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Business Associations

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by Stuart E. Walker*

I. INTRODUCTION

This Article surveys noteworthy decisions involving corporations and limited liability companies issued by the Georgia Court of Appeals between June 1, 2019, and May 31, 2020,[1] summarizes an amendment to the Georgia Business Corporation Code and an amendment to the Georgia Nonprofit Corporation Code passed during the 2020 session of the General Assembly, and says a brief word about the status of the new State-wide Business Court.[2]

As far as appellate decisions are concerned, this was a somewhat thin survey period in the area of business associations. But the handful of cases treated here have some lessons to teach the interested practitioner.

II. NOTEWORTHY CASES

A. The Georgia Court of Appeals Confirms that the Effective Date of a Change in the Location of the Registered Office of a Georgia LLC—and thus a Change in the Location of the LLC's County of Residence for Purposes of Venue—Cannot be Earlier than the Date that the Document Effecting the Change is Marked "Received" by the Secretary of State.

Suppose an LLC wants to change the location of its registered office from DeKalb County to Dawson County—thereby changing its county of residence and the place where it is subject to venue in civil proceedings generally[3]—and

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[1] For an analysis of business associations law during the prior survey period, *see* Stuart E. Walker, *Business Associations*, *Annual Survey of Georgia Law*, 71 MERCER L. REV. 15 (2019).

[2] During the survey period, the Georgia Supreme Court did not decide any appeals germane to the subject matter of this survey article. As in previous years, I have omitted decisions of the United States Court of Appeals for the Eleventh Circuit and orders of the federal district courts in the Northern, Middle, and Southern Districts of Georgia.

[3] O.C.G.A. § 14-2-510(b)(1) (noting that a corporation is "deemed to reside . . . in the county of this state where the corporation maintains its registered office"); O.C.G.A. § 14-11-1108(b) ("[T]he residence of a limited liability company . . . shall be determined in accordance with Code Section 14-2-510 as though such limited liability company . . . were a corporation.")

it does so by filing an annual registration with the Secretary of State.[4] Suppose also that the LLC signs and submits the annual registration document on February 27, but it is not received and filed by the Secretary of State's office until March 15. Now imagine that, as fate would have it, on March 14 a lawsuit is filed against the LLC in DeKalb County. Question: Based on the location of its registered office, where does venue lie against the LLC—in DeKalb or Dawson County? Answer: DeKalb County.

The Georgia Court of Appeals answered this question in *Andrews v. Blue Ridge NH Associates, LLC*,[5] a case in which the administrator of a decedent's estate brought tort and other claims[6] against two corporations, two LLCs, a limited partnership, and other defendants arising out of the alleged negligent treatment of the decedent at two nursing home facilities.[7] The suit was filed on March 14, 2018, in the State Court of DeKalb County, and venue was based on the allegation that one of the LLCs—Blue Ridge NH Associates, LLC (Blue Ridge Associates)—maintained its registered office in DeKalb County and that the remaining defendants, together with Blue Ridge Associates, were joint tortfeasors, making venue appropriate over all the defendants in DeKalb County.[8]

Blue Ridge Associates and other defendants moved to dismiss the suit for lack of venue in DeKalb County, arguing that Blue Ridge Associates had already changed the location of its registered office from DeKalb County to Dawson County as of February 27, 2018—15 days before the suit was filed.[9] As support for its argument, Blue Ridge Associates tendered to the trial court at an evidentiary hearing a copy of the annual registration that it submitted to the Secretary of State's office to effect the change in location of its registered office. The annual registration was signed by the manager of Blue Ridge Associates on February 27, 2018, and it contained a notation near the top, stating information on record as of: 2/27/2018.[10] But a stamp on the registration reflected that it was physically received by the Secretary of State's office at 1:07 p.m. on March 15, 2018.[11]

The trial court granted the motion to dismiss for lack of venue, concluding that the location of the registered office changed as of February 27 (the date the

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[4] *See* O.C.G.A. § 14-11-1103 (2020).

[5] 353 Ga. App. 75, 836 S.E.2d 197 (2019).

[6] The plaintiff's complaint alleged "claims for professional and ordinary negligence, premises liability, violations of the Omnibus Budget Reconciliation Act, negligent hiring, training, and supervision, and wrongful death." *Id.* at 76, 836 S.E.2d at 200.

[7] *Id.* at 75, 836 S.E.2d at 200.

[8] *Id.* at 76–7, 836 S.E.2d at 200–01. *See* O.C.G.A. § 9-10-31(b) ("[J]oint tort-feasors . . . residing in different counties [] may be subject to an action as such in the same action in any county in which one or more of the defendants reside.")

[9] *Andrews,* 353 Ga. App. at 76, 836 S.E.2d at 201.

[10] *Id.* at 84, 836 S.E.2d at 206.

[11] *Id.*

annual registration was signed and submitted) and that, as a result, Blue Ridge Associates resided and was subject to venue in Dawson County (not DeKalb County) at the time the suit was filed.[12]

On appeal, the court of appeals reversed that determination, holding that the effective date of the change in location of the registered office from DeKalb to Dawson County was March 15, 2018—one day *after* the suit was filed.[13] The court cited what it identified as the "clear and unambiguous language" of O.C.G.A. § 14-11-206(e)(1),[14] which provides, as a general rule, that "a document accepted for filing [by the Secretary of State] is effective: [a]t the time of filing on the date it is filed, *as evidenced by the Secretary of State's date and time endorsement on the original document*."[15] The court noted that the statute contains two exceptions to that general rule,[16] the first of which permits an LLC to state the specific *time of day* that a document is to become effective "on the date it is filed"[17] and the second of which permits an LLC to designate a "delayed effective *time and date*."[18] But the court underscored that "nothing in O.C.G.A. § 14-11-206 permits a party to specify an effective date for a filed document that *predates* the date of filing with the Secretary of State."[19] Thus, under the Georgia Limited Liability Company Act (LLC Act),[20] the earliest date that a document filed with the Secretary of State's office can become effective is the date on which it is marked filed (or received) by the Secretary of State's office.[21]

Consistent with a long line of precedent, the court of appeals reiterated that a post-filing change in a party's county of residence does not affect venue, which is fixed as of the date that a complaint is filed, so long as the complaint and summons are served on the party within a reasonable period of time.[22] As a result of the reversal by the court of appeals, Blue Ridge Associates and the other defendants were subject to venue in DeKalb County, and the suit was remanded to the trial court with instructions.[23]

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[12] *Id.* at 85, 836 S.E.2d at 206.

[13] *Id.* at 86, 836 S.E.2d at 207.

[14] O.C.G.A. § 14-11-206(e)(1) (2020).

[15] *Andrews*, 353 Ga. App. at 85, 836 S.E.2d at 206 (emphasis added) (2020).

[16] *Id.* at 86, 836 S.E.2d at 207.

[17] O.C.G.A. § 14-11-206(e)(2) (2020).

[18] O.C.G.A. § 14-11-206(f) (2020).

