Business Associations

Paul A. Quirós
Lynn S. Scott
William B. Shearer III
J. Haskell Murray

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INTRODUCTION

This Article surveys noteworthy cases in the areas of corporate, limited liability company, partnership, agency, and joint venture law decided during the survey period\(^1\) by the Georgia Supreme Court, the Georgia Court of Appeals, the United States Court of Appeals for the Eleventh Circuit, and the United States district courts located in Georgia.\(^2\) This Article also summarizes enactments at the 2007 Session of the Georgia General Assembly to the Official Code of Georgia Annotated ("O.C.G.A.") with respect to banking, finance, commerce, corporation, partnership, and associations laws.\(^3\)

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\(^1\) The survey period runs from June 1, 2006 through May 31, 2007.

\(^2\) See infra Parts I, II, and III.

\(^3\) See infra Part IV.
I. CORPORATIONS

A. Fiduciary Duties

1. The Georgia Business Corporation Code and the Business Judgment Rule Protect Officers and Directors Against Claims of Ordinary Negligence. In a case of first impression, the Georgia Court of Appeals, in *Flexible Products Co. v. Ervast*, held that the business judgment rule and sections of the Georgia Business Corporation Code protect officers and directors of Georgia corporations against liability for ordinary negligence as a matter of law. In this case, Roger Ervast sued his former employer, Flexible Products Co. ("FPC"), and two of its officers for breach of fiduciary duty for failing to inform him of FPC's merger discussions with Dow Chemical Company ("Dow") before Ervast sold his FPC stock back to the company.

In September 1999 Dow contacted and met with FPC executives to discuss acquiring FPC. In early October 1999, Dow and FPC entered a confidentiality agreement, and on October 26, 1999, Dow "telephonically offered a price that [FPC] was willing to consider." FPC set October 26, 1999 as the date on which negotiations became "material" and "paid all shareholders who sold their shares after that date the higher merger price per share." Ervast had sold his FPC shares on October 4, 1999 and October 11, 1999, and therefore received the lower pre-merger price. Arguing that FPC should have informed him of the merger discussions before he sold his shares, Ervast sued FPC and sought "the difference between his stock's pre- and post-merger values" and attorney fees.

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5. O.C.G.A. §§ 14-2-830(a), -830(d), -842(a), -842(d) (2003 & Supp. 2007).
7. *Id.* at 178, 643 S.E.2d at 562.
8. *Id.* at 179, 643 S.E.2d at 562-63.
9. *Id.*, 643 S.E.2d at 563.
10. *Id.* The Georgia Court of Appeals determined that the date on which merger discussions became "material" was (1) a mixed question of law and fact, (2) not admissible as opinion evidence by Ervast's expert who testified at the trial court that October 1, 1999 was the date that discussions between FPC and Dow became material, and (3) a question that should be decided by the fact-finder, which was, in this case, the jury. *Id.* at 180-81, 643 S.E.2d at 564.
11. *Id.* at 179, 643 S.E.2d at 563.
12. *Id.*, 643 S.E.2d at 562.
13. *Id.* at 178, 643 S.E.2d at 562.
At trial, the jury found that FPC and its officers had breached their fiduciary duties to Ervast and awarded Ervast $2,729,691 in damages. The Georgia Court of Appeals reversed, holding that the trial court should have granted FPC's motion for directed verdict on Ervast's claim of ordinary negligence because "Georgia's business judgment rule relieves officers and directors from liability for acts or omissions taken in good faith compliance with their corporate duties." The case of Flexible Products Co., while only providing a very brief discussion on the issue of standard of care, is still noteworthy because it is the first case to hold that officers and directors of Georgia corporations will be protected against claims of ordinary negligence in the performance of their duties on behalf of their respective corporations. Without expressly holding as such, by protecting Georgia officers and directors against liability for ordinary negligence, the court of appeals has effectively adopted a gross negligence standard of care, similar to the standard of care recognized by Delaware courts for over twenty years.

2. Georgia Courts Recognize a Claim for Aiding and Abetting a Breach of Fiduciary Duty. In Insight Technology, Inc. v. Freight-Check, LLC, the court of appeals reversed the decision of the trial court and held that while Georgia courts had never recognized a claim for aiding and abetting a breach of fiduciary duty in the past, Insight Technology, Inc. ("Insight") could maintain such a claim under O.C.G.A. section 51-12-30, which covers the inducement of actions as joint wrongdoers. Insight brought multiple claims against (1) Darren Brewer, Insight's former president, (2) GetLoaded.com, LLC ("GetLoaded"), an Insight competitor, (3) Patrick Hull, the majority shareholder of GetLoaded, and (4) FreightCheck, LLC, a company created by Brewer and Hull (collectively, the "Defendants"). Insight alleged that Brewer

