Commercial and Banking Law

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Last year's article\(^1\) limited its coverage to cases interpreting provisions of Georgia's Commercial Code.\(^2\) Although the courts have provided ample material to again dedicate the entire survey to that topic, to do so would ignore other substantive bodies of law that have had a significant impact on a commercial law practice. Therefore, in addition to a review of the standard Commercial Code topics (sales, negotiable instruments and bank collections, and secured transactions), this year's survey has endeavored to summarize case law and legislative enactments within the past year in the following categories: banking and finance, consumer protection, contracts of employment, contract drafting considerations, and promissory notes. Hopefully, the effort to include additional subjects has not unduly sacrificed the more comprehensive coverage that fewer topics would allow.

I. BANKING AND FINANCE

A. Case Law

*First Union National Bank of Georgia v. Collins*\(^3\) will have a significant impact on the day-to-day management of banks. The Unclaimed Property Act\(^4\) provides that funds represented by certain dormant instruments escheat to the State. Banks withheld service charges prior to...
to the remittance of the funds represented by these instruments to the State, a practice with which the State disagreed.\textsuperscript{5} When the State challenged this practice, several banks brought a declaratory judgment action against the State. The State contended that: (1) the service charges, imposed by the banks under the authority of the Official Code of Georgia Annotated ("O.C.G.A.") section 7-1-358,\textsuperscript{6} can only be levied against "deposit" accounts, and (2) O.C.G.A. sections 7-1-372\textsuperscript{7} and 11-3-104\textsuperscript{8} precluded service charges against the funds represented by the instruments.\textsuperscript{9} The court of appeals disagreed with both of these positions.

The Department of Banking and Finance Regulation implementing O.C.G.A. section 7-1-358 "define[d] unpresented certified and official checks more than two years old to be 'dormant accounts.'"\textsuperscript{10} Additionally the legislature had, in adopting the Uniform Unclaimed Property Act,\textsuperscript{11} deleted those provisions that would have prevented banks from assessing charges on unclaimed official checks.\textsuperscript{12} As such, the State's first contention failed.\textsuperscript{13}

The court of appeals similarly disagreed with the State's second argument that sections 7-1-372 and 11-3-104 precluded the service charges in this context.\textsuperscript{14} In particular, the court noted the legislature's decision to overrule the attorney general's opinion that section 7-1-372 did not permit such service charges.\textsuperscript{15} In light of that and other considerations, the court of appeals upheld banks' contractual and statutory authority to assess service charges against dormant instruments prior to remittance of the funds they represent to the State.\textsuperscript{16}

The court of appeals also issued two decisions during the survey period that elaborated upon the rights, duties, and obligations incident to joint tenancy bank accounts. The rule of joint tenancy accounts is that only clear and convincing evidence can rebut the presumption that amounts held in a joint account at the death of one joint tenant pass to the

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\item \textsuperscript{5} 221 Ga. App. at 442, 471 S.E.2d at 893.
\item \textsuperscript{6} O.C.G.A. § 7-1-358 (1997).
\item \textsuperscript{7} Id. § 7-1-372.
\item \textsuperscript{8} Id. § 11-3-104 (1994).
\item \textsuperscript{9} 221 Ga. App. at 442-43, 471 S.E.2d at 893-94.
\item \textsuperscript{10} Id. at 443, 471 S.E.2d at 894 (citing GA. COMP. R. & REGS. r. 80-1-8-.01 (1)(c) (1984)).
\item \textsuperscript{12} 221 Ga. App. at 444-45, 471 S.E.2d at 895.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id. at 445, 471 S.E.2d at 895.
\item \textsuperscript{15} See id.
\item \textsuperscript{16} Id.
surviving joint tenant(s).\textsuperscript{17} In \textit{Jordan v. Stephens},\textsuperscript{18} the court of appeals applied this rule in the context of a defendant who, at the time he was made a joint tenant with the decedent, held a general power of attorney over decedent's assets.\textsuperscript{19} In affirming the trial court's refusal to direct a verdict for plaintiffs, who challenged defendant's right to the funds as surviving joint tenant, the court of appeals found no evidence that the decedent did not intend for the assets transferred by her to belong to defendant at her death; "[i]n fact, the evidence indicated that [the decedent] specifically wanted [defendant] to have the assets . . . ."\textsuperscript{20}

For precedential purposes, the transfers were proper notwithstanding the fiduciary relationship that existed between defendant and the decedent by reason of the power of attorney: "An agent is not absolutely prohibited from making gifts of the principal's property . . . ."\textsuperscript{21}

The surviving joint tenant-fiduciary was not as fortunate in \textit{Moore v. Self}.\textsuperscript{22} The surviving joint tenant-defendant, one of three children of the decedent, held a joint tenancy with the decedent in certain real property and bank accounts. Prior to her death, the decedent was declared an incapacitated adult, and defendant petitioned to be appointed the decedent's guardian. In making her petition, defendant listed the above-referenced real estate and bank accounts as property of the ward (decedent) without any indication of defendant's joint tenancy rights.\textsuperscript{23}

The court of appeals first held that the joint tenancy did not terminate as a matter of law when the decedent was declared an incapacitated adult and a guardian was appointed for her.\textsuperscript{24} Specifically, the appointment of a guardian does not divest a joint tenant of his or her legal interest in the joint tenancy.\textsuperscript{25} However, defendant's failure to indicate her interest as a joint tenant with decedent in her petition to be appointed guardian violated the "loyalty rule" of guardianship:

A guardian owes a duty of undivided loyalty to his ward and must not place himself in a position where his individual interests conflict or may conflict with the interest of the ward . . . . "[I]t is generally, if not always, humanly impossible for the same person to act fairly in two

\textsuperscript{17} O.C.G.A. § 7-1-813 (1997).
\textsuperscript{18} 221 Ga. App. 8, 470 S.E.2d 733 (1996).
\textsuperscript{19} \textit{Id.} at 8, 470 S.E.2d at 734.
\textsuperscript{20} \textit{Id.} at 9, 470 S.E.2d at 735.
\textsuperscript{21} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 73, 473 S.E.2d at 509.
\textsuperscript{24} \textit{Id.} at 72, 473 S.E.2d at 508.
\textsuperscript{25} \textit{Id.} at 73, 473 S.E.2d at 509.
capacities and on behalf of two interests in the same transaction. Consciously or unconsciously he will favor one side as against the other, where there is or may be a conflict of interest. If one of the interests involved is that of the [guardian] personally, selfishness is apt to lead him to give himself an advantage. If permitted to represent antagonistic interests the [guardian] is placed under temptation and is apt in many cases to yield to the natural prompting to give himself the benefit of all doubts . . . . The principal object of the administration of the rule is preventative, that is, to make the disobedience of the [guardian] to the rule so prejudicial to him that he and all other [guardians] will be induced to keep away from disloyal transactions in the future . . . . It is not necessary that the [guardian] shall have gained from the transaction, in order to find that [he] is disloyal. If the dealing presented conflict of interest and consequent temptation to the [guardian, equity will provide a remedy at the option of the ward or his estate] regardless of gain or loss to the [guardian].”

Although defendant's violation of the loyalty rule did not terminate the joint tenancy as a matter of law, defendant was “estopped under principles of fiduciary law from asserting any claim to the property at issue as a joint tenancy survivor adverse to [decedent's] estate, regardless of the legal viability of the joint tenancies and any claim she would otherwise have had to survivorship rights.”

In addition to issues relating to joint tenancy accounts, the court of appeals addressed issues arising in loan commitments and the monitoring of distressed debtors. In Moore v. Bank of Fitzgerald, the terms of an oral agreement to loan money between plaintiff-borrower and defendant-bank (as lender) were reduced to writing in a letter, which stated that its terms superseded “any other verbal agreements made between the parties.” The letter memorialized an agreement to loan money for the purchase of land and to loan “reasonable funds for [plaintiff’s] cattle operation, provided that [plaintiff] can furnish assurances that cattle feed can be provided and that she can furnish data establishing the feasibility of payback of such operating loan or loans, and provided that such operating monies and loans will be consistent with sound banking practices.” The court apparently found this language too uncertain to be enforceable as a contract to make future operating loans, stating

27. Id. at 74, 473 S.E.2d at 510.
29. Id. at 122, 483 S.E.2d at 137.
30. Id. at 126, 483 S.E.2d at 139 (citations omitted).
Even if the letter from [defendant] to [plaintiff] is construed as a written commitment by [defendant] to make future operating loans, "unless an agreement is reached as to all terms and conditions and nothing is left to future negotiations, a contract to enter into a contract in the future [i.e., a loan] is of no effect."

The court in Moore also rejected plaintiff's contention that a fiduciary relationship arose between her and defendant as a result of defendant's alleged undertaking of management, direction, and control over her cattle operation. In support of her contention, plaintiff relied on those provisions of the letter that required her "to meet monthly with a bank official to 'monitor her farming operations and progress.'" Nevertheless, the court found no evidence in the record to indicate that the relationship "was so intertwined as to create a fiduciary relationship." In particular,

[No confidential relationship [exists] between lender and borrower . . . [where] they are creditor and debtor with clearly opposite interests . . . . [E]ven if the bank had undertaken to advise [plaintiff] on her [cattle operation] and had [misled] [plaintiff], [plaintiff] would not be

31. Id. at 127, 483 S.E.2d at 140 (quoting Hartrampf v. C & S Realty Invs., 157 Ga. App. 879, 881, 278 S.E.2d 750 (1981)).
32. 225 Ga. App. at 126, 483 S.E.2d at 139.
33. Id. at 125-26, 483 S.E.2d at 139.
34. Id. at 125, 483 S.E.2d at 139.
entitled to rely on any such representation but would be "under a duty to prosecute [her] own inquiries" . . . , as appropriate.35

B. Legislation

The 1997 session of the Georgia General Assembly enacted numerous provisions pertaining to the operation and management of banks.

