2013 Georgia
Corporation and Business Organization
Case Law Developments

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Thomas S. Richey and Michael P. Carey

I. <u>INTRODUCTION</u>

This survey catalogs case law developments dealing with Georgia corporate and business organization law issues handed down by Georgia state and federal courts during 2013. Several of 2013's decisions have significant precedential value, while others address less momentous questions of law as to which there is little settled authority. Even those cases in which the courts applied well-settled principles are instructive for the types of claims and issues that are currently being litigated in corporate and business organization disputes.

The decisions are organized first by entity type – those specific to business corporations, nonprofit 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, including derivative action procedure, *alter ego* and other forms of secondary liability, jurisdiction and insurance issues. Finally, we cover several significant decisions handed down by the Fulton County Business Court during the year 2013.

II. <u>OVERVIEW</u>

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

The most significant development of 2013 is as of yet unresolved. In two separate decisions, *FDIC v. Loudermilk*, ___ F. Supp. 2d ___, 2013 WL 6178463 (N.D. Ga. Nov. 25, 2013) (Thrash, J.) and *FDIC v. Skow*, 741 F.3d 1342 (11th Cir. 2013), a Georgia federal district court and the Eleventh Circuit asked the Georgia Supreme Court to decide whether the business judgment rule insulates bank directors from liability for claims of ordinary negligence. The Georgia Supreme Court has docketed the two appeals as S14Q0454 and S14Q0623, with briefing underway and oral argument currently scheduled for April and May, 2014, respectively.

The immediate question before the Supreme Court is whether the FDIC, acting as receiver for failed Georgia banks, may rely on an ordinary negligence theory in pursuing claims against the banks' former directors and officers. The FDIC has filed 21 such suits in Georgia federal district courts since the onset of the financial crisis of the late 2000's, and the defendants have moved to dismiss the FDIC's ordinary negligence claims in several of the cases. Beginning with the district court's February 2012 decision in *Skow,* the initial decisions agreed that the business judgment rule as described in *Flexible Products Co. v. Ervast*, 284 Ga. App. 178, 182, 643 S.E.2d 560 (2007) and *Brock Built, LLC v. Blake*, 300 Ga. App. 816, 822, 686 S.E.2d 425 (2009) foreclosed the FDIC's ordinary negligence claims.

In early 2013, the district court in *FDIC v. Adams*, 2013 WL 604411 (N.D. Ga. Apr. 10, 2013) (Forrester, J.), broke from these early decisions, holding that the business judgment rule applied but that its presumption could be overcome by allegations of ordinary negligence. In November, the district court in *Loudermilk, supra,* went a step further, stating that it was "not convinced" that the business judgment rule applied to bank directors in the first place. The court specifically questioned whether it made sense to treat bank directors and officers in the same manner as corporate directors and officers, reasoning that bank failures harm not only shareholders but also the FDIC and ultimately, taxpayers. While the court clearly hinted at a policy-based rationale for denying business judgment rule protection to bank directors and officers, it did not resolve the question, instead certifying to the Georgia Supreme Court the following question: "Does the business judgment rule in Georgia preclude as a matter of law a claim for ordinary negligence against the officers and directors of a bank in a lawsuit brought by the FDIC as receiver for the bank?"

Shortly thereafter, in the *Skow* appeal, the Eleventh Circuit also decided to certify questions to the Georgia Supreme Court. The Eleventh Circuit did not address the policy points raised in *Loudermilk*, but instead found that *Flexible Products* and *Brock Built* may conflict with the statutory standard of care set forth in the Banking Code, O.C.G.A. § 7-1-490, which it (like many previous courts) interpreted as an ordinary negligence standard. The court thus certified its own questions to the Georgia Supreme Court: (1) "Does a bank director or officer violate the standard of care established by O.C.G.A. § 7-1-490 when he acts in good faith but fails to act with "ordinary diligence," as that term is defined in O.C.G.A. § 51-1-2?" and (2) "In a case like this one, applying Georgia's business judgment rule, can the bank officer or director defendants be held individually liable if they, in fact as alleged, are shown to have been ordinarily negligent or to have breached a fiduciary duty, based on ordinary negligence in performing professional duties?" The Supreme Court's response to the certified questions will undoubtedly be significant to the ongoing FDIC litigation and to any litigation involving bank officers and directors. The Court's response may also have wider effects on the business judgment rule in Georgia generally, particularly if the Court addresses the interplay between the rule and the statutory standard of care. Notably, the standard set forth in the Banking Code, O.C.G.A. § 7-1-490, uses substantially the same wording as its counterparts in the Corporations Code, see O.C.G.A. §§ 14-2-830 (applicable to corporate directors) and 14-2-842 (applicable to corporate officers).

The *Adams* decision was significant in a second respect: it also addressed a failure of oversight claim under the principles established in *In re Caremark Int'l Inc. Deriv. Litig*., 698 A.2d 959 (Del. Ch. 1996), making it the second decision in two years to consider applying *Caremark* to a Georgia banking corporation. Without deciding whether Georgia would follow *Caremark* in adjudicating director liability claims not involving business decisions, the court held that the FDIC failed to allege the complete absence of internal controls or the conscious failure to monitor such controls, and thus failed to meet the "high threshold" for a *Caremark* claim. Another issue regarding claims against failed bank directors and officers was decided in *FDIC v. Cameron*, ___ F. Supp. 2d ___, 2013 WL 6490247 (N.D. Ga. Dec. 11, 2013), in which the court held that the Georgia statute of limitations for claims of negligence and gross negligence against bank directors and officers runs from the time of making bad loans, not the time when loans went into default.

A different standard of care issue was pending before the Georgia Supreme Court at the end of 2013 in an appeal from *Rollins v. Rollins*, 321 Ga. App. 140, 741 S.E.2d 251 (2013). There, the Georgia Court of Appeals held that trustees managing family business entities in which the trusts held minority interests may be held liable to beneficiaries under trust standards of care for their actions at the entity level and they may also be required under trust law principles to provide an accounting of those entities. The Georgia Supreme Court recently reversed the Court of Appeals on both counts, holding that because the trusts owned minority interests in the entities, the trustees' conduct as officers and directors must be governed by corporate law principles. As to the accounting, the Court of Appeals failed to consider the discretion exercised by the trial court in denying the accounting. *Rollins v. Rollins*, Appeal No. S13G1162, ___ S.E.2d ___, 2014 WL 819500 (Mar. 3, 2014).

In other cases examining the conduct of corporate officers and directors in 2013, in *Georgia Dermatologic Surgery Centers, P.C. v. Pharis*, 323 Ga. App. 181, 746 S.E.2d 678 (2013), the Court of Appeals held that the president of a two-shareholder corporation exceeded his authority under corporate bylaws and a shareholder agreement in terminating the other shareholder/director without board and shareholder approval, even where that approval would have to come from the terminated shareholder/director. In *Coast Buick GMC Cadillac, Inc. v. Mahindra & Mahindra, Ltd.*, 2013 WL 870060 (N.D. Ga. Mar. 7, 2013), the Northern District addressed the rule permitting fraud claims to be based on misrepresentations made to third parties where the defendant allegedly knows that the plaintiff will rely on a third party who received the misrepresentation. The court also declined to apply the federal "intracorporate conspiracy doctrine" to bar a state law conspiracy claim. The Georgia federal courts in two cases, *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299 (11th Cir. 2013) and *Stuart v. Resurgens Risk Management, Inc.*, 2013 WL 2903571 (N.D. Ga. June 12, 2013), reaffirmed that personal liability of a corporate officer under the Federal Labor Standards Act requires operational control or direct supervision over the offending conduct. Finally, in *Mecca Construction, Inc. v. Maestro Investments, LLC,* 320 Ga. App. 34, 739 S.E.2d 51 (2013), the Court of Appeals applied the familiar rule that an officer who personally participates in a tort can be held individually liable to an injured party by default without resort to veil-piercing principles.

B. CORPORATE STOCK AND DEBT – ISSUANCE, RESTRICTIONS AND BLUE SKY LAW APPLICATION.

In *In re Beauchamp (Mossy Dell, Inc. v. AB&T National Bank)*, 500 B.R. 235 (M.D. Ga. 2013), the Middle District of Georgia addressed what constitutes a valid stock transfer restriction under O.C.G.A. § 14-2-627(d), holding that the statute's list of four valid mechanisms for stock transfer restrictions is exhaustive, and any restrictions not consistent with the statute are impermissible. The court ruled that restricting transfers to family members is permitted, but a 10-year prohibition against all transfers is not valid under the statute. In *Ward v. Ward*, 322 Ga. App. 888, 747 S.E.2d 95 (2013), the Court of Appeals applied O.C.G.A. § 14-2-621(b) in holding that stock issued by a corporation's president was invalid because it was not authorized by the corporation's board of directors as required by its bylaws. In *Cushing v. Cohen*, 323 Ga.

App. 497, 746 S.E.2d 898 (2013), the Court of Appeals held that unsecured promissory notes given to investors in connection with a "leveraged lending program" were securities subject to the Georgia Securities Act. An officer of the corporation that issued notes was held liable under O.C.G.A. § 10-5-14. In *Olegbegi v. Hutto*, 320 Ga. App. 436, 740 S.E.2d 190 (2013), the Court of Appeals held that the purchaser of stock that was not delivered to him was not entitled to consequential damages stemming from tax liabilities and penalties he incurred in withdrawing funds from his 401(k) account to pay for the stock, finding that the plaintiff's evidence was insufficient.

C. NONPROFIT ORGANIZATION DECISIONS.

The year 2013 saw several cases in which the courts were called upon to interpret or apply the bylaws and incorporation documents of nonprofit corporations. In *God's Hope Builders, Inc. v. Mount Zion Baptist Church of Oxford, Georgia, Inc.*, 321 Ga. App. 423, 741 S.E.2d 185 (2013), the Court of Appeals examined a church's bylaws for the purposes of determining whether the plaintiffs were properly members of the church and had standing to sue. In *Hall v. Town Creek Neighborhood Association*, 320 Ga. App. 897, 740 S.E.2d 816 (2013), the Court of Appeals held that a homeowners association's declarations and bylaws did not permit the developer to forego appointing a board of directors or to act in lieu of a board. In *McGee v. Patterson*, 323 Ga. App. 103, 746 S.E.2d 719 (2013), the Court of Appeals held that a homeowners' association's documents permitted residents to enforce the association's covenants notwithstanding that the residents were delinquent in paying assessments. Finally, in *Xerox Corp. v. Light for Life, Inc.*, 2013 WL 1748327 (M.D. Ga. Apr. 23, 2013), the Middle District declined to rule on which of two competing groups purporting to represent a corporation in the lawsuit was the proper party, since the issue had been mooted by the plaintiff's voluntary dismissal of the corporation.

D. LIMITED LIABILITY COMPANY DEVELOPMENTS.

The courts considered a variety of issues involving limited liability companies in 2013. In *Denim North America Holdings, Inc. v. Swift Textiles, LLC*, 532 Fed. Appx. 853(11th Cir. 2013), the Eleventh Circuit strictly construing O.C.G.A. § 14-11-305, held that non-managing members of a member-managed LLC do not owe fiduciary duties to the LLC or to other members. In so holding, the Eleventh Circuit reversed the Middle District, which had reasoned that the non-managing member gained *de facto* control by virtue of having the power under the operating agreement to appoint half of the managers. In *Raiford v. National Hills Exchange, LLC,* 2013 WL 1286204 (S.D. Ga. Mar. 27, 2013) LLC non-member equity holders were found unable to challenge an undisclosed sale of partnership assets under the unanimous consent of requirements of O.C.G.A. § 14-11-308. In *Kaufman Development Partners, LP v. Eichenblatt*, 324 Ga. App. 71, 749 S.E.2d 374 (2013), the Court of Appeals held that a former LLC member who remained a party to the operating agreement retained rights under the agreement and had standing to sue for breaches of the agreement. In *Davis v. VCP South, LLC*, 321 Ga. App. 503, 740 S.E.2d 410 (2013), the Court of Appeals held that a member of a two-member LLC did not waive its rights under a buy-sell provision by obtaining its own independent valuation of the LLC interest.

Several other cases addressed questions of individual liability of LLC members and management. In *Jones Creek Investors, LLC v. Columbia County, Georgia*, 2013 WL 1338238 (S.D. Ga. Mar. 28, 2013), the Southern District of Georgia addressed issues of individual liability of LLC officers under the federal Clean Water Act and Georgia common law. In *American Arbitration Association v. Bowen*, 322 Ga. App. 51, 743 S.E.2d 612 (2013), the Court of Appeals held that members of an LLC were individually liable for the LLC's unpaid arbitration fees, since the members personally participated in the arbitration in their individual capacities as well. Finally, in *Primary Investments, LLC v. Wee Tender Care III, Inc.*, 323 Ga. App. 196, 746 S.E.2d 823 (2013), the Court of Appeals held that a non-competition clause in an LLC's sale agreement did not bind members of the LLC who had signed the agreement only in their capacities as representatives of the LLC.

In *STC Two, LLC v. Shuler-Weiner*, ___ Ga. App. ___, 750 S.E.2d 730 (2013), the Georgia Court of Appeals again honored the separateness of an LLC from its members, holding that an LLC would not be bound to extend a lease by payments promised by the lessee to the LLC's member. Also applying the principle of separateness, the court in *Uhlig v. Drayprop, LLC*, 2013 WL 5532883 (S.D. Ga. Oct. 4, 2013), granted summary judgment to two LLC members on third-party claims that they misrepresented the condition of a condominium building to a purchaser. The court concluded, we submit erroneously, that the members were shielded from personal liability under O.C.G.A. § 9-11-1107(j) so long as they were acting on behalf of the LLC, not on behalf of themselves.

E. PARTNERSHIP LAW DEVELOPMENTS.

The U.S. District Court for Middle District of Georgia addressed issues of partnership formation and completion in *Durkin v. Platz*, 920 F. Supp. 2d 1316 (M.D. Ga. 2013), holding that parties who contracted to write a screenplay formed a partnership for that purpose, but that the partnership ceased upon completion of the screenplay. As a result, the partners' fiduciary duties ceased and did not extend to producing a movie from it. The same court handed down a potentially far-reaching decision in *First Benefits, Inc. v. Amalgamated Life Insurance Co.*, 2013 WL 4011015 (M.D. Ga. Aug. 6, 2013), holding that the statute of limitations for claims between partners does not begin to accrue until the partnership is dissolved, basing its ruling on old Georgia Supreme Court authority and rejecting a recent, inconsistent Georgia Court of Appeals decision that suit must be filed within four years of the defendant partner's action.

According to the court in *Alliant Tax Credit Fund XVI, Ltd. v. Thomasville Community Housing, LLC*, 2013 WL 321548 (N.D. Ga. Jan. 28, 2013), general partners who failed to obtain audited financial statements exactly as specified in the limited partnership agreement may be subject to removal for material breach of the agreement. In *Pullar v. General MD Group*, 2013 WL 5781609 (N.D. Ga. Sept. 17, 2013), the court held that, under O.C.G.A §§ 14-8-13 and 14-8-15, a general partner can be liable to investors for fraud and breach of contract claims against the partnership arising from investment agreements with the plaintiffs, even though the general partner was not a signatory to the agreements. In *Crippen v. Outback Steakhouse International, L.P.*, 321 Ga. App. 167, 741 S.E.2d 280 (2013), the Court of Appeals held that a limited partnership officer/employee's pursuit of outside interests and his failure to devote full time to partnership business, while it violated his employment agreement, did not breach any fiduciary duty to the partnership and the partnership was not entitled to recover his profits, because there was no evidence that the outside interests were adverse to the partnership or caused it any harm. The Georgia Court of Appeals in *Petrakopoulos v. Vranas*, ___ Ga. App. ___, 750 S.E.2d 779 (2013) addressed procedural requirements in a partnership dispute, reversing the appointment of a receiver for the partnership at a hearing on a motion for appointment of an auditor, deciding which of the plaintiff's claims were direct and which were derivative, and finding factual issues in a claim for wrongful dissolution. In *NEF Assignment Corp. v. Northside Village Partnership GP, LLC*, 2013 WL 3755606 (N.D. Ga. Jul. 15, 2013), the Northern District held that guarantors of all of a general partner's obligations were liable for the general partner's obligation to repurchase another partner's interest under the buy-sell provisions of the partnership agreement. Finally, in *T.V.D.B. Sarl v. KAPLA USA*, 2013 WL 6623186 (Dec. 16, 2013), the District Court for the Southern District of Georgia found that the principal of the general partner of a limited partnership may be held liable for breach of fiduciary duty to a creditor for the unpaid debt of the partnership because she had diverted the partnership's business to a newly formed LLC. The court held that the new LLC may be subject to successor liability, but that the evidence did not support veil-piercing.

F. TRANSACTIONAL CASES.

The cases in this area in 2013 reflect the courts' increasing attention to and reliance on the Georgia Business Corporation Code in resolving disputes over major transactions and the rights and liabilities of successor entities. Several decisions in 2013 addressed the rights and liabilities of successor entities following corporate mergers. These issues have most frequently come up in the foreclosure context. In *National City Mortgage Co. v. Tidwell,* 293 Ga. 697, 749 S.E.2d 730 (2013), the Supreme Court held that the surviving entity in a bank merger succeeded to the rights of the original defendant to a wrongful foreclosure suit by operation of O.C.G.A. § 14-2-1106. Because of this, the Court concluded, it was immaterial that the surviving entity had not been formally substituted as a party. Similarly, in *Diaz v. JP Morgan Chase Bank,* 2013 WL 750480 (N.D. Ga. Feb. 27, 2013) and *Abdullahi v. Bank of America, N.A.*, 2013 WL 1137022 (N.D. Ga. Mar. 15, 2013), *aff'd*, ___ Fed. Appx. ___, 2013 WL 6085241 (11th Cir. Nov. 20, 2013), the Northern District applied O.C.G.A. § 14-2-1106 in favor of security deed holders who obtained the deeds via merger, holding that title passed to the surviving entities by operation of law and that no formal assignment of the deeds was necessary. *Abdullahi* was later affirmed on appeal by the Eleventh Circuit. In *Patel v. Ameris Bank*, 324 Ga. App. 227, 749 S.E.2d 809 (2013), a bank obtained a note by assignment after the initial holding bank was closed by the FDIC, but the first bank had changed its name and the documents therefore did not reflect an assignment from the initial holder to the current holder. The Court of Appeals found that the evidence was sufficient to support a judgment in favor of the assignee, since the initial holder's name change had been properly recorded with the Georgia Secretary of State.

In *Herren v. Sucher*, ___ Ga. App. ___, 750 S.E.2d 430 (2013), the court ruled that an indemnity clause in an asset purchase agreement did not constitute an agreement to assume the seller's liabilities. Successor liability was also at issue in *Fieldturf USA Inc. v. Tencate Thiolon Middle East, LLC*, 945 F. Supp. 2d 1379 (N.D. Ga. 2013), in which the court held that an acquirer of an artificial turf manufacturer had agreed to assume the company's liability for fraud claims against the predecessor. In *Freund v. Warren*, 320 Ga. App. 765, 740 S.E.2d 727 (2013), the Court of Appeals held that assets purchased by a corporation's shareholders in their individual capacities were property of the shareholders, not the corporation. In *In re Foster*, 500 B.R. 197 (Bankr. N.D. Ga. 2013), the Bankruptcy Court for the Northern District of Georgia held that a corporation's conveyance of real estate was valid even in the absence of a corporate seal, because the conveyance complied with all requirements of O.C.G.A. § 14-5-7. Finally, in *UWork.com, Inc. v. Paragon Technologies, Inc.,* 321 Ga. App. 584, 740 S.E.2d 887 (2013), the Court of Appeals rejected claims that parties to an arm's-length contract had developed a confidential relationship through their course of conduct, finding that the relationship was instead adversarial. The court also addressed the circumstances in which fraud and negligent misrepresentation claims can be based on representations made to a third party, similar to *Mahindra*, discussed above, however, finding the claims before it were insufficient.

G. LITIGATION ISSUES.

1. Derivative Action Procedure

In one of the most significant cases of 2013, *Benfield v. Wells*, 324 Ga. App. 85, 749 S.E.2d 384 (2013), the Court of Appeals addressed a corporation's motion to dismiss a shareholder's derivative suit under O.C.G.A. § 14-2-744(a), holding that dismissal was proper in light of the recommendation of a special litigation committee. Specifically, the court rejected a challenge to the independence of the special committee members, finding that their independence was not destroyed by their various business and social relationships with some of the defendants.

Two other decisions addressed whether corporate litigation claims were direct or derivative in character. In *In re Pervis*, 497 B.R. 612 (Bankr. N.D. Ga. 2013), the Bankruptcy Court for the Northern District of Georgia held that an individual shareholder's suit against the corporation's only other shareholder for misappropriation and usurpation of corporate opportunity did not need to be brought derivatively, because the typical reasons for requiring derivative suits were not present. The court also held fraud claims against the debtor could not be determined to be nondischargeable because corporate officers and directors are not fiduciaries within the strict meaning of 11 U.S.C. § 523(a)(4). In *Bobick v. Community & Southern Bank*, 321 Ga. App. 855, 793 S.E.2d 518 (2013), the Court of Appeals held that a shareholder's suit against a bank alleging mismanagement by its directors and officers resulting in devaluation of her stock was subject to dismissal because the claims were derivative.

2. Alter Ego, Piercing the Corporate Veil and Other Forms of Secondary Liability

The year brought the usual array of alter ego and piercing the veil decisions, none of which reflected any change in Georgia law. In *Instituforum Techs, LLC v. Cosmic Tophat, LLC*, 959 F. Supp. 2d 1335 (N.D. Ga. 2013), the Northern District addressed both traditional alter ego theories and "reverse piercing," which is not recognized in Georgia (and which the court refused to adopt). Reverse piercing was also addressed by the Court of Appeals in two other cases. In *Holiday Hospitality Franchising, Inc. v. Noons*, 324 Ga. App. 70, 749 S.E.2d 380 (2013), the court held that in light of the Supreme Court's decision in *Acree v. McMahan*, 276 Ga. 880 (2003), it could not permit reverse piercing to enable a creditor to reach the assets of alleged sham corporations. In *Carrier 411 Servs., Inc. v. Insight Tech., Inc.*, 322 Ga. App. 167, 744 S.E.2d 356 (2013), the court found that a judgment creditor's successful traverse of a corporate garnishee's answer regarding funds owed by its majority owner did not constitute reverse piercing. In *RMS Titanic, Inc. v. Zaller*, 2013 WL 5675523 (N.D. Ga. Oct. 17, 2013), the court rejected the plaintiff's attempt to apply an alter ego theory in a Lanham Act dispute and also rejected an effort to use "reverse piercing" to create personal jurisdiction over two foreign corporations through their Georgia shareholder.

Two decisions from the Southern District rejected attempts to hold a parent company liable for alleged wrongs committed by its subsidiary. In *Roberts v. Wells Fargo Bank, N.A.*, 2013 WL 1233268 (S.D. Ga. Mar. 27, 2013), the district court declined to pierce the corporate veil to allow a class action plaintiff to assert claims against the parent corporation of an insurance company accused of participating in a kickback scheme. In *Sullivan's Administrative Managers II, LLC v. Guarantee Insurance Co.*, 2013 WL 4511319 (S.D. Ga. Aug. 23, 2013), the district court held that evidence that a parent performed certain administrative functions for its subsidiary was not enough to create an inference that the corporate form was abused.

The Court of Appeals in *Cancel v. Sewell*, 321 Ga. App. 523, 740 S.E.2d 870 (2013) (*cert.* granted, appeal pending in Ga. S. Ct.) declined to hold that a newly-formed professional association was the alter ego of the individuals who organized it and the hospital where they practiced, rejecting a claim by members of the former association who were not invited to join the new association. Finally, the bankruptcy court *In re Palisades at West Paces Imaging Center, LLC*, 501 B.R. 896 (Bankr. N.D. Ga. 2013) addressed alter ego claims by the trustee for the debtor-LLC against the principals of the LLC and certain family entities that received some of the allegedly fraudulent transfers. The court found liability for the transfers that benefited the family entities, but not for other transfers that the principals made.

3. Jurisdictional Cases

There were no major developments involving jurisdiction, venue or service of process. The following decisions addressed personal jurisdiction and service of process issues: In *Gregory v. Preferred Financial Solutions*, 2013 WL 5725991 (M.D. Ga. Oct. 21, 2013), officers of a corporation were held subject to personal jurisdiction on the basis of their personal participation in alleged wrongdoing that targeted Georgia consumers. In an earlier ruling in *T.V.D.B. Sarl v. KAPLA USA, LP*, 2013 WL 1898158 (S.D. Ga. May 7, 2013), the Southern District allowed discovery in connection with challenges to personal jurisdiction by an overseas manufacturer alleged to be the alter ego of its Georgia-based distributor and a former Georgia resident living in France. In *Springer v. Bank of America, N.A.*, 2013 WL 2297053 (N.D. Ga. May 24, 2013), the Northern District addressed the rules governing service of a corporation under Federal Rule 4 and its Georgia counterpart, O.C.G.A. § 9-11-4(e)(1), holding that service of process on a bank's law firm did not constitute valid service on the bank in a wrongful foreclosure action. In *Gardner v. TBO Capital, LLC***,** 2013 WL 6271897 (N.D. Ga. Dec. 4, 2013), an attempt to serve a corporation by serving the Georgia Secretary of State was held ineffective under O.C.G.A § 9-11-4 for purposes of deciding the timeliness of a removal petition, and in *Seeney v. Nationstar Mortgage, LLC*, 2013 WL 6499359 (N.D. Ga. Dec. 11, 2013), service by registered mail on an LLC was ruled ineffective under O.C.G.A. § 9-11-4 and the Georgia LLC Code.

4. Evidence

In *Levine v. Suntrust Robinson Humphrey*, 321 Ga. App. 268, 740 S.E.2d 672 (2013), a professional liability suit against a financial advisor, the Court of Appeals held that expert testimony regarding the value of a business over the course of time was admissible and should not have been excluded. The court rejected arguments that the expert's valuation approach was not testable and that the expert had not used the methodology before, holding that these alleged flaws were best addressed through cross-examination at trial.

5. Director and Officer Liability Insurance Decisions

The year saw a sudden and significant rise in disputes involving coverage under directors' and officers' ("D&O") liability insurance policies. Most of this litigation involved policies issued to banks that later failed. Among the issues that have received close attention are the policies' exclusionary clauses and the sufficiency of notices given by the insureds.

Three decisions from the Northern District of Georgia reached different and sometimes conflicting conclusions as to whether a D&O policy's "insured vs. insured" exclusion was invoked by lawsuits filed by the FDIC in its receivership capacity against former directors and officers of the bank. In January, the district court held in *Progressive Casualty Ins. Co. v. FDIC*, 926 F. Supp. 2d 1337 (N.D. Ga. 2013) that an exclusion for claims brought "by, or on behalf of, or at the behest of the Company" was ambiguous when applied to suits brought by the FDIC, since the FDIC represents multiple interests and does not merely step into the shoes of the bank. In March, another district judge decided in *Davis v. Bancinsure, Inc.*, 2013 WL 1223696 (N.D. Ga. Mar. 20, 2013) that an insured-vs.-insured exclusion applied to the FDIC's claims, citing that the relevant exclusionary language specifically included the word "receiver." The court in *Davis* also denied coverage because it found that the insureds failed to comply with the policy's notice requirements. Finally, in August, the court in *St. Paul Mercury Ins. Co. v. Miller*, ___ F. Supp. 2d ___, 2013 WL 482520 (N.D. Ga. Aug. 19, 2013) held that an exclusion containing "by or on behalf of" language similar to the policy in *Progressive*, and making no explicit reference to receivers, *did* apply to suits brought by the FDIC. The *St. Paul* decision did not cite the *Progressive* decision and the two cases are difficult to reconcile. *St. Paul* is currently on appeal to the Eleventh Circuit, and a decision by the appellate court could restore some clarity in the area. Another coverage defense raised by the insurer in the *St. Paul* case was the effect of a carve-out for unpaid loans from the definition of the "loss" covered under the policy. The court considered the carve-out to be ambiguous as applied to director liability claims, but did not decide the issue in light of its ruling on the insured-vs.-insured clause.

