the latter case, the court of appeals refused to find that the attorney was the alter ego of the bank.<sup>173</sup>

These cases indicate that the Georgia courts will closely examine contractual and noncontractual relationships between banks and their customers, but are unlikely to find a duty unless a bank's actions are arguably outside reasonably expected conduct.

#### IV. SECURITIES

##### A. Definition of a Security

In *Moss v. The State*,<sup>174</sup> Moss appealed his conviction of violating the Georgia Securities Act, by arguing that the transaction in question involved an unsecured loan rather than a securities transaction.<sup>175</sup> Moss engaged in various transactions for a client as a Georgia licensed stockbroker and registered securities salesman. He asked the client to

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167. *Id.* at 326, 444 S.E.2d at 377.

168. *Id.* at 324, 444 S.E.2d at 377.

169. *Id.* at 326, 444 S.E.2d at 378 (citing *National City Bank v. Busbin*, 175 Ga. App. 103, 105, 332 S.E.2d 678 (1985)).

170. *Yates v. Trust Co. Bank of Middle Ga.*, 212 Ga. App. 438, 442 S.E.2d 293 (1994).

171. *Dixie Diners Atlanta, Inc. v. Gwinnett Fed. Bank, FSB*, 211 Ga. App. 364, 439 S.E.2d 53 (1993).

172. *Macomber v. First Union Nat'l Bank of Ga.*, 212 Ga. App. 57, 441 S.E.2d 276 (1994).

173. *Id.* at 58, 441 S.E.2d at 278.

174. 209 Ga. App. 486, 433 S.E.2d 692 (1993).

175. *Id.* at 486, 433 S.E.2d at 693 (citing O.C.G.A. § 10-5-12 (1982)).

participate in an investment pool promising a fifty percent profit.<sup>176</sup> The client stated that she wished to invest only in stocks, but Moss agreed to guarantee the fifty percent return in a notarized contract. She allowed Moss to make the initial investment, and Moss later convinced her to invest an additional sum.<sup>177</sup> When the client requested payment for the original investment, Moss gave her a check which he asked her to hold for a period of time. After several weeks Moss informed her that her money was gone.<sup>178</sup>

The court of appeals stated that in order for an investment to be considered a security under Georgia law, "there must be an investment, a reasonable expectation of profit, and a reliance on the management of others to achieve the profit."<sup>179</sup> The court of appeals focused on Moss's clients reliance upon other persons' managerial efforts to realize the expected profits.<sup>180</sup> The court of appeals found that the representations in the investment pool proposal and the other evidence presented supported a finding that the investment constituted a security sold in violation of Georgia law.<sup>181</sup>

The court of appeals applied the investment contract analysis to determine that an investment in a pool promising a fifty percent return is a security under Georgia law and the investor is entitled to the protection of the Georgia securities laws.<sup>182</sup> As discussed above, the court of appeals focused on the investor's reliance on the skills of others to make the promised profit rather than the reasonableness prong of the investment contract analysis.<sup>183</sup> One might argue that the expectation of profit in this case, a promised fifty percent return, did not satisfy the reasonable expectation requirement, although it is unlikely that a court would focus solely on this part of the investment contract analysis.

#### B. *Agreement to Arbitrate*

In *Wheat, First Securities v. Green*,<sup>184</sup> the Eleventh Circuit decided that a district court should determine whether an agreement to arbitrate exists between a broker/dealer purchasing assets of another broker/dealer and the customers of such selling broker/dealer rather than

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176. *Id.*

177. *Id.* at 487, 433 S.E.2d at 693.

178. *Id.*

179. *Id.* (citing *Tech Resources v. Estate of Hubbard*, 246 Ga. 583, 584, 272 S.E.2d 314 (1980)).

180. *Id.* (citing *D.K. Properties v. Osborne*, 143 Ga. App. 832, 240 S.E.2d 293 (1977)).

181. *Id.* (citing O.C.G.A. § 10-5-12(h) (1994); *Jackson v. Virginia*, 443 U.S. 307 (1979)).

182. *Id.*

183. *Id.*

184. 993 F.2d 814 (11th Cir. 1993).

an arbitrator making this critical determination.<sup>186</sup> Wheat, First Securities acquired certain assets of Marshall & Co. Securities, Inc., but specifically did not assume any liabilities of Marshall under its customer contracts. The district court decided that Wheat First had no obligation to arbitrate the claims of Marshall's customers because Wheat First did not enter into a contract with those customers containing an arbitration clause.<sup>186</sup> The customers argued that the arbitrator, instead of the district court, should determine the agreement of the parties to arbitrate. They also argued that the code of the National Association of Securities Dealers ("NASD") requires arbitration of "any dispute, claim or controversy"<sup>187</sup> and Wheat First, as a NASD member, must abide by this requirement in all its dealings with customers.<sup>188</sup> Alternatively, these customers argued that Wheat First, as Marshall's successor-in-interest, acceded to their customer contracts containing the arbitration clause.<sup>189</sup>