1. Bank Powers and Management. The 1997 General Assembly significantly expanded the powers granted to banks. Formerly, banks were limited to exercising, in addition to traditional bank functions identified by statute, those powers "necessary or convenient" to the business of banking.36 The General Assembly replaced the "necessary and convenient" catchall phrase to provide that banks may now exercise all powers "incidental" to their business.37 More significantly, incidental powers were defined as inclusive of the power to sell insurance subject to state insurance laws, as well as other powers deemed "financial in nature" by the Commissioner of the Georgia Department of Banking and Finance.38 By specifically permitting banks to sell insurance products, the General Assembly empowered state-chartered banks to compete with their federally chartered counterparts who already enjoyed this power.

The General Assembly also adopted legislation further eroding the geographic limitations under which banks have traditionally operated. A bank may now locate its ATMs statewide without the risk of violating branching laws; that is, ATMs are not considered "bank branches."39 In addition, the General Assembly authorized the Department of Banking and Finance to require registration of, and to regulate, entities providing financial services via the Internet.40 Internet banking, now in its infancy, promises to be a fertile ground for future regulations.

Presumably in recognition of the reality of interstate banking, the General Assembly amended residency requirements for bank directors. Formerly, sixty percent of a bank’s directors had to satisfy certain residency requirements, whereas now only a majority need do so.41 As to the residency requirement, the law formerly required any director to reside (1) in Georgia, and (2)(a) either in the county of the bank’s

35. Id. at 126, 483 S.E.2d at 139 (quoting Pardue v. Bankers First Fed. Sav. Ass’n, 175 Ga. App. 814, 815, 334 S.E.2d 926 (1985)).
37. Id. § 7-1-261(11) (1997).
38. Id.
39. Id. § 7-1-603(b).
40. Id. § 7-1-61(c)(2).
41. Id. § 7-1-480.
registered office, or (b) within forty miles of any full service office.\textsuperscript{42} However, new legislation provides that a bank director may reside anywhere in Georgia or within forty miles of any office in Georgia, thus permitting persons in Alabama, Florida, North Carolina, South Carolina, and Tennessee to serve as a director of a Georgia bank.\textsuperscript{43}

Finally, the General Assembly created a new form of financial entity known as a "mutual savings bank."\textsuperscript{44} Presently, the prospect exists that Congress will adopt a "master federal charter" that would eliminate the mutual form of ownership for federally chartered financial institutions. The newly created state-chartered "mutual savings bank" provides federally chartered institutions with the option of converting to a "mutual savings bank" if they elect to retain their mutual ownership form rather than adopt a master federal charter.\textsuperscript{45}

2. Bank Match Registry. The Bank Match Registry legislation, adopted by the General Assembly in accordance with the requirements of Congressional welfare reform legislation, is intended to create a database of bank accounts owned by delinquent child support obligees.\textsuperscript{46} Charged with the responsibility of compiling this list, the Georgia Department of Administrative Services ("DAS") will request account information on delinquent child support obligees from financial institutions at which these persons are suspected of maintaining an account.\textsuperscript{47} In making the request, DAS must provide the financial institution with the name, address, social security number, and other identifying information. Requests may be made no more frequently than quarterly.\textsuperscript{48}

Upon receipt of such a request, the financial institution has thirty days to reply to DAS in "machine readable form."\textsuperscript{49} If after the expiration of the thirty-day period no reply has been sent, DAS must notify the financial institution by certified mail of its obligation to reply.\textsuperscript{50} Failure by the financial institution to reply within fifteen days of the receipt of this notice subjects the financial institution to a maximum penalty of one thousand dollars.\textsuperscript{51}

\textsuperscript{42} Id. § 7-1-480 (1989).
\textsuperscript{43} Id. § 7-1-480 (1997).
\textsuperscript{44} Id. § 7-1-293(e).
\textsuperscript{45} Id.
\textsuperscript{46} Id. § 19-11-30.1 (Supp. 1997).
\textsuperscript{47} Id. § 19-11-30.2.
\textsuperscript{48} Id. § 19-11-30.2(b).
\textsuperscript{49} Id. § 19-11-30.2(d).
\textsuperscript{50} Id. § 19-11-30.5.
\textsuperscript{51} Id.
Other provisions of the Bank Match Registry legislation impose penalties for financial institutions that warn depositors that a request has been made, provide civil immunity for compliance with its provisions, and permit financial institutions to levy a fee against funds on deposit prior to remittance to DAS.

The 1997 General Assembly also substantially revised garnishment procedures regarding property possessed by financial institutions that is subject to garnishment. After July 1, 1997, any summons of garnishment served on a financial institution must contain the following: (1) the name of the defendant, along with all known aliases or combinations or configurations thereof; (2) both the service and current addresses of the defendant, as well as any other known past addresses; (3) the defendant's social security number; and (4) the account numbers known or suspected by plaintiff to be held by defendant. Attorneys should verify that their post-judgment discovery forms elicit the foregoing information.

The form of answer to a summons of garnishment seeking property held in a safe deposit box has also been revised. The answer to such a summons must inform the court that the property sought is in a safe deposit box. Moreover, the financial institution should not pay or transmit such property to the court at the time of answer. Instead, it should hold the property until (1) the court issues an order releasing the garnishment, or requiring delivery, of the safe deposit box's contents, or (2) 120 days has passed from the date on which the answer is made, whichever occurs first.

Numerous provisions now also insulate financial institutions from liability in the garnishment context. A financial institution is not liable for failing to answer a summons of garnishment when the plaintiff fails to provide identification information sufficient to reasonably enable a financial institution to answer. Nor is a financial institution liable for freezing assets or paying monies into court if it reasonably believes the property is that of the defendant and that the action taken with respect to the property was reasonably required to comply with the summons of garnishment. Other provisions protect financial institutions when the property sought to be garnished is held in an association-

52. Id. § 19-11-30.9.
53. Id.
54. Id. § 19-11-30.11.
55. Id. § 18-4-20(i).
56. Id. § 18-4-84.
57. Id. § 18-4-82.1(a).
58. Id. § 18-4-82.1(b).
al or fiduciary account. In such cases, the financial institution is not liable for failing to deliver property from such accounts into court merely because of the account holder's status as either a principal of an associational entity or a fiduciary. However, the associational and fiduciary account exemptions from liability are not applicable when the plaintiff alleges in the summons that use of the account by the principal, or fiduciary as the case may be, is for an improper purpose such as hiding assets.

3. Miscellaneous. Formerly, the fee that could be charged for a bad check was twenty dollars; that amount has been increased to twenty-five dollars. Banks, as well as practitioners, should amend any form letters to reflect this. Although this change will result in increased fees for banks, the General Assembly eliminated the ability of banks to charge noncustomers fees for cashing checks drawn on them.

The General Assembly partially reversed a line of court decisions that held the transferee of a security deed with an open-end provision cannot have the benefit of the security under the deed from prior indebtedness or for additional advances to the maker. Now, a transferee or assignee of a “home equity line” who makes additional advances or disbursements shall have the benefit of the security under the deed if post-assignment disbursements were authorized by the original parties.

Lastly, the General Assembly ameliorated the harsh effects that befall a foreclosing party upon post-foreclosure discovery that intangible tax had not been paid on the foreclosed instrument. Formerly, a foreclosing party was subject to an action for wrongful foreclosure for foreclosing on an instrument on which the required intangible tax had not been paid. Now, if the intangible tax has not been paid prior to foreclosure, and as a result the deed from foreclosure is deemed unperfected, such a deed may be perfected by payment of (1) the required tax, (2) interest from the time the tax was due, and (3) a penalty equal to fifty percent of the tax.

59. Id. § 18-4-92.1(c)(2).
60. Id. § 18-4-92.1(c)(2)(A)-(B).
61. Id. § 18-4-92.1(c)(2).
62. Id. § 13-6-15(b).
63. Id. § 7-1-239.5 (1997).
65. O.C.G.A. § 44-14-1(c) (Supp. 1997).
66. Id. § 48-6-77.
67. Id.
II. COMMERCIAL CODE

A. Sales

The rules regarding passage of title under Article 2 provided the rule for decision in Clark v. Messer Industries. In Clark, plaintiff had contracted with defendant-carrier to deliver goods to plaintiff’s customer, and the parties had agreed among themselves that plaintiff was responsible for payment of the freight charges. Because of the customer’s nonpayment to defendant-carrier in prior unrelated transactions, defendant withheld from the customer plaintiff’s goods that were in its possession.

In plaintiff's suit for recovery of the goods held by defendant, defendant contended that because the reverse side of the shipping form stated “FOB Shipping Point,” title to the goods passed to the customer when accepted by the defendant for shipment. Under section 11-2-319, the term “FOB place of shipment” means that at the place of shipment, the seller must place the goods with a carrier and bear the risk of transportation unless otherwise agreed. However, when the seller is responsible for payment of the shipping costs, title passes to the buyer on tender at the destination. Because of the agreement among the parties that seller was responsible for payment of shipping costs, it had been “otherwise agreed,” and the parties had altered the operation of the Uniform Commercial Code (“UCC”) provision.

Two survey period decisions addressed the question of whether notice given under O.C.G.A. section 11-2-607 was reasonable. Section 11-2-607, which prescribes the effect of acceptance, obligates a buyer to “pay at the contract rate for any goods accepted,” and once accepted, the goods may not be rejected. Although acceptance does not “impair any other remedy provided by [Article 2] for nonconformity,” section 11-2-607 does impose a prerequisite for recovery on the basis of accepted, nonconforming goods. In particular, when a tender has been accepted by a buyer, the buyer “must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.”

67. Id. at 606-07, 475 S.E.2d at 654.
68. Id. at 607, 475 S.E.2d at 654-55.
70. Id. § 11-2-607(1)-(2).
71. Id. § 11-2-607(2).
72. Id. § 11-2-607(3)(a).
In *Great Western Press, Inc. v. Atlanta Film Converting Co.*, a seller produced wrappers for a buyer who in turn distributed the wrappers to its customer through a contract with a third party. The buyer ordered a specific quantity of wrappers from the seller on June 8, and the seller began delivery on June 22, with the entire shipment arriving by June 24. The wrappers were delivered to the customer on June 27, and the customer notified the third party on June 30 of defects in the wrappers. The customer cured this defect at its own expense. The customer passed the charge for the cure on to the third party, who in turn passed the cost to buyer. On August 4, the buyer informed the seller that it would not be paid, and the seller made a demand for payment on September 8. The seller sued, and the buyer counterclaimed for breach of warranty.