In *Bank of Camilla v. St. Paul Mercury Ins. Co.*, 939 F. Supp. 2d 1299 (M.D. Ga. 2013), the Middle District held that common law fraud and RICO claims brought against a bank that allegedly participated in a Ponzi scheme fell within an exclusion to coverage because they involved "Lending Acts" as defined in the policy.

Finally, two decisions found – on completely different grounds – that the FDIC should not be a party to coverage litigation involving claims against failed bank officers and directors. In *OneBeacon Midwest Ins. Co. v. FDIC*, 2013 WL 1337193 (N.D. Ga. Mar. 28, 2013), the Northern District rejected an insurer's attempt to sue the FDIC in a declaratory judgment action to determine coverage under a D&O policy issued to a bank before its failure, holding that the suit interfered with the FDIC's exercise of its powers and duties under federal law. In a separate ruling in the *Davis v. BancInsure, Inc.* case, 2013 WL 1226491 (N.D. Ga. Mar. 18, 2013) (Batten, J.), the court denied the FDIC's motion to intervene in an insurance coverage dispute, finding that the FDIC's potential interest in policy proceeds was not sufficient to establish intervention of right.

6. Nondischargeability of Breach of Fiduciary Duty Claims

The bankruptcy court in *In re Allen*, 2013 WL 6199304 (Bankr. N.D. Ga. Nov. 25, 2013), applied principles established in the corporate context, holding that the fiduciary duties owed by members of a partnership venture or LLC do not qualify those entities as the "express or technical trust" required in the 11th Circuit for purposes of nondischargeability of fiduciary liability under 11 U.S.C. § 523(a)(4). *See also In re Pervis*, 497 B.R. 612 (Bankr. N.D. Ga. 2013), *supra*. In *In re May*, 2013 WL 441440 (Bankr. S.D. Ga. Feb. 5, 2013), the Bankruptcy Court for the Southern District of Georgia held that a creditor sufficiently stated a claim for relief under 11 U.S.C. § 523(a)(6) by alleging that a corporate officer personally participated in the corporation's allegedly malicious and willful failure to pay the creditor. The court in *In re Edelson*, 2013 WL 5145714 (Bankr. N.D. Ga. Jul. 3, 2013) rejected a nondischargeability complaint against an LLC member who locked out the other member because the debtor did not conceal his actions and lacked fraudulent intent. In *In re Melton*, 2013 WL 2383657 (Bankr. N.D. Ga. May 20, 2013), the Bankruptcy Court for the Northern District held that the personal liability of an LLC's sole owner/manager for fraud and conversion in diverting funds that were supposed to be held in escrow by the LLC was nondischargeable.

7. Miscellaneous Litigation Procedure Issues

In *Superior Roofing Co. of Georgia, Inc. v. American Professional Risk Services, Inc.*, 323 Ga. App. 416, 744 S.E.2d 400 (2013), the Court of Appeals held that the Georgia Insurance Commissioner, as receiver for an insolvent trust fund, had exclusive standing to pursue claims common to the receivership estate, but that claimants could individually pursue claims that are strictly personal in nature. In *Artson, LLC v. Hudson*, 322 Ga. App. 859, 747 S.E.2d 68 (2013), the Court of Appeals held that absent members of an LLC were indispensable parties to a lawsuit against a managing member that involved a dispute among all of the LLC's members.

Two cases were disposed of on principles of *res judicata*. In *Bank of the Ozarks v. DKK Development Company*, 2013 WL 2555834 (S.D. Ga. June 10, 2013), the Southern District held that a debtor's statutory setoff claims against a bank were precluded by an earlier state court equitable setoff lawsuit, since both cases turned on the same question of whether the bank and its holding companies were alter egos of one another. In *Coffee Iron Works v. QORE, Inc.*, 322 Ga. App. 137, 744 S.E.2d 114 (2013), the Court of Appeals found that a shareholder was in privity with her corporation, which had previously litigated the same issues, and that the shareholder's suit was thus barred.

Four cases addressed attorney-client issues in the corporate context. In *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.,* 293 Ga. 419, 746 S.E.2d 98 (2013), the Supreme Court held that communications between law firm attorneys and the firm's in-house general counsel were privileged and constituted attorney work product, in a professional liability suit brought by one of the firm's clients, despite alleged conflicts of interest. The Eleventh Circuit held in *Abdulla v. Klosinski*, 523 Fed. Appx. 580 (11th Cir. 2013) that an attorney for a company in connection with its bankruptcy filing did not also represent its principal in his individual capacity when negotiating a personal guaranty to be signed by the principal. In *Oxmoor Portfolio, LLC v. Flooring and Tile Superstore of Conyers, Inc.*, 320 Ga. App. 640, 740 S.E.2d 363 (2013), the Court of Appeals held that an answer filed on behalf of a corporation by a non-attorney was a nullity, reiterating the settled rule that a corporation must be represented by an attorney in court proceedings. In *Vig v. All Care Dental, P.C.*, 2013 WL 210895 (N.D. Ga. Jan. 18, 2013), the Northern District addressed the same principle in considering an attorney's motion to withdraw from representing a corporation.

Other miscellaneous procedural decisions include *Rigby v. Boatright*, 294 Ga. 253, 751 S.E.2d 851 (2013) in which the Georgia Supreme Court held that mandamus is not a proper remedy to compel a public utility corporation to include a candidate's name on the ballot for election to the board, because the corporation was not a governmental entity. In *McGee v. Sentinel Offender Services, LLC*, 719 F.3d 1236 (11th Cir. 2013), the Eleventh Circuit addressed the circumstances under which an LLC may be held criminally liable under principles of *respondeat superior*. Finally, in *Goodwill v. BB&T Investment Services, Inc.*, 2013 WL 6271868 (N.D. Ga. Dec. 4, 2013), the court applied a four year statute of limitations under O.C.G.A. § 9-3-31 to a breach of fiduciary duty claim against an investment advisor based on alleged misrepresentations to its client.

H. Fulton County Business Court Decisions

There were also a handful of noteworthy decisions from the Fulton County Business Court in 2013. *Raser Technologies, Inc. v. Morgan Stanley & Co., LLC*, No. 2012-cv-214140 was a mass action by an issuer and investors against Wall Street firms engaging in the controversial practice of "naked" short selling, in which the plaintiffs brought claims under the Georgia RICO Act and the Georgia Securities Act, among other theories, for the loss in stock value allegedly caused by the defendants. On the defendants' motion to dismiss, the court held that the plaintiffs' Georgia Securities Act and Georgia RICO claims were sufficiently pled, finding allegations that the defendants created false documentation supported a market manipulation claim. In *Melamud v. Page, Perry & Associates, LLC*, No. 2012-cv-219444, the court held that there were issues of fact regarding whether an attorney-client relationship developed between an investor and counsel for an investment advisor with whom the plaintiff was investing and doing other business. In *Hatcher Management Holdings, LLC v. Hatcher*, No. 2009-cv-179145, the court awarded over $4 million in compensatory and punitive damages against a former manager of an LLC who was found to have misappropriated LLC assets. In *Zelby v. Thomas*, No. 2012-cv-225412, the court allowed an LLC member's contractual claims under the operating agreement to go forward, but dismissed contractual claims brought against other parties who did not owe the contractual obligations, as well as a non-contractual breach of fiduciary duty claim that was not based upon a duty independent of the agreement. In *Etowah*

Environmental Group, LLC v. Walsh, No. 2012-cv-211149, the court addressed the crime-fraud exception to the attorney-client privilege in the context of a dispute concerning the valuation of an LLC.

III. DISCUSSION OF CASE LAW DEVELOPMENTS

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

***FDIC v. Loudermilk*, ___ F. Supp. 2d ___, 2013 WL 6178463 (N.D. Ga. Nov. 25, 2013) (Thrash, J.) and *FDIC v. Skow*, 741 F.3d 1342 (11th Cir. 2013) – Federal District Court and Eleventh Circuit ask Georgia Supreme Court whether the business judgment rule insulates bank directors and officers from ordinary negligence claims.**

In the most significant development to date in the FDIC's ongoing litigation against former officers and directors of failed banks, the Northern District of Georgia (in *Loudermilk*) and the Eleventh Circuit (in *Skow*) have separately certified questions to the Georgia Supreme Court, asking the Supreme Court to address whether the business judgment rule bars ordinary negligence claims against bank directors and officers. The two matters are currently pending before the Supreme Court.

As of February, 2014, the FDIC has filed 21 lawsuits in Georgia federal district courts in its capacity as the receiver for banks that failed during the late 2000's financial crisis. (This is 7 more than the next highest state, California.) The lawsuits typically have asserted that the former directors and officers named as defendants were negligent and/or grossly negligent in allowing the banks to enter into risky loans, particularly in the real estate, construction and development areas. Many of the defendants have filed motions to dismiss the FDIC's ordinary negligence claims, arguing that their liability for ordinary negligence is foreclosed by the business judgment rule as stated in *Flexible Products Co. v. Ervast,* 284 Ga. App. 178, 182, 643 S.E.2d 560 (2007) and *Brock Built, LLC v. Blake*, 300 Ga. App. 816, 822, 686 S.E.2d 425 (2009). In response, the FDIC has argued that the district courts were not bound by *Flexible Products* and *Brock Built*, contending that these intermediate appellate decisions conflicted with O.C.G.A. § 7-1-490, which provides that bank directors and officers shall discharge their duties "in good faith and with that diligence, care, and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

In February, 2012, the Northern District of Georgia in the *Skow* case agreed with the defendants and dismissed the FDIC's ordinary negligence claims. Although the district court acknowledged that O.C.G.A. § 7-1-490 purported to state an ordinary diligence standard of care and recognized the tension between the statutory standard and the business judgment rule, it nonetheless held that it was bound by *Flexible Products* and *Brock Built.* The FDIC was permitted to appeal the ruling on an interlocutory basis. In the meantime, four other district court decisions in 2012 agreed with *Skow* and dismissed similar ordinary negligence claims.[1] A

[1] *See FDIC v. Blackwell*, 2012 WL 3230490 (N.D. Ga. Aug. 3, 2012); *FDIC v. Briscoe*, No. 11-cv-02303-SCJ (N.D. Ga. Aug. 14, 2012); *FDIC v. Whitley*, No. 12-cv-00170-WCO (N.D. Ga.

decision in early 2013, *FDIC v. Adams* (discussed below), diverged from these five earlier decisions by holding that the FDIC could overcome the business judgment rule's presumption through allegations of ordinary negligence.

The FDIC's complaint in *Loudermilk*, which involves the failure of Buckhead Community Bank, was filed in November 2012. The FDIC sued nine former officers and directors, alleging that they were negligent and/or grossly negligent in allowing the bank to pursue an "aggressive growth strategy" between 2005 and 2007. The FDIC's allegations and theories of liability were generally consistent with their allegations and theories in *Skow* and the other previous suits, and the defendants again relied on *Flexible Products* and *Brock Built*, along with *Skow* and the other district court decisions.

The *Loudermilk* court acknowledged the earlier decisions but declined to follow them, stating that it may be proper to treat bank directors and officers differently from corporate directors and officers. The court reasoned that bank failures differ from other corporate failures in that "the FDIC and ultimately the taxpayer bear the pecuniary loss." Most notably, the court directly criticized bank directors and officers in a manner that is rather unusual for an order on a motion to dismiss, stating that "[t]o some extent, the failure of bank officers and directors to exercise ordinary diligence led to the very financial crisis that continues to affect the national economy. By all accounts, the loose lending practices alleged by the FDIC in this case were rampant within Georgia's community banks." Rather than directly address the vitality of *Flexible Products* and *Brock Built*, the court hinted that a distinction may exist for cases involving the liability of bank directors and officers, based on the policy concerns it cited. While the court also cited O.C.G.A. § 7-1-490 as providing possible support for this distinction, it did not address the corresponding sections of the Corporations Code that applied in *Flexible Products* and *Brock Built,* namely, O.C.G.A. §§ 14-2-830 and 14-2-842. Both of those statutes, like O.C.G.A. § 7-1-490, provide that a director or officer shall act "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances."

Ultimately, the court did not decide whether the business judgment rule applies to bank directors and officers, instead certifying the following question to the Georgia Supreme Court: "Does the business judgment rule in Georgia preclude as a matter of law a claim for ordinary negligence against the officers and directors of a bank in a lawsuit brought by the FDIC as receiver for the bank?"

The *Loudermilk* opinion was issued on November 25, 2013, just days after the Eleventh Circuit heard oral arguments in *Skow.* On December 23, 2013, the Eleventh Circuit issued its own order certifying questions to the Georgia Supreme Court. The Eleventh Circuit acknowledged the earlier *Loudermilk* ruling, but it did not discuss the policy points raised in that ruling. Instead, the Eleventh Circuit focused on the interplay between O.C.G.A. § 7-1-490 and the Court of Appeals' decisions in *Flexible Products* and *Brock Built*. The court found that there was a "plausible conflict" between the statutory language and the case law and that this rendered it "debatable" whether bank directors and officers may be subject to claims for ordinary

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Dec. 10, 2012); *FDIC v. Miller*, No. 12-cv-00042-WCO (N.D. Ga. Dec. 26, 2012). We summarized these decisions in our 2012 year-end survey.

negligence. As in *Loudermilk*, the Eleventh Circuit did not address O.C.G.A. § 14-2-830 and § 14-2-842. The questions certified by the Eleventh Circuit are "(1) Does a bank director or officer violate the standard of care established by O.C.G.A. § 7-1-490 when he acts in good faith but fails to act with "ordinary diligence," as that term is defined in O.C.G.A. § 51-1-2?" and "(2) In a case like this one, applying Georgia's business judgment rule, can the bank officer or director defendants be held individually liable if they, in fact as alleged, are shown to have been ordinarily negligent or to have breached a fiduciary duty, based on ordinary negligence in performing professional duties?"

If the Georgia Supreme Court discusses the relationship between the statutory standard of care and the business judgment rule, that discussion may have wide implications given the similarity between O.C.G.A § 7-1-490 and the corresponding provisions of the Corporations Code. No matter how the Supreme Court addresses the issue, its opinion will be extraordinarily significant — a Westlaw search using the term "business judgment rule" indicates that the Supreme Court has *never* before addressed the rule by that name.[2]

***FDIC v. Adams*, 2013 WL 6044111 (N.D. Ga. Apr. 10, 2013) (Forrester, J.) – FDIC's claims against former bank directors and officers held to overcome business judgment rule presumption; claims based on failure of *Caremark* oversight theory dismissed.**

Adams was the sixth and final Northern District of Georgia decision addressing the effect of the business judgment rule on the FDIC's ordinary negligence claims prior to *Loudermilk* and *Skow*. In it, the district court took an approach that was not adopted by any of the prior or subsequent decisions. The court held that the business judgment rule applies to the FDIC's ordinary negligence claims, but can be successfully rebutted by allegations of ordinary negligence. The court also considered the viability of a claim based on the principles stated in *In re Caremark Int'l Deriv. Litig*., 698 A.2d 959 (Del. Ch. 1996) against the former directors and officers. In so doing, the court's opinion appears to be the second Georgia federal or state court decision, following the district court's December 2012 opinion in *FDIC v. Miller*,[3] to address the *Caremark* doctrine in a case applying Georgia law.

The case arises from the failure of Freedom Bank of Georgia (the "Bank") in March, 2009. The defendants are 11 former directors and/or officers of the Bank. Similar to *Loudermilk* and most of the FDIC's failed bank lawsuits in Georgia, the complaint generally alleges that the defendants were negligent, grossly negligent, and breached fiduciary duties owed to the Bank in connection with their approval of certain loan transactions that allegedly caused significant losses to the Bank. The defendants moved to dismiss, arguing that Georgia's business judgment rule insulates corporate directors and officers against ordinary negligence claims, and that the FDIC failed to allege specific facts showing that the defendants' decision-making process was grossly negligent.

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[2] Not surprisingly, both sides in the federal court litigation have cited decades-old Supreme Court decisions that they contend support applying the business judgment rule, *see Regenstein v. J. Regenstein Co.*, 213 Ga. 157 (1957), or counsel against applying the rule in the banking context, *see Woodward v. Stewart*, 149 Ga. 620 (1919).

[3] Case No. 12-cv-00042-WCO (N.D. Ga. Dec. 26, 2012) (O'Kelley, J.).

While the FDIC principally argued that the business judgment rule did not apply, it also argued in the alternative that the business judgment rule operates only as a rebuttable presumption, which the FDIC could rebut. The court agreed, holding that allegations that the defendants repeatedly ignored established procedures and failed to inform themselves of material facts were sufficient to overcome the presumption. Some of the earlier district court decisions have treated similar allegations as supporting an inference of gross negligence, but *Adams* stands as the only Georgia district court decision to date that suggests that such allegations can support a viable ordinary negligence claim. (Not surprisingly, and consistent with multiple earlier decisions, the court also permitted the FDIC's gross negligence theory to go forward.) The court did, however, require re-pleading of both the negligence and gross negligence claims, finding that it was "troubled" by the FDIC's lumping together of all of the individual defendants in its allegations.

The *Loudermilk* decision did not discuss the approach taken in *Adams* at any length, and the Eleventh Circuit's *Skow* decision did not mention *Adams* at all. The questions certified to the Georgia Supreme Court, as written, do not squarely address how the business judgment rule operates as a presumption or whether it may be rebutted by allegations sounding in ordinary negligence. Nonetheless, it is certainly possible that the district court's ruling will be affected by the Supreme Court's response to the certified questions before it.

The court separately addressed the FDIC's claim that the defendants failed to create and implement policies to prevent the actions taken by one of the Bank's loan officers. The court recognized this to be a "Caremark" claim. Under the *Caremark* doctrine, a director may be liable for failure of oversight where (a) the director "utterly failed to implement any reporting system or controls" or (b) having implemented a reporting system or controls, the director "consciously failed to monitor or oversee its operations thus disabling [the director] from being informed of risks or problems requiring [the director's] attention." The court did not decide whether the *Caremark* doctrine is viable as a general principle in Georgia, since the parties apparently had not addressed the question. Instead, the court found that the FDIC's allegations did not rise to the level needed in order to support a *Caremark* claim. Specifically, the complaint did not allege the complete absence of internal controls or the conscious failure to monitor or oversee such controls. The court also observed that the Delaware courts have established a particularly "high threshold" for *Caremark* claims making it difficult for plaintiffs to prevail on such a theory.[4]

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[4] The authors would note that Georgia statutory and common law substantive principles of corporate governance have been formulated on a basis that accommodates corporations of all sizes and types of ownership, with the directors' and officers' duties and performance judged under the specific facts and circumstances of the case. There is nothing yet in Georgia law that would prevent a two-shareholder corporation from managing its finances out of a cigar box. We submit that the courts should at the very least exercise caution before uncritically adopting *Caremark* and requiring all Georgia entities, regardless of the size and circumstances, to implement a formal "reporting system and controls."

***FDIC v. Cameron*, ___ F. Supp. 2d ___, 2013 WL 6490247 (N.D. Ga. Dec. 11, 2013) – Georgia statute of limitations for claims of negligence and gross negligence against bank directors and officers runs from time of making bad loans, not time when loans went into default.**

In another one of the FDIC's lawsuits against former directors and officers of a failed bank, the district court addressed two questions regarding the statute of limitations for negligence and gross negligence claims arising from the approval of bad loans that subsequently went into default. The court held that (1) the statute of limitations begins to run when the loans are approved, not when they go into default and (2) any claims that were timely as of the date of the FDIC's appointment as receiver remained timely when the suit was filed due to the federal "extender statute," 12 U.S.C. § 1821(d)(14).

The case arose from the failure of Southern Community Bank. The FDIC alleged that the defendants approved 17 imprudent loans between July 23, 2004 and January 22, 2008. The bank's condition deteriorated and it was closed on June 19, 2009. The FDIC was appointed as receiver on the same date. The FDIC entered into a series of tolling agreements with the defendants and ultimately filed its lawsuit on June 18, 2013.

The parties did not dispute that Georgia law imposes a four-year statute of limitations for claims against bank directors or officers who allegedly approve bad loans. The defendants argued that all of the FDIC's claims were thus untimely because all of them were approved more than four years before the suit was filed. In response, the FDIC advanced two arguments, which operated in tandem. First, it argued that all of its claims were timely as of the date of its appointment because the statute does not begin to run until the date of default (which it contended fell within the four-year pre-suit period as to each loan). Second, it argued that any claim that was timely as of its appointment remained timely as of the date of the lawsuit because the extender statute operates to "restart" the four-year limitations period on the date of its appointment.

With regard to the FDIC's first argument, decades-old Georgia Supreme Court cases held that the limitations period for claims arising from bad loans began to run when the loans were made. *See Mobley v. Faircloth*, 174 Ga. 808 (1932). The FDIC argued that this rule was abrogated in 1975 when the Georgia legislature adopted the Financial Institutions Code. The district court disagreed, finding that an Eleventh Circuit case subsequent to 1975 treated *Mobley* as authoritative. *See RTC v. Artley*, 28 F.3d 1099 (11th Cir. 1994). The court also declined to apply the federal common law doctrine of adverse domination, holding that state law governed, and would not recognize adverse tolling under the circumstances. As a result, claims relating to 5 of the 17 loans, which were made prior to June 19, 2005, were deemed to be time barred.

The FDIC's second argument presented a question of federal statutory interpretation. 12 U.S.C. § 1821(d)(14)(A)(ii) provides that the statute of limitations with regard to actions brought by the FDIC as receiver is the longer of three years or "the period applicable under state law." The defendants argued that this language referred to the remaining limitations period under state law, while the FDIC argued that the language operated to restart the period, thus giving them a full four years to bring suit. Looking to the structure and language of § 1821(d)(14) as a whole and to previous federal cases construing the statute, the court held that the FDIC had the better of the argument, thus making its claims as to the remaining 12 loans timely. Because the court found that the claims were timely by operation of § 1821(d)(14), it did not address whether the FDIC's tolling agreements were valid and enforceable.

***Rollins v. Rollins*, 321 Ga. App. 140, 741 S.E.2d 251 (2013), *rev'd.*, ___ S.E.2d ___, 2014 WL 819500 (Ga. Mar. 3, 2014) – Trustees required to provide accounting of entities held within trusts they administered; trustees may be liable for breach of fiduciary duty to beneficiaries under trust standards of care for acts committed at the entity level.**

In this case, beneficiaries of trusts appealed an award of summary judgment in favor of the trustees on their claims for breach of trust and breach of fiduciary duty. The beneficiaries who appealed were four siblings who sued the trustees of their trusts for an accounting and breach of fiduciary duty. The beneficiaries sued two trustees individually and in their capacities as trustees and one only in his capacity as trustee. The beneficiaries alleged that after the settlor's death, the trustees changed "the structure, leadership, holdings, and distribution methods" used in the family entities that were held within the trusts in order to shift power and funds away from the beneficiaries and towards the trustees.

The parties filed cross-motions for summary judgment and the beneficiaries appealed from the trial court's order, claiming that the trial court erred in part by refusing to order an accounting of entities held in the trusts and by refusing to find that the trustees' actions taken at the entity level rather than the trust level were breaches of fiduciary duty. The Court of Appeals reversed and remanded. An appeal was pending in the Georgia Supreme Court at year's end and, as reported below, the Supreme Count in March of this year reversed the Court of Appeals.

On the accounting issue, the Court of Appeals held that the lower court "erred in failing to order a 'judicial accounting and an accounting of the entities controlled by the trustees which hold the trust assets.'" The trial court had held that the beneficiaries received "complete relief" on their accounting request because the trustees had provided the beneficiaries with a report on the trust assets after the complaint was filed. However, that report did not cover an accounting of the entities held within the trusts. The trustees argued they were not required to provide an accounting of the "family entities held within the trusts because such an accounting is required only if the trust holds a controlling interest in the entity[.]" The trustees relied on a line of cases from New York which they claimed held "that fiduciaries are obligated to account for corporate assets held in trust if either they or the trust hold a controlling, majority position in the corporation at issue."

The Court of Appeals held that the New York cases should be read more broadly than the trustees read them because this case was not "'the ordinary case' in which a minority interest equates to a lack of control making it 'impossible' for fiduciaries to produce the information requested." Rather, the trustees here did not contest the finding that they were "controlling members of the various family entities" or claim that they lacked the ability to provide the requested information. Although there was no Georgia authority directly on point, the court held that the general principle stated in the New York cases that a trustee is obligated as a fiduciary to provide beneficiaries information that is within his control, "when coupled with the mandates of O.C.G.A. §§ 53-12-243(a) and (b)" (requiring a trustee to provide reports and accountings upon a reasonable request by a qualified beneficiary), requires the trustees to provide an accounting of the family entities held in the trusts. 741 S.E.2d at 256.

Next, the Court of Appeals turned to whether the trial court "erred in failing to find that the appellees breached their fiduciary duties for actions taken at the entity level." The beneficiaries argued that the trustees' actions in shifting assets from the trusts to the entities held in the trust, in making distributions, in administering the entities held in trust, and in changing the voting rights and control of the entities, breached their fiduciary duties to the beneficiaries. The trustees argued that their duties and performance as officers and directors of the family entities must be judged under standards of the business judgment rule. The Court of Appeals held that "as a matter of law, the appellees may not shed their fiduciary duties in their management of and distributions from Family Entities under their control held within a trust." *Id.* at 147, 257. The trustees' fiduciary duties applied to their actions taken at the entity level because they controlled the entities, which were held in the trust. Once the court found that the trustees' fiduciary duties applied, it went on to hold that there was an issue of material fact as to whether the trustees breached their duties and thus the trial court erred in granting summary judgment in favor of the trustees. Many of the transactions that the beneficiaries challenged involved alleged self-dealing which could have been addressed under established corporate governance principles. The Court of Appeals' decision did not distinguish between the actions that the trustees took as trustees exercising the trusts' rights as shareholders of the family entities from the actions taken as officers and directors of the family entities and did not assess whether corporate fiduciary principles would have adequately protected the beneficiaries.

The Supreme Court of Georgia reversed the Court of Appeals decision with regard to the standard of care issue because that trust held only a minority interest in the family entities. Its ruling leaves the inference that trust standards could apply where a trust is the majority owner. On the accounting, it reversed as well, holding that the Court of Appeals failed to give proper consideration to the trial court's discretion in denying the accounting. *Rollins v. Rollins*, Appeal No. S13G1162, ___ S.E.2d ___, 2014 WL 819500 (Ga. Mar. 3, 2014).

***Georgia Dermatologic Surgery Centers, P.C. v. Pharis*, 323 Ga. App. 181, 746 S.E.2d 678 (2013) – President of close corporation lacked authority under corporate bylaws and shareholder agreement to terminate co-shareholder**.

This case illustrates that even in a close corporation formed by two shareholders who are also the sole directors and officers, the governing documents must be followed. The court held that the corporation's president exceeded his authority in terminating the other shareholder/director by failing to first obtain director and shareholder approval, which could only have been obtained from the terminated shareholder/director.

