2015 Georgia Corporation and Business Organization
Case Law Developments

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This paper is not intended as legal advice for any specific person or circumstance, but rather a general treatment of the topics discussed. The views and opinions expressed in this paper are those of the author only and not Bryan Cave LLP.

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I. INTRODUCTION

This article catalogs decisions handed down during 2015 by Georgia state and federal courts addressing questions of Georgia corporate and business organization law. It includes both decisions with significant presidential value and others dealing with less momentous questions of law as to which there is little settled authority. Even those cases in which the courts applied well-settled principles serve as a useful indication of the types of claims and issues that are currently being litigated in corporate and business organization disputes and how the courts are dealing with them.

The year saw a number of noteworthy decisions spanning a wide variety of corporate and business law issues. There were two significant decisions involving directors of corporations who simultaneously serve as trustees for trusts who hold a minority interest in the corporation—one dealing with liability issues, the other an insurance coverage dispute. Elsewhere, the Georgia Supreme Court issued an important opinion reaffirming the duty to read transactional documents and clarifying the circumstances under which that duty can be excused. The Supreme Court also addressed the availability of prejudgment interest in an action for specific performance of a stock purchase agreement, and the remedy of equitable partition in the context of a joint venture agreement. The Georgia Court of Appeals addressed two issues of first impression: the first dealing with a judgment creditor's right to a charging order against an LLC member, the other dealing with an LLC's right to recover for discomfort and annoyance in a nuisance action. The courts also dealt with interesting questions of jurisdiction and venue over corporate entities, including whether a foreign corporation or LLC with its corporate headquarters outside of Georgia can remove a tort action from the county in which it is filed to the county where its largest Georgia office is located.

The decisions are organized first by entity type – those specific to business corporations, limited liability companies and partnerships. The remaining sections of the survey deal with (1) transactional issues potentially applicable to all forms of business organizations, and (2) litigation issues that are common to all business forms, including secondary liability, jurisdiction and venue, evidence questions, and insurance issues.

II. OVERVIEW

A. DUTIES AND LIABILITIES OF CORPORATE DIRECTORS, OFFICERS AND EMPLOYEES.

One of the most significant and interesting Georgia corporate law cases in recent years, *Rollins v. Rollins*, returned to the Georgia Supreme Court in 2015. In a previous appeal, the Supreme Court held that corporate directors who simultaneously serve as trustees of trusts holding minority interests in the corporation are subject to the corporate standard of care, and not a more stringent trust standard, when acting in a corporate capacity. The case returned to the Supreme Court after the Georgia Court of Appeals ruled that it was unable to determine as a matter of law whether the defendants were acting in a corporate capacity or a trust capacity when they voted their trusts' interests in favor of amending a partnership agreement to make themselves managing partners, and also when they modified the partnership's distribution scheme. A unanimous Supreme Court held, without deciding any ultimate question of liability, that the capacity in which the defendants acted was ascertainable from the trial court's summary judgment record and could be determined as a matter of law. ***Rollins v. Rollins*, 298 Ga. 161, 780 S.E.2d 328 (2015) .** In so holding, the Court explained that when a particular action can only have been performed in one capacity—such as voting a trust's shares of stock, which can only be done by a trustee—there can be no confusion as to what standard of care to apply, and therefore, no need for a jury to determine that issue.

There were two noteworthy decisions involving claims of misappropriation of corporate opportunities. In ***Sewell v. Cancel*, 331 Ga. App. 687, 771 S.E.2d 388 (2015)**, the shareholders of an anesthesiology group structured as a professional corporation voted to dissolve the corporation and later, certain director/shareholders formed a new corporation, excluding other directors and shareholders of the previous corporation. The new corporation obtained a contract with the same hospital served by the previous corporation. Evaluating a motion for summary judgment by the defendants, the Court of Appeals held that no usurpation of a corporate opportunity or fraud occurred as a matter of law. Two facts weighed heavily in the court's decision. First, the dissolution of the initial corporation was brought about by factors beyond its control; namely, the hospital's unilateral decision to terminate its contract with the previous corporation and restructure its anesthesiology department. Second, the dissolution was unanimously approved, including by the plaintiffs, who showed no evidence that they were defrauded into voting in favor. In the second case, ***BST AG Solutions Inc. v. PWB AG Consulting LLC*, No. 1:15-cv-88(LJA), 2015 WL 4067569 (M.D. Ga. July 2, 2015)**, the Middle District of Georgia held that the evidence was insufficient to show that an exclusive distribution right was a corporate opportunity belonging to the plaintiff. While the defendant, a former director of the corporation, had previously assigned the distribution right to the corporation, it was clear to the court that the assignment was for a limited time period which expired before the defendant left.

Two other cases addressed questions of individual liability of corporate directors, officers and shareholders. In ***Houston v. Elan Financial Services*, ___ F. Supp. 3d ___, 2015 WL 5634626 (S.D. Ga. Sept. 24, 2015)**, the Southern District of Georgia held that the owner of a corporation bound himself personally to the terms of the corporation's credit card agreement, and therefore was liable for charges made to the account. The court found that the agreement plainly bound the owner through terms such as "the business owner is individually liable and jointly liable with the business for all charges made to the account." In ***Caplan v. Weis*, No. 1:14-cv-01321-RWS, 2015 WL 630441 (N.D. Ga. Feb. 11, 2015)**, the Northern District of Georgia held that a landlord's principal could be individually liable under the federal Lead-Based Paint Hazard Reduction Act of 1992 and for negligence under Georgia law, on the basis of allegations that the principal dealt personally with the plaintiff tenants but did not warn them about the dangers of lead-based paint on the premises.

B. CORPORATE STOCK AND DEBT – CONTRACTS AND VALUATION.

In ***Estate of Callaway v. Garner*, 297 Ga. 52, 772 S.E.2d 668 (2015)**, the Georgia Supreme Court held that a seller obtaining specific performance of a stock purchase agreement was not entitled to prejudgment interest under O.C.G.A. § 13-6-13, holding that the award of prejudgment interest was inconsistent with the nature of specific performance as an equitable remedy. The Court nonetheless noted that an award of interest might be available under O.C.G.A. § 7-4-15, which provides for an award of interest on "[a]ll liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain." In ***Hall v. Prosero, Inc.*, 333 Ga. App. 454, 774 S.E.2d 216 (2015)**, the Court of Appeals affirmed a trial court decision holding that there was no failure of consideration, either partial or full, when a corporation's chief executive officer executed a promissory note to exercise stock options. The court explained that because even stock valued at the nominal sum of $0.01 per share, as argued by the defendant, has some positive value, there cannot have been a complete failure of consideration. The court also found that the defendant's partial failure of consideration defense amounted to a claim that the stock's value was inadequate, which does not support a defense absent a showing of fraud.

C. LIMITED LIABILITY COMPANY DEVELOPMENTS.

There were a number of interesting cases from 2015 involving limited liability companies. Two cases involved the construction of operating agreement language dealing with the death of members. In ***Davis v. VCP South*, 297 Ga. 616, 774 S.E.2d 606 (2015)**, the Georgia Supreme Court held that a special master properly construed the provisions of an LLC operating agreement regarding the purchase of a deceased member's interest when it established a cutoff date for the estate of the deceased member's right to receive distributions that preceded the actual sale of the interest by over two years. The court reasoned that the operating agreement had provided for a streamlined valuation and sale process, and that once the valuation occurred shortly after the litigation commenced, it was reasonable for the trial court to cut off any future right to distributions so as to prevent the estate from unfairly benefiting from dragging out the process through litigation. In ***Myers v. Myers*, 297 Ga. 490, 775 S.E.2d 145 (2015)**, the Supreme Court held that an executor of a deceased LLC member's estate became a member of the LLC by operation of O.C.G.A. § 14-11-506, but that this fact did not give the executor an unfettered right to continue managing the LLC as a going concern. Instead, the executor was bound by the terms of the LLC operating agreement, which expressly limited his powers to bringing about the dissolution of the LLC.

There were two decisions, both issued by the same panel of the Court of Appeals, which appear to be the first Georgia appellate decisions interpreting the LLC Act's provisions regarding charging orders, O.C.G.A. § 14-11-504(a. In ***Mahalo Investments III, LLC v. First Citizens Bank & Trust Co.*, 330 Ga. App. 737, 769 S.E.2d 154 (2015)**, the court held that a judgment creditor seeking a charging order was not required to bring an independent action against the LLC. The court further held that a trial court may enter a charging order without first establishing that jurisdiction and venue are proper against the LLC. It reasoned that because a judgment creditor is not entitled to interfere in the internal affairs of the LLC, but instead holds only the rights of an assignee of the member's interest, the LLC has no right or interest in need of protection in proceedings to obtain a charging order. This was further illustrated in the second case, ***Gaslowitz v. Stabilis JE-102 Fund I, LP*, 331 Ga. App. 152, 770 S.E.2d 245 (2015)**. In *Gaslowitz*, the court affirmed the trial court's entry of a charging order and rejected arguments that the order was too unspecific as to the amount due and the method by which distributions should be made to the judgment creditor. At the same time, however, the Court of Appeals reversed the trial court's order insofar as it ordered an accounting of the LLC.

In ***Evanston Insurance Company v. Mellors*, ___ F. Supp. 3d ___, 2015 WL 5786745 (S.D. Ga. Sep. 28, 2015)**, the Southern District of Georgia addressed the definition of a manager under O.C.G.A. § 14-11-304 in determining whether an individual was an insured person under the LLC's insurance policy. Despite the fact that the individual was not a member of the LLC and held no formal title, he was deemed to be a manager because the LLC's sole owner, who was the individual's wife, designated him in writing to "handle all business matters" for the LLC. A similar question was addressed in ***In re Reynolds*, No. 11-87131-BEM, 2015 WL 6520157 (Bankr. N.D. Ga. Sept. 18, 2015)**, in which a bankruptcy trustee sought revocation of a debtor's discharge on the grounds that she failed to disclose her involvement in an LLC on whose behalf she routinely executed leases, contracts and other documents. The bankruptcy court held that disclosure was not required, citing the fact that the debtor was not a member and had no apparent financial interest in the LLC, as well as evidence showing that all of her acts performed on behalf of the LLC were done at the direction of its sole member and under his control. In ***Crumpton v. Vick's Mobile Homes, LLC*, 335 Ga. App. 155, 779 S.E.2d 136 (2015)**, the Court of Appeals held that a member's petition for dissolution of an LLC does not cause the petitioner's membership to cease. Interpreting O.C.G.A. § 14-11-601(b)(4)(D), which lists "dissolution" as one of several conditions that can cause one's membership in an LLC to cease, the court explained that this provision refers to dissolution of the member and not dissolution of the LLC.

Finally, in ***STL Management Consultants v. Manhattan Leasing Enters. Ltd.*, 333 Ga. App. 309, 775 S.E.2d 758 (2015)**, the Court of Appeals addressed a novel question regarding the time at which the resignation of an LLC's registered agent becomes effective. Under O.C.G.A. § 14-11-209(a)(2), a registered agent's resignation becomes effective 31 days after its statement of registration is "filed" with the Secretary of State. Here, in a dispute concerning whether service on an LLC through a registered agent who had resigned was effective, the agent's statement of registration was stamped as received by the Secretary of State's office in February, 2013, then stamped again with the Secretary's name in May, 2013. The court, unable to discern any reason for the later stamp, concluded that the resignation was effective 31 days after it was initially stamped as received by the Secretary's office. It relied heavily on O.C.G.A. § 14-11-206, which it interpreted as giving the Secretary's office a purely ministerial role in filing documents, and also analogized the situation to the filing of pleadings with the clerk of court.

D. PARTNERSHIP LAW DEVELOPMENTS.

One of the most interesting decisions of 2015 dealt with an equitable partition of joint venture property. In ***Bagwell v. Trammel*, 297 Ga. 873, 778 S.E.2d 173 (2015)**, the parties set up a joint venture to hold certain real estate which was intended to be sold. The operative agreement provided for a 70/30 distribution of sale proceeds in favor of the plaintiff. After most of the property had been sold and the proceeds from those sales completed, the plaintiff sued for specific performance of the distribution formula for future sales, and alternatively for equitable partition of the joint venture property consistent with the 70/30 formula. The trial court denied the request for specific performance and granted the request for equitable partition, but divided the property 50/50 instead. The Supreme Court affirmed the decision in all respects. It found that the request for specific performance was not ripe (even though the trial court had ruled on different grounds), because at the time of the action, the property had not been sold and there were no proceeds to distribute. It further upheld the trial court's decision to partition the property using a different formula from that agreed to by the parties, noting that in a equitable proceeding, trial courts have broad discretion to consider facts and circumstances beyond the terms of the parties' agreement.

Another case dealing with a real estate venture was ***Abdulla v. Chaudhary*, No. CV 114-008, 2015 WL 4477824 (S.D. Ga. July 21, 2015)**, in which the Southern District of Georgia held that no claim could be brought for breach of a partnership agreement, or for breach of fiduciary duties arising from a partnership, where the parties abandoned the partnership by failing to purchase properties through an LLC they had agreed to create for that purpose, and purchasing the properties in their own names instead. In ***McElvaney v. Roumelco*, 331 Ga. App. 729, 771 S.E.2d 419 (2015)**, the Court of Appeals held that a joint venturer produced sufficient evidence of an oral stock transfer agreement giving him a 47% interest in an LLC to entitle him to a jury trial of his claims against the LLC and its majority owner. Reversing the trial court's grant of summary judgment to the defendants, the court pointed to evidence that the defendants held the plaintiff out to be a 47% owner in communications with the defendant and a third party. Finally, in ***Smith v. Williams*, 333 Ga. App. 167, 775 S.E.2d 639 (2015))**, the Court of Appeals held that a question of fact existed as to when a law firm partnership terminated, thus precluding summary judgment in a dispute over the disposition of certain fees. While the plaintiff contended that the partnership terminated the moment her partner packed up and left the office, the court found evidence that the parties continued to split fees for some time thereafter, and noted that dissolution does not immediately terminate a partnership; instead, its existence continues until the winding up of its affairs is completed.

E. TRANSACTIONAL CASES.

The Georgia Supreme Court rendered a noteworthy decision on the duty to read transaction documents in ***Legacy Academy, Inc. v. Mamilove, LLC*, 297 Ga. 15, 771 S.E.2d 868 (2015)**. Reversing a 4-3 *en banc* Court of Appeals ruling from 2014, a unanimous Court held that the fact that a party was rushed into signing a document, without more, does not excuse a party from the well-established duty to read and be familiar with the document's contents. Instead, for a signatory to set up a fraud claim that is contradicted by the plain terms of the document being signed, the signatory must show that he or she was prevented from reading the document. The implications of this rule can be quite significant, as evidenced by the case before the Court. The plaintiffs had prevailed at trial and obtained a verdict of over $1 million, which the Court of Appeals narrowly affirmed. But because they were not actually prevented from reading the transaction documents, which contained non-reliance provisions and a merger clause that contradicted their fraud claim, the Supreme Court held that a directed verdict should have been entered in favor of the defendants.

Another investor's fraud in the inducement claim was permitted to go forward, however, in ***Stafford v. Gareleck*, 330 Ga. App. 757, 769 S.E.2d 169 (2015)**. Here, the Court of Appeals held that the trial court should not have dismissed fraud claims alleging that the plaintiff agreed to sell his interest in reliance on the defendant's misrepresentations about its fair value, combined with allegations that the defendant owed him a fiduciary duty. The court also found that the plaintiff was not required to make a tender of the shares in order to obtain rescission, because he alleged that the defendant had already acknowledged his demand to rescind the transaction and agreed to pay him more money. In ***Kreiger v. Bonds*, 333 Ga. App. 19, 775 S.E.2d 264 (2015)**, the Court of Appeals held that issues of fact precluded summary judgment in an action for specific performance of a buy-sell agreement, noting that there were numerous questions as to whether various conditions in the buy-sell agreement and the corporation's bylaws had been satisfied by either party. In ***US Capital Funding VI Ltd v. Patterson Bankshares Inc.*, ___ F. Supp. 3d ___, 2015 WL 5838491 (S.D. Ga. Sept. 30, 2015)**, the Southern District of Georgia held that an investor in trust preferred securities, or TruPS, adequately pled a claim against a bank holding company under the Georgia Uniform Fraudulent Transfer Act ("UFTA") challenging a subsequent stock offering by holding company's banking subsidiary. Notably, the court employed an alter ego analysis in concluding that the bank's stock offering could be treated as a transfer of assets by the holding company for purposes of the UFTA. The court also held that the complaint adequately pled a claim that the bank and holding company's directors breached fiduciary duties owed to creditors, citing the Georgia common law rule that prevents directors from engaging in preferential transactions when a corporation becomes insolvent, but dismissed a claim that the bank aided and abetted the directors' alleged breaches of fiduciary duty.

Finally, there were multiple decisions involving the transfer of assets, rights and liabilities as a result of bank mergers, none of which established any new legal principles. In ***Stoudemire v. HSBC Bank USA*, 333 Ga. App. 374, 776 S.E.2d 483 (2015),** the Court of Appeals affirmed the dismissal of a wrongful foreclosure action which was premised in part on allegations that the assignment of the plaintiffs' security deed was invalid under O.C.G.A. § 14-5-7 because it was not signed by a secretary, assistant secretary, cashier or assistant cashier of the transferor bank. In ***Shibley v. JPMorgan Chase Bank, N.A.*, No. 1:14-cv-1728-WSD, 2015 WL 576592 (N.D. Ga. Feb. 11, 2015)**, the Northern District of Georgia held that the lack of any record of transfer of the original lender's interest in the county deed records provides no basis for enjoining a foreclosure sale, because its interest was transferred by operation of law. And in ***McDonald-Forte v. Merrill Lynch Mortgage Investors Trust, Series MLCC 2004-D*, No. 1:14-cv-1660-WSD, 2015 WL 4928715 (N.D. Ga. Aug. 18, 2015)**, the Northern District dismissed a wrongful foreclosure claim against a securitized trust which had transferred the plaintiffs' mortgage, holding that the trust owed no duty to the plaintiffs.

F. LITIGATION ISSUES.

1. Standing and Capacity to Sue

In ***Oglethorpe Power Corp. v. Estate of Forrister*, 332 Ga. App. 693, 774 S.E.2d 755 (2015)**, the Court of Appeals addressed what it considered to be a question of first impression regarding the right of an LLC to recover nuisance damages for "discomfort and annoyance," holding that an LLC is entitled to recover such damages, even if it did not reside in Georgia. The court found support from an 1883 U.S. Supreme Court case which recognized a religious corporation's right to sue for annoyance and discomfort suffered by its members in their use of the corporation's property. In ***In re Mohr*, 538 B.R. 882 (Bankr. S.D. Ga. Sept. 24, 2015)**, the bankruptcy court held that a creditor that was a foreign LLC was not transacting business in Georgia by seeking relief in court, and therefore did not need to obtain a certificate of authority from the Secretary of State. And in ***AAA Restoration Co, Inc. v. Peek*, 333 Ga. App. 152, 775 S.E.2d 627 (2015)**, the Court of Appeals addressed the remedies available when an arbitration agreement contains a misnomer as to the identity of the arbitration provider. The court held that absent evidence of mutual mistake, there was no basis for reformation of the agreement to change the name.

2. Secondary Liability

There were a number of federal decisions, all involving related facts, in which the courts rejected attempts to hold individual owners and managers of a developer and building manager individually liable for torts allegedly committed by the companies under an alter ego theory. ***Lokey v. FDIC*, 608 Fed. Appx. 736 (11th Cir. 2015); *Harris Baking Company v. Drayprop LLC*, No. CV411-171, 2015 WL 5786743 (S.D. Ga. Sept. 30, 2015); *Hunt v. Drayprop, LLC*, No. CV411-172, 2015 WL 5786744 (S.D. Ga. Sept. 30, 2015); *Reinke v. Drayprop, LLC*, No. CV411-144, 2015 WL 5786742 (S.D. Ga. Sept. 30, 2015).** The Eleventh Circuit and the Southern District of Georgia held that the plaintiffs' evidence, which largely consisted of allegations that the individual defendants drafted and signed particular documents, and/or guaranteed certain loans, fell short of the showing needed to invoke the alter ego doctrine.

In ***Dezauche v. Bryce*, No. CV311-71, 2015 WL 5923581 (S.D. Ga. Oct. 9, 2015)**, the Southern District addressed—and ultimately found inapplicable—several theories of secondary liability: alter ego, partnership, joint venture and successor liability. The plaintiff had alleged that the defendants actually controlled a company that was one of its customers. The court found no evidence that the defendants ever failed to respect the customer's separate identity. It further found that claims that the defendants and its customers had formed a partnership, or that the defendants had acquired the customer, were rebutted by testimony from the customer's principals that they did not desire such a relationship.

Finally, in ***CHIS LLC v. Liberty Mutual Holding Co Inc.*, No. 5:14-cv-277, 2015 WL 4249358 (M.D. Ga. July 13, 2015)**, the Middle District of Georgia held that a policyholder's claims against its insurer's parent company and two affiliates, which relied on alter ego, agency and joint venture principles, were insufficiently pled. The plaintiff alleged that the various companies shared common officers and directors, shared office space, commingled financial resources, and used common intellectual property. The court acknowledged that allegations of this type can support an alter ego theory, but nonetheless held that the complaint failed to state a claim, noting that the Georgia Supreme Court has not recognized veil-piercing in the parent-subsidiary context without a showing that the subsidiary is insolvent or undercapitalized.