On appeal from the trial court's decision granting plaintiff-seller summary judgment on defendant-buyer's counterclaim for breach of warranty, defendant argued that material questions of fact remained as to whether its notice to plaintiff-seller on August 4 was reasonable under O.C.G.A. section 11-2-607(3). Plaintiff argued that the trial court was correct in finding that defendant's notice on August 4 was not, as a matter of law, reasonable under section 11-2-607. Defendant countered that because the time for performance had expired at the time the goods were delivered, plaintiff had no right to cure under O.C.G.A. section 11-2-508. The court of appeals agreed with defendant, noting that plaintiff had no right to cure even if notice had been given and that time was of the essence.

For precedential purposes, *Great Western Press* erroneously suggests that the availability of the seller's right to cure under O.C.G.A. section 11-2-508 was a factor to consider in determining whether notice provided under O.C.G.A. section 11-2-607(3) was reasonable. The right of cure provided in section 11-2-508 exists where goods have been rejected; however, the notice provided under section 11-2-607 is required only where goods have been accepted. Indeed, where notice is required under section 11-2-607, the right to cure under section 11-2-508 will never exist.

The court of appeals also addressed the notice required by section 11-2-607 in *Atwood v. Southeast Bedding Co.* On December 7, 1992,  

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76. *Id.* at 862, 479 S.E.2d at 144.
77. *Id.* at 863, 479 S.E.2d at 145.
78. *Id.*
80. *Id.* § 11-2-607.
defendant-retailer placed its first order for bedding with plaintiff-manufacturer, followed by several more. However, in September 1993, plaintiff became concerned with the amount of defendant's unpaid balance, and on October 13, 1993, the parties redefined their relationship: defendant would pay for goods on delivery and make additional payments against the unpaid balance. Because of plaintiff's dissatisfaction with defendant's payments thereafter, plaintiff terminated the account on November 5, 1993, repossessed the merchandise then in possession of defendant, and credited defendant's account in the amount of the repossessed merchandise, leaving an unpaid balance for which plaintiff sued. On November 11, 1993, defendant sent a letter through counsel to plaintiff stating that if plaintiff sued, defendant would counterclaim for breach of warranty for defects in goods dating from December 1992, and that the letter was intended to serve as notice under section 11-2-607(3).82

The court of appeals first ruled that the notice sent by letter on November 11, 1993 was untimely as a matter of law because “[w]ritten notice sent only after the relationship has been terminated and all goods either sold or retrieved by the seller does not and cannot serve the purposes of O.C.G.A. § 11-2-607(3)(a). Notice on November 11 did not permit [plaintiff-seller] to inspect or cure the already sold merchandise.”83 However, defendant's evidence that during the course of the relationship he had complained “over and over” and “on a regular basis” to plaintiff about the quality of merchandise demonstrated a genuine issue of material fact on whether the section 11-2-607 notice had been given.84 Moreover, the trial court erred by requiring the section 11-2-607 notice to be written or have a specific content.85 Rather, the notice must merely be sufficient to inform the seller that “the transaction was still troublesome and must be watched.”86

Generally, a seller who discovers that a buyer was insolvent while receiving goods on credit may reclaim those goods “upon demand made within [ten] days after the receipt” thereof.87 In Eastman Cutting Room Sales Corp. v. Ottenheimer & Co.,88 the determinative issue was the moment at which “receipt” had occurred.89 Plaintiff had begun

82. Id. at 51, 485 S.E.2d at 218-19.
83. Id. at 53, 485 S.E.2d at 220.
84. Id.
85. Id.
86. Id. (citing Oden & Sims Used Cars v. Thurmond, 165 Ga. App. 500, 500-01, 301 S.E.2d 673, 674 (1983)).
89. Id. at 659, 472 S.E.2d at 495.
delivery of equipment under a contract of sale with defendant-buyer in February 1995, and the last delivery of equipment was made May 26, 1995. The contract between the parties further provided for plaintiff to install the equipment after delivery, and plaintiff fully installed the equipment by June 28, 1995. Plaintiff learned of defendant's insolvency for the first time on June 28, 1995 and made demand under section 11-2-702 for reclamation of the goods on July 2, 1995.\(^{90}\) The court of appeals affirmed the trial court's ruling that the July 2 notice was untimely under the statute because all equipment had been received on or before May 26, 1995.\(^{91}\) Notwithstanding that the equipment remained to be installed after delivery was completed on May 26, 1995, it was in the physical possession of the defendant, and this was dispositive of the issue.\(^{92}\)

The court of appeals also addressed the proper elements of a purchaser's damages under Article 2. In *Latex Equipment Sales & Service, Inc. v. Apache Mills, Inc.*,\(^ {93}\) plaintiff had contracted with defendant to design, build, and install a unique piece of machinery. One third of the purchase price was to be paid on the date of contract, a second third on shipment, and a final third within thirty days after shipment. After plaintiff made the first payment, defendant failed to make timely delivery of the machine. More than seven months after the time for delivery had passed, defendant told plaintiff that the machine was ready, but that the balance of the purchase price would be required upon delivery because of plaintiff's default in paying for other equipment under unrelated contracts. Plaintiff sued defendant and in the meantime attempted to find a replacement for the machine for which it had contracted with defendant.\(^ {94}\)

Most notably, the court of appeals ruled that increased operating expenses incurred by plaintiff as a result of defendant's breach qualified as incidental damages under section 11-2-715.\(^ {95}\) The evidence showed that plaintiff had incurred additional labor and inventory costs as a result of defendant's failure to deliver the machine, that the costs were reasonable, and that they were incurred as a result of the defendant's conduct.\(^ {96}\) Although no Georgia case had decided whether labor costs are a proper element of incidental damages, the court found that

\(^{90}\) *Id.*

\(^{91}\) *Id.*

\(^{92}\) *See id.* at 660, 472 S.E.2d at 495.


\(^{94}\) *Id.* at 516-17, 484 S.E.2d at 275-76.

\(^{95}\) *Id.* at 518-19, 484 S.E.2d at 276-77.

\(^{96}\) *Id.* at 518, 484 S.E.2d at 277.
awarding damages for operating costs made the damaged party whole and was consistent with UCC policy.97

Moreover, the increased operating expenses incurred by plaintiff qualified as consequential damages because they were foreseeable by defendant, whose employees had visited plaintiff’s plant prior to contracting for the design of the machinery.98 Nor could plaintiff have mitigated the increased operating expenses. The evidence showed that plaintiff had attempted unsuccessfully to find a replacement machine and that even if plaintiff had paid the purchase price as demanded, it would nevertheless have incurred damages because defendant was no longer promising to install the machinery or provide the software necessary to its operation.99 Finally, “evidence of the market price of a similar, though less desirable, machine” was sufficient to support an award of damages under section 11-2-713, which requires proof of market price, because the item contracted for was unique.100

The survey period decision that promises to be the most discussed and cited is NEC Technologies, Inc. v. Nelson,101 in which the Georgia Supreme Court thoroughly discussed the law of unconscionability. In Nelson, plaintiffs had purchased a television set from defendant. Plaintiffs alleged that a defect in the television had caused a fire that destroyed their home and sued defendant on the basis of strict liability, negligence, and breach of warranty. The trial court granted partial summary judgment to the defendant on the basis of a warranty exclusion, which limited consequential damages for breach of warranty to the cost of repair and replacement. In so ruling, the trial court rejected plaintiffs’ contention that such an exclusion was unconscionable as a matter of law.102 The court of appeals reversed, finding that a jury question existed on the issue of unconscionability of this warranty exclusion.103 The supreme court granted certiorari on the question of whether the consequential damages limitation was unconscionable as a matter of law under these circumstances.104

The supreme court began its analysis by citing the basic test for determining unconscionability: “[W]hether, in light of the general

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97. Id. at 517-18, 484 S.E.2d at 276.
98. Id. at 518, 484 S.E.2d at 276.
99. Id., 484 S.E.2d at 277.
100. Id. at 519, 484 S.E.2d at 277.
102. Id. at 390, 478 S.E.2d at 770-71.
104. 267 Ga. at 390, 478 S.E.2d at 771.
commercial background and the commercial needs of the particular trader case, the clauses involved are so one sided as to be unconscionable under the circumstances existing at the time of the making of the contract. In applying this test, the court found it helpful to rely upon the distinction between the procedural and substantive elements of unconscionability. Procedural unconscionability refers to the process of making the contract and is determined by reference to the age, education, intelligence, business acumen, experience, and relative bargaining power of the parties; the conspicuousness and comprehensibility of the contract; any oppressiveness; and the presence of meaningful choice. By contrast, substantive unconscionability refers to the contract terms per se and requires courts to consider commercial reasonableness, purpose and effect, allocation of risk, and public policy. Whether procedural and substantive unconscionability must both exist for a court to invalidate a contract was left for another day.

Applying the foregoing principles, the court found no procedural unconscionability because the language was conspicuous and comprehensible; the warranty advised plaintiffs of their rights and provided them with a phone number to contact if they had any questions; plaintiffs were able to bargain on certain matters within the contract; and the evidence showed that the scope of warranty protection played no part in plaintiffs' decision to purchase the television set. Nor did the court find any substantive unconscionability, which must exist at the time of contract. In particular, there was no evidence that plaintiffs were unaware of the hazards associated with electrical appliances generally, nor was there evidence of knowledge of this particular danger by the defendant. Because the court could not conclude "as a matter of law that decent, fairminded persons would possess a profound sense of injustice from the enforcement of this warranty provision excluding the recovery of consequential property damages in the sale of a television set," the exclusion was not unconscionable as a matter of law.