[19] *Andrews*, 353 Ga. App. at 86, 836 S.E.2d at 207.

[20] O.C.G.A. §§ 14-11-100 to 14-11-102 (2020).

[21] Note that the same is true with respect to documents filed by corporations under the Georgia Business Corporation Code. *See* O.C.G.A. § 14-2-123 (2020).

[22] 353 Ga. App. at 84, 836 S.E.2d at 206.

[23] *Id.* at 88, 836 S.E.2d at 208. Blue Ridge Associates and other defendants had alternatively moved the trial court, on the basis of *forum non conveniens* under O.C.G.A. § 9-10-31.1, to transfer the suit to another county (Whitfield County) where venue was otherwise proper, and the trial court granted that motion based in part on its conclusion that the suit lacked a sufficient connection to DeKalb County because none of the defendants resided in DeKalb County. But the court of appeals vacated that portion of the court's order and remanded for reconsideration of the *forum*

B. The Georgia Court of Appeals Holds that Managers of an LLC (who are also Members) do not Breach Any Fiduciary Duties to LLC Members Simply by Voting Their Membership Interests on a Matter Coming Before the Members for a Vote of the Membership, and the Court Reiterates that Non-Manager Members of a Manager-Managed LLC Owe No Fiduciary Duties to the LLC or to its Members.

Suppose there is an LLC consisting of five members. In addition to owning membership interests in the LLC, all five members are employed by the LLC, and two of the members also serve as co-managers of the LLC. The LLC's operating agreement says that the fiduciary duties owed by the co-managers to the LLC and to its members extend only to their acts (or omissions) taken (or not taken) "in the management of" the Company, and no further. The operating agreement permits the employment of the five members to be terminated for cause or without cause, so long as at least a requisite percentage of the membership interests held by the five members vote in favor of the termination. Assume that four members vote to terminate the fifth member's employment, that the four members hold the votes necessary to take that action under the operating agreement, and that the four voting members include the two co-managers.

Now imagine that the member whose employment was terminated files suit against all four members of the LLC, alleging, among other things, that the members breached their fiduciary duties toward him by voting to terminate his employment. Question: how should the terminated member's fiduciary-duty claims be resolved? Answer: the claims against the co-managers fail on the merits, and the claims against the non-manager members fail to state a claim for relief.

The court of appeals answered this question in *Colquitt v. Buckhead Surgical Associates, LLC*.[24] In January 2013, five medical doctors—Colquitt, Skandalakis, Smith, McGill, and Procter—formed a medical practice, Buckhead Surgical Associates, LLC (BSA), and an affiliated surgery center, Buckhead Surgery Center, LLC (BSC). Skandalakis and Smith were appointed to serve as co-managers of BSA and BSC. All five doctors, in addition to owning membership interests in BSA, were employed by BSA.[25]

About two and a half years later, Colquitt decided that he wanted to leave the medical practice and, through counsel, sent a letter to McGill, Skandalakis, Procter, and Smith, demanding a buyout of his membership interest in BSA.[26]

non conveniens analysis, instructing the trial court to consider the fact that at least one defendant resided in DeKalb County at the time the suit was filed.

[24] 351 Ga. App. 525, 831 S.E.2d 181 (2019).

[25] *Id.* at 526, S.E.2d 181–83. It is not clear from the court's opinion whether the five doctors were also employed by BSC.

[26] *Id.* at 526, 831 S.E.2d at 183. It is not clear from the court's opinion whether Colquitt also demanded a buyout of his membership interest in BSC, although presumably (note: author's

Four days later, however, McGill, Skandalakis, Procter, and Smith—in accordance with the BSA operating agreement—voted their membership interests in favor of terminating Colquitt's employment with BSA. On the same day they informed Colquitt that his employment had been terminated for cause and that he no longer had access to the BSA premises or to its computer system.[27]

Colquitt thereafter sued BSA, BSC, Skandalakis, Smith, McGill, and Procter, alleging, among other things, claims against Skandalakis, Smith, McGill, and Procter for breach of fiduciary duty. McGill and Procter moved under O.C.G.A. § 9-11-12(b)(6)[28] to dismiss the fiduciary-duty claims against them for failure to state a claim upon which relief could be granted.[29] The trial court granted both motions and dismissed the claims against McGill and Procter. Skandalakis and Smith moved under O.C.G.A. § 9-11-56[30] for summary judgment on the fiduciary-duty claims alleged against them.[31] The trial court granted both motions and entered summary judgment for Skandalakis and Smith. Colquitt appealed all four rulings.[32] The court of appeals affirmed.[33]

With respect to the fiduciary-duty claims alleged against McGill and Procter, the court of appeals noted that the LLC Act expressly provides that non-manager members (like McGill and Procter) of a manager-managed LLC (like BSA) do not owe *any* fiduciary duties to the LLC or to the LLC's members.[34]

With respect to the fiduciary-duty claims alleged against Skandalakis and Smith, the court of appeals first noted that the LLC Act authorizes members of an LLC (either in the LLC's articles of organization or in a written operating agreement) to modify or restrict the scope of any fiduciary duties generally owed by a manager to the LLC and its members.[35] The court then highlighted a provision in the operating agreements of both BSA and BSC, which said that the fiduciary duties of the co-managers could be based only on "acts or omissions *in the management of the Company*."[36]

The court concluded that Colquitt's fiduciary-duty claims based on the termination of his employment failed as a matter of law because Skandalakis and Smith did not terminate Colquitt's employment in their managerial capacities (as co-managers of BSA) but rather in their capacities as voting

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assumption) Colquitt would not be permitted to remain a member of BSC if he were no longer a member of BSA.

[27] *Id.*

[28] O.C.G.A. § 9-11-12(b)(6) (2020).

[29] *Colquitt*, 351 Ga. App. at 526, 831 S.E.2d at 838.

[30] O.C.G.A. § 9-11-56 (2020).

[31] *Colquitt*, 351 Ga. App. at 526, 831 S.E.2d at 838.

[32] *Id.*

[33] *Id.* at 531, 831 S.E.2d at 186.

[34] *Id.* (citing O.C.G.A. § 14-11-305(1)).

[35] *Id.* at 527, 831 S.E.2d at 183–84. *See* O.C.G.A. § 14-11-305(4)(A) (2020).

[36] *Colquitt*, 351 Ga. App. at 528, 831 S.E.2d at 184.

members of the LLC.[37] In this regard, Skadalakis and Smith stood on the same footing as McGill and Procter.[38] As the court put it: "[T]hey [Skandalakis and Smith] simply participated in a vote—along with other members—to terminate Colquitt's employment. The act of voting was not an act in the management of the company."[39] The court continued: "[U]nder the terms of the operating agreement, participation in a member vote to terminate another member is not deemed a managerial act or otherwise limited to the managing members; it was instead an act that any member of the company was authorized to take."[40] As a result, and as a matter of law, "Smith and Skandalakis did not breach any managerial fiduciary duty by merely taking action expressly authorized by the operating agreement."[41]

C. Applying Delaware Law, the Georgia Court of Appeals Holds that the Chairman of a Board of Directors of an LLC, Who Also Holds the Majority of Votes on the Board, Can be Liable for Breaching his Fiduciary Duties to the LLC's Minority Members by Unilaterally Refusing to Entertain Reasonable Proposals to Buy the LLC, Even if the Proposals are not Binding Offers.

