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Business Associations

by W. Carter Bates III*
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I. INTRODUCTION

This Article surveys developments in Georgia law in the area of business associations, including corporations, partnerships, limited liability companies, and joint ventures.¹ The first portion of this Article reviews noteworthy published cases addressing issues of first impression from the Georgia Court of Appeals, the Georgia Supreme Court, federal district courts of Georgia, and the United States Court of Appeals for the Eleventh Circuit, issued from June 1, 2011 through May 31, 2012. The second portion of this Article summarizes additional cases of note that do not involve issues of first impression. The third portion of this Article discusses relevant legislation passed by both the Georgia House of Representatives and the Georgia State Senate in the 2012 session of the Georgia General Assembly and signed by Governor Nathan Deal.

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1. For an analysis of Georgia business associations law during the prior survey period, see Paul A. Quirós et al., *Business Associations, Annual Survey of Georgia Law*, 63 MERCER L. REV. 83 (2011).

II. CASES ADDRESSING ISSUES OF FIRST IMPRESSION

A. *The Georgia Supreme Court Overrules the Application of the Fiduciary Shield Doctrine*

In a case arising from a dispute over a forum selection clause in an agreement, the Georgia Supreme Court addressed the “fiduciary shield” doctrine as a matter of first impression.² Dr. Carol Walker sold nutritional supplements acquired from Amerireach.com, LLC, d/b/a AmeriSciences (AmeriSciences). Walker and AmeriSciences formalized their economic arrangement in an agreement containing a forum selection clause limiting venue in the case of litigation to state or federal courts located in the City of Harris, Texas.³ For reasons undisclosed by the court, Walker terminated the agreement in February 2009 and demanded that AmeriSciences repurchase the unsold merchandise in her possession⁴ pursuant to the Official Code of Georgia Annotated (O.C.G.A.) section 10-1-415(d)(1).⁵ Eight days later, AmeriSciences filed a declaratory judgment action against Walker related to the forum selection clause in a Harris, Texas state court.⁶

In April of that year, Walker filed a damage suit against AmeriSciences and three of its corporate officers in the State Court of Gwinnett County for failure to comply with the repurchase requirements of O.C.G.A. § 10-1-415(d)(1). The Texas court issued a final default judgment in June 2009 ruling that any damage suit for failure to repurchase was subject to the forum selection clause, that such clause was enforceable, and that filing of such a suit anywhere other than Harris, Texas was a breach of contract. The Gwinnett County court then granted AmeriSciences summary judgment in light of the forum selection clause and the Texas court’s ruling, and the court also dismissed the three corporate officers as defendants for lack of personal jurisdiction based on the fiduciary shield doctrine.⁷ The Georgia Court of Appeals reversed the Gwinnett County court, holding that because Walker’s suit was based on a statutory violation and not a claim under the contract with AmeriSciences, the forum selection clause contained in that

2. *Amerireach.com, LLC v. Walker*, 290 Ga. 261, 266, 719 S.E.2d 489, 494 (2011).

3. *Id.* at 261, 719 S.E.2d at 491.

4. *Id.*

5. O.C.G.A. § 10-1-415(d)(1) (2009).

6. *Amerireach.com*, 290 Ga. at 262, 719 S.E.2d at 491.

7. *Id.* The fiduciary shield doctrine generally provides that a nonresident individual cannot be subject to personal jurisdiction based solely on his or her actions as a corporate officer. *Id.* at 264, 719 S.E.2d at 493.

contract did not apply and *res judicata* did not prevent her suit.⁸ The court of appeals also held that the Gwinnett County court “had personal jurisdiction over the individual defendants even though they were present in Georgia only” as officers of AmeriSciences.⁹

Although the court of appeals applied the fiduciary shield doctrine in two prior decisions, the Georgia Supreme Court pointed out that both decisions were decided prior to *Innovative Clinical & Consulting Services v. First National Bank of Ames, Iowa*,¹⁰ decided by the supreme court in October 2005.¹¹ In that case, the court interpreted O.C.G.A. § 9-10-91(1),¹² the jurisdictional statute on which Walker subsequently relied,¹³ to grant Georgia courts “unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State,” limited only by the dictates of procedural due process.¹⁴ The court in *Amerireach.com* observed that special treatment of fiduciaries—promoted by the fiduciary shield doctrine—conflicts with the jurisdictional statute’s literal language, that the doctrine was not necessary as a matter of fairness, and overruled the two court of appeals cases to the extent that they applied the fiduciary shield doctrine, declining to follow several federal cases that also applied the doctrine.¹⁵