105. Id. at 391, 478 S.E.2d at 771 (quoting U.C.C. § 2-302 cmt. 1 (1989)).
106. Id. at 391-92, 478 S.E.2d at 771.
107. Id. at 392, 478 S.E.2d at 771-72.
108. Id., 478 S.E.2d at 772.
109. Id. at 394 n.6, 478 S.E.2d at 773 n.6.
110. Id. at 393-94, 478 S.E.2d at 772-73.
111. Id. at 394-95, 478 S.E.2d at 773.
112. Id. at 395-96, 478 S.E.2d at 773-74.
113. Id. at 396, 478 S.E.2d at 775.
Lastly under Article 2, the court of appeals ruled in *Topeka Machinery Exchange, Inc. v. Stoler Industries, Inc.*[114] that evidence of usage in the trade—in this case, that warranties in the particular trade were implicitly limited to providing parts and labor sufficient to bring an item into compliance with satisfactory standards of performance and, if unsuccessful, to return the item and refund the purchase price—was admissible by way of parol evidence to explain or supplement the warranty sued upon.[115] The court did not indicate whether the warranty was implied or one expressly contained in a contract between the parties.

B. Negotiable Instruments and Bank Collections

Most survey decisions dealing with Article 3 applied prerevision Article 3 in resolving issues. Whether and to what extent the courts will accord these interpretations of prerevision Article 3 precedential value remains to be seen. The court in *Union Planters National Bank v. Crook*[116] analyzed real defenses to an action for enforcement by a holder in due course. In *Crook*, defendant had written three checks on December 9, 1993 drawn on a bank in Alabama and payable to a truck dealership. Defendant gave the checks to the dealership to hold as a deposit for the purchase of trucks until financing could be arranged. Consistent with this understanding, the following notation appeared on the checks' memo lines: “91 Flt.Trk, to be held for fina[n]ce app[roval].”[117] Contradicting its agreement with defendant, the dealership deposited the checks with plaintiff-bank in the dealership's account on December 10, 1993. When defendant called the dealership to inform it that financing had been arranged, defendant learned that the checks had been deposited and immediately placed a stop payment order with the drawee bank. On December 13, 1993, the dealership filed bankruptcy and plaintiff-bank was inundated with stop payments on checks deposited into the dealership's account. On December 11, 1993, plaintiff received notice of dishonor of defendant's checks. On December 16, 1993, defendant signed a promissory note with the financier, who wired the funds to the dealership, and defendant took delivery of the truck. In the dealership's bankruptcy, a dispute arose between plaintiff bank and another of the dealership's creditors but was settled after dismissal of the bankruptcy petition. Under the settlement, plaintiff assigned to the

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115. Id. at 799, 470 S.E.2d at 251.
117. Id. at 579, 484 S.E.2d at 329 (alterations in original).
creditor "all accounts, contract rights, and accounts receivable then
owned or thereafter in existence, and all proceeds of the same."\textsuperscript{118}

Although plaintiff-bank was a holder in due course, a jury was
authorized to conclude that there had been "[s]uch misrepresentation as
[had] induced the party [defendant] to sign the instrument with neither
knowledge nor reasonable opportunity to obtain knowledge of its
character or its essential terms."\textsuperscript{119} In particular, a jury could con-
clude that acceptance and deposit by the dealership was theft by
deception and a RICO violation.\textsuperscript{120}

Contrasted with this rather broad interpretation of the "real defense"
of illegality is the decision in \textit{Southtrust Bank of Georgia v. Parker}.\textsuperscript{121}
Defendants, husband and wife, were cohabitating in a home when the
husband signed an installment agreement and note for installation of
siding. The note was assigned for value to plaintiff as a holder in due
course. The husband and wife then separated, and the wife continued
to live in the home. When payments were not made, plaintiff sued the
husband and wife as codefendants. Defendant-wife answered admitting
that the husband had signed her name but denied she consented to her
name being signed, cross-claimed against the husband, and filed a third
party complaint against the siding contractor. The trial court granted
defendant-wife's motion for summary judgment on the basis that her
signature on the note was a forgery.\textsuperscript{122}

The court of appeals reversed. Because plaintiff was a holder in due
course, it was incumbent upon defendant-wife to establish the real
defense of fraud in factum, that is, that her signature had in fact been
forged and unauthorized by her.\textsuperscript{123} However, the law implies that the
signature was authorized as funds were spent for improvement of the
home and marital relationship.\textsuperscript{124} If defendant-wife successfully
rebutted that implication, defendant-wife could nevertheless be deemed
to have ratified the signature by accepting the benefit of the work.\textsuperscript{125}
Even if defendant-wife succeeded in proving that the signature had been
forged, unauthorized, and unratified, the plaintiff would still be entitled
to have a jury decide whether the wife's negligence contributed to the
forgery.\textsuperscript{126}

\textsuperscript{118} Id. at 579-81, 484 S.E.2d at 328-31.
\textsuperscript{119} Id. at 581, 484 S.E.2d at 331 (quoting O.C.G.A. § 11-3-305(2)(c) (1994)).
\textsuperscript{120} Id. at 582, 484 S.E.2d at 331.
\textsuperscript{122} Id. at 292-93, 486 S.E.2d at 404.
\textsuperscript{123} Id. at 294, 486 S.E.2d at 405.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 295, 486 S.E.2d at 406.
\textsuperscript{126} Id.
At issue in Peavy v. Bank South\textsuperscript{127} was the question of liability for conversion of an instrument. An insurance company, as drawer, issued a check drawn on defendant-bank to plaintiff’s son and Trust Company Bank as joint payees. Because plaintiff’s son did not have an account with defendant, plaintiff allowed the son to deposit the check to his account at defendant-bank. When the son deposited the check with defendant-bank on December 29, 1992, he was the only endorser. Plaintiff drew against the deposited funds, and on March 30, 1993, defendant notified plaintiff of the improper deposit (the co-payee’s endorsement had not been obtained), debited plaintiff’s account in the amount of the check, and credited the account of the drawer-insurer. Defendant contacted plaintiff requesting that he deposit funds to cover the check. Plaintiff sued defendant-bank seeking recovery of the amount he had been required to pay into the account plus recovery for conversion and tortious coercion, damages, and attorney fees. Defendant-bank responded that the charge back was permitted under the terms of the deposit contract and under the terms of Article 4, which governs the relationship between banks and their depositors.\textsuperscript{128}

The court of appeals rejected plaintiff’s conversion theory on the ground that defendant’s action plainly did not qualify as a conversion—defendant had not refused to return the instrument to plaintiff.\textsuperscript{129} Further, plaintiff could not allege a cause of action under section 11-4-207 for breach of warranty, as he did not qualify as an “other payor” for purposes of that code section.\textsuperscript{130} However, the court of appeals did find that jury questions remained regarding whether defendant’s actions were timely and in good faith, notwithstanding that plaintiff had consented to the bank’s right of setoff in the deposit agreement.\textsuperscript{131} Additionally, a jury question remained as to the propriety of the bank’s actions in asserting its contract rights.\textsuperscript{132} In the court’s opinion, the record did not establish that the bank acted with “all commercially reasonable due diligence and dispatch, in discovering the irregularity, or that it acted evenhandedly as between its two customers, plaintiffs on the one hand and [the insurance company] on the other, in addressing the error.”\textsuperscript{133} The court of appeals decision on this last point is dangerously broad. It erroneously implies that a customer has a cause of action against a bank when the bank prefers one customer

\textsuperscript{128} Id. at 501-03, 474 S.E.2d at 691-93.
\textsuperscript{129} Id. at 504, 474 S.E.2d at 694.
\textsuperscript{130} Id. at 504-05, 474 S.E.2d at 694.
\textsuperscript{131} Id. at 505-06, 474 S.E.2d at 694-95.
\textsuperscript{132} Id.
\textsuperscript{133} Id., 474 S.E.2d at 694 (emphasis omitted).
over another. Certainly, the court of appeals did not intend to suggest that a bank may not, consistent with the terms and conditions of an account agreement, prefer one customer over another without subjecting itself to liability.

C. Letters of Credit

The court of appeals in Vass v. Gainesville Bank & Trust\(^{134}\) elaborated on the duties and obligations of the issuer of a letter of credit under Article 5 of the UCC. In Vass, defendant had issued a letter of credit to plaintiff to insure payment of bond claims by All American Bonding. The procedure for making payment requests under the letter was to present the claim on or before April 18, 1994, "but subject to a claim made [o]ccurring prior to that date unless the letter of credit is cancelled by the Sheriff of Hall County."\(^{136}\) After All American refused plaintiff's demand for payment, plaintiff on April 18, 1994 requested payment by defendant, stating in writing that "attached invoices have been presented to All American Bonding for payment and payment has been refused by All American Bonding Company."\(^{136}\)

The court held that defendant-bank, as issuer of the letter of credit, had a duty to carefully examine the documents presented to it and the request made by plaintiff "so as to ascertain that on their face they appear to comply with the terms of the credit letter."\(^{137}\) Nevertheless, plaintiff's failure to specify in the demand that the invoices had been presented and were unpaid thirty days after such presentation was not a "minor deviation from the conditions precedent for payment according to the letter of credit," and as such absolved defendant of its obligation to pay according to the letter of credit.\(^{138}\) Any ambiguity in the letter of credit was to be resolved by reference to standard contract interpretation principles.\(^{139}\)

D. Secured Transactions

In Paulsen Street Investors v. Ebco General Agencies,\(^{140}\) the court of appeals decided an issue of first impression in Georgia regarding the scope of Article 9 in the context of insurance premium financing arrangements. In Paulsen, plaintiff advanced money to defendant to

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135. Id. at 259, 480 S.E.2d at 295.
136. Id. at 259-60, 480 S.E.2d at 295-96.
137. Id. at 261, 480 S.E.2d at 296.
138. Id. at 260, 480 S.E.2d at 296.
139. See id. at 261, 480 S.E.2d at 296.
finance automobile insurance premiums. The insurance policies were written by a separate entity and purchased from various insurance companies. Plaintiff had a written security agreement with defendant under which plaintiff was granted a security interest in all accounts receivable, a term inclusive of any right by defendant to receive money as a result of policy cancellation and the return of any unused portion of any premium. Defendant had an agreement with each insured defining the scope of the right to receive unused portions of the premiums in addition to certain fees and penalties to which defendant was entitled upon cancellation of the policy. On November 9, 1990, plaintiff filed a financing statement on a UCC-1 covering all such accounts receivable of defendant. When defendant defaulted under the terms of the security agreement, plaintiff sought to recover against these receivables under the provisions of Article 9. The trial court granted defendant's summary judgment motion on the basis that plaintiff's security interest in accounts receivable under Article 9 did not include the "unearned insurance premiums." Following the lead established by other jurisdictions, the court of appeals held that section 11-9-104 excluded from the coverage of Article 9 "insurance and returned or unearned insurance premiums." Accordingly, Article 9 did not apply.