3. Jurisdiction, Venue and Service of Process

In ***Kingdom Retail Group, LLP v. Pandora Franchising, LLC*, 334 Ga. App. 812, 780 S.E.2d 459 (2015)**, the Court of Appeals addressed an interesting and potentially significant question concerning the venue for tort suits against a foreign corporation or LLC: can a corporation (or LLC) whose primary corporate headquarters is somewhere outside of Georgia avail itself of the removal remedy provided in O.C.G.A. § 14-2-510(b)(4)? In a tort action in which venue is only proper in the forum county because the cause of action originated there, the corporation has the right under § 14-2-510(b)(4) to remove the action to the county in which it maintains its principal place of business. Because the parallel statute in the LLC Act simply refers to § 14-2-510, the rule is equally applicable to LLCs. In this case, a defendant whose headquarters was in Maryland was permitted to remove an action brought in Thomas County, where it has no office, to Gwinnett County, where it maintains its registered office. The Court of Appeals reversed, holding that the operative statutory language—"where the defendant maintains its principal place of business," was intended to refer to a single place in the world, not to the corporation's main office within Georgia. This would seem to suggest that corporations whose main office is outside of Georgia will be treated differently from those whose main office is within Georgia. Because one of the three justices on the panel concurred in the judgment only, this decision stands as physical precedent only. However, a petition for writ of certiorari has been filed in the Georgia Supreme Court. In another interesting decision involving the corporate venue statute, ***Ross v. Waters*, 332 Ga. App. 623, 774 S.E.2d 195 (2015)**, the Court of Appeals held that venue in a tort action against a dissolved corporation lies in the county where it maintained its last registered office, not its last principal office. Notably, the opinion preceded ***Kingdom Retail*** by several months and did not address the potential impact of O.C.G.A. § 14-2-510(b)(4).

There were also the usual cases discussing personal jurisdiction of directors, officers and parent companies of corporations doing business in Georgia. In ***Stubblefield v. Stubblefield*, 296 Ga. 481, 769 S.E.2d 78 (2015)**, the Georgia Supreme Court held that two shareholders and directors of a Georgia corporation and two Mississippi corporations were subject to personal jurisdiction under the Long Arm Statute, O.C.G.A. § 9-10-91(1), based on their personal participation in removing corporate funds from banks located in Georgia and terminating the companies' Georgia-based accounting firm. In ***Williamson v. Walmart Stores Inc.*, No. 3:14-cv-97, 2015 WL 1565474 (M.D. Ga. Apr. 8, 2015)**, the Middle District of Georgia held that a products liability plaintiff sufficiently alleged a basis for the exercise of long arm jurisdiction over a foreign parent company and its affiliates under an alter ego theory. The court's ruling was based on allegations that the parent and affiliates rendered the seller of the defective product to be undercapitalized, controlled its board of directors, and otherwise sought to insulate the subsidiary from liability.

Finally, there were two cases addressing the citizenship of business entities for purposes of federal diversity jurisdiction. In ***Lawson v. Ocwen Loan Servicing LLC*, No. 1:14-cv-1301-WSD, 2015 WL 881252 (N.D. Ga. Mar. 2, 2015)**, the Northern District of Georgia held that a foreign corporation does not become a citizen of Georgia merely by maintaining a registered office within the state. In ***Blocker Farms of Florida Inc v. Buurma Properties LLC*, Nos. CV 613-068, 613-067, 2015 WL 2409031 (S.D. Ga. May 19, 2015)**, the Southern District of Georgia applied the rule that a limited liability company is a citizen of any state in which one of its members is a citizen.

4. Evidence, Business Records Act

In 2015, Georgia state courts continued to address evidentiary challenges to business records obtained as a result of mergers and acquisitions. This year's decisions illustrate the impact of Georgia's revised evidence code, which largely conforms to the Federal Rules of Evidence. In ***Ciras, LLC v. Hydrajet Technology, LLC*, 333 Ga. App. 498, 773 S.E.2d 800 (2015)**, the Georgia Court of Appeals reversed a trial court decision excluding bank records of a predecessor bank, which the successor bank sought to introduce through the testimony of one of its own officers. The court cited and followed federal decisions applying Federal Rule of

Evidence 803 which hold that employees of successor entities can authenticate business records of their predecessor entities that pass to them by virtue of merger, which had been the case here. Similarly, in ***Triple T-Bar, LLC v. DDR Southeast Springfield*, 330 Ga. App. 847, 769 S.E.2d 586 (2015)**, the Court of Appeals held (this time affirming the trial court) that business records were properly authenticated by a representative of a successor company.

5. Director and Officer Liability Insurance Decisions

There were two noteworthy decisions involving D&O insurance policies issued to Georgia corporations. In ***Langdale Co v National Union Fire Ins. Co. of Pittsburgh*, 609 Fed. Appx. 578 (11th Cir. 2015)**, the Eleventh Circuit, applying Georgia law, held that coverage was excluded for claims arising from the alleged conduct of two directors of a closely held corporation who simultaneously served as trustees of family trusts that were shareholders of the corporation. The court held that the policy's "insured capacity" exclusion, which generally excluded coverage for claims relating to acts committed outside of a director or officer's corporate capacity, applied to bar coverage in connection with litigation brought by the trust's beneficiaries, holding that the claims would not have existed but for allegations of wrongdoing committed by the individuals in their uninsured capacity as trustees.

In ***OneBeacon Midwest Ins Co v Ariail*, No. 2:14-cv—00007-RWS, 2015 WL 1412661 (N.D. Ga. Mar. 27, 2015)**, the Northern District of Georgia held that an insurer's declaratory judgment action against the FDIC as receiver for a failed bank that was a policyholder was barred by the insurer's failure to initiate the FDIC's administrative claims process in a timely fashion. The court held that instead of filing a lawsuit seeking a declaration that coverage for claims against the bank's former directors and officers was excluded, the insurer should have filed a proof of claim upon receiving notice of the FDIC's appointment as receiver.

6. Professional Liability

In ***Befekadu v. Addis International Money Transfer*, 332 Ga. App. 103, 772 S.E.2d 785 (2015)**, the Court of Appeals held that the trial erred in disqualifying an attorney representing an LLC member in litigation brought by the LLC, without first considering whether the conflict had been waived by the LLC's failure to promptly raise the issue, and without determining whether the attorney's prior work in setting up the LLC was substantially related to the litigation. In ***Hays v Page Perry LLC*, 92 F. Supp. 3d 1315 (N.D. Ga. 2015)**, the Northern District of Georgia, on a motion for reconsideration, reaffirmed its prior holding that an LLC's outside counsel had no duty to report potential securities violations to the SEC.

7. Corporate Receiverships

In ***Considine v Murphy*, 297 Ga. 164, 773 S.E.2d 176 (2015)**, the Georgia Supreme Court held that a lawsuit brought against a receiver for a corporation should have been dismissed because the plaintiff failed to obtain leave of court from the court appointing the receiver. The Court applied the *Barton* doctrine, named after an 1881 U.S. Supreme Court decision, which it interpreted to operate as a jurisdictional bar to suits against receivers brought without leave from the appointing court. While the Court's decision had the effect of affirming an earlier Court of Appeals ruling, the Court vacated the Court of Appeals' opinion because it rested on a different ground, official immunity, that the Court found it was without jurisdiction to consider under the *Barton* doctrine.

G. FULTON COUNTY BUSINESS COURT DECISIONS.

In a case styled *Rollins v. Rollins* that is related to the litigation that was before the Georgia Supreme Court in 2015, the Business Court held that the trustees of a marital trust which held a minority interest in one of the Rollins family corporations could assert mismanagement and breach of fiduciary duty claims against two directors in a direct shareholder action. ***Rollins v. Rollins*, No. 2014-cv-249480 (Feb. 04, 2015) (Order on Defendants' Motion to Dismiss and for Judgment on the Pleadings).** Following a long line of Georgia appellate decisions, the court found that the rule normally requiring breach of fiduciary duty claims to be brought derivatively on behalf of the corporation did not apply, because the reasons for requiring a derivative suit were not present—there were no interested creditors, and all of the corporation's shareholders were either parties to the suit or had acquiesced in the defendants' conduct. In ***Bronner v. Hardy*, No. 2014-cv-248023 (Apr. 14, 2015) (Order on Defendants' Motion to Dismiss and For Judgment on the Pleadings)**, the court dismissed a minority shareholder's oppression claim, holding that Georgia law recognizes no cause of action for oppression outside of the statutory close corporation context, and this case did not involve a statutory close corporation. In the same order, the court permitted fraud and breach of fiduciary duty claims to go forward, holding that they were adequately pled and did not need to be brought derivatively because they involved alleged rights unique to the plaintiff.

In ***Ordan v. Keen*, No. 2014-cv-240975 (Jan. 8, 2015) (Order on Defendants' Motion for Summary Judgment)**, the court denied the defendants' summary judgment motion as to claims for breach of an oral agreement to transfer a 25% LLC interest to the plaintiff, holding that there was sufficient evidence of the existence of the oral contract to create a genuine issue for the jury. In ***Robinson v. Wellshire Fin. Svcs., LLC*, No. 2015-cv-259408 (June 1, 2015) (Order on Application for Protective Order)**, the court had the opportunity to consider the "apex doctrine," a rule employed by some jurisdictions that imposes certain requirements on parties that seek to take the deposition of C-level executives. Noting that no Georgia appellate opinion has recognized the apex doctrine, the court declined to recognize it as a basis for entering a protective order in favor of the applicant, a former officer of a Texas company who was subpoenaed to give testimony in a Texas lawsuit. Finally, in ***Drummond Financial Services, LLC v. TMX Finance Holdings, Inc.*, No. 2014-cv-253677 (Feb. 26, 2015) (Order on Motion to Strike Affidavit and to Disqualify Counsel)**, the court disqualified counsel for the defendants in a commercial dispute between competitors, finding that the firm was conflicted due to its representation of affiliates of the plaintiffs in other matters.

III. REVIEW OF DECISIONS

A. DUTIES AND LIABILITIES OF CORPORATE DIRECTORS, OFFICERS AND EMPLOYEES.

***Rollins v. Rollins*, 298 Ga. 161, 780 S.E.2d 328 (2015)—Supreme Court finds that the capacity in which corporate fiduciaries/trustees acted, and thus the relevant standard of care to apply, was ascertainable from the record without the need for jury consideration.**

This longstanding dispute between trust beneficiaries and their trustees, who also served as directors of companies in which the trusts held minority interests, made its second appearance before the Georgia Supreme Court. This time, a unanimous Court found that the trial court's summary judgment record was sufficient to permit the Georgia Court of Appeals to determine, as a matter of law, the capacities in which the defendants acted when they undertook the actions forming the basis for the lawsuit.

Previously, the Supreme Court held that when a fiduciary holds the dual capacity of trustee and corporate director, actions undertaken in a corporate capacity are subject to the standards of conduct applicable to corporations, not the more stringent standard applicable to trustees. *Rollins v. Rollins*, 294 Ga. 711, 755 S.E.2d 727 (2014). Since the Court of Appeals had held to the contrary in finding that the defendants were not entitled to summary judgment, its decision was reversed. But in order to resolve the motion for summary judgment, there still remained the question of whether the defendants actually were acting as corporate directors or as trustees. In its March, 2014 opinion, the Supreme Court remanded the case for further proceedings to allow for that determination.

The issue was still undetermined when it returned to the Supreme Court in 2015. In late 2014, the Court of Appeals ruled that it still could not enter summary judgment in favor of the defendants, because issues of fact remained as to what capacity the defendants were acting in. *Rollins v. Rollins*, 329 Ga. App. 768, 766 S.E.2d 162 (2014). The Court of Appeals' opinion revealed some of the complexities of the case. The plaintiffs were beneficiaries of S-Trusts established by their grandfather, Rollins family patriarch O. Wayne Rollins, in 1986. In addition to the trusts, Wayne Rollins created several family entities to hold trust assets, as well as a partnership named Rollins Investment Fund ("RIF") whose partners included the S-Trusts and, upon reaching age 45, the grandchildren themselves. Under the complicated structure created by Wayne Rollins, most of the family-owned assets were held in various corporate entities which were held by the partnership, and the plaintiffs' interests in the partnership were held in trust until they reached age 45. The defendants were the plaintiffs' father Gary Rollins, his brother Randall Rollins and family friend Henry Tippie. Gary Rollins was the trustee of the plaintiffs' S-Trusts, while all three defendants were co-trustees of a closely related family trust. Gary and Randall Rollins were also the managers of the corporate entities created by Wayne Rollins to hold the trust assets and the managing partners of the partnership. The gravamen of the lawsuit is that the defendants changed the "structure, leadership, holdings, and distribution methods" of the corporate entities following Wayne Rollins' death in a manner that shifted power and funds away from the beneficiaries and in favor of themselves. The events leading up to the litigation began in 1993, when the defendants amended the RIF partnership agreement to permit non-pro rata distributions and to name Gary and Randall as managing partners. Following that, Gary and Randall created a "distribution program" for the various family entities that allowed them to take a "personal code of conduct" into account in authorizing non-pro rata distributions.

The parties filed cross-motions for summary judgment in the trial court. The defendants asserted in their motion that their conduct was protected by the business judgment rule, because all of their actions were undertaken in good faith and in the best interests of the corporate entities. The trial court granted summary judgment in favor of the defendants as to everything but the plaintiffs' breach of trust claim based on the defendants' alleged failure to make periodic accountings of trust assets to the plaintiffs. (It nonetheless denied a request for an accounting of the trust holdings because sufficient information about those holdings was provided in discovery.) As noted above and in previous editions of this Survey, the Court of Appeals initially reversed the trial court on the grounds that the defendants could be held to a trust standard of care even for acts committed at the corporate entity level, a ruling that the Supreme Court held to be erroneous.

In its late 2014 opinion, the Court of Appeals identified two acts as to which it was unclear whether Gary and Randall were acting in a corporate or trust capacity: (1) their approval of the RIF partnership amendment in 1993, and (2) their establishment of a code of conduct and decisions to make non-pro rata distributions based on that code of conduct. The Court of Appeals held that a jury would have to decide in which capacity the defendants acted, and it also remanded the accounting issue to the trial court with instructions to reconsider its ruling in light of the unresolved issues of fact. The defendants petitioned for certiorari, and the Supreme Court granted review.

The Court began its analysis by reiterating what it previously held last March: that when a "trustee is put in control of a corporate entity in which the trust owns a minority interest, the trustee should be held to a corporate level fiduciary standard when it comes to his or her corporate duties and actions." The Court explained that this holding disposed of all claims arising from corporate management decisions made by Gary and Randall for companies in which the trusts held minority interests, because these decisions could only have been made by them in their corporate capacity. Likewise, the Court found that there could be no confusion (and therefore no need for a jury) to determine what role the defendants were playing when they invested trust assets—those actions were undertaken as trustees and were governed by the trust instrument and relevant fiduciary standards.

Turning to the 1993 RIF partnership agreement amendment, in which Gary and Randall both voted their own partnership interests, Wayne Rollins' shares as executors of his estate, and the S-Trusts' shares as trustees, the Court found that the roles and duties played by Gary and Randall "are not difficult to parse and do not require the submission of those issues to a jury." It also observed that it would have been impossible for them to be acting as managing partners of RIF in approving the amendment because it was the amendment itself that made them managing partners. The Court explained that they were acting as partners with respect to voting their own interests and trustees with respect to voting the trusts' interests. This had significant consequences for the plaintiffs' claims that Gary and Randall violated duties of disclosure to them as partners. At the relevant time, none of the plaintiffs were partners of RIF, only the S-Trusts, meaning that the defendants' duties of disclosure as partners were owed only to themselves as trustees. The Court similarly found that it was clear from the record evidence that in establishing and implementing a code of conduct, Gary and Randall were acting as managing partners of RIF. The effect of these decisions is to put the two brothers in a somewhat different position, since only Gary Rollins was a trustee of the plaintiffs' S-Trusts. In summing up, the Court recognized that it was possible that both Gary and Randall would be granted summary judgment for alleged breach of their partnership duties in connection with the code of conduct, but that Gary might not be entitled to summary judgment for breach of his duty as trustee with respect to the same.

The Court did not decide the ultimate question of whether summary judgment was appropriately granted, but instead directed the Court of Appeals to do so "as a matter of law from the record evidence." The Court also stated no opinion as to a question first raised in the Court of Appeals' late 2014 decision: whether the business judgment rule as stated in *FDIC v. Loudermilk*, 295 Ga. 579, 761 S.E.2d 332 (2014) applies with equal force in the context of a partnership like RIF. As we noted last year, the Court of Appeals had identified that question as unresolved (and the Court of Appeals left it unresolved at the time).

Sewell v. Cancel, **331 Ga. App. 687, 771 S.E.2d 388 (2015)—Directors of dissolving professional corporation did not usurp corporate opportunities or commit fraud in connection with formation of new professional corporation.**

We have previously addressed this dispute involving the dissolution of an anesthesiology practice, which first came to the Court of Appeals in 2013. The plaintiffs were four anesthesiologists who were shareholders, directors and employees of Central Georgia Anesthesia Services, P.C. ("CGAS"). Until 2003, CGAS provided anesthesiology services to The Medical Center of Central Georgia, Inc. (the "Medical Center") pursuant to an exclusive contract. Certain of the plaintiffs complained about billing irregularities, and there was significant personal discord among the group. Upon learning about the alleged billing irregularities, on April 25, 2003, the Medical Center notified CGAS that it would terminate its contract with cause on May 31, 2003 unless CGAS could demonstrate through an independent audit that it was in substantial compliance with the contract. In the same communication, the Medical Center informed CGAS that it intended to restructure its anesthesiology department effective February 29, 2004, regardless of whether CGAS was able to demonstrate its compliance with the contract on May 31, 2003. The Medical Center further announced that as part of the planned restructuring, on May 12, 2003, it would begin a recruitment process for staff anesthesiology services. Members of CGAS were welcome to submit applications, but could not be guaranteed a contract. On May 5, 2013, the CGAS directors/shareholders held a meeting at which it was unanimously decided that CGAS would terminate its contract with the Medical Center effective August 31, 2013. Many of the CGAS members submitted applications to the Medical Center to work in the restructured department. While several members were offered employment, the four plaintiffs were not. A few months later, a group of former CGAS members and other doctors recruited by them formed Nexus Medical Group ("Nexus"). By January 1, 2004, Nexus had obtained an exclusive contract to perform anesthesiology services for the Medical Center.

The plaintiffs alleged that three of the former GGAS director/shareholders who later formed Nexus (referred to herein as the "Sewell Group") breached their fiduciary duties and usurped CGAS' corporate opportunities. The gravamen of the action was that the Sewell Group conspired with the Medical Center and its principals to force the plaintiffs out of their practice in retaliation for their complaints about the group's billing practices. After years of discovery, the defendants filed various motions for summary judgment. Relevant to this appeal, the trial court denied a motion by the Sewell Group for summary judgment as to the plaintiffs' claims for breach of fiduciary duty and fraud, finding that there were genuine issues of material fact to be tried. That decision was originally part of the appeal that we discussed in our 2013 survey, in which the court held that Nexus had no liability to the plaintiffs under an alter ego theory. *Cancel v. Sewell*, 321 Ga. App. 523, 740 S.E.2d 870 (2013). The Court did not decide the Sewell Group's appeal on its merits at that time, holding instead that it lacked jurisdiction. The Sewell Group appealed to the Supreme Court, which held that the appeal should have been considered as a properly filed cross-appeal. *Sewell v. Cancel*, 295 Ga. 235, 759 S.E.2d 485 (2014).

On remand, the Court of Appeals held that summary judgment should have been granted in favor of the Sewell Group defendants as to the breach of fiduciary duty and fraud claims, which were based on the May 5, 2013 decision to dissolve CGAS and terminate its contract with the Medical Center. Although the plaintiffs' claims appear to have implicated the defendants' duty of loyalty more than their duty of care, the Court of Appeals pointed out that CGAS' counsel was present at the May 5, 2013 meeting and that the idea of dissolving CGAS was initially counsel's suggestion. Turning to the question of whether the Sewell Group defendants usurped a corporate opportunity, the Court of Appeals distinguished the case at bar from *Quinn v. Cardiovascular Physicians, P.C.*, 254 Ga. 216, 326 S.E.2d 460 (1985), upon which the plaintiffs relied. *Quinn*, in which the Georgia Supreme Court held that the plaintiff was entitled to a jury trial on her misappropriation and corporate opportunity claims, was quite similar to the present case in some ways. Both cases involved a professional corporation that ceased to perform services for a hospital under a contract, and in both cases, the defendants formed a new corporation, excluding the plaintiffs, which went on to perform the same services to the hospital. In both cases, the defendants tried to argue that there was no relevant corporate opportunity because the initial corporation had become unable to perform services for the hospital. But while that argument failed in *Quinn*, it succeeded here. The key distinguishing factor, in the Court of Appeals' view, was the fact that the Medical Center had effectively brought about the dissolution of CGAS by informing CGAS of its intent to restructure the department. There was no similar fact in *Quinn*; instead, it appeared that the decision by the initial corporation in that case to cease its activities under its contract was entirely voluntary. Another distinguishing factor in *Quinn* was that the plaintiff had no notice of the defendants' activities, whereas in the present case, the plaintiffs voted for and therefore ratified CGAS' decision to dissolve.

The court also held that summary judgment was appropriate as to the plaintiffs' fraud claims, holding that there was no evidence of any fraudulent misrepresentation that induced the plaintiffs to vote in favor of terminating the CGAS contract. One of the justices on the panel concurred in the judgment only, meaning that the decision stands as physical precedent only.

