The ALI Principles of Corporate Governance Compared with Georgia Law—Continued

Marjorie Fine Knowles

Colin Flannery

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Business Organizations Law Commons

Recommended Citation

The ALI Principles of Corporate Governance Compared with Georgia Law—Continued†

by Marjorie Fine Knowles* and Colin Flannery**
I. PART VII, CHAPTER 1: THE DERIVATIVE ACTION

Nothing in The American Law Institute's... Principles of Corporate Governance: Analysis and Recommendations... proved more controversial than the effort to develop fair and balanced standards for the derivative action. Only the topic of corporate takeovers seems to evoke an equally intense level of emotion among corporate lawyers. Not surprisingly then, Part VII (Remedies) of the Principles attracted the same attention from critics that a lightning rod does in a thunderstorm.¹

Indeed, the lobbying and scrutiny visited upon the American Law Institute's ("ALI") work on the derivative action from the various interest groups and academic critics rose to a level normally reserved for congressional legislation. This remedy occupies more than half of Volume 2 of the two volume set of the ALI Principles of Corporate Governance ("Principles");² much of this space is devoted to explanations of carefully compromised text.

By stark contrast, the Official Code of Georgia Annotated ("O.C.G.A.") devotes only nine sections directly to the remedy,³ one of which contains definitions⁴ and one of which applies only to foreign corporations.⁵

In reviewing the relevant provisions of the ALI Principles and those of the Georgia Code, it is important to bear in mind that, although they may differ in detail, both utilize the same fundamental mechanisms to constrain derivative litigation:

1) both recognize a central role for the board of directors in derivative litigation by positioning the board so that its evaluation of the action is given significant legal effect; and 2) both purport to establish an expeditious means for screening and dismissing nonmeritorious litigation.⁶

². PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994) [hereinafter ALI PRINCIPLES].
⁴. Id. § 14-2-740.
⁵. Id. § 14-2-747.
A. Direct and Derivative Actions Distinguished

First, the ALI Principles, in section 7.01, distinguish between derivative actions and direct actions. The crux of the distinction is, of course, the party that is primarily injured. Section 7.01(a) provides that:

A derivative action may be brought in the name or right of a corporation by a holder . . . , as provided in [section] 7.02 . . . , to redress an injury sustained by, or enforce a duty owed to, a corporation. An action in which the holder can prevail only by showing an injury or breach of duty to the corporation should be treated as a derivative action.\(^7\)

On the other hand,

[a] direct action may be brought in the name and right of a holder to redress an injury sustained by, or enforce a duty owed to, the holder. An action in which the holder can prevail without showing an injury or breach of duty to the corporation should be treated as a direct action that may be maintained by the holder in an individual capacity.\(^8\)

Comment c to section 7.01 provides a nonexhaustive list of actions that most courts consider to be direct actions,\(^9\) and comment d describes the relevant criteria to be taken into account when borderline cases are presented to the court.\(^10\) The comments conclude by stating that courts are more permissive in allowing the plaintiff to characterize the action as a direct one when the plaintiff is seeking only injunctive or prospective relief, "because typically the requested relief will not involve significant financial damages against corporate officials, the period in which the corporation is exposed to multiple suits will be relatively brief, and the relief will benefit all shareholders proportionately."\(^11\)

Section 7.01(c) allows a shareholder to commence and maintain direct and derivative actions simultaneously, and provides that special defenses

---

7. ALI PRINCIPLES, supra note 2, § 7.01(a).
8. Id. § 7.01(b).
9. Id. § 7.01 cmt. c. These include, for example, actions to enforce a right to vote, to prevent the improper dilution of voting rights, to enjoin the improper voting of shares, to compel or protect dividends, to prevent the oppression of, or fraud against, minority shareholders, or to require the holding of shareholder's meetings. Id.
10. Id. § 7.01 cmt. d. For example, the more broadly the remedy is distributed, the more likely it is that the remedy is derivative; once a derivative action is concluded, it will have a preclusive effect, sparing the corporation and individuals from multiple suits; a derivative plaintiff is usually entitled to attorney fees; and characterizing a suit as derivative may allow the board to take over the conduct of the action. Id.
11. Id.
or restrictions pertaining to the maintenance, settlement, or dismissal of one action should be regarded as inapplicable to the other.\textsuperscript{12}

Section 7.01(d) specifically addresses cases in which a closely held corporation is a party. This section gives the court discretion to treat derivative claims as direct actions, provided that doing so will not "(i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons."\textsuperscript{13}

A "derivative proceeding" is defined in section 14-2-740(1) of the Georgia Code as "a civil suit in the right of a domestic corporation or, to the extent provided in Code Section 14-2-747, in the right of a foreign corporation."\textsuperscript{14} The essential element of the definition is that the suit be "in the right of the corporation." This maintains the distinction observed in the ALI Principles between actions for the benefit of the corporation and actions for the benefit of the shareholder individually, which cannot be pursued derivatively.\textsuperscript{15} The ALI Principles do not address the issue of foreign corporations in its definition.

The Georgia Code allows a shareholder to bring a derivative suit for the following relief:

(1) To compel the defendant to account for official conduct or to decree any other relief called for by his official conduct in the following cases:

(A) The neglect of, failure to perform, or other violation of his duties in the management of the corporation or in the disposition of corporate assets;
(B) The acquisition, transfer to others, loss, or waste of corporate assets due to any neglect of, failure to perform, or other violation of duties; or
(C) The appropriation, in violation of his duties, of any business opportunity of the corporation;

(2) To enjoin a proposed unlawful conveyance, assignment, or transfer of corporate assets or other unlawful transaction where there is sufficient evidence that it will be made; and

\textsuperscript{12} Id. § 7.01(c).
\textsuperscript{13} Id. § 7.01(d).
\textsuperscript{14} O.C.G.A. § 14-2-740 (1994).
\textsuperscript{15} See Hacienda Corp. v. White, 280 Ga. App. 879, 880, 400 S.E.2d 323, 325 (1991), in which the court held that a shareholder could not bring a derivative action to set aside a deed conveying all of the corporation's assets on the basis that the requisite notice was not given to minority shareholders. The court held the statute requiring the notice to be for the benefit and protection of minority shareholders, not the corporation, hence there was no basis for asserting the corporation's rights derivatively. Id.
(3) To set aside an unlawful conveyance, assignment, or transfer of corporate assets where the transferee knew of its unlawfulness and is made a party to the action.\textsuperscript{16}

The Georgia Code does not specifically address the issues of simultaneous direct and derivative suits by a holder, or special treatment for cases involving closely held corporations. Case law, however, has filled the gap. The Georgia Court of Appeals has held that, in cases involving closely held corporations, an exception exists to the general rule that only a derivative action may be used to seek redress of corporate injuries.\textsuperscript{17} It has also held that shareholders have a right to bring direct and derivative actions simultaneously.\textsuperscript{18}

B. Standing to Commence and Maintain a Derivative Action

Section 7.02(a) of the ALI Principles provides that an equity security holder has standing to commence and maintain a derivative action if the holder:

(1) Acquired the equity security either (A) before the material facts relating to the alleged wrong were publicly disclosed or were known by, or specifically communicated to, the holder, or (B) by devolution of law . . . from a prior holder who acquired the security as described in the preceding clause (A);
(2) Continues to hold the equity security until the time of judgment, unless the failure to do so is the result of corporate action in which the holder did not acquiesce, and either (A) the derivative action was commenced prior to the corporate action terminating the holder’s status, or (B) the court finds that the holder is better able to represent the interests of the shareholders than any other holder who has brought suit;
(3) Has complied with the demand requirement of section 7.03 . . . ; and
(4) Is able to represent fairly and adequately the interests of the shareholders.\textsuperscript{19}

The comment to section 7.02 notes that this approach departs from that of the majority of states because the Principles permit the court to use the date of disclosure, rather than that of the actual consummation of the wrong, in determining the standing of a shareholder/plaintiff

\textsuperscript{19} ALI PRINCIPLES, supra note 2, § 7.02(a).
under the contemporaneous ownership doctrine.\textsuperscript{20} The comment to section 7.02 also states that subsection (2) departs from the majority approach by allowing two limited exceptions to the continuing ownership rule.\textsuperscript{21} The latter requirement in subsection (4) recognizes and seeks to address the potential abuses that attend the necessary, and sometimes involuntary, trust the shareholders must place in the derivative plaintiff.\textsuperscript{22}

The factors considered in determining whether the plaintiff can adequately represent the interests of the shareholders are: "(i) the existence of any conflict of interest . . ., (ii) the competence of the attorney representing the plaintiff, and (iii) any other evidence suggesting that the action will not be prosecuted vigorously."\textsuperscript{23} To augment these provisions, section 7.02(b) permits intervention by a holder where that person's interests are not already fairly and adequately represented. Here the Principles are consistent with the majority rule.\textsuperscript{24}

Section 7.02(c) addresses the issue of whether a director of a corporation has standing to commence and maintain a derivative action. The Principles accord standing to such persons, subject to the same fair and adequate representation standard applied to other shareholders seeking to bring a derivative action.\textsuperscript{25}

The Georgia Code is very brief in its elucidation of standing requirements. O.C.G.A. section 14-2-741 provides that

\begin{quote}
[a] shareholder may not commence or maintain a derivative proceeding unless the shareholder:

(1) Was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time; and

(2) Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.\textsuperscript{26}
\end{quote}

Hence, Georgia follows the majority rule of "contemporaneous ownership," that is, the plaintiff must have been an owner of the shares at the time of the transaction in question.\textsuperscript{27} As noted, the ALI Principles do

\begin{footnotes}
\item[20] Id. § 7.02 cmt. a.
\item[21] Id.
\item[22] Id. § 7.02 cmt. e.
\item[23] Id.
\item[24] ALI PRINCIPLES, supra note 2, § 7.02(a)(4).
\item[25] Id. § 7.02(c).
\item[27] See id.
\end{footnotes}
not require ownership at the time of the wrong, but rather ownership before knowledge of the material facts relating to the alleged wrong were known by the holder.\textsuperscript{28}

The Georgia Code does not specifically mention "continuous ownership until time of judgment" as do the ALI Principles, but it does address this issue in another way. The use of the phrase "commence and maintain" in the introductory clause, coupled with the requirement that the plaintiff "fairly and adequately represent" the interest of the corporation, effectively mandates ownership from commencement and through the entirety of the suit.\textsuperscript{29} Finally, the Georgia Code does not allow for the exceptions that are provided in the ALI Principles.\textsuperscript{30}

Both the Georgia Code and the ALI Principles mandate "fair and adequate representation" by the plaintiff, but they differ as to whose interests are being represented: the Georgia Code specifies the interests of the corporation,\textsuperscript{31} but the ALI Principles specify the interests of the shareholder.\textsuperscript{32} The comment to O.C.G.A. section 14-2-741 makes it clear that the choice of "corporation" was deliberate, because this "more properly reflects the nature of the derivative suit."\textsuperscript{33} The language of the ALI Principles is derived from Rule 23.1 of the Federal Rules of Civil Procedure, "reflect[ing] a recognition that a derivative action is . . . a representative action and is subject to many of the same abuses . . . as are class actions."\textsuperscript{34} The focus of the concern is on representation of the shareholders as a class, rather than on the corporation.

Although the Georgia Code does not specifically address shareholder intervention, the comment states that "courts have in a number of instances provided an opportunity for . . . interven[tion]" by other shareholders if a plaintiff no longer has standing under the rules.\textsuperscript{35} The Georgia Code does not address director standing in a derivative proceeding.

C. Exhaustion of Intracorporate Remedies: The Demand Rule

Section 7.03(a) states that, prior to having standing to sue derivatively, "a holder or a director [is] required to make a written demand upon the board of directors of the corporation, requesting it to prosecute
the action or take suitable corrective measures. The only exception applies if demand is excused under section 7.03(b). Demand on the shareholders, however, is not required.

This demand requirement serves several distinct purposes. First, it prevents the court from hearing a case that is not yet ripe or which may be rendered moot by subsequent board action. Second, it gives the board an opportunity to correct the impending problem by appropriate action. Third, it gives the corporation the option of taking over the suit. Finally, it gives the corporation an opportunity to reject the demanded action and, if necessary, seek early dismissal of the plaintiff’s suit.

Section 7.03(b) excuses demand only if the plaintiff can specifically show that irreparable injury to the corporation would otherwise result. In such a case, the demand must still be made promptly after commencement of the action.

The requirement of universal demand and the elimination of the futility exception, along with “the substitution of a narrower ‘irreparable injury’ exception,” are justified on the following grounds: (i) the irreparable injury exception will eliminate much of the threshold litigation that slows the remedy and makes it more costly; (ii) the demand is a relatively cheap and easy step that places little burden on the plaintiff; (iii) elimination of the futility exception allows a clearer standard for judicial review of a board’s motion to dismiss the derivative litigation; and (iv) it will, to some extent, cure the problem of judges expanding the futility exception in order to rule on the merits of the case.

The board is granted a reasonable time to respond to the demand, during which the plaintiff cannot commence proceedings. Thus, the board need not simply capitulate to the plaintiff’s demands or stoically

36. ALI PRINCIPLES, supra note 2, § 7.03(a).
37. Id.
38. Id. § 7.03(c). This is consistent with the Model Business Corporations Act. “As a general rule, informed collective shareholder consideration of proposed litigation is not feasible. As a body, the shareholders cannot realistically discuss or evaluate the often complex factual and legal issues raised by derivative actions in the same collegial manner as the board.” Id. § 7.03 cmt. h.
39. Id. § 7.03 cmt. c.
40. Id.
41. Id. § 7.03.
42. Id. § 7.03(b).
43. Id.
44. Id. § 7.03 cmt. e.
45. Id.
refuse at this stage. It can pilot a middle course and respond by taking
the matter under review. Absent irreparable injury, the plaintiff should
not be able to commence suit at this stage.46 However, once a reason-
able time elapses without decision, the plaintiff's hands are untied.

No attempt is made to quantify what is a reasonable time, and bearing
in mind the innumerable factual variations that drive derivative suits,
such an attempt would probably be doomed to failure in any event. The
comments to section 7.03 do note, however, that the board should seldom
need more than sixty days to complete its review and respond definitively.47

The ALI regards dismissal without prejudice, rather than leave to
replead or dismissal with prejudice, as the most appropriate judicial
response to an unexcused failure to make demand.48

The Georgia Code, section 14-2-742 reads:

A shareholder may not commence a derivative proceeding until:
(1) A written demand has been made upon the corporation to take
suitable action; and
(2) Ninety days have expired from the date the demand was made
unless the shareholder has earlier been notified that the demand
has been rejected by the corporation or unless irreparable injury
to the corporation would result by waiting for the expiration of the
90 day period.49

Hence, Georgia has chosen a set period of time rather than the less
certain "reasonable time" favored by the ALI. Under O.C.G.A. section
14-2-743, the court may extend this ninety-day period if the corporation
has commenced an inquiry into the allegations and requests more time
to complete it.50 The comment to the section states that "it is expected
that the court will monitor the course of the investigation to ensure that
it is proceeding expeditiously and in good faith."51 Similar consider-
ations would probably be relevant to the question of what is a "reason-
able time" under the ALI Principles.