The court of appeals elaborated on the election of remedies by a secured party post-foreclosure in Oraka v. Jaraysi. In Oraka, defendant purchased a gas station from plaintiff, and plaintiff agreed to allocate $820,000 of the purchase price to improved realty and $80,000 to personalty. After closing the purchase on July 16, 1994, defendant learned that plaintiff had, the day before signing the purchase agreement, initiated an action for specific performance on a lease involving the same realty purportedly sold to defendant. Upon learning of this, defendant sought to rescind and plaintiff refused. When defendant failed to make payment on the notes given as part of the purchase price, plaintiff sued to foreclose on the deed to secure debt securing the notes on May 2, 1995. At the foreclosure sale, plaintiff bid $600,000 on the real property, notwithstanding the contractually assigned value of $820,000, thereby establishing a deficiency. The $600,000 paid at foreclosure was subsequently found to be the fair market value upon confirmation, notwithstanding the lack of any evidence of damage to the property or of a depressed real estate market. On December 21, 1994,
plaintiff gave notice under section 11-9-503 of its intent to repossess all equipment and business assets, and stated that plaintiff would credit the same against its contractually assigned value of $80,000, notwithstanding that in plaintiff's separate suit for specific performance, such assets were valued at $130,000 by plaintiff. Defendant appealed the trial court's grant of summary judgment to the plaintiff, contending that plaintiff's suit for the deficiency was barred by his election to retain the collateral repossessed under section 11-9-505(2).145

The court of appeals began its analysis by noting that Georgia follows a strict foreclosure rule. When a creditor takes possession of secured property, he does so pending (a) a commercially reasonable resale, or (b) an election to retain the collateral under section 11-9-505.146 However, taking possession does not imply an election under section 11-9-505 absent written notice of intent to do so.147 In this case, plaintiff's written notice of repossession, of his intent not to resell the collateral, and of his intent to keep such property constituted a written election that satisfied the requirements of section 11-9-505(2).148

III. CONSUMER PROTECTION

As noted previously in this Article, NEC Technologies, Inc. v. Nelson adopted a method for assessing consumer unconscionability claims in the context of a warranty disclaimer.149 Although decided under the UCC, that test would apparently apply as well to consumer contexts in which the UCC does not supply the substantive rule of law.150 Besides Nelson, the court issued several decisions dealing with the Fair Business Practices Act ("FBPA"),151 the Health Care Records Act ("HCRA"),152 and the Federal Fair Debt Collection Practices Act ("FDCPA").153

A. Fair Business Practices Act

Two survey period decisions addressed the scope of the FBPA. In Friedlander v. PDK Labs, Inc.,154 the Eleventh Circuit Court of Appeals certified the following question to the Georgia Supreme Court:

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145. Id. at 310-11, 486 S.E.2d at 69-70.
146. Id. at 311-12, 486 S.E.2d at 70.
147. Id. at 312, 486 S.E.2d at 70.
148. Id. at 313, 486 S.E.2d at 71.
149. See supra notes 101-13 and accompanying text.
152. Id. §§ 31-33-2, -3 (1996).
"Do non-consumers have a cause of action under the FBPA when they allege an injury due to a competitor's misrepresentations to the general consuming public?"\(^{156}\) Plaintiff, the developer of a patented diet control drug that had not yet received approval from the FDA, sued defendant, which marketed its own diet control products, in state court. Plaintiff's complaint alleged that defendant's failure to disclose that its products were untested and lacking governmental approval constituted an unfair and deceptive practice under the FBPA. The foregoing question was certified after removal of the case to federal district court.\(^{156}\)

The supreme court answered the question in the negative.\(^{157}\) Because a "suit predicated upon an alleged violation of the FBPA must be brought in the plaintiff's 'capacity as an individual member of the consuming public,'" plaintiff had failed to state a cause of action.\(^{158}\) Specifically, the court found that "[a] suit is not brought in the capacity of an individual member of the consuming public when the plaintiff's only allegation of an injurious consumer act or practice relates to representations made by his competitor in the marketing of competing products to the general consuming public."\(^{159}\)

The second decision addressing the scope of the FBPA similarly limited its coverage. In *Robin v. BellSouth Advertising & Publishing Co.*,\(^{160}\) plaintiff-attorney contracted with defendant for an advertisement in the yellow pages. For an additional fee, advertisers such as plaintiff would be listed in "real consumer tips," a display located among the various advertisements for attorneys. Upon calling the number provided in the "real consumer tips" section, consumers would hear advertisements for attorneys subscribing to that service. Plaintiff claimed that "because the attorney advertisements included in the 'consumer tips' messages do not reveal that attorneys paid for the ads, [defendant] creates the impression that the featured attorneys are more qualified or that [defendant] endorses them."\(^{161}\) The court of appeals confirmed the trial court's decision to dismiss plaintiff's complaint for failure to state a claim.\(^{162}\) Specifically, defendant was exempt from the FBPA "pursuant to O.C.G.A. [section] 10-1-396(2) because the allegedly

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155. Friedlander v. PDK Labs, 59 F.3d 1131, 1133 (11th Cir. 1995).
156. 266 Ga. at 180, 465 S.E.2d at 670-71.
157. Id. at 181, 465 S.E.2d at 671.
158. Id.
159. Id.
161. Id. at 360, 471 S.E.2d at 295.
162. Id. at 361, 471 S.E.2d at 296.
improper acts were committed in the course of its business as the publisher of an advertising periodical.\textsuperscript{163}

In addition to FBPA coverage issues, the court also addressed the validity of claims admittedly within the Act's coverage. Both decisions involved claims made in the context of car dealerships, a favorite target of FBPA plaintiffs. A claim under the FBPA consists of three elements: "a violation of the Act, causation, and injury."\textsuperscript{164} Further, a plaintiff need not establish "knowledge of the deception and intent to deceive" on behalf of the defendant.\textsuperscript{165} In \textit{Crown Ford, Inc. v. Crawford},\textsuperscript{166} the court dealt with the first and second of these three elements. Plaintiff, a used car buyer, alleged that defendant violated the FBPA by misrepresenting the vehicle's actual mileage. Defendant furnished plaintiff with an odometer disclosure form containing an unmarked box that, had it been checked, would have indicated the vehicle's odometer did not reflect actual mileage. Although the purchase order indicated the same mileage as the disclosure form provided plaintiff, defendant remitted its copy of the disclosure form to the state with the box checked, thereby indicating the car's odometer did not reflect actual mileage. Moreover, defendant had received from the prior owner an odometer disclosure form indicating that the odometer had been replaced and that the actual mileage was greater than indicated on the vehicle's current odometer.\textsuperscript{167}

In affirming the grant of summary judgment to plaintiff on defendant's liability on the FBPA claim, the court of appeals found there was no question of material fact regarding the existence of a violation of the Act: "[defendant] violated the FBPA because it had ample reason to know it had misrepresented to [plaintiff] the actual mileage on the [vehicle]."\textsuperscript{168} The court of appeals premised its holding on the fact that the defendant had "reasonable notice" of the odometer discrepancy and failed to take "reasonable measures" to uncover the actual state of affairs.\textsuperscript{169} Further, the court found that defendant had produced no evidence to rebut plaintiff's proof of causation as established by her verified complaint that she had "justifiably relied" on defendant's representations.\textsuperscript{170}

\begin{thebibliography}{99}
\bibitem{163} Id., 471 S.E.2d at 295.
\bibitem{165} Id.
\bibitem{167} Id. at 881-82, 473 S.E.2d at 555-56.
\bibitem{168} Id. at 883, 473 S.E.2d at 556.
\bibitem{169} Id., 473 S.E.2d at 556-57.
\bibitem{170} Id. at 884, 473 S.E.2d at 557.
\end{thebibliography}
The car dealership in Garcia v. Charles Evans BMW, Inc.\textsuperscript{171} fared better than its counterpart in Crown Ford. In Garcia plaintiff, a car lessor, entered negotiations with defendant for the lease of a new automobile. During the course of negotiations, plaintiff incorrectly assumed the method by which sales tax would be calculated and on the basis of this assumption entered into a lease agreement. Plaintiff sued on the basis of, inter alia, the FBPA, alleging misrepresentations by defendant regarding sales tax calculation.\textsuperscript{172} The court of appeals affirmed summary judgment in favor of defendant on the FBPA claim, citing the merger clause in the lease agreement, which stated: "'[t]here are no other promises or understandings between the parties concerning this lease.'"\textsuperscript{173} Because no evidence showed plaintiff was prevented from reading the contract, plaintiff could not establish the "justifiable reliance" that is essential to proving causation under an FBPA claim.\textsuperscript{174}

B. Health Care Records Act

Under the HCRA, a provider "having custody and control of the patient's records is required to furnish a copy of that record to that patient or to any other person or provider designated by the patient" upon written request from the patient.\textsuperscript{175} The party making the request is responsible for "reasonable costs for copying and mailing the patient's records."\textsuperscript{176}