***BST AG Solutions Inc. v. PWB AG Consulting LLC*, No. 1:15-cv-88(LJA), 2015 WL 4067569 (M.D. Ga. July 2, 2015)—Evidence insufficient to find that exclusive right to distribute was a corporate opportunity.**

In this case, the district court denied a closely held corporation's motion for preliminary injunction that was premised in part on a claim that one of the plaintiff's officers misappropriated a corporate opportunity of the plaintiff. The dispute centered around the right to distribute a Russian fertilizer product called Albit. In April, 2013, the individual defendant, Booysen, obtained for himself the exclusive right to distribute Albit in the United States and Canada. This right was renewable on an annual basis. Shortly thereafter, Booysen and two other individuals formed the plaintiff, B.S.T., for the purpose of developing an unrelated fertilizer product. The two other founders of B.S.T. had a pre-existing business together, Georgia Organic Solutions, LLC ("GOS"), through which they sold other fertilizers. The three founders agreed to become equal shareholders of B.S.T., and each was also a director and officer.

There was no indication in the record that B.S.T. initially had any right to distribute Albit. In January, 2014, Booysen received a competing job offer from R.W. Griffin. Shortly thereafter, Booysen and B.S.T. entered into a consulting agreement which contemplated that he would receive a monthly salary and commissions (payable to PWB, a separate company controlled by Booysen) for the next six months. In return—and apparently as a means to finance B.S.T.'s payment obligations—Booysen granted B.S.T. the exclusive right to distribute Albit in the United States for the same six-month period. At the expiration of that six month period in July, 2014, B.S.T. continued to distribute Albit for some time, but there was no indication in the record of any written understanding that the exclusive distribution right had been extended. In December, 2014, Booysen, acting on behalf of B.S.T., negotiated a deal with R.W. Griffin for that company to become the exclusive distributor of Albit in Georgia, Alabama and the Florida panhandle. B.S.T.'s other two director-shareholders rejected the proposed deal. The three founders had a falling out in 2015, which ultimately led Booysen to resign as director and officer of B.S.T. In the meantime, acting through his company PWB, Booysen granted R.W. Griffin the exclusive right to distribute Albit in Georgia, Alabama and the Florida panhandle—the same territorial right previously offered to R.W. Griffin by Booysen on behalf of B.S.T.

B.S.T. brought suit against Booysen and PWB, alleging that it was entitled to an injunction preventing them from importing, selling and distributing Albit because Booysen had previously granted B.S.T. the exclusive right to do so. It alleged that its right to an injunction arose under Georgia corporate law (specifically the corporate opportunity doctrine), the Georgia Trade Secrets Act, and the Georgia Uniform Deceptive Trade Practices Act.

The trial court held that B.S.T. was unlikely to succeed on its claims, and denied the requested injunction. It applied the settled Georgia test for usurpation of a corporate opportunity, in which the threshold question is "whether the appropriated opportunity was in fact a business opportunity rightly belonging to the corporation." *Southeast Consultants, Inc. v. McCrary Eng'g Corp.*, 246 Ga. 503, 273 S.E.2d 112 (1980). Here, the documentary record indicated that the right to distribute Albit belonged to Booysen prior to the formation of B.S.T., and that when Booysen granted B.S.T. the exclusive right to distribute Albit, he did so only for the limited six-month term of his consulting agreement. Although the plaintiff argued that Booysen had actually assigned his personal rights with respect to Albit as a condition of accepting his shares, the court found that there was no support for this contention in any of the company's records.

Two other facts weighed significantly in the court's conclusion. First, Booysen's right to distribute Albit had never been perpetual; rather, he had to renew it annually. In the court's view, this weighed heavily against a finding that B.S.T. had a reasonable expectancy in the ongoing right to distribute the product, since whatever right B.S.T. could possibly have had with respect to Albit was that of an assignee, and it therefore could not reasonably expect any greater right than Booysen had available to assign. Second, there was evidence that during the same period, B.S.T.'s two other principals continued to sell products through their other company, GOS, that were also sold through B.S.T. (and were well within its line of business). In essence, the court found that both Booysen and the two GOS principals had a history of treating as their own the rights they held prior to forming B.S.T.

***Houston v. Elan Financial Services*, ___ F.Supp.3d ___, 2015 WL 5634626 (S.D. Ga. Sept. 24, 2015)—Use of corporate credit card bound owner to individual liability terms in user agreement.**

A *pro se* plaintiff brought suit against the company that issued him a business line of credit, claiming fraud, harassment and wrongful collection and seeking damages under the Fair Debt Collection Practices Act and Georgia law. The district court granted summary judgment in favor of the defendant, finding that the plaintiff voluntarily bound himself to the terms of his company's credit agreement, making him personally liable for the company's debt.

In applying for a business line of credit with the defendant, the plaintiff represented himself to be the "business owner" of Houston Electric, Inc. ("Houston Electric"). During the application process, which occurred over the telephone, he was read the liability terms of the defendant's card member agreement, which included a statement that "the business owner is individually liable and jointly liable with the business for all charges made to the account." The agreement further provided that use of the card or account signified acceptance of the terms of the agreement. The plaintiff "stated that he understood the terms, confirmed that he would be the only individual with access to the card, and verbally provided his assent for the representative to complete his application." The plaintiff later received a written copy of the agreement, but claimed that he threw it away. He used the card frequently and paid his bills from his personal bank account. When the company's financial fortunes soured and the plaintiff became unable to pay off the card, the defendant sought to collect the debt from both the plaintiff and Houston Electric. The plaintiff filed this suit, claiming that he was not personally liable for Houston Electric's debt because he never signed as a guarantor. The court found that the plaintiff accepted the terms of his card member agreement by using the card, as had been explained to him during the application process. The card member agreement provided, in relevant part, that the plaintiff was "individually liable" as well as "jointly liable" with the company for all charges to the line of credit, and that he agreed to pay "all charges" in connection with his use of the card regardless of whether he was reimbursed by the company. The court found this language to be clear and unambiguous and to foreclose the plaintiff's claims that he was not personally liable. The court also found the plaintiff's statutory claims to be unsupported by the evidence.

***Caplan v. Weis*, No. 1:14-cv-01321-RWS, 2015 WL 630441 (N.D. Ga. Feb. 11, 2015)—Principal may be individually liable for personal participation in a tort.**

In this case, the plaintiffs alleged that they entered into a residential lease with a corporation and its principal, and then later became suspicious that the house contained lead based paint. It was alleged that the individual defendant, Weis, did not disclose any defects or warn the plaintiffs about the dangers of lead based paint at the time the parties entered into the lease. It was further alleged that when the plaintiffs first contacted Weis with their concerns, he told them he would take care of them, but that he later refused to make any repairs once it was confirmed that the house had lead based paint. The plaintiffs asserted claims under the federal Lead-Based Paint Hazard Reduction Act of 1992 (the "Act"), which authorized the Environmental Protection Agency to promulgate disclosure regulations applicable to home sellers and lessors, and provides that any person who knowingly violates the Act's disclosure rules "shall be jointly and severally liable to the purchaser or lessee in an amount equal to 3 times the amount of damages incurred by such individual." The defendants moved to dismiss the complaint. They argued, among other things, that Weis should be dismissed because he was not a party to the lease. The district court denied the motion to dismiss on this ground, noting that the Act broadly applies to "any person who knowingly violates" the disclosure rule, and that the allegations were sufficient to support a finding that Weis violated the rule. The court also declined to dismiss the plaintiffs' negligence claims against Weis, citing the well-settled rule that shareholders and officers of a corporation, notwithstanding their limited liability with respect to the corporation's affairs, can nonetheless be individually liable for torts in which they personally participate.

B. CORPORATE STOCK AND DEBT – CONTRACTS AND VALUATION.

***Estate of Callaway v. Garner*, 297 Ga. 52, 772 S.E.2d 668 (2015)—Party obtaining specific performance of stock purchase agreement not entitled to prejudgment interest under O.C.G.A. § 13-6-13, but may be available under O.C.G.A. § 7-4-15.**

This is the continuation of a case we addressed in last year's survey, in which minority shareholders of a closely held corporation obtained an order of specific performance requiring the defendant to purchase the plaintiffs' shares at a price of $160 per share, for a total purchase price of $1.2 million. The trial court also awarded the plaintiffs prejudgment interest pursuant to O.G.G.A. § 13-6-13, which added another $462,000 to the award. This appeal addressed only the award of prejudgment interest. A unanimous Supreme Court held that it was error for the trial court to award prejudgment interest under O.C.G.A. § 13-6-13; however, it suggested that the same relief might be available under a provision in the Interest and Usury chapter of the Code on Banking and Finance, O.C.G.A. § 7-4-15 In its analysis under O.C.G.A. § 13-6-13, which permits an award of interest on damages in contract cases, the Court noted that specific performance is "not a form of damages," but instead is an equitable remedy appropriate only when an award of damages is insufficient to compensate the injured party. It found that its conclusion was supported by the fact that parties injured by a breach of contract are required to elect between specific performance and contract damages. The court further observed that had the plaintiffs chosen to sue for contract damages, the calculation of damages would have been entirely different. This case involved a family business in which there was no apparent market for the stock. The defendant, who was the founder of the business and who passed away during the litigation, was found to have reneged on an oral promise to purchase the plaintiffs' stock for $160 per share. Had the plaintiffs chosen to sue in contract, the Court observed, the measure of damages would have been the difference between the value of the stock on the date that the sale should have been consummated and the ultimate contract price, leading to a vastly different result.

While the Court reversed the award of prejudgment interest, it nonetheless remanded the case for consideration of whether relief was available under O.C.G.A. § 7-4-15, which provides for an award of interest on "[a]ll liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain." The Court referenced a prior Court of Appeals opinion in which prejudgment interest was awarded under O.C.G.A. § 7-4-15 in a case in which specific performance was obtained. *See Gwinnett County v. Old Peachtree Partners, LLC*, 329 Ga. App. 540, 764 S.E.2d 193 (2014). The Court ultimately did not decide whether an award under O.C.G.A. § 7-4-15 would be appropriate in this case, leaving it to the trial court to determine whether the plaintiffs had made a sufficient demand and were otherwise entitled to invoke the statute. Under earlier Georgia Supreme Court decisions referenced in the opinion, a party seeking prejudgment interest under O.C.G.A. § 7-4-15 must show that there is no bona fide controversy over the amount owed, and can do this by showing that the measure of damages from the breach of the contract is ascertainable.

***Hall v. Prosero, Inc.*, 333 Ga. App. 454, 774 S.E.2d 216 (2015)—Corporate stock holding nothing more than nominal value was sufficient consideration for exercise of promissory note.**

In this action, a software company sought to recover on a note executed in favor of the company by a former officer in connection with his exercise of stock options. The officer asserted a failure of consideration defense, claiming that the stock had nothing more than a nominal value when he executed the note. The trial court rejected this defense, granting summary judgment in favor of the plaintiff, and the Court of Appeals affirmed.

The defendant, Hall, was hired by plaintiff Prosero as its president and chief operating officer in 2001, and he was promoted to chief executive officer soon thereafter. Prosero's board offered the defendant a compensation package which included a 25% raise and stock options of 500,000 shares exercisable at $1.25 per share. At the time, the company was struggling financially in the wake of the dot-com crash and was in the midst of a fundamental shift in its business strategy.

In January, 2012, for tax reasons, the defendant exercised the options by executing a full-recourse promissory note for $625,000, backed by the 500,000 shares of company stock. Two years later, the defendant was terminated. As part of his separation agreement, the defendant negotiated an extension of the original maturity date on his note to January, 2010, at which time all principal and unpaid interest would be due and payable in full. The note remained unpaid at maturity, and Prosero (now under new management) filed suit to collect the unpaid balance. The defendant asserted that there was either a full or partial failure of consideration, and proffered expert testimony that the stock was worth nothing more than the nominal value of $0.01 per share. After extensive litigation and with the trial date near, the trial court granted summary judgment to Prosero, holding that as a matter of law, the defendant received full consideration when he exercised his option to purchase 500,000 shares in exchange for the note.

The Court of Appeals concurred with the lower court that there was not a complete failure of consideration since even the defendant, both through his expert and his own testimony, acknowledged that the stock held at least *some* value. To show a total failure of consideration, the defendant was required to show that the stock was "wholly without value." Even a nominal value of $0.01 per share, in the court's view, was sufficient to defeat a total failure of consideration defense, and meant that the case had to be evaluated under the test for a partial failure of consideration. Turning to that question, the Court of Appeals observed that the defendant was really arguing that his consideration was inadequate (due to what he contended to be an inflated valuation of the stock). Inadequacy of consideration, the court explained, does not in and of itself support a partial failure of consideration defense. While inadequacy of consideration could serve as evidence of fraud in some cases, the defendant here had not asserted that he was defrauded. Accordingly, the Court of Appeals held, the trial court correctly found that full consideration had been given for the note.

C. LIMITED LIABILITY COMPANY DEVELOPMENTS.

***Davis v. VCP South*, 297 Ga. 616, 774 S.E.2d 606 (2015)—Special master properly construed LLC operating agreements in setting parameters for expiration of deceased member's financial interest.**

In this case, a unanimous Supreme Court upheld the trial court's grant of summary judgment based upon the findings of a special master, the most significant of which was to establish a cutoff date for determining a deceased LLC member's estate's right to profits and distributions. Though the sale of the estate's membership interest was not completed until December, 2013, the Court held that it was reasonable to set a cutoff date of September 30, 2011, since the operating agreement's requirement of a commercially reasonable valuation had been satisfied as of that date.

Two plastic surgeons, Davis and Roth, formed a number of LLCs, including VCP South. Through their various businesses, they formed a successful vein care practice known to the public as the "Vein Guys." In January, 2010, Davis died suddenly. Under the terms of the VCP South operating agreement (which the Court indicated was similar to the other entities' operating agreements), upon the death of a member, the surviving member had a first option to purchase the deceased member's membership units, at a value to be determined in a commercially reasonable manner by VCP South's regular accountant. In November, 2010, Roth sought to exercise his option to purchase Davis' membership units in the various entities, but was unable to negotiate a mutually agreeable price with Roth's widow, who served as representative of his estate. One apparent hangup was that Davis had registered the Vein Guys trademark and other intellectual property in his own name, without Roth's knowledge, and the estate claimed that it, and not VCP South, owned the trademarks.

Roth, VCP South and another LLC filed this suit against the estate in December, 2010, seeking enforcement of the operating agreements and also seeking a ruling that VCP South owned the trademarks. Early on in the litigation, the trial court authorized the LLCs' accountant to determine the fair value, over the estate's objections that the accountant was conflicted because he continued to do regular work for the LLCs. The accountant completed his determination in September, 2011. The trial court then appointed a special master to consider the estate's objections to the valuation and to resolve other disputed issues. The special master determined, *inter alia*, that Davis ceased to be a member upon his death and held only certain financial rights in the LLCs thereafter, and that the cutoff date for the estate's financial rights would be September 30, 2011, provided that the valuation was later found to have been done in a commercially reasonable manner. Though the operating agreement did not specify a relevant date for cutting off the financial interest of a deceased member, the special master reasoned that it should be the last day of the month in which the reasonable value of the membership units was determined, since the estate had no choice under the operating agreement but to accept that price. The valuation was eventually found to have been done in a commercially reasonable manner, and the sale of the membership units closed on December 18, 2013, with the litigation still pending.

The estate argued that it was entitled to distributions up to the sale date, and that it was error for the special master to cut off its right to distributions as of September 30, 2011. The trial court adopted the special master's findings and granted summary judgment to the plaintiffs. The Court of Appeals affirmed, and this appeal followed. The estate argued that the special master misconstrued the operating agreement. First, it claimed that the special master should not have considered the tax code and IRS regulations in construing the agreement. The Court found that the special master's consideration of tax laws and regulations was not only appropriate but actually required by the operating agreement, which stated that VCP South was to be treated as a partnership for tax purposes and that its provisions were to be "construed so as to preserve that tax status." Second, the estate claimed that the September 30, 2011 cutoff date was arbitrary given that the sale occurred two years later. The Court found that the special master acted reasonably in establishing an earlier cutoff, noting that while the operating agreement did not specify a time frame for completing a sale, the implied duty of good faith and fair dealing meant under the circumstances that the sale had to occur in an expeditious manner, and the special master's ruling prevented the estate from unfairly benefiting from dragging out the sale process through litigation.

The Court also addressed a cross-appeal by the plaintiffs, who argued that the cutoff date should have been in the month that Davis passed and ceased to become a member, or the month in which Roth exercised his option. The Court summarily rejected these arguments as inconsistent with the operating agreement, and reaffirmed that the special master's construction was appropriate under the circumstances.

Finally, the Court held that the trial court acted properly within its discretion in issuing a mandatory injunction against Ms. Davis, and later finding her to be in civil and criminal contempt, for her actions in unilaterally instructing Facebook to take down the Vein Guys' page in March, 2014. In directing that the page be taken down, Ms. Davis was asserting the estate's claimed right to the trademarks Davis registered, but the ownership of the marks was still in dispute at that time. The trial court directed Ms. Davis to have the page restored, and when she failed to do so before the court's deadline, it imposed a $1,000 per day penalty until it was restored. (The Court's opinion does not address the substance of the dispute over the ownership of the trademarks.)

***Myers v. Myers,* 297 Ga. 490, 775 S.E.2d 145 (2015), Executor of LLC member's estate became member of LLC by operation of O.C.G.A. § 14-11-506, but powers were limited by operating agreement requiring that he dissolve the LLC.**

This was a dispute between two brothers and heirs to their late father's estate, in which one of the brothers, the appellant, was appointed executor. One of the estate's largest assets was Buckshot Properties, LLC ("Buckshot"), whose sole member had been the father. The appellant took over the management of Buckshot in or around November, 2012, after he had been issued letters testamentary. In this lawsuit seeking an accounting, the second brother alleged, *inter alia*, that the appellant was operating a business on land owned by Buckshot without paying rent, that he used estate resources to pay Buckshot's expenses, and that he paid personal expenses using Buckshot's funds. The appellee initially sought to have his brother removed as executor, but later withdrew that request. Nonetheless, after a hearing on the petition, the probate court ordered the removal of appellant and appointed a new administrator. The probate court's order cited evidence of self-dealing transactions undertaken by the appellant as manager of Buckshot, but that was not the only basis for its ruling. The court also noted that Buckshot's operating agreement required the company to be dissolved upon the father's death. Noting that the appellant had not undertaken to do so, the court ordered the newly appointed administrator to wind up Buckshot's affairs.

On appeal, a unanimous Supreme Court affirmed. The appellant argued that his continued management of Buckshot was consistent with both the will and the Georgia LLC Act. The will empowered the executor to "form, terminate, continue or participate in the operation of any business enterprise including…a limited liability company." O.C.G.A. § 14-11-506, meanwhile, provides that when an LLC's sole member dies, the executor of the member's estate becomes a member. The Court acknowledged that the appellant properly became Buckshot's sole member by operation of the will and statute, but this did not relieve him from the express provisions of the operating agreement, which limited his powers to effectuating the dissolution of the LLC. Specifically, the operating agreement provided that the death of the Member (i.e., the father) dissolved the company, and that upon a terminating event (such as death), "the Company shall be dissolved, the Member shall convert the Company's assets into cash, and all such cash shall be applied and distributed…." Since this had clearly not happened in the 18 months between the appellant's appointment as executor and the date of the probate court hearing, the Court concluded that the probate court did not err in requiring the new administrator to wind up the company. The Court also upheld the probate court's order requiring the appellant to repay funds paid by the estate to Buckshot, holding that the transactions were tainted by the appellant's conflict of interest.

***Mahalo Investments III, LLC v. First Citizens Bank & Trust Co.,* 330 Ga. App. 737, 769 S.E.2d 154 (2015)—Judgment creditor not required to bring action against LLC in order to obtain charging order against one of its members.**

This action to collect a judgment raised an question, identified by the Court of Appeals as an issue of first impression, "whether under O.C.G.A. § 14-11-504(a), an order charging a member's interest in a limited liability company with payment of an unsatisfied judgment must be initiated as a separate action against the limited liability company." The court answered the question in the negative, and affirmed the trial court's entry of a charging order.

The appellee, First Citizens, obtained a $3 million judgment against Mahalo Investments III, LLC ("Mahalo") and two individuals, which was affirmed without opinion by the Court of Appeals in 2013. First Citizens then obtained post-judgment discovery from the two individuals, which revealed that they owned interests in several other LLCs. First Citizens filed an application under § 14-11-504(a) seeking a charging order against the individuals' interests in the LLCs. Rather than file an independent action against the LLCs, First Citizens filed its application in the original action. Appellants, the two individuals and Mahalo, opposed the application on the grounds that First Citizens was required to file an independent action. The trial court issued the charging order without addressing the procedural question posed by the appellants.

On appeal, the appellants argued that the trial court should not have entered the charging order as part of the original proceeding, and also that the trial court failed to establish jurisdiction and venue over the LLCs. The Court of Appeals looked to the text of O.C.G.A. § 14-11-504, which reads: "[o]n application to a court of competent jurisdiction by any judgment creditor of a member or of any assignee of a member, the court may charge the limited liability company interest of the member or such assignee with payment of the unsatisfied amount of the judgment with interest." The appellants did not dispute that the trial court was a court of competent jurisdiction. This effectively ended the question for the court, which found that the statute unambiguously permitted any court of competent jurisdiction to enter a charging order. Nonetheless, the court addressed the various arguments advanced by the appellants. First, the appellants pointed to language in the parallel provision of the Georgia Uniform Partnership Act, O.C.G.A. § 14-8-28(a), which authorizes "the court which entered the judgment" to issue a charging order, and argued that the absence of similar language in O.C.G.A. § 14-11-504(a) meant that the court rendering the underlying judgment lacked the authority to enter a charging order in cases involving LLCs. The court expressed doubt that the LLC Act and Uniform Partnership Act should be read *in pari materia* as urged by the appellants, but concluded that it did not matter because § 14-11-504(a) was unambiguous. Second, the appellants cited *Prodigy Centers/Atlanta v. T-C Associates Ltd.*, 269 Ga. 522, 501 S.E.2d 209 (1988) for the proposition that First Citizens was required to pursue a charging order through a collateral proceeding. The court acknowledged that *Prodigy* did use the term "collateral proceeding" in describing the process through which a judgment creditor obtains a charging order, but found that the comment was not material to the court's holding in that case (which dealt with the question of whether an LLC interest was a chose in action). It found that at most, *Prodigy* recognized that a judgment creditor must initiate an additional proceeding, but could not be read to require that that proceeding occur under a different file number or in a different court.