Two doctors formed a professional corporation, and they were the sole two directors and officers. Dr. Baucom served as president, and Dr. Pharis served as vice president, secretary and treasurer. In October 2010, Dr. Baucom, in his capacity as president, notified Dr. Pharis that he was being terminated for cause. Dr. Pharis claimed that Dr. Baucom breached the shareholders' agreement by terminating him without the approval of the board of directors or a shareholders' meeting. The shareholders' agreement provided that the president's authority was limited to conducting the corporation's "day-to-day" activities and the president's functions were further set forth in the bylaws. The bylaws provided that the removal of a director required a special shareholders' meeting and that the president, vice president, secretary and treasurer could only be terminated by the board of directors. When read together, the court found that only the shareholders and board of directors had the authority to terminate an employee/shareholder who was also a director and officer. Given the facts, the termination of Dr. Pharis was outside of Dr. Baucom's authority as president. The court noted that there were only two shareholders and directors, and had they met to discuss Dr. Pharis's termination, they undoubtedly would have reached a deadlock. However, this did not excuse the corporation from adhering to its bylaws and governing documents. Finally, the court noted that Dr. Baucom was not left without a remedy, as he could seek a judicial dissolution of the corporation.

***Coast Buick GMC Cadillac, Inc. v. Mahindra & Mahindra, Ltd.*, 2013 WL 870060 (N.D. Ga. March 7, 2013) – Fraud allegations against corporations based on statements of directors and officers held sufficient to survive motion to dismiss; court declines to apply federal "intracorporate conspiracy doctrine" to bar state law conspiracy claim.**

A group of automobile dealers sued an Indian truck and SUV manufacturer and its wholly-owned, US-based subsidiary for fraud, negligent misrepresentation and civil conspiracy. The essence of the dealers' complaint was that the defendants fraudulently and/or negligently induced them to enter into a dealership network contract, and to pay $9.5 million in cash and divulge certain trade secrets in connection therewith. The case was before the district court on the defendants' motion to dismiss for failure to state a legally viable claim.

The district court held that the plaintiffs sufficiently pled each of their claims. The fraud and negligent misrepresentation claims were based on several alleged misrepresentations made by officers and directors of the subsidiary defendant ("Mahindra USA"). The court recognized the general principle that a corporation is liable for misrepresentations made by its agents that are committed "in the prosecution of and within the scope of its business." The court held that the misrepresentations here were actionable notwithstanding that they were made to a non-party, citing the principle that where a defendant intends to defraud the plaintiff and knows that the plaintiff will rely on a third party, fraud may be established by showing that the defendant fraudulently induced the third party to act and that the plaintiffs relied on the third party's actions.[5]

Mahindra USA claimed that the plaintiffs could not base their fraud claim on statements made by two particular individuals who were directors of both Mahindra USA and the parent corporation ("Mahindra"), since the alleged statements were made on behalf of Mahindra only. The district court held that it could not make such a determination at the motion to dismiss stage, since it amounted to resolving a question of fact.

The district court went on to find that the plaintiffs' allegations were sufficient to establish each of the respective elements of fraud and negligent misrepresentation under Georgia law. With regard to the civil conspiracy claim, the defendants urged the court to apply the

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5 For another decision discussing claims based on representations to third parties, *see UWork.com, Inc. v. Paragon Technologies, Inc.,* 321 Ga. App. 584, 740 S.E.2d 887 (2013), discussed *infra* at p. 25.

"intracorporate conspiracy doctrine," a federal law principle holding that acts of corporate agents are attributed to the corporation itself. The defendants argued that Mahindra and Mahindra USA should be considered a single actor under the intracorporate conspiracy doctrine, thus negating the necessary element of a conspiracy claim that there be a "multiplicity of actors." The court declined to apply the doctrine, holding that it was inapplicable to the plaintiffs' claim which was based on state law. Under Georgia law, the court observed, a corporation and its agents can conspire with one another. Note that in reaching its conclusion, the court did not specifically address how Georgia law would treat the precise situation presented, namely, whether a corporation can conspire with its wholly-owned subsidiary.

***Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299 (11th Cir. 2013); *Stuart v. Resurgens Risk Management, Inc.*, 2013 WL 2903571 (N.D. Ga. June 12, 2013) – Individual personal liability under the FLSA requires operational control or direct supervision.**

These two federal decisions address issues of individual liability under the Federal Labor Standards Act ("FLSA"). In *Lamonica*, two directors and shareholders of a company that installs hurricane shutters appealed from a judgment following a jury trial in which they were found individually liable. The two individuals argued that they were absentee owners who lacked the level of "operational control" necessary for individual liability. The Eleventh Circuit affirmed the judgment against them. The court cited the fact that both individuals owned approximately 22.5 percent of the company, which in the court's view was sufficiently large to support an inference that they had control over the company's financial affairs. The court further found that there was sufficient evidence to support the jury's verdict that the individuals were physically present at the company's facilities on a regular basis, and that they interfaced with installers regularly.

In *Stuart*, an insurance corporation's president and chief operating officer and its vice president of its employee benefits division were among numerous defendants. The two individuals moved for summary judgment. To determine whether the two individuals were "employers" under the FLSA and therefore subject to individual liability, the district court looked to the defendants' power to hire and fire employees, whether they supervised and controlled work schedules, whether they determined rates of pay, and whether they maintained employment records. The court also cited cases stressing that a corporate officer must have actual operational control or direct supervision of the employee, as opposed to the mere ability to control operations or the employee, in order to be subject to joint and several liability with the corporation under the FLSA.

***Mecca Construction, Inc. v. Maestro Investments, LLC,* 320 Ga. App. 34, 739 S.E.2d 51 (2013) – Personal liability of corporate officer for participation in fraud determined by default.**

In this fraud suit in which the defendants were appealing from a default judgment, the court applied the settled principle that an officer who personally participates in a tort committed by the corporation can be individually liable to the injured party, regardless of whether there is a basis for piercing the veil. Since the defendants had defaulted, thus establishing liability, the court did not examine whether the officers had, in fact, personally participated in the fraud.

B. CORPORATE STOCK AND DEBT – ISSUANCE, RESTRICTIONS AND BLUE SKY LAW APPLICATION.

***In re Beauchamp* (*Mossy Dell, Inc. v. AB&T National Bank*), 500 B.R. 235 (M.D. Ga. 2013) – Restriction of stock transfers to family members held permissible under O.C.G.A. § 14-2-627; 10-year prohibition against transfers not valid.**

The District Court for the Middle District of Georgia clarified that the list of four mechanisms for valid stock transfer restrictions provided by O.C.G.A. § 14-2-627(d) is exhaustive, and all restrictions not consistent with section 627(d) are impermissible. A ten-year ban on transfers was held invalid, but a restriction limiting transfers to family members only was permissible. In this case, AB&T National Bank (the "Bank") obtained a judgment against Robert Beauchamp ("Debtor") and eventually executed upon the judgment by seizing the Debtor's 4,000 shares of stock in Mossy Dell, Inc. ("Mossy Dell") and purchasing them at a public sale. The Bank then demanded that Mossy Dell issue a new stock certificate showing it as the owner, but Mossy Dell refused, citing stock transfer restrictions provided by its articles of incorporation prohibiting the transfer of shares to anyone other than lineal descendants of Robert and Flora Lee, and prohibiting the transfer of shares altogether for ten years. The Bank filed suit, alleging that Mossy Dell had been incorporated (and the Debtor received his shares) shortly after the Bank had obtained its judgment against the Debtor, such that the purpose of the transfer restrictions was to defraud creditors. It argued that the restrictions were manifestly unreasonable and therefore unenforceable under O.C.G.A. § 14-2-627(d)(4).

While the case was pending, the Debtor filed a voluntary petition for bankruptcy, and the parties requested the Bankruptcy Court to resolve the Bank's then-pending motion for summary judgment. The Bankruptcy Court issued a Memorandum Opinion, 483 B.R. 268 (Bankr. M.D. Ga. 2012), granting summary judgment in favor of the Bank, holding that the ten-year restriction and the restriction prohibiting transfer to non-family members were unenforceable. O.C.G.A. § 14-2-627 provides that a corporation's articles of incorporation or bylaws, as well as shareholders' agreements can provide for restrictions on the transfer or registration of transfer of shares, which will be valid and enforceable in certain situations. Subsection (c), which governs the purposes for which restrictions on transfer may be imposed, provides that a restriction is authorized specifically in two situations and then contains a catch-all for "any other reasonable purpose." Subsection (d), which governs the types of transfers that are permitted under the statute, lists four types of restrictions, but without a similar catch-all provision. The fourth mechanism, which was undisputedly the only one that applied here, provides that a restriction may "[p]rohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable." The Bankruptcy Court reasoned that the restrictions here did not fit within this category because the restriction against non-family members did not exclude designated persons or a class of persons, rather it did the inverse and excluded the world, save for a very limited class of family members. It also held that this restriction was manifestly unreasonable because the Debtor's ability to realize the value of his shares was completely dependent on whether his family members decided to purchase them, and if they were unwilling or unable, the restriction would serve as an absolute prohibition on transfer in contravention of public policy.

On appeal, the Debtor asked the Middle District of Georgia to decide whether the list of mechanisms set forth in subsection (d) was a comprehensive, exclusive list. In a carefully reasoned opinion, the District Court, after noting that the commentary to section 14-2-627(d) and Georgia case law do not explicitly provide the answer, concluded that "the list provided by Ga. Code 14-2-627(d) is a complete list of the acceptable mechanisms that may be utilized by a transfer restriction." 500 B.R. at 241. The Court pointed to the fact that subsection (d) does not contain the same catch-all language as subsection (c), indicating that the Legislature intended for the list in subsection (d) to be complete. It went on to hold that because the ten-year restriction did not utilize one of the four mechanisms listed in subsection (d), it was unenforceable, as well as unreasonable. With regard to the non-family member restriction, however, the District Court disagreed with the Bankruptcy Court, finding that limiting transfer to family members only was valid under subsection (d)(4), and "'excluding the world' is less tedious and just as effective as the inverse." *Id.* at 243. Finally, it disagreed with the Bankruptcy Court's finding that this restriction was unreasonable in not providing an alternative means for a shareholder to realize the value of his stock, holding that Georgia law does not guarantee a shareholder a right to transfer his shares, and subsection (d)(4) should not be read as "requiring an avenue for every shareholder to realize the value of his or her shares." *Id.* at 245.

***Ward v. Ward*, 322 Ga. App. 888, 747 S.E.2d 95 (2013) – Issuance of stock invalidated where not authorized by the board of directors.**

Appellant was held not to be the majority shareholder of a corporation when the issuance of additional shares that purportedly made him the majority shareholder was not authorized by the board of directors and was thus invalid under Georgia law. All parties to the case sought a declaratory judgment as to who was the majority shareholder in the corporation. Appellant was the vice president and secretary and also served on the five-person board of directors. The corporation's bylaws provided that the corporation operated under the authority of the board of directors. From its inception in 1960 until 2006, the corporation issued 45 stock certificates, which were either expressly authorized by the board of directors at the time of issuance, or later ratified by the board. The board also held regular meetings during this time period, though its last formal meeting was on February 3, 2005. Between 2006 and 2008, the president, along with the appellant, issued stock certificates to the appellant to compensate the appellant for money he had paid on behalf of the corporation. The issuance, which purportedly gave the appellant a majority interest in the corporation, was done without a formal resolution or any authorization from the board of directors. In April 2006, the president executed an affidavit to be used as a substitute for the 2006 board meetings, which the board of directors signed and acknowledged. The affidavit did not mention the issuance of the additional stock certificates, and they were only attached to the affidavit after the board of directors signed it. The trial court determined that the issuance of stock was not valid, and the appellant appealed.

The appellant first argued that the issuance of the stock certificates was approved by the board because the appellant himself and the president, who had a power of attorney for a third board member, constituted a majority of the board of directors and they signed the certificates in their capacities as officers. The Court of Appeals disagreed, looking first to O.C.G.A. § 14-2-621(b), which empowers the board of directors to authorize shares to be issued and requires the board to determine the adequacy of consideration, and then to the corporation's bylaws, which provided that all actions by the directors required a majority vote of the directors and required that notice be given to each director prior to all meetings. The Court of Appeals found that there were no meetings in 2006, that the board of directors never received notice of the issuance of the stock, and that the act of signing the stock certificates as officers did not substitute for the formal board approval required by the bylaws.

The appellant also argued that the corporation had a settled course of business allowing the informal issuance of stock, but the court found that the evidence showed the contrary because every other issuance of stock by the corporation was either expressly authorized or later ratified by the board. Finally, the appellant argued that the corporation ratified the issuance of the stock when it received the benefit of the consideration – namely, the cancellation of corporate debt owed to the appellant. Again, the court disagreed, noting that the board never received any notice or knowledge of the issuance of stock and citing *Dragon Corp. v. Syphers*, 85 Ga. App. 781, 784 (1952) for the proposition that "[t]o prove ratification by a corporation, it must be proven that the governing body of the corporation had full knowledge of all material facts in connection with the transaction in question. Furthermore, the corporation's knowledge must be more than just knowledge on the part of the agents(s) whose acts are the subject of the purported ratification."

***Cushing v. Cohen*, 323 Ga. App. 497, 746 S.E.2d 898 (2013) – Promissory notes given to investors in real estate lending program held to be securities subject to Georgia Securities Act; officer of corporation that issued notes held liable under O.C.G.A. § 10-5-14.**

The Georgia Court of Appeals held that unsecured promissory notes to investors who had pooled their investments to fund loans to real estate borrowers were securities under the Georgia Securities Act, and that the secretary of the corporation that managed the investments was liable for the sale of unregistered securities. James Ruben formed a corporation that put together real estate development loans made up of contributions from numerous investors. The borrowers would issue promissory notes and security deeds in the name of the corporation, the corporation would issue unsecured promissory notes to the investors, and when the borrowers' notes and deeds were paid off, the investors would obtain their returns. Approximately ten years after incorporation, the corporation began a "leveraged lending program," in which it would pool investors' money with funds borrowed from a bank and then loan out the money to the real estate developers at a higher interest rate than the banks charged. For each project, the borrower would give the corporation a promissory note and deed to secure the debt, and the corporation entered into a secured participation agreement with the bank, giving the bank a first priority interest in the deed and the loan proceeds that the developers paid to the corporation. The court determined that the notes to investors were securities as defined in the Georgia Securities Act because the pooled funds constituted a common enterprise, and because the success of the investments was dependent upon the managerial efforts of the corporation in choosing the development projects in which to invest and managing the loans as time went on. The court also looked to the promotional materials in making this determination. The corporate officer was also held liable because "every executive officer of an entity that sells unregistered securities is liable jointly and severally" with the entity under O.C.G.A. § 10-5-14(c).

***Olagbegi v. Hutto,* 320 Ga. App. 436, 740 S.E.2d 190 (2013) – Consequential damages relating to breach of stock purchase contract should not have been awarded due to lack of specific proof.**

In this case, the plaintiff purchased stock valued at $156,500 from the defendant. The terms of the stock purchase contract entitled the plaintiff to rescission of the purchase price plus accrued dividends in the event that the stock was not issued within a year of the purchase. When the defendant failed to deliver the stock within the allotted time or to repay the plaintiff, the plaintiff filed suit under the contract. The plaintiff claimed that in addition to the $156,500, he was entitled to over $67,000 in consequential damages because he withdrew funds from his 401(k) account to pay for the stock and incurred tax liabilities and other penalties as a result. After a bench trial, the trial court awarded both the contract damages and the full amount of the plaintiff's claimed consequential damages, but the Court of Appeals reversed the award of consequential damages. The court found the plaintiff's evidence to be insufficient to support an award of consequential damages. The court cited O.C.G.A. § 13-6-9, which provides that "remote or consequential damages are not recoverable unless they can be traced solely to the breach of contract or unless they are capable of exact computation…" In this case, the plaintiff relied on his own testimony regarding the consequential damages, and was unable to testify as to any exact amounts. He also failed to present any tax returns, bank statements or similar documentary evidence in support of his claim, relying instead on a handwritten summary of his damages. Finding that the testimony and document were insufficient to support a claim for consequential damages, the court reversed the trial court on this point, while affirming the rest of the judgment.

C. NONPROFIT ORGANIZATION DECISIONS.

***God's Hope Builders, Inc. v. Mount Zion Baptist Church of Oxford, Georgia, Inc.,* 321 Ga. App. 423, 741 S.E.2d 185 (2013) – Plaintiffs' church membership must be determined without delving into ecclesiastical issues in order to determine compliance with bylaws and standing to sue.**

In this case, a group claiming to be members of a Baptist church accused two church officers of unlawfully conveying church property to an outside entity. The group sued the officers and the outside entity. The parties stipulated to a bench trial on the limited issues of whether the plaintiffs had standing to bring suit and whether the conveyance was lawful. The trial court held that the plaintiffs had standing and ordered that the property be returned to the church. On appeal, the Court of Appeals determined that the trial court record was insufficient to determine whether the plaintiffs constituted a majority of the church's membership, as was necessary to give them standing to sue. The court first acknowledged that its ability to decide the question was limited by the United States and Georgia Constitutions, as well as Georgia precedent providing that the courts cannot inquire into a church's internal affairs in matters of theology, church discipline or church governance. While this does not prevent a court from considering questions of a church's membership, the inquiry cannot "improperly delve into church ecclesiastical issues." The trial court examined the church's bylaws, which provided for four different ways in which a person could become a member. The Court of Appeals acknowledged that this approach was proper, but took issue with the trial court's treatment of several plaintiffs who claimed to have become members of the church through a "profession of faith." The relevant bylaw provided that such persons would be admitted to the church "after baptism," but the trial court record did not contain evidence of the baptism of these plaintiffs. The court concluded that an interpretation that did not require evidence of baptism would render the words "after baptism" without meaning, and therefore vacated the trial court's order. The court further directed the trial court to definitively determine whether the plaintiffs in question were members "to the extent that it can do so without engaging in a subjective analysis of ecclesiastical matters."

***Hall v. Town Creek Neighborhood Ass'n.*, 320 Ga. App. 897, 740 S.E.2d 816 (2013) – Property developer not entitled to act in lieu of neighborhood association board in assessing fees.**

This was a dispute between a homeowners' association formed in September, 2006 and a homeowner who was delinquent in paying special assessments. The association's declarations empowered its board of directors to make special assessments. The bylaws further provided that for the first seven years of the association's existence, the property developer would have the exclusive authority to appoint and remove directors and officers. It was admitted that the developer had never appointed a board of directors. Instead, at all relevant times the developer acted in lieu of a board. The developer, rather than the board, levied the special assessment at issue and pursued the instant suit on behalf of the association. The homeowner challenged the validity of the assessment, and on appeal from the trial court's award of summary judgment in favor of the association, the Court of Appeals agreed with the homeowner and reversed. The developer had argued that the bylaws, by authorizing the developer to appoint and remove directors and officers, allowed it also to act as the board itself. The developer also produced testimony stating that it was customary for property developers to act in lieu of a board during the formative years of a homeowners' association. The court disagreed with the developer's reading of the bylaws and found the testimony irrelevant, holding that none of the association's formation documents specifically permitted the developer to forego appointing a board or to act in place of a board. Concluding that no body ever existed with the authority to levy the special assessments, the court ruled that the homeowner was not required to pay them.

***McGee v. Patterson*, 323 Ga. App. 103, 746 S.E.2d 719 (2013) – Failure to pay homeowners' association assessments did not deprive members of standing to sue directors; questions of fact remained regarding validity of certain board actions.**

A dispute between two residents of a Fulton County subdivision and several members of their homeowners' association's board led to a series of lawsuits filed by the residents. The plaintiffs alleged in their various lawsuits that a board member misappropriated association funds, that the board spent funds and levied assessments in an unauthorized manner, and that certain actions taken by the board were illegitimate because the board had failed to hold a valid election for the period in question. The plaintiffs admitted that they stopped paying annual assessments, claiming that they had no intent to do so. The trial court granted summary judgment in favor of the defendants, and the plaintiffs appealed.

The Court of Appeals reversed the trial court's grant of summary judgment in several respects. First, it held that the trial court was wrong to conclude that the plaintiffs lacked standing due to their failure to pay assessments. The court reasoned that the association documents permitted individual owners to enforce the association's covenants without any relevant limitation. The court distinguished *Parker v. Clary Lakes Recreation Assoc.*, 272 Ga. 44, 526 S.E.2d 838 (2000), in which the Georgia Supreme Court held that an association member who did not pay a challenged assessment could not obtain an injunction, holding that *Parker* rested on a balancing of harms rather than an analysis of standing.

The court then found that summary judgment was inappropriate as to the merits of several claims. The court disagreed with the trial court's reliance on the association's bylaws, finding that there was insufficient evidence that the bylaws had ever been adopted. The court also found that the plaintiffs had raised a question of fact as to whether there was a valid election of board members in 2010, and as to whether the board had given proper notice of its 2011 budget and assessment, and it held that the trial court should not have granted summary judgment on claims that depended on the validity of these acts. The court sided with the defendants, however, on the claims that the plaintiffs purported to assert on behalf of the association for the reimbursement of improper expenditures, because the plaintiffs filed their complaint *pro se*. The court found that such claims were derivative and had to be brought by an attorney, citing the principle that a corporation must be represented by an attorney in any proceeding in a court of record.

***Xerox Corp. v. Light for Life, Inc.,* 2013 WL 1748327 (M.D. Ga. Apr. 23, 2013) – Court declines to determine ownership and control of defendant corporation since corporation's liability to plaintiff was no longer at issue.**

In this case, the district court granted a defendant's motion to strike a declaratory judgment cross-claim seeking to determine the ownership and control of a nonprofit corporation, holding that the issue raised was immaterial to the breach of contract action given that the corporation itself had been voluntarily dismissed by the plaintiff (and remained in the case only because of the cross-claim). Two separate groups purporting to represent the corporation had appeared and filed answers to the complaint. The plaintiff then amended its complaint to assert claims against the individual who signed the contract at issue in his individual capacity. Applying Federal Rule of Civil Procedure 13, which authorizes a party to bring a cross-claim if it arises out of the "same transaction or occurrence" as the original action, the court determined that the cross-claim did not arise from the same facts as the breach of contract claim, and did not need to be addressed in light of the amendment to the complaint.

D. LIMITED LIABILITY COMPANY DEVELOPMENTS.

***Denim North America Holdings, LLC v. Swift Textiles, LLC,* 532 Fed. Appx. 853 (11th Cir. 2013) – Right of member to appoint half of the managers of a manager-managed LLC does not give rise to fiduciary duties.**

Reversing a district court ruling, the Eleventh Circuit Court of Appeals held that an LLC that was a member of a two-member joint venture waived its right to rescind the joint venture's operating agreement when it relied on the agreement to demand capital contributions after discovering the alleged fraud that formed the basis of rescission. The Court also relied on statutory law to uphold the principle that non-managing members of a manager-managed LLC do not owe fiduciary duties to the LLC or to other members. Two LLCs became joint members of a new LLC, with each owning a 50% interest. The joint venture LLC's operating agreement provided that it would be managed by 8 managers, and that each member would appoint four managers. The managers were given complete authority over all management decisions for the joint venture. The operating agreement also provided that either member could contribute funds required to fulfill the joint venture's cash needs and then demand that the other member make an equal capital contribution. After formation, the member LLCs' relationship began to deteriorate, and one member came to believe that the other had provided it with false sales projections to fraudulently induce it to enter into the joint venture. However, despite admitting that it was aware of the fraud, and stating that it intended to rescind the contract, the first LLC later made a capital contribution and demanded that the second LLC make an equal contribution pursuant to the terms of the operating agreement. The first LLC eventually filed suit against the second, alleging fraudulent inducement, breach of fiduciary duty, rescission, breach of contract and breach of a duty owed by a member of a Georgia LLC. The Eleventh Circuit re-affirmed that a party who has knowledge of fraud that gives rise to a claim for rescission cannot act in a manner inconsistent with repudiation and then attempt to rescind the contract. Thus, it held that the first LLC waived its right to rescission when it relied on the operating agreement to demand and accept the capital contribution from the second LLC. The court also noted that the second LLC was not a manager of the joint venture, and did not owe any fiduciary duties to the first LLC under the Georgia Limited Liability Company Act. Non-managing members in a manager-managed LLC do not owe duties to each other or to the LLC. The plaintiff argued that there could be fiduciary duties owed because the second LLC had the authority to appoint four managers, giving it "de facto" control over the board of managers. The court disagreed, noting that Georgia law provides for managers to be appointed by members, and presumes that this will, in fact, occur.[6]

***Raiford v. National Hills Exchange, LLC*, 2013 WL 1286204 (S.D. Ga. Mar. 27, 2013) – LLC equity holders held unable to challenge an undisclosed sale of partnership assets based on the unanimous consent of requirements of O.C.G.A. § 14-11-308 because they were not LLC members.**

In this factually complex suit involving a shopping center, the plaintiffs, who were the original sellers of the complex, negotiated for a "trailing equity interest" which eventually became a 15% equity interest in the LLC that acquired the shopping center. The plaintiffs were thus entitled to a share of the profits of a subsequent sale, but the agreement specifically provided that the plaintiffs' interest did not include voting or management rights with respect to any aspect of the operation of the LLC. The property was eventually sold below the profit

[6] We summarized several earlier trial court rulings in this case in our 2011 survey, in which the trial court had denied the defendants' motion to dismiss and for summary judgment on several grounds, including that a non-managing member owed no fiduciary duties to other members and that the plaintiff had waived its right to rescission. While the Eleventh Circuit's opinion reverses significant portions of these earlier rulings, other portions of these rulings should continue to have some vitality, including the trial court's ruling in favor of the defendants that an LLC formed pursuant to Title 14, Chapter 11 of the Georgia Code cannot be considered a partnership under Title 14, Chapter 8.

threshold, and plaintiffs alleged that the managers and members concealed material facts from them about leasing prospects and prospective tenants. The court found that the defendants owed plaintiffs a duty of candor due to their controlling influence over plaintiffs' 15% equity interest, and that the concealed facts were material. The court found, however, that plaintiffs were unable to prove proximate causation and actual damages because they had no way to influence the defendants' decision to sell the property below the profit threshold.

In so holding, the court rejected an argument by the plaintiffs under O.C.G.A. § 14-11-308(b)(3). That section states that "[u]nless otherwise provided in the articles of organization or a written agreement [of the LLC], the unanimous vote or consent of the members shall be required to approve the…sale, exchange, lease, or other transfer of all or substantially all of the assets of the limited liability company." Since the shopping center was the LLC's only asset, the plaintiffs' consent would have been required if they were "members." The court determined that "member" referred to "a person who has been admitted to a limited liability company as a member as provided in [O.C.G.A. § 14-11-505]." The LLC's operating agreement did not designate the plaintiffs as members, and the agreement granting plaintiffs a 15% equity interest in the LLC did not purport to grant membership status. The court concluded that the plaintiffs thus "had no right to approve the sale of the Shopping Center under [section] 14-11-308(b)(3)," and no way to prevent the decision to sell the property even if they had known of the concealed information. In an earlier portion of the decision, the court found that the plaintiff's allegations could have a claim for contractual damages for a breach of the implied duty of good faith and fair dealing. The same facts, however, did not give rise to a fraud claim.

***Kaufman Development Partners, LP v. Eichenblatt,* 324 Ga. App. 71, 749 S.E.2d 374 (2013) – Former LLC member has standing to sue for violations of operating agreement.**

In 1995, David Eichenblatt entered into an operating agreement with Kaufman Development Partners, LP ("Kaufman Development") for Piedmont/Maple, LLC, a real estate management company. Eichenblatt and Craig Kaufman ("Kaufman") were the members of Piedmont/Maple. Subsequently, Kaufman and Eichenblatt executed a separation agreement in which Eichenblatt ceased doing business with Kaufman, with some exceptions that were listed in the separation agreement. The separation agreement provided that Eichenblatt would be removed as a member of Piedmont/Maple in accordance with the operating agreement, under which Eichenblatt continued to receive distributions but had no other powers as a member of Piedmont/Maple. Eichenblatt and Kaufman subsequently amended the Piedmont/Maple operating agreement to provide for Eichenblatt's removal as a member. The amendment stated that the operating agreement remained in force except as modified by the amendment.