In Cotton v. Med-Cor Health Information Solutions, Inc.,\textsuperscript{177} provider-hospital had contracted with defendant to provide copying services. Defendant complied with a request made by plaintiff for copies of records in possession of the provider and charged plaintiff between $1.06 and $7.60 per page.\textsuperscript{178} Defendant contended that it was not a "provider" for purposes of the HCRA. Eschewing a plain language reading of the HCRA, the court of appeals disagreed, holding that the legislative intent of insuring patient access to medical records without excessive charges therefor "would be completely defeated through a construction of the Act that would allow patients to be charged more than the reasonable copying and mailing cost if the providers hire others to perform the task..."
of supplying the records."\textsuperscript{179} Although the majority opinion by the court of appeals did not address the question, a special concurrence noted that "the defendant's copying charges were unreasonable."\textsuperscript{180}

C. \textit{Federal Fair Debt Collection Practices Act}

Although a federal law, the FDCPA provides a cause of action that may be enforced in state courts. Under the FDCPA, a debt collector\textsuperscript{181} may not, inter alia, use any false or misleading representation in the collection of a consumer debt.\textsuperscript{182} Once a debt collector has notified the consumer of the debt, the consumer may respond by disputing the debt.\textsuperscript{183} If disputed, the debt collector must respond by sending the consumer verification of the debt.\textsuperscript{184} In \textit{Vidrine v. American Professional Credit, Inc.},\textsuperscript{185} defendant-debt collector sent plaintiff a dunning letter, and plaintiff responded by disputing the debt. Defendant sent plaintiff verification of the debt and thereafter closed its collection file on plaintiff. However, evidence showed that after the file was closed, defendant had furnished several credit bureaus with information concerning the debt without indicating that it was disputed by plaintiff.\textsuperscript{186} Plaintiff claimed that defendant violated the FDCPA by failing to indicate in its communication with credit bureaus the fact that the debt was disputed. Section 1692e(6), which states that a debt collector makes a false or misleading representation by "[c]ommunicating . . . to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed," supported plaintiff's claim.\textsuperscript{187} The court of appeals agreed with plaintiff that evidence of defendant's failure to indicate the debt's disputed nature and its communication to credit bureaus created a question for the jury.\textsuperscript{188}

However, the more significant aspect of the decision in \textit{Vidrine} was the court of appeals ruling on the permissible elements of plaintiff's

\begin{itemize}
\item \textsuperscript{179} \textit{Id.} at 611, 472 S.E.2d at 95.
\item \textsuperscript{180} \textit{Id.} at 613, 472 S.E.2d at 97 (Blackburn, J., concurring specially).
\item \textsuperscript{181} "Debt collector" is a statutorily defined term that includes attorneys who regularly engage in consumer debt collection litigation on behalf of creditor clients.\textsuperscript{182} \textit{Heintz v. Jenkins}, 115 S. Ct. 1489 (1995); \textit{see also Schimmel v. Slaughter}, 975 F. Supp. 1481 (M.D. Ga. 1997).
\item \textsuperscript{182} \textit{15 U.S.C. § 1692e} (Supp. 1997).
\item \textsuperscript{183} \textit{Id.} § 1692g.
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} 223 Ga. App. 357, 477 S.E.2d 602 (1996).
\item \textsuperscript{186} \textit{Id.} at 358, 477 S.E.2d at 603-04.
\item \textsuperscript{187} \textit{Id.}, 477 S.E.2d at 604.
\item \textsuperscript{188} \textit{Id.}
\end{itemize}
damages under the FDCPA. Although the court of appeals found that plaintiff was not entitled to recover damages for emotional distress under her state-based intentional infliction of emotional distress claim, such damages were a proper element of actual damages under the FDCPA. Thus, plaintiff was “entitled to seek damages for emotional distress caused by [defendant’s] alleged FDCPA violation, without proving the elements of the state law tort of intentional infliction of emotional distress.”

IV. PROMISSORY NOTES AND GUARANTY

Apart from being used as a form of payment in commercial dealings, the promissory note is an effective means to establish liability in a sum certain between parties and thereby eliminate any complaints one might have about the other’s performance under a prior contractual arrangement. Thus, “[d]efects, if any, in a [maker’s] prior contractual obligations [are] cured . . . by signing the promissory notes.” The survey period produced several decisions in the promissory note context on such issues as admissibility of parol evidence to explain the terms of the note, authority to give a note, liability for attorney fees under the terms of a note, and defenses available to a maker.

A. Use of Parol Evidence in Suit on Promissory Note

Although parol evidence is generally not admissible to contradict or vary the terms of a valid written contract, "when the consideration underlying [a] note is at issue . . . 'the maker of a note, when sued, has the right to show by parol, if he can, a want or failure of consideration.'" However, admissibility of parol evidence under this exception appears to be conditioned on the absence of a merger clause or some other statement in the note that it evidences the “entire agreement” between the parties. But, even if the promissory note contains a merger or “entire agreement” clause, parol evidence may still be admissible where the terms of the note are ambiguous.

189. Id.
190. Id.
194. Id. at 710, 478 S.E.2d at 903. “[B]ecause none of these documents embodied the parties’ entire agreement, parol evidence was properly admitted . . . .” Id.
In *Atha v. Atha*, defendant executed the following handwritten note: "I, [defendant] agree to pay [plaintiff] $22,000 at the time Able Properties . . . has secured financing from a financial institution. One year from *this date* I agree to pay another $22,000 to [plaintiff] or to his estate." Because the court found the emphasized language ambiguous, parol evidence was properly admissible.

Yet another exception to the rule that parol evidence is generally inadmissible in a suit to enforce a promissory note permits introduction of parol evidence of "a separate and distinct, collateral oral agreement that is consistent with and forms part of the consideration or inducement for a written agreement." However, application of this exception is subject to the presence of a sufficiently broad merger clause, so that it will not apply where the parties expressly agree "to preclude enforcement of any prior inducement not included in the written contract."

**B. Authority to Execute Note**

A principal drafting consideration in the promissory note context is ensuring that it is executed by someone with authority to do so. The Equal Dignity Rule provides that "[w]here the exercise or performance of an agency is by written instrument, the agency shall also be created by written instrument." However, "the legislature excepted the creation of corporate agents from the equal dignity rule and . . . permitted corporations to create such agents in their usual mode of transacting business—i.e. shareholder action in the adoption of charters, by-laws, resolutions and similar conduct vesting corporate agents with authority to act." In *Rohm & Haas Co. v. Gainesville Paint & Supply Co.*, the court of appeals applied this rule to conclude that the signatory on the guaranty sued upon did not have authority to execute the same on behalf of the corporate defendant.

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197. *Id.* at 280, 480 S.E.2d at 298 (emphasis added).
198. *Id.* at 281, 480 S.E.2d at 299.
202. *Id.*
203. *Id.*
205. *Id.* at 442-43, 483 S.E.2d at 891.
ville Paint, the name of the corporate defendant's president was signed to the guaranty by another on his behalf. Notwithstanding testimony from the person who actually signed the president's name that she did so at his direction (a contention denied by the president), the court held the corporate defendant not liable on the guaranty. Specifically, the record was devoid of any evidence that defendant's president had authority to verbally appoint agents or that it was the corporate defendant's practice to verbally authorize persons to sign for its principals. In the absence of such evidence, the corporate exception to the equal dignity rule did not apply, and failure to establish written authority for the person who signed the guaranty was fatal to plaintiff's claim.

Another survey decision highlights the importance of correctly indicating the capacity in which the note is to be executed by the maker. "[T]he form of the signature on the note . . . governs the capacity in which the signor executes the note." Defendants in Talmadge v. Respess appealed the trial court's ruling that they were liable in their individual capacities. The note signed by defendants contained the handwritten words "TWELVE OAKS REALITY" directly above defendants' signatures, but neither signature indicated a representative capacity. The court of appeals, applying former O.C.G.A section 11-3-403(2), which provides that the signor of a note is personally obligated when his or her signature fails to indicate execution in a representative capacity, affirmed the trial court.

C. Attorney Fees

The payee of any promissory note will certainly want to include a provision requiring payment of attorney fees in the event the note is collected through an attorney. An obligation to pay attorney fees contained in any note is enforceable under O.C.G.A. section 13-1-11, which requires that the party seeking enforcement thereof notify the maker that it has ten days from receipt of such notice to pay the note to

206. Id. at 442, 483 S.E.2d at 891.
207. Id.
208. Id.
209. Id. at 443, 483 S.E.2d at 891.
212. Id. at 770, 482 S.E.2d at 712.
213. O.C.G.A. § 11-3-403(2) (1994).
214. Id.
avoid payment of attorney fees as well.\textsuperscript{216} In \textit{Talmadge v. Respess}, the court of appeals rejected the defendants' argument that this provision requires a plaintiff to specify in its notice that the maker has "exactly ten days."\textsuperscript{217} The notice at issue in \textit{Talmadge} had generously provided defendant with twenty days in which to comply and avoid payment of attorney fees.\textsuperscript{218} The court found this sufficiently complied with section 13-1-11.\textsuperscript{219} The court in \textit{Rohm \& Haas v. Gainesville Paint \& Supply Co.} also ruled in favor of the maker on the attorney fees issue, finding the liability limitation clause in the guaranty "did not similarly limit the amount paid for attorney fees," so that it was error for the trial court to deny plaintiff summary judgment on the attorney fees issue.\textsuperscript{220}

\textbf{D. Defenses}

Both the \textit{D'Oench} doctrine\textsuperscript{221} and 12 U.S.C. § 1823\textsuperscript{222} preclude the assertion of certain defenses by makers of notes given to banks. In particular, 12 U.S.C. § 1823 prevents the maker of a note from asserting "a defense based on any agreement that does not clearly appear in a bank's records."\textsuperscript{223} The court in \textit{Resiventure, Inc. v. National Loan Investors}\textsuperscript{224} refused to apply \textit{D'Oench} or this statutory bar to a defense by the maker that it had paid the note, stating that "since the payment defense is independent of any side agreement, the trial court erred in applying 12 U.S.C. § 1823 and \textit{D'Oench} to bar [defendant's] payment defense."\textsuperscript{225}