Suppose a person owns a minority interest in a five-member LLC organized under Delaware law and that he is also the LLC's chief executive officer. The LLC is managed by a board of directors, and the chairman of the board, while not a member of the LLC, holds a majority of the votes on the board under the terms of the LLC's operating agreement and thus effectively manages the LLC's affairs.

Now suppose that two private equity firms express to the board chairman an interest in acquiring the LLC for several hundreds of millions of dollars. The prospective acquirors engage in extensive due diligence and submit letters of intent setting out the general terms of a proposed acquisition. Nevertheless, the board chairman abruptly stops negotiating with both prospective acquirors and terminates further discussions with them—all without consulting the board of directors, the LLC's CEO, or the LLC's minority owners. Question: can the board chairman be held liable for breaching his fiduciary duties to the minority owners based on the way he negotiated with the prospective acquirors, even though the letters of intent presented to him were not binding and thus not capable of formal acceptance? Answer: yes.

The court of appeals answered this question in *Miller v. Lynch* (*Miller II*)[42] which involved FiberLight, LLC (FiberLight), a company organized under

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[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 529, 831 S.E.2d at 184.

[42] 351 Ga. App. 361, 830 S.E.2d 749 (2019). An earlier appeal arising out of the same suit came before the court of appeals in 2017. *See Miller v. FiberLight, LLC* (*Miller I*), 343 Ga. App. 593, 808

Delaware law that furnished fiberoptic services to technology companies and consisted of five members—Michael Miller (about .5%); Kevin Coyne (about .5%); Ron Kormos (about .5%); Thermo Telecom Partners, LLC (about 26%); and NT Assets, LLC (about 72%).[43] Miller was the chief executive officer of FiberLight. Jim Lynch, not a member, served as chairman of FiberLight's board of directors. Under FiberLight's operating agreement, Lynch was entitled to exercise a majority of votes on the board and thus effectively controlled FiberLight's affairs.[44]

After FiberLight terminated his employment as CEO and reacquired his membership interests, Miller sued Lynch and FiberLight's majority owners, alleging that they had, in three discrete ways, breached fiduciary duties owed to Miller as a minority owner under Delaware law.[45] Miller alleged that one of the ways in which Lynch had breached fiduciary duties owed to him was that Lynch, without consulting or communicating with FiberLight's minority members or its board of directors, unilaterally rejected acquisition offers submitted to FiberLight by two private equity firms—General Atlantic and Summit, LLC—interested in purchasing FiberLight for several hundreds of millions of dollars.[46] The defendants moved for summary judgment on this claim and argued that Lynch could not have formally accepted them because the offers submitted to Lynch were not binding and that, as a result, Lynch's rejection did not breach any duty owed to Miller or the other minority owners. Accepting that argument, the trial court granted summary judgment against Miller on this fiduciary-duty claim (and on all his other claims).[47] Miller appealed the summary judgment entered against him and the court of appeals reversed the grant of summary judgment on the fiduciary-duty claim based on Lynch's alleged rejection of the acquisition offers, concluding: "[W]e find that whether the defendants rejected offers to purchase FiberLight, thereby breaching default fiduciary duties, depends on disputed issues of material fact."[48] Following the reversal, the case returned to the trial court, and Miller's fiduciary-duty claim based on Lynch's negotiations with the two prospective acquirors proceeded to trial.[49]

At trial, Miller testified that in April 2011, Lynch announced that a number of prospective acquirors had submitted proposals to purchase FiberLight. One

S.E.2d 75 (2017). In Miller I, the court reversed the grant of summary judgment in favor of the defendants and remanded the case for trial. At the close of the evidence at trial, the defendants moved for a directed verdict, which the trial court granted, giving rise to *Miller II*, discussed in the text above.

[43] *Miller I*, 343 Ga. App. at 593, 595, 808 S.E.2d at 78, 79.

[44] *Id.* at 593, 808 S.E.2d at 78.

[45] *Id.* at 598, 808 S.E.2d at 81.

[46] *Id.* at 605–06, 808 S.E.2d at 86.

[47] *Id.* at 593, 606, 808 S.E.2d at 78, 86.

[48] *Id.* at 606, 808 S.E.2d at 86.

[49] *See Miller II*, 351 Ga. App. at 361–62, 830 S.E.2d at 751.

proposal (for $325 million) was from a private equity firm called General Atlantic, and one (for $320 million) was from a private equity firm called Summit, LLC.[50] General Atlantic submitted a nonbinding letter of intent in June 2011, which spelled out many details of the proposed transaction and "explained the assumptions on which its valuation was based, its financing arrangements, and the projected timing for the acquisition."[51] Additionally, "General Atlantic also indicated it had received investment committee approval, subject to due diligence and 'customary closing conditions.'"[52] Lynch himself testified at trial that General Atlantic's proposal was acceptable and very strong.[53] Nevertheless, in the middle of the negotiation process, Lynch sent an e-mail to various FiberLight personnel saying that General Atlantic had changed its offer price and that, as a result, we are done—meaning that Lynch had terminated all further discussions with General Atlantic.[54] Miller testified at trial that Lynch did not tell Miller, the board, or the other minority members the amount of the reduced price offered by General Atlantic or otherwise consult with them about terminating the negotiations.[55]

Like General Atlantic, Summit also submitted a letter of intent outlining its proposal to acquire FiberLight.[56] Summit's letter of intent, like General Atlantic's, "presented an investment summary and identified its source of funds for the acquisition and anticipated closing conditions."[57] But again, Lynch, in the middle of the negotiation process, told FiberLight personnel that Summit had changed its offer price and that, as a result, "we're not going forward with it"—meaning that, as with General Atlantic, Lynch had unilaterally scuttled further negotiations and terminated all discussions with Summit.[58] And as before, Lynch did not consult Miller, the board, or the other minority members before terminating the negotiations with Summit.[59]

At the close of the evidence, the defendants moved for a directed verdict, echoing their earlier summary-judgment arguments, again asserting that they were entitled to prevail on Miller's fiduciary-duty claim because the evidence presented at trial established that the offers submitted by General Atlantic and Summit were nonbinding (and therefore not capable of acceptance). The defendants contended that if the offers were incapable of being formally accepted, then failing to accept them could not, as a matter of law, have

[50] *Id.* at 362–63, 830 S.E.2d at 752.
[51] *Id.* at 363, 830 S.E.2d at 752.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 363, 365, 830 S.E.2d at 752–53.
[56] *Id.* at 363, 830 S.E.2d at 752.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 365, 830 S.E.2d at 753.