Eichenblatt later sued Kaufman, Kaufman Development, and other entities related to Kaufman, alleging in part that Kaufman Development breached Piedmont/Maple's operating agreement and that those breaches reduced Eichenblatt's allocations and distributions from the company. The trial court determined that Eichenblatt had standing to bring the case as a party to the amended operating agreement. Kaufman argued on appeal that Eichenblatt did not have standing to bring suit because Eichenblatt was no longer a member of Piedmont/Maple. The Court of Appeals affirmed the trial court's holding, finding that Eichenblatt had standing to sue under the operating agreement because the amendment to the operating agreement stated that the agreement remained in full force and effect except as provided in the amendment, Eichenblatt continued to be a party to the agreement, and neither the operating agreement nor the amendment indicated that only members of Piedmont/Maple had standing to enforce the agreement.

***Davis v. VCP South, LLC*, 321 Ga. App. 503, 740 S.E.2d 410 (2013) – LLC operating agreement buy-sell provisions not waived by a member's obtaining its own valuation of LLC interest.**

The court determined various contract claims relating to an LLC operating agreement in which the two members agreed that upon the death of one, the other would have the option to purchase the deceased member's interests, with the purchase price to be determined by the LLC's accountant. The surviving member filed a complaint against the deceased member's estate, seeking to enforce the operating agreement provision regarding the purchase price. The estate representative argued that the plaintiffs waived enforcement of the provision by first obtaining a valuation of the LLC interest from another accounting firm rather than the LLC's accountant named in the agreement. The estate representative relied on cases involving arbitration clauses, but the court distinguished them, finding that appraisement is not the same as arbitration. In addition, because there was no evidence showing fraud or bad faith on the part of the LLC's accountant, his determination of the purchase price was binding, given that it was the parties' intent at the time of contracting to make it binding.

***Jones Creek Investors, LLC v. Columbia County, Georgia*, 2013 WL 1338238 (S.D. Ga. Mar. 28, 2013) – LLC officers may be personally liable for violations of Clean Water Act and related tort claims.**

The plaintiff, a golf course operator, sued various entities and individuals under the Federal Clean Water Act ("CWA") and several common law theories including nuisance and negligence, alleging that the defendants' upstream activities caused significant harm to the plaintiff's property. Ruling on a motion to dismiss filed by several defendants, the district court considered (among other things) issues of individual liability under both federal and state law. The court held that the federal "responsible corporate officer" doctrine can apply to cases brought under the CWA. The court also found that the plaintiff's allegations were sufficient to make out a claim against the moving individual officers, who were alleged to have been responsible for CWA compliance and privy to CWA violations. Turning to the common law claims, the court again held that the plaintiff's allegations were sufficient to state a claim for personal liability. Under Georgia law, an officer "who takes part in the commission of a tort by the corporation" may be personally liable to injured parties. The court held that allegations that the individual defendants were responsible for their company's best practices and compliance with laws, and that they had knowledge of unlawful conditions which continued to persist despite this knowledge, were sufficient to defeat a motion to dismiss.

***American Arbitration Assn. v. Bowen,* 322 Ga. App. 51, 743 S.E.2d 612 (2013) – LLC members held liable for arbitration fees because they personally participated in the proceeding.**

Two individual members of a limited liability company submitted breach of contract and fraud claims to the American Arbitration Association ("AAA") for binding arbitration. The members and the LLC were unable to pay the arbitration fees and the arbitration was discontinued. The AAA sent a bill for the arbitration to the members and sued when the bill was not paid. The AAA argued that the members of the LLC were responsible for paying the arbitration fees.

The trial court dismissed the suit, holding that the AAA failed to establish that the LLC's members were personally liable for the LLC's debts. The Court of Appeals reversed, holding that the AAA presented sufficient evidence to show that the LLC members incurred personal debts in the arbitration proceeding. Although members of an LLC are generally not liable for the company's debts just by being members of the LLC, a member can "incur personal liability for an LLC's business debts if they execute a written agreement to personally guarantee the corporation's debts and liabilities." 322 Ga. App. at 53 (citing O.C.G.A. § 14-11-303(b)).

Although there was no written agreement here, the LLC members did state in their trial brief that they and the LLC submitted the claims to binding arbitration. Also, AAA presented evidence showing that the members appeared at the arbitration in their personal capacity. Thus, the court held that the members were personally liable for the arbitration fees to the extent the fees related to their personal claims.

Primary Investments, LLC v. Wee Tender Care III, Inc., **323 Ga. App. 196, 746 S.E.2d 823 (2013) – Non-competition clause in LLC sale of business held not to bind LLC members who signed acquisition agreement merely as representatives.**

This case arose from the sale of a child care facility by a limited liability company and the subsequent attempts by members of the seller to open another facility that allegedly violated the non-competition clause in the sale contract. The Court of Appeals reversed a trial court judgment holding defendants liable for violating the non-competition cause but affirmed the trial court's judgment in favor of the plaintiffs on defendants' counterclaim for rescission of the sale contract based on fraud or mistake.

The sale agreement stated that the seller agreed that neither seller nor its agents would open a competing child care facility within ten miles of the facility. After the sale, two members of the selling company formed a new limited liability company and opened a new child care facility within a ten mile radius of the sold facility. The court noted that the key issue was whether the language in the sale agreement stating that "neither Seller nor its agents" would open a competing facility barred the members of the LLC, individually, from opening up a competing facility. The members had signed the sale agreement in their capacity as representatives of the LLC and were not mentioned by name in the agreement.

The plaintiffs argued that the use of the words "its agents" in the sale agreement referred to the members of the limited liability company. However, the court noted that the members of the company were afforded protection from liability for the company's actions under the Georgia Limited Liability Company Act (the "Act") and that the selling company did not have authority to bind the individual members to the non-competition clause. The court held that under the Act, "merely including the term 'its agents' in a contract signed by a limited liability company does not bind its members or managers individually." 323 Ga. App. at 200. Thus, the court held that if plaintiffs intended to bind the selling company's members individually to the terms of the non-competition clause, plaintiffs would have had to make those members parties to the sale agreement and have them sign the agreement in their individual capacities. Thus, the Court of Appeals held that the trial court erred in granting partial summary judgment against defendants on the issue of their liability under the noncompetition clause.

The court affirmed the trial court's grant of summary judgment against defendants on their counterclaims for rescission and equitable reformation of the sale agreement based on fraud and mutual mistake because the non-competition zone was changed from five miles to ten miles in the second and subsequent drafts of the agreement. The court found that the member of the company who negotiated the sale had multiple opportunities to read the agreement and discover the change, and that any mistake in failing to discover the change was a unilateral mistake by the seller.

***STC Two, LLC v. Shuler-Weiner*, ___ Ga. App. ___ 750 S.E.2d 730 (2013) – Lease extension held unenforceable for lack of consideration; payments promised by the lessee to representatives of the property's owners, a trust and an LLC, did not constitute consideration to the owners.**

STC Two, Inc., the plaintiff, leased commercial property jointly owned by a trust and Staircase Old National, LLC. STC sought an extension of the lease for six additional five-year terms, proposing a letter agreement to be signed as "Lessors" by the sole member of the LLC and one of the trust's two trustees, individually. The letter agreement as eventually signed provided for payments of $50 apiece to the LLC member and trustee, together with a $7,500 fee to each as an "Expedite Fee" if a formal lease amendment was signed within 10 days of the letter agreement. When STC failed to pay either amount, the signatories terminated the agreement, and STC sued the two owners and their representatives to enforce the agreement. The Georgia Court of Appeals affirmed summary judgment to defendants holding that the payments promised to the representatives in their individual capacities did not constitute consideration to the lessors. It held that the letter agreement was not binding on the LLC and trust. The court noted the separateness of a limited liability company member from the company and the difference between a trustee's individual and representative capacities. Also, the payments were associated with entry into the letter agreement and expediting delivery of the lease amendment and were thus not intended to compensate the trust and the LLC for extending the lease.

***Uhlig v. Drayprop, LLC*, 2013 WL 5532883 (S.D. Ga. Oct. 4, 2013) – LLC members held shielded from liability under O.C.G.A. 9-11-1107(j) for alleged misrepresentations because they were made on behalf of the LLC.**

A purchaser of two apartments in a Savannah condominium building sued the owner, Drayprop, LLC, and two of its members, alleging that they were negligent and made misrepresentations regarding promised renovations and the presence of asbestos in the structure. In granting the defendants' summary judgment motion, the court stated that the plaintiff was required "to show that Brown and Croll acted as individuals, not as members of Drayprop," citing and quoting O.C.G.A. § 9-11-1107(j), which states 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." However, the court's description of the plaintiff's allegations leaves no doubt that the plaintiff was suing the members for their conduct. The court failed to focus on the word "solely," and in the authors' opinion reached the erroneous conclusion that LLC members are shielded from liability for their misrepresentations so long as they were acting on behalf of the company, rather than themselves. Georgia law is decidedly to the contrary.

E. PARTNERSHIP LAW DEVELOPMENTS.

***Durkin v. Platz*, 920 F. Supp. 2d 1316 (M.D. Ga. 2013) – Partnership formation and completion: partners' fiduciary duties cease after partnership purpose completed.**

Plaintiffs Brian F. Durkin and Craig W. Richards ("Plaintiffs") were working with defendants Ann Platz and Rachel Thomas Hale ("Defendants") on adapting an unpublished manuscript into a screenplay. The parties executed a contract stating that plaintiffs would write the screenplay with defendants' assistance. The parties contested the scope of that contract, and plaintiffs claimed that in addition to providing that the parties would write the screenplay together, "the contract also evidences the parties' intent to form a partnership to produce the screenplay" into a movie. Plaintiffs claimed that defendants breached the contract and breached their fiduciary duty to them as partners when defendants "refused to work with them to develop a film based on the screenplay and feigned dissatisfaction with the screenplay, despite months of plentiful praise." Defendants denied that the parties formed a partnership and argued they had completed their contractual obligations by paying plaintiffs $8,000 and editing the first draft of the screenplay.

The contract between the parties stated in part that the parties would own the screenplay "in full partnership," and stated that "[b]y signing this agreement both institutions agree to be active partners and agree to abide by this agreement." *Id.* at 1323. Plaintiffs sought a declaratory judgment regarding their ownership rights to the screenplay and asserted claims for breach of fiduciary duty, breach of contract, *quantum meruit* and specific performance. Defendants sought summary judgment on plaintiffs' claims.

In addressing whether a partnership existed, the court noted that under Georgia law, "[a] partnership is an association of two or more persons to carry on as co-owners of a business for profit," and that "[a] partnership results from a contract, which may be either express or implied." *Id.* at 1334, (quoting O.C.G.A. § 14-8-6 and *Clark v. Schwartz*, 210 Ga. App. 678, 436 S.E.2d 759, 760 (1993)). The court looked at the language the parties used in the contract to determine if the parties intended to create a partnership. The court noted that in *Antoskow & Associates, LLC v. Gregory*, 278 Ga. App. 468, 629 S.E.2d 1 (2005), the court looked at a similar contract clause stating that parties would own a script "in full partnership" and found that the parties had established an express partnership. Here, the court held that the language of the contract "unambiguously expresses the parties' intent to form a partnership" to create the screenplay but rejected plaintiffs' claim that the partnership was also intended to produce that screenplay into a movie because that was not included in the contract. *Id.* at 1336.

After determining that a partnership existed, the court addressed whether defendants breached a fiduciary duty to plaintiffs by "inexplicably ceasing communication with plaintiffs regarding the screenplay" and telling them it was unsatisfactory, despite prior positive feedback. At the time that Defendants took those actions, the purpose of the partnership (to create the screenplay) was completed and the parties were trying to produce the screenplay into a movie, which was not part of the purpose of the partnership under the contract. In order to prove a breach of fiduciary duty, the plaintiff must show: "(1) the existence of a fiduciary duty, (2) breach of that duty, and (3) damages proximately caused by the breach." *Id.* at 1338 (*citing Bailey v. Stonecrest Condo. Assn., Inc.*, 304 Ga. App. 484, 696 S.E.2d 462, 470 (2010)). The court granted defendants' motion for summary judgment on the breach of fiduciary duty claim because plaintiffs' claims were based on defendants' actions after the purpose of the partnership was completed, and defendants did not owe a duty to plaintiffs to work with them to produce the screenplay into a movie.

***First Benefits, Inc. v. Amalgamated Life Insurance Co.*, 2013 WL 4011015 (M.D. Ga. Aug. 6, 2013) – Statute of limitations does not accrue on claims between partners until partnership is dissolved.**

The plaintiffs in this case were sellers and servicers of employee benefits products and the defendants were providers of insurance and benefits programs. In late 2004, plaintiffs and defendants allegedly formed a partnership to "combine resources and efforts to increase profits and expand their respective union accounts." Plaintiffs alleged that after the first enrollment, the parties agreed to continue their relationship as partners. In 2006, plaintiffs alleged that defendants began trying to take full control of the accounts and cut plaintiffs out by turning over the accounts plaintiffs brought to the partnership to a different company, Benefits Associates. Plaintiffs claimed that they orally demanded the return of their share of the profits and that in 2011 they terminated the partnership in writing. Plaintiffs brought suit against defendants for multiple claims, including breach of the partnership agreement, breach of fiduciary duty, conversion, and misappropriation of business opportunities.

Defendants argued that plaintiffs' complaint should be dismissed because their claims were barred by the statute of limitations and because the complaint failed to state a claim for which relief could be granted. On the statute of limitations issue, the parties agreed that plaintiffs' claims were subject to a four-year statute of limitations. (citing O.C.G.A. §§ 9-3-25, 9-3-31, and 9-3-32). Plaintiffs argued that under Georgia law, the statute did "not begin to run on claims by one partner against another partner until after dissolution of the partnership." 2013 WL 4011015, at *2 (*citing Powell v. Powell*, 171 Ga. 840, 156 S.E. 677 (1931); *Hammond v. Hammond*, 20 Ga. 556 (1856)). Defendants admitted that these cases held that the statute of limitations did not begin to run until after dissolution, but relied on a more recent Georgia Court of Appeals case, *Hendry v. Wells*, 286 Ga. App. 774, 650 S.E.2d 338 (2007), to argue that "'contemporary' Georgia law holds that limitations periods on claims between partners run from breach of duty." *Id.* at *3. The *Hendry* decision "held that a partner's claim for breach of fiduciary duty based on misrepresentations must be brought within four years of his partner's allegedly fraudulent statements." *Id.* (*citing Hendry*, 286 Ga. App. at 779-81). The district court in *First Benefits* held that it could not read *Hendry* to abrogate the clear holdings of the prior Georgia Supreme Court cases, and that the court must follow the Georgia Supreme Court precedent clearly holding that the statute did not begin to run until after dissolution of the partnership. As a result, the plaintiffs' claims were not barred by the statute of limitations.

Next, the court addressed whether plaintiffs' claims were subject to dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The court held that plaintiffs had satisfied the pleading standard for fraud claims under Fed. R. Civ. P. 8 because they alleged the existence of a partnership and the manner in which defendants allegedly breached the partnership agreement. The partnership relationship triggered fiduciary duties and thus plaintiffs' breach of fiduciary duty claim did not fail. Lastly, the court held that plaintiffs' complaint properly alleged a claim for conversion and complied with the heightened pleading standard for fraud and deceit claims under Fed. R. Civ. P. 9(b). Thus, defendants' motion to dismiss was denied.

***Alliant Tax Credit Fund XVI, Ltd. v. Thomasville Community Housing, LLC*, 2013 WL 321548 (N.D. Ga. Jan. 28, 2013) – General partners who fail to obtain audited financial statements as required by limited partnership agreement may be removed for material breach of the agreement.**

The plaintiffs were investors in two limited partnerships formed in connection with the development of low income housing projects. The defendants were the developers of the projects. The limited partnership agreements (the "LPAs") imposed specific reporting duties on the defendants, including a requirement that they provide a yearly audited financial statement for each LP, accompanied by the unqualified opinion of a designated accountant. The plaintiffs alleged, *inter alia*, that the defendants failed to provide audited financial statements for 2008 and 2009. They sought to have a "Major Default" declared under the LPAs, which would entitle them to remove the defendants as general partners of the LPs.

On the parties' cross-motions for summary judgment, the district court considered whether declaratory relief was appropriate and whether the defendants had committed a material breach given their claim that they did provide audited statements, only from someone other than the designated auditor.

First, the court found that there was an "actual controversy" in that the plaintiffs asserted that a Major Default had occurred, that they had informed the defendants of the same, but that the defendants continued to act as general partners. The LPAs expressly gave the plaintiffs the right to remove the defendants, and the court held that such a provision is enforceable. The court specifically cited O.C.G.A. § 14-9-602(a)(3), which provides for the removal of general partners "in accordance with the partnership agreement."

Next, the court evaluated whether the defendants' use of an auditor different from the designated accountant was a material breach. The court's analysis was clouded somewhat by two factual disputes that it did not resolve: whether the plaintiffs effectively withdrew their previously given consent to the use of a different accountant, and whether the 2008 and 2009 financial statements were ever delivered to the plaintiffs at all. The court did, however, rule on the issue of materiality, holding that if the withdrawal of consent was effective (and assuming that the statements were in fact delivered), the use of someone other than the designated accountant would be material. The court reasoned that the requirement of annual financial statements was "essential" to the plaintiffs' ability to monitor their investments, and that the plaintiffs had shown that they were harmed by the breach. (The court also noted that other misconduct alleged by the plaintiffs might also ultimately support a finding that a Major Default occurred.) The court denied the motions for summary judgment in light of the unresolved factual issues.

***Pullar v. General MD Group*, 2013 WL 5781609 (N.D. Ga. Sept. 17, 2013) – Under O.C.G.A §§ 14-8-13 and 14-8-15, a general partner can be liable to investors for fraud and breach of contract claims against the partnership arising from investment agreements, even though general partner was not a signatory to the agreements.**

The two plaintiffs, Pullar and Campagna, invested money in a general partnership, General MD, which provided back office services for medical offices. For several months, the plaintiffs were solicited by defendant David Weinstein and other representatives who held Weinstein out to be the owner of General MD. A few months later, another individual, Dustin Simon, informed the plaintiffs that he was the new owner of General MD. Pullar entered into an investment contract with General MD under which Simon agreed to give Pullar certain of the partnership's service accounts in exchange for the investment. Campagna entered into a similar agreement, signed by Weinstein as "partner," prior to the time that Simon claimed to be the new owner of General MD. Notwithstanding the supposed change in ownership, the plaintiffs alleged that Weinstein was a partner at the time both agreements were executed. (While the opinion was unclear as to who signed Pullar's agreement, it was not Weinstein.)

Pullar alleged that no accounts were ever given to him, while Campagna alleged that the accounts she received were "minimally or non-performing." Both brought claims under their contracts and under several tort theories, including fraud. The fraud claims were based on misrepresentations made during the solicitation process as well as misrepresentations in the investment contracts themselves.

Weinstein moved to dismiss Pullar's breach of contract claim on the grounds that he never signed the agreement. The court disagreed, reciting the rule that in a general partnership, "all partners are jointly and severally liable for all debts, obligations, and liabilities of the partnership." O.C.G.A. § 14-8-15(a). Because of this, a plaintiff suing to recover a debt due by the partnership can hold the individual partners liable by serving them with the suit. Weinstein argued that Pullar's complaint admitted that he was no longer the owner, but the court disagreed with this characterization of the complaint, finding that Pullar only alleged that he had been told Weinstein was no longer a partner.

The defendants moved to dismiss the fraud claims as insufficiently pled under Federal Rule of Civil Procedure 9(b). The court agreed as to the defendants' statements during the solicitation process, but declined to dismiss the claims based on statements made in the investment agreements. Again, Weinstein had claimed that he was not liable for claims based on misstatements in the agreement he did not sign, but the court disagreed. The court cited O.C.G.A. § 14-8-13, which provides that "[W]here, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person ... the partnership is liable therefor to the same extent as the partner so acting or omitting to act." The court further cited Georgia precedent interpreting § 14-8-13 to mean that each party to a joint venture is jointly and severally liable for the tortious acts of the other committed within the scope of the venture or enterprise. Since the matter was before the court on a motion to dismiss, the court did not address whether Weinstein was in fact a partner at the relevant time.

***Crippen v. Outback Steakhouse International, L.P.,* 321 Ga. App. 167, 741 S.E.2d 280 (2013) – Limited partnership employee's pursuit of outside interests and failure to devote full time to partnership business did not breach fiduciary duties and partnership was not entitled to recover his profits without evidence of adversity and harm to partnership.**

This was a dispute between a restaurant chain operator and one of its former employees, who during the relevant period served as a vice president of operations for the Asia-Pacific market. The employee worked without a formal employment contract until shortly before he was terminated. The plaintiff, Outback Steakhouse, alleged that unbeknownst to it, during the defendant's time of employment, the defendant purchased a minority interest in three restaurants in Asia and had either an ownership interest in or consulting relationship with several restaurant suppliers. Outback asserted a variety of contract and tort claims and also sought to offset its damages against money it admittedly owed the defendant in order to buy out his interest in certain related limited partnerships. The trial court granted summary judgment in favor of Outback as to several issues, and the defendant appealed.

The Court of Appeals agreed that the employee had violated his employment agreement, which required him to devote his full attention to Outback and under which he could not continue to hold his previously-purchased outside business interests. The court reached a different conclusion, however, with regard to Outback's breach of fiduciary duty and fraud claims. The court reasoned that notwithstanding that the defendant was barred from keeping his outside business interests under his contract, it was still not clear as a factual matter whether his outside interests were in any way adverse to Outback. The trial court specifically made no determination that the defendant's outside interests affected the prices paid by Outback to suppliers or the quality of the goods it received or that the employee had any role in choosing those suppliers, and its ruling as to breach of fiduciary duty was based solely on the employee's failure to devote his full attention to the business. The Court of Appeals reasoned that this did not provide a basis for a breach of loyalty claim absent a showing that Outback was harmed. Similarly, with regard to the fraud claim, the court found that notwithstanding whether Outback could prove all the elements of its claim, there was no evidence of actual loss. In granting summary judgment, the trial court had awarded damages in the amount by which the employee allegedly profited from his outside ventures. The Court of Appeals found that the proper measure of damages is Outback's actual loss, which it had failed to demonstrate.

As a final matter, the court held that the trial court erred by arriving at a valuation of the defendant's limited partnership interests based solely on the "unsupported contentions" of an Outback representative, who apparently was not personally involved in the calculations contained in his testimony. The court noted that the employment agreement contained procedures for valuation of the interests to be based on expert appraisals, which were not followed, and held that if the parties failed to follow those procedures or otherwise agree to a valuation, a trial on valuation would need to be held.

***Petrakopoulos v. Vranas*, No. ___ Ga. App. ___, 750 S.E.2d 779 (2013) – Procedural requirements in partnership dispute for appointment of auditors, special masters and receivers, direct vs. derivative claims and claim for wrongful dissolution.**

Three men (Petrakopoulos, Mellas and Vranas) formed a partnership in 1991 to develop and invest in real estate. The partnership agreement made certain provisions relating to the default of a partner, buyout rights, and dissolution. Over time, disputes arose among the three partners, particularly with regard to a tenant of the partnership that was owned by Petrakopoulos and Mellas. The tenant had its rent reduced due to purported economic difficulties, and eventually, Petrakopoulos represented that it could no longer make payments at all. Vranas, who had no ownership interest in the tenant, contended that the other two partners improperly credited the tenant's account with payments that were never made. He also alleged that his two partners misappropriated other funds and failed to properly account for transactions in the partnership records. In the meantime, Petrakopoulos and Mellas contended that Vranas was required to pay a capital contribution and had not done so. Petrakopoulos and Mellas sent Vranas a letter declaring him to be in default and purporting to exercise a buyout of his partnership interest. Vranas, in response, notified his two partners that they were in default and stated that he would defend his interests in the partnership. He later filed suit, seeking an accounting, dissolution of the partnership, removal of the managing partner and damages.

The trial court noticed a status hearing regarding the appointment of an auditor. After the trial court made the appointment orally, the appointee (who was present) stated that he viewed his role as more appropriately described as that of a special master or receiver. The court's written appointment order thus described him as a "Receiver/Special Master." The court also entered an injunction enjoining the partners from interfering with the duties of the Receiver/Special Master. The defendants argued on appeal that this was error, since there had been no notice or opportunity to be heard on the issue of appointing a *special master* or *receiver*. The Court of Appeals agreed, noting that auditors, special masters and receivers spring from different statutes and rules and play different functions: "[A]uditors and special masters primarily assist the trial court in resolving issues in the litigation, while a receiver acts as a guardian over funds or property at issue in the litigation and should be appointed only in clear and urgent cases." Finding that the situation was not "clear and urgent," the court held that the term "receiver" should not have been used and that the trial court really intended to appoint a special master. It held that the court should have followed Uniform Superior Court Rule 46, which requires the court to give notice and an opportunity to be heard before appointing a special master. In the court's view, the notice regarding the appointment of an auditor was insufficient. The court also found that it was error to grant injunctive relief, since notice was not given as required under O.C.G.A. § 9-11-65(a)(1).

The Court of Appeals also affirmed the trial court's denial of the defendants' motion for summary judgment. A few points are notable. Vranas asserted a fraud claim based on alleged misrepresentations by his partners that the tenant would continue to pay rent at its existing rate if Vranas signed a guaranty of the partnership's refinancing of a bank loan. The court addressed the circumstances under which a fraud claim may be based on statements as to future events, an issue recently addressed in *Greenwald v. Odom*, 314 Ga. App. 46, 53, 723 S.E.2d 305 (2012). The court recognized the two situations in which a statement as to future events is actionable:

where there is no present intent to perform, and where false representations of existing facts are combined with promises as to future acts. Finding that issues of fact existed that could render both of these exceptions actionable, the court denied summary judgment.

Turning to the breach of contract claim, which dealt in part with the tenant's outstanding obligations to the partnership, the court ruled that Vranas could not bring the claim individually and that it had to be brought on behalf of the partnership instead. The court reached a different result as to Vranas' claims that his partners breached the partnership agreement. The court held that Vranas could proceed individually under the partnership agreement based on claims that his partners improperly treated funds paid by the tenant as their own funds, and otherwise commingled funds of the tenant and the partnership as part of their effort to squeeze Vranas out of the partnership.

Finally, the court held that Vranas was not entitled to summary judgment on his claims of wrongful dissolution of the partnership, because factual issues remained surrounding issues of default and whether the partnership had been dissolved.

NEF Assignment Corp. v. Northside Village Partnership GP, LLC, **2013 WL 3755606 (N.D. Ga. July 15, 2013) – Guarantors of general partner's obligations held liable for its obligation under buy-sell provisions of partnership agreement.**

Plaintiff NEF Assignment Corp., a limited partner in Northside Village Partnership GP, LLC, brought suit against that partnership, the general partner, and four guarantors who had guaranteed the performance of the general partner for the general partner's obligations to plaintiff under the partnership agreement. Plaintiff claimed that certain triggering events listed in the partnership agreement had occurred and that the general partner was obligated to buy out plaintiff's partnership interest under the agreement. Plaintiff also argued that the guarantors were responsible for repurchasing plaintiff's interest if the general partner failed to do so.

The court determined that neither party was entitled to summary judgment on the question of whether the conditions triggering the general partner's obligation to repurchase plaintiff's partnership interest had occurred and whether the general partner was thus obligated to buy out plaintiff under the partnership agreement. On the guaranty question, the court held that the guarantors were obligated to assume the general partner's obligation to repurchase plaintiff's partnership interest in the event that the general partner failed in his obligations. The partnership agreement stated that the guarantors guaranteed all of the general partner's obligations, which were defined as including, without limitation, certain obligations under enumerated sections of the agreement.