Defenses may also be waived, as demonstrated by \textit{Ramirez v. Golden}.\textsuperscript{226} In \textit{Ramirez}, defendant executed an individual guaranty regarding his corporation's purchase of a business. The guaranty was applicable to "all renewals, amendments, extensions, consolidations, and modifications of the loan documents" that were the subject of the guaranty and also contained a clause waiving "any legal or equitable defenses whatsoever to which guarantor might otherwise be enti-

\begin{itemize}
\item \textsuperscript{216} Id.
\item \textsuperscript{217} 224 Ga. App. at 773, 482 S.E.2d at 713.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} 225 Ga. App. at 445, 483 S.E.2d at 893.
\item \textsuperscript{221} \textit{D'Oench}, Duhme \& Co. v. FDIC, 315 U.S. 447 (1942).
\item \textsuperscript{224} 224 Ga. App. 220, 480 S.E.2d 212 (1997).
\item \textsuperscript{225} Id. at 223, 480 S.E.2d at 215.
\item \textsuperscript{226} 223 Ga. App. 610, 478 S.E.2d 430 (1996).
\end{itemize}
The sale's closing documents also included a noncompete agreement to be executed by plaintiff-seller, which could be amended with the prior consent of the purchasing corporation. Defendant-guarantor subsequently sold his interest in the purchaser-corporation, which thereafter released plaintiff-seller from his covenant not to compete. The purchaser corporation then declared bankruptcy and defaulted on the obligation for which the guaranty was given. In defense of plaintiff's complaint against him on the guaranty, defendant claimed that release of plaintiff from the covenant not to compete was a novation resulting in defendant's release as a guarantor under O.C.G.A. section 10-7-21, or, alternatively, was an act increasing the risk to him as a guarantor that discharged him under O.C.G.A. section 10-7-22. However, because defendant had consented in advance to waiver of all legal or equitable defenses under the terms of the guaranty, he was precluded from raising either novation or increased risk under O.C.G.A. sections 10-7-21 and 10-7-22, respectively. The protection afforded by O.C.G.A. [sections] 10-7-21 and 10-7-22 can be waived in advance at the time a guarantor signs the instrument.

Lastly, a maker who executes a note for the admitted purpose of delaying, hindering, or defrauding a potential creditor cannot thereafter seek cancellation of the note. In *Laxton v. Laxton*, plaintiff-son gave his defendant-father a note secured by a deed to his real property in an attempt to avoid a potential judgment creditor. After the threat of a judgment against him had disappeared, plaintiff-son filed suit against defendant-father seeking to cancel the note and deed. The supreme court affirmed the trial court's grant of directed verdict in favor of defendant on the grounds that the plaintiff had unclean hands.

V. CONTRACTS OF EMPLOYMENT

Although the validity vel non of covenants not to compete within employment contracts dominated this area of law, the courts addressed other issues as well. One of the more interesting decisions outside the covenant not to compete context was that real estate brokers have a fiduciary obligation to their agents to compensate and protect an agent during the broker-agent relationship. Moreover, a breach of this fiduciary obligation by the broker will give the agent a cause of action

227. *Id.* at 610, 478 S.E.2d at 430.
228. *Id.* at 610-11, 478 S.E.2d at 430-31 (citing O.C.G.A. §§ 10-7-21, -22 (1994)).
229. *Id.* at 612, 478 S.E.2d at 431.
231. *Id.* at 591, 481 S.E.2d at 228.
232. *Id.* at 592, 481 S.E.2d at 228.
for damages against the broker.\textsuperscript{233} In \textit{McLane v. Atlanta Market Center Management Co.},\textsuperscript{234} defendant-real estate brokerage had an exclusive agency agreement through October 11, 1992 with defendant-property management company to lease certain commercial space. Defendant-broker assigned the Atlanta Committee for the Olympic Games ("ACOG") as a potential tenant for this space, to its employee, plaintiff-real estate agent. Under plaintiff's oral employment agreement with defendant-broker, plaintiff was to receive a commission based on square footage leased, and the sole condition precedent to entitlement to commission was the execution of a lease and subsequent occupancy by a tenant.\textsuperscript{235}

On July 22, 1992, ACOG informed plaintiff of its need for a substantial amount of additional space, and plaintiff communicated this to defendant-broker and defendant-property manager. On August 25, 1992, defendant-property manager instructed defendant-broker and plaintiff to have no further contact with ACOG and on October 19, 1992 informed defendant-broker that no commission would be paid to it for leases not executed by October 31, 1992. On October 31, 1992, defendant-broker fired plaintiff, who rejected a severance package that would have required her to forego her commission rights in the additional ACOG space.\textsuperscript{236}

Defendant-broker responded to plaintiff's rejection of the severance package with assurances that it would continue to press for plaintiff's commission rights in its dealings with defendant-property manager and if successful it would pay plaintiff her commission on the ACOG space. Defendant-broker and defendant-property manager then settled the dispute: defendant-broker would receive leasing rights to other facilities owned by defendant-property manager in exchange for a stipulation that all commissions were paid under the prior agreement and that defendant-broker would hold harmless defendant-property manager from any commissions claimed by defendant-broker's employees. ACOG eventually leased the additional space on February 18, 1993. An internal memo from defendant-broker suggested withholding plaintiff's commissions on an unrelated matter until a settlement could be reached with her on the ACOG deal.\textsuperscript{237}

\textsuperscript{234} \textit{Id.}  
\textsuperscript{235} \textit{Id.} at 819-20, 486 S.E.2d at 32.  
\textsuperscript{236} \textit{Id.} at 820-21, 486 S.E.2d at 33.  
\textsuperscript{237} \textit{Id.} at 821-22, 486 S.E.2d at 33-34.
As previously noted, the court of appeals held that plaintiff had a cause of action against defendant-broker for breach of fiduciary duty. The fiduciary nature of the broker-agent relationship imposed on the broker a duty not to usurp a business opportunity arising from that relationship. Moreover, the following evidence was sufficient to create a question for the jury on whether defendant-broker had breached its fiduciary obligation: (1) defendant-broker's letter to plaintiff that it would continue to press for plaintiff's commission rights, (2) the settlement with defendant-property manager less than three weeks after such assurances without regard to plaintiff's rights, and (3) the internal memo suggesting retention of plaintiff's commission on an unrelated matter pending settlement with her over the ACOG deal.

A. The Contract of Employment, Generally

An essential element of an employment contract is the amount of compensation to be paid, which must be stated with sufficient definiteness. In Carter v. Hubbard, the court of appeals applied this rule to a contract of employment that, although assumed by the court to be for a five-year term, was declared unenforceable beyond the first

238. Id. at 825, 486 S.E.2d at 36.
239. Id.
240. Id. at 825-26, 486 S.E.2d at 36-37. Plaintiff also filed a civil conspiracy claim against defendant-property manager. "A conspiracy is a combination to accomplish an unlawful end, or to accomplish a lawful end by unlawful means." Id. at 826, 486 S.E.2d at 37. Plaintiff also alleged a cause of action against defendant-property manager for malicious interference with contractual rights, the elements of which are as follows: "(1) an independent wrongful act of interference by a stranger to the contract; (2) malicious intent to cause injury; and (3) resulting damage." Id. at 827, 486 S.E.2d at 37. The same set of facts that enabled plaintiff's claim against the broker for breach of fiduciary duty similarly precluded entry of summary judgment in favor of defendant-property manager on the claims against it for civil conspiracy and for maliciously interfering with plaintiff's right to compensation under its employment contract with defendant-broker. Id. at 826-28, 486 S.E.2d 36-38.

In contrast to her claim against defendant-property manager for malicious interference with her right to compensation under her contract with defendant-broker, plaintiff also included a second malicious interference claim as to her right to procure a lease under her contract with defendant-broker. Because defendant-property manager (1) took over lease negotiations with ACOG after learning of its request for additional space from plaintiff; (2) prohibited plaintiff from having further contact with ACOG; and (3) delayed execution of the lease with ACOG to avoid payment of plaintiff's commission, a jury issue existed whether plaintiff had stated a claim for malicious interference as to her right to "procure a lease" under her contract with defendant-broker. Id.

Because the contract of employment contained only compensation for the first year, it was unenforceable beyond that time notwithstanding the five-year term.244

In Marcre Sales Corp. v. Jetter,245 the court of appeals refused to imply in a contract of employment a provision permitting termination for cause.246 The employment contract between employer and employee provided for automatic renewals for twelve-month periods and permitted employer to terminate only by giving notice towards the end of a twelve-month term. Although earlier drafts had contained a provision allowing termination for cause, the final agreement did not.247

After employer fired employee during the middle of a twelve-month term, employer sued employee to enforce the covenant not to compete in the employment agreement. Employee counterclaimed for wrongful termination.248 The court of appeals, in upholding the trial court's decision granting the employee summary judgment on his wrongful termination counterclaim, said it could not locate "any authority supporting [employer's] proposition that a termination for cause provision was intended by the parties."249

As a last note under general employment contract matters, the court of appeals reiterated that "personnel manuals stating that employees can be terminated only for cause and setting forth termination procedures are not contracts of employment; failure to follow the termination procedures contained in them is not actionable [as a breach of contract]."250

B. Covensants Not to Compete

Attempting a rational synthesis of Georgia law on covenants not to compete is simply impossible. Decisions litter the Georgia Reports that, when read together, provide little if any guidance on whether a covenant will be enforceable. This is perhaps because of the fact sensitive nature

243. Id. at 378, 480 S.E.2d at 385.
244. Id. at 377-78, 480 S.E.2d at 384-85.
246. Id. at 72, 476 S.E.2d at 842.
247. Id.
248. Id. at 70, 476 S.E.2d at 841.
249. Id. at 72, 476 S.E.2d at 842.

However, this statement is only applicable to causes of action alleging a breach of contract on the basis of a policy manual. Id. A public employee may nevertheless have a cause of action for a violation of procedural due process under 42 U.S.C. § 1983 for a governmental employer's failure to follow the procedures outlined in a personnel manual. Id. See also Brownlee v. Williams, 233 Ga. 548, 212 S.E.2d 359 (1975).
of the decisions. Nevertheless, a court will generally enforce a covenant not to compete in an employment contract if it is "reasonable in terms of duration, territorial coverage, and the scope of activity precluded, considering the legitimate business interests the employer seeks to protect and the effect on the employee." Of course, this merely begs the question of what will be deemed "reasonable" in addition to the three-element test of duration, territorial coverage, and scope of precluded activity. A court should consider "the nature and extent of the trade or business, the situation of the parties, and all other relevant circumstances" in making the reasonableness determination.

