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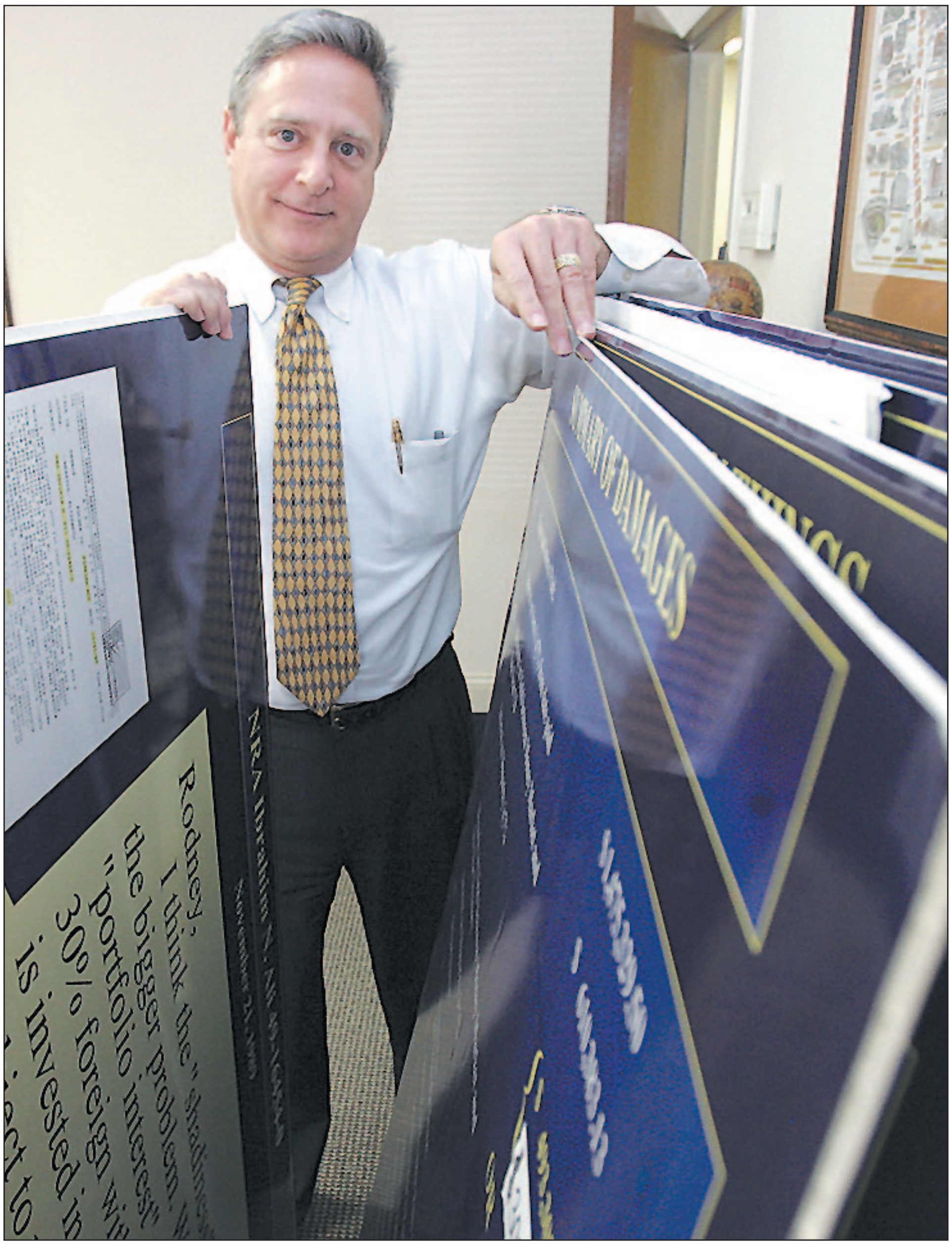

ALISON CHURCH/DAILY REPORT

Robert J. Kaufman: As a result of the high court decision, "a trust is a trust is a trust."

HIGH COURT HANDS WACHOVIA TAB FOR IRAQI'S LOSSES

Ruling may mean greater risk of liability for investment managers

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A decision this week by the Georgia Supreme Court may mean investment managers carry much more liability risk than they previously thought.

The justices reinstated a trial court's holding that Wachovia Bank of Georgia breached its fiduciary duty to a client. Trust officers failed to follow the client's request that they place his $2.65 million into U.S. government investments that would not have been subject to estate taxes.

The officials instead placed the money in a money market fund that led to what the client's heirs said were nearly $1.5 million in unnecessary estate taxes and fees.

The high court's ruling reversed a 2003 decision by the Georgia Court of Appeals, which had said that under state law, the "revocable living trust" the client established was a vehicle for investment, not estate planning. Accordingly, the appeals court conclud-

See **INVEST**, *Page 4*

INVEST, *from page 1*

ed, Wachovia had no duty to consider the tax consequences of its decisions.