The Eleventh Circuit admitted that a national policy favoring arbitration exists,<sup>190</sup> but found that such policy does not require parties to arbitrate absent an agreement to do so<sup>191</sup> and that a court must determine if the parties had such an agreement.<sup>192</sup> The Eleventh Circuit applied the two-pronged test that it adopted in *Chastain v. Robinson-Humphrey Co.*<sup>193</sup> to determine whether a district court should decide an arbitration question.<sup>194</sup> First, the party trying to avoid arbitration "must unequivocally deny that an agreement to arbitrate was reached and [second,] must offer 'some evidence' to substantiate the denial."<sup>195</sup> The Eleventh Circuit also noted that in

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185. *Id.* at 816.

186. *Id.*

187. *Id.* (quoting NASD Code of Arbitration Procedure §§ 1 and 12(a)).

188. *Id.*

189. *Id.* at 816-17.

190. *Id.* at 817 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

191. *Id.* (citing *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989)).

*See also Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 864 (11th Cir. 1992).

192. 993 F.2d at 817 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). *See also* 9 U.S.C. § 4 (1988).

193. 957 F.2d 851 (11th Cir. 1992).

194. 993 F.2d at 817.

195. *Id.* (quoting *Chastain v. Robinson-Humphrey Co.*, 937 F.2d 851, 854 (11th Cir. 1992)).

*Chastain*, it refused to extend previous holdings<sup>196</sup> to allow arbitrators to determine a party's allegation that no contract existed at all.<sup>197</sup>

The Eleventh Circuit next addressed an issue of first impression concerning whether Wheat First's NASD membership required it to arbitrate the claims in this case.<sup>198</sup> NASD rules require that a customer relationship exist between the parties and that the claim have arisen in connection with the member's business.<sup>199</sup> The Eleventh Circuit refused to follow the lead of the United States Court of Appeals for the Second Circuit<sup>200</sup> and decided that the customer status must be determined at the time of the events in controversy and that these customers were not customers of Wheat First at the time of the events leading to their claim.<sup>201</sup> The court did not reach the questions of whether the claim arose in connection with Wheat First's business or the sufficiency of Wheat First's membership in NASD to impose arbitration.<sup>202</sup> An extension of a duty to arbitrate solely through NASD membership would indicate a radical change from the Eleventh Circuit's emphasis on contract analysis in arbitration matters.

#### V. LEGISLATIVE CHANGES

During 1993 and 1994, the Georgia General Assembly passed amendments to Article 9 of the Georgia Uniform Commercial Code ("UCC") to establish a central indexing system.<sup>203</sup> New UCC filings must include the debtor's social security number or Internal Revenue Service taxpayer identification number.<sup>204</sup> The 1993 amendments include changes to filing requirements allowing financing statements to be filed anywhere in the state rather than tying the filing requirement to the location of the debtor or the collateral.<sup>205</sup> In addition, certain notice filings are allowed now with respect to real property related collateral.<sup>206</sup> Because these amendments contain conflicting effective

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196. *Id.* at 818 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).

197. *Id.* at 819 (quoting *Chastain v. Robinson-Humphrey Co.*, 937 F.2d 851, 854 (11th Cir. 1992)).

198. *Id.*

199. *Id.* at 820.

200. See *Paine, Webber, Jackson & Curtis, Inc. v. Chase Manhattan Bank*, 728 F.2d 577, 580 (2d Cir. 1984).

201. 993 F.2d at 820.

202. *Id.* at 821.

203. 1993 Ga. Laws 1550.

204. O.C.G.A. § 11-9-402 (1994).

205. *Id.* § 11-9-401.

206. See *id.* § 11-9-403.

dates,<sup>207</sup> many practitioners recommend continuing to file in the locations currently required but also urge including identification material.<sup>208</sup>

The Limited Liability Company Act became effective in Georgia on March 1, 1994,<sup>209</sup> and many practitioners recommend their clients examine the benefits of this type of entity for their business activities. A description of the differences between corporations and limited liability companies is beyond the scope of this article. The Georgia courts did not review any issues with respect to this new form during the survey period, but it will be interesting to examine future developments in this new area.

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207. See 1993 Ga. Laws 1550, 1562; 1994 Ga. Laws 1693, 1696.

208. See Richard P. Kessler, Jr., *Report from the Uniform Commercial Code Committee*, CORPORATE AND BANKING LAW SECTION NEWSLETTER, Summer 1994.

209. 1993 Ga. Laws 123 (codified as O.C.G.A. §§ 14-11-100 to -109 (1994)).