The Georgia Code thus differs from the ALI Principles by requiring
that demand be made upon the corporation, whereas, under the ALI
Principles, demand is made upon the board of directors. The reasoning
behind the requirement of making demand on the corporation, as
opposed to the board, is that there may be instances in which the taking

46. Id. § 7.03(d).
47. Id. § 7.03 cmt. f.
48. Id. § 7.03 cmt. g.
50. Id. § 14-2-743.
51. Id. § 14-2-743 cmt.
of, or refusal to take, action would fall within the authority of an officer of the corporation, such as a decision to sue a third party for an injury to the corporation.\textsuperscript{52}

Although both the Georgia Code and the \textit{ALI Principles} require a showing of irreparable injury, such a showing under the Principles will excuse service of the demand until after the suit is commenced. Under the Georgia Code, it will simply expedite the ninety-day period; the initial demand still has to be served.\textsuperscript{53}

Section 14-2-743 of the Georgia Code adds another dimension to the period following the initial demand. It provides that, if the corporation commences an inquiry into the plaintiff’s demand or complaint, the court may stay any derivative proceeding for as long as the court deems appropriate. The comment to the section notes that the court should monitor any inquiry so commenced by the corporation.\textsuperscript{54}

Neither the \textit{Principles} nor the Code directly addresses the content of the demand, but the comment to O.C.G.A. section 14-2-742 says that it should “set forth the facts concerning share ownership and be sufficiently specific to apprise the corporation of the action so that the demand can be investigated.”\textsuperscript{55}

\textbf{D. Action Following the Board’s Rejection of the Plaintiff’s Demand}

Sensitive to the corporate sector’s robust suspicion of derivative plaintiffs, the \textit{ALI} imposed pleading rules on the derivative plaintiff’s complaint. These rules are clearly designed to winnow out meritless claims at the summary judgment stage. Section 7.04 requires the detailed pleading of facts that, if true, raise a significant prospect that the transaction or conduct complained of breached the duty of care, duty of fair dealing, or duties that arise in transactions in control or tender offers.\textsuperscript{56} This section is meant to impose a higher standard of pleading on the derivative plaintiff than the “notice pleading” provisions of the Federal Rules of Civil Procedure.\textsuperscript{57}

If, following the board’s rejection of the plaintiff’s demand, the board delivers a written reply to the plaintiff stating that the demand was rejected by disinterested directors, that those directors constituted a majority of the board and were “capable of objective judgment in the circumstances,” and that the reply has facts supporting these assertions.

\begin{itemize}
\item \textsuperscript{52} See \textit{id.} § 14-2-742 cmt.
\item \textsuperscript{53} \textit{id.} § 14-2-742.
\item \textsuperscript{54} \textit{id.} § 14-2-743 cmt.
\item \textsuperscript{55} \textit{id.} § 14-2-742 cmt.
\item \textsuperscript{56} \textit{ALI PRINCIPLES}, \textit{supra} note 2, § 7.04(a)(1).
\item \textsuperscript{57} \textit{id.} § 7.04 cmt. c.
\end{itemize}
by the board, then the plaintiff must also “plead with particularity facts that, if true, raise a significant prospect that” one of the following conditions exists: “(A) The statements in the reply are not correct,” or (B) if the conduct in question has the benefit of the business judgment rule, that the rejection of the plaintiff’s demand did not satisfy the requirements of that rule, or (C) if the conduct in question does not have the benefit of that rule, either (i) the rejecting directors did not satisfy the good faith and information requirements of the business judgment rule, or (ii) the rejecting directors could not reasonably have determined that rejection of the demand was in the best interests of the corporation.

If these additional pleading requirements are not met, the defendants are entitled to dismissal prior to discovery. The section is self-policing, with 7.04(b) requiring a Rule 11 type certification by the derivative plaintiff’s attorney, and section 7.04(d) allowing an award of costs where the derivative action was taken in bad faith or without reasonable cause.

On their face, subsections 7.04(b) and (d) apply to both the derivative plaintiffs and defendants and their respective counsels; however, the sections’ main prey was clearly intended to be the original complaint.

Under section 7.04(b), all attorneys of record must sign every paper filed on behalf of their client, and in so doing, they certify that:

(i) to the best of the attorney’s knowledge, information, and belief, formed after reasonable inquiry, the ... paper is well grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law, and (ii) the ... paper is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

58. Id. § 7.04(a)(2)(A).
59. Id. § 7.04(a)(2)(B).
60. Id. § 7.04(a)(2)(C).
61. Id.
62. ALI PRINCIPLES § 7.04 cmt. e states that § 7.04(b) should not be read as a general endorsement of ... Rule [11], or of the more liberal use of sanctions, but rather as a context-specific judgment that the special nature of the derivative litigation and the broad ability it confers on the individual shareholder to commence suit justifies authorizing courts to require such a certification, and also to award sanctions for a failure to comply with its standard, even if this power is not generally possessed by courts within the jurisdiction. It should be emphasized that § 7.04 (b) is two-sided and equally applies to counsel for the defendants.
63. Id. § 7.04(b).
Taken directly from Rule 11, this section is meant to invoke the objective standard of reasonableness applied by the Supreme Court of the United States in *Business Guides v. Chromatic Communications Enterprises.* As such, a showing of bad faith on the part of the filing party or their attorney is not necessary to invoke the sanctions provided in section 7.04(d).

The Georgia Code does not appear to evidence as much suspicion of derivative claims as do the ALI Principles. No heightened pleading rules are imposed across the board on Georgia derivative proceedings. The Georgia Code does, however, contain a costs sanction; section 14-2-746 allows the court to order the derivative plaintiff to "pay any defendant's reasonable expenses (including attorneys' fees) incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose."

E. Board Authority in Derivative Actions

Following the filing of the plaintiff's derivative action, the board of directors still has a role, albeit a limited one, in the conduct of the action. Section 7.05(a) lists a series of powers vested in the board of directors after the action is filed. The board may:

(1) Move to dismiss the action on account of the plaintiff's lack of standing, [for failure to serve the requisite demand on the board, or inadequate pleading], or move for dismissal of the complaint or for summary judgment;
(2) Move for a stay of the action, including discovery, as provided by [section] 7.06 . . . ;
(3) Move to dismiss the action as contrary to the best interest of the corporation, as provided in [sections] 7.07-7.12 . . . ;
(4) Oppose injunctive or other relief materially affecting the corporation's interests;
(5) Adopt or pursue the action in the corporation's right;
(6) Comment on, object to, or recommend any proposed settlement, discontinuance, compromise, or voluntary dismissal by agreement between the plaintiff and any defendant under [section] 7.14, . . . or any award of attorney fees and other expenses under [section] 7.17 . . . ;

---

64. *See id.* § 7.04 cmt. e.
66. ALI PRINCIPLES, *supra* note 2, § 7.04 cmt. e.
(7) Seek to settle the action without agreement of the plaintiff under [section] 7.15 . . .

Apart from these enumerated powers, "the corporation may not otherwise defend the action in the place of, or raise defenses on behalf of, other defendants." However, the board may delegate its authority to take any of these actions to a committee of directors, or may "[r]equest the court to appoint a special panel in lieu of a committee of directors, or a special member of a committee, under [section] 7.12." Comment c to section 7.05 articulates the rationale for these powers:

It is axiomatic that the corporation may take over a derivative action and pursue the action itself. An original purpose of the demand rule was to provide an opportunity for the corporation to do so. This right is not, however, absolute, and the court may reject the corporation's application when it finds that those controlling or representing the corporation in the action could not provide "fair and adequate representation" for the other shareholders. See [section] 7.02(a)(4). In addition, any settlement between the corporation and the defendants is subject to the standards of [section] 7.15. Finally, even when the corporation displaces the original plaintiff, the plaintiff's attorney should be entitled to remain in the litigation with the same status as an intervenor and may be entitled to an award of attorneys' fees under [section] 7.17 . . .

Section 7.06 grants the court a broad authority to stay a derivative action. It provides:

In the absence of special circumstances, the court should stay discovery and all further proceedings by the plaintiff in a derivative action on the motion of the corporation and upon such conditions as the court deems appropriate pending the court's determination of [the corporation's motion] under [section] 7.04(a)(2) and the completion, within a reasonable period of any review and evaluation undertaken and diligently pursued pursuant to [section] 7.09 . . . [T]he court may stay discovery and further proceedings pending (a) the resolution of a related action or (b) such other event or development as the interests of justice may require.

This section follows the common practice in derivative litigation, which is to stay discovery by the plaintiff pending the board's preparation and

68. ALI PRINCIPLES, supra note 2, § 7.05(a).
69. Id. § 7.05(a).
70. Id. § 7.05(b).
71. Id. § 7.05 cmt. c (citations omitted).
72. Id. § 7.06.
submission to the court of a report evaluating the action and its impact on the corporation.\textsuperscript{73}

Comment c to section 7.06 notes that, although it is usually appropriate for the court to postpone the action until it is determined that the action should not be dismissed or otherwise terminated, there is a danger in this procedure because it can serve to sidetrack derivative litigation for a long period of time.\textsuperscript{74} Hence, heightened judicial scrutiny of the corporation’s actions is appropriate: “When the corporation has earlier made an unsuccessful motion to dismiss under [section] 7.04(a)(2) and then determines to conduct a more extended inquiry under [section] 7.09, close judicial supervision is particularly appropriate to ensure that unnecessary delay does not occur.”\textsuperscript{75}

Section 7.07 provides that the court should dismiss a derivative action on a motion by the board requesting dismissal as in the best interest of the corporation if any of the following three conditions are met:

1. In the case of an action against a person other than a director, senior executive, or person in control of the corporation, or an associate of any such person, the determinations of the board or committee underlying the motion satisfy the requirements of the business judgment rule . . . ;
2. In the case of an action against a director, senior executive, or person in control of the corporation, or an associate of any such person, the conditions specified in [section] 7.08 [see below] are satisfied; or
3. In any case, the shareholders approve a resolution requesting dismissal of the action in the manner provided in [section] 7.11 [see below].\textsuperscript{76}

These are not the only options available to the board. “Regardless of whether a corporation chooses to proceed under [section] 7.08 or [section] 7.11, it is free to make any other motion available to it under the law, including a motion to dismiss the complaint or for summary judgment.”\textsuperscript{77}

Section 7.07(a)(1) reiterates the almost universal rule: where the action is against a person who is neither a director, senior executive, nor controlling person of the corporation or an associate of any of them, the board’s authority to dismiss is governed by the business judgment

\textsuperscript{73} \textit{Id.} § 7.06 cmt. c.
\textsuperscript{74} \textit{Id.} (citing Kaplan v. Wyatt, 484 A.2d 501 (Del. Ch. 1984), aff’d, 499 A.2d 1184 (Del. 1985)).
\textsuperscript{75} \textit{Id.} § 7.06 cmt. c.
\textsuperscript{76} \textit{Id.} § 7.07(a) (citations omitted).
\textsuperscript{77} \textit{Id.} § 7.07(b).
rule. In contrast, where the action is against one of these parties, the heightened scrutiny of sections 7.08 to 7.10 is brought into play.

Section 7.08 provides:

The court should, subject to [a determination of whether the defendant obtained a significant improper benefit] dismiss a derivative action against a defendant who is a director, a senior executive, or a person in control of the corporation, or an associate of any such person, if:

a. The board . . . has determined that the action is contrary to the best interests of the corporation and has requested dismissal of the action;

b. The procedures specified in [section] 7.09 . . . for the conduct of a review and evaluation of the action were substantially complied with . . . , or any material departures therefrom were justified under the circumstances; and

c. The determinations of the board or committee satisfy the applicable standard of review set forth in [section] 7.10(a).

This section is meant to outline "an integrated framework for judicial review" of a board's decision to seek dismissal of a derivative action. It "comes into play when a derivative action is not dismissed under [section] 7.04(a), either because the corporation did not make a motion under that section or because the court declined to grant the motion."

The procedural standards to be applied by the board to the review and evaluation of a derivative action against directors, senior executives, controlling persons, or associates thereof (and to section 7.11 dismissals), are contained in section 7.09(a). These standards are:

1. The board or committee should be composed of two or more persons, no participating member of which was interested in the action, and should as a group be capable of objective judgment in the circumstances;

2. The board or committee should be assisted by counsel of its choice and such other agents as it reasonably considers necessary;

3. The determinations of the board or committee should be based upon a review and evaluation that was sufficiently informed to satisfy the standards applicable under [section] 7.10(a); and

4. If the board or committee determines to request dismissal of the derivative action, it shall prepare and file with the court a report or

---

78. Id. § 7.07 cmt. a.
79. Id. § 7.07 cmt. c.
80. Id. § 7.08 (citations omitted).
81. Id. § 7.08 cmt. a.
82. Id. § 7.08 cmt. c.
other written submission setting forth its determinations in a manner sufficient to enable the court to conduct the review required under [section] 7.10.83

A mere procedural irregularity will generally not be fatal to the corporation's aims. Under section 7.09(b), if the court is not prepared to grant the motion to dismiss under section 7.08 or 7.11 because the procedures of section 7.09(a) were not followed, the court should permit the board or committee to supplement its procedure and to make such further reports or other written submissions so as to satisfy section 7.09(a), unless the court decides that "(i) the board or committee did not act on the basis of a good faith belief that its procedures and report were justified in the circumstances; (ii) unreasonable delay or prejudice would result; or (iii) there is no reasonable prospect that such further steps would support dismissal of the action."84

Section 7.10 of the Principles is an important section that addresses the standard of judicial review to be applied to the board's motions to dismiss under section 7.08. Under section 7.10(a)(1), the business judgment rule standard should be applied if

the gravamen of the claim is that the defendant violated . . . [the duty of care], other than by committing a knowing and culpable violation of the law that is alleged with particularity, or if the underlying transaction or conduct would be reviewed under the business judgment rule under [sections 5.03, 5.04, 5.05, 5.06, 5.08, or 6.02].85

This section counsels dismissal of the claim unless the court finds that the board's or committee's determinations do not satisfy this rule. Section 7.10(a)(2) states:

In other cases governed by Part V (Duty of Fair Dealing) or Part VI (Role of Directors and Shareholders in Transactions in Control and Tender Offers), or to which the business judgment rule is not applicable, including cases in which the gravamen of the claim is that defendant committed a knowing and culpable violation of law . . ., the court should dismiss the action if the court finds, in light of the applicable standards under Part IV, V, or VI that the board or committee was adequately informed under the circumstances and reasonably determined that dismissal was in the best interests of the corporation, based on grounds that the court deems to warrant reliance.86

83. Id. § 7.09(a) (citations omitted).
84. Id. § 7.09(b).
85. Id. § 7.10(a)(1).
86. Id. § 7.10(a)(2).
Section 7.10(b) addresses the retention of a significant improper benefit by the defendant or an associate. It provides that the court should not allow dismissal when doing so would allow the defendant or an associate to retain a significant improper benefit in those cases in which: (1) the defendant, either alone or with others who improperly benefitted from the same transaction, has control of the corporation, or (2) the benefit was obtained by fraud or without the advance authorization or ratification of the benefit by disinterested directors or shareholders, and in breach of section 5.02 or section 5.04.87 However, if the court finds that the likely injury to the corporation from continuance of the suit "convincingly outweighs any adverse impact on the public interest from dismissal," it should dismiss the action.88 Developments "subsequent to the time of the underlying transaction or conduct" are relevant to the court's determination, including events subsequent to the time of the board's motion for dismissal.89