But Robert J. Kaufman, who represented the heirs against Wachovia, said Monday's high court ruling means that there is no distinction between the scope of responsibility different types of trusts carry.

As a result of the high court decision, "a trust is a trust is a trust," said Kaufman, a name partner of Kaufman Miller & Sivertsen.

David G. Ross of Powell Goldstein, who represented Wachovia, declined to discuss the case. A Wachovia spokeswoman said only that the bank was "disappointed in the court's decision."

King & Spalding business litigator Benjamin F. Easterlin IV, who was not involved with the case, said the high court's decision could hold banks, estate planners, brokerage houses and other firms liable for unexpected investment results.

"You may have some extensive redrafting," Easterlin said, of thousands of standard documents so that clients waive their rights to sue firms for—as in Wachovia's case—not knowing the tax implications of an investment choice.

Jeffrey N. Pennell, who teaches trusts and estates law at Emory University School of Law, said it was not clear how much the case would affect the liability of investment managers.

But if investment managers are using trust vehicles only for investment purposes, he added, "they ought to make that clear in the agreement."

Bertram L. Levy of Arnall Golden Gregory represented the Georgia Bankers Association, which filed amicus briefs siding with Wachovia. He said, "We're disappointed [the high court] overturned the Court of Appeals' decision."

Iraqi General, U.S. Investments

Behind the case's possible implications on the investment industry are some unusual facts.

In 1989, former Iraqi general Ibrahim Namik Ali visited Atlanta to see his son, Issam Namik, then an exchange student at the Georgia Institute of Technology, according to Kaufman. While here, Ali went to a Wachovia branch and set up a revocable living trust based on a $2.65 million certificate of deposit that would mature in September 1989.

According to the high court decision, a memorandum dictated by trust officer Thomas Slaughter said that Ali asked the bank to invest the money "only in U.S. government issues."

Ali viewed government investments as safe investments, said Kaufman, but they also had a huge tax advantage because the funds of nonresident aliens are not subject to estate taxes when invested in certain government issues.

According to the appeals court decision, when the CD matured, a Wachovia trust officer attempted to contact Ali at addresses and telephone numbers in Atlanta and Iraq but was unsuccessful. So the officer, believing Slaughter's memorandum did not have sufficient information about how Ali wanted his money invested, put the money in a tax-free Fidelity money market fund.

It turned out that Ali had been imprisoned by Saddam Hussein's regime upon returning to Iraq. He died in prison in 1990, according to Kaufman.

When the bank learned of Ali's death in 1994, it became the administrator of his estate. The estate was subject to estate tax of $933,248, and—due to the lapse of time between Ali's death and the filing—interest of $542,018.

Appeals Ruling 'Misses the Point'

At issue in the case was whether Wachovia breached its fiduciary duty to Ali by failing to avoid estate taxes and by failing to follow Ali's instructions. At trial, an expert for the plaintiffs said Wachovia's failure to consider the tax consequences of its investment decisions was "a fundamental mistake," according to the high court decision.

Fulton County Senior Judge Floyd E. Propst III ruled at trial for the plaintiffs and ordered the bank to pay Ali's family $1.1 million in damages. Both sides appealed—the bank seeking to avoid liability and Ali's family seeking more money.

The appeals court panel of Presiding Judge Edward H. Johnson and Judges Charles B. Mikell Jr. and Frank M. Eldridge reversed the finding of liability, which negated the question of damages.

A key point in their ruling was the Slaughter memorandum that outlined Ali's instructions to invest in government issues. The appeals court found that the memorandum should not be considered as evidence in comparison to the trust agreement signed by Ali, which said Wachovia as trustee was to manage Ali's money "in its discretion." *Wachovia Bank v. Namik*, 265 Ga. App. 80 (2003).

Justice Robert Benham, writing for a unanimous high court, noted that the appeals court correctly cited a basic rule that says courts should turn to evidence such as the Slaughter memorandum only if the trust agreement is ambiguous. But unlike the appeals court, Benham found that the trust agreement between Ali and the bank was "incomplete and ambiguous" because it omitted the type of investment to be made.

With the Slaughter memo reinstated, the high court found that there was evidence to support the trial court's finding that Wachovia should have invested Ali's money as he requested.

Benham added that the appeals court "misses the point" in basing its decision on state laws that do not require trustees of investment accounts to consider estate tax consequences.

"[T]he evidence authorized the trial court to find, as it did, that a trustee in Wachovia's position should have been aware of the consequences of not following Ali's instructions and of investing as it did," Benham concluded.

The court remanded the case to the appeals court to revisit the question of damages; Ali's heirs claim they are owed the more than the $1.1 million awarded by Propst.

According to the decision, *Namik v. Wachovia Bank*, No. S04G0857, Justice George H. Carley was disqualified; he was replaced by Judge James F. Bass Jr. ❐