In support of this decision, the supreme court cited *Calder v. Jones*,¹⁶ a United States Supreme Court case that weakened the legal theory behind the fiduciary shield doctrine.¹⁷ The court stated that even though the individual defendants in this case were members of an LLC rather than officers of a corporation, the court’s analysis was not changed.¹⁸ The court then proceeded to hold that the individual defendants had sufficient contacts with the State of Georgia—and, in fact, admitted to physical presence in the State—to support the trial court’s jurisdiction over them.¹⁹

8. *Id.* at 262, 719 S.E.2d at 491.

9. *Id.*

10. 279 Ga. 672, 620 S.E.2d 352 (2005).

11. *Amerireach.com*, 290 Ga. at 265, 719 S.E.2d at 493.

12. O.C.G.A. § 9-10-91(1) (2007 & Supp. 2012).

13. *Amerireach.com*, 290 Ga. at 264-66, 719 S.E.2d at 493-94.

14. *Innovative Clinical & Consulting Servs.*, 279 Ga. at 675, 620 S.E.2d at 355.

15. *Amerireach.com*, 290 Ga. at 266, 719 S.E.2d at 494.

16. 465 U.S. 783 (1984).

17. *Amerireach.com*, 290 Ga. at 266-67, 719 S.E.2d at 494.

18. *Id.* at 268, 719 S.E.2d at 495.

19. *Id.* at 269-70, 719 S.E.2d at 496.

B. The Georgia Court of Appeals Interprets a Statute Permitting Corporations to Limit Minority Shareholders' Access to Books and Records

In *Mannato v. SunTrust Banks, Inc.*,²⁰ the Georgia Court of Appeals held that O.C.G.A. § 14-2-1602(e)²¹ abrogated any common law right of a shareholder owning two percent or less of a corporation's outstanding stock to inspect corporate books and records.²² Edward Mannato, a shareholder of SunTrust Banks, Inc. (SunTrust) stock, requested that SunTrust sue its officers and directors for breach of fiduciary duty related to the housing market crash. After an investigation, SunTrust's board of directors refused Mannato's request. Mannato then demanded access to SunTrust's books and records in his capacity as a SunTrust shareholder. SunTrust again denied Mannato's request, this time asserting he was not entitled to inspect SunTrust's books and records under O.C.G.A. § 14-2-1602(e) and SunTrust's bylaws as he held less than two percent of SunTrust's outstanding stock. Mannato subsequently sought an injunction to prevent SunTrust from blocking his access to its books and records, but the trial court granted SunTrust's motion to dismiss in light of O.C.G.A. § 14-2-1602(e). Mannato appealed, arguing that he had a common law right to inspect SunTrust's records.²³

The court of appeals interpreted O.C.G.A. § 14-2-1602(e), which provides that a corporation's articles of incorporation or bylaws may limit inspection of certain corporate records for shareholders owning less than two percent of the corporation's outstanding stock.²⁴ Relying on legislative history, the court concluded that the Georgia General Assembly intended to supersede any contrary common law right to inspection of corporate records by enacting O.C.G.A. § 14-2-1602(e).²⁵ Consequently, the court held that O.C.G.A. § 14-2-1602(e) abrogated any common law right of inspection provided to shareholders owning two percent or less of a corporation's outstanding shares and affirmed the trial court's dismissal of the complaint.²⁶

20. 308 Ga. App. 691, 708 S.E.2d 611 (2011).

21. O.C.G.A. § 14-2-1602(e) (2003 & Supp. 2012).

22. *Mannato*, 308 Ga. App. at 693, 708 S.E.2d at 613.

23. *Id.* at 691-92, 708 S.E.2d at 612; *see also* O.C.G.A. § 14-2-1602(e).

24. *Mannato*, 308 Ga. App. at 692-93, 708 S.E.2d at 612; O.C.G.A. § 14-2-1602(e).

25. *Mannato*, 308 Ga. App. at 693, 708 S.E.2d at 612-13.

26. *Id.* at 693, 708 S.E.2d at 613.