Recognizing that the shareholders are the ultimate owners of the corporation, "and as such cannot be excluded from a significant voice in deciding matters affecting them," section 7.11 gives an overriding right to the shareholders to dismiss a derivative action. The only qualifications on this right are that certain procedural steps must be met prior to the shareholders' vote, and that dismissal must not constitute a waste of corporate assets.90

Section 7.11 gives the shareholders this overriding power to dismiss a derivative action provided certain procedures are followed and full disclosure is made to the shareholders. The section advises the court to dismiss a derivative action upon approval of a resolution by the shareholders requesting dismissal because the action is not in the best interests of the corporation.91 Dismissal should follow provided:

(a) A resolution recommending such dismissal . . . was adopted by the board . . . after a review and evaluation that substantially complied with the procedures specified in [section] 7.09(a)(1)-(3) . . . or in which any material departures from those procedures were justified under the circumstances;

(b) Disclosure was made to the shareholders of all material facts . . . and, if requested by plaintiff, the disclosure statement included a brief

87. Id. § 7.10(b).
88. Id.
89. Id. § 7.10(c).
90. Id. § 7.11 cmt. c.
91. Id. § 7.11.
92. Id.
statement by the plaintiff summarizing the plaintiff's views [on the matter];
(c) The resolution was approved by a vote of disinterested shareholders; and
(d) Dismissal would not constitute a waste of corporate assets.93

Comment a to section 7.11 notes that, as of the drafting of the ALI Principles, no case appeared to have “sustained a shareholder ratification of a decision not to sue,” but the comment acknowledges that section 7.11 is “consistent with repeated statements in the case law that shareholders have this power.”94

The scope of judicial scrutiny applied to a decision made under section 7.11 is substantially more restricted than under section 7.10. Provided that the requisite procedures were followed and the required disclosures were made, the court can only refuse to dismiss if doing so amounts to a waste of corporate assets.95 This is in recognition of the fact that the shareholders are the ultimate owners of the corporation.96

Comment d to section 7.11 provides that the utility of section 7.11 is likely to be the greatest in four circumstances:

(1) when the action is against a person having “control,” because the special prophylactic restrictions in [section] 7.10(b) would become applicable if the motion for dismissal had to qualify under [section] 7.08; (2) when [section] 7.09(a)(4)’s requirement that a report or other written submission be filed with the court (which does not apply under [section] 7.11) creates special difficulties (possibly because of concerns about the loss of the attorney-client privilege); (3) when the corporation is closely held so that shareholders can be easily solicited . . .; and (4) when the corporation wishes to make applicable the more deferential “waste” standard of [section] 7.11(d).97

These latter two circumstances are the most likely to attract the use of the section.98

The Georgia Code is silent as to whether the shareholders have an overriding power to request dismissal of a derivative action. O.C.G.A. section 14-2-744 lists those groups entitled to make an independent determination that the suit is not in the best interests of the corporation, and the shareholders are not listed as one of the groups.

93. Id. § 7.11 (citations omitted).
94. Id. § 7.11 cmt. a.
95. Id. § 7.11 cmt. c.
96. Id.
97. Id. § 7.11 cmt. d.
98. Id.
Section 7.12 of the ALI Principles allows the corporation to move the
court for the appointment of “one or more individuals to serve as a panel
in lieu of a committee of directors for the purposes of [section] 7.08 . . .
or [section] 7.11.” None of these persons may “be interested in the action
or have a significant relationship with a senior executive of the
corporation or a similar relationship with any defendant or plaintiff.”
This panel is to “conduct a review and evaluation and prepare a report
or other written submission as to the advisability of terminating the
action, in compliance with the procedures specified in [section] 7.09.”
The report or written submissions “should have the same status under
[sections 7.08, 7.10, 7.11, or 7.13] . . . as a report or other written
submission of the board or a properly delegated committee thereof.”
Unless the court otherwise directs, the corporation should bear the cost
of the inquiry and report or other written submission.

In lieu of appointing a panel under section 7.12(a), the court, on the
corporation’s motion, “may appoint one or more individuals who are not
directors of the corporation and who meet the qualifications specified in
[section] 7.12(a) to serve on a committee established by the corporation
under [section] 7.05(b)(1).”

The principal use of this section arises when “a controlling person or
a majority of the board is sued in a derivative action and the board does
not have the requisite number of disinterested directors to staff a
litigation committee that complies with the standards set forth in
[section] 7.09(a).”

Georgia Code section 14-2-744(b)(3) parallels section 7.12(b). It
effectively allows the corporation to move the court for the appointment
of one or more independent persons to make a determination of whether
the derivative suit is in the best interests of the corporation. This
section allows only one person to be appointed, even though section 14-2-
744(b)(2) requires the committee of directors to be comprised of at least
two persons. This is in recognition of the increased costs to the
corporation that the appointment of outside persons generates.

For the purposes of section 14-2-744, none of the following facts alone
will cause a director to be considered not independent:

99. Id. § 7.12(a).
100. Id.
101. Id.
102. Id. § 7.12(b).
103. Id. § 7.12 cmt. c.
105. Id. § 14-2-744 cmt.
The nomination or election of the director by directors who are not independent;

(2) The naming of the director as a defendant in the derivative proceeding; or

(3) The fact that the director approved the action being challenged in the derivative proceeding so long as the director did not receive a personal benefit as a result of the action.\(^\text{106}\)

Section 14-2-744 deals generally with dismissal. It provides that the court may dismiss the action if one of the groups listed in the section\(^\text{107}\) determines in good faith and after a reasonable investigation that the suit is not in the best interests of the corporation. The corporation bears the burden of proving good faith, the reasonableness of the investigation, and the independence of the directors.\(^\text{108}\)

Section 7.13 of the ALI Principles sets out in detail the procedures, burdens, and standards applicable to the board's motion (instituted under section 7.08) or the shareholders' motion (instituted under section 7.11) to dismiss the plaintiff's derivative suit. Section 7.13(a) requires that the corporation submit to the court a written report setting out the procedures and determinations of the board or the committee thereof, or the resolution of the shareholders calling for dismissal. A copy of this report must be provided to the plaintiff's counsel.\(^\text{109}\) If the report is accompanied by an opinion of counsel, this opinion must also be given to the plaintiff's counsel.\(^\text{110}\) Section (b) grants the court discretion to issue a protective order concerning the report.\(^\text{111}\)

Section (c) sets forth the criteria governing when the court should allow the plaintiff to engage in discovery prior to the court's decision regarding dismissal of the action. To obtain a discovery order, the plaintiff must show: (1) that "a substantial issue exists as to whether the applicable standards of [sections 7.08 through 7.12] have been satisfied;" and (2) that "the plaintiff is unable without undue hardship to obtain the information by other means."\(^\text{112}\) The discovery order is

---

106. Id. § 14-2-744(c).
107. Section 14-2-744(b) provides that the dismissal determination be made by a majority of independent directors, if they constitute a quorum; a majority of a committee of independent directors appointed by a majority of independent directors, whether or not they constitute a quorum; or the above described panel. Id. § 14-2-744(b).
109. ALI PRINCIPLES, supra note 2, § 7.13(a).
110. Id. § 7.13(e).
111. Id. § 7.13(b).
112. Id. § 7.13(c).
also subject to the court's general discretion in section 7.06 to stay a
derivative action.113

Provided the plaintiff overcomes these hurdles, the plaintiff is entitled
to "such limited discovery or limited evidentiary hearing, as to issues
specified by the court, as the court finds to be (i) necessary to enable it
to render a decision on the motion under the applicable standards of
[sections 7.08 through 7.12]; and (ii) consistent with an expedited
resolution of the motion."114 Absent special circumstances, the court
should also "limit on a similar basis any discovery that is sought by the
plaintiff in response to a motion for summary judgment by the corpora-
tion or any defendant to those facts likely to be in dispute."115 A
protective order is also available for discovery garnered under this
section.116

Section 7.13(d) supplies the standards that govern the burden of proof.
That subsection provides that the burden of proof will rest on the party
making the relevant allegation or raising the relevant defense. The
plaintiff has the burden of proof:

(1) under [section] 7.08 where the standard of judicial review is
determined under [section] 7.10(a)(1) because the basis of the claim [is
a breach of the duty of care] or because the underlying transaction
would be reviewed under the business judgment rule, or (2) under
[section] 7.07(a)(1) (suits against third parties and lesser corporate
officials).117

The corporation has the burden in motions "under [section] 7.08 where
the standard of judicial review is determined under [section] 7.10(a)(2)
because the underlying transaction would be reviewed under a standard
other than the business judgment rule," except that the plaintiff has the
burden of showing: "(i) that a defendant's conduct involved a knowing
and culpable violation of law, (ii) that the board or committee . . . was
not capable of objective judgment . . . as required by [section] 7.09(a)(1),
and (iii) that dismissal . . . would permit a defendant or an associate . . .
to retain a significant improper benefit under [section] 7.10(b)."118

For the purposes of section 7.10(b), the corporation has the burden of
proving "that the likely injury to the corporation from continuation of
the action convincingly outweighs any adverse impact on the public

113. Id.
114. Id.
115. Id.
116. Id.
117. Id. § 7.13(d).
118. Id.
interest from dismissal of the action."\textsuperscript{119}\) Where shareholders bring an action for dismissal under section 7.11, the plaintiff has the burden of proof for subsections (b), (c), and (d), but the corporation has the burden with respect to subsection (a).\textsuperscript{120}

Section 7.13(e) states that, subject to the requirement that any legal opinion given to the court with the report under subsection (a) be given to the plaintiff’s counsel, communications between the board or committee and its counsel will not cease to be privileged, and the attorney’s work product will not lose its privileged character either because the action is derivative, or on the grounds that privilege was waived by the production of the report to the plaintiff or to the court under section 7.13(a).\textsuperscript{121}

Section 7.14 requires the court to approve any settlement, discontinuance, or compromise of a derivative action between the plaintiff and a defendant. The section provides two standards that should be met before the court grants its approval. First, the “balance of corporate interests” should favor the settlement; and second, the settlement should be “consistent with public policy.”\textsuperscript{122} In evaluating the proposed settlement against these standards, “the court should place special weight on the net benefit, including pecuniary and nonpecuniary elements, to the corporation.”\textsuperscript{123}

This provision recognizes the fact that in some cases it may be in the plaintiff’s attorneys’ interests to settle in cases in which such a settlement is not necessarily in the interests of the shareholders.\textsuperscript{124} This situation is exacerbated in derivative suits by two factors not present in most other litigation: (i) the corporation usually pays the derivative plaintiff’s attorney’s fees; (ii) and nonpecuniary settlements are more commonplace and, indeed, are contemplated by section 7.14(b).\textsuperscript{125} The section only applies to voluntary settlements, not involuntary dismissals in which, obviously, little prospect of collusion exists.\textsuperscript{126}

\textsuperscript{119.  Id.  \\
120.  Id.  \\
121.  Id. § 7.13(e).  Comment e to § 7.13 notes that the cases have recognized a potential exception to the privilege doctrine where the action is derivative because the plaintiff is seeking to represent the corporation and privilege may not be asserted against one’s own client.  Id.  \\
122.  Id. § 7.14(b).  \\
123.  Id.  \\
124.  Id. § 7.14 cmt. c.  \\
125.  Id.  The section requires the court to consider the benefit to the corporation “including pecuniary and nonpecuniary elements.”  Id. § 7.14(b).  \\
126.  Id. § 7.14 cmt. c.
The shareholders are given a voice in any proposed settlement. Section 7.14(c) provides that, except where their interests will not be substantially affected, the shareholders must be given notice of any proposed settlement and be provided with an opportunity for a hearing to voice opposition to the settlement. At this hearing they may call witnesses, conduct cross-examination, and, with the court's approval, undertake reasonable discovery.  

Unfortunately, neither the comments nor the section itself provides guidance as to how much weight is to be afforded vehement opposition by shareholders to any proposed settlement that the court is otherwise inclined to approve. The section does not seem to grant a right of veto to the shareholders, but such considerable opposition would be given weight by the court in determining whether the standards under section 7.14(b) have been met.

Georgia Code section 14-2-745 addresses this issue, but not in as much detail as the ALI Principles. Section 14-2-745 requires court approval prior to settlement or discontinuance, as well as notice and the opportunity for shareholders to be heard if it is determined that they will be substantially affected by the proposed settlement. According to the comments in both the ALI Principles and the Georgia Code, these sections are consistent with modern federal practice requiring judicial approval and notice for a settlement. Because the derivative suit is brought for the benefit of the shareholders, they should be heard on the matter.

Section 7.15 of the ALI Principles gives the board the power to settle a derivative action without the consent of the plaintiff, provided that the court approves the settlement. The court should approve the settlement if three conditions are met: (1) A disinterested board (or committee thereof) must have conducted an adequate evaluation of the matter and have followed the procedures in section 7.09 (procedures for requesting dismissal of a derivative action). Any material departures from those procedures must have been justified in the circumstances. (2) The section 7.14 provisions governing notice and an opportunity for a hearing to affected shareholders were substantially complied with; and (3) In light of the entire record, "the balance of corporate interests warrants approval and the settlement or release is consistent with public policy." In evaluating this, special weight is to be placed on the net benefit (pecuniary and nonpecuniary) to the corporation.  

Regarding the first requirement above, section 7.15(c) allows the court to consider the

---

127. Id. § 7.14(c).  
129. ALI PRINCIPLES, supra note 2, § 7.15.
conclusions of a specially appointed panel in lieu of a report submitted from the board or a committee if the procedures required by section 7.12 were followed.\textsuperscript{130}

Section 7.15(b) states the obvious. It provides that "[a]ny settlement or release . . . constitutes a valid affirmative defense with respect to the claims and liabilities covered" by the settlement to the same extent that a settlement with the plaintiff's consent would under section 7.14. This subsection also addresses an area in which there is very little case law.\textsuperscript{131} The comments to the section note that the reason for requiring judicial approval of any proposed settlement is to prevent the derivative suit from being rendered totally ineffective by the corporation having the power to settle meritorious claims for nominal consideration.\textsuperscript{132} The burden is on the proponents of the settlement, usually the board or a committee thereof, to show that the standards of section 7.15(a)(1) to (3) have been met.\textsuperscript{133} Where such a settlement is approved, the plaintiff's counsel will usually be entitled to attorneys' fees under section 7.17 for having "caused" the result.\textsuperscript{134}

Similar to most states' laws, the Georgia Code does not specifically address settlement procedures except as stated above. Georgia Code section 14-2-744 (as it pertains to dismissals) does require a disinterested board, committee, or specially appointed panel to review and evaluate the action prior to their determinations, but does not specifically mention applicability to settlement, as does section 7.15(a)(1) of the ALI Principles.