Turning to the question of jurisdiction and venue, the court noted that § 14-11-504(a) does not state whether the LLC is to be made a party to a proceeding by a judgment creditor to obtain a charging order. The court considered the scope of the relief afforded by § 14-11-504(a), and concluded that it was designed to avoid interfering with the rights and interests of the LLC. For instance, the statute limits the rights of a judgment creditor obtaining a charging order to that of an assignee, and it expressly states that the creditor has no right to force the dissolution of the LLC or otherwise interfere in its internal affairs. The court determined that from the standpoint of the LLC, the only impact of a charging order is to divert distributions from the member to the judgment creditor. It therefore concluded that it was unnecessary for the trial court to have jurisdiction over the LLCs. In this case, since jurisdiction over the judgment debtors was undisputed, the trial court committed no error.

***Gaslowitz v. Stabilis JE-102 Fund I, LP,* 331 Ga. App. 152, 770 S.E.2d 245 (2015)—Creditor of LLC member entitled to charging order against membership interest, but not entitled to an accounting of the LLC's assets.**

This was another case involving the rights of a judgment creditor seeking a charging order against an LLC member, decided by the same Court of Appeals panel that decided *Mahalo* (see above) a month earlier. Here, the court found that the creditor was entitled to a charging order against the LLC's member, but had no right to obtain an accounting against the LLC. The court affirmed the trial court's entry of a charging order, but reversed the part of the court's ruling that ordered an accounting.

The appellee obtained a judgment against appellant Gaslowitz in June 21, 2011. It then filed a petition against Gaslowitz, appellant Adam R. Gaslowitz & Associates LLC ("G&A") and a separate corporation associated with Gaslowitz. Gaslowitz is the sole member of G&A. The appellants argued that the appellee had not shown evidence of the amount due, and that the charging order was vague in that it did not determine what distributions from G&A were required to be paid to the appellee and when they were to be paid. The Court of Appeals held that summary judgment in favor of the appellee was nonetheless proper. The court explained, as it did in *Mahalo,* that a charging order under § 14-11-504(a) simply entitles the creditor, as assignee of the member's interest in the LLC, to obtain distributions that the member would otherwise have been entitled to receive, up to the unsatisfied amount of the judgment. It further held that in light of the nature of post-judgment collection proceedings, in which the unsatisfied amount of the judgment will change over time due to a variety of factors, it was not reasonable to read into § 14-11-504(a) a requirement that the creditor establish the specific unsatisfied amount of the judgment in order to obtain a charging order. Nor was it necessary, in the court's view, that the order direct what funds were to be distributed to the creditor, since by definition, a creditor can obtain nothing more than the unsatisfied portion of its judgment.

Turning to the portion of the trial court's ruling that ordered an accounting, the court cited several reasons for its decision to reverse. First, the appellee had no direct remedy against G&A's assets, since members of Georgia LLCs have no specific interest in LLC property, and allowing creditors to reach the LLC's assets would constitute reverse piercing, which Georgia law does not permit. Second, the Georgia LLC Act does not expressly contemplate an accounting as a remedy available to its members. Third, consistent with the court's previous observation in *Mahalo,* a charging order does not confer a judgment creditor with the privileges of a member, and does not permit a creditor to participate in (or interfere with) the management and affairs of the LLC. Fourth, the appellee was unable to explain how an accounting would help to ensure that the charging order would be obeyed.

The Court of Appeals also found that the trial court should not have required G&A to post a supersedeas bond, although it was appropriate to require Gaslowitz to post a bond. Citing *Mahalo,* the court explained that a charging order does not effect a "disposition of property" insofar as G&A is concerned, and that G&A was neither a judgment debtor nor a necessary party to the proceeding.

***Evanston Insurance Company v. Mellors*, ___ F. Supp. 3d ___, 2015 WL 5786745 (S.D. Ga. Sep. 28, 2015)).**

In this insurance coverage dispute arising from a products liability suit against an athletic supplement seller structured as an LLC, the district court held that the seller's self-described owner and manager was an individual insured under the policy, notwithstanding that he was not a member of the LLC and held no formal title. The court concluded that uncontroverted evidence clearly established that he was a manager.

The individual defendant, Mellors, purported to be the owner and manager of June & Johnny, LLC ("J&J"), which sold a supplement called RAGE. A user of RAGE brought a lawsuit claiming that the product caused him to suffer a stroke. J&J held an insurance policy issued by the plaintiff, which defined the insureds as "the limited liability company so named [J&J], any manager thereof, but only with respect to their duties as manager of the limited liability company and any member thereof, but only with respect to the conduct of the business of the limited liability company." In seeking coverage in connection with his defense of the litigation, Mellors claimed that he was a member and a manager. The district court disagreed that Mellors was a member. While Mellors claimed to be the "owner" of J&J, there was no corroborating evidence in J&J's records suggesting that Mellors had ever been admitted as a member. Turning to the question of whether Mellors was a manager, the court found uncontroverted evidence that J&J's 100 percent owner and sole member was Mellors' wife, and that she had executed a document stating that she allowed Mellors "to handle all business matters concerning [J&J] from this point forward." There was no evidence that this designation had been rescinded in any fashion. Therefore, the court concluded, Mellors satisfied the definition of a manager set forth in O.C.G.A. § 14-11-304, which provides that managers shall be designated with the approval of more than one half by number of the members, need not be members, and shall hold office until their successors have been elected and qualified. The court cited a recent decision holding that a member could be a manager even where not expressly defined as such under the operating agreement. *See Inland Atlantic Old Nat'l Phase I, LLC v. 6425 Old Nat'l, LLC*, 329 Ga. App. 671, 675, 766 S.E.2d 86, 91 (2014). Since Mellors was a manager, he was an insured under the policy.

The Court also addressed a number of coverage issues not discussed here, including a claim that coverage was barred because of misrepresentations in the insurance application, which the court addressed under Texas law.

***In re Reynolds*, No. 11-87131-BEM, 2015 WL 6520157 (Bankr. N.D. Ga. Sept. 18, 2015)—Bankruptcy debtor not required to disclose involvement as manager of LLC in absence of evidence of ownership or discretionary control.**

In this case, a bankruptcy trustee sought revocation of the debtor's discharge, claiming that the debtor fraudulently concealed her involvement in an LLC which managed a shopping center. The debtor filed a Chapter 7 petition in December, 2011 and received a discharge in April, 2012. Shortly thereafter, the bankruptcy trustee for the debtor's case, while gathering information for another bankruptcy matter in which she was acting as trustee, discovered documents that associated the debtor with Ridgemont, LLC. The debtor had not disclosed any such relationship in her statement of financial affairs. The trustee investigated further, and uncovered an extensive history of transactions in which the debtor acted on behalf of Ridgemont with respect to its management of a shopping center. For instance, the debtor executed a resolution authorizing her to "execute any and all documents pertaining to the purchase of" the shopping center property, and then signed the documents necessary to close the transaction. She also opened Ridgemont's bank account and was a signatory on the account throughout its existence. The debtor also served as Ridgemont's contact person for tenants at the shopping center and was primarily responsible for collecting rents. The record showed that the debtor performed functions of this nature for over a year, both prior to and after she filed her petition.

However, the record also showed that the debtor was not an owner or member of Ridgemont, and that its sole member instead was a man named Ray Easterling. Ridgemont's operating agreement, executed by Easterling, provided that "[t]he management of the Company shall be conducted by the Member(s)," further adding that "[t]he Member(s) grant authority to [the debtor] to act as Manager for Ridgement, LLC with the ability to enter into Leases, Contracts and other necessary work products in accordance with business operations pursuant to the Member(s) wishes and direction." The debtor asserted that at all times, she was acting under the direction and authority of Easterling, who resided out of state and was suffering from an illness. She described her function as that of a paralegal, responsible for handling paperwork for Easterling.

The bankruptcy court found that the debtor did not fraudulently conceal her involvement with Ridgemont. The court found that with one exception, there was no evidence that the debtor took any action or signed any document except at the direction and under the control of Easterling. The court also read the operating agreement as depriving the debtor of any independent decision making authority, through its reference to "the Member's wishes and direction." Since it was also undisputed that the debtor had no ownership interest in Ridgemont, the court concluded that she was not required to disclose her affiliation. The court also found no evidence of fraudulent intent, noting that there was no allegation by the trustee that Ridgemont held any assets that would have been relevant to the disposition of the debtor's case.

***Crumpton v. Vick's Mobile Homes, LLC*, 335 Ga. App. 155, 779 S.E.2d 136 (2015)—LLC member's dissolution petition does not cause the petitioner's membership to cease.**

In this case, a member of two LLCs formed to own and manage a mobile home park sought dissolution of the LLCs, claiming that the other member (her brother) mismanaged the entities and prevented her from accessing their bank accounts. In response, the brother argued that his sister's petition served to terminate her membership under O.C.G.A. § 14-11-601.1(b)(4)(D). The trial court agreed, and granted partial summary judgment to the brother on the issue of standing.

On appeal, the Court of Appeals reversed, finding that the trial court misinterpreted the statue. Although it mused that the statute was "not a model of clarity," the court found that the statute could not be read to mean that a member who seeks dissolution ceases to become a member by that act alone. O.C.G.A. § 14-11-601.1 describes the circumstances in which a person ceases to be a member of a Georgia LLC. Relevant to this case was subsection (b)(4)(D), which provides for cessation of membership when a member "files a petition or answer seeking for the member any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute law or regulation." The court found that the words "for the member" were critical to understanding the meaning of the statute. Following a previous Court of Appeals decision, *Sayers v. Artistic Kitchen Design, LLC*, 280 Ga. App. 223, 633 S.E.2d 619 (2006), the court interpreted subsection (b)(4)(D) to apply only when a member seeks dissolution for itself, not for the LLC. The court further explained that when subsection (b) is read as a whole, it lists various events that affect a member personally (such as death, incompetence, bankruptcy, or reorganization) but not the LLC as an entity. Since a member can be either a natural person or an incorporated entity, it is completely plausible that a member can seek its own dissolution. The court concluded that subsection (b)(4)(D) was intended to address this eventuality, not a member's petition for dissolution of the LLC.

***STL Management Consultants v. Manhattan Leasing Enters. Ltd.*, 333 Ga. App. 309, 775 S.E.2d 758 (2015)—Resignation of LLC's registered agent becomes effective 31 days after receipt by Secretary of State's office.**

In this lawsuit concerning a default on a car lease in which an LLC was sued as guarantor of the primary borrower's obligations, the Court of Appeals had to determine whether the resignation of the LLC's registered agent was effective 31 days after it was received by the Secretary of State's office, or 31 days after it was stamped as "filed" by the Secretary of State. The court found that the date of receipt controlled, and reversed the trial court's grant of a default judgment against the LLC.

Had the later date controlled, the LLC would have been in default. According to the sheriff's return of service, the LLC was served on April 2, 2013, when a copy of the complaint and summons were delivered to its registered agent, Jeffrey Allen. The return of service also indicated that Mr. Allen had resigned, which he had, by letter dated February 14, 2013. Since it was undisputed that the LLC did not answer the complaint within 45 days of service upon Mr. Allen, its sole objection to the default was that it had never been served properly in light of Mr. Allen's resignation. The Secretary of State's record of the resignation had two date stamps on it. The first stamp read: "2013 FEB 20 AM10:08 Secretary of State Administrative Support." The second read: "Control No. 0519117 Date Filed: 05/20/2013 03:54 PM Brian P. Kemp Secretary of State."

O.C.G.A. § 14-11-209(a)(2) provides that an LLC must maintain a registered agent for service of process, and that a registered agent "may resign…by signing and delivering to the Secretary of State for filing a statement of resignation[.]" It further provides that "[t]he agency appointment is terminated…on the…thirty-first day after the date on which the statement of resignation was filed." Thus the LLC took the position that Mr. Allen's resignation became effective in March, prior to the time he was served, and the plaintiff argued that the resignation did not become effective until June 20, 2013, over two months after the service.

The Court of Appeals relied heavily on O.C.G.A. § 14-11-206 in its decision. That statute, the court wrote, "describes the duties of the Secretary of State with regard to documents filed on behalf of an LLC, and specifies that the Secretary's duty to file documents is ministerial." Of particular importance was subsection (e), which provides that "a document accepted for filing 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." The Court of Appeals found that the initial February stamp indicated the time and date and bore the words "Secretary of State," which served as at least prima facie proof that the resignation was filed as of that date. The court then shifted the burden to the plaintiff to show evidence that its service was proper. The plaintiff pointed out that the February stamp did not bear the Secretary's name or title (while the May stamp did), but instead only indicated receipt by the office's support staff. The plaintiff relied on the Georgia Corporations Code's provisions for filing documents with the Secretary of State, specifically O.C.G.A. § 14-2-125(b), which states that the Secretary of State "files a document by stamping or otherwise endorsing his official title and the date and time of receipt on both the original and the document copy." The Court of Appeals was not persuaded that § 14-2-125 had any application to an LLC, and noted that § 14-11-206 had no equivalent requirement that the stamp include the Secretary's official title or the word "filed." The court also found that there was no evidence in the record indicating the significance of the second stamp—in the court's view, it could have been made for purely ministerial reasons such as bookkeeping. Finally, the court analogized the situation to filing pleadings in court. Under well-settled law, a pleading "is said to be filed, when it it is delivered to the proper officer, and by him received to be kept on file." *Valentine v. Hammill*, 258 Ga. 582, 372 S.E.2d 435 (1988).

D. PARTNERSHIP LAW DEVELOPMENTS.

***Bagwell v. Trammel*, 297 Ga. 873, 778 S.E.2d 173 (2015)—Joint venturer not entitled to specific performance of agreement to divide proceeds from sale of joint venture property where sale had not yet occurred; trial court permitted to make equitable partition of joint venture property that differed from distribution formula in parties' written contract.**

In this case, the Georgia Supreme Court issued two interesting rulings regarding the disposition of land owned by the parties pursuant to a joint venture agreement. The Court unanimously held that one joint venturer was not entitled to specific performance of the agreement, which would have entitled him to 70 percent of the proceeds of the sale of the land, because the sale had not yet occurred and the proceeds were not yet in existence. The Court also held, in a 6-1 ruling, that the trial court was authorized to equitably partition the land such that the distribution of the sales proceeds would be 50/50, notwithstanding that the parties' contract called for a 70/30 distribution in favor of the plaintiff.

The joint venture in question was formed in 2000 by the execution of a joint venture agreement establishing an entity called Etowah Ventures ("Etowah"). The parties to the agreement were the plaintiff-appellant Thomas Bagwell and the defendant-appellees Bobby and Oretta Trammel. At the time, Bagwell held notes owed or guaranteed by the Trammels in excess of $1,875,000. He agreed to cancel the notes in exchange for a 50 percent interest in approximately 103 acres of real estate. The real estate would be held by the Trammels in trust for the benefit of Etowah. The parties further agreed to a formula whereby proceeds from the sale of the joint venture property would be applied first to satisfy the Trammels' debt, then divided 50/50 between Bagwell and the Trammels.

In August, 2002, with none of the joint venture property having yet been sold and with the Trammels in need of additional money, the parties entered into a Redemption Agreement which amended the original joint venture agreement. Under the Redemption Agreement, Bagwell advanced a portion of the future sales proceeds. In return, the formula for distribution of future sales proceeds was modified so that Bagwell would be entitled to a 70 percent distribution rather than 50 percent.

Over the next two years, approximately 73.6 acres of joint venture property were sold, and the sale proceeds were distributed pursuant to the Redemption Agreement's formula. In September, 2004, the Trammels transferred the remaining 29 acres to their sons. Bagwell filed suit in 2010, seeking a declaratory judgment, cancellation of the deed, a constructive trust, dissolution of the joint venture under the Georgia Partnership Act, and an accounting consistent with the Redemption Agreement's formula. During the pendency of the litigation, the Trammels' sons conveyed the 29 acres back to the Trammels to be held for the benefit of Etowah. Bagwell amended his complaint to reflect this development and to assert claims for an equitable dissolution and accounting of Etowah, an equitable partitioning under O.C.G.A. § 44-6-140, and specific performance of the Redemption Agreement. The trial court held a bench trial, in which the court granted Bagwell's requests for an equitable accounting and equitable partitioning, but directed that upon the sale of the 29 acres, Bagwell and the Trammels would be entitled to a 50/50 split of the proceeds. The Supreme Court's opinion notes that the "trial court specifically held that the [original joint venture agreement] operated as a valid deed under O.C.G.A. § 44-5-30 and that the Redemption Formula found in the Redemption Agreement…did not govern the trial court's grant of equitable relief in this case."

In this appeal, Bagwell argued first that the trial court should have granted his claim for specific performance of the Redemption Agreement as it applied to the 29 acres. The trial court denied Bagwell's specific performance claim on the ground that monetary damages were available to him under the agreement. The Supreme Court, following the "right for any reason" rule, affirmed for a different reason: the claim was not ripe. The Court noted that it was undisputed that the 29 acres remained unsold, and also undisputed that proceeds from the earlier sales of land were distributed in accordance with the Redemption Agreement. Bagwell therefore could not point to any sales proceeds in existence that had not been properly paid to him, such that specific performance would be appropriate. The Court also held, unanimously, that the original joint venture agreement was a valid deed under O.C.G.A. § 44-5-30, and affirmed that finding by the trial court.

The Court then turned to the trial court's decision to equitably partition the 29 acres in a manner that contravenes the Redemption Agreement. Though the trial court was granting relief sought by Bagwell, its ruling effectively reduced Bagwell's interest in the properties. The Supreme Court affirmed, with six justices concurring and Justice Melton dissenting. Applying the deferential "abuse of discretion" standard, the majority reasoned that the trial court was authorized to deviate from the contractual formula. The majority cited the trial court's "broad discretion to consider all of the circumstances that make a proceeding in equity more suitable and just" when evaluating a claim for an equitable partition. Applied to this case, this broad grant of discretion meant that even though the Redemption Agreement "may have remained a valid and enforceable contract between the parties, the trial court was not bound by its terms in making its equitable partition award." The majority found that there were facts in the record that supported the trial court's decision; namely, that it appeared that Bagwell was trying to force the Trammels to sell the property at a substantially reduced price.

In his dissent, Justice Melton wrote that the matter should have been remanded to the trial court with directions to state its findings with respect to the impact of the Redemption Agreement on its position. In Justice Melton's view, it was not clear from the trial court's opinion whether it took the Redemption Agreement under consideration at all. (The majority opinion disagreed with this view.) The dissent found that the trial court's order suffered from a "troubling" lack of analysis about the Redemption Agreement, which it found to be "essentially nullified" by the order.

***Abdulla v. Chaudhary*, No. CV 114-008, 2015 WL 4477824 (S.D. Ga. July 21, 2015)—No partnership formed between business associates due to conduct demonstrating abandonment of partnership agreement.**

In this case, two individuals formed a partnership, but both of them began to act inconsistently with the terms of their partnership agreement almost immediately from the day it was signed. In a lawsuit brought several years later by one of the would-be partners to recover his portion of the partnership assets, the district court found that the agreement had been abandoned by the parties' conduct.

In May, 2005, the plaintiff and defendant entered into a one-page written agreement, drafted by the defendant, to jointly purchase various properties in Augusta. The agreement stated, among other things, that "[b]oth parties agree to form a LLC (which will be named and registered) later to buy the following properties" followed by a list of the properties. The agreement further stated that both parties would contribute equal amounts of capital and would be equal partners with respect to the listed properties. On the same day that the agreement was executed, the parties formed Net Assets, LLC to purchase the properties listed in the agreement. However, the LLC never purchased the properties, and it was dissolved by the defendant in 2010. Instead, the various properties were purchased either by the defendant in his own name, by the plaintiff in his own name, or by a different LLC owned by the plaintiff. (In fact, the record indicated that some of the properties had already been purchased by the plaintiff at the time of the agreement.) In 2012, the plaintiff demanded that the defendant pay him his share of the partnership assets. The defendant refused, stating that their May 2005 agreement "never went through" because the plaintiff did not acquire the listed properties in a jointly owned LLC. The plaintiff sued for breach of contract, *quantum meruit* and breach of fiduciary duty.

The district court ruled that the parties abandoned the agreement by their subsequent conduct. Under Georgia law, "[p]arties may by mutual consent abandon an existing contract between them so as to make it not thereafter binding and the contract may be rescinded by conduct as well as by words." *C. Brown Trucking Co. Inc. v. Henderson*, 305 Ga. App. 873, 884 (2010). The district court reviewed the May 2005 agreement and found that its prominent references to the formation of an LLC indicated that this was not some minor detail, but instead "was the defining characteristic of [the parties'] chosen business model." This was further evidenced by the fact that the LLC was formed the same day. The district court then found that "the record clearly demonstrates that [the parties] mutually abandoned the idea in the weeks and months following their agreement[,]" pointing to the fact that all of the listed properties were purchased by someone other than the LLC and were never owned by the LLC.