The guarantors argued that because the buyout provision was not specifically enumerated in the definition of the general partner's obligations, that obligation was not included in the guaranty. The court disagreed, holding that the guaranty unambiguously stated that it covered all of the general partner's obligations, "including, without limitation" certain enumerated provisions. The court held that the use of the word "all" and the phrase "including, without limitation" indicated that the guaranty did not limit the scope of the guaranty to only the listed provisions but listed those provisions just as examples of the covered provisions. Thus, the court held that the guaranty covered the buyout provision of the partnership agreement and the guarantors were obligated to assume the general partner's buyout obligations.

***T.V.D.B. Sarl v. KAPLA USA*, 2013 WL 6623186 (S. D. Ga. Dec. 16, 2013) – Principal of a general partner may be directly liable for breach of fiduciary duty to a creditor for unpaid partnership debt resulting from diversion of business to a new LLC; new LLC may be subject to successor liability, but not veil-piercing on the facts.**

The plaintiffs, overseas manufacturers of wooden toy blocks, entered into an exclusive distribution relationship with an American individual ("Chayette"), who formed a limited partnership KAPLA USA, LP ("KAPLA USA") to serve as the distributor of the blocks. Chayette also formed a separate entity KAPLA USA GP, LLC ("GP") to serve as the general partner of KAPLA USA. In September 2008, KAPLA USA placed two orders for blocks but never paid the amounts invoiced. In October 2008, a new company called CITIBLOCS, LLC went into business and began marketing very similar toy blocks to KAPLA USA. Chayette became the sole member and manager of CITIBLOCS in June, 2009. In the meantime, KAPLA USA has become insolvent and is out of business. Plaintiffs sued Chayette, KAPLA USA, GP and CITIBLOCS alleging breach of contract and several tort theories, including breach of fiduciary duty. Both sides moved for summary judgment.

The plaintiffs' breach of fiduciary duty claim was based on a exclusive distribution relationship between KAPLA USA and the French manufacturer Kapla, one of the plaintiffs. The court held that the distribution relationship did not give rise to any fiduciary duty, but that the plaintiffs could be owed fiduciary duties as creditors under the principles stated in *Ware v. Rankin*, 97 Ga. App. 837, 104 S.E.2d 555 (1958). Under *Ware*, a limited fiduciary obligation to creditors may exist when a corporation engages in transactions at the time it is insolvent. The court found that the facts were sufficient to create a jury issue under *Ware*, given that KAPLA USA transferred money to CITIBLOCS during the time it owed Kapla for the unpaid orders (and further given that Chayette may have personally benefited from the transaction as CITIBLOCS' member and manager).

In a footnote, the court further made it clear that it believed that all of the defendants could be liable for breach of this fiduciary duty, and that the court did not need to resort to veil piercing or successor interest liability. The court nonetheless also addressed successor liability and veil piercing, since the parties moved for summary judgment as to those issues. The court found that "nearly all signs point to CITIBLOCS as being a continuation of and successor in interest to KAPLA USA," citing that the entities used the same bank accounts, some of the same employees and the same mailing address. The court also cited evidence of Chayette's involvement in both entities as supporting its finding. Turning to Chayette's personal liability under veil-piercing principles, the court held—using a reluctant tone—that the evidence was insufficient to pierce the veil. While the court was persuaded that there was evidence of commingling, it cited *Instituform Techs. LLC v. Cosmic TopHat, LLC* (see page 48) for the proposition that commingling alone is not sufficient to justify piercing the corporate veil. The court agreed with the defendants that KAPLA USA and CITIBLOCS were validly organized and that they maintained corporate formalities, and found that evidence that Chayette may have represented herself to be a member of CITIBLOCS a few months before she actually became a member was insufficient to warrant a finding to the contrary.

F. TRANSACTIONAL CASES.

***National City Mortgage Co. v. Tidwell,* 293 Ga. 697, 749 S.E.2d 730 (2013) – Surviving corporation in a bank merger succeeded by law to the interests of the original plaintiff and therefore had standing to appeal even though it was never formally substituted as a party.**

This is one of a number of recent decisions to address the impact of bank mergers on foreclosure litigation in Georgia. Similar to the multiple recent cases in which plaintiffs alleging wrongful foreclosure have challenged the assignment of a security deed (see below), the court relied on O.C.G.A. § 14-2-1106 in concluding that the surviving bank succeeded to the rights of the original party by operation of law.

Here, the plaintiffs sued National City Mortgage Company ("National City") in 2007, alleging claims relating to the foreclosure of their home. National City then merged with PNC Bank. PNC Bank was never formally substituted as the defendant. After the trial court entered summary judgment against the defendant in part, a notice of appeal was filed that was styled "Defendant National City's Notice of Appeal," but mentioned PNC Bank in its first sentence. The Court of Appeals found that there was nothing in the record indicating that PNC Bank had been substituted as a party, and thus dismissed the appeal. National City petitioned for a writ of *certiorari*, which the Supreme Court granted.

Much of the Supreme Court's analysis rested on its reading of O.C.G.A. § 9-11-25, the rule addressing the substitution of parties. The court found that the rule permits actions to go forward against the original defendant when there is a transfer of interest if there is no motion or order to substitute the affected party. Here, no party had ever filed a motion seeking to substitute PNC Bank for National City. Finding that it was ambiguous whether National City or PNC Bank had filed the appeal with the Court of Appeals, the Supreme Court suggested that the ambiguity should have been resolved in favor of allowing the appeal.

Significantly, however, the court went further in its analysis, pointing out that it was essential to determine whether, as a matter of substantive law, the lawsuit survived National City's transfer of interest to PNC Bank. Turning to O.C.G.A. § 14-2-1106, the court held that a proceeding pending against a corporation that merges may continue as if the merger had not taken place. This is because, the court explained, title to each corporation's property as well as each corporation's liabilities passes to the surviving corporation by operation of law. The claims brought by and against National City therefore vested in PNC Bank automatically. On this basis, the court concluded that it was error for the Court of Appeals to treat PNC Bank as a non-party and to deny it standing to appeal.

***Diaz v. JPMorgan Chase Bank*, 2013 WL 750480 (N.D. Ga. Feb. 27, 2013) and *Abdullahi v. Bank of America, N.A.*, 2013 WL 1137022 (N.D. Ga. March 15, 2013) *aff'd*, ___ Fed. Appx. ___, 2013 WL 6085241 (11th Cir. Nov. 20, 2013) – Security deed holder who obtained the deed through a merger held to be rightful holder of deed by operation of O.C.G.A. § 14-2-1106.**

Diaz v. JPMorgan Chase Bank was an action to enjoin a non-judicial foreclosure sale and for damages for wrongful foreclosure and breach of contract. Similar to last year's *Jiles v. PNC Bank N.A.*, 2012 WL 3241927 (M.D. Ga. Aug. 7, 2012), the court relied on O.C.G.A. § 14-2-1106 in resolving the matter in favor of the deed holder.

In 2002, Plaintiff Armando Diaz ("Diaz") had executed a promissory note and a security deed in favor of Northpoint Capital, Inc. The note was transferred to Chase Manhattan Mortgage Company ("Chase Manhattan") by allonge. On November 12, 2002, Diaz executed an acknowledgment that the note had been transferred and on the same date, Northpoint transferred all interest in the security deed to Chase Manhattan. On January 1, 2005, Chase Manhattan merged with Chase Home Finance, LLC ("Chase Home Finance"), and Chase Home Finance later merged with JPMorgan on May 1, 2011. As a result of these mergers, JPMorgan became the servicer of the loan and the holder of the promissory note.

Diaz defaulted on the loan by failing to make payments and the payments owed under the note were accelerated. Diaz also transferred the property by quitclaim deed to plaintiff Gerardo Mireles without JPMorgan's written consent, which was a default requiring immediate payment in full under the terms of the loan documents. A foreclosure sale was scheduled but plaintiffs filed suit before it was carried out. In support of their claim for wrongful foreclosure, plaintiffs claimed that the security deed was not properly assigned to JPMorgan. However, the court noted that pursuant to O.C.G.A. § 14-2-1106(a)(2), title and all contractual rights in real property possessed by Chase Manhattan vested in JPMorgan as the surviving company in the mergers. The note and security deed both provided that they were transferable, and they had been properly transferred and assigned to Chase Manhattan. JPMorgan, as successor by merger to Chase Manhattan, was the holder of the note and security deed and had authority to foreclose. Thus, the court found that JPMorgan was entitled to foreclose under the note and security deed.

Shortly after the *Diaz* decision, the Northern District of Georgia in *Abdullahi v. Bank of America, N.A.,* once again applied O.C.G.A. § 14-2-1106 in favor of a security deed holder in yet another case involving a deed that changed hands multiple times between the origination of the mortgage and the commencement of foreclosure proceedings.

The suit arose from the non-judicial foreclosure sale of property in Cumming, Georgia. The borrower had originally entered into a loan agreement with Peachtree Residential Mortgage, LP as the lender and executed a security deed that named Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the lender. MERS transferred the security deed to BAC Home Loans, LP ("BAC") on April 29, 2011, before BAC merged with Bank of America, N.A. ("BANA") on July 1, 2011. Plaintiff asserted a number of wrongful foreclosure theories against the defendants, including that BANA "never received an assignment giving it the power of sale" from BAC, which held the security deed. The court again relied on O.C.G.A. § 14-2-1106, holding that because BANA obtained the deed by operation of statute, it did not need to take any further action when it merged with BAC to become the rightful holder of plaintiff's security deed.

In November, the Eleventh Circuit affirmed the *Abdullahi* decision on appeal. The Eleventh Circuit's discussion only briefly touched upon O.C.G.A. § 14-2-1106.

***Patel v. Ameris Bank*, 324 Ga. App. 227, 749 S.E.2d 809 (2013*)* – Court of Appeals applies O.C.G.A. § 14-2-1009 to uphold summary judgment in favor of successor bank against guarantors**.

This appeal was brought by two guarantors of a promissory note against Ameris Bank ("Ameris"), who obtained summary judgment in its suit to enforce the guarantees. The guarantees were initially executed in 2007 in favor of Southern Horizon Bank, and contained a clause stating that they would be "binding upon and inure to the benefit of the parties, their successors and assigns." Southern Horizon Bank changed its name to High Trust Bank, and a Certificate of Amendment Name Change was filed with the Secretary of State's office to reflect this change. Later, High Trust Bank was closed by the FDIC, and the note and guarantees were assigned to Ameris. Ameris submitted affidavits from High Trust Bank's Executive Vice President outlining the facts described above, as well as other evidence showing the outstanding indebtedness. After the trial court entered summary judgment in favor of Ameris, the defendants appealed, arguing that Ameris' evidence did not show any assignment from Southern Horizon Bank (as opposed to High Trust Bank) to Ameris. The Court of Appeals affirmed, holding that the evidence was more than sufficient to show that Southern Horizon Bank had changed its name and that High Trust Bank was the holder of the note prior to its closure. The Court further found that O.C.G.A. § 14-2-1009 provided an independent reason for affirming the trial court. O.C.G.A. § 14-2-1009 provides that "[a]n amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation" and that an amendment changing a corporation's name does not abate a proceeding brought by the corporation in its former name.

***Herren v. Sucher*, ___ Ga. App. ___, 750 S.E.2d 430 (2013) – Indemnity clause in asset purchase agreement held not to constitute an agreement to assume seller's liabilities.**

After suffering a stroke, the plaintiff sued various parties, including Barrin Innovations, Inc. ("Barrin"), the seller of a dietary supplement that he was using. Prior to the stroke, Barrin had sold its assets and liabilities. Barrin contended that the purchasers assumed its liabilities pursuant to the asset purchase agreement, and the trial court agreed. The Court of Appeals reversed. The trial court's holding was based on an indemnity clause in the asset purchase agreement, which read: "Buyer shall indemnify and hold harmless Seller from any liability arising from the actions of the business including but not limited to liabilities incurred, outstanding debts, harm caused by products and/or machinery owned or produced by the businesses." The court held that "such an agreement is not synonymous with an agreement to assume another's liabilities." The court cited *Gwinnett Hospital Systems, Inc. v. Massey*, 220 Ga. App. 334, 469 S.E.2d 729 (1996) as illustrating the difference between an indemnity clause and an agreement to assume liabilities. The court noted that the agreement with Barrin and the Buyer lacked any express language that the Buyer assumed Barrin's liabilities and obligations, as had been the case in *Gwinnett Hospital*.

***Fieldturf USA Inc. v. Tencate Thiolon Middle East, LLC,* 945 F. Supp. 2d 1379 (N.D. Ga. 2013) – Acquirers' assumption of liabilities held to include liability for sellers' fraud.**

The plaintiffs in this case were artificial turf manufacturers who entered into two supply contracts for fiber with a company that was later partially acquired by defendants. After the acquisition, plaintiffs entered into a third supply agreement with defendants. Subsequently, plaintiffs determined that the yarn provided by defendants was "degrading prematurely" and plaintiffs introduced a competing fiber product. Plaintiffs then sued defendants for breach of contract, breach of warranty, and fraud. Defendants counterclaimed for, among other things, commercial disparagement and unfair competition. Plaintiffs moved for partial summary judgment on some of defendants' counterclaims and defendants moved for summary judgment on plaintiffs' claims.

On plaintiffs' fraud claim, defendants argued that they did not assume liability for claims related to the acquired company's alleged fraud. The court held that the Asset Purchase Agreement was ambiguous but that, based on parol evidence, defendants did assume liability for the alleged fraud.

The court noted that in general, "a purchasing corporation does not assume liabilities of the seller unless: (1) there is an agreement to assume liabilities; (2) the transaction is, in fact, a merger; (3) the transaction is a fraudulent attempt to avoid liabilities; or (4) the purchaser is a mere continuation of the predecessor corporation." *Fieldturf USA Inc. v. Tencate Thiolon Middle East, LLC*, 945 F. Supp. 2d at 1394 (*quoting Bullington v. Union Tool Corp.*, 254 Ga. 283, 284, 328 S.E.2d 726 (1985)). Here the Asset Purchase Agreement stated that the purchaser "agrees and acknowledges that from the Transfer Date it shall assume all Assumed Liabilities and all Defective Product Claims" and required that the parties continue to address ongoing liabilities. Additionally, the plaintiffs' parol evidence showed that the acquired company intended for the acquirer to assume liabilities for future claims in order to "maintain positive relations with its customers" and thus defendants could be held liable for the acquired company's fraud. Therefore, the court held that defendants assumed liability for the fraud claim against the acquired company.

***Freund v. Warren*, 320 Ga. App. 765, 740 S.E.2d 727 (2013) – Assets purchased by corporate stockholders in their individual capacities were property of individuals, not corporation.**

In this case, the court applied the cardinal legal principle that a corporation is a separate legal entity, distinct and apart from each of its individual stockholders. The Sheriff of Cobb County filed an interpleader to determine who should receive two CDs held as collateral. Freund, Ltd. was a bail bonding service doing business as "All Cobb Bail Bonds." Two individuals, Smith and Hall, formed and were stockholders in a separate corporation called All Cobb Bail Bonds, Inc. ("ACBB"). In 2007, Smith and Hall in their individual capacities entered into a Purchase and Sale Agreement to purchase certain assets of All Cobb Bail Bonds (i.e., Freund, Ltd.), including all interest in CDs being held by the Sheriff. All Cobb Bail Bonds and the Sheriff subsequently purportedly entered into a Deposit Agreement that provided the working arrangement between the two parties. However, the Deposit Agreement was signed by Hall and

Smith as individuals, and not as representatives of ACBB nor All Cobb Bail Bonds. The court considered the "plain language" of the Purchase and Sale Agreement and determined that the assets, including the CDs, were sold to Hall and Smith individually. It then concluded that, contrary to Hall's deposition testimony in which he averred that the CDs belonged to ACBB, the signatures on the Deposit Agreement indicated that Hall and Smith signed in their individual capacities and not on behalf of ACBB. The Court relied on the venerable principle that a corporation is a separate entity from its individual stockholders and concluded that the CDs were the property of Hall and Smith individually.

***In re Foster*, 500 B.R. 197 (Bankr. N.D. Ga. 2013) – Corporate conveyances of interest in real estate held valid under O.C.G.A. § 14-5-7 without corporate seal.**

A Chapter 13 debtor objected to a proof of claim filed by the assignee of the original lender, relying on O.C.G.A. § 14-5-7 to argue that two prior assignments of the deed to secure debt were invalid because they did not bear a corporate seal. Both the 2007 and 2011 versions of the statute were at issue here due to the dates of the assignments. The 2007 version of the statute provided that instruments executed by a corporation conveying an interest in real property, when signed by the president or vice president and attested or countersigned by certain corporate personnel, "shall be conclusive evidence" that the president or vice president does in fact occupy the indicated position, that the signature is genuine, and that the execution of the document on behalf of the corporation has been duly authorized. The court noted that while the presence of a seal also provides a presumption of an authorized corporate act, a corporate seal is not necessary on an assignment of deed to secure debt because O.C.G.A. § 14-5-7 operates to provide conclusive evidence of a valid, authorized corporate act when the deed to secure debt takes the prescribed statutory form. Because with the first assignment, the notary attestation on the assignment stated that the signatory was an attorney-in-fact for the corporation known to the notary, there was no question that the signatory was acting on behalf of the corporation, and thus no corporate seal was necessary. For the 2011 assignment, the court noted that the 2011 version of O.C.G.A. § 14-5-7(b) specifically provided that instruments executed by a corporation transferring a deed to secure debt, when signed by the appropriate agent, shall be conclusive evidence that the executing officer did in fact occupy the official position; that the signature is genuine; and that the execution of the instrument on behalf of the corporation was duly authorized, "notwithstanding the lack of a corporate seal." Thus, the second assignment was valid because it met all of the formalities required by the statute.

***UWork.com, Inc. v. Paragon Technologies, Inc.*, 321 Ga. App. 584, 740 S.E.2d 887 (2013) – Arm's-length, adversarial relationship negates agency and fiduciary duty; negligent misrepresentation, fraud claims based on representations to a third party held insufficient.**

In this case, the Georgia Court of Appeals, sitting *en banc* as a seven-member court, held that there was no evidence of a confidential relationship between two parties to an arm's-length transaction, and concluded that summary judgment should therefore have been granted as to a breach of fiduciary duty claim brought by one of the parties. The court also addressed the issue of when a fraud defendant's representations to a third party, as opposed to the plaintiff, can give rise to a fraud claim under Georgia law.

The case involved a series of business disputes between UWork.com d/b/a Covendis ("Covendis"), who developed and maintained a listing service for temporary IT workers on behalf of the State of Georgia, and Paragon Technologies, Inc. ("Paragon"), one of the suppliers who contracted with Covendis to supply IT workers for the State. Covendis and Paragon had an earlier dispute arising over allegations that Paragon had submitted false background reports for its workers. This dispute was settled via a March, 2010 agreement which, among other things, imposed a six-month "probation" period on Paragon before it could be fully reinstated as a supplier. Several new disputes between Covendis and Paragon arose afterwards, and Paragon ultimately filed a lawsuit asserting claims of breach of contract, fraud and negligent misrepresentation, and breach of fiduciary duty against Covendis. Certain Covendis officers and employees were also named defendants in the non-contractual claims. Covendis counterclaimed for breach of contract and fraud. Both parties moved for partial summary judgment, and two companion appeals followed.

The Court of Appeals addressed a number of issues. Of particular interest was the court's treatment of Paragon's breach of fiduciary claim and its fraud claim.

Breach of fiduciary duty. Paragon's breach of fiduciary duty claim turned on whether a confidential relationship existed between the parties. The trial court had found that there was evidence that Covendis entered new work proposals onto its listing service on Paragon's behalf. The Court of Appeals disagreed that this created an agency relationship, noting that Covendis and Paragon were parties to an arm's-length agreement and that their relationship was "tenuous, transitional, and at times adversarial," as evidenced by the fact that Paragon had been placed on probation. 740 S.E.2d at 896. The court found that the record was devoid of evidence that Paragon reasonably could have believed that Covendis was acting on its behalf rather than on the State's behalf. While it was true that Covendis entered rates on Paragon's behalf and that the entries stated that they were "submitted on behalf of Paragon by Covendis," there was no evidence that Paragon had actually authorized Covendis to calculate or enter the rates, and no issue of apparent authority arose because it was Covendis itself who accepted the rates on behalf of its client, the State. Finding no evidence of a confidential relationship, the court held that summary judgment should have been granted in Covendis' favor.

Fraud. Paragon's fraud claim was based on alleged misrepresentations made to Paragon's subcontractors, which Paragon conceded did not conform to the general rule that "actionable fraud must be based on a misrepresentation made *to* the defrauded party, and relied upon *by* the defrauded party." 740 S.E.2d at 898 (*quoting Florida Rock & Tank Lines, Inc. v. Moore*, 258 Ga. 106, 365 S.E.2d 836 (1988) (emphasis in original)). The Court of Appeals found that no recognized exception to the general rule applied. As the Georgia Supreme Court held in *Florida Rock, supra,* a fraud claim can be based on a misrepresentation made to a third party where the defendant knows that the plaintiff will rely on the third party and where the defendant fraudulently induces the third party to act in a manner that will accomplish the goal of defrauding the plaintiff. The court found that the evidence was insufficient to support a claim under that theory.

Other claims. The court also addressed both parties' breach of contract claims and Covendis' fraud claim. With regard to Covendis' fraud claim, the court reiterated settled authority that a party alleging fraudulent inducement must elect whether to sue on the contract or rescind it and sue in tort. Because Covendis had not timely attempted to rescind the agreement at issue, rescission was unavailable as a remedy.

These holdings represent the five-judge majority opinion of the bench. However, a short concurrence in part and dissent in part was submitted on behalf of two judges. Paragon filed a motion for reconsideration on its claim for breach of fiduciary duty based on a theory of apparent authority, but the court denied the motion.

G. LITIGATION ISSUES.

1. Derivative Action Procedure

***Benfield v. Wells*, 324 Ga. App. 85, 749 S.E.2d 384 (2013) – Court of Appeals upholds dismissal of derivative suit upon motion of the corporation under O.C.G.A. § 14-2-744(a), rejecting a challenge to the independence of the special litigation committee.**

The Court of Appeals upheld a ruling by the Fulton County Business Court dismissing a derivative suit filed by a SunTrust shareholder upon a motion filed by SunTrust pursuant to O.C.G.A. § 14-2-744(a). Section 14-2-744(a) permits a corporation to dismiss a derivative suit filed on its behalf under certain conditions, including when a special litigation committee determines in good faith, after a reasonable investigation, that the maintenance of the suit is not in the best interests of the corporation.

A SunTrust shareholder sent SunTrust a shareholder demand letter in February 2011, requesting that the Board take action to remedy certain alleged breaches of fiduciary duty, abuse of control, gross mismanagement and unjust enrichment by current and former directors and officers going back to 2004. The shareholder then filed suit in September 2011. After satisfying itself that the shareholder's allegations differed from previous allegations such that a new response was appropriate, SunTrust reconstituted its Demand Review Committee ("DRC"), appointing to it three directors who joined the board in 2010 or 2011, at the end of the period addressed in the demand. The DRC reviewed relevant documents, interviewed current and former directors and officers and other witnesses, and ultimately issued a 178-page report in which it concluded that the defendants in the shareholder's suit had acted in good faith and in accordance with their fiduciary duties, that there was no credible evidence to support the plaintiff's claims, that the defendants acted in accordance with the business judgment rule, and that no corrective actions were required. The DRC had been authorized to make the determination referenced in § 14-2-744(a). Pursuant to that authority, the DRC instructed SunTrust to seek dismissal of the lawsuit. The trial court found that SunTrust had sufficiently demonstrated the independence and good faith of the DRC's members and the reasonableness of their investigation, and it granted the motion to dismiss.

On appeal, the sole issue presented was the independence of the DRC's members. Specifically, the plaintiff contended that one of the members was not independent because he was a longtime executive at Georgia Power and had a business relationship with one of the defendants, who had approved his compensation at Georgia Power. The Court of Appeals held that the trial court had fairly taken this fact into consideration, noting that the DRC member and the defendant in question were together at Georgia Power for only a brief time. The court concluded that it was within the trial court's discretion to find that this relationship did not destroy the DRC member's independence under the totality of the circumstances. The court also agreed that the other relationships cited by the plaintiff, which generally involved connections to defendants based on common involvement in charitable and civic organizations, did not destroy independence. Accordingly, the court affirmed the dismissal of the suit.

***In re Pervis*, 497 B.R. 612 (Bankr. N.D. Ga. 2013) – Bankruptcy court decides issues of direct vs. derivative liability, tortious interference with contract, and nondischargeability of fraud claims involving former corporate officer.**

The bankruptcy court in this case reviewed the factors for determining whether a suit brought by a shareholder is derivative or direct and reaffirmed that when the reasons for a derivative suit do not apply, as in a close corporation with only two shareholders, then a derivative suit is not necessary, and the aggrieved shareholder can bring her claims directly. In this case, the claims arose from a failed business relationship among three women who worked in the child and teen talent industry and formed multiple businesses together. Two of the women, Brenda Pauley and Joy Pervis (the debtor in the bankruptcy proceeding), formed a corporation called JB Entertainment Group ("JBE"), in which they were equal owners. Later, Pauley and Pervis along with the third woman formed Hot Shot Kids, Inc. ("HSKI"), whose shareholder agreement contained a non-competition clause involving certain clients of JBE. Several disputes arose, and Pervis was accused of, among other things, misappropriating commissions that should have been paid to JBE and/or HSKI, usurping corporate opportunities, and tortuously interfering with business opportunities. HSKI and Pauley, in her individual capacity, filed a Complaint Objecting to Discharge of Pervis.

The bankruptcy court was called upon to rule on several summary judgment motions filed by Pervis. Among the grounds for summary judgment asserted by Pervis was that claims relating to JBE should have been brought in the name of the corporation, and not by Pauley individually. The court found that Pauley could proceed individually, citing the *Thomas v. Dickson* exception to the general rule requiring that injuries to the corporation be brought derivatively on behalf of the corporation. *See Thomas v. Dickson*, 250 Ga. 772, 301 S.E.2d 49 (1983). The *Thomas* exception allows such claims to be brought directly by a shareholder where the injury is personal, there is no risk of multiplicity of lawsuits, and all potentially injured parties are before the court. Since JBE had only two shareholders, Pauley and Pervis, the court found that the exception applied to the extent that Pauley's claims involved alleged JBE clients. The court also denied summary judgment as to the merits of Pauley's claims for fraud, conversion and breach of an oral agreement.

With regard to alleged HSKI clients, however, the court found that Pauley could not assert tort claims in her individual capacity since HSKI was asserting those claims itself. The court found that the only claim that Pauley could assert individually with respect to HSKI was for breach of its shareholder agreement, since she was a party to it.

The court also discussed whether a corporate officer could tortiously interfere with the corporation's business relationships. In general, the alleged interference must be with a third party, and the defendant must be a "stranger" to both the contract and the business relationship. Nevertheless, a corporate officer may still be liable if the officer disregarded the corporate entity or acted outside the scope of authority to the corporation's detriment.

Finally, the court had to determine whether the claims were non-dischargeable on the grounds that Pervis committed fraud or defalcation while acting in a fiduciary capacity under 11 U.S.C. § 523(a)(4). The court noted that the term "fiduciary" in the bankruptcy statute does not have the same meaning as it does under state law. The bankruptcy code requires that the debtor hold a fiduciary position vis-a-vis the plaintiff under a technical, express or statutory trust and that the claim arise while the debtor was acting in such a capacity. Looking to other bankruptcy courts in Georgia that had considered whether a corporate officer or director is a fiduciary under the statute, the court here noted that the near-unanimous ruling is that they are not, and it likewise determined that the mere fact that the defendant was a corporate officer was not enough to consider her a "fiduciary" under the bankruptcy code.