\textbf{F. Recovery in Derivative Proceedings}

The ALI Principles adhere to the proposition that the derivative plaintiff effectively sues as the trustee or "next friend" of the corporation.\textsuperscript{135} As such, any recovery in the suit accrues exclusively for the benefit of the corporation.\textsuperscript{136} Any plaintiff or attorney who receives property or money from the suit holds it for the benefit of the corporation and is required to account to the corporation for it, "unless such money or property was received pursuant to a judicial order or a judicially approved settlement."\textsuperscript{137}

\begin{itemize}
  \item \textsuperscript{130} \textit{Id.} \textsuperscript{[Vol. 48} § 7.15(c).
  \item \textsuperscript{131} \textit{Id.} \textsuperscript{[Vol. 48} § 7.15 cmt. a.
  \item \textsuperscript{132} \textit{Id.} \textsuperscript{[Vol. 48} § 7.15 cmt. c.
  \item \textsuperscript{133} \textit{Id.} \textsuperscript{[Vol. 48} § 7.15 cmt. d.
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} ALI PRINCIPLES, supra note 2, § 7.16.
  \item \textsuperscript{137} \textit{Id.}
\end{itemize}
The only exception to this rule applies when the court, under section 7.18(e), has ordered that all or a portion of the proceeds be paid directly to the shareholders on a pro-rata basis. The circumstances in which such an order may be warranted are those in which "a substantial portion of the shares are held either by persons who had aided or abetted the defendants to commit the fiduciary breach or by non-contemporaneous holders who had suffered no injury" because they purchased at a price reflecting the injury.\(^{138}\) The obvious aim of this provision is to prevent the circulation of recovery and the unjust enrichment of these shareholders.

The Georgia Code is silent on the issue of the disposition of any recovery. In *Schnorbach v. Fuqua*,\(^{139}\) however, the court regarded it as "well settled" that, in shareholder's derivative suits, the recovery "normally" goes to the corporation.\(^{140}\) Indeed, this is the very nature of the derivative suit: the plaintiff sues for, and on behalf of, the corporation.

**G. Plaintiff’s Attorney’s Fees and Expenses**

The ALI *Principles*, in section 7.17, allow for the recovery of "reasonable attorneys' fees and other reasonable litigation expenses" from the corporation by a successful plaintiff in derivative proceedings.\(^{141}\) However, this award of costs should not "exceed a reasonable proportion of the value of the relief (including nonpecuniary relief) obtained by the plaintiff for the corporation."\(^{142}\)

In providing only that the costs awarded should not exceed a "reasonable proportion" of the value of the relief, the ALI deliberately avoided choosing between the "lodestar" method of awarding costs and the percentage-of-the-recovery formula.\(^{143}\)

The term "successful" in section 7.17 does not necessarily require a plaintiff’s verdict. It includes a settlement, or corporate action, that substantially achieves the ends sought by the plaintiff. The test is whether the plaintiff's action was a significant cause of the remedial action taken by the defendant.\(^{144}\)

---

138. *Id.* § 7.18 cmt. g. The mere fact that the breaching party was a shareholder, however, will not necessarily result in a pro rata recovery. The court must also consider the effect such an action would have on other parties, including creditors of the company. *Id.*


140. *Id.*


142. *Id.*

143. *Id.* § 7.17 cmt. a.

144. *Id.* § 7.17 cmt. e.
For the derivative action to have been of sufficient benefit to the corporation to merit the award of costs, it must have had an effect "more than technical in its consequence" and have achieved "a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest."\textsuperscript{1}

O.C.G.A. section 14-2-746(1) states that the court may "order the corporation to pay the plaintiff's reasonable expenses (including attorney's fees)" if it finds that the corporation has substantially benefitted from the derivative proceedings.\textsuperscript{46} Like the ALI Principles, then, the Georgia Code requires some benefit to the corporation. Unlike the ALI Principles, however, there is no facial requirement of success under the Georgia Code. However, it is hard to imagine how a derivative proceeding could confer a "substantial benefit" on the corporation without at least reaching the level of success demanded by the ALI Principles.

The Georgia Code has a punishment for unwarranted litigation similar to that of the ALI Principles. Section 14-2-746(2) permits the court to "order the plaintiff to pay any defendant's reasonable expenses (including attorney's fees) \ldots if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose."\textsuperscript{47}

II. PART VII, CHAPTER 2: RECOVERY FOR BREACH OF DUTY

The ALI Principles devotes two sections to the corporation's right to damages arising from derelictions of duty by its own directors or officers. Section 7.18 governs when a corporation can recover from the purportedly delinquent director or officer, and section 7.19 regulates the extent to which a corporation can, by its corporate charter, limit this right. The scope of the duties themselves are dealt with elsewhere in this article.\textsuperscript{48} This chapter deals exclusively with the remedies available to the corporation, or its shareholders, once those duties have been breached.

\textsuperscript{145} Id. § 7.17 cmt. d. (citing Bosch v. Meeker Cooperative Light & Power Ass'n, 101 N.W.2d 423, 427 (Minn. 1960)).
\textsuperscript{146} O.C.G.A. § 14-2-746(1) (1994).
\textsuperscript{147} Id. § 14-2-746(2). In Pfister v. Delta Airlines, Inc., 496 F. Supp. 932 (N.D. Ga. 1980), the court held that, in such a case, costs may be awarded against the plaintiff's attorney in the event the plaintiff has little or no assets.
Under section 7.18(a), a defendant who violates the duty of care, the duty of fair dealing, or the duties that arise during transactions in control and tender offers, is liable to the corporation (or, when a direct action is permitted under section 7.01, to its shareholders) for the losses that the violation caused. Where the violation is of the duty of fair dealing, the defendant must, in addition to compensating the corporation for any losses, disgorge to the corporation any gains made by the defendant or by an associate of the defendant, "to the extent necessary to make equitable restitution."149

The Georgia Code also addresses the director's liability for breach of duty. The director's duties themselves are set out in O.C.G.A. section 14-2-830. It seems, however, that to visit liability upon a director under Georgia law, it is not enough for the plaintiff to show that the defendant breached the applicable duty. The comments to section 14-2-830 provide that, in cases in which a director's conduct (or lack thereof) falls short of the standards set by section 14-2-830, the director will not necessarily be liable to the corporation. The director has the benefit of the additional safe harbor provided by the business judgment rule. Only if the defendant's breach of section 14-2-830 is so blatant as to fall short of the less stringent requirements of the business judgment rule does liability ensue. Essentially identical duties are imposed on officers by section 14-2-843.

Section 14-2-831 provides that the company, or a shareholder in a derivative suit, may sue directors or officers of the corporation for the following relief:

(1) To compel the defendant to account for official conduct or to decree any other relief called for by [the defendant's] official conduct in the following cases:

(A) The neglect of, failure to perform, or other violation of [the defendant's] duties in the management of the corporation or in the disposition of corporate assets;
(B) The acquisition, transfer to others, loss, or waste of corporate assets due to [the defendant's breach of duty]; or
(C) The appropriation, in violation of [the defendant's] duties, of any business opportunity of the corporation;

149. ALI PRINCIPLES, supra note 2, Part IV.
150. Id., Part V.
151. Id., Part VI.
152. Id. § 7.18(a).
153. See discussion, Part IV, supra.
1. To enjoin a proposed unlawful conveyance, assignment, or transfer of corporate assets, or other unlawful transaction where there is sufficient evidence that it will be made; and

2. To set aside an unlawful conveyance, assignment, or transfer of corporate assets where the transferee knew of its unlawfulness and is made a party to the action. 154

Unlike the ALI, which makes no recommendation for a limitations period, the Georgia Code section sets a four year limitation of actions. 155 The period begins running when the cause of action accrues. 156

This section reflects the long standing common law position in Georgia. 157 As the leading case held in 1913:

[The]ose who accept the position of directors impliedly undertake to exercise ordinary care and diligence in the discharge of the duties thus committed to them. They may commit the active transaction of the business to duly authorized officers; but this does not absolve them from the duty of reasonable supervision . . . . Unfortunately some directors appear to think that they have fully discharged their duties by acting as figureheads and dummies; but this is a mistake, and a delusion from which some of them are now and then awakened by a judgment for damages arising from allowing the corporation to be looted while they sat negligently by and looked wise. 158

The Georgia Code, following the approach of the Model Business Corporations Act, treats one particular breach of duty separately, that of an unlawful distribution to shareholders. Section 14-2-832(a) provides that a director who votes for, or assents to, an unlawful distribution 159 to the shareholders, is personally liable to the corporation for that part of the distribution which was illegal, if it is established that the director

---

155. Id. § 14-2-831(b).
156. Id.
157. Comolli v. Comolli, 241 Ga. 471, 473, 246 S.E.2d 278, 280 (1978). “In Georgia the 1968 Corporation Code requires directors to act in ‘good faith’ and with ordinary ‘diligence’ in all transactions . . . . This is the same duty that had been developed by case law prior to the adoption of the 1968 Corporation Code.” Id. (citing KAPLAN’S NADLER GEORGIA CORPORATION LAW § 10-18 (1971)).
159. O.C.G.A. § 14-2-640(c) makes a distribution illegal if the effect of the distribution is to make the corporation unable to pay its debts when they fall due, or if the distribution causes the corporation’s assets to be worth less than its liabilities and, unless the articles provide otherwise, preferential rights. O.C.G.A. § 14-2-640(c) (1994).
did so in breach of the director's duties to the corporation.\textsuperscript{160} The director does, however, have the benefit of the business judgment rule.\textsuperscript{161}

Such an action by the director would probably fall within the purview of section 14-2-831 in any event. However, when section 14-2-832 is relied on, causation in fact need not be specifically proved. The mere act of voting for, or assenting to, the distribution is sufficient to hold the director liable.\textsuperscript{162} As with the \textit{ALI Principles},\textsuperscript{163} it is no answer to the corporation's suit that the defendant's conduct was not causally significant because a large number of other directors also voted for the distribution. The term "distribution" includes not only money, but other corporate property as well. It does not, however, include the corporation's own shares.\textsuperscript{164}

\textls[120]O.C.G.A. section 14-2-832(b) provides that directors held liable are entitled to a contribution from every other director who could be held liable under the section for the unlawful distribution. The director is also entitled to a return of the overpayment from each shareholder, if the shareholder accepted it "knowing that the distribution was made in violation of [the Georgia Code] or the corporation's articles of incorporation."\textsuperscript{165} There is a two-year limitation period on an action for this breach of duty.\textsuperscript{166}

The two main issues that often arise with respect to a director's breach of duty, once that breach has been established, are causation and the quantum of damages recoverable by the corporation.

\textsuperscript{160} See \textit{id.} § 14-2-830.
\textsuperscript{161} \textit{Id.} § 14-2-832 cmt.
\textsuperscript{162} \textit{Id.} § 14-2-832(a).
\textsuperscript{163} See \textit{ALI PRINCIPLES}, supra note 2, § 7:18 cmt. d.
\textsuperscript{164} O.C.G.A. § 14-2-140(6) (1994). The actual definition of distribution is a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, a redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.
\textit{Id.}
\textsuperscript{165} \textit{Id.} § 14-2-852(b)(2).
\textsuperscript{166} \textit{Id.} § 14-2-832(c). The comment does note that the purpose of the limitation period is to clear up contingent claims in shorter periods than under the previous law (six years), but no reason is given as to why it is only half as long as the period for breaches under § 14-2-831. \textit{Id.} § 14-2-832 cmt.
A. Causation

Under section 7.18 of the ALI Principles, for losses to be recoverable, they must have been caused by the violation.\textsuperscript{167} The burden of proving causation is on the plaintiff.\textsuperscript{168} A two-prong test is suggested by section 7.18(b) for determining whether the defendant's conduct caused the loss. The breach is the legal cause of the loss if "(i) satisfaction of the applicable standard would have been a substantial factor in averting the loss, and (ii) the likelihood of injury would have been foreseeable to an ordinarily prudent person in like position to that of the defendant and in similar circumstances."\textsuperscript{169}

This idea of causation is similar to the concept of causation in torts, and indeed, the phrase "substantial factor" is borrowed from the Restatement (Second) of Torts section 431.\textsuperscript{170} The first prong of the test deals with causation, and the second prong limits recovery to foreseeable injury once causation in fact is established.

The fact that damage to the corporation would not have resulted but for the acts or omissions of other individuals will not break the chain of causation.\textsuperscript{171} This statement, contained in section 7.18(b), is designed to address the issue of multiple corporate officials failing to perform a duty that is the cause of the loss.\textsuperscript{172} An obvious example is board action or inaction that amounts to a breach of duty. Each defendant might otherwise claim "that his or her conduct was less causally significant than that of others."\textsuperscript{173} Section 7.18(b) proscribes such attempts to dilute causation by pointing the finger at codefendants.

The ALI Principles take no position on whether the liability of multiple defendants should be joint and several in such a case or should be apportioned in terms of culpability among those responsible.\textsuperscript{174} The

\textsuperscript{167} ALI PRINCIPLES § 7.18 cmt. a provides:

Section 7.18(b) recognizes the necessity of an adequate causal relationship between the defendant's breach of duty and any loss to the corporation. Consistent with the case law, the burden is placed on the plaintiff to show that the defendant's conduct or omission was the cause of the loss sustained by the corporation.

\textsuperscript{168} Id. § 7.18(c).

\textsuperscript{169} Id. § 7.18(b).

\textsuperscript{170} See id. § 7.18 cmt. a. This section of the RESTATEMENT (SECOND) OF TORTS is entitled What Constitutes Legal Cause and seeks to establish the causal relationship necessary for liability.

\textsuperscript{171} Id. § 7.18 cmt. d.

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} Id.
ALI Principles are also silent on whether a defendant subject to joint and several liability should have a right of equitable contribution against other corporate officials.\textsuperscript{175} These matters are left to the law of the individual jurisdictions.

Comment d to section 7.18 elaborates generally on causation. It makes the point that it is more difficult to prove causation by omissions rather than by affirmative acts.\textsuperscript{176} This is particularly so when the defendant was a member of a board, committee, or other body that "might have rejected the defendant's judgment had the defendant alerted fellow directors to the impending problem."\textsuperscript{177}

Comment d goes on to provide that causation should be analyzed in two stages. Surprisingly, the approach suggested in comment d seems to differ from the two-prong analysis set out in section 7.18(b) itself. First, section 7.18(b) provides that the defendant's act or omission must have been the cause-in-fact of the loss. The court must decide "whether the loss would have been prevented had the defendant been adequately diligent." If, and only if, the court answers the first question in the affirmative does it proceed to the second question of proximate cause: "Was the chain of causation too remote or attenuated for the loss in question to be fairly ascribed to the defendant?\textsuperscript{178}" This second question, according to comment d, is answered by determining whether the act or omission was a "substantial factor" in producing the loss.

The approach suggested by comment d seems to add an unnecessary and somewhat confusing step to the determination of whether a director is liable for any particular loss. No mention is made in comment d of "reasonable foresight." Section 7.18(b) clearly contemplates reasonable foresight as delineating the outer boundary of liability once causation in fact has been established (which it is by showing that the breach was a "substantial factor" in causing the loss). Comment d provides that the "substantial factor" test is the second step of the analysis, limiting the chain of legal causation once causation in fact has been established. Section 7.18 clearly requires the "substantial factor" test to be used in the first step to establish causation in fact, not to delineate the outer boundary of liability once it is established. This latter task, section 7.18(b) states, is to be analyzed under "reasonable foresight."

Unlike the ALI Principles, the Georgia Code is silent about causation. Case law, however, has essentially followed the same approach as the

\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
ALI Principles, requiring that the plaintiff prove causation. However, when the plaintiff can establish that a corporate opportunity has been presented to a director or officer, the burden of proof is cast upon the defendant to show that he or she did not violate the "fiduciary duties of loyalty, good faith, and fair dealing toward the corporation."