constituted a breach of any fiduciary duty.[60] Accepting that argument, the trial court directed a verdict in favor of the defendants, finding that "because there was no 'binding offer,' there was nothing to accept, and, resultantly, there was no breach."[61] Miller appealed that ruling (and others).[62]

The court of appeals, based on the evidence presented at trial and on Miller's theory of the case, disagreed with the trial court's narrow view of what could qualify as a breach of fiduciary duty.[63] The court of appeals acknowledged that Miller's complaint highlighted Lynch's rejection of at least one *offer* as evidence of his breach of duty and also acknowledged that Miller "did not specifically allege a theory regarding terminated sale negotiations."[64] Nevertheless, the court observed that Miller consistently argued throughout the trial that it was not simply Lynch's failure to accept binding offers that constituted a breach of fiduciary duty.[65] Rather, Miller insisted more broadly that Lynch breached his fiduciary duty by failing to negotiate in good faith with General Atlantic and Summit, as evidenced by Lynch's unilateral termination of the negotiations without consulting the board or FiberLight's members.[66] Miller, the court stressed, "repeatedly contended that [Lynch] breached fiduciary duties to him by shutting down or cutting off negotiations with the companies that had demonstrated interest in purchasing FiberLight" and that "Lynch made such decisions without consulting either the board of directors or FiberLight's minority owners."[67] Although this bad-faith-negotiation theory was not specifically articulated in Miller's complaint, the court nevertheless permitted Miller's pursuit of this broader theory at trial because it was generally consistent with his complaint and because the defendants did not claim or demonstrate that they were in any way prejudiced by Miller's focus on the nature of the negotiations rather than on the mere rejection of the proposals.[68]

The court noted that under Delaware law "one who manages an LLC can breach fiduciary duties to minority members of the LLC by his 'failure to negotiate with an interested buyer in good faith—this conduct is governed by traditional fiduciary duties of loyalty and care.'"[69] And because the trial record revealed that there was "evidence at trial, however slight, that Lynch was not negotiating with interested buyers [General Atlantic and Summit] in good

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60 *Id.* at 364, 830 S.E.2d at 753.

61 *Id.*

62 *Id.*

63 *Id.* at 366, 830 S.E.2d at 754.

64 *Id.* at 365, 830 S.E.2d at 754.

65 *Id.* at 365, 830 S.E.2d at 753–54.

66 *Id.*

67 *Id.* at 365, 80 S.E.2d at 753.

68 *Id.* at 365, 830 S.E.2d at 754.

69 *Id.* at 365, 830 S.E.2d at 753 (citations and brackets omitted).

faith,"[70] the court of appeals concluded that the trial court erred in directing a verdict for the defendants on Miller's fiduciary-duty claim and thus reversed the trial court's judgment and remanded the case for further proceedings.[71]

D. The Georgia Court of Appeals Confirms that a Shareholder who Votes Against a Corporate Acquisition but who Does Not Pursue His Dissenters' Rights Remedy is Barred From Thereafter Suing the Corporation, its Board of Directors, and its Officers to Challenge the Acquisition or the Value of the Acquisition Consideration Based on Claims for Breach of Fiduciary Duty, Breach of Contract, and Fraudulent Misrepresentation.

Suppose you are a shareholder of a target corporation that is entertaining two competing acquisition proposals. Under one proposal (Proposal A), which values the target corporation at $47.5 million, the acquiror would purchase a 56% equity ownership interest in the target and all the shareholders of the target would retain their shares in the corporation. Under the other proposal (Proposal B), which values the target corporation at $45 million, the acquiror would purchase a 63% equity ownership interest in the target, most of the target's shareholders would receive cash consideration in exchange for selling their shares, and only a select few of the target's shareholders (but not you) would retain their shares in the corporation. You prefer Proposal A over Proposal B.

Now suppose that the board of directors of the target corporation votes to pursue Proposal B, under which your shares are cashed out, and you will have no further ownership. The shareholders vote in favor of Proposal B. You vote against it because you are dissatisfied with the value you will be paid for your shares, but you take no further action and the acquisition is consummated. Afterward, you sue the corporation, the chief executive officer, the board members, and various of the employees, alleging, among others, claims for breach of contract, breach of fiduciary duty, and fraudulent misrepresentation arising out of the acquisition. Question: can you maintain these claims in this lawsuit? Answer: no, the claims are barred because you failed to comply with the dissenters' rights statute—which provides that your sole and exclusive remedy is to be paid the fair value of your shares, either through an agreement with the corporation or by means of a summary court proceeding initiated for

[70] *Id.* at 366, 830 S.E.2d at 754.

[71] *Id.* The defendants raised other defenses to the fiduciary-duty claim, including that Lynch's decisions to terminate negotiations with General Atlantic and Summit were insulated by the business judgment rule, that Miller's claims were barred by an exculpatory clause in FiberLight's operating agreement, and that Miller could not prove any damages resulting from the alleged breach. The directed verdict in favor of the defendants effectively mooted those arguments, which, as a result, the trial court did not address. The court of appeals declined to address those arguments in the first instance, concluding (interestingly) that the circumstances did not warrant applying the usual rule that a judgment should be affirmed on appeal if it is right for any reason.

that sole purpose—and your claims do not fall within any exception to the statute's exclusive-remedy provision.

SDM Investments Group, LLC v. HBN Media, Inc.[72] involved a company called HBN Media, Inc. (HBN), which was incorporated in 2010 by Duane LeGate, who became its CEO. In 2011, SDM Investment Group, LLC (SDM) invested $22,000 into HBN to become one of its founding shareholders. HBN experienced liquidity problems from the outset, and by 2014 LeGate had hired an investment bank to help find an acquiror to buy HBN.[73]

In June 2014, HBN received an offer from Serent Capital, L.P. (Serent) to acquire 62.9% of HBN's outstanding stock. Under the proposal, many of HBN's existing shareholders would receive cash in exchange for their shares, but three shareholders—LeGate and two others, but not SDM—would be allowed to retain their shares in HBN after Serent's acquisition of its controlling interest. Serent valued HBN at $45 million and proposed to pay HBN's shareholders approximately $33 million as consideration for Serent's controlling interest.[74]

But Serent's offer was not the only one presented to HBN's board of directors. Another firm, Frontier Capital, also submitted a proposal to acquire a controlling interest in HBN. Frontier Capital valued HBN at $47.5 million and proposed to acquire 56.3% of HBN's outstanding stock, while allowing *all* of HBN's existing shareholders—including SDM—to retain their shares in HBN and to continue as HBN shareholders after Frontier Capital's acquisition.[75]

After considering both proposals, HBN's board of directors voted to pursue the one presented by Serent. HBN's board sent a letter to HBN's shareholders, which explained the terms of Serent's proposal and recommended a vote in favor of it. HBN's shareholders voted in favor of Serent's proposal, and SDM voted against it but took no further action with respect to the transaction. Less than two years after Serent acquired its interest in HBN, Fidelity National Financial, Inc. acquired HBN for nearly $230 million.[76]

Shortly after HBN's acquisition by Fidelity National, SDM (whose shares in HBN were cashed out before the sale to Fidelity) sued HBN, LeGate, and a number of other HBN officers and employees, alleging claims for breach of contract, breach of fiduciary duty, and fraudulent misrepresentation. In particular, SDM alleged that Serent's acquisition resulted in the unfair dilution of SDM's stock ownership in HBN and that LeGate and other board members committed fraud and made material misrepresentations concerning the terms of the transaction and the amount of money that SDM received for its shares.