C. The United States Court of Appeals for the Eleventh Circuit Holds a Dissolved Corporation Has No Principal Place of Business for Purposes of Diversity Jurisdiction

In a case of first impression for the United States Court of Appeals for the Eleventh Circuit,²⁷ the court held that a dissolved corporation has no principal place of business for purposes of diversity jurisdiction and that such a corporation's citizenship is therefore determined with reference to the state in which it was incorporated.²⁸ LanLogistics Corporation (LanLogistics) sold several companies it owned and, in so doing, breached a contract with Holston Investments, Inc. (Holston), in which it granted Holston a right of first refusal with respect to the stock of one of the companies it sold. LanLogistics never gave Holston an opportunity to exercise its right of first refusal. Holston, a Florida corporation, sued LanLogistics, a Delaware corporation with its headquarters in Miami, in federal court, alleging diversity jurisdiction. By the time Holston filed suit, LanLogistics had dissolved, forfeiting its authority to conduct business in Florida.²⁹

After the federal district court entered a judgment in favor of Holston, LanLogistics moved to vacate the judgment for lack of subject matter jurisdiction, arguing that it was a citizen of Florida for purposes of diversity jurisdiction and therefore could not be sued by Holston, also a Florida citizen, in federal court under the auspices of diversity jurisdiction.³⁰ In analyzing the jurisdictional claim, the Eleventh Circuit referred to 28 U.S.C. § 1332(c)(1),³¹ which provides for purposes of diversity jurisdiction that a corporation is a citizen of every state in which it has been incorporated and also of the state in which it has its principal place of business.³² The court then examined a circuit split on the issue of whether a dissolved or inactive corporation has a principal place of business for purposes of diversity jurisdiction.³³ Looking to the United States Supreme Court's admonition in *Hertz Corp. v. Friend*³⁴ that simple jurisdictional tests are preferable to complex ones,³⁵ the court sided with the United States Court of Appeals for the

27. *Holston Invs., Inc. B.V.I. v. LanLogistics Corp.*, 677 F.3d 1068 (11th Cir. 2012) (per curiam).

28. *Id.* at 1071.

29. *Id.* at 1069-70.

30. *Id.* at 1070.

31. 28 U.S.C. § 1332(c)(1) (2006).

32. *Holton Invs.*, 677 F.3d at 1070; *see also* 28 U.S.C. § 1332(c)(1).

33. *Holton Invs.*, 677 F.3d at 1070-71.

34. 130 S. Ct. 1181 (2010).

35. *Id.* at 1193-94.

Third Circuit and held that a dissolved corporation has no principal place of business for purposes of diversity jurisdiction.³⁶ The court explained that this bright-line rule would provide clarity and predictability.³⁷ Because LanLogistics was dissolved by the time the suit was filed, it had no principal place of business for diversity jurisdiction purposes and was a citizen only of Delaware.³⁸ Consequently, the court had subject matter jurisdiction over the case.³⁹

D. The Georgia Court of Appeals Rules a Corporate Car Dealer's Market Area for Purposes of the Georgia Motor Vehicle Franchise Practices Act is Based on the Corporation's Principal Place of Business

In *WMW, Inc. v. American Honda Motor Co.*,⁴⁰ the Georgia Court of Appeals affirmed the trial court's grant of a motion to dismiss filed by WMW, Inc. (WMW), challenging the establishment of a new Honda dealership in Cumming, Georgia, based on the proposed dealership's proximity to WMW's Honda service center in Alpharetta, Georgia.⁴¹ WMW operated Honda Carland, a dealership and service center in Roswell, Georgia, under a franchise agreement with American Honda Motor Company, Inc. (Honda). WMW also operated a service center in Alpharetta, Georgia. In 2010, Honda notified WMW that it intended to establish a new Honda dealership in Cumming, Georgia, allegedly within eight miles of WMW's Alpharetta service center.⁴² WMW objected and filed a complaint seeking an injunction against Honda and its would-be franchisee, claiming that the new franchise would violate the Georgia Motor Vehicle Franchise Practices Act (the Act),⁴³ which, among other things, allowed an existing franchisee to seek an injunction against the establishment of a new franchise within such franchisee's "relevant market area."⁴⁴ The trial court dismissed WMW's complaint with prejudice, holding that WMW had no standing. WMW appealed.⁴⁵

For the first time, the court of appeals interpreted the anti-encroachment provisions of the Act.⁴⁶ The relevant provisions of the Act require a franchisor, such as Honda, to give a franchisee notice of its intent to

36. *Holton Invs.*, 677 F.3d at 1071.