14. Id.
15. Id. at 182, 643 S.E.2d at 564.
16. See id., 643 S.E.2d at 564-65. The notes to O.C.G.A. section 14-2-830 state that the Georgia statute does not codify the business judgment rule and that "[t]he elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts." O.C.G.A. § 14-2-830 cmt.
20. Insight, 280 Ga. App. at 23-24, 633 S.E.2d at 377-78. O.C.G.A. section 51-12-30 reads in full: "In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury." O.C.G.A. § 51-12-30.
and Hull used Insight’s software, pricing, website design, and other business information in forming FreightCheck while Brewer was still employed by Insight. The trial court granted the Defendants’ motion for summary judgment on the claim that Hull, GetLoaded, and FreightCheck aided and abetted Brewer in his alleged breach of fiduciary duty. In granting the motion, the trial court stated that Georgia courts have never recognized such a claim.\(^2\)

The court of appeals reversed the decision of the trial court.\(^2\)\(^3\) Citing Rome Industries, Inc. v. Jonsson,\(^2\)\(^4\) the court in Insight discussed how Georgia courts have held a defendant liable for assisting in a breach of fiduciary duty under O.C.G.A. section 51-12-30 and tortious interference with contractual rights.\(^2\)\(^5\) The court in Rome Industries stated that “[t]he fiduciary relationship between a corporation and its officer arises out of the contractual or employment relationship between the two parties” and, thus, aiding in a breach of fiduciary duty is tantamount to tortious interference with contractual rights.\(^2\)\(^6\) The court in Insight noted that “there is ‘no magic in mere nomenclature.’”\(^2\)\(^7\) The court held that “‘aiding and abetting a breach of fiduciary duty,’ ‘procuring a breach of fiduciary duty,’ or ‘tortious interference with a fiduciary relationship’” are all different names for a viable claim under Georgia law and may entitle a plaintiff to recovery upon proof that:

1. through improper action or wrongful conduct and without privilege, the defendant acted to procure a breach of the primary wrongdoer’s fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure; (3) the defendant’s wrongful conduct procured a breach of the primary wrongdoer’s fiduciary duty; and (4) the defendant’s tortious conduct proximately caused damage to the plaintiff.\(^2\)\(^8\)

The significance of Insight is even more noteworthy in light of the fact that two federal courts, interpreting Georgia law, dismissed claims based


\(^{23}\) Id. at 23-24, 633 S.E.2d at 377-78.


\(^{25}\) Insight, 280 Ga. App. at 24-25, 633 S.E.2d at 378.

\(^{26}\) Rome Indus., 202 Ga. App. at 683, 415 S.E.2d at 652.


\(^{28}\) Id. at 25-26, 633 S.E.2d at 379 (footnotes omitted).
on theories of aiding and abetting a breach of fiduciary duty just a few months prior to this decision.29

3. The Fine Line Between Active Solicitation of Customers and Mere Preparation for Competition Determines Breach of Fiduciary Duty. The United States District Court for the Northern District of Georgia, in *Impreglon, Inc. v. Newco Enterprises, Inc.*,30 added color to the line between an officer’s mere preparation for competition, which is not a breach of fiduciary duty under Georgia law, and an officer’s active solicitation of customers, which is a breach.31 Newco Enterprises, Inc. (“NEI”) outsourced its surface coating of metal and other materials to Impreglon, Inc.32 Curt Jarrell, while serving as Impreglon’s CEO, entered into negotiations with NEI regarding numerous topics, including employment, potential lease options, and the formation of a new company to compete with Impreglon.33 The court held that even though there had been extensive negotiations between Jarrell and NEI, the discussions did not result in a breach of fiduciary duty.34 Moreover, the court noted that under Georgia law, an officer could even purchase a competing business while employed by a rival company without breaching his or her fiduciary duties.35 However, the court granted Impreglon’s summary judgment motion on its breach of fiduciary duty claim against Jarrell based on one additional significant factor—his active solicitation of Impreglon’s customers and his receipt of specific, written assurances that NEI, and not Impreglon, would receive future business from those customers.36


31. *See id.* at *16-21; see also KEG Techs., Inc. v. Laimer, 436 F. Supp. 2d 1364, 1376 (N.D. Ga. 2006) (holding that mere preparation to compete does not rise to the level of a breach of fiduciary duty).


33. *Id.* at *20-21.

34. *Id.*

35. *Id.* at *21 (citing Gresham & Assocs., Inc. v. Strianese, 265 Ga. App. 559, 560-61, 595 S.E.2d 82, 84 (2004)). In Gresham & Assocs., the court held that “[a]n officer] is entitled to make arrangements to compete [and] can properly purchase a rival business and upon termination of employment immediately compete.” But during the term of employment with the corporation, the officer may not solicit customers for a competing company or otherwise engage in direct competition with the corporation’s business.

court in Impreglon reiterated the core concern in fiduciary duty analysis: that a corporate officer such as Jarrell may not appropriate “the business opportunities of the corporation.” 37 While the court did not provide much additional color in this case on what, outside of solicitation of customers, would rise to the level of impermissible appropriation of business opportunities, the court stated that “brief, nonspecific, and strictly hypothetical” inquiries into whether a customer would place orders with an officer if he or she left his or her employer, would not rise to the level of a breach of fiduciary duty. 38