[72] 353 Ga. App. 281, 836 S.E.2d 193 (2019).
[73] *Id.* at 282, 836 S.E.2d at 194–95.
[74] *Id.* at 282, 836 S.E.2d at 195.
[75] *Id.*
[76] *Id.* at 282–83, 836 S.E.2d at 195.

The defendants moved for summary judgment, and the trial court granted summary judgment for them on all of SDM's claims.[77]

The court of appeals affirmed the summary judgment, concluding that SDM was barred from pursing any of its claims because it had not complied with the exclusive remedy available to it: the demand for payment of the fair value of its shares under O.C.G.A. §§ 14-2-1301 to 14-2-1332,[78] the dissenters' rights statute.[79] What does this mean, and why is it an important principle of corporate law to know?

First, a little background. Certain corporate actions—listed in O.C.G.A. § 14-2-1302(a)(1)[80]—create in a minority shareholder who opposes the action the right to dissent from it, vote against it, tender his shares for sale to the corporation, and receive payment for the fair value of those shares.[81] This is the objecting shareholder's sole remedy. He cannot block the transaction. As the comments to O.C.G.A. § 14-2-1302 explain:

> The theory underlying [the dissenters' rights statute] is as follows: when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous . . . . Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss.[82]

If a dissenting shareholder follows the procedural steps prescribed by the statute but is dissatisfied with and rejects the value that the corporation proposes to pay for his tendered shares, then the corporation is thereafter required to commence in the superior court where its registered agent is located "a nonjury equitable valuation proceeding"[83] in which the court must determine and then enter a "judgment for the amount which the court finds to be the fair value of [the shareholder's] shares, plus interest to the date of judgment."[84]

Except in three narrow circumstances,[85] the right of a dissenting shareholder to be paid the "fair value" of his shares (whether through

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[77] *Id.* at 283–84, 836 S.E.2d at 195–96.

[78] O.C.G.A. §§ 14-2-1301 to 14-2-1332 (2020).

[79] *SDM Investments Group, LLC*, 353 Ga. App. at 284, 836 S.E.2d at 196.

[80] O.C.G.A. § 14-2-1302(a)(1) (2020). "Subsection (a) [of O.C.G.A. § 14-2-1302] establishes the scope of a shareholder's right to dissent (and his resulting right to obtain payment for his shares) by defining the transactions with respect to which a right to dissent exists." Cmt. to O.C.G.A. § 14-2-1302 (2020).

[81] O.C.G.A. § 14-2-1323(c); O.C.G.A. § 14-2-1325(a) (2020).

[82] Cmt. to O.C.G.A. § 14-2-1302 (2020).

[83] O.C.G.A. § 14-2-1330(b) (2020).

[84] O.C.G.A. § 14-2-1330(e) (2020).

[85] The three circumstances are: (1) the failure of the corporation to comply with the procedural requirements of the Georgia Business Corporation Code; (2) the failure of the corporation to comply with its bylaws or its articles of incorporation; and (3) the use of fraudulent and deceptive

negotiation with the corporation or through the judicial appraisal proceeding) is the shareholder's sole and exclusive remedy, meaning that a shareholder is barred from filing a lawsuit against the corporation or its officers to challenge the corporate action that created his right to dissent.[86] This exclusivity principle spelled the death of SDM's lawsuit against HBN and LeGate.[87]

In affirming the trial court's grant of summary judgment against SDM, the court of appeals characterized all of SDM's claims as "simply attacks on the price SDM ultimately received for its shares and/or the terms of the buyout, rather than claims for actual fraud that would have allowed it to circumvent the exclusive remedy of the dissenters' rights statute."[88] SDM's claims, in other words, did not fall within any exception to the statutory bar on lawsuits challenging merger transactions. In so concluding, the court of appeals applied the following practical rule announced by the Georgia Supreme Court in *Grace Bros., Ltd. v. Farley Industries, Inc.*:[89] if a shareholder's claim, at bottom, is simply that he "would have been paid more money per share if defendants had not breached their fiduciary duty to seek consummation of the merger agreement"[90]—or, stated differently, if his claim "boils down to nothing more than a complaint about stock price"[91]—then the shareholder's exclusive remedy is the appraisal process set forth in the dissenters' rights statute and he is barred from challenging the merger in a separate lawsuit.[92] Because SDM

means to obtain the shareholder vote necessary to approve the corporate action. *See* O.C.G.A. § 14-2-1302(b). The comments to O.C.G.A. § 14-2-1302 underscore the exclusivity of the dissenters' rights statutory provisions: "Subsection (b) establishes dissenters' rights as the *exclusive remedy* of this article . . . . [T]he fact that the merger might be argued to be unlawful as a breach of the directors' duty of care is not ground for equitable relief at the instance of a shareholder. The dissenters' rights remedy is the exclusive remedy unless the transaction is not in compliance with the requirements of the Code, or the vote required to approve the action was obtained by fraudulent and deceptive means." (emphasis added).

[86] Grace Bros., Ltd. v. Farley Industries, Inc., 264 Ga. 817, 820–21, 450 S.E.2d 814, 817 (1994) ("The statutory appraisal remedy is exclusive . . . . It permits a dissenting shareholder to be paid the fair value of his shares and preempts any other remedy where the claim is essentially one regarding the price the shareholder is to receive for his shares.").

[87] *See SDM Investment Group, LLC*, 353 Ga. App. 281, 836 S.E.2d 193.

[88] *Id.* 353 Ga. App. at 284, 836 S.E.2d at 196.

[89] 264 Ga. 817, 450 S.E.2d 814 (1994).

[90] *Id.* at 821, 450 S.E.2d at 817.

[91] *Id.*

[92] The 1989 comments to O.C.G.A. § 14-2-1302 emphasize that the so-called fraud exception to the exclusive remedy of the fair value appraisal process—that "the vote required to obtain approval of the corporate action was obtained by fraudulent and deceptive means," O.C.G.A. § 14-2-1302(b)—requires "'actual fraud,' involving traditional notions of deception, [to] permit[] [a] collateral attack on the corporate action." But "claims that a fiduciary has acted unfairly" are not sufficient, according to the comments, "to litigate valuation issues that are appropriately disposed of in appraisal proceedings." *See Grace Bros. Ltd.*, 264 Ga. at 820 n.11, 450 S.E.2d at 817 n.11.

failed to exercise its dissenters' rights, the claims it later alleged against SDM, LeGate, and others failed as a matter of law.[93]

E. The Georgia Court of Appeals Holds that Members who Formerly Owned a Controlling Interest in an LLC May Pursue a Direct (Rather than Derivative) Action Against an LLC Manager who is Alleged to Have Breached His Fiduciary Duties by Intentionally Diluting the Members' Controlling Interest by Improper Means.