***Bobick v. Community & Southern Bank,* 321 Ga. App. 855, 793 S.E.2d 518 (2013) – Claims against directors and officers of a failed bank for mismanagement, resulting in the devaluation of bank holding company stock held to be derivative claims that cannot be brought directly by an individual holding company shareholder.**

A bank filed suit against a debtor for breach of a promissory note. The debtor asserted counterclaims against the bank and joined its CEO as a counterclaim-defendant, alleging, among other things, breach of fiduciary duty by mismanaging the bank which caused the debtor's stock of the bank's holding company to become worthless. While the case was pending, the bank failed, and the FDIC was appointed as receiver. The FDIC assigned and transferred certain of the bank's assets to another bank, which continued as plaintiff in the litigation. The Court of Appeals held that the FDIC was the proper owner of all shareholder derivative claims and that the debtor's counterclaims here were derivative because she was alleging the devaluation of shares due to corporate mismanagement. It thus upheld the dismissal of her breach of fiduciary duty claims for lack of standing. The court relied on and agreed with the reasoning of an unpublished Eleventh Circuit opinion, *Lubin v. Skow*, 382 Fed. Appx. 866, 870 (11th Cir. 2010), which similarly held that when a claim alleges that a failed bank's officers mismanaged the bank resulting in devaluation of the holding company's shares, the harm caused to the holding company is inseparable from the harm done to the bank, such that the claim is derivative in nature.

2. Alter Ego, Piercing the Corporate Veil and Other Forms of Secondary Liability

***Instituforum Technologies, LLC v. Cosmic Tophat, LLC,* 959 F. Supp. 2d 1335 (N.D. Ga. 2013) – Court declines to pierce the corporate veil in patent infringement dispute.**

In the context of a patent infringement dispute between competitors in the pipe repair business, the district court addressed several veil-piercing arguments raised by the plaintiff. The court's rulings all involved settled law, but the decision offers a useful roadmap for evaluating issues of veil-piercing and alter ego under Georgia law.

The defendants were an Austrian corporation ("Cosmic-Austria"), its owner and president ("Kubel") and a separate California-based LLC ("Cosmic TopHat") also owned and controlled by Kubel. In earlier proceedings, Cosmic-Austria was held in default as a discovery sanction. The matter before the court was the plaintiff's summary judgment motion against Kubel and Cosmic TopHat. The plaintiffs claimed, *inter alia*, that Cosmic TopHat was the alter ego of Kubel and that each should be held liable for the other's infringement. As an initial matter, the court observed that holding Cosmic TopHat responsible for Kubel's infringement would amount to reverse piercing, a theory that is not recognized in Georgia under the circumstances. Turning to the plaintiffs' traditional veil-piercing argument, the court outlined the plaintiffs' burden: in order to pierce the veil and hold an individual personally liable for the debt of the LLC, the plaintiffs must show that the defendant "disregarded the separateness of legal entities by commingling of an interchangeable or joint basis or confusing the otherwise separate properties, records or control." 2013 WL 4038722, at *7 (*quoting Sun Nurseries, Inc. v. Lake Erma, LLC*, 316 Ga. App. 832, 730 S.E.2d 556 (2012)).

The plaintiffs first argued that Cosmic TopHat had failed to observe corporate formalities. The court, citing O.C.G.A. § 14-11-314, held that this was an insufficient ground for alter ego liability. The plaintiffs then argued that Kubel did not treat Cosmic TopHat as a separate entity from Cosmic-Austria, citing evidence that Cosmic-Austria received payments for Cosmic TopHat products and paid certain of Cosmic TopHat's expenses. The court held that this was irrelevant in that it did not tend to show that Kubel failed to keep Cosmic TopHat separate from *himself*. The plaintiffs also argued that Cosmic TopHat was undercapitalized and alleged that Kubel controlled the cash flow between it and Cosmic-Austria in a manner that limited Cosmic TopHat's available cash. The court cited settled authority that for undercapitalization to justify piercing the veil, it must be coupled with evidence of an intent to avoid future debts of the LLC. Finding no such evidence of intent to avoid future debts, the court held that summary judgment would not be appropriate on this basis. Finally, the court rejected the plaintiffs' argument that piercing the veil was necessary to prevent Kubel from transferring or disposing of assets via Cosmic TopHat, noting that other avenues were available if that situation were to arise.

***Holiday Hospitality Franchising, Inc. v. Noons,* 324 Ga. App. 70, 749 S.E. 2d 380 (2013) – Reverse piercing of corporate veil by third-party creditors is still impermissible.**

In this case, the Court of Appeals rejected a judgment creditor's attempt to reach the assets of alleged "sham corporations" through reverse piercing of the veil. The court's discussion of the issue was brief, as it considered the Supreme Court's decision in *Acree v. McMahan*, 276 Ga. 880, 585 S.E.2d 873(2003) to be controlling. In *Acree*, the Supreme Court rejected reverse piercing "at least to the extent that it would allow an 'outsider,' such as a third-party creditor, to pierce the veil in order to reach a corporation's assets to satisfy claims against an individual corporate insider." The plaintiff in the instant case urged the court to adopt a fraud exception that would allow reverse piercing in the case of single-shareholder corporations that are alter egos or frauds. The court summarily rejected this argument, holding that it could not permit reverse piercing in light of *Acree*.

***Carrier 411 Servs., Inc. v. Insight Tech., Inc.*, 322 Ga. App. 167, 744 S.E.2d 356, (2013) – Plaintiff's traverse of corporate garnishee's answer regarding funds owed to individual judgment debtor did not constitute "reverse piercing."**

The plaintiff brought a garnishment action against a company that was owned by a limited liability corporation in which the judgment debtor held a 70% interest and a second corporation wholly owned by that LLC. The garnishee filed an answer stating that it no longer employed the judgment debtor and it did not hold any funds belonging to him. The plaintiff successfully traversed the answer, presenting evidence that after the garnishment period ended, the garnishee transferred funds from its bank account to the LLC and to another entity solely owned by the judgment debtor. The garnishee argued that the claims amounted to "reverse piercing," but the court disagreed, finding that reverse piercing is only applicable in equitable cases when there is no adequate legal remedy, and the garnishment process provided the plaintiff a legal remedy. The court also recognized that while the "cardinal rule of corporate law" is that the corporation has a separate legal existence from its officers, directors, employees and shareholders, it was bound to uphold the trial court's finding that, given the evidence of the post-garnishment funds transfer, the garnishee and judgment debtor colluded to make false statements in an attempt to defeat the garnishment action. The garnishee also sought reversal on the basis of O.C.G.A. §§ 14-2-1501 and 1502(a), arguing that the plaintiff, a foreign corporation, could not pursue its suit because it had not obtained a certificate of authority to transact business in Georgia. The Court of Appeals rejected this argument, in part because the garnishee failed to plead its argument as an affirmative defense and thus lost the ability to raise it at trial, and in part because the garnishee failed to come forward with any evidence that the plaintiff was actually transacting business in Georgia. The court noted that merely filing a lawsuit or attempting to secure a debt in Georgia does not constitute "transacting business" for purposes of O.C.G.A. § 14-2-1501.

***RMS Titanic, Inc. v. Zaller*, 2013 WL 5675523 (N.D. Ga. Oct. 17, 2013) – Court rejects attempt to apply alter ego theory in Lanham Act dispute; court also rejects "reverse piercing" for purposes of personal jurisdiction.**

The district court addressed what it considered to be an "odd application" of the alter ego theory in a case brought under the federal Lanham Act and several common law theories. The plaintiffs alleged that they are developing a "museum quality" exhibition of the RMS Titanic, and that a former employee misappropriated its intellectual property to stage his own Titanic exhibits in Singapore and China. Along with the former employee, who was an American citizen and Georgia resident, the complaint named two businesses based in Nevada and Singapore under the theory that they were alter egos of the former employee.

The defendants argued that the Lanham Act could not be applied because the alleged tortious acts occurred outside of the United States, and the facts did not support extraterritorial application. In an analysis over extraterritorial application of the Lanham Act, a relevant factor is whether the defendants are American citizens. Plaintiffs contended that the Singapore defendant could be considered an American citizen for purposes of this analysis because it was the alter ego of the Georgia resident. It argued that the Singapore defendant maintained an Atlanta office which handled its administrative functions and that the Georgia defendant was its sole shareholder, president and CEO. The court reasoned that the plaintiffs' apparent purpose was to show why the Singapore entity should be regarded as a United States corporation. The court found that this was a "misapplication of the alter-ego theory" and "illogical." It further noted that the plaintiffs had not seriously addressed the traditional grounds for applying the alter ego theory, such as disregard of the corporate form and failure to adhere to corporate formalities. Having rejected the plaintiffs' application of the alter ego theory, the court found that it lacked subject matter jurisdiction over the Lanham Act claims.

The plaintiffs also raised an alter ego theory in response to the motion of the two non-Georgia defendants to dismiss for lack of personal jurisdiction. The plaintiffs argued that because the two corporations were alter egos of the Georgia resident, the court could pierce the corporate veil and exercise personal jurisdiction over them. The court recognized this to be a reverse piercing argument. While alter ego is a recognized theory under which *parent* companies may become subject to personal jurisdiction in cases involving the conduct of their subsidiaries, the court understood the plaintiffs to be asking for the opposite: to hold the corporations subject to personal jurisdiction because the court has personal jurisdiction over the controlling shareholder. The court found no controlling Eleventh Circuit authority on reverse piercing in this context, but it found persuasive a Tenth Circuit case holding such an approach to be illogical. *See Home-Stake Prod. v. Talon Petroleum*, 907 F.2d 1012 (10th Cir. 1990). The court did not address any of the recent Georgia appellate decisions regarding reverse piercing, but it did note in a footnote that the complaint had failed to allege sufficient facts to support an alter ego theory.

***Roberts v. Wells Fargo Bank, N.A.*, 2013 WL 1233268 (S.D. Ga. March 27, 2013) – Holding company's parent/subsidiary relationship held to be insufficient basis for veil-piercing theory.**

In this case, the Southern District declined to pierce the corporate veil to allow a class action plaintiff to assert claims against the parent corporation of an insurance company accused of participating in a kickback scheme involving "force-placed" homeowners' insurance.

This case was a putative class action brought by Plaintiff Lucy Roberts ("Roberts") against Wells Fargo Bank, N.A. ("Wells Fargo"), Wells Fargo Insurance, Inc. ("WFI"), American Securities Insurance Company ("ASIC"), and Assurant, Inc. ("Assurant"), ASIC's corporate parent. Wells Fargo allegedly maintained a policy whereby if a borrower's required insurance on the mortgaged property lapses, Wells Fargo will purchase insurance, "force-place" it on the loan, and charge the borrower for the premium. Roberts claimed that Wells Fargo received refunds on the premiums and had an agreement with Assurant "'to provide force-placed insurance policies' at 'unreasonably high rates.'" Under the agreement, Assurant allegedly paid kickbacks to Wells Fargo, thus giving Wells Fargo an incentive to seek more expensive policies that would offer larger kickbacks. Roberts' insurance policy lapsed and Wells Fargo force-placed an insurance policy purchased from ASIC on Roberts' property. Roberts brought suit for breach of contract and breach of fiduciary duty against Wells Fargo, unjust enrichment against all defendants and aiding and abetting a breach of fiduciary duty against ASIC and Assurant.

Assurant argued in its motion to dismiss that Roberts did not have standing to sue it because it "is not an insurance company, does not issue insurance policies, and is not an insurer of plaintiff Lucy Roberts." Roberts argued that "because Assurant derives income from its ownership of ASIC the corporate veil between the two entities should be pierced to allow" her unjust enrichment claim to proceed. Assurant's SEC filings showed that Assurant is "a holding company and, as such, has limited direct operations of its own. [Its] assets consist primarily of the capital stock of [its] subsidiaries." Assurant has "four operating segments, each of which is comprised of many different individual corporations, one of which is ASIC." ASIC, a wholly-owned subsidiary of Assurant, did sell the insurance policies at issue in the suit. However, Assurant did not sell insurance policies and was "a mere holding company, a corporation designed only to own other corporations and profit from that ownership."

Roberts argued that her unjust enrichment claim against Assurant should survive the motion to dismiss because Assurant profited from the scheme alleged in the suit. The court rejected this argument because there was no reason to pierce the corporate veil. Although it was true that Assurant derived some profit from its ownership of ASIC, which allegedly paid kickbacks to Wells Fargo in exchange for premiums for force-placed insurance, the court found that there was no justification for piercing the corporate veil.

The court noted that the "parent/subsidiary relationship does not in and of itself establish the subsidiary as either the alter ego of the parent or as the parent's actual or apparent agent." 2013 WL 1233268 at *7. (*quoting Matson v. Noble Inv. Grp.*, 288 Ga. App. 650, 659, 655 S.E.2d 275 (2007)). The court distinguished this case from *Williams v. Wells Fargo Bank, N.A.*, 2011 WL 4368980 (S.D. Fla. Sept. 19, 2011), where a defendant received part of the force-placed insurance premium paid to its subsidiary. Here, Assurant "profited from ownership of ASIC, not from payment of premiums by borrowers with force-placed insurance." *Id.* Additionally, the court noted that although Assurant "likely also exercises the measure of control [over ASIC] commensurate with that of a majority shareholder[,]" that was not sufficient to show "the 'total domination' necessary to support liability under the alter ego theory." *Id.* (*citing Kissun v. Humana, Inc.*, 267 Ga. 419, 421, 479 S.E.2d 751 (1997)). Thus, the plaintiff failed to allege facts showing that Assurant played any role in the scheme or that the veil between Assurant and ASIC could be pierced under the alter ego or agency theory and the court dismissed the claims against Assurant.

***Sullivan's Administrative Managers II, LLC v. Guarantee Insurance Co.,* 2013 WL 4511319 (S.D. Ga. Aug. 23, 2013) – Evidence failed to support plaintiff's parent-subsidiary veil-piercing and agency theories.**

In this case, the district court rejected a plaintiff's contentions that it could hold an insurance company's parent liable for losses allegedly caused by its subsidiary under either a veil-piercing theory or an agency theory. The court held that a plaintiff cannot pierce the veil merely by showing that the parent performed certain administrative functions for the subsidiary, as this fact does not create an inference that the corporate form has been abused. The court further found that there was no evidence that the parent held out the subsidiary as its agent or that the plaintiff relied on any representation to that effect.

***Cancel v. Sewell*, 321 Ga. App. 523, 740 S.E.2d 870 (2013) – Newly-formed successor to professional association held not to be liable to members of former association under alter ego theory.**

Plaintiffs were four anesthesiologists who formerly practiced medicine under their group, Central Georgia Anesthesia Services, P.C. ("CGAS"), comprised of 14 anesthesiologists, all of whom were shareholders, members of the board and employees of the company. CGAS had an exclusive contract with The Medical Center of Central Georgia, Inc. (the "Medical Center") to provide anesthesiology services to the Medical Center's hospital and patients. Certain of the anesthesiologists who later became plaintiffs complained about perceived billing problems and potential fraud, and there was interpersonal discord among some members of the group. Eventually, the President/CEO of the Medical Center sent a letter to Dr. Cancel, CEO of CGAS (and a plaintiff) notifying him that due to the allegations regarding behavioral issues and fraudulent billing practices, the Medical Center intended to terminate its contract with CGAS. It also announced the Medical Center's intent to restructure its anesthesiology department, pursuant to which it would begin a recruitment process for staff anesthesiology positions, for which the members of CGAS were welcome to apply. At a CGAS shareholders and directors meeting days later, a proposal was unanimously passed that the contract would terminate. The four plaintiffs submitted their applications to join the Medical Center, but none received an offer to join. Eight other CGAS physicians did receive offers.

A few months later, Nexus Medical Group, LLC ("Nexus") was formed, consisting of some former CGAS members along with others who had not been members, and it entered into an exclusive contract with the Medical Center. The plaintiffs sued, alleging that they had been singled out for exclusion and expulsion from providing services to the Medical Center because they had raised concerns about fraudulent billing practices. They also alleged that the former CGAS physicians who now were members of Nexus breached fiduciary duties as directors and officers of CGAS by engaging in fraud and misrepresentations. They further alleged that Nexus was the alter ego of The Medical Center as well as the individual defendants, and that it was established to further the fraudulent conspiratorial acts of the defendants in depriving the plaintiffs of their contractual rights. Nexus filed a motion for summary judgment arguing that it could not be liable because it was not in existence until months after the plaintiffs' employment with CGAS terminated. The court declined to go along with this argument, citing the plaintiffs' allegation that the eventual formation of Nexus was a component of the other defendants' alleged scheme to defraud them out of their contractual right. The court also pointed to cases standing for the proposition that the "date of a corporate formation may not end, as a matter of law, all inquiry as to the corporation's liability." However, because the plaintiffs failed to provide any basis for disregarding the separateness of Nexus and CGAS, the Court of Appeals found that the trial court erred by denying Nexus's motion for summary judgment.

***In re Palisades at West Paces Imaging Center, LLC*, 501 B.R. 896 (Bankr. N.D. Ga. 2013) – Bankruptcy court rejects alter ego claims by trustee for debtor-LLC against the principals of LLC's majority member, but finds liability as to recipients of alleged fraudulent transfers.**

A Chapter 7 trustee for the owner and operator of a limited liability company operating an MRI imaging facility brought a complaint to avoid certain fraudulent transfers allegedly made to entities owned by two of its principals (including an LLC owned by the two principals and their spouses which held a 66% interest in the debtor). Finding the debtor insolvent at the time of the transfers, the court avoided numerous transfers under the Georgia Uniform Fraudulent Transfer Act. The trustee also pursued alter ego claims against the two principals, alleging that they were alter egos of the debtor and therefore liable for the full amount of the claims filed in the case, and also that they and their spouses were alter egos of the two family partnerships that owned the aforementioned LLC.

In each instance, the court weighed evidence that the entities in question disregarded corporate formalities in transferring funds. With regard to the debtor, the court held that the evidence was insufficient to sustain an alter ego theory. While the debtor had unquestionably moved funds to entities owned by the two principals, the court found that the principals did not disregard the corporate entity in the process, and did not use the funds directly to pay personal expenses. It was also significant to the court that the two principals in question were not the only owners.

With regard to the two family owned partnerships, the court reached a different result as to one partnership. In that partnership, the court cited undisputed evidence that funds were regularly transferred in order to pay personal expenses and that funds were used to pay for a vacation home, a motorcycle and a residence. This was sufficient evidence to hold the husband and wife individually liable as alter egos for that partnership's liability to the trustee. In the second case, however, while the court found evidence of "some commingling" in the transfer of funds to the husband, other evidence showed that the husband was the only working spouse, and there was no evidence in the record as to how the transferred funds were ultimately used. Here, the court declined to hold that the second partnership was the alter ego of the husband and wife.

3. Jurisdictional Cases

***Gregory v. Preferred Financial Solutions*, 2013 WL 5725991 (M.D. Ga. Oct. 21, 2013) – Officers of corporation held subject to personal jurisdiction on the basis of their personal participation in alleged wrongdoing.**

In this putative class action brought against four officers of an Indiana-based debt adjustment services company, the district court denied the defendants' motion to dismiss for lack of personal jurisdiction. The plaintiffs alleged that the company, Preferred Financial Solutions ("Preferred"), violated the Georgia Debt Adjustment Act by charging fees in excess of the statutory cap. The defendants, three senior level officers and a sales manager, contended that they never spoke to the plaintiffs or any other customers in Georgia, did not personally attempt to settle the plaintiffs' debts, and did not physically transact any Preferred business in Georgia.

They did not deny that Preferred conducted business in Georgia and did not address their own level of participation in the activities that were alleged to form the basis for jurisdiction, however.

The court began its analysis by noting that the Georgia Supreme Court had rejected the "fiduciary shield" doctrine in *Amerireach.com, LLC v. Walker*, 290 Ga. 261, 719 S.E.2d 489 (2011). The fiduciary shield doctrine prohibits a court from exercising personal jurisdiction over a non-resident based solely on that person's acts as a corporate officer. As the court noted, however, the question of personal jurisdiction involving a corporate officer still depends on the individual's contacts with the forum as opposed to the corporation's contacts. Here, the court concluded that the plaintiff had alleged and shown that the four movants were the primary participants in the alleged scheme to provide debt adjustment services in Georgia that violated the Georgia Debt Adjustment Act. It cited allegations and evidence that the movants "initiated and implemented the debt adjustment program," and that each movant was responsible for and exercised control over "significant aspects" of the program. For instance, two of the movants were alleged to have control over Preferred's website and advertising, which the plaintiffs alleged were specifically targeted to Georgia residents. While the court made no ruling on the merits, it noted the general rule that a corporate officer who personally participates in wrongful acts may be individually liable to persons injured by those acts, without regard to principles of alter ego.

In the same ruling, the court granted a motion for more definite statement brought by other defendants, finding that the plaintiff's allegations of piercing the corporate veil, alter ego and joint venture were insufficient to apprise the moving defendants as to which defendant allegedly committed which act.

***T. V. D. B. Sarl v. KAPLA USA, LP*, 2013 WL 1898158 (S.D. Ga. May 7, 2013) – District court grants jurisdictional discovery in connection with pending motion to dismiss.**

In this case, an international business dispute, the court addressed several discovery disputes, including the plaintiffs' motion to compel jurisdictional discovery. Defendant Marjorie Chayette created KAPLA USA as a limited partnership registered in Delaware to distribute wooden toy blocks from a manufacturer in Europe. She took two orders, failed to make full payment, and then created a competing line of toy blocks called CitiBlocs, LLC. The plaintiffs alleged that KAPLA USA had its principal place of business in Savannah, Georgia, where it received its two orders. Chayette claimed the Georgia court did not have personal jurisdiction over her because she had resided in Paris, France for the past thirty years, never met the plaintiffs in Georgia, never owned any property in the state, and only traveled to the state a "handful" of times. In support of her motion to dismiss, Chayette submitted "a declaration stating that she has maintained a proper separation with Citiblocks, KAPLA USA, and KAPLA USA, GP, so there is no reason to pierce the corporate veil in order to subject her to personal jurisdiction." *Sarl*, 2013 WL 1898158, at *1. The plaintiffs claimed that Chayette's behavior allowed for veil-piercing, and that she was individually subject to personal jurisdiction.

The plaintiffs asked the court to deny Chayette's motion to dismiss, or, in the alternative, to allow them to conduct jurisdictional discovery. The court noted that the burden was on the plaintiffs to show that the court had jurisdiction, and that as a general rule, the plaintiffs should be allowed to discover facts supporting jurisdiction. *Id.* at *2 (*citing Maid-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984)). Although there was evidence that the plaintiffs had not been diligent in seeking jurisdictional discovery, the court decided not to exercise its discretion to deny the request and allowed them to pursue the discovery.

A subsequent decision on the merits is discussed above at p. 39.

***Springer v. Bank of America, N.A.*, 2013 WL 2297053 (N.D. Ga. May 24, 2013) – Service of process on bank's law firm held not to constitute valid service on bank in foreclosure action.**

In this case, the district court addressed the rules governing service of a corporation in dismissing a wrongful foreclosure complaint against Bank of America. The plaintiff had attempted to serve Bank of America by sending a copy of the complaint and summons to the law firm that handled the initial foreclosure of the plaintiff's property. The court granted the motion to dismiss due to insufficient service of process. The court reviewed the two methods for service of process on a corporate defendant that may satisfy Fed. R. Civ. P. 4: (a) service consistent with state law of the forum state, in this case O.C.G.A. § 9-11-4(e)(1), which requires delivery of the summons and complaint "to the president or other officer of the corporation, secretary, cashier, managing agent, or other agent thereof…" and (b) service consistent with Fed. R. Civ. P. 4(h)(1)(B), which requires delivery to be made to "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process." Finding that the plaintiff had failed to perfect service under either method, and that the plaintiff had not attempted to cure the insufficient service of process as permitted under Fed. R. Civ. P. 4, the court dismissed the complaint.

***Gardner v. TBO Capital, LLC*, 2013 WL 6271897 (N.D. Ga. Dec. 4, 2013) – Service of corporation by serving the Georgia Secretary of State held ineffective under O.C.G.A § 9-11-4 for purposes of deciding timeliness of removal petition.**

In *Gardner v. TBO Capital, LLC*, the Northern District of Georgia examined the rules for service of process on a Georgia corporation in deciding whether a petition for removal was timely made. Originally, plaintiffs filed their wrongful foreclosure case in DeKalb County Superior Court. In their amended complaint, plaintiffs added claims pursuant to the Fair Debt Collection Practices Act as well as state law. Plaintiffs attempted to serve certain defendants by delivering copies of the complaint and summons to the Georgia Secretary of State pursuant to O.C.G.A. § 9-11-4(e)(1)'s provision for substitute service. More than thirty days after plaintiffs delivered the documents to the Secretary of State, a notice of removal was filed by certain defendants who were not personally served. Plaintiffs challenged the removal as untimely since 28 U.S.C. § 1446(b)(1) provides a defendant thirty days to file its notice of removal after service. The court noted that Federal Rule of Civil Procedure 4 incorporates state law in determining when service is effective. The court then found that plaintiffs failed to comply with O.C.G.A. § 9-11-4(e)(1) because they did not certify to the Secretary of State that they attempted service, and they did not assert that they sent copies of the complaint and summons by registered mail to the last known addresses of those defendants. The court concluded that service was thus ineffective as to these defendants, meaning that their 30-day period for removal had yet to begin running.

***Seeney v. Nationstar Mortgage, LLC*, 2013 WL 6499359 (N.D. Ga. Dec. 11, 2013) – Service on LLC by registered mail held ineffective under O.C.G.A. § 9-11-4 and the Georgia LLC Code.**

In *Seeney v. Nationstar Mortgage, LLC*, the Northern District of Georgia granted a defendant's motion to set aside default, holding that service on the defendant LLC was ineffective under O.C.G.A. § 9-11-4 as incorporated into Federal Rule of Civil Procedure 4. A *pro se* plaintiff alleged violations of the Real Estate Settlement Procedures Act and the Truth in Lending Act. The *pro se* plaintiff attested that he served the defendant with the complaint himself. Looking to O.C.G.A. § 9-11-4(e)(1)(A) and state court decisions involving LLCs, the court determined that LLCs may be served in the same manner as corporations: by delivering a copy of the summons and the complaint to its president, other officer, managing agent or registered agent. The plaintiff's proof of service affidavit stated that "a registered mail receipt requested was sent" to the LLC's purported address, but the affidavit did not specify to whose attention it was sent. Moreover, the plaintiff acknowledged that the LLC had a registered agent in Georgia but the record did not show that the plaintiff made any attempt to serve that agent. The court also noted that the process server's affidavit was signed by the plaintiff himself, which would run afoul of the rule under both federal and Georgia law that service cannot be effected by a party.

4. Evidence

***Levine v. Suntrust Robinson Humphrey,* 321 Ga. App. 268, 740 S.E.2d 672 (2013) – Expert testimony on value of company held admissible in professional liability suit against financial advisor.**

A Chapter 11 Bankruptcy Trustee brought suit against the debtor's financial advisor, alleging that the advisor negligently or intentionally caused damages to the debtor's estate through negligence, breach of contract, negligent misrepresentation, fraud, conspiracy, and breach of fiduciary duty. The Fulton County Superior Court adopted the special master's report and recommendations in part excluding testimony of the trustee's expert witness regarding the value of the debtor's business over the course of time.