As with the ALI Principles, the analysis of causation is essentially the same as it is in tort. If a director is to be held liable for a breach of the duty of care, the breach of duty must have been the proximate cause of the damage to the corporation. There is a surprising paucity of Georgia authority on the issue. As one author notes, "[v]ery few cases discuss proximate cause, usually holding the director not liable when there is no clear chain of causation." One such case that indirectly addresses the issue is Holland v. Holland Heating & Air Conditioning, Inc. In that case, plaintiff alleged that defendant, corporate vice-president, breached his duties to the corporation in several ways, including refusing to guarantee loans the corporation was endeavoring to obtain, and generally performing poorly as a result of a drinking problem. Plaintiff offered no specific proof of damages. The court held that, even if the various breaches of duty could be made out, plaintiff still had to prove that the breaches caused a loss and had to provide evidence of the quantum of damages with reasonable certainty. Because plaintiff failed to do so, the verdict in his favor was reversed.

B. Damages

Both the Georgia Code and the ALI Principles provide that damages are essentially compensatory in nature, and both place the burden of proving damages on the corporation. Under the ALI Principles, the measure of damages recoverable by the corporation, or a shareholder in the case of a direct action, is the amount necessary to afford the corporation full restitution for the losses it incurred as a result of the

---

183. Id. at 794, 432 S.E.2d at 238.
184. Id. at 797, 432 S.E.2d at 242.
185. ALI PRINCIPLES, supra note 2, § 7.18(b); see Holland, 208 Ga. App. 794, 432 S.E.2d 238.
defendant's breach.\textsuperscript{186} This "precludes reduction of liability to reflect either the defendant's proportionate ownership of the corporation's stock or the tax effect of the loss."\textsuperscript{187}

A breach of the duty of fair dealing is treated more harshly than the other duties. This is because of the obvious element of moral turpitude that attends the breach. Section 7.18(a) provides that gains received by the defendant from a breach of the duty of fair dealing must be disgorged to the corporation, irrespective of whether the company suffered any independent monetary loss.\textsuperscript{188} "In some cases, the defendant will be required to account for gains that the corporation itself could not have realized, on the principle that the agent is liable to the principal for any gains realized through improper use of the latter's property."\textsuperscript{189}

Section 7.18(d) provides:

> The losses deemed to be legally caused by a knowing violation of...[the duty of fair dealing] include the costs and expenses to which the corporation was subjected as a result of the violation, including the counsel fees and expenses of a successful plaintiff in a derivative action, except to the extent the court determines that inclusion of some or all of such costs and expenses would be inequitable in the circumstances.\textsuperscript{190}

This fee-shifting does not apply to settlements.\textsuperscript{191}

Consistent with the principle of compensation for net loss, the defendant is allowed to offset, against the corporation's damages, any gain to the corporation that the defendant can show arose out of the same transaction, provided such an offset does not offend some public policy.\textsuperscript{192} The burden of proof is on the defendant to prove any such offsetting gains,\textsuperscript{193} and gains from other, unrelated transactions are not included in the calculation of damages.\textsuperscript{194}

Illustration 4 to section 7.18 provides a good example:

\textsuperscript{186} ALI PRINCIPLES, supra note 2, § 7.18 cmt. c (citing Liken v. Shaffer, 64 F. Supp. 432, 441 (N.D. Iowa 1946)).
\textsuperscript{187} Id.
\textsuperscript{188} Id. The concept has its genesis in the agent's liability to the principal. Comment c refers to the RESTATEMENT OF RESTITUTION § 151 cmt. c.
\textsuperscript{189} Id.
\textsuperscript{190} Id. § 7.18(d).
\textsuperscript{191} Id. § 7.18 cmt. f. The rationale is the "difficulty of establishing the relative responsibility of the parties in such cases." Id.
\textsuperscript{192} Id. § 7.18(c).
\textsuperscript{193} Id. § 7.18 cmt. e.
\textsuperscript{194} Id.
A derivative action is brought to require a corporate official of XYZ Corporation to account to the corporation for $200,000 in legally questionable overseas political contributions. The defendant admits the payments, but seeks to defend on the basis that in prior years other such payments had produced profitable contracts. The court should reject this defense . . . because the alleged profits do not arise out of the same transaction. Even if the offsets arise out of the same transaction, the court should decline to permit offsets that it determines are contrary to an established public policy.\textsuperscript{196}

As this illustration shows, the offset is discretionary and will be refused if, in the court's judgment, it would "frustrate the policy of a statute or another clearly established public policy."\textsuperscript{196} Once again, the considerations that underlie the exercise of this discretion may lead to a refusal in cases of unfair dealing.

Under the Georgia Code, damages are also essentially compensatory:\textsuperscript{197}

There can hardly be any dissent from the assertion that in the circumstances named, the corporate officers are liable to the corporation for any loss or injury resulting to the corporation, but another and equally sound rule of law is that the extent of liability of such an officer is the amount of injury or damage suffered by the corporation. It is, therefore, obvious that Kennedy could not be held personally liable here, although he may have been ever so negligent, unless there is evidence that would authorize a finding that his negligence resulted in loss or injury to the corporation.\textsuperscript{198}

As is the general requirement with damages, the damages for a breach of the director's or officer's duty must be proved with reasonable certainty.\textsuperscript{199} Exact mathematical precision is not required, but the court will not award damages that are merely speculative, vague, or uncertain.\textsuperscript{200}

\begin{footnotes}
\item[195] Id. § 7.18 cmt. e, illus. 4.
\item[196] Id. § 7.18 cmt. e.
\item[198] Id. at 845, 201 S.E. at 526 (emphasis added).
\item[200] Id. at 796, 432 S.E.2d at 241.
\end{footnotes}
C. Limits on Directors’ or Officers’ Liability in the Corporate Charter

Section 7.19 allows a provision in the corporate charter that limits the liability of an officer or director for a breach of the duty of care to a sum not less than that person’s annual compensation (in the year of the violation, not the year of the judgment), provided failure to meet the standard did not:

1. Involve a knowing and culpable violation of the law . . .;
2. Show a conscious disregard for the duty . . . under circumstances in which [the defendant] was aware that the conduct or omission created an unjustified risk of serious injury to the corporation; or
3. Constitute a sustained and unexcused pattern of inattention that amounted to an abdication of the defendant’s duty to the corporation.

Further, the defendant must not have received a benefit in breach of the duty of fair dealing, and the provision in the corporate charter must have been adopted by a vote of disinterested shareholders after full disclosure.

Several considerations are presented in support of this section: simple fairness; the enormous liability claims directors and officers may be exposed to at the hands of the corporation; the cost of, and difficulties encountered in securing, adequate insurance; the impetus the exposure to liability may create in directors and officers to become overly adverse to risk, thereby ultimately injuring the corporation; the removal of judicial reluctance to find liability where a director will face a large

201. See ALI PRINCIPLES, supra note 2, § 7.19 cmt. d. The duty of fair dealing is not included for the obvious reason that limiting liability in such cases causes an unacceptable risk of fraud or overreaching. Id.

202. Id. § 7.19 cmt. h.

203. “Knowing” does not require knowledge of the law, but merely knowledge of the material facts that led to the violation of the law. Id. § 7.19 cmt. f.

204. “Culpable” can include knowing tortious violations of the law that are not criminal, but which threaten the life or safety of others. Further, simply because a breach of the criminal law is involved, it does not necessarily follow that the breach was culpable. Id.

205. Subjective awareness of an unjustified risk of serious injury to the corporation is required. Gross negligence will not suffice. Id.

206. Id. § 7.19. Mere repetitive inattention will not suffice. The failure must go to the core of the defendant’s duties and is not excused by factors such as poor health. Id. § 7.19 cmt. f.

207. Id. § 7.19.

208. Id.
damages judgment; and reduced economic incentives for plaintiffs' attorneys to sue.\textsuperscript{209}

Section 7.19 applies equally to direct and derivative actions, including class actions such as those that might be brought by a shareholder following a merger.\textsuperscript{210} The ALI specifically advised that it took no position on whether a corporation should adopt such a provision in its charter. Section 7.19 simply provides that, if the corporation chooses to do so, its wishes should be recognized, subject to the restrictions contained in the section.\textsuperscript{211}

O.C.G.A. section 14-2-202(b)(4) permits, but does not require, the articles of incorporation to contain a limitation, or a complete elimination of, the director's liability for breach of the duty of care or other duty.\textsuperscript{212} While this may, at first, seem broader than the ALI \textit{Principles}, no provision is permitted that can limit liability for any breach of duty involving a wrongful appropriation of a business opportunity of the corporation, intentional misconduct, a knowing violation of the law, an unlawful distribution to shareholders, or a transaction in which the director received an improper personal benefit.\textsuperscript{213} Further, no such provision can be adopted with retrospective effect.\textsuperscript{214}

Much of the conduct excluded by the ALI \textit{Principles} is, therefore, also excluded under Georgia law. However, Georgia law allows a complete elimination of liability for covered areas, whereas the ALI \textit{Principles} only allow a reduction of liability down to a minimum of one year's compensation and restrict the exculpation to the breach of the duty of care.

III. \textbf{PART VII, CHAPTER 3: INDEMNIFICATION AND INSURANCE}

Both the ALI \textit{Principles} and the Georgia Code regulate when and how a corporation should be able to indemnify a director engaged in corporation-related litigation for the expenses and liabilities, if any, that the director incurs in the suit.

The counterbalancing forces which act to mold these provisions are obvious. On the one hand, the corporation has an interest in providing protection to its senior executives, so as to make the positions attractive to talented applicants, and in avoiding unduly conservative exercises of

\begin{itemize}
  \item \textsuperscript{209} \textit{Id.} § 7.19 cmt. c.
  \item \textsuperscript{210} \textit{Id.} § 7.19 cmt. i.
  \item \textsuperscript{211} \textit{Id.} § 7.19 cmt. b.
  \item \textsuperscript{212} O.C.G.A. § 14-2-202(b)(4) (1994).
  \item \textsuperscript{213} \textit{Id.}
  \item \textsuperscript{214} \textit{Id.}
\end{itemize}
power by litigation-wary executives. On the other hand, an overly broad economic immunity from suit may lead to cavalier, and even dishonest, actions by directors who are secure in the knowledge that if something does go wrong, the corporation, or an insurance company, is there to "pick up the tab." It is for these latter reasons that both the ALI Principles and the Georgia Code omit most dishonest or reprehensible behavior from the scope of permissible indemnities.

The ALI Principles and the Georgia Code follow the same basic pattern. In certain circumstances an indemnity is permitted, in other cases it is mandatory, and in still other cases it is prohibited. As will be detailed below, both schemes allow an advance of the indemnity on certain conditions, and both allow insurance to be obtained in slightly broader circumstances than those for which an indemnity is permitted.

A. Permissive Indemnity

Section 7.20(a)(1) of the ALI Principles provides:

A corporation should have the power to indemnify . . . a director . . . or officer . . . for liabilities and reasonable expenses incurred in connection with any threatened . . . [or actual litigation or investigative proceeding] to which the director or officer is or may be made a party . . . or may be otherwise required to appear:

(A) Because such person was acting in [an official capacity],

or acting in some capacity on behalf of a third party at the request of the corporation, if such person was acting in good faith or

(B) Solely because of the fact that such person is or was a director or officer.

Virtually all conceivable proceedings will fall within the scope of this section, including civil, criminal, and administrative proceedings. The term "liabilities" is also broad and includes "settlement, judgments, fines, and civil penalties, subject to the limitations of section 7.20(b)" (prohibited indemnities) discussed below.

The types of third parties envisioned by section 7.20(a)(1)(A) are directors and officers "serving at the request of the corporation, including

---

215. The same considerations underlying the permissible limits on a director or officer's liability under § 7.19 of the ALI PRINCIPLES support this section. The section is broader than § 7.19, however, because, unlike § 7.19, it also extends to breaches of the duty of fair dealing and to third party actions. ALI PRINCIPLES, supra note 2, § 7.20 cmt. c.
216. ALI PRINCIPLES, supra note 2, § 7.20(a)(1).
217. Id. § 7.20(a)(1).
218. Id. § 7.20 cmt. d.
service as a trustee or manager of the corporation's pension, profit-sharing, and other compensation plans.\textsuperscript{219}

The base requirement for the availability of the indemnity in section 7.20(a)(1)(A) is that the director acted in good faith. This means that, provided this element is established, the director is not deprived of the indemnity merely because he or she breached the duty of care or similar standard.\textsuperscript{220}

An example of the operation of section 7.20(a)(1)(B) is afforded by illustration 3 to section 7.20.\textsuperscript{221} The illustration indicates that a director sued for short swing trading profits under section 16(b) of the Securities Exchange Act of 1934 falls within the purview of the section (subject, once again, to the restrictions discussed below) because the action is based on his position as a director. On the other hand, a Rule 10b-5 action, for example, will not fall within the section, because the defendant's directorship is superfluous to the cause of action.\textsuperscript{222}

The power to indemnify contained in section 7.20, subject to the limitations in 7.20(b), is additional to, and is not meant to restrict, any power to indemnify contained in the corporation's standards, any agreement, or otherwise.\textsuperscript{223}

In Georgia, indemnification is dealt with in Part V of Article 8 of the Georgia Business Corporations Law, O.C.G.A. sections 14-2-850 to 14-2-859. Section 14-2-851 is the linchpin section and sets out the corporation's power to indemnify. As with the ALI Principles, the base requirement is that of "good faith."\textsuperscript{224} Under subsection (a), the corporation may indemnify a director against liability incurred in "proceedings," if the director acted in a manner he or she "believed in good faith to be in or not opposed to the best interests of the corporation and, in the case of any criminal proceeding, [the director] had no reasonable cause to believe [the] conduct was unlawful."\textsuperscript{225} As with the ALI Principles, "proceedings" are defined to include threatened legal action or suits, administrative matters, and investigations, whether civil

\textsuperscript{219} Id.
\textsuperscript{220} Id. § 7.20 cmt. e.
\textsuperscript{221} See id. § 7.20. Although the illustration appears to be directed toward § 7.21(a)(3)(A), comment d offers the illustration as an example of the operation of § 7.20(a)(1)(B).
\textsuperscript{222} See id. § 7.20 illus. 4.
\textsuperscript{223} Id. § 7.20(e).
\textsuperscript{224} O.C.G.A. § 14-2-851 (1994).
\textsuperscript{225} Id. Where an employee benefit plan is involved, the director must have believed in good faith that he or she was acting in the best interests of the participants in, and the beneficiaries of, the plan. Id. § 14-2-851(b) (1989).
\textsuperscript{226} O.C.G.A. § 14-2-851(a) (1989).
or criminal, formal or informal. Although the section itself does not refer to “expenses,” “liability” is broadly defined in section 14-2-850 to include the expenses of the litigation.

In a similar vein to the ALI Principles, when the director is acting on behalf of an employee retirement fund or as trustee on behalf of the corporation, subsection (b) provides that the director must believe in good faith that he or she is acting in the interests of the beneficiaries of the fund or trust.

The ALI Principles seem slightly broader than the Georgia Code section in that the Georgia Code requires both good faith and a belief by the director that he or she was acting in, or not opposed to, the best interests of the corporation. The ALI Principles intentionally omit this latter requirement and allow for indemnity when the director merely acted in good faith. The additional requirement of “best interests” is absent.