In Chaichimansour v. Pets are People Too, the court of appeals provided some insight on the interrelationship of several of these considerations. Defendant-veterinarian challenged a noncompete covenant as overbroad because it prevented her from serving clients whom she had never served or had contact with while employed by plaintiff. In support of her argument, defendant relied on Darugar v. Hodges and Vortex Protective Service v. Dempsey for the proposition that a covenant not to compete is overbroad in the scope of activity precluded, and thus unreasonable, when it prevents competition with respect to clients with whom she did not deal while employed by plaintiff.

In distinguishing Darugar and Vortex, the court of appeals referred to the supreme court's decision in W.R. Grace & Co. v. Mouyal, upon which the holding in both cases had been based. The court found as follows:

[W.R. Grace] focused on the interplay between the territorial limitation and the scope of the prohibition: if the scope of prohibited behavior is narrow enough (e.g., contacting those with whom the employee dealt while working for the employer), the covenant may be reasonable even if it has no territorial limitations or has a territorial limitation which is very broad. But if the scope of the prohibition is broader, the

256. 226 Ga. App. at 70, 485 S.E.2d at 250.
258. 226 Ga. at 70-71, 485 S.E.2d at 260.
The court of appeals disapproved Darugar and Vortex to the extent those decisions implied that “prohibitions on competition with respect to customers or potential customers beyond those with whom the employee dealt during his employment will always be unreasonable, even if in a specified and reasonable geographic area.”

Although not discussing the relationship between territorial coverage and the scope of the prohibition, the court of appeals decision in Delli-Gatti v. Mansfield did elaborate upon the circumstances to be considered in deciding whether the scope of activity precluded is overbroad in the medical services context. In Mansfield, plaintiff-employee challenged the following covenant not to compete as unenforceable: “[plaintiff] . . . covenants that she shall not provide pediatric services or other medical care as a physician within Upson County or provide said services at the Upson Regional Medical Center for twelve (12) months immediately following the said termination.” In finding the scope of the prohibited activity reasonable, the court of appeals noted that the breadth of the scope of the activity prohibited—“other medical care as a physician”—did not operate to prevent plaintiff from earning a living (except in Upson County for twelve months); did not prevent him from practicing medicine (except in Upson County); and, moreover, the clause challenged by plaintiff as overbroad was not the portion preventing him from doing what he wanted, which was to practice pediatrics.

The court of appeals also assessed the reasonableness of a territorial limitation defined by reference to the employee’s territory in Sysco Food Services of Atlanta, Inc. v. Chupp. An issue in Chupp was the following “agreement not to compete:”

Employee covenants and agrees that during employment by the company and for a period of one year after termination of such employment for any reason, employee will not, without prior written consent of the company, directly or indirectly within the territory, (a) for himself, (b) as a consultant, manager, supervisor, employee or owner of a competing business, or (c) as an independent contractor for a competing business, engage in any business in which employee

259.  Id. at 71, 485 S.E.2d at 250.
260.  Id. at 71-72, 485 S.E.2d at 250.
262.  Id. at 77, 477 S.E.2d at 135.
263.  Id. at 79, 477 S.E.2d at 137.
provides services which are the same or substantially similar to employee's duties for [employer] as described in this agreement and its incorporated exhibits.

"Territory" was separately defined to include numerous counties in which defendant-employee had been initially assigned.

The court of appeals, finding that both the scope of activities prohibited and the one year duration were reasonable, turned to the territorial limitation. The trial court had found the territorial limitation overbroad because it applied to counties in which defendant had formerly (but no longer) worked. The court of appeals disagreed and found the territorial restriction reasonable because it undisputedly included "only territory in which [defendant] had actually performed work for [plaintiff]." However, the court of appeals seemed to qualify its ruling by reference to the fact that within the past eighteen months, defendant had worked in the territory covered by the covenant not to compete. That apparent qualification suggests that if territorial limitations defined similar to the one at issue in Chupp are not periodically amended, they may become overbroad by prohibiting competition in an area where the employee has not worked for several years.

VI. DRAFTING CONSIDERATIONS

The survey period produced a number of decisions regarding the use of various clauses in commercial agreements.

A. Litigation Oriented Clauses

Although most lawyers would contend that every clause in an agreement is "litigation-oriented," some, such as forum selection and choice of law provisions, are more so than others. The court of appeals reminds us in Central Ohio Graphics, Inc. v. Alco Capital Resource, Inc. that limitations do exist on the breadth of forum selection clauses. At issue in Central Ohio was the following forum selection clause: "[Plaintiff] has the option of pursuing any action under this agreement in any court of competent jurisdiction and the customer

265. Id. at 584, 484 S.E.2d at 324 (emphasis added).
266. Id.
267. Id. at 585-86, 484 S.E.2d at 325.
268. Id. at 586, 484 S.E.2d at 325.
269. Id.
270. See id. at 586-87, 484 S.E.2d at 325-26.
[defendant] consents to jurisdiction in the state of our choice.\textsuperscript{272} Although the general rule is that "contractual clauses providing advance consent to the jurisdiction of a court which would not otherwise have personal jurisdiction are valid and enforceable in this state," the court of appeals found this particular clause unenforceable.\textsuperscript{273} First, the "clause provide[d] no intimation of the forum contemplated," and as such failed "to reflect a meeting of the minds sufficient to show [that] the parties reached an agreement on the forum."\textsuperscript{274} Second, the clause's "lack of specificity impugns a fundamental purpose of such clauses: to eliminate uncertainties by agreeing in advance on a forum acceptable to both parties."\textsuperscript{275} Because the clause would have permitted plaintiff "to bring this action in any State in the country," it was unreasonable and hence unenforceable.\textsuperscript{276} Apparently, either of these rationales would have alone been sufficient to invalidate this forum selection clause.

In Antec Corp. v. Popcorn Channel, L.P.,\textsuperscript{277} the court of appeals addressed several issues relating to the following forum selection clauses contained in a development agreement and a sales agreement:

\begin{quote}
[T]he construction and interpretation of this agreement shall at all times and in all respects be governed by the laws of the State of New York not including its conflict and choice of laws provisions. The parties agree to submit to the personal and exclusive jurisdiction and venue of the courts of the state of New York . . . . These terms and conditions shall be governed by and interpreted in accordance with the laws of the State of New York, excluding its choice of laws rules. The parties hereby agree that any dispute regarding the interpretation or validity of, or otherwise arising out of, these terms and conditions, or relating to the Products sold or licensed hereunder shall be subject to the exclusive jurisdiction of the New York state and federal courts.\textsuperscript{278}
\end{quote}

The court of appeals framed its analysis in light of the rule announced in Brinson v. Martin:\textsuperscript{279} "[W]here no Georgia law specifically governs venue, and where more than one state and its citizens are involved, 'forum selection' clauses are prima facie valid and should be enforced
unless enforcement is shown by the resisting party to be “unreasonable” under the circumstances.

The “resisting party” in Antec failed to carry its burden of showing the clauses to be unreasonable under the circumstances. That “the contracts were negotiated, signed, and substantially performed in Georgia” did not make litigation in a foreign forum (New York) inconvenient. The resisting party was “aware of these considerations” when it agreed to the foreign venue, and there was no indication of inequality of bargaining positions.

However, the court of appeals did find that the trial court erred in dismissing plaintiff’s entire complaint, which contained causes of action arising out of contracts separate and distinct from those containing the forum selection clauses. In so holding, the court of appeals restrictively interpreted the decision in Brinson, in which the court held that “because the claims against the other defendants arose directly or indirectly from a single contract connecting the plaintiffs with all the defendants, the other defendants were transaction participants entitled to rely on the forum selection clause.” But the court of appeals noted that to the extent that subsequent discovery revealed plaintiff’s additional claims to have arisen from the development and sales agreements, dismissal would be appropriate.

Choice of law contractual provisions often go hand in hand with forum selection clauses. In Young v. W.S. Badcock Corp., plaintiff and defendant were parties to a dealership agreement containing the following choice of law provision: “This Agreement and the terms hereof shall be governed by and construed in accordance with the laws of the State of Florida.” After plaintiff terminated the agreement according to its provisions, defendant informed plaintiff of the sum of money it was entitled to receive. Plaintiff filed a tort claim against defendant alleging that the sum due was greater. Because the choice of law provision did “not state that any and all claims arising out of the

281. Id., 482 S.E.2d at 510-11.
282. Id., 482 S.E.2d at 511.
283. Id.
284. Id. at 3, 482 S.E.2d at 511.
285. Id. at 2-3, 482 S.E.2d at 511 (emphasis added) (quoting Brinson, 220 Ga. App. at 640, 469 S.E.2d at 539).
286. Id. at 3, 482 S.E.2d at 511.
288. Id. at 218-19, 474 S.E.2d at 88.
289. Id. at 218, 474 S.E.2d at 88.
relationship between the parties shall be governed by Florida law," the court of appeals held that "the provision [was] not applicable in determining whether plaintiffs had set forth a valid tort claim." The lesson from Young is obvious: choice of law provisions should state that in addition to governing the agreement itself, the chosen state's law will govern "any and all claims" arising from the parties' relationship.

As a final note on litigation-oriented clauses, an attempt to determine a court's subject matter jurisdiction by contract remains a vain endeavor. 

VII. MISCELLANEOUS

For those attorneys who count health clubs among their clients, the court of appeals validated the use of an exculpatory clause in a membership agreement that required members to: (1) assume any risk occasioned by the use of the facilities and (2) forever release and discharge the corporate owner of the club and any affiliated companies and/or its agents and employees from liability for claims arising out of the use of the facilities.

290. Id. at 219, 474 S.E.2d at 88 (emphasis added).