Because the purpose of the contract had been abandoned, it was unenforceable at the time of the alleged breach, and the plaintiff could not enforce it. By the same logic, the plaintiff could not maintain an action for breach of fiduciary duty. The court found that "[a]lthough the Contract contemplated a partnership, that business relationship never developed as envisioned and the parties quickly abandoned the agreement that would have governed that relationship." The court entered summary judgment in favor of the defendant.

***McElvaney v. Roumelco*, 331 Ga. App. 729, 771 S.E.2d 419 (2015)—Question of fact regarding existence of LLC stock transfer agreement precluded summary judgment.**

In another dispute between real estate investors, the Court of Appeals held that there was sufficient evidence that the parties entered into an agreement giving the plaintiff a 47% interest in an LLC, despite some significant uncertainty as to the actual terms of the agreement, to submit the plaintiff's claims arising from and relating to that agreement to the jury. The Court of Appeals reversed the trial court, which had granted summary judgment to the defendant.

While working for an unrelated company owned by the plaintiff, the individual defendant Roumel approached the plaintiff about an opportunity to buy an apartment complex in Atlanta. The plaintiff provided over $100,000 in funds towards the purchase of the property, and according to the plaintiff, he and Roumel orally agreed that he would work with Roumel to raise the remaining funds needed to close on the acquisition in exchange for 50 percent ownership of and shared decision-making concerning the property. During May and June, 2011, the plaintiff borrowed the remaining funds from a friend and forwarded those funds to Roumel, and Roumel purchased the property through an entity called Roumelco. During the same period, Roumel wrote two emails in which he identified the plaintiff as his partner—one to the plaintiff and one to a third party. The plaintiff sought documentation of the parties' arrangement. In the fall of 2011, the plaintiff and Roumel entered into an agreement backdated to June 10, 2011 (the day after the property was purchased) in which Roumel agreed to transfer 47% of Roumelco's stock to the plaintiff in exchange for a cash investment of "approximately" $300,000. On December 7, 2011, Roumel sent a letter to the plaintiff and two minority owners of Roumelco, which stated that the plaintiff owned 47% of Roumelco.

The exact genesis of the lawsuit is not entirely clear, but the record showed that between 2011 and 2013, Roumel used Roumelco funds to pay personal and family expenses, while during the same time, Roumelco defaulted on the mortgage for the apartment complex. The plaintiff sued Roumel and Roumelco for breach of contract, specific performance, fraud, breach of fiduciary and unjust enrichment, and sought an accounting and appointment of a receiver.

The trial court granted summary judgment to the defendants, finding as a matter of law that the parties had not reached an enforceable agreement as to their respective ownership interests in Roumelco. The Court of Appeals ruled that this was error because even if the parties' initial oral agreement was too indefinite to be enforceable, their subsequent writings and actions were sufficient evidence that the parties intended to make the plaintiff a 47% owner of Roumelco. In its opinion, the Court of Appeals distinguished *Razavi v. Shackelford,* 260 Ga. App. 603, 580 S.E.2d 253 (2003) and *Green v. Zaring*, 222 Ga. 195, 149 S.E.2d 115 (1966), two cases in which oral agreements between joint venturers were found to be too vague to be enforced. In those cases, the court reasoned, there was no subsequent writing that appeared to confirm the oral agreement, and no relevant written admissions by the party resisting enforcement of the oral agreement. In the case at bar, Roumel's apparent admissions and the written stock transfer agreement presented a jury question as to whether the earlier uncertainty as to terms had been cured. Turning to the plaintiff's motion to appoint a receiver, the Court of Appeals vacated the trial court's denial of the motion because it was premised on the erroneous ruling that the plaintiff had no ownership interest in Roumelco as a matter of law, and remanded the matter for reconsideration by the trial court.

***Smith v. Williams*, 333 Ga. App. 167, 775 S.E.2d 639 (2015)—Question of fact as to timing of termination of law firm partnership precluded summary judgment as to division of disputed assets.**

The principal parties to this lawsuit were two partners in a law firm that handled workers' compensation cases and other matters. In November, 2012, the individual defendant, Smith, abruptly "packed up her things, took case files, and left the office." Sometime thereafter, the individual plaintiff, Williams, filed this action which sought dissolution of the partnership, damages for breach of contract, and an injunction. The parties disputed how to properly divide fees earned from the workers' compensation cases in which the clients retained Smith and her new firm after she ceased practicing with Williams. Smith alleged that she notified Williams in writing no later than September 19, 2013 that these clients had terminated Williams' services. It was undisputed that Williams did not file attorney fee liens in accordance with the rules of the State Board of Workers' Compensation. Smith moved for partial summary judgment, seeking a ruling that she was entitled to the fees from those cases as a matter of law. The trial court denied the motion, ruling that Williams' failure to file an attorney fee lien was not dispositive as to the disposition of fees relating to numerous cases that settled prior to when Smith sent the termination letters. It held that these cases were partnership assets whose disposition was governed by the partnership agreement.

On appeal, the Court of Appeals agreed that the subject cases were partnership assets "because there remains a material factual dispute as to when the partnership terminated." The court rejected Smith's argument that the partnership ended as a matter of law when she left the office in November, 2012, noting that evidence in the record showed that the parties continued to split fees for some time after that date. The court also observed that the partnership's affairs had not yet been wound up. Under O.C.G.A. § 14-8-30, a dissolved partnership is not immediately terminated, but instead "continues until the winding up of the partnership affairs is completed." As the purpose of Williams' suit was to bring the partnership's affairs to an end, the Court of Appeals concluded that the proper course was to reserve determination of the disputed assets "until the main determination of the case."

E. TRANSACTIONAL CASES.

***Legacy Academy, Inc. v. Mamilove, LLC*, 297 Ga. 15, 771 S.E.2d 868 (2015)—Franchisees' failure to read franchise agreement precluded rescission claim based on oral representations, absent evidence they were prevented from reading agreement.**

In a unanimous decision which reversed an *en banc* Court of Appeals ruling from last year, the Georgia Supreme Court held that parties to a franchise agreement could not sustain a rescission claim against the franchisor based on oral representations that allegedly induced them to enter into the agreement. The Court further held that the plaintiffs also could not sustain claims for damages based on fraud, negligent misrepresentation or the Georgia RICO statute. The Court ruled that the plaintiffs' acknowledged failure to read the franchise agreement, which contained their disclaimer that they received any such representations as well as a merger clause, precluded their rescission claim in the absence of evidence that they were prevented from reading the agreement. The evidence supported only a finding that they were pressured not to read the agreement, which the Court deemed to be insufficient.

The case arises from the plaintiffs' purchase of a day care franchise in 2001. The plaintiffs claimed that during their initial discussions with the franchisors, they were provided with an income and expense statement that purported to show how other franchises already in operation were performing. At trial, the plaintiffs showed evidence that the actual historical performance of other franchisees was very different from what had been represented. A few months after they were shown the allegedly false earnings information, the plaintiffs met with the defendants and were given an offering circular and a franchise agreement for their signature. The plaintiffs signed the agreement that day, without reading either the agreement or the offering circular. The agreement included a disclaimer stating that "[f]ranchisor expressly disclaims the making of, and Franchisee and each Owner acknowledge that it has not received from Franchisor or any party on behalf of Franchisor, any representation...as to the potential volume, profit, income or success of the business licensed under this Agreement...." The agreement also contained a more specific disclaimer stating that the defendants made no representation of expected earnings except as set forth in the circular. Finally, the agreement contained a merger clause stating that it represented the "entire agreement of the parties with respect to the matters conned herein."

The plaintiffs brought common law fraud and negligent misrepresentation claims and statutory claims under O.C.G.A. § 51-1-6 and the Georgia RICO Act. At the close of evidence, the defendants moved for a directed verdict, and the trial court denied the motion. The jury then returned a verdict awarding over $1 million in damages to the plaintiffs.

In a sharply divided 4-3 *en banc* opinion, the Court of Appeals affirmed the trial court's denial of the defendants' motion for directed verdict. *Legacy Academy, Inc. v. Mamilove, LLC*, 328 Ga. App. 775, 761 S.E.2d 880 (2014). The majority opinion held that the evidence supported a finding that the plaintiffs were rushed into signing the franchise agreement before they could read it and the offering circular. Specifically, there was testimony at trial indicating that the defendants told the plaintiffs that others were interested in their desired location for the franchise. The Georgia Supreme Court granted a writ of certiorari.

The question before the Court was whether evidence that the plaintiffs were pressured or rushed into signing the franchise agreement excused their failure to read the document. As a matter of well settled law, "a party who has the capacity and opportunity to read a written contract cannot afterwards set up fraud in the procurement of his signature to the instrument based on [extra-contractual] representations that differ from the terms of the contract." *Novare Group, Inc. v. Sarif*, 290 Ga. 186, 188-89, 718 S.E.2d 304 (2011). An exception exists for fraud that prevents the party from reading the contract. The Court emphasized that "rushed" and "prevented" do not mean the same thing. It found earlier Georgia decisions holding that allegations that parties were hurried into signing documents did not, without more, excuse their failure to read them. *See Budget Charge Accounts, Inc. v. Peters*, 213 Ga. 17, 18, 96 S.E.2d 887 (1957); *Citizens Bank, Vienna v. Bowen*, 169 Ga. App. 896, 897, 315 S.E.2d 437 (1984). Reviewing the record in the case at bar, the Court found that the plaintiffs were not prevented from reading the agreement but instead "blindly relied on Legacy's representations regarding expected income as a result of their own desire to quickly begin construction of their center at a particular location."

The Court further found that the plaintiffs' reliance on oral representations about earnings was "unreasonable as a matter of law" in light of the disclaimers that "expressly contradict[ed]" their allegations, citing the rule that "[s]tatements that directly contradict the terms of the agreement…simply cannot form the basis of a fraud claim for the purpose of cancelling or rescinding a contract." *Novare Group*, 290 Ga. at 188-89. It also held that in light of its finding that the plaintiffs had a duty to read the franchise agreement which was not excused, the agreement's merger clause barred the plaintiffs' fraud, negligent representation and RICO claims.

Finally, the Court rejected the plaintiffs' argument that they were still entitled to damages for their claim under O.C.G.A. § 51-1-6, which provides that "[w]hen a law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby." The plaintiffs' claim under O.C.G.A. § 51-1-6 was based not on any affirmative misrepresentations but instead on allegations that the defendants failed to make certain disclosures mandated by Federal Trade Commission regulations governing franchise agreements. The Court ruled that the jury's award of compensatory damages was a general verdict that gave no indication as to whether the jury had awarded any damages for that claim. (The Court declined to rule on whether the O.C.G.A. § 51-1-6 claim itself was properly submitted to the jury, noting that the defendants did not seek review as to that issue.)

***Stafford v. Gareleck*, 330 Ga. App. 757, 769 S.E.2d 169 (2015)—LLC member adequately stated claims based on alleged misrepresentations as to value of proceeds from sale of LLC.**

In this case, the Court of Appeals held that the trial court erred in dismissing claims for fraud, conversion, breach of fiduciary duty and accounting brought by a member of an LLC alleging that he received an inadequate share of the proceeds from the sale of the LLC.

The plaintiff, Stafford, held an interest in an LLC in which the defendant, Gareleck, was a managing member. The LLC was sold in February, 2012 for an unknown amount. On January 28, 2012, Gareleck told Stafford that his share of the sale proceeds would be $170,099.22 and asked him to sign a document necessary to effectuate the sale and the payment of his share of the proceeds. Stafford signed the document. In his complaint, Stafford alleged that unbeknownst to him, the document transferred his interest in the LLC to Gareleck, which permitted Gareleck to pay him less than the actual value of his interest in the LLC. He further alleged that when he discovered that he had been defrauded, he notified Gareleck that he was rescinding the document he had signed, and that Gareleck acknowledged this rescission and agreed to pay him more money.

Gareleck filed a verified answer in which he asserted that the document signed by Stafford was a Mutual Release and Ownership Interest Purchase ("Release") in which Stafford released any and all claims he had or could have had against Gareleck and the LLC, and promised not to sue them. Gareleck filed a motion to dismiss, which the trial court granted, on three grounds: that Stafford had released all claims against Gareleck and the LLC, that he failed to plead fraud in the inducement with particularity, and that the Release's merger clause barred his claims.

The Court of Appeals reversed. As an initial matter, although Stafford did not explicitly assert a claim for rescission of the Release, the Court of Appeals construed his complaint as seeking rescission since he made no claim for breach of contract and appeared to be rejecting his Release under a fraud in the inducement theory. Under Georgia law, a plaintiff asserting a claim for rescission must "either make a tender 'or show a sufficient reason for not doing so[.]'" Stafford's complaint was silent as to tender. Nonetheless, the Court of Appeals determined that it was not required to determine whether Stafford was required to make a tender, because he had elsewhere alleged that Gareleck acknowledged his demand to rescind the release and agreed to increase Stafford's share of the sale proceeds. In the court's view, this satisfied Stafford's burden under notice pleading standards to state a rescission claim, because he could show evidence demonstrating that the Release had been rescinded by agreement of the parties. For the same reason, the court ruled that the dismissal order was error insofar as it held that the language of the release barred Stafford's claims.

The Court of Appeals further held that Stafford had met his burden to plead fraud in the inducement with particularity. The trial court had held that Stafford failed to allege the content of any misrepresentation and failed to allege facts showing reasonable reliance. But in the view of the Court of Appeals, Stafford sufficiently alleged that he signed the Release in reliance on the alleged misrepresentation that the $170,099.22 he received was the actual fair value of this ownership interest. The court also found that Stafford's allegations that Gareleck owed him a fiduciary duty as managing member of the LLC supported a finding that he reasonably relied on Gareleck's representation as to the value of his interest.

***Kreiger v. Bonds*, 333 Ga. App. 19, 775 S.E.2d 264 (2015)—Issues of fact as to plaintiff's satisfaction of conditions precluded summary judgment on claim for specific performance of buy-sell agreement.**

In this case, two shareholders of a closely held corporation both sought specific performance of a buy-sell agreement containing a mandatory put/call provision. The Court of Appeals held that multiple issues of fact precluded either party from obtaining summary judgment on their respective specific performance claims. Since the trial court had granted summary judgment in favor of one of the shareholders, the Court of Appeals reversed that portion of the decision.

The case involved Southeast Cooler Corp ("SCC"), in which plaintiff Bonds held 5,500 shares and defendant Kreiger held 27,500 shares. In 2010, Bonds and Kreiger entered into the buy-sell agreement that formed the basis for the lawsuit. Section Four of the agreement provided that at any time, one shareholder may offer both to sell all of his shares in SCC or to buy all of another shareholder's shares. Any offers made pursuant to this section were subject to certain conditions, including that they be in writing and that they contain a statement that the purchase price shall be payable in cash at closing. Offers remained open for 60 days, during which time the offeree could accept either the offer to sell or the offer to buy, but not both. If the offeree failed to accept the offer within 60 days, the offeror had the additional right, within 15 days, to either buy all of the offeree's shares or to sell all of his shares to the offeree, with the closing for such a transaction to take place on or before the 10^{th} day after the right to purchase or sell was exercised.

The agreement and SCC's bylaws contained other rules and conditions that could—and ultimately did—bear on the parties' rights and obligations in the context of an offer under the agreement. For instance, SCC's bylaws placed certain restrictions on corporate borrowing and the use of its line of credit, requiring authorization by the SCC Board before SCC could enter into any loan. The agreement also specified what documents an offeree would need to tender in order to effectuate his acceptance of the offer.

On December 6, 2012, Kreiger sent Bonds a letter invoking Section Four and offering either to purchase Bonds' shares or to sell Bonds his own shares at a price of $63.64 per share. The offer thus called for a sale price of $350,020 if Bonds sold his shares to Kreiger, or $1,750,100 if Kreiger sold his shares to Bonds. 53 days later, on January 28, 2013, Bonds sent a letter indicating that he accepted Kreiger's offer to sell for $1,750,100. Numerous issues relating to the financing of the purchase quickly arose. Bonds attempted to obtain a loan for SCC from its regular bank, without seeking Kreiger's approval, with the aim of using the loan proceeds to purchase the stock and convert it to treasury stock. Bonds also attempted to avail himself of SCC's line of credit without Kreiger's consent. These actions led Kreiger to close the line of credit. At the initial closing, scheduled for February 1, 2013, other issues arose as to payment, the closing of the line of credit, and the location of Kreiger's stock certificate. The closing was not consummated, and both parties asserted that the other had failed to perform under the agreement. Kreiger's attorney notified Bonds, by email sent shortly before the failed February 1 closing, that if Bonds failed to perform, Kreiger was "ready, willing and able" to acquire Bonds' stock on February 4, 2013 (which was the 60^{th} day after the initial offer). On February 4, Kreiger held a second closing, with neither Bonds nor his representatives in attendance, in which Kreiger signed documents purporting to transfer Bonds' shares to Kreiger, and had a cashier's check for $350,020 delivered to Bonds' attorney. Bonds rejected and returned the tender of the certified check and transfer documents.

Bonds initiated the lawsuit seven days later, on February 11, 2013, by filing a complaint seeking specific performance of his agreement to purchase Kreiger's shares and other relief. Kreiger filed an answer and counterclaim in which he sought specific performance of his agreement to purchase Bonds' shares. Both parties moved for summary judgment. The trial court granted Bonds' motion and denied Kreiger's.

The Court of Appeals identified a number of reasons why summary judgment should not have been granted. First, Bonds had not shown his substantial compliance with his own obligations under the agreement, a necessary condition to specific performance. The Court of

Appeals found that there were issues of fact as to whether Bonds tendered "duly executed" documents as required under the agreement and whether his tender of a check satisfied the agreement's requirement of cash. The court also noted that the financing ultimately obtained by Bonds, in which SCC shares were pledged as collateral, may not have been permitted under the agreement. The court identified several other issues calling into question whether both parties had performed under the agreement and whether Bonds acted with unclean hands, which is a defense to special performance.

***US Capital Funding VI Ltd v Patterson Bankshares Inc.*, ___ F. Supp. 3d ___, 2015 WL 5838491 (S.D. Ga. Sept. 30, 2015)—Creditor's allegations that bank's stock offering effectively constituted fraudulent transfer of holding company's interest in the bank held sufficient to state a claim under the UFTA; allegations of breach of fiduciary duty by holding company and bank's directors also held sufficient.**

In this case, an investor in trust preferred securities, or TruPS, brought suit against a defaulting bank holding company, its banking subsidiary, three directors of the holding company and bank, and an outside financial advisor, along with unidentified John Doe defendants. The gravamen of the action is that the defendants purposely caused the bank holding company's interest in the bank to become diluted through a subsequent offering of common stock of the bank, to the injury of the plaintiff as a creditor of the holding company. The plaintiff asserted several theories of relief, including fraudulent transfer under the Georgia Uniform Fraudulent Transfer Act ("UTFA"), tortious interference with contractual relations against the financial advisor, breach of fiduciary duty by the directors, aiding and abetting a breach of fiduciary duty by the bank and the financial advisor, and conspiracy by the bank holding company and bank. In this opinion, the district court ruled on motions to dismiss by the various defendants. The court allowed a number of claims to go forward, including the fraudulent transfer and breach of fiduciary duty claims, but it dismissed the claim that the bank aided and abetted a breach of fiduciary duty.

Applying the motion to dismiss standard, the court found that the allegations regarding the bank's stock offering were sufficient, at least at the pleadings stage, to state a plausible claim under the UFTA. The court reasoned that the broad purpose of the UFTA embraced not only transfers effectuated by the debtor but also by an "alter ego" of the debtor. Finding that the complaint's allegations were sufficient to suggest that the bank was an alter ego of the holding company, the court held that the UTFA could apply to the stock offering. The court also cited allegations that it found to constitute the "badges of fraud" necessary to support the scienter element of a fraudulent transfer claim, such as that the purchasers of bank stock were "insiders" (i.e., current shareholders and their friends and families), that the transfer was of substantially all the debtor's assets (since the bank was the holding company's primary asset), and that the holding company was insolvent at the time of the stock offering.

The court also found that a plausible claim for breach of fiduciary duty was stated against the director defendants, citing previous Georgia case law holding that directors of an insolvent corporation may owe a fiduciary duty to creditors which forbids them from using their position to prefer themselves over other creditors. *See, e.g., Hickman v. Hyzer*, 261 Ga. 38 (1991). In addition, the court held that the complaint sufficiently alleged claims against the financial advisor for tortious interference with the holding company's contractual obligations to the trust, and for aiding and abetting the director defendants' breaches of fiduciary duty. With respect to the aiding and abetting claim against the bank, however, the court concluded that the claims failed as a matter of law because the bank was not a stranger to the fiduciary relationship between its own directors, the holding company and the plaintiff. Finally, the court found that the allegations were sufficient to state a claim against the holding company and the bank for conspiracy to effect a fraudulent transfer.

