

BUSINESS NEWSLETTER



We understand that business law is continually changing.
So we're sending quarterly newsletters to help keep you informed.



BLASINGAME • BURCH
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ANNOUNCEMENTS

The Business Team is pleased to announce the addition of shareholder Rob Huestis. Rob joined the firm in July of 2018 and focuses on all manners of commercial litigation and business disputes, including business organizational disputes, business torts, professional malpractice, and errors and omissions claims, insurance coverage litigation, employment-related contract disputes, general corporate law, and corporate organizational work. As a litigator with nearly 20 years experience, Rob maintains a comprehensive motions, trial, and appeals practice.



BUSINESS NEWS

The Georgia Legislature has Established the State-Wide Business Court

By passing HB239, the Georgia Legislature amended Title 15 of the Official Code of Georgia, relating to Courts, by adding “the Georgia State-wide Business Court.” The new Court will sit in either Atlanta or Macon. The Governor will be appointing the new judge by August 1, subject to the approval by a majority vote of the Senate Judiciary Committee and the House Committee on Judiciary.

The Business Court judge will begin administrative functions on January 1, 2020, and his or her initial term shall commence August 1, 2020. The judge shall sit for a term of five years and may be appointed to as many consecutive terms as he or she remains qualified.

Although the new Business Court will sit in either Atlanta or Macon, venue shall be in accordance with O.C.G.A. §§ 9-10-93 or 14-2-510; and, “if more than one venue is proper, then the party initiating the civil action in the Georgia State-wide Business Court shall select among the proper venues at the time of filing.”



A plaintiff can file an action directly with the Business Court, or the case can be transferred by consent of the parties. A party also may petition to transfer the case to the Business Court and if it meets all other jurisdictional requirements and considering a presumption that the action shall remain in the court of filing, the Business Court may accept the case. Interestingly, the judge of the Business Court will have discretion to reject any petitions for transfer or removal “even if such claims are within the jurisdiction of the Georgia State-wide Business Court.”

The Business Court shall exercise concurrent jurisdiction and the powers of a court of equity, to the extent permitted by the facts of the case. HB239 enumerates 17 substantive areas where jurisdiction is expressly proper such as those arising under the UCC, the Georgia Uniform Securities Act and the Georgia Business Corporation Code, among others.

Where damages are requested, the amount in controversy must exceed \$500,000 or \$1 million for claims involving commercial real property. The Business Court will have supplemental jurisdiction over all pending claims that are so related to cases and which otherwise meet the jurisdictional prerequisites. Yet, HB239 explicitly preclude the exercise of jurisdiction for claims involving certain subject matters, such as claims arising from physical and emotional injuries, residential landlord tenant disputes and foreclosures.

The fee for filing a case, or having a case transferred or removed to the Georgia State-wide Business Court shall be \$3,000 and paid by the party filing the action or seeking transfer, or by an equal allocation if the parties consent to adjudication by the State-wide Business Court.

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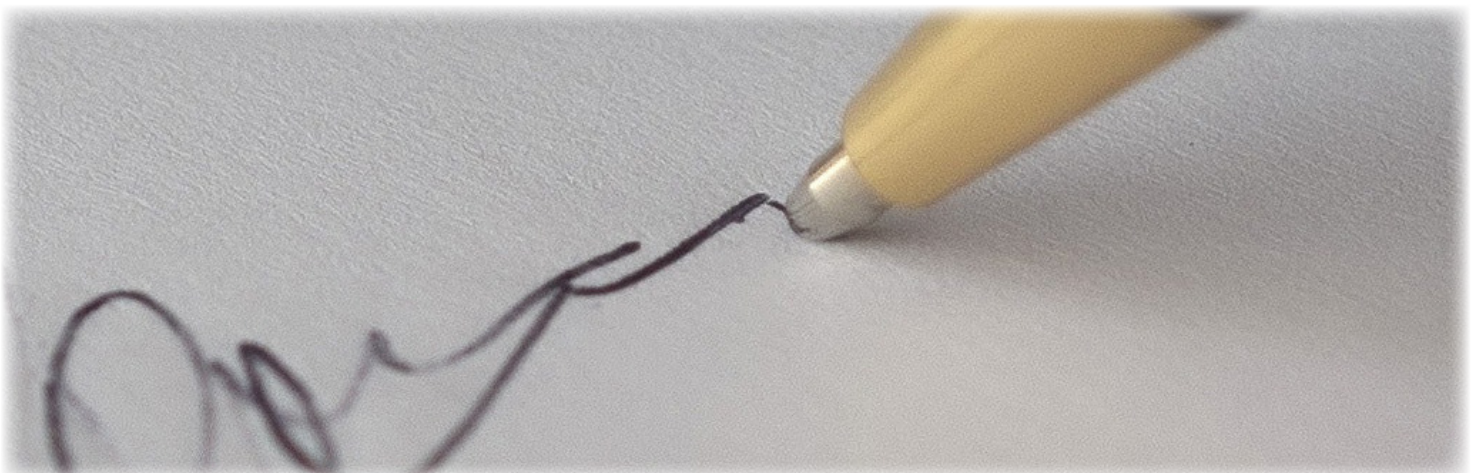
Georgia's Legislature Amends the Statute of Frauds