B. Strict Scrutiny Applied to an Employment Agreement Signed Separately from (but Concurrently with) a Sale of Business Agreement

The Georgia Court of Appeals, in Hilb, Rogal & Hamilton Co. of Atlanta v. Holley, 39 held that (1) strict scrutiny review should be applied to restrictive covenant language in an employment agreement that differed from a sale of business agreement executed by the parties on the same day; (2) under strict scrutiny review, a restriction against “‘accepting an entreaty’ from known or prospective customers is overly broad and unenforceable”; (3) Georgia law does not recognize the blue pencil doctrine when dealing with restrictive covenants in employment contracts; and (4) because of the lack of availability of the blue pencil doctrine, the court may not amend the restrictive covenants in the employment agreement, and therefore, the agreement is unenforceable. 40 Under Georgia law, courts analyze restrictive covenants under three levels of scrutiny: (1) strict scrutiny for employment contracts, (2) a lesser, middle scrutiny for professional partnership agreements, and (3) a much lower scrutiny for sale of business agreements. 41

In Hilb Hugh Holley signed an Agreement of Merger and a separate employment contract with Hilb, Rogal & Hamilton Company of Atlanta (“HRH”) pursuant to the sale of Holley's insurance agency to HRH. 42 The court refused to analyze Holley's employment contract under the much lower standard used for sale of business agreements, even though: (1) Holley signed the employment agreement on the same day as the merger agreement; (2) the execution of the employment agreement was

37. Id. at *18.
38. Id. at *22 (citing Nilan's Alley, Inc. v. Ginsburg, 208 Ga. App. 145, 145, 430 S.E.2d 368, 369 (1993)).
41. Id. at 595, 644 S.E.2d at 866.
42. See id. at 591-95, 644 S.E.2d at 864-66.
a condition precedent under the merger agreement; and (3) the restrictive covenant language in the merger agreement expressly stated that "this covenant is in addition to any covenants which [Holley] may make in any employment or other agreements executed or to be executed with Surviving Corporation." The court in Hilb held that "when parties execute separate contracts for the seller’s sale of the business and the seller’s subsequent employment and each contract contains different restrictive covenants, the restrictive covenants in the employment contract are subject to strict scrutiny."  

In Hilb the Agreement of Merger restricted Holley from competing directly or indirectly with the buyer of his business for five years, while the employment agreement contained different restrictions including language preventing Holley from contacting, soliciting, or "accept[ing] an entreaty from" a known or prospective customer. The court of appeals in Hilb held the employment agreement invalid because the "accept[ing] an entreaty from" language was overly broad and because Georgia courts do not employ the blue pencil doctrine to modify overly broad employment agreements. This holding highlights the importance of integrating the most restrictive of the restrictive covenant language (or simply mirroring the restrictive covenant language) that may otherwise appear in a separate employment agreement into the covenants in the sale of business agreement so that the party to receive the benefit of the noncompete may obtain the lowest standard of scrutiny if its covenants are analyzed for enforceability by Georgia courts.

C. Nonbinding Letter of Intent Incorporated into a Binding Addendum Held Enforceable

In Goobich v. Waters, the Georgia Court of Appeals held that a nonbinding letter of intent, which the parties incorporated into a binding addendum, was an enforceable contract. On November 29, 2004, Joel Goobich and Gary and Teresa Waters entered into a nonbinding letter of intent ("LOI"), which specified that Goobich would purchase the Waterses' nursery business, Outdoor Environments, Inc. On December 30, 2004, the parties signed an addendum, which stated that "[t]he

43. See id. at 592-93, 644 S.E.2d at 864-65.
44. Id. at 595-96, 644 S.E.2d at 866.
45. Id. at 593, 644 S.E.2d at 865.
46. Id. at 596, 644 S.E.2d at 866-67.
47. Id. at 595-96, 644 S.E.2d at 866.
49. Id. at 56-57, 640 S.E.2d at 609.
50. Id. at 54, 640 S.E.2d at 607-08.
Non Binding LOI . . . [was] binding on both parties’ subject to the preparation and execution of closing documents. 51 When the Waterses “requested that Goobich personally guarantee the earnout and bonus amounts,” a requirement not addressed in the LOI, the deal fell apart and “Goobich sued the Waterses for breach of contract and specific performance.” 52

The court held that an enforceable contract requires agreement to all of the essential terms and that the addendum, which incorporated the nonbinding LOI as binding on the parties, covered all such terms. 53 Furthermore, the court held that the addendum’s requirement that the parties execute closing documents did not destroy the validity of the contract, but merely acted as a condition precedent to performance. 54