The Special Master determined that the expert was qualified to give an opinion on the value of the company, but excluded the expert's testimony because his valuation approach "was not testable" and because he "had no prior experience using the procedure he used in this case." *Levine v. Suntrust Robinson Humphrey*, 321 Ga. App. at 275, 740 S.E.2d at 680. The Court of Appeals noted that the trial court has broad discretion to admit or exclude expert testimony, and that the standard for admissibility is governed by O.C.G.A. § 24-9-67.1(b), which provides that an expert witness can give opinion testimony "if: (1) the testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case."

The Court of Appeals held that the trial court had abused its discretion by excluding the expert witness' testimony in this case. The expert had testified that "he used a standard valuation technique for assessing the true value of the business at various dates around the transactions." The expert's valuations varied from the valuations "based on a calculation using the relevant market capitalization for each time period," but the expert explained the analysis that he and other valuation specialists used to value a business enterprise where public information was not available. The Court of Appeals noted that "[t]his is precisely the type of opinion that is susceptible to testing during cross-examination because the information" the expert used was available to the jury and the defendant. *Id.*

The Court of Appeals also held that exclusion of the expert's testimony was an abuse of discretion because the expert testimony was intended to give an opinion of the company's value at certain times, and these "opinions are relevant *for the jury* to determine, in conjunction with other testimony and evidence, the amount of damages that Suntrust's alleged actions may have caused, which necessarily requires consideration of opinion evidence as to the value of the business." *Id.* (emphasis in original). Thus, the court reversed the portion of the trial court's order excluding the expert witness' testimony.

5. Director and Officer Liability Insurance Decisions

This year has seen a large number of disputes involving coverage under directors' and officers' ("D&O") liability insurance policies. All of the decisions discussed below deal with policies issued to banks; all but one involving insurance coverage for claims by the FDIC against officers and/or directors of failed banks. Among the issues that have received close attention are the policies' exclusionary clauses and the sufficiency of notices given by the insureds.

***Progressive Casualty Ins. Co. v. FDIC*, 926 F. Supp. 2d 1337 (N.D. Ga. 2013) (Vining, J.) – Insured-vs.-insured provision held to be ambiguous when applied to suit brought by FDIC as receiver for failed bank.**

In this declaratory judgment action decided two months before *Davis*, the district court held, among other things, that the policy's "insured vs. insured" exclusion was ambiguous as to whether it applied to claims by the FDIC against the bank's former directors and officers.

The bank in question, Omni National Bank, was closed on March 27, 2009, and the FDIC was appointed as its receiver. The FDIC subsequently asserted claims against certain of Omni's former directors, officers, and employees and eventually filed a lawsuit against them. Progressive, the insurer, filed a declaratory judgment action seeking a declaration that the policy did not cover the asserted claims for numerous reasons. Progressive moved for summary judgment on its claims.

The policy purported to exclude losses in connection with any claim "by, on behalf of, or at the behest of the Company." The district court agreed with the FDIC's position that this language was ambiguous when applied to a suit brought by the FDIC as receiver for the bank. The court reasoned that the ambiguity stemmed from the fact that the FDIC has "multiple roles" when it acts as the receiver of a failed bank. These roles, which are defined by FIRREA, distinguish the FDIC from other parties who might "step into the shoes" of a failed bank and thus create an ambiguity as to whether the FDIC's claims are truly "by" or "on behalf of" the bank.

The district court also held that the policy's "loan loss carve-out" was ambiguous because it did not clearly exempt claims of tortious conduct such as the negligence and gross negligence claims asserted by the FDIC. Finally, the court held that summary judgment in favor of Progressive was appropriate as to certain claims based on alleged conduct occurring outside of the relevant policy period.

***Davis v. BancInsure, Inc.,* 2013 WL 1223696 (N.D. Ga. Mar. 20, 2013) (Batten, J.) – Claims by FDIC against former directors and officers of failed bank held not covered by insurance policy due to failure to comply with notice requirements, and insured-vs.-insured exclusion.**

This insurance coverage action involved another directors' and officers' ("D&O") policy issued to a community bank that was later closed and placed under FDIC receivership. The bank's former directors and officers, who were the insureds under the policy, sought a ruling that they had sufficiently placed the carrier on notice of potential D&O liability claims by the FDIC that had not yet been filed at the time the policy period expired. The district court issued two significant rulings, both in favor of the carrier. First, it held that the insureds' attempts to notify the carrier of circumstances that could give rise to a claim failed to conform to the policy's notice requirements, and therefore were ineffective. Second, it held that the "insured vs. insured" exclusion applied to claims brought by the FDIC as receiver for the Bank following its closure, since the operative policy language specifically included "receivers" within the scope of the exclusion. In a separate decision (see below), the court denied the FDIC's motion to intervene as a plaintiff.

Southern Community Bank ("SCB") held a D&O policy with a policy period running from March 1, 2007 to March 1, 2010. During the policy period, on September 26, 2008, the FDIC issued a cease and desist order to SCB and the plaintiffs to the instant action, citing numerous alleged unsafe and unsound banking practices and violations of law and/or banking regulations. SCB's president and CEO subsequently sent two letters in May and June, 2009 to the carrier, BancInsure. The first letter stated that "there may be Claims made" against the insureds and others and specified that he anticipated such claims because "investors, regulators, and creditors could be disappointed with the financial performance of [SCB]," specifically citing the potential for closure. The second letter included a list of potential allegations that might be made against the plaintiffs and a list of twelve loans from which alleged losses might arise. On June 19, 2009, SCB was closed and the FDIC was appointed as its receiver. Two-and-a-half years later, in March, 2012, the FDIC sent subpoenas *duces tecum* to the plaintiffs. The plaintiffs notified BancInsure of the subpoenas and requested coverage under the policy. BancInsure denied coverage, and following a further exchange of correspondence in which the parties argued their respective positions, the plaintiffs filed a declaratory judgment action. The parties stipulated to a set of facts and filed cross-motions for summary judgment.

The district court agreed with BancInsure as to the two critical issues. First, it held that the plaintiffs' 2009 correspondence with BancInsure did not satisfy the policy's requirements for a notice of circumstances that may give rise to a later claim. Had it done so, any subsequent claim arising from those circumstances would have been treated as a claim made during the policy period. The policy required the plaintiffs to include in their notice (1) their reasons for anticipating a claim, (2) the nature and date of the alleged "Wrongful Acts," (3) the alleged injury, (4) the names of the potential claimants and any insured person involved in the alleged Wrongful Acts, and (5) the manner in which the plaintiffs or SCB first became aware of the potential claim. The court found that the plaintiffs' 2009 correspondence lacked the required specificity. In particular, the court viewed the initial letter as stating nothing more than a "general sentiment" that litigation could be filed, and noted that there was no specific mention of the FDIC. The court appeared to view the second letter more favorably, but still found that even that letter was insufficient because it failed to identify specific wrongful acts related to the issuance of the twelve specific loans. The court was unmoved by the fact that the plaintiffs had also forwarded the FDIC's cease and desist order to BancInsure, stating that "without a threat from the FDIC [in its receivership capacity] that it intended to hold Plaintiffs liable for such actions, Plaintiffs' attaching the cease and desist order did not provide notice of specific wrongful acts." Interestingly, the court appeared to place considerable significance on the fact that the FDIC had not, by the time of the 2009 correspondence, alleged any injury. In the court's view, the FDIC made no such allegation until May, 2012, long after the Bank was closed, when the FDIC notified the plaintiffs that it had been authorized to file a lawsuit against them. Finally, the court believed that the notices were also deficient in that they failed to link specific potential defendants to specific alleged wrongful acts, and failed to specifically identify the possibility of a lawsuit by the FDIC.

Second, the court held that the insured vs. insured exclusion applied. The policy's list of exclusions (Section V.11) included claims brought on behalf of "any other Insured Person, the Company, or any successor, trustee, assignee or *receiver*" of the Company." (emphasis added). The court found that the explicit reference to a "receiver" was controlling. The plaintiffs argued that the policy's overall intent was not to exclude potential claims by the FDIC as receiver, citing the fact that the policy's regulatory exclusion (Section V.12), which excluded claims brought by any regulatory agency or "deposit insurance organizations," was deleted by amendment. In the court's view, this deletion was of no significance because it left Section V.11 intact.

Finally, the court held that the plaintiffs were not entitled to an advance of their litigation expenses, again citing the fact that the plaintiffs had not satisfied the policy's notice requirements.

***Davis v. BancInsure, Inc.*, 2013 WL 1226491 (N.D. Ga. Mar. 18, 2013) (Batten, J.) (Order on FDIC's Motion to Intervene) – FDIC's motion to intervene in insurance coverage dispute denied; FDIC's interest in policy proceeds held not sufficient to establish intervention of right.**

In the D&O insurance coverage litigation involving Southern Community Bank (see above), the FDIC, whose allegations against SCB's directors and officers set in motion the coverage dispute, sought to intervene as a party plaintiff, supporting the plaintiffs' position that coverage was available under the BancInsure D&O policy. The district court denied the motion, holding that (1) the FDIC had failed to show that it had a sufficient interest in the subject matter of the action, and therefore was not entitled to intervention of right, and (2) the coverage dispute and the FDIC's potential claims against the plaintiffs did not involve common questions of law and fact, rendering permissive intervention inappropriate.

The FDIC argued that it had a direct and legally protectable interest in the coverage dispute as a third-party claimant. The district court disagreed, citing Eleventh Circuit authority rejecting a similar argument. *See Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308 (11th Cir. 2005). The court found the FDIC's attempts to distinguish *Mt. Hawley* to be unavailing. The FDIC argued that its statutory status as the successor in interest to SCB distinguished its situation from that of the ordinary third-party claimant, but the court disagreed that this presented any reason to depart from *Mt. Hawley*. The FDIC also argued that it was an intended third-party beneficiary of the policy in question, but the court disagreed with this as well, holding that the law generally does not treat third-party claimants as intended third-party beneficiaries under insurance policies, and none of the recognized exceptions to this rule applied here. Specifically, the FDIC did not have an unsatisfied judgment against an insured, there was no relevant legislative directive, and the FDIC was not specifically identified in the policy as a beneficiary. Accordingly, the FDIC was not permitted to intervene of right.

Turning to the issue of permissive intervention, which is discretionary with the court, the district court found that there was not sufficient overlap between the issues presented in the coverage dispute and the FDIC's potential claims against the plaintiffs. Noting that the FDIC had asserted no claim against the plaintiffs, the court reasoned that the FDIC's attempt to intervene amounted to nothing more than an attempt to piggyback off the plaintiffs' coverage claims. The court also observed that the coverage issues in the plaintiffs' suit diverged significantly from the liability issues that would be at issue in an eventual suit by the FDIC against the plaintiffs.

St. Paul Mercury Ins. Co. v. Miller, **___ F. Supp. 2d ___, 2013 WL 4482520 (N.D. Ga. Aug. 19, 2013) (Story, J.) – Insured-vs.-insured exclusion applied to claims by FDIC as receiver for failed bank; loan loss carve-back considered ambiguous.**

In this insurance coverage dispute arising from the FDIC's lawsuit against two former officers of Community Bank & Trust, Cornelia, Georgia (the "Bank"),[7] the district court held that an "insured vs. insured" exclusion in the Bank's director and officer liability insurance policy applied to the FDIC's claims, and that coverage under the policy was therefore barred.

The underlying suit is one of several brought by the FDIC as receiver for a recently failed Georgia bank. The complaint generally alleged that the defendants, the Bank's CEO and a loan officer, caused the Bank losses by improperly approving certain loans. The insurer agreed to advance defense costs under a reservation of rights and filed the instant coverage suit. The insurer raised two issues: that the claimed losses fell under an exclusion for unrecovered loans, and that the insured-vs.-insured exclusion applied. The district court agreed with the insurer's second argument and applied the insured-vs.-insured exclusion.

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[7] A decision in the underlying suit, *FDIC v. Miller*, Case No. 12-cv-00042-WCO (N.D. Ga. Dec. 26, 2012) (O'Kelley, J.), is summarized in our 2012 survey.

The relevant policy provided that the insurer "shall not be liable for Loss on account of any Claim made against any Insured…brought or maintained by or on behalf of any Insured or Company in any capacity….," subject to exceptions that the court found to be inapplicable. The court concluded that this language was not ambiguous and that the FDIC had stepped into the shoes of the Bank, meaning that any exclusion that would have applied to the Bank "applies equally to the FDIC." The court further noted that derivative claims were carved out from the exception and reasoned that "[a]side from a derivative action, the only party that could bring an action on a federally insured bank's behalf is the FDIC, demonstrating that the exclusion speaks specifically to this circumstance." The court distinguished several decisions from other federal courts outside Georgia that have refused to apply an insured-vs.-insured exclusion to claims made by the FDIC as receiver, stating that the policy language in those cases did not include the phrase "on behalf of," and reasoning that each case should turn on the relevant policy language rather than any bright line rule. Interestingly, however, the district court did not address *Progressive v. FDIC*, see page 58, above, which was decided several months earlier and which involved very similar policy language. While the policies are not identical, Progressive and St. Paul arguably are in conflict with one another.

In dicta, the district court expressed skepticism towards the insurer's initial argument, finding that the policy language excluding from the definition of loss "any unrepaid, unrecoverable or outstanding loan, lease or extension of credit to any…Borrower" was ambiguous given that the FDIC was suing in tort and not to recover under a loan agreement.

The decision is currently on appeal to the Eleventh Circuit.

Bank of Camilla v. St. Paul Mercury Ins. Co., **939 F. Supp. 2d 1299 (M.D. Ga. 2013) (Sands, J.) – RICO claims arising from bank's extensions of credit held to involve Lending Acts subject to exclusion in insurance policy.**

In this insurance coverage action, the district court held that a group of bondholders' common law fraud and RICO claims that implicated a bank as a participant in an alleged Ponzi scheme fell within a prior acts exclusion. The critical issue, decided in the insurer's favor, was whether the acts alleged constituted Lending Acts as defined in the policy.

The plaintiffs to the underlying suit held bonds issued by Georgia Finance of Grady County, Inc. ("GFGC"), which was a customer of Bank of Camilla (the "Bank"). Their initial complaint in 2009 alleged that the bonds were not registered and GFGC was not authorized to sell them. It further alleged that the Bank knew of GFGC's illegal activities but nonetheless extended credit to GFGC and obtained promissory notes and a security interest in the bulk of GFGC's assets. The complaint went on to allege that the Bank disposed of the collateral to a corporation with ties to one of its insiders and did not receive reasonably equivalent value in exchange. The 2009 complaint asserted fraudulent transfer claims against the Bank under the Georgia Uniform Fraudulent Transfer Act. The Bank's then-existing insurance policy excluded coverage for any "Lending Act." In 2010, the Bank was issued a new insurance policy which covered Lending Acts, but contained an exclusion for "any Claim made against any Insured based upon, arising out of, or attributable to any Lending Act…taking place prior to [January 19, 2010]." On October 27, 2010, the plaintiffs to the underlying lawsuit filed an "Amended and Recast Petition" based on significantly altered factual allegations and legal theories. The plaintiffs now alleged that GFGC was a Ponzi scheme, and that the Bank knew of and was part of the Ponzi scheme. The plaintiffs further alleged that the Bank repeatedly misrepresented to the plaintiffs the true financial condition of GFGC. The 2010 complaint alleged a common law fraud and RICO claim against the Bank and GFGC.

As a preliminary matter, the district court held that the insurer did not waive defenses relating to the prior acts exclusion by failing to raise the defenses in its correspondence denying coverage. The court distinguished the Georgia Supreme Court's recent decision in *Hoover v. Maxum Ind. Co.*, 291 Ga. 402, 730 S.E.2d 413 (2012), finding that *Hoover* did not apply because the policy at issue did not include a duty to defend. Turning to the merits of the coverage dispute, the court was called on to determine whether the 2010 complaint alleged a Lending Act under the policy. The court was un-persuaded by the Bank's attempt to narrowly construe "Lending Act" by arguing that its use of the phrases "with respect to," "in connection with" and "relating to" meant that the plaintiff had to allege independent wrongful conduct separate from the making of the loans. In the court's view, the plain meaning of those phrases suggested the opposite - that the policy meant to define Lending Act broadly by including not just the act of lending but also the various enumerated acts that are alleged to have related to the lending act. As a result, allegations that the Bank misrepresented GFGC's financial condition to its bondholders by continuing to advance credit on its overdrawn account were allegations of Lending Acts. Because the acts in question occurred before January 19, 2010, the prior acts exclusion applied.

***OneBeacon Midwest Ins. Co. v. FDIC,* 2013 WL 1337193 (N.D. Ga. Mar. 28, 2013) (Story, J.) – Insurer's coverage suit against FDIC held barred by federal statute; court holds that suit "would interfere" with FDIC's exercise of its powers and duties.**

In this case, the district court held that an insurer's declaratory judgment action against the FDIC as receiver for a failed bank, seeking a declaration that no coverage existed under a D&O policy issued to the bank prior to its failure, was barred by the anti-injunction provision of FIRREA, 12 U.S.C. § 1821(j).

The action involved a D&O policy issued to Habersham Bancorp, which subsequently was closed by the FDIC. The FDIC was appointed as Habersham's receiver, and thereafter sent a claim to its former directors and officers seeking compensation for losses stemming from alleged breaches of duties owed to the bank. OneBeacon, the insurer, filed a declaratory judgment action asserting that coverage was barred for a variety of reasons, including failure to give timely notice under the policy and the application of numerous exclusions and carve-outs, including an insured-vs.-insured exclusion. The FDIC moved to dismiss the complaint under F. R. Civ. P. 12(b)(1) and 12(b)(6), citing lack of subject matter jurisdiction due to FIRREA's anti-injunction provision.

The court agreed that the anti-injunction provision applied. Citing a 2010 decision from the Northern District of Illinois, *FDIC as receiver for Wheatland Bank v. OneBeacon Midwest Insurance Co.*, 883 F. Supp. 2d 754 (N.D. Ill. 2010) ("Wheatland"), the district court held that a preemptive lawsuit seeking to determine rights under a D&O policy was barred under the circumstances because it interfered with the FDIC's ability to perform its duties, namely in this case, the FDIC's ability to collect all obligations and money due the institution. The *Wheatland* case involved the same insurer (OneBeacon) and the same general set of circumstances. OneBeacon argued that *Wheatland* was inapplicable because Georgia law, unlike Illinois law, does not permit a tort claimant to bring an action to determine coverage prior to obtaining a judgment against the insured. The court found this distinction to be "inapposite" to the question of whether exercising jurisdiction would interfere with the FDIC's powers and duties. The court also observed that FIRREA provides for an administrative process through which OneBeacon could seek relief.

6. Nondischargeability of Breach of Fiduciary Duty Claims

***In re Allen*, 2013 WL 6199304 (Bankr. N.D. Ga. Nov. 25, 2013) – Fiduciary duties owed by members of partnership venture or LLC held not to constitute "express or technical trust" for purposes of nondischargeability under 11 U.S.C. § 523(a)(4).**

A group of investors in an alleged partnership venture brought a complaint seeking a denial of discharge against the debtors, members of the venture who were accused of having misappropriated funds belonging to the venture. The alleged partnership, which involved constructing and developing homes, was formed by an oral agreement between the plaintiffs and the debtor. The plaintiffs asserted a number of grounds for denial of discharge, including "fraud or defalcation while acting in a fiduciary capacity" under 11 U.S.C. § 523(a)(4).

At issue was whether the debtors acted as a fiduciary under an express or technical trust, as required by established 11th Circuit authority for nondischargeability of fiduciaries under Section 523(a)(4). The court declined to hold that fiduciary duties created by statute could, without more, satisfy Section 523(a)(4): "[A]lthough certain Georgia statutes impose a fiduciary duty on a general partner…they do not create an express or technical trust as required by Section 523(a)(4)." The court explained that Section 523(a)(4) is intended to be applied narrowly with regard to who may qualify as a fiduciary, because of the federal bankruptcy policy favoring discharge. The court was careful not to cast any doubt upon whether O.C.G.A. § 14-8-21(a) and § 23-2-58 may impose fiduciary duties; rather, it found that the Bankruptcy Code requires further evidence of an express trust. Finding no such evidence before it, the court ruled in favor of the debtors.

***In re May*, 2013 WL 441440 (Bankr. S.D. Ga. Feb. 5, 2013) – Discharge may be denied to corporate officer for personal participation in wrongful conduct on behalf of corporation.**

In *In re May*, the Bankruptcy Court for the Southern District of Georgia overruled and struck a debtor's affirmative defense of failure to state a claim in an adversary proceeding. The case involved payments made under contracts for construction services. Specifically, the plaintiff, Pioneer Construction, Inc., a general contractor, alleged that the debtor Jeffrey May, CEO and CFO of one of the plaintiff's subcontractors, May Specialty Fabricators, Inc. ("MSF") directed MSF to withhold payments to a sub-subcontractor in order to convert the funds for his own use. As a result, the general contractor was sued by the sub-subcontractor for payment and had a judgment entered against it. Invoking the principle that officers who directly participate in corporate conduct that causes injury can be held personally liable, the court found that the plaintiff's complaint stated a claim under 11 U.S.C. § 523(a)(6) which authorizes denial of a bankruptcy discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity."

***In re Edelson*, 2013 WL 5145714 (Bankr. N.D. Ga. Jul. 3, 2013) – Court rejects nondischargeability complaint against LLC member who locked out other member because the debtor did not conceal his actions and lacked fraudulent intent.**

The bankruptcy court issued findings of fact and law recommending that the relief sought in a complaint to determine nondischargeability under 11 U.S.C. § 523(a)(4) be denied. The case involved a dispute between the two members of W.R. Agency, LLC ("WRA"), an office equipment dealer. The bankruptcy debtor, Edelson, was the sole owner of one of the members, while the plaintiff, Silver, was the other member. Silver accused Edelson of locking him out of the business by, among other things, opening a new bank account to which Silver had no access, forming a new dealership and operating it at the same location, and effectively terminating the business of WRA. Silver, acting on behalf of WRA, sued the member owned by Edelson as well as Edelson individually in the DeKalb County Superior Court, obtaining a judgment for breach of fiduciary duty. Silver, again acting on behalf of WRA, filed a complaint in Edelson's bankruptcy seeking to have the judgment excepted from discharge under 11 U.S.C. § 523(a)(4), which provides that debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" are not dischargeable. Silver alleged that Edelson's conduct constituted embezzlement. He also sought to hold a newly-formed business of Edelson's, HE Office Solutions ("HE"), liable under principles of successor liability and alter ego.

In recommending that the embezzlement claim be denied, the bankruptcy court conducted an extensive review of the record, which indicated that while Edelson indeed took sole control of WRA and its property and locked Silver out of the business, there was no evidence that he concealed his actions from Silver. As a result, the court found that Edelson lacked the requisite fraudulent intent for exempting a debt from discharge. The decision illustrates that conduct constituting a breach of fiduciary duty or a breach of an LLC operating agreement will not necessarily constitute the sort of fraudulent conduct required under § 523(a)(4).

With regard to the successor liability and alter ego claims, the record indicated that HE was formed while Edelson's bankruptcy petition was pending and that its owner was Edelson's wife, since Edelson did not want the business in his name with his bankruptcy petition pending. Edelson eventually became HE's manager. The record showed that HE engaged in the same office furniture business as Edelson's previous ventures, but at a different location and with different employees other than Edelson himself. The court found that this was insufficient to support a successor liability or alter ego theory. Note that the court's opinion did not discuss evidence regarding whether Edelson abused the corporate form or failed to observe corporate formalities.

***In re Melton,* 2013 WL 2383657 (Bankr. N.D. Ga. May 20, 2013) – personal liability of sole owner and manager of LLC for fraud and conversion of escrowed funds held to be non-dischargeable.**

In this adversary proceeding, the plaintiff sought a non-dischargeable judgment in the amount of $50,000 against the debtor on the grounds that he committed fraud, conversion and breach of fiduciary duty. The plaintiff alleged that the debtor, while negotiating a commercial lease with the plaintiff on behalf of his LLC, represented that the LLC would hold the plaintiff's security deposit in escrow. Instead, the funds were diverted to the debtor and his family members. As an initial matter, the court declined to read *Stern v. Marshall*, ___ U.S. __, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011) as prohibiting a bankruptcy court from entering final judgment as to both nondischargeability and amount of a plaintiff's claim. The court reasoned that its inquiry into the dischargeability of the debt (i.e., whether it arose from fraud) and the amount of the claim were intertwined, and that the case did not present the same concerns as *Stern*, in which an unwilling creditor was forced to litigate in bankruptcy court because the objecting party in this case was the debtor, who initially chose the forum. Turning to the merits, the court held that the debtor was personally liable for fraud notwithstanding that the creditor's funds were paid to the debtor's LLC (and subsequently diverted from the LLC). The court cited well-settled Georgia law holding that directors and officers of a business entity can be individually liable to third parties for torts in which they personally participate, without any need for the court to resort to a veil-piercing theory. Finding that the record showed that the debtor directed the transfer of the funds and was the sole owner and manager of the LLC, and that it was he who made the representation that the funds would be held in escrow, the court concluded that he was individually liable. The court ultimately found the debtor liable for fraud and conversion, but not breach of fiduciary duty, since Georgia law does not recognize a fiduciary relationship arising from an escrow arrangement in the context of a commercial lease.

7. Miscellaneous Litigation Procedure Issues

***Superior Roofing Co. of Georgia, Inc. v. American Professional Risk Svcs., Inc.,* 323 Ga. App. 416, 744 S.E.2d 400 (2013) – Receivership: Georgia Insurance Commissioner as receiver has exclusive standing to pursue common claims, but individual claims held by interested parties may be brought individually.**

In this case, the Court of Appeals held that the Georgia Insurance Commissioner (the "Insurance Commissioner"), acting as receiver for an insolvent trust fund, had exclusive standing to pursue claims that are common to the receivership estate and its interested parties, but that claims that are strictly personal in nature can be pursued individually.

The dispute involves a self-insured workers compensation fund for roofing contractors that was closed in 2010. The fund was placed under permanent receivership and the Insurance Commissioner was appointed as its permanent receiver. Prior to being closed, the fund was administered by the appellee, known as "AmPro." Appellants, who were members of the fund, filed a lawsuit against AmPro alleging breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty and fraud. The complaint alleged, among other things, that AmPro systematically under-reserved for known claims, falsified reports, and prepared inaccurate financial statements. The Insurance Commissioner intervened and argued, as did AmPro, that the Insurance Commissioner had exclusive standing to pursue the asserted claims. The trial court agreed and dismissed all claims.

The Court of Appeals considered the question of whether the Insurance Commissioner had exclusive standing to be a matter of first impression in Georgia. The court looked to the statutory scheme governing the administration of insolvent trust funds and found that while the statutes gave broad powers to the Insurance Commissioner, they did not explicitly confer the Insurance Commissioner with exclusive standing. The court then turned to a number of cases from other jurisdictions, as well as secondary sources, and found that the overall intent of the receivership was best satisfied if the Insurance Commissioner possessed exclusive standing to prosecute claims that are common to the fund (i.e., claims that, if successful, would inure to the benefit of the common fund). The court noted, however, that the authorities it relied on reached a different conclusion for claims that are personal in nature, such as fraud. Adopting the same reasoning, the court held that the Insurance Commissioner had exclusive standing to pursue claims common to the fund, and that the appellants would be permitted to pursue any claims that were personal to them. Since the trial court had dismissed all claims without determining which were common and which were personal, the court directed the trial court to make such a determination.