SB 37 was introduced during the 2019 legislative session of the Georgia General Assembly and was signed by Governor Kemp on May 7. SB 37 amends O.C.G.A. § 13-5-30, Georgia's statute of frauds, so as to clarify that an agreement to release or rescind an agreement subject to the statute of frauds must be in writing and signed by all parties to the original agreement.

SB 37 is a direct response to a 2018 Georgia Court of Appeals decision, *Crop Production Services, Inc. v. T.E. Moya* [1]. In *Crop Production*, the Court held that the rescission of a guaranty (an agreement subject to the statute of frauds) need not be in writing when the parties mutually agree to the rescission.

Crop Production dealt with a guarantor who alleged that the lender had orally released him from his obligations under a guaranty agreement. The implication of *Crop Production* is that an oral release of a party from any agreement subject to the statute of frauds will be enforceable if the released party can establish a mutual agreement between the parties to the original contract.

While *Crop Production* acknowledged the long-standing rule that a contract subject to the statute of frauds cannot be subsequently modified by an oral agreement, the Court distinguished the modification of a contract from the rescission of a contract. In doing so, *Crop Production* reversed nearly three decades of Georgia case law that provided that the rescission or release of a party to a contract subject to the statute of frauds must be in writing.



A Very Costly Drafting Error

A recent decision in *Wagner, Averett vs. Landcastle Acquisition Corporation* reaffirms previous holdings that exculpatory clauses in contracts must be conspicuous to be enforced.

An exculpatory clause is part of an agreement or contract that relieves one party from liability or limits one party's liability, should a dispute arise. An enforceable exculpatory clause can be of great importance in facilitating the resolution of a potential business dispute. Many times, potential business disputes are resolved prior to litigation being initiated because an enforceable exculpatory clause acts as a deterrent to the party who is bound by the clause.

Many exculpatory clauses are upheld, but a Court has the authority to declare such a clause to be void if they are deemed to be inconspicuous. In other words, if the clause doesn't stand out, it's not noticeable and therefore it is inconspicuous and void.



Exculpatory clauses in contracts should be in a separate paragraph, have a heading, be in bold type, or have a different font. Sometimes the exculpatory provision calls for the initials of the other party to ensure it's been seen.

Other requirements include the exculpatory clause should be clear, understandable, and specific.

This case involved the accounting firm for Warren Averett, LLC. The engagement letter contained an exculpatory clause that limited damages to the fees paid to the accounting firm, approximately \$80,000.

The Court of Appeals held that the exculpatory clause was unenforceable because it was not sufficiently conspicuous, therefore the case was remanded for trial on a claim for \$17.5 million.

The court agreed the exculpatory clause was insufficiently prominent within the context of the surrounding text. It wasn't in a separate paragraph, it didn't have a separate heading, and there were no other distinguishing features such as font size or bold text.

A very costly drafting error, indeed.

FROM THE DESK OF

ROB HUESTIS

As the Chair of the Litigation Section of the Atlanta Bar this past year, there has been so much for which I am proud and thankful. At the top of my list, the Litigation Section was honored to bestow The Honorable Gail S. Tusan of the Superior Court of Fulton County with the Logan E. Bleckley Award for Judicial Excellence.



The Logan E. Bleckley Distinguished Service Award is presented to an Atlanta judge in recognition of years devoted to public service and excellence as a member of the judiciary. The award is named for Logan E. Bleckley, Chief Justice of the Georgia Supreme Court, considered by legal historians as one of Georgia's most illustrious jurists.