D. Mere Payment of Corporate Debts Not Justification for Piercing the Corporate Veil

The United States District Court for the Southern District of Georgia, in DaimlerChrysler Financial Services Americas, LLC v. Nathan Mobley Chrysler, Dodge, Jeep, Inc., 55 dealt with a suit by DaimlerChrysler Financial Services Americas, LLC (“DaimlerChrysler”) against a car dealership, its owner, and others for breach of a loan agreement. 56 Under the loan agreement, the dealership agreed to hold “all proceeds from the sale or lease of its inventory . . . in trust for the benefit of DaimlerChrysler.” 57 Before the dealership ceased operations, it sold over $340,000 worth of vehicles out of trust and used the money to pay other debts of the corporation. 58 DaimlerChrysler argued that the court should pierce the corporate veil and hold Nathan Mobley, the owner of the dealership, personally liable for the breach of the loan agreement because Mobley used the dealership as his “alter ego.” 59 The court rejected DaimlerChrysler’s argument, holding that DaimlerChrysler could not pierce the corporate veil because even though Mobley used the funds from the sale of vehicles to satisfy other obligations of the dealership, he did not abuse the corporate form to pay any of his

51. Id. at 55, 640 S.E.2d at 608.
52. Id. at 53, 55, 640 S.E.2d at 607, 608.
53. Id. at 56, 640 S.E.2d at 608-09.
54. Id. at 56-57, 640 S.E.2d at 609 (citing Brack v. Brownlee, 246 Ga. 818, 820, 273 S.E.2d 390, 393 (1980)).
56. Id. at *1.
57. Id. at *3.
58. Id. at *2.
59. Id. at *3.
personal debts. This case reaffirms that alter ego claims must be predicated on personal, rather than business, use of corporate monies and that the shield of the corporate form is available to individuals who use funds to pay valid debts of the corporation.

II. LIMITED LIABILITY COMPANIES

A. A Member of a Limited Liability Company Does Not Disassociate Itself from a Limited Liability Company by Filing a Petition for Disassociation of Another Member

In a case of first impression, the Georgia Court of Appeals, in Sayers v. Artistic Kitchen Design, LLC, held that a member of a limited liability company did not disassociate itself from the limited liability company by filing a petition for disassociation of another member. Timothy and Melissa Sayers and Robert and Valerie Landau were each members of Artistic Kitchen Design, LLC ("AKD"). The Landaus sued the Sayerses for conversion of company property and filed a petition for reorganization of AKD to divest the Sayerses of their membership interests under O.C.G.A. section 14-11-601.1(b)(5).

In rebuttal, the Sayerses argued that by filing the petition for reorganization, the Landaus had disassociated themselves from AKD and therefore no longer had standing to bring the lawsuit on behalf of AKD. The court rejected the Sayerses’ standing argument based on the plain language of O.C.G.A. section 14-11-601.1(b)(4)(D), which states that a person ceases to be a limited liability company member when "the member . . . files a petition or answer seeking for the member any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief." While the court noted that no case law existed on the topic, it held that the plain text of the Georgia Limited Liability Company Act, coupled with common sense, led to the

60. See id.
61. See generally id. See Boswell v. Primary Care Prof'l's, P.C., 265 Ga. App. 522, 526-27, 594 S.E.2d 725, 728-29 (2004) (holding that an alter ego claim failed because the plaintiffs failed to show that the debts paid by the defendant were personal rather than corporate debts).
63. Id. at 224-25, 633 S.E.2d at 621.
64. Id. at 223, 633 S.E.2d at 620.
67. Id. at 224, 633 S.E.2d 620-21 (emphasis added by court) (quoting O.C.G.A. § 14-11-601.1(b)(4)(D)).
conclusion that filing a petition for reorganization does not result in the disassociation of the filing member, rather it would only lead to the disassociation of the member for whom the petition was filed. 69

B. Corporate Form of Limited Liability Companies Upheld

In two cases decided during the survey period, Georgia courts upheld the corporate form of limited liability companies. 70 The Georgia Court of Appeals, in Milk v. Total Pay & HR Solutions, Inc., 71 held that the sole managing member of a limited liability company would not be held personally liable for the debts of the limited liability company when there is no evidence of (1) undercapitalization to avoid future debts or (2) fraud by the member. 72 On March 31, 2003, Joseph Milk formed Burrito Joe’s, as a Georgia limited liability company, and was the company’s sole managing member. A few months after formation, a restaurant manager, on behalf of Burrito Joe’s, signed a client service agreement with the payroll company, Total Pay and HR Solutions, Inc. (“Total Pay”). When Burrito Joe’s ceased operations due to unprofitability, Total Pay sued Burrito Joe’s and Milk to recover damages for the payroll services provided. 73 The court held that Milk could not be held personally liable for the debts of Burrito Joe’s because: (1) similar to the protection of the corporate veil provided to shareholders of a corporation, Georgia law recognizes that members of a limited liability company are protected from personal liability arising from the debts of a properly maintained limited liability company; (2) Georgia courts use great caution before disregarding the corporate form of a limited liability company; (3) Milk did not sign the client service agreement in any capacity; (4) the $20,000 used to pay employees of the restaurant appeared to be used for a legitimate business expenses and, in any case, was not an undercapitalization with the intent to avoid future debts; and (5) Total Pay provided no evidence of fraud or misuse of the corporate form by Milk. 74