Suppose that Carl and his business partner, Tom, form an LLC to provide medical devices to low-income customers. You and Tom own a controlling interest in the company, and Tom serves as its sole manager. In need of cash for the growing company, Carl solicits loans from an acquaintance and successful entrepreneur, Bill, who promises to loan money to the LLCs until they are in a position to be sold to an acquiror for tens or hundreds of millions of dollars. After Bill acquires an ownership interest in the company, however, he concocts an elaborate scheme to seize control of the company from Carl and Tom, to benefit himself personally at the expense of Carl and Tom (but not other members of the company), and removes Tom as a manager of the company through deceptive means.

Question: if, as a result of Bill's conduct, Carl and Tom sue Bill for breaching the company's operating agreement and for breaching the fiduciary duties imposed on Bill as a manager of the company, can Carl and Tom pursue those claims in a direct action in their names for their individual benefit, or must they assert them in a derivative action in the name of the company for the benefit of the company and, indirectly, all the company's members? Answer: because the harms suffered by Carl and Tom are distinct from any harms to the company itself and were not suffered by all the company's members, Carl and Tom may pursue the claims individually in a direct action for their own benefit.

The court of appeals answered this question in *TMX Finance, LLC v. Goldsmith*.[94] Dr. Manning M. Goldsmith, III formed ICOT Hearing Systems, LLC (ICOT Hearing) to provide inexpensive hearing aids to consumers. Goldsmith's business partner, Jason Jue, served as the sole manager of ICOT Hearing. ICOT Hearing was a wholly owned subsidiary of ICOT Holdings, LLC (ICOT Holdings), a company in which Goldsmith and Jue owned a majority ownership interest.[95]

Goldsmith and Jue wanted to accelerate the growth of the ICOT companies so that they could be sold for tens or hundreds of millions of dollars, but they

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[93] *SDM Investment Group, LLC*, 353 Ga. App. at 197, 836 S.E.2d at 284.

[94] 352 Ga. App. 190, 833 S.E.2d 317 (2019).The appeal was from the denial of the defendants' motions to dismiss the plaintiffs' complaint (or, alternatively, for judgment on the pleadings). The facts recounted in the text above (and in the opinion of the court of appeals) are as alleged in the plaintiffs' complaint because in resolving motions to dismiss and motions for judgment on the pleadings, courts must accept as true the factual allegations in the complaint.

[95] *Id.* at 190–91, 833 S.E.2d at 321–22.

knew that in order to do so the companies would require more money than they were currently generating. For financial help they turned to Tracy Young, the founder of a family of title-pawn companies (TitleMax, etc.) and other businesses. In August 2015, Young began loaning money to the ICOT companies, and Young assured Goldsmith and Jue that he would continue doing so.[96]

In March 2016, Goldsmith, Jue, Young, and Young's limited liability company, TY ICOT Investments, LLC (TY Investments), entered into a written agreement under which Young agreed to loan additional money to the ICOT companies and to secure two existing bank loans to ICOT Hearing in exchange for the acquisition by TY Investments of membership units in ICOT Holdings and the acquisition by TY Investments of options to buy additional membership units in ICOT Holdings in the future. Goldsmith and Jue still retained a majority ownership interest in ICOT Holdings although Young (through TY Investments) became a member of ICOT Holdings.[97] At the same time, an amended operating agreement for ICOT Holdings was signed, under which the affairs of ICOT Holdings would be managed by a three-member board of managers. Under the operating agreement, Jue and Young would serve as two of the three managers and the third would be proposed by Jue and approved by TY Investments.[98]

In October 2016, two reputable firms each expressed a willingness to invest capital into ICOT Holdings—thereby improving its financial condition—but Young derailed conversations with those firms because he knew that doing so would cause the liquidity problems that the ICOT companies experienced to persist. Still in need of money to fund the operations of the ICOT companies while a potential sale could be negotiated (for a purchase price between $100 million and $250 million), ICOT Holdings arranged to execute a significant line of credit from United Community Bank. Although both Jue and Young had agreed to personally guarantee the repayment of the line of credit, Young refused to sign his personal guaranty agreement unless Goldsmith and Jue agreed for ICOT Holdings to issue Young warrants to buy additional membership units in ICOT Holdings.[99]

After Goldsmith and Jue refused to issue Young warrants that, if exercised, would increase his ownership interest in ICOT Holdings, Young attended a dinner with the potential acquiror of ICOT Holdings and spoke poorly about the financial condition of ICOT Holdings, thereby causing the potential acquiror to break off further negotiations. Meanwhile, Young insisted that personnel of his title-pawn companies be permitted to inspect the books and financial records of the ICOT companies, not to improve the financial health of the ICOT companies but instead because he wanted his personnel to gain familiarity with

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[96] *Id.* at 191, 833 S.E.2d at 322.

[97] *Id.* at 191–92, 833 S.E.2d at 322–23.

[98] *Id.* at 192, 833 S.E.2d at 323.

[99] *Id.* at 192–93, 833 S.E.2d at 323.

the internal workings of the companies so that they could run them after Young seized control of the companies from Goldsmith and Jue.[100]

To further his takeover attempt, Young proposed that his friend, Robert Pirkle, serve as the third member of the three-person board of managers of ICOT Holdings. Young persuaded Jue to accept Pirkle's appointment under false pretenses, telling Jue (falsely) that United Community Bank had conditioned the line of credit on the appointment of Pirkle. Believing it was critical for ICOT Holdings to get the line of credit in place, Jue agreed to Pirkle's appointment.[101]

Shortly after Pirkle had been appointed to serve as a manager of ICOT Holdings, Young and Pirkle voted to terminate Jue as a manager of ICOT Hearing. As a result, Jue immediately resigned as manager of ICOT Holdings. Young and Pirkle voted, as managers of ICOT Holdings, to issue a $6 million capital call to all members of ICOT Holdings. In accordance with that capital call, each member of ICOT Holdings was required to invest additional money into ICOT Holdings (in exchange for receiving additional membership units) pro rata according to his existing ownership percentage. If a member chose not to meet the capital call, his ownership percentage would be diluted, and the ownership percentages of those members who did contribute additional capital would be correspondingly increased.[102]

At the time the capital call was announced, Young knew that Goldsmith and Jue did not have the financial wherewithal to meet it and that, as a result, their ownership interests in ICOT Holdings would be diluted to virtually nothing as a result. Young and some other members of ICOT Holdings met the capital call. As predicted, Goldsmith and Jue did not. As a result of Young's infusion of capital, he acquired control of ICOT Holdings and, indirectly, of ICOT Hearing—divesting Goldsmith and Jue of the controlling interest they once held. Shortly after acquiring control of the ICOT companies by squeezing out Goldsmith and Jue, Young reinitiated conversations with the potential acquiror he had earlier shunned, this time offering to sell the ICOT companies for $40 million.[103]

Goldsmith and Jue sued Young, TY Investments, and a number of other businesses owned by Young, alleging claims for breach of contract (the ICOT Holdings operating agreement), breach of fiduciary duty, and fraud (among others). They filed the suit as a direct action—meaning that they filed it in their own names seeking damages to compensate them for injuries they personally suffered. They did not bring it as a derivative action on behalf of ICOT Holdings and ICOT Hearing because, in their view, the harms they alleged were not harms suffered by the companies or by all its members.[104]

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[100] *Id.* at 193–94, 833 S.E.2d at 323–24.