Judge Gail S. Tusan's 35- year judicial career includes service as a Fulton County Magistrate Judge, City Court of Atlanta Judge, State Court of Fulton County Judge, Superior Court of Fulton County Judge, and Chief Judge of the Fulton County Superior Court.

Judge Tusan has served the Georgia legal community in many leadership capacities, including as a founding member and second president of the Georgia Association for Black Women Attorneys, past president of Atlanta Legal Aid Society, Inc.; past chair of the Judicial Section of the Atlanta Bar Association; and past member of the Georgia Commission on Family Violence and Commission on Child Support.

Congratulations to Judge Tusan, a truly worthy recipient!

BUSINESS LAW AND LITIGATION ATTORNEYS



David Dismuke
Shareholder
Attorney & CPA
ddismuke@bbga.com



Rob Huestis
Shareholder
rhuestis@bbga.com



Haley Robison
Attorney
hrobison@bbga.com



Thomas Rogers
Shareholder
trogers@bbga.com



Richard Schmidt
Shareholder
Lake Oconee Office
rschmidt@bbga.com

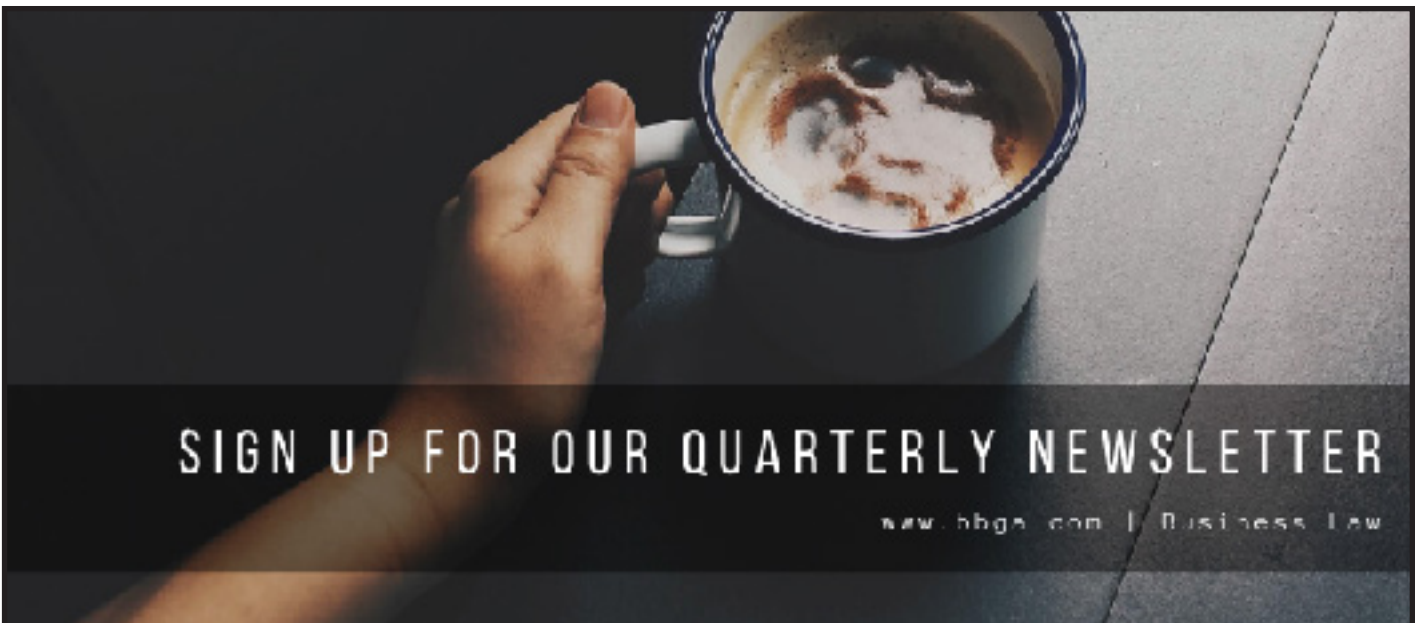


BLASINGAME • BURCH
GARRARD • ASHLEY, P.C.

706-354-4000
440 College Avenue
Suite 320
Athens, GA 30601

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