The court of appeals, in Global Diagnostic Development, LLC v. Diagnostic Imaging of Atlanta, 75 denied the plaintiff’s, Diagnostic

72. Id. at 454, 634 S.E.2d at 213.
73. Id. at 449-50, 634 S.E.2d at 209-10.
74. See id. at 452-55, 634 S.E.2d at 212-13.
Imaging of Atlanta ("Diagnostic"), argument that the court should treat North Atlanta Scan Associates, Inc. ("North Atlanta") and Global Diagnostic Development, LLC ("Global") as a single entity because Dr. Howard Rosing owned both companies. In this case, North Atlanta did not obtain a certificate of need, as required by the Georgia Department of Community Health, to relocate its diagnostic imaging center. Global then applied for, and later received, a certificate of need "proposing to purchase the equipment and assets of North Atlanta for the purpose of operating a diagnostic imaging center at [the] same location." Diagnostic, a competitor of Global, challenged the sale as a "sham transaction" because Dr. Rosing owned both companies. The court held that absent a showing of abuse, it would not disregard the separate corporate forms of Global and North Atlanta, and would not treat them as one company due to Dr. Rosing's sole ownership of both entities.

III. PARTNERSHIP, AGENCY, AND JOINT VENTURES

A. Individuals Deemed Partners and Personally Liable Under a Partnership Agreement When They Sign on Behalf of an Unformed Entity

In Nationwide Mortgage Services, Inc. v. Troy Langley Construction Co., Nationwide Mortgage Services, Inc. ("Nationwide") and VentureCap Development, Inc. ("VentureCap") executed a lease purchase agreement whereby VentureCap would purchase property located at 2000 Perry Boulevard (the "Property") from Nationwide. On February 23, 2001, Mike Roberts and Theodore Jockisch, both executives of Nationwide, executed a partnership agreement on behalf of Perry Limited, LLC ("Perry") with VentureCap in an effort to obtain financing to acquire the Property and construct town homes on the Property. However, although Roberts and Jockisch signed on behalf of Perry, Perry had not been formed properly and was therefore referred to as "unformed." While there is no explanation in Nationwide, the authors surmise that the failure to file the certificate of formation was the
On April 24, 2001, before VentureCap had acquired the Property, VentureCap entered into a contract with Troy Langley Construction Company, Inc. ("Langley") to demolish the structure on the Property. After demolishing the structure and failing to recover payment from VentureCap, Langley sued Nationwide for payment. Nationwide counterclaimed, "asserting that it had never authorized the demolition work and seeking to recover the value of the demolished property."  

Nationwide argued that because Perry was an unformed limited liability company, the partnership agreement to acquire and develop the Property between Nationwide's officers (who signed on behalf of Perry) and VentureCap was invalid because the agreement contained language that would automatically terminate the partnership upon the dissolution of one partner. Rejecting Nationwide's argument, the court upheld the validity of the partnership agreement and held that because the limited liability company was never formed it could not be considered dissolved. Additionally, the court stated that it would treat Roberts and Jockisch as partners under the agreement and treat them as if they had signed the partnership agreement in their individual capacities when they signed on behalf of Perry, the unformed limited liability company. The court continued, holding that Roberts and Jockisch were separate legal persons from the company of which they were officers, Nationwide. Lastly, the court concluded that factual issues remained regarding "whether Nationwide acquiesced in and/or later ratified VentureCap's" demolition of the structure on Nationwide's property.  

One lesson from Nationwide is that parties signing on behalf of a limited liability company should be cautious and confident that all formation actions have been perfected. According to the decision in Nationwide, signing behalf of an unformed limited liability company (or other business entity for that matter) will subject the individual to personal liability or an implied partnership under the agreement.

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84. Id. at 539-40, 634 S.E.2d at 503-04.
85. Id. at 539, 634 S.E.2d at 503.
86. Id. at 542 & n.4, 634 S.E.2d at 505-06 & n.4.
87. Id.
88. Id.
89. Id. at 542, 634 S.E.2d at 506.
90. Id. at 545, 634 S.E.2d at 508.
B. Formation of an Agency Relationship Requires Action by the Principal

Two Georgia cases decided during the survey period reconfirmed that an agency relationship is created through the actions of the alleged principal, not merely through the actions of the alleged agent. In *Ellis v. Fuller*, Thomas Ellis sued Glen Fuller for refusing to release Ellis's equipment from Fuller's building. Fuller argued that Ellis's son, Anthony, acted as Ellis's agent in leasing Fuller's building, and therefore, Fuller had a lien against the equipment for past rent owed by Anthony. The court held that Anthony's actions, such as his comment that he would have to get his father's permission before leasing the building, were insufficient to create an agency relationship. According to the court, in order for Ellis to have been held liable for Anthony's actions, Ellis would have had to have made a statement or taken other steps to show that he gave Anthony the authority (actual or apparent) to act on his behalf.