[101] *Id.* at 194, 833 S.E.2d at 324.

[102] *Id.* at 194–95, 833 S.E.2d at 324–25.

[103] *Id.* at 195–96, 833 S.E.2d at 325.

[104] *Id.* at 196, 833 S.E.2d at 326. Disputes about whether plaintiffs may bring direct actions against corporate directors and officers or are instead required to sue them in derivative actions

Young and TY Investments moved to dismiss the complaint against them, arguing that "the plaintiffs had failed to plead special injuries entitling them to pursue a direct rather than a derivative action on behalf of ICOT Holdings" and that:

> the plaintiffs failed to allege any injuries they sustained that were different from other members of ICOT Holdings, and thus they were required to adhere to the procedural requirements for filing a derivative action under the Georgia Limited Liability Company Act, O.C.G.A. §§ 14-11-100 to 14-11-102, which the plaintiffs failed to allege they had done.[105]

The trial court denied the motion, and Young and TY Investments succeeded in petitioning for an interlocutory appeal of that ruling.[106]

Whether claims against corporate directors and officers may be brought in a direct action or whether they must be brought in a derivative action turns on the particular injuries alleged in the complaint.[107] The court of appeals thus began its analysis by noting that Goldsmith and Jue alleged in their complaint that "they held a controlling interest in ICOT Holdings, but that Young then ousted them from control by orchestrating an unnecessary funding crisis in breach of his fiduciary duties as a manager of ICOT Holdings and through false representations and omissions about funding and other matters."[108]

The general rule, the court noted, is that these kinds of harms—dilution of ownership and voting power—are not unique to individual members but are instead suffered alike by all members "'where the interests of *all* the shareholders [are] diminished in proportion to their ownership,'" meaning that claims alleging these kinds of harms must ordinarily be brought in a derivative action.[109] The court then explained that an exception to that general rule applies "'in the case where wrongdoers by fraud have seized control of the corporation from the complaining stockholders,'" in which case "'[s]tockholders may maintain an action on an individual basis, as distinguished from a derivative action, against directors, officers, or others for the redress of wrongs constituting a direct fraud upon them.'"[110] The court determined that

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are routinely litigated. *See, e.g.*, Stuart E. Walker, *Business Associations, Annual Survey of Georgia Law*, 71 MERCER L. REV. 15, 23–30 (2019); Stuart E. Walker, *Business Associations, Annual Survey of Georgia Law*, 70 MERCER L. REV. 19, 38–46 (2018).

[105] *Id.* at 196–97, 833 S.E.2d at 326.

[106] *Id.* at 190, 833 S.E.2d at 321.

[107] "[T]he determination of whether a claim is derivative or direct is made by 'looking to what the pleader alleged' . . . [because] it is 'the nature of the wrong alleged and not the pleader's designation or stated intention that controls the court's decision.'" Patel v. 2602 Deerfield, LLC, 347 Ga. App. 880, 884, 819 S.E.2d 527, 532 (2018) (citations and internal quote marks omitted).

[108] *TMX Finance, LLC*, at 197, 833 S.E.2d at 326.

[109] *Id.* at 197–98, 833 S.E.2d at 326.

[110] *Id.* at 198, 833 S.E.2d at 326 (quoting Gieselmann v. Stegeman, 443 S.W.2d 127, 131 (Mo. 1969)). The court cited secondary sources and primary sources from a number of foreign

the intentional seizure of control of ICOT Holdings from Goldsmith and Jue is the situation alleged here and concluded that:

> because of [Goldsmith's and Jue's] loss of control resulting from the alleged breach of fiduciary duties and fraud specifically targeted at them by Young, the alleged harm to [Goldsmith and Jue] was different from that experienced by ICOT Holdings and its minority members, and [they] thus sufficiently pled a special injury.[111]

In addition to alleging fiduciary-duty claims, Goldsmith and Jue based their direct action against Young and TY Investments on claims for breach of contract and wrongful termination: Goldsmith alleged that Young breached the written agreement under which TY Investments became a member of ICOT Holdings and Jue alleged that he was wrongfully terminated as a manager of ICOT Hearing.[112] These claims, the court of appeals determined, alleged injuries unique to Goldsmith and Jue individually and thus were not required to be brought in a derivative action.[113]

Based on its review of the nature of the allegations in Goldsmith's and Jue's complaint, the court of appeals affirmed the trial court's denial of the motion to dismiss.[114]

III. AMENDMENTS TO THE GEORGIA BUSINESS CORPORATION CODE AND THE GEORGIA NONPROFIT CORPORATION CODE.

A. The Business Corporation Code is Amended to Authorize the Creation of Benefit Corporations.

During the 2020 legislative session, the General Assembly passed (and Governor Kemp has since signed into law) House Bill 230,[115] which amends Chapter 2 of Title 14 of the Official Code of Georgia Annotated (the Georgia Business Corporation Code) to authorize the organization of a new kind of for-profit corporation under Georgia law: the benefit corporation.

Benefit corporations were first authorized by legislation enacted in the State of Maryland in 2010 and in the past decade similar laws have been enacted in thirty-seven states and in Washington, D.C., according to the most

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jurisdictions to support its holding that corporate shareholders and LLC members may bring direct actions against those officers or managers who have, by fraudulent means or by breach of their fiduciary duties, wrested control of the corporation or LLC away from them. *Id.* at 198 n.2, 833 S.E.2d at 327 n.2 (collecting authorities).

[111] *Id.* at 198, 833 S.E.2d at 327.

[112] *Id.* at 199, 833 S.E.2d at 327.

[113] *Id.*

[114] *Id.* at 214, 833 S.E.2d at 336.

[115] Ga. H.R. Bill 230, Reg. Sess. (2020).

recent statistics available.[116] Benefit corporations are for-profit companies obligated by statute to meet strict standards of social and environmental performance, accountability, and transparency. Although they may seem like non-profit corporations in some respects, they are not operated solely for charitable purposes, and their for-profit status allows them to attract capital investment unavailable to non-profit corporations. Examples of well-known benefit corporations include Patagonia, Ben & Jerry's, Kickstarter, Warby Parker, and New Belgium Brewing.