* * * * *

Finally, there were once again a number of cases addressing the transfer of assets, rights and liabilities as a result of bank closings, mergers and other transactions. In ***Stoudemire v. HSBC Bank USA*****, 333 Ga. App. 374, 776 S.E.2d 483 (2015),** the Court of Appeals affirmed the trial court's dismissal of a wrongful foreclosure action which was premised on allegations that the assignment of the plaintiffs' security deed to the defendant bank was ineffective. Among other things, the plaintiffs argued that the assignment was invalid under O.C.G.A. § 14-5-7 because it was not signed by a secretary, assistant secretary, cashier or assistant cashier of Wells Fargo, the transferor bank. The court observed that while the operative (pre-2011) version of O.C.G.A. § 14-5-7 provided that the presence of a corporate seal and attestation by another corporate officer was conclusive evidence that the officer was authorized to execute the instrument, that did not necessarily mean that the absence of a corporate seal and attestation is conclusive evidence of the officer's *lack* of authority. In ***Shibley v. JPMorgan Chase Bank, N.A.*****, No. 1:14-cv-1728-WSD, 2015 WL 576592 (N.D. Ga. Feb. 11, 2015)**, a defaulting borrower sought to prevent a foreclosure sale by arguing, *inter alia*, that there was no document filed within the county deed records showing how the interest of the original lender, Washington Mutual, was transferred to the FDIC (who then sold the loan to the defendant). The district court found that the argument had no sound basis in law or fact, noting that Washington Mutual's interest was transferred by operation of law. In ***McDonald-Forte v. Merrill Lynch Mortgage Investors Trust, Series MLCC 2004-D*****, No. 1:14-cv-1660-WSD, 2015 WL 4928715 (N.D. Ga. Aug. 18, 2015)**, the district court dismissed a wrongful foreclosure claim against a securitized trust, explaining in its opinion why the pro se plaintiffs were incorrect in asserting that the trust owed any duty to the plaintiffs. The plaintiffs' security deed had been assigned by its original holder to Merrill Lynch, which then merged into Bank of America. The court noted that as a result of the merger, by operation of law, Bank of America had acquired the security deed and no further evidence of transfer was necessary.

F. LITIGATION ISSUES.

1. Standing and Capacity to Sue

Oglethorpe Power Corp. v. Estate of Forrister**, 332 Ga. App. 693, 774 S.E.2d 755 (2015)—Limited liability company may recover nuisance damages for "annoyance and discomfort" affecting the use of its property.**

In this nuisance action brought by numerous landowners against a power plant, the Court of Appeals addressed a question of first impression: "may a limited liability company recover nuisance damages for 'discomfort and annoyance' when it is a non-resident owner?" The Court answered the question in the affirmative.

The plaintiff in question was an LLC that owned land near the facility, which the trial court ruled was a permanent nuisance. The trial court also ruled, however, that the LLC was not entitled to recover damages for "discomfort and annoyance," and declined to give a jury instruction that would have permitted the jury to find such damages. In so doing, the trial court apparently accepted the defendants' argument that discomfort and annoyance damages under nuisance law are equivalent to damages for emotional distress, which can only be recovered by natural persons. The Court of Appeals held, as a threshold matter, that this was not a correct statement of Georgia nuisance law, which recognizes discomfort and annoyance as a distinct element of nuisance damages and not akin to emotional distress.

The Court of Appeals then turned to whether such damages can be recovered by an LLC. It found support in the United States Supreme Court's decision in *Baltimore & Potomac R.R. v. Fifth Baptist Church*, 108 U.S. 317, 329-330 (1883), in which the Court recognized a religious corporation's right to sue a railroad for annoyance and discomfort suffered by its members in their use of the corporation's property after the railroad built an engine yard nearby. Under *Fifth Baptist Church*, the Court of Appeals concluded, an LLC could bring an action for discomfort and annoyance "affecting the use of its property for the purposes intended by its members and those they permit to join them."

But this did not answer the entire question before the Court of Appeals, because the defendant here had also argued to the trial court that the plaintiff LLC did not reside in Georgia. Although the defendant appeared to have abandoned on the argument on appeal, The Court of Appeals nonetheless addressed it, finding that "residence is not necessary for occupancy" and that a jury could conclude that the LLC used the property even though it was a non-resident. The court thus concluded that the trial court had erred in preventing the LLC's claim from being submitted to the jury.

***In re Mohr*, 538 B.R. 882 (Bankr. S.D. Ga. Sept. 24, 2015)—Foreign LLC's failure to obtain certificate not a bar to seeking relief in bankruptcy proceeding.**

This bankruptcy decision addressed the circumstances under which a foreign limited liability company may seek relief in a Georgia court without obtaining a certificate of authority from the Secretary of State. RREF, a foreign LLC, filed fourteen proofs of claim in a bankruptcy proceeding based on the debtor's guaranty of loans made to an entity associated with the debtor, and also moved for relief from the bankruptcy stay. The debtor argued that RREF lacked standing to pursue this relief because it failed to qualify to do business in Georgia in accordance with O.C.G.A. § 14-11-711(a). That section provides that a foreign LLC "transacting business in this state may not maintain an action, suit or proceeding in a court of this state until it is authorized to transact business in this state." Section 14-11-702(b, however, provides a non-exhaustive list of activities that are excluded from the definition of "transacting business in this state," which include "maintaining or defending any action," "making loans or creating or acquiring evidences of debt," and "securing or collecting debts or enforcing any rights in property securing the same." *See* O.C.G.A. § 14-11-702(b)(1), (b)(7). The bankruptcy court held that RREF's involvement in the proceeding fell within the plain language of these exceptions. Noting that the bankruptcy was initiated by the debtor and that RREF was in the posture of "defending its rights to pursue and collect its debt pursuant to the terms of the loan documents and guaranty," the court held that RREF was under no obligation to obtain a certificate of authority.

***AAA Restoration Co, Inc. v. Peek*, 333 Ga. App. 152, 775 S.E.2d 627 (2015)—No reformation of arbitration agreement based on misnomer as to arbitration provider.**

In this decision involving enforcement of an arbitration agreement, the Court of Appeals held that the misidentification of an arbitral forum's corporate name did not provide a basis for reformation of the contract. The Court ultimately held that the agreement should have been enforced, but its decision rested on arbitration law principles rather than Georgia corporate or contract law.

The owners of a house destroyed by fire entered into a contract with a restoration company to construct a new home. The contract contained an arbitration clause identifying the "Construction Arbitration Association (of Atlanta)" as the arbitral body that would hear any dispute arising from or related to the contract. In fact, no entity by that name exists. A dispute arose between the parties and the homeowners filed a lawsuit in the Henry County Superior Court. The contractor moved to compel arbitration based on the parties' contract. The plaintiffs asserted that the arbitration clause was void and unenforceable since the arbitral forum did not exist. In response, the contractor submitted evidence that it intended for the agreement to designate "Construction Arbitration Associates, Ltd." as the arbitral forum, and that the contract simply contained a misnomer. The trial court sided with the plaintiffs, finding that the arbitral forum was unavailable and that the arbitration agreement was therefore void and unenforceable.

On appeal, the contractor argued that the trial court erred by voiding the agreement instead of reforming it by correcting the misnomer, and also that the court's decision was contrary to Georgia and federal arbitration law. The Court of Appeals reversed, but its decision rested on the second argument—it held that under arbitration law, the trial court should have appointed a substitute arbitrator rather than void the agreement. The Court nonetheless agreed with the trial court that reformation of the agreement to correct the supposed misnomer was not a proper remedy under the circumstances. In so doing, it neatly summarized Georgia law as it pertains to corporate misnomers in contracts. The general rule in Georgia is that "a mere misnomer of a corporation in a written instrument…is not material or vital in its consequences, if the identity of the corporation intended is clear or can be ascertained by proof." *Pinion v. Hartsfield Int'l Commerce Ctr.*, 191 Ga. App. 459, 461, 382 S.E.2d 136 (1989). As the Court observed, however, this rule has generally developed in cases where the misnomer pertains to one of the contracting parties. The Court reasoned that it was more problematic to apply the general rule when the misidentified corporation was a non-party, at least in the absence of evidence of a mutual mistake. The Court further found that there was no evidence that the *plaintiffs* were aware of the actual arbitral forum, which rendered the mistake to be unilateral. While a mutual mistake as to the name of a corporation might provide a ground for reformation, a unilateral mistake will not.

2. Secondary Liability

***Lokey v. FDIC*, 608 Fed. Appx. 736 (11th Cir. 2015)—No claim against LLC members individually for LLC's actions absent circumstances that would support veil piercing.**

This case was brought by purchasers of condominium units in a Savannah building, Drayton Tower. We have previously covered related litigation involving the same building, and there were three new district court decisions in 2015 involving some of the same defendants, which we address below.

The gravamen of the plaintiffs' claim is that they were induced to purchase their units by representations that the renovation of the building would be completed by a particular date, which turned out to be false. Among the defendants were a local bank that later went into receivership, the developer Drayprop, LLC ("Drayprop"), the building manager Marley Management, Inc. ("Marley"), and two individuals who were affiliated with members of Drayprop (Croll and Brown). The district court granted the defendants' motion for summary judgment. In this appeal, the plaintiffs argued that Croll and Brown were liable under an alter ego theory. The Eleventh Circuit affirmed, finding that the plaintiffs produced no evidence to support an alter ego theory. The court recited the maxim that a member of a limited liability company is "not a proper party to a proceeding...against a limited liability company, solely by reason of being a member of the limited liability company." *Yukon Partners, Inc. v. Lodge Keeper Grp.*, 258 Ga. App. 1, 6, 572 S.E.2d 647, 651 (2002). It then applied the familiar test for piercing the veil under Georgia law, in which the plaintiff has the burden to show that the defendant abused the LLC form, which can be shown by evidence that they conducted their personal and LLC business as if they were one, with the purpose of defeating justice or perpetrating fraud. Here, the plaintiffs pointed to evidence that Croll and Brown were involved in drafting a letter from the defendant bank which made the representations forming the basis for the lawsuit, and alleged that they perpetrated a fraud through that letter. The court held that this was not the sort of evidence of commingling of personal and LLC business that invokes the alter ego doctrine, and in the absence of any other evidence, the plaintiffs' alter ego claims failed.

Although it appears that the plaintiffs could have framed the issue as involving the liability of an individual officer for his own acts, we understand that their claims were framed as alter ego claims. Since the trial court and Eleventh Circuit also ruled in favor of the corporate defendants on the merits of the plaintiffs' claims, and apparently found no wrongdoing on the part of the individual defendants that could give rise to a claim, the manner in which the claims were framed probably did not make any difference here.

***Harris Baking Company v. Drayprop LLC*, No. CV411-171, 2015 WL 5786743 (S.D. Ga. Sept. 30, 2015); *Hunt v. Drayprop;, LLC*, No. CV411-172, 2015 WL 5786744 (S.D. Ga. Sept. 30, 2015); *Reinke v. Drayprop, LLC*, No. CV411-144, 2015 WL 5786742 (S.D. Ga. Sept. 30, 2015)—Summary judgment granted to defendant in veil piercing claim.**

These were three more district court actions brought by purchasers and lessees of space in the Savannah building that was the subject of *FDIC v. Lokey*, discussed above. The three defendants in these cases were Drayprop, Marley and Brown, and as was the case in *Lokey*, the plaintiffs asserted that Brown was individually liable under an alter ego theory. The underlying allegations in this case appear to have been a little bit different--the plaintiffs alleged that the building was in a general state of disrepair and that the defendants failed to provide basic services--but the result was the same. The district court granted summary judgment in favor of the defendants. The plaintiffs' alter ego claim against Brown was based on evidence that Brown's name was included on a loan application submitted by Drayprop, and evidence that other entities in which Brown had a financial interest were guarantors of the loan. The court concluded that these allegations were insufficient to create a genuine factual dispute that Brown was individually liable.

***Dezauche v. Bryce*, No. CV311-71, 2015 WL 5923581 (S.D. Ga. Oct. 9, 2015)—Court rejects secondary liability based on alter ego, partnership, joint venture, successor liability.**

This was a “Supplement to the Record and Order” filed by the district court to explain its oral ruling at trial granting judgment as a matter of law to the defendants. While the supplement does not lay out the full history of the litigation, it is clear that the plaintiff’s claims hinged on a variety of secondary liability theories premised on the allegation that the defendants (an individual and his three companies) controlled Aircraft Manufacturing and Design, LLC (“AMD”), a company with whom the defendants contracted for the purchase of several airplanes. The plaintiff alleged that the defendants used AMD as an alter ego, were partners with AMD, were joint venturers with AMD, and were successors to AMD. The district court rejected each theory, explaining in the supplement its reasons for doing so.

First, the court held that the evidence failed to support an alter ego claim as a matter of law. There was evidence showing that the defendants made deposits to AMD “sufficient to continue AMD’s payroll at a diminished level” for a period of nearly three years, that they provided hangar space to AMD, and that an employee of Defendants was regularly present at AMD’s hangar. The apparent significance of these facts is that they showed that the defendants had an interest in keeping AMD’s business afloat. But the court found no evidence that the transfers of funds failed to respect the separate identity of AMD, and no evidence that the defendants were treated any differently from any other AMD customer. The court also found the evidence to be largely conjectural and based on conclusory testimony.

Second, the court held that the plaintiff failed to show the existence of a partnership between the defendants and AMD. The court noted that a partnership can be proven through evidence of a “common enterprise, the sharing of risk, the sharing of expenses, the sharing of profits and losses, a joint right of control over the business, and a joint ownership of capital.”

Aaron Rents, Inc. v. Fourteenth Street Venture, L.P., 243 Ga. App. 746, 747 (2000). Here, the evidence showed that while the defendants were interested in a partnership with AMD, the members of AMD rejected such a partnership and did not want to enter into a joint undertaking with them. For the same reasons, the court rejected the plaintiff's joint venture theory.

Finally, the court held that the plaintiff's successor liability theory also failed as a matter of law. It noted that a plaintiff asserting that a purchasing company assumed the liabilities of a selling company must show one of the following: an express agreement between the parties to assume liabilities, that the transaction was a merger, that the transaction was a fraudulent attempt to avoid liability, or that the purchasing company was a "mere continuation" of the selling company. *See First Support Svcs., Inc. v. Trevino*, 288 Ga. App. 850, 852 (2007). Here, there was some evidence that the defendants acquired "the objects and assets of AMD," but this evidence was insufficient to show that a *de facto* merger had occurred (since there was no transfer of shares) or that the defendants were a mere continuation of AMD (since the members of AMD had no interest in a business partnership with the defendants, meaning that there could not have been continuity of membership from AMD to the defendants).

The plaintiff has appealed the trial court's ruling to the Eleventh Circuit.

***CHIS LLC v. Liberty Mutual Holding Co. Inc.*, No. 5:14-cv-277, 2015 WL 4249358 (M.D. Ga. July 13, 2015)—Allegations that parent and affiliate were alter egos of subsidiary held insufficient under federal pleading standards; agency and joint venture also insufficiently pled.**

This was a putative class action brought by the holder of an insurance policy issued by defendant Peerless Indemnity Insurance Company ("Peerless"). Also included as defendants were Liberty Mutual Holding Company ("LMHC") and two of its affiliates (collectively, "Liberty Mutual"). The plaintiff sought to hold Liberty Mutual liable under an alter ego, agency, and/or joint venture theory. Its complaint alleged facts setting forth the general corporate structure of LMHC, asserting that LMHC was the "ultimate parent company" of Peerless and that all three Liberty Mutual defendants controlled Peerless. The complaint also alleged that the defendants "share and have in common several officers and directors," that they "have a common administrative or principal place of business," that they "coordinate and commingle financial and other resources" by, among other things, entering into transactions with each other and filing consolidated tax returns, that they operate under a common trade name and use common logos for promotional purposes, and that the relevant documents in this case instructed the plaintiff to make payments to "Liberty Mutual Insurance."

The district court granted LMHC's motion to dismiss for lack of personal jurisdiction and the other Liberty Mutual defendants' motion to dismiss for failure to state a claim, finding that the allegations failed to state a plausible claim under the alter ego, agency or joint venture theories. The court observed that the Georgia Supreme Court has only recognized a veil piercing claim in the context of a parent-subsidiary relationship where the subsidiary is insolvent or has insufficient assets. It found that since the complaint lacked any such allegation, it did not sufficiently allege an alter ego theory. The court did acknowledge, however, that the plaintiff's allegations concerning the Liberty Mutual defendants' common officers and directors, filing of consolidated tax returns and use of common intellectual property could be sufficient, at the pleadings stage, to show that Peerless was a "mere instrumentality" of Liberty Mutual.

Turning to the question of agency, the district court recognized the general rule that the existence of a parent-subsidiary relationship does not, without more, create an agency relationship under Georgia law. The court found the plaintiff's allegations of control to be conclusory and too unspecific to state a claim under the federal *Twombly/Iqbal* pleading standard. It also found that there was no allegation that Liberty Mutual, as opposed to Peerless, made any representations to the plaintiff, which foreclosed any apparent agency theory. Finally, the court held that the plaintiff did not sufficiently allege a basis for joint venture liability because it did not allege that each party exercises mutual control over a joint undertaking. Instead, all that was alleged was that the Liberty Mutual defendants controlled Peerless.

For the two Liberty Mutual defendants that are affiliates of LMHC, the court dismissed the action pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Since LMHC also moved to dismiss for lack of personal jurisdiction, the court evaluated its motion under Federal Rule 12(b)(1). The resulting analysis was essentially the same, however, because the plaintiff's only asserted bases for exercising personal jurisdiction over LMHC were its alter ego, agency and joint venture theories. The plaintiff also asked for jurisdictional discovery, but the district court denied this request, holding that the plaintiff had failed to allege a prima facie case of personal jurisdiction. The court did note that if the plaintiff were to uncover new facts in its continuing litigation against Peerless that would support its secondary liability theories against Liberty Mutual, it might be able to allege facts supporting those theories at a later time. The defendants were all dismissed without prejudice.

3. Jurisdiction, Venue and Service of Process

***Kingdom Retail Group, LLP v. Pandora Franchising, LLC,* 334 Ga. App. 812, 780 S.E.2d 459 (2015)—Corporate defendant's right to remove litigation to the county where it maintains its "principal place of business" does not apply to foreign entity whose principal place of business is outside Georgia.**

In this tort action arising out of a failed attempt to acquire jewelry stores, the Court of Appeals resolved a novel question regarding a foreign LLC's right to transfer venue to a different county under O.C.G.A. § 14-11-1108(b). It held that a foreign LLC whose principal place of business was outside of Georgia could not avail itself of the right to remove a tort action to another Georgia county solely on the basis that it maintains its "principal office within Georgia" in that county. Georgia corporations and LLCs are entitled to invoke a removal right under O.C.G.A. § 14-2-510(b)(4) when a tort suit is brought against them in a Georgia county where they do not maintain an office or transact business. The Court of Appeals' decision here casts serious doubt over whether a foreign LLC or corporation whose principal place of business is somewhere outside of Georgia can similarly remove a tort action to the county in which they maintain their registered office or even the county in which they conduct most of their Georgia business. It should be noted, however, that the decision is physical precedent only because one of the three justices on the panel concurred in the judgment only.

The plaintiff in this action, Kingdom, was an entity based in Thomas County. The defendant, Pandora, was an LLC whose principal place of business is in Columbia, Maryland. According to Pandora, it is registered to do business in Georgia and maintains its registered office in Gwinnett County. Pandora is in the business of franchising independent jewelry stores. Kingdom alleged that Pandora unlawfully interfered with its attempt to purchase a number of franchises from a third party (the location of whom was not known to the court). Kingdom sued Pandora in Thomas County asserting a number of tort theories, including tortious interference and fraud. In response, Pandora sought to remove the case to Gwinnett County. Pandora filed an affidavit asserting that it "maintains its registered office [in Gwinnett County] as its principal place of business in the State of Georgia." The Thomas County court held a hearing and ordered that the case be removed to Gwinnett County pursuant to O.C.G.A. § 14-2-510(b)(4). The court certified the issue for interlocutory review and the Court of Appeals granted review.

As a preliminary matter, the court noted that the venue provisions of Georgia's LLC code effectively adopt the rules found in the Corporations Code at O.C.G.A. § 14-2-510. Both make clear that they apply to both Georgia based LLCs/corporations and foreign LLCs/corporations that are registered to do business in Georgia. The court thus conducted a review of O.C.G.A. § 14-2-510 to determine whether the Thomas County court correctly transferred the case to Gwinnett County.

O.C.G.A. § 14-2-510(b) provides that domestic and foreign corporations are deemed to reside, for purposes of venue:

(1) In civil proceedings generally, in the county of this state where the corporation maintains its registered office;
(2) In actions based on contracts, in that county in this state where the contract to be enforced was made or is to be performed, if the corporation has an office and transacts business in that county;
(3) In actions for damages because of torts, wrong, or injury done, in the county where the cause of action originated, if the corporation has an office and transacts business in that county;
(4) In actions for damages because of torts, wrong, or injury done, in the county where the cause of action originated. If venue is based solely on this paragraph, the defendant shall have the right to remove the action to the county in Georgia where the defendant maintains its principal place of business.

Applying the statute to this case, it was apparent to the Court of Appeals that Kingdom *could* have sued Pandora in Gwinnett County, since that is the county of its registered office. Kingdom could not avail itself of subsection (2) because this was not a contract suit, nor could it establish venue under subsection (3) because there was no evidence that Pandora maintained any office or transacted business in Thomas County. Subsection (4), however, provided a proper basis for Kingdom to sue Pandora in Thomas County because Pandora did not challenge the claim that the tort action originated there.

The dispositive question, therefore, was whether Pandora could remove the case to Gwinnett County as contemplated by subsection (4), given that its principal place of business was not anywhere in Georgia but instead in Maryland. The Court determined that "principal place of business" was not defined in the statute and had to be determined by reviewing Georgia caselaw and by reviewing the statute as a whole.

The court found that "Georgia case law shows that in determining questions of residency and jurisdiction, the term 'principal place of business' is used almost exclusively to refer to a single place in the world meeting a certain standard, not to a place within a state meeting that standard." In the case of Pandora, the Court found it significant that Pandora's certificate of authority with the Georgia Secretary of State listed Columbia, Maryland as its principal place of business. The court then concluded that its interpretation of "principal place of business" was not only consistent with its commonly accepted meaning, but also could be read in harmony with the rest of O.C.G.A. § 14-2-510(b). For instance, the court reasoned, subsection (4) could have been written so as to expressly permit a corporation to remove actions to the county in which it maintains its registered office, or to a county in which it maintains any office or transacts business, but did not do so. The court also reasoned that the statute could have simply used the term "principal place of business in Georgia" if that had been its intent.