In *Satisfaction & Service Housing, Inc. v. SouthTrust Bank, Inc.*, the court of appeals affirmed the trial court's decision that no agency relationship existed between SouthTrust Bank, Inc. ("SouthTrust") and Bergen Acceptance Corporation ("Bergen"). Satisfaction & Service Housing, Inc. ("S&S") assigned a loan agreement to Bergen, who then assigned the agreement to SouthTrust for a fee. Bergen filed for bankruptcy after receiving payment from SouthTrust but before paying S&S the money Bergen owed S&S. S&S claimed "that SouthTrust was liable to S&S for the money owed [by Bergen] because Bergen acted as SouthTrust's agent and merely facilitated the loan purchase for SouthTrust." Confirming the decision of the trial court, the court of appeals determined that no apparent agency existed because S&S failed to provide any evidence that SouthTrust took action to lead S&S to believe Bergen was acting as SouthTrust's agent. Even Bergen's use...
of SouthTrust's name on the funding package and SouthTrust's funding of past loans between Bergen and S&S was insufficient to create apparent agency between Bergen and SouthTrust because of the lack of any action by Southtrust, the alleged principal in this transaction, that could be construed as its consent to Bergen's actions.101

The court in Satisfaction also held that no actual agency existed between SouthTrust and Bergen.102 The court held that in order to prove actual agency, S&S needed to show "SouthTrust assumed the right to control the time, manner, and method of Bergen's work."103 The court held that neither Bergen's profits from loans sold to SouthTrust nor SouthTrust's set criteria for acceptance of loans, such as minimum credit scores, rose to the level of control required for the formation of an actual agency relationship.104

The decisions in both Ellis and Satisfaction serve as practice pointers to Georgia practitioners advising clients on agency law. Clients should make certain that the representation on which they rely stems from an action by a principal, not merely a claim of an agent, and they should also make certain that such actions are relevant to the transaction at issue, as opposed to prior unrelated activities.

C. Three Elements Required for the Formation of a Joint Venture in Georgia

The United States District Court for the Northern District of Georgia, in Hillis v. Equifax Consumer Services, Inc.,105 held that a joint venture relationship existed between the defendants and, in so deciding, succinctly laid out the elements required for the formation of a joint venture under Georgia law as: "(1) a pooling of action; (2) a joint undertaking for profit; and (3) rights of mutual control."106 In Hillis the court quickly worked through the joint venture analysis and decided that there was a joint venture because (1) the two parties bundled credit services together, (2) there was an undertaking for profit, and (3) there were provisions of the agreement between the two parties (which the court did not cite) that provided "some amount of mutual control."107 While the court's discussion in Hillis focused on the procedural issues of

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101. Id.
102. Id. at 713, 642 S.E.2d at 365-66.
103. Id.
104. Id.
106. Id. at 508.
107. See id. at 508-09.
a class action case, Hillis is a helpful, concise review of the court's view of the elements required for formation of a joint venture in Georgia. The court of appeals, in Kitchens v. Brusman, provided additional analysis regarding the requirements of a joint venture and focused the majority of its discussion on the element of mutual control. Following the death of his wife, Trammell Kitchens sued Dr. Harold Paul Brusman, Dr. Brusman's practice, and Southern Regional Medical System ("Southern Regional") for wrongful death due to misdiagnosis. The court held no mutual control existed between Southern Regional and Dr. Brusman's direct employer, South Suburban. Supporting its holding, the court considered the fact that the contract between Southern Regional and South Suburban specifically stated that Southern Regional could not control the provision of services by South Suburban and its pathologists. Furthermore, the court stated that the interdependency of the two businesses alone was insufficient to meet the mutual control requirement of a joint venture.

IV. THE FULTON COUNTY SUPERIOR COURT'S BUSINESS CASE DIVISION

As many corporate practitioners are aware, Fulton County Superior Court's Business Case Division (the "Business Court") began operating in October 2005 and was founded for the purpose of providing "judicial attention and expertise to certain complex business cases and to facilitate the timely and appropriate resolution of such disputes." While the authors have not discussed the Business Court in previous articles, the authors decided to include a brief section in this article because, with recent amendments allowing parties to more freely transfer cases to the Business Court, this court may see more activity and become a practical and more available option for practitioners trying complex business cases in Georgia.