Under O.C.G.A. section 14-2-851(c), the termination of proceedings by judgment, order, settlement, conviction, or plea of nolo contendere is not, of itself, determinative that the director did not act with good faith. Such considerations are, however, of “considerable weight.” By contrast, “a final determination of nonliability or acquittal automatically entitles the director to indemnification of expenses under section 14-2-852” (which deals with mandatory indemnification).

B. Mandatory Indemnity

The ALI Principles provide that the company should be obliged, as opposed to merely permitted, to indemnify a director for expenses and liabilities, if the director is “wholly successful, on the merits or otherwise,” in the proceedings, or if there is an obligation in the company’s charter, or its contract with the director, to do so. The provision in

227. Id. § 14-2-850(6). The official comments to the section provide: “The broad definition of 'proceeding' ensures that the benefits of this part will be available to directors in new and unexpected, as well as traditional, types of proceedings whether civil, criminal, administrative, or investigative. It also includes appeals in lawsuits and petitions to review administrative actions.” Id. § 14-2-850 cmt.
228. Id. § 14-2-850(4).
229. Id. § 14-2-851(b).
230. See ALI PRINCIPLES, supra note 2, § 7.20 cmt. e.
231. O.C.G.A. § 14-2-851 cmt. (1994). The comment continues; “by the same token, it is clear that the termination of a proceeding by settlement or plea of nolo contendere should not of itself create a presumption either that conduct met or did not meet the standard of section 14-2-851.” Id.
232. Id.
233. ALI PRINCIPLES, supra note 2, § 7.20(a)(3).
the charter must itself be valid and obviously, no indemnity can be obtained under this section where an indemnity is prohibited by the ALI Principles.\textsuperscript{234}

The ALI Principles will not impose mandatory indemnification where the director is only partially successful in the litigation. For example, if one of a number of claims against the director are dismissed, there is no mandatory requirement that the company indemnify the expenses attributable to that dismissed action.\textsuperscript{235} This follows the approach of section 8.52 of the Model Business Corporations Act, from which Georgia has specifically departed.\textsuperscript{236}

Section 7.20(c)(1) of the ALI Principles provides that the court should order indemnification (and payment of the expenses the director incurred in obtaining this court order) where the company is obliged to indemnify the director, but fails to do so.

Under O.C.G.A. section 14-2-852, indemnification is mandatory (unless the corporation is prevented from indemnification by its articles of incorporation) when a director “has been successful, on the merits or otherwise, in the defense of any proceeding to which [the director] was a party, or in defense of any claim, issue, or matter therein, because he [or she] is or was a director of the corporation.”\textsuperscript{237} The official comment notes that the intent of the section is, inter alia, to provide the director with partial mandatory indemnification if the defendant succeeds, by plea bargain or otherwise, in obtaining the dismissal of some, but not all, counts of an indictment.\textsuperscript{238} As noted above, the ALI Principles mandate an indemnity only when total success is achieved.

As with the ALI Principles, under the Georgia Code the director may sue the corporation to enforce this right of mandatory indemnification, and if the director is successful in obtaining the indemnification, the corporation must also pay the director's costs of bringing the suit.\textsuperscript{239} The director's suit can be brought as part of the proceedings in which he or she has been named and for which he or she is seeking the indemnity.\textsuperscript{240} The ALI is silent on whether the director's suit for indemnity should be appended to the proceedings for which the indemnity is sought.

\begin{itemize}
\item \textsuperscript{234} See id. § 7.20 cmt. h.
\item \textsuperscript{235} See id. § 7.20 cmt. g.
\item \textsuperscript{236} See O.C.G.A. § 14-2-852 cmt. (1994).
\item \textsuperscript{237} Id. § 14-2-852.
\item \textsuperscript{238} Id. § 14-2-852 cmt.
\item \textsuperscript{239} Id. § 14-2-854.
\item \textsuperscript{240} Id.
\end{itemize}
C. Prohibited Indemnities

Both the ALI Principles and the Georgia Code place limits on the corporation’s power to indemnify directors or officers. The power urged by the ALI Principles in section 7.20(a)(1) is qualified by section 7.20(b)(1) which provides that the corporation should have no power to indemnify the director or officer:

(A) If the conduct . . . involved a knowing and culpable violation of law or a significant pecuniary benefit was obtained to which the director or officer was not legally entitled;

(B) To the extent that the indemnification would involve [the] satisfaction of a fine, civil penalty, or similar judgment as a result of violation of statutory law, the policy of which clearly precludes indemnification;

(C) [For] any amount paid in settlement of the proceeding [where] the conduct directly involved violation of statutory law, the policy of which clearly precludes indemnification; or

(D) To the extent that the indemnification involves amounts paid (i) in satisfaction of a judgment or in settlement of an action that was brought by or in the right of the corporation, or (ii) for expenses incurred in any such proceeding in which the director or officer was adjudged liable to the corporation, [except for court ordered indemnification].

The use of the term “directly” in paragraph (A) is to prevent an indemnity from being prohibited where the conduct “only tangentially involves a violation of law that is both knowing and culpable.”

The persuasiveness of a judgment, order, settlement, conviction, or plea of nolo contendere by the director on the issue of whether the director violated paragraph (A) appears to be the same as that under Georgia Code section 14-2-851(c), discussed above.

The requirement of “culpability” in paragraph (A) means “morally reprehensible” and is in addition to “knowing,” in that the mere fact that a violation was knowing does not per se make it culpable. On the other hand, unlike paragraphs (B) and (C), this paragraph is not limited to breaches of the statutory law. Intentionally tortious conduct may, in appropriate circumstances, suffice. “Statutory law” for the purposes

241. ALI PRINCIPLES, supra note 2, § 7.20(b).
242. Id. § 7.20 cmt. h.
243. Id.
244. Id.
245. Id.
of paragraphs (B) and (C) includes valid regulations.\textsuperscript{246} The clear intent of section 7.2(b)(1)(D) is to prevent the circularity of recovery, when the corporation indemnifies the director for a judgment that it received against that person.\textsuperscript{247}

It seems that most conduct that falls afoul of paragraphs (A) to (D) in section 7.20(b)(1) would, in any event, fail to meet the threshold requirement of "good faith" necessary to trigger the power to indemnify in section 7.20(a)(1)(A). The greater utility of these restrictions, perhaps, is in their preventing indemnities otherwise payable under section 7.20(a)(1)(B), that is, when the defendant is made a party purely because he or she was a director or officer, and when no element of good faith is facially required.

Section 7.20(d) requires the corporation to report to its shareholders whenever it indemnifies, or advances expenses to, a director or officer in connection with proceedings by or in right of the corporation.\textsuperscript{248}

After enumerating in sections 7.20(b)(1)(A) to (D) the limitations on indemnification, the ALI Principles provide guidelines for determining whether a director should be refused indemnification because of those provisions. The decision may initially be made by disinterested directors, shareholders, or counsel, but the director should have the right to a de novo determination by the court.\textsuperscript{249} However, the court has an overriding discretion to award the indemnification of money paid by the director or officer in settlement of an action that would otherwise fall within paragraph (A) or (D), other than when it is substantially likely that the director or officer obtained a significant, improper pecuniary benefit, or when doing so is not "fair and reasonable."\textsuperscript{250}

The Georgia Code prohibits any payment to the director until it is positively determined that the director acted in good faith. O.C.G.A. section 14-2-855 provides that a corporation cannot indemnify a director until it is determined that the director has met the good faith standards of conduct required by O.C.G.A. section 14-2-851. That finding is to be made by a majority of the board, excluding directors who are parties to the proceedings, by special legal counsel selected by the board, or by shareholders, excluding the shareholding of any interested director.\textsuperscript{251}

Under the Georgia Code, the determination of whether the director acted in good faith is preliminary to the subsequent decision of whether

\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id. § 7.20(d).
\textsuperscript{249} Id. § 7.20(b)(1).
\textsuperscript{250} Id. § 7.20(c)(2).
\textsuperscript{251} O.C.G.A. § 14-2-855(b) (1989).
or not to indemnify the director. This second decision is broader in scope, encompassing issues of the reasonableness of the expense and the financial ability of the company to make the payment. The first decision is simply whether the director is entitled to be considered for indemnification.\textsuperscript{252}

The Georgia Code prohibits an indemnification “(1) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or (2) In connection with any other proceeding in which he was adjudged liable on the basis that personal benefit was improperly received by him.”\textsuperscript{253}

The court is vested with a similar discretion to award an indemnity like that suggested by the ALI Principles when the director does not meet the requisite standard of conduct required by section 14-2-851(a) or falls within this subsection.\textsuperscript{254} The prerequisites are those of the ALI Principles—fairness and reasonableness.\textsuperscript{255} Unless the bylaws, contract, articles, or shareholders’ resolution provides otherwise, the indemnity is limited to “reasonable expenses.”\textsuperscript{256}

Under section 14-2-856, the shareholders have an overriding right to approve the indemnification of a director without regard to limitations contained in the Georgia Code, if that right is authorized by the articles, bylaws, contract, or resolution. However, such an indemnity is prohibited when the director is held liable to the corporation, or enjoined by the corporation for: (1) The misappropriation of a corporate opportunity; (2) Intentional misconduct or a knowing violation of the law; (3) Liability for unlawful distributions to shareholders; (4) Transactions involving an improper personal benefit.\textsuperscript{257}

Advances of the indemnity are permitted on identical terms to advances under section 14-2-853, discussed below.\textsuperscript{258}

\section*{D. Advancement of the Indemnity}

Both the ALI Principles\textsuperscript{259} and the Georgia Code\textsuperscript{260} allow the corporation to advance the director the indemnity prior to final disposition of the matter for which the indemnity is sought. Section 7.20(a)(2) of the

\begin{footnotesize}

252. \textit{Id.} § 14-2-855 cmt.
253. \textit{Id.} § 14-2-851(d).
255. \textit{Id.}
256. \textit{Id.}
257. \textit{Id.} § 14-2-856(b).
258. \textit{Id.} § 14-2-856(c).
259. \textit{ALI PRINCIPLES, supra} note 2, § 7.20(a)(2).
\end{footnotesize}
Principles provides that the corporation should have the power to pay the expenses in advance, upon receiving an undertaking from the director or officer to repay the advance if it is ultimately determined that they were not entitled to be indemnified.

The section does not require any specific procedure to be adopted by the corporation prior to advancing the expenses. In particular, a finding that the director is entitled to the indemnity by virtue of section 7.20(b)(1) is not a prerequisite to advancement of the expenses. However, if it is ultimately determined that the director was not entitled to the indemnity, the money has to be repaid. When the director is wholly successful on the merits, the money does not have to be repaid.

The corporation can compromise or waive this right to repayment, as with any other claim it might have against the director. However, if the director has been adjudged liable to the corporation in a derivative suit, the waiver requires court approval.

Similarly, under the Georgia Code, a corporation may advance a permissible reimbursement prior to final disposition of the proceedings, "if the director furnishes the corporation a written affirmation of his good faith belief that he has met the standards of conduct" set forth in section 14-2-851(a) and furnishes a signed undertaking "to repay any advances if it is ultimately determined that he is not entitled to the indemnification." The undertaking "must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment."

With respect to the question whether the determination of good faith, which is required by section 14-2-855 before an indemnity can be made, is also necessary prior to an advance of the indemnity pending the outcome of the proceedings, the Georgia Supreme Court, in Service Corp. International v. H.M. Patterson & Son, held that a determination was not required and that the director providing the requisite affirmation and undertaking were the only prerequisites to the advance.

Under both the ALI Principles and the Georgia Code, the director's indemnity right extends to his or her personal representative upon the

261. ALI PRINCIPLES, supra note 2, § 7.20 cmt. f.
262. Id.
263. Id. § 7.20(a)(2).
264. Id. § 7.20 cmt. f.
265. Id.
267. Id. § 14-2-853(b).
269. Id. at 414, 434 S.E.2d at 457.
death of the director: Section 7.20(f) of the ALI Principles specifically says so, and the definition of "director" in the Georgia Code includes personal representatives.270

E. Insurance

The ALI Principles state that, irrespective of whether the company has the power to indemnify the director as provided in section 7.20(a)(1), it should nevertheless have the power to purchase insurance to cover the expenses and liabilities incurred by the director in such proceedings.271

The only limitations are that a corporation should not be entitled to insure a director against conduct involving a knowing and culpable violation of law, or against conduct involving a significant pecuniary benefit to which the person was not entitled.272

Therefore, subject to these limitations, the section, "permits the purchase of insurance policies that would cover amounts paid in settlement or adverse judgments in derivative actions even though the corporation could not itself make such payments."273

Georgia grants the corporation the right to insure its directors or officers.274 No limit on this right is found in the Georgia Code. The drafters apparently felt that the insurance market provided adequate protection against coverage for things like willful self-dealing.275

IV. PART VII, CHAPTER 4: THE APPRAISAL REMEDY

The Introductory Note to the ALI chapter on the appraisal remedy makes the point that this remedy is an attempt to balance the overall need for flexibility in corporate governance with the minority's need to rely on basic, legitimate expectations about its shareholding rights.276

The remedy seeks to recognize the necessity for majoritarian control, while providing a counterbalance in order to avoid misuse of the power vested in the majority.277

Similar considerations also underlie the Georgia remedy. The comment to the Georgia remedy, called "dissenter's rights" in the Georgia Code, provides:

270. O.C.G.A. § 14-2-850(2).
271. ALI PRINCIPLES, supra note 2, § 7.20(a)(4).
272. Id. § 7.20(b)(2).
273. Id. § 7.20 cmt. i.
275. See id. § 14-2-858 cmt.
276. ALI PRINCIPLES, supra note 2, Introductory Note to Part VII, Chapter 4.
277. Id.
The theory underlying this section is as follows: when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous, and persuades a court that this is correct. Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss. But the prospect that shareholders may be "paid off" does not justify the corporation in proceeding unlawfully or fraudulently. If the corporation attempts an action in violation of the corporation law on voting, in violation of clauses in articles of incorporation prohibiting it, or by deception of the shareholders—to take some examples—the court's freedom to intervene should be unaffected by the presence or absence of dissenters' rights under this article.

There are four main issues that arise in connection with the exercise of the appraisal remedy: (1) which corporate actions trigger the remedy; (2) the procedural requirements for exercising the remedy; (3) the valuation of the shares; and (4) whether the remedy is exclusive.

A. Transactions That Give Rise To The Remedy

The transactions giving rise to the remedy under the ALI Principles are listed in subsections 7.21(a) to (e). These will be discussed in turn. Section 7.21(a) provides:

A merger, a consolidation, a mandatory share exchange, or an exchange by the corporation of its stock for substantial assets or equity securities of another corporation (hereinafter collectively referred to as a "business combination"), whether effected directly or by means of a subsidiary, unless those persons who were shareholders of the corporation immediately before the combination own 60 percent or more of the total voting power of the surviving or issuing corporation immediately thereafter, in approximately the same proportions (in relation to the other preexisting shareholders) as before the combination;

Most of the transactions falling within this section are "transactions in control" under section 1.38. Subsidiaries are included to ensure that the remedy cannot be avoided by simple triangular mergers, and the section is generally intended to reflect the de facto merger doctrine which developed at common law.