37. *Id.*

38. *Id.*

39. *Id.*

40. 311 Ga. App. 1, 714 S.E.2d 689 (2011), *cert. granted*.

41. *Id.* at 1-2, 714 S.E.2d at 690.

42. *Id.* at 2-3, 714 S.E.2d at 690-91.

43. O.C.G.A. §§ 10-1-620 to -670 (2009 & Supp. 2012).

44. *WMW, Inc.*, 311 Ga. App. at 2, 714 S.E.2d at 690-91; *see also* O.C.G.A. § 10-1-664.

45. *WMW, Inc.*, 311 Ga. App. at 2, 714 S.E.2d at 691.

46. *Id.* at 1, 714 S.E.2d at 690.

establish a new franchise within the existing franchisee's relevant market area, and they also permit the franchisee to petition the appropriate superior court to enjoin or prohibit the establishment of such a franchise.⁴⁷ The Act defines "[r]elevant market area" as "the area located within an eight-mile radius of an existing dealership."⁴⁸ The court determined that the location of the dealership in question was based on the location of the "person" of WMW as a corporation.⁴⁹

Relying on *Citizens & Southern Bank v. Taggart*,⁵⁰ the court ruled that WMW was located for purposes of the Act where its principal office or place of business was located: in this case, at WMW's Roswell dealership, which was more than eight miles away from the proposed Cumming franchise.⁵¹ In light of this interpretation of the Act, the court held that the trial court did not err in concluding that WMW had no standing to challenge the establishment of the Cumming franchise.⁵² Judge Christopher J. McFadden dissented, noting that the majority's interpretation of the Act arose from a failure to recognize that a corporation "can occupy more than one place at a time."⁵³

III. ADDITIONAL CASES OF INTEREST

Where a member of an LLC was not a manager of the LLC but had the unilateral power to appoint four of the eight managers, the United States District Court for the Middle District of Georgia held that a genuine fact dispute existed as to whether the member was a managing member of the LLC owing a fiduciary duty to the other members.⁵⁴ This case suggests that a member of an LLC who is not named a manager may nonetheless be treated as a managing member for fiduciary duty purposes if such member has functional control over the management of the entity.

In another case where a member of the board of directors of a bank and its holding company brought a fraud claim against the bank for inducing her to invest in the bank's holding company based on misrepresentations about a potential sale of the holding company, her unique

47. O.C.G.A. § 10-1-664(a)-(b).

48. O.C.G.A. § 10-1-622(13.1).

49. *WMW, Inc.*, 311 Ga. App. at 4, 714 S.E.2d at 692 (quoting O.C.G.A. § 10-1-622(13)).

50. 164 Ga. 351, 138 S.E. 898 (1927).

51. *WMW, Inc.*, 311 Ga. App. at 4 & n.1, 714 S.E.2d at 691-92 & n.1.

52. *Id.* at 5, 714 S.E.2d at 692.

53. *Id.* at 5, 714 S.E.2d at 693 (McFadden, J., dissenting).

54. *Denim N. Am. Holdings, LLC v. Swift Textiles, LLC*, 816 F. Supp. 2d 1308, 1325-26 (M.D. Ga. 2011).

access to information about the bank was one factor that led the court to grant summary judgment to the bank.⁵⁵

In a case where a shareholder of a corporation executed a personal guaranty of the corporation's debt identifying the debtor using only a later-abandoned fictitious name of the corporation and not the legal name of the corporation, the court of appeals held that a creditor could not enforce the shareholder's guarantee of the debt in light of Georgia courts' preference for strict construction of guaranty agreements.⁵⁶

Where corporate officers signed a promissory note only once and their corporate titles appeared with their signatures, the court held that they signed in a representative capacity only and did not personally guarantee the note.⁵⁷

IV. STATUTORY DEVELOPMENTS

A. House Bill 945 Authorizes Issuance of Non-Cash Valued Shares by a Bank or Trust Company and Relaxes Dividend Restrictions

House Bill 945 amends O.C.G.A. §§ 7-1-415⁵⁸ and 7-1-460⁵⁹ to relax certain requirements with respect to the stock and dividends of banks and trust companies in the State of Georgia.⁶⁰ Prior to House Bill 945, O.C.G.A. § 7-1-415 required banks and trust companies to issue shares of stock only in exchange for cash, and such cash was required to be at least equal to the par value of the share.⁶¹ House Bill 945 permits a bank or a trust company to issue shares of stock, in a manner that does not comply with these restrictions, with the approval of the Department of Banking and Finance after a showing of good cause.⁶² Thus, banks and trust companies in Georgia could issue shares of stock in exchange for capital contributions of property other than cash. Additionally, a capital contribution of cash could be less than the par value of the stock. However, any such deviation from prior rules would be subject to the approval of the Department of Banking and Finance.