By way of background, the Business Court only accepts cases that have an amount in controversy of over $1,000,000 and implicate one of the following:

108. See generally id. at 508.
110. Id. at 167, 633 S.E.2d at 588.
111. Id. at 163-64, 633 S.E.2d at 586.
112. Id. at 167, 633 S.E.2d at 588.
113. Id.
114. Id.
2. UCC, O.C.G.A. § 11-1-101
4. Uniform Partnership Act, O.C.G.A. § 14-8-1
6. Georgia Revised Uniform Limited Partnership Act, O.C.G.A. § 14-9-100
7. Georgia Limited Liability Company Act, O.C.G.A. § 14-11-100
[and]
8. Any other action that the parties and the Court believe warrants assignment to the Business Court, including large contract and business tort cases and other complex commercial litigation.\textsuperscript{116}

As a general rule, "Cases involving personal injury, wrongful death, employment discrimination, or low-dollar consumer class action claims . . . are excluded from the Business Court unless all parties consent to the transfer."\textsuperscript{117}

Originally, cases could only be heard by the Business Court upon the mutual agreement of the parties, which limited the utility of the Business Court.\textsuperscript{118} As of June 6, 2007, Rule 1004,\textsuperscript{119} governing the Business Court, was amended to allow cases to be eligible for transfer to the Business Court by (1) request of the superior court judge assigned to the case or (2) a motion of one or both of the parties.\textsuperscript{120} The new amendments also provide for a twenty-day briefing period, during which the opposing party may file its objection to the transfer.\textsuperscript{121} The ultimate decision of whether the case will be transferred to the Business Court is made by agreement of (1) the chief judge of the superior court, (2) a member of the Business Court division committee (made up of

\begin{footnotes}
\item[117.] Id.
\item[118.] Kirsten Tagami, \textit{Open for Business: New Fast-Track Fulton Court Tries to Fill a Niche}, ATLANTA J. CONST., Jan. 12, 2006, at 1F.
\item[119.] FULTON COUNTY SUPER. CT. R. 1004, available at http://www.fultoncourt.org/sup iorcourt/pdf/business_court.pdf; see also Superior Court of Fulton County Business Court, supra note 115. The Authors recognize that adoption of this rule falls a few days outside of the survey period but have chosen to include it to provide a more accurate picture of the Business Court.
\item[120.] FULTON COUNTY SUPER. CT. R. 1004.
\item[121.] Id.
\end{footnotes}
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three active superior court judges), and (3) a senior judge of the Business Court who may hear the case.\textsuperscript{122}

The Business Court resolved six cases in 2006, resolved three cases through the first half of 2007, and has had only one case go to a jury trial.\textsuperscript{123} In June 2007, prior to the amendments to Rule 1004 noted above, the Business Court had eighteen cases on its docket.\textsuperscript{124} As of September 2007, a mere three months after the amendments to Rule 1004 eased the requirements to transfer a case to the Business Court, the Business Court’s case load has more than doubled to forty-one cases.\textsuperscript{125}

V. LEGISLATION

In the 2007 Session of the Georgia General Assembly, the Georgia General Assembly made a number of revisions to the O.C.G.A., including revisions to Title 7, regarding banking and finance;\textsuperscript{126} Title 10, regarding commerce and trade;\textsuperscript{127} and Title 14, regarding corporations.\textsuperscript{128} Brief summaries of each the noteworthy revisions to Title 7 of the O.C.G.A. are as follows:

1. The Georgia General Assembly amended O.C.G.A. section 7-1-4(35)(A)\textsuperscript{129} to exclude "good will, core deposit intangibles, or other intangible assets related to the purchase, acquisition, or merger of a bank charter" from the definition of "statutory capital base."\textsuperscript{130}

\begin{footnotesize}
\begin{enumerate}
\item[122.] \textit{Id.}
\item[123.] Greg Land, \textit{Rule Change Opens Business Court’s Doors: Justices Order that Cases Can Be Transferred if One Party, Judge Approve Move}, DAILY REPORT, June 19, 2007, at 1A, 9A.
\item[124.] E-mails from Anne Nees, Staff Attorney, Georgia Business Court, to J. Haskell Murray, Associate, King & Spalding LLP (Sept. 16, 2007, 19:34:08 EST and Sept. 17, 2007, 08:54 EST) (on file with authors).
\item[125.] \textit{Id.}
\item[130.] \textit{Id.} § 7-1-4(35)(A) (Supp. 2007).
\end{enumerate}
\end{footnotesize}
2. The Georgia General Assembly revised O.C.G.A. section 7-1-286(a)\textsuperscript{131} to require banks making "loans secured by improved or unimproved real estate" to comply with certain federal laws.\textsuperscript{132}

3. The Georgia General Assembly amended O.C.G.A. section 7-1-437\textsuperscript{133} to allow for the electronic transmission of proxy by a person lawfully entitled to attend a shareholders' meeting or by that person's attorney in fact.\textsuperscript{134}

4. The Georgia General Assembly amended multiple sections of the O.C.G.A. to define, allow for, and govern share exchanges in mergers or consolidations involving banks or trust companies.\textsuperscript{135}

5. The Georgia General Assembly revised various sections of the O.C.G.A. regarding check sellers, including (1) multiple requirements regarding licensing and qualifications to sell checks or money orders,\textsuperscript{136} (2) authorization and a requirement to perform background checks on employees and agents of check sellers,\textsuperscript{137} and (3) a requirement to maintain corporate security bonds.\textsuperscript{138}