Having found that "principal place of business" could not be interpreted to refer to a foreign corporation's principal place of business within Georgia when its actual headquarters are somewhere outside the state, the court concluded that it was error for the Thomas County court to transfer the case.

***Ross v. Waters*, 332 Ga. App. 623, 774 S.E.2d 195 (2015)—Venue for action against dissolved corporation lies in the county where it last maintained its registered office.**

This medical malpractice action involving a dissolved corporation raised another interesting venue question under O.C.G.A. § 14-2-510. The case arose from a medical procedure that took place at Ross Orthopaedic Wellness Center ("Ross Orthopaedic"), which was located in Dekalb County but maintained its registered office in Fulton County. The plaintiff originally filed suit against Ross Orthopaedic and the doctor performing the procedure in 2009 in Fulton County. The plaintiff voluntarily dismissed her complaint in September, 2012. During that same month, Ross Orthopaedic was administratively dissolved. In March, 2013, the plaintiff filed a renewal action against Ross Orthopaedic and the doctor, this time in Dekalb County. The defendants moved to dismiss or transfer, citing improper venue. The doctor was a Fulton County resident, meaning that for venue to be proper in Dekalb County against either defendant, it had to be proper against Ross Orthopaedic under O.C.G.A. § 14-2-510(b).

In support of their motion to transfer venue, the defendants argued that venue against Ross Orthopaedic was only proper in the county where it last maintained its registered office. The plaintiff countered that venue was proper in the county where Ross Orthopaedic last maintained its *principal* office, which was Dekalb. The trial court ruled in favor of the plaintiff. On appeal, the Court of Appeals reversed.

As indicated in our discussion of *Kingdom Retail Group v. Pandora Franchising, LLC* above, O.C.G.A. § 14-2-510(b)(1) provides that in all types of suits, venue is proper against a corporation in the county where its registered office or principal office is maintained. Because this was a tort action, the Court of Appeals also had to consider O.C.G.A. § 14-2-510(b)(3), in which venue will also lie in the county where the cause of action arose, *if the corporation has an office and transacts business in that county*. It was undisputed that the cause of action arose in Dekalb County. But at the time the renewal action was filed, Ross Orthopaedic no longer had an office or transacted business there. Quoting *Savannah Laundry & Machinery Co. v. Owenby*, 186 Ga. App. 130, 131, 366 S.E.2d 787 (1988), the court reasoned that "the determination of venue must be based upon the facts as they exist at the time that suit is initiated, not as the facts may have existed at some previous point in time." As in that case, the court reasoned that venue could only be proper in the county where the dissolved corporation had its last registered office.

***Stubblefield v. Stubblefield*, 296 Ga. 481, 769 S.E.2d 78 (2015)—officers and directors of Georgia corporation subject to personal jurisdiction based on corporate acts they personally undertook in Georgia.**

In this dispute between siblings and co-officers and directors of closely held corporations, none of whom reside in Georgia, the Georgia Supreme Court held that the trial court properly exercised personal jurisdiction over the defendants under Georgia's long arm statute, O.C.G.A. § 9-10-91. The plaintiff-appellees were two brothers living in Mississippi, while the defendant-appellants were two sisters living in Florida. Together, they served as officers, directors and shareholders of a Georgia corporation and two Mississippi corporations. A dispute arose between the parties after the brothers made withdrawals of money that the sisters considered to be improper, leading the sisters to eventually vote, in a meeting held in Mississippi, to remove the brothers from their positions in the three corporations.

The brothers filed suit against the sisters and the three corporations in Forsyth County. They claimed that the meeting in which they were removed from their positions was invalid, and they sought to have their positions restored. They alleged that jurisdiction was proper because the sisters seized funds from corporate bank accounts which were located in Forsyth County, used corporate funds to fund their legal defense, terminated the corporation's Forsyth County-based bookkeeper and accounting firm, and attempted to seize the corporations' original corporate documents which were located in Forsyth County. The trial court determined that personal jurisdiction and venue were proper and granted the brothers' request for temporary injunction and appointment of a receiver.

In a unanimous decision, the Supreme Court held that the trial court properly applied the Long Arm Statute to exercise personal jurisdiction over the sisters. O.C.G.A. § 9-10-91(1) permits a Georgia court to exercise personal jurisdiction over any nonresident who "[t]ransacts any business within this state." The Court observed that the statutory language contained no qualifications or limitations and that it is therefore limited only by constitutional due process considerations. The sisters argued that the brothers' entire complaint stemmed from their actions in removing the brothers which took place entirely in Mississippi. The Court held that this reading of the complaint was "far too narrow," and that the sisters' alleged actions in removing funds and documents and terminating the bookkeeper were relevant to the jurisdictional analysis. The Court further found that the exercise of personal jurisdiction did not offend constitutional concerns, holding that the sisters' actions in Georgia were purposeful acts creating a reasonable expectation that they would be sued in Georgia. The Court also held that venue was proper in Forsyth County on the ground that a substantial part of the sisters' alleged activities took place there. Finally, while the two Mississippi corporations did not appeal the trial court's ruling, the sisters attempted to argue on their behalf that jurisdiction and venue were improper. The Court held that they could not do this, noting the rule that a corporation must hire its own counsel to sue or defend in court.

***Williamson v. Walmart Stores Inc.*, No. 3:14-cv-97, 2015 WL 1565474 (M.D. Ga. Apr. 8, 2015)—Allegations of alter ego as basis for exercising long arm jurisdiction over foreign parent corporation held sufficient to justify jurisdictional discovery.**

The plaintiff in this case was badly injured in a fire while using a plastic gas container manufactured by Blitz USA, Inc. ("Blitz") and sold to her in Georgia. In this product liability action, the plaintiff asserted claims against Kinderhook Capital Fund II, L.P., who held a majority interest in an LLC that indirectly owned Blitz, as well as other entities related to Kinderhook (collectively, the "Kinderhook Defendants"). The Kinderhook Defendants were Delaware entities whose principal place of business was in New York. They moved to dismiss for lack of personal jurisdiction. The district court held that the complaint alleged sufficient facts to warrant jurisdictional discovery in two respects: it sufficiently alleged that the Kinderhook Defendants were "manufacturers" under O.C.G.A. § 51-1-11(b)(1), and it also alleged a sufficient factual foundation for an alter ego claim.

O.C.G.A. § 51-1-11(b)(1) provides a remedy against product manufacturers for selling products that are "not merchantable and reasonably suited to the use intended." The plaintiff alleged that the Kinderhook Defendants "actually became the designers of Blitz's gas cans, having the power to control and actually using that power to make design changes, schedule changes, require reports regarding design changes, review design prototypes and actually determine when a newly designed product was ready for sale." The court determined that these allegations, notwithstanding that they were disputed in a declaration filed by the Kinderhook Defendants, were sufficient to warrant jurisdictional discovery on this claim.

To support her alter ego claim, the plaintiff alleged, *inter alia*, that the Kinderhook Defendants (1) restructured Blitz and rendered it undercapitalized by forcing "extraordinary debt" upon it, (2) controlled Blitz's board of directors, (3) created additional corporations in an attempt to insulate Blitz's assets from personal injury claims, (4) collected management fees that were disproportionate to the amounts paid to Blitz's on-site managers, (5) transferred "millions of dollars" in an attempt to avoid paying bodily injury claims, and (6) was "intimately involved" in the Blitz's activities. The court found these allegations sufficient to entitle the plaintiff to jurisdictional discovery on the issue of whether Blitz was the alter ego of the Kinderhook Defendants. The court dismissed a number of other claims on the merits.

***Lawson v. Ocwen Loan Servicing LLC*, No. 1:14-cv-1301-WSD, 2015 WL 881252 (N.D. Ga. Mar. 2, 2015)—Foreign corporation does not become citizen of Georgia, for diversity jurisdiction purposes, by maintaining registered office in state.**

In this removal action brought by a defaulting borrower against her loan servicer, the district court denied a motion to remand which had been based on the assertion that the servicer, a foreign LLC, became a citizen of Georgia by virtue of maintaining a registered office in the state. The ruling did not break any new ground, but it did helpfully explain the difference between the Georgia LLC Code's venue provisions and the principles underlying federal diversity jurisdiction.

The plaintiff was a Georgia resident and the defendant was a foreign LLC. In its notice of removal, the defendant asserted that its sole member is Ocwen Loan Servicing, Inc., which is incorporated in and maintains its principal office in the U.S. Virgin Islands. The defendant has been registered to transact business in Georgia since 2002. In federal courts, for purposes of diversity jurisdiction, a limited liability company is a citizen of any state in which one of its members is a citizen. In this case, the court explained, the defendant was a U.S. Virgin Islands resident because that was its sole member's state of citizenship. The court then explained that O.C.G.A. § 14-11-1108 and O.C.G.A. § 14-2-510(b) did not bear on the question because they only govern venue for suits brought against LLCs and corporations in Georgia state courts. The fact that these statutes provide for venue in the Georgia county where a foreign LLC maintains its registered office does not mean that the LLC becomes a citizen of the state simply by maintaining that registered office.

Blocker Farms of Florida Inc. v. Buurma Properties LLC, **Nos. CV 613-068, 613-067, 2015 WL 2409031 (S.D. Ga. May 19, 2015)—District court determines citizenship of limited liability company in diversity action.**

In this case, the district court was called upon to determine the citizenship of a limited liability company, which required it to determine the citizenship of all of its members. Interestingly, the two cases at issue had advanced to the Eleventh Circuit, which remanded the matter to the district court to determine if diversity jurisdiction had existed at the time the case was filed.

Applying the rule that a limited liability company is a citizen of any state in which one of its members is a citizen, the district court found that in one case, the defendant, a Georgia LLC, was a citizen of Michigan and Ohio because all of its members resided in one of those two states. In the other case, the defendants were two individuals residing in Georgia. Determining the plaintiff's residence proved to be more difficult. The plaintiff, Blocker Farms, alleged that it was a Florida corporation. In fact, however, it was a Florida limited liability company, which meant that it too was a citizen of any state in which one of its members was a citizen. And one of its two members was itself an LLC, Blocker Farming Enterprises. That entity's sole member died in 2010. As the court found, O.C.G.A. § 14-11-506 provides that when the last member of a Georgia LLC dies, that member's executor or administrator becomes a member unless he or she elects not to become a member within 90 days of the member's death. Since the record revealed no evidence that the deceased member's administrator had declined to be a member of Blocker Farming Enterprises, the administrator remained a member. As it happened, that individual was Cale Blocker, the other member of Blocker Farms, meaning that there was only one person whose residence would be relevant to determining the plaintiff's citizenship. Unfortunately, determining Mr. Blocker's citizenship was not an easy task, as he claimed that his residence was a hotel in Florida in which he spent "as many as 148 nights a year" on business. The court concluded that he was nonetheless a resident of Georgia, where his wife resided and to where he always returned at the end of his business travels. As a result, the Plaintiff was a Georgia citizen, by virtue of its members' citizenship. This meant that there was no diversity of citizenship to the suit against the two Georgia individuals, but there was diversity of citizenship as to the case against the Georgia LLC because it was a citizen of Michigan and Ohio.

4. Evidence, Business Records Act

***Ciras, LLC v. Hydrajet Technology, LLC*, 333 Ga. App. 498, 773 S.E.2d 800 (2015)—Trial court abused discretion by failing to admit bank records properly authenticated by affidavit of successor bank's senior vice president.**

Recent years have seen an uptick in Georgia state court litigation over the admission of business records in actions to collect on promissory notes. Since January 1, 2013, those cases have been governed by Georgia's revised evidence code, which largely adopts and conforms to the Federal Rules of Evidence.

In this case, the plaintiff sought to enforce a promissory note and personal guaranties that were originally executed in favor of Wachovia Bank and were later assigned to the plaintiff. The trial court awarded summary judgment to the plaintiff on the issue of liability and held a bench trial on the issue of damages. At trial, the plaintiff sought to introduce Wachovia bank records through an authenticating affidavit by a senior vice president of Wells Fargo, who acquired Wachovia in 2008. The affiant stated that Wells Fargo acquired the relevant loan account in connection with the acquisition and that the proffered bank records were "obtained by Wells Fargo from Wachovia in the regular course of business as part of the acquisition[.]" She also testified that she was familiar with both Wells Fargo's record keeping and "the manner in which Wachovia prepared and kept the attached records." The defendants objected to the admission of the affidavit and attached loan documents. In connection with its final order, the trial court ruled that the affidavit and records were inadmissible because the affiant did not have personal knowledge of Wachovia's record keeping practices.

On appeal, the Court of Appeals reversed the evidentiary ruling. Because O.C.G.A. § 24-8-803 mirrors Federal Rule of Evidence 803, the court followed the practice, which should become more frequent under the new evidence rules, of looking to federal case law. As the Court of Appeals previously noted in last year's *Ware v. Multibank 2009-1 RES-ADC Venture, LLC*, 327 Ga. App. 245, 758 S.E.2d 145 (2014), federal courts applying Rule 803 have held that "employees of successor entities can authenticate business records of their predecessor entities that pass to them by virtue of merger." Turning to the case at bar, the court noted that the affiant established from her own knowledge that the records passed from Wachovia to Wells Fargo, and other circumstantial evidence (such as the fact that the records were consistent with the exact principal balance admitted to by one of the defendants) helped to establish the trustworthiness of the records. Notably, even though evidentiary rulings are subject to a deferential abuse of discretion standard on appeal, the Court of Appeals found that it was reversible error to fail to admit these "routine bank records" given the evidence that they had been transferred to Wells Fargo and integrated into its own records. The court remanded the matter for reconsideration in light of the admissible records.

***Triple T-Bar, LLC v. DDR Southeast Springfield*, 330 Ga. App. 847, 769 S.E.2d 586 (2015)—Records of predecessor entity properly authenticated by affidavit of representative of successor entity.**

In another decision implicating O.C.G.A. § 24-8-803, the Court of Appeals affirmed the trial court's decision to admit business records authenticated by a representative of a successor company. Here, plaintiff DDR Southeast Springfield, LLC ("DDR") sought to enforce a commercial lease against the operator of a now-defunct bar and a personal guaranty against its principals. DDR obtained the lease and guaranty by virtue of its acquisition of the original landlord for the property. In the trial court, DDR moved for summary judgment, attaching an affidavit of its assistant general counsel which attached the lease agreement and guaranty. The affidavit failed to include any testimony establishing the affiant's familiarity with DDR's record keeping procedures or her personal knowledge about the transactions, and it did not state that the lease and guaranty were made in the regular course of business. The Court of Appeals recognized that such an affidavit fails to lay a proper foundation for admission of the documents as business records. However, DDR submitted a second affidavit of its assistant general counsel with its reply brief, in which the affiant now asserted that "she was familiar with DDR's record keeping, lease files were maintained in DDR's regular course of business, and DDR acquired the lease agreement in this case after merging with [the original landlord]." The trial court held, and the Court of Appeals agreed, that the second affidavit cured the defects in the initial affidavit. The Court of Appeals again cited the rule that employees of successor entities can authenticate the business records of the predecessor entities that pass to the successor via merger. (The court also addressed an argument about the timeliness of the second affidavit, holding that it was not an abuse of discretion for the trial court to consider it since the reply brief was filed nearly 8 months before the trial court ruled on the motion.)

5. Director and Officer Liability Insurance Decisions

***Langdale Co. v. National Union Fire Ins. Co. of Pittsburgh*, 609 Fed. Appx. 578 (11th Cir. June 22, 2015)—"Insured capacity" coverage exclusion enforced against corporate directors sued for conduct undertaken as trustees of a separate trust.**

Affirming a decision of the Northern District of Georgia, the Eleventh Circuit held that a directors' and officers' insurance policy excluded coverage for claims arising out conduct undertaken by two directors of a family-owned corporation who simultaneously served as trustees of family trusts that were shareholders of the corporation. The court's ruling relied on an exclusion in the policy for claims arising out of misconduct committed in a capacity other than as a director or officer. Applying Georgia law, it found that the exclusion operated to relieve the insurer of its coverage obligations for claims that would not have arisen "but for" the alleged misconduct undertaken in the uninsured capacity (i.e., as trustees). Accordingly, the court concluded that the insurer was entitled to rely on the exclusion and that the insured parties' bad faith claim failed as a matter of law.

The coverage suit arose from longstanding litigation involving The Langdale Company ("TLC"), some of which we have discussed in prior editions of this Survey. TLC is a holding company for a variety of businesses. The Virginia Miller Langdale Family Trust ("Miller Trust") was once a 24.8% shareholder of TLC. Its trustees were Johnny and Harley Langdale. During the relevant period, Johnny Langdale also served as TLC's CEO and a director, and Harley Langdale was also a TLC director. In 2009, the beneficiaries of the Miller Trust sued Johnny and Harley, alleging that they schemed to consolidate their control over TLC by having TLC redeem the Trust's stock at "an absurdly low price." The beneficiaries also alleged that Johnny and Harley misrepresented to them the value of the stock and their reasons for selling it to the company. While some of the beneficiaries' claims were clearly for breach of trust, Count III of their complaint asserted a claim for breach of fiduciary duty as directors of TLC. Later in 2009, the trust beneficiaries filed a counterclaim in a separate declaratory judgment action that had been brought by TLC. Count V of the counterclaim asserted a claim based on TLC's *respondeat superior* liability for its officers' misconduct. The beneficiaries' state court complaint and their counterclaim to the declaratory judgment action were consolidated into one Georgia state court action.

TLC agreed to indemnify Johnny Langdale for the fees he incurred in defending against the trust beneficiaries' suit. It then demanded that National Union advance payment of its costs to defend against Count III under TLC's D&O policy with National Union. TLC also demanded that National Union advance its costs to defend against Count V of the counterclaim. TLC's policy provided coverage for losses of an Individual Insured (including TLC's officers) arising from claims made against that Individual Insured, and also for TLC's losses arising from either a claim made against TLC or a claim made against an Individual Insured for which TLC has provided indemnification, subject to the policy's various exclusions. National Union denied coverage, citing Exclusion 4(g), which provides: "The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured…alleging, arising out of, based upon or attributable to any actual or alleged act or omission of an Individual Insured serving in any capacity, other than as Executive or Employee of a Company, or as an Outside Entity Executive of an Outside Entity." (National Union also cited, perhaps belatedly, a second exclusion it found to be applicable because the acts alleged were raised in prior litigation. Because it affirmed on the basis of Exclusion 4(g), the Eleventh Circuit did not reach the issues of whether the other exclusion applied or whether National Union had waived it by not asserting it in its initial coverage position letter.)

National Union's position was that Exclusion 4(g) applied whenever a claim would not exist "but for" the alleged wrongful conduct undertaken by the individuals while in an uninsured capacity. Here, that meant that regardless of whether the claims purported to hold Johnny and Harley accountable for their duties owed to TLC, the exclusion still applied so long as the claim would not have existed but for their alleged misconduct as trustees. The trial court held, and the Eleventh Circuit agreed, that National Union's interpretation of the "but for" test was a correct statement of Georgia law. The Eleventh Circuit accepted that the "genesis" of the trust beneficiaries' claims was the acts of Johnny and Harley as trustees. It cited allegations that Johnny and Harley "had documents created and caused the execution of agreements" that caused TLC to purchase stock from both the Trust and its beneficiaries, that they were personally enriched by these transactions, that they "failed to deal fairly with the beneficiaries," and that they misrepresented facts and failed to disclose information to the beneficiaries. For instance, it was alleged that Johnny and Harley misrepresented the Trust's termination date to the beneficiaries when explaining the need from the Trust's perspective to enter into the stock redemption.

TLC argued, among other things, that each cause of action constituted its own "claim" under the policy and that the trial court should not have treated the entire consolidated proceedings as a single claim. The Eleventh Circuit declined to rule on whether TLC's interpretation of "claim" was correct, holding instead that even if Count III of the beneficiaries' suit and Count V of the counterclaim were viewed in isolation, they still arose out of allegations that Johnny and Harley committed wrongful acts as trustees.

The Eleventh Circuit did not necessarily disagree that the litigation involved allegations that Johnny and Harley engaged in misconduct as TLC directors. But under the "but for" test, that did not matter because the claims "could not have existed" independent of the allegations of wrongdoing as trustees. The decision therefore can be read as a very pro-carrier ruling that could significantly narrow coverage for directors of closely held companies whenever officers or directors act in multiple capacities, not merely when they also serve as trustees for some of the company's beneficial owners, but also when they act as majority shareholders or lenders or engage in other transactions with the company. It should be noted, however, that the court was dealing with specific policy language and a specific set of underlying allegations, and subsequent cases will turn on their own facts and relevant policy language.

***OneBeacon Midwest Ins Co v Ariail,* No. 2:14-cv—00007-RWS, 2015 WL 1412661 (N.D. Ga. Mar. 27, 2015)—Insurer's declaratory action against FDIC barred where insurer failed to initiate administrative claims process in a timely fashion.**

We have previously discussed this litigation brought by a D&O insurer against the FDIC as receiver for the failed Habersham Bank ("FDIC-R") and several former directors and officers of the bank, seeking a declaration that the directors and officers were not entitled to coverage or reimbursement of their defense costs in connection with claims asserted against them by the FDIC-R. In 2013, the district court dismissed the action, holding that it was barred by the anti-injunction provision of FIRREA, 12 U.S.C. § 1821(j). *OneBeacon Midwest Ins. Co. v. FDIC*, 2013 WL 1337193 (N.D. Ga. Mar. 28, 2013. The court reaffirmed its decision upon a motion for reconsideration. *Onebeacon Midwest Ins. Co. v. FDIC*, 2014 WL 869286 (N.D. Ga. March 5, 2014). In that order, the court noted that its holding did not leave the insurer without a remedy, because a party in its position can pursue a claim through FIRREA's administrative process.