***Artson, LLC v. Hudson,* 322 Ga. App. 859, 747 S.E. 2d 68 (2013) – Dismissal of suit by LLC against former managing member was proper where litigation involved dispute among members and non-resident members were indispensable parties beyond the court's jurisdiction.**

The Court of Appeals in this case upheld the trial court's dismissal of the lawsuit by plaintiff Artson, LLC ("Artson") against defendant David Hudson because plaintiff failed to join indispensable parties. Artson was a Virginia limited liability company established in 2003 with four members with equal interests: Lawyer and Doris Artis, their daughter Denise Hudson, and their son-in-law David Hudson. After the company was established, Doris and David moved to Georgia and were subsequently divorced in 2008. In January of 2009, Lawyer, Denise, and Doris removed David as managing member of Artson and revoked his authority to act on behalf of the company. Artson filed suit against David in Cobb County Superior Court for conversion and an accounting, and sought attorneys' fees related to a motion to compel discovery. David filed a third-party complaint against Denise and sought to add her as a third-party defendant, alleging that Artson shared business matters and finances with other companies run by the same parties. After discovery, the trial court held that Lawyer and Doris were indispensable parties to the litigation and that because it lacked personal jurisdiction over them, the case was dismissed pursuant to O.C.G.A. § 9-11-19.

The Court of Appeals upheld the trial court's holding that Doris and Lawyer were indispensable parties under O.C.G.A § 9-11-19 and held that the trial court did not err in dismissing the complaint, despite the fact that David did not file a motion to dismiss on that ground. Although the issue of failure to join an indispensable party is waived if it is not asserted prior to judgment, the court found that David had raised the issue in his pleadings by alleging in his amended answer, counterclaim, and third-party complaint that the case involved a dispute between all of Artson's shareholders, thus allowing the court to conclude that complete relief would not be possible in the absence of all parties. The Court of Appeals also held that the trial court did not err in dismissing the case pursuant to O.C.G.A. § 9-11-19(b) where joinder of the necessary parties was not possible because Doris and Lawyer were Virginia residents who were not subject to service of process in Georgia. The court noted that immediate dismissal of the complaint was proper where the trial court did not have personal jurisdiction over an indispensable party. 2013 WL 3498629, at 24, *5 (*citing Dixon v. Cole*, 277 Ga. 353, 355(2), 589 S.E.2d 94 (2003)).

***Bank of the Ozarks v. DKK Development Company,* 2013 WL 2555834 (S.D. Ga. June 10, 2013) – Borrower cannot re-litigate setoff defense previously decided in state court action where right to setoff hinged on adversely-decided alter ego issue.**

This case involves the latest round of litigation between the successor to the failed Oglethorpe Bank (the "Bank") and one of its borrowers. The borrower, DKK Development Company ("DKK"), had an outstanding $930,000 loan from Oglethorpe Bank, but also had lent $2.5 million to the Bank's holding company, which was formed shortly before the Bank's failure in an effort to raise needed capital for the Bank. DKK had previously sought a declaration in state court that its loan to the Bank should be equitably set off by the larger loan to the holding company. The superior court agreed with that argument, but on appeal, the Court of Appeals held that DKK was not entitled to an equitable setoff. *See Bank of the Ozarks v. DKK Development Co*., 315 Ga. App. 529, 726 S.E.2d 608 (2012).[8]

Bank of the Ozarks, which acquired the loan after the Bank failed, filed a suit in the Southern District of Georgia to recover on its $930,000 promissory note, and then moved for summary judgment. In response, DKK argued that it was entitled to statutory setoff. The district court found that the argument was precluded under *res judicata* principles due to the earlier state court action. Though the state court proceedings focused on *equitable* setoff and DKK's federal court argument relied on *statutory* setoff, the district court found that both claims involved litigation of the same issue: whether the Bank and its holding company were alter egos of each other such that a loan from the bank could be set off by a loan to the holding company. Having disposed of DKK's setoff argument, the district court granted summary judgment in favor of Bank of the Ozarks.

***Coffee Iron Works v. QORE, Inc.,* 322 Ga. App. 137, 744 S.E.2d 114 (2013) – Shareholder found to be in privity with corporation for purposes of *res judicata* analysis.**

This case arose from a dispute between a paving company (Douglas Asphalt) hired by the Georgia Department of Transportation to perform work on Interstate 95, and a materials testing company (QORE) hired by the paving company in connection with that project. Douglas Asphalt claimed that QORE's work was faulty, causing it to be placed in default with respect to several of its contracts, and also causing it to incur significant legal expenses in litigation with the DOT. Previously, Douglas Asphalt had sued QORE in federal court and QORE was awarded summary judgment.

[8] We summarized the Court of Appeals' decision in our 2012 survey.

The plaintiffs to the instant action were two guarantors of Douglas Asphalt's surety bond and a shareholder of Douglas Asphalt. The case was before the Court of Appeals after the trial court awarded summary judgment to QORE on the basis of *res judicata*. All of the plaintiffs appealed. The court found, as the trial court did, that the issues decided in the earlier federal action were essentially the same as the issues presented in the state court suit.[9] The dispositive issue in the shareholder's appeal was whether she was in privity with Douglas Asphalt. The court cited authority holding that there is no bright line definition of privity and that each case must be evaluated according to its particular circumstances. Turning to the facts before it, the court determined that the shareholder's claim was solely premised on the alleged injury to Douglas Asphalt that was fully litigated by Douglas Asphalt in the prior litigation. Accordingly, the court found the shareholder to be in privity with Douglas Asphalt and affirmed the trial court's grant of summary judgment. The court also ruled against the guarantors of the surety bond, citing the principle that a party's insurer stands in the shoes of the insured for purposes of collateral estoppel.

***St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.,* 293 Ga. 419, 746 S.E.2d 98 (2013) – Georgia Supreme Court upholds attorney-client and work product privileges of in-house general counsel despite alleged conflicts of interest.**

The Georgia Supreme Court granted *certiorari* "to examine the applicability of the attorney-client privilege and work product doctrine in the law firm in-house counsel context" in *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.* The case involved an appeal from a discovery dispute in an action for legal malpractice, breach of fiduciary duty, and fraud.

In the trial court, the client sought communications between law firm attorneys and the firm's in-house general counsel. The firm objected on the grounds of attorney-client privilege and attorney work product and sought protective orders. Nevertheless, the trial court ordered production. The trial court reasoned that any privilege that might otherwise apply had been abrogated by a conflict of interest between the firm and its client. However, on interlocutory appeal, the Court of Appeals vacated the order and remanded.

The Georgia Supreme Court held that the "general rules" governing attorney-client privilege apply in the law firm in-house context as they would in any other context. The Court reviewed O.C.G.A. § 24-5-501(a) and related case law and made clear that the privilege applies where there is an attorney client relationship; where the communication at issue relates to legal advice; where such communication is maintained in confidence; and where no exception applies. Notably, the Court declined to adopt the "fiduciary exception" - recognized in other jurisdictions - to the attorney-client privilege. With respect to the attorney work product doctrine, the Court similarly found that the protection applies to documents generated by a law firm's in-house general counsel the same as it would in any other context pursuant to O.C.G.A. § 9-11-26(b)(3). The Court also confirmed that the Georgia Rules of Professional Conduct do not govern the

[9] The court observed that while the trial court was technically incorrect in applying *res judicata* because the causes of action were not identical, the doctrine of collateral estoppel applied, and the trial court could therefore be affirmed under the right for any reason rule.

application of attorney-client or work product protection. For these reasons, the Court vacated the judgment of the Court of Appeals and remanded the case.

***Abdulla v. Klosinski,* 523 Fed. Appx. 580 (11th Cir. 2013) – Attorney for corporation did not represent principal in his individual capacity.**

The Eleventh Circuit affirmed a 2012 district court decision holding that there was no attorney-client relationship between the outside counsel for a sporting goods store and the store's principal.[10] The principal ("Abdulla") sued the attorney who represented the store in its Chapter 11 bankruptcy case ("Klosinski"), as well as an attorney who represented him and the store in an earlier litigation matter that had been stayed by the bankruptcy filing ("Williams"). After the plaintiff in the litigation matter ("Henry's Tackle") sought to have a trustee appointed to take over the store or alternatively to have the bankruptcy stay lifted, Klosinski negotiated a personal guaranty, to be signed by Abdulla, in exchange for Henry's Tackle's agreement to withdraw its demands. Klosinski forwarded the proposed guaranty to Williams, who advised Abdulla to sign it. Eventually, the bankruptcy was converted to a Chapter 7 proceeding, which triggered Henry's Tackle's right to collect on the guaranty.

Abdulla filed a malpractice claim against Klosinski, along with Williams and both attorneys' respective firms. The dispositive issue in the claim against Klosinski was whether he ever represented Abdulla individually. The district court held that he did not, and the Eleventh Circuit agreed. Abdulla argued on appeal that Klosinski represented him personally, in addition to the store, because he personally paid the retainer fee. The court found that this was immaterial, citing that the engagement letter clearly stated that the purpose of the engagement related to the store's Chapter 11 filing. Abdulla also argued that Klosinski represented him personally through his involvement in the negotiation of the personal guaranty. The court disagreed with this as well, finding that Klosinski's involvement was within the scope of his representation of the store in the bankruptcy proceeding, and specifically noting that Klosinski "offered no advice regarding [the] execution of the guaranty." Finally, the court held that Klosinski's representation of Abdulla in a separate and unrelated suit did not provide any basis for concluding that he represented Abdulla in the matter that formed the basis for his claim.

***Oxmoor Portfolio, LLC v. Flooring and Tile Superstore of Conyers, Inc.,* 320 Ga. App. 640, 740 S.E.2d 363 (2013) – Answer filed on behalf of corporation by a non-attorney held to be a nullity; corporation's failure to amend the defective answer warranted default judgment.**

In this case, the Georgia Court of Appeals reviewed a trial court's decision to set aside a default judgment in a garnishment proceeding. The default judgment was originally entered because the individual who filed the answer on behalf of the corporate garnishee was not an attorney. As a result, the answer was found to be a nullity and was not considered by the trial court. Following the entry of default judgment against it, the garnishee successfully moved to set aside the judgment on the basis that it should have been provided with an opportunity to amend its answer. On interlocutory appeal, the garnishor argued that the garnishee failed to

[10] *Abdulla v. Klosinski,* 2012 WL 4429179 (S.D. Ga. Sept. 25, 2012). We summarized the district court decision in our 2012 survey.

demonstrate a non-amenable defect on the face of the record as required to set aside the judgment under O.C.G.A. § 9-11-60(d)(3). The Court of Appeals accepted that argument and reversed the trial court's decision. The Court reiterated settled authority that in Georgia courts of record, a corporation must be represented by an attorney. The court then found that although the answer was defective because no attorney signed it, the defect could have been cured. Since there was no showing that the garnishee attempted to cure the defect, there was a sound basis for entry of the default judgment, and it was error for the trial court to set aside the default judgment.

***Vig v. All Care Dental, P.C.*, 2013 WL 210895 (N.D. Ga. Jan. 18, 2013) – A corporate entity can only appear and be represented by counsel in federal court litigation.**

In *Vig*, the Northern District of Georgia granted a motion to withdraw filed by defendants' counsel, which the defendants opposed. The court reviewed Local Rule 83.1(E) which requires notice to a client prior to the filing of such a motion. Among other things, defendants' counsel failed to advise the corporate defendant, as required by N.D. Ga. L.R. 83.1 E.(2)(b)(I), that it could not appear and defend *pro se*, but was required to be represented by counsel. Over defendants' objection, the court found that the deficiencies in the notice of withdrawal were harmless and did not prejudice defendants, since they were aware of the corporation's need for counsel and had sufficient time to secure new counsel.

***Rigby v. Boatright*, 294 Ga. 253, 751 S.E.2d 851 (2013) – Mandamus not a proper remedy to compel public utility corporation, which is not a governmental entity, to include candidate's name on board election ballot.**

In this dispute involving a rural electric membership corporation, the Supreme Court weighed arguments that the public nature of such a corporation justified use of the remedy of mandamus to compel the corporation's board to place a candidate's name on its board election ballot. The Court found that mandamus was not appropriate and reversed a trial court order granting mandamus relief. In its opinion, the Court drew some notable distinctions between public utility corporations and governmental entities.

The appellants constituted the board of the Satilla Rural Electric Membership Corporation ("Satilla"). The appellee was a member of Satilla who sought nomination to its board of directors (the "Board"). The Board ruled that the appellee was ineligible for board service due to his business relationship with a contractor of Satilla. After the Board declined to consider a second petition by the appellee to place his name on the ballot, the appellee sued the Board for injunctive relief and a writ of mandamus. The trial court found that the Board's decision was arbitrary and capricious, and it granted the writ of mandamus.

On appeal, the Supreme Court first addressed O.C.G.A. § 9-6-20, which permits mandamus to compel a "public officer" to perform a required duty. The Court found that the Board members were not public officers, citing the differences between a governmental entity and public utility corporations such as Satilla. It quoted a prior case, *Georgia Power Co. v. Georgia Public Service Commission*, 211 Ga. 223 (1954), stating that "[t]he fact that a business or enterprise is, generally speaking, a public utility, does not make every service performed or rendered by it a public service…").

The appellee also argued that mandamus was appropriate under O.C.G.A. § 9-6-23, which provides that "[a] private person may by mandamus enforce the performance by a corporation of a public duty as to matters in which he has a special interest." The Court recognized that it has previously granted mandamus relief in cases involving utility and railroad corporations, but distinguished those cases on the grounds that the relief sought by the appellee was purely personal to him. The Court also observed that the central issue in the dispute – the appellee's qualifications for board service – did not implicate any of Satilla's statutory duties but rather was an issue governed by its own bylaws. The Court's ruling was confined to the mandamus issue. It left alone the appellee's claims for injunctive relief, which the trial court had not ruled upon.

***McGee v. Sentinel Offender Services, LLC*, 719 F.3d 1236 (11th Cir. 2013) – Criminal liability of LLC under Georgia RICO for theft by deception requires evidence of specific intent to deceive by LLC's employees.**

Plaintiff, a probationer, brought suit against a private probation services company, alleging in part that the company had violated the Georgia Racketeer Influenced and Corrupt Organizations Act ("RICO"). Defendant had petitioned the court to revoke plaintiff's probation when plaintiff failed to pay the probation fees, and the court ordered plaintiff to either pay the fees or serve two months in jail. Plaintiff was sent to jail and filed a writ of habeas corpus. The court granted plaintiff's habeas petition because plaintiff lacked the mental competence to waive his right to counsel at the revocation hearing and ordered that plaintiff be released from jail. After plaintiff's release from jail, defendant mailed two letters to plaintiff saying he failed to report to his probation officer, that plaintiff owed $186 in fees, and that defendant would petition the court to revoke his probation if he continued to fail to report.

Plaintiff then filed suit against defendant. Count II of plaintiff's complaint was a class action claim for damages, alleging defendant engaged in a "pattern of racketeering activity" under Georgia's RICO act, O.C.G.A. § 16-14-1 *et seq*. *McGee*, 719 F.3d at 1239. Plaintiff alleged that the two letters that defendant sent constituted attempted theft by deception. The District Court granted defendant summary judgment on the grounds that plaintiff "failed to raise a genuine issue about whether [Defendant] possessed the intent to commit attempted theft by deception." *Id.* at 1242.

The Eleventh Circuit addressed the issue of corporate criminal liability because plaintiff sought to hold an LLC "liable for criminal acts whose commission requires specific intent to deceive." *Id.* at 1243. The court noted that "a company may be held liable for specific intent offenses based on the 'knowledge and intent' of its employees." *Id.* at *5 (*quoting N.Y. Cent. & Hudson River R.R. Co. v. U.S.*, 212 U.S. 481, 495, 29 S. Ct. 602, 609 (1909)). Thus, the court stated that "in Georgia, corporate criminal liability is a product of the common law doctrine of *respondeat superior*" and in order to survive summary judgment, plaintiff would have to allege and present evidence that defendant's "employee acted with specific intent to commit theft by deception." *Id.* On its motion for summary judgment, defendant produced three sworn statements stating that the letters were sent due to a clerical error and were not intended to deceive plaintiff, and plaintiff failed to produce any evidence to rebut those statements. Because plaintiff failed to present any evidence showing that any employees of defendant had the specific intent to deceive plaintiff, the court affirmed summary judgment in favor of the defendant.

***Goodwill v. BB&T Investment Services, Inc.*, 2013 WL 6271868 (N.D. Ga. Dec. 4, 2013) - Statute of limitations for breach of fiduciary duty claim against investment advisor based on alleged misrepresentations is four years.**

In this case, the district court held that breach of fiduciary duty claims brought against a financial advisor were barred by the four-year statute of limitations in O.C.G.A. § 9-3-31. The plaintiff alleged that he purchased an annuity based on representations by his financial advisor that turned out to be false. He sued the financial advisor's firm for breach of contract and breach of fiduciary duty. The defendant asserted that the breach of fiduciary claim was subject to a four-year statute of limitations, and the court agreed. The court observed that under Georgia law, there is no specific statute of limitations for breach of fiduciary duty, but that in similar cases involving alleged misrepresentations, Georgia courts have consistently applied the four-year statute set forth in O.C.G.A. § 9-3-31 for injuries to personalty or damage to property. The court also noted that claims for negligence, misrepresentation and fraud have been held to be subject to § 9-3-31.

H. SUPERIOR COURT OF FULTON COUNTY BUSINESS COURT DECISIONS

The Georgia State University College of Law maintains an archive of selected decisions of the Superior Court of Fulton County Business Court that can be accessed at http://digitalarchive.gsu.edu/col_businesscourt/. The court has issued several decisions in 2013 bearing on Georgia corporations and business organizations law that reportedly will be posted to that website.

***Raser Technologies, Inc. v. Morgan Stanley & Co., LLC,* No. 2012-cv-214140 (Fulton Sup. Ct. Jul. 11, 2013) (Order on Defendants' Motion to Dismiss) – Claims for market manipulation based on naked short-selling found viable under Georgia Securities Act of 2009 and Georgia RICO.**

This case is a state-law based mass action involving the practice of "naked" short selling, in which a trader sells a security short without first borrowing or making arrangements to borrow the security in question. The plaintiffs are Raser Technologies, Inc., whose stock was delisted from the New York Stock Exchange in November, 2010 after it fell below $1 per share, and numerous individuals who allegedly purchased and sold Raser stock between 2003 and 2011. The defendants are well-known Wall Street firms. The plaintiffs claim that the defendants manipulated the price of Raser stock through naked short selling, which allegedly amounted to the injection of "counterfeit shares" into the marketplace thus depressing the price of the stock.

The plaintiffs brought their claims under a variety of state-law theories, including the Georgia RICO Act, the Georgia Securities Act (both its current and pre-2009 versions), the Georgia Computer Systems Protection Act, the common law theories of money had and received and civil conspiracy. The court significantly culled the plaintiff's list of theories, but nonetheless held that the plaintiff's basic theory was sufficiently alleged to survive a motion to dismiss under Georgia's pleading rules.

The court looked first at the plaintiffs' claims under the current and prior versions of the Georgia Securities Act. It held that claims under the prior act were time barred because any claims under that version had to be brought before July 1, 2011. The court declined to rule as to whether any claims under the current Act were time barred, holding that such a determination was improper on a motion to dismiss. Turning to the substance of the plaintiffs' securities law claims, the court held that the plaintiffs' allegations of market manipulation were sufficient to state a claim, based on allegations that the defendants created false documentation including mismarked order tickets, submitted false reports to regulators, and otherwise misrepresented that they were borrowing securities when in fact they were not. The court further found that it was sufficient for purposes of a motion to dismiss for the plaintiffs to rely on a "fraud on the market" theory, holding that the Supreme Court's decision in *Holmes v. Grubman*, 286 Ga. 636, 639-40, 691 S.E.2d 196 (2010) did not disavow a fraud on the market theory in the context of a statutory securities claim.[11] The court thus declined to dismiss the plaintiffs' market manipulation claims, and also declined to dismiss their Georgia RICO claims to the extent that the alleged predicate act involved securities violations.

While the court permitted the market manipulation claims to go forward, it dismissed the plaintiff's theory that the defendants' alleged conduct amounted to the sale of unregistered securities. Similarly, the court found that the facts as alleged did not fit a claim under the Georgia Computer Systems Protection Act, the common law theory of money had and received, or the Georgia RICO Act because the predicate act did not involve any of these claims, nor a theory of theft by taking.

Finally, the court addressed whether certain of the plaintiffs who are not Georgia residents could assert certain claims. The court held that the non-Georgia plaintiffs could not invoke Georgia's RICO statute or the Georgia Securities Act, but rather were required to plead those claims under the laws of their home states. Likewise, the non-Georgia plaintiffs did not state a civil conspiracy claim by alleging that the defendants conspired to violate the Georgia RICO statute as to them.

***Melamud v. Page, Perry & Assocs., LLC,* No. 2012-cv-219444 (Fulton. Sup. Ct. Sept. 16, 2013) (Order on Defendants' Motion for Summary Judgment) – Issue of fact found whether an attorney-client relationship was formed between an investment advisor's counsel and an opposing party who was represented by other counsel in a joint venture and investment transaction.**

In this case, the Business Court addressed circumstances where an attorney-client relationship may be found to exist between a party to a transaction and counsel for the other

[11] In *Holmes*, which dealt with a common law fraud "holder claim" based on the plaintiff's forbearance from selling stock, the Supreme Court indicated that plaintiffs asserting such claims needed to prove actual reliance. The court in *Raser* distinguished *Holmes* as dealing only with common law claims.

party to the transaction. The plaintiffs, a software engineer and his related entities, entered into a joint venture with an investment advisor ("DeHaan") to develop and license investment-related software. The plaintiffs also invested funds and were to receive an interest in one of the DeHaan entities. The defendants represented DeHaan as counsel in the negotiations. The plaintiffs contended that during the course of negotiations, the defendants also advised the plaintiffs regarding changes that would need to be made to the software in order to comply with securities laws and regulations. DeHaan and his investment firm later became the subject of an SEC investigation and enforcement action asserting that they were conducting a Ponzi scheme, and DeHaan ultimately pled guilty to certain crimes. The plaintiffs sued DeHaan's counsel under various theories including professional malpractice, breach of fiduciary duty, fraud and negligent misrepresentation. The plaintiffs contended that the defendants had an obligation to disclose DeHaan's fraudulent conduct. The defendants moved for summary judgment.

The principal issue before the court was whether the parties had formed an attorney-client relationship. It was undisputed that the plaintiffs were represented by separate counsel in connection with the negotiations. The plaintiffs nonetheless contended that the defendants represented them in addition to their own clients with respect to the compliance advice that they were given. Although the plaintiffs had not paid the defendants any fees – typically an indication of the attorney-client relationship – the plaintiffs contended that DeHaan's investment firm had agreed to pay for attorneys' fees as long as the plaintiffs absorbed the costs of modifying the software. The court found that these facts were sufficient to raise a question of fact as to whether an attorney-client relationship existed between the parties, thus making summary judgment inappropriate. The court specifically noted that it could not determine, at this stage of the litigation, whether it was reasonable for the plaintiffs to interpret the defendants' advice as being intended for their benefit.

Hatcher Management Holdings, L.L.C. v. Hatcher, **No. 2009-cv-179145 (Fulton Sup. Ct. Mar. 5, 2013) (Final Order And Judgment) – Compensatory and punitive damages awarded against defendants who breached fiduciary duty and LLC operating agreement by self-dealing and fraudulent conduct.**

Following a trial on damages, the Business Court awarded over $4 million in compensatory and punitive damages against a former manager of an LLC who was found to have misappropriated LLC assets. The court had previously entered summary judgment against the defendant as to his liability for breach of fiduciary duty and breach of the LLC's operating agreement. After the summary judgment order was upheld on appeal, the issue of damages and the remaining claims were set for trial. The defendant failed to appear at trial, and the court struck his answer and defenses upon motion of the plaintiffs. The plaintiffs urged the court to find that the defendant acted with specific intent to harm them, thus removing the statutory limit on punitive damages under O.C.G.A. § 51-12-5.1(f). The court found that there was indeed sufficient evidence to support a finding of specific intent. The court's findings indicated that the defendant had, over several years, made distributions to himself and his family that exceeded their pro rata interests in the LLC, paid himself compensation that was not approved by the LLC's members, and secretly redeemed his and his family's membership interests on terms unfavorable to the LLC, causing nearly $1.5 million in losses to the plaintiffs. The court also found that the defendant made numerous misrepresentations to the plaintiffs and that he used his superior understanding of finance to conceal his activities from the plaintiffs. The court awarded

$2.25 million in punitive damages, $1.492 million in compensatory damages and approximately $300,000 in attorneys' fees under O.C.G.A. § 13-6-11.

***Zelby v. Thomas,* No. 2012-cv-225412 (Fulton Sup. Ct. May 8, 2013) (Order on Defendants' Motion to Dismiss) – LLC member seeking to assert breach of fiduciary duty claims in suit to recover his investments is limited to contract claims to the extent that he alleged violations of operating agreement provisions.**

In 2003 and 2005, the plaintiff made two investments in defendant Thomas USAF Group, LLC ("TUG"). The second investment was used by TUG to invest in land in Appling County. After the second investment failed, the plaintiff sued TUG, its managing member ("TBNI"), and TBNI's principal ("Thomas"), for breach of contract, breach of fiduciary duty, and an accounting. The plaintiff asserted claims based on (i) the defendants' alleged failure to pay him his proportionate share of profits in connection with his initial investment and (ii) claims based on the loss of the second investment. The court made several briefly-stated rulings on the defendants' motion to dismiss. First, the court found that the breach of contract claim, based on TUG's operating agreement, could only go forward against TUG, since the other defendants did not owe the plaintiff the allegedly breached contractual obligations under the operating agreement. Second, the court found that the complaint sufficiently alleged a breach of contract claim against TUG with regard to the loss of the second investment, notwithstanding TUG's argument that there was no guarantee of a return on the investment. Third, the court held that the plaintiff could not assert a breach of fiduciary duty claim based on the initial investment because it was not based on any alleged duty that was independent of the alleged breach of the operating agreement. The plaintiff was thus limited to his rights under the agreement. The Court did not discuss the LLC Code's provisions regarding modification of fiduciary duties under an operating agreement. Fourth, the court declined to make the same holding with regard to the second investment, since the pleadings were unclear as to whether the second investment was governed by the operating agreement. In addition, the court briefly addressed the statute of limitations and the plaintiff's accounting claim in denying the motion to dismiss as to those issues.

***Etowah Environmental Group, LLC v. Walsh,* No. 2012-cv-211149 (Fulton Sup. Ct. Jul. 15, 2013) (Order on Plaintiffs' Motion to Compel Production of Documents Withheld on the Basis of Attorney-Client Privilege) – *In camera* inspection conducted to determine whether documents allegedly dealing with LLC valuation met crime-fraud exception to attorney-client privilege.**

This action involved claims that the plaintiff, a 25% LLC member, was defrauded out of exercising its "tag-along" rights under the LLC's operating agreement and its share of the proceeds of the sale of LLC assets. Addressing a dispute over the defendants' redaction of several e-mails on the basis of attorney-client privilege, the Business Court ordered an *in camera* review of the un-redacted e-mails, but ultimately found that the privilege was properly asserted. In so doing, the court addressed the "low threshold" that is required for *in camera* review. The plaintiff had asserted that the documents fell within the "crime-fraud" exception to the attorney-client privilege, and also that the redacted communications did not constitute legal advice. Under the general rule regarding *in camera* review, as applied to a crime-fraud challenge, a plaintiff need only make a preliminary showing that the communication was made in furtherance of illegal or fraudulent activity. The court found that the plaintiff here satisfied that threshold by producing letters from the defendants showing a "suspiciously reduce[d]" valuation of the entity being sold. The court found it "feasible" that the redacted communications, which took place at around the same time as the letters produced by the plaintiff, might relate to a scheme to devalue the subject entity. Following *in camera* review, however, the court found that the privilege applied and that the crime-fraud exception was not met.