Under the new sections of the Georgia Business Corporation Code—O.C.G.A. § 14-2-1801[117]—a benefit corporation is a for-profit corporation whose articles of incorporation state that it is a benefit corporation and that one of its purposes is to pursue a public benefit.[118] A public benefit, in turn, is defined to mean

> a positive effect, or reduction of negative effects, on society, on the environment, or on one or more communities or categories of persons, entities, or interests, other than shareholders in their capacity as shareholders, including effects of an artistic, charitable, cultural, economic, ecological, educational, environmental, literary, medical, religious, scientific, social, or technological nature.[119]

A benefit corporation may identify itself as such by including as part of its corporate name the words benefit corporation or public benefit corporation or the abbreviations "BC" or "PBC."[120] To the extent not inconsistent with the provisions of newly enacted Article 18, all provisions of the Business Corporation Code apply to benefit corporations.[121]

An existing traditional for-profit corporation may amend its articles of incorporation to become a benefit corporation, may transfer its property to a benefit corporation, may engage in a merger or share exchange with a benefit corporation, and may sell all or substantially all of its assets to a benefit corporation; but none of these actions is permissible unless first approved by a two-thirds vote of each class or series of shares of the traditional for-profit corporation—with each class or series voting as a separate voting group—even if the shares do not otherwise have voting rights.[122] Likewise, an existing benefit corporation may amend its articles of incorporation to delete or modify

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[116] *State by State Status of Legislation*, Benefit Corporation, https://benefitcorp.net/policymakers/state-by-state-status?state= (last visited August 11, 2020).

[117] O.C.G.A. § 14-2-1801 (2020).

[118] O.C.G.A. § 14-2-1802(3) (2020).

[119] O.C.G.A. § 14-2-1802(2) (2020).

[120] O.C.G.A. § 14-2-1803 (2020).

[121] O.C.G.A. § 14-2-1801(a) (2020).

[122] O.C.G.A. § 14-2-1805(a) (2020).

its public-benefit provision and may engage of in any of the just-described transactions with a traditional for-profit corporation, subject to the same voting requirements by its shareholders.[123] It is worth noting that the actions described in this paragraph—whether taken by a traditional or a benefit corporation—create dissenters' rights under O.C.G.A. § 14-2-1302.[124]

In addition to the duties generally imposed on them by the Georgia Business Corporation Code, directors of a benefit corporation have a duty to consider the corporation's public benefit when managing or directing the corporation's affairs and a duty to adopt a standard by which to measure the corporation's performance in pursing the public benefit identified in its articles of incorporation;[125] but the directors do not owe those duties to persons who merely have an interest in the public benefit and the directors generally have no financial liability for failing to pursue the corporation's public benefit or for failing to consider the benefit or adopt the statutorily required standard by which to measure the corporation's performance.[126]

At least once a year, a benefit corporation must send a report to its shareholders, and to any other person who requests one, that addresses the corporation's performance in pursuing the public benefit in its articles of incorporation. The report must also include the following information: (a) the objectives adopted by the corporation to achieve its public benefit; (b) the standards adopted to measure the corporation's progress in pursing the public benefit; (c) the facts related to the corporation's success or failure in pursuing the public benefit; and (d) an assessment of the corporation's success or failure in meeting its objectives.[127] A benefit corporation may, but is not required to, undertake additional duties with respect to its reporting obligations.[128]

Time will tell how many corporations incorporated under Georgia law will take advantage of the ability to organize as a benefit corporation, but the national trend appears to show a steady increase in the popularity of these kinds of socially conscious and culturally aware corporations.

B. The Nonprofit Corporation Code is Amended to Revise and Strengthen the Business Judgment Rule Applicable to Officers and Directors of Nonprofit Corporations.

During the 2020 legislative session, the General Assembly also passed (and Governor Kemp has since signed into law) Senate Bill 373,[129] which amends Chapter 3 of Title 14 of the Official Code of Georgia Annotated (the Georgia

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[123] O.C.G.A. § 14-2-1805(b) (2020).
[124] *See* O.C.G.A. § 14-2-1302(a)(5) (2020).
[125] O.C.G.A. § 14-2-1806(a)(3) (2020).
[126] O.C.G.A. § 14-2-1806(b) (2020).
[127] O.C.G.A. § 14-2-1807(b) (2020).
[128] O.C.G.A. § 14-2-1807(c) (2020).
[129] Ga. S. Bill 373, Reg. Sess. (2020).

Nonprofit Corporation Code) to do three main things. *First*, the statute brings the standards of care for directors[130] and officers[131] of non-profit corporations into line with those that apply to directors[132] and officers[133] of for-profit corporations. *Second*, the statute provides that all decisions of directors and officers are rebuttably presumed to have been made in good faith, in the exercise of reasonable care, and that the presumption can be rebutted only with evidence that the director or officer committed gross negligence by grossly deviating from the reasonableness standard of care.[134] *Finally*, the statute overhauls and clarifies the various sources of information that directors and officers may properly rely on in performing their duties.[135]

IV. THE GEORGIA STATE-WIDE BUSINESS COURT

The Georgia State-wide Business Court—created by an amendment to Article VI of the Georgia Constitution,[136] ratified by Georgia voters in November 2018, and by enabling legislation passed by the General Assembly during the 2019 legislative session[137]—began accepting its first cases on August 1, 2020.[138] To the best of the author's knowledge, there is no publicly available information about the filing statistics of the new court.

The first and (so far) only judge of the new court—Judge Walter W. Davis, appointed by Governor Kemp and approved by the Senate and House Judiciary Committees—has, in consultation with an eight-member commission, prepared and sent to the Georgia Supreme Court for review and approval a set of rules to govern the conduct of the court and the litigants and counsel who will practice before it.[139] On May 29, 2020, the court's proposed rules were posted to the website of the supreme court, and public comments were invited to be submitted to the supreme court by June 15, 2020.[140] As of this writing (August 2020) the rules have not been finalized. The Uniform Superior Court Rules will govern the procedures of the court on an interim basis, in accordance with an order issued by Chief Justice Harold Melton on July 31, 2020.[141]

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130 O.C.G.A. § 14-3-830(a) (2020).

131 O.C.G.A. § 14-3-842(a) (2020).

132 O.C.G.A. § 14-2-830(a).

133 O.C.G.A. § 14-2-842(a).

134 O.C.G.A. § 14-3-830(c) (2020); O.C.G.A. § 14-3-842(c) (2020).

135 O.C.G.A. § 14-3-830(b) (2020); O.C.G.A. § 14-3-842(b) (2020).

136 GA. CONST. art. VI. § 3, para. 2.

137 *See* O.C.G.A. §§ 15-5A-1 to15-5A-16 (2020).

138 O.C.G.A. § 15-5A-6(b) (2020).

139 O.C.G.A. § 15-5A-10(a), (b) (2020).

140 *Supreme Court of Georgia Solicits Comments on Proposed New Georgia State-wide Business Court Rules*, Supreme Court of Georgia

https://www.gasupreme.us/proposed-new-uniform-rules/ (last visited August 11, 2020).

141 Administrative Minutes July 31, 2020, Supreme Court of Georgia

https://www.gasupreme.us/wp-content/uploads/2020/07/Business_court_interim_rules_order_as_issued.pdf (last visited August 11, 2020).