Prior to House Bill 945, O.C.G.A. § 7-1-460 provided that Georgia banks and trust companies could only declare and pay dividends out of

55. Griffin v. State Bank of Cochran, 312 Ga. App. 87, 92, 718 S.E.2d 35, 40 (2011).

56. PlayNation Play Sys., Inc. v. Jackson, 312 Ga. App. 340, 341-42, 718 S.E.2d 568, 569 (2011).

57. Elwell v. Keefe, 312 Ga. App. 393, 396, 718 S.E.2d 587, 590 (2011).

58. O.C.G.A. § 7-1-415 (2004 & Supp. 2012).

59. O.C.G.A. § 7-1-460 (2004).

60. Ga. H.R. Bill 945, Reg. Sess. (2012) (codified at O.C.G.A. §§ 7-1-415(a) to -460(a)(1)).

61. O.C.G.A. § 7-1-415(a).

62. Ga. H.R. Bill 945 § 1.

retained earnings.⁶³ House Bill 945 permits dividends that do not comply with that restriction if such dividends are approved in advance by the Department of Banking and Finance “on terms consistent with standards of safety and soundness.”⁶⁴

B. House Bill 898 Authorizes a New Type of Limited Purpose Bank

House Bill 898, the Georgia Merchant Acquirer Limited Purpose Bank Act,⁶⁵ provides for the incorporation and control of a new type of limited purpose bank connected with payment card networks.⁶⁶ Payment card networks include systems designed to allow payment or acceptance of payment for goods or services using credit or debit cards.⁶⁷ Such a merchant acquirer bank must maintain at least \$3 million in capital at all times.⁶⁸ A merchant acquirer bank may not accept deposits from the general public, but it may apply for deposit insurance from the Federal Deposit Insurance Corporation.⁶⁹

C. House Bill 886 Limits Issuance of Credit to Any One Person, Including Many Business Entities, in a Derivative Transaction

House Bill 886 amends provisions prohibiting a bank from extending credit to any one person or corporation in excess of certain limitations.⁷⁰ Prior to enactment, O.C.G.A. § 7-1-285(a)⁷¹ prohibited a bank from lending to any one person or corporation, or having obligations owing to it from any one person or corporation in excess of fifteen percent of the statutory capital base of the bank, without approval by the bank’s board of directors or a committee authorized by the board to grant such approval.⁷² House Bill 886 clarifies that the phrase “[p]erson or corporation” includes partnerships, associations, joint ventures, and other entities.⁷³ The Bill also provides that “[h]av[ing] credit exposure as a counterparty in derivative transactions” will count towards the credit limitation found in O.C.G.A. § 7-1-285(a).⁷⁴

63. O.C.G.A. § 7-1-460(a)(1).

64. Ga. H.R. Bill 945 § 2.

65. O.C.G.A. §§ 7-9-1 to -13 (Supp. 2012).

66. Ga. H.R. Bill 898, Reg. Sess. (2012) (codified at O.C.G.A. §§ 7-9-1 to -13 (Supp. 2012)).

67. *Id.* § 1.

68. *Id.*

69. *Id.*

70. Ga. H.R. Bill 886, Reg. Sess. (2012) (codified at O.C.G.A. § 7-1-285 (Supp. 2012)).

71. O.C.G.A. § 7-1-285 (2004 & Supp. 2012).

72. O.C.G.A. § 7-1-285(a).

73. Ga. H.R. Bill 886 § 1.

74. *Id.*

V. CONCLUSION

The most significant judicial development in the area of business associations this year was the death knell of the fiduciary shield doctrine in the State of Georgia. After *Amerireach.com, LLC v. Walker*,⁷⁵ nonresident officers of a corporation and members of an LLC cannot rely on the corporate or LLC form alone to protect them from suit in Georgia.⁷⁶ It will be interesting to see how Georgia courts determine the extent to which procedural due process limits their authority to exercise personal jurisdiction over nonresidents who carry on business in this state.

75. 290 Ga. 261, 719 S.E.2d 489 (2011).

76. *Id.* at 265-66, 719 S.E.2d at 493-94.