6. The Georgia General Assembly revised and added multiple sections to the O.C.G.A. regarding check cashers, including: (1) revising the requirements for licensing and qualifications of check cashers;\textsuperscript{139} (2) providing the authorization and requirement to perform background checks on applicants for check cashing licenses;\textsuperscript{140} (3) revising provisions regarding notices, record-keeping, and procedures required of check cashers;\textsuperscript{141} (4) adding a provision to set the maximum check cashing fee at the greater of two percent of the amount of the check or two

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\item \textsuperscript{131} O.C.G.A. § 7-1-286(a) (2004 & Supp. 2007).
\item \textsuperscript{132} Id. § 7-1-286(a) (Supp. 2007). The federal laws cited are: provisions of Part 365 of the Federal Deposit Insurance Corporation's rules and regulations, including 12 C.F.R. 365.1 and 365.2 and the Interagency Guidelines for Real Estate Lending Policies in Appendix A and 12 C.F.R. 208.51 and the guidelines contained in 12 C.F.R. Part 208 in the case of Federal Reserve member banks.
\item \textsuperscript{133} O.C.G.A. § 7-1-437 (2004 & Supp. 2007).
\item \textsuperscript{134} Id. § 7-1-437 (Supp. 2007).
\item \textsuperscript{135} O.C.G.A. §§ 7-1-530 to -537, -557, -601, -606, -608 (2004 & Supp. 2007).
\item \textsuperscript{136} O.C.G.A. §§ 7-1-681 to -683, -686 to -687, -689 (2004 & Supp. 2007).
\item \textsuperscript{137} O.C.G.A. § 7-1-682(e) (2004 & Supp. 2007).
\item \textsuperscript{138} O.C.G.A. § 7-1-683(b)(2) (2004 & Supp. 2007). This section requires a $100,000 surety bond for check sellers and a $50,000 surety bond for money transmitters. Id. The bond amount required increases by $5000 for each location for a maximum of $250,000.
\item \textsuperscript{139} O.C.G.A. § 7-1-701 (2004 & Supp. 2007).
\item \textsuperscript{140} O.C.G.A. § 7-1-702 (2004 & Supp. 2007).
\item \textsuperscript{141} O.C.G.A. § 7-1-705 (2004 & Supp. 2007).
\end{itemize}
dollars," and (5) amending a section regarding the revocation or suspension of a license to cash checks.\textsuperscript{143}

7. The Georgia General Assembly revised O.C.G.A. section 7-1-1001(13)\textsuperscript{144} to clarify that a person making five or less mortgage loans in a calendar year is not exempt from the licensing requirements for mortgage lenders or brokers.\textsuperscript{145} The Georgia General Assembly revised O.C.G.A. section 7-1-1004(f)\textsuperscript{146} to authorize and require background checks on applicants for mortgage broker licenses.\textsuperscript{147}

8. The Georgia General Assembly revised O.C.G.A. section 7-1-1016\textsuperscript{148} to regulate advertising for mortgage loans requiring that such advertisements (1) "may not be false, misleading, or deceptive"; (2) may not "indicate or imply that its interest rates or charges for loans are in any way ‘recommended,’ ‘approved,’ ‘set,’ or ‘established’ by the state"; (3) may not contain publicly available information about an individual’s loan without "clearly and conspicuously . . . in bold-faced type at the beginning of the advertisement” stating that the information was not provided by the individual’s lender and that the advertiser is not affiliated with the lender; and (4) must “contain the name, license number, and an office address of [the] licensee or registrant."\textsuperscript{149}

Also in the 2007 Session, Article 1 of Chapter 1 of Title 10 of the O.C.G.A.,\textsuperscript{150} regarding retail installment and home solicitation sales, was amended to increase the maximum delinquency charge for installment payments that are ten or more days overdue from eighteen dollars to twenty-five dollars.\textsuperscript{151}

Finally, the Georgia General Assembly amended Title 14 of the O.C.G.A. to require Georgia corporations, limited partnerships, and limited liability companies to file a certificate of conversion with the Secretary of State when the entity converts to foreign status.\textsuperscript{152}

\textsuperscript{142} O.C.G.A. § 7-1-706(b) (2004 & Supp. 2007).
\textsuperscript{144} O.C.G.A. § 7-1-1001(13) (2004 & Supp. 2007).
\textsuperscript{145} Id. § 7-1-1001(13) (Supp. 2007).
\textsuperscript{146} O.C.G.A. § 7-1-1004(f) (2004 & Supp. 2007).
\textsuperscript{147} Id. § 7-1-1004(f) (Supp. 2007).
\textsuperscript{149} Id. § 7-1-1016 (Supp. 2007).
\textsuperscript{150} O.C.G.A. § 10-1-1 to -16 (2004 & Supp. 2007).