279. ALI PRINCIPLES, supra note 2, § 7.21(a).
280. See id. § 7.21 cmt. c(1).
281. Id.
Section 7.21 (b) provides:

Any business combination, amendment of the corporation's charter documents . . . , or other corporate act or transaction that has the effect of involuntarily eliminating the eligible holder's equity interest . . . (other than the elimination of less than a round lot in a publicly traded corporation or a similar elimination of a comparably insignificant interest in a non-publicly traded corporation); 282

This section is directed toward "freeze out" transactions, even if the business combination falls below the sixty percent commonality of ownership threshold that triggers section 7.21(a). 283 The section is meant to include reverse stock splits with a significant freeze-out effect, but not traditional, low-ratio stock splits which have a legitimate purpose and merely an incidental, de minimis freeze-out effect. 284 It is not the intent of the section to discourage freeze-outs, but simply to protect the minority when they occur. 285

Section 7.21 (c) provides:

A sale, lease, exchange, or other disposition of substantial assets by the corporation that

(1) Falls within [section] 5.15(a) (Transfer of Control in Which a Director or Principal Senior Executive Is Interested) and the assets so disposed of would account for a majority of the corporation's earnings or total assets . . . as of the end of its most recent fiscal year, unless (A) the procedures specified in [section] 5.15 (b)(1)-(3) are complied with, and (B) at least one class of equity securities . . . of the corporation is listed on a national securities exchange or is included within NASDAQ's National Market System; or

(2) Leaves the corporation without a significant continuing business, unless the sale (A) is in the ordinary course of business, or (B) is for cash or for cash equivalents that are to be liquidated for cash or used to satisfy corporate obligations, and is pursuant to a plan of complete dissolution by which all or substantially all of the net assets will be distributed to the shareholders within one year after the date of such transaction; 286

282. ALI PRINCIPLES, supra note 2, § 7.21(b).
283. Id. § 7.21 cmt. c(2).
284. Id. Three reasons are given for the publicly held corporations exception. Such eliminations almost invariably have a business purpose, they are probably never used to effect a freeze-out, and the appraisal remedy is unlikely to be effective in such a case. Id.
285. Id. § 7.21 cmt. c(2).
286. Id. § 7.21(c).
The focus of the section is purposely on whether there exists a significant continuing business after the transaction, rather than on the quantitative amount of the assets transferred. Subsection (c)(1) will usually not include a simple divisional buyout unless the transaction amounts to a management buyout within section 5.15(a). However, if the procedure of section 5.15(b) is complied with, no appraisal rights arise, the potential conflict being adequately regulated by that procedure.

Section 7.21(d) provides:

An amendment of [the corporation's charter] whose effect is to (1) materially and adversely alter or abolish a preferential, preemptive, redemption, or conversion right applicable to the eligible holder's shares, or (2) reduce the number of shares owned by the eligible holder (other than a holder of less than a round lot in a publicly traded corporation or a similar holder of a comparably insignificant interest in a non-publicly traded corporation) to a fraction of a share or less, or (3) create a right to redeem the eligible holder's shares, or (4) exclude or limit the voting rights of shares with respect to any matter, other than simply through the authorization of new shares of an existing or new class, or the elimination of cumulative voting rights.

Only the affected shareholders may rely on the section. A limitation on subsequent holders, however, can affect existing holders by reducing the value of the shares.

Finally, section 7.21(e) allows for application of the appraisal remedy to any action in which the corporate charter, other than the bylaws, grants the shareholder appraisal rights.

Under the Georgia Code, dissenters' rights are triggered by the following actions:

287. Id. § 7.21 cmt. c(3). Illustration 1 provides: X Corp., a conglomerate, has three equal-sized divisions making plastics, sporting goods, and telecommunications equipment, respectively, each having revenues of approximately $30 million annually. It sells the first two divisions to ABC Corp. but continues to operate the last division. No appraisal right[s] accrue under § 7.21(c). Id. § 7.21 cmt. c(3), illus. 1.

Had the remaining division held only passive real estate investments there would be no significant continuing business and appraisal rights would arise. See id. illus. 2.

288. Id. § 7.21 cmt. c(3).

289. See id. § 5.15(b), § 7.21 cmt. c(3), illus. 3.

290. Id. § 7.21(d).

291. Id. § 7.21 cmt. c(4).

292. Id.

293. Id. § 7.21(e).
(1) A merger for which shareholder approval is required under the Georgia Code or the articles of incorporation and on which the shareholder is entitled to vote, or the merger of a subsidiary into its parent company.

(2) A share exchange in which the corporation's shares will be acquired, "if the shareholder is entitled to vote on the plan."  

(3) A sale or exchange of substantially all of the corporation's assets, if a shareholder vote on the action is required under the Code, but excluding court-ordered sales or sales in which the proceeds will be distributed to shareholders within one year of the sale.

(4) An amendment of the Articles that materially and adversely affects the dissenting shareholder's rights because it:
   (A) Alters or abolishes their preferential rights;  
   (B) Creates, alters, or abolishes the redemption rights attending the shares, including an alteration of any provision for a sinking fund for the repurchase or redemption of the shares;  
   (C) Alters or abolishes their preemptive rights to acquire shares or other securities;  
   (D) Excludes or limits their voting rights, except by diluting the voting rights through issuing other shares or securities with similar voting rights;  
   (E) Reduces the shareholding to a fraction of a share, if the fraction is to be acquired for cash; or  
   (F) "Cancels, redeems, or repurchases all or part of the shares of the class."  

(5) Any corporate action for which the Code provisions governing Close Corporations, the articles, bylaws, or a resolution of the board provides that voting or nonvoting shareholders are entitled to appraisal of their shares.

294. The circumstances in which shareholder approval is required for a proposed merger are contained in O.C.G.A. § 14-2-1103 (1989).
296. Id. § 14-2-1302(a)(2).
299. Id. § 14-2-1302(a)(4).
300. Id.
301. Id.
302. Id.
303. O.C.G.A. § 14-2-604 gives the corporation a right to acquire fractional shares.
304. Id. § 14-2-1302(a)(4).
305. Id. §§ 14-2-901 to -950.
306. Id. § 14-2-1302(5).
However, there is no appraisal remedy when the company is listed on a national securities exchange\(^{307}\) or when it is held of record by more than two thousand shareholders, unless: (1) in a merger or share exchange, the shareholders are required to receive anything except shares of the surviving corporation or another corporation so listed or held by more than two thousand shareholders, “except for scrip or cash payments in lieu of fractional shares;” or (2) “the articles of incorporation or a resolution approving the transaction provides otherwise.”\(^{308}\)

Several provisions of Article 9 of the Georgia Code, which deals with Close Corporations, also trigger dissenters’ rights. A shareholder who votes against an election of statutory close corporation status may dissent,\(^{309}\) as may a shareholder who votes against an election to terminate such status.\(^{310}\) A close corporation may also elect, in its articles of incorporation, for a mandatory buyout of deceased shareholders.\(^{311}\) The procedures and price formula\(^{312}\) may be modified by an amendment to the articles, and shareholders who vote against the amendment are entitled to dissenters’ rights, if the amendment terminates or substantially alters the shareholders’ existing rights to have the shares held purchased.\(^{313}\)

Georgia allows a record shareholder whose shares are owned beneficially by more than one person to dissent with respect to one such person’s shares and not to dissent with respect to the other person or persons’ shares. However, the record shareholder is unable to dissent with respect to some of the shares held beneficially by one person and can elect not to dissent with respect to the rest of the shares held by that same person.\(^{314}\) When a record shareholder does dissent with respect to a beneficial shareholder, the record shareholder must notify the corporation of the name and address of each person on whose behalf he or she dissents.\(^{315}\) The “record shareholder” means the person in

\(^{307}\) A “national securities exchange” is defined in O.C.G.A. § 14-2-140(16) as any exchange or securities quotation system which is exempt from the Georgia Blue Sky registration requirements by virtue of paragraph (8) or paragraph (8.1) of O.C.G.A. § 10-5-8. This currently means the New York Stock Exchange, the American Stock Exchange, the Midwest Stock Exchange, the Pacific Coast Stock Exchange, the Philadelphia-Baltimore-Washington Stock Exchange, the NASDAQ National Market System and any other stock exchange approved by the Georgia Commissioner of Securities.

\(^{308}\) Id. § 14-2-1302(c).

\(^{309}\) Id. § 14-2-902.

\(^{310}\) Id. § 14-2-931.

\(^{311}\) Id. § 14-2-914.

\(^{312}\) Id. §§ 14-2-915 to -917.

\(^{313}\) See id. § 14-2-1302 cmt.

\(^{314}\) Id. § 14-2-1303.

\(^{315}\) Id.
whose name the shares are registered in the records of the corporation,\textsuperscript{316} whereas the "beneficial shareholder" is the person who is the effective equity owner of the shares.\textsuperscript{317}

There is no procedure in Georgia for beneficial shareholders to dissent directly; they must do so through the record shareholder. The comment to section 14-2-1303 notes, "The fiduciary duties of nominees . . . will require them to dissent when requested by the beneficial owners, unless they are trustees with trust power to exercise their own discretion and judgment."	extsuperscript{318}

**B. Procedure for Exercising the Appraisal Remedy**

The procedure recommended by the ALI for enforcing the appraisal remedy is contained in section 7.23. The corporation is required to give adequate notice to shareholders of their appraisal rights.\textsuperscript{319} This notice is to be given "reasonably in advance of the date on which the transaction is to be voted upon by the shareholders, or, if no shareholder vote is required, the date on which the corporate action giving rise to appraisal is to be taken."\textsuperscript{320} This notice should: (1) "Describe the method for exercising the right," including the procedural requirements,\textsuperscript{321} (2) "Disclose the material facts" concerning the proposed transaction and include copies of the corporation's financial statements,\textsuperscript{322} and (3) "Provide a reasonable means by which eligible holders . . . can easily and effectively indicate their election to dissent."\textsuperscript{323}

To utilize the right, the shareholder should be required to do no more than the notice requires or otherwise provide a written election to dissent prior to the shareholders' meeting, or, if no shareholder vote is to be taken, prior to the date on which the corporate action giving rise to the appraisal right is taken.\textsuperscript{324} There should be a reasonable period between this date and the date the shareholder received the notice in which to elect to dissent.\textsuperscript{325} If the company does not give notice, "any

\textsuperscript{316} Id. § 14-2-1301(7).
\textsuperscript{317} Id. § 14-2-1301(1).
\textsuperscript{318} Id. § 14-2-1303 cmt.
\textsuperscript{319} ALI PRINCIPLES, supra note 2, § 7.23(a).
\textsuperscript{320} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Id.
\textsuperscript{323} Id. § 7.23(a)(ii) to (iv).
\textsuperscript{324} Id. § 7.23(b).
\textsuperscript{325} Id.
eligible holder may initiate an appraisal proceeding without taking any other action.\textsuperscript{326}

Promptly after consummation of the transaction giving rise to the appraisal rights and upon tender of the dissenting shareholder's shares, the corporation should pay its reasonable estimate of the fair value of the shares, plus any interest due.\textsuperscript{327} Acceptance of the prepayment by the shareholder is not a waiver of his or her appraisal rights.\textsuperscript{328}

If payment is not made within thirty days of the tender of the shares (or of the corporate action giving rise to the rights, whichever is later), or if the amount paid is "materially less than the amount ultimately determined by the court to constitute fair value, the corporation should be required to pay all costs and expenses of the appraisal proceeding," including attorney and experts fees.\textsuperscript{329}

In all other cases the costs and expenses shall be determined "as the court deems equitable," except that the corporation's attorney fees can only be assessed against the shareholder if the shareholder's action was "arbitrary, vexatious, or not in good faith."\textsuperscript{330}

When the court is required to value the shares, interest "should be paid at the time of the payment of the award."\textsuperscript{331} It should be computed on the amount of the award, less any prepayment from the time the triggering transaction is consummated, at an "appropriate market rate."\textsuperscript{332} Comment h notes that this rate will generally be the rate that the corporation pays on its short-term bank debt.\textsuperscript{333}

Section 7.23(f) provides for consolidated proceedings:

If there are any dissenting holders, the corporation should commence a consolidation proceeding in the state of incorporation . . . to fix fair value and determine eligibility to dissent. All dissenting holders should be made parties to the action. If such a consolidated action is not commenced by the corporation within a reasonable time after consummation of the transaction . . . , it may be commenced by any dissenting holder. The court may appoint a lead counsel or steering committee to coordinate discovery and the trial of the proceeding and to represent any dissenting holders who have not secured other counsel. The court should also require the corporation to provide it

\textsuperscript{326} Id.
\textsuperscript{327} Id. § 7.23(c). Interest is payable under § 7.23(e) from the date of the consummation of the transaction that gave rise to the appraisal rights. Id.
\textsuperscript{328} Id.
\textsuperscript{329} Id. § 7.23(d).
\textsuperscript{330} Id.
\textsuperscript{331} Id.
\textsuperscript{332} Id. § 7.23(e).
\textsuperscript{333} Id. § 7.23 cmt. h.
with the names and addresses of all dissenting holders known to the corporation, and, subject to appropriate restrictions, such list should be available for inspection by dissenting holders or their agents.\(^{334}\)

Under the Georgia Code, a shareholder wishing to exercise dissenters’ rights must be prudent in observing the procedural requirements mandated by the Code. The failure to do so can result in a loss of the dissenters’ rights.\(^{335}\) A “Dissenter” is defined in section 14-2-1301 as “a shareholder who is entitled to dissent from corporate actions under section 14-2-1302 and who exercises that right when and in the manner required by Code Sections 14-2-1320 through 14-2-1327.”\(^{336}\)

As with the ALI Principles, Georgia law requires the corporation to take the first step in the procedure. If a proposed corporate action creating dissenters’ rights is to be submitted to a shareholders’ meeting, the notice must state that the shareholders are entitled to dissent, and it must be accompanied by a copy of Article 13 of the Georgia Code, the article discussed here. If the action is to be taken without a shareholders’ vote, the corporation must notify “all shareholders entitled to assert dissenters’ rights . . . and send them the dissenters’ notice described in Code Section 14-2-1322 no later than ten days after the corporate action was taken.”\(^{338}\)

When the proposed corporate action is submitted to a vote at the shareholders’ meeting, a record shareholder wishing to assert dissenters’ rights “must deliver to the corporation before the vote is taken written notice of [the shareholder’s] intent to demand payment for [the] shares if the proposed action is effectuated; and . . . must not vote . . . in favor of the proposed action.”\(^{339}\) If the shareholder fails to carry out both of these steps (either failing to deliver the notice or voting in favor of the proposed action) the shareholder loses his or her dissenters’ rights.\(^{340}\)

The comment to section 14-2-1321 notes that the notice from the shareholder serves two purposes. First, it “enables other voters to determine how much of a cash payment may be required” to carry out the proposed action, and second, it “serves to limit the number of persons to whom the corporation must give further notice, including the technical details of the depositing share certificates.”\(^{341}\)

\(^{334}\) Id. § 7.23(f).
\(^{335}\) See O.C.G.A. § 14-2-1321(b) (1994).
\(^{337}\) Id. § 14-2-1320(a).
\(^{338}\) Id. § 14-2-1320(b).
\(^{339}\) Id. § 14-2-1321(a).
\(^{340}\) Id. § 14-2-1321(b).
\(^{341}\) Id. § 14-2-1321 cmt.
When the corporate action creating the dissenters' rights is approved at the shareholders' meeting, the corporation must deliver a written dissenters' notice to all shareholders who complied with section 14-2-1321. It must be sent no later than ten days after the action was taken and must:

1. State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;
2. Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;
3. Set a date by which the corporation must receive the payment demand, which date may not be fewer than 30 nor more than 60 days after the date the notice . . . is delivered; and
4. Be accompanied by a copy of [Article 13 of the Georgia Code.]