In May, 2013, the insurer filed a proof of claim through the FDIC-R's administrative claims process. The claim was denied as untimely several months later. As explained in the opinion, Habersham Bank had closed in February, 2011, and in connection with its appointment as receiver, the FDIC-R published notices of the bank's failure to potential creditors and claimants. Those notices stated that claims were required to have been filed on or before May 25, 2011, 90 days after the initial publication of the notices. Notice was sent to the plaintiff on February 24, 2011. Notably, the insurer's initial lawsuit appears to have been triggered by a letter from the FDIC-R to the former directors and officers dated August 28, 2011, after the bar date had passed.

The insurer filed the present lawsuit in January, 2014, alleging that it timely filed a proof of claim and that it had been denied, thus allowing its initial declaratory judgment action to go forward. The district court once again dismissed the action, holding that the insurer's claim was untimely. The court noted that 18 U.S.C. § 1821(d)(5) provides only one exception to the timeliness requirement for proofs of claim—when the claimant did not receive notice of the appointment of the receiver in time to file a timely claim. The insurer argued that this rule did not apply under the present circumstances because its claim did not exist until after the FDIC-R's letter of August 28, 2011. Calling the question a "close one," the court concluded that the insurer had (or should have had) sufficient information about the FDIC's potential claims against the directors and officers prior to the bar date, and therefore would have been aware of its potential claim against the FDIC. The court reasoned that the insurer's cause of action accrued prior to the bar date, because the FDIC-R's allegations against the directors and officers related to conduct occurring before Habersham Bank was closed. While the court did not make any specific finding that the insurer was actually aware of potential claims against Habersham's directors and officers prior to the August 28, 2011 letter, it reasoned that "an insurer surely would know that its insureds face potential claims by the FDIC-R…after a bank is put in receivership." The court concluded that the insurer "had notice of the existence of potential claims by the FDIC-R against its insureds even if the claim was contingent or not known at that time."

6. Professional Liability

***Befekadu v. Addis International Money Transfer*, 332 Ga. App. 103, 772 S.E.2d 785 (2015)—Court addresses standards for disqualification of attorney who incorporated LLC in subsequent litigation involving the LLC**

In this breach of fiduciary duty and conversion lawsuit brought by an LLC and certain of its members against another member who served as its treasurer, the Court of Appeals vacated an order disqualifying counsel for the defendant, who had been involved in setting up the LLC. The Court of Appeals held that the trial court applied the wrong standards in disqualifying the defendant's attorney. The attorney contended that his prior work on behalf of the LLC consisted of filing the articles of incorporation and obtaining an employer identification number in 2006. The lawsuit involved claims that in 2010, four years later, the defendant made unauthorized payments to himself and others. When the defendant's attorney began to cross-examine the first witness at trial, the trial court promptly excused the jury and engaged in a *sua sponte* examination of the attorney's qualification to represent the defendant against the LLC, his former client. The trial court found that the fact that the attorney filed the articles of incorporation effectively ended the inquiry. The court disqualified the attorney and declared a mistrial. The Court of Appeals found two problems with the trial court's decision—it ruled too hastily without considering whether the attorney's conflict had been waived, and it misapplied the legal standards for disqualification. An attorney's conflict of interest arising from the representation of a former client can be waived by failing to raise the issue with reasonable promptness after discovering the facts that would support disqualification. Because it was apparent to the Court of Appeals that waiver had not been considered, the Court of Appeals remanded the case to permit the defendant to argue that any conflict had been waived. The Court of Appeals also found that it was error for the trial court not to consider whether the attorney's prior representation of the LLC and his representation of the defendant were substantially related. As the court noted, an attorney is not prevented from representing a party in the case merely because the attorney previously represented the opposing party. Instead, disqualification is only warranted when the current matter is substantially related to the prior representation, or when the attorney was actively representing the former party when the events giving rise to the current dispute occurred. The Court of Appeals instructed the trial court to consider whether there was a substantial relationship between the attorney's prior legal services and the current dispute, and whether he was actively representing the LLC in 2010 when the events leading to the lawsuit took place. Finally, the Court of Appeals addressed the question of when an attorney may act as a witness in a lawsuit, finding that under Rule 3.7 of the Georgia Rules for Professional Conduct, disqualification on this basis is only appropriate if the attorney is likely to be a necessary witness (meaning that the attorney's testimony is relevant to a disputed question of material fact and there is no other evidence available to prove the fact).

***Hays v. Page Perry LLC*, 92 F. Supp. 3d 1315 (N.D. Ga. 2015)—On reconsideration, court affirms that outside counsel had no duty to report client wrongdoing to regulators.**

Ruling on a motion for reconsideration in this professional malpractice suit, the district court reaffirmed that the plaintiff had stated no claim that its corporate counsel breached a duty to report the plaintiff's wrongful actions to federal regulators. We reviewed the initial dismissal order in last year's survey. *Hays v. Page Perry, LLC*, 26 F. Supp. 3d 1131 (N.D. Ga. 2014).

The case arose out of the receivership for Lighthouse Financial Partners, LLC, an investment advisory company whose assets were frozen in connection with an SEC enforcement action against the company and its principal, Benjamin DeHaan. The defendants included Lighthouse's former outside counsel and two of its principals. Lighthouse's receiver alleged, among other things, that the firm was engaged to advise Lighthouse regarding registration, licensing and regulatory requirements of the SEC and state securities regulators, and that its services to Lighthouse included "mock audits" which revealed some violations of securities regulations. The receiver claimed that the defendants violated ethical rules and committed professional malpractice by not reporting these violations to regulators (which presumably would have led to an earlier detection of DeHaan's alleged theft of customer funds).

In its initial dismissal order, the district court found that there was no applicable duty under Georgia law that required the defendants to "report out" the violations to regulators. In his motion for reconsideration, the receiver revisited Rule 1.13 of the Georgia Rules of Professional Conduct, which outlines an attorney's duty to report violations of law. The receiver argued that the district court misconstrued the rule, focusing on prefatory language in the rule directing the attorney to "proceed as is reasonably necessary in the best interest of the organization." The receiver reasoned that under the circumstances, it was in the best interest of Lighthouse that its counsel report the violations. This did not persuade the district court, which found the prefatory language to be "vague in isolation." The court noted that the actual guidance provided by the rest of Rule 1.13 is more specific, and that Rule 1.13(c) permits, but does not command, an attorney to notify an external agency of illegal conduct. By contrast, Rule 1.13(b) appears to command the attorney to refer illegal conduct to "higher authority" within the corporation. The court concluded that any obligation on the attorney's part to report wrongdoing to a higher authority within the corporate hierarchy did not extend to outside agencies. The court summarily rejected arguments that the attorneys should have reported the wrongdoing to a particular indirect owner of Lighthouse who was "actively involved" in its operations (but was admittedly not the highest authority within the organization), or to the receiver himself.

The court also rejected the receiver's attempts to downplay the potential harm that a duty to report wrongdoing to regulators might inflict on the attorney-client relationship. The receiver argued that this concern was not implicated here because the wrongdoer was DeHaan and the defendants' client was Lighthouse. The court disagreed that DeHaan and Lighthouse could be separated as neatly as the receiver suggested: the violations in question were violations of Lighthouse, and the enforcement action ultimately brought by the SEC named both as defendants. The receiver also argued that the defendants had not obtained any confidential information because their representation facilitated a fraud. The court found this line of reasoning to be "absurd" in that it confused attorney-client confidentiality with the crime-fraud exception to the attorney-client privilege: "That certain confidential information may be discoverable [in litigation under the crime-fraud exception] does not mean that attorneys may volunteer such information outside of a judicial proceeding, much less be required to do so under the threat of civil penalties."

Finally, the court reaffirmed its earlier rulings dismissing claims that the defendants performed "inadequate mock audits" and that their representation of DeHaan before the SEC created a conflict of interest.

7. Corporate Receiverships

***Considine v. Murphy*, 297 Ga. 164, 773 S.E.2d 176 (2015)—Supreme Court applies "*Barton*" doctrine as jurisdictional bar to suit against receiver brought without leave of court.**

This lawsuit arose from an earlier dispute between two business partners in which the partners agreed to the appointment of the appellees, an accountant and his firm, as receiver for their company while their litigation was pending. The receiver was appointed by consent order in September, 2008. Two years later, while the lawsuit was still pending, the appellant filed a separate lawsuit in the same court against the receiver, alleging mismanagement of the receivership. The receiver sought dismissal on two grounds: official immunity and the plaintiff's failure to obtain leave of court in the underlying lawsuit. Before the trial court could rule on the motion to dismiss, the appellant voluntarily dismissed her lawsuit. A year later, however, she filed a new suit against the receiver. The receiver again moved to dismiss, and the trial court granted the motion, citing official immunity as the reason for its dismissal. We addressed the Court of Appeals' opinion in last year's survey. *Considine v. Murphy*, 327 Ga. App. 110, 755 S.E.2d 556 (2014).

Reviewing on writ of certiorari, a unanimous Supreme Court affirmed the dismissal, but for a different reason than the Court of Appeals. It held that the *Barton* doctrine, named after *Barton v. Barbour*, 104 U.S. 126 (1881), requires the dismissal of any suit brought against a receiver without leave of the court by which the receiver was appointed. The Court reviewed prior Georgia decisions citing the *Barton* rule and found that Georgia treats the rule as jurisdictional in character. As a jurisdictional rule, the Court explained, the *Barton* rule requires dismissal regardless of whether the suit is brought in the same court that appointed the receiver and is presiding over the underlying matter.

The appellant argued that the initial consent order appointing the receiver effectively served as leave to file an action against the receiver, citing a provision that limited the receiver's liability to the parties to acts constituting gross negligence or willful misconduct "as determined by a Court of competent jurisdiction." The Court rejected this argument, holding that the cited language merely addressed the types of claims that might give rise to liability but did not authorize any party to file a lawsuit.

Having found that the action should have been dismissed under the *Barton* doctrine, the Court took the additional step of vacating the Court of Appeals' opinion insofar as it ruled on the question of official immunity, holding that it was without jurisdiction to decide that question. The Court stated no opinion as to whether the receiver was entitled to assert official immunity or any other privilege.

G. FULTON COUNTY BUSINESS COURT DECISIONS.

***Rollins v. Rollins*, No. 2014-cv-249480 (Feb. 04, 2015) (Order on Defendants' Motion to Dismiss and for Judgment on the Pleadings)**

This action is separate from but related to *Rollins v. Rollins*, discussed on page 11. It involves a marital trust whose sole beneficiary is Ruth Rollins, the former wife of Gary Rollins, and whose trustees are the plaintiffs in both this action and the lawsuit that came before the Supreme Court in 2015. Here, the plaintiffs did not bring any claims on their own behalf, but are suing as trustees on behalf of the marital trust. The sole asset of the marital trust is an 18% non-voting interest in LOR, Inc. ("LOR"), a closely held corporation. The other shareholders of LOR are Gary and Randall Rollins, both individually and as trustees of various other family trusts.

The plaintiffs allege that Gary and Randall mismanaged LOR, made unauthorized withdrawals from the marital trust's account, and failed to pay certain dividends. Their complaint asserted claims for, *inter alia*, breach of fiduciary duty and dissolution of LOR. The defendants moved to dismiss these claims on the ground that they had to be brought derivatively on behalf of the corporation. The court denied the motion to dismiss, holding that the claims were properly asserted as a direct action under the principles laid out in *Thomas v. Dickson*, 250 Ga. 772, 786 (1983) provides an exception to the general rule requiring breach of fiduciary duty suits against corporate officers to be brought derivatively, when the reasons for the general rule do not apply. Those reasons are typically described as follows: derivative suits (1) prevent a multiplicity of suits by shareholders, (2) protect the corporation's creditors by ensuring that any recovery goes to the corporation, (3) protect the interests of all shareholders by increasing the value of their shares, and (4) adequately compensate the plaintiff by increasing the value of the plaintiff's shares. The court evaluated the case law that has developed under *Thomas* and determined that the present case most closely resembled *Parks v. Multimedia Technologies, Inc.*, 239 Ga. App. 282 (1999). In *Parks*, the Georgia Court of Appeals held that no derivative suit was necessary where the other shareholders were family members of the defendants who had not complained about the defendant's conduct and were unlikely to bring suit.

Here, the court found that the same logic applied because the other shareholders were the defendants themselves, either individually or as trustees of other trusts. The court further noted that other family members had not joined in the other litigation involving claims that Gary and Randall mismanaged Rollins family entities, and instead had sought to intervene on their behalf in an appeal. This, in the court's view, seemed to support the plaintiffs' allegation that the other shareholders had acquiesced in the defendants' conduct (and therefore, like the absent shareholders in *Parks*, were unlikely to file their own suits). The court also found that there were no alleged creditors, and that the other reasons for requiring a derivative suit were not present.

In the same order, the court denied the defendants' motion to dismiss a number of claims relating to the defendants' management of the marital trust, rejecting the argument that the claims had been released by the trust beneficiary pursuant to her divorce settlement agreement.

***Bronner v. Hardy*, No. 2014-cv-248023 (Apr. 14, 2015) (Order on Defendants' Motion to Dismiss and For Judgment on the Pleadings)**

In this suit brought by a shareholder and director of a film production company against two other director-shareholders, the court dismissed the plaintiff's count based on oppression, but allowed the plaintiff's fraud and breach of fiduciary claims to go forward. The plaintiff alleged that the defendants misrepresented to him that the company was not profitable, withheld information from him, diverted corporate opportunities, improperly raised their own salaries and misappropriated corporate funds. The complaint asserted eleven counts, four of which were relevant to the defendants' motion to dismiss and for judgment on the pleadings. Two counts asserted a direct action for oppression and fraud, and the other two asserted derivative claims for breach of fiduciary duty and lack of candor.

The court dismissed the oppression claim, holding that Georgia law recognizes no cause of action for oppression outside of the statutory close corporation context. While O.C.G.A. § 14-2-940(a)(1) permits a shareholder of a statutory close corporation to petition a court for relief if those in control of the corporation act in an "illegal, oppressive, fraudulent or unfairly prejudicial" manner, there was no evidence in this case that the corporation was a statutory close corporation. Under O.C.G.A. § 14-2-902(a), a corporation must designate in its articles that it is a statutory close corporation in order to be treated as one.

The court then denied the motion as to the plaintiff's fraud claim, holding that it was properly asserted as a direct claim. Significantly, the plaintiff had entered into a Reconciliation Agreement with the defendants in 2011 that appear to have vested the plaintiff (and the two defendants) with certain rights not generally enjoyed by other shareholders of the company. In light of this fact, the plaintiff was able to plead a special injury separate and distinct from that suffered by other shareholders. The court also denied the motion as to the derivative claims for breach of fiduciary duty and lack of candor. Here, the defendants' sole argument at this stage appears to have been that the claims were barred by the 2011 reconciliation agreement. The court noted, however, that the plaintiff was challenging the enforceability of that agreement through this lawsuit, and it was also not clear if the absent shareholders (who collectively hold 6% of the corporation's shares and were not identified as parties to the reconciliation agreement) were bound by any potentially enforceable waiver contained in the agreement.

***Ordan v. Keen,* No. 2014-cv-240975 (Jan. 8, 2015) (Order on Defendants' Motion for Summary Judgment)**

This dispute involved claims that the owner of an LLC promised the plaintiff a 25% equity interest in the LLC but failed to follow through on that promise. The plaintiff asserted claims for breach of oral contract, fraud and quantum meruit, and also claimed relief under O.C.G.A. § 14-11-313. On a motion for summary judgment by the defendants (the owner and the LLC), the court held that disputed issues of fact precluded summary judgment as to the breach of contract and quantum meruit claims, but granted summary judgment as to the other claims.

The plaintiff and defendants began their relationship in 2012, when the plaintiff found an investor for the LLC in exchange for a finder's fee. The plaintiff claimed that afterwards, he and the individual defendant, Keen, verbally agreed that he would receive a 25% equity stake in the LLC in exchange for his continued consulting and marketing work on behalf of the company. The plaintiff shared office space with other executives of the LLC, and was listed in its phone directory. He claimed that he performed consulting and marketing services and other work on behalf of the LLC, in reliance on Keen's promise to give him a 25% equity stake. He further claimed that in reliance on this promise, he agreed to give a portion of his interest to another individual who performed services for the LLC. It was undisputed that no written agreement was ever executed granting the plaintiff a 25% interest. Multiple drafts of an operating agreement were prepared on behalf of the plaintiff and his colleague, but they were not executed, and Keen's knowledge of these drafts was in dispute. Both parties produced additional evidence supporting their respective positions. The defendants pointed to an email from the relevant time period purporting to discuss the plaintiff's compensation structure, which did not mention a 25% interest. The plaintiff, meanwhile, produced affidavits from third party witnesses testifying that Keen held the plaintiff out as an equity partner of the LLC.

The court held that there was a genuine dispute as to whether the parties entered into an oral agreement to give the plaintiff a 25% interest, which meant that his breach of contract and quantum meruit claims were triable to a jury. The court found that the plaintiff's testimony as well as the third party affidavits were sufficient to support a jury finding that the parties mutually agreed to an equity sharing arrangement. The court also rejected an argument that the terms of the oral agreement were too indefinite to be enforced, which was based on the fact that different versions of the draft operating agreements conflicted with each other as to the amount of the interest (ranging from 20% to 26.7%). It cited the rule that an indefinite contract may become enforceable if subsequent words or actions provide greater certainty. Finally, the court rejected the defendants' argument that there was a failure of consideration, which was based on claims that the only work the plaintiff ever promised to perform was the work that was already compensated through his finder's fee. The court found that the plaintiff successfully rebutted this claim with evidence that he performed additional work.

In granting summary judgment to the defendants on the plaintiff's fraud claim, the court held that even though the existence of the defendants' promise to give a 25% stake was in dispute, there was no evidence that the defendants acted with scienter in making that promise. Under well-settled law, a promise to perform an act in the future—such as to grant an equity interest—is fraudulent only if there was no present intent to perform. Since the plaintiff failed to show that the defendants never intended to give him a 25% stake, his claim failed as a matter of law. Finally, the court quickly disposed of the plaintiff's claim for relief under O.C.G.A. § 14-11-313, which provides for court-ordered inspection of an LLC's books and records, because the plaintiff was not a member of the LLC and therefore had no standing to obtain relief under that section.

***Robinson v. Wellshire Fin. Svcs., LLC*, No. 2015-cv-259408 (June 1, 2015) (Order on Application for Protective Order).**

In this action, a Georgia resident sought relief from a subpoena requiring him to appear for a deposition in a Texas lawsuit arising from events that occurred while the applicant served as the president and a director of the defendant to the Texas suit. The applicant has since moved to Georgia, where he is now the CEO of a large Georgia corporation. He sought a protective order on several grounds, including that he had no knowledge relevant to the Texas suit, that he was "very busy" in his new position with his current employer, and that he should be protected under the "apex doctrine." The apex doctrine generally protects C-level officers from having to appear for a deposition unless the party seeking the deposition shows that the officer has superior knowledge that cannot be discovered in a less burdensome fashion (such as from the deposition of lower level officers).

The applicant's reliance on the apex doctrine presented an interesting question because while the doctrine is recognized in Texas and has been applied by federal courts in Georgia, it has not been expressly adopted by Georgia state courts. Here, the court declined to adopt the apex doctrine, citing the lack of any evidence that it has been adopted in the Georgia state court system. The court also declined to follow the Georgia federal decisions applying the doctrine, holding that O.C.G.A. § 24-13-116, which governs proceedings involving foreign subpoenas, provides that Georgia state law is controlling in such proceedings.

The court did, however, grant a temporary protective order to the applicant, which it based on the fact that the Texas Court of Appeals had stayed the depositions of other executives while it considered an appeal based on the apex doctrine. Noting that the apparent purpose of the Texas stay was to preserve the status quo, which would be disturbed if the depositions went forward, a similar stay was appropriate here. The court made no ruling as to whether the discovery sought was relevant or whether the applicant's current schedule rendered compliance with the subpoena unduly burdensome.

***Drummond Financial Services, LLC v. TMX Finance Holdings, Inc.*, No. 2014-cv-253677 (Feb. 26, 2015) (Order on Motion to Strike Affidavit and to Disqualify Counsel)**

In this dispute between competitors in the title loan industry, the court entered an order disqualifying counsel for the defendants, on the ground that the firm was conflicted due to its representation of affiliates of the plaintiffs in other matters. The record indicated that the plaintiffs were operational affiliates of Select Management Resources, LLC ("SMR"), a company for whom the defendants' performed legal services between 2006 and 2014. The firm represented SMR in five distinct matters, for which four attorneys billed 34 hours. The firm's initial engagement letter made no reference to affiliates of SMR in its description of the client's identity. Nonetheless, the court found evidence that the representation extended beyond SMR to its operational affiliates. For instance, one legal memorandum referred specifically to affiliates, and confidential information about some of the plaintiffs' operations was provided to the firm. It was also shown that SMR and the plaintiffs had common ownership, the same managing member, the same key personnel, the same legal department and general counsel, and kept consolidated financial records. The court also determined that the relationship had not been terminated in a manner that would have led SMR to reasonably have known that it was no longer a client of the firm at the time the lawsuit was filed.