The comment to this section explains that "[t]he basic purpose of [this section] is to require the corporation to tell all actual or potential dissenters what they must do in order to take advantage of their right of dissent." The comment further notes, "[i]n the case of a transaction not involving a vote by shareholders, the dissenter's notice must be sent to all persons who are eligible to dissent and demand payment."

The notice must also "contain or be accompanied by a form which [a dissenter] may use to complete the demand for payment under section 14-2-1323." This form must "specify the date by which the payment demand must be received by the corporation" (at least thirty and no more than sixty days after the effective date of the notice of how to demand payment).

Once the shareholder receives the notice from the corporation, the shareholder "must demand payment and deposit [the share] certificates in accordance with the terms of the notice." If the shareholder fails to do so by the date set in the dissenters' notice, the shareholder loses the dissenters' rights.

Under section 14-2-1324, the corporation

may restrict the transfer of uncertificated shares from the date the demand for their payment is received until the proposed corporate action is taken, or the restrictions released under Code Section 14-2-1326 . . . . The person for whom the dissenters' rights are asserted as

342. Id. § 14-2-1322.
343. Id. § 14-2-1322 cmt.
344. Id.
345. Id.
346. Id.
347. Id.
348. Id. § 14-2-1323.
to uncertificated shares retains all other rights of a shareholder until these rights are canceled or modified by the taking of the proposed corporate action.\(^{349}\)

Section 14-2-1325 provides:

within ten days of the later of the date the proposed corporate action is taken or receipt of a payment demand, the corporation shall by notice to each dissenter who [made a timely demand for payment] offer to pay to such dissenter the amount the corporation estimates to be the fair value of his or her shares, plus accrued interest.\(^{350}\)

This offer must be accompanied by:

(1) The corporation's balance sheet as of the end of a fiscal year ending not more than 16 months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any;
(2) A statement of the corporation's estimate of the fair value of the shares;
(3) An explanation of how the interest was calculated;
(4) A statement of the dissenters' right to demand payment under Code Section 14-2-1327; and
(5) A copy of [Article 13].\(^{351}\)

Also, if the shareholder accepts the corporation's offer by written notice within thirty days, or is deemed to have accepted it by a failure to respond within thirty days, payment must be made within sixty days from the making of the offer or the taking of the proposed corporate action, whichever is later.\(^{352}\)

If the corporation ultimately does not take the proposed action which gave rise to the dissenters' rights "within 60 days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares."\(^{353}\) Section 14-2-1326 provides: "If after returning deposited certificates and releasing transfer restrictions, the corporation takes the proposed action, it must send a new dissenters' notice . . . and repeat the payment demand procedure."\(^{354}\)

\(^{349}\) Id. § 14-2-1324.
\(^{350}\) Id. § 14-2-1325.
\(^{351}\) Id. § 14-2-1325(b).
\(^{352}\) Id. § 14-2-1325(c).
\(^{353}\) Id. § 14-2-1326(a).
\(^{354}\) Id. § 14-32-1326(b).
If the shareholder is dissatisfied with the payment offer, the shareholder may notify the corporation in writing of his or her own estimates of fair value and interest due and demand payment for this amount. This right also arises if the corporation, "having failed to take the proposed action, does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within 60 days after the date set for demanding payment." Dissenters waive the right to demand payment and are deemed to have accepted the corporation’s offer unless they notify the corporation of their objections within the thirty days. If the corporation fails to make the offer required by section 14-2-1325 within the set ten days, the shareholder may demand the information that was required to accompany the offer, and it must be provided within ten days of that demand. The shareholder may also submit to the corporation his or her own estimate of the value of the shares at any time and demand payment, subject only to the limitation of actions period of three years.

Section 14-2-1330, providing for court action, states: "If a demand for payment under Code Section 14-2-1327 remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest." If the corporation does not do so, it must "pay each dissenter whose demand remains unsettled the amount demanded." The proceedings are nonjury, equitable evaluation proceedings, held "in the superior court of the county where the corporation's registered office is located." However, "if the surviving corporation is a foreign corporation without a registered office" in Georgia, the proceedings shall be commenced in the county where the registered office of the corporation is located.

The corporation is required to make all dissenters whose demand remains unsettled parties to the proceeding, whether or not they are

355. Id. § 14-2-1327(a).
356. Id.
357. Id. § 14-2-1327(b).
358. Id. § 14-2-1327(c)(1).
359. Id. § 14-2-1327(c)(2).
360. Id. § 14-2-1332.
361. Id. § 14-2-1330(a).
362. Id.
363. Id. § 14-2-1330(b).
364. Id.
residents of Georgia. This "shall have the effect of an action quasi in rem against their shares." The corporation must serve a copy of the petition in the proceeding upon each dissenting shareholder who is a resident of [Georgia] in the manner provided by law for the service of a summons and complaint, and upon each nonresident dissenting shareholder either by registered or certified mail or by publication, or in any other manner permitted by law.

Section 14-2-1330(d) provides:

The jurisdiction of the court in which the proceeding is commenced . . . is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them or in any amendment to it.

According to section 14-2-1330(e), "[e]ach dissenter made a party to the proceeding is entitled to judgment for the amount which the court finds to be the fair value of his shares, plus interest to the date of judgment."

The court determines all costs of the appraisal proceedings, "including the reasonable compensation and expenses of appraisers appointed by the court, but not including fees and expenses of attorneys and experts for the respective parties." The court generally assesses the costs against the corporation, "except that the court may assess the cost against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment."

Further, "the court may also assess the fees and expenses of attorneys and experts for the respective parties, in amounts the court finds equitable . . . [a]gainst the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements" of Article 13, or "against either the corporation or a dissenter, in favor of any other party, if the court finds the party against whom fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith."

Section 14-2-1331(c) states:

365. Id. § 14-2-1330(c).
366. Id.
367. Id.
368. Id. § 14-2-1330(d).
369. Id. § 14-2-1330(e).
370. Id. § 14-2-1331(a).
371. Id.
372. Id. § 14-2-1331(b).
If the court finds that the services of attorneys for any dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award these attorneys reasonable fees to be paid out of the amounts awarded the dissenters who were benefited.  

Section 14-2-1332 indicates the limitations period as follows: "No action by any dissenter to enforce dissenters' rights shall be brought more than three years after the corporate action was taken, regardless of whether notice of the corporate action and of the right to dissent was given by the corporation in compliance with the [Code]."

C. Valuation of the Shares

The method for determining fair value under the ALI Principles is contained in section 7.22. It is the value of the shareholding "without any discount for minority status or, absent extraordinary circumstances, lack of marketability." Subsection (a) provides that, subject to subsections (b) and (c), the fair value is to be determined "using the customary valuation concepts and techniques generally employed in the relevant securities and financial markets for similar businesses in the context of the transaction giving rise to appraisal."

This flexible method of valuation reflects recent decisions rejecting the Delaware block method of valuation in favor of this less structured approach. Comment d to section 7.22 provides:

[Section] 7.22(a) deliberately gives the court the flexible admonition that it should look to the customary valuation standards and techniques actually employed in the relevant securities and financial markets to value similar businesses. In a given case, customary industry valuation standards could instruct the court as to the relative weight to be given expected future earnings versus historical earnings, or could indicate the appropriate price/earnings ratio to apply to historical earnings.

373. Id. § 14-2-1331(c).
374. Id. § 14-2-1332.
375. ALI PRINCIPLES, supra note 2, § 7.22 cmt. e provides, "the court should apply this exception only when it finds that the dissenting shareholder has held out in order to exploit the transaction giving rise to appraisal so as to divert value to itself that could not be made available to other shareholders."
376. Id. § 7.22(a).
377. Most notably, by the Delaware Supreme Court in Weinberger v. UOP, 457 A.2d 701 (Del. 1983). See ALI PRINCIPLES, Introductory Note to Part VII, Chapter 4, supra note 2.
378. ALI PRINCIPLES, supra note 2, § 7.22 cmt. d.
The ALI also notes that often the board will be in a better position than the court to value the shares accurately; therefore, absent a reason to suspect that the board’s determination is self serving, its valuation should be given presumptive effect.

Section 7.22(b) provides a partial presumption in favor of the board’s judgment, when there is no obvious reason to doubt its sincerity. In the case of business combinations not falling under sections 5.10 (transactions by a controlling shareholder with the corporation), 5.15 (transfer of control in which a director or principal senior executive is interested), or 7.25 (transactions involving corporate combinations to which a majority shareholder is a party), “the aggregate price accepted by the board of directors of the subject corporation should be presumed to represent the fair value of the corporation, or of the assets sold in the case of an asset sale, unless the plaintiff can prove otherwise by clear and convincing evidence.”

Section 7.22(c) provides that, if the transaction does fall within sections 5.10, 5.15, or 7.25, the court should give:

substantial weight to the highest realistic price that a willing, able, and fully informed buyer would pay for the corporation as an entirety. In determining what such a buyer would pay, the court may include a proportionate share of any gain reasonably to be expected to result from the combination, unless special circumstances would make such an allocation unreasonable.

In Georgia, flexibility is also regarded as a key to the court’s task of determining the “fair value” of the shares. “Fair value” is defined in section 14-2-1301(5) as “the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action.” This contrasts with the ALI Principles which permit the court to consider the effects of the proposed corporate action where appropriate. No further guidance is provided by the Georgia Code for determining fair value, except that section 14-2-1330(d) allows the court to appoint expert appraisers to “recommend decision on the question of fair value.”

---

379. See id.
380. Id. § 7.22(b).
381. Id.
382. Id. § 7.22(c).
384. ALI PRINCIPLES, supra note 2, § 7.22(c).
Indeed, in *Atlantic States Construction Co. v. Beavers* 385 the Georgia Court of Appeals declined to establish a set methodology for determining fair value. Unlike the ALI Principles, which ignore minority status and only consider lack of marketability in extraordinary circumstances, the Georgia Court of Appeals regarded the minority status of shares and the lack of marketability of shares in a close corporation, as relevant considerations. However, the court, finding that the legislature clearly intended a flexible approach to be taken to valuation, declined to require a specific methodology. 386

D. Exclusivity of the Remedy

Under the Georgia Code, the appraisal remedy is the exclusive remedy for a shareholder entitled to it. The shareholder cannot challenge the corporate action giving rise to the appraisal rights, except when there is a breach by the corporation of the procedural requirements of Article 13 or of its article or bylaws, or when the vote approving the corporate action was obtained by fraud, regardless of whether the shareholder has exercised dissenter's rights. 387 For this reason the shareholder must be particularly diligent in exercising his or her dissenter's rights.

Section 7.24(a) of the ALI Principles states that:

An appraisal proceeding is the exclusive remedy of an eligible holder . . . to challenge a transaction in control . . . involving a corporate combination that requires shareholder approval and is not subject to [section] 5.10 (Transactions by a Controlling Shareholder with the Corporation), [section] 5.15 (Transfer of Control in Which a Director or Principal Senior Executive Is Interested), or [section] 7.25 (Transactions in Control Involving Corporate Combinations to Which a Majority Shareholder is a Party) if:

(1) Disclosure concerning the transaction . . . is made to the shareholders who are entitled to authorize the transaction;

(2) The transaction is approved pursuant to, and is otherwise in accordance with, applicable provisions of law and the corporation's charter documents . . . ;

(3) Eligible holders who are entitled to but do not vote to approve the transaction are entitled to an appraisal remedy . . . .

---

386. Id. at 584, 314 S.E.2d at 245.
387. O.C.G.A. § 14-2-1302(b). The official comment to the section provides that "the fact that the merger might be argued to be unlawful as a breach of the directors' duty of care is not ground for equitable relief at the instance of a shareholder. The dissenters' rights remedy is the exclusive remedy unless the transaction is not in compliance with the requirements of the Code, or the vote required to approve the action was obtained by fraudulent and deceptive means." Id. § 14-2-1302 cmt.
reflecting the general principles embodied in [sections] 7.22 . . . and 7.23.\textsuperscript{388}

The burden is on the shareholder to prove a failure to comply with this section.\textsuperscript{389} When subsection (3) is the only subsection breached, the cause of action is for waste of corporate assets.\textsuperscript{390} The exclusivity of the remedy will not prevent a personal action against a director for a breach of the duty of fair dealing.\textsuperscript{391}

Section 7.24 is meant to deal with "the simple arm's-length corporate combination to which neither a director, principal senior executive, nor controlling shareholder is a party."\textsuperscript{392} When they are a party, the section has no operation.\textsuperscript{393}

Under section 7.25, the appraisal remedy is the exclusive remedy to challenge a transaction in control involving a corporate combination to which a shareholder who has power to approve the combination is a party only if:

(1) The directors who approve the transaction . . . have an adequate \[objective\] basis . . . for believing that the consideration offered to the minority shareholders in the transaction constitutes fair value for their shares, as determined in accordance with the standards provided in \[section\] 7.22 . . . ;
(2) Disclosure concerning the transaction [including the belief of the director described in paragraph (1)] and the conflict of interest . . . is made to the minority shareholders . . . ;
(3) The transaction is . . . [legal and in accordance with the corporate charter documents]; and
(4) Holders of equity securities who do not vote to approve the transaction are entitled to an appraisal remedy reflecting the general principles embodied in \[sections\] 7.22 . . . and 7.23 . . . .\textsuperscript{394}

When the transaction was "authorized in advance by disinterested directors and authorized in advance or ratified by disinterested shareholders," following the disclosure required by paragraph (2) above, the shareholder bears the burden of proof of a breach of the four

\textsuperscript{388} ALI PRINCIPLES, supra note 2, \$ 7.24(a).
\textsuperscript{389} Id. \$ 7.24(b).
\textsuperscript{390} Id. \$ 7.24(c).
\textsuperscript{391} Id. \$ 7.24(d).
\textsuperscript{392} Id. \$ 7.24 cmt. c.
\textsuperscript{393} Id.
\textsuperscript{394} Id. \$ 7.25(a).
If all but paragraph (4) is complied with, then: (1) "If the transaction was approved by disinterested shareholders following the disclosure required" by paragraph (2), it may be challenged as being unfair, with the burden of proof on the minority shareholders; and (2) If it was not so approved, it may be challenged as unfair with the burden of proof on the majority shareholder. These exclusivity provisions do not apply to closely held corporations.

V. CONCLUSION

The ALI Principles and the Georgia Corporations Code were written for different purposes and by different participants. The Georgia statutory provisions are notable for their relative brevity; there is also a relative scarcity of case law interpreting them. By contrast, the ALI Principles are voluminous, heavily annotated, and generously supported with case references on a national basis; many practitioners, representatives from both management and shareholders, a veritable "who's who" of corporate law academics, and various lobbying groups participated in their preparation. Georgia judges and legislators have at their disposal this vast repository of knowledge to use when further developing and interpreting Georgia corporations law. Indeed, all judges, lawyers, and legislators should benefit from the research, resources, balancing of interests, and intellectual groundwork that has produced the ALI Principles of Corporate Governance.

396. Id. § 7.25(c).
397. Id. § 7.25(d).